OUTSIDERS NEED NOT APPLY: MYOPIC APPELLATE INTERPRETATIONS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT INSULATE PROSPECTIVE EMPLOYERS FROM DISPARATE IMPACT LIABILITY

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The Age Discrimination in Employment Act of 1967[1] [ADEA] seeks to eradicate discrimination against older workers. The statute was enacted after Title VII of the Civil Rights Act of 1964 became law and is closely modelled on that statute.[2] The key distinction is that the ADEA protects age while Title VII protects race, color, sex, religion and national origin.

To set for stage for the drama that is analyzed in this article, the scope of coverage of the ADEA, as well as theories of liability recognized for its enforcement, are summarized in Part I. In January 2019, the Seventh Circuit, as did the Eleventh Circuit less than eighteen months before, handed down a fractured *en banc* decision that precludes external job applicants from pursuing litigation based on disparate impact under the ADEA. The rationale supporting those rulings, as well as the thrust of their vigorous dissents, are described in Part II. A critical appraisal of the majority rationale is articulated in Part III. In sum, the rulings impermissibly deviate from relevant Supreme Court precedent, ignore expert statutory interpretation from the agency tasked with the enforcement of the ADEA, and offend a common sense interpretation of that statute because the rulings render an absurd result. The article concludes with a call for Supreme Court reversal to clearly establish the viability of disparate impact for external job seekers and, failing that outcome, for vigorous enforcement of state age anti-discrimination laws to accomplish that which federal law may not.

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[1] 29 U.S.C. §§ 621-634 (2018). All statutory references are to the ADEA unless otherwise indicated.

[2] *See* Lorillard v. Pons, 434 U.S. 575, 584 (1978) ("[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII.").

I. SCOPE OF ADEA COVERAGE & EMPLOYER LIABILITY

Individuals protected from discrimination under the ADEA are those who are at least forty years of age.[3] Those prohibited from engaging in unlawful activities are private sector employers, employment agencies, labor organizations[4] as well as state and local governments.[5] The heart of the ADEA is found in the section that articulates illegal actions. Section 623 makes it 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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> (2) *to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age*; or
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> (3) to reduce the wage rate of any employee in order to comply with this chapter.[6]

Two theories of liability have been recognized by the Supreme Court to enforce Title VII and, ultimately, the ADEA. The first theory of liability, disparate treatment, was recognized for Title VII and makes clear that no covered entity can intentionally discriminate.[7] By its express terms the ADEA makes intentional discrimination illegal.[8] In order to prevail, a plaintiff must offer direct or circumstantial evidence that age was the motivating – "but for" – reason for the employer's or prospective employer's adverse action.[9] The second theory of liability, disparate impact, enables individuals to challenge facially neutral policies, practices and procedures

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[3] 29 U.S.C. § 631(a). Employees are defined as individuals employed by an employer (elected officials are exempted). *Id.* § 630(f).

[4] Private employers must employ at least twenty people who have worked at least twenty weeks in the current or preceding calendar year. *Id*. § 630(b). Employment agencies and labor organizations of any size are also covered generally and, more precisely for the issue addressed in this article, are prohibited from failing or refusing to refer for employment any individual. *Id*. § 623(b), (c).

[5] *Id*. § 630(b)(2); *see also Mount Lemmon Fire Dist. v. Guido,* 139 S. Ct. 22, 25–26 (2018) (holding that state and local governments are covered by the ADEA).

[6] 29 U.S.C. § 623(a)(1)-(3) (italics added for emphasis).

[7] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-05 (1973).

[8] 29 U.S.C. § 623(a)(1).

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

that disproportionately harm them.[10] In a disparate impact case, plaintiff need not prove a discriminatory intent by an employer or prospective employer.[11] All that matters is the result. When an employer's facially neutral policy, practice or procedure is applied and that application, proven with a statistical analysis, falls more harshly on individuals over forty rather than younger referents, a covered employer operating in the United States will be liable unless it can prove as affirmative defenses that age was a bona fide occupational qualification reasonably necessary to the normal operation of the business, that the differentiation by and among individuals was based on reasonable factors other than age or that an exemption (e.g., seniority system, employee benefit plan) applies.[12] Proving disparate impact liability under the ADEA is more difficult than under Title VII.[13]

The path of disparate impact liability under the ADEA has followed a more tortuous route than that of its 1964 Civil Rights Act cousin. Prior to 1993, circuit courts that addressed the issue consistently ruled that disparate impact was viable under the ADEA.[14] That year, in *Hazen Paper v. Biggins*[15] the Supreme Court held that a discharge motivated by an employer's desire to avoid the vesting of pension benefits did not constitute disparate treatment

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[10] Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971).

[11] Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977)).

[12] 29 U.S.C. § 623(f)(1); *Hazen*, 507 U.S. at 609. In order to establish a *prima facie* case of disparate impact under the ADEA, a plaintiff must prove that the defendant utilized a specific, outward neutral practice and that it had a significantly disproportionate impact on covered individuals. Walsh v. Scarsdale Union Free Sch. Dist., 375 F. Supp. 3d 467, 479 (S.D.N.Y. 2019) (quoting *Attard v. City of New York*, 451 F. App'x 21, 24 (2d Cir. 2011)); *see also* Magnello v. TJX Cos., Inc., 556 F. Supp. 2d 114, 122 (D. Conn. 2008) (stating that to establish a prima facie case of disparate impact under the ADEA, a plaintiff must allege a specific employment practice that has an adverse impact on the protected class and prove the disparity with substantial statistical data). The defendant has the burden of proving affirmative defenses such as a bona fide occupational qualification, a reasonable factor other than age or a specified exemption. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 100–01 (2008).

[13] *See* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) ("Unlike Title VII, however, ADEA § [623] (f) (1) significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'").

[14] BARBARA LINDEMANN & DAVID D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW, at 12-3--12-4 (Eric W. Iskra, et al. eds., 2d ed. 2015 & Supp. 2016) (citing Faulkner v. Super Valu Stores Inc., 3 F.3d 1419, 1428 (10th Cir. 1993); Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992); MacPherson v. Univ. of Montevallo, 922 F.2d 766, 771 (11th Cir. 1991); Wooden v. Bd. of Educ. of Jefferson County, 931 F.2d 376, 379 (6th Cir. 1991); Arnold v. United States Postal Serv., 863 F.2d 994, 998 (D.C. Cir. 1988); Blum v. Witco Chem. Corp., 829 F.2d 367, 372 (3d Cir. 1987); Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986); Palmer v. United States, 794 F.2d 534, 536 (9th Cir. 1986); Monroe v. United Airlines, 736 F.2d 394, 404 (7th Cir. 1984); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 690–91 (8th Cir. 1983)).

[15] 507 U.S. 604, 609-14 (1993).

age discrimination. While it may seem that a ruling based on disparate treatment would have little bearing on disparate impact, Justice O'Connor, writing for a unanimous court, noted that the Court had never decided whether disparate impact liability was available under the ADEA (and declined to do so because disparate impact was not asserted by the plaintiff at trial).[16] In the wake of *Hazen*, the circuit courts split with some holding that disparate impact was available[17] while a larger chorus concluded that it was not.[18] The chief reason given by those courts that rejected disparate impact was that stereotypes stigmatizing older workers – one of the evils the ADEA was passed to vanquish – were not implicated when reasonable factors other than age were involved in an adverse employment decision even if they were correlated with age.[19] In 2005, the Court seemingly bridged the chasm by holding in *Smith v. City of Jackson*[20] that disparate impact is viable under the ADEA (though in that case the plaintiff had failed to prove it). As the Court later explained, the aim of the ADEA was to eliminate discrimination by challenging "arbitrary" policies, practices and procedures that "unfairly" and "without sufficient justification" exclude older workers from economic opportunities due to "unconscious prejudices and disguised animus."[21] Concurring in the judgment, Justice O'Connor expanded upon her dicta in *Hazen,* fueled by Justice Kennedy's concurring opinion in that case, by firmly rejecting disparate impact liability under the ADEA.[22] The embers of her rationale smoldered for over a decade before the Seventh and Eleventh circuits weighed into the debate.

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[16] *Id*. at 610; *see also* LINDEMANN & KADUE, *supra* note 14, at 12-4. In his concurring opinion (joined by the Chief Justice and Justice Thomas), Justice Kennedy was more emphatic. *Hazen*, 507 U.S. at 618 (Kennedy, J., concurring) ("[W]e have not yet addressed the question whether [an adverse impact] claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over adverse impact analysis from Title VII to the ADEA.").

[17] LINDEMANN & KADUE, *supra* note 14, at 12-4 (citing Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000); District Council 37 v. New York City Dep't of Parks & Recreation, 113 F.3d 347, 351 (2d Cir. 1997); Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996)).

[18] *Id*. (citing O'Regan v. Arbitration Forums, Inc., 246 F.3d 975, 986 (7th Cir. 2001); Adams v. Fla. Power Corp., 255 F.3d 1322, 1324–26 (11th Cir. 2001); Mullin v. Raytheon Co., 164 F.3d 696, 700 (1st Cir. 1999); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1048 (6th Cir. 1998); Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732–34 (3d Cir. 1995)).

[19] *Id*. at 12-5 – 12-6.

[20] 544 U.S. 228, 240 (2005).

[21] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2521–22 (2015).

[22] Smith v. City of Jackson, 544 U.S. 228, 247-48 (2005) ((O'Connor, J., dissenting).

II. RECENT *EN BANC* DECISIONS BAR EXTERNAL JOB APPLICANTS FROM ALLEGING DISPARATE IMPACT UNDER THE ADEA

Recently, two circuit courts handed down *en banc* decisions that have erected a daunting barrier before older, unemployed workers by holding that external job candidates cannot allege disparate impact under section 623 (a) (2) of the ADEA. The opinions supporting and disparaging those decisions are discussed in this section. Also addressed is the lone district court case that has yet weighed in with a countervailing ruling. The real world stakes involved for older job seekers are highlighted to emphasize the importance of the issue and, therefore, the pressing need for higher court reversal and, failing that outcome, more vigorous enforcement of state age discrimination statutes.

A. Seventh Circuit

Dale Kleber, a 58-year-old attorney, was under great financial strain after being unemployed for three years with three children at home to support. He applied for an in-house counsel position at CareFusion that limited candidates to those with no more than seven years of experience. Based on having a distinguished employment record (e.g., he had been general counsel of a national food company), he decided to apply for the position though his years of experience exceeded the boundary stated in the job posting. CareFusion passed over him and hired a 29-year-old instead. He filed a lawsuit under the ADEA and asserted disparate treatment and disparate impact theories of liability. The district court dismissed his disparate impact count on the basis of Seventh Circuit precedent (preceding *Smith)* that rejected disparate impact liability. After he voluntarily dismissed his disparate treatment count, the judgment was appealed to the Seventh Circuit where a divided panel reversed. *En banc* review was granted. The full court affirmed the district court dismissal by holding that section 623 (a) (2) does not protect external job applicants.[23]

The opinion of Judge Scudder for the eight judges in the majority reflects a narrow linguistic approach and strict application of canons of statutory construction. The dense opinion can be distilled in three prongs. First, section 623 (a) (2) on its face refers to employees, it mentions individuals only as a subset of employees and, therefore, its patent terms exclude external job applicants. Second, the Supreme Court's decision in

[23] Kleber v. CareFusion Corp., 914 F.3d 480 (7th Cir.) (en banc), *cert. denied*, 2019 WL 4923464, at *1 (Oct. 7, 2019).

Griggs[24] that created disparate impact liability under Title VII was limited to employees, a fact confirmed by Congress's decision to amend that statute in 1972 to add applicants as a protected group without mentioning the ADEA – a silence, he concluded, that demonstrated a refusal to recognize disparate impact for age. Third, while the legislative history of the ADEA admittedly favors a broad scope for those protected by the statute, the specific language of section 623 (a) (2) prevails over general language that supports the remedial goals of that statute.[25] In effect, the *Kleber* majority reads § 623 (a) (2) along the lines of the following permutation (with existing language stricken and replacement language italicized):

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

Key to the majority's approach is the constitutional line of demarcation between Congress and the courts. When the language of a statute is plain the only course of action within the constraints that separate the judiciary from the legislature is to enforce the words that appear in the statute. More precisely, the conduct prohibited by section 623 (a) (2) entails employer actions that limit, segregate or classify employees based on age. The majority deemed this word choice to be deliberate by Congress and reinforced that interpretation by characterizing the last part of the paragraph – "or otherwise adversely affect" – as a catchall formulation that unifies the prohibitions under the aegis of employees. "Reading [§ 623 (a)(2)] in its entirety shows that Congress employed the term 'any individual' as a shorthand reference to someone with 'status as an employee'."[26] Furthermore, the majority concludes that any reliance placed on *Griggs* is misplaced since that case was limited to employees. "Nowhere in *Griggs* did the Court state that its holding extended to job applicants".[27] Lastly, Judge Scudder declines the invitation to construe the ADEA broadly for two reasons. First, the majority rejected a broad interpretation of "employee" based on *Robinson v. Shell Oil Company*[28] where the Court held that Title VII's reference to employees included former employees. Indeed, he drew support from that case because there the Court was confronted with a claimed ambiguity in Title VII that called for an application of the broad purpose of Title VII to resolve but the

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[24] Griggs v. Duke Power Co., 401 U.S. 424 (1971).
[25] *Kleber*, 914 F.3d at 481–88.
[26] *Id*. at 483.
[27] *Id*. at 485.
[28] 519 U.S. 337, 346 (1997).

Court declined finding any such ambiguity. "There being no ambiguity in the meaning of [§ 623 (a) (2)] of the ADEA, our role ends – an outcome on all fours with *Robinson*."[29]

Four judges dissented in *Kleber*. In the principle dissent, Judge Hamilton (joined in full by Chief Judge Wood and Judge Rovner and in part by Judge Easterbrook), advances three arguments to include external job applicants as a class protected by disparate impact discrimination: A holistic reading of section 623 (a) (2), an expansive embrace of the seminal *Griggs* opinion and an assessment of the practical consequences of the majority's ruling measured against the purpose of the ADEA. The first contention wades into the linguistic thicket to read section 623 (a) (2) along the lines of the following permutation (with existing language stricken and replacement language italicized):

> to limit, segregate, or classify ~~his employees~~ *individuals* 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. . . .

Judge Hamilton's dissent begins by noting that section 623 (a) (1), the section embodying disparate treatment liability as defined by the Court in *Smith*, does not use the words "job applicant" but plainly concerns them because it makes it illegal for an employer to use age in failing or refusing to hire someone. Construing section 623 (a) (2) as a "parallel" provision, Judge Hamilton focuses on a defendant's behavior. When an employer defines the job of an employee, and that behavior adversely affects a person's ability to become an employee due to age, then individuals are adversely affected – an internal classification system is created that disadvantages older individuals.[30] "If 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 within the meaning of paragraph (a) (2). If that classification 'would deprive or tend to deprive an individual of employment opportunities' because of age, paragraph (a) (2) can reach that classification. The broad phrase 'any individual' reaches job applicants, so the focus turns to employer's action and its effects – i.e. [sic] whether the employer has classified jobs in a way that tends to limit any individual's employment opportunities based on age."[31] In effect, he promotes the twice mentioned term "individual" in section 623 (a) (2) over the majority's "cramped,"

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[29] Kleber v. CareFusion Corp., 914 F.3d 480, 487 (7th Cir.) (en banc), *cert. denied*, 2019 WL 4923464, at *1 (Oct. 7, 2019).
[30] *Id*. at 491 (Hamilton, J., dissenting).
[31] *Id*.

"mechanical" focus on the lone reference to "employee".[32] "If 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."[33]

The main dissent than seeks shelter under the aegis of *Griggs*. (Judge Easterbrook joined this portion of the main dissent based on the belief that the Court's ruling in that case controls the outcome because the high court unanimously recognized disparate impact as a theory of liability under Title VII, Congress copied the language of Title VII when it drafted the ADEA and, therefore, the definitive interpretation of disparate impact in Title VII extends to the ADEA.[34]) Judge Hamilton takes issue with the majority's assertion that *Griggs* was limited to employees. Not so, he finds, since the class controlled by the judgment in that case included outside job applicants as well as internal job applicants seeking transfers.[35] Moreover, he views a narrow reading of the individuals effected by *Griggs* as belied by no less than four cases subsequently decided by the Court that read *Griggs* to embrace hiring practices.[36] The 1972 amendment to Title VII is immaterial, he concludes, because Congress never disputed the high court's inclusion of job applicants under section 623 (a) (2) and, therefore, had no need to expressly amend the ADEA by adding job applicants.[37]

The main dissent concludes with a lament about the practical consequences of discounting disparate impact protection for older job seekers. Judge Hamilton raises a hypothetical case in which two applicants, both in their fifties, apply for the senior counsel position CareFusion sought to fill and are turned down. One applicant already works for the firm and was seeking a transfer; the other is not employed by the firm. Under the

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[32] *Id*.
[33] *Id*. at 494.
[34] *Id*. at 488–89 (Easterbrook, J., dissenting).
[35] *Id*. at 487–98 (Hamilton, J., dissenting).
[36] *Id*. at 499 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 427 (1975); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Connecticut v. Teal, 457 U.S. 440, 446 (1982); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2517 (2015)).
[37] *Kleber*, 914 F.3d at 500–03 (Hamilton, J., dissenting). The majority drew support for its view by pointing to a 1972 amendment to Title VII that included the term "applicant" in the parallel provision of Title VII which was used verbatim to create section 623 (a) (2). *See id*. at 501–04. That amendment omitted any reference to the ADEA. In effect, if Congress felt the need to pass an amendment specifying that the scope of disparate impact includes job applicants than omitting it with regard to the ADEA is telling. Judge Hamilton essentially challenges the majority's reliance on the amendment as making a mountain out of a molehill. The dissent views the 1972 amendment's reference to job applicants as a minor, non-substantive portion of a bill whose inclusion did nothing more than incorporate the holding of *Griggs*. *Id*.

majority's ruling, the former can sue for disparate impact but the latter cannot.[38] The main dissent argues:

> Neither the majority nor the defendant or its *amici* have offered a reason why Congress might have chosen to allow the inside applicant but not the outside applicant to assert a disparate-impact claim. I can't either . . . Wearing blinders that prevent sensible interpretation of ambiguous statutory language, the majority adopts the improbable view that the [ADEA] outlawed employment practices with disparate impacts on older workers, but excluded from that protection everyone not already working for the employer in question.[39]

B. *Eleventh Circuit*

Less than eighteen months before the *en banc* ruling in *Kleber*, Richard Villarreal suffered a similar fate in a case whose procedural history would provide a roadmap for the Seventh Circuit. In 2007, the 49-year-old had unsuccessfully applied for a job as a territory manager at R.J. Reynolds. Unbeknownst to Mr. Villarreal, recruiting guidelines listed a targeted candidate as someone 2-3 years out of college and described unwelcome candidates as those having 8-10 years of sales experience. In response to an invitation from lawyers accusing the firm of age discrimination, Mr. Villarreal filed a charge with the EEOC. After being issued a right to sue letter, he filed a class action against R.J. Reynolds and its contractor on behalf of all those over age 40 who had unsuccessfully applied for the territory manager job. Among the flurry of motions that ensued, the district court dismissed the disparate impact count. A divided Eleventh Circuit panel reversed the district court, *en banc* review was granted, and the full court reversed the panel by holding that disparate impact was unavailable under the ADEA.[40]

The eight judges in the majority focused on a close reading of statutory language – section 623 (a) (2) protects employees only. "The key phrase in section [623 (a) (2)] is 'or otherwise adversely affect his status as an employee.'" wrote Judge William Pryor. "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. In other words, section [623 (a) (2)]

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[38] *Id*. at 505.
[39] *Id*. at 506–07.
[40] Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 2016) (en banc).

protects an individual only if he has a 'status as an employee."[41] The remainder of the majority opinion responds to Judge Martin's searing dissent (which was joined by Judges Wilson and Jill Pryor (as to the disparate impact argument)). In sum, the dissent contends that the language of section 623 (a) (2) applies because it addresses the adverse action befalling Mr. Villarreal: He is an individual who was deprived of employment opportunities and denied status as an employee because of something R. J Reynolds did to limit its employees.[42] "Congress said age discrimination must not 'deprive any individual of employment opportunities.' If Congress intended to protect a narrower group, it would have said so."[43] Competing references to dictionary definitions and rules of statutory interpretation abound.[44] Judge Martin also casts aside the majority's attempt to limit the holding in *Griggs* to current employees by noting the fact that the class certified in that case included present and future external applicants before going on to tout the substance of *Griggs.*[45] "I read the ADEA in the same way the Supreme Court read identical Title VII language in the seminal *Griggs* opinion. *Griggs* held that this identical language in Title VII authorizes disparate impact claims. When *Smith* read disparate impact liability into the ADEA, the Court 'beg[a]n with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[46] The dissent closes by citing *Smith* again to draw comfort from longstanding regulations promulgated by the Equal Employment Opportunity Commission [EEOC] that interpret section 623 (a) (2) to support disparate impact liability.[47]

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[41] *Id*. at 963 (citations omitted).
[42] *Id*. at 982 (Martin, J., dissenting).
[43] *Id*.
[44] The linguistic jousting is nicely illustrated by the dissent's argument that under the Dictionary Act of 1871 the term "employee" includes future employees since words used in the present tense include the future tense. 1 U.S.C. § 1 (2018). But the term "employee" is a noun and has no tense, according to the majority opinion, since only verbs have a tense. *Villarreal,* 839 F.3d at 965.
[45] *Villarreal,* 839 F.3d at 986–87 (Martin, J., dissenting). To bolster her point, Judge Martin cited two Supreme Court opinions in which the court characterized the employment practice at issue in *Griggs* as pertaining to job applicants. *Id.*; *see* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2517 (2015) (holding that *Griggs* governed hiring criteria); Connecticut v. Teal, 457 U.S. 440, 446 (1982) (finding that *Griggs* applied to applicants as well as employees).
[46] *Id*. at 986 (Martin, J., dissenting) (emphasis in original).
[47] *Id*. at 988.

C. *Countervailing Lower Court Precedent*

Presently no circuit court has handed down a decision disagreeing with much less discussing *Kleber* or *Villarreal*.[48] The lone case standing in opposition is *Rabin v. PriceWaterhouseCoopers*.[49] There, a class alleged that the firm maintained hiring policies that favored younger applicants in external hiring (e.g., by targeting college job fairs for entry level accountants). In denying a motion for judgment on the pleadings, Judge Tigar rejected *Villarreal* for four reasons. First, his review of section 623 (a) (2) leads him to conclude that the plain language of the statute includes external job applicants. "Critically, the ADEA uses the phrase 'any individual,' rather than 'employee' to identify those people" the section protects.[50] Second, his interpretation of that "plain language" is supported by *Griggs* whose judgment expressly included outside job applicants in the class action. "It cannot be that despite *Griggs*'s clear message, an employer remains free to freeze the status quo 'by not hiring minorities at all'."[51] Third, the EEOC has long interpreted the ADEA as permitting disparate impact liability in cases prosecuted by outside job seekers.[52] Fourth, the legislative history of the ADEA includes job seekers in the statute's ambit. Citing statements offered by Senator Yarborough, among others, who testified that the statute protects against discrimination in hiring, Judge Tigar concluded that while not controlling such "references to protecting older job applicants negate any impression that Congress viewed discrimination in hiring as less important than discrimination against those already employed."[53]

D. *Stakes Involved for Older Job Seekers*

The absence of Supreme Court review of, or appellate precedent challenging, *Kleber* or *Villarreal* is disconcerting. Those *en banc* rulings will cast a shroud over the job hunting efforts of older applicants in the six states covered by the Seventh and Eleventh circuits as well as fomenting

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[48] Decisions preceding *Kleber* and *Villarreal* have applied disparate impact theory to job applicants under the ADEA. *See, e.g.*, Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1427-28 (10th Cir. 1993); Wooden v. Bd. of Educ. of Jefferson County, 931 F.3d 376, 379-80 (6th Cir. 1991); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1369-74 (2d Cir. 1989); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 690-91 (8th Cir. 1983).
[49] 236 F. Supp. 1126 (N.D. Cal. 2017).
[50] *Id*. at 1128.
[51] *Id*. at 1130 (emphasis in original).
[52] *Id*. at 1132.
[53] *Id*. at 1133.

uncertainty in all other circuits.[54] To be sure, the pernicious problem of age discrimination – particularly discrimination perpetrated covertly by policies, practices and procedures that appear innocuous – cries out for judicial relief.[55] Sadly, such practices remain a treacherous obstacle to employment for older workers – the fastest growing segment of the workforce. According to the U.S. Bureau of Labor Statistics, about forty percent of people ages 55 and older were working or actively looking for work in 2014 and that number is expected to increase most rapidly through 2024 for those over age 65.[56] Ageism is the biggest problem older applicants confront.[57]

The empirical record of age discrimination in hiring is unsettling. An experimental study published in 2008 yielded significant results that prompted researchers to conclude that younger workers are forty percent more likely to be offered an interview than older workers.[58] A meta-analysis published in 2016 concludes that those over age fifty face significantly longer unemployment periods than younger applicants.[59] In a 2017 correspondence study (i.e., a research method designed to mimic controlled experiments by creating artificial job applicants who have identical job-related background characteristics and apply for work), 13,000 resumes were sent out on behalf of 40,000 workers seeking lower-skill positions in eleven states and yielded results showing that employers were significantly less likely to call back older applicants.[60] In a 2018 survey, 61 percent of

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[54] *See, e.g.*, Heath v. Google LLC, No. 15-cv-01824-BLF, 2018 WL 398463, at *1 (N.D. Cal. Jan. 12, 2018) (the issue of whether § 623 (a)(2) authorizes external job applicants to litigate disparate impact claims is a complex question of statutory interpretation that lower courts have struggled with in the absence of Ninth Circuit or Supreme Court precedent.).

[55] *See* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 318 (1990) (finding that age discrimination in hiring is characterized more by bias than by overt hostility and, therefore, that the risk of evasion is enhanced).

[56] Mitra Toossi & Elka Torpey, *Older Workers: Labor Force Trends and Career Options*, U.S. BUREAU OF LABOR STAT. ¶ 2 (May 2017), https://www.bls.gov/careeroutlook/2017/article/older-workers.htm.

[57] Allana Akhtar, *3 Million Older Americans Can't Find High-paying Jobs, and it Has Nothing to Do with Skills. Here's the One Barrier They Face That No One's Addressing,* BUS. INSIDER (May 7, 2019, 10:11 AM), https://www.businessinsider.com/retraining-doesnt-help-older-workers-find-jobs-because-of-ageism-2019-5.

[58] Joanna N. Lahey, *Age, Women, and Hiring: An Experimental Study,* 43 J. HUM. RESOURCES 30 (2008).

[59] Connie R. Wanberg et al., *Age and Reemployment Success After Job Loss: An Integrative Model and Meta-analysis,* 142 PSYCHOL. BULL. 400, 400–26 (2016).

[60] David Neumark et al., *Is it Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment,* 127 J. OF POL. ECON. 922 (2019) (noting that across all occupations and genders, senior applicants received fewer callbacks than younger applicants); *see also* Marianne Bertrand & Esther Duflo, *Field Experiments on Discrimination*, *in* 1 HANDBOOK OF ECONOMIC FIELD EXPERIMENTS 309, 309–93 (Abhijit Vinayak Banerjee & Esther Duflo eds., 2017).

respondents (over age forty-five) reported witnessing or experiencing age discrimination at work.[61] "Some job ads put a cap on the number of years of experience a candidate should have, or asked applicants to select from a dropdown menu that excluded birth years for older people. Age discrimination 'is an open secret, and everyone knows it happens all the time, but few people stand up and say it's wrong'."[62] More than half of workers over age fifty are involuntarily terminated from long term jobs and ninety percent of those who find work never recover their earning power.[63] Unemployed older workers, on average, remain jobless for protracted periods leading many of them to drop out of the labor force altogether.[64] Though age discrimination litigation across industries is on the rise,[65] so far lawsuits filed by the EEOC and class actions pursued by older individuals against Darden Restaurants, Amazon, T-Mobile, Cox Communications and Facebook, to name a few, have yielded few monetary settlements or changes in policies.[66] Commentators and researchers have called for greater attention on the part of managers to minimize the risk of age discrimination in recruiting.[67] One

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[61] Allen Smith, *Workers Around the Globe Face Age Discrimination*, SOC'Y FOR HUM. RESOURCE MGMT. (May 14, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/global-age-discrimination.aspx.

[62] *Id*. at ¶ 3; *see also* Patrick Button, *Population Aging, Age Discrimination, and Age Discrimination Protections at the 50th Anniversary of the Age Discrimination in Employment Act* 22 (Nat'l Bureau of Econ. Research, Working Paper No. 25850, 2019), https://www.nber.org/papers/w25850 (finding that employers could filter out older workers from an applicant pool by posting job advertisements with ageist language to discourage older applicants, putting experience or time-since-graduation restrictions on job applicants, posting job ads only in ways where the job ad is more likely to be seen by younger people, or using evaluation methods that favor younger applicants).

[63] Peter Gosselin, *If You're Over 50, Chances Are the Decision to Leave a Job Won't Be Yours, PROPUBLICA,* https://www.propublica.org/article/older-workers-united-states-pushed-out-of-work-forced-retirement (last updated Jan. 4, 2019).

[64] Sara E. Rix, *The Employment Situation, December 2014: Unemployment Rate for Older Workers Lowest Since 2008*, AARP PUB. POL'Y INST. (Jan. 2015), https://www.aarp.org/content/dam/aarp/ppi/2015/the-employment-situation-december-2014-AARP-ppi-econ-sec.pdf*; see also* David Neumark & Patrick Button*, Did Age Discrimination Protections Help Older Workers Weather the Great Recession?* 33 J. POL'Y ANALYSIS & MGMT. 566 (2014).

[65] Sheila Callaham, *Retail, Healthcare, Energy, Tech: Age Discrimination Allegations Continue To Hit,* FORBES (June 5, 2019, 5:42 AM), https://www.forbes.com/sites/sheilacallaham/2019/06/05/retail-healthcare-energy-tech-age-discrimination-allegations-continue-to-hit/#4c9d8fc20daf.

[66] Patricia Cohen, *New Evidence of Age Bias in Hiring, and a Push to Fight It,* N.Y. TIMES (June 7, 2019), www.nytimes.com/2019/06/07/business/economy/age-discrimination-jobs-hiring.html?searchResultPosition=5.

[67] *See* Sheila Callaham, *PWC Lawsuit Alleges Older Applicants Were Target of Collective Discrimination in Recruiting Efforts*, FORBES (May 1, 2019, 4:08 AM), https://www.forbes.com/sites/sheilacallaham/2019/05/01/pwc-lawsuit-alleges-older-applicants-were-target-of-collective-discrimination-in-recruiting-efforts/#5c85d6a28f3f;

wonders how potent the threat of large scale litigation or expert calls for vigilance would be in ferreting out furtive screening practices (such as the use of code words[68] and manipulation of big data with algorithms[69]) if potential employers are confident that they would never have to stand up in court to defend themselves against disparate impact lawsuits.

III. A CRITICAL ANALYSIS OF *KLEBER* & *VILLARREAL*

The Seventh and Eleventh Circuits erred for at least three reasons. First, denying external job applicants the right pursue a case of disparate impact is incompatible with relevant Supreme Court precedent that define the contours of that theory generally and under ADEA specifically. Second, the majority in those circuits inexplicably ignore the authoritative interpretation of the EEOC, the agency tasked by Congress to enforce antidiscrimination laws, which has long construed disparate impact liability under the ADEA to include external job applicants. These arguments have been raised in Kleber and Villarreal, albeit unsuccessfully, and provide perhaps the most

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Gwenith G. Fisher et al., *Age Discrimination: Potential for Adverse Impact and Differential Prediction Related to Age*, 27 HUM. RESOURCE MGMT. REV. 316, 316–27 (2017).

[68] *See* Frank J. Cavico et al., *Code Words and Covert Employment Discrimination: Legal Analysis and Consequences for Management*, 5 INT'L J. ORGANIZATIONAL LEADERSHIP 231, 245–47 (2016) (discussing cases in which code words have been found to constitute age discrimination that include a restaurant that rejects applicants who "don't fit in", a firm that refuses to consider overqualified applicants and a firm that ignores applicants who were not a "cultural fit" with a youth-oriented company); Daniel Kalish, *Covert Discrimination: What You Need to Know About Coded Job Listings*, PAYSCALE (June 15, 2015), https://www.payscale.com/career-news/2015/06/covert-discrimination-what-you-need-to-know-about-coded-job-listings (explaining that employers use coded language in job postings as a pretext for eliminating certain candidates based on age); Vivian Giang, *This is the Latest Way Employers Mask Age Bias, Lawyers Say*, FORTUNE (May 4, 2015), https://fortune.com/2015/05/04/digital-native-employers-bias (reporting that media giants and startups that list being a "digital native" as a job requirement are engaged in a veiled form of age discrimination according to lawyers interviewed); 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 (ADEA) 33 (2018), https://www.eeoc.gov/eeoc/history/adea50th/upload/report.pdf (stating that experts have "testified about job postings preferring younger workers, referred to as 'digital natives,' rather than older workers who are referred to as 'digital immigrants,'" as well as online application systems that include 'birth or graduation dates in fields that cannot be bypassed'").

[69] *See* Press Release, U.S. Equal Emp't Opportunity Comm'n, Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC (October 13, 2016), https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm; Sarah O'Connor, *The Risks of Relying on Robots for Fairer Staff Recruitment*, FIN. TIMES (August 31, 2016), https://www.ft.com/content/ad40b50c-6e9a-11e6-a0c9-1365ce54b926 (describing research that has found that age was the most significant predictor of being invited to interview and that the oldest applicants were among those least likely to be invited).

compelling logic for overturning those decisions. Third, the constricted interpretation of section 623 (a) (2) provided by Kleber and Villarreal reaches a conclusion that is absurd. Those decisions open a Pandora's Box of experience limits, code words and algorithms employers use to surreptitiously snuff out job opportunities for undesirable older applicants.

A. *Relevant Supreme Court Precedent Supports Disparate Impact for External Job Applicants Under the ADEA*

Supreme Court precedent supports an interpretation of section 623 (a) (2) that enables external job applicants to pursue disparate impact litigation. The question before the Court in *Griggs* was whether Title VII barred an employer from requiring a high school diploma or a passing score on a standardized general intelligence test as a condition of employment in, or transfer to, certain jobs."[70] Chief Justice Burger, writing for a unanimous court in its first opportunity to construe Title VII, held that the statute prohibited the employer's actions if they were shown to have a disparate impact on the class comprising African Americans seeking employment or job transfers.[71]

In *Smith,* the Court characterized its holding in *Griggs* as "a precedent of compelling importance" for interpreting the ADEA.[72] Indeed, Justice Stevens, writing for the plurality, pointed to two, and only two, textual differences between Title VII's and the ADEA's disparate impact provisions that render the theory narrower under the ADEA – the "reasonable factor other than age" defense, and the nuances of the burden-shifting structure.[73] Nowhere in Justice Stevens's opinion did he suggest that the scope of liability under the ADEA was narrower than that available under Title VII. In comparing section 623 (a) (1), the section that creates disparate treatment

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[70] Griggs v. Duke Power Co., 401 U.S. 424, 425-26 (1971).
[71] *Id*.
[72] Smith v. City of Jackson, 544 U.S. 228, 232 (2005); *see also* Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 95–6 (2008) (acknowledging that in *Smith* "we confirmed that the prohibition in § 623 (a) (2) extends to practices with a disparate impact").
[73] *Smith*, 544 U.S at 240 ("Two textual differences between the ADEA and Title VII make clear that the disparate-impact theory's scope is narrower under the ADEA than under Title VII. One is the RFOA provision. The other is the amendment to Title VII in the Civil Rights Act of 1991, which modified this Court's Wards Cove Packing Co. v. Atonio, [citation omitted] holding that narrowly construed the scope of liability on a disparate-impact theory. Because the relevant 1991 amendments expanded Title VII's coverage but did not amend the ADEA or speak to age discrimination, Wards Cove's pre–1991 interpretation of Title VII's identical language remains applicable to the ADEA. [¶] Congress' decision to limit the ADEA's coverage by including the RFOA provision is consistent with the fact that age, unlike Title VII's protected classifications, not uncommonly has relevance to an individual's capacity to engage in certain types of employment.").

liability, with section 623 (a) (2), the section creating disparate impact liability, Justice Stevens drew no substantive distinction between them much less one that would exclude external hiring claims under section (a) (2). Perhaps Judge Easterbrook's dissent in *Kleber* best summarizes the persuasive power of *Griggs. "[Griggs]* treats the word 'individual' in [Title VII] as it stood before an amendment in 1972, as including applicants for employment. The pre-1972 version of that statute is identical to the existing text in § 623(a); Congress copied this part of the ADEA from that part of Title VII. It may be that the Court in *Griggs* was careless to treat outside applicants for employment as 'individuals' in paragraph (2), but that is what the Justices did."[74]

B. *EEOC Has a Longstanding, Authoritative Interpretation of § 623 (a) (2) that Includes External Job Applicants*

In *Smith*, eight justices participated in the decision with the plurality opinion written by Justice Stevens (joined in its entirety by Justices Souter, Ginsburg and Breyer). Justice Scalia added a fifth vote to the judgment though he declined to adopt Justice Stevens's comparative reading of Title VII and the ADEA. Instead, he concluded that disparate impact liability is permitted under the ADEA because the EEOC has unqualifiedly construed that statute to permit disparate impact and that interpretation is entitled to deference because the language of section 623 (a) (2) is ambiguous.[75] "This is an absolutely classic case for deference to agency interpretation" based on the *Chevron* doctrine[76] The *Chevron* doctrine calls for a two-step analysis: Is the statute ambiguous and, if so, is the agency's interpretation reasonable.[77] The doctrine is based on the notion that ambiguity in a statute constitutes an implicit delegation from Congress to an administrative agency to fill in the gaps."[78] Where a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[79] To be given weight, a court must

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[74] Kleber v. CareFusion Corp., 914 F.3d 480, 489 (7th Cir. 2019) (en banc) (Easterbrook, J., dissenting), *cert. denied*, 2019 WL 4923464, at *1 (Oct. 7, 2019). The 1972 amendment to Title VII added "applicants for employment" to Title VII but did not amend the ADEA. That amendment covered many points but, in relevant part, did nothing more than to be declaratory of existing law – the *Griggs* ruling. *Id*.; *see also* Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 1126, 1131 (N.D. Cal. 2017).

[75] *Smith*, 544 U.S at 243 (Scalia, J. concurring).

[76] *Id*. (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

[77] *Chevron*, 467 U.S. at 842–43.

[78] *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159 (2000).

[79] City of Arlington v. FCC, 569 U.S. 290, 296 (2013) (quoting *Chevron*, 467 U.S. at 843).

not only construe an agency's interpretation to be reasonable but one that is within its expertise.[80]

Is section 623 (a) (2) ambiguous? Determining ambiguity in statutes involves a complex, multifaceted literary construction that has internal and external foci.[81] At the end of the day, however, ambiguity is a conclusion bereft of guidelines.[82] In this instance, however, the fact that section 623 (a) (2) is ambiguous is confirmed by the mere existence of vastly divergent interpretations in the majority and dissenting opinions filed in *Kleber* and *Villarreal*. While the aggregate of fifteen judges comprising the majority in those cases vehemently declare that section 623 (a) (2) is clear, that view is refuted by the fact that an aggregate of seven judges steadfastly conclude that the very same language is unclear. The existence of such a split between appellate judges focusing on the same language in and of itself is testament to the section's ambiguity.[83]

Has the EEOC issued an interpretation of the ADEA and, if so, is it reasonable and authoritative? The EEOC has, indeed, interpreted the ADEA as permitting disparate impact claims by external job applicants. The agency's disparate impact rule for the ADEA 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.' An individual alleging that a policy, practice or procedure constitutes disparate impact is responsible for isolating and identifying the specific employment practice and proving a statistical disparity in its implementation between the older, protected group and a younger group as specified by regulations updated by the EEOC in 2012.[84] This regulation tracks the "any individual" language of section 623 (a) (2). Moreover, the preamble to the regulation addresses its impact in the hiring context. "Data show that older individuals who become unemployed have more difficulty finding a new position and tend to stay unemployed longer than younger individuals. To the extent that the difficulty in finding new work is attributable to neutral practices that act as barriers to the employment of older workers, the regulation should help to reduce the rate of their

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[80] *United States v. Mead Corp.*, 533 U.S. 218, 229–231 (2001).
[81] *See* Robinson v. Shell Oil Co., *519 U.S. 337, 341 (1997)* (explaining that the ambiguity of a statute is determined by reference to its language, the specific context in which that language is used and the broader context of the statute as a whole).
[82] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2138 (2016).
[83] *See* Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 988 (11th Cir. 2016) (en banc) (Martin, J., dissenting) (noting that the eleven judges of the Eleventh Circuit have reached different interpretations about 623 (a) (2) that each feels is correct but which cannot all be right and, therefore, since the law can be variously interpreted it is ambiguous).
[84] 29 C.F.R. § 1625.7(c) (2012).

unemployment and, thus, help to reduce these unique burdens on society."[85] The agency's interpretation has been consistent. After the ADEA was enacted, the Department of Labor, then the agency in charge of its enforcement, declared that supposedly neutral "pre-employment" tests, such as physical fitness tests, must be "reasonably necessary for the specific work to be performed" and "uniformly and equally applied to all applicants."[86] And the EEOC's interpretation is authoritative for two reasons. First, it falls within the expertise Congress expected of it. Second, the perspective it brings to bear has been honed by the experience of investigating a multitude of allegations of age discrimination.

In 1972, amendments to Title VII expanded the powers of the EEOC.[87] The supporting Senate Committee report classified modern employment discrimination as a "complex and pervasive phenomenon" and relegated to the EEOC the power to define and develop approaches to "handling serious problems of [employment] discrimination."[88] The agency has fulfilled its Congressional mandate by providing enforcement guidance to individuals and employers of their legal rights as well as interpreting "novel legal issues" for the judiciary.[89]

The agency's expertise has been honed over thousands of case investigations involving millions of dollars in damages. Since 2008, for example, detecting and eradicating discriminatory hiring policies effecting older workers has been one of the EEOC's priorities.[90] In the following decade, the EEOC received an average of 21,439 charges each year that included age discrimination, found reasonable cause supporting the charge in an annual average of 627 cases and recovered an average monetary benefit

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[85] Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, 77 Fed. Reg. 19080, 19092 (Mar. 30, 2012).

[86] 33 Fed. Reg. 9172 (June 21, 1968) (codified at 29 C.F.R. § 860.103). "The initial regulations, while not mentioning disparate impact by name, nevertheless permitted such claims if the employer relied on a factor that was not related to age." Smith v. City of Jackson, 544 U.S. 228, 239-40 (2005) (citing 29 C.F.R. § 860.103(f)(1)(i) (1970) (noting physical fitness requirements that were not "reasonably necessary for the specific work to be performed" are barred by § 860.103(f)(1)(i)). After the EEOC assumed ADEA enforcement responsibilities from the Department of Labor in 1979, it issued regulations providing that employment practices that disadvantage older "applicants for employment" are subject to disparate-impact liability under the ADEA. 46 Fed. Reg. 47,724, 47,727 (Sept. 29, 1981) (codified at 29 C.F.R. § 1625). That viewpoint stands under the agency's 2012 update to its regulations.

[87] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

[88] S. REP. NO. 92-415, at 19 (1971).

[89] EEOC PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2018, U.S. EQUAL EMP'T OPPORTUNITY COMM'N 43 (2018) https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf.

[90] LIPNIC, *supra* note 68, at 12–14.

(excluding those obtained through litigation) of $88 million.[91] Based on this limited window,[92] one would be hard pressed to contend that the agency responsible for conducting investigations, analyzing their merit, and holding offenders accountable lacks proficiency in recognizing age discrimination. From its vantage point in the trenches, the EEOC is well positioned to have discovered the subtler, more nuanced forms of discrimination that disparate impact aims to prevent. That hard-earned knowledge should provide an invaluable insight to federal courts that are stretched to confront myriad federal and state issues transcending the realm of employment discrimination. Accordingly, its enforcement experience informs the agency's interpretation of section 623 (a) (2) and should be recognized as persuasive.

The plurality opinion by Justice Stevens in *Smith*[93], as qualified by Justice's Scalia's concurrence in the judgment, augurs the conclusion that including adverse impact liability for all job seekers under section 623 (a) (2) is a reasonable, authoritative administrative conclusion deserving of *Chevron* deference. And while some members of the Court have increasingly criticized the *Chevron* doctrine as impermissibly delegating legislative power constitutionally entrusted to Congress to the executive branch,[94] there is a better, less threatening, understanding of the doctrine. Rather than usurping the judiciary's obligation to reach a final decision on a statute's meaning, where reasonable people can disagree courts should consult the viewpoint of administrators Congress assigns to gain expertise in applying the statutes it enacts. So rather than characterize *Chevron* as a doctrine of deference, it serves a more useful purpose when viewed as a doctrine of guidance. And in the construction of the ADEA, the EEOC, charged by congressional mandate and informed through abundant case investigations, has established an expert perspective on disparate impact that the *Kleber* and *Villarreal* majorities ignored.

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[91] *EEOC Age Discrimination in Employment Act (Charges Filed with EEOC) (Includes Concurrent Charges with Title VII, ADA, EPA, and GINA) FY 1997 - FY 2018,* U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm (last visited Aug. 14, 2019).

[92] Despite the fact that older workers report that they have seen or experienced age discrimination, only three percent made a formal complaint to someone in the workplace or to a government agency. LIPNIC, *supra* note 68, at 28 (citing Rebecca Perron, *The Value of Experience Study*, AARP RESEARCH (July 2018), https://www.aarp.org/research/topics/economics/info-2018/multicultural-work-jobs.html?CMP=RDRCT-PRI-OTHER-WORKJOBS-052118).

[93] Smith v. City of Jackson, 544 U.S. 228, 239–40 (2005).

[94] *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 312–16 (2013) (Roberts, C.J., dissenting); Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).

C. *En banc Rulings Insupportable Because They Derogate the Purpose of the ADEA and Render Absurd Results*

Two competing approaches to statutory construction beckoned by *Kleber* and *Villarreal* are purposivism and textualism. Purposivism looks beyond confusing language in a part of a statute to take a holistic view that considers the law's objectives.[95] Congress passes laws to achieve purposes and judges should construe statutory language to meet those purposes. "On the assumption that Congress legislates against the constraints of limited time, imperfect foresight, and imprecise human language, [purposivism suggests] that when the plain import of a statutory text [does] not correspond to available evidence about the law's purposes, principles of legislative supremacy required judges to enforce the 'spirit' rather than the 'letter' of the law."[96] A purposivist scours not only a statute's language but surrounding evidence, such as legislative history, to determine what Congress intended a statute to accomplish.[97]

Textualism, on the other hand, focuses exclusively on the language of a statute. If the language is clear, the judicial inquiry ends.[98] Textualists abhor legislative history because of its dubious value. "[E]ven if one thinks of legislative history as mere evidence of legislative intent or understanding, interpreters simply have no way to know whether the enacting majority subscribed to the understanding expressed in a floor statement or committee report."[99] Textualists tend to find that statutes are clear while purposivists are prone to view them as ambiguous.[100]

A close examination of *Kleber* and *Villarreal* reveals an anomaly. Normally antagonistic, purposivism and textualism coalesce to buttress a challenge their rationales. First, the purpose of section 623 (a) (2) is embedded in the language of the ADEA itself and, therefore, legislative history need not be consulted to define the statute's purpose. Second, while legislative history is crafted from multiple sources (e.g., witness testimony, investigative reports and floor speeches) there is another source, outside the statute, that lends an authoritative interpretation of the ADEA that no textualist can ignore – the reasons President Johnson gave in signing the bill.

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[95] William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1037 (1989).
[96] John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113 (2011).
[97] *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994).
[98] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 638 (1990).
[99] Manning, *supra* note 96, at 124. *See generally* Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1924–35 (2006).
[100] Kavanaugh, *supra* note 82, at 2129.

Section 621 contains the Congressional statement of findings and purpose. Subsection (a) provides, in part, the following findings (italics added):

> (1) In the face of rising productivity and affluence, *older workers find themselves disadvantaged* in their efforts to retain employment, and *especially to regain employment when displaced from jobs*; . . .
>
> ….
>
> (3) *The incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to younger ages, high among older workers; their numbers are great and growing, and their employment problems grave*; …

Subsection (b) makes clear the purpose of the statute (italics added):

> It is therefore 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; …

Whatever evidence or political motivation prompted the votes of legislators, the language of the bill they approved – italicized above – plainly states that age discrimination confronting job applicants was a practice the law aimed to eradicate. Any reading of section 623 (a) (2) that prohibits external job applicants from pursuing discrimination cases based on disparate impact is in conflict with the findings and purpose codified in section 621.

Furthermore, the reasons President Johnson gave for signing the bill – reasons that none of the Seventh or Eleventh Circuit judges considered – unambiguously disclose his concern for the predicament older workers face in the job market and his desire to remediate their plight. The *Statement by the President After Signing the Age Discrimination in Employment Act of 1967* provides in pertinent part (italics added):

> The report of the Secretary of Labor[101] showed that, although there are now 52 million Americans between the age of 40 and 64, *half*

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[101] President Johnson was alluding to a report prepared by Secretary of Labor W. Willard Wirtz. *See* U.S. SEC'Y OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965) [hereinafter the WIRTZ REPORT]. During deliberations over the Civil Rights Act of 1964, Congress considered and rejected amendments that would have included age as a protected classification. Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (citing

> *of all jobs were closed to workers over 55, and one-fourth of all jobs were closed to workers over 45. It showed that workers 45 years old and older made up half of this country's long term unemployed, and over one-fourth of all the unemployed*. . . . It showed that, although Americans are now living longer and enjoying better health than ever before, *older workers were often barred from jobs* that could be performed efficiently by workers of any age. Those figures added up to a senseless and costly waste of human talents and energy. They showed that *men and women who needed to work – who wanted to work – and who were able to work, were not being given a fair chance to work*. The need for national action was clear. In my message to Congress in January of this very year, I recommended the Age Discrimination in Employment Act of 1967. Yesterday I signed that act. *Its basic purpose is to outlaw discrimination in employment against persons 40 to 65 years of age*. . . .
>
> The Age Discrimination in Employment Act of 1967 gives *the vital part of our labor force between 40 and 65 a better chance to go on working productively and gainfully*. The country will gain as well – from making better use of their skills and experience. This is *humane and practical legislation*. The Congress acted wisely in passing it and I am proud to sign it.[102]

The italicized language confirms that President's Johnson avowed aim was to move older workers from unemployment rolls to payrolls. The way to accomplish that goal is to protect them against discrimination in hiring. A construction of section 623 (a) (2) that insulates employers from disparate impact liability in the consideration of external job applicants is antagonistic to that goal. Surely, it is not one that President Johnson would have countenanced.

When courts attempt to adduce the meaning of a statute, they indulge an artificial presumption that Congress is a monolithic entity that thinks and acts

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Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 587 (2004)). Instead, it asked the Secretary of Labor to examine the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected. *Id*. The Wirtz Report was the result and it played a significant role in the drafting and passage of the ADEA. Based on extensive testimony and investigation, the Wirtz Report condemned firm policies that "indirectly restrict the employment of older workers'" *Id*. (citation omitted); *see also* RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE 18 (2001) (contending that the elimination of discriminatory hiring practices, rather than terminations or retirement, was the impetus for the ADEA).

[102] Statement by the President After Signing the Age Discrimination in Employment Act of 1967, 548 PUB. PAPERS 1154 (December 16, 1967).

with one mind. The reality is anything but. The process of drafting legislation involves multiple levels of staff members working in the offices of legislators and joint conferences, career lawyers in the Office of Legislative Counsel, lobbyists and legislators, all of whom tinker with bills designed to achieve moving targets in a chaotic environment in which language changes to attract votes – votes from legislators who rarely read the bills they pass on.[103] Those who draft language in a bill, and those who review it, are human after all and so when a bill comes up for a vote important language can easily be missed. Transcending the debate over what Congress and the President intended when they enacted the ADEA, the impact of that statute on older external job applicants provides a more accurate prism for determining what section 623 (a) (2) means.

A focus on real world results is consistent with the Supreme Court's approach to analyzing statutes such as the ADEA. "Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."[104] The majorities in *Kleber* and *Villarreal* construe section 623 (a) (2) to deny external job applicants the right to pursue cases against prospective employers based on disparate impact. The safe harbor those judgments ensconce is hard to fathom in light of the purpose of the ADEA. An in-house lawyer in her late fifties with decades of legal experience who seeks a senior legal position at CareFusion in Chicago but who is passed over in favor of a younger applicant with less than seven years of experience could allege disparate impact liability but Dale Kleber cannot. An employee of R.J. Reynolds over age forty who applies for a territory manager position in Atlanta but is turned down in favor of a younger applicant could allege disparate impact liability but Richard Villarreal cannot. No judge voting in favor of the judgment in *Kleber* or *Villarreal* attempted to justify that distinction (though Judge Hamilton raised such a hypothetical in his dissent in *Kleber*). Nor could they. **"**Consideration of purpose cannot do the work of statutory text, but to ignore purpose is to engage in a highly abstract interpretive venture bearing little resemblance to what the legislators were trying to do. I call textualism without proper consideration of purpose 'untethered textualism' and there is

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[103] Victoria A. Nourse & Jane Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 583–93 (2002).

[104] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518 (2015).

considerable evidence of it [in *Kleber*]".[105] Quite simply, the real world impact of *Kleber* and *Villarreal* is absurd.

Where applying a statute's language "would produce an absurd and unjust result which Congress could not have intended," courts need not apply the language in such a fashion.[106] The Court recognizes the usefulness of the absurdity doctrine and has applied it in construing statutes whose literal interpretation renders illogical results.[107] The absurdity doctrine enables courts to construe statutes in order to effectuate Congressional intent.[108] "Some absurd outcomes can be avoided without doing real violence to the [statutory] text. But sometimes there is *no* sense of a provision – *no* permissible meaning – that can eliminate an absurdity unless the court fixes the textual error."[109]

The absurdity doctrine enables judges to reject an outcome dictated by strict reading of a statute that no reasonable person would intend by changing or supplying a particular word or phrase whose inclusion or omission could only have been a ministerial error.[110] The interpretation of Section 623 (a) (2) manifested in the majority opinions in *Kleber* and *Villarreal* cry out for reversal based on the absurdity doctrine. No reasonable person would intend that internal job applicants over age forty can sue for disparate impact but that external job applicants over forty cannot. After all, only the latter are unemployed. Congress and President Johnson made clear that removing boundaries for older workers seeking work was essential to the ADEA. Fixing the language in section 623 (a) (2), if fixing need be, is easily

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[105] Samuel Estreicher, *Untethered Textualism in the Seventh Circuit's Kleber Ruling on Age Bias in Hiring,* VERDICT ¶¶ 1-2 (March 21, 2019), https://verdict.justia.com/2019/03/21/untethered-textualism-in-the-seventh-circuits-kleber-ruling-on-age-bias-in-hiring.

[106] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 (1982); *accord* Perry v. Commerce Loan Co., 383 U.S. 392, 400 (1966) (stating that when the conventional interpretation of a statutory text produces absurd results a court may look beyond those words to the purpose of the act).

[107] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419–21 (2003)*; see, e.g.,* Clinton v. City of New York, 524 U.S. 417, 429 (1998) (noting that the absurdity doctrine applied to expand the meaning of "individuals" who could seek expedited review under Line Item Veto Act to include corporations).

[108] United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 542 (1940).

[109] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 234 (2012) (emphasis in original).

[110] *Id*. at 237–38*; see, e.g.,* King v. Burwell, 135 S. Ct. 2480, 2494–96 (2015) (stating that while the Court refused to defer to the IRS's interpretation of the Affordable Care Act by applying the *Chevron* doctrine, it nonetheless held that the context and structure of the statute's allowance for tax credits for those who purchase insurance through exchanges established by states compels a departure from a literal reading of the statute in favor of including exchanges established by the federal government).

accomplished by reading "individual" for "employee" in the middle of that sentence.

IV. CONCLUSION

The majorities in *Kleber* and *Villarreal* placed section 623 (a) (2) under a microscope and in so doing missed the forest for the trees. They injudiciously close the courthouse doors to external job applicants who merely seek a fair opportunity to work. Not only are unemployed older workers at greater risk of veiled exclusionary hiring policies, practices and procedures in the six states within the jurisdiction of the Seventh and Eleventh circuits, those decisions stand as an ominous precedent in other circuits. Commentators often suggest that where appellate decisions produce deleterious results Congress should step in as it has done for Title VII.[111] Yet the political gridlock that envelopes Congress[112] strains hope for passage of any substantive legislation. Given the stakes involved for older job seekers the Supreme Court should have granted review in *Kleber* and overruled it. Doing so would have served the spirit of the ADEA by reinforcing, indeed extoling, the remedial mandate of section 623 (a) (2) so as to achieve a more reasonable result – one that guarantees that older workers have the opportunity to compete for jobs based on merit without regard to their age.

External job seekers need not lose hope. Almost every state makes age discrimination illegal.[113] If federal law provides no relief from the noxious effects of covert discrimination against external job applicants, states stand as a bulwark to protect older workers who choose or need to work.[114] And since state laws often allow higher damage awards than the ADEA[115] prudent financial, as well as human resource, management favors employers who are proactive in ferreting out policies that could constitute disparate impact. States can, and should, step up by unambiguously recognizing disparate

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[111] *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009).
[112] *See* Stuart Kasdin, *Creating Comity Amidst Gridlock: A Corporatist Repair for a Broken Congress*, 51 POL'Y SCI. 117, 118 (2018) (noting that Congress currently avoids deliberating substantive legislation).
[113] LIPNIC, *supra* note 68, at 38 (identifying South Dakota as the exception).
[114] *See* Perron, *supra* note 92 (finding that most older Americans who work do so out of economic necessity); Toossi & Torpey, *supra* note 56 (asserting that changes to Social Security benefits, the elimination of employee retirement plans, and the unmet burden of saving for retirement have created incentives for older workers to keep working); LIPNIC, *supra* note 68, at 18 (the recession of 2007-2009 forced many older people to work longer to recoup retirement savings).
[115] Laura L. Robertson, *Older, Wiser, and Out of Luck: Seventh Circuit Decision Limits Job Applicants' Right to File Age Discrimination Claims (US)*, NAT. L. REV. (Jan. 31, 2019), https://www.natlawreview.com/article/older-wiser-and-out-luck-seventh-circuit-decision-limits-job-applicants-right-to.

impact as a form of liability for age discrimination and embracing external job applicants within its ambit. For example, the California Fair Employment and Housing Council is currently considering amendments to the regulations implementing its antidiscrimination statute to accomplish just that.[116] If a critical mass of states follow suit, then a uniform state statute could provide an alternative to federal protection. The struggle for a workplace untainted by age discrimination is ageless.

[116] Employment Regulations Regarding Religious Creed and Age Discrimination, CAL. CODE REGS. tit. 2, § 11016 (2019) (proposed July 19, 2019), https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2019/07/AttachC-InitStmtofReason4EmployRegReligiousCreedAgeDiscrimination.pdf.