No. _____

In the Supreme Court of the United States

DALE E. KLEBER,

Petitioner,

v.

CAREFUSION CORPORATION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

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

Counsel for Petitioner

QUESTION PRESENTED

Does the text of section 4(a)(2) of the Age Discrimination in Employment Act (ADEA) protect outside job applicants, as this Court held when interpreting language identical to section 4(a)(2) in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), or does section 4(a)(2) unambiguously apply only to incumbent employees applying for transfers and promotions, as the majority of a divided en banc Seventh Circuit held below?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were:

Petitioner Dale E. Kleber
Respondent CareFusion Corp.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

MISCELLANEOUS

In the Supreme Court of the United States

DALE E. KLEBER,

Petitioner,

v.

CAREFUSION CORPORATION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Dale E. Kleber respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's en banc opinion is reported at 914 F.3d 480 (App. A, at 1a-59a). The Seventh Circuit's panel opinion is available at 888 F.3d 868 (App. B, at 60a-104a). The district court's decision granting defendant's motion to dismiss on Count I (disparate impact) and denying defendant's motion to dismiss on Count II (disparate treatment) is available at 2015 U.S. Dist. LEXIS 157645 (App. C, at 105a-111a).

JURISDICTION

The Seventh Circuit entered its judgment on January 23, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291(a). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This petition only involves the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634.

Section 4(a) of the ADEA provides:

It shall be unlawful for an employer –

(1) 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;

(2) 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; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

INTRODUCTION

While the Petitioner, Dale Kleber, was in the midst of a prolonged period of unemployment, CareFusion denied him the opportunity to be considered for employment because the company set a maximum years of experience limit for the position he applied for. Recognizing that CareFusion's restriction on experience denied him and other older jobseekers employment opportunities at CareFusion, Kleber challenged the practice under the ADEA.

The ADEA is firmly grounded in and an integral part of this nation's civil rights legacy. Its enactment in 1967 was "part of an ongoing congressional effort to eradicate discrimination in the workplace," and "reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Co.*, 513 U.S. 352, 357 (1995). "The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *Id.* (listing other civil rights statutes that, along with the ADEA, protect employees from discrimination in the workplace).

In drafting the ADEA, Congress replicated Title VII's prohibitions of discriminatory employment policies and practices word-for-word and incorporated them into the ADEA. *Lorillard v. Pons*, 434 U.S. 575,

584 (1978) ("the prohibitions of the ADEA were derived *in haec verba* from Title VII."). As the Court further observed, "Title VII with respect to race, color, religion, sex, or national origin, and the ADEA with respect to age make it unlawful for an employer 'to fail or refuse to hire or to discharge any individual,' or otherwise to 'discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,' on any of those bases. 42 U.S.C. § 2000e-2 (a)(1); 29 U.S.C. § 623(a)(1). Compare 42 U.S.C. § 2000e-2(a)(2) (1970 ed., Supp. V) with 29 U.S.C. § 623(a)(2)." *Lorillard*, 434 at 584 n.12. As the Acting Chair of the Equal Employment Opportunity Commission (EEOC), Victoria A. Lipnic, recently noted, "Congress clearly viewed employment discrimination as a unified phenomenon suited to a unified legislative solution, regardless of whether the protected characteristic was age, race, sex, or another basis protected by Title VII." Victoria A. Lipnic, Acting Chair, U.S. Equal Employment Opportunity Commission, *The State of Age Discrimination and Older Workers in the 50 Years After the Age Discrimination in Employment Act*, at 16 (2018) https://www.eeoc.gov/eeoc/history/adea50th/report.cfm ("Lipnic Report").

This Court's landmark decision, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), laid a crucial cornerstone for construing the language shared by these kindred civil rights statutes. *Griggs* interpreted language identical to section 4(a)(2) of the ADEA, 29 U.S.C. 623(a)(2), to affirm a disparate impact claim for incumbent employees and outside applicants under Title VII. Since *Griggs*, this Court has repeatedly

confirmed the broad significance of that seminal decision in condemning discrimination against all job applicants whether they come from outside or within an organization. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 427 (1975); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2517 (2015).

In confirming that the ADEA recognizes a disparate impact cause of action in *Smith v. City of Jackson*, 544 U.S. 228, 234 (2005), the Court declared *Griggs* "a precedent of compelling importance" for interpreting the ADEA; *see also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) (reaffirming disparate impact cause of action under section 4(a)(2) of the ADEA). Indeed, *Smith* pointed to two and only two textual differences between Title VII's and the ADEA's disparate impact provisions that render the theory narrower under the ADEA – the available defense, and the nuances of the burden-shifting structure. *Smith*, 544 U.S. at 240. The Court did not even allude to the far more fundamental disparity that the Seventh Circuit drew: that the exact same words that prohibited hiring discrimination against outside applicants under Title VII unambiguously permitted such discrimination under the ADEA.

In light of this Court's lengthy and unbroken line of precedent reading language identical to that in section 4(a)(2) as supporting disparate impact claims for job applicants under Title VII, the Court should grant certiorari to review the Seventh Circuit's split,

en banc ruling, which conflicts with the Court's prior decisions. The Court of Appeals' majority erroneously narrowed – and, thus, threatens to drastically impede the effectiveness of – a remedial statute that this Court has long recognized as a key building block of the nation's civil rights edifice. The Seventh Circuit's ruling risks rendering largely meaningless this Court's recent efforts, in *Smith* and *Meacham,* to reaffirm the vitality of the ADEA as an anti-discrimination law.

STATEMENT OF THE CASE

1. Factual Background

The facts underlying Kleber's disparate impact claim are uncomplicated and undisputed. When Kleber applied for the position of "Senior Counsel, Procedural Solutions" in CareFusion's legal department on March 5, 2014, he was a 58-year-old attorney with extensive law firm and in-house experience. (Complaint, Dkt. No. 22, p.1, 4). Since his involuntary separation from his previous job in 2011, he had applied for at least 150 jobs, primarily online. *Id*. at p. 4. The online job description for the Senior Counsel position listed, as one of the prerequisites, "3 to 7 years (no more than 7 years) of relevant legal experience." (First Amended Complaint, Dkt. No. 22, p.1) At least two other posted Senior Counsel positions on CareFusion's website at the time contained similar maximum-experience restrictions. *Id*. at 6.

While Kleber's work experience exceeded the seven-year experience restriction for the Senior

Counsel position, he decided to apply for it anyway due to the increasing financial strain his long-term unemployment was posing for his family and his genuine interest in the position. *Id.* at 6-7. Despite the maximum years of experience requirement, the job announcement described what appeared to be an advanced position, indicating that the person selected would be required to "[p]erform[] special assignments or projects without significant supervision" and "advise clients on complex business and legal transactional risks," "work autonomously," and have the "ability to synthesize complex legal issues to essential elements for clients throughout the organization." *Id.* at 7.

CareFusion does not dispute that it received Kleber's application and did not interview him for the position. One hundred and eight individuals applied for the position, and CareFusion interviewed ten of them. All ten had fewer than seven years of experience. The individual hired for the position was twenty-nine years old. *Id.* at 8.

2. Procedural History

Kleber brought this age discrimination case on July 7, 2015 in the U.S. District Court for the Northern District of Illinois. He alleged that CareFusion's use of a seven-year experience limit in its Senior Counsel job posting violated the ADEA under both disparate impact (Count 1) and disparate

treatment (Count II) theories.[1] Dkt. No. 22. On July 21, 2015, CareFusion moved to dismiss the Complaint in its entirety. Dkt. No. 25. On November 23, 2015, the district court dismissed Kleber's disparate impact claim, but denied the motion to dismiss with regard to his disparate impact claim. Dkt. No. 49. In dismissing Kleber's disparate impact claim, the district court relied almost exclusively on pre-*Smith* Seventh Circuit precedent that it nonetheless viewed as binding. *Kleber v. CareFusion Corp.*, App. C at 108a quoting *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1077 (7th Cir. 1994).[2]

---

[1] Initially, Petitioner filed his Complaint pro se on March 5, 2015, Dkt. No. 1, but subsequently filed a First Amended Complaint with the assistance of counsel.

[2] The only issue before the Seventh Circuit in *Francis Parker* was whether, in the wake of this Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the disparate impact theory of liability remained available *at all* under the ADEA, despite the fact that previously every other appellate court had "uniformly interpreted the ADEA as authorizing recovery on a 'disparate impact' theory in appropriate cases." *Smith*, 544 U.S. at 237. The *Francis Parker* opinion misinterpreted *Hazen Paper* as changing this paradigm and ruled that the disparate impact theory did not apply to the ADEA. 41 F.3d at 1077. The Seventh Circuit's ruling against the plaintiffs in *Francis Parker* was based on this fundamental legal error and not on any hiring-specific analysis. *Id.* at 1075-77. *Francis Parker* did, however, include in dicta that ADEA section 4(a)(2) excludes job applicants, but in so holding, erroneously concluded that this Court had construed the post-1972 amendment parallel provision of Title VII in *Griggs*. *Griggs,* however, interpreted the pre-amendment version, which was identical to section 4(a)(2).

The district court declined to dismiss Kleber's disparate treatment claim because it "appear[ed] to fit the hypothetical possibility discussed by th[is] Court," App. C at 110a, in *Hazen Paper*. Because the court could not "reject the possibility" that "[a]n employer could use experience, like pension status, as a proxy for age if it supposed a correlation between the two factors and accordingly made decisions based on experience but motivated by assumptions about the age of those who would be impacted," App. C at 111a, Kleber adequately pled a claim for disparate treatment under the ADEA.

Kleber moved to reconsider or, in the alternative, for permission to seek interlocutory appeal, arguing that the Supreme Court overruled *Francis Parker* when it decided in *Smith*, 544 U.S. at 232, that the ADEA permits disparate impact claims. Dkt. Nos. 55, 64. The district court denied the motion. Dkt. No. 65.

After a period of discovery regarding Kleber's disparate treatment claim, the parties stipulated to dismissal of Kleber's disparate treatment claim on January 10, 2017. Dkt. No. 104. The district court issued a final judgment as to all claims on January 30, 2017. Dkt. No. 107.

On April 26, 2018, a divided Seventh Circuit panel reversed the district court's ruling on Kleber's disparate impact claim. App. B, reported as *Kleber v. CareFusion Corp.*, 888 F.3d 868 (7th Cir. 2018). The panel majority ruled that section 4(a)(2) protects both outside job applicants and current employees. The

panel majority determined such a reading was "the better reading of the statutory text," and was "more consistent with the purpose of the Act and nearly fifty years of case law interpreting the ADEA and similar language in other employment discrimination statutes." App. B at 61a. And, the panel majority specifically noted that its reading "tracks the Supreme Court's reading of virtually identical statutory language in Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co*., 401 U.S. 424, 426 n.1, 431, (1971), which found that this text protects 'the job-seeker.'" App. B at 61a.

The Seventh Circuit granted CareFusion's petition for rehearing en banc on June 22, 2018, and on January 23, 2019, the en banc court issued a divided opinion affirming the district court. App. A, reported at *Kleber v. CareFusion Corp*., 914 F.3d 480 (2019). The majority concluded that "[b]y its terms, § 4(a)(2) proscribes certain conduct by employers and limits its protection to employees." App. A at 3a. The majority focused its textual analysis on the phrase "status as an employee," summarily concluding that "the reach of § 4(a)(2) does not extend to applicants for employment, as common dictionary definitions confirm that an applicant has no 'status as an employee.'" *Id*. at 4a. To explain away Congress's use of the broad term "individual," the majority reasoned that "Congress employed the term 'any individual' as a shorthand reference to someone with 'status as an employee.'" *Id*. at 5a.

Four judges dissented. Judge Hamilton, joined in full by Chief Judge Wood, and Justice Rovner,

argued that the disparate impact language in section 4(a)(2) "protects both outside job applicants and current employees." App. A. at 20a. The dissent explained that its conclusion is "the better reading of the statutory text that is at worst ambiguous on the coverage of job applicants," *id.*; "tracks the Supreme Court's reading of identical statutory language in Title VII," *id.*; and is "more consistent with the purpose of the [ADEA] (as set forth in the statute itself) and avoids drawing an utterly arbitrary line." *Id.* at 21a.

Judge Easterbrook, while joining Part II of the part of the dissent that concluded that this Court's "interpretation of identical language in Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*, 401 U.S. at 430-31," App. A at 33a (Hamilton, J. dissenting), was "the most reliable basis" for interpreting section 623(a)(2), *id.*, wrote separately. Judge Easterbrook stressed that *Griggs* controls and should have determined the outcome: "*Griggs* . . . treats the word 'individual' in 42 U.S.C. § 2000e-2(a)(2), as it stood before an amendment in 1972, as including applicants for employment. The pre-1972 version of that statute is identical to the existing text in § 623(a); Congress copied this part of the ADEA from that part of Title VII . . . If the Justices think that this topic (or *Smith* itself) needs a new look, the matter is for them to decide." App. A. at 18a-19a (J. Easterbrook, dissenting).

REASONS THE PETITION SHOULD BE GRANTED

This Court should grant certiorari because in holding that outside job applicants may not challenge hiring discrimination under section 4(a)(2) of the ADEA, the Seventh Circuit decided a significant issue of federal law in a manner that conflicts with multiple decisions of this Court. Moreover, this break with settled law threatens to materially harm the ability of millions of current and future older workers to secure financial security and to cause significant damage to the nation's economy. In particular, the court of appeals' decision misconstrues and disregards this Court's rulings in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Smith v. City of Jackson*, 544 U.S. 228 (2005) to impose an overly restrictive and arbitrary interpretation of section 4(a)(2) that thwarts Congress's principal reason for enacting the ADEA – eliminating age discrimination against older job applicants. The Court's holdings in *Griggs* and *Smith* directly conflict with the Seventh Circuit's majority ruling that Congress intended to extend greater legal protections to older workers who already hold a job than to older workers who are seeking a job.

I. THE SEVENTH CIRCUIT'S OVERLY RESTRICTIVE INTERPRETATION OF SECTION 4(a)(2) OF THE ADEA CONFLICTS WITH THIS COURT'S DECISIONS IN *GRIGGS v. DUKE POWER COMPANY AND SMITH v. CITY OF JACKSON*.

This Court's precedents in *Griggs* and *Smith* provide a clear path to concluding that section 4(a)(2) permits outside applicants to bring disparate impact claims. The Seventh Circuit en banc majority, however, misreads the facts and holding of *Griggs* and ignores significant portions of *Smith* to inappropriately narrow the reach of a remedial civil rights statute.[3]

---

[3] Three years ago, the U.S. Court of Appeals for the Eleventh Circuit, in another divided en banc decision that had also reversed a divided panel decision, similarly held that section 4(a)(2) unambiguously restricts its protections to incumbent employees. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016). This Court denied a petition for certiorari to review three questions presented: (1) the scope of section 4(a)(2)'s protections; (2) an agency deference issue; and (3) a question concerning equitable tolling of employment discrimination claims. *Villarreal v. R.J. Reynolds Tobacco Co.*, 137 S. Ct. 2292 (2017). This Petition, by contrast, only seeks review of one of those questions: whether outside applicants as well as incumbent employees can bring a disparate impact claim under section 4(a)(2) of the ADEA. For this reason, as well as the straightforward, largely undisputed underlying facts, this case provides an excellent vehicle for reviewing this important issue.

A. *Griggs* Held that Language Identical to the Text of Section 4(a)(2) of the ADEA Permits Job-Seekers to Bring Disparate Impact Claims.

The Supreme Court granted *certiorari* in *Griggs* "to resolve the question whether 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 when . . . (b) both requirements operate to disqualify Negroes at a substantially higher rate than white *applicants* . . . ." *Griggs*, 401 U.S. at 425-26 (emphasis added). *Griggs* held that 42 U.S.C. § 2000e-2(a)(2), as written at the time, permitted disparate impact claims by current and prospective employees. In this case, the question is whether language identical to that analyzed in *Griggs* should be interpreted identically – i.e., whether that language prohibits an employer from imposing a maximum years of experience requirement that "operate[s] to disqualify" older applicants. Given that *Griggs* and this case concern strikingly similar issues and identical statutory language, the result should be the same – the original statutory language of both Title VII and the ADEA allows disparate impact claims by outside applicants and current employees alike. The Seventh Circuit en banc majority strayed from this Court's precedent in deciding otherwise.

When *Griggs* was decided, the language of section 703(a)(2) of Title VII and section 4(a)(2) of the ADEA was indistinguishable "[e]xcept for substitution of the word 'age' [in the ADEA] for the words 'race,

color, religion, sex, or national origin' [in Title VII]. *Smith*, 544 U.S. at 233; *see also Lorillard*, 434 U.S. at 584 ("[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII."). Had the Seventh Circuit correctly analyzed and applied *Griggs* to Mr. Kleber's claim, he would have prevailed. Instead, the Seventh Circuit's en banc majority misread the facts and narrowed the holding of *Griggs* to shut the courthouse door to Mr. Kleber and countless other older jobseekers.

As this Court pointed out in *Smith*, Congress's use of identical language in the ADEA and Title VII establishes that Congress intended the two statutes' protections to be identical as to both (1) whom they protect and (2) what they protect against. 544 U.S. at 233. First, as to whom, both statutes protect a broad group: "any individual." 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). Second, as to what, both statutes protect against disparate impact (not just disparate treatment). As *Smith* explained, "[n]either § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that 'limit, segregate, or classify' persons; rather the language prohibits actions that 'deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race or age." *Smith*, 544 U.S. at 235 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (emphasis in original)).

Despite this Court's admonition in *Smith* that *Griggs* is "a precedent of compelling importance" for

interpreting the ADEA, *Smith*, 544 U.S. at 234,[4] and instruction that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes," *id.* at 233 citing *Northcross v. Bd. of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam), the Seventh Circuit dismissed the relevance of *Griggs*.[5] The Seventh Circuit conceded that in *Griggs* this Court interpreted language "that in 1971 mirrored the present language of § 4(a)(2) of the ADEA," App. A at 9a, yet rejected any suggestion that *Griggs* was a controlling precedent. *Id.*

The en banc majority's justifications for not following this Court's holding in *Griggs* are grounded in a misreading of the facts of *Griggs* and misguided analysis of *Griggs*' progeny, as well as a misinterpretation of the purpose of a subsequent amendment to Title VII. This Court must resolve this important question of federal law by reaffirming the holding and scope of *Griggs*.

---

[4] *See also Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2517 (2015) (*Smith* concluded that the reasoning in *Griggs* "pertained to § 4(a)(2) of the ADEA").

[5] Neither the Seventh Circuit in this case nor the Eleventh Circuit in *Villarreal* took this important statutory construction maxim into consideration when both courts declared the 1972 amendment to Title VII to be determinative.

1. The Facts, Language, Procedural History, and Jurisprudential Progeny of *Griggs* Unaminously Confirm That the Supreme Court Interpreted the Relevant Statutory Text to Protect Outside Job Applicants.

In *Griggs*, the Court reviewed the decision of the district court below that had found that Duke Power had "discriminated on the basis of race in the *hiring* and assigning of employees at its Dan River plant." 401 U.S. at 426-27 (emphasis added). The Court considered whether section 703(a)(2) of Title VII, which at the time was identical to section 4(a)(2) of the ADEA, prohibited an employer from establishing requirements as "*condition[s] of employment in* or transfer to jobs," where such "requirements operate to disqualify [members of the protected class] at a substantially higher rate *than [other] applicants* . . . ." *Griggs*, 401 U.S. at 425-26 (emphasis added). *See also id.* at 427-28 (employer required high school education "for initial assignment to any department except Labor" and required that "*new employees* . . . register satisfactory scores on two professional prepared aptitude tests") (emphasis added).

Furthermore, the employees who filed the *Griggs* suit brought it as a class action on behalf of a class that included, among others, "all Negroes who may hereafter *seek employment*" at the employer's power station. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1227-28 (4th Cir. 1970) (emphasis added), *rev'd*,

401 U.S. 424 (1971).[6] Finally, the unanimous *Griggs* Court stated clearly and emphatically, "Congress has now required that the posture and condition *of the job-seeker* be taken into account." 401 U.S. at 431 (emphasis added).[7]

The Seventh Circuit majority outright ignored unequivocal evidence that the class in *Griggs* encompassed job-seekers, instead searching to uncover any evidence that the holding only applies to incumbent employees. App. A. at 9a-10a.[8] In so doing,

---

[6] In his book documenting the history of the *Griggs* litigation, Robert Belton, one of the plaintiffs' counsel in the case, recounted that, "In *Griggs* [the district court judge], as other courts had begun to do on a regular basis, accepted the plaintiffs' broad definition of the class to include African Americans currently employed by Duke Power as well as African Americans *who might thereafter seek employment*, provided the plaintiffs could show that at least one African American had sought and had been denied employment." Robert Belton, *The Crusade for Equality in the Workplace: The Griggs v. Duke Power Story* 126 (Stephen L. Wasby, ed.) 2014 (emphasis added).

[7] Moreover, as Judge Hamilton points out in his dissent, all parties involved in the *Griggs* litigation, including dissenting judges and amicus curiae organizations opposing the result, clearly understood that the decision "recognized disparate-impact protection for both current employees and job applicants." App. A. at 39a-40a and nn. 4, 5).

[8] Similarly, in its en banc opinion denying the disparate impact theory to older job applicants challenging discriminatory policies and practices, the Eleventh Circuit also dismissed *Griggs* as irrelevant because "[t]he plaintiffs in *Griggs* were employees." *Villarreal*, 839 F.3d at 968.

the court "treats the Supreme Court's references in *Griggs* to hiring as careless slips of the pen," which is "not how federal courts should read Supreme Court opinions." App. A. at 35a-36a (Hamilton, J., dissenting). *Griggs* nowhere limited its decision to policies and practices that adversely impacted current employees only, nor did it suggest that the employer defendant could continue to apply the requirements challenged therein when hiring new employees.

This Court's post-*Griggs* decisions have consistently described *Griggs* as applying to initial hiring decisions as well as internal promotions and transfers. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 427 (1975) ("Like the employer in *Griggs*," the defendant required "[a]pplicants for hire" to achieve certain test scores); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (describing *Griggs* as protecting "applicants for hire"). Nowhere has the Court been more clear than in *Connecticut v. Teal*, when it explained that the requirements in *Griggs* were invalid because although they "applied equally to white and black employees *and applicants*, they barred *employment opportunities*[9] to a disproportionate number of blacks." 457 U.S. 440, 446 (1982) (emphasis added). More than thirty years after *Teal*, this Court noted in *Texas Dep't of Hous.*., that *Griggs* addressed "*hiring criteria."* 135 S. Ct. at 2517

[9] Notably, this Court treated the phrase "employment opportunities," which appears in both section 703(a)(2) and section 4(a)(2), as focusing on hiring discrimination – another aspect of the proper statutory interpretation ignored by the Seventh Circuit. *Teal*, 475 U.S. at 446.

(emphasis added). Given such consistent recognition by this Court that *Griggs* applies to hiring practices, the Seventh Circuit's pronouncement to the contrary is inexplicable and its refusal to follow *Griggs* warrants review.

2. The 1972 Amendment That Added a Reference to "applicants" in 42 U.S.C. § 2000e-(a)(2) Merely Codified Existing Law.

The Seventh Circuit engaged in historical as well as linguistic gymnastics to justify its disregard of controlling Supreme Court precedent. The en banc majority wrote an alternate history in which, instead of merely confirming *Griggs*, Congress in 1972 dramatically expanded Title VII's scope and left the ADEA narrower by comparison. That is not what happened.

After the Court's decision in *Griggs* that hiring criteria like Duke Power's education and testing requirements could be challenged under section 703(a)(2), Congress amended that section by adding "or applicants for employment" after "his employees." Pub. L. No. 92-261, 86 Stat. 109 (1972). The en banc Court of Appeals majority claimed that the amendment "extend[ed] Title VII's disparate impact protection to job applicants." App. A. at 10a. The facts show otherwise. *See* App. A. at 45a ("Without considering the facts of the 1972 legislation as a whole, the majority has leaped to the wrong conclusion.") (Hamilton, J., dissenting).

As the Senate Committee on Labor and Public Welfare explained, the amendment was "merely . . . declaratory of present law," S. Rep. No. 92-415, at 43 (1971). House reports further confirmed that the amendment was "fully in accord with the decision of the Court" in *Griggs*. H.R. Rep. No. 92-238, at 21-22 (1972).[10] S*ee also Rabin v. PricewaterhouseCoopers, LLP*, 236 F. Supp. 3d 1126, 1131 (N.D. Cal. 2017) ("the amendment signaled that *Griggs* had properly interpreted Title VII as protecting both employees and applicants" and "supports, rather than detracts from an interpretation of the ADEA as likewise covering both employees and applicants.").

The 1972 amendment thus has no relevant effect on the ADEA's meaning: like section 703(a)(2) of Title VII, section 4(a)(2) of the ADEA does now and has always covered applicants. The Seventh Circuit's misinterpretation of both G*riggs* and the 1972 amendment to Title VII to justify narrowing the reach of the ADEA warrants review by this Court.

---

[10] This House report demonstrates that Congress also understood *Griggs* as governing hiring practices. The report described *Griggs* as a case "where the Court held that the use of employment tests as determinants of *an applicant's* job qualification . . . was in violation of Title VII as such tests work a discriminatory effect in *hiring* patterns" without a "showing of an overriding business necessity." H.R. Rep. 92-238, at 8, reprinted at 1972 U.S.C.C.A.N. at 2144 (emphasis added).

B. Excluding Outside Job Applicants from the ADEA's Disparate Impact Coverage Clashes with *Smith v. City of Jackson* and its Analysis of *Griggs*.

The Seventh Circuit paid no mind to this Court's admonition in *Smith v. City of Jackson* that section 4(a)(2) of the ADEA must be interpreted in a way "that parallels [its] holding in *Griggs* . . . ." 544 U.S. at 238. The majority opinion in *Smith*[11] strongly supports a parallel interpretation of section 4(a)(2) as protecting outside job applicants in the same way that the identical language analyzed in *Griggs* did so. First, the Court's textual analysis of the differences between sections 4(a)(1) and 4(a)(2) of the ADEA inferred no significance from the absence of a reference to hiring in section 4(a)(2). Second, the *Smith* majority identified two textual differences between the ADEA and Title VII that make the scope of disparate impact claims narrower under the ADEA than under Title VII: (1) ADEA defendants can invoke the "reasonable factors other than age" ("RFOA") defense, whereas Title VII defendants must satisfy the "business necessity" defense; and (2) the "*Ward's Cove*[12] pre-

---

[11] Because Justice Scalia joined Parts I, II, and IV, these parts constitute majority holdings. *Smith*, 544 U.S. at 229 (referring to the opinion of the Court with respect to Parts I, II, and IV).

[12] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). This case addressed the burden-shifting framework for discrimination cases, and *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), later clarified that the "reasonable factor other than age" (RFOA) provision in the ADEA, 29 U.S.C. § 623(f)(1), is an affirmative defense.

1991 interpretation of Title VII's identical language [referring to section 4(a)(2) and section 703(a)(2)] remains applicable to the 544 U.S. at 240. Neither distinction is even remotely connected to the arbitrary and illogical outside/inside applicant dispute maintained by the Seventh Circuit.

The Seventh Circuit disregards *Smith*'s clear directive that disparate impact under the ADEA differs in only two respects from disparate impact under Title VII by inventing a third difference whose significance dwarfs the combined impact of the two differences identified in *Smith*. Denying the disparate impact theory to outside applicants under the ADEA and instead limiting its availability to current employees renders the theory much narrower than under Title VII. Yet, *Smith* made no mention of such a difference despite the fact that "[w]hen *Smith* was decided, the amendment to Title VII that added the "or applicants for employment language had been in place for over three decades." *Rabin*, 236 F. Supp. 3d at 1131 n.4. Congress and the Supreme Court have left no room for additional limitations; therefore none should be created. *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.")

Instead, the *Smith* majority sent a strong signal that it believed section 4(a)(2) covers applicants when it cited two hiring cases by outside applicants in support of its statement that "for over two decades

after our decision in *Griggs*, the Courts of Appeals uniformly interpreted the ADEA as authorizing recovery on a 'disparate-impact' theory in appropriate cases." 544 U.S. at 237, 238 n.8 (plurality opinion) (citing *Wooden v. Bd. of Educ. of Jefferson County*, 931 F.2d 376 (6th Cir. 1991) (challenge to school board's salary policy which gave credit for prior teaching experience as having a disparate impact on those over forty), and *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993) (disparate impact challenge to employer's policy of not considering applications from ex-employees)). In short, the Seventh Circuit defied *Smith*'s clear support for applying the disparate impact theory to combat age discrimination in hiring. The disparate impact challenges to hiring practices in *Wooden* and *Faulkner* were "appropriate" disparate impact cases, so was Kleber's challenge to CareFusion's maximum years of experience requirement. *Villarreal*, 839 F.3d at 988 (Martin, J., dissenting).

Finally, *Smith* also specifically suggests that the 1965 report of U.S. Labor Secretary Willard Wirtz,[13] a report recognized by this Court as the

---

[13] U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment*, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964 ("Wirtz Report"). The Department of Labor compiled the Wirtz Report after Congress directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964). The overwhelming thrust of the Wirtz

blueprint for the ADEA,[14] anticipated the ruling in *Griggs* in the context of unjustified hiring criteria:

> The congressional purposes on which we relied in *Griggs* have a striking parallel to . . . important points made in the Wirtz Report . . . [J]ust as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools . . . the Wirtz Report identified the identical obstacle to the employment of older workers. "Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers – unfairly if, despite his [or her] limited schooling, an older worker's years of

---

Report is the inhumanity of employers' irrational resistance to *hiring* skilled and productive older workers.

[14] *See EEOC v. Wyo.*, 460 U.S. 226, 230-32 (1983) (explaining that the Wirtz Report's "findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress," and that after the Report's submission, Congress directed the Secretary "to submit specific legislative proposals for prohibiting age discrimination"). President Johnson endorsed these proposals, and they culminated in the 1967 law enacted by Congress. *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 587-91 (2004) (discussing the strong influence of the Wirtz Report on the ADEA's text).

> experience have given him [or her] the relevant equivalent of a high school education." Wirtz Report 3. *Thus, just as the statutory text is identical, there is a remarkable similarity between the congressional goals we cited in Griggs and those present in the Wirtz Report*.

Smith, 544 U.S. at 235 n.5 (internal citation omitted) (emphasis added).

The Seventh Circuit rejected the clear guidance of *Griggs* and *Smith* to invent a narrower interpretation of section 4(a)(2). This Court should grant review of the Seventh Circuit's decision to properly analyze this important issue under the legal standards established by this Court in *Griggs* and *Smith*.

II. THE SEVENTH CIRCUIT'S HOLDING THWARTS THE ADEA'S PRIMARY PURPOSE OF ELIMINATING AGE DISCRIMINATION IN HIRING.

Congress's concern about age discrimination in hiring practices was unquestionably the driving force behind its enactment of the ADEA – the "principal evil" the law was designed to stamp out. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998). Hence, in the Act's declaration of "Findings and Purpose," Congress stressed the adverse results of hiring barriers; citing "the incidence of unemployment, especially long-term unemployment, with resultant deterioration of skill, morale, and

employer acceptability" as a factor necessitating a federal law prohibiting age discrimination in employment. 29 U.S.C. § 621(a)(3). This Court has repeatedly emphasized that Congress's "primary purpose" in enacting the ADEA was the "hiring of older workers." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 n.9 (1977) citing H.R. Rep. No. 90-805, at 4 (1967) *reprinted in* U.S. Equal Employment Opportunity Commission (EEOC), Legislative History of the Age Discrimination in Employment Act (1981); *accord Ohio Pub. Emps. Ret. Sys. v. Betts,* 492 U.S. 158, 179 (1989) (both cases superseded by statute on other grounds).

The ADEA's legislative record powerfully demonstrates that eliminating age discrimination in hiring, whether based on explicit age limits or facially neutral criteria, was Congress's principal goal in passing the ADEA. Secretary Wirtz could not have been clearer in communicating that outside applicants need to be able to challenge policies and practices that adversely impact their ability to secure employment opportunities when he stated: "To eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices *which quite unintentionally lead to age limits in hiring*." Wirtz Report at 22 (emphasis added).[15]

---

[15] The Wirtz Report is replete with objections to and concern about arbitrary requirements that unfairly blocked older outside applicants from being considered for employment opportunities. Wirtz Report at 6-25.

Congressional reports accompanying the legislation that became the ADEA also stressed the overriding goal of eliminating hiring discrimination. These reports cited and quoted the Wirtz Report in support of legislation banning age discrimination in hiring:

> The possibility of new nonstatutory means of dealing with such arbitrary discrimination has been explored. That area is barren . . . A clear cut and implemented Federal policy . . . would provide a foundation for a much-needed vigorous, nationwide campaign to promote *hiring without discrimination on the basis of age.*

H.R. Rep. No. 90-805, at 2 (1967); S. Rep. No. 90-723, at 2 (1967) (emphasis added).

There is not a scintilla of evidence in the record of the ADEA's enactment to support the Seventh Circuit's conclusion that Congress intended "outside applicants" to have less legal protection than "inside applicants."[16] In dissent, Judge Hamilton shows just

---

[16] Professor Samuel Estreicher described the Seventh Circuit's decision as "untethered textualism," because its "effect," which is "to prevent job seekers from challenging on impact grounds rules and policies that present no evidence of intentional age discrimination but create 'headwinds' against the older job seeker . . . is [ ] difficult to square with the 'evil' Congress had in mind in enacting the ADEA, as set forth in the statute's statement of

how absurd this conclusion is with a "simple hypothetical" comparing the experience of two applicants – one an "inside applicant," and the other an "outside applicant," like Mr. Kleber. If both were to be turned down for a position because of a maximum experience limit, only the "inside applicant" could challenge the requirement under the disparate impact theory. App. A. at 54a. (Hamilton, J. dissenting).

That result is not merely "baffling," as Judge Hamilton aptly observes, *id.*, but devastating for current and future "outside applicants" who face long spells of unemployment. For while the ADEA has been effective in combating the most blatant forms of age discrimination in hiring, employers have turned to more covert and subtle discriminatory behaviors that deny older applicants fair treatment.[17] Older job seekers' need for the disparate impact theory to challenge the intractable age discrimination in hiring, which contributes to older workers' historical and persistent overrepresentation among the long-term

---

findings. . . . ." Samuel Estreicher, *Untethered Textualism in the Seventh Circuit's Kleber Ruling on Age Bias in Hiring*, VERDICT (March 21, 2019), https://verdict.justia.com/2019/03/21/untethered-textualism-in-the-seventh-circuits-kleber-ruling-on-age-bias-in-hiring

[17] For example, in December 2017, dozens of the nation's leading employers were sued for placing recruitment ads limited to particular age groups. Older applicants were unaware that they were not being shown the employment ads. Julia Angwin, Noam Scheiber and Ariana Tobin, *Targeted Job Ads on Facebook Prompt Concerns About Age Bias*, N.Y. TIMES, Dec. 20, 2017, at A1.

unemployed, is arguably far greater than inside applicants' need to challenge denials of promotions or transfers.

A. Shielding Unreasonable Hiring Policies and Practices that Disadvantage Outside Applicants Will Have Significant Negative Consequences For Unemployed Older Individuals.

"[T]heir numbers are great and growing; and their employment problems grave." 29 U.S.C. § 621(a)(3). That is how Congress described the situation for older workers seeking employment at the time of the ADEA's enactment in 1967. Over fifty years later, their numbers are still great and growing, and their employment problems are still grave. Older workers still experience far longer periods of unemployment and are disproportionately represented among the long-term unemployed.[18]

---

[18] "Overall, 31% of jobseekers age 55 and older report they have been looking for work for 27 weeks or longer, according to the BLS, compared to just 24% of younger job seekers. Older job seekers report looking for work, on average 34.6 weeks. That is nearly three months longer than the average of 23.4 weeks reported by unemployed 25-to 54-year-olds." Ruth Simon, *'Just Unbearable.' Booming Job Market Can't Fill the Retirement Shortfall*, THE WALL STREET JOURNAL, Dec. 20, 2018, https://www.wsj.com/articles/even-a-booming-job-market-cant-fill-retirement-shortfall-for-older-workers-11545326195?mod=djemRTE_h (hereinafter "Ruth Simon Article").

> The financial and emotional harm of age discrimination on older workers and their families is significant. Once an older worker loses a job, she will likely endure the longest period of unemployment compared to other age groups and will likely take a significant pay cut if she becomes re-employed . . . The loss of a job has serious long-term financial consequences as older workers often must draw down their retirement savings while unemployed.

Lipnic Report at 22-23 (internal footnotes omitted).[19] The Seventh's Circuit's arbitrary line-drawing that denies "outside applicants"—i.e., the unemployed—the right to bring disparate impact claims under the ADEA will embolden employers seeking to limit their applicant pools to younger workers, thus exacerbating older workers' unemployment instead of ameliorating it as Congress intended.

Although the explicit age bans so prevalent in 1967 when the ADEA was enacted are generally

---

[19] *See also* Ruth Simon Article ("Even just a few months out of work or living on a depressed salary without benefits can strain a senior's finances as he struggles to cover mortgage payments, health care and other routine expenses. When a job is lost late in life and it takes a long time to find a new one, it can push back retirement by years or even erase the prospect of retirement completely.").

gone,[20] age discrimination in hiring remains a pervasive presence in the U.S. work force. In a recent AARP survey, three quarters of the respondents age 45-plus blame age discrimination for their lack of confidence in finding a *new* job.[21] Unfortunately, research confirms the validity of their concerns. Multiple experimental studies have documented significant discrimination against older applicants in the hiring process, including one recent study that sent out similar resumes to over 13,000 lower-skill positions in 12 cities across 11 states, totaling 40,000 applicants, to determine if employers were less likely to respond to the resumes of older applicants than to the resumes of younger applicants. The results showed that employers were significantly less likely to call back older applicants.[22]

---

[20] In the mid-1960's, about half of private job openings explicitly barred applicants over age 55, and a quarter barred those over age 45. Wirtz Report at 6.

[21] Rebecca Perron, *The Value of Experience: Age Discrimination Against Older Workers Persists*, https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2018/value-of-experience-age-discrimination-highlights.doi.10.26419-2Fres.00177.002.pdf (study conducted in September 2017 of 3,900 respondents age 45 and older either working or looking for work).

[22] David Neumark, Ian Burn, and Patrick Button, *Age Discrimination and Hiring of Older Workers*, Federal Reserve Bank of San Francisco (2017), http://frbsf.org/economic-research/publications/economic-letter/2017/february/age-discrimination-and-hiring-older-workers/. *See also* Henry S. Farber, Dan Silverman, Till M. Von Wachter, *Factors Determining Callbacks to Job Applications by the Unemployed:*

This recent research confirms that age discrimination in hiring is not only pervasive, but also persistent. Similar research conducted over twenty years ago had similar results. Pairs of resumes were mailed to 775 large firms and employment agencies across the United States. Although the resumes presented equal qualifications, the older job seeker received a less favorable employer response 26.5 percent of the time.[23]

Without the disparate impact theory, outside applicants are defenseless against covert and indirect discriminatory policies and practices that deny older job applicants fair treatment. *See, e.g.*, Dan Kalish, *Covert Discrimination: What You Need to Know About Coded Job Listings*, PayScale.com (June 15, 2015),

---

An Audit Study, THE RUSSELL SAGE FOUNDATION JOURNAL OF THE SOCIAL SCIENCES 3(3): 168 (2017); Joanna N. Lahey, *Age, Women, and Hiring: An Experimental Study,* 43(1) JOURNAL OF HUMAN RESOURCES 30 (2008) (a study of "real rather than hypothetical choices by businesses," found that a younger worker is more than 40 percent more likely to be offered an interview than is an older worker).

[23] Marc Bendick, Jr., Charles W. Jackson, J. Horacio Romero, *Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices*, 8 J. OF AGING & SOCIAL POLICY 25 (1996). *See also* Marc Bendick, Jr., Lauren E. Brown, Kennington Wall, *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, 10 J. of Aging & Social Policy 5 (1999) (finding even greater amounts of unfavorable treatment of older applicants compared to younger applicants (41.2%) when actual human testers were used in the study).

http://bit.ly/1QBb2bL; Vivian Giang, *This is the latest way employers mask age bias, lawyers say*, FORTUNE (May 4, 2015), http://for.tn/1E1Orvm (describing job postings with preferences for digital "native speakers," rather than older "digital immigrants"). Hiring discrimination is notoriously difficult to challenge because it is so difficult to detect. The fact that "age discrimination is characterized more by indifference and thoughtless bias than by overt hostility . . . makes detection of unlawful motive impractical and enhances the risk of evasion." Steven J. Kamenshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. 229, 318 (1990).

Outside applicants in particular lack sufficient information about a company's hiring processes and the relative qualifications of their competition to confidently suspect a potential claim. Indeed, the newest and perhaps most pernicious frontier of age discrimination in hiring screens is the use of "big data" – the collection and compilation of data from multiple sources, to which a robo-recruiting algorithm is applied – to recruit and refer job applicants.[24] Discrimination buried deep in multiple datasets and mathematical algorithms is far more difficult to detect, and as harmful for older job seekers as explicit age bans in job ads were fifty years ago. At least one

[24] Equal Employment Opportunity Commission (EEOC), *Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC* (press release) (Oct. 13, 2016), https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm.

study has found that, under such algorithms, age was the most significant predictor of being invited to interview, with the youngest and the oldest applicants least likely to be successful.[25] If spurned older applicants must prove disparate treatment, it will be impossible to challenge these algorithms based on their effects alone, and the Act's ban on discriminating against older applicants will go largely unenforced as long as bias goes unspoken.

For precisely the same reason, in *Watson v. Fort Worth Bank and Trust*, a plurality of this Court noted that the disparate impact theory of proof is necessary to "adequately police[ ] . . . the problem of subconscious stereotypes and prejudices." 487 U.S. 977, 990 (1988). Without the disparate impact theory to ferret out more subtle forms of hiring discrimination against older applicants, older "outside applicants" are at risk of having a permanent seat among the long-term unemployed.

B. Allowing Discriminatory Hiring Policies and Practices that Adversely Impact Older Applicants Will Significantly Harm the National Economy.

The United States cannot afford the short-sightedness of the Seventh Circuit's opinion. As recognized by Secretary Wirtz, "the consequences [of

---

[25] *See* Sarah O'Connor, *The Risks of relying on robots for fairer staff recruitment*, FINANCIAL TIMES, Aug. 31, 2016, https://www.ft.com/content/ad40b50c-6e9a-11e6-a0c9-1365ce54b926.

age discrimination] did not stop with current and discharged older workers: they affected the whole society through lower productivity and higher unemployment insurance payments." Judith D. Fischer, *Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers*, 53 S.C.L. Rev. 211, 212 (2002) quoting Wirtz Report at 18 ("It is a fair estimate that a million man-years of productive time are unused each year because of unemployment of workers over 45;"). While recognizing that due to many factors, only a hypothetical estimate of the cost to the economy resulting from age discrimination was possible, Wirtz concluded that "[s]uch a calculation would easily yield several billion dollars a year . . . ." *Id.*

The cost today is undoubtedly far greater. John Challenger, CEO of Challenger, Gray & Christmas, testified to the EEOC in 2017 that, "Societal tradition, outdated legislation and flawed business practices that channel older people out of the work force, especially skilled workers, is damaging the economic health of our country."[26] As recognized by the Senate Special Committee on Aging, "the size of the older workforce is expected to grow substantially in the next several years while the size of the younger workforce will remain comparatively dormant."[27]

---

[26] Written Testimony of John Challenger, Challenger, Gray & Christmas, EEOC Meeting: The ADEA @50 – More Relevant Than Ever (June 14, 2017), https://www.eeoc.gov/eeoc/meetings/6-14-17/challenger.cfm.

[27] Senate Special Committee on Aging, America's Aging Workforce: Opportunities and Challenges, 36 (December 2017),

Keeping older workers who want and need jobs out of the workforce will also seriously damage the nation's financial support systems. As "the world is experiencing an unprecedented increase in average life expectancy and population aging, described as a revolution of longevity," International Longevity Center, AGEISM IN AMERICA, 1 (2006), https://aging.columbia.edu/sites/default/files/Ageism_in_America.pdf, the social security system must bear more and more weight already. The country is already at a high risk of running out of money to pay for Social Security. An important way to take pressure off the Social Security trust fund is to reduce age discrimination, allowing older workers to work longer—a policy already favored by Congress through delayed retirement social security credits. A key way to effectuate that intent and extend individuals' work lives is through bridge jobs, or "partial retirement" jobs, or "unretirement" (leaving retirement to work, then permanently retiring). Without meaningful protections against age discrimination in hiring, older individuals who are denied jobs will overburden the system beyond its capacity.

Lastly, while age discrimination lawsuits "impose substantial costs for employers violating the ADEA[,]" Lipnic Report at 23, the desired outcome of allowing outside applicants to bring disparate impact claims is not more lawsuits. As recognized by this Court, disparate impact claims under the ADEA are

---

https://www.aging.senate.gov/imo/media/doc/Aging%20Workforce%20Booklet_4web.pdf.

still narrow and not easy to prove. *Meacham,* 544 U.S. at 101 (explaining that establishing a prima facie case of disparate impact "is not a trivial burden" and employers should not worry that the availability of the theory would "encourage strike suits or nudge plaintiffs with marginal cases into court, in turn inducing employers to alter business practices in order to avoid being sued.") Instead, the law should incentivize employers to be more mindful about the potential impact their hiring policies and practices would have on older outside applicants. That would be a good result for individuals and businesses alike, as well as the American economy.

In *McKennon v. Nashville Banner Pub. Co*., this Court declared that "Congress designed the remedial measures in [the ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." 513 U.S. 352, 358 (1995) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).[28] Without the disparate impact theory to challenge subtle forms of hiring discrimination, employers will have no reason to examine policies that adversely affect older applicants, but instead can

[28] Significantly, *Albemarle Paper Co*. was a disparate impact hiring discrimination case challenging race-neutral "pre-employment tests," 422 U.S. at 412, used by the employer to assess "[a]pplicants for hire into skilled lines" of employment at its plant. *Id*. at 427. The case was tried in 1971, *id*. at 409, prior to *Griggs*, when the language in Title VII that establishes a disparate impact claim, section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2), was identical to section 4(a)(2) of the ADEA.

continue to ignore them – or even embrace them – with impunity. As a result, rather than being eliminated, the last vestiges of age discrimination in the hiring context will likely become entrenched, "operat[ing] to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430.

CONCLUSION

To date, two divided en banc decisions overturned two divided panel decisions to rule that section 4(a)(2) of the ADEA permits disparate impact claims by current employees but not by prospective employees. While these decisions offered four different "plain language" arguments for denying older "outside applicants" this critical legal theory for combating hiring discrimination, they both misinterpreted the statutory text and this Court's prior precedents to do so. The ADEA cannot fulfill its central mandate to abolish age discrimination in hiring unless it fully protects outside applicants for employment as well as current employees.

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

Respectfully submitted,

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

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

Counsel for Petitioner