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Samantha Pitsch

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QUICK, STOP HIRING OLD PEOPLE! HOW THE ELEVENTH CIRCUIT OPENED THE DOOR FOR DISCRIMINATORY HIRING PRACTICES UNDER THE ADEA

Samantha Pitsch*

Abstract: Do not discriminate against older persons. It seems like a simple mandate. However, the statute creating that mandate, the Age Discrimination in Employment Act (“ADEA”), has been anything but simple to implement. The details of the ADEA—who can bring a claim, and what kind of claim they can bring—have been extensively litigated since its inception. In 2016, the Eleventh Circuit, sitting en banc, decided that an employer could discriminate against older applicants by having a policy of not hiring people who have been out of college for a certain number of years, or who have a certain number of years of work experience. This has created a rift within that circuit and is a departure from the governing agency’s interpretation. This Comment explores the case law and legislative history leading up to the critical Eleventh Circuit case, *Villarreal v. R.J. Reynolds Tobacco Co.*, which addresses the following question: can applicants for employment bring disparate impact claims under the ADEA? This Comment argues that the Supreme Court should hold that the ADEA does cover applicants for employment making disparate impact claims and that arbitrary age-based hiring policies are discriminatory. Regardless of any Supreme Court decision on the question, this Comment also suggests that Congress should amend the ADEA to include language that would allow applicants for employment to bring disparate impact claims, bringing the ADEA in line with Title VII.

INTRODUCTION

Imagine a business owner is looking to hire new employees. The owner hires a recruiting firm to help choose from all of the applications received. Ideally, the business owner would like someone to bring in new and fresh ideas to the business. In the pursuit of this goal, the business owner asks the firm reviewing the applications not to consider any applicants who have been out of college for more than five years or have five years of experience. This requirement *could* be seen as discriminating against an employee based on age. It may not be intentional discrimination because the business is not directly stating that it will not hire persons of a certain age, but it would disparately impact certain age groups and therefore could be discriminatory.¹ Under existing disparate impact law, it should follow

* J.D. Candidate, University of Washington School of Law, Class of 2018. I would like to thank Professor Eric Schnapper for his thoughtful input on this topic. I would also like to thank the entire *Washington Law Review* for tirelessly working with me on this piece.

that businesses could not lawfully maintain these policies. Surprisingly, in 2016 the Eleventh Circuit decided, en banc, that employers could discriminate based on age if the person being discriminated against was an applicant for employment and not yet an actual employee.² In its decision, the court held that ADEA protection does not cover an applicant for employment;³ therefore, policies of hiring only people who have been out of college for a certain amount of time with certain amounts of work experience are legal. The court's determination is surprising given that it was based on a statute that was created to protect older persons from discrimination in the workplace.⁴ Is the Eleventh Circuit correct in its interpretation of the ADEA? This Comment argues that the court is mistaken and that the ADEA does in fact cover applicants for employment. Additionally, this Comment suggests that Congress should amend the ADEA to include the terms "or applicants for employment" to make it explicitly clear that the law covers applicants for employment.

Congress passed the ADEA in 1967, three years after passing Title VII, the federal law prohibiting discrimination against employees on the basis of sex, race, color, national origin, and religion.⁵ After requesting a study from the Secretary of Labor,⁶ Congress recognized a trend of businesses neither hiring nor promoting older persons.⁷ Congress passed the ADEA to combat this trend and to ease older persons' abilities to get and maintain jobs.⁸ The ADEA has two sections forbidding discrimination by an employer.⁹ First, section 4(a)(1)¹⁰ of the ADEA makes it unlawful for an

1. See *infra* section II.B.

2. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 2292 (2017).

3. *Id.*

4. Age Discrimination in Employment Act, 29 U.S.C. § 621 (1967); *id.* § 623(a) ("It shall be unlawful for an employer— (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.").

5. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602; see also Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 241, 253–66.

6. Civil Rights Act of 1964, Pub. L. 88-352, § 715, 78 Stat. 241, 265.

7. Age Discrimination in Employment Act § 631 (older persons being defined in the statute as those who are forty or older).

8. *Id.* § 621.

9. *Id.* § 623(a)(1)–(2).

10. In referring to sections of the ADEA, courts generally cite the original sections of the Act. However, the Act was also codified into the U.S. Code. Therefore, this Comment will vary between

employer to “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”¹¹ Second, section 4(a)(2) states that an employer may not “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.”¹²

Under these two sections, the ADEA covers two different types of claims: disparate treatment and disparate impact.¹³ The first type, disparate treatment, allows plaintiffs to make claims of intentional discrimination against an employer.¹⁴ The second type was recognized in 2005, when the Supreme Court held that section 4(a)(2) of the ADEA also allows employees to bring disparate impact claims.¹⁵ Disparate impact claims focus on employment policies that impact one group of people more than others and do not require a court to find intent on behalf of the employer.¹⁶ One question left unresolved by Congress and the Supreme Court, however, is whether applicants for employment are also eligible to make disparate impact claims.

Since its passage in 1967, courts have struggled to determine who is eligible to bring claims under the ADEA and on what grounds. In search of guidance, courts have largely looked to Title VII cases due to the statute’s similar language and intent.¹⁷ The courts have also turned to the language of the ADEA, its legislative history, and the Equal Employment Opportunity Commission’s (EEOC) interpretation of the Act when deciding what types of claims can be made under the ADEA.¹⁸ Although the Supreme Court has yet to rule directly on the question of whether the ADEA covers applicants for employment making disparate impact claims, several Supreme Court decisions illuminate the contours of the statute and the breadth of its coverage.¹⁹ Additionally, several circuit

citing to the original Act sections and the U.S. Code.

11. *Id.* § 623(a)(1).

12. *Id.* § 623(a)(2).

13. *See Smith v. City of Jackson*, 544 U.S. 228, 237, 240 (2005).

14. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36, n.15 (1977).

15. *Smith*, 544 U.S. at 240.

16. *Int’l Bhd. of Teamsters*, 431 U.S. at 335–36, n.15.

17. *See, e.g., Smith*, 544 U.S. at 233.

18. *See infra* Part III.

19. *Smith*, 544 U.S. at 228; *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (many courts look to *Griggs*’ interpretation of Title VII to understand the identical language in the ADEA).

courts have also grappled with questions related to the ADEA.²⁰ In 2010 a Georgia plaintiff, Richard M. Villarreal, brought a case that forced the district court to specifically deal with the issue of whether applicants for employment could make disparate impact claims.²¹ Mr. Villarreal brought a disparate impact claim under section 4(a)(2) of the ADEA claiming age discrimination.²² Ultimately, the Eleventh Circuit in an en banc decision ruled against Mr. Villarreal, holding that applicants cannot make disparate impact claims under the ADEA.²³

Mr. Villarreal petitioned the Supreme Court for certiorari in February 2017.²⁴ The Supreme Court denied certiorari in June 2017.²⁵ However, given the lack of clarity in the statute, this issue is likely to appear before the Court again. If the issue is appealed to the Supreme Court, this Comment argues that the Court should hold the ADEA covers applicants for employment with valid disparate impact claims. Like the Eleventh Circuit's original decision,²⁶ the Supreme Court will likely find that the statute is ambiguous and that case law does not clarify the language. If so, the Court should then look to the interpretation of the governing agency, the EEOC, which already recognizes disparate impact claims by applicants for employment.²⁷ Regardless of any potential Supreme Court decision, this Comment also asserts that Congress should clarify the language of the ADEA to include applicants for employment in order to further realize the purpose of the statute—stopping employment discrimination against persons over the age of forty.²⁸

20. See *infra* section IV.C.

21. Villarreal v. R.J. Reynolds Tobacco Co., 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), and *on reh'g en banc*, 839 F.3d 958 (11th Cir. 2016), *aff'd and remanded to* 839 F.3d 958 (11th Cir. 2016), and *aff'd* 15-10602, 2017 WL 2781522 (11th Cir. June 27, 2017).

22. *Id.* at *3; see also *Smith*, 544 U.S. at 240 (section 4(a)(2) allows for disparate impact claims under the ADEA).

23. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2292 (2017).

24. Petition for Writ of Certiorari at 1, Villarreal v. R.J. Reynolds Tobacco Co., __U.S.__, 137 S. Ct. 2292 (2017) (No. 16-971).

25. Villarreal, 137 S. Ct. 2292.

26. Villarreal, 806 F.3d at 1292–93, *reh'g en banc granted, opinion vacated*, 15-10602, 2016 WL 635800, and *on reh'g en banc*, 839 F.3d 958, *cert. denied*, 137 S. Ct. 2292.

27. 29 C.F.R. § 1625.7 (2012).

28. Age Discrimination in Employment Act, 29 U.S.C. § 621(b) (1967) (“It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”).

Part II of this Comment discusses the creation of the ADEA and the types of claims covered under the statute. It first addresses the legislative history that led to the creation of the statute. Next, it reviews what a disparate impact claim is and how that type of claim differs from a disparate treatment claim. In Part III, this Comment discusses the multiple methods of statutory interpretation available to courts, as well as the specific methods courts use to interpret ADEA and Title VII claims. Courts start their interpretation by deciding whether the language of the ADEA is ambiguous and then generally move from legislative history to look at how the governing agency—in this case the EEOC—treats the issues. Part IV of this Comment discusses the pertinent case law related to the ADEA. It first discusses early Supreme Court decisions interpreting the relevant portions of Title VII²⁹ as well as cases interpreting the ADEA.³⁰ Part IV then assesses circuit court cases that, at least in dicta, discuss whether applicants for employment can make disparate impact claims. This Part delves into the first case that forced the Court to determine whether applicants for employment are able to bring disparate impact claims: *Villarreal v. R.J. Reynolds Tobacco Co.*³¹ Each step of the case is addressed—from the district court, to the court of appeals, to the court of appeals en banc—to show how the different courts ruled on the issue. In Part V, this Comment argues that the Supreme Court should hold that the ADEA does cover disparate impact claims by applicants for employment when next given the opportunity. Finally, this Comment concludes that regardless of a Supreme Court decision on the issue, Congress should amend the statute to include the phrase “or applicants for employment” to solidify applicants’ abilities to bring suit under the ADEA in the future.

I. THE ADEA WAS CREATED TO STOP DISCRIMINATION AGAINST OLDER PERSONS

In 1967, Congress passed the ADEA.³² Since its passage, litigants have brought a myriad of actions to the courts raising questions regarding the ADEA. Like its counterpart, Title VII, the ADEA has worked its way

29. *Griggs v. Duke Power Co.*, 401 U.S. 424, 424 (1971).

30. *Smith v. City of Jackson*, 544 U.S. 228, 228 (2005).

31. 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*, 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *and on reh'g en banc*, 839 F.3d 958 (11th Cir. 2016), *aff'd and remanded*, 839 F.3d 958 (11th Cir. 2016), *and aff'd* 15-10602, 2017 WL 2781522 (11th Cir. June 27, 2017).

32. Age Discrimination in Employment Act § 623.

through the court system in a quest to determine Congress's exact meaning.³³ Many courts have yet to resolve the issue of whether applicants for employment are able to make disparate impact claims under the ADEA. Reviewing the ADEA's background and understanding disparate impact claims can instruct how the Supreme Court should answer the question.

A. *Legislative History and Purpose*

The impetus to create the ADEA was Congress's passage of Title VII. The purpose of both statutes is to limit discrimination. The ADEA was fashioned to cover a class that Title VII did not: older persons.

Congressional efforts to prohibit arbitrary age discrimination in employment began in the mid-1950s.³⁴ In 1964, the House and Senate even offered amendments codifying a prohibition against age discrimination in Title VII of the Civil Rights Act of 1964.³⁵ In the end, however, these amendments were opposed on the grounds that Congress did not have enough information to make a decision on the issue of age discrimination.³⁶ In order to more fully understand the issue, Congress directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."³⁷ In 1965, the Secretary of Labor, W. Willard Wirtz, presented his report to Congress entitled, "The Older American Worker: Age Discrimination in Employment."³⁸ The report documented the existence of age discrimination in the workplace, and it also concluded that this discrimination often stemmed from inaccurate stereotypes about older workers' declining abilities and productivity.³⁹

In 1966, Congress responded by directing the Secretary to propose remedial legislation to address age discrimination.⁴⁰ On January 23, 1967,

33. See *infra* Part IV.

34. See 113 CONG. REC. 2199–2200 (1967) (statement of Sen. Javits), reprinted in U.S. EQUAL EMP'T OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 64–65 (1981) [hereinafter LEGISLATIVE HISTORY].

35. 110 CONG. REC. 2596–99, 9911–13, 13490–92 (1964), reprinted in LEGISLATIVE HISTORY, *supra* note 34, at 5–14.

36. *Id.*

37. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265.

38. SEC'Y OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965), reprinted in LEGISLATIVE HISTORY, *supra* note 34, at 16–41.

39. *Id.* at 22–23.

40. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 606, 80 Stat. 830, 845.

the Secretary sent a letter to Congress proposing legislation entitled “Age Discrimination in Employment Act of 1967.”⁴¹ Building on this recommendation, and on independent studies by committees in both the House and Senate,⁴² Congress enacted the ADEA in 1967.⁴³ The stated purpose of the Act is to “promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”⁴⁴

B. *Disparate Impact Claims Under the ADEA*

The ADEA creates a cause of action for both disparate treatment and disparate impact claims.⁴⁵ Disparate treatment occurs when an “employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.”⁴⁶ Plaintiffs can make disparate treatment claims through section 4(a)(1) of the ADEA, which requires discriminatory intent.⁴⁷ This is because the emphasis in section 4(a)(1) is on how the employer acted toward the employee.⁴⁸

Disparate impact claims, by contrast, “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”⁴⁹ Proof of a discriminatory motive is not required

41. Letter from the Secretary of Labor to the Speaker of the House of Representatives and the President of the Senate (Jan. 23, 1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 34, at 62–63.

42. *See* S. REP. No. 90-723 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 34, at 105–16; H.R. REP. No. 90-805 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 34, at 74–85; S. REP. No. 90-169 (1967), *reprinted in* LEGISLATIVE HISTORY, *supra* note 34, at 58–59.

43. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.

44. Age Discrimination in Employment Act, 29 U.S.C. § 621(b) (1967).

45. *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005).

46. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (alteration in original) (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

47. *Smith*, 544 U.S. at 248–49 (O’Connor, J., concurring) (“[F]or to take an action against an individual ‘because of such individual’s age’ is to do so ‘by reason of’ or ‘on account of’ her age.” (emphasis in original)).

48. *Id.* at 236 n.6 (“[T]he focus of the [section] is on the employer’s action with respect to the targeted individual.”); *see also* Age Discrimination in Employment Act § 623(a)(1) (an employer may not “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”).

49. *Int’l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

under a disparate impact theory.⁵⁰ Disparate impact is only addressed in section 4(a)(2) of the ADEA, because section 4(a)(2) targets the results of an employer's conduct and not the motive:

Unlike in paragraph (a)(1), there is . . . an incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact.⁵¹

The Supreme Court first articulated the standard for analyzing disparate impact claims under the ADEA in *Smith v. City of Jackson*.⁵² To establish a prima facie case, a plaintiff is “responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.”⁵³

An employer can avoid liability by showing that any discrimination was based on a Reasonable Factor Other than Age (“RFOA”).⁵⁴ Unlike the mandate of Title VII,⁵⁵ it is not unlawful for an employer “to take any action otherwise prohibited under subsection[] (a) . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, *or where the differentiation is based on reasonable factors other than age.*”⁵⁶ The RFOA exception appears to apply equally to both types of claims under the ADEA, but the Supreme Court has stated that in “most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place.”⁵⁷ The Court concluded that it is

50. *Id.*

51. *Smith*, 544 U.S. at 236 n.6; *id.* at 236 (“Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.” (emphasis in original)).

52. 544 U.S. 228 (2005).

53. *Id.* at 241 (emphasis in original) (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988)); Carla J. Rozycki & Emma J. Sullivan, *Disparate-Impact Claims Under the ADEA*, AM. BAR ASS'N (Sept. 2011), http://www.americanbar.org/publications/gp_solo/2011/september/disparate_impact_claims_adea.html [<https://perma.cc/DX22-J6GB>].

54. *Smith*, 544 U.S. at 241; Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1) (1967).

55. *Smith*, 544 U.S. at 229 (“Congress’ decision to limit the ADEA’s coverage by including the RFOA provision is consistent with the fact that age, unlike Title VII’s protected classifications, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment.”).

56. Age Discrimination in Employment Act § 623(f)(1) (emphasis added).

57. *Smith*, 544 U.S. at 238 (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (“[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee’s age.”)).

“in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was ‘reasonable.’”⁵⁸

II. METHODS OF STATUTORY INTERPRETATION USED IN ADEA CASE LAW

When faced with a legal question regarding the interpretation of a statute, courts often look to different methods of statutory analysis.⁵⁹ In relation to the ADEA, courts have relied on several specific methods of statutory interpretation. First, courts interpreting the ADEA look at the text of the statute.⁶⁰ If the language is found to be ambiguous, or more justification is warranted, courts then look to case law, the context of the statute being interpreted,⁶¹ the legislative history,⁶² and the purpose of the statute.⁶³ Courts also look to the governing agency interpretation of a given statute, if any exists, for guidance.⁶⁴

A court interpreting a statute first looks to the text of the statute.⁶⁵ If the text of the statute is clear and unambiguous, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁶⁶ To that end, every word and provision should be given a meaning so as to not cause duplication or to cause a word or provision to have no consequence.⁶⁷ If “[a] word or phrase is presumed to bear the same meaning throughout a text[,]” then “a material variation in terms suggests a variation in meaning.”⁶⁸

Because courts must also construe words in a way to give meaning to the other words in the statute, courts also look at the broader context of

58. *Id.* at 239.

59. See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

60. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 963 (11th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2292 (2017).

61. *Id.*

62. *Smith*, 544 U.S. at 232–33.

63. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

64. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1292 (11th Cir. 2015), *reh'g en banc granted, opinion vacated*, 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *and on reh'g en banc*, 839 F.3d 958, *cert. denied*, 137 S. Ct. 2292 (2017).

65. *Watt v. Alaska*, 451 U.S. 259, 265 (1981) (“[T]he starting point in every case involving construction of a statute is the language itself.” (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring))).

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

67. *Villarreal*, 839 F.3d at 963 (citing SCALIA & GARNER, *supra* note 59, at 174).

68. *Id.* (citing SCALIA & GARNER, *supra* note 59, at 170).

the text.⁶⁹ The Supreme Court held that “Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”⁷⁰ This applies with particular force where the words or phrases are in close proximity.⁷¹ Therefore, “deliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent.”⁷²

Courts have also looked to the legislative history of the ADEA and compared it to the amendments and the language of Title VII.⁷³ The Supreme Court has stated that it could not “ignore Congress’s decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA.”⁷⁴ However, there are a plethora of reasons why Congress may or may not have amended a statute.⁷⁵ Therefore, although some courts find legislative history to be instructive, other courts still find that questions remain after looking at the legislative history.⁷⁶

Relatedly, courts also look to legislative purpose to understand the meaning and scope of a statute.⁷⁷ Although courts generally follow the presumption that “‘identical words used in different parts of the same act are intended to have the same meaning’ . . . the presumption ‘is not rigid’ and ‘the meaning of the same words may vary to meet the purposes of the law.’”⁷⁸ This interpretive canon is tempered, however, by the notion that the court’s “job is to follow the text even if doing so will supposedly ‘undercut a basic objective of the statute.’”⁷⁹ “Strong evidence” therefore

69. *Id.* at 963; *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

70. *Dep’t of Homeland Sec. v. MacLean*, ___ U.S. ___, 135 S. Ct. 913, 919 (2015); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.”).

71. *MacLean*, 135 S. Ct. at 919.

72. *United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003).

73. *Villarreal*, 839 F.3d at 978–79 (Rosenbaum, J., concurring).

74. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009).

75. *Villarreal v. R.J. Reynolds Tobacco Co.*, 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.”), *reh’g en banc granted, opinion vacated*, 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), and *on reh’g en banc*, 839 F.3d 958, *cert. denied*, 137 S. Ct. 2292 (2017).

76. *See infra* section III.D.2.

77. *Smith v. City of Jackson*, 544 U.S. 228, 253 (2005) (O’Connor, J., concurring).

78. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (citing *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

79. *Villarreal*, 839 F.3d at 969 (citing *Baker Botts L.L.P. v. ASARCO LLC*, ___ U.S. ___, 135 S. Ct. 2158, 2169 (2015)); *see also Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002) (“Even if a statute’s legislative history evinces an intent contrary to its straightforward statutory command, ‘we

is necessary to prove that Congress intended words to be read with a certain purpose.⁸⁰

When a court finds a statute to be ambiguous, judges turn to the agency that enforces the statute to see if it has dealt with the ambiguity.⁸¹ This approach recognizes the theory that “a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”⁸² If the agency has interpreted the statute, and that interpretation is reasonable, the court can defer to that interpretation.⁸³ Courts have emphasized, however, that the statute must be ambiguous before turning to an agency interpretation.⁸⁴

In sum, courts use a variety of tools to interpret contested statutes. When interpreting the ADEA in particular, courts have generally relied on the tools above.⁸⁵ These decisions also show that although there is no rule on which tools must be used, analysis must begin with the text of the statute.⁸⁶

III. PERTINENT CASE LAW FOR ADEA CLAIMS

In *Villarreal v. R.J. Reynolds Tobacco Co.*,⁸⁷ the Eleventh Circuit, en banc, held that the section of the ADEA allowing disparate impact claims does not apply to job applicants.⁸⁸ The underpinning of the decision

do not resort to legislative history to cloud a statutory text that is clear.” (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994))).

80. *Smith*, 544 U.S. at 260–61 (O’Connor, J., concurring).

81. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1299 (11th Cir. 2015), *reh’g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), and *on reh’g en banc*, 839 F.3d 958, *cert. denied*, 137 S. Ct. 2292 (2017); *see, e.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

82. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (citing *Chevron*, 467 U.S. at 844); *Villarreal*, 806 F.3d at 1299 (“When a statute is ambiguous, policy choices belong to the agency that enforces the statute.” (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005))).

83. *See King v. Burwell*, ___ U.S. ___, 135 S. Ct. 2480, 2488 (2015); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (“[I]t is axiomatic that the EEOC’s interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC’s interpretation of ambiguous language need only be reasonable to be entitled to deference.” (citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979))); *Chevron*, 467 U.S. at 845.

84. *See, e.g., Villarreal*, 839 F.3d at 970 (en banc) (“[W]e do not defer to an agency’s interpretation of a statute when the text is clear.”), *cert. denied*, 137 S. Ct. 2292.

85. *See infra* Part III.

86. *See id.*

87. 839 F.3d 958 (en banc), *cert. denied*, 137 S. Ct. 2292.

88. *Id.* at 961 (“We conclude that the whole text of the Act makes clear that an applicant for

stemmed from two Supreme Court decisions: *Griggs v. Duke Power Co.*⁸⁹ and *Smith v. City of Jackson*.⁹⁰ Three circuit courts have also ruled on whether applicants may make disparate impact claims.⁹¹ The Supreme Court has not directly ruled on this issue yet, but if it does, it will likely review these cases.

A. *Griggs v. Duke Power Co.*

In *Griggs*, the Supreme Court dealt with the question of whether Title VII of the Civil Rights Act of 1964 prohibited an employer from requiring a high school diploma or passage of an intelligence test “as a condition of employment in or transfer to jobs.”⁹² The suit was brought by a group of African American employees against Duke Power Company.⁹³ In a recent decision interpreting the ADEA, the Supreme Court stated the “interpretation of § 703(a)(2) of Title VII in *Griggs* is . . . a precedent of compelling importance.”⁹⁴ The Court explained that “[e]xcept for substitution of the word ‘age’ for the words ‘race, color, religion, sex, or national origin,’ the language of that provision in the ADEA is identical to that found in section 703(a)(2) of the Civil Rights Act of 1964 (Title VII).”⁹⁵ Courts therefore first turn to *Griggs* when analyzing an ADEA claim.⁹⁶

In *Griggs*, the petitioners’ case related to two policies enforced by Duke Power Company. The first policy was introduced in 1955, when the company began requiring a high school education for initial assignment to company departments, excluding the labor department (the lowest paid department).⁹⁷ In 1965, the company introduced an additional requirement that new employees register “satisfactory scores” on two professionally prepared aptitude tests to qualify for placement in a department.⁹⁸

employment cannot sue an employer for disparate impact because the applicant has no ‘status as an employee.’” (quoting Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(2) (1967))).

89. 401 U.S. 424 (1971).

90. 544 U.S. 228 (2005).

91. *See infra* section IV.C.

92. *Griggs*, 401 U.S. at 425–26.

93. *Id.* at 426.

94. *Smith*, 544 U.S. at 234.

95. *Id.* at 233.

96. *Villareal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1294 (11th Cir. 2015), *reh’g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *and on reh’g en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).

97. *Griggs*, 401 U.S. at 427.

98. *Id.* at 428.

The district court and the court of appeals both decided that there “was no showing of a racial purpose or invidious intent in the adoption” of the requirements.⁹⁹ The court of appeals held that, in the absence of a discriminatory purpose, the requirements instituted by the company did not violate the Civil Rights Act.¹⁰⁰ The Supreme Court disagreed. The Supreme Court held that “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”¹⁰¹ The Court further stated that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”¹⁰² The Court recognized that Congress intended the Civil Rights Act to address “the *consequences* of employment practices, not simply the motivation[s]” behind them.¹⁰³ In recognizing this, the Court “held that the plain text of § 703(a)(2) of Title VII . . . authorized disparate impact liability” claims.¹⁰⁴

Courts disagree as to whether *Griggs* applies to cases brought by applicants for employment.¹⁰⁵ In 1977, the Supreme Court discussed the *Griggs* opinion when ruling on a Title VII discrimination case.¹⁰⁶ Citing *Griggs*, the Court held that to establish a prima facie case of discrimination, “a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.”¹⁰⁷ In 2015, the Supreme Court again alluded to the fact that a plaintiff could make a disparate impact claim like in *Griggs* in cases concerning hiring criterions.¹⁰⁸ The Court held “that in a disparate-impact case, § 703(a)(2) does not prohibit *hiring criteria* with a

99. *Id.* at 429.

100. *Id.*

101. *Id.* at 430.

102. *Id.* at 432.

103. *Id.* (emphasis in original).

104. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1294 (11th Cir. 2015), *reh'g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *and on reh'g en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).

105. *Villarreal*, 839 F.3d at 968 (en banc), *cert. denied*, 137 S. Ct. 2292.

106. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

107. *Id.*

108. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2517 (2015).

‘manifest relationship’ to job performance.”¹⁰⁹ Several circuit courts have also held that *Griggs* could be applied to applicants for employment.¹¹⁰

Other courts do not extend the argument from *Griggs* beyond claims brought by current employees. In *Villarreal*, the Court of Appeals en banc’s majority opinion reasoned that many of the cases characterizing *Griggs* as applying to applicants to employment were adjudicated after Title VII was amended in 1972.¹¹¹ Arguably, the courts deciding those cases were not focused on the question of whether or not *Griggs* applied to applicants because the statute already applied to them.¹¹² Additionally, the plaintiffs in *Griggs* were already employees.¹¹³ Thus, the case did not even deal with the question of whether applicants for employment were included under Title VII.¹¹⁴ Several Supreme Court cases have also described *Griggs* as having a limited application to employees or transferees. In 1975, the Supreme Court described *Griggs* as only addressing transferees.¹¹⁵ In a later opinion, the Supreme Court instead focused on the fact that *Griggs* was brought by employees of the Duke Power Company.¹¹⁶ Thus, the Supreme Court seems to have waffled in its choice of words when describing *Griggs*. As such, it is difficult to say whether the *Griggs* precedent extends only to current employees and transferees or also includes applicants for employment.

109. *Id.* (emphasis added) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

110. *See* EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1279 n.16 (11th Cir. 2000) (“In *Griggs* . . . the plaintiffs showed that the objective and facially neutral requirements . . . in order to be hired or transferred . . . had a disproportionate effect on white and black applicants.”); *id.* at 1282 n.18 (“For example in *Griggs* the Supreme Court made clear that Title VII prohibited an employer from using neutral hiring and promotion practices.”); *Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant*, 491 F.2d 1364, 1373 n.25 (5th Cir. 1974) (“No test for hiring or promotion is valid if it ‘operates to exclude Negroes (and) cannot be shown to be related to job performance.’” (quoting *Griggs*, 401 U.S. at 431)); *United States v. Ga. Power Co.*, 474 F.2d 906, 911 (5th Cir. 1973) (in *Griggs*, “the Supreme Court held that the proviso of this section means that no test used for hiring or promotion is valid if it ‘operates to exclude Negroes [and] cannot be shown to be related to job performance’”).

111. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 968–69 (11th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2292 (2017). The 1972 amendment added the words “or applicant to employment” to Title VII. *See infra* note 201.

112. *Villarreal*, 839 F.3d at 969.

113. *Griggs*, 401 U.S. at 426.

114. *See, e.g., Villarreal*, 839 F.3d at 969.

115. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 426 (1975) (“The concept of job relatedness takes on meaning from the facts of the *Griggs* case. A power company in North Carolina had reserved its skilled jobs for whites prior to 1965. Thereafter, the company allowed Negro workers to transfer to skilled jobs, but all *transferees*—white and Negro—were required to attain national median scores on two tests.” (emphasis added)).

116. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (“Prior to the enactment of Title VII, the Duke Power Co. restricted its black *employees* to the labor department.” (emphasis added)).

B. Smith v. City of Jackson

In *Smith v. City of Jackson*, the Supreme Court settled the conflicting case law that developed after *Griggs*.¹¹⁷ The conflict arose after the Supreme Court ruled on an ADEA case, *Hazen Paper Co. v. Biggins*.¹¹⁸ In that case, the Supreme Court held that where an employer takes action based on a reasonable factor other than age, there is no violation of the ADEA.¹¹⁹ Although the Court in *Griggs* maintained that Title VII allowed for disparate impact claims,¹²⁰ the *Hazen Paper* opinion held that disparate treatment claims “capture[d] the essence of what Congress sought to prohibit in the ADEA.”¹²¹ Thus, the *Hazen Paper* Court left the question open as to the availability of disparate impact claims under the ADEA, stating: “we have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here.”¹²² Several lower courts subsequently expressed confusion as to whether the ADEA allowed for disparate impact claims.¹²³ The decision in *Smith*, then, answered the question of whether the disparate impact theory of liability announced in *Griggs* is cognizable under the ADEA.¹²⁴

Smith began when police and public safety officers of Jackson, Mississippi alleged that the plan to increase the salaries of city employees violated the ADEA.¹²⁵ On October 1, 1998, the City of Jackson “adopted a pay plan granting raises to all City employees.”¹²⁶ In a 1999 revision of the plan, all police officers and police dispatchers were granted raises.¹²⁷

117. 544 U.S. 228, 237–38 (2005) (plurality opinion).

118. 507 U.S. 604 (1993).

119. *Id.* at 609.

120. *See supra* section IV.A.

121. *Hazen Paper*, 507 U.S. at 610.

122. *Id.*

123. *Smith v. City of Jackson*, 544 U.S. 228, 237 (2005) (plurality opinion) (“It was only after our decision in [*Hazen Paper*] that some of those courts concluded that the ADEA did not authorize a disparate-impact theory of liability.”); *see also* *Smith v. City of Jackson*, 351 F.3d 183, 187 (5th Cir. 2003) (discussing the debate among the courts of appeals in interpreting both *Griggs* and *Hazen Paper*), *aff’d on other grounds*, 544 U.S. 228 (2005).

124. *Smith*, 544 U.S. at 232 (“We . . . now hold that the ADEA does authorize recovery in ‘disparate-impact’ cases comparable to *Griggs*.”); *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 2518 (2015) (“Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.”).

125. *Smith*, 544 U.S. at 230.

126. *Id.* at 231.

127. *Id.*

In this revision, officers and dispatchers who had been there fewer than five years received “proportionally greater raises” than those with “more seniority.”¹²⁸ Consequently, a group of older officers filed suit under the ADEA.¹²⁹ The officers alleged the facts of both a disparate treatment claim—that the City deliberately discriminated against them because of their age—as well as a disparate impact claim—that they were adversely affected by the plan because of their age.¹³⁰

The district court hearing the case granted summary judgment to the City on both the disparate treatment and disparate impact claims.¹³¹ The court of appeals held that the decision on the disparate treatment claim was premature and remanded the issue back to the district court.¹³² However, the court of appeals affirmed the judgment on the disparate impact claim, holding “that the ADEA was not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age.”¹³³ Upon appeal, however, the Supreme Court held that both the ADEA and Title VII authorize recovery on a disparate impact theory.¹³⁴ The Court stated that the only difference between the two statutes is that “the scope of disparate-impact liability under ADEA is narrower than under Title VII.”¹³⁵ Thus, the Court recognized that disparate impact claims are available but are limited to section 4(a)(2) of the ADEA.¹³⁶

The *Smith* opinion, therefore, allows for disparate impact claims but does not answer the question of whether job applicants can bring disparate impact claims.¹³⁷ Several courts have looked to Justice O’Connor’s

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Smith v. City of Jackson*, 351 F.3d 183, 187 (5th Cir. 2003), *aff’d on other grounds*, 544 U.S. 228 (2005).

134. *Smith*, 544 U.S. at 240. The Court held that the ADEA authorizes disparate impact claims. *Id.* However, the opinion becomes a plurality when discussing which statutory interpretation correctly comes to that conclusion. *Id.* at 229. In a concurrence, Justice Scalia stated that the ADEA should authorize disparate impact claims solely because the EEOC interprets the statute in that way. *Id.* at 242 (Scalia, J., concurring).

135. *Id.* at 240.

136. *Id.* at 236 n.6 (there are “key textual differences between [section] 4(a)(1), which does not encompass disparate-impact liability, and [section] 4(a)(2)”; *see supra* section II.B).

137. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1292 (11th Cir. 2015) (“Because *Smith* involved only claims of current employees, it did not answer the question we face here: whether job applicants may bring disparate impact claims as well.”), *reh’g en banc granted, opinion vacated*, 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *and on reh’g en banc*, 839 F.3d 958 (11th Cir.

concurrence in *Smith* as a guide for answering that question.¹³⁸ In her concurrence, joined by Justice Kennedy and Justice Thomas, Justice O'Connor stated "[s]ection 4(a)(2), of course, does not apply to 'applicants for employment' at all—it is only [section] 4(a)(1) that protects this group."¹³⁹ However, other courts have found Justice O'Connor's concurrence to be unpersuasive or inconclusive.¹⁴⁰ Without a more binding precedent, and given that Justice O'Connor's concurrence argued the ADEA should not allow disparate impact claims at all, the *Smith* case alone does not answer whether applicants can make disparate impact claims under the ADEA.¹⁴¹

C. Other Circuits Weigh In

Three other circuits have discussed the issue of whether applicants for employment can make disparate impact claims. The cases in these circuits were decided before the Supreme Court decision in *Smith*.¹⁴² Despite this, they are still worth considering for several reasons. First, the decisions specifically touch upon the applicability of section 4(a)(2) of the ADEA in the context of an applicant for employment. Second, they are indicative of broadly applicable approaches to the issues. The arguments used by the courts to deny coverage to applicants for employment in these cases are still used when discussing the issue today.

In 1994, the Seventh Circuit held in *EEOC v. Francis W. Parker School*¹⁴³ that the ADEA did not cover disparate impact claims—regardless of the plaintiff's status as an employee or applicant.¹⁴⁴ The majority decision focused on the Supreme Court's decision in *Hazen Paper*, in which the Supreme Court expressly recognized only the

2016), *cert. denied*, 137 S. Ct. 2292 (2017).

138. *See, e.g., id.* at 1309–10 (Vinson, J., dissenting); *Villarreal*, 839 F.3d at 969 (en banc), *cert. denied*, 137 S. Ct. 2292.

139. *Smith*, 544 U.S. at 266 (O'Connor, J., concurring).

140. *Villarreal*, 806 F.3d at 1296 n.4 (“[T]here is dicta in a binding opinion and there is dicta in a nonbinding concurrence. It’s one thing to abide by dicta that is ‘three long, citation-laden paragraphs’ of ‘well thought out, thoroughly reasoned, and carefully articulated analysis’ in a majority opinion, as *Schwab* did It’s another to do the same for a single sentence in a minority opinion.” (quoting *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006))).

141. *Id.*

142. *Smith*, 544 U.S. at 228 (decided in 2005).

143. 41 F.3d 1073 (7th Cir. 1994).

144. *Id.* at 1077 (“[R]eliance on Title VII jurisprudence . . . seems inappropriate on the facts of this case. [The dissent] concludes that because Title VII’s prohibitions mirror those of the ADEA and Title VII permits disparate impact relief, ‘similar acceptance in ADEA cases’ is required.”).

elements of a disparate treatment claim.¹⁴⁵ The circuit court, in dicta, also emphasized the difference between Title VII and the ADEA. It specified that because the “‘mirror’ provision in the ADEA omits from its coverage, [the language of Title VII providing coverage for] ‘applicants for employment,’” the ADEA does not cover applicants for employment.¹⁴⁶ The court stated, “[i]n light of the ADEA’s nearly verbatim adoption of Title VII language, the exclusion of job applicants from subsection (2) of the ADEA is noteworthy. . . . [I]t is a result dictated by the statute itself.”¹⁴⁷

The precedent set by *Francis W. Parker School* did not last, as the Supreme Court decision in *Smith v. City of Jackson* overruled it seven years later.¹⁴⁸ Moreover, the majority decision in *Francis W. Parker School* may have contained a mistake stemming from the circuit court’s interpretation of the Supreme Court’s holding in *Griggs*.¹⁴⁹ Although the circuit court correctly notes that the language in Title VII protects applicants for employment, the court failed to distinguish between the language interpreted by *Griggs*—the pre-1972 language—and the current language of the statute after the 1972 amendment.¹⁵⁰

Two years later, the Eighth Circuit concluded that disparate impact claims are cognizable under the ADEA.¹⁵¹ In *Smith v. City of Des Moines*,¹⁵² the court was faced with a firefighter dismissed by the Des Moines Fire Department.¹⁵³ The case did not directly deal with the question of whether or not applicants can make disparate impact claims.

145. *Id.* at 1076–77; *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

146. *Francis W. Parker Sch.*, 41 F.3d at 1077–78.

147. *Id.*

148. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1309 (11th Cir. 2015) (Vinson, J., dissenting), *reh’g en banc granted, opinion vacated*, 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), and *on reh’g en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017); see also *supra* section IV.B.

149. En Banc Brief of Plaintiff-Appellant at 33, *Villarreal*, 839 F.3d 958 (en banc) (No. 15-10602), 2016 WL 1376064.

150. *Francis W. Parker Sch.*, 41 F.3d at 1077 (“Subsection (2) of Title VII’s prohibitions, which was the basis for the Supreme Court’s holding in *Griggs* . . . proscribes any actions by employers which ‘limit, segregate, or classify [their] 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.’ 42 U.S.C. § 2000e–2(a)(2) (emphasis added).”); see *infra* note 201 (1972 amendment added the language “or applicant for employment”); *Villarreal*, 806 F.3d at 1296 n.5 (“This is the problem with dicta: when an issue is superfluous, even obvious errors escape notice.”).

151. *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1996).

152. *Id.*

153. *Id.* at 1468.

The court did, however, state in a footnote that “[s]ection 623(a)(2) of the ADEA governs employer conduct with respect to ‘employees’ only, while the parallel provision of Title VII protects ‘employees or applicants for employment.’”¹⁵⁴ Accordingly, based on the Eighth Circuit dicta, applicants for employment are limited to relying on section 4(a)(1) of the ADEA, limiting litigants to disparate treatment claims.¹⁵⁵

In the same year, the Tenth Circuit also addressed the question of whether the ADEA covers disparate impact claims.¹⁵⁶ In *Ellis v. United Airlines, Inc.*,¹⁵⁷ two women who had applied for a job at United Airlines filed an ADEA claim challenging the airline’s weight requirements.¹⁵⁸ The plaintiffs argued that they were disparately impacted by the weight requirements because of their age.¹⁵⁹ The court ultimately held that “ADEA claims cannot be based on a disparate impact theory of discrimination.”¹⁶⁰ In a footnote, the court also stated, “[w]e do not dwell on Section 623(a)(2) because it does not appear to address refusals to hire at all.”¹⁶¹ Notably, however, in the same footnote, the court also recognized that “the Supreme Court applied language similar to § 623(a)(2) in Title VII to job applicants in *Griggs*.”¹⁶² Like *EEOC v. Francis Parker School*, the precedent set by *Ellis* did not last long. The case was also overturned by the *Smith* decision.¹⁶³

Although all three circuits discussed the issue, none of the circuits directly ruled on the question of whether an applicant for employment qualifies under the ADEA. The Second and the Tenth Circuit Courts’ decisions were also overturned, undermining even the persuasiveness of their dicta. As of today, only one circuit has made a direct holding on the issue of whether applicants for employment can make disparate impact claims, *Villarreal v. R.J. Reynolds Co.*¹⁶⁴

154. *Id.* at 1470 n.2.

155. *Id.*; see *infra* section II.B.

156. *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1001 (10th Cir. 1996).

157. 73 F.3d 999 (10th Cir. 1996).

158. *Id.* at 1000.

159. *Id.*

160. *Id.* at 1001.

161. *Id.* at 1007 n.12.

162. *Id.*

163. *Woods v. Boeing Co.*, 355 Fed. App’x 206, 214 n.4 (10th Cir. 2009).

164. 839 F.3d 958, 961 (11th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2292 (2017).

D. *Villarreal Forces the Courts to Directly Address Disparate Impact Claims for Applicants*

1. *Factual Background*

Villarreal was first filed in the Northern District of Georgia in June 2012.¹⁶⁵ In the complaint, Richard M. Villarreal, a fifty-five year-old resident of Cumming, Georgia, claimed that the defendant, R.J. Reynolds Tobacco Company (R.J. Reynolds), used employment policies that “had a disparate impact on qualified applicants over the age of [forty], in violation of [the ADEA].”¹⁶⁶ The case worked its way through the court system, culminating in an en banc decision by the Eleventh Circuit in October 2016.¹⁶⁷ In a question of first impression,¹⁶⁸ *Villarreal* forced the courts to directly answer whether applicants are covered under section 4(a)(2) of the ADEA—the section allowing disparate impact claims.

The underlying problem of the case began on November 8, 2007, when Mr. Villarreal applied for a position as a territory manager for R.J. Reynolds.¹⁶⁹ He was forty-nine years old at the time he applied.¹⁷⁰ R.J. Reynolds had provided guidelines to the company to be used when screening applications¹⁷¹ that included a description of a “target candidate” as someone “2–3 years out of college” who “adjusts easily to changes.”¹⁷² Additionally, the guidelines instructed the company to “stay away from” applicants who have been in “sales for 8–10 years.”¹⁷³ Mr. Villarreal had over eight years of sales experience when he applied.¹⁷⁴ R.J. Reynolds never contacted Mr. Villarreal, and he was not offered a territory manager position.¹⁷⁵

Over two years later, on May 17, 2010, Mr. Villarreal filed a charge of discrimination with the EEOC alleging discrimination on the basis of

165. Complaint at 1, *Villarreal v. R.J. Reynolds Tobacco Co.*, No. 2:12-CV-0138-RWS, 2013 WL 823055 (Mar. 6, 2013), 2012 WL 5209709 [hereinafter “Complaint”].

166. *Id.* at 2–3.

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

168. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1290 (11th Cir. 2015), *reh’g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *and on reh’g en banc*, 839 F.3d 958, *cert. denied*, 137 S. Ct. 2292.

169. *Villarreal*, 839 F.3d at 961; Complaint, *supra* note 165, at 6.

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

171. *Id.*

172. *Id.*

173. *Id.*; Complaint, *supra* note 165, at 7.

174. Complaint, *supra* note 165, at 8.

175. *Id.* at 6.

age.¹⁷⁶ In April of 2012, the EEOC issued a right-to-sue notice.¹⁷⁷ Only then did Mr. Villarreal file his lawsuit.¹⁷⁸

The Northern District of Georgia first ruled on the case on March 6, 2013.¹⁷⁹ In its decision, the court held that “disparate impact failure-to-hire claims are not authorized under § 4(a)(2) of the ADEA.”¹⁸⁰ In coming to this decision, the court noted “important textual difference[s]” between sections 4(a)(1) and 4(a)(2) of the ADEA.¹⁸¹ Specifically, the court found it persuasive that unlike section 4(a)(1), section 4(a)(2) “does not mention hiring or prospective employees.”¹⁸² The district court cited Justice O’Connor’s concurrence from *Smith v. City of Jackson* as supportive of this conclusion.¹⁸³ Additionally, the district court pointed to the change in Title VII’s language from the 1972 amendments.¹⁸⁴ Although Congress amended Title VII to include “or applicants for employment,” it did not amend the ADEA to state the same.¹⁸⁵ The court interpreted this as a clear indication that Congress intentionally did not change the statute.¹⁸⁶

2. *The Eleventh Circuit First Hears the Case*

In June 2014, Mr. Villarreal appealed his case to the Eleventh Circuit.¹⁸⁷ The circuit court overruled the district court and held that

176. *Id.* at 12; Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1291 (11th Cir. 2015), *reh’g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), *and on reh’g en banc*, 839 F.3d 958, *cert. denied*, 137 S. Ct. 2292 (2017).

177. Villarreal, 839 F.3d at 961; EEOC, *Filing a Lawsuit*, <https://www.eeoc.gov/employees/lawsuit.cfm> [<https://perma.cc/9VP2-9QQV>] (a person must file a charge with the EEOC, which will then issue a right-to-sue notice).

178. Villarreal, 806 F.3d at 1291.

179. Villarreal v. R.J. Reynolds Tobacco Co., 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, *and on reh’g en banc*, 839 F.3d 958, *aff’d and remanded*, 839 F.3d 958, *and aff’d* No. 15-10602, 2017 WL 2781522 (11th Cir. June 27, 2017).

180. *Id.* at *6.

181. *Id.* at *5.

182. *Id.*

183. *Id.* (“Section 4(a)(2), of course, does not apply to ‘applicants for employment’ at all—it is only § 4(a)(1) that protects this group.” (quoting *Smith v. City of Jackson*, 544 U.S. 228, 266 (2005) (O’Connor, J., concurring))); *see also supra* note 139.

184. Villarreal, 2013 WL 823055, at *5.

185. *Id.*

186. *Id.* at *6 (“As the Supreme Court recognized in *Gross v. FBL Fin. Serv.’s*, 557 U.S. 167, 174 (2009), . . . ‘[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally’ . . . ‘[w]e cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA.’”).

187. Notice of Appeal at 1, Villarreal, No. 2:12-CV-0138-RWS, 2013 WL 823055 (N.D. Ga. Mar.

section 4(a)(2) of the ADEA does apply to disparate impact claims brought by job applicants.¹⁸⁸ The court started by analyzing the language of the statute.¹⁸⁹ Both Mr. Villarreal and R.J. Reynolds pointed to the language of section 4(a)(2) which switches between “his employees” and “any individual.”¹⁹⁰ Mr. Villarreal argued that the term “any individual” broadly included applicants for employment.¹⁹¹ R.J. Reynolds, however, argued that the term “any individual” only relates back to the term “his employees.”¹⁹² The court concluded that the arguments by both parties were reasonable.¹⁹³ The court held that the language was, therefore, ambiguous.¹⁹⁴ However, the court analyzed the other arguments brought by Mr. Villarreal and R.J. Reynolds to “underscore [the point] that section 4(a)(2) can reasonably be read in more than one way.”¹⁹⁵

First, the court discussed Mr. Villarreal’s argument that *Griggs* is instructive.¹⁹⁶ The court recognized that the Supreme Court repeatedly referenced job applicants in *Griggs*, giving the circuit court the impression that it is reasonable to read the statute to include applicants for employment.¹⁹⁷

Next, the court dealt with the question of whether Congress purposefully chose not to amend the ADEA when it amended Title VII in 1972 and 1991.¹⁹⁸ Despite the fact that the statutes are codified in different laws, language in certain provisions of both statutes is nearly identical and mostly parallel.¹⁹⁹ Courts, therefore, have often looked at Title VII when interpreting the ADEA.²⁰⁰

6, 2013).

188. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1303 (11th Cir. 2015), *reh’g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), and *on reh’g en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).

189. *Id.* at 1292.

190. *Id.* at 1293 (Mr. Villarreal “argues R.J. Reynolds ‘limited’ its ‘employees’ in a ‘way which would deprive or tend to deprive’ an ‘individual’ like him ‘of employment opportunities’ because of his age. R.J. Reynolds, in turn, directs us to the earlier term ‘his employees.’ It says the later reference to ‘any individual’ only includes these employees”).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1294.

197. *Id.* at 1295.

198. *Id.*

199. Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

200. *Id.*

In 1972, Congress amended Title VII.²⁰¹ The amended language extended the section on unlawful employment practices to include “applicants for employment.”²⁰² 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.”²⁰³ Congress added the new language to reaffirm current law and expand the class of persons having standing, but Congress did “not intend[] to limit standing to the classes of persons specifically mentioned in the new statute.”²⁰⁴ The 1972 amendment has also been read to include the concept of disparate impact that had developed in Supreme Court rulings.²⁰⁵ In the debates for the amendments to Title VII, the House Committee referenced then recent case law stating:

[An] example [of nonobvious discrimination] was provided by the U.S. Supreme Court in *Griggs v. Duke Power Co.*, where the Court held that the use of employment tests as determinants of an applicant’s job qualification . . . was in violation of Title VII if the tests had a discriminatory effect.²⁰⁶

Thus, the legislative history of Title VII reveals that the disparate impact theory of discrimination stemming from *Griggs* was also ratified in the 1972 amendments.²⁰⁷ Congress was not in the process of amending, and did not amend, the ADEA in 1972 when considering the Title VII amendments.²⁰⁸

In 1991, Congress amended Title VII again.²⁰⁹ This time, however, Congress enacted the amendment as a “response to ‘a number of recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of [civil rights] laws.’”²¹⁰ Two Supreme Court cases were specifically affected by the new amendment: *Price*

201. Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 109 (codified at 42 U.S.C. § 2000e).

202. *Id.*

203. *Villarreal*, 806 F.3d at 1295, *reh’g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), and *on reh’g en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017); see also George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 864 (1972).

204. See *supra* Sape & Hart note 203, at 864.

205. Katherine J. Thompson, *The Disparate Impact Theory: Congressional Intent in 1972 – A Response to Gold*, 8 BERKELEY J. EMP. & LAB. L. 105, 109 (1986).

206. *Id.* (citing H.R. REP. NO. 238, 92d Cong., 1st Sess. 8, 9 (1971)).

207. *Id.* at 116; *Villarreal*, 806 F.3d at 1295.

208. *Villarreal*, 806 F.3d at 1295.

209. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

210. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 185 (2009) (Stevens, J., dissenting) (citing H.R. REP. NO. 102-40, pt. 2, p. 2 (1991), U.S. Code Cong. & Admin. News 1991, p. 694).

*Waterhouse v. Hopkins*²¹¹ and *Wards Cove Packing Co. v. Antonio*.²¹² In *Price Waterhouse*, the Court held that:

[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability . . . [by proving] that it would have made the same decision even if it had not taken the plaintiff's gender into account.²¹³

The new amendment eliminated the affirmative defense created in *Price Waterhouse*.²¹⁴ In *Wards Cove*, the Court held that "a plaintiff must demonstrate that it is the application of a specific or *particular* employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII."²¹⁵ The amendment overturned *Wards Cove* by expanding the scope of relevant civil rights statutes to provide adequate protection to victims of discrimination.²¹⁶ During the same year, Congress made only minor amendments to the ADEA.²¹⁷

Neither the 1972 nor the 1991 amendments to Title VII were adopted into the ADEA.²¹⁸ However, the Eleventh Circuit in *Villarreal* ultimately dismissed the importance of the Title VII amendments:

Congress has all kinds of reasons for passing laws, and presumably all kinds of reasons for not passing laws as well . . . 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.²¹⁹

Third, the court dismissed the defendant's arguments that *Smith v. City of Jackson* is binding.²²⁰ The court pointed out that the facts of *Smith* did not force the Supreme Court to answer the question of whether applicants for employment can make disparate impact claims, making the *Smith*

211. 490 U.S. 228 (1989).

212. 490 U.S. 642 (1989).

213. *Price Waterhouse*, 490 U.S. at 258.

214. *Gross*, 557 U.S. at 185.

215. *Wards Cove*, 490 U.S. at 657 (emphasis added).

216. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

217. *Id.* at 1079 (affecting the notice of limitations period).

218. *Gross*, 557 U.S. at 174; *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1295 (11th Cir. 2015), *reh'g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), and *on reh'g en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).

219. *Villarreal*, 806 F.3d at 1296.

220. *Id.*

opinion unhelpful.²²¹ The majority therefore held that the concurrences from *Smith*, at most, show that R.J. Reynolds's reading of the statute was reasonable.²²²

Fourth, the court analyzed R.J. Reynolds's argument that the court should look to other parts of the statute to define the terms in section 4(a)(2).²²³ The court dismissed this argument, stating, "this interpretive canon does little to reveal whether Congress used the term 'any individual' to exclude job applicants or to include them."²²⁴ Indeed, the court pointed out that Congress "knew how to use the more specific term 'employees'" but chose not to in this section.²²⁵

Finally, the court dismissed Mr. Villarreal's argument that the court should interpret the statute in a way that would fit the ADEA's general purpose.²²⁶ Although the court recognized that the ADEA was enacted to allow claims regarding discriminatory hiring, the court found that the purpose of the statute did not illuminate the *types* of claim that would be allowed.²²⁷ Thus, the court declined to rule on the issue based on the ADEA's general purpose.²²⁸

Ultimately, the court found the language was ambiguous and deserved analysis under a different interpretive canon: agency deference.²²⁹ The court therefore looked to the EEOC's interpretations of the ADEA.²³⁰ Under the EEOC's standard, "[section] 4(a)(2) protects any individual an employer discriminates against, regardless of whether that individual is an employee or job applicant."²³¹ Thus, while the court found the ADEA's language was ambiguous, it found support for its holding that applicants for employment are allowed to make disparate impact claims through the EEOC's interpretation.

221. *Id.*

222. *Id.*; see *Smith*, 544 U.S. at 266 (O'Connor, J., concurring) (stating that applicants for employment cannot make disparate impact claims).

223. *Villarreal*, 806 F.3d at 1297.

224. *Id.*

225. *Id.*

226. *Id.* at 1298.

227. *Id.*

228. *Id.*

229. *Id.* at 1293.

230. *Id.* at 1299 ("When a statute is ambiguous, policy choices belong to the agency that enforces the statute.").

231. *Id.*

Judge Vinson dissented from the Eleventh Circuit decision.²³² His opinion stated that the statute was not, in fact, ambiguous.²³³ Like the district court, the dissent placed emphasis on the differing language between sections 4(a)(1) and 4(a)(2), noting that section 4(a)(2) “makes no reference to hiring decisions at all.”²³⁴ Ultimately, the dissent found Justice O’Connor’s concurrence in *Smith* to be decisive on the issue.²³⁵

3. *Eleventh Circuit en banc*

In January 2016, R.J. Reynolds petitioned the court for a rehearing by the Eleventh Circuit, en banc.²³⁶ The Eleventh Circuit granted the appeal and affirmed the district court, thereby reversing the decision of the appeals court.²³⁷ The en banc panel concluded that the text of the ADEA does not allow an applicant for employment to make disparate impact claims because the applicant does not have “status as an employee.”²³⁸ Like the first decision by the Eleventh Circuit, the en banc panel began by considering the text of the statute as well as the statutory context.²³⁹ The panel specifically looked at the meaning of “or otherwise.”²⁴⁰ The majority held that “[b]y using ‘or otherwise’ to join the verbs in this section, Congress made ‘depriv[ing] or tend[ing] to deprive any individual of employment opportunities’ a subset of ‘adversely affect[ing] [the individual’s] status as an employee.’”²⁴¹ Consequently, applicants are only protected from deprivation of employment opportunities if they already have status as an employee.²⁴² The majority also bolsters its conclusion by stating that “‘status as an employee’ connotes a present fact.”²⁴³

232. *Id.* at 1306 (Vinson, J., dissenting).

233. *Id.* at 1311.

234. *Id.* at 1308–09.

235. *Id.* at 1311.

236. Petition for Rehearing En Banc at 1, *Villarreal*, 806 F.3d 1288 (No. 15-10602).

237. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 973 (11th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2292 (2017).

238. *Id.* at 961.

239. *Id.* at 963.

240. *Id.* (“Section 4(a)(2) of the Act makes it ‘unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.’” (quoting 29 U.S.C. § 623(a)(2))).

241. *Id.* (alterations in original).

242. *Id.* at 964.

243. *Id.*

In a dissenting opinion,²⁴⁴ Judge Martin stated that section 4(a)(2) of the ADEA should be read as supporting Mr. Villarreal's claim because "Mr. Villarreal is an 'individual' who was 'deprive[d]' 'of employment opportunities' and denied any 'status as an employee' because of something an employer did to 'limit . . . his employees.'"²⁴⁵ The dissent focused on the variation in terminology between "his employees" and "any individual."²⁴⁶ The opinion also noted that even the Supreme Court has acknowledged that "when the word 'employee' lacks any temporal qualifier' it can include people other than current employees."²⁴⁷

The majority panel also held that the statutory context of the section supported the district court's decision.²⁴⁸ The panel pointed to section 4(c)(2) of the ADEA, which contains language that parallels section 4(a)(2).²⁴⁹ Unlike section 4(a)(2), however, section 4(c)(2) distinguishes between employees and applicants for employment.²⁵⁰ Based on this difference, the panel held that the term "'employee' does not encompass 'applicant for employment.'"²⁵¹ And, "because '[a] word or phrase is presumed to bear the same meaning throughout a text,'" section 4(a)(2) does not encompass applicants for employment.²⁵²

The dissent criticized the majority's reliance on using other sections of the ADEA in deciding the question of whether applicants for employment can make disparate impact claims.²⁵³ The dissent pointed out that section 4(c)(2) applies to labor organizations, rather than individual employees.²⁵⁴ The opinion then indicated that the problem with cross-applying the rules regarding labor unions to section 4(a)(2) is that section 4(c)(2) targets "the unique way in which labor organizations can discriminate when they

244. Joined by Judge Wilson, Judge Jill Pryor, Judge Jordan and Judge Rosenbaum for Part II.

245. *Villarreal*, 839 F.3d at 982 (Martin, J., dissenting) (alternations in original).

246. *Id.* ("This deliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent." (citing *United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003))).

247. *Id.* at 984 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342 (1997)).

248. *Id.* at 966.

249. *Id.*; Age Discrimination in Employment Act, 29 U.S.C. § 623(c)(2) (1967) ("It shall be unlawful for a labor organization . . . to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age.").

250. Age Discrimination in Employment Act § 623(c)(2).

251. *Villarreal*, 839 F.3d at 966.

252. *Id.* (citing SCALIA & GARNER, *supra* note 59, at 174).

253. *Id.* at 984–85 (Martin, J., dissenting).

254. *Id.* at 985.

‘refer’ ‘applicants’ to employers.’²⁵⁵ Unlike employers, labor unions are unique because of their referral roles.²⁵⁶ Section 4(c)(2) thus protects an employee who attempted to find work but was unable to *because of* a labor organization.²⁵⁷ The dissent therefore contended that “[i]t’s sometimes dangerous to infer what Congress meant in one part of a statute based on what it *didn’t* say in other parts.”²⁵⁸

The majority did not find case law analysis necessary in this case. Instead, the majority described Mr. Villarreal’s use of case law as an attempt “to circumvent the plain meaning of the statute by citing decisions of the Supreme Court that interpret similar language in other statutes.”²⁵⁹ The majority also found that *Griggs* was unhelpful because it was not a case brought by applicants, as Mr. Villarreal argued, but rather a case involving current employees.²⁶⁰ Cases that have interpreted *Griggs* as applying to applicants for employment were all decided after Congress added language about applicants to Title VII.²⁶¹

The dissent, however, concluded that the “Supreme Court has never limited *Griggs* as the majority suggests.”²⁶² Although the plaintiffs in the *Griggs* case were current employees, the “employment requirements challenged in *Griggs* were used both for initial hiring as well as for those already employed.”²⁶³ The dissent therefore read the ADEA in the same way the Supreme Court read the identical Title VII language in *Griggs*.²⁶⁴

Finally, the majority held that it would not defer to the EEOC’s interpretation when it did not find the language to be ambiguous.²⁶⁵ The majority stated that it would not interpret the word to have a “forced meaning”—an interpretation used to create ambiguity—therefore, relying on an agency’s interpretation is unnecessary.²⁶⁶ The dissent, however,

255. *Id.*

256. *Id.*

257. *Id.* (“In other words, the statute protects someone who sought work but was denied status as an applicant—that is, being allowed to apply at all—due to labor organizations’ control of the hiring process.”).

258. *Id.*

259. *Id.* at 967.

260. *Id.* at 968.

261. *Id.*

262. *Id.* at 986 (Martin, J., dissenting).

263. *Id.*

264. *Id.*

265. *Id.* at 970 (“Finally, Villarreal and the Commission urge us to defer to the Commission’s interpretation of the statute, but we do not defer to an agency’s interpretation of a statute when the text is clear.”).

266. *Id.*

pointed out that there have been multiple interpretations of the language, and therefore deference to the agency's interpretation is required.²⁶⁷

In a concurring opinion, Judge Jordan agreed with the conclusion that Mr. Villarreal could not assert a disparate impact claim.²⁶⁸ However, the concurrence posed another interpretation of the statute.²⁶⁹ As an alternative to either the circuit court or the en banc panel's decision, the concurrence proposed the following interpretation:

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 an 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).²⁷⁰

In Mr. Villarreal's case, he would not be able to recover because he did not challenge conduct by R.J. Reynolds that affected current employees.²⁷¹

4. *Summary and Other Ongoing Litigation*

Overall, eleven judges analyzed Mr. Villarreal's claim and interpretation of the ADEA: "[a]mong the eleven of us, we read the statute to mean at least three different things. While each of us feels certain about the correctness of our own reading, we can't all be absolutely right."²⁷² The issue of whether applicants for employment can make disparate impact claims under the ADEA has been far from clear cut. There is also ongoing litigation in another state disagreeing with the Eleventh Circuit's en banc holding.²⁷³

Mr. Villarreal appealed his case to the Supreme Court but was denied certiorari.²⁷⁴ The issues and questions raised by the Eleventh Circuit and the en banc dissent questioning this result remain unanswered. Additionally, there is potential for a circuit split on this issue. In 2017, a

267. *Id.* at 988 (Martin, J., dissenting).

268. *Id.* at 973 (Jordan, J., concurring in part and dissenting in part).

269. *Id.*

270. *Id.* at 974.

271. *Id.*

272. *Id.* at 988 (Martin, J., dissenting).

273. *See* Rabin v. PricewaterhouseCoopers LLP, No. 16-CV-02276-JST, 2017 WL 661354, at *1 (N.D. Cal. Feb. 17, 2017).

274. Villarreal v. R.J. Reynolds Tobacco Co., __U.S.__, 137 S. Ct. 2292 (2017).

California district court came to the opposite conclusion of the Eleventh Circuit in *Rabin v. PricewaterhouseCoopers LLP*.²⁷⁵ The court held that applicants for employment are allowed to make disparate impact claims, stating “[t]he plain language of the statute supports the more inclusive interpretation.”²⁷⁶ Although Mr. Villarreal might have been denied certiorari, the issue is still relevant, and courts remain divided.

IV. THE SUPREME COURT SHOULD INTERPRET THE ADEA AS ALLOWING APPLICANTS FOR EMPLOYMENT TO MAKE DISPARATE IMPACT CLAIMS

The plaintiff in *Villarreal v. R.J. Reynolds* petitioned for certiorari to have his case heard by the Supreme Court.²⁷⁷ The Supreme Court denied certiorari in June 2017.²⁷⁸ Regardless of this particular denial, the issue still lacks clarity, and when it inevitably comes before the Supreme Court again, the Court should interpret the statute as allowing applicants for employment to make disparate impact claims under the ADEA.

A. *The ADEA’s Text Is Ambiguous*

Like the Supreme Court, all courts should start with statutory analysis by looking at the text of the statute.²⁷⁹ Only if a statute is ambiguous can a court look to other methods of interpretation.²⁸⁰ In the case of section 4(a)(2) of the ADEA, the text of the statute is ambiguous. The Eleventh Circuit en banc decision in *Villarreal v. R.J. Reynolds* demonstrates the ambiguity of this statute. In that case, eleven judges found the statute to have three different meanings.²⁸¹ Additionally, the case had gone before three other courts in which the judges each provided conflicting interpretations.

Section 4(a)(2) of the ADEA contains the text at issue. This section states that “an employer may not 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

275. No. 16-CV-02276-JST, 2017 WL 661354, at *1 (N.D. Cal. Feb. 17, 2017).

276. *Id.* at *2.

277. Petition for a Writ of Certiorari at 1, *Villarreal*, 137 S. Ct. 2292 (No. 16-971).

278. *Villarreal*, 137 S. Ct. at 2292.

279. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 963 (11th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2292; *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

280. *Villarreal*, 839 F.3d at 963–70.

281. *Id.* at 988 (Martin, J., dissenting).

status as an employee, because of such individual's age.”²⁸² The problem with courts resting on the plain meaning of the statute is that Congress used multiple terms in discussing what “person” the statute affects. First, the statute uses the term “his employees,” but it then switches to “any individual” before going back to “his status as an employee.” Because courts take seriously Congress’s intentional choice to use different language,²⁸³ it is apparent that the section is not limited to current employees, as “any individual” would indicate a group larger than current employees. However, in another section of the statute addressing labor unions, Congress chose to clarify that the section specifically applies to applicants for employment.²⁸⁴ This creates confusion as to whether Congress used the broad term “any individual” to exclude job applicants or include them.²⁸⁵ Additionally, the Eleventh Circuit en banc opinion held that the use of the term “or otherwise” connects the verbs in the sentence, only allowing an individual protection if he has status as an employee.²⁸⁶ The judges in both the majority and the dissent then point to the Dictionary Act,²⁸⁷ which says that “unless the context indicates otherwise . . . words used in the present tense include the future as well as the present.”²⁸⁸ While the dissent argues that the status of an employee can include those applying for status as an employee,²⁸⁹ the majority states that “status” in this sentence is not a verb and therefore the Dictionary Act would not apply.²⁹⁰

Both the majority and dissent are reasonable in their interpretation of the statute.²⁹¹ Because of this, the Supreme Court should find the language

282. Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(2) (1967).

283. *See supra* note 68.

284. Age Discrimination in Employment Act § 623(c)(2) (“[T]o limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual’s age.”).

285. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1297 (11th Cir. 2015), *reh’g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), and *on reh’g en banc*, 839 F.3d 958, *cert. denied*, 137 S. Ct. 2292 (2017).

286. *Villarreal*, 839 F.3d at 963.

287. Dictionary Act, 1 U.S.C. § 1 (2012).

288. *Villarreal*, 839 F.3d at 983 (Martin, J., dissenting) (citing 1 U.S.C. § 1 (2012)).

289. *Id.*

290. *Id.* at 965.

291. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1293 (11th Cir. 2015) (arguing that both the readings by the defendant and the plaintiff of the plain language of the ADEA seemed reasonable), *reh’g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), and *on reh’g en banc*, 839 F.3d 958, *cert. denied*, 137 S. Ct. 2292 (2017).

to be ambiguous and look to other methods of statutory interpretation in order to resolve the issue.²⁹²

B. The ADEA's Case Law and Legislative History Are Unhelpful

Just as the analysis of the plain meaning alone is inconclusive, the case law and legislative history of the ADEA leading up to *Villarreal* are unhelpful in analyzing the current question. Regarding the case law, only three other circuits have discussed whether applicants for employment could be protected under the disparate impact section.²⁹³ Despite various dicta, none of the courts directly held on the issue.²⁹⁴ The Supreme Court's decisions in *Griggs* and *Smith* face the same problem. While *Griggs* clearly allowed disparate impact claims under Title VII, courts are still unsure what group of persons are covered by the decision.²⁹⁵ Some courts have held that *Griggs* covered both employees and applicants for employment, while a few courts still hold otherwise.²⁹⁶ Regardless, the *Griggs* decision addressed a Title VII claim, and Title VII was amended to include applicants for employment after the case was decided, arguably coloring any future interpretations of the case. Although *Smith* addressed the ADEA, it did not answer the question of whether applicants for employment are covered by section 4(a)(2) of the ADEA.²⁹⁷

The legislative history of the ADEA and Title VII also do little to instruct the Court on how to decide the issue. The ADEA was created in the wake of Title VII's inception.²⁹⁸ Because of this, many courts look to the history of Title VII to understand the ADEA. This, however, has proven fruitless in answering the question of whether applicants for employment can make disparate impact claims because of the varying legislative histories between the two amendments. For instance, Title VII was amended in 1972 and 1991, but each amendment was in direct response to Title VII specific case law. It is therefore logical that Congress did not amend the ADEA because the case law at the time was not dealing with that statute. Thus, the idea that Congress intentionally did not amend

292. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 706 (1991) (Scalia, J., dissenting) (“Deference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation.”).

293. *See supra* section IV.C.

294. *Id.*

295. *See supra* section IV.A; *Villarreal*, 806 F.3d at 1294.

296. *See supra* section IV.A.

297. *See generally* *Smith v. City of Jackson*, 544 U.S. 228 (2005).

298. *See supra* note 5.

the ADEA ignores a key fact about the histories of Title VII and the ADEA. Additionally, Congress did not even consider the ADEA during the 1972 amendment.²⁹⁹ Congress's inaction at that time is therefore inconclusive when deciding whether Congress purposefully did not amend ADEA.³⁰⁰

C. *The Court Should Defer to the Agency in Charge of Enforcement*

The Supreme Court has continuously recognized the considerable weight an agency interpretation should be accorded when entrusted to administer a regulatory scheme.³⁰¹ In order to analyze an agency's interpretation, the Supreme Court set up a two-step framework. First, a court must ask whether the statute is ambiguous.³⁰² If the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."³⁰³ Stated differently, if Congress did not clearly state its intent, the court should look to a reasonable agency interpretation.³⁰⁴

Because the ADEA grants the EEOC authority to issue rules and regulations needed to carry out the statute, and the statute is ambiguous, it is "an absolutely classic case for deference to agency interpretation."³⁰⁵ Under the EEOC's interpretation, there is no distinction between prospective and current employees.³⁰⁶ Instead, the EEOC regulation on the ADEA states, "[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

299. *Id.*

300. *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. 'It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.'" (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946))).

301. *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389 (1984); *Blum v. Bacon*, 457 U.S. 132, 141 (1982); *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626–27 (1971); *Unemp't Comp. Comm'n v. Aragan*, 329 U.S. 143, 153–54 (1946); *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 131 (1944); *McLaren v. Fleischer*, 256 U.S. 477, 480–81 (1921); *Webster v. Luther*, 163 U.S. 331, 342 (1896); *Brown v. United States*, 113 U.S. 568, 570–71 (1884); *United States v. Moore*, 95 U.S. 760, 763 (1877); *Edwards' Lessee v. Darby*, 25 U.S. 206, 210 (1827).

302. *King v. Burwell*, ___ U.S. ___, 135 S. Ct. 2480, 2488 (2015).

303. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

304. *See King*, 135 S. Ct. at 2488.

305. *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring).

306. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1297 (11th Cir. 2015), *reh'g en banc granted, opinion vacated*, No. 15-10602, 2016 WL 635800 (11th Cir. Feb. 10, 2016), and *on reh'g en banc*, 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).

than age.”³⁰⁷ The EEOC’s statement, which accompanied the publication of the agency’s final interpretation regarding the ADEA, clarified the regulation: “[p]aragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity.”³⁰⁸ Therefore, any individual within the protected age group is able to make a disparate impact claim.³⁰⁹

Deferring to the agency’s interpretation also has the secondary benefit of more accurately reflecting the purpose of the ADEA. In the statute, Congress wrote that the “purpose of this chapter [is] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”³¹⁰ The EEOC interpretation encourages employers not to utilize policies that negatively impact the hiring of older applicants. Thus, by following the EEOC interpretation, the Supreme Court would further the goals of the statute: to prohibit arbitrary age discrimination as well as to limit the number of arbitrarily jobless older persons.³¹¹

CONCLUSION

The Supreme Court should adopt the Eleventh Circuit’s first interpretation and hold that the ADEA does cover applicants for employment in disparate impact claims. Although case law is inconclusive, the EEOC has interpreted the statute as covering plaintiffs like Mr. Villarreal. The Supreme Court should recognize this interpretation.³¹² This interpretation will also bring the courts into

307. 29 C.F.R. § 1625.7 (2012).

308. Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47724-01 (1981).

309. *Smith v. City of Jackson*, 544 U.S. 228, 239–40 (2005) (plurality opinion) (“Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, 29 U.S.C. § 628, have consistently interpreted the ADEA to authorize relief on a disparate-impact theory See also § 1625.7 (2004) (setting forth the standards for a disparate-impact claim).”).

310. Age Discrimination in Employment Act, 29 U.S.C. § 621(b) (1967).

311. *Id.* (“[T]he purpose of this chapter to promote employment of older persons based on their ability rather than age.”).

312. 29 C.F.R. § 1625.7.

alignment with the purpose of the statute: to inhibit employers from arbitrarily discriminating against older persons.³¹³

In addition, Congress should amend the ADEA to expressly include applicants for employment.³¹⁴ The fact that Title VII was amended in response to case law supports the argument that Congress must now similarly clarify the ADEA.³¹⁵ Additionally, because courts have struggled with the interpretation, a Congressional amendment would ease the burden on the courts, which would no longer have to grapple with a convoluted statutory analysis. Congress's amendment could be as easy as adding the language "or applicants for employment" after "to limit, segregate, or classify his employees."³¹⁶ This addition would bring the language of the ADEA in line with Title VII, which was amended to add that language—in the portion of Title VII that is identical to the ADEA—in 1972.³¹⁷ Additionally, such a change would be unlikely to significantly affect businesses' hiring practices, as employers would still have access to the broad exceptions set forth in the RFOA sections of the ADEA.³¹⁸ But it would bring the ADEA in line with its stated purpose: to prohibit discrimination.³¹⁹

313. Age Discrimination in Employment Act § 621.

314. If the intention behind certain language of a statute is unclear, it is up to Congress to rewrite the statute to create clarity, not the courts. *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) ("It is not for [the Court] to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.").

315. *See supra* section IV.D.

316. Age Discrimination in Employment Act § 623.

317. *See supra* note 201.

318. *See supra* section II.B.

319. Age Discrimination in Employment Act § 621.