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DISPARATE IMPACT UNDER THE ADEA: APPLICANTS NEED NOT APPLY

L. Whitney Woodward*

INTRODUCTION

Generally, American employment's default rule is employment at will, meaning that unless agreed upon otherwise, employers are free to hire and fire who they wish for any reason or no reason, so long as the employer's reason is not illegal.[1] Though this approach provides benefits to both employers and employees,[2] employer practices before the mid-1960s often used this default position of employment at will to unfairly discriminate against their employees for innate characteristics, like race, gender, and age.[3] To combat certain discriminatory practices, Congress, in 1964, passed Title VII of the Civil Rights Act (Title VII), which prohibits workplace discrimination on the bases of race, color, sex, religion, and national

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1. STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 7, 395 (LexisNexis ed., 5th ed. 2012); *see also The At-Will Presumption and Exceptions to the Rule*, NAT'L ASS'N OF ST. LEGISLATORS, http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/HA3G-UGZE] (last visited Sept. 21, 2019) ("Thus far, Montana is the only state [in the United States] to have completely eliminated the at-will rule.").

2. Marilyn Lindblad, *Advantages & Disadvantages of At-Will Employment*, BIZFLUENT (Sept. 26, 2017), https://bizfluent.com/info-8533105-advantages-disadvantages-atwill-employment.html [https://perma.cc/V6EJ-E5J5]; Catherine Lovering, *Good Things About At-Will Employment*, SMALL BUS.-CHRON., https://smallbusiness.chron.com/good-things-atwill-employment-34594.html [https://perma.cc/U4MA-UQTB] (last visited Sept. 24, 2019). Employment at will arrangements retain the benefit of choice for both employees and employers—the choice to walk away from the employment relationship if it is not working for either party. Lindblad, *supra*; Lovering, *supra*.

3. *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 380–81 (1976) (discussing Age Discrimination in Employment Act's creation); Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SOC'Y FOR HUM. RESOURCE MGMT. (May 21, 2014), https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx [https://perma.cc/4VWC-DYCZ].

origin.[4] Although its drafters contemplated prohibiting discrimination against older workers, Title VII is silent regarding age.[5] This missing protection, however, was remedied in 1967 with the passage of the Age Discrimination in Employment Act (ADEA), which stands outside Title VII protections and prohibits age-based employment discrimination.[6]

Under Title VII, both non-employee applicants and employees alleging employment-based discrimination may bring suit under a disparate treatment theory, a disparate impact theory, or both.[7] Disparate treatment claims involve the employer's intentional discrimination based on a prohibited factor under the law.[8] In contrast, disparate impact claims involve employer practices that are facially neutral but permit an individual to prove employment discrimination based on the effect of an employment policy or practice on a protected class, rather than the employer's intent behind it.[9] Though many of Title VII's interpretations were applied analogously to discrimination claims under the ADEA, the disparate impact theory was not explicitly recognized as applicable to employees in the ADEA context until *Smith v. City of Jackson*.[10]

4. *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/statutes/titlevii.cfm [https://perma.cc/4PFN-2J7H] (last visited Aug. 8, 2019). "[A]fter the longest debate in its nearly 180-year history, the U.S. Senate passes the Civil Rights Act of 1964. The vote in favor of the bill is [seventy-three] to [twenty-seven]. Five hundred amendments were made to the bill and Congress has debated the bill for 534 hours." *1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/history/35th/milestones/1964.html [https://perma.cc/VNP8-64XE] (last visited Sept. 24, 2019).

5. Smith v. City of Jackson, 554 U.S. 228, 232 (2005) (citing Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 587 (2004)) ("During the deliberations that preceded the enactment of the Civil Rights Act of 1964, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination."); *see* Jeremy J. Glenn & Katelan E. Little, *A Study of the Age Discrimination in Employment Act of 1967*, 31 GPSOLO 40, 42 (2014).

6. *The Age Discrimination in Employment Act of 1967*, *supra* note 3, at 381.

7. WILLBORN ET AL., *supra* note 1, at 395.

8. *Employment Tests and Selection Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/policy/docs/factemployment_procedures.html [https://perma.cc/W5YM-J3D2] (last visited Sept. 24, 2019).

9. *Id.*

10. *Smith*, 554 U.S. at 233–34, 240. "[We] now hold that the ADEA does authorize recovery in 'disparate[]impact' cases comparable to *Griggs*. Because, however, we conclude that petitioners have not set forth a valid disparate[]impact claim, we affirm." *Id.* at 232. In *Smith*, although the Court agreed that a disparate impact right existed under the ADEA, the petitioner-employees were not successful in

However, *Smith* involved an *employee's* ability to bring a claim of disparate impact age discrimination and did not address whether the theory of recovery was available to non-employee job applicants, leaving the question open as to whether applicants for employment have a cognizable claim under the ADEA's disparate impact theory.[11] Part I[12] of this Note addresses the current debate on this topic, illustrated through case law in the Eleventh Circuit,[13] the Seventh Circuit,[14] and a recent federal district court ruling in the Ninth Circuit.[15] Part II analyzes the unambiguous, textual differences between the various subsections of the ADEA as well as the textual differences between Title VII and the ADEA.[16] This Note explores these textual arguments through an analysis of the statutes and interpretative case law and concludes that, as drafted, the disparate impact theory of age discrimination should not be available to non-employee job applicants.[17] Part III illustrates why utilizing a disparate impact theory of recovery in age discrimination cases is futile for non-employee job applicants, demonstrates why the current position held[18] by the Equal Employment Opportunity Commission (EEOC), the administrative agency responsible for the ADEA's enforcement,[19] should not be determinative on this matter,[20] and

their claim of age-based discrimination because the employer had a "reasonable factor other than age" for the employment action. *Id.* at 244.

11. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1292 (11th Cir. 2015), *rev'd en banc*, 839 F.3d 958 (11th Cir. 2016).

12. *See infra* Part I.

13. *See, e.g.*, *Villarreal*, 806 F.3d at 1288 (2015).

14. *See, e.g.*, Kleber v. CareFusion Corp., 888 F.3d 868 (7th Cir. 2018), *aff'd on reh'g en banc*, 914 F.3d 480 (7th Cir. 2019).

15. *See, e.g.*, Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126 (N.D. Cal. 2017).

16. *See infra* Part II.

17. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 969 (11th Cir. 2016).

18. 29 C.F.R. § 1625.2 (2007); 29 C.F.R. § 1625.7(c)(2012).

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

29 C.F.R. § 1625.2 (2007) (emphasis added).

19. *About EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/index.cfm [https://perma.cc/CD84-GNZF] (last visited Sept. 24, 2019). The

proposes a new pathway to support older job applicants in their quests for employment.[21] This Note advocates for Congress, through legislative action, and the EEOC, through its rulemaking responsibilities, to develop incentives and education initiatives for employers to eliminate the unconscious biases and stereotypes often encumbering older workers.[22]

I. Background

Although the ADEA recognizes disparate treatment claims for both employees and applicants,[23] the ADEA's recently recognized disparate impact language, appearing in Title 29, § 623(a)(2) of the United States Code, contains slightly different language.[24] In *Smith*, the Court first recognized the disparate impact theory for *employees* under the ADEA but also noted that this theory is narrower under the ADEA than it is under Title VII.[25] Although Title VII explicitly

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EEOC enforces employment discrimination laws provided under various federal laws like Title VII and the ADEA. *Id.* One of the agency's primary responsibilities is to investigate discrimination charges raised by workers, make a finding, and either settle with or sue the employer in response to discriminatory behavior. *Id.*

20. *Villarreal*, 839 F.3d at 970.

> Because "[t]he judiciary is the final authority on issues of statutory construction," we must first "employ[] [the] traditional tools of statutory construction" to determine whether the meaning of the statute is clear. Although employing the traditional tools of statutory construction may require some effort, that effort does not make a text ambiguous. We have employed the traditional tools of statutory interpretation here, and we conclude that the only reasonable meaning of the statute is that a job applicant cannot sue under [§] 4(a)(2).

Id. (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)) (citing Wagner Seed Co. v. Bush, 946 F.2d 918, 924 (D.C. Cir. 1991)) (citations omitted).

21. *See infra* Part III.

22. *See infra* Part III.

23. ADEA, 29 U.S.C. § 623(a)(1) (2012) ("It shall be unlawful for an employer . . . to fail or refuse to hire or 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 ").

24. *Id.* § 623(a)(2) ("It shall be 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 ").

25. Smith v. City of Jackson, 554 U.S. 228, 240 (2005). *Smith* involved claims by age forty and older employees, arguing that the city's adopted pay plan, granting raises to all city employees, provided a greater percentage of income raises to younger employees than older employees. *Id.* at 230. The pay plan's purpose was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability" and accomplished this purpose partly through bringing all

recognizes that both employees and job applicants may raise disparate impact claims,[26] the question of whether non-employee job applicants may raise disparate impact claims under the ADEA remains unsettled.[27] The following cases illustrate this timely debate.[28]

A. *The Eleventh Circuit:* Villarreal v. R.J. Reynolds Tobacco Co.

In *Villarreal*, the Eleventh Circuit Court of Appeals considered whether a non-employee job applicant could sue a potential employer for age discrimination under the ADEA pursuant to a disparate impact theory.[29] In 2007, forty-nine-year-old Richard Villarreal applied for a territory manager position with R.J. Reynolds Tobacco Company (R.J. Reynolds).[30] The position guidelines targeted candidates "[two to three] years out of college," and more specifically, sought applicants who "adjust[] easily to changes."[31] The job position's recruiter was also advised to "'stay away from' applicants 'in sales for [eight to ten] years.'"[32] Villarreal applied to work at R.J. Reynolds six times but was screened out based on the aforementioned guidelines or rejected each time.[33]

In May 2010, Villarreal filed a charge of discrimination with the EEOC, alleging that R.J. Reynolds discriminated against him because

starting salaries of police officers up to the regional average. *Id.* at 231. Those with less tenure benefited from the pay adjustments with higher percentage of pay adjustments than the percentage of pay adjustments for higher tenured police officers. *Id.* The claimants in the case consisted of officers with more seniority (i.e., more than five years of service) who also happened to be age forty and over. *Id.*

26. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2)(2012).

27. *See* Kleber v. CareFusion Corp., 888 F.3d 868, 870 (7th Cir. 2018), *aff'd on reh'g en banc*, 914 F.3d 480 (7th Cir. 2019) (holding, before vacated en banc, that both employees and applicants may sue employer or potential employer, respectively, for age discrimination under disparate impact theory); Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016) (holding that applicant cannot sue potential employer for age discrimination under disparate impact theory); Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1133 (N.D. Cal. 2017) (holding that both employees and applicants may sue an employer or potential employer, respectively, for age discrimination under disparate impact theory).

28. *See Kleber*, 888 F.3d at 871; *Villarreal*, 839 F.3d at 961; *Rabin*, 236 F. Supp. 3d at1127.

29. *Villarreal*, 839 F.3d at 961.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

of his age.[34] After receiving an EEOC right-to-sue letter[35] in April 2012, Villarreal filed an age discrimination suit against R.J. Reynolds.[36] One count[37] of the plaintiff's complaint alleged disparate impact under ADEA § 4(a)(2).[38]

The district court dismissed the plaintiff's disparate impact claim, holding that only employees, not job applicants, could pursue a disparate impact theory of recovery under the ADEA.[39] In 2015, a divided panel of the Eleventh Circuit Court of Appeals reversed the lower court's decision, ruling as a matter of first impression that § 4(a)(2) of the ADEA authorized applicants for employment—not just employees—to bring disparate impact claims.[40] The court's decision hinged not on the plain language of the statute, but instead stemmed from the court's view that the statute was unclear, and thus the EEOC's interpretation was entitled to deference.[41] This decision,

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34. *Id.*

35. *What You Can Expect After You File a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/process.cfm [https://perma.cc/6Q6M-PLSB] (last visited Sept. 24, 2019). Generally, before a claimant alleging employment discrimination may sue, the claimant must first file a charge with the EEOC, allowing the EEOC 180 days to investigate the matter. *Id.* If the EEOC is unable to determine that discrimination happened, the agency issues a right-to-sue letter to the claimant so that a lawsuit may be filed. *Id.* For violations of the ADEA, a claimant may file suit after the passage of sixty days from filing the charge with the EEOC, and no right-to-sue letter is required. *Id.*

36. *Villarreal*, 839 F.3d at 961–62.

37. *Id.* Although the plaintiff alleged two counts of age discrimination against defendant employer, disparate treatment and disparate impact, he voluntarily dismissed the disparate treatment claim, only moving forward on the ADEA disparate impact theory. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1292 (11th Cir. 2015), *rev'd en banc*, 839 F.3d 958 (11th Cir. 2016).

38. *Villarreal*, 839 F.3d at 961–62.

> Villarreal brought a collective action against R.J. Reynolds . . . under the Act on behalf of "all applicants for the Territory Manager position who applied for the position since the date R[.]J[.] Reynolds began its pattern or practice of discriminating against applicants over the age of [forty] . . . ; who were [forty] years of age or older at the time of their application; and who were rejected for the position." The complaint alleged two counts: disparate treatment under [§] 4(a)(1) of the Act and disparate impact under [§] 4(a)(2) of the Act.

Id.

39. *Villarreal*, 806 F.3d at 1291.

40. *Id.* at 1290.

41. *Id.*

> The EEOC's current ADEA disparate impact regulation, issued under its statutory rulemaking authority . . . does not distinguish between prospective and existing employees. Instead, it states that, "[a]ny employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'". . The regulation extends disparate impact liability to all "individuals within the protected age group." The EEOC argues that the regulation therefore established the agency's

however, was vacated pending a rehearing en banc in early 2016.[42] On October 5, 2016, the Eleventh Circuit Court of Appeals, sitting en banc, held that job applicants are not entitled to bring disparate impact claims under § 4(a)(2) of the ADEA because the applicant has no "status as an employee."[43] Thus, although the Eleventh Circuit permits job applicants to bring ADEA disparate treatment claims (i.e., claims of intentional age discrimination),[44] those same non-employee job applicants may not bring ADEA disparate impact claims.[45]

B. The Seventh Circuit: Kleber v. CareFusion Corporation

In 2018, the Seventh Circuit Court of Appeals in *Kleber* also heard a case on this issue: whether the ADEA's disparate impact provision protects job applicants in addition to current employees.[46] Here, Dale Kleber, a fifty-eight-year-old attorney with extensive experience across multiple industries, applied for a senior counsel position with CareFusion Corporation (CareFusion), a healthcare products employer.[47] Although the employer's job posting noted a desire for "a business person's lawyer" with experience handling "complex projects," the employer also included a provision stating that applicants "must have '[three] to [seven] years (no more than [seven] years) of relevant legal experience.'"[48] The fifty-eight-year-old

> view that § 4(a)(2) protects any individual an employer discriminates against, regardless of whether that individual is an employee or job applicant.

Id. at 1299 (citations omitted).

42. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 962 (11th Cir. 2016).

43. *Id.* at 961.

> [Section 4(a)(2) of the Act] makes it "unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). . . . If the text of the statute is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Id. at 963 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

44. *Id.* at 970. "Congress did not leave applicants without recourse. Section 4(a)(1) provides them with a cause of action for disparate treatment." *Id.* (citing ADEA, 29 U.S.C. § 623(a)(1) (2012)).

45. *Id.* at 963.

46. Kleber v. CareFusion Corp., 888 F.3d 868, 870 (7th Cir. 2018), *aff'd on reh'g en banc*, 914 F.3d 480 (7th Cir. 2019).

47. *Id.* at 871.

48. Id.

attorney submitted his application but was not selected to interview because, according to the employer, the role's years of experience maximum precluded this applicant's consideration.[49]

Kleber filed an age discrimination charge with the EEOC alleging age discrimination stemming from CareFusion's decision to exclude him from consideration because of his years of experience.[50] After CareFusion provided its business rationale for the years of experience maximum, the EEOC issued Kleber a right-to-sue letter. [51] Kleber then filed a lawsuit against CareFusion which included a claim of disparate impact age discrimination under § 4(a)(2) of the ADEA.[52] Therein, Kleber specifically alleged that "the maximum experience cap was 'based on unfounded stereotypes and assumptions about older workers, deters older workers from applying for positions . . . and has a disparate impact on qualified applicants over the age of [forty].'"[53] Relying on precedent, the district court dismissed the plaintiff's claim, professing that the ADEA's disparate impact provision applies only to employees, not non-employee job applicants;[54] however, on appeal, the Seventh Circuit reversed, holding, unlike the Eleventh Circuit,[55] that non-employee job applicants *are* protected under the ADEA's disparate impact provision.[56] Then, less than two months post-ruling, the Seventh

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49. Id.

50. Id.

51. Id.

> Because of the experience cap, Kleber filed a charge of age discrimination with the Equal Employment Opportunity Commission. CareFusion responded in a letter to the EEOC saying its maximum experience cap in the job posting was 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."

Kleber, 888 F.3d at 871.

52. Id. Plaintiff applicant initially filed an age discrimination suit under both disparate treatment and disparate impact theories; however, the plaintiff voluntarily dismissed the disparate treatment claim, proceeding only with the disparate impact theory. *Id.* at 871–72.

53. *Id.* at 871.

54. *Id.* at 872 (citing Equal Emp't Opportunity Comm'n v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994)).

55. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016).

56. *Kleber*, 888 F.3d at 888.

> Given the statutory language in § 623(a)(2), the interpretation of that language in Smith and virtually identical language in Griggs, and the absence of any apparent policy rationale for barring outside job applicants from raising disparate impact

Circuit vacated the decision, required a rehearing en banc, and subsequently affirmed the district court's holding that pursuant to the plain language of § 4(a)(2), job applicants are *not* entitled to bring disparate claims under the ADEA.[57]

C. *A Ninth Circuit District Court:* Rabin v. PricewaterhouseCoopers LLP

In *Rabin*, the Northern District of California recently broached the topic of whether, in addition to employees, job applicants also had the right to raise disparate impact claims under the ADEA.[58] Rabin filed suit against PricewaterhouseCoopers (PwC), "alleging that PwC 'engages in systemic and pervasive discrimination against older job applicants . . . maintain[ing] hiring policies and practices for giving preference to younger employees that result in the disproportionate employment of younger applicants.'"[59] Recognizing that neither the Ninth Circuit nor the Supreme Court had ruled specifically on this applicant issue, the court held that the right to file ADEA-related disparate impact claims attaches to employees and applicants.[60]

II. Analysis

Although current case law highlights debate as to whether the ADEA § 4(a)(2) covers non-employee job applicants,[61] a literal reading of the statute, with its varied component parts,[62] and a

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> claims, we are not persuaded by the defendant's more subtle comparative arguments using various other statutory provisions.

Id.

57. Kleber v. CareFusion Corp., 914 F.3d 480, 481 (7th Cir. 2019). "In the end, the plain languageof § 4(a)(2) leaves room for only one interpretation: Congress authorized only employees to bring disparate impact claims." *Id.* at 485.

58. Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1128 (N.D. Cal. 2017).

59. *Id.* at 1127.

60. *Id.* at 1128. "Based on the language of the ADEA, existing precedent, agency interpretations of the ADEA, and the Act's legislative history, the Court today concludes that job applicants like [p]laintiffs may bring disparate impact claims." *Id.*

61. *See Kleber*, 888 F.3d at 871; Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016); *Rabin*, 236 F. Supp. 3d at 1127.

62. ADEA, 29 U.S.C. § 623(a)–(d) (2012).

comparison of the ADEA to close companion legislation, Title VII,[63] settles this debate. First, the section of the ADEA giving rise to disparate impact claims omits the needed reference for non-employee job applicant protection from employer related actions.[64] Next, language used in other portions of the ADEA expressly includes applicant language or references to hiring activities.[65] This distinction illustrates that Congress made explicit language choices when drafting the comprehensive statute. Additionally, when comparing the ADEA to Title VII, legislation passed five years before the ADEA and protecting certain innate characteristics other than age,[66] the statutes' different language again demonstrates that Congress knew the specific words to include when the intent was to reach non-employee applicants and chose not to include those words in ADEA § 4(a)(2). Without congressional action amending ADEA § 4(a)(2) to expressly include a group of individuals so clearly omitted from the current language, judicial inquiry is complete.[67]

A. Congress Means What It Says and Says What It Means

As noted in *Smith,* the United States Supreme Court recognizes disparate impact claims under the ADEA[68] through ADEA § 4(a)(2).[69] That particular section's ADEA language "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer," meaning that the claim analysis is only one of disparate impact, rather than disparate treatment, where the

63. Glenn & Little, *supra* note 5.

64. *See* Smith v. City of Jackson, 554 U.S. 228, 232–33 (2005).

65. ADEA, 29 U.S.C. § 623(a)(1), (b), (c)(1)–(2), (d)(2012).

66. Glenn & Little, *supra* note 5.

67. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 963 (11th Cir. 2016) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

68. *Smith*, 554 U.S. at 232.

69. ADEA, 29 U.S.C. § 623(a)(2) (2012).

> [N]or the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive . . . or otherwise adversely affect his status as an employee, because of such individual's" . . . age[] (explaining that in disparate[]impact cases, "the employer's practices may be said to 'adversely affect [an individual's status] as an employee'"). Thus the text focuses on the effects of the action on the employee rather than the motivation for the action of the employer.

Smith, 554 U.S. at 235–36 (citations omitted).

result turns on an employer's intentional discriminatory motivations.[70] So, although *Smith* affirmatively recognizes the ADEA's disparate impact right, the case squarely focuses on employees, not non-employee job applicants.[71] Moreover, ADEA § 4(a)(2) does not, specifically or generally, reference applicants or individuals contemplated for hire.[72] Lastly, when comparing the ADEA's language in § 4(a)(2) to other portions of the ADEA, it is clear that when Congress desires the inclusion of applicants or individuals contemplated for hire, the legislature knows the particular words to include.[73] As it relates to judicial interpretation of statutes, courts leverage the canons of construction to guide their statutory interpretation journey.[74] However, when a court "find[s] the terms of a statute unambiguous, judicial inquiry is complete . . . ."[75] The ADEA's applicant language, or lack thereof, tells the judiciary all that is needed without jumping through secondary or tertiary statutory interpretation hoops beyond the written words.[76]

1. The ADEA Text for Applicants to Raise Disparate Impact Claims Is Missing

The ADEA's development in 1967 came on the heels of a Congress-commissioned Secretary of Labor report on age discrimination.[77] This report, the *Wirtz Report*, involved extensive

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70. *Smith*, 554 U.S. at 236.

71. *Id.* at 232.

72. ADEA, 29 U.S.C. § 623(a)(2) (2012).

73. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 967 (11th Cir. 2016).

74. *Canon of Construction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A rule used in construing legal instruments, esp[ecially] contracts and statutes; a principle that guides the interpreter of a text.").

> [C]anons of construction are . . . rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute[,] a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).

75. *Rubin*, 449 U.S. at 430.

76. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016).

77. Glenn & Little, *supra* note 5.

study regarding the plight of "older workers"[78] in America—specifically, employers' tendencies to terminate older workers' employment and employers' failure to hire workers age forty and over.[79] Given the proximity of the *Wirtz Report* to the ADEA's inception, it would be untenable to argue that applicants were not considered in the ADEA's development. The statute's development contemplated older applicants in the case of employer practices;[80] however, only in ADEA § 4(a)(1), not § 4(a)(2)[81]—the section that *Smith* recognized as providing ADEA's disparate impact right[82]—

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78. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, THE OLDER AMERICAN WORKER AGE DISCRIMINATION IN EMPLOYMENT: REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (June 30, 1965) https://www.eeoc.gov/eeoc/history/adea50th/wirtz_report.cfm [https://perma.cc/X3KY-EYCW] [hereinafter WIRTZ REPORT]. "Older workers" is a term of art used throughout writings about the ADEA. Glenn & Little, *supra* note 5, at 41. When the ADEA was originally passed, it provided protection for older workers, meaning those workers age forty to seventy. *Id.* Although the lower age threshold of forty currently remains the starting point of the ADEA's protection, any reference to an age cap was removed from the ADEA during its 1986 amendment. *Id.* Therefore, the ADEA today provides protection for workers age forty and older. *Id.*

79. WIRTZ REPORT, *supra* note 78, at 2–3. One of the WIRTZ REPORT's findings illustrated the negative effect that arbitrary job age limits had on older workers. *Id.* at 6. According to a 1965 U.S. Department of Labor Bureau of Employment Security survey of hiring practices in five cities, "older workers represent less than [five] percent of new hires in most establishments." *Id.* at 7.

80. Glenn & Little, *supra* note 5.

> Testimony before the Senate General Subcommittee on Labor and Public Welfare in 1967 revealed a number of troubling statistics that helped motivate Congress to take action. For example, in 1964, applicants over [fifty-five] years of age were barred from half of all job openings in the private sector. Workers over [forty-five] were barred from a quarter of these jobs, and workers over [sixty-five] were barred from almost all of them.
>
> The data presented to Congress also indicated that the problem was worsening over time—jobs were disappearing, and older workers were bearing the brunt of the layoffs. Between 1965 and 1966 alone, the share of workers unemployed for [twenty-seven] weeks or more that were over age [forty-five] increased from 30.2 percent to 34.3 percent. Older men, it was reported, had been leaving the workforce in droves since 1951.

Id.

81. ADEA, 29 U.S.C. § 623(a)(1)–(2) (2012). The ADEA's distinctly different employer practice sections are as follows:

> (a) Employer practices[:] It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

Id. (emphasis added).

82. Smith v. City of Jackson, 554 U.S. 228, 235–36 (2005).

does the ADEA reference unlawfulness when employers "fail or refuse to hire . . . because of such individual's age."[83]

The text of the statute is clear: an employer's failure-to-hire or refusal-to-hire actions of non-employee job applicants are only included in ADEA § 4(a)(1), providing a claim for disparate treatment.[84] ADEA § 4(a)(2), alternatively, provides protection to "an individual only if he has a 'status as an employee.'"[85] To read non-employee applicants into § 4(a)(2) requires textual gymnastics that run counter to the rules of statutory interpretation.[86] Courts agree: "If the text of the statute is clear, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'"[87] Here, Congress provided clarity in the statute by adding words to include coverage for non-employee job applicants in ADEA § 4(a)(1) but declining to use the same non-employee applicant inclusive language in
§ 4(a)(2)[88]—the only subpart giving rise to disparate impact claims under the ADEA.[89] Thus, if the statute's language or lack thereof is clear, the judicial inquiry is complete.[90]

83. ADEA, 29 U.S.C. § 623(a)(1) (2012).

84. Id.

85. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 963 (11th Cir. 2016).

86. See id. at 963–66; *see also* Kavanaugh, *supra* note 76, at2121.

87. Villarreal, 839 F.3d at 963 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 842–43 (1984)).

88. *Id.* at 967.

89. Smith v. City of Jackson, 554 U.S. 228, 232 (2005).

90. *Villarreal*, 839 F.3d at 963 (citing *Chevron*, 467 U.S. at 842–43). "Although employing the traditional tools of statutory construction may require some effort, that effort does not make a text ambiguous." *Id.* at 970 (citing Wagner Seed Co. v. Bush, 946 F.2d 918, 924 (D.C. Cir. 1991)).

> The American rule of law . . . depends on neutral, impartial judges who say what the law is, not what the law should be [T]his goal is not merely personal preference but a constitutional mandate in a separation of powers system. Article I assigns Congress, along with the President, the power to make laws. Article III grants the courts the "judicial Power" to interpret those laws in individual "Cases" and "Controversies." When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power.

Kavanaugh, *supra* note 76, at 2120 (citations omitted).

2. Section 4(a)(2)'s Text Differs from Other Parts of the ADEA

In addition to the clear omission of words in ADEA § 4(a)(2)[91] that would give disparate impact claim rights to non-employee applicants, the employment status language giving rise to ADEA disparate impact claims differs not only from § 4(a)(1) but also from ADEA subsections 4(b),[92] 4(c)(2),[93] and 4(d).[94] In each of these subsections, the statute provides overt recognition of applicants as protected from the unlawful practices listed.[95] Clearly, Congress knows how to phrase legislation to include non-employee job applicants within the statute's purview.[96]

ADEA § 4(b) explicitly provides that an employment agency's[97] "fail[ure] or refus[al] to refer for employment . . . any individual because of . . . age" is unlawful.[98] Like § 4(a)(1), this portion of the

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91. ADEA, 29 U.S.C. § 623(a)(2) (2012).

92. *Id.* § 623(b) ("Employment agency practices[:] It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.").

93. *Id.* § 623(c)(2).

> (c) It shall be unlawful for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age . . . .

Id. § 623(c)(1)–(2) (emphasis added).

94. *Id.* § 29 U.S.C. § 623(d).

> It shall be unlawful for an employer to discriminate against any of his employees *or applicants for employment*, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because of such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Id. (emphasis added).

95. ADEA, 29 U.S.C. § 623(b), (c)(1)–(2), (d).

96. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992); Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 966–68 (11th Cir. 2016).

97. ADEA, 29 U.S.C. § 623(b). "A business that procures, for a fee, employment for people and employees for employers. Whether the employer or the employee pays the fee depends on the terms of the agreement." *Employment Agency*, BLACK'S LAW DICTIONARY (11th ed. 2019).

98. ADEA, § 29 U.S.C. § 623(b).

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ADEA erases any question about whether non-employee applicants qualify by specifically outlining age discrimination protection for workers before employment.[99] Additionally, ADEA § 4(d) prohibits age discrimination by an employer when "any of his employees *or applicants for employment* . . . opposed any practice made unlawful by [the ADEA] . . . or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."[100] Here, again, a subsection of the same comprehensive statute overtly includes applicants versus § 4(a)(2)'s clear omission of applicants and the hiring process.[101]

Finally, ADEA § 4(c), governing labor organization practices,[102] is crafted to mirror § 4(a), applicable to employers,[103] including distinct subsections giving rise to disparate treatment and disparate impact claims, respectively.[104] However, the two subsections expressly differ in that § 4(c) references "any *individual* because of his age" and actions that "limit such employment opportunities or . . . adversely affect his status as an employee or *as an applicant for employment*, because of . . . age[,]"[105] whereas § 4(a)(2) entirely omits any reference to applicants for employment.[106] Here, again, Congress chose to include applicant language within another subsection of the ADEA, § 4(c), without doing the same in a preceding provision, § 4(a)(2).[107] In citing to *Reading Law* by Antonin Scalia and Bryan Garner, *Villarreal* quotes: "The text must be construed as a whole. A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in

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99. *Id.*

100. *Id.* § 623(d) (emphasis added).

101. *Id.* § 623(a)(2), (d).

102. *Id.* § 623(c). "A labor organization is an association of workers who have combined to protect or promote their interests by bargaining collectively with their employers to secure better working conditions, wages, and similar benefits." *Labor Organizations*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/other-non-profits/labor-organizations [https://perma.cc/E4TH-T6A8] (last visited Sept. 25, 2019).

103. ADEA, 29 U.S.C. § 623(a).

104. Smith v. City of Jackson, 544 U.S. 228, 232 (2005); Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

105. ADEA, 29 U.S.C. § 623(c) (emphasis added).

106. *Id.* § 623(a).

107. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 963 (11th Cir. 2016).

the meaning."[108] As illustrated by ADEA subsections 4(a)(1), 4(b), 4(c), and 4(d), Congress knew how to grant non-employee applicants ADEA protection; hence, the stark omission of applicant language in § 4(a)(2) requires a reading to include only those individuals with "status as an employee."[109]

The 1967 *Wirtz Report*, noted previously as the impetus for the ADEA's creation, studied the plight of older workers, both actively working and those seeking employment,[110] and served as the research driven legislative foundation for this statutory protection of workers age forty and older. Leaning on that report, Congress expressly included the coverage of non-employee job applicants in ADEA subsections 4(a)(1), 4(b), 4(c)(2), and 4(d).[111] However, Congress's overt omission of any non-employee job applicant language in ADEA § 4(a)(2), in contrast to the language choices in those other subparts of the ADEA[112] and the research embedded in the legislative foundation's *Wirtz Report,*[113] further solidifies the position that, as drafted today, § 4(a)(2) of the ADEA does not, nor did Congress intend for it to, provide a non-employee job applicant disparate impact right under the ADEA. Yet again, if the statute's language or lack thereof is clear, the interpretive role of the judiciary ends.[114]

B. The ADEA Differs from Title VII

The ADEA is often described as a Title VII offshoot because it passed just three years after Title VII.[115] Although legislative records indicate that age was debated as a potential protected class when Title VII was drafted, age did not make the cut in Title VII's protections of race, color, sex, religion, and national origin.[116] Instead, age received its own unique protections under the ADEA in

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108. Id.
109. ADEA, 29 U.S.C. § 623(a)(2).
110. WIRTZ REPORT, *supra* note 78, at 7.
111. ADEA, 29 U.S.C. § 623(a)(1), (b), (c)(1)–(2), (d).
112. *See id.* § 623(a)(1), (b), (c)(1)–(2), (d); *Villarreal*, 839 F.3d at 963.
113. WIRTZ REPORT, *supra* note 78, at 7.
114. *Villarreal*, 839 F.3d at 963; Kavanaugh, *supra* note 76, at2120.
115. Glenn & Little, *supra* note 5.
116. Id.

1967 after completion of the *Wirtz Report*.[117] Although separate statutes, the courts through the years often interpreted Title VII and the ADEA similarly.[118] For example, the Court in *Smith* held that "the ADEA does authorize recovery in 'disparate[]impact' cases comparable to *Griggs v. Duke Power Co.*,"[119] a purely Title VII challenge. Title VII does recognize disparate impact claims for both applicants and employees;[120] however, the disparate impact right in *Griggs* specifically applied to employees, not non-employee applicants.[121]

Griggs, a 1971 seminal case, established the disparate impact theory as cognizable under Title VII.[122] This case involved thirteen African-American employees of a power generation facility claiming that the requirement of obtaining a high school education or passing an intelligence test to transfer out of the lowest paying department in the company had a disparate impact on African-American versus Caucasian employees.[123] Before Title VII's passage, this defendant-employer had an overt policy of discrimination, precluding African-American employees from working in any department except for the lowest paying labor department.[124] To comply with Title VII, the company introduced a facially neutral policy[125] to

117. Smith v. City of Jackson, 554 U.S. 228, 232–33 (2005); WIRTZ REPORT, *supra* note 78, at 2–3; Glenn & Little, *supra* note 5, at 43.

118. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 183 (2009) (Stevens, J., dissenting).

119. *Smith*, 554 U.S. at 232.

120. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2) (2012). Though, today, Title VII covers both applicants and employees, the *Griggs* case only contemplated a disparate impact right for employees, not non-employee applicants, and the case did so before the amendment of Title VII's additional coverage for applicants for employment. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 968 (11th Cir. 2016).

> [The] [d]issent contend[s] that the Supreme Court has since described *Griggs* as a case about applicants, but they are incorrect. Villarreal quotes language about applicants and *Griggs* from *Dothard v. Rawlinson*, but because the Supreme Court decided *Dothard* after Congress added language about applicants to Title VII ("employees or applicants for employment"), we do not consider this dicta significant.

Id. (citations omitted).

121. *Villarreal*, 839 F.3d at 968 (citing Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971)).

122. *Smith*, 554 U.S. at 234–35.

123. *Griggs*, 401 U.S. at 425–26.

124. *Id.* at 426–27.

125. *Id.* at 427–28. A facially neutral policy or factor means that the charging party must "identify the 'particular employment practice' causing" a disproportionate impact on a protected class of people.

replace its previously overt and intentionally discriminatory race-based policy.[126] The Court, however, deemed the new facially neutral policy to have the effect of "'freez[ing]' the status quo of prior discriminatory employment practices," an unlawful disparate impact on African-Americans under Title VII.[127] Although *Griggs* involved job qualifications to enter certain employer defined roles, the plaintiffs there were employees, not non-employee applicants.[128] Thus, the connection of the ADEA disparate impact theory determined in *Smith* to the comparable Title VII disparate impact theory found in *Griggs* only supports the disparate impact theory recognition for employees.[129] This position harmonizes with the prior statutory language arguments; without express inclusion of non-employee job applicant language at the time of a court's statutory review, the interpretive role of the judiciary ends when it encounters unambiguous statutory language.[130]

Although it is true today that either employees or non-employee applicants may raise Title VII disparate impact claims,[131] the rights of applicants under Title VII developed only after Title VII's amendment[132] and a subsequent *Griggs* case, *Dothard v. Rawlinson*, leveraging the amended language. [133] The 1977 *Dothard* case

WILLBORN ET AL., *supra* note 1, at 457. The employer need not have any discriminatory intent and may actually have good intentions when designing the policy that is later deemed to have a disproportionate impact on a legally protected group of individuals. *Griggs*, 401 U.S. at 432. "Congress directed the thrust of the Act [Title VII] to the *consequences of employment practices*, not simply the motivation." *Id.* (emphasis added).

126. *Griggs*, 401 U.S. at 427–28.

127. *Id.* at 430.

128. *Id.* at 426.

129. Smith v. City of Jackson, 554 U.S. 228, 235–36 (2005); Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 968 (11th Cir. 2016).

130. Rubin v. United States, 449 U.S. 424, 430 (1981).

131. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2)(2012).

132. Title VII of the Civil Rights Act, Pub. L. No. 92-261, 86 Stat. 109 (1972). In 1972, Congress amended numerous provisions of Title VII of the Civil Rights Act of 1964, including an amendment adding applicants to the statute's protections. *Id.* This amendment adding applicants for employment to the already covered employees in the statute's purview took place *after* the *Griggs* case—involving only employees of the defendant-employer—was decided in 1971. *See generally Griggs*, 401 U.S. 424.

133. Dothard v. Rawlinson, 433 U.S. 321, 329–32 (1977). "*After her application was rejected*, [plaintiff] brought this class suit under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000c et seq. (1970 ed. and Supp. V) " *Id.* at 323 (emphasis added). In *Dothard*, Dianne Rawlinson applied to work in an Alabama corrections prison as a "correctional counselor." *Id.* The position applied for required that each applicant weigh at least 120 pounds and be

recognized a non-employee job applicant's right under Title VII to bring a claim for discrimination under a theory of disparate impact but grounded the decision in Title VII's amended language of "employees *or applicants for employment*."[134] This case did not overrule *Griggs* or extend *Griggs* to include applicants.[135]

Even with this case law illustrating that *Griggs* granted an employee disparate impact right under Title VII[136] while the same Title VII disparate impact right for non-employee applicants did not arise until *Dothard*—a case decided after Title VII's amendment adding a reference to applicants—[137] some still argue that the ADEA provisions "were derived *in haec verba*[138] from Title VII."[139] Those proponents, therefore, argue that the two distinctly different statutes should be interpreted equally as it relates to the unique protected classes named in the statutes.[140] The 2009 five to four *Gross v. FBL Financial Services* decision debunked the myth that Title VII and the ADEA must track together for interpretation.[141]

In *Gross*, a fifty-four-year-old, long-tenured employee of FBL Financial Services sued his employer under the ADEA for reassigning him from his position of claims administration director to

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five feet two inches tall. *Id.* at 323–24. Rawlinson did not meet the weight requirement, and her application was rejected for that reason. *Id.* at 324. Rawlinson argued that the minimum weight requirement violated federal law on the basis of sex, and after filing an EEOC charge and receiving a right-to-sue letter, Rawlinson filed suit "on behalf of herself and other similarly situated women, challenging the statutory height and weight minima as violative of Title VII " *Id.* at 323–24.

134. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 968 (11th Cir. 2016) (emphasisadded).

135. *Id.* at 963; *see generally* Griggs v. Duke Power Co., 401 U.S. 424, 430(1971).

136. *Dothard*, 433 U.S. at 328; *Villarreal*, 839 F.3d at 968. "In enacting Title VII, Congress required 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissibleclassification.'" *Dothard*, 433 U.S. at 328 (quoting *Griggs*, 401 U.S. at 431).

137. Title VII of the Civil Rights Act, Pub. L. No. 92-261, 86 Stat. 109 (1972); *Dothard*, 433 U.S. at 323.

138. *In Haec Verba*, BLACK'S LAW DICTIONARY (11th ed. 2019). The phrase *in haec verba* is Latin for "[i]n these same words; verbatim." *Id.*

139. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 183 (2009) (Stevens, J., dissenting) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)).

140. *Id.* at 183 (Stevens, J., dissenting). "[W]e have long recognized that our interpretations of Title VII's language apply 'with equal force in the context of age discrimination, for the substantive provisions of the ADEA '" *Id.* (Stevens, J., dissenting) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).

141. *Id.* at 174.

claims project coordinator.[142] Gross argued "that his reassignment was based at least in part on his age" even if other reasons for the employment action existed.[143] The plaintiff here relied on the motivating factor framework applicable to Title VII intentional discrimination claims; however, the Court ruled that this motivating factor framework did not apply to claims under the ADEA.[144] Congress amended Title VII in 1991, adding this motivating factor causation framework, but did not amend the ADEA to add this provision.[145] "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[146] For an ADEA aggrieved plaintiff to prevail, he or she must prove that their age was the "but-for" cause of the undesired employment action, not merely one of the motivating factors.[147] By holding that the mixed-motive instruction endorsed under Title VII does not apply under the ADEA,[148] the Court made it clear that Title VII and the ADEA are two distinct statutory animals.[149]

It follows that if Congress's intention was to include applicants in the recognized disparate impact provision of the ADEA, it would have done so. Neither Title VII nor the ADEA has been free from amendment since their respective passages in 1964 and 1967;[150]

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142. *Id.* at 170.

143. *Id.*

144. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009).

145. *Id.* at 174.

146. *Id.* (citing Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).

147. *Id.* at 176.

148. *Id.* at 170, 173.

149. *Id.* at 173.

> When conducting statutory interpretation, we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e–2(m) and §§ 2000e–5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways . . . .

Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009) (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008)) (citation omitted).

150. Title VII of the Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 255 (1964), *amended by* Pub. L. No. 92-261, 86 Stat. 109 (1972), *amended by* Pub. L. No. 102-166, 105 Stat. 1074–76 (1991); VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, THE STATE OF AGE DISCRIMINATION AND OLDER WORKERS IN THE U.S. 50 YEARS AFTER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

however, even with the ADEA's amendments, the word "applicant" or the idea of "hiring activities" have not been added to § 4(a)(2), the section giving rise to disparate impact claims.[151] "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[152] If the statute's language or lack thereof is clear, the judicial inquiry is complete.[153]

III. Proposal

To settle the debate on whether non-employee job applicants may bring disparate impact claims under the ADEA, the Supreme Court must grant certiorari in a future case to resolve the varied views and interpretations of federal courts on this issue.[154] The role for the Court then is quite simple—read and hold to the plain language of ADEA § 4(a)(2) that provides no reference to applicants or individuals contemplated for hire.[155] This proposal runs counter to the argument that the ADEA is a broad-brush piece of legislation providing protection for all individuals, whether currently working or seeking work, age forty and over.[156]

If Congress's current desire is to protect both employees and non-employee job applicants, then a simple amendment to § 4(a)(2) adding an explicit reference to applicants for employment, like Title VII's 1972 amendment, is all that would be needed.[157] However, as uncomplicated as this language addition might be, the congressional exercise would likely be futile in practice based on the defenses available for both disparate treatment and disparate impact claims in

(ADEA) 9–10 (2018).

151. Smith v. City of Jackson, 554 U.S. 228, 232–33 (2005).

152. *Gross*, 557 U.S. at 175 (quoting Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)).

153. Kavanaugh, *supra* note 76, at 2120.

154. *See* Kleber v. CareFusion Corp., 914 F.3d 480, 481 (7th Cir. 2019); Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016); Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1127 (N.D. Cal. 2017).

155. ADEA, 29 U.S.C. § 623(a)(2) (2012).

156. *See generally* 29 C.F.R. § 1625.2 (2007); Glenn & Little, *supra* note 5.

157. Title VII of the Civil Rights Act, Pub. L. No. 92-261, 86 Stat. 109 (1972).

§ 4(f)(1).[158] Particularly for disparate impact claims, *Smith* notes that "[u]nlike Title VII . . . § 4(f)(1) of the ADEA . . . contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age' . . . . "[159] Hence, even if non-employee job applicants were added to the ADEA's disparate impact provision, the desired effect, supporting older workers in their quest for gainful employment,[160] is unlikely because the additional language would produce little, if any, real change.

A. *The Reasonable Factor Other Than Age Defense*

Although the ADEA prohibits intentional age-based discriminatory practices and facially neutral practices that have a disparate impact on older workers, the statute includes affirmative defenses for both of these otherwise unlawful practices.[161] ADEA § 4(f) reads:

> It *shall not be unlawful* for an employer . . . to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of [the ADEA] where age is a *bona fide occupational qualification* reasonably necessary to the normal operation of the particular business, or where the differentiation is based on *reasonable factors other than age* [162]

The bona fide occupational qualification (BFOQ) is an affirmative defense arising under Title VII and the ADEA for disparate treatment cases.[163] Applied in *Western Air Lines, Inc. v. Criswell*, an ADEA disparate treatment case, an employer claiming a BFOQ defense must prove both that the facially discriminatory classification is reasonably

158. ADEA, 29 U.S.C. § 623(f)(1).
159. Smith v. City of Jackson, 554 U.S. 228, 233 (2005).
160. *See generally* 29 C.F.R. § 1625.2; Glenn & Little, *supra* note 5.
161. ADEA, 29 U.S.C. § 623(a)(1)–(2), (f)(1); Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 91 (2008).
162. ADEA, 29 U.S.C. § 623(f)(1) (emphasis added).
163. ADEA, 29 U.S.C. § 623(f)(1); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(e), (k) (2012).

necessary to the essence of the employer's business and that the employer must be compelled to rely on the facial classification as a proxy for the reason validated in the first part of the test.[164] The Court in *Western Air Lines* noted that the BFOQ standard is one of "reasonable necessity," not merely reasonableness.[165] However, in *Meacham v. Knolls Atomic Power Laboratory*, the Court recognized that the ADEA's BFOQ defense only "establishes an affirmative defense against claims of disparate treatment," whereas the appropriate affirmative defense against an ADEA claim of disparate impact is reasonable factors other than age (RFOA).[166]

In contrast to the BFOQ's strict application of reasonable necessity, the RFOA defense only requires that the facially neutral "factor relied upon was a 'reasonable' one for the employer to be using . . . . [A] reasonable factor may lean more heavily on older workers . . . ."[167] With this statutorily defined defense squarely outlined by Congress in the ADEA, the likelihood of an employer not having at least one reasonable business factor for a facially neutral employment policy is improbable. Especially as it relates to applicants and years-of-experience targets, employers have a myriad of reasons—employee retention; the role's value to the organization and in the competitive job market; and the establishment of a culture of growth, development, and promotion from within—they might cite for the practice.[168] An applicant-plaintiff would be hard-pressed to argue that those factors do not represent reasonable business factors and hence, the non-employee applicant-plaintiff would find his disparate impact claim dead on arrival.

164. W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 416–17, 419, 422–23 (1985).

165. *Id.* at 419.

166. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 92, 96 (2008).

167. *Id.* at 96.

168. Mike Kappel, *How Your Business Benefits when You Hire Millennials*, FORBES (Sept. 3, 2016, 4:13 AM), https://www.forbes.com/sites/mikekappel/2016/09/03/how-your-business-benefits-when-hiring-millennials/#5d00636127a0 [https://perma.cc/N7TE-RLAC]; Pini Yakuel, *Why Promoting from Within Works*, FORBES COMMS. COUNCIL (June 20, 2018, 8:00 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2018/06/20/why-promoting-from-within-works/#31b9b2ed2231 [https://perma.cc/9JM3-AS8H].

B. *EEOC Only Seeking a Legitimate Business Purpose*

For those who argue ADEA § 4(a)(2) disparate impact provision applies to non-employee job applicants despite the statute's plain language reference only to employees, their premise is that the language in this portion of the ADEA is ambiguous.[169] Once a court defines language as ambiguous, the court then moves to the next step in the statutory interpretation chain—deference to the statute's enforcement agency.[170] For the ADEA, the EEOC is that enforcement agency.[171] Although the EEOC views the ADEA disparate impact provision as reaching both employees and non-employee job applicants,[172] the enforcement agency also recognizes the limited applicability of ADEA disparate impact claims resulting from the RFOA affirmative defense.[173]

Following the rulings in *Smith* and *Meacham* and a lengthy EEOC notice of rulemaking comment period,[174] the EEOC, in March 2012, issued its final rule concerning disparate impact and reasonable factors other than age.[175] Here, the EEOC's rule clarified that the appropriate defense for ADEA disparate impact claims was RFOA rather than business necessity and explained the meaning of the RFOA defense.[176] The EEOC describes an employment practice as being "based on an RFOA when it was reasonably designed and

169. *See* Kleber v. CareFusion Corp., 888 F.3d 868, 877 (7th Cir. 2018), *aff'd on reh'g en banc*, 914 F.3d 480 (7th Cir. 2019); Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1128, 1132 (N.D. Cal. 2017).

170. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43(1984).

171. *About EEOC*, *supra* note 19.

172. *See generally* 29 C.F.R. § 1625.2 (2007); Glenn & Little, *supra* note 5.

173. *Questions and Answers on EEOC Final Rule on Disparate Impact and "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act of 1967* at No. 7, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/regulations/adea_rfoa_qa_final_rule.cfm#_ftnref1 [https://perma.cc/48KM-7HEA] (last visited Sept. 25, 2019) [hereinafter *Questions and Answers*].

174. Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, 77 Fed. Reg. 19080, 19080 (Mar. 30, 2012) (to be codified at 29 C.F.R. pt. 1625). As the agency responsible for implementing workplace discrimination laws, like the ADEA, the EEOC issues regulations to carry out this responsibility. *EEOC Regulations*, U.S. EQUAL EMP. OPPORTUNITY COMM., https://www.eeoc.gov/laws/regulations/index.cfm [https://perma.cc/JRE7-DUYX] (last visited Sept. 25, 2019).

175. Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, *supra* note 174, at 19080.

176. *Questions and Answers*, *supra* note 173, at No. 3.

administered to achieve a *legitimate business purpose* in light of the circumstances, including its potential harm to older workers."[177] The EEOC provides a non-exhaustive list of considerations relevant to this reasonableness assessment, including components like the employer's stated business purpose, the employer's fair and accurate application of the defined factor, the degree of harm to individuals within the protected age group, and any steps taken to reduce the harm.[178] Clear in the EEOC guidance, a successful RFOA defense does not require an employer to meet all of these considerations; moreover, the employer may still assert a successful RFOA defense without meeting any of these listed considerations.[179] This defense's practical results are that time and again, plaintiffs, after identifying a specific employment practice ripe for an ADEA disparate impact claim,[180] will find themselves on the losing end of such claim with an employer citing one of many business reasons for these facially neutral practices (e.g., market pay increases,[181] targeted years of experience,[182] focused recruiting on college campuses, or specific technology skills) that disparately impact older workers.

C. Provide Employers the Knowledge and Incentive to Thrive with Older Workers

Employers, especially in today's exceedingly difficult labor market, are searching for the holy grail of talent recruiting and retention;[183] yet, those same employers find themselves frustrated

177. *Id.* at No. 8 (emphasis added).
178. Id.
179. *Id.* at No. 9.
180. *Id.* at No. 6.
181. Smith v. City of Jackson, 554 U.S. 228, 231 (2005).
182. Kleber v. CareFusion Corp., 888 F.3d 868, 877 (7th Cir. 2018), *aff'd on reh'g en banc*, 914 F.3d 480 (7th Cir. 2019); Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016).
183. Workforce 2020: The Looming Talent Crisis, OXFORD ECON., https://www.oxfordeconomics.com/recent-releases/workforce-2020-the-looming-talent-crisis [https://perma.cc/VVS3-6VWS] (last visited Sept. 25, 2019). The unemployment rate in September 2018 settled at 3.7%, a low number, the likes of which the United States has not experienced in almost fifty years and a rate that is expected to remain below four percent through the year 2021. Eric Morath & Harriet Torry, *U.S. Unemployment Rate Falls to Lowest Level Since 1969*, WALL STREET J. (Oct. 5, 2018, 4:44 PM), https://www.wsj.com/articles/u-s-unemployment-rate-falls-to-lowest-level-since-1969-1538742766 [https://perma.cc/FCP8-LMN2]; *see Labor Force Statistics from the Current Population*

when navigating a complicated web of often ineffective regulation.[184] Instead of clogging courts with non-fruitful ADEA disparate impact arguments by older job applicants where employers can typically provide one of many legitimate purposes for facially neutral employment practices, the more appropriate response would be using the EEOC's voice and power to influence employers to hire older workers by educating and incentivizing employers on the benefits of such action. To further positive movement, congressional and EEOC action should focus on creating incentives for employers to hire older workers, those most susceptible to unconscious biases and stereotypes, and developing programs that increase older workers' relevance in the workplace.

The concept of incentivizing employers to hire difficult to employ individuals instead of using a regulatory stick to drive action is not an untested idea. For example, the Work Opportunity Tax Credit (WOTC) program, created in 1996 and renewed eleven times since its inception, provides a federal tax credit to employers for hiring individuals in targeted and underserved groups.[185] Although WOTC program research is limited, a Government Accountability Office research study "concluded that 'the tax subsidy was by far the factor motivating employers to hire WOTC eligible workers.'"[186] Additionally, Peter Cappelli, a Wharton School professor, analyzed

Survey, BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., https://data.bls.gov/timeseries/LNS14000000 [https://perma.cc/JL56-2KCA] (last visited Sept. 25, 2019).

184. *See generally* Kent Hoover, *[Ten] Regulations that Give Small Business Owners the Worst Headaches*, THE BUS. JOURNALS (Apr. 28, 2016, 1:38 PM), https://www.bizjournals.com/bizjournals/washingtonbureau/2016/04/10-regulations-that-give-small-business-owners-the.html?s=print [https://perma.cc/3XYU-3BF7]; Ilyse Schuman, Michael J. Lotito & Betsy Cammarata, *Ready or Not, Here it Comes! 2018 Brings New Labor & Employment Laws, Primarily at the State Level*, LITTLER MENDELSON P.C. (Nov. 13, 2017), https://www.littler.com/publication-press/publication/ready-or-not-here-it-comes-2018-brings-new-labor-employment-laws [https://perma.cc/6PNN-6MWU].

185. *Work Opportunity Tax Credit*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit [https://perma.cc/9LRZ-GQXJ] (last visited Sept. 25, 2019). The WOTC program provides tax credits to employers that hire individuals from targeted groups like supplemental nutrition assistance program recipients, veterans, and supplemental security income recipients. *Id.* Once an employer acquires certification that an individual hired is a member of a targeted group, the employer then takes a tax credit to offset a portion of the business's income tax liability. *Id.*

186. Katherine English, *Conflicting Approaches to Addressing Ex-Offender Unemployment: The Work Opportunity Tax Credit and Ban the Box*, 93 IND. L.J. 513, 522 (2018).

the WOTC program through limited, program-specific research and a comparison to a broad range of other well-researched employment subsidy programs and determined the WOTC program was cost-effective for society.[187] Not only does society benefit from these now-employed workers being less dependent on governmental programs, like welfare, employers benefit from the coveted tax credit with an estimated "three-quarters of employers chang[ing] their employment practices in some way to accommodate WOTC recipients[] and half chang[ing] training practices."[188]

The EEOC recognizes improvement in blatant or intentional discrimination since the ADEA's 1967 passage; however, the agency notes that today's age discrimination often stems from age-based stereotypes and unconscious biases rather than intentional discriminatory actions.[189] In a survey conducted in 2017, "[six] out of [ten] older workers have seen or experienced age discrimination in the workplace[,] and [ninety] percent of those say it is common."[190] These high rates of perceived age discrimination, however, resulted in only three percent of these older workers' discriminatory experiences being reported as formal complaints either in the workplace or to a regulatory agency like the EEOC.[191] The statistics clearly demonstrate that regulation alone cannot and has not solved this pervasive issue. Instead, employers must be educated and incentivized to drive real improvement for older workers, debunking myths plaguing the aging workforce.[192]

Stereotypes about older workers are that they cost more than younger workers for the same job, have an increased absence rate due to illness, do not exhibit the same mental agility that younger workers

187. *Id.* at 522, 524; Peter Cappelli, *Assessing the Effect of the Work Opportunity Tax Credit*, ADP, LLC, https://www.adp.com/~/media/Reference%20PDFs/Cappelli_Study_2011.ashx [https://perma.cc/4VZD-X74N] (last visited Sept. 25, 2019).

188. English, *supra* note 186, at 522.

189. LIPNIC, *supra* note 150, at 22–23.

190. *Id.* at 4.

191. *Id.* at 28.

192. *The Myths of Older Workers Need to be Debunked*, RANDSTAD, https://www.randstad.com/press/news/randstad-news/the-myths-of-older-workers-need-to-be-debunked/ [https://perma.cc/N9GQ-YAZC] (last visited Sept. 25, 2019).

might, and are less productive and relevant in the workplace.[193] Alternatively, some cutting-edge employers are refusing to fall prey to these stereotypes and are instead leveraging older workers to shore up the skills shortages faced in America.[194] These employers recognize the strengths of experienced workers, citing the older workers' good judgment, unvarnished insight, ability to parse the clutter from what truly matters in a particular situation, emotional intelligence exhibited through keen listening and a strong sense of self, and holistic thinking.[195]

As noted by the 1973 Senate Special Committee on Aging, the "ADEA was enacted, not only to enforce the law, but to provide the facts that would help change attitudes."[196] Those facts, with the power to nullify some of the long-term biases against aging workers, exist. For example, with a focus on market-based competitive wage benchmarking by job,[197] older workers do not always cost more than younger workers for the same market-priced job. Additionally, the return on investment in an older worker may be higher with millennials changing jobs about every three years versus older workers seeking stability and delivering longer tenures.[198] This increased retention decreases turnover costs and stems the loss of employer-specific knowledge.[199] Finally, "[a]ge is positively correlated with employee engagement, as workers age [fifty] and older have the highest levels of engagement in the

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193. *Id.*; Eric Titner, *Workplace Tips: Avoiding Age Discrimination on the Job*, USA TODAY (Jan. 23, 2018, 9:02 AM), https://www.usatoday.com/story/money/careers/professional-development/2018/01/23/avoiding-age-discrimination-on-the-job/109569042/ [https://perma.cc/9XCF-ZFMZ].

194. Eben Harrell, *The Solution to the Skills Gap Could Already Be Inside Your Company*, HARV. BUS. REV. (Sept. 27, 2016), https://hbr.org/2016/09/the-solution-to-the-skills-gap-could-already-be-inside-your-company [https://perma.cc/A8EE-U7M6]; Pavel Krapivin, *How Organizations Are Harnessing the Wisdom of Baby Boomers to Combat Skills Shortages*, FORBES (Sept. 24, 2018, 3:21 AM), https://www.forbes.com/sites/pavelkrapivin/2018/09/24/how-airbnb-got-wiser-with-the-help-of-a-modern-elder/ [https://perma.cc/5LX2-9B86].

195. Krapivin, *supra* note 194.

196. LIPNIC, *supra* note 150, at 3.

197. *Building a Market-Based Pay Structure from Scratch,* SOC'Y FOR HUMAN RES. MGMT. (Jan. 12, 2018), https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/buildingamarket-basedpaystructurefromscratch.aspx.

198. LIPNIC, *supra* note 150, at 43.

199. *Id.* at 44.

workplace. . . . [H]igh employee engagement increases employee productivity."[200]

For unconscious biases to dissipate, especially in the hiring realm, and for employers to reap the rewards of older workers, companies must proactively work to change their facially neutral but nonetheless age-limiting practices. Small changes in hiring processes could result in significant changes for older applicants. For example, employers removing years-of-experience maximums from job postings and delivering web content and graphics that depict the multi-generational workforce they seek[201] would open the labor pool to individuals often excluded before even entering the interview process.[202] Additionally, employers' creation of age-diverse interview teams has the potential to reduce or eliminate the tendency for interviewers to gravitate toward hiring someone like themselves.[203] "Age discrimination is legally wrong and has been since the ADEA took effect five decades ago[,] [b]ut it remains too common and too accepted in today's workplace."[204] Additional punitive regulation is not the answer; employer education and incentives are.

CONCLUSION

Fifty years since its passage, courts are still interpreting the ADEA's language, specifically as it relates to a non-employee job applicant's right to claim disparate impact from an employer's facially neutral employment practice.[205] Despite clear statutory language,[206] opponents who believe the disparate impact theory of recovery should be available to job applicants argue ambiguity, and

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200. *Id.*

201. *Id.* at 43.

202. Kleber v. CareFusion Corp., 888 F.3d 868, 877 (7th Cir. 2018), *aff'd on reh'g en banc*, 914 F.3d 480 (7th Cir. 2019).

203. LIPNIC, *supra* note 150, at 43–44.

204. *Id.* at 40.

205. *See Kleber*, 914 F.3d at 481; Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016); Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1127 (N.D. Cal. 2017).

206. *See generally Villarreal*, 839 F.3d at 963 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 842–43 (1984)).

therefore, deference to the EEOC's position on the matter.[207] The EEOC, ignoring the plain language of the statute, recognizes this disparate impact right as arising for non-employee job applicants;[208] however, in practice, this right provides little, if any, relief to older workers attempting to acquire gainful employment. Instead of continuing to waive the ADEA enforcement stick at disparate impact claims, a stick that packs little punch due to an employer's recognized RFOA affirmative defense,[209] Congress and the EEOC must leverage their voices and subsequent action to educate and incentivize employers, shucking the negative myths associated with older workers and embracing the benefits workplace age diversity produces.

207. 29 C.F.R. § 1625.2 (2007).
208. Id.
209. Questions and Answers, *supra* note 173, at No. 8.