No. 16-971

IN THE
Supreme Court of the United States

RICHARD M. VILLARREAL,
Petitioner,
v.

R. J. REYNOLDS TOBACCO CO., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF OF AARP AND AARP FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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March 8, 2017

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP Foundation – AARP's charitable affiliate – creates and advances effective solutions that help low-income individuals fifty and older to secure the essentials and to prevent them from falling into poverty during retirement. Among other things, AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pension, health, disability, and other employee benefits that countless members and older individuals receive or may be eligible to receive, including through participation as amicus curiae in state and federal courts.

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[1] Amici state that no party's counsel authored this brief either in whole or in part and, further, that no party or party's counsel, or any person or entity other than AARP, AARP Foundation, AARP's members, and their counsel, contributed money intended to fund preparing or submitting this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of Amici's intent to file this brief and granted their consent in writing.

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AARP and AARP Foundation have a substantial interest in this case as it concerns older jobseekers' right under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (2012), to challenge barriers that unreasonably block them from employment opportunities. Approximately one-third of AARP members work or are seeking work, and, thus, are protected by the ADEA. Vigorous enforcement of the ADEA is of paramount importance to AARP, its working members, and the millions of older workers who rely on it to deter and remedy ageism in the workplace.

While the ADEA has been effective in combating the most blatant forms of age discrimination in hiring, employers continue to engage in more subtle discriminatory behavior that denies older applicants fair treatment. Prospective employees need the disparate impact theory to fight the intractable hiring discrimination that contributes to older workers' historical and persistent overrepresentation among the long-term unemployed.

For many years, amici have advocated vigilantly for older workers' right to pursue disparate impact claims. In this Court, AARP participated as amicus curiae in *Smith v. City of Jackson*, 544 U.S. 228 (2005), supporting age discrimination victims' right to pursue disparate impact claims under the ADEA, and also in *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), urging the Court to recognize that the ADEA's "reasonable factor other than age" (RFOA), 29 U.S.C. § 623(f)(1),B provision

is an affirmative defense for which the employer bears both the burdens of production and proof. Amici continue to advocate in the courts, in Congress, and in the regulatory arena to ensure that the disparate impact theory remains an effective method of challenging and eliminating covert and indirect forms of age discrimination in the workplace, particularly in the hiring context.

Amici's efforts on behalf of older jobseekers extend beyond legal advocacy. For more than 45 years, AARP Foundation has been one of the grantees of the Senior Community Service Employment Program (SCSEP), the nation's oldest program to help low-income unemployed individuals aged 55 and older find work. In addition, AARP Foundation's Back to Work 50+ program connects struggling Americans aged 50 and older with the information, support, training and employer access they need to regain employment, advance in the workforce, and build financial capability and resiliency to prevent them from slipping into poverty later in life. Back to Work 50+ operates in over 20 locations across the country.

Given the significance of this case to the plight of older, unemployed individuals, and to the ADEA's ability to effectively respond to their predicament, Amici respectfully urge this Court to grant Petitioner's writ for certiorari.[2]

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[2] Amici AARP and AARP Foundation also firmly believe that all three of Petitioner's questions presented are critically important and merit this Court's review. However, as Petitioner and Amicus Curiae NAACP Legal Defense Fund

SUMMARY OF THE ARGUMENT

Congress's concern about age discrimination in hiring practices was the driving force behind the enactment of the ADEA. Hence, in the Act's declaration of "Findings and Purpose," Congress stressed the adverse results of hiring barriers citing "the incidence of unemployment, especially long-term unemployment, with resultant deterioration of skill, morale, and employer acceptability" as a factor necessitating a federal law prohibiting age discrimination in employment. 29 U.S.C. § 621(a)(3). Further, based on Secretary of Labor Willard Wirtz's 1965 report and other authorities, Congress was well aware that age bias in hiring included age-neutral policies disadvantaging older workers and that a federal policy was needed to remove such barriers to employment.

Unfortunately, fifty years after the ADEA's enactment, Congress's agenda is still not realized: older workers remain overrepresented among the long-term unemployed. One obstacle preventing the ADEA from effectively achieving Congress's goal of eradicating unemployment among older workers is the dispute over whether § 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), allows applicants to bring disparate impact claims. The Eleventh Circuit's decision that section 4(a)(2) only covers discrimination against current employees and does not protect applicants for employment, *Villarreal v.*

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expertly address the equitable tolling issue, we limit our argument to the ADEA issue at this stage of the case.

R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 2016) (en banc), disregards this Court's admonition in *Smith v. City of Jackson* that section 4(a)(2) of the ADEA must be interpreted in a way "that parallels our holding in *Griggs* [*v. Duke Power Co.,* 401 U.S. 424 (1971)]. " 544 U.S. 228, 238 (2005)).

If the Eleventh Circuit's decision is allowed to stand and is followed by other courts of appeals, the ADEA will become mere words on paper for older, unemployed individuals. For while employers will still be prohibited from limiting job applicants by age, a practice extremely prevalent prior to the enactment of the ADEA, they can effectively achieve the same result by imposing maximum-years-of-experience criteria or requiring recent educational degrees as minimum qualifications for employment opportunities. Accordingly, this Court should grant certiorari to resolve this important issue that has significant implications for hundreds of thousands of older Americans.

ARGUMENT

I. THE ADEA'S CAPACITY TO ACHIEVE ITS PRIMARY PURPOSE HINGES ON INTEPRETING SECTION 4(a)(2) TO ALLOW CHALLENGES TO AGE-NEUTRAL HIRING CRITERIA THAT DISPROPORTIONATELY DISADVANTAGE OLDER INDIVIDUALS.

It is imperative that this Court grant review to confirm what it clearly implied in *Smith*; section 4(a)(2) of the ADEA permits disparate impact claims by applicants and not just current employees.[3] Interpreting the ADEA to allow disparate impact hiring claims is consistent with the plain language of section 4(a)(2), as interpreted consistently by this Court beginning with *Griggs*, which construed statutory text in Title VII identical to that in section 4(a)(2), and most recently in *Smith*, which made clear that Congress intended both Title VII and the ADEA to address "identical obstacle[s] to the employment of older" and minority job applicants "unrelated to job performance" yet causing an "unfair impact" in excluding such individuals from employment

[3] Section 4(a)(2) of the ADEA forbids an employer:

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

opportunities. 544 U.S. at 235 n.5.[4] The ADEA grew out of Congress's concern that "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs," 29 U.S.C. § 621(a)(1), and that "the incidence of unemployment, especially long-term unemployment . . . is relative to the younger ages, high among older workers." *Id.* § 621(a)(3).

Barring disparate impact claims by older jobseekers undercuts Congress's principal objective for enacting the ADEA: eliminating unreasonable impediments to the employment of older workers. It is widely accepted that Congress's "primary purpose" in enacting the ADEA was the "hiring of older workers." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 n.9 (1977) citing H.R. Rep. No. 90-805, at 4 (1967) ("House Report") *reprinted in* U.S. Equal Employment Opportunity Commission (EEOC), Legislative History of the Age Discrimination in Employment Act (1981); *accord Ohio Pub. Emps. Ret. Sys. v. Betts*, 492 U.S. 158, 179 (1989). [5]

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[4] Amici curiae AARP and AARP Foundation fully concur with the plain language and deference arguments set forth in Villarreal's Petition for Certiorari and focus instead on other aspects of this case – principally the paramount importance of the issues presented – that strongly favor a decision by the Court to grant the Petition.

[5] The *McMann* and *Betts* cases both concerned section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), which "permits an employer either to provide equal benefits to all workers or to spend the same amount of money for a particular benefit, even though a lesser benefit for older workers might be the result. The purpose behind the ADEA's "equal benefit or equal cost" defense is "*to*

A. The ADEA's Legislative History Is Replete With References to The Unjust Impact of Age-Neutral Barriers to Hiring Older Workers and Reflects Congress's Intent To Provide A Means to Secure Relief for Such Injuries in The Form of A Disparate Impact Claim.

The ADEA's legislative record powerfully demonstrates that eliminating hiring discrimination against older workers, including age-neutral criteria unrelated to performance that unfairly hinder older job seekers, was Congress's principal goal in passing the ADEA. The ADEA's architects identified a need to combat arbitrary age-neutral employer restrictions that impede job offers to older workers and that do not correlate with their ability to perform the work. Such barriers, they said, include unnecessary educational, testing, and physical qualifications that compound the burdens imposed by overt age bias.

1. The Wirtz Report

For more than three decades, this Court has looked to the "Wirtz Report," a 1965 report to Congress, produced by U.S. Labor Secretary Willard

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encourage the hiring of older workers by relieving employers of the duty to provide them with equal benefits – where equal benefits would be more costly for older workers." *EEOC v. Borden's Inc.,* 724 F.2d 1390, 1396 (9th Cir. 1984) (emphasis added). *See also* S. Rep. No. 90-723, at 4 (1967) ("Senate Report").

Wirtz,[6] as the preeminent source for construing the legislative intent behind the ADEA.[7] Indeed, *Smith* specifically suggests that the Wirtz Report anticipated the ruling in *Griggs* in the context of unjustified hiring criteria:

> The congressional purposes on which we relied in *Griggs* have a striking parallel to . . . important points made in the Wirtz Report . . . [J]ust as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools . . . the Wirtz Report

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[6] U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment*, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964 (1965) ("Wirtz Report"). The Department of Labor compiled the Wirtz Report after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

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

> identified the identical obstacle to the employment of older workers. "Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if, despite his [or her] limited schooling, an older worker's years of experience have given him [or her] the relevant equivalent of a high school education." Wirtz Report 3. Thus, just as the statutory text is identical, there is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report.

Smith, 544 U.S. at 235 n.5 (internal citation omitted); *see also* Wirtz Report at 12 ("Even for many plant production jobs in the major industries, employers for a variety of reasons seek young workers with high school educations or equivalent vocational training."). While the origins of race-related and age-related inequity attributable to an unnecessary high school diploma requirement differ, the impact is the same: significantly poorer prospects of securing jobs, in some instances wholly unrelated to a worker's ability to perform.

Another "striking parallel" between the Wirtz Report and *Griggs*, also involving hiring discrimination, involves the disparate impact of testing requirements for job applicants that are unrelated to job qualifications and performance. The Wirtz Report objected to arbitrary requirements that

some job applicants "pass a variety of aptitude and other entrance tests." *Id.* at 14. Specifically, it noted that younger workers' "recency of education and testing experience," rather than any strong connection between test results and "average performance" or "steadiness of output," explained younger applicants' greater success in securing some jobs. *Id.* at 14-15. The Report reasoned that some jobs genuinely require workers with "better" or more "recent" education, but others do not. For instance, "average performance of older workers compares most favorably in office jobs, where productivity . . . r[i]se[s] with age." *Id.* at 14. Likewise, in *Griggs*, this Court faulted Duke Power for relying on aptitude test results as hiring criteria because of their lack of a "demonstrable relationship" to job performance and grossly disparate pass rates favoring whites and disfavoring black applicants. 401 U.S. at 430-31 and 430 n. 6.

Thus, six years prior to *Griggs*, the Wirtz Report described as unjust the precise hiring criteria that this Court later held unlawful on a theory of disparate impact. The Wirtz Report's prescience should not be casually dismissed as coincidence. Its consistent and repeated attention to inequities that disadvantage older applicants provides further proof that Congress intended the ADEA to protect "any individual," i.e., prospective, as well as current employees from employment policies or practices that are "fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431.

More broadly, the overwhelming thrust of the Wirtz Report is the inhumanity of employers' irrational resistance to hiring skilled and productive older workers. The Wirtz Report opens by lamenting tragedy "at the hiring gate":

> There is . . . no harsher verdict in most men's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is "You're too old," that a man turns away, in [a] poet's phrase, finding "nothing to look backward to with pride, nothing forward to with hope."

Wirtz Report at 1.

A significant portion of the Wirtz Report focuses on "[t]he most obvious kind of age discrimination in employment" in hiring. *Id.* at 6. But plainly the Report does not describe this conduct as the "only" kind of age bias, i.e., overt employer pronouncements that they are "not hiring people over a certain age . . . ." *Id.* at 7-11. Subsequent sections maintain a focus on hiring discrimination in ways clearly suggesting opposition to age-neutral hiring bias as well as to overt ageism. For instance, the Report discusses the "many reasons why a particular older worker does not get a particular job," *id.* at 11, 12-16, and later, the impact on older worker hiring of employers' "personnel policies" and "seniority systems," as well as "workman's compensation laws," and "private pension, health and insurance plans." *Id.*

at 15-17. The final sections of the Wirtz Report also stress the challenges older workers face in finding and keeping work. *See id.* at 17-25. Yet, nowhere does the Report indicate that hiring discrimination is limited to overt hiring restrictions, or that hiring discrimination is a lesser problem than age bias in terminations or other aspects of employment. Instead, Secretary Wirtz could not have been more clear in communicating that applicants need to be able to challenge policies and practices that adversely impact their ability to secure employment opportunities when he stated: "To eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices *which quite unintentionally lead to age limits in hiring*." Wirtz Report at 22 (emphasis added).

2. Congressional Consideration of the ADEA

Congressional reports accompanying the legislation that became the ADEA also stressed the goal of eliminating hiring discrimination. The House Committee on Education and Labor, *see* House Report at 1 (discussing H.R. 13054), and the Senate Committee on Labor and Public Welfare, *see* Senate Report at 1 (discussing S. 83), declared that "the purpose of [these bills was] to promote the employment of older workers based on their ability." In addition, both reports cited and quoted the Wirtz Report for support of legislation banning age discrimination in hiring:

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

House Report at 2; Senate Report at 2 (emphasis added). Both committees also quoted President Johnson's message endorsing a draft ADEA of 1967 "transmitted to Congress" by Secretary Wirtz, and praising it as a response to the pressing need of many older workers to be hired. *Id.*

In congressional committee hearings, prominent ADEA supporters echoed themes in the Wirtz Report indicating that the proposed law was designed to address covert or indirect age hiring restrictions. The chief Senate majority sponsor of the ADEA, Mr. Yarborough of Texas, declared: "It is time that we turn our attention to the older worker who is not ready for retirement – but *who cannot find a job* because of his age, despite the fact that he is able, capable, and efficient. He is not ready for retirement – but he is, in effect, being retired nonetheless, regardless of his ability to do the job." *Age Discrimination in Employment: Hearing on S. 830 and S. 788 Before the S. Subcomm. on Labor, Comm. on Labor and Public Welfare*, 90th Cong. 22 (1967) (emphasis added). He added: "Our industrial system has *apparently almost unconsciously* placed a

premium on youth." *Id.* (emphasis added). Senator Javits, the chief Senate minority sponsor of the ADEA, quoted the Wirtz Report at length, including its call for Congress to enact a law that "declares, clearly and unequivocally, and implements, as far as is practical, *a national policy with respect to hiring on the basis of ability rather than age*." *Id.* at 26 (emphasis added).

One committee witness, testifying regarding the ADEA's potential to benefit older workers by empowering them to assert claims that later would be called disparate impact claims, spoke to the lack of empirical evidence that non-discriminatory factors other than age explain age-based disparities in hiring data. *Id.* at 175-89 (Statement of Dr. Harold L. Sheppard, Social Scientist, Upjohn Institute for Employment Research). Dr. Sheppard described what he called the "obstacle course set up by our public institutions and private employers" confronting older workers "becoming unemployed after many years of continuous employment." *Id.* at 176. The obstacle course, he said, "includes . . . conscious and *unconscious patterns of discrimination against older jobseekers*." *Id.* (emphasis added). Sheppard rebutted the assertion that "skill level is the simple explanation for the problems of older job seekers," summarizing the results of studies using "multiple classification analysis" (now known as "multiple regression analysis") that "when every other factor was taken into account" to assess workers' unemployment, "age was still found to be significantly related to unemployment status." *Id.* at 181. Thus, the concept of disparate impact, while not

yet named as such, was fully-formed as a theory of age discrimination years before *Griggs*.

As the ADEA neared enactment, congressional leaders shepherding the law focused on the ADEA's potential to reduce older worker unemployment by challenging age discrimination in hiring. Mr. Perkins, the manager of the House bill, proclaimed that it was "a bill to promote employment of middle aged and older persons on the basis of ability." 113 Cong. Rec. 34738, 34740 (1967). Perkins invoked conditions "[i]n [his] own district in Kentucky," in which "thousands of former coal miners" learned that "age is a great handicap in finding a job." *Id.* He claimed that the ADEA would redress "this longstanding misconception about the employability of older workers" despite their superior "reliability, productivity, and attendance." *Id.*

Senate floor manager Yarborough summarized that "[i]n simple terms, this bill prohibits [age] discrimination in hiring and firing." 113 Cong. Rec. 31248, 31252 (1967); s*ee also id.* at 31256 ("Should those 65 or older applying for positions they are eminently qualified to fill be discriminated against in favor of someone with less experience but who happens to be 10 or 20 or 30 years younger?") (Sen. Young, D., Oh.).

Finally, just days before the House agreed to final changes to the ADEA passed by the Senate, Rep. Burke offered grounds for Congress to conclude that age bias in hiring is especially serious:

> It is one of the cruel paradoxes of our time that older workers holding jobs are considered invaluable because of their experience and stability. But let that same worker become unemployed and he is considered "too old" to be hired. Once unemployed, the older worker can look forward to longer stretches between jobs than a young worker in the same position.

113 Cong. Rec. 34742 (daily ed. Dec. 4, 1967). Nowhere in the record of the ADEA's enactment is there even a hint that Congress intended older applicants to have less legal protection than incumbent older workers or that Congress envisioned hiring bias itself as purely a phenomenon involving overt bias, to the exclusion of age-neutral policies and practices that screen out qualified and capable older workers. Rather, the evidence is entirely to the contrary.

B. Disparate Impact is Indispensable to the ADEA's Efforts to Eliminate Age Discrimination in Hiring.

Section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), has been effective in eliminating biased job ads[8] and other blatant forms of age discrimination in hiring. However, as detailed in Section II, older workers still

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

experience far longer periods of unemployment than younger workers and constitute a disproportionate share of the long-term unemployed. One reason these disparities persist is covert employer bias. To combat this type of discrimination, section 4(a)(2)'s protections are critical. Denying older unemployed workers the disparate impact method of proving age discrimination thwarts the intent of Congress by insulating from challenge many of the institutional policies and practices that Congress deemed devastating to the ability of older job seekers to secure employment.

In *McKennon v. Nashville Banner Pub. Co.*, this Court declared that "Congress designed the remedial measures in [the ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and, to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." 513 U.S. 352, 358 (1995) (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).[9] Without the disparate impact theory to challenge subtle forms of hiring discrimination, employers will have no reason to examine policies that adversely affect older

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

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

This Court has had to step in to correct improper developments in the law concerning disparate impact and the ADEA in the past, and must do so again here. In the wake of this Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), employers seized upon dicta[10] to argue that the disparate impact theory did not apply to the ADEA. However, as this Court noted in *Smith*, "[F]or over two decades after our decision in *Griggs*, the Courts of Appeals uniformly interpreted the ADEA as authorizing recovery on a 'disparate impact' theory in appropriate cases." 544 U.S. at 236-37. And, during that time, cases alleging age discrimination in hiring practices, brought by job applicants, were among those cases considered appropriate for disparate impact analysis. *See, e.g., Geller v. Markham*, 635 F.2d 1027, 1030 (2d Cir. 1980) (school's policy that prohibited hiring teachers with

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[10] Justice O'Connor commented that, "Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper*, 507 U.S. at 610. According to one federal court of appeal, as a result of this gratuitous comment, "tectonic plates shifted . . . caus[ing] lower courts to rethink the viability of disparate impact doctrine in the ADEA context." *Mullin v. Raytheon Co.*, 164 F.3d 696, 700 (1st Cir. 1999).

more than five years of experience had unlawful disparate impact on older workers).

Yet, several circuit courts of appeals went astray and "categorical[ly] rejected[ed] . . . disparate impact liability. . . ." *Smith* at 238; s*ee also id*. at 237 n.9 (collecting cases). This Court put an end to that misguided shift by ruling in *Smith* that "the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-*Hazen Paper* consensus concerning disparate-impact liability." *Id.* at 238.

In this case, the Eleventh Circuit ignored this Court's instruction in *Smith* that "the scope of disparate-impact liability under ADEA is narrower than under Title VII" because of "[t]wo textual differences" between the two statutes. 544 U.S. at 240. First, the ADEA's reasonable factors other than age (RFOA) provision, 29 U.S.C. § 623(f)(1), is the employer defense to a disparate impact claim under the ADEA as opposed to the more stringent "business necessity" standard under Title VII. *Id.* Second, "*Ward's Cove*'s[11] pre-1991 interpretation of Title VII's identical language [referring to sections 4(a)(2) of the ADEA and 703(a)(2) of Title VII] remains applicable to the ADEA." *Id*. Denying the disparate impact theory to applicants under the ADEA and instead limiting its availability to current employees renders the theory much narrower under the ADEA than under Title VII. Yet, the *Smith* Court did not mention that as a "textual difference" between the

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[11] *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

two. Instead, significantly, this Court listed two age cases challenging discriminatory hiring practices as "appropriate" ADEA disparate impact cases. *Id.* at 237 n.8 citing disparate impact hiring claims in *Wooden v. Bd. of Educ.*, 931 F.2d 376 (6th Cir. 1991), and *Faulkner v. Super Valu Stores*, 3 F.3d 1419 (10th Cir. 1993), as examples of the proper application of section 4(a)(2)).

The Eleventh Circuit ignored this Court's signal in *Smith* that disparate impact is an appropriate tool for challenging hiring discrimination under the ADEA. In the face of the latest assault on hiring discrimination victims' ability to challenge policies and practices that have the effect of screening out older applicants, this Court should grant certiorari to confirm that section 4(a)(2) permits challenges to hiring criteria that disproportionately disadvantage older applicants seeking employment opportunities.

In the "Conclusions and Recommendations," section of his report, Secretary Wirtz lamented, "It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription." Wirtz Report at 21. Denying the disparate impact method of proving age discrimination to unemployed older workers would do just that. It would thwart the intent of Congress by insulating from challenge many of the institutional policies and practices that Congress deemed devastating to the ability of older job seekers to secure employment.

The Eleventh Circuit's decision misreads the language of section 4(a)(2), ignores Congress's primary purpose for enacting the ADEA and disregards longstanding guidance from the federal agencies charged with enforcing the ADEA. The result is to deny the most effective means for determining if "inaccurate and stigmatizing stereotypes," *Hazen Paper*, 507 U.S. at 610, are behind hiring policies or practices that disproportionately disadvantage older individuals. This Court "ought not to open the door to an evasion of the [ADEA's core goals] by this device." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998)[12]. As it did previously in *Oubre* and *Smith*, this Court must once again close the door to a misguided attempt to evade the ADEA's commands. The ADEA prohibits hiring discrimination no matter what form it takes, whether it is overt and obvious, or covert and subtle.

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[12] *Oubre* rejected decisions by courts of appeals that had permitted employers to evade the strict requirements for waivers and releases of claims under the ADEA imposed by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990), by claiming that employees ratify unlawful releases when they do not return the monies received in consideration for the release. 522 U.S. at 424.

II. THE ADEA'S PRIMARY PURPOSE OF ELIMINATING DISCRIMINATION AGAINST OLDER JOB APPLICANTS IS NO LESS IMPORTANT TODAY THAN IT WAS FIFTY YEARS AGO.

"[T]heir numbers are great and growing; and their employment problems grave." 29 U.S.C. § 621(a)(3). This is how Congress described the situation for older workers seeking employment at the time of the ADEA's enactment in 1967. Fifty years later, there is no reason to remove that text from the statute, for "their numbers are [*still*] great and growing and their employment problems [*are still*] grave." Indeed, a statement made over 40 years ago still rings true today: "[T]here is more reason now not less, for rigorous enforcement of the ADEA." *Impact of the Age Discrimination in Employment Act of 1967: Hearing Before the Subcomm. On Retirement Income and Employment of the House Select Comm. on Aging*, 94th Cong. 81 (1976).

In his message to Congress on the day the legislation that would become the ADEA was introduced, President Johnson emphasized that workers 45 and over comprised 27 percent of the unemployed and 40 percent of the long-term unemployed. *Aid to the Aged, Message from the President of the United States transmitting a Review of Measures Taken to Aid the Older Americans and Recommendations for Legislation to Provide Further Aid*, H.R. Doc. No. 90-40, at 7 (1967). The situation has not improved. Older workers still experience far longer periods of unemployment and are

disproportionately represented among the long-term unemployed.[13] In 2014, "[o]n average, 45 percent of older jobseekers (ages 55 and older) were long-term unemployed (out of work for 27 weeks or more)." Gary Koenig, Lori Trawinski, and Sara Rix, *The Long Road Back: Struggling to Find Work after Unemployment*, 1 (March 2015) http://www.aarp.org/content/dam/aarp/ppi/2015-03/The%20Long%20Road%20Back_INSIGHT-new.pdf.[14]

Despite the ADEA's protections, employers still engage in covert and indirect discriminatory behavior to deny older job applicants fair treatment. *See, e.g.,* Dan Kalish, *Covert Discrimination: What You Need to Know About Coded Job* Listings, PayScale.com (June 15, 2015), http://bit.ly/ 1QBb2bL (describing use of coded phrases like "parseltongue" to weed out older applicants); Vivian Giang, *This is the latest way employers mask age bias, lawyers say*, Fortune (May 4, 2015), http://for.tn/1E10rvm

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[13] The average duration of unemployment of older jobseekers (age 55+) reached 54.7 weeks in May 2011, after first exceeding one year in the prior month. The comparable figure for jobseekers under age 55 was far less (38.9 weeks). In May 2011, the share of age 55+ jobseekers among the long-term unemployed reached 57.8%. Sara E. Rix, *The Employment Situation, May 2011: Average Duration of Unemployment for Older Jobseekers Continues to Rise*, AARP Public Policy Institute, 1, 4 (June 2011), http://www.aarp.org/work/job-hunting/info-06-2011/fs226-employment.html.

[14] *See also* Sara E. Rix, *Long-Term Unemployment: Greater Risks and Consequences for Older Workers*, AARP Public Policy Institute (Feb. 2015), http://www.aarp.org/content/dam/aarp/ppi/2015-2/AARP953_LongTermUnemployment_FSFeb2 v1.pdf.

(describing job postings with preferences for digital "native speakers," rather than older "digital immigrants"). According to an AARP survey, two-thirds of workers aged forty-five to seventy-four in a variety of professions have encountered age discrimination in the workplace, with an overwhelming majority of those workers describing it as "very or somewhat common." AARP Research, *Staying Ahead of the Curve 2013: the AARP Work and Career Study Older Workers in an Uneasy Job Market* 28 (Jan. 2014), http://bit.ly/1p8Aard. Furthermore, a majority of unemployed older survey respondents seeking employment (65%) described their age as having a negative effect on their prospects, labeling age discrimination as one of the most significant barriers to finding employment. AARP Pub. Policy Inst., *Boomers and the Great Recession: Struggling to Recover* 21-22 (2012), http://bit.ly/2j8O1kL.

Hiring discrimination is notoriously difficult to challenge because it is difficult to detect. Jobseekers lack sufficient information about a company's hiring processes and the relative qualifications of their competition to confidently suspect a potential claim. Accordingly, if hiring claims under the ADEA can be established through disparate treatment analysis only, the Act's command to not discriminate against older applicants will go largely unenforced and little progress will be made. The fact that "age discrimination is characterized more by indifference and thoughtless bias than be overt hostility . . . makes detection of unlawful motive impractical and enhances the risk of evasion." Steven J.

Kamenshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. 229, 318 (1990).

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

CONCLUSION

For the reasons set forth above, Amici AARP and AARP Foundation respectfully urge this Court to grant the petition for writ of certiorari.

Respectfully Submitted,

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