Case No. 15-3435

In The United States Court Of Appeals For The Third Circuit

RUDOLPH KARLO, et al.

Plaintiffs-Appellants,

vs.

PITTSBURGH GLASS WORKS LLC,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Pennsylvania, Case No. 2-10-CV-01283
The Honorable Terrence F. McVerry

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE

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INTERESTS OF AMICUS[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members, and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases like this one, which raise issues of concern to the nation's business community.

The brief filed by Appellee Pittsburgh Glass Works ("PGW") provides numerous reasons to affirm, and the Chamber endorses those arguments. First, the case is materially indistinguishable from *Wal-Mart Stores, Inc.*, *v. Dukes*, 131 S. Ct. 2541 (2011); in both cases, the employer adopted "a policy *against having* uniform employment practices." *Id.* at 2554 (emphasis in original). As the Supreme Court held in *Dukes*, an employer's decision to *eschew* a uniform policy does not provide the "glue" necessary to make litigation on common proof possible. Here, it did not make the putative members of the collective action group

[1] Pursuant to Fed. R. App. P. 29, the Chamber certifies that no party's counsel authored this brief in whole or in part or contributed money intended to fund the brief's preparation or submission, and no person other than the Chamber, its counsel, or its members contributed money to fund the brief's preparation or submission.

"similarly situated" as required by 29 U.S.C. § 216(b). Second, Plaintiffs' expert evidence was flawed and properly excluded and without it, Plaintiffs simply failed to make their case under any conception of the Age Discrimination in Employment Act ("ADEA").

The Chamber writes separately to address the argument advanced by both Plaintiffs and the Equal Employment Opportunity Commission (EEOC or "the agency") that a plaintiff in an ADEA disparate impact case can satisfy her prima facie burden by segmenting the Act's protected group into *ad hoc* sub-categories in search of a statistical disparity.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court specified the plaintiff's initial burden of proof in an ADEA disparate impact case more than 30 years ago:

> To establish his prima facie case of discriminatory impact, the plaintiff must show that the employer's selection process results in unfavorable treatment of a disproportionate number of members of *the protected group* to which the plaintiff belongs . . . . Thus, an essential element of a disparate impact claim is a disparate impact on *the protected group*. . . . Because the ADEA only prohibits discrimination against employees between the ages of 40 and 70, [the plaintiff] had to *show a disproportionate effect on individuals in that age group*.
>
> * * * *
>
> The ADEA is only implicated when a policy has a differential impact on those *within the protected class, i.e., those between 40 and 70 years of age*. [Accordingly,

> in a disparate impact case, the Act is not] violated unless *those age 40 to 70 were disproportionately represented among the laid off employees*.

Massarsky v. Gen. Motors Corp., 706 F.2d 111, 121 (3d Cir. 1983) (emphasis added).[2]

This threshold requirement — a "differential impact on those within the protected group" — has also been adopted by every other circuit to set out the specifics of the prima facie case,[3] and three circuits have directly addressed, and rejected, the protected age group segmentation urged by Plaintiffs and the EEOC:

- *Smith v. Xerox Corp.*, 196 F.3d 358, 366 (2d Cir. 1999) (ADEA disparate impact analysis requires that "persons under 40 years of age

[2] In 1983, when *Massarsky* was decided, the ADEA's protected group was the cohort between 40 and 70. The protected group is now age 40 and above. *See* 29 U.S.C. § 631(a).

[3] *See*, *e.g.*, *Pippin v. Burlington Res. Oil And Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006) (question was whether reduction in force "resulted in the termination of more over-forty workers than under-forty employees."); *Arnett v. Cal. Pub. Emp. Ret. Sys.*, 179 F.3d 690, 697 (9th Cir. 1999) (question is whether practice "fall[s] more harshly on 'those employees . . . age 40 and over'"), *as amended on denial of reh'g and reh'g en banc* (Aug. 17, 1999), *remanded on other grounds Cal. Pub. Emp. Ret. Sys. v. Arnett*, 528 U.S. 1111 (2000); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1432 (10th Cir. 1993) ("Plaintiffs failed to prove . . . policy resulted in a disparate impact on persons over forty"); *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1162 (7th Cir. 1992) ("brunt of [policy] inevitably fell mainly on workers within the class protected by the [ADEA]"); *Arnold v. U.S. Postal Serv.*, 863 F.2d 994, 996, 998 (D.C. Cir. 1988) ("The plaintiff must simply establish . . . that the challenged practice has a disparate impact on [employees] forty years of age and older"); *cf Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1533 (5th Cir. 1993) (class certification properly denied; plaintiffs failed to show that "schoolteachers over forty years of age … had [disproportionately] been terminated").

[be] compared to persons 40 and over"), *superseded on others grounds, Smith v. City of Jackson,* 544 U.S. 228 (2005) .

- *EEOC v. McDonnell Douglas Corp*., 191 F.3d 948, 950-51(8th Cir. 1999) (disparate impact actionable only when an employment process has a disparate impact on individuals "because of their membership in a protected group," and in ADEA case, that is the age cohort of 40 and above).

- *Smith v. Tenn. Valley Auth*. 924 F.2d 1059, 1991 U.S. App. LEXIS 1754, at *11-12 (6th Cir. Feb. 4, 1991) (table) (to make out prima facie case, plaintiff must "produce statistics to show that a particular selection practice resulted in the [favorable treatment] of a larger share of workers under the age of forty than over the age of forty").

- *Lowe v. Commack Union Free Sch. Dist*., 886 F.2d 1364, 1370-74 (2d Cir. 1989) (disparate impact age claim requires demonstrated disparity between those under 40 years of age and those 40 and older; rejecting plaintiff's attempt to create a "sub-group" within the 40-and-over cohort for analysis).

Because Plaintiffs cannot show a "differential impact on those within the protected class, *i.e.*, those [aged] 40 and [over]," they now urge this panel to change the Circuit's controlling law and create a circuit split where none currently exists. They do so, however, without even acknowledging the existence of *Massarsky* or the Circuit's existing standard.

Specifically, Plaintiffs ask the Court to hold that in any given case, any given plaintiff may establish his or her case by showing a disparate impact on any sub-category of the ADEA's 40-and-above "protected age group" so long as the lower boundary of that segment is divisible by five (*e.g.*, 45-and-above, or 50-and-above, or 55-and-above). This case-by-case age segmentation should be permitted,

they say, even if the personnel process or procedure under attack has a statistically neutral or *positive* impact on the statutorily "protected age group" as a whole, as was the case below, or a neutral impact on the oldest workers, as was also true in this case.[4] Plaintiffs argue that the "plain language" of the ADEA permits this sort of segmentation — *i.e.*, permits this *ad hoc*, results-driven, case-by-case segmentation of the "protected age group" and mandates their "divisible-by-five" rule — even though a quick check of the Act's text reveals no such Congressional design.

Plaintiffs' *amicus curiae*, the EEOC, also claims to embrace a "plain language" approach, but Plaintiffs and the EEOC cannot be reading the same "plain language." The agency claims that the statute's "plain language" requires an even more malleable approach that is even less demanding than plaintiffs' theory for pursuing a disparate impact claim.

First, the EEOC does not defend the idea that the lower boundary of the *ad hoc* "protected age group" segment must be divisible by five. In the EEOC's view, any bottom boundary will do, no matter how gerrymandered and results-driven, as long as there are enough individuals within the selected segment to permit a meaningful statistical comparison. *See* EEOC br. at 13-14. In a sufficiently large

[4] As was explained in PGW's brief, there was no statistically significant adverse impact on workers 40 and above, or on workers aged 60 and above. *See* PGW br. at 29, fn.7.

workforce, for example, the EEOC would allow a plaintiff's expert to show a practice's disparate impact on a slice of the workforce bounded on the bottom by those who are 54 years, nine months and 53 days old, excising those one day younger if it would change the statistical result.

Second, the EEOC would allow the plaintiffs in such a case to compare the impact on those in any *ad hoc* sub-group of the protected class their expert might pick to the impact on *any another group*, either within or outside the 40-and-above protected class. For instance, the EEOC would allow a plaintiff's expert to compare the selection rate for employees aged 67 to 70 to the selection rate of those aged 50 to 53, and a prima facie case of discrimination might exist in such a case, even if the data showed that those aged 54 to 66, and those aged 71 and above were treated neutrally or even *favored* to a statistically significant degree. The agency recognizes only two limitations: the case must be brought by (or on behalf of) those in the older segment, and the resulting age differential between the older and younger *ad hoc* groups must be sufficient to "support an inference of discrimination." *Id*. at 16.

As explained below, since the ADEA became law in 1967, no court, at any level, in any case, has ever embraced such an arbitrary, transparently results-driven rule, and the text of the ADEA does not require or even permit such a bizarre result. But even if such a construction of the statutory text were arguably possible,

this Court has repeatedly said that it will "avoid constructions that produce 'odd' or 'absurd results' or [results] that are 'inconsistent' with common sense." *Bonkowski v. Oberg Indus., Inc.*, 787 F.3d 190, 200 (3d Cir. 2015) (internal citation omitted). That is surely the case here.

The Chamber's members strive to comply with the law. To that end, many test their employment tools, policies, and practices for adverse impact before they are deployed to ensure that employees in a protected class are not disproportionately affected. Under *Massarsky*, adverse impact testing is a relatively straightforward task.[5] An employer can compare the success (or failure) rates of those within the ADEA's "protected age group" — *i.e.*, employee aged 40 and above — to the impact on those who are not in that group.

Where the "protected age group" and the comparison group are each subject to boundless *post hoc* manipulation, however, limited only by the creativity and resourcefulness of some future plaintiff and her statistical expert, prior planning is not possible. No employer could perform adverse impact testing, using the nearly infinite variety of potential protected-class segments and comparison groups any future plaintiff might opportunistically adopt.

The Court should confirm this Circuit's settled law and reject the invitation to impose on employers' prima facie liability for inadvertent disparities they

[5] *Massarsky*, 706 F.2d at 121.

cannot identify in advance and thus have no ability to prevent. Adopting the approach urged by either Plaintiffs or the EEOC would overturn Circuit precedent, create a circuit split, undermine the ADEA, and lead to absurd and unfair results.[6]

ARGUMENT

I. THE DISPARATE IMPACT COMPARISON MUST BE MADE USING THE ADEA'S "PROTECTED AGE GROUP," THAT IS, THOSE 40 AND ABOVE

A. ADEA Disparate Impact Cases Are Premised on a Comparison Between Those Within the Statute's Protected Age Group and Those Who Are Not

Plaintiffs and the EEOC argue that because age is a continuous variable (and not a dichotomous one), the prima facie burden on age discrimination plaintiffs should be fundamentally different from (and much more forgiving than) the Title VII burden established by the Supreme Court in *Griggs v. Duke Power Co*mpany, 401 U.S. 424 (1971). In *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005),

[6] Plaintiffs argue that the law of the case doctrine bound Judge McVerry to follow Judge Fischer's conditional certification decision, in which she said that the ADEA permits this segmentation. Karlo br. at 16-19. This argument is both incorrect and irrelevant. First, the conditional certification decision was explicitly tentative, and, as Judge Fischer acknowledged, was intended to be revisited. *See* PGW br. at 23-24. . Second, like Plaintiffs and the EEOC, Judge Fischer failed to acknowledge or apply controlling Circuit law, an error Judge McVerry was obliged to reconsider the question. *ACLU v. Mukasey*, 534 F.3d 181, 188 (3d Cir. 2008) ("reconsideration is necessary to prevent clear error"). Finally, the law of the case doctrine is simply irrelevant on appeal. As the Supreme Court recently reiterated, "[a]n appellate court's [very] function *is* to revisit matters decided in the trial court. When an appellate court reviews a matter . . . it is not bound by district court rulings under the law-of-the-case doctrine." *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016) (emphasis in original).

however, the Supreme Court expressly held that the ADEA only "authorizes recovery in 'disparate-impact' [cases] comparable to *Griggs*."

The scope of the cause of action authorized in *Griggs* (and thus, by extension, authorized by *Smith*) is plain enough. Griggs and its progeny allow Title VII plaintiffs to recover for "facially neutral employment practices that have significant adverse effects on [Title VII's] protected groups." *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986-87 (1988). Thus, the threshold, "essential element of a disparate impact claim is a disparate impact on the protected group." *Massarsky,* 706 F.2d at 120.

Indeed, after *Smith* confirmed the existence of a disparate impact theory under the ADEA, the EEOC responded with a new disparate impact regulation that acknowledged that the Supreme Court had only authorized a disparate impact cause of action to the extent that it was "comparable to [that recognized in] *Griggs*."[7] The EEOC regulation provides that an ADEA disparate impact claim reaches "employment practice[s] that adversely affect[] individuals *within the protected age group*," which, by statute, is 40 and above. 29 C.F.R. § 1625.7(c). The agency also indicated that a key factor in determining whether a practice is a reasonable factor other than age is the degree of harm on the "individuals *within the* [ADEA's] *protected age group*," that is, aged 40 and above. *Id.* at

[7] *See Smith v. City of Jackson*, 544 U.S. at 230; 29 C.F.R. § 1625.7.

§1625.7(e)(2)(v) (emphasis added).[8] The EEOC's regulation thus acknowledges that the focus in any disparate impact case must be on the presence (or absence) of significant adverse impact on the ADEA's "protected age group." And that is precisely what the courts of appeals have uniformly held: the appropriate comparison for disparate impact purposes is between those who are "within the protected age group" and those who are not. *See supra* at p. 4 and cases collected in fn. 3.

B. Every Circuit To Address this Issue Has Rejected ADEA Disparate Impact Claims on Behalf of Subgroups

1. The Second, Sixth and Eighth Circuits Have Declined To Expand the ADEA's Protection Against Disparate Impact To Subgroups of the Protected Class

Every circuit to address the issue has rejected the availability of ADEA disparate impact claims for subgroups. *Lowe*, 886 F.2d at 1372-74; *Smith v. Tenn. Valley Auth.*, 924 F.2d 1059, 1991 U.S. App. LEXIS 1754; *EEOC v. McDonnell Douglas Corp*., 191 F.3d 948 (8th Cir. 1999). In each case, the court has said that the focus in a disparate impact case is "not on the individual plaintiff as much as on the adverse effect of the challenged practice *on the protected group* of which the plaintiff is a member." *Lowe*, 886 F.2d at 1373 (emphasis in original). In an ADEA disparate impact claim, the court "look[s] only to the effect of the practice

[8] The EEOC's brief does not seek deference for, *or even mention*, its own ADEA disparate impact regulation.

on the group Congress has specified is protected under the ADEA, those at least 40 years of age." *Id.*

In *Lowe*, the two 52-year-old plaintiffs applied for and were denied positions as elementary school teachers, and raised a disparate impact hiring discrimination claim under the ADEA. *Id.* at 1368. After a jury verdict for the employer, the applicants appealed. *Id.* at 1369. The Second Circuit affirmed, holding that the plaintiffs had failed to establish a prima facie case of disparate impact. *Id.* at 1371. The court explained that "the facts of th[e] case seemingly could not support such a claim" because the statistical evidence suggested the procedures "actually *favored* members of the protected group." *Id* (emphasis in original). Eight of the thirteen candidates ultimately hired were age 40 or older, even though a majority of those in the applicant pool were under 40. *Id.* at 1371. The plaintiffs acknowledged the lack of disparate impact against the protected class as a whole, but asked the court to "compare the effect of the hiring procedures on candidates over 50 with the effect on candidates under 50." *Id.* at 1372.

The Second Circuit refused to "expand the disparate impact approach so as to include recognition of 'sub-groups' in the analysis of the impact a hiring process has on the group that Congress has explicitly provided to be the protected group under the ADEA." *Id.* at 1373. The court explained that there was no "support in

the case law or in the ADEA" for the plaintiffs' approach and warned of the mischief segmentation would allow:

> Because [the plaintiffs] are in their fifties, they seek to define the protected group as those 50 or older. Under this approach, however, any plaintiff can take his or her own age as the lower end of a 'sub-protected group' and argue that said 'sub-group' is disparately impacted. If appellants' approach were to be followed, an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'sub-group' of those age 85 and above, even though all those hired were in their late seventies.

Id.

The Sixth and Eighth Circuits have agreed. In *Smith v. Tennessee Valley Authority*, the Sixth Circuit held that a plaintiff alleging ADEA disparate impact discrimination in connection with a reduction in force must show "that a particular selection practice resulted in the [retention] of a larger share of workers under the age of forty than over the age of forty." *Smith*, 1991 U.S. App. LEXIS 1754, at *11-12. As in this case, the evidence in *Smith* showed that the "protected group" of employees 40 and older were not selected for termination at statistically significantly higher rates than employees under 40. *Id.* As a result, plaintiffs could not raise a prima facie case of disparate impact discrimination: "A plaintiff cannot succeed under a disparate impact theory by showing that younger members *of the protected class* were preferred over older members of the protected class." *Id.* (emphasis added).

Similarly, in *EEOC v. McDonnell Douglas Corp.*, the Eighth Circuit refused to "expand [the] recognition of disparate-impact claims under the ADEA to include claims on behalf of subgroups of the protected class." 191 F.3d at 950. The EEOC alleged that the company's RIF procedures disparately impacted employees aged 55 and older. *Id.* The Eighth Circuit agreed with its sister circuits that permitting segmented disparate impact claims would be inconsistent with Congress' explicit definition of the protected group, and could lead to findings of discrimination even when an employer's neutral policies *favor* employees in the protected age group — a situation Congress could not possibly have intended to be a violation of the ADEA:

> [I]f such claims were cognizable under the statute, a plaintiff could bring a disparate-impact claim despite the fact that the statistical evidence indicated that an employer's RIF criteria had a very favorable impact upon the entire protected group of employees aged 40 and older, compared to those employees [under 40]. We do not believe that Congress could have intended such a result.

Id. at 951. The court explained that permitting subgroup disparate impact claims would lead to absurd results:

> [T]he consequence would be to 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 work force. Adoption of such a theory, moreover, might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the

> very sort of age-based decision-making that the statute proscribes.

Id.

2. This Court Should Avoid Creating an Unnecessary Circuit Split

Even if there were no controlling Circuit law on the baseline standard for ADEA disparate impact cases, and even if the EEOC had not previously instructed that disparate impact analysis requires a comparison of the 40-and-above "protected age group," this Court would be wise to eschew a ruling that would needlessly create a division of authority among the appellate courts.

Because public policy favors consistent, nationwide application of federal law, this Court has historically been "reluctant to contradict the unanimous position of other circuits." *See Butler Cty. Mem'l Hosp. v. Heckler*, 780 F.2d 352, 356-57 (3d Cir. 1985). It is "rarely appropriate to overrule circuit precedent [in this case, *Massarsky*, if doing so] creat[es] a conflict here where none exists." *Morrow v. Balaski*, 719 F.3d 160, 185 (3d Cir. 2013) (*en banc*) (Smith, J., concurring) (citations omitted); *see also Sikkelee v. Precision Airmotive Corp.*, 2016 U.S. App. LEXIS 7015, *71-72 (3d Cir. Apr. 19, 2016) ("declin[ing] the invitation to create a circuit split" where there was "no indication of congressional intent" and "relevant precedent militate against it"). In the present case, every

circuit, and the overwhelming weight of district court authority,[9] weighs against creating such a division of authority. No compelling reason exists to destabilize this settled law.

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[9] *See, e.g., Petruska v. Reckitt Benckiser, LLC*, No. 14-03663, 2015 U.S. Dist. LEXIS 38935, *16-18 (D.N.J. Mar. 26, 2015) (rejecting Judge Fischer's tentative decision in this case; "it is improper to distinguish between subgroups within the protected class"); *Kinnally v. Rogers Corp*., No. cv-06-2704, 2009 U.S. Dist. LEXIS 18385, at *27 (D. Ariz. Mar. 9, 2009) ("The Court agrees with the circuits that have rejected disparate impact claims based on age sub-groups."); *Schechner v. KPIX-TV*, No. C-08-05049, 2011 U.S. Dist. LEXIS 4041, at *11-13 (N.D. Cal. Jan. 13, 2011) ("it is improper to distinguish between subgroups of employees over the age of 40 and that a disparate impact analysis must compare employees aged 40 and over with those 39 and younger.") (internal citations omitted), *aff'd on other grounds*, 2012 U.S. App. LEXIS 10766 (9th Cir. May 29, 2012); *Bingham v. Raytheon Tech. Servs. Co., LLC*, No. 1:13-cv-00211, 2014 U.S. Dist. LEXIS 160499, *9-10 (S.D. Ind. Nov. 14, 2014) ("the Court finds that these [sub-]groups appear to have been selected because it yielded the desired result — a showing of adverse impact — not because it was necessarily relevant to Mr. Bingham's claim.") (internal citations omitted). *See also Diersen v. Walker*, No. 00 C 2437, 2003 U.S. Dist. LEXIS 19794, at *20 (N.D. Ill. Nov. 3, 2003) (emphasis added) (disparate impact requires that "employment practice has a disproportionately negative effect on members of the *employee's protected class as a whole*."), *aff'd*, 2004 U.S. App. LEXIS 23325 (7th Cir. Nov. 4, 2004) citing *Noreuil v. Peabody Coal Co*., 96 F.3d 254, 258 (7th Cir. 1996)); *Overstreet v. Siemens Energy & Automation, Inc.*, EP-03-CV-163, 2005 U.S. Dist. LEXIS 32211, at *11 (W.D. Tex. Sept. 26, 2005) (declining to "analyze[] discrete subgroups of the group protected by the statute"); *Gillum v. ICF Emergency Mgmt. Servs., L.L.C.*, Civil Action No. 08-314-C-M2, 2009 U.S. Dist. LEXIS 124359, at *16-17 (M.D. La. Nov. 19, 2009) ("focus under Fifth Circuit jurisprudence [is] the protected versus non-protected class groupings"); *Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1130-1131 (D. Kan. 2013) ("Plaintiffs present no relevant statistical evidence that the impact fell more harshly on the protected group than a non-protected group [failing to] establish a prima facie case of disparate impact age discrimination.", *rev'd in part on other grounds by,* 778 F.3d 1147, 1152 (10th Cir. 2015).

C. Congress Has Declined To Alter Existing ADEA Disparate Impact Principles

In November 1991, Congress enacted the Civil Rights Act of 1991 ("CRA 1991"), which amended both Title VII and the ADEA in a number of respects. One of the primary goals of the 1991 Act was to "clarify provisions regarding disparate impact actions." Civil Rights Act of 1991, P.L. 102-166, 105 Stat 1071 (Nov. 21, 1991). Although the CRA 1991 amended the disparate impact approach in Title VII cases, and although it came after two courts of appeals had explicitly and directly rejected segmentation under the ADEA(the Second Circuit's decision in *Lowe* and the Sixth Circuit's decision in *Smith*), Congress chose ***not*** to amend the ADEA to address, or "correct," those decisions.

The fact that Congress altered the disparate impact approach in Title VII cases but did *not* amend the ADEA to permit disparate impact claims on behalf of subgroups of the 40-and-above protected class is evidence that Congress intended to preserve the Second and Sixth Circuit's interpretation.[10] Had Congress believed

[10] *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-382 (1982) ("[T]he fact that a comprehensive reexamination and significant amendment[] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that [interpretation]."); *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 619 (3d Cir. 2015) ("Against the backdrop of these cases . . . it bears particular significance that Congress reenacted that subsection without change."); *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 177 (3d Cir. 2015) ("Subsequent to [judicial interpretation], Congress twice amended the statute . . . . [T]he fact that

that the uniform appellate understanding of disparate impact claims under the ADEA was contrary to the "plain text" of the statute, as Plaintiffs and the EEOC contend, it surely would have addressed the issue in the 1991 Act. The fact that Congress did not do so serves as confirmation that the prior appellate decisions were consistent with congressional intent.

II. PROTECTED CLASS SEGMENTATION IS NOT SUPPORTED BY THE STATUTORY TEXT AND WOULD ALLOW UNLIMITED GERRYMANDERING

A. Nothing in the "Plain Language" of the ADEA Permits Gerrymandered Segmentation

With uniform law in the circuits, including controlling case law in this Circuit, and an EEOC disparate impact regulation that rejects the sort of segmentation that Plaintiffs and the EEOC urge, this case can and should be resolved without extended detours into the arguments either Plaintiffs or the EEOC advance. Nonetheless, those arguments are easily dismissed on their own merits.

Both Plaintiffs and the EEOC argue that their (very different) views on protected age group segmentation are required by the "plain language" of the ADEA. This 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

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the amendment[s] occurred after [judicial interpretation] further indicates that Congress was aware of the Court's interpretation [ ] and accepted it.").

individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age." 29 U.S.C. § 623(a)(2).

Nothing in that language allows protected age group segmentation or the Plaintiffs' divisible-by-five limit, and it strains credulity to suppose that every circuit court panel and the long list of district judges who have considered the question have all failed to comprehend language so "plain."

Instead, the language merely proscribes (subject to defenses) practices that deprive or tend to deprive individuals of employment opportunities "because of such individual's age." As the *Lowe* court explained, when the evidence shows that a neutral practice falls more harshly on *the protected age group*, compared to those outside the group, it may support an inference that age is the causative factor — employees may well have found themselves in an unfortunate situation "because of [their] age." 886 F.2d at 1370.

But when results show a statistical difference between one gerrymandered slice of the protected group and some *other* slice within that same group, no such inference arises, especially when *others* within the protected group are *favored*. The *Lowe* court explained: "We do not believe that such a 'disparity' [between one segment of those in the protected age group and others in the same group] would support the inference of discrimination that the disparate impact approach

permits when those outside a statutorily protected group are preferred over those included in that group." *Id.* at 1373.

Indeed, one of two things will inevitably be true about the operation of any employer policy, practice, or tool: either it will have an adverse impact on *some* slice of the protected age group, or the results will fortuitously be distributed perfectly by age, in every conceivable sub-segment of the statutorily protected group, when compared to every other segment a plaintiff's expert might select after the fact. The odds of a perfect distribution are infinitesimally small, and could not be manufactured by the employer without the age-conscious decision-making the statute proscribes. Accordingly, adopting the rule urged by Plaintiffs and the EEOC would essentially be to declare that employers always and inevitably discriminate on the basis of age. Absent compelling evidence that Congress intended such a profoundly implausible result, the Court ought not adopt it. *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 731-32 (3d Cir. 1995) ("Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. . . . [T]his Court has never held . . . that discrimination must always be inferred from such consequences.") (internal citations omitted).[11]

[11] As noted above, this court strives to "avoid constructions that produce 'odd' or 'absurd results' or [results] that are 'inconsistent' with common sense." *Bonkowski*, 787 F.3d at 200 (internal citation omitted); *see also* 2A N. Singer, Sutherland Statutes and Statutory Construction § 45:12, at 92 (6th ed. 2000).

B. The Disparate Treatment Cases Cited by Plaintiffs and the EEOC Are Inapposite

Finally, both the EEOC and Plaintiffs rely on a handful of disparate treatment cases, but by doing so they betray a fundamental misunderstanding about the differences between the two theories of recovery. These cases have nothing to say about this appeal.

Both Plaintiffs and the EEOC rely primarily on *O'Connor v. Consolidated Coin Caterers Corp*., 517 U.S. 308 (1996). In that case, the Supreme Court held that in a disparate treatment ADEA case, a plaintiff using the inferential mode of circumstantial proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), can satisfy her prima facie burden by showing that she was treated adversely when compared to a similarly situated, substantially younger employee, even if the younger employee is also in the ADEA's protected age group. The EEOC and Plaintiffs contend that this holding is easily transferrable to the disparate impact context and permits protected group segmentation. That is incorrect.

First, the Supreme Court's holding pertained only to *disparate treatment* cases; indeed, *O'Connor* was decided in 1996, almost a decade before the Court had even acknowledged the *existence* of ADEA disparate impact theory of recovery. Plaintiffs would have the Court believe that in *O'Connor,* the Supreme Court unanimously established a standard for disparate impact cases incompatible

with every circuit court decision on point at the time, even though it had not even recognized the cause of action, and that it did so in a five-page opinion. The contention is all the more remarkable since Chief Justice Rehnquist and Justices O'Connor, Kennedy and Thomas joined the unanimous *O'Connor* opinion, but three of them — Justices O'Connor, Kennedy and Thomas — all rejected the existence of a disparate impact ADEA claim when they had the opportunity to do so in *Smith*, and Chief Justice Rehnquist had already written a vigorous dissent from a denial of *certiorari* in *Markham v. Geller*, 451 U.S. 945 (1981), expressing his belief that the theory did not exist under the ADEA. Plaintiffs' suggestion that the *O'Connor* Court disposed of this issue unanimously but accidently, in a way that is inconsistent with the expressed views of four of the justices joining the opinion, is simply not plausible.

More fundamentally, Plaintiffs misunderstand the nature of the issue in *O'Connor*. In a disparate treatment case, the question is whether the employer intentionally denied some benefit to an individual in the protected age group "because of" his or her age. If the employer does so, the statute is violated *regardless* of whether a younger worker is favored. Thus, an employer that refuses to hire a qualified individual within the protected age group for a vacancy *because of his age* violates the ADEA, even if the vacancy is never filled so no younger worker is preferred.

The *O'Connor* decision dealt only with how *McDonnell Douglass*'s inferential proof scheme would work in an ADEA case. 517 U.S. at 312. *O'Connor* was thus not about what the ADEA makes unlawful; it was exclusively about one of the evidentiary approaches a plaintiff may use to *prove* that purposeful bias has occurred.

In contrast, in a disparate impact case, *the disparity is itself the violation* (unless an affirmative defense applies). The comparison between those inside and outside the statutorily protected group is not just one type of inferential proof scheme; it is the definition of the violation itself. Thus, the holding in *O'Connor*, that a disparate treatment plaintiff may support an inference of intentional bias by showing that he or she was replaced by a substantially younger but protected employee, is a *non sequitur* in the disparate impact context.

The agency also relies on *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004) — another disparate treatment case that does not mention or discuss the disparate impact theory. *Cline*, however, undermines the argument that the scope of the ADEA's protections can be gleaned from the "plain language" of the statute. In *Cline*, the Court noted that the plain language of the Act might arguably protect a younger employee from discrimination in favor of older workers since the younger worker would have been denied an opportunity "because of [his] age."

> [T]he word "age" standing alone can be readily understood either as pointing to any number of years lived, or as common shorthand for the longer span and concurrent aches that make youth look good. Which alternative was probably intended is a matter of context . . . .

540 U.S. at 596. The Court held, based on "context," and not on "plain language," in a disparate treatment case, that "age" must be read as "old age." *Cline* does not speak to, much less dictate the answer, to the segmentation question posed in this appeal, but it is a cautionary note against literalism in parsing the Act's supposedly "plain language."

Finally, although *Connecticut v. Teal*, 457 U.S. 440 (1982), is a disparate impact case, it is similarly irrelevant here. In *Teal*, the Court held that the employer violated Title VII when it used a written promotions exam that disproportionately screened out African Americans, even though the racial composition of those ultimately promoted did not reflect an adverse impact because African Americans "made up ground" in subsequent steps of the promotions process. The fact that the "bottom line" number of promotees was "balanced" did nothing to remedy the fact that certain African American individuals were eliminated from the process unfairly.

The EEOC claims that *Teal* helps their cause, but it hard to see how. This is not a case where an intermediary step in a process is alleged to have harmed those aged 40 and up. It is true that the statute provides a remedy for individuals and not

groups, and that a challenged practice need not adversely impact all of those in the protected group for the practice to be unlawful. Those observations are consistent with *Teal* but do not advance the agency's protected group segmentation argument in the slightest.

III. THE COURT SHOULD REJECT ANY VERSION OF ADEA DISPARATE IMPACT THEORY THAT WOULD IMPOSE PRIMA FACIE LIABILITY ON EMPLOYERS FOR STATISTICAL THEY CANNOT PREDICT OR AVOID

Congress enacted the ADEA to foster the employment of older workers, "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." 29 U.S.C. § 621(b). Allowing segmentation of the protected age group in disparate impact cases would serve none of these purposes.

First, the two schemes proposed by Plaintiffs and the EEOC would neither reach discrimination "because of" age nor eliminate "arbitrary" impediments to the employment of older workers; it would, rather, *impose* an *ad hoc*, "arbitrary" scheme that would foster litigation brought by those who find themselves by happenstance to be in an age band correlated with a statistical deficit.

This case is an apt example. The statistical evidence produced by the parties shows that the reduction in force did not have any statistically significant adverse impact on workers aged 40 and above or on those *aged 60 and above* — the most senior employees in the workforce. Plaintiffs were able to claim a disadvantage to

a group aged 50 and above only by purposefully masking this material variability, both at the top and the bottom of the protected age group.

It would do little to foster the purposes of the ADEA to proscribe a decision-making process that is neutral on its face, *and* neutral in operation with respect to the employer's oldest workers but, by happenstance falls more harshly on one slice of *younger* workers in the protected age group. Plaintiffs get to this result only by gerrymandering and obscuring — refusing to study separately — the fate of the oldest workers.[12] Indeed, in Plaintiff Rudolph Karlo's group, almost every employee retained by his manager was *older* than Karlo.[13] Mr. Karlo was 51 *and* terminated; he was not terminated *because* he was 51. Only the most opportunistic construction of the ADEA, untethered from the language of the statute and its avowed legislative purpose, would impose liability based on what happened to Mr. Karlo.[14]

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[12] Plaintiffs' expert refused to analyze the over-60 cohort. PPG's brief carefully examines the data in this case and the Chamber will not duplicate that study here.

[13] Plaintiffs pointed to one younger employee who remained in the department after the reduction in force but his "job function and duties were unmatched by any Plaintiff," and the retained individuals who absorbed Mr. Karlo's duties were older than him. *Karlo v. Pittsburgh Glass Works, LLC*, No. 2:10-CV-1283, 2015 U.S. Dist. LEXIS 117147, at *52-53 (W.D. Pa. Sept. 2, 2015).

[14] In this respect, Plaintiffs' suggested approach is more like the EEOC's than might first appear. The EEOC explicitly endorse a rule that would allow a plaintiff to focus on a supposedly disadvantaged slice of the workforce (*e.g.*, those between 56 and 64) while ignoring the *favorable* treatment of older workers (those 65 and above, in this example). Plaintiffs accomplish the same thing by urging a "50-and-

Moreover, construing the statute as the EEOC suggests would impose prima facie liability on employers that they could not anticipate and thus could not forestall. In a statutory regime enacted to "help employers" deal with the problem of age discrimination, such a construction would be counter-productive.

The Chamber's members are subject to, and devote substantial resources to comply with, a vast array of federal, state, and local antidiscrimination statutes. To that end, they devise, as best they can, job-related human resources practices that avoid discriminating against employees and applicants, *inter alia*, on the basis of race, color, religion, sex, national origin, disability, military service, gender identity, sexual orientation, political affiliation, arrest record, marital status, place of residence, genetic information, matriculation, and family responsibilities. The task is difficult; altering a test or procedure to ameliorate a potential disparity as to one protected category can create or aggravate an adverse impact with respect to another. *DiBiase*, 48 F.3d at 731-32 ("Even a completely neutral practice will inevitably have some disproportionate impact on one group or another").

Before implementing a new tool (such as a new evaluation procedure or hiring questionnaire) or proceeding with a process (such as a reduction in force), employers often use adverse impact testing to determine if they are complying with

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above" rule that would make irrelevant neutral or even favorable treatment of the oldest workers.

their non-discrimination obligations, especially as to race, gender, and age. Adverse impact testing entails comparing outcomes for those within and outside the various protected classes. This statistical work is usually straightforward.

If the protected class were mutable and subject to gerrymandering long after the fact, however, no such testing would be possible, because the employer would have no way of knowing what slice of the workforce some plaintiff will pick at a later (and often much later) date. This problem would be especially pronounced with age testing for practices that are applied regularly over time; every day, each employee gets older and moves from one potential opportunistically-selected subcategory into another.

Thus, the conception of the statute urged here would not do what the statute was designed to do: "help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Rather, it would enshrine a liability scheme that would make it impossible for an employer to know whether it's policy or practice has a disproportionate impact on some slice of the protected age group yet to be determined, and would prevent the employer from being able to correct that "discrimination" before it occurs. The Court should reject a construction of the statute so antithetical to the purpose for which it was enacted.

CONCLUSION

For the foregoing reasons, the judgment of district court should be affirmed.

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Respectfully submitted,

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**CERTIFICATE OF BAR MEMBERSHIP,
COMPLIANCE WITH TYPEFACE LIMITATIONS,
AND VIRUS CHECK**

I, Neal D. Mollen, counsel for amicus curiae, certify, pursuant to Local Appellate Rule 28.3(d), that I am a member in good standing of the Bar of this Court. I further certify, pursuant to Federal Rules of Appellate Procedure 29(d), 32(a)(5)-(7), and Local Appellate Rules 31.1 (c) and 32.1(c), that the foregoing Brief of Amicus Curiae the Chamber of Commerce of the United States in Support of Appellee is proportionately spaced and has a typeface of 14 point Times New Roman, contains 6,995 words, and that the text of the electronic brief is identical to the text of the paper copies. I further certify, pursuant to Local Appellate Rule 31.1(c), that McAfee VirusScan Enterprise + AntiSpyWare Enterprise, version 8.8 did not detect a virus.

s/ Neal D. Mollen
Neal D. Mollen

June 15, 2016

CERTIFICATE OF SERVICE

I, Neal D. Mollen, counsel for amicus curiae, certify that, on June 15, 2016, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. All counsel of record in this case are registered CM/ECF users. Pursuant to Local Appellate Rule 31.1, as amended by the April 29, 2013 order, seven copies of this brief were sent to the Clerk of the Court for delivery.

s/ Neal D. Mollen
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June 15, 2016