No. 19-1063

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHRISTINE FRAPPIED, CHRISTINE GALLEGOS, KATHLEEN GREENE, JOYCE HANSEN, KRISTINE JOHNSON, GEORGEAN LABUTE, JOHN ROBERTS, ANNETTE TRUJILLO AND DEBBIE VIGIL,

Plaintiffs-Appellants,

v.

AFFINITY GAMING BLACK HAWK, LLC,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Colorado, U.S. District Judge Raymond P. Moore, No. 1:17-CV-01294-RM-NYW

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION SUPPORTING APPELLANTS CHRISTINE FRAPPIED, et al., AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

AARP has no parent corporation, nor has it issued shares or securities.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

Amici are dedicated to addressing the needs and interests of older workers and strive through legal advocacy to preserve the means to enforce their rights. Approximately one-third of AARP's members are employed full-time or part-time and still others are seeking employment. All such members, as well as other older persons similarly situated, are covered by the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-34, ("ADEA"). Amici are committed to vigorous enforcement of the ADEA. This case presents important issues of ADEA implementation key to the effectiveness of that statute for older workers.

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[1] In accordance with Fed. R. App. P. 29(a)(4)(E), Amici hereby 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 Amici, their members, and counsel, contributed money intended to fund preparing or submitting this brief.

INTRODUCTION

Plaintiffs-Appellants are nine former casino employees who brought ADEA claims challenging their dismissal in 2013 in group layoffs carried out by appellee Affinity Gaming Black Hawk, LLC ("Affinity") at three Colorado casinos it owned. At summary judgment, Christine Frappied and her co-Plaintiffs presented statistics supporting their ADEA claims. This evidence showed large group disparities between the ages of those fired in each of four job categories in which Plaintiffs had been employed and the ages of those hired in the ensuing months to fill openings in the same job groups.[2] In each instance, the difference in the median age of those fired and hired was significant: 29.4 years for Cage Cashiers; 15.6

[2] *See* Plaintiffs'-Appellants' Appendix ("App.") at 2287-90 (filed under seal), Plaintiffs' Response to Defendant's Motion for Summary Judgment, Exhibit AU, *Frappied v. Affinity Gaming of Black Hawk, LLC*, No. 1:17-cv-01294-RM-NYW (D.Colo.) (Dkt. #148-30) (Aug. 31, 2018) (hereafter "Ex. AU"). In these terminations Affinity fired 11, 5, and 3 individuals, respectively, in the Table Games Dealer, Cage Cashier, and Food & Beverage Cashier categories; over the next six months Affinity filled these positions. *Id*. at 2287-88, 2290. Affinity also fired a Casino Host and later filled a slightly different "Casino Host-H[ou]rly" position. *Id.* at 2289; *see also id*. at 2168 (filed under seal), "Hires Since 11-1-12," *Frappied* (D. Colo.) (Dkt. # 131-101) (July 26, 2018), attachment to App. 1702-03 (Dkt. #148-29) (Aug. 31, 2018) (Declaration of Barry Roseman), at 6. Plaintiffs sought to show that "in each of the four departments where [they had] worked the median age of the fired employees was higher than the median age of the new employees hired." App. 2089 (January 17, 2019 Order at 6).

years for Casino Hosts; 14.2 years for Table Games Dealers; and 12 years for Food & Beverage Cashiers.[3]

In its January 17, 2019 Order, the district court rejected this evidence for failure to show a specific younger replacement for each Plaintiff, declaring "these numbers are consistent with the . . . possibility that Plaintiffs . . . were in fact replaced by older employees, even though the median age of employees went down[.]" App. 2089-30. The court also cited a "lack of authority" directly on point—i.e., for the precise proposition "that a group of plaintiffs can establish a prima facie case of age discrimination merely by asserting that they were replaced by another group of employees based on the median age of each group." *Id*. Yet, the court ignored ample precedent in closely analogous circumstances.

The district court also failed to consider a critical factual inference that a jury could draw from Affinity's decision to replace an older group of employees with a younger group. A jury could infer that Affinity discharged the older employees because it preferred a younger group.

The district court faulted Plaintiffs for not citing the *average* age of those fired and hired in the four groups in which Plaintiffs had held jobs. App. 2090 & n3. Yet, the court either ignored or did not realize that Plaintiffs provided all the data needed for such simple calculations. And when performed, they show very

[3] App. 2287-90.

similar, large age disparities. Finally, the court expressed disappointment that Plaintiffs did not provide other age studies, such as of all 60 employees the Complaint alleged that Affinity fired, *id.* at 2092, as opposed to the 20 terminated in Plaintiffs' four groups. In short, the court insisted that Plaintiffs should have presented *other* proof, instead of assessing the evidence that Plaintiffs *actually* provided.

The district court's refusal to the take Plaintiffs' statistical evidence seriously was a key step in the court concluding that Frappied, et al., failed to establish a prima facie case of age discrimination. Amici submit that this evidence was strong enough to support such a prima facie case under precedents of the U.S. Supreme Court, this Court, and those of sister circuits. Hence, the district court's failure to accord that evidence adequate weight (or any at all) amounted to error warranting reversal of its summary judgment in favor Affinity.

SUMMARY OF ARGUMENT

The district court misinterpreted a key element of the proof framework first announced in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and since then regularly applied by this Court in ADEA cases that, as here, rely on circumstantial evidence of age discrimination. *See, e.g., Bennett v. Windstream Commc'ns, Inc.*, 792 F.3d 1261, 1266 (10th Cir. 2015) (ADEA and Title VII case).

Thus, the district court usurped the role of the jury by prematurely granting summary judgment to Affinity.

In particular, the district court deviated from decisions of this Court and other federal courts applying the very first step of the *McDonnell Douglas* framework, in which plaintiffs are directed to establish a prima facie case that "the challenged action occurred under circumstances giving rise to an inference of discrimination." *Bennett*, 792 F.3d at 1266. Other basic components of the prima facie case include: membership in a class of persons protected by statute (e.g., by the ADEA); an employer's adverse action affecting a plaintiff's employment, *id.*; and, *where logically applicable*—i.e., in many individual termination cases—that the discharged plaintiff was replaced by a specific younger worker. *See e.g., Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1146 (10th Cir. 2008). However, the district court's rigid requirement that Christine Frappied and her fellow discharged Plaintiffs each had to prove that they were replaced by a specific younger worker, App. 2089-90, defies precedent and common sense.

This Court has recognized not only that the foregoing factors must be flexibly applied, *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), but also, in the reduction-in-force context, that the specific replacement requirement should not be a bar when that showing is impossible. *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988). Here, it is undisputed by Plaintiffs,

Defendant, and the district court, App. 2089, that it was impossible to identify specific replacements of individual discharged employees. The record indicates that—as in myriad other discharge and rehire situations—the employer fired and hired groups of persons for jobs lacking individually distinctive roles or functions. Amici contend that in such situations *McDonnell Douglas* does not require—and it makes no sense for courts to demand—proof of a specific younger replacement. Such rigidity erodes ADEA enforcement. It also clashes with the core purpose of the *McDonnell Douglas* prima facie case—to weed out ill-founded claims undeserving of a court's attention at the second and third stages of the *McDonnell Douglas* proof regime. *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1227 (10th Cir. 2000) (following *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981)). Achieving these goals requires flexibility. To that end, "the elements required for a plaintiff's prima facie case may vary depending on the context of the claim and the nature of the alleged conduct." *Bennett*, 792 F.3d at 1266 n.1 (citing *McDonnell Douglas*, 411 U.S. at 802 n.13 and *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1353-54 (2015)).

Amici also urge this Court to reject two other aspects of the district court's misapplication of *McDonnell Douglas*, which, Amici likewise believe, if affirmed, will impede the ADEA's effectiveness and hamper courts' ability to accurately distinguish between employment discrimination claims that are deserving of a trial

by jury from those that are not. First, the district court rejected Plaintiffs' evidence of group disparities between the ages of those fired and hired by Appellee Affinity Gaming Black Hawk, LLC ("Affinity") for the same categories of jobs despite this Court's and other federal courts' frequent reliance on statistical evidence of group differences in age. Second, the district court cited *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), as a basis for its inflexible analysis of the components of a *McDonnell Douglas* prima facie case, despite *Gross*' express decision not to address *McDonnell Douglas at all*.[4]

ARGUMENT

I. The District Court Failed to Apply Extensive Precedent that the Standard for Establishing a Prima Facie Case of Age Discrimination under *McDonnell Douglas Corp. v. Green* is Flexible, Not Onerous, and Focuses on Whether the Challenged Action Occurred, as Here, under Circumstances Giving Rise to an Inference of Discrimination.

In *McDonnell Douglas Corp. v. Green,* the U.S. Supreme Court established a framework for "the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S. at 800. The three-step burden-

[4] Amici do not address whether the district court should have dismissed Plaintiffs-Appellants' claim of discrimination against older women—i.e., discrimination on grounds of sex-plus-age, App. 285-88 (June 22, 2018 Order at 5-8), given the extensive treatment of it by Plaintiffs-Appellants and other Amici.

shifting proof regime[5] has become ubiquitous[6] as a method available to employment discrimination plaintiffs "seek[ing] to show disparate treatment through indirect [i.e., circumstantial] evidence." *Young*, 135 S. Ct. at 1353, including under the ADEA.[7]

At the very first step of the *McDonnell Douglas* framework, "[a] prima facie case generally requires a plaintiff to show, by a preponderance of the evidence, that she is a member of a protected class, she suffered an adverse employment action, and the challenged action occurred under circumstances giving rise to an inference

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[5] *See, e.g., Laul v. Los Alamos Nat'l Labs*, No. 18-2084, 2019 U.S. App. LEXIS 13500, *6-7 (10th Cir. May 6, 2019) (ADEA and Title VII case) ("Under *McDonnell Douglas*, [the plaintiff] has the burden to establish a prima facie case . . . . If [the plaintiff] carries his burden, [the defendant] must then come forward with a legitimate, non-discriminatory reason for its [challenged action]. If [the defendant] makes this showing, the burden shifts back to [the plaintiff] to show that [the defendant's] proffered justification is pretextual."). Amici contest only the district court's ruling that Frappied, et al., failed to establish a prima facie case.

[6] *See Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 141 (2000) (noting that all "the Courts of Appeals, including the Fifth Circuit in this case, have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence").

[7] The U.S. Supreme Court "has not squarely addressed whether the *McDonnell Douglas* framework . . . also applies to ADEA actions," but has assumed as much. *Reeves,* 530 U.S. at 142. This Court has ruled that it does. *See, e.g., Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1278 (10th Cir. 2010) (declaring "[T]his circuit has long held that plaintiffs may use the *McDonnell Douglas* three-step analysis to prove age discrimination under the ADEA" and holding that *Gross* did not "overturn" that "circuit precedent.").

of discrimination." *Bennett,* 792 F.3d at 1266. The importance of making out an ADEA prima facie case is clear, albeit limited; "it establishes a 'legally mandatory, rebuttable presumption'" of discrimination, *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996) (quoting *Burdine*, 450 U.S. at 254 n.7), and thereby "triggers the employer's burden of production" to show a legitimate nondiscriminatory reason for the challenged actions. *Id.* at 311.[8]

This Court has recognized that an "essential purpose served by a prima facie test" is to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection." *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1227 (10th Cir. 2000) (quoting *Burdine*, 450 U.S. at 253-54).[9] However, the Court also has observed that "[t]he critical prima facie inquiry in all cases is whether the plaintiff has demonstrated that the adverse employment action occurred 'under circumstances which give rise to an inference of unlawful discrimination.'" *Id.* (quoting *Burdine,* 450 U.S. at 253).

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[8] Although the employer's burden at this stage likewise is not onerous—after all, "[t]his burden is one of production, not persuasion," *Reeves*, 530 U.S. at 142—it is also true that "[i]f the trier of fact finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff." *O'Connor*, 517 U.S. at 311.

[9] These include "an absolute or relative lack of qualifications," *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 358 n.44 (1977), a factor Affinity concedes is not in question in this case, *see infra*, n.11.

Thus, "[t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any . . . plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . ." *Teamsters,* 431 U.S. at 358. In this case, the district court ignored "the general principle" underlying *McDonnell Douglas* in favor of an "onerous" requirement that plaintiffs satisfy an inapplicable "discrete element[] of proof": identifying a specific younger replacement hire.

A. The District Court's Insistence that Plaintiffs Cannot Establish a *McDonnell Douglas* Prima Facie Case Due to Their Inability to Identify Specific Younger Replacements Conflicts with Settled Law that the Prima Facie Case Must be Applied Flexibly.

The district court erred by treating a mere common formulation of the *McDonnell Douglas* prima facie case in ADEA discharge cases[10] as an unvarying recipe. The court ignored precedent and record facts crying out for a different approach.

[10] The court listed as elements of this prima facie case: to "show by a preponderance of the evidence that [a plaintiff] was (1) within the protected class of individuals forty or older[,] (2) performing satisfactory work[,] (3) terminated from employment[,] and (4) replaced by a younger person . . . ."[10] App. 2087 (citing *Adamson*, 514 F.3d at 1146). Affinity "concede[d] that Plaintiffs satisf[ied] the first three elements." App. 2088.

Unaccountably, the court insisted that the plaintiffs identify specific younger replacements despite the plaintiffs' undisputed contention that for many of the positions vacated it was "not possible to track which employees replaced the employees who were terminated." App. 2089.[11] This is so in many group layoffs followed by large-scale rehiring where, as here, no *individual* is replaced by any other *specific individual*; rather, *groups* of employees in various job categories are replaced by *groups* of new employees, as the jobs in question apparently required generic, not individualized qualifications. The district court's rigid focus on a single form of evidence that *the record indicates could not be produced* constituted a violation of the rule, recognized by the court itself, that "Plaintiffs' burden of production at the prima facie stage is not onerous." App. 2091 (citing *Bennett*, 792 F.3d at 1267, citing *Burdine*, 450 U.S. at 253).[12]

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[11] While Affinity did not dispute this contention, it still faulted the plaintiffs for failing to identify specific replacements. *See* App. 1870-71, Defendant's Reply in Support of Motion for Summary Judgment, *Frappied v. Affinity Gaming of Black Hawk, LLC*, No. 1:17-cv-01294-RM-NYW (D. Colo.) (Dkt. #152) (Sept. 14, 2018), at 4-5.

[12] The district court's casual dismissal of Plaintiffs' statistical evidence as offering no probative proof is inexplicable under these standards. *See* App. 2088 ("As a matter of math, these [job group median age] numbers do not prove that Plaintiffs . . . were replaced by younger employees"), *id*. at 2089 ("these numbers are consistent with the . . . possibility that Plaintiffs . . . were in fact replaced by older employees, even though the median age of employees went down").

The district court's approach also clashed head on with its own acknowledgment that "[t]he [*McDonnell Douglas*] framework is meant to be flexible," App. 2088, and the Supreme Court's observation that the *McDonnell Douglas* prima facie case "was never intended to be rigid, mechanized, or ritualistic." *Furnco*, 438 U.S. at 577. This Court has repeatedly echoed this precept,[13] even in ADEA decisions referencing a four-factor prima facie case including proof of a younger replacement. In *Adamson*, for example, this Court noted that "the elements of a prima facie case under the *McDonnell-Douglas* framework are neither rigid nor mechanistic," and "their purpose is the establishment of an initial inference of unlawful discrimination warranting a presumption of liability in plaintiff's favor." 514 F.3d at 1146. Yet, ignoring such nuances, the district court cited *Adamson* for the proposition that "to establish a prima facie case of age discrimination a plaintiff *must* show that she was replaced by a younger person." App. 2089 (emphasis added).

Likewise, other decisions of this Court that the trial judge cited to justify its commitment to a younger replacement rule do not support that approach. In

[13] *See, e.g., Whittington v. Nordam Grp., Inc.*, 429 F.3d 986, 993 (10th Cir. 2005) (affirming single plaintiff's ADEA verdict and citing *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983), in turn quoting *Furnco*); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1139 (10th Cir. 2000) (saying this text of *Furnco* applies "particularly in an age discrimination case," quoting *MacDonald v. Eastern Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1121 (10th Cir. 1991)).

particular, in *Greene v. v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996), the Court noted that prior to 1994, its ADEA termination decisions held that a single plaintiff "ordinarily" must prove replacement by a younger person. *Id.* at 558. Later decisions dropped the word "ordinarily," but, the Court said, "we do not read it as transforming the requirement into an absolute one." *Id.* at 559. Further, the Court suggested "that in an extraordinary case, a plaintiff may be relieved from satisfying the four elements of the *McDonnell Douglas* test for establishing a *prima facie* case of employment discrimination." *Id.* at 559-60.[14]

Greene identified a sensible way to resolve cases where proving a younger replacement is not possible:

> the flexible *McDonnell Douglas* approach is meant to be adapted to the particular type of adverse employment decision in question. For example, where a plaintiff is discharged as a result of a so-called "reduction in force," he or she is not replaced by someone so that the fourth factor can be analytically applied. In this instance, the *prima facie* test is modified to fit the particular situation by allowing the plaintiff to show that older employees were fired while younger ones in similar positions were retained. *See Ingels v. Thiokol Corp.*, 42

[14] In *Miller v. Eby Realty Grp. LLC*, 396 F.3d 1105 (10th Cir. 2005), also cited by the district court to support an ADEA prima facie case with a younger replacement requirement, the formulation of the single plaintiff's prima facie case was not at issue. Instead, the parties stipulated to it, given clear evidence of plaintiff's specific replacement by an individual 24 years younger. *Id.* at 1109, 1111. Similarly, in *Rivera v. City and Cty. of Denver*, 365 F.3d 912, 920 (10th Cir. 2004), another single-plaintiff case cited by the district court, "the City conceded for the purposes of its motion for summary judgment that Plaintiff could establish a prima facie case of . . . age discrimination").

> F.3d 616, 621 (10th Cir. 1994); *Jones v. Jones Brothers Constr. Corp.*, 879 F.2d 295, 299 (7th Cir. 1989).

Id. The Court has continued to embrace this alternative approach in ADEA "reduction-in-force" ("RIF") cases, in which jobs are eliminated and employees are discharged and not replaced—i.e., in which "plaintiffs are simply laid off and thus *incapable of proving actual replacement by a younger employee*." *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988) (emphasis added). *See Jones v. Unisys Corp.*, 54 F.3d 624, 630 (10th Cir. 1995) (following *Branson*).

"Consequently," *Branson* explained, "courts have modified the fourth prima facie element[15] by requiring the plaintiff 'to produc[e] evidence . . . from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.'" *Id.* (quoting *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). Since then, this Court has embraced similar flexible criteria. *See Brainard v. City of Topeka*, 597 Fed. Appx. 974, 978 (10th Cir. 2015) ("In order to establish a prima facie case of discrimination in the context of a RIF, Ms. Brainard must show: . . . (4) that there is some evidence the employer intended to discriminate against her in

[15] In *Greene and Adamson*, this Court listed a showing of satisfactory performance as a third component, while in *Bennett*, the Court treated that issue as part of the plaintiff's general obligation to present some evidence "giving rise to an inference of discrimination." 792 F.3d at 1266. In any event, that issue is not presented here.

reaching its . . . decision,'" quoting *Beaird v. Seagate Tech., Inc.*. 145 F.3d 1159, 1165 (10th Cir. 1998)); *Finney v. Lockheed Martin Corp.*, 654 Fed. Appx. 943, 945 (10th Cir. 2016) (RIF case requiring proof that the plaintiff "(4) . . . was treated less favorably than others not in the protected class.").

While the district court acknowledged these RIF cases, *see* App. 2091 (citing *Jones*, 54 F.3d at 630), the court inexplicably failed to apply their logic here. The court rejected the RIF model out of hand on dubious grounds, citing a "lack of analogous circumstances." *Id.* But even if the record does not show that a RIF occurred here, Plaintiffs and Defendant agree that it was "not possible" to show a younger replacement, *id*. at 2089, just as in the RIF context. This case—involving group terminations *and* group rehiring—presents a fact pattern as complex as a RIF and as deserving of an exception to the younger replacement rule.

Although conceding that *McDonnell Douglas* makes room for "Other Articulations of the Fourth Element," App. 2091, the court showed no real flexibility in doing so. The court declined to consider Plaintiffs' best evidence—their data on median age differences—in this context. The court also unfairly chided Plaintiffs for "not establishing they were similarly situated to . . . the new employees," *id*. at 2092, when, in fact, Plaintiffs plainly *did* offer evidence that Affinity hired new employees to fill the same (or similar) job categories that the Plaintiffs once filled. In this manner, Plaintiffs attempted to establish that they

were similarly situated—in groups, not as individuals—with groups of new employees hired by Affinity. And, as the district court seemed to endorse, Plaintiffs argued that their statistics show that they were "treated less favorably" than these comparators "under circumstances giving rise to an inference of discrimination." *Id*. at 2091 (quoting *Jones v. Okla. City. Pub. Schls.*, 617 F.3d at 1279, and *Bennett*, 972 F.3d at 1266). The court's misinterpretation of Plaintiffs' proof was error.

Finally, the district court lamented Plaintiffs' choice to offer statistics regarding subsets of those fired and hired, even though those subsets reflected Affinity's own job categories. App. 2092 (criticizing the Plaintiffs' statistics for not addressing *all* "the sixty employees who were terminated" or *all* the "new employees" hired "to replace the employees who were laid off"). However, *McDonnell Douglas* and cases interpreting it command attention *not* just to evidence *typically* suggesting or rebutting an inference of illegal discrimination, but, rather, to the persuasive power of evidence *actually presented*.

Where, as here, the non-existence of a specific younger replacement leaves unsettled whether "the challenged action occurred under circumstances giving rise to an inference of discrimination," *Bennett*, 792 F.3d at 1266, it is important for courts to consider *other evidence* that may create an inference of age bias "in light

of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577. Such evidence may be probative:

> because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

Id. The district court violated these basic principles underlying *McDonnell Douglas* and its decision doing so thereby warrants reconsideration.

B. The District Court Erred in Rejecting Evidence of Differences in the Median Age of Those Affected by Affinity's Firing and Hiring of Groups of Individuals for the Same Job Categories.

Plaintiffs presented strong prima facie evidence of age discrimination in the form of statistics regarding each of the job categories from which Frappied, et al., were fired and into which Affinity hired groups of replacement employees in the months following the 2013 terminations. "[I]n each of the four departments where [Plaintiffs had] worked . . . the median age of the fired employees was higher than the median age of the new employees hired." App. 2089. Indeed, these age disparities were so significant that they each exceeded the threshold of ten years,[16] the standard for a specific *individual* replacement giving rise to an inference of

[16] The differences were 29.4 years for the five Cage Cashier jobs, 14.2 years for the 11 Table Games Dealer positions, and 12 years for the three Food & Beverage Cashier jobs; the age gap between the Casino Host Affinity discharged and the "Casino Host Hourly" Affinity later hired was 15.6 years. App. 2287-90 (Ex. AU), *see supra,* n. 2.

discrimination in an ADEA termination case. *Grosjean v. First Energy Corp.*, 349 F.3d 332, 336 (3d Cir. 2003) (collecting decisions demonstrating that "[a]ge differences of ten or more years have generally been held to be sufficiently substantial to meet the requirement of the fourth part of age discrimination prima facie case."). *See Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 521 (6th Cir. 2008) (citing *Grosjean*).

Nevertheless, the district court refused to consider this evidence in support of Plaintiffs' prima facie case due to a "lack of authority" directly on point—i.e., for the precise proposition "that a group of plaintiffs can establish a prima facie case of age discrimination merely by asserting that they were replaced by another group of employees based on the median age of each group." App. 2089-90. This ruling failed the flexible test compelled by the broad principles articulated by the Supreme Court and this Court in implementing *McDonnell Douglas.*

First, the district court ignored this own Court's analysis of median age differences as relevant to prove an ADEA prima facie case. In a RIF case brought by the government, *EEOC v. Sandia Corp*., 639 F.2d 600 (10th Cir. 1980), the Court upheld a district court's ruling that disparities between "the median age of . . . employees [in various job categories] and the median age of those terminated" supported "a prima facie showing of age discrimination" with respect to laid-off employees between the age of 52 and 64. *Id*. at 607, 620-21. Likewise, the district

court did not take into account comparable rulings outside this circuit. *See Lubahn v. Absolute Software, Inc.,* No. 16-14425, 2018 U.S. Dist. LEXIS 186233, *14-17 (E.D. Mich. Oct. 31, 2018) (finding proof—including a seven-year difference between the median age of employees terminated in a RIF and of those "retained and hired"—was "sufficient to establish a prima facie case of age discrimination" under Michigan civil rights law); *Romero v. Allstate Ins. Co.*, 251 F. Supp. 3d 867, 884 (E.D. Pa. 2017) (ADEA plaintiffs "demonstrate[d] a prima facie case of disparate impact" based on various evidence including a disparity of 13 years between the median age of agents exempted from, and agents subjected to, the employer's challenged program for converting employees to contractors).

Powerful support for close attention to group age differences, such as in Plaintiffs' data, also exists in two Third Circuit ADEA decisions involving comparable situations in which an older worker challenging their termination could identify no specific replacement hire. In *Steward v. Sears, Roebuck & Co.*, 231 Fed. App'x 201 (3d Cir. 2007), the plaintiff, age 50, *id*. at 202, identified four employees who took over his job duties upon his discharge. *Id.* at 209 ("Steward's duties were assumed by . . . Carter (45), Merkel (35) and Sipple (60), with some assistance from DeWit (33)."). The Court of Appeals treated as probative the plaintiff's evidence of the difference between his age and *the average age* of his four replacements. *Id.* The court declined to rule that the "6.75 year average age

difference" was, as a matter of law, insufficient to give rise to an inference of age discrimination." *Id.*

Twelve years earlier, the Third Circuit similarly considered supportive of an ADEA prima facie case evidence of the difference between the plaintiff's age and that of two former co-workers who each assumed some of his duties. *Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir. 1995). The circuit court rejected the trial court's sole consideration of the age difference between the plaintiff and his "final replacement" given the larger age difference ("well over ten years") between the plaintiff and the second co-worker. *Id.* at 729-30. In reversing summary judgment for the employer the Court of Appeals said: "The combined differences in age between [the plaintiff] on the one hand and [his two co-workers] on the other is clearly sufficient to satisfy the fourth prong of a prima facie case by raising an inference of age discrimination." *Id.* at 730. *Sempier* likewise supports Plaintiffs' prayer for reconsideration here.

The analysis Amici propose under Tenth and Third Circuit precedent also is strongly supported by two Ninth Circuit decisions. In *Diaz v. v. Eagle Produce, Ltd.*, 521 F.3d 1201 (9th Cir. 2008), as here, the court examined whether a group of older ADEA plaintiffs had "created a triable issue of fact concerning the fourth and final requirement for a prima facie case" under the *McDonnell Douglas* proof framework. *Id.* at 1208. The *Diaz* court declared that "[r]easonable jurors could

find" that the "disparity between the average age of those hired and fired" after a particular biased supervisor "started to make personnel decisions" "support[ed] an inference of [age] discrimination." *Id.* at 1209-1210. In this case, as in *Diaz*, the plaintiffs have asked the courts to focus on a subset of data, within a larger volume of dismissals and later hires, in which they allege that the record reveals "hot spots" of age bias.

Similarly, *France v. Johnson*, 795 F.3d 1170 (9th Cir. 2015), an ADEA promotion discrimination case, endorsed consideration of the difference between the age of a plaintiff and the *average* age of his multiple competitors as evidence bearing on the validity of his ADEA prima facie case. *Id.* at 1174.[17] The *France* court ruled that the plaintiff's evidence fell short, but made clear that it would have sufficed had the age disparity been larger. *Id.* (holding that "an average age difference of ten years or more between the plaintiff and the replacements will be presumptively substantial, whereas an age difference of less than ten years will be presumptively insubstantial.").

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[17] "At the time of the promotion decisions, France was 54 years old and the four [individuals] selected [instead of him] were 44, 45, 47, and 48 years old, so the average age difference between France and th[os]e [promoted] was eight years. . . . A majority of circuit courts . . . have held that an age difference of less than ten years, without more . . ., is insufficient to make a prima facie case of age discrimination." *Id.* (citing *Grosjean*).

The proposed use of median age differences in this case is boosted by the use of average age differences in *Steward*, *Sempier*, *Diaz,* and *France* because of the convergence in the purposes and effects of these two statistical measures. In the first place, the small amount of data at issue here makes it very easy to verify that for all four job categories for which Plaintiffs provided median age differences, the average age differences also exceeded ten years.[18] Thus, using the ten-year standard as a measure of significance for age disparities, the use of averages versus medians does not change the results.

Furthermore, the ordinary dictionary definition of the term "average" encompasses both the "mean"—a calculated number found by adding up all values and dividing by how many values there are—and the "median"—the middle value in a series or collection of numbers. *See* "Average," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/average (May 2019)

[18] The median age difference between those fired and those hired was 20.4 years for the five Cage Cashier positions (58.3 vs. 37.9), 15.6 years for the single Casino Host position (59.7 vs. 44.1), 11 years for the three Food & Beverage Cashier positions (51.0 vs. 40.0), and 10.7 years for the eleven Table Games Dealer positions (48.6 vs. 37.9). Ex. AU. Given the limited data involved, the ease of performing these calculations, and the consistency of the results of calculating averages and medians, it is unfair to say that Plaintiffs' reliance on medians was "arbitrary," App. 2090, n.3, and, further, that the outcome of calculating averages is a mystery. *Id.* (""the average age may have increased, decreased, or not changed at all").

("average": "a single value (such as a mean, mode, or median) that summarizes or represents the general significance of a set of unequal values").

In addition, the use of a mean, a median, or both, to determine a single representative value for a data set is a common practice in statistical analysis. *See* Dieter Schremmer, *Stuck in the middle – mean vs. median* (March 15, 2017), https://www.cinfo.eu/mean-median/ ("The best strategy us to calculate both measures."). *See also Holman v. Comm'r*, 130 T.C. 170, 204 n. 11 (2008) (both the "'[m]ean' and 'median' are common descriptive statistics used to describe a central tendency (i.e., the middle or 'expected' value) of a set of numerical data.").

The median age difference data offered by Plaintiffs in this case was neither unconventional nor misleading. It should have been routinely considered just as numerous courts have considered average data. On the record before the Court in this case, the district court's failure to consider it was reversible error.

II. The District Court Erred in Relying on *Gross v. FBL Fin Servs., Inc.*, to Justify Imposing a Higher Standard for Proving a Prima Facie Case Under the ADEA than Under Title VII.

The district court also erred in faulting Plaintiffs for their supposed mistaken "reliance on cases outside of the ADEA context" that identify a flexible approach to proving a plaintiff's prima facie case under *McDonnell Douglas*. In the first place, it is well-established in this Circuit that in closely analogous circumstances "the prima facie case is the same for age and gender claims." *Brainard v. City of*

Topeka, 597 Fed. Appx. at 978 (RIF case founded on claims under the ADEA and sex discrimination in violation of Title VII); *accord Beaird v. Seagate Tech., Inc.*, 145 F.3d at 1167.

The district court's reasoning to the contrary is unfounded. The court's statement that the decisions pertinent to this question all "predate the Supreme Court's decision" in 2009 in *Gross*, App. 2092 (citing 557 U.S. at 173, 176), is simply incorrect. This Court's 2015 *Brainard* decision, following the analysis of the Court's prior decision in *Beaird*, alone belies the district court's temporal grounds for asserting that *Gross* fundamentally changed the *McDonnell Douglas* landscape.

Equally flawed was the district court's conclusion that *Gross*' adoption of a higher ADEA causation standard ("but-for") than under Title VII ("motivating factor") justifies rejecting guidance from Title VII cases regarding the necessity of showing a specific younger replacement when presenting a prima facie case of age discrimination. The text of *Gross* demolishes the district court's novel thesis. In his majority opinion, Justice Thomas *expressly declined* to address the substance of *McDonnell Douglas at all*, noting that "the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* . . . utilized in Title VII cases is appropriate in the ADEA context." 557 U.S. at 175 n.2.

Since *Gross*, federal courts are virtually unanimous in continuing to apply *McDonnell Douglas* in ADEA cases. And this Court has specifically disavowed any linkage between *Gross* and the proper formulation of the *McDonnell Douglas* proof regime. *See Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1278 (10th Cir. 2010) ("the rule articulated in *Gross* has no logical effect on the application of *McDonnell Douglas* to age discrimination claims.").

Requiring more from ADEA plaintiffs to present a prima facie case also is inconsistent with this Court's decisions under other federal employment statutes. For instance, the Court has established no rigid requirement to show a specific individual replacement in a termination case under either the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101, et seq., or the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. §§ 2601, et seq. Rather, the Court has framed the applicable test more flexibly, in general terms, to "require[] only a 'small amount of proof necessary to create an inference' of discrimination or retaliation." *Smothers v. Solvay Chem. Inc.*, 740 F.3d 530, 539 (10th Cir. 2014). Of course, a plaintiff "must satisfy different elements for [various] FMLA and ADA claims," but for an individual ADA termination claim, the prima facie case simply requires a plaintiff to show that he or she was terminated "under circumstances which give rise to an inference that the termination was based on [his] disability." *Id.* at 544.

CONCLUSION

For the reasons set forth above, the Court should reverse the district court's decision and remand for reconsideration of Plaintiffs' prima facie case.

June 6, 2019

Respectfully submitted,

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Dated: June 6, 2019

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I hereby certify that on June 6, 2019 the foregoing Brief of Amici Curiae AARP and AARP Foundation Supporting Appellants Christine Frappied, et al., and Reversal, was electronically filed with the Clerk of the Court for the United States Court of Appeals of the Tenth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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