No. 15–3435

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUDOLPH A. KARLO, MARK K. MCLURE,
WILLIAM S. CUNNINGHAM, JEFFREY MARIETTI, and
DAVID MEIXELBERGER,

Plaintiffs/Appellants,

v.

PITTSBURGH GLASS WORKS, LLC,
Defendant/Appellee.

On Appeal from the United States District Court
for the Western District of Pennsylvania, No. 10-1283

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS/APPELLANTS AND IN FAVOR OF REVERSAL

P. DAVID LOPEZ
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

ANNE NOEL OCCHIALINO
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Fl.
Washington, D.C. 20507
(202) 663-4724 (phone)
(202) 663-7090 (fax)
Annenoel.Occhialino@eeoc.gov

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is the agency charged by Congress with interpreting, administering, and enforcing the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq*. This appeal raises an important legal question of first impression in this circuit: whether the ADEA prohibits employment practices that have a statistically significant disparate impact on subgroups of employees over the age of 40. Because resolution of this issue will affect the EEOC's enforcement of the ADEA as well as the ability of private parties to enforce their federal civil rights, the Commission offers its views to the Court. *See* Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE[1]

Whether the ADEA prohibits employment practices that have a statistically significant disparate impact on subgroups of employees over the age of 40.

STATEMENT OF THE CASE

A. Statement of the Facts

Plaintiffs Rudolph Karlo, Mark McLure, William Cunningham, Jeffrey Marietti, and David Meixelsberger were longtime employees of Pittsburgh Glass Works, LLC (PGW) before their layoff during a reduction-

[1] We take no position with respect to any other issue presented.

in-force (RIF). A.87-A.90.[2] At the time, the Plaintiffs were at least 50 years old. A.92.

The Plaintiffs filed suit under the ADEA, 29 U.S.C. § 623, alleging *inter alia*, that the RIF had a disparate impact on workers age 50 and older. The case was originally assigned to the Honorable Nora Barry Fischer. She conditionally certified the case as a collective action under the ADEA. A.147. In her thorough and well-reasoned order, Judge Fischer held that the ADEA authorizes disparate impact claims on behalf of subgroups of older workers, A.153-A.162, and she therefore conditionally certified the class as to a subgroup of workers age 50 and older. The case was later reassigned to the Honorable Terrence F. McVerry.

Plaintiffs' statistical expert, Dr. Michael Campion, subsequently determined that employees age 50 or older had a 59% greater chance of being terminated than employees under age 50. R.400, p.13 (citing Campion Report, pp.12-13); A.189-190. PGW filed a motion to exclude Dr. Campion's analysis under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which the court granted. A.47. PGW also moved for summary judgment, arguing that the Plaintiffs could not establish disparate

[2] "A*" refers to the corresponding page of the Joint Appendix, and "R.*" refers to the district court docket.

impact without Dr. Campion's analysis and that claims on behalf of subgroups of older workers are not cognizable under the ADEA. R.374, 375.

B. District Court Decision

The district court granted PGW's motion for summary judgment on the disparate impact claim. A.82. The court stated that without Dr. Campion's statistical analysis, the Plaintiffs could not establish a prima facie case. A.111. Reversing course from Judge Fischer's earlier ruling that the ADEA authorizes disparate impact claims on behalf of subgroups of older workers, the district court held that even if Dr. Campion's analysis had survived the *Daubert* challenge, "an over-fifty-years-old subgroup is [not] cognizable under the ADEA." A.111.

In making its ruling, the district court did not consider the statute's plain language or discuss the Supreme Court's holding in *O'Connor v. Consolidated Coin Caterers, Corp.*, 517 U.S. 308 (1996), a disparate treatment case, that the ADEA prohibits discrimination based on an individual's age, not membership in the protected age category. A.111-112. Nor did the district court discuss why it was deviating from Judge Fischer's earlier order in which she devoted nine pages to explaining why the ADEA authorizes disparate impact subgroup claims for older workers. A.111-112. Instead, the district court stated summarily that every circuit to address the

subgroup issue "has declined to recognize this theory with regard to disparate impact claims." A.111 (citing *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *Smith v. Tennessee Valley Authority*, No. 90-5396, 1991 WL 11271 (6th Cir. Feb. 4, 1991); and *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989)). Although the court acknowledged that some district courts had reached a different conclusion, the court found the circuit decisions persuasive. A.112. To allow subgroup claims, the court added, would require employers to achieve statistical parity among groups and would have the anomalous effect of requiring employers to take age into account when making employment decisions. R.448, p.31 n.20 (citing *McDonnell Douglas*, 191 F.3d at 951).

The district court later certified final judgment under Rule 54(b), A.117, A.129, and the Plaintiffs appealed. A.1.

ARGUMENT

The ADEA prohibits employment practices that have a disparate impact on subgroups of employees over age 40.

The district court erred in holding that disparate impact claims on behalf of subgroups of older workers are not cognizable under the ADEA. The district court's holding contravenes the plain text of the statute, Supreme Court precedent, and the ADEA's legislative history. Additionally, the district court's ruling undermines the remedial objectives of the ADEA.

While three circuits have held that subgroup claims are not cognizable under the ADEA, these opinions are based on an improper interpretation of the plain language of the ADEA and cannot be reconciled with Supreme Court precedent holding that the ADEA prohibits intentional discrimination based on age, not membership in the protected class.

The Commission therefore urges this Court to reverse the district court's ruling and hold that the ADEA's prohibition on age discrimination encompasses those employment practices having a statistically significant disparate impact on subgroups of employees over age 40.

A. The plain language of the ADEA authorizes disparate impact claims on behalf of subgroups of older workers.

The starting point for any statutory interpretation is the plain language of the statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks and citation omitted). Here, the district court's analysis fell short because the court failed to consider the plain language. Consideration of that language compels the conclusion that the ADEA authorizes disparate impact claims on behalf of subgroups of older workers.

The statute 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 . . . because of such individual's age." 29 U.S.C. § 623(a)(2). The Supreme Court has confirmed that the text of § 623(a)(2) prohibits employment practices having a disparate impact based on age, unless the employer shows the impact was due to reasonable factors other than age. *Smith v. City of Jackson*, 544 U.S. 228, 238-39 (2005). The class of employees protected by § 623 is limited by § 631, which is titled "Age Limits." Specifically, section 631(a) states that "[t]he prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." 29 U.S.C. § 631(a). Read together, then, § 623(a)(2) and § 631(a) prohibit employment practices that have a disparate impact "because of such individual's *age*," although the protected class is limited to individuals who are at least "40 years of age."

Thus, the district court's holding that the ADEA prohibits only those employment practices having a disparate impact on the entire protected group (employees age 40 and older) cannot be reconciled with the plain language of the statute, which prohibits discrimination against an "*individual*[]" "based on . . . *age*."

B. Supreme Court precedent suggests that the ADEA authorizes subgroup disparate impact claims.

The district court's holding that subgroup claims are not cognizable under the ADEA is also in tension with the rationale underlying *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). In *O'Connor*, which the district court did not address, the Supreme Court held that a plaintiff alleging disparate treatment is not required to show that he was replaced by someone outside the protected group in order to make out a prima facie case of age discrimination. *Id.* at 311-12 (reversing summary judgment where the 56-year-old plaintiff was fired and replaced by a 40-year-old worker). The Court explained that the ADEA prohibits "discrimination 'because of [an] individual's age,' 29 U.S.C. § 623(a)(1), though the prohibition is 'limited to individuals who are at least 40 years of age,' § 631(a)." *Id.* at 312. In other words, the Court said, "[T]his language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees *because of their age*, but limits the protected class to those who are 40 or older." *Id.* (emphasis added). The Court continued:

> The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*. Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to "40 or over" discrimination)

> when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.

Id. Accordingly, the Court held that "[b]ecause it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case." *Id*. Thus, *O'Connor* confirms that the plain language of the ADEA prohibits discrimination because of age, not membership in the protected class.

To be sure, *O'Connor* involved disparate treatment, not disparate impact. But *O'Connor*'s reasoning is just as applicable to disparate impact cases as it is to disparate treatment cases. This is so because the operative statutory terms are the same. *See Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)). In *O'Connor* the Court was interpreting the language in § 623(a)(1), which prohibits discrimination "because of [an] individual's age," in conjunction with § 631(a), which limits the ADEA's protections to "individuals who are at least 40 years of age." This language is identical to the language governing disparate impact claims. As discussed, § 623(a)(2), which authorizes disparate impact claims, makes it unlawful to discriminate "because of [an] individual's age." And, as with § 623(a)(1), the

protections afforded by § 623(a)(2) are limited under § 631(a) to those individuals "who are at least 40 years of age." Therefore, *O'Connor*'s holding that the ADEA prohibits disparate treatment under § 623(a)(1) based on age, not membership in the protected class, compels the conclusion that the ADEA likewise prohibits disparate impact under § 623(a)(2) based on age, not membership in the protected class.

Disallowing subgroup claims is also in tension with the rationale of *Connecticut v. Teal*, 457 U.S. 440 (1982). In *Teal*, the Court rejected the "bottom-line" defense to a disparate impact claim under Title VII. *Id*. at 453. The Court explained that the "principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole." *Id*. at 453-54. Therefore, the Court held, "favorable treatment of [some] members of [the] respondents' racial group" does not justify discrimination against individuals. *Id*. at 454.

Although *Teal* involved Title VII, its rationale is equally applicable to the ADEA, which, like Title VII, is focused on protecting "individual[s]" from discrimination. 29 U.S.C. § 623(a)(2). Under *Teal*, the favorable treatment of younger members of the protected age group does not justify discrimination against older members of the protected age group (*i.e*., those age 55 and older). The district court's disallowance of subgroup claims,

however, does just this: it perrmits employers' favorable treatment of younger protected workers to negate discrimination against older protected workers, so long as there is no discrimination against protected workers as a whole. This result simply cannot be reconciled with *Teal.*

Disallowing subgroup claims on behalf of older workers is also contrary to the Supreme Court's decision in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004). In that case, the Court stated that the ADEA and its legislative history make clear "beyond reasonable doubt" that the ADEA was concerned with "protect[ing] a relatively old[er] worker from discrimination that works to the advantage of the relatively young." *Id*. at 590-91. Relying on the statute's focus on protecting older workers over age 40, not younger workers over age 40, the Court held that the ADEA permits employers to "favor[] an older employee over a younger one" where both employees are within the protected age category. *Id*. at 600. The district court's ruling in this case that the ADEA permits employment practices having a disparate impact on subgroups of older workers thus contravenes *Cline*'s holding and rationale, as it sanctions discrimination against older workers in favor of younger workers within the protected age category.

C. The circuit decisions disallowing subgroup claims under the ADEA are unpersuasive.

As the district court recognized, three circuits have held that subgroup claims are not cognizable under the ADEA. *See EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *Smith v. Tenn. Valley Auth.*, No. 90-5396, 1991 WL 11271 (6th Cir. Feb. 4, 1991); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989)). These decisions lack persuasive authority, however, as they are contrary to the text of the ADEA and the rationale of the Supreme Court's decision in *O'Connor*.

In *Lowe*, which pre-dated *O'Connor*, the Second Circuit became the first circuit court to hold that subgroup claims are not cognizable under the ADEA. *See Lowe*, 886 F.2d at 1372-74 (rejecting a subgroup claim for employees age 50 and older); *see also Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997) (applying *Lowe* and disallowing subgroup claim). The court was divided in *Lowe*, however, with a well-reasoned and thoughtful concurrence disagreeing with the majority's subgroup ruling. *See Lowe*, 886 F.3d at 1379-80 (Pierce, J. concurring) (stating that the text and purpose of the ADEA, as well as the case law, supported subgroup claims). The panel's opinion also lacks persuasive value for three reasons.

First, the *Lowe* panel failed to grapple with the ADEA's text. While the panel acknowledged at the outset that the ADEA prohibits discrimination "'because of . . . age,'" the panel never explored what this means. *Lowe*, 886 F.3d at 1369 (quoting 29 U.S.C. § 623(a)(1)). Instead, the panel focused on the language in § 631(a) defining the protected group as individuals age 40 or older. *Id*. at 1371. The court likewise overlooked the statute's focus in § 631(a) on protecting "individuals" from discrimination, not groups. *See Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 4 (D. Me. 1994) (rejecting *Lowe* and stating, "[t]he ADEA protects *individuals* against age discrimination"); *see also* 29 U.S.C. § 623(a)(2) (prohibiting discrimination "because of such *individual's* age") (emphasis added).

Second, although the *Lowe* panel acknowledged that other courts had held that the ADEA prohibits disparate treatment based on age, not membership in the protected class, the panel provided no convincing reason for failing to interpret the ADEA's disparate impact provision similarly. *See Lowe*, 886 F.3d at 1373 (citing two cases holding that replacement by an individual younger than 40 was not required to establish a prima facie case of disparate treatment). Rather, the panel stated perfunctorily that those cases did not apply because they involved disparate treatment. *See id*. But, as discussed above, the ADEA's disparate treatment

and disparate impact provisions share identical statutory terms, making the analysis of disparate treatment cases equally applicable to disparate impact cases.

The third reason this Court should rejected *Lowe* is because the policy rationale it relies upon does not withstand scrutiny. The panel expressed concern that a plaintiff could gerrymander a subgroup claim by utilizing his or her age as the lower end of the subgroup and then arguing the subgroup was disparately impacted. *Id*. at 1373. For instance, the court theorized, an 85-year-old plaintiff could allege disparate impact on a subgroup of employees 85 and older, "even though all those hired were in their late seventies." *Id*. at 1373. According to the *Lowe* panel, the ADEA must be interpreted as barring subgroup disparate impact claims to avoid such a scenario. The panel's concern about gerrymandered claims, and its hypothetical about the 85-year-old subgroup, rests on unjustified speculation that does not warrant deviating from the ADEA's plain language.

To begin with, the panel's concern about gerrymandered subgroups ignores the legal and practical challenges facing plaintiffs in disparate impact age cases. As in all disparate impact cases, a plaintiff must first identify the "specific employment practice" causing the disparate impact.

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988). As the *Lowe* decision itself illustrates, this is no easy task. *See Lowe*, 886 F.3d at 1370 (questioning whether the plaintiffs had adequately identified the specific employment practice causing the disparate impact). A plaintiff who adequately identifies a specific employment practice must then marshal statistics showing that the employment practice caused not just a disparate impact, but a "*significantly* disparate impact" based on age. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989) (emphasis added), *superseded in part*, 42 U.S.C. §2000e-2(k); *see also Watson*, 487 U.S. at 995 ("Statistical disparities must be sufficiently substantial that they raise . . . an inference of causation.").

Further, statistical evidence must be reliable, and a "small" database may undermine reliability. *Watson*, 487 U.S. at 996-97; *see also Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129-30 (D. Del. 1994) (rejecting *Lowe* and stating that "[i]f a plaintiff attempts to define the subset too narrowly, he or she will not be able to obtain reliable statistics upon which to prove a prima facie case"). In 2005, only 1.2% of the civilian workforce was 70 years or older, Sandra F. Sperino, *The Sky Remains Intact: Why Allowing Subgroup Evidence Is Consistent With The Age Discrimination In Employment Act*, 90 Marq. L. Rev. 227, 261-62 (2006), making it difficult

to fathom how a plaintiff could marshal reliable statistics showing that a specific employment practice had a statistically significant disparate impact on a subgroup of employees age 85 and older. *See, e.g.*, *Shutt v. Sandoz Crop Prot. Corp.*, 944 F.2d 1431, 1433 (9th Cir. 1991) (in disparate impact age case, finding pool of only 11 terminated employees too small to establish discrimination).

In fact, the *Lowe* panel's concern about gerrymandering subgroups appears to be entirely theoretical. The *Lowe* panel did not cite to any actual cases involving subgroups of 85-year-old employees, and we are unaware of any such cases. Rather, subgroup disparate impact cases routinely involve employees age 50 and older or age 55 and older. *See, e.g.*, *Criley*, 119 F.3d at 105 (age 55 and older); *Lowe*, 886 F.2d at 1373 (age 50 and older); *McDonnell Douglas*, 191 F.3d at 950 (age 55 or older); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984) (age 55 and older), *overruled on other grounds by Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989); *Finch*, 865 F. Supp. at 1129 (age 50 and older, and age 55 and older); *Graffam*, 848 F. Supp. at 4 (age 50 and older); *Caron v. Scott Paper Co.*, 834 F. Supp. 33, 35 (D. Me. 1993) (age 50 and older); *Klein v. Sec'y of Transp.*, 807 F. Supp. 1517, 1524 (E.D. Wash. 1992) (age 50 and

older). In short, the *Lowe* panel created a straw man argument and then used it to justify its disallowance of subgroups.

The *Lowe* court's hypothetical also overlooks that only a *substantial* age difference supports an inference of discrimination. *See O'Connor*, 517 U.S. at 313 (replacement of worker with another worker "insignificantly younger" will not support inference of discrimination). An age gap of only a few years (from the late 70s to 85 years of age), is therefore unlikely to support an inference of discrimination. *See Lowe,* 886 F.2d at 1380 (Pierce, J., concurring in judgment) (rejecting the panel's "octogenarian versus septuagenarian hypothetical" and explaining that such slight age differences are unlikely to support an inference of discrimination). Thus, the *Lowe* panel's hypothetical is based on a fallacy, meaning the hypothetical provides no valid ground for disallowing subgroup claims. *See Graffam,* 848 F. Supp. at 4 n.6 (rejecting *Lowe*'s rationale and pointing out that slight age differences may not suffice to establish an inference of discrimination); *see also McDonnell Douglas,* 191 F.3d at 950 (rejecting the gerrymandering justification of *Lowe* and stating, "[w]e can certainly envision cases that would involve an age distribution in the relevant workforce that would not support a claim of disparate impact on behalf of any subgroup of the protected class").

But assuming, *arguendo*, that the evidence sufficed to establish a statistically significant disparate impact on a group of 85-year-old workers with an age gap that supported an inference of discrimination, and the challenged practice was not justified by reasonable factors other than age, then the employment practice would be unlawful under the plain language of the ADEA—even if those hired were in their 70s. "The fact that a particular interpretation of a statute might spawn lawsuits is not a reason to reject that interpretation." *McDonnell Douglas*, 191 F.3d at 951 (rejecting the *Lowe* court's rationale as a ground for disallowing subgroup claims).

The Sixth Circuit's unpublished decision in *Smith*, 1991 WL 11271, is similarly unpersuasive. As with *Lowe*, the *Smith* decision does not explore the text of the ADEA, and it pre-dates *O'Connor*. Moreover, the *Smith* court offered no independent analysis of the subgroup question. Rather, the court merely cited to *Lowe* and declared summarily that the ADEA does not permit subgroup claims. *Id*. at *4. Such a cursory analysis falls far short of persuasiveness.

The only post-*O'Connor* decision to reject subgroup disparate impact claims is the Eighth Circuit's decision in *McDonnell Douglas*, 191 F.3d 948. The court reached this ruling, however, without ever citing—much less discussing—the language of § 623(a)(2), which prohibits discrimination

"because of such individual's age," not because of membership in the protected class. Ironically, as noted, the Eighth Circuit also declined to adopt the reasoning of *Lowe*, finding the *Lowe* panel's concern about gerrymandering and litigation insufficient reason for interpreting the text of the ADEA as prohibiting subgroup claims. *See id.* at 950. Rather than rely on *Lowe*, the *McDonnell Douglas* court reasoned that Congress could not have intended to permit plaintiffs to bring suit where a RIF had a favorable impact on "the entire protected group of employees aged 40 and older." *Id*. at 951. But this assumption about Congress' intent flies in the face of the plain language of the statute. As discussed, § 623(a)(2) prohibits discrimination against "individual[s]", not groups, and discrimination is prohibited "because of . . . age," not membership in the protected class. Had Congress intended to disallow discrimination suits where a RIF had a favorable impact on workers over age 40, then Congress could have accomplished this goal by prohibiting discrimination because of membership in the protected class. Congress instead prohibited discrimination against individuals based on age.

The *McDonnell Douglas* court also reasoned that subgroup claims should be disallowed because a contrary ruling would "require an employer engaging in a RIF to attempt what might well be impossible: to achieve

statistical parity among the virtually infinite number of age subgroups in its workforce." 191 F.3d at 951. The problem with this logic, which the district court relied upon in this case, is that it misstates the type of evidence needed to establish a prima facie case. As discussed above, a plaintiff must show a *statistically significant* disparate impact using a sufficiently large sample size to be reliable; in other words, statistical differences are not themselves enough to establish a prima facie case. Employers are therefore not required to achieve "statistical parity" in order to avoid liability for disparate impact claims.

Finally, the *McDonnell Douglas* court ruled that *O'Connor* was irrelevant because it involved disparate treatment. *Id*. The court erred. The Eighth Circuit offered no explanation for this conclusion, and, as discussed above, *O'Connor* is relevant because it interpreted the same language at issue here: "because of . . . age."

Thus, none of the three circuit decisions are persuasive. While no circuit court has yet to hold that subgroup disparate impact claims are cognizable under the ADEA, several district courts—including Judge Fischer in this case—have reached this conclusion. *See, e.g.*, *Graffam*, 848 F. Supp. at 4 (stating that it "fundamentally disagrees with the approach taken by the Second Circuit in *Lowe*"); *Finch*, 865 F. Supp. at 1129-30

(rejecting *Lowe* and allowing subgroups of workers age 50+ and 55+). Additionally, although no circuit has held expressly that subgroup claims are cognizable under the ADEA, the Ninth Circuit has allowed these claims to proceed. *See Borden's*, 724 F.2d at 1398 (holding that severance pay policy had unlawful disparate impact on employees age 55 and older). Finally, scholars have also argued that the ADEA authorizes subgroup claims in disparate impact cases. *See* Sperino, 90 113L. Rev. at 229 (arguing that "subgroup disparate impact should be recognized under the ADEA" because they "are consistent with the ADEA's statutory text, legislative history, and purposes"). Accordingly, this Court should decline to follow *Lowe*, *Smith*, and *McDonnell Douglas*.

D. The remedial objectives of the ADEA and its legislative history support the conclusion that the ADEA authorizes subgroup disparate impact claims.

Disallowing subgroup claims runs contrary to the remedial objectives of the ADEA. In enacting the ADEA, Congress sought to "prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b). That goal is undermined by permitting neutral employment practices that have a statistically significant disparate impact on subgroups of older workers. *See Finch*, 865 F. Supp. at 1129 (stating that neutral polices with a disparate impact on subgroups of older workers in the protected class "could well

reflect the specific type of arbitrary age discrimination Congress sought to prohibit by enacting the ADEA" and citing § 621(b)).

Refusing to recognize subgroup claims means that younger workers within the protected group will benefit more than older workers, even though older workers are the ones "most in need of the statute's protections." *Lowe*, 886 F.3d at 1379 (Pierce, J., concurring in judgment); *see also Gen. Dynamics*, 540 U.S. at 591 (stating that Congress was not worried about "protecting the younger against the older"). As the concurring judge in *Lowe* explained, because employers rarely replace an experienced 60-year old with someone in his or her 20s, "the likely beneficiary of discrimination against a 60-year-old person will be another member of the protected group, *i.e.*, a person more than 40 years of age." *Lowe*, 886 F.3d at 1379 (Pierce, J., concurring in judgment). In contrast, the most likely beneficiary of discrimination against a 40-year old is "a person *outside* the protected class," as that person is likely to be replaced by someone under age 40. *Id.*; *see Gen. Dynamics*, 540 U.S. at 591 ("The enemy of 40 is 30, not 50.") "Given the clear purpose of the Act, namely to protect persons against discrimination *due to age*, it would indeed be strange, and even perverse, if the youngest members of the protected class

were to be accorded a greater degree of statutory protection than older members of the class." *Id*. (emphasis added).

Finally, legislative history supports the conclusion that the ADEA authorizes subgroup claims. Senator Javits and Senator Yarborough were "two of the legislators most active in pushing for the ADEA." *Id.* at 598. Their exchange during a colloquy on the floor of the Senate confirms that Congress' intent was to prohibit discrimination based on age, not membership in the protected age category. Senator Javits stated that § 623 "specifically prohibits discrimination against any 'individual' because of his age. It does not say the discrimination has to be in favor of someone younger than age 40." 113 Cong Rec. 31255 (1967). He further explained that if an employer selects a 42-year-old over a 52-year-old because of his age, "then [the employer] will have violated the act." *Id*. Senator Yarborough agreed, stating that the law was intended to prohibit discrimination against a 52-year old in favor of either a 42-year old employee or a 38-year old employee; "[t]he law prohibits age being a factor in the decision to hire." *Id*.

Thus, Senator Javits and Senator Yarborough understood the ADEA to prohibit discrimination based on *age*, not membership in the protected class. This understanding accords with the plain language of the statue and

the Supreme Court's holding in *O'Connor*, leading to the conclusion that the ADEA prohibits disparate impact discrimination against subgroups of older workers.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

P. DAVID LOPEZ
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

LORRRAINE C. DAVIS
Assistant General Counsel

s/Anne Noel Occhialino
ANNE NOEL OCCHIALINO
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Fl.
Washington, D.C. 20507
(202) 663-4724 (phone)
(202) 663-7090 (fax)
Annenoel.Occhialino@eeoc.gov

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s/Anne Noel Occhialino
ANNE NOEL OCCHIALINO
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Fl.
Washington, D.C. 20507
(202) 663-4724 (phone)
(202) 663-7090 (fax)
Annenoel.Occhialino@eeoc.gov

Dated: April 7, 2016

CERTIFICATE OF SERVICE

I, Anne Noel Occhialino, hereby certify that I electronically filed the foregoing brief with the Court via the appellate CM/ECF system and filed an original and six paper copies of the foregoing brief (7 total) with the Court by next business day delivery, postage pre-paid, this 7th day of April, 2016. I also certify that the following counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system:

Counsel for Plaintiff/Appellant:
Bruce Fox, Andrew Horowitz
Obermayer, Rebmann, Maxwell, & Hippel
500 Grant St., Ste. 5420
One Mellon Drive.
Pittsburg, PA
15219
(412) 566-1500

Counsel for Defendant/Appellee:
Rachel Atterby, David Becker
Freeborn & Peters
311 South Wacker Dr., Ste.3000
Chicago, IL
60606
(312) 360-6000

s/Anne Noel Occhialino
ANNE NOEL OCCHIALINO
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Fl.
Washington, D.C. 20507
(202) 663-4724 (phone)
(202) 663-7090 (fax)
Annenoel.Occhialino@eeoc.gov