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## “Over-the-Hill” Yet Still Fighting Uphill Battles to Find Jobs: The Plight of Older Job Applicants Under the ADEA

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## Note

### “Over-the-Hill” Yet Still Fighting Uphill Battles to Find Jobs: The Plight of Older Job Applicants Under the ADEA

LINDSEY A. VISCOMI

*This Note discusses the unresolved issue of whether the Age Discrimination in Employment Act (ADEA) protects older job applicants from disparate impact discrimination, arguing that they should, in fact, be covered. This Note starts with an examination of the disparate impact framework and how arbitrary employment qualifications can operate indirectly to restrict the employment of older workers. It then goes into a statutory analysis of the pertinent sections of the ADEA and considers several different statutory interpretation methods. This Note will argue that the interpretation of the statute should align with its underlying purpose, which is to prohibit employers from discriminating against older people and to help older workers who have been displaced from work to regain employment.*

*This Note then summarizes recent case law interpreting the issue, discussing the most recent developments in differing circuits. Both the Seventh and Eleventh Circuits have now effectively held that older job applicants do not have an available disparate impact claim under the ADEA. This Note argues for a different interpretation of the ADEA that would afford older job applicants the same protections as other protected groups who face similar barriers in employment.*

*This Note suggests several remedial measures that may address this problem for the aging workforce. These recommendations include that advocates bring cases that enable other circuits to weigh in on this issue and create a circuit split to bring it to the Supreme Court so that the highest court can clarify the ambiguous language of the ADEA. Alternatively, a congressional amendment to the ADEA to expressly include applicants in the language of the statute would eliminate any ambiguity with respect to discrimination against older applicants for employment.*

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# “Over-the-Hill” Yet Still Fighting Uphill Battles to Find Jobs: The Plight of Older Job Applicants Under the ADEA

LINDSEY A. VISCOMI \*

## INTRODUCTION

*“There is . . . no harsher verdict in most men’s lives than someone else’s judgment that they are no longer worth their keep.”*<sup>1</sup>

Today, an “Over-the-Hill” 40th birthday party can implicate more than just getting closer to obtaining an AARP card. According to the Eleventh Circuit in *Villarreal v. R.J. Reynolds Tobacco Co. (Villarreal II)*,<sup>2</sup> and the Seventh Circuit in *Kleber v. CareFusion Corp. (Kleber II)*,<sup>3</sup> individuals over forty have no remedy if employers subject them to practices that have a disparate impact on older job applicants and have no reasonable business purpose—such as rejecting applicants for being overqualified<sup>4</sup> or having too much experience.<sup>5</sup> Yet, recent case law shows that courts have a hard time deciding this issue, signaling that hope is not yet lost for older applicants. When the Eleventh Circuit<sup>6</sup> and Seventh Circuit<sup>7</sup> first considered this issue, the two courts decided the cases differently, holding that job applicants were also protected by the same statutory provision that protects current

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\* University of Connecticut School of Law, Juris Doctorate Candidate 2020; Bentley University, *magna cum laude*, B.S. in Business Management 2017. I would like to extend my greatest thanks to Professor Jon Bauer for contributing his time and expertise in the development of this Note. I would also like to acknowledge my colleagues on the *Connecticut Law Review* for their many diligent edits. Thank you to my family for their constant love and support—this Note is lovingly dedicated to my late grandmother, who was always my biggest supporter.

<sup>1</sup> REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT I (1965) [hereinafter WIRTZ REPORT].

<sup>2</sup> 839 F.3d 958 (11th Cir. 2016) [hereinafter *Villarreal II*] (en banc).

<sup>3</sup> 914 F.3d 480 (7th Cir. 2019) [hereinafter *Kleber II*] (en banc).

<sup>4</sup> *Villarreal II*, 839 F.3d at 961 (validating the screening out of applicants with job requirements which “‘stay[ed] away from’ applicants ‘in sales for 8–10 years’”).

<sup>5</sup> *Kleber II*, 914 F.3d at 481–82 (stating the fact that Dale Kleber had more experience than the job description required, and CareFusion passed over Kleber, instead hiring a 29-year-old applicant who did not exceed the prescribed experience requirement).

<sup>6</sup> *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288 (11th Cir. 2015) [hereinafter *Villarreal I*], *vacated, reh’g granted en banc*, 839 F.3d 958 (11th Cir. 2016).

<sup>7</sup> *Kleber v. CareFusion Corp.*, 888 F.3d 868 (7th Cir. 2018) [hereinafter *Kleber I*], *vacated, reh’g granted en banc*, 914 F.3d 480 (7th Cir. 2019).

employees from disparate impact discrimination.<sup>8</sup> Recently, however, both circuits granted motions for a rehearing en banc, and vacated the *Villarreal I* and *Kleber I* holdings,<sup>9</sup> over strong dissents. This Note argues that the Seventh and Eleventh Circuits got it right the first time. The statutory text, Congress's intent, and agency interpretations all point toward recognizing that job applicants, as well as employees, should be able to bring disparate impact claims under the ADEA.

Congress enacted the Age Discrimination in Employment Act (ADEA) in 1967,<sup>10</sup> seeking to prohibit age discrimination in employment.<sup>11</sup> This statute shortly followed Congress's enactment of Title VII of the Civil Rights Act of 1964, which prohibited discrimination on the basis of race, color, religion, sex, or national origin.<sup>12</sup> These two statutes have played a significant role in combatting workplace discrimination. Nonetheless, this Note reveals that the ADEA has yet to be enforced consistently with its intent.

Before Congress enacted the ADEA, the Department of Labor was directed to research and study "the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination."<sup>13</sup> The resulting study came to be known as the Wirtz Report. This Report examined "circumstances which unquestionably affect older workers more strongly, as a group, than they do younger workers,"<sup>14</sup> which included questions of health, educational attainment, and technological change.<sup>15</sup> It notably expressed specific concern about the plight of older job seekers, finding that there was persistent and widespread use of age limits in hiring.<sup>16</sup> The Report also noted that the type of discrimination older workers "have most to fear" was not from "employer malice" but rather from "wholly impersonal forces," such as the use of

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<sup>8</sup> See *id.* at 870 (holding "that § 623(a)(2) [of the Age Discrimination in Employment Act of 1967] protects both outside job applicants and current employees"). See also *Villarreal I*, 806 F.3d at 1290 (holding that section 4(a)(2) of the ADEA authorizes disparate impact claims by applicants for employment because "the agency charged with enforcing the ADEA, has reasonably and consistently interpreted the statute to cover claims like Mr. Villarreal's").

<sup>9</sup> See Erin Mulvaney, *Full US Appeals Court Will Look at Scope of Federal Age-Discrimination Law*, NAT'L L.J. (June 22, 2018, 3:57 PM), <https://www.law.com/nationallawjournal/2018/06/22/full-u-s-appeals-court-will-look-at-scope-of-federal-age-discrimination-law/> (declaring the dispute as one "that tests the power of job applicants, not just current employees, to sue employers for alleged age discrimination").

<sup>10</sup> See Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (stating the act prohibiting age discrimination in employment was enacted on December 15, 1967).

<sup>11</sup> 29 U.S.C. § 621(b) (1994) ("It is therefore the purpose of this chapter . . . to prohibit arbitrary age discrimination in employment . . .").

<sup>12</sup> 42 U.S.C. § 2000e-2 (2012).

<sup>13</sup> WIRTZ REPORT, *supra* note 1, at ii.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.* at 11–13.

<sup>16</sup> *Id.* at 21.

educational requirements that work against the employment of many older workers who, at the time of the Report, had less formal education on the whole than younger workers.<sup>17</sup> Therefore, the Wirtz Report recommended that the government institute a national policy of hiring on the "basis of ability rather than age."<sup>18</sup> The Report became the catalyst to the enactment of the ADEA, and courts often refer to the Wirtz Report when analyzing the intent behind the ADEA. The Wirtz Report makes it clear that Congress enacted the ADEA in part to address the barriers that older applicants face when seeking employment.

According to the U.S. Census Bureau, one in every five residents will be older than sixty-five in 2030.<sup>19</sup> The number of older workers is on the rise<sup>20</sup> with about forty percent of people aged fifty-five and older working or actively looking for work in 2014.<sup>21</sup> Because the rate of older workers and applicants is increasing, the prevalence of this issue is mounting. Therefore, it is imperative that courts interpret the ADEA consistent with its underlying intent, which is to protect older applicants from the unfair burdens they face in their job searches that are not legitimately job-related. The courts should afford the same protections to older job applicants as other protected groups, or Congress should amend the ADEA to effectuate its intent to protect older Americans who are disparately impacted by discriminatory barriers in hiring.

Part I of this Note reviews the disparate impact framework under Title VII and the ADEA. Part II considers various methods of statutory interpretation as they apply to the question of whether job applicants may bring disparate impact claims under the ADEA, including textual analysis, comparisons to other provisions of the ADEA and Title VII, the legislative history, and agency interpretations. This part lays out arguments on both sides of the issue, analyzing the strengths and weaknesses of each argument. Part III examines the most recent case law involving claims brought under the ADEA for disparate impact in hiring. This part discusses the various legal arguments that the Seventh and Eleventh Circuits have addressed in their opinions.

Part IV contends that the purely textual approach to statutory construction, which the majorities in the circuit court opinions favored, leads to an absurdity in results. This part questions the plausibility that Congress

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<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 22.

<sup>19</sup> Erika McEntarfer, *Older People Working Longer, Earning More*, U.S. CENSUS BUREAU (Apr. 24, 2018), <https://www.census.gov/library/stories/2018/04/aging-workforce.html>.

<sup>20</sup> *Id.*

<sup>21</sup> Mitra Toossi & Elka Torpey, *Older Workers: Labor Force Trends and Career Options*, U.S. BUREAU LAB. STAT. (May 2017), <https://www.bls.gov/careeroutlook/2017/article/older-workers.htm>. The forty percent statistic is known as the labor force participation rate, which is also "expected to increase fastest for the oldest segments of the population—most notably, people ages 65 to 74 and 75 and older—through 2024." *Id.*

intended to make the arbitrary distinction that these courts have read into a minor difference in wording. Part IV also argues that the statutory language can, and should, be read to allow for disparate impact claims by older job applicants.

Part V recommends two different approaches to address this problem in light of the current case law. The first is for advocates not to give up on other circuits deciding this issue in a more favorable way. A favorable circuit court decision would create a circuit split, likely giving rise to Supreme Court review. The second is a congressional amendment to the ADEA, which would eliminate any ambiguity and finally offer full protection to older applicants in employment.

### I. DISPARATE IMPACT FRAMEWORK AND THE ADEA

In the instance of older Americans, it is seldom the case that employers are intentionally discriminating against them out of “dislike or intolerance,” as can be found with cases of discrimination on the basis of “race, color, religion, or national origin.”<sup>22</sup> However, negative stereotypes and misplaced assumptions about older individuals’ work ability are commonplace.<sup>23</sup> Age discrimination is based primarily upon unfounded assumptions about the relationship between an individual’s age and his or her ability to perform a job.<sup>24</sup>

But age discrimination does not have to be based on those stereotypical assumptions in order to be considered unlawful. Certain job qualifications might affect older workers more heavily, as a group, than they do younger workers.<sup>25</sup> For example, imagine an employer that has a policy of only hiring individuals with less than five years of experience in their field. This hiring policy is neutral on its face because younger workers and older workers alike may have less than five years of experience in that certain field. However, this policy disproportionately impacts older workers because it is more likely that older workers, rather than younger workers, will have exceeded that experience cap.

This Note is concerned with the types of arbitrary employment practices that operate indirectly to restrict the employment of older workers in a

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<sup>22</sup> WIRTZ REPORT, *supra* note 1, at 5 (finding that there was no significant evidence of intentional discrimination).

<sup>23</sup> Thomas W.H. Ng & Daniel C. Feldman, *Evaluating Six Common Stereotypes About Older Workers with Meta-Analytical Data*, 65 PERSONNEL PSYCHOL. 821, 826 (2012) (noting that “negative stereotypes about aging are often socially constructed from observations of the declining health of very old people who have long since retired . . . [and] [t]here is less evidence . . . that older workers who are still actively employed are especially susceptible to health problems”).

<sup>24</sup> WIRTZ REPORT, *supra* note 1, at 2.

<sup>25</sup> *See id.* at 11–13 (listing examples of “certain circumstances which unquestionably affect older workers more strongly, as a group, than they do younger workers” such as health, educational attainment, and technological change).

discriminatory manner.<sup>26</sup> Discrimination in the employment of older workers still exists in America and will continue to flourish until courts interpret the ADEA to protect older workers from "employment practices which . . . unintentionally lead to age limits in hiring."<sup>27</sup>

Unlawful discrimination can take two different forms: disparate treatment<sup>28</sup> and disparate impact.<sup>29</sup> A claimant can prove disparate treatment by establishing that an employer treated him or her less favorably than another worker of a different group and the individual's protected characteristic (such as race, sex, or age) was the reason for that differential treatment, thereby making intent a crucial element.<sup>30</sup> To prove disparate impact, however, a plaintiff need only establish that a particular employment practice has an adverse effect on workers of his or her group. This shifts the burden to the defendant to show that the practice has a sufficiently strong business justification.<sup>31</sup> Therefore, proof of discriminatory motive is not required under a disparate impact theory of liability.<sup>32</sup>

The Supreme Court has long recognized that both Title VII and the ADEA cover disparate treatment.<sup>33</sup> Disparate impact, on the other hand, has had a more distinctive historical development in the law. The Supreme Court, interpreting statutory language similar to that appearing in the ADEA, first held disparate impact to be a violation of Title VII in 1971.<sup>34</sup> However,

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<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.* at 22.

<sup>28</sup> *See, e.g.,* *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."); Hannah Arterian Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C. L. REV. 419, 419 (1982) ("In a disparate treatment case, the plaintiff attempts to demonstrate that he is the victim of intentional, but covert, discrimination.").

<sup>29</sup> *See, e.g., Teamsters*, 431 U.S. at 335–36 n.15 (stating that disparate impact involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity"); Furnish, *supra* note 28, at 419 ("In a disparate impact case the plaintiff attempts to demonstrate that a neutral rule, fair on its face and objectively applied, has a significantly greater effect on persons protected under Title VII than on the majority group.").

<sup>30</sup> Michael Evan Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 BERKELEY J. EMP. & LAB. L. 1, 4 (2004). *See also Teamsters*, 431 U.S. at 335 n.15 ("Proof of discriminatory motive is critical . . .").

<sup>31</sup> *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2514–15 (2015).

<sup>32</sup> *Teamsters*, 431 U.S. at 335–36 n.15.

<sup>33</sup> *See* 29 U.S.C. § 623 (2012) (covering disparate treatment as a violation of the ADEA); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing a disparate treatment cause of action under Title VII). *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) ("The disparate treatment theory is of course available under the ADEA, as the language of the statute makes clear.").

<sup>34</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 427–28 (1971) (prohibiting an employment policy that required a high school education and passage of two aptitude tests which was disproportionately disqualifying black applicants). "What is required by Congress is the removal of artificial, arbitrary, and



after that, the Supreme Court declined to address the availability of disparate impact under the ADEA for over thirty years.<sup>35</sup> It was not until 2005 that the Supreme Court held, for the first time, that the ADEA authorizes disparate impact claims.<sup>36</sup> The first case to do so, however, involved a claim from a group of *current employees*,<sup>37</sup> which left unanswered the question of whether *job applicants*, in addition to current employees, could bring disparate impact claims. Two circuit courts have considered this issue,<sup>38</sup> but the issue has yet to reach the Supreme Court.

Under the ADEA, proving a disparate impact claim is similar to, but in some respects different from, doing so under Title VII. Title VII allows for an affirmative defense from a claim of disparate impact if the employer can prove that its practice is both “job related for the position in question and consistent with business necessity.”<sup>39</sup> For example, if an employer were to implement a diploma and test requirement for employment or promotion, as they did in *Griggs v. Duke Power Co.*, the employer has the burden of proving that those requirements “bear a demonstrable relationship to successful performance of the jobs for which it was used.”<sup>40</sup> If the requirements operate to exclude a protected class, and they cannot be shown to be related to job performance, then the requirements are prohibited.

However, the Supreme Court has held that the Title VII business necessity test has “no place in ADEA disparate-impact cases.”<sup>41</sup> Rather, the ADEA prohibits practices that have a disparate impact unless the employer can show that the practice is based on a reasonable factor other than age—also known as the RFOA defense.<sup>42</sup> The Supreme Court took into account the ADEA’s distinct RFOA provision and found that Title VII had no “like-worded defense,”<sup>43</sup> making it unique and controlling only in matters involving the ADEA. The RFOA defense is “essentially that the employer did not need to rely on age in a discriminatory manner, because it had other

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unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” *Id.* at 431.

<sup>35</sup> *Biggins*, 507 U.S. at 610 (citations omitted) (“[W]e have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here.”). Yet, lower courts had applied disparate impact theory to the ADEA with some frequency. *See* cases cited *infra* note 128.

<sup>36</sup> *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

<sup>37</sup> *Id.* at 231 (discussing that the petitioners were a group of older officers who claimed that their employer had discriminated against them because of a pay plan that granted raises to all City employees in a disproportionate manner).

<sup>38</sup> The Eleventh Circuit in *Villarreal II*, 839 F.3d 958, 961 (11th Cir. 2016), and the Seventh Circuit in *Kleber II*, 914 F.3d 480, 481 (7th Cir. 2019).

<sup>39</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

<sup>40</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>41</sup> *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 97 (2008).

<sup>42</sup> *Gold*, *supra* note 30, at 55. *See also Meacham*, 544 U.S. at 97 (confirming that the RFOA exemption is an affirmative defense).

<sup>43</sup> *Meacham*, 554 U.S. at 100.

valid [and reasonable] reasons for making the same decision, and therefore it cannot be shown to have discriminated on the basis of age.”<sup>44</sup> By allowing such a defense, the Court has acknowledged that “certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.”<sup>45</sup> To illustrate this point, an employment policy that replaces a highly paid worker with a lower-paid worker would likely have a disparate impact on older workers but would be permissible under the RFOA defense because the practice is a reasonable means to lower costs.

This “reasonable factors” defense is a more lenient standard of justification than under the disparate treatment requirement in the ADEA, which requires the employer to provide a bona fide occupational qualification (also known as the BFOQ defense) to justify differential treatment.<sup>46</sup> Under the BFOQ defense, an employer may refuse to hire an older worker based on his age if being younger is a bona fide occupational qualification.<sup>47</sup> For example, mandatory retirement age requirements for airline pilots are allowed as a BFOQ because of proven safety concerns.<sup>48</sup> The BFOQ defense requires an examination into whether there was an alternative method that would not impact older workers and still achieve the desired outcome, but the RFOA does not require this inquiry.

In establishing a prima facie case of disparate impact under the ADEA, the plaintiff must (1) identify a specific employment policy or practice and (2) establish that it harmed older workers substantially more than younger workers with employment decisions made on the basis of the plaintiff’s age.<sup>49</sup> The burden of producing evidence and the burden of persuasion<sup>50</sup> then shift to the employer to establish that it relied on a factor other than age that was designed and administered reasonably to achieve a legitimate business purpose in light of the circumstances, including the potential harm to older workers.<sup>51</sup> If the employer can make such a showing, the plaintiff still has the opportunity to show that the employer’s reasons are pretext for discrimination, or that there is an alternative employment practice that does not disparately impact older workers, which also serves the employer’s legitimate interests.<sup>52</sup>

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<sup>44</sup> Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 275 (1995).

<sup>45</sup> *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005).

<sup>46</sup> Gold, *supra* note 30, at 55, 62–63.

<sup>47</sup> *Id.* at 55.

<sup>48</sup> *EEOC v. Exxon Mobil Corp.*, 560 F. App’x 282, 289 (5th Cir. 2014).

<sup>49</sup> Pontz, *supra* note 44, at 284–85.

<sup>50</sup> See *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93 (2008) (explaining that the burden of persuasion falls on the “one who claims its benefits”).

<sup>51</sup> Pontz, *supra* note 44, at 285.

<sup>52</sup> *Id.*

## II. STATUTORY INTERPRETATION

Courts employ a variety of approaches when interpreting statutes. They generally look to the ordinary meaning of the text and the organizational structure of the statute itself, as well as to the legislative purpose in enacting the statute and the legislative history.<sup>53</sup> Courts also often compare statutes under their review with other statutes utilizing similar language to infer similar, or different, meanings in congressional intent.<sup>54</sup> Courts generally begin with the statutory language, but when the ordinary language of the statute has various viable readings, they regularly look to external factors such as the legislative history and how the administrative agency tasked with administering and enforcing the act interprets it.<sup>55</sup> The next several sections of this Note consider each of the various modes of interpretation and apply them to the text and legislative history of the ADEA.

### A. *Analyzing the Text of the Statute*

Courts commonly start their statutory interpretation by looking to the ordinary meaning of the language used in the act, taken as a whole,<sup>56</sup> to discover the legislature's original intent. Section 4(a) of the ADEA provides in relevant part:

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;

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<sup>53</sup> WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 26 (2016). However, it is important to note that Justices on the Supreme Court disagree on the relative weight to be given to these criteria. For example, Justice Breyer “has strongly defended consideration of legislative history in order to discern the legislative intent.” Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1974 (2007). On the other hand, Justices Scalia and Kennedy have “explicitly rejected the validity of legislative history” with Justice Stevens also cautioning its unreliability as a “guide to interpretation.” *Id.* at 1975. Most famously and well known is the fact that Justices Gorsuch and the late Scalia “demonstrate a commitment to textualism and originalism” meaning they believe they “must follow the text, as written, without recourse to authorial or legislative intent.” Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. 185, 186 (2017).

<sup>54</sup> The ADEA is often compared to Title VII because of the similar language used by Congress in these two statutes. *See, e.g.,* *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (noting the identical language between the ADEA and Title VII and other parallel provisions in comparing the two statutes); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (stating that “the prohibitions of the ADEA were derived *in haec verba* from Title VII” when comparing Title VII to the ADEA).

<sup>55</sup> ESKRIDGE JR., *supra* note 53, at 422, 434 (discussing the legislative history rule and the administrability canon in the Supreme Court's interpretations of statutes).

<sup>56</sup> *Id.* at 85.

(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 . . . .<sup>57</sup>

Courts have held section 4(a)(1) to be limited to claims of disparate treatment because of its focus on taking discriminatory actions "because of such individual's age," thereby requiring proof of intentional discrimination.<sup>58</sup> Courts have held section 4(a)(2), in contrast, to encompass disparate impact discrimination as well as overt age-based actions.<sup>59</sup>

In analyzing the language of section 4(a)(2), courts have grappled with how to interpret several terms. One ambiguous term in section 4(a)(2) that the Supreme Court has examined is the meaning of "age."<sup>60</sup> The phrase "because of an individual's age" could be interpreted broadly to include claims by both younger and older individuals.<sup>61</sup> However, in *General Dynamics Land System v. Cline*, the Supreme Court concluded that a "narrower reading is the more natural one in the textual setting"<sup>62</sup> and held that the ADEA does not stop employers from "favoring an older employee over a younger one."<sup>63</sup> The Court, considering the structure and purpose of the ADEA, reasoned that Congress designed the statute to "manifestly . . . protect the older from arbitrary favor [of] the younger."<sup>64</sup> The Court also looked to precedent, which had not directly addressed the question at issue, but reflected a consistent understanding that the ADEA is a remedy for "unfair preference based on relative youth."<sup>65</sup> The *Cline* case helps illustrate that courts must assess ambiguous terms with multiple meanings in light of the ADEA's context, structure, purpose, and history.

The Court has also considered the meaning of the term "employees."<sup>66</sup> Section 4(a)(2) prohibits limiting, segregating, or classifying "employees" based on their ages.<sup>67</sup> On the surface, the term "employees" seems to refer merely to those individuals that currently have an existing employment

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<sup>57</sup> 29 U.S.C. § 623(a)(1)–(2) (2016).

<sup>58</sup> *Smith*, 544 U.S. at 236 n.6 (discussing the differing treatment of motive between section 4(a)(1) and 4(a)(2), concluding that section 4(a)(1) focuses on the employer's discriminatory motives, therefore authorizing disparate treatment claims).

<sup>59</sup> *Id.* at 236 (concluding that section 4(a)(2) "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer").

<sup>60</sup> *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584 (2004) (determining whether the ADEA prohibits favoring the old over the young in addition to preference for the young over the old).

<sup>61</sup> *Id.* at 586 (agreeing "[i]n the abstract, [that] the phrase is open to an argument for a broader construction, since reference to 'age' carries no modifier and the word could be read to look two ways").

<sup>62</sup> *Id.* at 598.

<sup>63</sup> *Id.* at 600.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 593.

<sup>66</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

<sup>67</sup> 29 U.S.C. § 623(a)(2) (2012).

relationship with an employer. However, in a case involving the claim of a former employee, the Supreme Court held that the term “employees,” as used in a comparable provision in Title VII, was ambiguous.<sup>68</sup> The complainant brought a suit against his former employer alleging that postemployment actions were taken to retaliate against him for a different claim he had filed.<sup>69</sup> The Supreme Court took up the question of whether the term “employees” was limited to current employees or could include former employees.<sup>70</sup> The Court held that the term, “employees,” “standing alone[,] is necessarily ambiguous.”<sup>71</sup> It then considered “whether the context gives the term a further meaning that would resolve the issue in dispute.”<sup>72</sup> The Court concluded that extending coverage to former employees was consistent with the broader context and primary purpose of Title VII, because of “several sections of the statute [that] plainly contemplate that former employees will make use of the remedial mechanisms of Title VII.”<sup>73</sup>

Since the term “employees” has been held to be ambiguous in Title VII’s comparable statutory language, similarly in section 4(a)(2) of the ADEA the term “employees” need not only be taken to be limited to current employees, but rather it could also extend to include prospective employees such as applicants for employment.

However, even if the term “employees” in section 4(a)(2) of the ADEA, standing alone, is taken to mean solely *current* employees of the defendant employer, section 4(a)(2) could still apply to *applicants* because of the interplay of the term “employees” with the phrase “any individual.” An employer that has experience caps in hiring illustrates this point. The employer in this example is, in essence, classifying its employees within the meaning of section 4(a)(2) of the ADEA because it will only hire employees with less than the prescribed experience requirement. Therefore, even in taking “employees” to mean *current* employees of the defendant employer, section 4(a)(2) could still apply to *applicants* because by denying an older, more experienced applicant employment, it is essentially limiting and classifying its employees in a way that deprives “any individual of employment opportunities.”<sup>74</sup> Job applicants are among the “any individuals” who are deprived of employment opportunities by this employer’s limitation of employees.

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<sup>68</sup> *Robinson*, 519 U.S. at 341.

<sup>69</sup> *Id.* at 339.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 343.

<sup>72</sup> *Id.* at 344.

<sup>73</sup> *Id.* at 345. The Court noted section 703(a) as one such section that “includes discriminatory ‘discharge’ as one of the unlawful employment practices against which Title VII is directed.” *Id.*

<sup>74</sup> 29 U.S.C. § 623(a)(2) (2012).

### B. *Comparison of Section 4(a)(2) with Other Sections of the ADEA*

An analysis of the ADEA section 4(a)(2), which looks to the textual differences between this section and other sections of the ADEA and comparable provisions in other statutes, also reaches inconclusive results. This Note breaks down each textual argument both in favor of, and opposed to, the availability of a disparate impact claim for applicants and demonstrates that courts should not put too much weight on the use of any one textual phrase.

In section 4(a)(1), which clearly applies the disparate treatment prohibition to job applicants because of its explicit listing of “refuse to hire” as a covered employment action, Congress uses the phrase “any individual” twice: “It shall be unlawful for an employer to fail or refuse to hire or to discharge *any individual* or otherwise discriminate against *any individual* . . . because of such individual’s age.”<sup>75</sup> Congress also chose to use the same expansive “any individual” language in section 4(a)(2) instead of specifying “any employee,”<sup>76</sup> which it easily could have done. This can lead courts interpreting the statute to reasonably conclude that “any individual,” when used in both sections 4(a)(1) and 4(a)(2), means the same thing—applying to both employees and applicants.<sup>77</sup>

The counterargument is that Congress could have used the phrase “any individual” twice in section 4(a)(2) like it did in 4(a)(1), yet it intentionally chose not to. But this argument is inconclusive; one could just as well say that Congress could have used the term “employees” twice to eliminate this ambiguity, yet it intentionally chose to include the more expansive “any individual” language. Therefore, these countervailing arguments negate the inference that the word choice signals anything meaningful about congressional intent.

The only section of the ADEA that does not use the phrase “any individual” is section 4(a)(3).<sup>78</sup> Section 4(a)(3) makes it unlawful for an employer to “reduce the wage rate of any employee.”<sup>79</sup> The American Association of Retired People (AARP),<sup>80</sup> which has filed numerous amicus

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<sup>75</sup> *Id.* § 623(a)(1) (emphasis added).

<sup>76</sup> Nicholas Piacente, *No Prior Experience Desired: Villarreal v. R.J. Reynolds Tobacco Co. and the Scope of Disparate Impact Claims Under the ADEA*, 91 ST. JOHN’S L. REV. 1005, 1018 (2017).

<sup>77</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012) (“[W]here a word has a clear and definite meaning when used in one part of a . . . document, but has not when used in another, the presumption is that the word is intended to have the same meaning in the latter as in the former part.”).

<sup>78</sup> Brief for the AARP as Amicus Curiae Supporting Appellant at 7, *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288 (11th Cir. 2015) (No. 15-10602) [hereinafter Brief for the AARP].

<sup>79</sup> 29 U.S.C. § 623(a)(3) (2018).

<sup>80</sup> “[The] AARP is a nonprofit, nonpartisan organization with a membership of nearly 38 million . . .” AARP, 2017 AARP ANNUAL REPORT 37 (2017). When an individual reaches the age of fifty, they receive in the mail the dreaded solicitation for membership in the AARP—a symbol of inevitable aging.

curiae briefs to advocate for older workers' right to pursue disparate impact claims,<sup>81</sup> stated the argument aptly: "Section 4(a)(3) demonstrates that Congress knew how to limit a prohibited practice to current employees by using only the term 'employees' and not the broader term 'any individual' in the textual description of the prohibited practice."<sup>82</sup>

This suggests that Congress would have used the phrase "any employee" and not "any individual," if it wanted section 4(a)(2) to only apply to employees, not applicants. Since Congress did not, the argument is that "any individual" should apply broadly to include applicants for employment.

However, a strong counterargument is that other provisions of the ADEA specify both applicants and employees, indicating that Congress knew how to reference job applicants but intentionally chose not to do so in the disparate impact portion.<sup>83</sup> Section 4(c)(2) makes it unlawful for a labor organization to adversely affect an individual's status as an "employee or as an applicant for employment" because of an individual's age.<sup>84</sup> Section 4(d) is the portion that prohibits retaliation against any of the employer's "employees or applicants for employment."<sup>85</sup> These provisions of the ADEA both explicitly specify employees and applicants, which supports an inference that Congress would have added "or applicants for employment" if it intended to cover applicants. This inference becomes stronger when Congress used the omitted phrase in "close proximity,"<sup>86</sup> and these provisions follow shortly after section 4(a)(2).

The question then becomes whether the absence of this phrase in section (a)(2) is meaningful. In answering that question, courts have considered "whether Congress intended its different words to make a legal difference."<sup>87</sup> However, courts are reluctant to draw significance from

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But with that membership also come undeniably valuable benefits. Among those benefits is the AARP's vigorous advocacy for its members' interests, including helping older workers overcome obstacles in the workplace. Brief for the AARP, *supra* note 78, at 1. The AARP has been around and involved in this issue from the beginning. *AARP History*, AARP (May 10, 2010), <https://www.aarp.org/about-aarp/company/info-2016/history.html> (documenting that the AARP was founded in 1958, having evolved from the National Retired Teachers Association, which had been established since 1947). It has also been conducting legal advocacy to advance the legal rights and interests of people fifty and older through its AARP Foundation Litigation (AFL). *AARP Foundation Legal Advocacy*, AARP FOUND., <https://www.aarp.org/aarp-foundation/our-work/legal-advocacy/?intcmp=FTR-LINKS-FOU-LEGAL-EWHERE> (last visited Mar. 13, 2019).

<sup>81</sup> Brief for the AARP, *supra* note 78, at 2 (citing *Smith v. City of Jackson*, 544 U.S. 228 (2005), as a landmark case in which the AARP filed an amicus curiae brief).

<sup>82</sup> *Id.* at 7.

<sup>83</sup> *Dep't of Homeland Sec. v. Maclean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.").

<sup>84</sup> 29 U.S.C. § 623(c)(2) (2012).

<sup>85</sup> *Id.* § 623(d)(2).

<sup>86</sup> *Maclean*, 135 S. Ct. at 919.

<sup>87</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62–63 (2006).

differences in wording between provisions that differ in scope.<sup>88</sup> Section 4(c) covers labor organizations, which protect the combined interests of workers by collective bargaining with their employers.<sup>89</sup> Labor organizations do not directly hire or fire an employer's employees, making the purpose and scope of section 4(c) vastly different than that of section 4(a), which only applies to employers. Section 4(d) creates a retaliation protection, which prohibits employers from taking adverse action against an employee or applicant engaged in a protected activity, such as opposing an unlawful practice.<sup>90</sup> The retaliation coverage is not determined by claims of disparate treatment or disparate impact based on age. Anyone who speaks out against unlawful discrimination is covered by the retaliation provision, making section 4(d) significantly different in scope from section 4(a).

The arguments on both sides of the textual analysis further evidence that we should not put too much weight in the use of the terms "employee" and "any individual" in section 4(a)(2) to try to glean the congressional intent. As explained below, despite the absence of express language implicating applicants in section (a)(2), there is strong reason to believe that Congress intended to cover applicants. A comparison with the language in Title VII helps illuminate this intent.

### C. *Comparison of the ADEA with Title VII*

Since Congress passed the ADEA soon after the passage of Title VII, and because much of the language is similar, courts often compare the language between the two. Section 703(a)(2) of Title VII is the relevant provision that applies to disparate impact claims. It provides in relevant part:

It shall be an unlawful employment practice for an employer—

. . .

(2) 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.<sup>91</sup>

The clear discrepancy between the current disparate impact provisions in Title VII and the ADEA could be read to imply that the ADEA only

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<sup>88</sup> See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 355–56 (2013) (finding a fundamental difference in statutory scope between the provisions of section 2000e-2(m) and Title IX, sections 1981 and 1982 and several provisions of the ADEA and therefore declining to draw inferences from differences between them).

<sup>89</sup> 29 U.S.C. § 623(c) (2012).

<sup>90</sup> *Id.* § 623(d).

<sup>91</sup> 42 U.S.C. § 2000e-2 (2012).



explicitly applies to “employees,” whereas Title VII applies to either “employees or applicants for employment.” Before 1972, however, the relevant portion of Title VII was virtually identical to that of the ADEA.<sup>92</sup> The Equal Employment Opportunity Act of 1972 amended Title VII to add “or applicants for employment” to the language that parallels the ADEA section (4)(a)(2).<sup>93</sup>

The amendment of Title VII has been used to argue that ADEA disparate impact claims should not extend to applicants. The argument goes: it is presumed that Congress acted intentionally by specifically choosing to change Title VII, yet failing to make the same change to the ADEA.<sup>94</sup> The Supreme Court employed this analysis when considering whether the ADEA permitted mixed motive liability or required but-for causation in *Gross v. FBL Financial Services, Inc.*<sup>95</sup> In that case, the Court refused to apply Title VII decisions that had established a “motivating factor” test for disparate treatment claims to the interpretation of the ADEA because Congress had amended Title VII to expressly include that standard, but had intentionally decided not to amend the ADEA in a similar way.<sup>96</sup>

The problem with this argument, however, is that, at the time of the amendment of Title VII that added “or applicants for employment” to section 703(a)(2), there was no reason for Congress to look at the comparable provision in the ADEA. The 1972 Equal Employment Opportunity Act exclusively addressed Title VII. There were no proposed amendments to the ADEA in front of Congress at the time.<sup>97</sup> In contrast, when Title VII was amended to add the motivating factor language in 1991, the ADEA was also “contemporaneously amended . . . in several ways.”<sup>98</sup> Therefore, the argument that we should draw an inference from the fact that Congress did not amend the ADEA at the same time it amended Title VII is attenuated because the ADEA was not before the legislature at the time.

Further, the conference committee report to the Senate stated that the addition of “applicants for employment” to Title VII was intended “to make it clear that discrimination against applicants for employment . . . is an unlawful employment practice” and the additional language was “merely

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<sup>92</sup> *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (“Except for substitution of the word ‘age’ for the words ‘race, color, religion, sex, or national origin,’ the language of that provision in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII).”).

<sup>93</sup> Pub. L. No. 92-261, § 8(a), 86 Stat. 109 (1972).

<sup>94</sup> *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009).

<sup>95</sup> *Id.* at 173.

<sup>96</sup> *Id.* at 175.

<sup>97</sup> *ADEA and Amendments*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/history/adea50th/adea.cfm> (last visited Mar. 13, 2019) (listing the amendments to the ADEA, with the first amendment after its passage in 1967 being in 1974—two years after the amendment to Title VII).

<sup>98</sup> *Gross*, 557 U.S. at 174.

declaratory of present laws.”<sup>99</sup> This signals that the amendment was not necessary in order for the prior language, which mirrors that of the ADEA, to apply to applicants.<sup>100</sup> Congress was merely making it explicitly clear, reiterating what courts had already decided—that the disparate impact language of Title VII covered applicants for employment.

In early cases that established disparate impact liability under the ADEA, courts presumed that Congress intended the text to have the same meaning in both Title VII and the ADEA.<sup>101</sup> In *Griggs v. Duke Power*, the Supreme Court interpreted the language of section 703(a)(2) of Title VII prior to its amendment, making it a reliable reading of how to interpret the nearly identical language that appeared in the ADEA.<sup>102</sup> The Court in *Griggs* held that the same language contained in the ADEA included disparate impact protection for both current employees and job seekers.<sup>103</sup> The Supreme Court has applied the authoritative construction of identical statutory language in *Griggs* as controlling when interpreting section 4(a)(2) of the ADEA.<sup>104</sup> In *Smith v. City of Jackson*, the Court held that *Griggs*’s conclusion that section 703(a)(2) of Title VII allows for disparate impact claims “strongly suggests that a disparate-impact theory should be cognizable under the ADEA.”<sup>105</sup>

Recently, the Supreme Court, in *Texas Department of Housing & Community Affairs v. Inclusive Communities*, held that *Griggs* and other cases interpreting Title VII and the ADEA provided essential background and instruction in interpreting the Fair Housing Act (FHA), even though its wording differed from section 703(a)(2) of Title VII.<sup>106</sup> This provides further support for the use of *Griggs*, which was interpreting Title VII, to interpret other statutes, including the ADEA, despite minor textual differences in the statutes. In *Inclusive Communities*, the Court looked to the three statutes—the FHA, Title VII, and the ADEA—and concluded that despite differences in language, “Congress . . . chose words that serve the same purpose and bear the same basic meaning . . . .”<sup>107</sup> Therefore, a comparison of Title VII

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<sup>99</sup> 118 CONG. REC. 7166, 7169 (Mar. 6, 1972).

<sup>100</sup> See *Rabin v. PricewaterhouseCoopers, LLP*, 236 F. Supp. 3d 1126, 1131 (2017) (finding the amendment to Title VII “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”).

<sup>101</sup> *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

<sup>102</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971).

<sup>103</sup> *Id.* at 430–31. See also *Kleber II*, 914 F.3d 480, 496 (7th Cir. 2019) (Hamilton, J., dissenting) (discussing how to follow the interpretation used in *Griggs* in ADEA cases).

<sup>104</sup> See, e.g., *Smith*, 544 U.S. at 233–34 (describing the *Griggs* analysis as it applies to the ADEA); *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2517 (2015) (citing the ADEA as a “relevant statute that bears on the proper interpretation of the FHA”).

<sup>105</sup> *Smith*, 544 U.S. at 236.

<sup>106</sup> *Inclusive Cmty.*, 135 S. Ct. at 2518.

<sup>107</sup> *Id.* at 2519.

to the ADEA demonstrates that the lack of any reference to “applicants” in the ADEA is not dispositive. It certainly does not support the inference that Congress intended, by that omission, to keep disparate impact claims unavailable to applicants.

#### D. *Legislative History and Intent*

When there is ambiguity in the statutory text, courts often look to legislative history for clarification.<sup>108</sup> In the findings and purpose section of the ADEA, Congress declared that “older workers find themselves disadvantaged . . . especially to regain employment when displaced from jobs . . . .”<sup>109</sup> Further, Congress stated that it was the “purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment . . . .”<sup>110</sup> These declarations indicate that Congress intended the statute to cover age discrimination against more than just employees, but also to extend protection to older applicants.<sup>111</sup>

Outside the statutory text, Congress’s intent is apparent from the Department of Labor’s Wirtz Report.<sup>112</sup> Prior to the enactment of the ADEA, Congress had directed the Department to study and report on factors that might result in discrimination in employment because of age and the consequences of such discrimination.<sup>113</sup> In its findings, the Report described how specific age limits in hiring are one of the most obvious types of age discrimination in employment.<sup>114</sup> Significantly, the Report also addressed employment practices that have a disparate impact, stating that it would be necessary “not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring.”<sup>115</sup>

The Report recommended age discrimination legislation, which provided the initiative for the passage of the ADEA.<sup>116</sup> The ADEA’s statement of findings and purpose incorporates several of the Department of

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<sup>108</sup> See ESKRIDGE JR., *supra* note 53, at 198 (“For more than a century, federal judges have been willing to consider legislative history.”).

<sup>109</sup> 29 U.S.C. § 621(a)(1) (2012).

<sup>110</sup> *Id.* § 621(b).

<sup>111</sup> Senator Ralph Yarborough, the chief sponsor of the ADEA in the Senate, stated “[i]n simple terms, this bill prohibits discrimination in hiring and firing workers.” 113 CONG. REC. 31,248, 31,252 (1967).

<sup>112</sup> In this report, W. Willard Wirtz called age discrimination the “most deserving and much neglected cause” hoping that the report would “provide the impetus for effective measures.” WIRTZ REPORT, *supra* note 1, at ii.

<sup>113</sup> Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. RICH. L. REV. 757, 758 (1997).

<sup>114</sup> WIRTZ REPORT, *supra* note 1, at 6.

<sup>115</sup> *Id.* at 22.

<sup>116</sup> Harper, *supra* note 113, at 762.

Labor's goals and the reasoning in the Wirtz Report, which supports the connection between the Report and the ADEA when analyzing congressional intent.<sup>117</sup> The Supreme Court has also relied repeatedly on the Wirtz Report to interpret the ADEA.<sup>118</sup> In fact, in *Cline*, the Court even went so far as to use the Wirtz Report to conclude that the ADEA did not cover discrimination in favor of older workers, despite statutory language that could support that reading. The Court held that "[t]he ADEA's ban on 'arbitrary limits' thus applies to age caps that exclude older applicants, necessarily to the advantage of younger ones," citing the Wirtz Report as evidence that the intent behind the statute was to protect older applicants.<sup>119</sup>

The Wirtz Report and the statutory purpose articulated in the findings and purpose sections of the ADEA indicate that Congress enacted the ADEA to address discriminatory barriers in the hiring of older workers and intended for the ADEA to protect older prospective job applicants, not just current employees, from practices having a disparate impact.

#### E. EEOC Interpretations

If, even after looking at the ordinary meaning of the text and the legislative history, the statute is still ambiguous, courts may then consider interpretations from the agency charged with enforcing the statute, which has the authority to interpret the statute through rulemaking or adjudication.<sup>120</sup> Courts will uphold agency regulations that interpret ambiguous statutory terms, as long as they are reasonable.<sup>121</sup> This is known as *Chevron* deference, which is granted to administrative interpretations when Congress has delegated authority to the agency to make rules carrying the force of law.<sup>122</sup> The Equal Employment Opportunity Commission

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<sup>117</sup> *Id.* See also *Kleber II*, 914 F.3d 480, 487–88 (7th Cir. 2019) ("Nobody disputes that the Wirtz Report reinforces Congress's clear aim of enacting the ADEA to prevent age discrimination in the workplace by encouraging the employment of older persons, including older job applicants.").

<sup>118</sup> See, e.g., *Smith v. Jackson*, 544 U.S. 228, 254 (2005) (O'Connor, J., concurring) (stating that "the ADEA was modeled on the Wirtz Report's findings and recommendations," so "the Report provides critical insights into the statute's meaning"); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 590 (2004) (noting the "unmistakable references to the Wirtz Report's finding[s]" in the ADEA).

<sup>119</sup> *Cline*, 540 U.S. at 590.

<sup>120</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) ("[T]here is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight . . ."); see also *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (recognizing that "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings" is a good indicator of delegation meriting deference by the courts).

<sup>121</sup> See *Chevron*, 467 U.S. at 844 (stating that such "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"); see also *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) ("[T]he EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference.").

<sup>122</sup> *Mead*, 533 U.S. at 226–27. It is worth acknowledging that the use of *Chevron* deference has been contested and the doctrine significantly narrowed by Supreme Court opinions over the years. See,

(EEOC) enforces the ADEA, and Congress has expressly delegated the authority to issue rules to effectuate the statute to it.<sup>123</sup> Therefore, courts are compelled to defer to reasonable EEOC rules when addressing the meaning of ambiguous statutory language in the ADEA.<sup>124</sup>

The EEOC has issued a disparate impact regulation that states: “Any 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.’”<sup>125</sup> By utilizing the word “individuals,” the EEOC effectively did not distinguish between *prospective* and *existing* employees. Some courts have discussed the regulation as grounds for treating section 4(a)(2) of the ADEA as “covering disparate-impact claims . . . and thus protect[ing] applicants for employment.”<sup>126</sup> Since the EEOC, the agency charged with enforcing the ADEA, has reasonably and consistently interpreted the statute to allow for disparate impact claims by job applicants, this interpretation provides yet another reason for courts to conclude that the ambiguous statutory language should be read to authorize disparate impact claims by applicants.

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*e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (calling for reconsideration of the “premises that underlie *Chevron* and how courts have implemented that decision”); *Michigan v. EPA*, 135 S. Ct. 2699, 2712–13 (2015) (Thomas, J., concurring) (noting that the *Chevron* deference doctrine allows for “potentially unconstitutional delegations” because of its encroachment on judicial powers and consideration of agency policymaking); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.”).

<sup>123</sup> 29 U.S.C. § 628 (2012) (“[T]he Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter . . .”).

<sup>124</sup> *Chevron*, 467 U.S. at 844 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations . . .”). However, when the delegation of rulemaking is not clear from the empowering statute, courts apply *Skidmore* deference. Theodore W. Wern, *Judicial Deference to the EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1539–40 (1999). The EEOC is entitled to *Chevron* deference for interpretations and regulations based on the ADEA. *See Smith v. City of Jackson*, 544 U.S. 228, 245 (2005) (Scalia, J., concurring) (stating that “the EEOC’s reasonable view that the ADEA authorizes disparate-impact claims is deserving of” *Chevron* deference). This is because Congress explicitly delegated to the EEOC the authority to promulgate rules with the force of law. 29 U.S.C. § 628 (2012). However, the EEOC has only been held to have *Skidmore* deference for interpretations of Title VII. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976), *reh’g denied*, 429 U.S. 1079 (1977). This is because the EEOC was not granted the authority to promulgate rules with the force of law under Title VII. *See* 42 U.S.C. § 2000e-12(a) (2012) (granting the EEOC only the authority to issue “suitable procedural regulations” for Title VII).

<sup>125</sup> 29 C.F.R. § 1625.7(c) (2012). *See also* 29 C.F.R. pt. 1625 (1981) (tracing the history of the predecessor regulation which shows that the regulation has been the same for over thirty years).

<sup>126</sup> *Kleber II*, 914 F.3d 480, 504 (7th Cir. 2019) (Hamilton, J., dissenting) (citing *Smith*, 544 U.S. at 266); *see also Villarreal I*, 806 F.3d 1288, 1299 (11th Cir. 2015) (discussing the EEOC’s ADEA disparate impact regulation as extending liability to all individuals within the protected age group and noting that the court “owe[s] deference to the EEOC’s view”).

### III. CURRENT CASE LAW: DISPARATE IMPACT CLAIMS UNDER THE ADEA

From when Congress enacted the ADEA in 1967 to 2015, no court had addressed the question, outside of dicta, whether *applicants* could bring disparate impact claims under the ADEA.<sup>127</sup> However, over the years, courts have applied disparate impact to claims by applicants without raising the issue, but assuming that it applied.<sup>128</sup> In 2015, the Eleventh Circuit in *Villarreal* was the first court to address, as an issue of first impression, whether section 4(a)(2) of the ADEA authorizes disparate impact claims by applicants for employment.<sup>129</sup> A few years later, in 2018, the Seventh Circuit followed suit in *Kleber*.<sup>130</sup>

#### A. *Villarreal v. R.J. Reynolds Tobacco Co.*

##### 1. *Background*

Richard Villarreal applied for a sales position at R.J. Reynolds Tobacco when he was forty-nine years old.<sup>131</sup> However, R.J. Reynolds had a recruiting system that targeted candidates two to three years out of college and steered away from applicants that had eight to ten years of prior sales experience.<sup>132</sup> Therefore, Villarreal's application was effectively screened out of the process, although R.J. Reynolds never responded to the application and did not inform Villarreal of his rejection.<sup>133</sup> Two years later, lawyers contacted Villarreal and told him that he had a viable claim of age discrimination against R.J. Reynolds.<sup>134</sup> Villarreal then filed a charge with the EEOC and applied for the same position five more times, for which he was rejected by R.J. Reynolds every time.<sup>135</sup> Statistics showed that R.J. Reynolds had a history of hiring younger applicants.<sup>136</sup> So, Villarreal brought a lawsuit on behalf of himself and other applicants over the age of forty who R.J. Reynolds also rejected for the position, alleging claims of

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<sup>127</sup> Brice Smallwood, *Extending Disparate Impact Coverage of the ADEA to Applicants: Villarreal v. R.J. Reynolds Tobacco Co.*, 85 U. CIN. L. REV. 473, 479 (2017).

<sup>128</sup> See, e.g., *Katz v. Regents of the Univ. of Cal.*, 229 F.3d 831, 835 (9th Cir. 2000) ("[I]n this circuit, disparate impact claims are cognizable under the ADEA."); *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1997) (stating that disparate impact claims under the ADEA were cognizable); *Geller v. Markham*, 635 F.2d 1027, 1030 (2d Cir. 1980) (finding that the plaintiff had been subjected to a hiring practice with discriminatory impact which "may be applied in ADEA cases").

<sup>129</sup> *Villarreal I*, 806 F.3d at 1290.

<sup>130</sup> *Kleber I*, 888 F.3d 868, 872 (7th Cir. 2018).

<sup>131</sup> *Villarreal II*, 839 F.3d 958, 961 (11th Cir. 2016).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Smallwood, *supra* note 127, at 479–80.

disparate treatment and disparate impact.<sup>137</sup> The district court dismissed the disparate impact claim, and Villarreal appealed.<sup>138</sup>

## 2. *Villarreal I*

When an Eleventh Circuit panel heard the case for the first time on appeal, it “construe[d] § 4(a)(2) of the ADEA to apply to disappointed job applicants like Mr. Villarreal.”<sup>139</sup> Its analysis started with the ordinary language of the statute, looking to Mr. Villarreal’s and R.J. Reynolds’s contrary interpretations of the statutory language.<sup>140</sup> But because both readings seemed “reasonable,”<sup>141</sup> the Eleventh Circuit then analyzed the EEOC’s reading.<sup>142</sup>

The court determined that the EEOC’s regulation “established the agency’s view that § 4(a)(2) protects any individual an employer discriminates against, regardless of whether that individual is an employee or job applicant.”<sup>143</sup> The court noted that the preamble to the EEOC’s regulation makes it clear that its choice of the term “individuals” covered both employees and applicants.<sup>144</sup> The court also looked to the Department of Labor, the agency that had been tasked with enforcement of the ADEA before the EEOC, which had “clarified that neutral ‘pre-employment’ tests must be . . . ‘equally applied to all applicants.’”<sup>145</sup> The EEOC’s subsequent regulation affirmed this longstanding position.<sup>146</sup> Therefore, the Eleventh Circuit found the EEOC’s interpretation to be reasonable and deserving of deference<sup>147</sup> and held that the ADEA’s protection against disparate impact discrimination applies to applicants.<sup>148</sup> However, that holding did not remain

<sup>137</sup> *Villarreal II*, 839 F.3d at 961–62.

<sup>138</sup> Smallwood, *supra* note 127, at 480 (“Like the Seventh, Eighth, and Tenth Circuits, the district court dismissed his disparate impact claim under the theory that only current employees could bring disparate impact claims.”).

<sup>139</sup> *Villarreal I*, 806 F.3d 1288, 1303 (11th Cir. 2015).

<sup>140</sup> “Mr. Villarreal reads § 4(a)(2) to plainly cover his allegations. . . . He says RJ Reynolds ‘limited’ its ‘employees’ in a ‘way which would deprive or tend to deprive’ an ‘individual’ like him ‘of employment opportunities’ because of his age.” *Id.* at 1293. “RJ Reynolds, in turn, directs us to the earlier term ‘his employees.’ It says the later reference to ‘any individual’ only includes these employees.” *Id.*

<sup>141</sup> *Id.* at 1293.

<sup>142</sup> *Id.* at 1299.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1301. The preamble lists “a number of examples of cases involving job applicants” and “declares that the regulation will address ‘neutral practices that act as barriers to the employment of older workers.’” *Id.*

<sup>145</sup> *Id.* at 1302.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1300.

<sup>148</sup> *Id.* at 1303.

for long—R.J. Reynolds petitioned for a rehearing en banc, which the court granted.<sup>149</sup>

### 3. *Villarreal II*

The en banc Eleventh Circuit overturned the panel's decision, divided eight-to-three, holding that the ADEA does *not* protect applicants for employment under a disparate impact theory of liability.<sup>150</sup> The court concluded that the plain text of section 4(a)(2) only covered discrimination against employees, not applicants for employment.<sup>151</sup> It came to this conclusion through a textual analysis that emphasized the phrase "or otherwise adversely affect his status as an employee"<sup>152</sup> in section 4(a)(2), which states that it is 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."<sup>153</sup> The court held that this phrase made the first action, "deprive or tend to deprive," a subset of the second action, "adversely affect his status as an employee,"<sup>154</sup> meaning an individual is only protected if he has a status as an employee. It then invoked statutory context to confirm its reading of the section by contrasting section 4(a)(2), which omits any reference to job applicants, with other parallel provisions that expressly reference applicants as well as employees.<sup>155</sup> The Eleventh Circuit refused to consider the legislative history or to defer to the EEOC's interpretation of the statute since it found the text to be clear.<sup>156</sup>

Judge Martin, writing for the dissent, stated "the majority's holding[] in this case do[es] harm to this court's precedent and to the nation's anti-discrimination laws."<sup>157</sup> The dissent contended that the plain text of the ADEA, agency interpretations, and the landmark decision of *Griggs* all point to reaching an opposite conclusion than the majority.<sup>158</sup> Since the dissent did not prevail, Mr. Villarreal petitioned the United States Supreme Court,

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<sup>149</sup> Samantha Pitsch, *Quick, Stop Hiring Old People! How the Eleventh Circuit Opened the Door for Discriminatory Hiring Practices Under the ADEA*, 92 WASH. L. REV. 1605, 1630 (2017).

<sup>150</sup> *Villarreal II*, 839 F.3d 958, 963 (11th Cir. 2016).

<sup>151</sup> *Id.*

<sup>152</sup> 29 U.S.C. § 623(a)(2) (2012); *Villarreal II*, 839 F.3d at 963 ("By using 'or otherwise' to join the verbs in this section, Congress made 'depriv[ing] or tend[ing] to deprive any individual of employment opportunities' a subset of 'adversely affect[ing] [the individual's] status as an employee.'").

<sup>153</sup> 29 U.S.C. § 623(a)(2) (2012) (emphasis added).

<sup>154</sup> *Villarreal II*, 839 F.3d at 963–64.

<sup>155</sup> *Id.* at 966.

<sup>156</sup> *Id.* at 969–70.

<sup>157</sup> *Id.* at 981 (Martin, J., dissenting).

<sup>158</sup> *Id.*



which eventually denied certiorari.<sup>159</sup> No other circuit court addressed the issue until the Seventh Circuit in *Kleber*.

## B. *Kleber v. CareFusion*

### 1. *Background*

Dale Kleber, a fifty-eight-year-old attorney, was actively looking for a job after his previous employment ended in 2011.<sup>160</sup> He had extensive legal and business experience and applied to more than 150 positions without any success.<sup>161</sup> After a few years, he applied for the senior counsel position with CareFusion Corporation.<sup>162</sup> The job posting listed several requirements suitable to Kleber's experience.<sup>163</sup> This posting, however, dictated that applicants must have *only* three to seven years of relevant legal experience, and *not more than* seven years.<sup>164</sup> CareFusion did not select Kleber for an interview and filled the position with a twenty-nine-year-old.<sup>165</sup> Kleber filed suit claiming disparate treatment and disparate impact, alleging the seven years maximum experience cap had a disparate impact on qualified applicants over the age of forty, like himself.<sup>166</sup>

### 2. *Kleber I*

Similar to *Villarreal I*, the Seventh Circuit panel that decided *Kleber I* held that the language of the ADEA did not bar a disparate impact claim for applicants.<sup>167</sup> The court stated that “protect[ing] both outside job applicants and current employees . . . is the better reading of the statutory text.”<sup>168</sup> It cited the purpose of the ADEA, previous case law, and similar language from other employment discrimination statutes, such as the “virtually identical statutory language in Title VII,” as support for holding in favor of protecting job applicants from disparate impact employment discrimination in hiring.<sup>169</sup>

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<sup>159</sup> *Villarreal II*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).

<sup>160</sup> *Kleber I*, 888 F.3d 868, 871 (7th Cir. 2018).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *See id.* (“The job posting called for ‘a business person’s lawyer’ with the ability ‘to assume complex projects,’ which we must assume would be well-suited to Kleber’s skills and experience.”).

<sup>164</sup> *Id.* The court also noted that CareFusion qualified its maximum experience cap as an “objective criterion based on the reasonable concern that an individual with many more years of experience would not be satisfied with less complex duties . . . which could lead to issues with retention.” *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* The district court dismissed the disparate impact claim relying on a previous Seventh Circuit decision in *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994), which held that the ADEA’s disparate impact provision did not cover job applicants not already employed by the defendant. *Id.* at 872.

<sup>167</sup> *Id.* at 889.

<sup>168</sup> *Id.* at 870.

<sup>169</sup> *Id.*

The panel began its analysis with the statutory language and the "overall statutory scheme" of the ADEA.<sup>170</sup> The court held that although section 4(a)(2) does not refer specifically to applicants or hiring decisions, its "broad language easily reaches employment practices that hurt older job applicants as well as current employees."<sup>171</sup> It explained that "[i]f an employer classifies a position as one that must be filled by someone with certain minimum or maximum experience requirements, it is classifying its employees,"<sup>172</sup> and job applicants who are disqualified as a result are also "individual[s]" deprived of employment opportunities by this classification of employees. Looking specifically at the "status as an employee" language, the court maintained:

[I]f Congress really meant to outlaw employment practices that tend to deprive older workers of employment opportunities, which it did, *but at the same time deliberately chose to leave a wide array of discriminatory hiring practices untouched*, its use of the phrase "status as an employee" would have been a remarkably indirect and even backhanded way to express that meaning.<sup>173</sup>

Additionally, the Seventh Circuit panel considered what the outcome would be if it were to hold that disparate impact liability was not available for outside job applicants, calling the result "arbitrary and even baffling."<sup>174</sup> The court illustrated this unfairness by supposing that there were two applicants for the CareFusion position—both were in their fifties with more than seven years of experience. However, one of the applicants, like Kleber, did not currently have a job at CareFusion and the other applicant was a current employee which had applied for the job as a transfer or promotion. In this situation, only the applicant who already worked for CareFusion could sue for disparate impact violation, but the external applicant could not.<sup>175</sup> The court concluded that it could not "imagine a plausible policy reason for drawing that arbitrary line" between inside and outside applicants of an employer.<sup>176</sup>

However, the Seventh Circuit, similar to the Eleventh Circuit in *Villarreal I*, granted a motion for rehearing en banc in *Kleber*,<sup>177</sup> vacating the panel's initial decision.

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<sup>170</sup> *Id.* at 872 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 874.

<sup>174</sup> *Id.* at 875.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 875–76.

<sup>177</sup> Mulvaney, *supra* note 9.

### 3. *Kleber II* Majority Opinion

Upon rehearing, the en banc panel was divided eight-to-four<sup>178</sup> when it held that the “plain language of § 4(a)(2) makes clear that Congress, while protecting employees from disparate impact age discrimination, did not extend that same protection to outside job applicants.”<sup>179</sup> The en banc court based its conclusion on the plain language of the ADEA, reinforced by “the ADEA’s broader structure and history.”<sup>180</sup>

In its plain language analysis, the Seventh Circuit found that common dictionary definitions of “applicants” and “employees” confirmed that applicants have no “status as an employee.”<sup>181</sup> Moreover, the court interpreted Congress’s word choice in the “or otherwise” clause as a catchall formulation extending “employee” to the rest of the sentence.<sup>182</sup> This grammatical construction connects the “any individual” language to “status as an employee,” limiting the section, in the court’s opinion, to employees.<sup>183</sup> The court also made the comparison to other provisions of the ADEA that distinguish between employees and applicants, drawing the conclusion that because section 4(a)(2) only mentions employees and not applicants, Congress only authorized employees to bring disparate impact claims.<sup>184</sup>

The Seventh Circuit declined to resolve the question presented on the basis of statutory purpose or legislative history, stating that it would not use “an interpretation of but one provision of the ADEA . . . to advance the enactment’s full objectives.”<sup>185</sup> The court concluded its responsibility was to interpret section 4(a)(2) as it stands, based solely on its plain meaning.<sup>186</sup> Overall, the court felt it “le[ft] teeth in § 4(a)(2)”<sup>187</sup> because although its decision was unfavorable to Kleber, it still protects older employees who encounter age-based disparate impact discrimination in the workplace.

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<sup>178</sup> *Kleber II*, 914 F.3d 480, 480–81 (7th Cir. 2019).

<sup>179</sup> *Id.* at 481.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 482 (citing MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 60, 408 (11th ed. 2003), which defines “applicant” as “one who applies,” including, for example, “a job [applicant],” while defining “employee” as “one employed by another usu[ally] for wages or salary”).

<sup>182</sup> *Id.* at 482–83. *But see id.* at 483 (qualifying that “[i]f the only question were whether a job applicant counts as ‘any individual,’ Kleber would be right”). This argument is also made in *Villarreal II* when the Eleventh Circuit interpreted similarly that the “or otherwise” language “operates as a catchall: the specific items that precede it are *meant* to be subsumed by what comes after the ‘or otherwise.’” *Villarreal II*, 839 F.3d 958, 964 (11th Cir. 2016).

<sup>183</sup> *Kleber II*, 914 F.3d at 483 (“The clear takeaway is that a covered individual must be an employee.”).

<sup>184</sup> *Id.* at 484–85.

<sup>185</sup> *Id.* at 488.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

#### 4. *Kleber II Dissent*

Four judges dissented from the outcome in *Kleber II*.<sup>188</sup> Judge Hamilton, writing in an opinion much longer than the majority's, dissented based on the reading of the statutory text and a comparison to Title VII's disparate impact provision, which protects both current employees and job-seekers.<sup>189</sup> Hamilton advocated for a reading that would better align with the purpose of the ADEA and which would avoid drawing an "utterly arbitrary line."<sup>190</sup> The dissent asked some important questions, such as: "How does one read a bar against depriving 'any individual' of 'employment opportunities' to exclude all cases where a person is looking for a job? And if Congress meant to limit the provision's coverage only to current employees, why didn't it just use the word 'employee'?"<sup>191</sup> The dissent also argued that even if the court were to apply the majority's conclusion that "status as an employee" must be implicated to have a disparate impact claim, an employer refusing to hire an individual would still fall under section 4(a)(2) because that has "the most dramatic possible adverse effect on that individual's 'status as an employee.'"<sup>192</sup>

The dissent also focused on the congressional intent behind enacting the ADEA, which was to address "the incidence of unemployment, especially long-term unemployment" among older workers, particularly the difficulty they faced in trying to "regain employment."<sup>193</sup> Similarly, the dissent looked to the practical consequences of the different readings of section 4(a)(2), concluding that the majority's arbitrary line "undermines the stated purpose of the statute."<sup>194</sup>

Judge Easterbrook, joining Judge Hamilton's dissent in part and also writing his own, argued that "the statute lacks a plain meaning" because it is unclear whether or not the term "individual" includes applicants for employment.<sup>195</sup> He reasoned that under the majority's holding, the word "individual" has two different meanings within two paragraphs—it includes applicants for employment in section 4(a)(1), but only means current or former employees in section 4(a)(2).<sup>196</sup> Easterbrook emphasized that

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<sup>188</sup> Judges Hamilton, Wood, Rovner, and Easterbrook dissented in *Kleber II*. *Id.* at 489 (Hamilton, J., dissenting).

<sup>189</sup> *Id.* at 490.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 492.

<sup>192</sup> *Id.* at 493. The dissent further states that "[i]f Congress really meant to exclude job applicants from disparate impact protection, the phrase 'status as an employee' was a remarkably obscure and even obtuse way to express that meaning." *Id.* at 494.

<sup>193</sup> *Id.* at 494 (citing the statute's stated purpose at 29 U.S.C. § 621(a)(3) (internal quotations omitted)).

<sup>194</sup> *Id.* at 507.

<sup>195</sup> *Id.* at 488 (Easterbrook, J., dissenting).

<sup>196</sup> *Id.* at 488–89.

normally, when one word is used in an adjacent paragraph, the word “means a single thing,”<sup>197</sup> yet the majority failed to “explain why the statute would use ‘individual’ in dramatically different ways within the space of a few words.”<sup>198</sup> However, Judge Easterbrook took issue with Judge Hamilton’s reliance on legislative purpose, stating that the court’s “job is to apply the enacted text . . . not to plumb legislators’ hopes and goals.”<sup>199</sup>

#### IV. THE RESULT: ARBITRARY DIFFERENTIAL TREATMENT OF EMPLOYEES AND APPLICANTS

With their recent decisions, the Seventh and Eleventh Circuits have effectively permitted discrimination based on age by creating substantial barriers to employment for older individuals.<sup>200</sup> The Eleventh Circuit seemed to reason that even though older applicants are not protected under the ADEA for disparate impact, they still have recourse for disparate treatment.<sup>201</sup> But that reasoning disregards the most salient problem many older workers face, which is not outright discrimination, but rather neutral hiring policies that prevent them from getting jobs for which they are more than qualified. Further, intentional discrimination is notoriously difficult to prove.<sup>202</sup> Therefore, the Eleventh Circuit’s reasoning fails to adequately protect older job applicants unless a plaintiff can prove a hiring policy to be truly arbitrary, thus supporting an inference of discriminatory purpose.

Additionally, Congress intended the ADEA to afford more protection to applicants. The attorney for the AARP Foundation Litigation representing Dale Kleber stated that “[t]he importance of the ADEA law is less about people being able to sue for age discrimination and more about making sure that employers are not shaping their hiring processes in ways that prevent older workers from getting jobs.”<sup>203</sup> Several courts’ usage of the Wirtz Report when interpreting the ADEA enforces this perspective because the Report clarifies the congressional intent as one of promoting “hiring on the basis of ability rather than age.”<sup>204</sup> The Wirtz Report’s emphasis on hiring

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<sup>197</sup> *Id.* (citing ANTONIN SCALIA & BRYAN A. GARNER, *Canon 25: Presumption of Consistent Usage*, in *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (1st ed. 2012)).

<sup>198</sup> *Id.* at 489.

<sup>199</sup> *Id.* at 488.

<sup>200</sup> Commentators have called the *Kleber II* decision a “setback to older job applicants.” Jonathan Stempel, *Age Bias Law Does Not Cover Job Applicants: U.S. Appeals Court*, REUTERS (Jan. 23, 2019, 7:50 PM), <https://www.cnbc.com/2019/01/23/reuters-america-age-bias-law-does-not-cover-job-applicants-u-s-appeals-court.html>.

<sup>201</sup> *Villarreal II*, 839 F.3d 958, 970 (11th Cir. 2016).

<sup>202</sup> Carolyn Wheeler, *Seventh Circuit Joins Other Courts in Rejecting ADEA Impact Claims by Job Applicants*, KATZ, MARSHALL & BANKS, LLP (Jan. 29, 2019), <https://www.kmblegal.com/employment-law-blog/seventh-circuit-joins-other-courts-rejecting-adea-impact-claims-job-applicants>.

<sup>203</sup> Kenneth Terrell, *Age Discrimination Law Protects Job Applicants*, AARP (Apr. 27, 2018), <https://www.aarp.org/work/working-at-50-plus/info-2018/job-applicants-age-discrimination.html>.

<sup>204</sup> WIRTZ REPORT, *supra* note 1, at 22.

elucidates that Congress's enactment of the ADEA came from a place of concern for older applicants.

The question remains why Congress would make such an arbitrary distinction between employees and applicants. The court in *Kleber I* noted that "we have not been presented with, and could not imagine on our own, a plausible policy reason why Congress might have chosen to allow disparate impact claims by current employees, including internal job applicants, while excluding outside job applicants."<sup>205</sup> That Congress would make such an arbitrary distinction is unlikely, and the fact that courts have found this distinction to be implied by a mere wording difference is illogical. This exemplifies that a purely textual approach in interpreting statutes can lead to an absurdity in results.

However, the Supreme Court has held that "a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."<sup>206</sup> Several state legislatures have codified the understanding that absurd results are not intended.<sup>207</sup> Here, an overly literal application of section 4(a)(2) has led the courts awry, eschewing basic conceptions of fairness and proportionality. A reasonable interpretation of the language, taking the legislative purpose into consideration, would resolve this arbitrary and absurd distinction between employees and applicants and allow for disparate impact claims by applicants under the ADEA.

## V. RECOMMENDATIONS MOVING FORWARD

This Note recommends two different approaches to resolving the issue of whether the ADEA protects job applicants on a disparate impact theory of liability. First, advocates can seek decisions from other circuits with the hope of creating a circuit split that will lead to Supreme Court review. Alternatively, an outright congressional amendment to the ADEA, to eliminate any ambiguity in the language of section 4(a)(2), would clarify Congress's intent to protect older applicants in employment.

### A. *Supreme Court Review*

Other circuit courts can, and should, weigh in on this issue. It is important, despite the holdings in *Villarreal II* and *Kleber II*, to note that the

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<sup>205</sup> *Kleber I*, 888 F.3d 868, 870 (7th Cir. 2018).

<sup>206</sup> *United States v. Katz*, 271 U.S. 354, 357 (1926).

<sup>207</sup> *See, e.g.*, MINN. STAT. ANN. § 645.17(1) (Westlaw through legislation effective through July 1, 2019) ("[T]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable . . ."); TEX. GOV'T CODE § 311.021(3) (Westlaw through legislation effective May 29, 2019) ("In enacting a statute, it is presumed that . . . a just and reasonable result is intended . . .").

fight is not entirely over for older job applicants. The fact that despite the Eleventh Circuit's earlier en banc decision disallowing disparate impact claims by job applicants, the Seventh Circuit initially felt comfortable enough to hold differently and create a circuit split on the issue is cause for some hope. If another circuit addresses this issue, it could create a circuit split, which might prompt the United States Supreme Court to review the issue and resolve it once and for all.<sup>208</sup> If the Supreme Court does review this issue, the Court should interpret the ADEA as allowing older job applicants to make disparate impact claims. The Supreme Court can do this by adopting the initial interpretations in *Villarreal I* and *Kleber I*, which this Note argues were correctly decided before their rehearings en banc.

First, the Supreme Court should find that the text of the ADEA is ambiguous. The Court should then look to the legislative purpose and intent behind Congress's enactment of the ADEA. The Court is also compelled to defer to the EEOC's interpretation under *Chevron*, which treats employees and applicants alike. By following the purpose and intent of the ADEA and the EEOC interpretation, the Supreme Court would be able to hold in favor of older applicants receiving disparate impact protection.

Unfortunately, since there is no clear circuit split, Supreme Court review seems unlikely at this juncture. The Supreme Court denied review in *Villarreal*,<sup>209</sup> and denied Dale Kleber's recent petition for certiorari.<sup>210</sup> Alternatively, the en banc panel in the majority opinion of *Kleber II* invited Congress to review ADEA section 4(a)(2), proclaiming in its opinion that "Congress, of course, remains free to do what the judiciary cannot—extend [section] 4(a)(2) to outside job applicants, as it did in amending Title VII."<sup>211</sup> A congressional amendment would be the quickest way to clarify congressional intent.

### B. Congressional Amendment to the ADEA

When courts have misconstrued what Congress intended, Congress has good reason to step in to amend the statute in order to clarify what it meant.<sup>212</sup> Therefore, Congress should amend the ADEA to effectuate its

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<sup>208</sup> Lorraine Bailey, *Full Seventh Circuit Hears Age-Bias Arguments*, COURTHOUSE NEWS SERV. (Sept. 6, 2018), <https://www.courthousenews.com/full-seventh-circuit-hears-age-bias-arguments/>.

<sup>209</sup> *Villarreal II*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).

<sup>210</sup> *Kleber II*, 914 F.3d 480 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 306 (2019). *See also* Patrick Dorrian, *Justices Won't Review Age Bias Protections for Outside Applicants*, BLOOMBERG L. (Oct. 7, 2019, 9:50 AM), <https://news.bloomberglaw.com/daily-labor-report/justices-wont-review-age-bias-protections-for-outside-applicants> (noting the importance Supreme Court review would have on the "job prospects of millions of older workers as well as the stability of the U.S. economy").

<sup>211</sup> *Kleber II*, 914 F.3d at 488.

<sup>212</sup> *See* *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) ("It is not for [the Court] to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.").

intent of protecting older applicants for employment. The simplest way to do this would be to amend section 4(a)(2) to expressly include "applicants for employment" after "to limit, segregate, or classify his employees."<sup>213</sup> This language would mirror Title VII and bring the ADEA in line with its stated purpose.

Congress has frequently enacted clarifying amendments in the past to overturn Title VII decisions that misconstrued congressional intent. For instance, the Pregnancy Discrimination Act<sup>214</sup> and several aspects of the Civil Rights Act of 1991<sup>215</sup> were aimed at overturning Supreme Court decisions that narrowly construed Title VII.<sup>216</sup>

A congressional amendment would be the fastest and most effective way to resolve this issue, but getting anything through today's Congress may prove difficult.<sup>217</sup> However, this minor amendment to the ADEA might not be controversial, as it would merely afford older job applicants the same protections against discrimination that people already have when they face hiring practices with a discriminatory impact based on race, sex, or religion. Additionally, the amendment would surely have the backing of the AARP, which has proved to be a powerful lobbyist.<sup>218</sup> This issue is, and should be, enough to warrant congressional action. Older job applicants are waiting for Congress to afford them the same protections as employees. Congress should work in a bipartisan manner to benefit the aging workforce population.

## CONCLUSION

The ADEA provides a significant protection for older working Americans, but it has been over fifty years since Congress enacted the ADEA and courts still do not enforce it the way Congress intended. Congress made it abundantly clear in the ADEA's statement of purpose that the intent was to protect older workers in their search for employment when

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<sup>213</sup> 29 U.S.C. § 623(a)(2) (2012).

<sup>214</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978). The Pregnancy Discrimination Act amended Title VII to prohibit discrimination on the "basis of pregnancy, childbirth, or related medical conditions." *Id.*

<sup>215</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The Civil Rights Act of 1991, among other things, codified the disparate impact theory of discrimination, overturning aspects of the Supreme Court decision of *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

<sup>216</sup> See also Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (overturning the Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), stating that each paycheck which contained discriminatory compensation is a separate violation regardless of when the discrimination began); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (responding to and overturning a number of Supreme Court decisions which had interpreted the ADA to limit the rights of persons with disabilities).

<sup>217</sup> See Jay Cost, *Why Congress Can't Manage to Get Anything Done*, N.Y. POST (Apr. 22, 2018), <https://nypost.com/2018/04/22/why-congress-cant-manage-to-get-anything-done/> (describing Congress as "[b]eset by gridlock and petty partisanship").

<sup>218</sup> See *supra* note 80 and accompanying text.



displaced from jobs. Taken together, the textual analysis, the legislative history, and deference to the EEOC's interpretation all confirm that Congress intended the ADEA to cover applicants from discriminatory practices that have a disparate impact.

“Over-the-Hill” birthday parties should be a time of celebration, not a time of concern because an individual's age leaves him or her vulnerable to barriers to employment. In order to ensure that older workers are hired based on their ability rather than denied based on their age, disparate impact claims ought to be cognizable for job applicants under the ADEA.