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NO PRIOR EXPERIENCE DESIRED: *VILLARREAL V. R.J. REYNOLDS TOBACCO CO.* AND THE SCOPE OF DISPARATE IMPACT CLAIMS UNDER THE ADEA

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INTRODUCTION

The specter of discrimination continues to plague the job search process for millions of Americans.[1] Whether in the form of overt discrimination, or vague criteria such as "fit," the hiring practices of many firms still impose barriers to entry for discrete groups and deprive individuals of the opportunity to work in certain industries.[2] In response to these barriers, Congress passed Title VII of the Civil Rights Act of 1964, the cornerstone of federal employment discrimination law in the United States.[3] Since the enactment of Title VII, the endeavor to eradicate discrimination on the basis of "race, color, religion, sex, or national origin" has transformed the way in which business is conducted, staff is managed, and job applicants are hired in America.[4]

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[1] *See* KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT 155 (2012); Dorian T. Warren, *Racial Inequality in Employment in Postracial America*, *in* BEYOND DISCRIMINATION: RACIAL INEQUALITY IN A POSTRACIST ERA 135, 135 (Frederick C. Harris & Robert C. Lieberman, eds., 2013).

[2] *See, e.g.*, Elizabeth Olson, *Claims of Age Bias Rise, But Standards of Proof are High*, N.Y. TIMES (Mar. 18, 2016), http://www.nytimes.com/2016/03/19/your-money/trying-to-make-a-case-for-age-discrimination.html.

[3] *See* Title VII, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2 (2012)).

[4] *See id.*; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975) (noting that Congress intended for the protections of Title VII and the ADEA to function as a "spur or catalyst" compelling employers "to self-examine and to self-

Recognizing the unique hurdles faced by older people in the workforce, Congress passed the Age Discrimination in Employment Act ("ADEA") of 1967.[5] The ADEA is viewed as a companion statute to Title VII, and in fact, derives much of its language and structure from that earlier law.[6] In enacting the ADEA, the Ninetieth Congress took inspiration from the Wirtz Report,[7] which noted that "employers for a variety of reasons seek young workers" to the disadvantage of more experienced individuals.[8] Echoing these sentiments, the preamble to the ADEA conveys that its central purpose is "to prohibit arbitrary age discrimination in employment."[9] The ADEA is also intended "to promote employment of older persons based on their ability rather than age," and "to help employers and workers find ways of meeting problems arising from the impact of age on employment."[10]

The ADEA has only become more relevant now that the American workforce is aging.[11] More than half of Americans working today are over the age of forty.[12] Likewise, the number of workers over the age of fifty-five continues to rise relative to

evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[5] The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621–634 (2012)).

[6] *See* Lorillard v. Pons, 434 U.S. 575, 584 (1978) (announcing "[i]n fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII"). The phrase, *in haec verba*, means "in these words," and it refers to the use of texts verbatim in other texts.

[7] *See* W. Willard Wirtz, U.S. Dep't of Labor, The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *as reprinted in* EEOC, Legislative History of the Age Discrimination in Employment Acts (1981).

[8] *See id.*

[9] 29 U.S.C § 621(b) (2012).

[10] *Id.*

[11] *See* Mitra Toossi & Elka Torpey, *Older Workers: Labor Force Trends and Career Options*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT. (May 2017), https://www.bls.gov/careeroutlook/2017/article/older-workers.htm; *see also* Kenneth R. Davis, *Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem*, 70 BROOK. L. REV. 361, 361 (2004/2005) ("As the generation of baby boomers approaches its fifties and sixties, it occupies every venue in the American workforce.").

[12] *See Employment Status of the Civilian, Noninstitutional Population by Age, Sex, and Race*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., http://www.bls.gov/cps/cpsaat03.htm (last modified Jan. 19, 2018) (expressing the percentages of all employed people over forty years old, which when combined yields 54.5% of the total employed population).

younger age brackets.[13] The Bureau of Labor Statistics projects that by 2024, the labor participation rate for people between the ages of fifty-five and sixty-four will grow by 2.2%, while the same rate for individuals aged sixty-five and older will grow by 3.1%.[14] Thus, the centrality of the ADEA in employment law has only increased since its enactment in the mid-1960s.

While great strides have been made in combatting age discrimination since then, individuals over the age of forty still face patent and latent discrimination in the American labor market.[15] This struggle has been particularly acute in the job search and interview process. Recently, the United States Court of Appeals for the Eleventh Circuit, in *Villarreal v. R.J. Reynolds Tobacco Co.*,[16] found that job applicants may bring disparate impact claims under the ADEA, making it the first federal appeallate court to recognize these claims for job seekers under the Act.[17] However, after granting a rehearing en banc, the Eleventh Circuit reversed itself, in an 8-to-3 decision, holding that job applicants may not assert disparate impact claims under the ADEA.[18] The plaintiff in *Villarreal*, a forty-nine-year-old

[13] *See* Ann Marie Tracey, *Still Crazy After All These Years? The ADEA, the Roberts Court, and Reclaiming Age Discrimination as Differential Treatment*, 46 AM. BUS. L.J. 607, 607 (2009).

[14] *Civilian Labor Participation Rate by Age, Gender, Race and Ethnicity*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., http://www.bls.gov/emp/ep_table_303.htm (last modified Jan. 19, 2018).

[15] *See* Ashton Applewhite, *You're How Old? We'll Be in Touch*, N.Y. TIMES (Sept. 3, 2016), http://www.nytimes.com/2016/09/04/opinion/sunday/youre-how-old-well-be-in-touch.html (recounting a story about a man who overheard a prospective employer call him "too old" for an available position).

[16] Villarreal v. R.J. Reynolds Tobacco Co. (*Villarreal II*), 806 F.3d 1288 (11th Cir. 2015), *reh'g en banc granted*, *opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *rev'd en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).

[17] *Id.* at 1302–03.

[18] *See* Villarreal v. R.J. Reynolds Tobacco Co. (*Villarreal III*), 839 F.3d 958, 963 (11th Cir. 2016). A claim for disparate treatment requires a demonstration of discriminatory intent, whereas disparate impact concerns practices which are ostensibly neutral on their face, but substantially impact a certain protected segment of society. The Supreme Court has articulated the distinctions:

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin . . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall

man, applied for a regional sales manager position with R.J. Reynolds, but his application was repeatedly denied despite his years of sales experience.[19] The Supreme Court in *Smith v. City of Jackson* first announced that disparate impact protections are cognizable under the ADEA,[20] but the ruling only addressed current employees, not job applicants.[21]

This Note argues that § 4(a)(2) of the ADEA permits disparate impact claims for job applicants, despite the revised holding of the Eleventh Circuit. First, the plain meaning of § 4(a)(2) strongly suggests that disparate impact protections lie for job seekers, in contrast to the Eleventh Circuit's ultimate finding. This argument draws on a close textual and structural analysis of the ADEA, supplemented with a comparative analysis to Title VII.[22] Furthermore, this Note unpacks the legal arguments surrounding the 1972 amendment to Title VII, demonstrating that the absence of the "applicants for employment" language from § 4(a)(2) does not restrict the scope of disparate impact theory to current employees under the ADEA. This reflects the robust case law to suggest otherwise, as well as the practical limitations of the congressional override

> more harshly on one group than another and cannot be justified by business necessity.

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[19] *See Villarreal II*, 806 F.3d at 1291. Mr. Villarreal brought an action for age discrimination pursuant to 29 U.S.C. § 623, the disparate impact provision of the ADEA. This section of the ADEA provides, "It shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because such individual's age." 29 U.S.C. § 623(a)(2) (2012).

[20] Smith v. City of Jackson, 544 U.S. 228 (2005).

[21] *See id.* at 240. Previously, the Seventh, Eighth and Tenth circuits have denied job applicants the right to assert disparate impact claims under the ADEA, but these rulings date from the early to mid-1990s. *See, e.g.*, Smith v. City of Des Moines, 99 F.3d 1466, 1470 n.2 (8th Cir. 1996); Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 n.12 (10th Cir. 1996); E.E.O.C. v. Francis W. Parker Sch., 41 F.3d 1073, 1077–78 (7th Cir. 1994). However, *Smith* overruled both *Ellis* and *Francis W. Parker School*, rendering this circuit split less fractious.

[22] By comparison, Title VII recognizes disparate impact protections for both job applicants and current employees. The difference, in part, derives from a key textual difference between the two statutes. In 1972, Congress amended Title VII to provide an express provision for job applicants—"his employees *or applicants for employment* . . . ," while Congress has not revisited the ADEA to insert the same language to § 4(a)(2). *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 109 (codified at 42 U.S.C. § 2000a (2012)).

amendment as a legislative device, which evidences very little if any congressional intent to distinguish between closely related statutes.

I. *VILLARREAL V. R.J. REYNOLDS TOBACCO CO.*: FACTUAL BACKGROUND AND LEGAL ARGUMENTS OF THE NORTHERN DISTRICT OF GEORGIA AND THE ELEVENTH CIRCUIT

Richard M. Villarreal applied for a Territory Manager position with R.J. Reynolds Tobacco Company ("RJR") on November 8, 2007.[23] At the time, he was forty-nine years old.[24] The Territory Manager job was a sales position, and Villarreal had more than eight years of sales experience when he applied.[25]

Almost three years later, Villarreal applied for the Territory Manager position again, in June 2010.[26] Unlike in 2007, Villarreal received prompt notification from RJR that his application had been rejected.[27] He applied for the same position in December 2010, May 2011, September 2011, and March 2012.[28] None of Villarreal's applications led to a job interview, or any other further employment action.[29]

Between 2007 and 2012, RJR contracted with two recruiting companies, Kelly Services, Inc. and Pinstripe, to review applications and forward résumés to its human resources office.[30] To assist Kelly Services in selecting résumés, RJR provided it with specific guidelines of "what to look for on a resume," "targeted candidate" qualities, and characteristics to "stay away from."[31] Among the desired attributes were "2-3 years out of college" and "adjusts easily to changes."[32] Among the disfavored qualities was "8-10 years" of sales experience.[33] RJR also

[23] Villarreal v. R.J. Reynolds Tobacco Co. (*Villarreal I*), No. 2:12-CV-0138-RWS, 2013 WL 823055, at *1 (N.D. Ga. Mar. 6, 2013), *rev'd and remanded*, 806 F.3d 1288 (11th Cir. 2015), *reh'g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *rev'd en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at *2.

[29] *Id.*

[30] *Id.*

[31] *Id.* at *1.

[32] *Id.*

[33] *Id.* at *1.

provided Pinstripe with certain criteria, largely based on the attributes of recent hires who had earned the status of "Blue Chip Territory Manager."[34] Of the new hires who had attained the Blue Chip accolade, only nine percent had six or more years of sales experience.[35]

Between September 2007 and March 2008, Kelly Services received 19,086 applications for Territory Manager position, with 9,100 originating from applicants with eight or more years of sales experience.[36] Kelly Services only submitted fifteen percent of the latter group's applications to RJR for further review, compared to thirty-five percent of those applications with less professional experience.[37] Similar return rates occurred when Pinstripe screened a total of 25,729 applications, of which 12,727 originated from candidates with more than ten years of experience.[38] Yet, Pinstripe referred just 7.7% of this subset to RJR, compared to forty-five percent of applicants with less than three years of experience.[39] In total, RJR hired 1,024 individuals for the Territory Manger position between September 2007 and July 2010; and just nineteen were over the age of forty, or 1.9%.[40]

Villarreal brought an action for discrimination under the ADEA on behalf of "all applicants for the Territory manager position who applied for the position since the date RJR began its pattern or practice of discriminating against applicants over the age of 40."[41] He asserted claims for both intentional age discrimination, or disparate treatment under 29 U.S.C. § 623(a)(1), and the unlawful use of hiring standards

[34] *Id.* at *2. RJR management nominated a number of recent hires as "ideal" Blue Chip sales force employees. *Id.* Statistically speaking, sixty-seven percent of the Blue Chip employees had between zero and three years of work experience. Among this group, just nine percent had six or more years of relevant experience. *Id.* Their characteristics formed the criteria which Pinstripe used to filter applicants. *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at *2.

[39] *Id.*

[40] *Id.*

[41] *Id.* at *3. Mr. Villarreal filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on May 17, 2010. *Id.* He did not file with the EEOC until 2010 because he was awaiting a response to his 2007 application. *Id.* The EEOC issued a Right to Sue letter on April 2, 2012. *Id.* These facts are relevant to the equitable tolling claim Mr. Villarreal asserted alongside his disparate impact claim. This Note does not address this aspect of the *Villarreal* litigation.

that discriminated against individuals over the age of forty, or disparate impact under 29 U.S.C. § 623(a)(2).[42] Specifically, § 4(a)(2) of the ADEA, the disparate impact provision, provides, "It shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because such individual's age."[43]

In response, the District Court granted RJR's motion to dismiss.[44] On substantive grounds, the District Court concluded that under the ADEA, only current employees can bring disparate impact claims, pursuant to *Smith v. City of Jackson*.[45] Until then, the Supreme Court had only recognized disparate impact claims for current employees or rehires, not job applicants.[46]

On appeal, the Eleventh Circuit reversed the District Court's holding that only current employees can bring disparate impact claims under the ADEA, finding instead that § 4(a)(2) of the ADEA supports disparate impact protections for job applicants.[47]

Overall, Judge Martin's opinion consisted of a three-part inquiry, addressing various substantive arguments asserted by Villarreal. In the first part, Judge Martin evaluated the language of the statute and the competing interpretations offered by the litigants.[48] RJR insisted that § 4(a)(2) only pertains to current employees, given the clause, "to limit, segregate, or classify *his employees*."[49] However, Mr. Villarreal argued that the object of the verbs limit, segregate, and classify is "any individual," so the presence of "his employees" earlier in the

[42] *See id.*

[43] 29 U.S.C. § 623(a)(2) (2012).

[44] *See Villarreal I*, 2013 WL 823055, at *8. As an initial matter, the court denied Villarreal's claims originating before November 2009, dismissing them as time-barred. *Id.* at *7–8. The EEOC mandates that claimants file their complaints within 180 days of receiving a Right to Sue letter. Villarreal's claims dating back to November 2007 clearly fell outside this window of time. *Id.* at *2.

[45] *See id.* at *5.

[46] *See* Smith v. City of Jackson, 544 U.S. 228, 230–31 (2005); E.E.O.C. v. Allstate Ins. Co., 528 F.3d 1042, 1047 (8th Cir. 2008).

[47] *See Villarreal II*, 806 F.3d at 1290, 1301. Prior to filing his appeal, Villarreal also moved to amend his complaint, to include additional details to justify his delay and persuade the court to grant his request for equitable tolling. *Id.* at 1292.

[48] *See id.* at 1292–93.

[49] *See id.* at 1293 (emphasis added).

provision pertains to an employer's selection of "any individuals" to be "his employees."[50] Judge Martin determined that § 4(a)(2) is reasonably susceptible to both interpretations, and a plain reading was inconclusive.[51]

The second part of the opinion analyzed the relationship between § 4(a)(2) of the ADEA and § 2000e-2(a)(2) of Title VII, the provision on which § 4(a)(2) is based.[52] As an initial matter, the Court acknowledged that the language of the two statutes is identical, with the exception of four words.[53] In 1972, Congress amended § 2000e-2(a)(2) to include the phrase "or applicants for employment."[54] To date, Congress has not inserted "applicants for employment" into § 4(a)(2) of the ADEA.[55] Despite this difference, the Eleventh Circuit did not consider this absence to be dispositive, sidestepping the holding in *Gross v. FBL Financial Services*.[56] Judge Martin opined that "[w]e will not assume that Congress chose not to pass legislation modifying the ADEA simply because it did make this one change in a broader restructuring of Title VII."[57] This stance departed from that of the District Court, which compared the twin provisions of the ADEA and Title VII.[58] Precisely because § 4(a)(2) of the ADEA lacks the language "or applicants for employment," the District

[50] *See id.*

[51] *Id.*

[52] *See id.* at 1295.

[53] *See* 42 U.S.C. § 2000e-2(a)(2) (2012). In particular, Title VII language of § 703(a)(2) provides, "to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.* (emphasis added).

[54] *See Villarreal II*, 806 F.3d at 1295.

[55] *Id.*

[56] *See id.* at 1295–96; s*ee also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009). The District Court had in fact relied on *Gross*, and its seminal line, "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Id.* at 174. *See* discussion *infra* notes 135–160 and accompanying text.

[57] *Villarreal II*, 806 F.3d at 1296. Judge Martin also attended to the legislative history and purpose of the ADEA to determine whether disparate impact claims extend to job applicants. She acknowledged that Congress enacted the ADEA in order to "promote employment of older persons"—29 U.S.C. § 621(b)—and to assist peoples over the age of forty in their efforts "to regain employment when displaced from jobs"—29 U.S.C. § 621(a). But the Eleventh Circuit declined to infer from these statements that a cause of action may lie for job applicants under § 4(a)(2).

[58] *See Villarreal I*, 2013 WL 823055, at *5–6.

Court denied the claim that the ADEA supports disparate impact claims for job applicants.[59] Instead, the Eleventh Circuit held that disparate impact claims could be available under the ADEA despite the textual disparity with Title VII.[60]

Following the portions on statutory interpretation and legislative history, the third and final part of the Eleventh Circuit's opinion addressed agency deference, and whether such an analysis could resolve the dispute over disparate impact claims for job applicants under the ADEA.[61] First, Judge Martin noted that the Equal Employment Opportunity Commission ("EEOC") stipulates in 29 C.F.R. § 1625.7(c) 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.' "[62] For the Eleventh Circuit, this represented the official agency interpretation of § 4(a)(2).[63] In fact, the EEOC filed an amicus brief on behalf of Mr. Villarreal endorsing this reading of § 1625.7(c).[64] Relying on the *Chevron* deference standard, the court concluded that disparate impact claims extend to job applicants under § 4(a)(2).[65]

By contrast, in his dissent, Judge Vinson maintained that the absence of the "applicants for employment" language from the ADEA indicated that disparate impact claims only pertain to current employees.[66]

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[59] *See id.*

[60] *Villarreal II*, 806 F.3d at 1293–95.

[61] *See id.* at 1299. The Eleventh Circuit was quite explicit in disclosing its methodology: "Because the text of § 4(a)(2) does not clearly resolve the issue in this case, we ask the question we must when faced with a vague statute: has the agency tasked with enforcing the statute given a reasonable reading?" *Id.* at 1298.

[62] *See Villarreal II*, 806 F.3d at 1299 (quoting 29 C.F.R. § 1625.7(c) (2017)).

[63] *Id.* at 1299–1300.

[64] *Id.* at 1303. RJR resisted this finding by arguing that 29 C.F.R. § 1625.7(c) only pertained to the reasonable factor other than age defense ("RFOA"), discussed extensively in *Smith*, and in *Meacham v. Knolls Atomic Power Laboratory*. In *Smith*, four justices concluded that the RFOA defense, itself, suggests that disparate impact claims are cognizable under the ADEA. *See* Smith v. City of Jackson, 544 U.S. 228, 246 (2005).

[65] *See Villarreal II*, 806 F.3d at 1299.

[66] *See id.* at 1308–09 (Vinson, J., dissenting).

On February 10, 2016, the Eleventh Circuit granted a rehearing en banc, thus vacating the judgment.[67] On October 5, 2016, an en banc panel overruled the initial Eleventh Circuit holding, finding 8-to-3 that disparate impact protections are restricted to current employees under the ADEA.[68] Judge Pryor authored the majority opinion.[69] While concurring in the judgment, Judge Jordan filed an opinion presenting his own interpretation of § 4(a)(2), as did Judge Rosenbaum.[70] Judge Martin filed a dissent, which Judges Jordan and Rosenbaum joined with respect to the equitable tolling issue, but not the disparate impact claim.[71]

Judge Pryor adopted a plain reading of the statute to conclude that the ADEA does not authorize disparate impact claims for job applicants.[72] The grammatical construction of § 4(a)(2) proved essential to this finding, specifically the final clause, "or otherwise adversely affect his status as an employee."[73] Under Judge Pryor's approach, the preceding portions of § 4(a)(2) are subordinate to this residual, functionally supreme phrase, such that the individual asserting a claim under § 4(a)(2) must already be an employee to enjoy its protections.[74] Judge Pryor also distinguished *Griggs v. Duke Power Co.* by noting that *Griggs* concerned "promotion and transfer policies," not the " 'hiring criteria' for fist-time applicants."[75] His opinion declined to compare § 4(a)(2) to the analogous provision of Title VII, § 703(a)(2), because "we do not consider legislative history when the text is clear."[76]

Judge Jordan filed a concurrence, objecting to Judge Pryor's reductive interpretation rendering the § 4(a)(2) functionally dormant except for the final clause, "or otherwise adversely affect

[67] *See* Villarreal v. R.J. Reynolds Tobacco Co., No. 15-10602, 2016 WL 635800, at *1 (11th Cir. Feb. 10, 2016).

[68] *Villarreal III*, 839 F.3d 958, 963 (11th Cir. 2016).

[69] *Id.* at 962–73.

[70] *Id.* at 973–75 (Jordan, J., concurring in part and dissenting in part); *id.* at 975–81 (Rosenbaum, J., concurring in part and dissenting in part).

[71] *Id.* at 981–93 (Martin, J., dissenting).

[72] *See id.* at 963–64 (majority opinion).

[73] *See id.*

[74] *See id.*

[75] *Id.* at 968–69. See also *infra* notes 189–198 and accompanying text for further detail on *Griggs*.

[76] *Villareal III*, 839 F.3d at 969.

his status as an employee."[77] Rather, Judge Jordan focused on the key phrase "any individual," noting the tension between "any individual" and "employee" or "employees" elsewhere in § 4(a)(2).[78] Preferring to read the provision as a functional whole, Judge Jordan found that job seekers could bring disparate impact claims, but only if the alleged discriminatory practice also affected current employees at the same time.[79]

At the same time, Judge Rosenbaum concurred with Judge Pryor's interpretation, and elaborated even further on the importance of the word "otherwise" as the operative term of § 4(a)(2).[80] Furthermore, he engaged in a Whole Act Rule analysis, observing those places within the ADEA where the phrase "applicant for employment" appears, such as in § 4(a)(3), to highlight its absence from § 4(a)(2).[81] Judge Rosenbaum did acknowledge the 1972, post-*Griggs* amendment to Title VII.[82] Still, he argued that the *Griggs* ruling, announced before the "applicants for employment" language was added to Title VII, was unavailing because the 1972 amendment had languished in Congress from 1967 until its formal enactment in 1972.[83]

Dissimilarly, Judge Martin, in her dissent, offered alternative bases for finding disparate impact protections for job seekers under the ADEA.[84] Notably, Judge Martin began with a discussion of the *Griggs* decision, observing that "[t]he text of the ADEA that we interpret here is identical to the text the Supreme Court interpreted in *Griggs*."[85] Martin raised other salient

[77] *See id.* at 973–74 (Jordan, J., concurring in part and dissenting in part).

[78] *See id.* at 974.

[79] *See id.* ("If we are trying to give effect to *both* critical terms—'his employees' and 'any individual'—the reading that makes the most sense to me is that a job applicant ('any individual') can bring an ADEA claim under a disparate impact theory, but only if something the employer has done vis-à-vis 'his employees' violates the ADEA by 'limit[ing], segregat[ing] or classify[ing]' those employees. So, if any employer's practice with respect to his employees violates the ADEA, and that same practice has a disparate impact on job applicants, those applicants can sue under § 623(a)(2).").

[80] *See id.* at 975–77 (Rosenbaum, J., concurring in part and dissenting in part).

[81] *Id.* at 977–78.

[82] *See id.* at 979–80.

[83] *See id.* at 979.

[84] *See id.* at 981–93 (Martin, J., dissenting).

[85] *Id.* at 981.

points, such as the key term of "any individual," and the original draft bill for the ADEA, which substituted this term for the originally much narrower, "his employees."[86]

Absent from the Eleventh Circuit's en banc opinion was any discussion of *Gross v. FBL Financial Services, Inc.*, which had been previously addressed in the District Court and first Eleventh Circuit opinions.[87] In fact, there was no mention of *Gross* whatsoever throughout the Eleventh Circuit's revisited ruling.

II. PARSING THE STATUTE: THE CURRENT TEXT OF THE ADEA AND DISPARATE IMPACT PROTECTIONS FOR JOB APPLICANTS

A. Roadmap to the Legal Arguments

Despite the Eleventh Circuit's reasoning, the text of § 4(a)(2) itself authorizes disparate impact protections for job applicants. In the following two Parts, this Note offer two justifications for this finding. First, the plain meaning of § 4(a)(2) enables disparate impact protections for job seekers. Second, the case law and legislative history of the ADEA confirms this interpretation, independent of the plain meaning of the statute. This precedential record supports the contention that disparate impact protections lie for applicants.

This Part examines the language, grammar, and syntax of § 4(a)(2) to conclude that its text suggests that job applicants, as well as current employees, may enjoy disparate impact protections. Once again, 29 U.S.C. § 623(a)(2) reads:

> It shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.[88]

Overall, in the next Section, this Note demonstrates that § 4(a)(2) is sensitive to the myriad forms of employment discrimination based on age. Operating from this assumption, it illustrates that the text of § 4(a)(2) is deliberately expansionist, because the

[86] *Id.* at 981–82. The following is a keen rebuke: "The majority never explains why Congress chose the term 'any individual' in § 4(a)(2) if it really meant 'employee.' " *Id.* at 984.

[87] *See generally Villarreal III*, 839 F.3d 958 (11th Cir. 2016).

[88] 29 U.S.C. § 623(a)(2) (2012).

provision speaks of "any" action that "deprive[s]" and merely practices that "tend to deprive any individual of employment opportunities."[89] Therefore, the ADEA enables job seekers to bring disparate impact claims, along with current employees.

B. Plain Meaning of Section 4(a)(2) of the ADEA

First, the use of the word "any" in § 4(a)(2), which appears twice in the provision, strongly recommends that disparate impact claims lie for job applicants. Here, Congress used the word "any" to modify the modes of discrimination prohibited by the law—"any way"—as well as the grammatical objects of discrimination—"any individual." On the face of the statute, the placement and operation of the word "any" fails to impose restrictions on the application of the statute, namely to current employees alone. In addition, the word "individual" is modified by the prepositional phrase of "of employment opportunities." Read altogether, the statute ostensibly refers to "any individual" "deprive[d]" of "employment opportunities" in "any way." Based on this simple reading alone, the statute seems to apply to "any individual," not just current employees.

As well, the syntax of the simplified phrase, "to limit . . . employees," indicates that job seekers may assert disparate impact protections. The prohibition of "to limit . . . employees" refers to discriminatory practices that have the effect of excluding individuals from employment on the basis of age. Read in this way, the statute plainly prohibits actions that "limit . . . employees . . . because of such individual's age." The use of "limit" in conjunction with "his employees," strongly suggests that the provision contemplates practices that disparately impact older job seekers. The relationship between the verb "limit" and the object "his employees," focuses on potential actions that bar individuals from employment opportunities on the basis of age.[90] This central concern is echoed later in the key phrasing of "employment opportunities or . . . status as an employee." Accordingly, the operative syntax

[89] *See id.*

[90] To be sure, the next two verbs, segregate and classify, refer to acts that pertain to both current employees, as well as applicants. Nevertheless, the simplified phrase of "limit . . . his employees" clearly contemplates the employee selection process—that is, job applicants.

of § 4(a)(2) *repeatedly* prohibits actions that restrict employment opportunities, implying that job applicants are covered by the ADEA's conception of disparate impact.

Moreover, Congress notably selected the expansive "any individual," instead of specifying "any *employee*" at the end of the clause, "which would deprive or tend to deprive." An early draft of § 4(a)(2) restricts the object of the operative verbs to "employees." The provision was originally constructed as "limit, segregate, or classify *employees* so as to deprive *them* of employment opportunities or adversely affect *their* status."[91] But in its current form, the statute eschews this far narrower language, with employees as the direct object, in favor of "any individual." Furthermore, Congress eliminated the demonstrative pronouns of "them" and "their" referring back to "employees" found in its initial draft.[92] Clearly, the drafters preferred the language "any individual," a deliberately broad approach. Likewise, Congress could have employed language like "such employees," recalling the direct object of "his employees."[93] Instead, the statute refers to "any individual," a telling choice. Thus, whatever the meaning of "any individual," it must mean something more than just current employees.

In addition to the words "any individual," other aspects of § 4(a)(2) also recommend an expansive understanding of the statute's scope. The provision begins with the broadly worded, "limit, segregate, or classify." It does not just condemn acts that "segregate," but also those that may simply "limit or classify" individuals on the basis of age. Furthermore, the various clauses of § 4(a)(2) logically function in unison, such that the "limit, segregate, or classify" phrase distributes across the whole of the provision. Under this reading, the later phrase "deprive any individual of employment opportunities" operates reflectively,

[91] *See Villareal II*, 806 F.3d 1288, 1298 n.8 (11th Cir. 2015) (emphasis in original), *reh'g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. 2016), *rev'd en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S.Ct. 2292 (2017).

[92] *See id.*

[93] En Banc Brief for AARP as Amicus Curiae Supporting Plaintiff-Appellant at 10, Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 2016) (No. 15-10602), 2016 WL 1376063, at *10. Oddly, RJR submitted this evidence, arguing that § 4(a)(2) is principally concerned with current employees. However, the choice of Congress to abandon this language, in favor of more expansive language, suggests the opposite: § 4(a)(2) at the very least encompasses some group besides current employees, whether or not it be job applicants, or perhaps past employees.

prohibiting employers from instituting practices that "limit, segregate, or classify" employees "which would deprive any individual . . . of employment opportunities." Crucially, this reading adopts a global as opposed to a segmented interpretation of the statute.

Along with this theme, the absence of any explicit mention of job applicants in § 4(a)(2) is immaterial, because the tenor of the statute is broad and inclusive. In fact, the absence permits its protections to apply even more broadly than if job seekers were explicitly mentioned. Enumerating job applicants would exclude other classes of peoples by operation of *expressio unius est exclusio alterius*.[94] For example, contractors or temporary employees may not qualify as a protected class if the statute were to itemize job applicants and current employees.[95] This lack of exclusive specificity in § 4(a)(2) authorizes the maximalist purpose of the provision to reach a wide class of potential litigants.

The penultimate clause of § 4(a)(2) affirms the maximalist reading intrinsic to the language of § 4(a)(2). The clause reads, "or otherwise adversely affect his status as an employee." This language significantly enlarges the scope of activities prohibited by § 4(a)(2) as a whole, by extending to literally any acts that "otherwise adversely affect his status as an employee." As the statute is currently structured, this clause functions as a protective, precautionary backstop. In cases where the "deprive or tend to deprive any individual" clause has not been triggered, the "or otherwise adversely affects his status as an employee" clause ensures that § 4(a)(2) embraces practices that may not overtly deprive individuals of employment, but still operate as effective barriers. Overall, this penultimate provision betrays the expansive and, arguably, overly inclusive tone of § 4(a)(2).

Similarly, a comparison between the § 4(a)(2) and § 4(a)(3) of the ADEA reinforces this interpretation. Addressing retaliatory actions, § 4(a)(3) makes it unlawful "to reduce the wage rate of

[94] *See* All. for Cmty. Media v. F.C.C., 529 F.3d 763, 779 (6th Cir. 2008).

[95] *See* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350–51 (1943) (limiting the application of *ejusdem generis* and *expressio unius* in the context of the 1933 Act on the basis "that courts will construe the details of an act in conformity with its dominating general purpose . . . and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy").

any employee in order to comply with this chapter."[96] In § 4(a)(3), "any" applies unambiguously to "employee," in contrast to § 4(a)(2), which provides protections for "any individual," carte blanche. The difference between these neighboring provisions is glaring. It can be inferred from this distinction that if Congress intended to restrict the object of "limit, segregate, or classify" to only current employees, then it would have—and could have—done so, by substituting "any individual" for "any employee."

Despite this interpretation, the parties in *Villarreal* disputed whether "any individual" is the object of the verbs "limit, segregate, or classify," or that the only object of these verbs is "his employees."[97] Robert Villarreal asserted that the verbs "limit, segregate, or classify" apply across the statute to "any individual," even though "his employees" is the direct object of the three verbs.[98] By contrast, RJR contended that the only object of the three verbs is "his employees," and that "any individual" only refers to these employees—for example, "any individual" is modified by "his employees," even though the terms are separated by eleven intervening words.

But once again, the relationship between the verb "limit" and the object "his employees" overcomes this counterargument. Whether or not "any individual" serves as the object of "limit, segregate, or classify," the core of the statute forbids actions that "limit[, segregate, or classify] his employees in any way . . . ." While this Note argues that "limit, segregate, or classify" applies across the whole statute, even without so concluding, the statute still addresses activities that "limit" employees on the basis of age discrimination. Without question, then, hiring activities that have the effect of *limiting* employees necessarily encompasses job applicants for the statute to make logical sense, textually speaking.

III. THE EVOLUTION OF DISJUNCTIVE CANONS: THE 1972 AMENDMENTS TO TITLE VII AND ADEA CASE LAW

The previous Part presented a textual analysis of § 4(a)(2) confirming that the unambiguous language of the ADEA permits disparate impact claims for job applicants. While the plain

[96] 29 U.S.C. § 623(a)(3) (2012).
[97] *See Villarreal II*, 806 F.3d at 1293.
[98] *See id.*

meaning of § 4(a)(2) supports this conclusion, the case law interpreting the ADEA, and by extension, Title VII, affirms this reading as well. The bulk of this case law concerns the role of the 1972 amendment to Title VII. With this amendment, Congress added the language, "or applicants for employment," to the analogous provision of § 4(a)(2)—§ 703(a)(2) of Title VII. To date, the ADEA has not been amended to conform with this revision to Title VII.

The absence of the "applicants for employment" language from the ADEA has been read to bar job seekers from claiming disparate impact protections under the statute.[99] This inference reflects a comparison to Title VII, with its explicit enumeration of applicants. The comparative analysis suggests that if Congress intended for the ADEA to encompass job seekers under § 4(a)(2), then Congress would have inserted the phrase, "or applicants for employment," as it did to Title VII in 1972.[100] RJR advanced this exact claim in *Villarreal*.[101]

While this language and its appearance in Title VII is significant its absence from the ADEA, in truth, is unavailing. This meaningful variation argument necessarily fails once one observes the substantive case law surrounding Title VII and the ADEA, as well as the legislative history of statutory amendments which has resulted in the textual distinction.[102] First, since the inception of the federal employment discrimination laws, courts have interpreted the statutes in tandem, due to their shared text and shared purpose.[103] This practice flows from the heavy presumption of interpretive commonality when the language and structure of one statute closely tracks the language and structure of another.[104] Over the last fifty years, the relationship between Title VII and the ADEA, therefore, has been a symbiotic one of uniform interpretation.[105] Jurists have sought to align these two

[99] *See Villarreal I*, No. 2:12-CV-0138-RWS, 2013 WL 823055, at *5 (N.D. Ga. Mar. 6, 2013); *Villarreal II*, 806 F.3d at 1308–09 (Vinson, J., dissenting); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009).

[100] *See Villarreal I*, 2013 WL 823055, at *5–6.

[101] *See Villarreal II*, 806 F.3d at 1296–97.

[102] *See infra* notes 109–205 and accompanying text.

[103] *See infra* Part III.A.

[104] *See infra* notes 118–134 and accompanying text; *see also* Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857, 871 (2010) ("[T]he *Gross* Court rejected a perfectly reasonable and widely applied canon of construction—the presumption of uniformity—with no good reason for doing so.").

[105] *See infra* Part III.A.

statutes rather than to differentiate them, with interpretation of the ADEA paralleling and informing that of Title VII, and vice-versa.[106] Thus, § 4(a)(2) authorizes disparate impact claims for applicants, in spite of the 1972 amendment to Title VII.

Second, the nature of congressional amendments to Title VII and the ADEA does not overcome this interpretive practice, despite the inconsistent legislative history of the two statutes. In particular, the process by which Congress enacts override amendments provides virtually no evidence for an intent to distinguish two closely related statutes if one text is amended, and the other is not.[107] Therefore, the textual variation between the two statutes is not interpretively meaningful, and so the judicial practice of interpreting Title VII and the ADEA *in pari passu* and *in pari matera* should control in the context of § 703(a)(2) and § 4(a)(2).

A final reason for recognizing disparate impact claims for job seekers relates to the specific disposition of case law surrounding § 4(a)(2). Assuming *arguendo* that the 1972 congressional amendment to Title VII restricts disparate impact claims under the ADEA, the Supreme Court determined that disparate impact protections lie for job applicants under Title VII *prior* to the 1972 amendment.[108] Accordingly, the 1972 addition of "applicants for employment" to Title VII cannot serve as the legal basis for restricting disparate impact claims under the ADEA to only current employees. This finding demonstrates that disparate impact claims extend to job applicants, under both statutes, historically and currently, and is bolstered by the judicial practice of maintaining interpretive unity between Title VII and the ADEA.

[106] *See infra* notes 123–134 and accompanying text.
[107] *See infra* notes 152–205 and accompanying text.
[108] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

A. The Canon of Uniformity for Title VII and the ADEA

The ADEA, passed by Congress in 1967, took inspiration from Title VII, passed in 1964.[109] The ADEA, itself, is closely modeled after Title VII.[110] The ADEA owes its basic structure to Title VII, and derives the vast majority of its language, verbatim, from Title VII.[111]

The close relationship between the two statutes has guided and informed judicial interpretation of the ADEA for decades.[112] Due to this shared textual DNA, the legal protections recognized under the ADEA closely mirror those available under Title VII.[113] Two examples are the disparate treatment cause of action and the disparate impact cause of action.[114] In fact, the disparate treatment and disparate impact provisions within the ADEA are based entirely on the disparate treatment and disparate impact protections of Title VII.[115]

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[109] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975) (noting that Congress intended for the protections of Title VII and the ADEA "to eliminate, so far as possible, the last vestiges" of discrimination [in employment opportunities]).

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

[111] *See* Smith v. City of Jackson, 544 U.S. 228, 333 (2005) ("[W]e begin 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."); *Lorillard*, 434 U.S. at 584.

[112] *See* Katz, *supra* note 104, at 872. Katz contends that the Court attempted to unify the interpretive scheme for closely related statutes immediately preceding *Gross*. He proffers the example of *Trans World Airlines, Inc. v. Thurston*, incorporating the employment benefit standard under Title VII into the ADEA, as well as *Goodman v. Lukens Steel Co.*, in which the Court aligned union regulations under Title VII and the National Labor Relations Act (NLRA), given the same provisions in Title VII were derived *in haec verba* from the NLRA. *See* Goodman v. Lukens Steel Co., 482 U.S. 656, 688 (1987); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

[113] *See, e.g.*, *Smith*, 544 U.S. at 228.

[114] *See* 42 U.S.C. § 2000e-2(a)(1); 29 USC § 623(a)(1), (2) (2012).

[115] *See Trans World Airlines, Inc.*, 469 U.S. at 121 (1985) (finding employment benefits under the ADEA should mirror those under Title VII given the textual parity between the analogous provisions); Northcross v. Bd. of Ed. of Memphis City Schs., 412 U.S. 427, 428 (1973) (per curiam) (finding that "a strong indication that the two statutes should be interpreted *pari passu*" when the language of one statute parallels that of another); *see also Smith*, 544 U.S. at 233–34 ("We have consistently applied that presumption to language in the ADEA that was 'derived *in haec verba* from Title VII.' ") (quoting *Lorillard*, 434 U.S. at 584).

At the same time, the language of § 703(a)(2) and § 4(a)(2) is identical, except that Title VII states, "it shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or *applicants for employment* . . . ."[116] The remainder of the statute corresponds exactly to the language of the ADEA, excluding the final clause of "because of such individual's age."[117] The only difference involves the "applicants for employment" clause of Title VII.

In spite of this distinction, a long-established canon of construction requires courts to interpret closely related statutes with an eye towards conformity.[118] Settled opinion recommends that "statutes which relate to the same subject matter," that is, are *in pari materia*, "should be read, construed and applied together so that the legislature's intention can be gathered from the whole of the enactments."[119] Leading authorities on statutory interpretation advocate this interpretive scheme.[120] This approach respects the reality that statutes like Title VII and the ADEA share a common purpose, and so the use of similar, if not identical language suggests that the interpretation of these statutes align.[121] Within the legislative context of derivative statutes, such as Title VII and the ADEA, the "canon of

[116] 42 U.S.C. § 2000e-2(a)(2) (2012) (emphasis added).

[117] *See* 29 U.S.C. § 623(a)(2) (2012).

[118] *See Lorrillard*, 434 U.S. at 584; *Northcross*, 412 U.S. at 428.

[119] *In pari materia*, BLACK'S LAW DICTIONARY (6th ed. 1990); Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217, 234 (2007) ("When the legislature borrows language from one statute to draft a subsequent statute, courts generally agree that the statutes should be construed consistently."); Caren Sencer, *When a Boss Isn't an Employer: Limitations of Title VII Coverage*, 25 BERKELEY J. EMP. & LAB. L. 441, 466 (2004) ("Analysis of Title VII, the ADA, and ADEA is very closely integrated, as Title VII and [the] ADEA use the same definitions in most instances and many of those terms are explicitly incorporated into the ADA.").

[120] *See* WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 282–85 (2000); William N. Eskridge, Jr. & Phillip P. Frickey, Foreword, *Law as Equilibrium*, 108 HARV. L. REV. 26, 27–31 (1994).

[121] *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (commenting that the ADEA and Title VII exhibit common substantive aspects, and serve common purposes); *see also* Smith v. City of Jackson, 544 U.S. 228, 233–34 (2005) ("We have consistently applied that presumption to language in the ADEA that was 'derived *in haec verba* from Title VII.' ") (quoting *Lorillard*, 434 U.S. at 584).

uniformity" ensures that language employed in one context—for example, racial discrimination—conveys the same meaning in other contexts—for example, age discrimination.[122]

Along these lines, the record of the ADEA and Title VII jurisprudence has been one of equity and commonality, with courts interpreting the statutes in like fashion.[123] The 2005 ruling in *Smith* continued this legacy, recognizing for the first time disparate impact protections under the ADEA, which had first been established under Title VII in *Griggs v. Duke Power Co.*[124] Justice Stevens's plurality opinion began by outlining the affinities between Title VII and the ADEA, owing to the textual parity between the two statutes.[125] Justice Stevens even commented that "[e]xcept for the substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of [§ 4(a)(2)] in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII)."[126] The opinion ventured as far as saying:

> In determining whether the ADEA authorizes disparate-impact claims, we begin with the premise that when Congress uses the same language in two statutes having [a] similar purpose[], particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended th[e] text to have the same meaning in both statutes.[127]

While Justice Scalia's concurrence, advocating for deference to the EEOC interpretation of § 4(a)(2), carried the 5-to-3 ruling, the principles articulated in Justice Steven's opinion served as the *raison d'être* for the Court's conclusions.[128]

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[122] *See Northcross*, 412 U.S. at 428 (finding that "a strong indication that the two statutes should be interpreted pari passu" when the language of one statute parallels that of another).

[123] *See* Katz *supra* note 104, at 860–63.

[124] *See Smith*, 544 U.S. at 233.

[125] *See id.* Especially telling is the following pronouncement: "*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA." *Id.* at 236.

[126] *See id.* at 233.

[127] *See id.*

[128] *See id.* at 243–47 (Scalia, J., concurring). Chief Justice Rehnquist took no part in the judgment, thus the 5-to-3 ruling.

Likewise, the outcome under the ADEA in *Meacham v. Knolls Atomic Power Laboratory* paralleled the ruling in *Wards Cove Packing Co. v. Atonio*,[129] both addressing the burdens of proof for disparate impact claims under the sister statutes.[130] In *Meacham*, the Court attempted to harmonize the causation standard of the ADEA with the burden-shifting framework of Title VII.[131] At the time, Title VII required that an employer demonstrate that an alleged discriminatory practice was a "bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation" of a business.[132] However, the ADEA contains an explicit "reasonable factor other than age" ("RFOA") provision, whereby the employer may assert an RFOA defense to exculpate itself.[133] Still, in spite of the procedural distinction between the BFOQ and RFOA, the Court held that the RFOA provision is an affirmative defense, just as the BFOQ is an affirmative defense under Title VII.[134] In other words, the Court aligned the burdens of proof under both statutes in *Meacham*, despite the incidental distinctions between the functionally analogous BFOQ and the RFOA provisions.

B. Gross v. FBL Financial Services, Inc. *and the Current Status of Override Amendments*

As shown in the rulings of *Smith* and *Meacham*, the Court continued to abide by this practice of interpreting the ADEA *in pari materia* with Title VII until recently.[135] The Court departed from this course with its controversial ruling in *Gross v. FBL Financial Services, Inc.*[136] The outcome in *Gross* drove an unprecedented wedge between Title VII and the ADEA, once again with respect to the burden-shifting framework of the two

[129] Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

[130] *See Meacham*, 554 U.S. at 91; *Wards Cove*, 490 U.S. at 660.

[131] *See Meacham*, 554 U.S. at 93. The Court sought to resolve the issue persisting since *Smith* regarding the "reasonable factor other than age" ("RFOA") defense under the ADEA. *Id.* at 89–90.

[132] *See* 42 U.S.C. § 2000e-2(e) (2012). This standard is commonly referred to as the "business necessity test."

[133] *See Meacham*, 554 U.S. at 92–93; *see also id.* at 87.

[134] *See id.* at 93–95.

[135] *See* Katz, *supra* note 104, at 858.

[136] 557 U.S. 167, 169–70, 180 (2009).

statutes.[137] Much like the arguments in *Villarreal*, the dispute in *Gross* centered on a textual disparity between Title VII and the ADEA owing to a congressional amendment of Title VII.[138] To summarize, the majority in *Gross* inferred a congressional intent to distinguish the burdens of proof under the ADEA and Title VII based on Congress's failure to amend the ADEA in tandem with Title VII.[139]

In *Gross*, a fifty-four-year-old employee was reassigned from his managerial position to a "project coordinator" position, while his former responsibilities were reassigned to a younger colleague whom he had previously supervised.[140] At trial, a dispute arose as to the jury instructions.[141] The United States Court of Appeals for the Eighth Circuit determined that the instructions were incorrectly administered, based on the Supreme Court's ruling in *Price Waterhouse v. Hopkins*.[142] *Price Waterhouse*, itself, outlined the burden-shifting framework for disparate treatment claims under Title VII.[143]

But, the Court in *Gross* repudiated the approach of both the trial court and the Eighth Circuit, basing its decision on the absence of language in the ADEA, which Congress had subsequently added to Title VII.[144] The textual disparity stemmed from the 1991 Civil Rights Amendments ("1991 CRA"),

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[137] *See id.* at 174–75.

[138] *See id.* at 185–86 (Stevens, J., dissenting) ("Because the 1991 Act amended only Title VII and not the ADEA with respect to mixed-motives claims, the Court reasonably declines to apply the amended provisions to the ADEA.").

[139] *See id.* at 174 (majority opinion) ("Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e–2(M) and 2000e–5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways . . . .").

[140] *See id.* at 170.

[141] *See* Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 360 (8th Cir. 2008). At the trial court level, the jury was instructed if Gross proved by a preponderance of the evidence that his age was a motivating factor for his demotion, then Gross should prevail, but if FBL Financial Services could then demonstrate that it would have reached the same result, absent his age, then the jury must find in FBL's favor. *See id.*

[142] 490 U.S. 228, 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

[143] *See id.* at 248–250, 254. The Court in *Price Waterhouse* grappled with defining causation for Title VII disparate treatment claims, and more precisely, whether or not direct evidence of discrimination is required to shift the burden to the defendant in mixed-motive cases. *Id.* at 254. Justice O'Connor's decisive concurrence recommended the direct evidence requirement. *Id.* at 267–69 (O'Connor, J., concurring).

[144] *See Gross*, 577 U.S. at 172, 174–75.

which represented Congress's response to the *Price Waterhouse* ruling.[145] In this override amendment, Congress expressly rejected the direct evidence requirement for motivating factor discrimination, originally advocated in Justice O'Connor's concurrence.[146] In addition to rejecting this aspect of the ruling, the 1991 CRA amended and clarified other aspects of Title VII in response to the parts of the Court's decision with which it disagreed.[147] During this process, Congress also included provisions amending the ADEA, but these revisions were unrelated to *Price Waterhouse* and the Title VII burden-shifting framework.[148]

This congressional record proved dispositive for the Court in *Gross*, as Justice Thomas determined that neither the 1991 CRA provisions, nor the ruling in *Price Waterhouse* controlled in the context of the ADEA and the requisite burden of proof.[149] Rather, the Court found that under the ADEA, "but-for" causation is the necessary burden, not the motivating factor standard promulgated by the 1991 CRA.[150] To arrive at this conclusion, the *Gross* Court disposed of the *Price Waterhouse* burden-shifting framework for the ADEA on the basis that "Title VII is materially different [from the ADEA] with respect to the relevant burden of persuasion."[151] Prior to *Gross*, lower courts had already applied the *Price Waterhouse* framework to the ADEA since

[145] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

[146] *See Price Waterhouse*, 490 U.S. at 267–69.

[147] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections 29 U.S.C. and 42 U.S.C.) In addition to *Price Waterhouse*, the 1991 CRA sought to redress the ruling in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

[148] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1079 (codified as amended at 29 U.S.C. § 626(e) (2012)); *id.* § 302, at 1088 (codified as amended at 2 U.S.C. § 1202 (2006)). These two amendments to the ADEA made it necessary for the EEOC to notify plaintiffs about the status of complaints filed with the agency, so that plaintiffs could commence a civil action within the statutorily-required, ninety days. *Id.*

[149] *See Gross*, 577 U.S. at 178, 180.

[150] *See id.* at 177–78, 180.

[151] *See id.* at 173. Justice Thomas also justified his repudiation of the *Price Waterhouse* framework by contending "it is far from clear that the Court would have the same approach were it to consider the question today in the first instance." *Id.* at 178–79. In other words, he doubted that the Court would have derived the same framework in 2009 as it had in 1989 under the *Price Waterhouse* plurality.

1991.[152] While the 1991 CRA undoubtedly controlled Title VII, the prevailing logic assumed that the burden-shifting provisions of *Price Waterhouse* persisted as to the ADEA and ADA.[153]

The Court in *Gross* vitiated this practice of interpretive commonality, and the opinion attempted to delimit the scope of the 1991 Civil Rights Amendments across the employment discrimination statutes.[154] Working from the assumption that Congress *neglected* to amend the ADEA when it could have done so in 1991, the Court inferred a congressional intent *not* to amend the ADEA as it had Title VII with the 1991 CRA.[155] The Court articulated this tenet in the following passage:

> We cannot ignore Congress' [sic] decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.[156]

It is clear, then, that the textual disparity engendered by the 1991 CRA served as the lynchpin for the Court in *Gross*. The inconsistent amendments to the ADEA and Title VII signaled to the Court that Congress intended to distinguish the burdens of proof under the two statutes.[157] This novel insight thereby licensed Justice Thomas to synthesize a causation framework for the ADEA completely divorced from Title VII and Title VII case law.[158]

The opinion in *Gross* forever changed the landscape of Title VII and its legislative progeny, namely the ADEA. At the very least, the holding in *Gross* stands for the proposition that if Congress does not amend closely related statutes, in an identical fashion, then the amendment of the one statute is wholly

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[152] *See* Charles A. Sullivan, *The Curious Incident of* Gross *and the Significance of Congress's Failure to Bark*, 90 TEX. L. REV. 157, 160 (2012).

[153] *See id.* at 159–60.

[154] Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 860–61 (2012) [hereinafter Widiss, *The Hydra Problem*].

[155] *See Gross*, 577 U.S. at 174–75.

[156] *See id.* at 174–75 (citing E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 256 (1991)).

[157] *See id.*

[158] *See id.* at 179–80; *see also* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 561 (2009) [hereinafter Widiss, *Shadow Precedents*].

irrelevant to the other.[159] More overtly, *Gross* infers a congressional intent for closely related statutes to evolve along different tracks when Congress fails to amend them identically.[160] Projecting the logic of *Gross* onto the circumstances in *Villarreal* suggests that the absence of the "applicants for employment" from § 4(a)(2) of the ADEA evidences a congressional intent not to amend the ADEA in line with Title VII when it did so in 1972. As a result, this textual inconsistency manifests a congressional intent to distinguish the scope of disparate impact claims under the two statutes.

All that being said, the ruling in *Gross* has been widely criticized for its cavalier approach to interpreting the override amendment in the context of closely related statutes.[161] Commentators have noted that the ruling presents a "turn-about on the value of uniformity in employment discrimination law," reversing a canon of uniformity which has guided jurisprudence in this arena.[162] Similarly, employment discrimination expert, Deborah Widiss, takes issue with the long-term implications of *Gross*, writing, "[t]he rule of interpretation that the Court announced in *Gross* is radically asymmetrical" with respect to closely related statutes.[163] These assessments outline the broad problems that have emerged from the *Gross* decision. Overall, the ruling ignores the overwhelming judicial, constitutional, and

[159] *See Gross*, 577 U.S. at 174.

[160] *See id*. *Contra Villarreal II*, 806 F.3d 1288, 1295–96 (11th Cir. 2015) ("Congress has all kinds of reasons for passing laws, and presumably all kinds of reasons for not passing laws as well. The 1972 change to Title VII was part of a broad revamp of the statute aimed at expanding the jurisdiction and power of the EEOC . . . . We will not assume that Congress chose not to pass legislation modifying the ADEA simply because it did make this one change in a broader restructuring of Title VII.").

[161] *See, e.g.*, Meghan C. Cooper, *Reading Between the Lines: The Supreme Court's Textual Analysis of the ADEA in* Gross v. FBL Financial Services, Inc., 45 NEW. ENG. L. REV. 753, 765–66 (2011) ("This declaration [*Gross*] flies in the face of decades of precedent and language by the Court to the contrary."); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–09 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 273–74 (2009) ("The substantive outcome in *Gross* is not good for employment discrimination plaintiffs. The way the Court got there is not good for the law."); Katz, *supra* note 104, at 871 ("The *Gross* Court rejected a perfectly reasonable and widely applied canon of construction—the presumption of uniformity—with no good reason for doing so.").

[162] *See* Katz, *supra* note 104, at 857–58.

[163] Widiss, *The Hydra Problem*, *supra* note 154 at 860–61.

purposivist rationales that recommend courts analyze closely related statutes according to a uniform scheme of interpretation, in spite of textual disparities owing to intermittent amendments.

As an initial matter, the holding in *Gross* overlooks the practical limitations of the statutory override. Generally speaking, a legislative override represents an attempt by Congress to overrule, clarify, or curtail a ruling of the federal courts.[164] Most congressional overrides address individual judicial decisions, not the overarching legal principles implicated by a given opinion.[165] For decades, Congress has relied on the statutory override as a means of reversing specific rulings it sought to invalidate or qualify.[166] In other words, the congressional override does not function as a remedial device for correcting every potential interpretive ill introduced by the Court.[167] Rather, it is responsive to distinct judicial opinions, which in themselves pertain to isolated statutory provisions.[168]

The history of legislative amendments to Title VII and the ADEA confirms this finding. Congress has amended the employment discrimination statutes in reaction to Supreme Court rulings on a statute-by-statute and case-by-case basis.[169] It has not amended one statute based on a ruling related to another statute, albeit a closely related one. As just one ready example, the ADEA has consistently been amended in response to Supreme Court rulings on the ADEA, not rulings on Title VII, or the ADA, or the Pregnancy Discrimination Act.[170] More

[164] *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n.1 (1991) ("A congressional 'override' includes a statute that: (1) completely overrules the holding of a statutory interpretation decision . . . (2) modifies the result of a decision in some material way . . . or (3) modifies the consequences of the decision. . . ."). Eskridge, a leading scholar on statutory interpretation, repeats this definition elsewhere. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967—2011*, 92 TEX. L. REV. 1317, 1319 (2014).

[165] *See* Christiansen & Eskridge, Jr., *supra* note 164, at 1319–20.

[166] *See id.*; Widiss, *The Hydra Problem*, *supra* note 154, at 895 (emphasis in original) ("In all of these overrides, Congress amended only the statute *actually* interpreted in the prior judicial interpretation.").

[167] *See* Widiss, *The Hydra Problem*, *supra* note 154, at 930.

[168] *See id.*

[169] *See id.*; Christiansen & Eskridge, *supra* note 164, at 1319–20.

[170] *See, e.g.*, Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (responding to *United Air Lines v. McMann*, 434 U.S. 192 (1977)); Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-521, 104 Stat. 2287 (responding to *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989)). *See also* Jessica Sturgeon, Smith v. City of Jackson*: Setting an*

importantly, this record contradicts the inferential argument outlined in *Gross*; the congressional override is a highly and deliberatively narrow legislative transaction. Without any question, override amendments have never been mobilized to redress the far-reaching consequences of the Court's rulings across a series of statutes.[171]

Yet, the holding in *Gross* now imposes on the legislative branch the burden of formally amending similar statutes to avoid the inference of congressional neglect.[172] Under this scheme, subcommittees must canvass the federal code and evaluate whether or not to amend these closely related laws in tandem, wholesale, piecemeal, or not at all.[173] But again, this requirement disregards the function of the override as a narrowly-construed, corrective measure, and it ignores the practical realities of the amendment enactment process.[174] Otherwise, Congress would be performing a prophylactic function, whereas the override process is necessarily responsive.[175] The burden is simply too immense for a Congress preoccupied by a host of more urgent affairs.[176] Requiring Congress to implement trans-statutory amendments for a group of closely related statutes would frustrate a prime interest in efficiency contemplated by the override.[177]

Unreasonable Standard, 56 DUKE L.J. 1377, 1395 (2007) ("The 1991 amendments to Title VII were not accompanied by corresponding changes to the ADEA. However, *Wards Cove* was a Title VII decision, not a decision under the ADEA.").

[171] *See* Widiss, *The Hydra Problem*, *supra* note 154, at 930.

[172] *See* Prenkert, *supra* note 119, at 255.

[173] *See id.*

[174] *See* Widiss, *The Hydra Problem*, *supra* note 154, at 923. Widiss uses the terminology "blanket" amendment to describe this trans-statutory amendment procedure.

[175] *See* Eskridge, *supra* note 164, at 332 n.1.

[176] *See* Widiss, *Shadow Precedents*, *supra* note 158, at 564–65.

[177] *See id.* at 564; Widiss, *The Hydra Problem*, *supra* note 154, at 861–62. ("This approach improperly cabins the effects of congressional overrides and dramatically aggrandizes the judicial role . . . . It distorts the separation of powers, making it difficult for overrides to serve their intended role as a check on judicial law making . . . ."). Moreover, there is the risk of congressional oversight implicated by this procedure. It is conceivable that at least some of the statutes within a family of statutes might escape congressional attention during these more comprehensive amendment deliberations. *See* Widiss, *The Hydra Problem*, *supra* note 154, at 890. Under the ruling in *Gross*, the Court would infer from this inadvertent omission an intent to ignore the given law, despite a purely *unintended* mistake. And while seemingly administrable, the procedure of reverting back to historical interpretations of Title VII presents various practical challenges. *See* E.E.O.C. v.

At the same time, these reservations concerning burdensome, trans-statutory amendment process invoke constitutional matters of legislative supremacy. Arguably, the holding in *Gross* disturbed the balance of power between Congress and the judiciary with respect to overrides.[178] The Court in *Gross* inferred from the inconsistent amendment history that Congress intended for the burdens of proof under Title VII and the ADEA to diverge.[179] However, the *Gross* ruling overlooked evidence of Congress's intent to apply the motivating factor standard outlined in the CRA to the ADEA.[180] Instead, the Court assumed a more pronounced role, which contradicted congressional will.[181] The *Gross* opinion set forth a dangerous precedent which authorized the Court to substitute its interpretation for that of Congress, rejecting the deferential stance of previous decades in the wake of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[182]

For these discrete reasons, the *Gross* opinion proves unpersuasive for interpreting § 4(a)(2) and the scope of disparate impact under the ADEA. First, the Court in *Gross* disregarded the interpretive scheme of uniformity which has guided and informed adjudication of closely related statutes for decades. In addition, the opinion incorrectly construed a statutory override addressing just one ruling and installed it as a talisman of legislative intent for other statutes. Again, the nature of the congressional override as a direct, efficient response to an isolated ruling does not function as a broad panacea that the

Arabian Am. Oil Co., 499 U.S. 244, 256 (1991). The *Arabian American* decision was itself overridden by congressional amendment. For instance, plaintiffs often bring claims under the ADEA and Title VII simultaneously, but now courts must apply divergent standards of proof or causes of action. *See* Katz, *supra* note 104, at 865. The disjunction of burdens under *Gross* overcomplicates pleading requirements within the tightly-knit landscape of federal employment discrimination law. *See id.* at 867; Widiss, *The Hydra Problem*, *supra* note 154, at 860–61.

[178] *See* Widiss, *Shadow Precedents*, *supra* note 158, at 560–61.

[179] *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009). The Court rejected the causation standard under *Price Waterhouse*, expressing its disfavor for direct evidence requirements in Justice O'Connor's concurrence.

[180] *See* H.R. REP. NO. 102-40, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697. The Committee Report for the 1991 CRA states that Congress "intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act." *Id.*

[181] *See id.*

[182] 467 U.S. 837, 844 (1984).

Court presumed in *Gross*. Third, the trans-statutory amendment process stipulated by the Court frustrates legislative purposes, and invokes the possibility of a constitutional imbalance.

This robust critique of *Gross* suggests that job applicants may assert disparate impact claims under the ADEA, despite the textual disparity owing to the 1972 amendment of Title VII. And the case study of *Gross* even leaves open the possibility that Congress intended the 1972 amendment of Title VII to distribute across the employment discrimination statutes, just as the Committee Report for the 1991 CRA discloses a similar intent for those amendments.

But perhaps most importantly, the canon of uniformity overcomes the arguments predicated on the textual disparity between the statutes. As discussed above, the congressional override amending one statute reveals little of Congress's intent to either amend or fail to amend another statute. Given this, the presumption persists that for closely related statutes which share nearly identical language and serve a common purpose—for example, combatting employment discrimination—jurists should interpret these provisions uniformly. Therefore, § 4(a)(2) of the ADEA supports disparate impact claims for job applicants.

IV. *GRIGGS*, THE HYDRA, AND THE STATUS OF DISPARATE IMPACT CLAIMS UNDER THE ADEA

Despite scholarly misgivings, *Gross* still stands as good law. Therefore, its precepts on inconsistent amendments and congressional *neglect* controls subsequent interpretation of the ADEA. The procedure for interpreting override amendments found in *Gross* should necessarily inform the interpretation of § 4(a)(2) of the ADEA. This is precisely why the absence of any discussion of *Gross* in the Eleventh Circuit's revised ruling is so conspicuous.

The outcome in *Gross* reflects a phenomenon called the "hydra problem" in statutory interpretation.[183] The "hydra problem" emerges when Congress overrides a judicial opinion with respect to one statute, but does not amend closely related statutes implicated by the decision.[184] The congressional override for the one law thus "sever[s] . . . a head"—or branch—of case law

[183] Widiss, *The Hydra Problem*, *supra* note 154, at 863.

[184] *See id.*

which previously applied to the amended statute—that is the 1991 CRA with respect to Title VII and *Price Waterhouse*.[185] However, because Congress invalidates these rulings with the override, a "new [judicial] head" must evolve to interpret the otherwise identical, though, unamended closely related law(s), which Congress did not amend in a similar fashion.[186] As a result, "an entirely divorced parallel path of case law . . . that no longer control[s] [the amended statute] . . . [is] deemed to control the interpretation of [the] related statutes" which have not been amended.[187]

This paradigm mirrors the holding in *Gross*. The Court traced back the family tree of dormant Title VII case law to identify the standard that controlled the ADEA prior to *Price Waterhouse* and the 1991 CRA, namely, but-for causation.[188] Thus, a new precedential "head"—or judicial branch—developed to determine the proper standard of causation under the ADEA. This had the effect of reviving otherwise moot rulings, which now form the divergent branch of ADEA-employment-discrimination case law. The causation standard under the ADEA is now entirely disconnected from the current Title VII burdens, as well as the *Price Waterhouse* opinion which the 1991 CRA overruled.

The ruling in *Villarreal* is itself symptomatic of the hydra problem. The 1972 amendment to Title VII—adding "applicants for employment" language—requires that a new, precedential strain of case law emerge for the purposes of defining the scope of disparate impact claims under the ADEA. Oddly enough, the Eleventh Circuit declined any invitation to trace back the family tree of Title VII, and revive pre-1972 case law.

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[185] *Id.*

[186] *Id.* at 877–78.

[187] Widiss, *Shadow Precedents*, *supra* note 158, at 561; Sullivan, *supra* note 152, at 157–58. Sullivan, summarizing Widiss, explains it in simplified terms:

> This scenario arises when the Court construes Statute *A* in a way in which Congress disapproves, and Congress responds by amending Statue *A*, without formally amending analogous Statute *B* to like effect. When the same interpretive question then arises under Statute *B*, the Court finds that Congress's failure to amend Statute *B* conveys a legislative intent that the two should be read differently. This is the "hydra problem"—Congress's override of a judicial interpretation with which it disagreed ("the metaphorical severing of a head") justifies a different interpretation ("the rapid growth of new head") of other, unamended statutes.

Id.

[188] *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009).

All that being said, the *Gross* paradigm generates an interesting result when deployed in the context of disparate impact claims under the ADEA, because jurists will arrive back at *Griggs v. Duke Power Co*.[189] The controversy in *Griggs* centered on qualifying standards within an employee transfer program.[190] African American plaintiffs in *Griggs* alleged that the required qualifications, such as a high school diploma and various aptitude standards, functioned as barriers to their advancement.[191] The Court analogized the diploma and aptitude thresholds to literacy tests administered to limit the black franchise.[192] Ultimately, it reached the conclusion that disparate impact claims are cognizable under § 703(a)(2) of Title VII.[193]

As the watershed for disparate impact in employment discrimination, *Griggs* lends ample support to the argument that disparate impact claims are cognizable for job applicants under § 4(a)(2) of the ADEA. Even if the procedure in *Gross* is followed, the language of Justice Burger's opinion compels the finding that disparate impact under the ADEA encompasses job applicants. Justice Burger announced, "Congress has now required that the posture and condition of the *job-seeker* be taken into account," recalling that *Griggs* pertained to an employee transfer program.[194] Justice Burger continued, "If an employment practice which operates to *exclude* Negroes cannot be shown to be related to job performance, the practice is prohibited."[195] Thus, the Court in *Griggs* unequivocally held that disparate impact claims extend to job applicants under Title VII, absent the 1972 Amendments to Title VII.[196] In fact, the Court drew no distinction between current and prospective employees, although the plaintiffs in that case were current employees of Duke Power.[197]

[189] 401 U.S. 424, 436 (1971).

[190] *Id.* at 427–28.

[191] *Id.* at 428–29.

[192] *Id.* at 430.

[193] *See id.* at 431.

[194] *Id.* (emphasis added).

[195] *Id.* (emphasis added) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary *barriers* to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (emphasis added)).

[196] *See id.* at 436.

[197] *See id.* at 429–30.

In the end, *Griggs* proves dispositive for settling the present dispute over disparate impact protections under the ADEA. The Court delivered the *Griggs* ruling in 1971. However, Congress only added the key phrase of "applicants for employment," in 1972.[198] This chronology is crucial. According to the ruling in *Gross*, the decision in *Griggs* must govern the interpretation of disparate impact claims under § 4(a)(2) of the ADEA, because *Griggs* constitutes the relevant case law controlling Title VII disparate impact protections prior to the 1972 amendment. Yet, the Court in *Griggs* fully reached and resolved the question of whether disparate impact protections encompass job applicants in the affirmative: Job applicants enjoy these protections as much as current employees do under Title VII.

So, despite even the best attempt to distinguish Title VII and the ADEA in *Gross*, with its inference of intent from congressional inaction, the interpretive framework of *Gross* points back to *Griggs*, and the inescapable conclusion that job seekers are entitled to disparate impact protections under the ADEA. Thus, *Gross* itself compels the conclusion that disparate impact claims lie for job applicants under both statutes, because, regardless of the procedure required by *Gross*, the Court in *Griggs* broadly outlined the scope of disparate impact in the *absence* of the "applicants for employment" amendment. This, itself, fully confirms the finding that job seekers enjoy disparate impact protection under § 4(a)(2) of the ADEA.

CONCLUSION

Based on the foregoing reasons, disparate impact claims ought to be cognizable for job applicants under the ADEA. This conclusion depends on the plain meaning of the statute, the "canon of uniformity" for closely related statutes, the disposition of case law surrounding the ADEA, practical considerations on override amendments, and, finally, the outcome in *Griggs v. Duke Power Co*. Ironically—and that is the appropriate word—the ruling in *Gross* only assists this position, rather than

[198] *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8, § 703(a)(2), 86 Stat. 109 (codified as amended at 42 U.S.C. 2000e-2(a)(2) (2012)). In ratifying the Act, the report attached to the bill declared, "The promises of equal job opportunity made in 1964 must be made realities." S. REP. NO. 92-415, at 8 (1971). Once again, the legislative history explicitly references the job search process and applicants.

hindering it. And even if the preceding arguments prove wholly unconvincing, this Note has not even addressed the official EEOC interpretation of § 4(a)(2) of the ADEA, which authorizes job applicants to bring disparate impact claims, and which served as the basis for the first Eleventh Circuit ruling in *Villarreal*, which relied on *Auer* deference.[199]

Just recently, the North District of California held that job applicants may assert disparate impact claims under the ADEA, in contravention of the second Eleventh Circuit ruling in *Villarreal*. There, in *Rabin v. PricewaterhouseCoopers LLP*, the plaintiffs brought a class action against the accounting firm, alleging " 'systemic and pervasive discrimination against older job applicants.' "[200] The district court took full cognizance of the arguments found in *Villarreal*, and yet arrived at the conclusion that the disparate impact provision under the ADEA encompasses job seekers.[201] In fact, the court commented that "Defendant's [PricewaterhouseCooopers] statutory comparison . . . cannot overcome the use of the phrase 'any individual' " in § 4(a)(2).[202] On the topic of the 1972 amendment to Title VII, Judge Tigar confirmed that the congressional action after *Griggs*, in reality, bolsters the current position that disparate impact claims lie for job seekers:

> Defendant draws the wrong inference. As Plaintiffs [Rabin et al.] point out, the amendment to Title VII was intended to be "declaratory of the present law," and "fully in accord with the decision of the Court" in *Griggs*. In other words, the amendment signaled that *Griggs* had properly interpreted Title VII as protecting both employees and applicants. Therefore, the

[199] Under the standard in *Auer*, an agency is permitted to interpret ambiguous terms found its own regulations, and such agency interpretations are entitled to deference "unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997). To be sure, the EEOC regulations of § 4(a)(2) explain 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.' " 29 C.F.R. § 1625.7(c). *See Villarreal II*, 806 F.3d 1288, 1299 (11th Cir. 2015).

[200] Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1127 (N.D. Cal. 2017).

[201] *Id.* at 1129.

[202] *Id.*

> amendment supports, rather than detracts from, an interpretation of the ADEA as likewise covering both employees and applicants.[203]

Accordingly, the issue persists as to whether the ADEA enables disparate impact protections for job applicants, and other jurists have endorsed the precise arguments offered in this Note.

As a final comment, the purpose and tone of the ADEA contemplates the challenges face by older Americans in securing employment. A House committee report from 1967 confirms that a chief purpose of the statute is to provide "a much-needed vigorous, nationwide campaign to promote hiring without discrimination on the basis of age."[204] The Wirtz Report, itself the impetus for enacting the ADEA, contains similar mandates. The following passage is most illustrative:

> 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."[205]

Evidently, it was the intent of the drafters for such protections to reach all individuals for which the law is applicable.

Given these commentaries, the conclusion that the ADEA allows for broad disparate impact claims is hardly a strained one. Thus, the disparate impact provision of the ADEA, § 4(a)(2), enables disparate impact claims for job applicants.

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[203] *Id.* at 1131.

[204] H.R. REP. NO. 90-805, at 2214 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214.

[205] Wirtz, *supra* note 7, at 1 (referencing Robert Frost's *The Death of the Hired Man*).