No. 17-1206

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DALE E. KLEBER,

Plaintiff-Appellant,

v.

CAREFUSION CORP.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
HON. SHARON JOHNSON COLEMAN
CASE NO. 1:15-CV-1994

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel provides the following statement in compliance with Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1:

1. The full name of every party that the attorney represents in the case:

Amicus curiae Chamber of Commerce of the United States of America.

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Akin Gump Strauss Hauer & Feld LLP

U.S. Chamber Litigation Center

3. If the party is a corporation:

i. Identify all its parent corporations, if any:

Amicus has no parent corporations.

ii. List any publicly held company that owns 10% or more of the party's stock:

No publicly held company owns ten percent or more of *amicus*'s stock.

/s/ Donald R. Livingston
Donald R. Livingston

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/s/ Warren Postman
Warren Postman

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three 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 its members' interests before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of national concern to American business.

The Age Discrimination in Employment Act strikes a careful balance between prohibiting irrational barriers to the employment of older workers and preserving employers' ability to adopt sound hiring policies. The Chamber's members have a strong interest in preserving that appropriate balance because they frequently litigate claims under the Age Discrimination in Employment Act, including disparate impact claims asserted under § 4(a)(2) of the Act. A ruling that incorrectly expands the scope of § 4(a)(2) by permitting unsuccessful applicants' disparate impact claims would disrupt that balance and would subject the

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

Chamber's members to costly, unwarranted litigation that Congress never intended.

The Chamber is uniquely situated, by virtue of its members' considerable experience with litigation under the Age Discrimination in Employment Act in general, and disparate impact claims in particular, to address the question presented. The Chamber believes that this brief, which does not repeat the Appellee's legal arguments and instead addresses in more detail the practical consequences of reversal for businesses in this Circuit and beyond, will aid the Court's review.

SUMMARY OF ARGUMENT

In the Age Discrimination in Employment Act of 1967 (ADEA), Congress carefully circumscribed the manner in which employers could be subject to liability based on a neutral employment practice that had a disparate impact based on age, imposing narrower liability than for race and other protected classes under Title VII of the Civil Rights Act. Congress had sound policy reasons for engaging in this careful line drawing, because age is different than the other classifications protected from employment discrimination. Most pertinent here, Congress did not face the same need to restrict the use of neutral employment practices that could operate to freeze a status quo of disparate employment outcomes due to a long history of racism or other bias in education and society. Older workers today were

younger workers yesterday; their employment prospects under neutral employment criteria are not reduced by the headwinds of a lifetime of discrimination on account of age. Congress thus opted to significantly narrow the scope of disparate impact liability concerning older workers.

One of the careful lines drawn by Congress was to preclude disparate impact claims under the ADEA by job applicants, as opposed to employees. Many important, widespread hiring practices, including on-campus recruiting, could be expected to have a disparate impact simply because of the average age of the college student population. These programs have enormous benefits for businesses. They are a key means for employers to access the cutting-edge advances from colleges and universities, and they permit companies to create robust programs for developing homegrown leaders. Although employers might often be able to avoid liability under the ADEA because of the reasonableness of these programs, Congress chose instead not to put employers to the choice of either shutting down college recruiting or facing ongoing, perpetual litigation scrutiny—as college students and recent graduates will always be younger, on average, than the general population. It makes sense for Congress to distinguish age in this context from the protected classes under Title VII; in the age context, one could not expect any disparate impact from college recruiting to reflect the vestiges of a long history of disparity in educational opportunities. Instead, any disparate

impact reflects the simple fact that college students tend to be younger—not that older workers are being held back because of a lifetime of discrimination based on age. Congress thus made a considered, categorical choice that widespread hiring practices should not be subject to disparate impact liability when they not only further important values for employers, but also do not operate to perpetuate a status quo that reflects a history of institutional age discrimination.

ARGUMENT

CONGRESS'S DECISION NOT TO PERMIT FAILURE-TO-HIRE DISPARATE IMPACT CLAIMS UNDER THE ADEA REFLECTS SOUND POLICY

Section 4(a)(2) of the ADEA 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." 29 U.S.C. § 623(a)(2). For the reasons stated by Defendant-Appellee CareFusion Corp., the Chamber agrees that the text, structure, and history—as well as comparison to the text and history of the contrasting provision found in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2)—compel the conclusion reached by every court of appeals to have considered the question presented: Congress chose not to make it an unlawful employment practice for employers to adopt hiring practices that may have a disparate impact on applicants by age. That line drawing makes sense

because, unlike with employee promotions or terminations, employers have long engaged in a wide range of sound hiring practices that are age neutral, but are likely to have a disparate impact based on age.

Yet Plaintiff-Appellant Dale E. Kleber's argument, breaking ranks with the Supreme Court and other Courts of Appeals, would stamp these policies as *prima facie* violations of the ADEA. According to Kleber, "the ADEA's disparate impact provision must cover applicants" in order "to fulfill Congress's intent" and to achieve Congress's "[p]rimary [g]oal." Br. 28. But "it is quite mistaken to assume . . . that 'whatever' might appear to 'further[] the statute's primary objective must be the law,'" as "[l]egislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose[] at all costs.'" *Henson v. Santander Consumer USA Inc.*, --- S. Ct. ----, No. 16-349, 2017 WL 2507342, at *6 (June 12, 2017) (alterations except third in original) (citation omitted). The real-world implications of allowing disparate impact hiring claims underscores the soundness of Congress's careful delineation of unlawful employment practices within Section 4(a)(2) and reinforces that Kleber's position is incorrect.

A. The Dissimilar Wording Of The ADEA And Title VII Disparate Impact Provisions Reflects Important Differences Between Age And Race

Under either the ADEA or Title VII, "[t]o establish a prima facie case of discrimination [by disparate impact], a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact." *Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *see Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (explaining that "[i]n [ADEA] disparate-impact cases *** the allegedly 'otherwise prohibited' activity is not based on age" because such claims "'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'" (citations omitted)); *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 69 (3d Cir. 2017) ("To state a prima facie case for disparate impact under the ADEA, a plaintiff must (1) identify a specific, facially neutral policy, and (2) proffer statistical evidence that the policy caused a significant age-based disparity."). Because the very premise of disparate impact is that the employer does not act with discriminatory intent, disparate impact claims are based on "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the [disproportionate] exclusion" of persons with the protected characteristic. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988); *see, e.g.*, *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 n.13 (2008) (noting that factual causation element of ADEA disparate

impact claim "is typically shown by looking to data revealing the impact of a given practice on actual employees").

The ADEA and Title VII, however, treat disparate impact claims in materially different ways. *Contra* Appellant Br. 20 (arguing that "it is only logical to interpret the two statutes as protecting the same people"). As the Supreme Court recognized in *Smith*, "textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII." 544 U.S. at 240. For example, "[u]nlike Title VII . . . , § 4(f)(1) of the ADEA, 81 Stat. 603, contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" *Id.* at 233; *see* 29 U.S.C. § 623(f)(1).

As this Court held in *EEOC v. Francis W. Parker School*, there are also "noteworthy" textual differences with respect to the treatment of applicants for employment. 41 F.3d 1073, 1077-78 (7th Cir. 1994). While Section 4(a)(2) of the ADEA refers solely to "employees" in authorizing disparate impact claims, 29 U.S.C. § 623(a)(2), Title VII's comparable provision refers to "employees or applicants for employment," 42 U.S.C. § 2000e-2(a)(2). That result continues to be independently "dictated by the statute itself," 41 F.3d at 1078, regardless of the

other grounds identified in *Francis W. Parker School* for concluding that the ADEA did not authorize disparate impact relief for the applicant in that case.

The omission of "applicants" in Section 4(a)(2) cannot be deemed accidental; it shows that Congress intended the ADEA to have a narrower scope than Title VII. The ADEA expressly refers to "applicants for employment" in other provisions governing retaliation and labor union practices, underscoring that Congress knew how to extend the ADEA's provisions to "applicants" when it wished to do so. *See* 29 U.S.C. § 623(c)-(d). Against this statutory backdrop, the omission of "applicants for employment" from the ADEA's disparate impact provision is dispositive and must be given effect. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (citation and internal quotation marks omitted)). That is particularly true given that Congress has no trouble drawing lines when it comes to disparate impact claims. *See, e.g.*, *Smith*, 544 U.S. at 239 n.11 (noting that Equal Pay Act of 1963 bars disparate impact claims altogether); 42 U.S.C. § 1981a(a)(1) (permitting compensatory and punitive damages only for "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)").

Congress's decision to create narrower disparate impact liability under the ADEA than under Title VII stands on an important policy footing: age discrimination does not consign individuals to a lifetime of disadvantage, such that neutral policies could freeze in place the effects of prior discriminatory practices. Policies that give rise to disparate impact liability, by definition, are neutral on their face and often supported by valid business judgments having nothing to do with a protected trait. These policies, unlike acts of intentional discrimination, are not inherently suspect. Rather, disparate impact liability is premised in large part on the view that neutral policies may need to be altered as an affirmative remedy to eliminate the vestiges of a lifetime of intentional discrimination.

Thus, in interpreting Title VII to authorize disparate impact claims, the Supreme Court in *Griggs v. Duke Power Co.* explained that its conclusion was based on its understanding that "[u]nder the Act, 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*." 401 U.S. 424, 430 (1971) (emphasis added). Subsequent Supreme Court precedent reinforces that congressional purpose of actively combatting the vestiges of discrimination:

> We concluded [in *Griggs*] that Title VII prohibits "procedures or testing mechanisms that operate as '*built-in headwinds*' for minority groups." We found that Congress' primary purpose was the

> *prophylactic* one of achieving equality of employment "opportunities" and removing "barriers" to such equality.

Teal, 457 U.S. at 448-49 (emphasis added) (internal citations omitted); *see also id.* at 447 ("*Griggs* recognized that in enacting Title VII, Congress required 'the removal of artificial, arbitrary, and unnecessary barriers to employment' and professional development that had historically been encountered by women and blacks as well as other minorities.").

With respect to the ADEA, Congress did not face the same impetus to guard against neutral employment policies that could perpetuate and lock-in a status quo that had been created by decades of social and employment discrimination against a discrete, fixed group of individuals. Where neutral employment practices could operate to freeze a discriminatory society where it was, as with race discrimination, Congress chose to subject such practices to demanding scrutiny. *See Griggs*, 401 U.S. at 432 (confronting race disparate impact claims based on "diploma and test requirements"). But the workers who are older than 40 today were younger than 40 yesterday. Their educational achievements, social position, and employment prospects when they enter the protected class have not been shaped by discrimination *on account of their age*. Unlike racial minorities and women, older workers did not face societal headwinds that might lock them into a lifetime of inferior job prospects absent judicial scrutiny of even neutral employment practices.

Accordingly, faced with the option of lumping together classes of persons facing uncommon barriers to employment, Congress had good reason to "reject[] proposed amendments that would have included older workers among the classes protected from employment discrimination" by Title VII. *Smith*, 544 U.S. at 232. A report by Secretary of Labor W. Willard Wirtz, on which Congress drew heavily in crafting the ADEA, *EEOC v. Wyoming*, 460 U.S. 226, 229-32 (1983), reflects the common understanding that age discrimination is different. *See* U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment*, at 1-2 (1965) ("Wirtz Report"). The Wirtz Report explained that it "would be easy—and wrong"—to "extend the conclusions derived from [Title VII] to the problem of discrimination in employment based on aging" because "'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example—race." *Id.* Congress thus sensibly crafted the ADEA to have a narrower scope: it did not permit disparate impact at all for hiring claims, and it gave employers a less-difficult defense to those disparate impact claims that can be asserted.

B. The Differences Between Age And Race Discrimination In The Hiring Context Are Illustrated By Ubiquitous Recruiting Practices Familiar To The Chamber's Members

These core distinguishing features of the ADEA and Title VII are well illustrated by failure-to-hire disparate impact claims. Businesses regularly recruit students and recent graduates from college and university campuses using a variety of means—including on-campus interviewing, on-campus recruiting, and internship and externship relationships with colleges and universities. *See, e.g.*, PAUL GILLIS, THE BIG FOUR AND THE DEVELOPMENT OF THE ACCOUNTING PROFESSION IN CHINA 165 (1st ed. 2014) (noting "the ubiquitous presence of the Big Four [accounting firms] on college campuses worldwide"); Press Release, Coll. Emp't Research Inst., Mich. State Univ., Rapid Growth in Job Opportunities for College Graduates (Oct. 7, 2014) (discussing on-campus recruiting activities and state of college labor market).[2] Beyond simply hiring students and recent graduates, businesses also structure important training and development programs around recent-graduate recruitment. *See, e.g.*, *Grossmann v. Dillard Dep't Stores, Inc.*, 109 F.3d 457 (8th Cir. 1997) (discussing "Executive Development Program"); *O'Rourke v. CNA Ins. Cos.*, No. 88-cv-942, 1990 WL 207328 (N.D. Ill. Nov. 21, 1990) (discussing "rotational training program" used to "recruit and train recent college graduates with accounting degrees").

[2] *Available at* http://www.ceri.msu.edu/wp-content/uploads/2014/10/press-release-1-10-7-14.pdf.

Many of these recruiting practices could be expected to have a disparate impact based on age. Although there has been considerable growth in the number of undergraduates who are "adult students"—"[t]hirty-eight percent of those enrolled in higher education are over the age of 25 and one-fourth are over the age of 30"—college students are overwhelmingly still under the age of 25. Frederick Hess, *Old School: College's Most Important Trend Is the Rise of the Adult Student*, THEATLANTIC.COM, Sept. 28, 2011 (discussing National Center for Education Statistics report).[3] The demographic of professional schools is not much older. For example, half of law school applicants from 2005 to 2009 were between the ages of 22 and 24, and only five percent were over the age of 40. *See* Kimberly Dustman & Phil Handwerk, Law School Admissions Council, *Analysis of Law School Applicants by Age Group: ABA Applicants 2005-2009*, at 2 (Oct. 2010)[4]; *see also, e.g.*, Columbia Business School, *Class Profile* (last visited June 26, 2017) (average age of MBA student for class entering 2016 is 28, and 80% of students are 25-31).[5]

[3] *Available at* http://www.theatlantic.com/business/archive/2011/09/old-school-colleges-most-important-trend-is-the-rise-of-the-adult-student/245823/.

[4] *Available at* http://www.lsac.org/docs/default-source/data-%28lsac-resources%29-docs/analysis-applicants-by-age-group.pdf.

[5] *Available at* http://www8.gsb.columbia.edu/programs/mba/admissions/class-profile.

Unlike with Title VII disparate impact claims, however, the fact that college- and university-age students are predominantly in their teens or twenties is not a product of institutionalized discrimination. *See* pp. 9-11, *supra*. Instead, it reflects the reality that higher education is a traditional path *to* the workforce taken early in an individual's career arc. Accordingly, there is no basis to deem on-campus recruiting an "artificial, arbitrary, and unnecessary barrier[] to employment" that "operate[s] invidiously" with respect to age, *Griggs*, 401 U.S. at 431, and no provocation for extending disparate impact claims to applicants for employment under the ADEA for the "prophylactic [purpose] of achieving equality of employment 'opportunities,'" *Teal*, 457 U.S. at 449.

C. Stretching The Text Of The ADEA To Permit Failure-To-Hire Disparate Impact Claims Would Have Significant Consequences For Businesses Nationwide

The practical consequences of ignoring Congress's considered and distinct treatment of ADEA disparate impact claims reinforce the conclusion that ADEA disparate impact claims should not be given the same scope as Title VII disparate impact claims meant to eliminate "built-in headwinds" of discrimination.

First, while Kleber's theory treats the posting of experience ranges in job listings as *prima facie* unlawful, that practice is both widespread and helpful to employees and employers alike. Many prospective employers have limited time and resources in which to review and evaluate a large number of applications.

Faced with that task, there are obvious efficiency reasons to focus recruitment and hiring efforts on applicants whose experience fits the job opening. Namely, while repeatedly screening, interviewing, and extending offers to overqualified job applicants might occasionally result in a successful hire, there is nothing discriminatory about an employer preferring not to spend time and effort on job applicants who are clearly overqualified for, and thus less likely to accept, the position. Moreover, as the record in this case reflects, many employers have a "reasonable concern that an individual with many more years of experience would not be satisfied with less complex duties or comfortable taking direction from an [employee] with less experience which could lead to issues with retention." R.22, Ex. 5, at 3.

Second, on-campus recruiting is a critical part of many businesses' strategies for retaining and developing the best talent. Companies that hire the most new college graduates have a "common thread" of a "promote-from-within model," not because they prefer employees of a certain age, but rather because recruiting large numbers of recent graduates enables them to produce "[h]omegrown leaders" that "have a familiarity with the company and understand its future." Seth Cline, *The Companies Hiring the Most New College Grads*, FORBES.COM, July 21, 2010[6]; Gillis, *supra*, at 165 (practice of "hiring mostly new college graduates" allows

[6] *Available at* http://www.forbes.com/2010/06/21/companies-hiring-college-graduates-leadership-careers-jobs.html.

"firms to instill their culture and professionalism before the recruits are influenced by experience in another organization"). Indeed, the Wirtz Report recognized that "[p]ersonnel polices are properly designed to establish an orderly system for assignment and promotion of already employed workers" even though such "[p]romotion-from-within policies" often "restrict[] outside recruitment to low-level jobs and younger workers." Wirtz Report, *supra*, at 15. The Wirtz Report described such programs as a "mark of civilization" that "vastly enhance the dignity . . . of the later years of life," and did not recommend that any changes be made with respect to this "institutional arrangement[] that indirectly restrict[s] the employment of older workers." *Id.* at 2, 15 (capitalization omitted).

Companies also look to recent graduates to bring cutting-edge advances in their fields from the classroom to the workplace. *See, e.g.*, *Sack v. Bentsen*, 51 F.3d 264 (1st Cir. 1995) (unpublished table decision) (rejecting ADEA disparate treatment claim because recent law school graduates "had more current legal knowledge, as evidenced by their recent legal education"); *Mistretta v. Sandia Corp.*, Nos. 74-536-M, 74-556-M, 75-150-M, 1977 WL 17, at *7 (D.N.M. Oct. 20, 1977) ("The available labor market for Sandia technical staff would be expected to come from recent graduates at all degree levels, in addition to the most recent exposure to advanced education, new techniques and new discoveries in the fields of science[.]"). These practices have become increasingly important in the Internet

age, whether because employers are conducting "virtual" on-campus recruiting[7] or instead believe that in-person recruiting gives them a competitive edge.[8]

Notably, such beneficial effects of on-campus and recent-graduate recruiting are important to federal agencies also, and reflected in their recruitment programs. For instance, the Department of Justice's "Honors Program is 'the exclusive means by which the Department hires' all of its entry-level attorneys, including 'recent law school graduates and judicial law clerks who do not have prior legal experience.'" *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 164 (D.C. Cir. 2013) (citation omitted). Likewise, in some years, the EEOC has run its own "Attorney Honor Program," for which the only eligible applicants are "third-year law student[s]," "full-time graduate law student[s]," and "Judicial Law Clerk[s]" whose "clerkship must be [their] first significant legal employment following [their] graduation." U.S. Equal Employment Opportunity Commission, *EEOC Attorney Honor Program* (last visited June 26, 2017).[9] In short, the EEOC seeks to "hire[] recent graduates." *Id.* Judicial clerkship programs, too, insist that "[a]pplicants must be recent law school graduates." New Jersey Courts, *New Jersey Judiciary*

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[7] John A. Byrne, *The Online MBA Comes of Age*, FORTUNE, May 29, 2013, http://fortune.com/2013/05/29/the-online-mba-comes-of-age/.

[8] Richard White, *Getting the Competitive College Recruiting Edge*, MONSTER.COM (last visited June 26, 2017), http://hiring.monster.com/hr/hr-best-practices/workforce-management/emerging-workforce/college-recruiting.aspx.

[9] *Available at* http://www.eeoc.gov/eeoc/jobs/honorprogram.cfm.

Law Clerk Application and Hiring Process: Fact Sheet (last visited June 26, 2017).[10]

As courts made explicit long ago, "the bare fact that an employer encourages employment of recent college and technical school graduates does not constitute unlawful age discrimination." *E.g.*, *Williams v. Gen. Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981) (disparate treatment case). But if this Court holds that Section 4(a)(2) of the ADEA permits applicants for employment to bring disparate impact claims—which by definition do not involve disparate treatment because of age—the "bare fact" that a business has a practice or policy of hiring students and recent graduates may in fact expose businesses to claims of liability by virtue of the statistics discussed above.

Congress's decision that these important, widespread hiring practices should not be deemed *prima facie* unlawful simply because of the average age of the college student population was one way among several in which Congress recognized that age is different from the classifications protected by Title VII.

Third, engrafting an atextual disparate impact hiring claim onto the ADEA would also impose unwarranted costs on businesses. The bare fact that a business has a practice or policy with a disparate impact based on age—such as on-campus recruiting—is likely to expose businesses to large collective action claims by virtue

[10] *Available at* https://www.judiciary.state.nj.us/public/assets/lawclerkrecuitmentfactsheet.pdf

of mere statistics. Indeed, plaintiffs already attempt to shoehorn meritless on-campus recruiting claims into the ADEA's disparate treatment framework. *See, e.g.*, *Grossmann*, 109 F.3d at 459 (dismissing ADEA disparate treatment claim because fact that "Dillards recruits recent college graduates" as part of its "Executive Development Program" is "not evidence it discriminates against older workers"); *Stone v. First Union Corp.*, 203 F.R.D. 532, 549 (S.D. Fla. 2001) (decertifying class action alleging pattern or practice claim of disparate treatment regarding "recruiting on college campuses for graduates to enter a management training program"). Embracing an extension of the disparate impact framework would only invite a greater number of such claims premised on as little as the makeup of a college's or university's student body.

It is no answer that those claims would likely fail due to the affirmative defenses available to employers under the ADEA. As discussed (p. 7, *supra*), the ADEA "contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" *Smith*, 544 U.S. at 233; *see* 29 U.S.C. § 623(f)(1). As the Tenth Circuit has recognized post-*Smith*, "recruiting concerns are . . . reasonable business considerations" that qualify for that so-called "RFOA" defense. *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006); *accord Magnello v. TJX Cos.*, 556 F. Supp. 2d 114, 123 (D. Conn. 2008) ("Defendant

asserts that it is appropriate and reasonable to recruit recent college graduates for a training program with entry-level pay. In light of the job requirements and pay level, plaintiff has not demonstrated that defendant's use of college recruitment is unreasonable.").[11] But the fact that the RFOA defense should ultimately insulate employers from liability is no answer to the fact that employers will incur risk and significant costs litigating these suits.

That consideration has particular force with respect to disparate impact claims brought by applicants for employment. In addition to the fact that *prima facie* claims are based on statistical evidence, courts have held that RFOA, "as an affirmative defense not anticipated in the pleadings, . . . provides no basis for relief on a motion to dismiss, as opposed to a motion for summary judgment." *Loffredo v. Daimler AG*, 500 F. App'x 491, 498 (6th Cir. 2012); *see Cummins v. City of Yuma*, 410 F. App'x 72, 73 (9th Cir. 2011) (applying rule that RFOA defense may only form basis for dismissal if plaintiff pleads necessary facts in complaint); *Mabry v. Neighborhood Defender Serv.*, 769 F. Supp. 2d 381, 395 (S.D.N.Y. 2011) (same); *cf. Davis v. District of Columbia*, 949 F. Supp. 2d 1, 9-10 (D.D.C. 2013) (same for business necessity defense in Title VII case). Thus, employers typically must proceed through discovery—no trivial imposition—in order to prevail,

[11] These cases concern claims by terminated employees challenging reductions in force. As CareFusion notes, "every . . . court of appeals to address the issue has agreed that § 4(a)(2) disparate impact claims are not available to job *applicants*." Appellee Br. 9, 23 (emphasis added).

barring plain deficiencies on the face of a complaint, *e.g.*, *Smith*, 544 U.S. at 241 (requiring employee to "isolat[e] and identify[] the *specific* employment practices that are allegedly responsible for any observed statistical disparities"); *Magnello*, 556 F. Supp. 2d at 123 ("Plaintiff offers as evidence only the percentage of individuals under 40 hired into the PASE program. However, plaintiff has adduced no evidence or statistical comparison that would give rise to an inference of causation between defendant's employment practice and the disproportionate impact upon applicants over 40.").

Fourth, disparate impact hiring claims under the ADEA will not only impose direct costs on employers named as defendants, but will also create pressure for employers to abandon perfectly lawful and legitimate age-neutral hiring practices in order to avoid these burdens. *See Watson*, 487 U.S. at 993 (describing possibility that disparate impact liability could cause employers to adopt worse alternatives as a "cost-effective means of avoiding expensive litigation and potentially catastrophic liability"). These policies have real benefits for employers and recent graduates, and it is critical to keep the disparate impact "analysis within its proper bounds," *id.* at 994, in order to avoid an unnecessary abandonment of widespread hiring practices.

Fifth, Kleber's argument invites courts to second-guess unnecessarily the reasonableness of age-neutral hiring policies. Congress's intent in guarding

against discriminatory employment practices has never been to task the judiciary with micromanaging the employer-employee relationship. *See McKennon v. Nashville Banner Publ'g Co.,* 513 U.S. 352, 361 (1995) ("The ADEA . . . is not a general regulation of the workplace but a law which prohibits discrimination."). Because failure-to-hire disparate impact claims involve facially neutral policies by definition, and typically will center on the RFOA defense, such claims will force courts to be armchair human resource managers, subjecting many routine hiring practices to *post hoc* judgments regarding reasonableness.

* * *

In light of the text and structure of Section 4(a)(2) of the ADEA, and the considerable consequences of permitting applicants for employment to make disparate impact claims under that provision, it is plain that Congress did not intend to subject employers to the potential cost of litigating such suits merely because they adopt routine, widespread, and important recruiting practices embraced by the private sector and the government alike. Simply put, "[Congress] does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Accordingly, this Court should make clear that *Francis W. Parker School* continues to be binding precedent and affirm the district court's judgment limiting disparate impact claims to current employees.

CONCLUSION

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

Respectfully submitted,

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June 28, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I certify that the foregoing brief complies with the type-volume limitation prescribed by Circuit Rule 29. The brief contains 4,947 words in Times New Roman font, 14-point size.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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