No. 21-5877

ORIGINAL

In the Supreme Court of the United States

Brian J. Neary *–Petitioner*

v.

Jeff T.H. Pon *–Respondent*

U.S. Office of Personnel Management

Donald J. Trump, et al., *–Respondents*

On Petition for a Writ of Certiorari to

United States Court of Appeals for the Second Circuit

Appeal No. 20-3584

Petition for Writ of Certiorari

Pro Se (in forma pauperis), filed upon behalf of himself

Brian J. Neary
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Question(s) Presented

1.) Has the **Executive Branch** of the U.S. Federal government breached the 'Separation of Powers' Principle by issuing Presidential Executive Order **#13562**? Thus, unlawfully **legislating** from the Oval Office, and, exceeding its delegated administrative authority; in violation of **Article I** of the U.S. Constitution:

"All *Legislative* Powers herein granted shall be vested in a Congress of the United States"

Whereby, creation of the Schedule-D Federal Excepted Service Hiring Authority has permanently established a fraudulent "Class-of-Disenfranchised-Persons".

2.) Does the Schedule-D Federal Excepted Service Hiring Authority PATHWAYS *Recent Graduates Program* employment **advertising policy**, managed by the U.S. Office of Personnel Management, infringe upon **29 C.F.R. § 1625.4 (a)** of the U.S. EEOC employment standards, rules, and regulations?

3.) Does the Schedule-D Federal Excepted Service Hiring Authority PATHWAYS *Recent Graduates Program* employment **advertising policy**, managed by the U.S. Office of Personnel Management, violate **29 U.S.C. § 623 (e)** of the ADEA?

"Printing or publication of notice or advertisement indicating Preference, Limitation, etc"

4.) Is the Schedule-D Federal Excepted Service Hiring Authority PATHWAYS *Recent Graduates Program* recruitment & selection policy **2-year maximum** Educational Qualification Limitation prerequisite for employment furtively infringing upon **29 U.S.C. § 623 (Section 4) A2** of the ADEA?

5.) Did the U.S. Office of Personnel Management deliberately violate federal oversight delegation authority **5 U.S.C. § 1104 (Subsection b) [2, 3]**, when Deputy Associate Director of Merit System Accountability and Compliance **Ana A. Mazzi** explicitly ordered all Federal Agency Human Resources Directors nationwide to **exclude** the Schedule-D PATHWAYS Programs from a government-wide audit of the Federal Excepted Service Hiring Authorities for effectiveness, compliance with federal law, government regulations, and the Merit System Principles; **5 U.S.C. § 2301 (Subsection b) (1),(2)**?

6.) Is the United States Court of Appeals for the Second Circuit Judicial mandate of "Frivolity and Meritless . . . lacking an arguable basis in either fact or law" issued upon my [442] employment civil complaint a cursory, vague, unexplained and purely subjective ruling; by completely disregarding the double-standard evident within the exemption of the Schedule-D **national** federal hiring policy?

7.) Was the U.S. District Court for the Eastern District of New York Order of Dismissal citing the Plaintiff's "Failure to State a Claim" an erroneous Judicial decision, as it pertains to my 'Standing' as an aggrieved federal job applicant?

List of Parties and Related Cases

[✔] All parties appear in the caption of the case on the cover page.

1. The U.S. Office of Personnel Management
2. The Executive Branch, Office of the President of the United States, *et al.*

[ ] All parties do not appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✔] For cases from federal courts:
The opinion of the United States court of appeals appears at **Appendix A** to the petition and is

[✔] reported at PACER **CM/ECF system** (ecf_bounces@nyed.uscourts.gov); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at **Appendix B** to the petition and is

[✔] reported at PACER **CM/ECF system** (ecf_bounces@nyed.uscourts.gov); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from state courts:
The opinion of the highest state court to review the merits appears at Appendix to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the court
appears at Appendix to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

Jurisdiction

[✔] For cases from federal courts:
The date on which the United States Court of Appeals decided my case was **July 13th, 2021**.

[ ] No petition for rehearing was timely filed in my case.
[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:_____, and a copy of the order denying rehearing appears at Appendix .
[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from state courts:
The date on which the highest state court decided my case was_____ .
A copy of that decision appears at Appendix .

[ ] A timely petition for rehearing was thereafter denied on the following date:_____, and a copy of the order denying rehearing appears at Appendix .
[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Constitutional and Statutory Provisions Involved

Presidential Executive Order #13562 is in violation of the 'Separation-of-Powers' Principle of **Article I, Section I** of the United State Constitution:

"All *Legislative* Powers herein granted shall be vested in a Congress of the United States"

Ref. https://constitution.congress.gov/constitution/article-1/

The Executive Branch (*i.e.* the Office of the President), with the issuance of Executive Order #13562, has exceeded its delegated authority by legislating from the Oval Office. The administrative directive unilaterally instituted a segregating exemption to the federal Competitive Service, while bypassing the U.S. Congress. The creation of the Schedule-D Federal Excepted Service Hiring Authority is a direct breach of **5 U.S.C. 2301(b) (1)(2)** of the U.S. Federal Merit System Principles **29 U.S.C.§ Sec.623 (a)(1)(e)** of the Age Discrimination in Employment Act of 1967 Title-V of the United States Code for federal civil service regulations, as well as the U.S. EEOC Systemic Enforcement Regulation; **29 C.F.R. § 1625.4 (a)**.

Statement of the Case

The fundamental purpose of my civil complaint is meant to be a referendum on **"The Power of the Pen"**

I, Brian Neary the Petitioner, am directly accusing the **Executive Branch** of the United States Government of breaching the 'Separation of Powers' Principle by unlawfully **legislating** from the Oval Office. With the issuance of Executive Order **#13562** and the consequent formation of the Schedule-D Federal Excepted Service Hiring Authority, the Executive Office of the President has exceeded its delegated legal authority, in violation of **Article I, Sec. I** of the U.S. Constitution:

"**All legislative Powers** herein granted **shall be vested** in a **Congress** of the United States"

Furthermore, I assert that I have been denied my Constitutional Right to receive satisfactory 'Due-Process' in the matter of my [442] age-discrimination in federal employment civil complaint. This determination is due to the *lack* of proper consideration given to applicable federal rules & statutes which I have presented before the lower courts. The erroneous and cursory judicial mandate of 'Frivolity' decreed upon my grievance by the Second Circuit completely ignored the underlying dispute of my Appeal, as well as the irrefutable facts at hand. Moreover, the lower court **failed** to expound upon its interpretation of the SCOTUS precedent cited. I am now compelled to bring my charge before the highest authority in the nation. Consequently, I implore this esteemed judicial body to please review the appellate court ruling, and render a fair, impartial Decision upon the overriding **supremacy** of a Presidential Executive Order *versus* pre-existing Federal Law.

To begin, during the time-period from January 10th to August 13th of FY 2018 I was intentionally **prohibited** from submitting online applications for employment to 33 federal job announcements. The job listings were advertised **nationally**, via the USAJOBS web-based employment portal, and had contained a total of 172 separate vacancies. The recruitment announcements were posted by numerous federal agencies, and were located in various municipalities throughout the country. All of the available positions were categorized as open-to-the-public, *albeit* with the segregating & exclusionary caveat of the term "***Recent Graduates***".

To be clear, the specified designation of *Recent Graduates* along with the corresponding **Schedule-D** Federal Excepted Service Hiring Authority, were formed by Presidential **Executive Order #13562** on December 27th, 2010:

> **Accordingly, pursuant to my authority under 5 U.S.C. 3302(1), and in order to achieve a workforce that represents all segments of society as provided in 5 U.S.C. 2301(b)(1), I find that conditions of good administration (specifically, the need to promote employment opportunities for students and *recent graduates* in the Federal workforce) make necessary an exception to the competitive hiring rules for certain positions in the Federal civil service.**

Ref. Federal Register; Vol. 75, No. 248 / Thursday December 30th, 2010 / Part VII pages 82585-82586

The Schedule-D Federal Excepted Service Hiring Authority has permanently established an Education-based Qualification **Limitation** Requirement of **2 years or less**; outlined within the Federal Register Final Rules and Regulations. **(Exhibit C)**

The U.S. Office of Personnel Management was mandated by the Executive Order to institute, coordinate, and manage three new programs: Interns, *Recent Graduates* and Presidential Management Fellows; collectively known as the OPM Federal PATHWAYS Programs. **(Exhibit D)**

Ref. Federal Register; / Vol. 77, No. 92 / Friday, May 11th, 2012 / Part III, pages 28194, 28196, 28202

Furthermore, the implementation of the hiring authority had resulted in a corresponding employment category listed on the USAJOBS website. Wherein, the exclusionary two-year **maximum** educational prerequisite was (and is) stated front-and-center on every USAJOBS *Recent Graduates* national employment posting. To date, every federal agency, except for the **EEOC,** and all branches of the U.S. military are active participants in the Schedule-D recruitment & hiring program.

The Schedule-D *Recent Gradates* Program is a non-merit based **degree specific** exemption. Whereby, qualifying recent college graduates simultaneously receive a "free-pass" from the federal civil service Competitive Service candidate assessment process, and, get access to exclusive job offers; despite the primary stipulations contained within the latest federal civil service procedural guidelines which are **subject to legislation passed by Congress**. These **merit-based** laws are meant to ensure a fair and open competition for every federal candidate, recruitment from all segments of society, and a scrupulous final-selection process determined on the basis of the applicants' competencies, knowledge, skills, and abilities.

Ref. https://www.dol.gov/general/jobs/understanding-the-federal-hiring-process

The following historical record outlines the Legislative progression of the four contemporaneous Federal Excepted Service Hiring Authorities:

- **Schedules A, B**
  The **Pendleton Act** was introduced in the Senate as S.133; by George H. Pendleton (D-OH)

  Passed the Senate on December 27, 1882 (39–5)
  Passed the House on January 4, 1883 (155–46)
  Signed into Law by President Chester A. Arthur on January 16th, 1883

Ref: http://www.loc.gov/law/help/statutes-at-large/47th-congress.php

- **Schedule C**
  Formed within the Civil Service Commission Report of 1956

  It was officially incorporated in H.R. 10104
  Finalized and codified from passage of Title V- 89th Congress (1965–1966)
  Signed by President Lyndon B. Johnson
  Enacted on September 6th, 1966 as **Public Law# 89-554**

Ref: https://www.govtrack.us/congress/bills/89/hr10104/text

- **Schedule D**
  Formed from **Executive Order #13562**, a non-descript administrative action

  No House or Senate sponsorship
  No Committee due-diligence examination
  No Congressional debate
  No Legislative vote or bi-partisan passage of a Bill
  Not officially signed into Law

" I've got a pen and I've got a phone . . . . . and I can use that pen to sign Executive Orders, and take executive actions & administrative actions."

- **President Barack H. Obama** (January 14th, 2014)

In his own words- President Obama defiantly declared that issuing Executive Orders would effectively give him the "Political Power" to **circumvent** both Congress and the Courts.

With Mr. Obama's quotation in mind, I reiterate the initial standpoint of my complaint that the non-statutory Schedule-D *Recent Graduates* hiring exemption formulated from Executive Order #13562 **did not** originate from a bicameral Bill passed within the U.S. Legislative Branch, and, **was not** formally signed into Law by the President. In truth, Congress had absolutely nothing to do with instituting this Federal Excepted Service Authority. Totally insulated from any public scrutiny and undeserving of "Protected-Class" status, the existence of the *Recent Gradates* program is categorically due to an unwarranted administrative Executive-Action emanating from within an obfuscated, altogether unaccountable bureaucracy.

The hiring exemption has never been Judicially-tested for Constitutionality. Moreover, it has been completely shielded from examination for a potential breach of U.S. Merit System Principles **5 U.S.C. § 2301(b)**, or, for any possible violations of pre-existing federal workplace discrimination Law. By default, we are all involuntarily **obligated** to comply with the Fiat of its authoritarian pronouncement. This unambiguous fact contradicts the origination of Schedules A, B & C which were basic constructs of bi-partisan support, public debate, mutual consensus, and ultimately were codified as Federal Law. The Schedule-D exemption is clearly establishing an UNREASONABLE BARRIER to employment for "older" workers. Whereby, the primary offense is giving preferential treatment to younger job candidates within the discriminatory policy guidelines.

After the groundless rejection of my candidacy for federal employment, and my subsequent discernment of *allegedly* biased conduct being perpetrated by the government, I filed an age-discrimination in recruitment & final selection complaint against the Office of Personnel Management with the OPM (internal) EEO group. In its agency final decision, the OPM EEO pronounced I "failed to state a claim". Dissatisfied with not being provided a thorough explanation as to the reasoning behind this vague and unsubstantiated conclusion, I then filed an Appeal with the U.S. EEOC Office of Federal Operations. The OFO has since affirmed the OPM agency final decision stating that it was not the proper forum to challenge an administrative Directive, as the EEOC has no jurisdiction or authority to adjudicate a Presidential Executive Order; citing **Hipona v. EEOC- March 2, 1988.** **(Exhibit E)**

Consequently, I filed a [442] employment discrimination civil complaint within my local U.S. Federal District Court jurisdiction, claiming premeditated **systemic** age-bias, with a "Declaration" of the following accusation outlined below.

I charged the U.S. Office of Personnel Management (inclusive of all participating federal agencies) with deliberate prejudice in the recruitment & selection of federal job candidates; in violation of the Age Discrimination in Employment Act of 1967. The complaint of age-discrimination is the consequence of an exclusionary policy implemented and managed by the OPM.

The OPM PATHWAYS *Recent Graduates* Program [targeting] policy has a negative, **Disparate Impact** upon workers **aged 40** and above. I was DENIED the 'Right' to submit applications for employment within multiple job announcements for no other reason than an unfair, segregating procedural technicality meant to disqualify "non-conforming" older candidates; despite being fully capable to perform the required duties that were listed.

On its surface, this seemingly neutral rule treats everyone equally in form, but has a disadvantageous effect on people of a "protected class" characteristic as compared to others. Likewise, this policy was (and is) effective nationwide, having been publicized on the USAJOBS website. The less favorable treatment that I experienced automatically eliminated me from consideration for federal employment because candidate eligibility criteria is reserved exclusively for people who recently have graduated from a qualifying educational institution or program a maximum of **2 years** from the date of completion of an academic course of study.

The degree-based Schedule-D Authority is evidently in direct opposition to the merit & skills-based Competitive Service policy standards. More importantly, the co-existence of the Schedule-D exemption actually gives every participating federal agency a relatively convenient and easily accessible tool to completely **nullify** the national public-sector recruitment & hiring system. For example: any federal agency having the deliberate intention to **defy** federal civil service employment regulations can simply advertise respective job openings under the *Recent Graduates* category.

In essence Schedule-D **negates** the federal civil service Competitive Service recruitment and hiring rules, as well as furtively undermines the very foundation of the "Employment Fairness" Policy.

The framework of *Recent Graduates* provision constructed from the Schedule-D hiring Authority appears to have been deliberately formulated to circumvent the competitive hiring rules, in order to give preferential treatment to younger workers. The administrative procedures being utilized by the OPM are deliberately targeting the conscription of Millennials and Gen-Z, while simultaneously causing the outright rejection of older job applicants. It is fomenting a permanent system of Generational Hiring. Whereby, the expedient "loop-hole" of an educational time restriction stipulation prohibits non-conforming candidates from consideration regardless of their particular qualifications or skill-set. Consequently, as the vast majority of readily available and capable workers are *several years out of school*, they will NEVER be permitted to submit an application for the consideration of federal employment within these specially designated jobs.

The Schedule-D exemption is counterintuitive to the underlying principles of other legitimate Equity, Diversity & Inclusion initiatives, as well as to the obligatory federal Competitive Service guidelines.

It is **De Facto** Age-Discrimination.

For that reason, I charged the OPM (inclusive of all participating federal agencies and the U.S. Military) with being mutually in violation of the ADEA; **29 U.S.C. [Chapter 14] § 623. (a) (1), and Sub-section (e):**

(a)(1): I claim that I was deliberately PROHIBITED from submitting online applications for employment to 33 nationally advertised federal job announcements *only* because I didn't meet the discriminatory, education-based 2 year **maximum** time limit requirement unlawfully imposed by the policy. I was unemployed, and more than 50 years old at the time of the advertisements. I had previously acquired a Master's Degree in 2009; which was my most recent educational accreditation. I was automatically categorized as "ineligible" for consideration by the terms and conditions of employment under Schedule-D policy. This was in spite of the fact that I either fully satisfied or exceeded the minimum qualifications of experience and education as outlined in all **33** of the respective federal agency job postings.

(e): The nationwide **job advertisements** unambiguously enforce a LIMITATION by restricting the recruitment & selection for the *Recent Graduates* Program to federal candidates graduating from a qualified educational institution or program within a **maximum** 2 year time span. All prospective applicants who do not meet this qualification are prohibited from proceeding forward within the consideration process. A do-not-reply email is auto-generated from the usastaffingoffice@opm.gov system notifying the applicant(s) of his/her pre-programmed ineligibility.

But, how can I truly communicate to the SCOTUS Review Panel the irrationality and meritlessness of the Schedule-D *Recent Graduates* educational qualification time-limitation without demonstrating it, in the simplest of terms?

So, for perspective, I will now depict an applicable "real-world" example:

A Class of 2020 Juris Doctor graduate of Abraham Lincoln Online University Law School (whose virtual main campus is in the Glendale Galleria shopping mall; Los Angeles, CA) applying for a PATHWAYS *Recent Graduates* job advertised by the U.S. Department of Justice Civil Rights Division, Criminal Section [USAJOBS Announcement #20-CRT-PATH-001; Ctrl #555395600] is immediately GUARANTEED hiring preference over a 2017 Harvard Law Summa Cum Laude graduate who is initially pre-screened by the USAJOBS algorithm, and is then automatically classified by the Federal government as "Ineligible" . . . *based upon education.*

Ref: https://www.usajobs.gov/GetJob/ViewDetails/555395600
Ref: https://www.alu.edu/academics/school-of-law/

Paradoxically, the *Policy Section* of Executive Order #13562 explicitly states that the competitive hiring process for the federal civil service is structured in a manner that favors job applicants who have "significant" previous work experience and therefore creates a barrier to recruiting *less* experienced [i.e. less qualified] candidates. After all, why would federal agencies want to hire more accomplished competent people in the first place??? Somehow, the U.S. government has managed to render the "Meritocracy" of personal excellence & academic achievement, such as the prestige of attaining an Ivy League Degree . . . obsolete.

The *Recent Graduates* program is deliberately designed to benefit the only stratum of people who are eligible for the preferential status; the vast majority of who are in the mid-20's to early-30's age group. For the duration of the program tens-of-thousands of older job applicants have been (and continue to be) passed-over by the segregating USAJOBS algorithm. We are being deprived of receiving equal consideration for employment, by the recruitment of younger job candidates; who in many instances may have academically inferior educational credentials, and lack any professional workplace proficiency. Undoubtedly, the contrived Schedule-D "Class-of-Persons" has made it expedient for the federal government to indirectly **bypass** Merit System Principles in order to give special treatment to these privileged younger candidates. Likewise, it is demonstrably advantageous to utilize this exclusionary loophole to **evade** the stringent **ADEA Sec. 623.(e)** "Preference" regulations without having to expressly reject older individuals *outright* because of their respective [protected class] age group.

Lastly, E.O. #13562 conflicts with **Executive Order #13932; Section 2(a)** which directs <u>all</u> federal agencies to revise national job classification qualification standards to prescribe minimum educational requirements for employment:

(i) Only WHEN a **minimum educational qualification is legally required** to perform the duties of the position in the State or locality where those duties are to be performed

(ii) Only IF the candidate's education directly reflects the **competencies necessary to satisfy that qualification** and perform the duties of the position

Returning to the present moment, there are several factors to mention in having impeded my [442] federal employment civil complaint from efficiently proceeding thru the bureaucratic judicial process, primarily due to:

1.) **Six extensions** filed by the D.O.J., in order to **delay** answering my charge

2.) Two separate case files; #1-18-cv-08351 (SDNY), #2:19-cv-00916 (EDNY)

3.) Four DOJ lawyers; Dollinger (SDNY), Soloveichik, Knapp, Nelson (EDNY)

4.) Two federal government shut-downs

5.) Four Courts; SDNY, EDNY Islip, EDNY Brooklyn, and the 2nd Circuit

6.) Three Judges; Furman (SDNY), Bianco (EDNY Islip), and Brodie (Brooklyn)

7.) Six OPM Directors; Pon, Weichert, Cabaniss, Rigas, Weichert *again*, now Ahuja

8.) The forced lockdowns because of the COVID pandemic

9.) Two Motion documents I filed that were **lost** by the 2nd Circ. Clerk's office

Aside from the numerous holdups to the progression of this case, pin-balling me around the judicial system while hampering my 'Right to Due-Process', **neither** of the lower courts have actually addressed the fundamental aspect of my complaint:

The U.S. federal government is perpetrating a duplicitous 'Double-Standard' by exploiting an illicit recruitment "loophole" under the guise of the Excepted Service, in order to facilitate the hiring of younger individuals and evade federal employment Law; which every other private-sector employer in the nation must follow to the letter.

Now, I am facing an Order-of-Dismissal based entirely upon an unexplained unsupported and *procedural* mandate of 'Frivolity'. In point of fact, it is a generic pronouncement, which invariably could have been affirmed at the very outset of this arduous process; sparing me a mountain of time and effort.

Reasons for Granting the Petition

In regard to the 2nd Circuit Appellate Court Order-of-Dismissal, the Opinion tersely states that my civil complaint **lacks** an arguable basis of '**Fact or Law**'. However, I fervently disagree with this perfunctory and vague conclusion issued from the bench. In support of my assertion, the following argument will outline **3** particular points of contention that I want to address concerning the erroneous and inconsistent determination which was reached by the Appellate Judges.

I. APPELLANT FAILED TO STATE A CLAIM

As far as **FACT** of the Merit of my charge is concerned:

1.) Executive Order #13562 has created an illegitimate, deliberately manufactured "Class-of-Disenfranchised-Persons" who do not have a physical, emotional, or mental disability (as outlined in Schedule A), or possess any sort of discernible impediment to seeking federal employment (Schedules B, C); thus meriting preferential status or treatment. The subsequent Schedule-D Excepted Service Hiring Authority OPM Pathways *Recent Graduates* Program 2 year maximum educational qualification **Limitation** has formally established a discriminatory prerequisite which enables those privileged candidates to receive unfettered access to exclusive federal job advertisements; along with an unjustifiable exemption from the ADEA, the federal civil-service Competitive Service hiring regulations, as well as the U.S. Federal Merit System Principles.

2.) I had personally applied to 33 job announcements (containing 172 vacancies). However, I was deprived of the protected Right to receive 'Equal Consideration' for federal employment when my credentials were rejected and my applications were discarded. I had experienced **Disparate Impact** by being directly prohibited from participating within the candidacy process, because of the segregating proviso contained within this 2 year maximum educational qualification Limitation.

The basis of which clearly **supersedes** all ADEA recruitment & hiring regulations.

3.) The OPM FOIA selection records which I obtained, and entered onto the lower court docket have verified that of the **141,555** Schedule-D federal candidates hired into the OPM PATHWAYS programs nationwide, from inception to July 31st, 2020:

92% were UNDER the age of **40** | **98%** were UNDER the age of **50** **(Exhibit F)**

4.) The U.S. Department of Education NCES age-demographic dispersion table **303.40-**(April 2020) has certified, for the past 50 years, **85%** of all postsecondary students and *recent graduates* were UNDER the age of **35.** FY 2021-29 enrollment projections are also aligned. I challenge any demographic experts to disprove the overwhelmingly compelling historical & predicted total degree-granting educational enrollment age-dispersion data tables which are fundamental to my standpoint:

FY 1970-2018	**83%** of all Students & Recent Graduates	**were** UNDER age **35**
FY 2019-2020	**86%** of all Students & Recent Graduates	**are** UNDER age **35**
FY 2021-2029	**85%** of all Students & Recent Graduates	**will be** UNDER age **35**

Ref. https://nces.ed.gov/programs/digest/d19/tables/dt19_303.40.asp

5.) The EEOC Office of Federal Operations final-decision stated that the Commission **does not** have jurisdiction or the authority to adjudicate an Executive Order (citing **Hipona v. EEOC 1988**); then issued me a formal "Right to Sue" letter.

6.) On March 25th, 2016: within an interagency memorandum that was distributed nationally to all federal agency Human Resources Divisions, OPM Deputy Associate Director of Merit System Accountability and Compliance Ana A. Mazzi deliberately breached **5 U.S.C. § 1104 (Subsection b) [2, 3],** when she **blocked** an investigation of Schedule-D, instructing all federal HR Directors **NOT** to audit the three programs for **any violations** of Law, EEO regulations, or Merit System Principles; during a comprehensive review of the Excepted Service Authorities conducted in FY 2017.

Ref. https://chcoc.gov/content/upcoming-governmentwide-study-excepted-service-hiring-authorities

The U.S. Merit System Protection Board then published the following statement within a Congressional report **criticizing** the apparent dereliction-of-duty committed by Director Mazzi, while highlighting the deceptive actions of the OPM:

> **In light of concerns that have been expressed about Pathways, we recommend that OPM *reconsider* its decision to exclude Pathways from this study. Additionally, the expressed purpose of the study includes assessing compliance with merit system principles and the law. There is a merit system principle that opposes favoritism (5U.S.C. § 2301(b)(8)(A)), and a PPP prohibiting the tailoring of the scope of competition to favor a particular candidate (5 U.S.C. § 2302(b)(6)). Thus, we recommend that OPM also consider including in its study competitive service authorities that have restricted applicant pools.**

U.S. MSPB report to Congress- Preventing Nepotism; (June 20th, 2016) page 44

Ref.
https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1315054&version=1320272&application=ACROBAT

According to the MSPB report, it is apparent Schedule-D **infringes** upon Title V-Subpart A of the Federal Employment Practices; **5 C.F.R. § 300.102 (a),(b),(c)**. This subpart is directed toward the implementation of a Federal recruitment policy in which competitive employment practices:

(a) Be practical in character, and as far as possible, relate to matters that **fairly test** the relative capacity & fitness of candidates for the jobs to be filled

(b) Result in recruitment and selection from among the **best qualified** candidates

(c) Be developed and used without discrimination on the basis of race, color, religion, sex, national origin, **age**, disability, genetic information, marital status, political affiliation, sexual orientation, or any other **non-merit** factors

Schedule-D has created an illegitimate "class of persons" who DO NOT have a genuine disability or share in other similar barriers to employment. In doing so, the exemption is showing obvious **favoritism** toward select individuals, breaching U.S. Federal Merit System Principles; **5 U.S.C. § 2301 (b) (8) (A)**.

Moreover, according to the MSPB, the Schedule-D exemption is also violating a prohibited personnel practice (PPP) which prohibits the **tailoring** of the scope of competition to benefit a particular candidate(s); **5 U.S.C. § 2302 (b) (6)**.

And . . . the OPM is **complicit** in concealing that fact!

The Schedule-D *Recent Graduates* loophole is undeniably infringing upon the Title V- Subpart A "Relevance Requirement". Whereby, a rational relationship **does not** exist between the basic qualifications of the position(s) to be filled {i.e. the duties, responsibilities knowledge, skills and abilities necessary to perform the job} and the [targeting] employment practices repeatedly being used during the recruitment & selection process of federal candidates; **5 C.F.R. § 300.103 (b) (1)**.

7.) In a FOIA request entered onto the lower court docket, I have verified that the EEOC **does not** participate in the "Recent Graduates" program. For the duration of the Schedule-D programs, the EEOC has hired **ZERO** recent graduates.

Ref. EEOC **FOIA No. 820-2018-000315**; August 24, 2018

Now, as far as **LAW** is concerned, there are clearly **5 items** of legal precedence validating my 'Claim' of premeditated systemic age-discrimination before the bench:

1.) The Civil Service Reform Act of 1978 verifies that federal job applicants have 'Standing', and can file a discrimination grievance against an agency or the military:

The U.S. Federal Merit System Principles 5 USC § 2301 (b)(1), (2)

1.) **Recruitment** should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement **should be determined solely on** the basis of relative **ability, knowledge and skills**, after **fair and open competition** which assures that all receive **equal opportunity**.

2.) All employees and **applicants for employment** should receive **fair & equitable treatment** in all aspects of personnel management without regard to political affiliation race, color religion, national origin, sex, marital status, **age**, or handicapping condition, and with proper regard for their privacy and constitutional rights.

2.) **29 C.F.R. § 1625.4 (a)** which explicitly states:

> Help wanted notices or **job advertisements may not contain terms and phrases** that **limit** or deter the employment of older individuals
>
> Notices or **job advertisements that contain terms such as** young, *age 25 to 35 college student,* ***recent college graduate***, *boy, girl,* or others of a similar nature **violate** the Age Discrimination in Employment Act

Ref. Final Rule; Federal Register / Vol. 72, No. 129 / Friday, July 6, 2007 / page **36875** **(Exhibit G)**

3.) The newly released EEOC Office of General Counsel Systemic Enforcement Guidelines certifying that **job applicants** are protected by, and can pursue a Systemic Age-Discrimination Charge; specifically *highlighting* job advertisements showing preference & using the term "*Recent Graduates*".

Ref. EEO Systemic Guidelines: Section III, page 4

4.) The **distinct competitive advantage** provided from Schedule-D is not limited only to external federal job applicants. Current federal employees are also entitled to exploit the OPM PATHWAYS *Recent Graduates* hiring exemption in advancing their respective careers, to the detriment of other similarly situated public-sector workers; as referenced in ADEA **29 U.S.C. § 623** Prohibition of Age Discrimination. **Section 4 (a) 2** of the ADEA forbids an employer:

> **To limit**, segregate, or classify his **employees** in any way which would **deprive or tend to deprive any individual of employment opportunities** or otherwise adversely affect his status as an employee because of such individual's age

Ref. https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title29-chapter14&edition=prelim

For instance, an **existing** federal employee who **recently obtained a degree** and is seeking a promotion, submits an application to a higher-rated *Recent Grads* position (e.g. she is currently a GS-7 grade for a GS-9 level job). That internal employee is automatically guaranteed the non-merit based Schedule-D Excepted Service Authority "privileged" status, and therefore **derives a clear benefit** over all other non-conforming federal employees who are **prohibited** from applying to these exclusive job offers.

It's textbook Nepotism/Favoritism!

5.) **Rabin (et al) v. PwC**; U.S. N.D. of California Case No. **#3:16-cv-02276 JST**. District Judge Jon S. Tigar's precedential Order, declaring that **job applicants** can bring Disparate Impact claims under the ADEA, is pivotal to my 'Standing'.(Exhibit H)

Coincidentally, I happened to be a class-member of the PwC age-bias complaint. It is also noteworthy that the segregating and exclusionary conduct exhibited by PricewaterhouseCoopers **mirrors** that of the OPM *Recent Graduates* Program. Perhaps, instead of settling out-of-court, counsel for PwC should have relied upon the concurrent federal practice as a viable defense against the charges; *i.e.* why?!? should our client be held liable for a graduation date (time-limit) recruitment policy when the U.S. government can do the exact same thing without penalty!

In consideration of the legal threshold for establishing my 'Claim', I believe my position couldn't be any more transparent, has **Merit**, and is based on **Fact & LAW**.

II. FRIVOLITY

So, now here's the obvious problem . . . the appellate court chose to disregard Hon. Judge Tigar's Judicial Order which substantiated my allegation, and *still* upheld its mandate; dismissing my Appeal based upon 'Frivolity'.

What then, is the recourse/defense of my position?

First off, the Frivolity definition seems quite broad, and on its surface is rather imprecise. Likewise, there was no detailed explanation provided to me by the court as to its reasoning or applicability to my charge. Subsequently, I need to ascertain the judicial interpretation, in order to accurately dispute the yet unstated premise behind the Dismissal Order. The SCOTUS case cited by the 2nd Circuit Court ruling is: **Neitzke v. Williams- 490 U.S. 319, 325 (1989); see also 28 U.S.C.§1915 (e)**.

The SCOTUS Opinion deliberated whether Williams failed to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6).

Under Rule 12(b)(6) the "failure to state a claim" standard (originally designed to streamline litigation by dispensing with needless discovery and fact finding), a court may dismiss a claim based on a dispositive issue of law; without regard to whether it is based on outlandish legal theory, or upon a close but ultimately unavailing one.

Whereas, under the **§1915(d)** "frivolousness" standard, which is intended to discourage baseless lawsuits, a dismissal is proper **only** if the underlying legal theory (as in Williams' 14th Amendment claim) or the factual contentions lack an arguable basis. The considerable common ground between the two standards does not mean that one invariably encompasses the other, since, where a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not.

This conclusion flows from the §1915(d) role of replicating the function of screening out inarguable claims from arguably meritorious ones played out in the realm of paid cases by financial considerations. Moreover, it accords with the understanding articulated in other areas of law that not all unsuccessful claims are frivolous. It is also consonant with the goal of Congress in enacting the in forma pauperis statute of assuring equality of consideration for <u>all</u> litigants.

To conflate these standards would deny impoverished plaintiffs the practical protections of Rule 12(b)(6) -- notice of a pending motion to dismiss and an opportunity to amend the complaint before the motion is ruled on -- which are not provided when in forma pauperis complaints are dismissed sua sponte under §1915(d). Pp. 490 U. S. 324-331.

With the **Neitzke** SCOTUS Opinion in mind, my central question to this Court is:

So . . . which is it ???

No comprehensive rationalization was provided to me by the 2nd Circuit Judicial panel as to the relevance of either rule. More importantly, what actually constitutes the common **bench-mark** for making such an ambiguous ruling?

Or, is it a purely arbitrary, **subjective** interpretation!

To put it another way, an action is "frivolous" under §1915(d) when either the factual contentions are clearly baseless (such as when allegations are the product of delusion or fantasy), or the claim is based on an indisputably meritless legal theory; **Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2nd Cir. 1998)**.

Courts have concluded that claims are frivolous, or in bad faith in several situations:

- The plaintiff filed a claim based on **false** allegations
- The plaintiff failed to allege facts **sufficient** to support their claim
- The plaintiff filed claims under an **inapplicable** statute
- The plaintiff knew facts that would **defeat** the claim at the time of filing
- The plaintiff failed to adequately **investigate** the claims to support the action

However, my civil complaint has evidently constructed a valid, factual allegation based upon officially documented & authenticated evidentiary data, filed under applicable federal statutes and codes of federal regulations, and after performing an "in-depth" precise examination of the underlying circumstances.

As to the Motion to Dismiss under Rule 12(b)(6) for the Failure to State a Claim: In general, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, **accepted as true**, to state a claim to relief that is **plausible** on its face."; **Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)**.

Additionally, an employment discrimination complaint "must contain **only** a **short and plain statement** of the claim showing that the pleader is entitled to relief."; **Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 (2002)**.

The Supreme Court has declined to revisit Swierkiewicz and has applied its standard as **good law** after Twombly and Iqbal; **Johnson v. City of Shelby, Miss., 135 S.Ct. 346, 347 (2014)** (citing Swierkeiwicz for the assertion that "imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)'"); **Skinner v. Switzer, 562 U.S. 521, 530 (2011)** (assessing "whether [plaintiff's] complaint was sufficient to cross the federal court's threshold" under Swierkeiwicz); see also **Thai v. Cayre Group, Ltd., 726 F. Supp .2d 323, 329 (SDNY 2010)** ("Reconciling Swierkiewicz, Twombly, and Iqbal, a complaint **need not establish** a prima-facie case of employment discrimination to survive a motion to dismiss. However, 'the claim must be **facially plausible**, and must give fair notice to the defendants of the basis for the claim'.")

Disparate Impact claims that primarily rely upon **statistical evidence** to prove discrimination are subject to a higher standard. The plaintiff must "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection [to] make out a prima facie case of disparate impact" to survive dismissal; **Tex. Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507, 2523 (2015)**.

Again, I believe that my complaint is a straightforward & plain statement which is factually plausible, contains sufficient factual matter, and is facially plausible. Wherein, the *Claim for Relief* estimate is based upon officially published EEOC guidelines; **Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)**.

Therefore, devoid of being provided with a reasonable justification for Dismissal by the appellate court, it leaves me at a distinct disadvantage to provide SCOTUS with relevant precedent. Thus, it is preventing me from possibly utilizing the Law to refute this determination. Whereby, I don't exactly know what I am contesting?!? It seems as if the bench was ultimately trying to **re-define** or deflect the crux of the argument away from my focal complaint accusation. So, I am seeking clarification from this judicial body in regard to the principal charge of the complaint that Presidential Executive Order #13562 has instituted a baseless, exclusionary, and meritless Federal Excepted Service Authority, while unilaterally bypassing the Congressional Legislative Process; in violation of **Article I** of the Constitution, Title-V, Merit System Principles, the ADEA . . . as well as numerous rules & statutes.

Ostensibly, the court deemed my case as frivolity (defined- "silliness or trifling") But, I strongly affirm that it is an **act of altruism.** Like so many other people of my age demographic whom I've been tirelessly fighting for during the progression of this complaint, I am still unemployed - ineligible for jobless benefits - and remain in grave danger of losing my home due to economic hardship.

And, the COVID debacle isn't making it any easier to survive.

Besides, what makes my Pro Se in-forma pauperis dispute any *more* or *less* 'frivolous' than some of the other notable civil complaints that the U.S. Supreme Court has recently heard? Specifically:

a.) The Colorado baker Jack Philips who was being sued for refusing to bake a cake for a same-sex marriage ceremony: **584 U.S.___; Docket No. 16-111**

b.) The State of Pennsylvania, along with the U.S. Department of Justice, suing the 'Little Sisters of the Poor' Order of celibate Catholic nuns for not providing access to birth-control in their health plan: **591 U.S.___; Docket No. 19-431 Vide 19-454**

And now this latest example:

c.) A 14 year old girl sued for throwing a temper tantrum, after getting cut from her High School cheerleading squad. In her anger, she gave the middle-finger to school officials in a Snapchat$_{TM}$ picture posted on social-media, stating in the caption quote: "f[u]ck cheerleading, f[u]ck softball, f[u]ck school, and f[u]ck everything"

594 U.S.___; Docket No. 20-255, Mahanoy Area School District v. Brandi Levy

Honestly, how are these SCOTUS cases any **less** frivolous than mine!

Or, is the calculated withholding of a Frivolity pronouncement by certain federal District Court jurisdictions merely an exercise of Judicial-Populism based upon political expediency . . . And, with respect to these three specific case file examples:

The deliberate imposition of a "woke" Cancel Culture socio-political agenda?!?

If the Supreme Court has decided to undertake such seemingly "trivial" matters then why did the 2nd Circuit deride my position, in having **exposed** a segregating preferential national federal recruitment and selection policy? Wherein, the hiring data has verified Schedule-D to be disparately impacting countless unemployed and proficient older job candidates, who may be in similar dire-straits to mine.

In fact, we'll actually never know the true number of people who have been and certainly continue to be, harmed by this exclusionary policy, because *conveniently* the federal government does not keep or create records for (i.e. discards) all of the job applications of non-selected candidates beyond a period of more than 1 year. As a result, there is no paper-trail or digital footprint of my or anyone else's rejected applications available for the Court to review, which will either confirm or refute my accusation. Thus, its absence seriously impedes the lawful obligation regarding the 'Burden-of-Proof', as I am responsible for the production of the truth of facts.

As to **Stare Decisis**, because there is a deficiency of legal precedence regarding age-discrimination in recruitment cases specifically related to preferential online advertising & digital publication of job announcements equivalent to the USAJOBS platform within the Federal archives, I have included three noteworthy private sector class-action complaints for comparative review:

- **5:17-cv-07232** Bradley et al v. T-Mobile US, Inc. et al Hon. Beth Labson Freeman
- **5:15-cv-01824** Heath v. GOOGLE Inc. Hon. Beth Labson Freeman
- **1:18-cv-02689** National Fair Housing Alliance et al v. Facebook Inc. Hon. John G. Koeltl

The primary allegations contained within these separate and distinct complaints mutually accuse the Defendants with deliberately using exclusionary policies, and restrictive qualification requirements during the online publication recruitment process, in detriment to older workers. At issue in **Bradley** (and NFHA) are algorithms utilized by numerous advertisers on the Facebook® platform which screen out "non-conforming" applicants through the use of **targeting** specifications.

Consequently, in March 2019, Facebook® CEO Mark Zuckerberg decided to settle out-of-court. The resolution encompasses at least **five** lawsuits filed by groups including HUD, the American Civil Liberties Union, the Communications Workers of America, and the National Fair Housing Alliance in the Southern District of NY. As part of the final agreement, Facebook® unilaterally consented to overhaul its advertising system, and disable *biased* segmentation portal algorithm parameters.

The accord compels the corporation to withhold a wide array of detailed demographic information of its user membership. The key structural change significantly limits advertisers' exclusionary targeting options. The modification eliminates the ability to select specified audiences (for example- gender, **age**, race sexual orientation, **graduation date**, and zip code). These various category tools are used as "indicators" by the discriminating advertisers to pre-screen applicants when they promote online job opportunities, housing, and finance/credit lending. Advertisers are also barred from segregating any groups who are protected under federal, state or local regulations. Lastly, Facebook® now requires companies to certify their compliance with existing anti-discrimination laws, along with internal "terms of use" anti-discrimination corporate policies.

In October 2018, Google® too settled out-of-court with Heath for an undisclosed amount. The case file is sealed, and the final terms of agreement are unknown.

Analogously, the USAJOBS federal employment platform has launched digital accounts with, and, actively markets *Recent Graduates* job openings on social media software apps like **Facebook®**, **Twitter®**, **YouTube®**, **Linkedin®**, **Instagram®** et cetera. Moreover, these commonly publicized employment ads have been deliberately using the illicit, preferential segmentation settings. All of these Big Tech sites are now implicated as being **complicit** in the biased behavior.

Any potential candidates who "click" on one of the various externally advertised social-network links are subsequently redirected back to the USAJOBS website. Whereupon, the [Who may apply] keyword box section of USAJOBS qualifications and assessment instructions then enforce the exclusionary and segregating barriers to inclusion within the applicant pool for federal employment.

Aside from these private-sector lawsuits, I do know of two other public-sector complaints filed against the *Recent Graduates* recruitment policy:

- *James W. Moeller v. EEOC*; U.S. Dist. Court of D.C.; Docket **#1:19-cv-2330 (DLF)**

Moeller is challenging the usage of "terms or phrases" that **limit** or deter the employment of older individuals within public-sector job advertisements.

- *Bernardo C. v. Tillerson*; EEOC Appeal No. **0120160564** (Nov. 8, 2017)

The Bernardo grievance had been filed with the EEOC Office of Federal Operations. I have diligently attempted to obtain a copy of the proceeding, but it was never made available for public access within their searchable digital archives.

III. REMEDY

As far as 'Relief' is concerned, the EEOC outlines restitution; **29 CFR § 1614.501**:

> Whenever discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred. The types of relief will depend upon the discriminatory action and the effect it had on the victim. For example, **if someone is not selected for a job** or a promotion because of discrimination, the remedy may include placement in the job **and/or back pay and benefits the person would have received.**
>
> **The employer also will be required to stop any discriminatory practices and take steps to prevent discrimination in the future.**
>
> A victim of discrimination also may be able to recover attorney's fees, expert witness fees, and court costs.
>
> In cases involving intentional age discrimination, or in cases involving intentional sex-based wage discrimination under the Equal Pay Act, victims cannot recover either compensatory or punitive damages, but may be entitled to "liquidated damages." **Liquidated damages** may be awarded to punish an especially malicious or reckless act of discrimination. The amount of liquidated damages that may be awarded is **equal to the amount of back pay** awarded the victim.

Ref. https://www.eeoc.gov/remedies-employment-discrimination

Accordingly, in conformity with EEOC guidelines, I have demanded that the federal government must immediately **STOP** the discriminatory *Recent Graduates* recruitment & hiring policy; **§1614.501(a)(2)**. As far as any *potential* financial compensation is concerned, within my REMEDY computation spreadsheet previously filed with the EDNY, I had outlined the potential damages: per job announcement/vacancy **§1614.501(c)(1)**, and including liquidated damages **§1614.408**. The figures are tabulated from the open date of <u>each</u> job announcement up to and including the present federal pay period. **(Exhibit I)**

To date, the totals are as follows:

$ 6,395,247 per the **33** individual job announcements I was prohibited from applying to
$32,162,349 per the **172** vacancies contained within all of the job announcements
$12,790,494 per the **33** individual job announcements (plus Liquidated Damages)
$64,324,698 per the **172** vacancies contained in the announcements (plus Liquidated Damages)

Unreimbursed healthcare costs, and, unpaid benefits weren't included in the numbers. As per the existing federal regulations & guidelines on granting ' Relief ' to an aggrieved applicant, I recorded the range of infractions in chronological order while simply calculating any *potential* financial compensation based exclusively upon the prescribed EEOC Remedy formula.

But, I now want to make something **perfectly clear** to this Court as it pertains to 'frivolity' and my having purportedly *Failed to state a Claim* upon which Relief' could be granted under Federal Rule of Civil Procedure **12(b)(6)**:

I will forego ANY of the financial restitution remedies which were outlined in my itemized spreadsheet calculations, and **only** request a total amount of **$1** $\underline{00}$ for recompense, thus dispelling any <u>doubt</u> as to the sincerity of my motives.

Conclusion

Honorable SCOTUS Justices, I implore the Court to please **remove me** from the equation and objectively scrutinize the Schedule-D Federal Excepted Service Hiring Authority *Recent Graduates* program for what it really is- unmerited FAVORITISM. In short, Schedule-D equals:

"Do not pass GO" for <u>all</u> non-conforming federal job applicants!

The heart of this legal dispute is first and foremost about "Checks-and-Balances". My complaint isn't just about Schedule-D alone, *but also*, it concerns what other potentially inequitable Presidential Executive Orders may be coming down the Equity, Diversity & Inclusion pipeline next (i.e. Schedules. E, F, G . . . and so on). Because there's a whole lot of letters left in the alphabet! And, as I have plausibly demonstrated within this Court Petition, the "People's Voice" is being silenced by Executive-Branch **Legislative** Action; in defiance of **Article I** of the Constitution.

Case-in-point, recently inaugurated President Joseph R. Biden Jr. had barely gotten the seat warm in the Oval Office, and he has already officially signed-off on 42 new Executive Orders; the most having been issued within the first 100 days of a Presidency in more than 88 years, since **FDR** back in 1933.

Ref. https://www.npr.org/2021/04/27/988822340/bidens-1st-100-days-a-look-by-the-numbers

Therefore, I am taking a stand against unchecked authority!

Honorable SCOTUS Justices, I deferentially request the Court to conduct an honest assessment of this petition, concerning my [442] age-discrimination in federal employment civil complaint. The **national implications** far outweigh the lower court's marginalization of the charges, and, the wholesale disregard of my personal conviction. As it is plainly summarized within the *rules and guidance* section for the Court:

Nature of Supreme Court Review

> **It is important to note that review in this Court by means of a writ of certiorari is not a matter of right, but of judicial discretion. The primary concern of the Supreme Court is not to correct errors in lower court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved.**

By my original declaration, the ultimate purpose of this grievance was meant to be a referendum on the power of the pen. Accordingly, I truly believe my publicly "Speaking-out" to be a moral imperative . . . . as well as my Civic Duty.

To quote SCOTUS Associate Justice Stephen G. Breyer:

"Sometimes it is necessary to protect the superfluous in order to preserve the necessary."

September 24th, 2021 Respectfully Submitted,

Brian J. Neary
Petitioner


signature

App'x 52, 53 (2d Cir. 2018) (citing *Morrison*, 547 F.3d at 170); *Clayton v. United States*, No. 18-CV-5867, 2020 WL 1545542, at *3 (E.D.N.Y. Mar. 31, 2020) (quoting *Tandon*, 752 F.3d at 243); *Fed. Deposit Ins. Corp. v. Bank of N.Y. Mellon*, 369 F. Supp. 3d 547, 552 (S.D.N.Y. 2019) (quoting *Tandon*, 752 F.3d at 243).

ii. Rule 12(b)(6)

In reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must construe the complaint liberally, "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Kim v. Kimm*, 884 F.3d 98, 103 (2d Cir. 2018) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)); *see also Tsirelman v. Daines*, 794 F.3d 310, 313 (2d Cir. 2015) (quoting *Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997)). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Matson v. Bd. of Educ.*, 631 F.3d 57, 63 (2d Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although all allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

In reviewing a *pro se* complaint, a court must be mindful that a plaintiff's pleadings must be held "to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (noting that after *Twombly*, courts "remain obligated to construe a *pro se* complaint liberally").

b. The Court declines to strike Plaintiff's sur-reply

Defendants move to strike Plaintiff's sur-reply, "or, in the alternative, to direct the government to any portion as to which the Court would like a response." (Defs.' Mot. to Strike 1.) Defendants argue that Plaintiff has "identified no *basis* for needing a sur-reply," and that the sur-reply impermissibly addresses Plaintiff's "concerns with declarations attached to, and threshold legal arguments advanced in, the [Defendants'] *opening* papers, and should have been made in [P]laintiff's opposition to the [Defendants'] motion, not after the [Defendants] filed its reply." (*Id.* at 2.)

Plaintiff argues that the Court should strike Defendants' objection because they waited "more than [nine] days from [Plaintiff's] submission to" move to strike. (Pl.'s Opp'n Letter 1.) Plaintiff also asserts that the Court should allow his sur-reply because he has "been vigilant to . . . meet or exceed" his filing deadlines. (*Id.*)

The general principle is that supplemental filings require leave of the court. *See Guadagni v. N.Y.C. Transit Auth.*, 387 F. App'x 124, 126 (2d Cir. 2010) ("[T]here is no evidence that [the plaintiff] moved the district court for leave to file a sur-reply."); *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252 (2d Cir. 2005) (finding that the plaintiff could have "sought to file a responsive sur-reply" in district court); *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 227 (2d Cir. 2000) ("[The defendant] did not move the district court for leave to file a sur-reply to respond to [the plaintiff's] evidence."); *Sevilla v. Perez*, No. 15-CV-3528, 2016 WL 5372792, at *2 n.5 (E.D.N.Y. Sept. 26, 2016) ("[The plaintiff] did not seek leave to file the sur-reply and the court did not grant permission for the filing of a sur-reply; this contravenes the general principle that supplemental filings require leave of the court."); *Endo Pharm. Inc. v. Amneal Pharm., LLC*, No. 12-CIV-8060, 2016 WL 1732751, at *9 (S.D.N.Y. Apr.

29, 2016) (striking a supplemental filing where the plaintiff "neither sought nor received permission from the court to file a [sur-reply]"). District courts have discretion to decide whether to strike or permit a litigant's sur-reply. *See Endo Pharm. Inc.*, 2016 WL 1732751, at *9 ("It is beyond dispute that the decision to permit a litigant to submit a [sur-reply] is a matter left to the court's discretion" (citing *Kapiti v. Kelly*, No. 07-CV-3782, 2008 WL 754686, at *1 n.1 (S.D.N.Y. Mar. 12, 2008))); *Kapiti*, 2008 WL 754686, at *1 n.1 ("[T]he decision to permit a litigant to submit a [sur-reply] is a matter left to the Court's discretion, since neither the Federal Rules of Civil Procedure nor the Local Civil Rules of [the] court authorize litigants to file [sur-replies].").

While Plaintiff neither sought nor received permission from the Court to file a sur-reply to Defendants' motion to dismiss, Plaintiff is proceeding *pro se* and the Court construes his supplemental filings liberally. Plaintiff's sur-reply consists of some beneficial data to corroborate Plaintiff's substantive claims, rather than arguments regarding the subject matter jurisdictional issues raised by Defendants in their motion. (*See* Pl.'s Opp'n Letter.) As Defendants argue,

> [Plaintiff's] sur-reply . . . fails to grapple with the threshold legal arguments of absolute immunity, sovereign immunity, standing, administrative exhaustion, and failure to state a claim addressed in the *opening* brief; . . . [rather, it] sets forth a factual contention without addressing its implications for the 'injury in fact' and 'traceability' prongs of standing that [Defendants] discuss[] at length.

(Defs.' Mot. to Strike 2.) Thus, Plaintiff's sur-reply does not prejudice Defendants because it "largely repeat[s] [arguments] [P]laintiff previously interposed," (*id.* at 3), and Defendants do not argue otherwise.

Accordingly, the Court exercises its discretion and denies Defendants' motion to strike

Plaintiff's sur-reply.

c. The Court lacks subject matter jurisdiction

Defendants argue that Plaintiff's claims against President Trump must be dismissed because "he enjoys absolute immunity in actions such as this one predicated on a President's official acts," (Defs.' Mot. 12), and, in the alternative, because President Trump has sovereign immunity from this action, (*id.* at 14). Defendants also argue that Plaintiff's claims against Weichert must be dismissed because she has sovereign immunity and, in the alternative, because Plaintiff lacks standing and failed to exhaust his administrative remedies. (*Id.* at 13, 17.)

Plaintiff fails to address Defendants' arguments regarding President Trump's absolute and sovereign immunity, Weichert's sovereign immunity, and Defendants' arguments that he lacks standing to bring this suit.[11] (*See* Pl.'s Opp'n.)

i. President Trump enjoys absolute immunity

Defendants argue that even if "President Trump [is] culpable for failing to revoke his predecessor's allegedly discriminatory [Executive Order] — President Trump would still enjoy absolute immunity from suit, as well as from liability." (Defs.' Mot. 13.) Defendants argue that the Executive Order "is a quintessentially non-ministerial official act, setting federal-employment policy government-wide and rendering a discretionary determination to mandate a new excepted service." (*Id.*)

Plaintiff argues that the Executive Order "exceeds the President's [c]onstitutional [a]uthority." (Compl. 20.)

[11] Although Plaintiff does not respond to Defendants' claim that he failed to exhaust administrative remedies, (Defs.' Mot. 21), Plaintiff asserts in the Complaint that he filed an age discrimination complaint with OPM in March of 2018, which was dismissed for failure to make a claim, (Compl. 8). The OPM's final decision was affirmed by the EEOC. (*Id.* Ex A, at 22.)

"No one doubts that Article II guarantees the independence of the [e]xecutive [b]ranch. As the head of that branch, the President 'occupies a unique position in the constitutional scheme.'" *Trump v. Vance*, ---, U.S. ---, ---, 140 S. Ct. 2412, 2425–26 (2020) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)). The President's duties "come with protections that safeguard [his] ability to perform his vital functions." *Id.* These include "absolute immunity from damages liability predicated on his official acts." *Nixon*, 457 U.S. at 749. The President has absolute immunity because "the prospect of . . . liability could 'distract a President from his public duties, to the detriment of not only the President and his office but also the [n]ation.'" *Trump*, 140 S. Ct. at 2426 (quoting *Nixon*, 457 U.S. at 753); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (noting that an injunction "against the President himself" as to apportioning representatives based on census data "is extraordinary, and should have raised judicial eyebrows"). Courts define official acts using a "functional approach." *Clinton v. Jones*, 520 U.S. 681, 694 (1997) (holding that a president did not have absolute immunity from sexual harassment claims); *see also Nixon*, 457 U.S. at 757–78 (holding that a former President was entitled to absolute immunity based on his official acts in reorganizing the armed forces).

The Executive Order is an official act, which sets policy on how federal employees are hired, and, as a result, the President enjoys absolute immunity from this suit. *See Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part) ("As the plurality notes, [the Supreme Court] emphatically disclaimed the authority to [enjoin President Johnson from enforcing the Reconstruction Acts], stating that 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" (quoting *Mississippi v. Johnson,* 71 U.S. (4 Wall.) 475, 501 (1867))).

Accordingly, the Court finds that President Trump has absolute immunity from this suit, and dismisses Plaintiff's claims against him.

ii. President Trump enjoys sovereign immunity

Defendants argue that "[a]ssuming *arguendo* that President Trump were not dismissed [from the suit] owing to absolute immunity, sovereign immunity would still bar this ADEA action against" him because "[t]he *only* proper defendant to such ADEA action is the head of the subject federal agency." (Defs.' Mot. 14.)

"It is, of course, 'axiomatic' under the principle of sovereign immunity 'that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.'" *Adeleke v. United States*, 355 F.3d 144, 150 (2d Cir. 2004) (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)); *see also Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) ("Absent a waiver, sovereign immunity shields the [f]ederal [g]overnment and its agencies from suit." (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994))). Waivers of sovereign immunity must be "unequivocally expressed" by statute. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992) (quoting *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95 (1990)); *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) ("The terms of consent to be sued may not be inferred, but must be 'unequivocally expressed'" (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980))). Congress created a limited sovereign immunity waiver in the ADEA, which authorizes age-based discrimination suits against federal employers under certain circumstances. *See* 29 U.S.C. § 633a(a).[12]

[12] The waiver in section 633a(a) covers:

> All personnel actions affecting employees or applicants for employment who are at least [forty] years of age (except personnel actions with regard to aliens employed outside the limits of the

Although the ADEA does not specify who the proper defendant should be in an age-based discrimination suit against federal employers, courts have held that the proper defendant in a federal employee's ADEA suit is the head of the agency. *See, e.g.*, *Ellis v. U.S. Postal Serv.*, 784 F.2d 835, 838 (7th Cir. 1986) (applying Title VII's rule that "the only proper defendant is the head of the agency" to the ADEA); *Healy v. U.S. Postal Serv.*, 677 F. Supp. 1284, 1289 (E.D.N.Y. 1987) ("Since both [Title VII and the ADEA] should be construed consistently, this court holds that the only proper party defendant in a suit against the Postal Service under the ADEA is the Postmaster General of the United States.").

Plaintiff improperly named President Trump as a defendant in this suit. The only proper defendant in this action is the head of the OPM, Weichert. *See Rector v. DOJ*, No. 14-CIV-11883, 2016 WL 7188135, at *1 n.1 (S.D.N.Y. Nov. 22, 2016) (dismissing claims against the Department of Justice and Director of Executive Office for Immigration Review because the only proper defendant was the head of the agency being sued); *Klestadt v. Duncan*, No. 14-CV-2831, 2016 WL 816788, at *1 n.1 (E.D.N.Y. Feb. 25, 2016) (collecting cases) (granting leave to amend caption "because the proper defendant in [an] . . . ADEA lawsuit is the 'head of the federal agency in which the alleged discriminatory actions occurred.'" (quoting *Tulin v. U.S.*

> United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the [f]ederal [g]overnment having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

29 U.S.C. § 633a(a).

Postal Serv., No. 06-CV-5067, 2008 WL 822126, at *4 (E.D.N.Y. Mar. 25, 2008))); *Elhanafy v. Shinseki*, No. 10-CV-3192, 2012 WL 2122178, at *11 (E.D.N.Y. June 12, 2012) (collecting cases) (substituting the original defendants, U.S. Department of Veterans Affairs and the New York Harbor Healthcare System, with the Secretary of the Department of Veterans Affairs, as the Secretary was the proper defendant in the lawsuit).

Accordingly, the Court dismisses Plaintiff's claims against President Trump on this basis also.[13]

(iii) Plaintiff lacks standing

Defendants argue that Plaintiff cannot bring this suit because Plaintiff lacks standing "to assert an ADEA claim as to []his non-selection" and "also lacks standing to the extent that the wrong allegedly accruing to OPM is its promulgation of the RGP regulations, as mandated by the [Executive Order] that created the RGP hiring authority." (Defs.' Mot. 18.) In support, Defendants argue, *inter alia*, that Plaintiff fails to show that his "injury will be redressed by a favorable decision," because Plaintiff's "failure to secure a variety of jobs, cannot by definition

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[13] With regard to jurisdiction over Weichert, Defendants argue that sovereign immunity precludes the ADEA claim against her because immunity is limited to "personnel actions" by the OPM, and the Executive Order is not personnel action but rather a mandatory promulgation of executive regulations. (Defs.' Mot. 16.) While the Court declines to address this issue because it dismisses the claims on other grounds, the Court notes that

> it is now well established that '[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.' Even if the [director] were acting at the behest of the President, this 'does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.

Chamber of Comm. of U.S. v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (first and third alterations in original) (first quoting *Franklin v. Massachusetts*, 505 U.S. 788, 815 (1992) (Scalia, J., concurring in part and concurring in the judgment); and then quoting *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971)).

be redressed by prospectively enjoining the RGP."[14] (*Id.* at 20–21 (citing *Platsky v. Nat'l Sec. Agency*, 547 F. App'x 81, 83 (2d Cir. 2013)).)

Plaintiff seeks to enjoin the RGP, requests monetary damages equal to the number of job announcements he applied to, and seeks removal of the two-year education limitation from the Pathways Program. (Compl. 12.)

"'Standing to sue is a doctrine' that 'limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.'" *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 183–84 (2d Cir. 2020) (quoting *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1547 (May 16, 2016)). In order to show standing, a plaintiff must establish three things: (1) an "injury in fact — an invasion of a legally protected interest which is . . . concrete and particularized and actual or imminent, not conjectural or hypothetical," (2) "a causal connection between the injury and the conduct complained of," and (3) redressability of the injury "by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also Pincus v. Nat'l R.R. Passenger Corp.*, 581 F. App'x 88, 89 (2d Cir. 2014) (citing *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983)) (describing the three elements of standing); *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) ("[A] plaintiff must show the three familiar elements of standing: injury in fact, causation, and redressability." (citing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009))). "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012) (quoting *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.*, 433 F.3d 181, 198 (2d Cir. 2005)).

[14] Because, as explained below, Plaintiff fails to show redressability, the Court declines to address the injury-in-fact and causal connection requirements.

The nature of a redressability inquiry "focuses . . . on whether the *injury* that a plaintiff alleges is likely to be redressed through the litigation." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 286–87 (2008). To satisfy the redressability requirement, a plaintiff must establish that "it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief [the] plaintiff seeks in bringing suit[]." *Id.* at 273–74 (citing *Lujan*, 504 U.S. at 560–61); *see also M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) ("A plaintiff's burden to demonstrate redressability is relatively modest. [The plaintiff] need not demonstrate that there is a guarantee that her injuries will be redressed by a favorable decision; rather, a plaintiff need only show a substantial likelihood that the relief sought would redress the injury." (alteration and citations omitted)).

"Th[e] [Supreme] Court is reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013); *see also Himber v. Intuit, Inc.*, No. 10-CV-2511, 2012 WL 4442796, at *7 (E.D.N.Y. Sept. 25, 2012) (holding that "[i]t is purely speculative whether the denials of service specified in the complaint can be traced to [the] petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications" and "whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services" (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 28 (1976))). There is no redressability where such depends on an independent actor who retains "broad and legitimate discretion [that] the courts cannot presume either to control or to predict." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989); *see also Himber*, 2012 WL 4442796, at *7 ("As the jurisprudence of the Supreme Court and Second Circuit has clearly articulated, claims of harm based upon speculation regarding decisions by third parties is

insufficient to confer Article III standing.").

Plaintiff fails to establish redressability. While enjoining the RGP may theoretically offer Plaintiff increased employment opportunities, Plaintiff's inability to get jobs in the past allegedly due to the RGP is "merely 'speculative'" and cannot be redressed. *Lujan*, 504 U.S. at 561. Plaintiff does not adequately suggest that he would have been hired if he applied for jobs via the RGP. As Defendants argue, Plaintiff failed to apply to a similarly competitive OPM job that did not have educational timing requirements. (Defs.' Mot. 7.) In addition, Plaintiff cannot show that he would be hired for the RGP jobs in the future even if he were eligible for them because such decisions depend on the discretion of "independent decisionmakers." *Clapper*, 568 U.S. at 413. The RGP operates as an entry-level hiring avenue, and as Plaintiff notes, he has adequate "professional background [and] work experience," (Compl. 18), and yet has had "rotten luck," (*id.* at 13), in the job market.[15] Plaintiff therefore fails to show redressability.

Accordingly, because Plaintiff cannot satisfy redressability, he cannot satisfy all three prongs necessary to adjudicate a claim in federal court. The Court therefore dismisses Plaintiff's claims for lack of standing.[16]

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[15] Given that the Court dismisses Plaintiff's claims for lack of subject matter jurisdiction, the Court declines to address Plaintiff's substantive claims. Nevertheless, the Court reiterates the Second Circuit's conclusion that the "Supreme Court has not to date recognized disparate impact claims under [29 U.S.C.] § 633a, which applies to federal employers." *Neary*, 730 F. App'x at 11 n.3.

[16] Defendants also moved to dismiss for failure to exhaust the administrative review and appeals processes as required by the Administrative Procedure Act (the "APA"), 5 U.S.C. § 704. (Defs.' Mot. 3–4.) Because the Court dismisses Plaintiff's claims for lack of standing, the Court declines to address this argument.

III. Conclusion

For the foregoing reasons, the Court grants Defendants' motion to dismiss and dismisses the action.

Dated: September 25, 2020
Brooklyn, New York

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge

[EXHIBIT C]

Federal Register

Thursday,
December 30, 2010

Part VII

The President

Executive Order 13562—Recruiting and Hiring Students and Recent Graduates

Federal Register
Vol. 75, No. 248
Thursday, December 30, 2010

Presidential Documents

Title 3—

The President

Executive Order 13562 of December 27, 2010

Recruiting and Hiring Students and Recent Graduates

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301 and 3302 of title 5, United States Code, it is hereby ordered as follows:

Section 1. *Policy.* The Federal Government benefits from a diverse workforce that includes students and recent graduates, who infuse the workplace with their enthusiasm, talents, and unique perspectives. The existing competitive hiring process for the Federal civil service, however, is structured in a manner that, even at the entry level, favors job applicants who have significant previous work experience. This structure, along with the complexity of the rules governing admission to the career civil service, creates a barrier to recruiting and hiring students and recent graduates. It places the Federal Government at a competitive disadvantage compared to private-sector employers when it comes to hiring qualified applicants for entry-level positions.

To compete effectively for students and recent graduates, the Federal Government must improve its recruiting efforts; offer clear paths to Federal internships for students from high school through post-graduate school; offer clear paths to civil service careers for recent graduates; and provide meaningful training, mentoring, and career-development opportunities. Further, exposing students and recent graduates to Federal jobs through internships and similar programs attracts them to careers in the Federal Government and enables agency employers to evaluate them on the job to determine whether they are likely to have successful careers in Government.

Accordingly, pursuant to my authority under 5 U.S.C. 3302(1), and in order to achieve a workforce that represents all segments of society as provided in 5 U.S.C. 2301(b)(1), I find that conditions of good administration (specifically, the need to promote employment opportunities for students and recent graduates in the Federal workforce) make necessary an exception to the competitive hiring rules for certain positions in the Federal civil service.

Sec. 2. *Establishment.* There are hereby established the Internship Program and the Recent Graduates Program, which, along with the Presidential Management Fellows Program, as modified herein, shall collectively be known as the Pathways Programs. I therefore direct the Director of the Office of Personnel Management (OPM) to issue regulations implementing the Pathways Programs consistent with this order, including:

(a) a description of the positions that executive departments and agencies (agencies) may fill through the Pathways Programs because conditions of good administration necessitate excepting those positions from the competitive hiring rules;

(b) rules governing whether, to what extent, and in what manner public notice should be provided of job opportunities in the Pathways Programs;

(c) a description of career-development, training, and mentorship opportunities for participants in the Pathways Programs;

(d) requirements that managers meaningfully assess the performance of participants in the Pathways Programs to identify those who should be considered for conversion to career civil service positions;

(e) a description of OPM oversight of agency use of the Pathways Programs to ensure that (i) they serve as a supplement to, and not a substitute for,

the competitive hiring process, and (ii) agencies are using the Pathways Programs in a genuine effort to develop talent for careers in the civil service;

(f) a description of OPM plans to evaluate agencies' effectiveness in recruiting and retaining talent using the Pathways Programs and of the satisfaction of Pathways Programs participants and their hiring managers; and

(g) standard naming conventions across agencies, so that students and recent graduates can clearly understand and compare the career pathway opportunities available to them in the Federal Government.

Sec. 3. *Internship Program.* The Internship Program shall provide students in high schools, community colleges, 4-year colleges, trade schools, career and technical education programs, and other qualifying educational institutions and programs, as determined by OPM, with paid opportunities to work in agencies and explore Federal careers while still in school. The Internship Program would replace the existing Student Career Experience Program, established pursuant to Executive Order 12015 of October 26, 1977. The following principles and policies shall govern the Internship Program:

(a) Participants in the program shall be referred to as "Interns" and shall be students enrolled, or accepted for enrollment, in qualifying educational institutions and programs, as determined by OPM.

(b) Subject to any exceptions OPM may establish by regulation, agencies shall provide Interns with meaningful developmental work and set clear expectations regarding the work experience of the intern.

(c) Students employed by third-party internship providers but placed in agencies may, to the extent permitted by OPM regulations, be treated as participants in the Internship Program.

Sec. 4. *Recent Graduates Program.* The Recent Graduates Program shall provide individuals who have recently graduated from qualifying educational institutions or programs with developmental experiences in the Federal Government intended to promote possible careers in the civil service. The following principles and policies shall govern the Recent Graduates Program:

(a) Participants in the program shall be referred to as "Recent Graduates" and must have obtained a qualifying degree, or completed a qualifying career or technical education program, as determined by OPM, within the preceding 2 years, except that veterans who, due to their military service obligation, were precluded from participating in the Recent Graduates Program during the 2-year period after obtaining a qualifying degree or completing a qualifying program shall be eligible to participate in the Program within 6 years of obtaining a qualifying degree or completing a qualifying program.

(b) Responsibilities assigned to a Recent Graduate shall be consistent with his or her qualifications, educational background, and career interests, the purpose of the Recent Graduates Program, and agency needs.

Sec. 5. *Presidential Management Fellows Program.* The Presidential Management Fellows (PMF) Program is an existing program established pursuant to Executive Order 13318 of November 21, 2003, that aims to attract to the Federal service outstanding men and women from a variety of academic disciplines at the graduate level who have a clear interest in, and commitment to, the leadership and management of public policies and programs. The following requirements shall govern the PMF Program upon the revocation of Executive Order 13318, as provided in section 8 of this order:

(a) Participants in this program shall continue to be known as Presidential Management Fellows (PMFs or Fellows) and must have received, within the preceding 2 years, a qualifying advanced degree, as determined by OPM.

(b) Responsibilities assigned to a PMF shall be consistent with the PMF's qualifications, educational background, and career interests, the purposes of the PMF Program, and agency needs.

(c) OPM shall establish the eligibility requirements and minimum qualifications for the program, as well as a process for assessing eligible individuals for consideration for appointment as PMFs.

Sec. 6. *Appointment and Conversion.* (a) Appointments to any of the Pathways Programs shall be under Schedule D of the excepted service, as established by section 7 of this order.

(b) Appointments to the Recent Graduates or PMF Programs shall not exceed 2 years, unless extended by the employing agency for up to 120 days thereafter.

(c) Appointment to a Pathways Program shall confer no right to further Federal employment in either the competitive or excepted service upon the expiration of the appointment, except that agencies may convert eligible participants noncompetitively to term, career, or career conditional appointments after satisfying requirements to be established by OPM, and agencies may noncompetitively convert participants who were initially converted to a term appointment under this section to a career or career-conditional appointment before the term appointment expires.

5 CFR PART 6

■ **PART 6—[AMENDED]**

Sec. 7. *Implementation.* (a) Civil Service Rule VI is amended as follows:

(i) 5 CFR 6.1(a) is amended to read:

OPM may except positions from the competitive service when it determines that (A) appointments thereto through competitive examination are not practicable, or (B) recruitment from among students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs can better be achieved by devising additional means for recruiting and assessing candidates that diverge from the processes generally applicable to the competitive service. These positions shall be listed in OPM's annual report for the fiscal year in which the exceptions are made.

(ii) 5 CFR 6.2 is amended to read:

OPM shall list positions that it excepts from the competitive service in Schedules A, B, C, and D, which schedules shall constitute parts of this rule, as follows:

Schedule A. Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.

Schedule B. Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by OPM.

Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C.

Schedule D. Positions other than those of a confidential or policy-determining character for which the competitive service requirements make impracticable the adequate recruitment of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs. These positions, which are temporarily placed in the excepted service to enable more effective recruitment from all segments of society by using means of recruiting and assessing candidates that diverge from the rules generally applicable to the competitive service, shall be listed in Schedule D.

(iii) The first sentence of 5 CFR 6.4 is amended to read:

Except as may be required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A, C, or D or from positions excepted from the competitive service by statute.

The second sentence of 5 CFR 6.4 is to remain unchanged.

(iv) The first sentence of 5 CFR 6.6 is amended to read:

OPM may remove any position from or may revoke in whole or in part any provision of Schedule A, B, C, or D.

The second sentence of 5 CFR 6.6 is to remain unchanged.

(b) The Director of OPM shall:

(i) promulgate such regulations as the Director determines may be necessary to implement this order;

(ii) provide oversight of the Pathways Programs;

(iii) establish, if appropriate, a Government-wide cap on the number of noncompetitive conversions to the competitive service of Interns, Recent Graduates, or PMFs (or a Government-wide combined conversion cap applicable to all three categories together);

(iv) administer, and review and revise annually or as needed, any Government-wide cap established pursuant to this subsection;

(v) provide guidance on conducting an orderly transition from existing student and internship programs to the Pathways Programs established pursuant to this order; and

(vi) consider for publication in the *Federal Register* at an appropriate time a proposed rule seeking public comment on the elimination of the Student Temporary Employment Program, established through OPM regulations at 5 CFR 213.3202(a).

(c) In accordance with regulations prescribed pursuant to this order and applicable law, agencies shall:

(i) use appropriate merit-based procedures for recruitment, assessment, placement, and ongoing career development for participants in the Pathways Programs;

(ii) provide for equal employment opportunity in the Pathways Programs without regard to race, ethnicity, color, religion, sex, national origin, age, disability, sexual orientation, or any other non-merit-based factor;

(iii) apply veterans' preference criteria; and

(iv) within 45 days of the date of this order, designate a Pathways Programs Officer (at the agency level, or at bureaus or components within the agency) to administer Pathways Programs, to serve as liaison with OPM, and to report to OPM on the implementation of the Pathways Programs and the individuals hired under them.

Sec. 8. *Prior Executive Orders.* (a) Effective March 1, 2011, Executive Order 13162 (Federal Career Intern Program) is superseded and revoked. Any individuals serving in appointments under that order on March 1, 2011, shall be converted to the competitive service, effective on that date, with no loss of pay or benefits.

(b) On the effective date of final regulations promulgated by the Director of OPM to implement the Internship Program, Executive Order 12015 (pursuant to which the Student Career Experience Program was established), as amended, is superseded and revoked.

(c) On the effective date of final regulations promulgated by the Director of OPM to implement changes to the PMF Program required by this order, Executive Order 13318 (Presidential Management Fellows Program), as amended, is superseded and revoked.

Sec. 9. *General Provisions.* (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

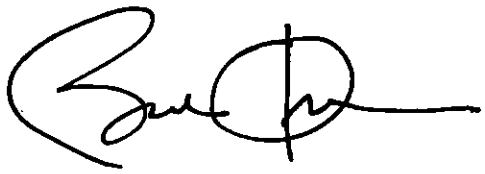
(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law, regulation, Executive Order, or Presidential Directive to an executive department, agency, or head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party

against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
December 27, 2010.

[FR Doc. 2010–33169
Filed 12–29–10; 11:15 am]
Billing code 3195–W1–P

[Exhibit D]

FEDERAL REGISTER

Vol. 77 Friday,
No. 92 May 11, 2012

Part III

Office of Personnel Management

5 CFR Parts 213, 302, *315 et al.*
Excepted Service, Career and Career-Conditional Employment; and Pathways Programs; Final Rules

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 213, 302, 315, 330, 334, 362, 531, 536, 537, 550, 575, and 890

RIN 3206–AM34

Excepted Service, Career and Career-Conditional Employment; and Pathways Programs

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations implementing the Pathways Programs established by E.O. 13562, signed December 27, 2010. As directed by the President, the Pathways Programs provide clear paths to Federal internships and potential careers in Government for students and recent graduates. The Pathways Programs consist of the Internship Program, the Recent Graduates Program and the Presidential Management Fellows Program. Positions in the Pathways Programs are excepted from the competitive service. Participants in these Programs are appointed under the newly created Schedule D of the excepted service.

DATES: This final rule is effective July 10, 2012. Agencies, however, shall have a 6-month transition period following the effective date of the final rule to convert to the Internship Program any students serving under appointments made pursuant to the Student Educational Employment Program and to transition to the new Presidential Management Fellows Program any Fellows currently serving under appointments made pursuant to the existing Presidential Management Fellows Program. In addition, during the transition period, agencies are permitted to make appointments under the Internship and Presidential Management Fellows Programs even if they have not entered into a final Memorandum of Understanding (MOU) with OPM, as required by 5 CFR 362.104. This transition period does not apply to the Recent Graduates Program, and appointments under the Recent Graduate Program may not be made until an MOU is in place.

FOR FURTHER INFORMATION CONTACT: Gale Perryman, 202–606–1143, Fax: 202–606–4430 by TTY: 202–418–2532, or email: *gale.perryman@opm.gov.*

SUPPLEMENTARY INFORMATION: In Executive Order 13562, dated December 27, 2010, President Obama established the Pathways Programs, consisting of three streamlined developmental programs: the Internship Program for students; the Recent Graduates Program for people who have completed a qualifying educational program within the preceding 2 years; and the Presidential Management Fellows (PMF) Program for people who obtained a graduate or professional degree within the preceding 2 years. To implement this Executive Order, OPM issued proposed regulations for parts 213, 302, 315, 330, 334, 362, 531, 536, 537, 550, 575, and 890 of title 5, Code of Federal Regulations (5 CFR) on August 5, 2011.

As explained in the proposed regulations, the President is authorized by statute to provide for "necessary exceptions of positions from the competitive service" whenever warranted by "conditions of good administration." (5 U.S.C. 3302). In Executive Order 13562, the President found that "conditions of good administration (specifically, the need to promote employment opportunities for students and recent graduates in the Federal workforce) make necessary an exception to the competitive hiring rules for certain positions in the Federal civil service," *i.e.*, those to be filled through the Pathways Programs. (Exec. Order No. 13562, 75 FR 82585 (Dec. 27, 2010)).

OPM's regulations implement the President's order by establishing the framework for each of the three discrete excepted service internship programs for students and recent graduates:

- The Internship Program is for current students. It consolidates two existing internship programs into a single program designed to provide high school, vocational and technical, undergraduate, graduate, and professional students, opportunities to be exposed to the work of Government through Federal internships. It is largely modeled after the existing Student Career Experience Program (SCEP).
- The Recent Graduates Program is a new program that will provide developmental opportunities in Federal jobs for individuals who have recently graduated from qualifying educational institutions or programs.
- The Presidential Management Fellows (PMF) Program has been the Federal Government's premier leadership development program for graduate and professional degree candidates for over three decades. Executive Order 13562 preserves the PMF Program while making it more flexible by, for example, expanding the eligibility window for applicants to include those who have received a qualifying graduate degree within the preceding 2 years.

The appointing authorities for each Pathways Program are contained in Schedule D of the excepted service, a new schedule created by section 7 of Executive Order 13562. The President created this new schedule pursuant to his statutory authority to make necessary exceptions to the competitive hiring rules when warranted by conditions of good administration. His findings to support the exception are set forth in section 1 of the Executive Order. Under the new Schedule D authority, agencies will be able, under OPM's guidance, direction, and oversight, to use excepted service hiring to fill positions from among a particular class of eligible individuals—students and recent graduates. This approach is consistent with long-standing civil service practice under excepted service hiring authorities, including, for example, Schedule A hiring for people with disabilities.

Part 362 of title 5, Code of Federal Regulations (CFR) contains the regulatory requirements for each Pathways Program. Part 362 consists of four subparts. Subpart A contains only those requirements common to all Pathways Programs. Program-specific requirements are set forth in subpart B for the Internship Program, subpart C for the Recent Graduates Program, and subpart D for the PMF Program.

Summary of Comments

OPM received 238 written submissions with comments on the proposed Pathways Programs. A member of Congress, 24 Federal agencies, 8 labor unions representing Federal employees, 74 individual Federal employees, 20 colleges and universities, 11 professional organizations and student unions, 56 current students and recent graduates and 44 other members of the public submitted comments.

OPM did not address comments that are outside the scope of the regulations. One agency wanted to know how current hiring and pay freezes would affect hiring under the Pathways Programs. Some students and recent graduates submitted resumes for employment consideration under the Pathways Programs. Some submissions detailed personal job search experiences. A few were addressed to agency specific programs not related to Pathways. We did not respond to these submissions in this final regulation.

The majority of the comments expressed support for the creation of the Pathways Programs. Multiple commenters emphasized that the Programs are necessary for recruiting and hiring students and recent

This commenter also contends that the best indicator of success on the job is experience, and that it would be "perplexing" for the Federal Government to "seek out" and "prefer" inexperienced applicants over those with experience. These Programs are not motivated by any desire to prefer one type of worker over another. As discussed, agencies should use the Pathways Programs as part of an overall workforce planning strategy to ensure that their workforce is diverse and drawn from all segments of society.

Another union suggested that the introduction of "category rating" into the competitive service selection process, combined with other improvements to the competitive hiring process, may have eliminated barriers to entry for inexperienced workers. The union contends that this change has not been in place long enough to evaluate its impact on students and recent graduates. The union is correct that category rating allows a hiring official to select from a larger list of best qualified candidates than the so-called "rule of 3." But category rating does not address the advantage held by experienced workers in the competitive examining process. In order to be considered, an individual must make the top quality category that the agency established by performing well in the competitive examining process. Students and recent graduates have not fared well in the examining process because of their lack of work experience. Though we think the move to category rating is a good one for competitive examining overall, we disagree that it addresses the specific needs that the Pathways Programs are narrowly drawn to address.

This union also suggested that a better solution to the problem with recruiting and hiring students and recent graduates is to reform the competitive hiring process itself. This initiative is not inconsistent with improving the competitive hiring process. Rather, it is an efficient, targeted approach to address specific, identified problems with the current approach to entry-level hiring in the Federal Government.

A union commented that any program that focuses on students and recent graduates is demoralizing to temporary employees working at the Forest Service and other land management agencies. The Pathways Programs are not intended to demoralize any other segment of the Federal workforce. Rather, they are intended to provide for a limited exception to the competitive hiring rules to address a specific concern about the Federal Government's ability to interest students and recent graduates in Federal careers and to successfully recruit, hire, and retain them.

2. Schedule D

Multiple comments addressed the new Schedule D, which was created by section 7 of Executive Order 13562 and is the appointing authority for each of the Pathways Programs.

One union criticized the new Schedule D hiring authority as overly broad. The President created Schedule D pursuant to his statutory authority to make necessary exceptions to the regular competitive hiring rules when warranted by conditions of good administration. It is based upon his determination that the need to promote employment opportunities for students and recent graduates in the Federal workforce makes necessary an exception to the competitive rules. OPM's regulations simply implement the President's mandate.

The union also disputes that students and recent graduates constitute a "class" or a "class of persons" eligible for appointment pursuant to Schedule D. Schedule D was created by the Executive order, which provides that Schedule D shall include "[p]ositions other than those of a confidential or policy determining character for which the competitive service requirements make impracticable the adequate recruitment of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs." Section 2 of the Executive order directs OPM to issue regulations, including "a description of the positions that executive departments and agencies may fill through the Pathways Programs." The regulations provide for agencies to submit to OPM the positions they seek to fill through the Pathways Programs, and OPM can approve or disapprove of the use of the Programs for those positions through the MOU process. Because the President established Schedule D and the class of individuals covered by it through the Executive order, any comments challenging that determination are beyond the scope of these implementing regulations.

One union commented that Pathways Participants may have available to them training and mentoring opportunities that are not available to other agency employees. The union is correct that agencies may implement the Programs in this manner, but it is in keeping with the nature of the Program to provide Pathways Participants with training and mentoring opportunities. These types of programs are designed to leverage the cognitive abilities of students and recent graduates through training, mentorship, and development. The current version of the Presidential Management Fellows Program and the Veterans' Recruitment Appointment authority are examples where program participants receive training and development opportunities that may differ from those offered to individuals hired through the competitive process or through any other hiring authorities.

3. Position Identification

The proposed regulations contain provisions governing how to identify positions that may be filled through the Pathways Programs. One union commented that the regulations improperly delegate to agencies and their components the authority to exempt positions from the competitive service. We disagree. Agencies are required to report to OPM on the types of positions they seek to fill through the Pathways Programs; they are required to have an Memorandum of Understanding (MOU) in place with OPM in order to use the Pathways Programs; and OPM will decide whether or not to approve the types of positions agencies are filling through the Programs through the MOU renewal process.

4. Definitions

The proposed regulations contained a number of definitions. Some commenters requested clarifications to some of the definitions. As discussed below, we have modified some language in the definitions to address these concerns.

Some comments suggested that the definition of "qualifying educational institution" should not include a homeschool curriculum. We think it should. States generally recognize homeschooling as an adequate educational alternative, and we believe it is appropriate to defer to the states on this issue. Moreover, the requirements and standards for homeschooling vary widely from state to state or even within a particular state. OPM, therefore, declines to adopt one commenter's suggestion that there should be a specific Government-wide definition of homeschooling for purposes of these regulations. Rather, agencies will be responsible for determining the eligibility of a homeschooled student applicant.

One union commented that, with respect to the Recent Graduates Program, the definition of "qualifying educational institution" does not indicate whether high school degrees would qualify an individual for a Recent Graduate appointment. While the proposed regulation did not include

Pathways Programs are fair to veterans. These include requiring that information about Pathways opportunities be posted; specifying that veterans' preference rules apply to the Pathways Programs; and allowing certain veterans up to 6 years from the time of graduation (rather than the standard 2 years) to participate in the Recent Graduates Program. As discussed here, OPM has also included several significant oversight mechanisms in the regulations to ensure that agencies are properly using them as a supplement to competitive hiring, rather than a substitute for it.

One agency commented that it supported veterans' preference but did not believe that application of the preference should disadvantage current students or recent graduates. One agency wanted to know how veterans' preference would apply. Agencies are required to follow part 302 procedures (which includes the application of veterans' preference) when making any Pathways appointment, even if to do so disadvantages current students or recent graduates.

One agency wanted to know how the application of veterans' preference would affect the consideration of priority reemployment candidates under the Pathways Programs. The Pathways Programs do not change the requirements. Agencies must follow the order of consideration in part 302 when filling jobs under the Pathways Programs.

One agency suggested that OPM revisit the application of veterans' preference under the Pathways Programs because the agency believes OPM combined competitive and excepted service procedures for veterans' preference. The same agency also expressed concern that providing veterans' preference under Pathways gives the perception that veterans have an overall advantage and wanted to know how agencies would apply veterans' preference. The Veterans' Preference Act of 1944, as amended, applies to positions in the excepted service. OPM does not have the discretion to except Pathways from this statutory requirement, nor would it agree with an exception as a matter of policy. Further, many veterans may be availing themselves of the GI Bill to complete an education. They deserve to have their preference applied should they seek a Federal job via Pathways. Part 302 contains the regulatory requirements and procedures for the application of veterans' preference in the excepted service.

One agency wanted to eliminate from consideration preference eligibles that do not submit proper documentation. OPM will not adopt this suggestion. Agencies are required to exercise due diligence in affording veterans' preference to eligible applicants and to establish policy and procedures that follow existing regulations. This same agency suggested that OPM add a requirement to the final rule stating agencies are not required to accept late applications from veterans' preference eligibles. We did not adopt this suggestion because it is not necessary. The requirement to accept late applications from 10-point preference eligible veterans as provided in § 332.311 does not apply to filling positions in the excepted service.

11. Age Discrimination

One union questioned whether the Pathways Programs are discriminatory, claiming that the Programs favor younger applicants. The union's concerns are misplaced. First, we emphasize that the intention of these regulations is to provide agencies with options to employ as part of an overall recruiting and hiring strategy that will result in a workforce drawn from all segments of society, including employees of all ages. Second, the Pathways Programs themselves are open to all students and recent graduates, regardless of age. Eligible students and recent graduates will include older individuals who left the workforce and returned to school to prepare themselves for new careers, as well as those who obtained degrees while they took time off from their careers to raise a family. Older veterans who use the new GI Bill to further their education after completing their military service are also eligible to participate in the Pathways Programs.

In short, the Pathways Programs were not intended to discriminate based on age, nor should they have that effect. To the extent that an individual believes that an agency is misusing the Programs in order to discriminate against older applicants, he or she may pursue available legal remedies to address such misuse. ✱

12. Miscellaneous

The provisions for temporary assignment under the Intergovernmental Personnel Act (IPA) in § 332.102 contain a definition of "employee." PMFs, SCEPs, FCIPs and VRAs are included in the definition of employee as examples of excepted service employees eligible under the IPA. OPM removed these excepted service examples contained in 332.102 in the proposed regulations because most of them will become obsolete with the publication of the final Pathways rule. One agency suggested that OPM should replace the examples with the new Pathways Programs rather than deleting the explanatory language altogether. We are not adopting this suggestion because we believe the definition is adequate without examples.

One agency suggested OPM create a special Program identifier code to track Pathways Participants. OPM does not believe such a code is necessary at this time. Each Pathways Program has its own unique appointing authority that can be used to track Participants and Program usage. We will evaluate over time whether this approach is adequate.

One agency asked whether the Pathways Programs will be centrally funded from a source separate from the agency's approved appropriation. The Pathways Programs are not centrally funded. Agencies must fund their own Pathways Programs.

One agency recommended that OPM establish a Pathways alumni group to help with recruitment and mentoring. We will consider this idea. In the meantime, we note that agencies are free to establish these groups themselves.

Several agencies asked OPM to clarify whether the Administrative Careers with America (ACWA) testing is required when filling positions under the Recent Graduates Program and whether OPM will be developing assessment criteria for positions filled through the Recent Graduates Program. ACWA testing is not specifically required. Rather, agencies must use a valid and job-related assessment for all positions (including those formerly covered by ACWA). Agencies can choose to use the OPM assessment or other valid assessments.

Responses to Comments on the Regulations

1. Excepted Service (Part 213)

One agency suggested that OPM amend the final rule by placing the regulatory requirements for the administration of the Pathways Programs in part 213 rather than part 362 because it believes it is confusing to have the requirements for the administration of the Pathways Programs in part 362. We did not adopt this suggestion because we believe it is clearer to maintain the specific Program requirements of the Pathways Programs separate from the broad regulatory requirements for the use of excepted schedules that are contained in part 213. Additionally, the current regulatory requirements for use of the PMF Program are contained in part 362, and we decided that it would be best to have

[EXHIBIT E]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

Brian J. Neary, a/k/a
Keith L.,[1]
Complainant,

v.

Jeff T. H. Pon,
Director,
Office of Personnel Management,
Agency.

Appeal No. 0120181475

Agency No. 2017029

DECISION

On March 28, 2018, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated March 7, 2018, dismissing his complaint of unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, the Federal Deposit Insurance Corporation (FDIC), via announcement 2017-HQB-RG0029, sought applicants for the position of Financial Institution Specialist, CG-0570A-7. Under the terms of the announcement, which was pursuant to FDIC's "Pathways" hiring authority, applicants must have graduated within the last two years, or graduate by December 31, 2017, from a qualifying educational institution. Complainant graduated in 2009 (Master's Degree). As such, Complainant was ineligible to apply for the position.

On July 14, 2017, Complainant filed a formal complaint with Office of Personnel Management (OPM) alleging that it discriminated against him based on his age (49) when it promulgated the Pathways program which he contends has a disparate impact on potential applicants over the age of 40. He notes that OPM promulgated the regulations (5 C.F.R. § 362.302(a) and (b)(1) & (2)) governing the Pathways program, which implement Executive Order 13562 (December 27,

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

2010). He alleges this allows the FDIC and all participating federal Agencies in Pathways to use educational time limitations to deliberately exclude older workers from recruitment.[2]

Executive Order 13562 (Dec. 27, 2010) established the Recent Graduates Program, part of Pathways Programs. Section 4(a) of the Executive Order requires that participants in the Recent Graduates Program... "must have obtained a qualifying degree, or completed a qualifying career or technical education program, as determined by OPM, within the preceding 2 years, except..." certain veterans.

OPM Regulation 5 C.F.R. § 362.302(a) and (b)(1) & (2) implements Executive Order 13562. It defines candidate eligibility under Pathways Recent Graduates Program, including the educational requirements and the two-year rule as defined by the Executive Order.

The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant's complaint is about the legality of Pathways. It reasoned that the Agency and the Commission don't have jurisdiction over the legality of a program created by Executive Order. In support of this, it cited Hipona v. Equal Employment Opportunity Commission, EEOC Request No. 05860421 (Mar. 2, 1988). That case concerned Executive Order 11935 (September 2, 1976), which prohibited appointing anyone to the competitive service unless the person was a citizen or national of the United States, with exceptions. After being denied reinstatement because he was not a United States citizen, the complainant filed an EEO complaint and contended, among other things, that the Executive Order conflicted with Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on national origin. The Commission ruled that the complainant's argument that the Executive Order was invalid failed to state a claim that can be adjudicated in the administrative EEO complaint process. The Commission noted that the complainant did not allege disparate treatment in the adherence by the agency to the Executive Order or in applying for exceptions under the Executive Order, and under these circumstances his complaint failed to state a claim.

The instant appeal followed. On appeal, Complainant reiterates his claims.[3] The Agency argues that the FAD should be affirmed.

ANALYSIS AND FINDINGS

Complainant's claim is that Executive Order 13562, which establishes as a hiring authority the Pathways Recent Graduate Program for candidates who obtained a qualifying degree within the preceding two years is invalid because this conflicts with the ADEA, so the Agency's implementing regulations are also invalid. As remedy, Complainant asks in part that OPM

[2] According to the counselor's report, Complainant has an active EEO complaint against the FDIC's Pathways program for his "non-selection" under the above vacancy announcement.

[3] Complainant also argues that OPM and the FDIC jointly violated the ADEA. We decline to join FDIC with this case.

remove the two-year educational requirement from the Pathways hiring authority. Applying Hipona, we find Complainant's complaint fails to state a claim.

The FAD is AFFIRMED.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision. A party shall have twenty (20) calendar days of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do

so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission. The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

AUG 22 2018
Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

Brian J. Neary
2673 Fisher Lane
Bellmore, NY 11710

Katherine Brewer, Senior Counsel
Office of the General Counsel
Office of Personnel Management
1900 E Street, NW, Room 7536
Washington, DC 20415-1300

Lashonn Woodland, EEO Director
Equal Employment Opportunity Office
Office of Personnel Management
1900 E Street, N.W., Room 6460
Washington, D.C. 20415

AUG 2 2 2018
Date

Compliance and Control Division

[EXHIBIT F]

Donny D. Dristy
Office of Strategy and Innovation
US Office of Personnel Management
951-249-9507
Fedstats.Internet@opm.gov

OPM Federal Pathways Programs New Appointments- by Age

As of July 2012 inception date, through July 31st, 2020

FISCAL YEAR	PROGRAM TYPE	UNDER 40	OVER 40	OVER 50	TOTAL EMPLOYEES
2012	INTERNSHIP	2,611	133	32	2,744
2012	PMF	238	11	1	249
2012	RECENT GRADUATES	17	5	1	22
2012		**2,866**	**149**	**34**	**3,015**
2013	INTERNSHIP	16,517	857	263	17,374
2013	PMF	397	13	1	410
2013	RECENT GRADUATES	1,104	204	35	1,308
2013		**18,018**	**1,074**	**299**	**19,092**
2014	INTERNSHIP	16,091	922	274	17,015
2014	PMF	463	32	7	495
2014	RECENT GRADUATES	2,621	591	150	3,212
2014		**19,175**	**1,545**	**431**	**20,722**
2015	INTERNSHIP	16,335	979	312	17,315
2015	PMF	376	21	2	397
2015	RECENT GRADUATES	3,868	764	203	4,632
2015		**20,579**	**1,764**	**517**	**22,344**
2016	INTERNSHIP	15,032	845	246	15,960
2016	PMF	406	30	9	436
2016	RECENT GRADUATES	3,824	760	231	4,584
2016		**19,262**	**1,635**	**486**	**20,980**
2017	INTERNSHIP	12,228	642	168	13,131
2017	PMF	276	22	6	298
2017	RECENT GRADUATES	3,269	650	191	3,919
2017		**15,773**	**1,314**	**365**	**17,348**
2018	INTERNSHIP	10,061	417	117	11,218
2018	PMF	259	15	1	274
2018	RECENT GRADUATES	2,687	451	123	3,138
2018		**13,007**	**883**	**241**	**14,630**
2019	INTERNSHIP	8,629	357	91	10,807
2019	PMF	252	6	2	258
2019	RECENT GRADUATES	2,963	392	114	3,357
2019		**11,844**	**755**	**207**	**14,422**
2020	INTERNSHIP	4,726	192	70	6,214
2020	PMF	177	8	1	185
2020	RECENT GRADUATES	2,273	324	79	2,603
2020		**7,176**	**524**	**150**	**9,002**
	Total:	**127,700**	**9,643**	**2,730**	**141,555**
	percentage rate:	**90.2%**	**6.1%**	**1.9%**	**98.2%**

Total Recent Graduates hired:	**26,775**
Total Recent Graduates hired OVER age 50:	**1,127**
percentage rate:	**4.2%**

Data for ...
- FY2005 and later data pulled from OPM's Enterprise Human Resources Integration Statistical Data Mart (EHRI-SDM).
- FY2004 and earlier pulled from OPM's Central Personnel Data File (CPDF).

Coverage is limited to Federal civilian employees with the following inclusions or exclusions:

Executive Branch exclusions:

- U.S. Postal Ser
- Postal Rate Co
- Central Intellige
- National Securi
- Defense Intellig
- National Geosp
- Office of the Di
- White House O
- Office of the Vice President
- Foreign Service Personnel at the State Department
- Tennessee Valley Authority
- Board of Governors of the Federal Reserve
- Public Health Service's Commissioned Officer Corps
- Non-appropriated fund employees
- Foreign Nationals Overseas
- Executive Residence
- President's Intelligence Advisory Board

Legislative Branch inclusions:

- Government Pr
- Dwight D. Eiser
- Financial Crisis
- Ronald Reagan Centennial Commission
- Medicare Payment Advisory Commission
- U.S. - China Economic and Security Review Commission
- U.S. Commission on International Religious Freedom

Judicial Branch inclusions:

- U.S. Tax Court (see note below).

The above represents current coverage and is subject to change over time. Recent significant changes include:
- The Bureau of Consumer Financial Protection, a component of the Federal Reserve, began reporting in March 2011.
- The Federal Bureau of Investigation did not report data on personnel actions until FY2007.
- The State Department stopped providing data on Foreign Service Personnel in March 2006.
- Prior to Sep2013 the U.S. Tax Court was reflected as a legislative agency (agency code LT).

More information about our data sources can be found at http://www.opm.gov/feddata/guidance.asp

Unless otherwise specified data is for employees in active pay status.
Data is for all Pathways Program new appointments as of July 2012 through April 2019.

Pathway's new appointment definitions are listed below:

	NOA	Legal Authority	Legal Authority Code
Intern	170, 171, 570, 571, 760	213.3402(a)	YEA
Intern NTE			
Recent Grad	170, 570	213.3402(b)	YEB
PMF	170, 570	213.3402(c)	YEC

Prepared by:

OPM/Policy & Planning Analysis/Data Analysis

KP

[EXHIBIT G]

PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

■ 1. Revise the authority citation for part 1625 to read as follows:

Authority: 29 U.S.C. 621–634; 5 U.S.C. 301; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807; E.O. 12067, 43 FR 28967.

Subpart A—Interpretations

■ 2. Revise § 1625.2 to read as follows:

§ 1625.2 Discrimination prohibited by the Act.

It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies. Favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old. However, the ADEA does not require employers to prefer older individuals and does not affect applicable state, municipal, or local laws that prohibit such preferences.

■ 3. Revise § 1625.4 to read as follows:

§ 1625.4 Help wanted notices or advertisements.

(a) Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as *age 25 to 35, young, college student, recent college graduate, boy, girl,* or others of a similar nature violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as *over age 60, retirees,* or *supplement your pension.*

(b) Help wanted notices or advertisements that ask applicants to disclose or state their age do not, in themselves, violate the Act. But because asking applicants to state their age may tend to deter older individuals from applying, or otherwise indicate discrimination against older individuals, employment notices or advertisements that include such requests will be closely scrutinized to assure that the requests were made for a lawful purpose.

■ 4. Revise the first paragraph of § 1625.5 to read as follows:

§ 1625.5 Employment applications.

A request on the part of an employer for information such as *Date of Birth* or *age* on an employment application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination against older individuals, employment application forms that request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act. That the purpose is not one proscribed by the statute should be made known to the applicant by a reference on the application form to the statutory prohibition in language to the following effect:

* * * * *

[FR Doc. E7–13051 Filed 7–5–07; 8:45 am]

BILLING CODE 6570–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 197

[DoD–2006–OS–0023]

RIN 0790–AI12

Historical Research in the Files of the Office of the Secretary of Defense (OSD)

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This final rule identifies and updates the policies and procedures for the programs that permit U.S. citizens to perform historical research in records created by or in the custody of the Office of the Secretary of Defense (OSD). Historical Research in the Files of OSD updates the policies and procedures for the programs that permit U.S. citizens to perform historical research in records created by or in the custody of the OSD.

DATES: *Effective Date:* This rule is effective August 6, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Storer, 703–696–2197.

SUPPLEMENTARY INFORMATION: Anyone accessing classified material must possess the requisite security clearance. Information requested by historical researchers shall be accessed at a DoD activity or facility under the control of the National Archives and Records Administration (NARA).

Access to records by historical researchers shall be limited to the specific records within the scope of the proposed historical research over which the Department of Defense has classification authority. Access shall also be limited to any other records for which the written consent of other Agencies that have classification authority over information contained in or revealed by the records has been obtained.

Access to unclassified OSD Component files by historical researchers shall be permitted consistent with the restrictions of the exemptions of the Freedom of Information Act. The procedures for access to classified information shall be used if the requested unclassified information is contained in OSD files whose overall markings are classified.

On February 28, 2007 (72 FR 8952), the Department of Defense published a proposed rule, "Historical Research in the Files of the Office of the Secretary of Defense (OSD)" inviting public comments. No comments were received.

Executive Order 13132, "Federalism"

It has been certified that 32 CFR part 197 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

Executive Order 12630, "Government Actions and Interference With Constitutionally Protected Property Rights"

It has been certified that 32 CFR part 197 does not:

(1) Place a restriction on a use of private property;

(2) Involve a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property; or

(3) Regulate private property use for the protection of public health or safety.

Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 197 does not:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribunal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the

[EXHIBIT H]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STEVE RABIN, et al.,

Plaintiffs,

v.

PRICEWATERHOUSECOOPERS LLP,

Defendant.

Case No. 16-cv-02276-JST

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Re: ECF No. 55

Before the Court is Defendant PricewaterhouseCooper LLP's ("PwC" or "Defendant") Motion for Judgment on the Pleadings. ECF No. 55. Defendant seeks judgment as a matter of law on Plaintiff Steve Rabin and John Chapman's ("Plaintiffs") second cause of action—a disparate impact claim under the Age Discrimination in Employment Act ("ADEA"). For the reasons set forth below, the Court will deny the motion.

I. BACKGROUND

On April 27, 2017, Plaintiffs filed this putative class action, alleging that PwC "engages in systemic and pervasive discrimination against older job applicants." ECF No. 62 at 7. Plaintiffs claim that PwC's "maintains hiring policies and practices for giving preference to younger employees that result in the disproportionate employment of younger applicants." ECF No. 1 at 3. According to the complaint, these practices also deter older applicants from applying for positions at PwC in the first place. Id. at 4. On July 22, 2016, PwC answered the complaint. ECF No. 32. Plaintiffs filed an amended complaint on September 8, 2016, ECF No. 42, and Defendant answered again on September 30, 2017, ECF No. 47.

Then, on January 9, 2017, Defendant moved for judgment on the pleadings, asking the court to enter judgment in favor of PwC as to Plaintiffs' disparate impact claim under the ADEA.

ECF No. 60. Defendant argues that the ADEA does not permit job applicants to bring disparate impact claims.

II. LEGAL STANDARD

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The analysis for Rule 12(c) motions for judgment on the pleadings is "substantially identical to [the] analysis under Rule 12(b)(6) . . . ." Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012) (quotations omitted). To evaluate a Rule 12(b)(6) motion to dismiss, the court accepts the material facts alleged in the complaint, together with reasonable inferences to be drawn from those facts, as true. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A plaintiff must allege facts that are enough to raise her right to relief "above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). A "judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." Fajardo v. Cty. of Los Angeles, 179 F.3d 698, 699 (9th Cir. 1999).

III. ANALYSIS

"The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981) (quoting Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976). To that end, the Supreme Court held in Smith v. City of Jackson that the ADEA permits disparate impact claims in addition to disparate treatment claims. 544 U.S. 228, 240 (2005) ("[The ADEA] authorize[s] recovery on a disparate-impact theory[.]"). Neither the Supreme Court nor the Ninth Circuit has explicitly held, however, that this right extends to both employees and job applicants under the ADEA. Based on the language of the ADEA, existing precedent, agency interpretations of the ADEA, and the Act's legislative history, the Court today concludes that job applicants like Plaintiffs may bring disparate impact claims.

A. Text of the ADEA

Section 4 of the ADEA makes it unlawful for an employer:

> to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

29 U.S.C. § 623(a)(2). In Smith, the Supreme Court held unequivocally that section 4(a)(2) allows for disparate impact claims. 544 U.S. at 240. The only question here is whether that right extends to job applicants in addition to employees.

The plain language of the statute supports the more inclusive interpretation. Critically, the ADEA uses the phase "any individual," rather than "employee" to identify those people section 4(a)(2) protects. 29 U.S.C. § 623(a)(2). By contrast, elsewhere in the same provision, Congress chose the word "employees" to refer to the people an employer may not "limit, segregate, or classify." Id. The Court assumes that this variation in language was a deliberate choice, and one that reflects Congress's intent to include all "individuals" within section 4(a)(2)'s ambit. S.E.C. v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words."). This reading of section 4(a)(2) is bolstered further by the fact that, elsewhere in the ADEA, Congress used the phrase "any employee" to refer to the affected parties with a right to sue. See, e.g., 29 U.S.C. § 623(a)(3) (making it unlawful "to reduce the wage rate of any employee in order to comply with this chapter") (emphasis added). "If Congress intended to protect a narrower group, [such as employees only], it would have said so." Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 982 (11th Cir. 2016) (Martin, J., dissenting).

The Court acknowledges that the Eleventh Circuit came to the opposite conclusion in Villarreal. Indeed, Defendant leans heavily on the majority opinion in that case for its argument that the plain language of section 4(a)(2) clearly limits its application to employees. The Court in Villarreal focused on the phrase "or otherwise adversely affect his status as an employee," and argued that its use made "'depriving or tending to deprive any individual of employment opportunities' a subset of 'adversely affecting [the individual's status as an employee.'" Villarreal, 839 F.3d at 963. Under this reading, section 4(a)(2) gives only employees, and not applicants, the right to bring disparate impact claims. Defendant further explains how, in other

parts of the U.S. Code, similar "otherwise" phrases have been interpreted to "operate[] as a catchall: the specific items that precede it are meant to be subsumed by what comes after the 'or otherwise.'" ECF No. 64 at 8. But the power of this argument and Defendants' statutory examples is undermined by the fact that the Supreme Court has interpreted *identical* statutory language in Title VII, and did not suggest that only employees were entitled to bring suit or that the "otherwise" phrase modifies "any individual." See Part III.B (discussing Griggs v. Duke Power Co.).

Moreover, as Judge Martin noted in her dissent, "the Supreme Court has even told us that when the word employee lacks any temporal qualifier it can include people other than current employees," such as "prospective employees." Id. at 984 (Martin, J., dissenting) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 342 (1997)) (internal quotation marks omitted).[1] "If 'employees can mean prospective employees, surely 'any individual' can too." Id. The text of the statute therefore contradicts the Villarreal majority's conclusion that "4(a)(2) protects an individual only if he has a 'status as an employee.'" Id. at 963.

Defendant and the Villarreal majority also focus on section 4(c)(2) of the ADEA, which uses the words "status as an employee or as an applicant for employment" rather than "status as an employee" like section 4(a)(2). According to Defendant, Congress's decision to omit the "applicant for employment" language in section 4(a)(2) must mean something. This is Defendant's strongest textual argument. Nonetheless, Section 4(c)(2) is distinguishable, because it governs labor organizations, not employers. The Villarreal dissent explained the ramifications of this distinction:

> [Section 4(c)(2)] governs a labor organization's ability to "refuse to refer for employment." This part of the statute targets the unique way in which labor organizations can discriminate when they "refer" "applicants" to employers, such as through union hiring halls. None of the other parts of the ADEA that govern employers say anything about "referring" anyone for employment. Employers, after all, don't "refer applicants." But labor organizations, by virtue of their unique referral role, are sometimes the sole conduit by which an employer can get

[1] Defendant misunderstands Plaintiffs and the Court's use of Robinson. ECF No. 64 at 13. That decision supports a broader interpretation of the word "employee"; the Court does not rely on Robinson to interpret the word "individual."

> potential job applicants. And § 4(c)(2) prohibits labor organizations from "refus[ing] to refer" a person for employment at all because of her age and thereby denying her "status . . . as an applicant for employment." In other words, the statute protects someone who sought work but was denied status as an applicant—that is, being allowed to apply at all—due to labor organizations' control of the hiring process.

839 F.3d at 985 (Martin, J., dissenting). The Court finds this analysis persuasive. And Defendant's statutory comparison, however convincing, cannot overcome the use of the phrase "any individual," binding Supreme Court precedent, see Part III.B, or the legislative history of the Act, see Part III.C.

Finally, the most natural reading of section 4(a)(2) "plainly describes what [PwC allegedly] did to [Plaintiffs]. Specifically, Mr. [Rabin] is an 'individual' who was 'deprive[d]' 'of employment opportunities' and denied any 'status as an employee' because of something an employer did to 'limit . . . his employees.'" Id. at 982 (Martin, J., dissenting). Given that it is PwC's alleged discrimination that deprived Mr. Rabin of his status an employee, it would turn the ADEA on its head to say that Mr. Rabin cannot bring a disparate impact claim because he was never actually hired.

B. Supreme Court Precedent

Supreme Court precedent supports an interpretation of section 4(a)(2) that permits job-seekers to bring disparate impact claims. Most importantly, in Griggs v. Duke Power Co., the Supreme Court considered identical statutory language in Title VII. 401 U.S. 424 (1971).[2] The question before the Court was whether, under that identical statute, "an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs." Id. at 425-26 (emphasis added). The Court held that Title VII prohibited the employer's actions if they were shown to have a disparate impact on African Americans. Id.

Defendant argues that Griggs has no bearing on whether job applicants, versus employees, may bring disparate impact claims, because in Griggs the plaintiffs were all "employed at the

[2] Of course, the statutes differ in that protected status under Title VII is "race, color, religion, sex, or national origin," whereas under the ADEA it is "age."

Company's Dan River Steam Station." Id. at 426. But as described above, the Court phrased the question presented broadly to include a challenge to "condition[s] of employment." Id. Moreover, the Griggs Court explained the decision below as finding that the defendant had "openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant." Id. at 426-27 (emphasis added). This suggests that the Court did not intend to limit Title VII's protections in a way that excluded job applicants. That more liberal reading of Griggs makes sense given the Court's approval of disparate impact liability as a tool to combat "subtle forms of discrimination that 'freeze the status quo,' create 'artificial, arbitrary, and unnecessary barriers to employment,' or 'operate as built-in-headwinds for minority groups.'" Villarreal, 839 F.3d at 987 (Martin, J., dissenting) (quoting Griggs, 401 U.S. at 430-32). Those same "subtle forms of discrimination" are just as likely to persist in the interview room as they are within the walls of the workplace. It cannot be that, despite Griggs's clear message, an employer remains free to freeze the status quo "by not hiring minorities at all." Id.

Notably, several subsequent Supreme Court decisions have characterized Griggs as applying to job applicants. In Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., for example, the Court described how Griggs had placed important limits on Title VII disparate impact liability, explaining that even "in a disparate-impact case, § 703(a)(2) does not prohibit hiring criteria with a 'manifest relationship' to job performance." 135 S. Ct. 2507, 2517 (2015). Likewise, in Connecticut v. Teal, the Court explained that although the requirements in Griggs "applied equally to white and black employees and applicants, they barred employment opportunities to a disproportionate number of blacks" and were therefore invalid. 457 U.S. 440, 446 (1982) (emphasis added); see also Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (explaining that Griggs "ma[de] clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern"). That the Court described its own prior decision in these terms casts doubt on Defendant's cramped reading of Griggs.

Defendant makes much of the fact that Congress later amended the section of Title VII at issue in Griggs to read:

> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (emphasis on new language). Defendant suggests that the decision to add the phrase "or applicants for employment" means Congress believed that group was not protected under the earlier version – i.e., the version interpreted in Griggs. ECF No. 55 at 10. Because Congress did not add a similar phrase to the ADEA, the argument goes, job applicants remain unprotected under section 4(a)(2).[3] Defendant draws the wrong inference. As Plaintiffs point out, the amendment to Title VII was intended to be "declaratory of present law," S. Rep. No. 92-415 at 43 (1971), and "fully in accord with the decision of the Court" in Griggs, H.R. Rep. No. 92-238 at 21-22 (1971). In other words, the amendment signaled that Griggs had properly interpreted Title VII as protecting both employees and applicants. Therefore, the amendment supports, rather than detracts from, an interpretation of the ADEA as likewise covering both employees and applicants.

Smith, which announced that disparate impact claims are cognizable under section 4(a)(2) of the ADEA, made no distinction between applicants and employees. 544 U.S. 228 (2005).[4] It is true that the plaintiffs in Smith were employees. Id. at 230 (describing plaintiffs as "police and public safety officers employed by the city of Jackson"). But just because Smith granted relief to employees, it does not follow that the Court would *not* have granted relief had the plaintiffs been applicants instead. Moreover, the Smith Court relied heavily on the reasoning in Griggs, which, as described above, did not limit its holding to employees. Id. at 232 ("[We] now hold that the ADEA does authorize recovery in 'disparate-impact' cases comparable to Griggs.").

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[3] Defendant cites Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009), in support of this point. But there, the Court emphasized that "Congress neglected to add such a provision to the ADEA when it amended Title VII . . . , even though it *contemporaneously* amended the ADEA in several ways." Id. at 175 (emphasis added). Defendant makes no claim here that Congress specifically considered adding "or applicants for employment" to the ADEA at the time it amended Title VII and decided against it.

[4] When Smith was decided, the amendment to Title VII that added the "or applicants for employment" language had been in place for over three decades.

Smith did identify "[t]wo textual differences between the ADEA and Title VII [that] make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII." Smith, 544 U.S. at 240. Neither, however, has the slightest connection to the applicant/employee distinction.[5] That the Court chose to comment on the differences between Title VII and the ADEA's analogous provisions but made no mention of the "or applicants for employment" language in Title VII is noteworthy.

The Smith Court also carefully analyzed the textual differences between section 4(a)(2) and section (4)(a)(1). The latter makes it unlawful to "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Although subsection one contains the "fail or refuse to hire" language, and subsection two does not, the Smith Court "said nothing about the distinction between hiring versus other claims that [Defendant's] entire effort to distinguish Smith is staked on." Villarreal, 839 F.3d at 988 (Martin, J., dissenting).

Rather than invent a new and more restrictive interpretation of section 4(a)(2), this Court will follow the guidance of Smith and Griggs.[6] Those precedents support extending the right to make a disparate impact claim under the ADEA to "any individual" who has been adversely affected "because of such individual's age," regardless of whether she is an applicant or employee.

C. Agency Interpretation

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[5] First, ADEA defendants may use the "reasonable factors other than age" defense; and second, Wards Cove's pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA. ECF No. 62 at 16-17.

[6] Defendant claims that, by adopting this approach, the Court will be "break[ing] with th[e] significant weight of precedent," pointing to Villarreal, but also to Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996) and E.E.O.C. v. Francis W. Parker Sch., 41 F.3d 1073, 1075 (7th Cir. 1994). ECF No. 64 at 12. This reliance is misplaced. Both the Tenth and Seventh Circuits held that disparate claims were not available at all under the ADEA. The Supreme Court overruled that holding in Smith. The fact that Ellis and Francis W. Parker School involved claims by job applicants does not change the fact that their central holdings are no longer good law and cannot support Defendant's argument here.

Deference to agency interpretation provides yet another reason to reject Defendant's narrow construction of section 4(a)(2). To be clear, the Court believes the language of the statute, read in light of Griggs and Smith, makes plain that the ADEA permits job applicants to bring disparate impact claims. Nonetheless, the Court acknowledges that others might would interpret section 4(a)(2) differently, including a majority of judges on the Villarreal en banc panel. Where a statute is ambiguous, courts grant increased deference to the responsible agency's interpretation. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

Here, the Equal Employment Opportunity Commission ("EEOC"), the agency with authority to issue rules and regulations related to the ADEA, 29 U.S.C. § 628, has long interpreted the ADEA as permitting disparate impact claims by job-seekers. The EEOC's current regulation explains that "[a]ny employment practice that adversely affects *individuals* within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." 29 C.F.R. § 1625.7(c). The regulation mirrors section 4(a)(2)'s broad "any individual" language. Additionally, the regulation's preamble section explains how it addresses "neutral practices that act as barriers to the employment of older workers":

> Data show that older individuals who become unemployed have more difficulty finding a new position and tend to stay unemployed longer than younger individuals. To the extent that the difficulty in finding new work is attributable to neutral practices that act as barriers to the employment of older workers, the regulation should help to reduce the rate of their unemployment.

77 Fed. Reg. 19080, 19092 (2012) (footnote omitted). This endorsement of applicant disparate impact claims is not new. Only months after the ADEA was signed into law, the Department of Labor, then the agency in charge of its interpretation, declared that supposedly neutral "pre-employment" tests must be "reasonably necessary for the specific work to be performed" and "equally applied to all applicants." 33 Fed. Reg. 9173 (1968). Defendant offers no persuasive reason to discard this decades-old interpretation of the ADEA by its implementing agency.

D. Legislative History