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Brief of Amici Curiae Labor Economists and Social Scientists in Support of the Petition for Writ of Certiorari

Fred T. Korematsu Center for Law and Equality

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No. 16-971

In The Supreme Court of the United States

RICHARD M. VILLARREAL,

Petitioner,

v.

R.J. REYNOLDS TOBACCO CO., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE LABOR ECONOMISTS AND SOCIAL SCIENTISTS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are labor economists and social scientists listed in Appendix A. Amici have substantial expertise in employment discrimination or the harmful effects of discrimination on older individuals and the labor market. Amici are interested in this case because stronger anti-discrimination laws improve older workers' chances of being hired, benefitting them and the economy.

SUMMARY OF ARGUMENT

Hiring discrimination against older workers was the central problem that the Age Discrimination in Employment Act ("ADEA") sought to address; that much is clear from the Act's extensive legislative history. Yet, research shows that age discrimination in hiring remains pervasive. Managers often hold negative age-related stereotypes – for example, that older workers are slow, or resistant to new technology – which too easily infect hiring decisions. Thus, older jobseekers fare much worse than their younger counterparts in finding work, placing them at risk of poverty.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Correspondence evidencing the parties' consent to the filing of this brief are on file with the clerk. The parties were notified ten days prior to the due date of this brief of the intention to file.

Stronger anti-discrimination law helps older workers find new jobs more easily, much as anti-discrimination law has helped reduce race and sex discrimination. Moreover, one can infer based on research on sex and race discrimination that disparate impact liability helps to reduce employer reliance on age stereotypes in hiring and to prompt managerial change.

ARGUMENT

I. AGE DISCRIMINATION IN HIRING WAS CONGRESS' CENTRAL CONCERN IN ENACTING THE ADEA

The Age Discrimination in Employment Act ("ADEA") opens with Congress' first and central finding: "In the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment*, and especially to regain employment when displaced from jobs*." 29 U.S.C. § 621(a)(1) (emphasis added). The history of the ADEA's passage reveals that "especially" is an understatement. Discrimination in hiring was, overwhelmingly, the problem Congress enacted the ADEA to address. *See, e.g.*, S. Rep. No. 90-723, at 4 (1967) ("Senate Report") at 4 (the "primary purpose of the bill" is "the hiring of older workers"); *accord* H.R. Rep. No. 90-805 at 1 (1967) ("it is the purpose of [the ADEA] to promote the employment of older workers based on their ability"); Statement of Sen. Javits, *Age Discrimination in Employment: Hearing on S. 830 and S. 788 Before*

the S. Subcomm. on Labor, Comm. on Labor and Public Welfare, 90th Cong. 1st Sess. 22 (1967) at 28 ("I think we all agree on the ultimate objective of this hearing: that is, to report a meaningful bill to protect the opportunities of older workers to find employment"); Statement of Rep. Dent, 113 Cong. Rec. 34746 (1967) ("the problem addressed . . . is so obvious that to belabor it is to dull it. I am talking about the frustration and failure many workers incur in trying to gain employment when they happen to be 40, 50, or even 60 years of age"). Indeed, the fact that hiring discrimination dominated the debate is perhaps the most surprising aspect of the legislative record to the contemporary reader.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), this Court held that the ADEA includes a disparate impact cause of action, subject to the defense provided by its "reasonable factors other than age" provision. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 101 (2012) (internal quotation marks omitted). Did Congress create a disparate-impact cause of action under the ADEA, only to exclude hiring discrimination from its application? One should hesitate before concluding that the ADEA "adopted such a topsy-turvy approach." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1071 (2016) (Roberts, C.J.)

The Wirtz Report (Dep't of Labor, *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act, Doc. No. 5 (1981)) was central to the development of the ADEA, and has been central to this Court's understanding of the statute. *See*, *e.g.*, *Smith*, 544 U.S. at 232-33, 238; *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 587-88, 590 (2004). The Wirtz Report was prepared by Secretary of Labor W. Willard Wirtz in 1965 by order of Congress, and was based upon (and contained a separate volume of) detailed and accessible governmental labor market research studies. Wirtz Report, Letter of Transmittal; Wirtz Report, Research Materials iii ("Research Materials") (identifying participating agencies). The overarching concern raised by the Wirtz Report was discrimination in hiring (*accord* Barbara Lindemann, et al., *Age Discrimination in Employment Law* 1-5 (2d ed. 2015)), and the prevalence of hiring discrimination was extensively documented in the accompanying research materials.

The Wirtz Report identifies the fact that "employers and supervisors often rate their own older workers high in overall performance, but are at the same time reluctant to hire new employees in the same age brackets," Wirtz Report at 9, as the central puzzle of hiring discrimination. The Report points to numerous practices that contribute to this puzzle. For example, the

Report and its studies discuss the arbitrary use of "categorical" age restrictions (including preferences for "recent college graduates," Research Materials at 113); they also note the pre-employment use of "formal employment standard[s]," such as high-school diploma requirements, Wirtz Report at 3, to provide "evidence of desirable personal characteristics" rather than to "measure or contribute to job performance," Research Materials at 67.

Later sections of the Wirtz Report note in greater detail the "forces of circumstance" that affect the hiring of older workers, Wirtz Report at 11. These include differences (e.g., in educational attainment, *id.* at 11-13, and health status, *id.* at 11) that are, at least in some cases, relevant to job performance. In addition, the Wirtz Report discusses "institutional arrangements that indirectly restrict the employment of older workers." *Id.* at 15. These include "a broad range of personnel programs and practices," *id.*, such as seniority systems, employee benefit plans, and promotion-from-within policies,[2] some of which provide security for already-employed older workers but "ironically" create

[2] Even in 1967, there was reason to question the reasonableness of excluding older workers under these policies. *See* Senate Report at 269 (testimony of John Willard, National Employment Association (a trade group of employment agencies) ("in the fluid and dynamic state that our business economy is in at the present time," employers cannot count on the ambitious young worker staying around long enough to be available for promotion in the course of "orderly succession").

obstacles to the hiring of displaced older workers. *Id.* at 2; *see also* Research Materials at 59-60.[3]

As to these factors, Congress made choices: it used express exclusions for some, but not for others. In the case of bona fide seniority systems and employee benefit plans, the bill was amended at Senator Javits' strong suggestion to craft a partial exemption aimed at removing this obstacle to hiring. *See* 29 U.S.C. § 623(f)(2); S. Rep. No. 90-723, at 4 (1967); *id.* at 13 (Individual Views of Mr. Javits). But except in the case of seniority systems and benefit plans, Congress rejected the use of exemptions. In the case of age-restricted management training programs, for example, the House rejected an amendment sought by industry that would have exempted such programs. The reason was overbreadth: "[a]lmost any training, or opportunity for acquiring experience on the job, might be construed as leading to future advancement to management positions." H.R. Rep. No. 90-805 at 4 (1967). Similarly, the

[3] The dissent in *Smith* used the Wirtz Report's distinction between "arbitrary discrimination" on the one hand and these "circumstances" and "institutional arrangements" on the other to argue against the availability of disparate impact claims under the ADEA, 544 U.S. at 255-56 (O'Connor, J., dissenting), but that position was rejected by the Court. Reviewing these same passages of the Wirtz Report – passages all of which concerned hiring discrimination – the *Smith* Court concluded that Congress' response to these issues was to allow disparate impact claims under the ADEA, but subject to the "narrower" "reasonable factors other than age" defense. 544 U.S. at 240-41 (Stevens, J., opinion of the Court) (discussing the Wirtz Report and holding that "the RFOA provision reflects" the differences between age discrimination and "race or other classifications protected by Title VII").

House Report noted that in some industries there were acknowledged concentrations of older workers, and that the hiring of younger workers might be justified by the need to maintain a measure of age balance in the workforce. *Id.* at 7. In both of these cases, Congress called for case-by-case assessment of the adverse impact of such programs on older workers balanced against the need for such programs. *Id*. ("it is expected that the Secretary will recognize these particular situations and treat them according to their individual merits on a case-by-case basis"); *accord* Senate Report at 7 (calling for the statute to be "administered" in a way that is sensitive to age-balance issues in industries with high concentrations of older workers).[4]

The Wirtz Report closes by calling for "a national policy with respect to hiring on the basis of ability rather than age," which would result in increasing the availability of jobs for older workers. Wirtz Report at 23. The ADEA was Congress' answer to that call, and the disparate impact cause of action is a crucial part of it. The ADEA's "reasonable factors other than age" defense (which, per *Smith*, is the defense applicable to disparate impact claims) is well-designed to permit the kind of case-by-case analysis proposed by the House

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[4] *See also Age Discrimination in Employment: Hearing on H.R. 3651, H.R. 3768, and H.R. 4221 Before the Gen. Subcomm. on Labor, Comm. on Education and Labor*, 90th Cong. 1st Sess. 68 (1967) (statement of Rep. Dent, noting, over industry objections, that "many employers use [educational requirements] as their dodge or coverup for not wanting to employ a person over 40 years of age" and that the ADEA would require employers to "consider the effect" of such requirements).

and Senate Reports. As this Court explained in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2523 (2015), "reasonableness" defenses to disparate impact claims exist to allow for countervailing "legitimate concerns," particularly those which serve interests that are themselves consistent with the goals of the statute. "To be sure, the [Fair Housing Act] framework may not transfer exactly to the [age-discrimination] context, but the comparison suffices for present purposes." *Id*. The need for sensitivity in the application of the disparate impact standard is not reason to exclude it from the "heartland," *id.* at 2522, of the ADEA – which is the problem of hiring discrimination.

II. SOCIAL SCIENCE RESEARCH SHOWS THAT AGE DISCRIMINATION IN HIRING REMAINS PERVASIVE

A. Older Workers Face Discrimination in Hiring

Age discrimination in hiring has not disappeared in the ADEA's wake. There is significant scholarly consensus that age discrimination, especially at the hiring stage, "remains pervasive." David Neumark & Joanne Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?* 108 J. Pub. Econ. 1, 1-2 (2013) (citing studies); *see also* Scott J. Adams & David Neumark, *Age Discrimination in U.S. Labor Markets: A Review of the Evidence*, in *Handbook on the Economics of Discrimination* 203 (William M. Rogers III, ed., 2006). A recent review of literature on age

discrimination concluded that, despite differences in methodological approaches, "[t]he main studies almost uniformly find evidence of age discrimination in hiring." David Neumark, *Experimental Research on Labor Market Discrimination*, 54 (2016), http://www.nber.org/papers/w22022 (forthcoming J. Econ. Literature). Studies find that older workers fare worse than their younger counterparts "in terms of unemployment duration, the probability of getting hired, their incidence of displacement and the consequences of displacement in terms of reemployment earnings." Adams & Neumark, *Age Discrimination in US Labor Markets*, *supra*, at 206; Lora A. Phillips Lassus, Steven Lopez, & Vincent J. Roscigno, *Aging Workers and the Experience of Job Loss*, 41 Res. in Soc. Stratification and Mobility 81, 81-82 (2015).

There is no single explanation for employers' discrimination against older job applicants. However, age-related stereotypes – for example, that older workers are resistant to change, slow, or difficult to train – persist among managers. Richard A. Posthuma & Michael A. Campion, *Age Stereotypes in the Workplace: Common Stereotypes, Moderators, and Future Research Directions*, 35 J. Mgmt. 158, 159 & 162 (2009); Robert M. McCann & Shaughan A. Keaton, *A Cross Cultural Investigation of Age Stereotypes and Communication Perceptions of Older & Younger Workers in the USA and Thailand*, 39 Educ. Gerontology 326, 335 (2013) ("older workers . . . were generally seen by young workers as more uncomfortable with new technology, less flexible and more cautious on the job, and more loyal"); Vincent

J. Roscigno, et al., *Age Discrimination, Social Closure and Employment*, 86 Soc. Forces 313, 314 (2007); Gilbert C. Gee, et al., *Age, Cohort and Perceived Age Discrimination: Using the Life Course to Assess Self-Reported Age Discrimination*, 86 Soc. Forces 265, 268 (2007) ("employers and the lay public prefer workers in their 30s and . . . negative attitudes begin to rise around age 40"). One study showed that older applicants who tout their experience and maturity in order to "proactively suggest that their age is associated with qualities that employers value" fare worse than those who deemphasize their age or stress their youthful qualities. Marc Bendick Jr., et al., *Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices*, 84 J. Aging & Soc. Pol'y 25, 40-41 (1996). Likewise, some employers assume that younger people will work for lower wages, incur fewer significant health expenses and take less time off to deal with illness, and stay in their jobs longer. Roscigno, et al., *supra*, at 315; *see also* Nicole Maestas & Julie Zissimopoulos, *How Longer Work Lives Ease the Crunch of Population Aging*, 24 J. Econ. Persps. 139, 152-53 (2010). Thus, decades after the Wirtz Report, "[e]vidence continues to mount that statistical discrimination, judgment based on a group's characteristics rather than the individual's, is an important factor in the hiring and retention of older workers." *Id*. In this vein – and of particular relevance to disparate impact in hiring – one group of researchers reasoned that "explicit ageism is largely invisible, yet discriminatory patterns nevertheless manifest especially where the

perceived costs of ageing employees outweigh what employers deem as the benefits." Roscigno, et al., *supra*, at 325.

"Few human resource management processes rival hiring in impact on the distribution of employment opportunities and rewards." Marc Bendick, Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. Soc. Issues 238, 238 (2012). Yet, initial hiring decisions are especially prone to bias, because they are often made without detailed knowledge of individual applicants or their past performance. *Id*. at 242-43. Without detailed, personalized information about applicants, employers can easily fall back on stereotypes to winnow down the pool.

Researchers have measured hiring bias against older workers largely by comparing the reactions of employers to resumes of comparably qualified older and younger applicants.[5] For example, one study

[5] Older workers also self-report significant age-related bias in the workplace, both in response to researchers, and in EEOC charges alleging age discrimination. *See, e.g.*, Sarah von Schrader & Zafar E. Nazarov, *Trends and Patterns in Age Discrimination in Employment Act (ADEA) Charges*, 38 Research on Aging 580, 588 (2015); AARP, *Protecting Older Workers Against Discrimination Act: National Public Opinion Report*, 6 (2012) http://www.aarp.org/content/dam/aarp/research/surveys_statistics/work_and_retirement/powada-national.pdf (about one-third of older workers report experiencing or witnessing age discrimination); Richard W. Johnson & David Neumark, *Age Discrimination, Job Separations, an Employment Status of Older Workers: Evidence from Self-Reports*, 32 J. Hum. Resources 779, 782 (1997) (based on worker self-reports, "age discrimination may be an important factor in

compared employers' reactions to otherwise-similar job applicants who were aged 32 and 57 years old, respectively, and found that employers responded more favorably to the younger applicant 42 percent of the time, and more favorably to the older applicant just one percent of the time. Marc Bendick, Jr., et al., *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, 10 J. Aging & Social Pol'y 5, 10-11 (1999). A more recent, large-scale study compared employers' reactions to more than 40,000 job applications, and found evidence of hiring discrimination against older women. David Neumark, et al., *Is It Harder for Older Workers To Find Jobs?, New and Improved Evidence from a Field Experiment*, 3 (2015) http://www.nber.org/papers/w21669. Another similar study, focused on women, found that "younger applicants are 42 percent more likely than older applicants to be offered an interview in Massachusetts and 46 percent more likely in Florida." Joanna N. Lahey, *Age, Women, and Hiring: An Experimental Study*, 43 J. Hum. Resources 30, 46 (2008). That means an older job seeker must send out eight more resumes in Massachusetts and seven more in Florida than her younger counterpart to get a single interview. *Id*. at 37. In these terms, it is easy to see how employers' preferences for younger workers over their

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determining job separations and employment status of older workers"). Other research suggests workers are often correct in perceiving discrimination. *See* Gee, et al., *supra*, at 281 (2007) ("close match" between employers' stated preferences for younger workers and workers' reported experiences of discrimination.).

similarly qualified older counterparts can translate into weeks or months of additional unemployment and job-searching for older workers, if not total inability to find a job.

B. Age Discrimination in Hiring Harms Older Workers And the Economy

Americans are living longer and healthier lives, and the population as a whole is aging. Neumark & Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?*, *supra*, at 1. But longer life expectancy means that Americans will either need to save more during the earlier years of their working lives to see them through retirement, or – more likely – work longer. Reflecting that dynamic, the number of Americans in the labor force who were aged 45 years or older nearly doubled between 1990 and 2010, and individuals aged 55 years or older may comprise more than one-quarter of the labor force by 2020. Von Schrader & Nazarov, *supra*, at 581.

Age discrimination in hiring has a complex set of effects on older workers themselves and the economy as a whole. First, preventing "[a]ge discrimination *in hiring* is especially important" in allowing aging workers to remain in the workforce. Neumark, et al., *Is It Harder for Older Workers To Find Jobs?*, *supra*, at 1 (emphasis in original). This is in part because aging workers may need to change to a less physically demanding job, or find a part-time job to act as a bridge to retirement; if they cannot, their alternatives will be

to remain in an undesirable job for longer, or simply to retire earlier. *Id*. But earlier-than-intended retirement places aging workers at risk of slipping into poverty. In a 2012 survey of 1,000 Americans aged 50 or older, more than half of those who were not yet retired said they were not close to being able to retire comfortably; sixteen percent of those who were already retired predicted that their savings would run out, necessitating a return to work. AARP, *Protecting Older Workers Against Discrimination Act*, *supra*, at 5. Older widows are especially at risk; they "suffer an average 30 percent drop in living standards upon widowhood and are more likely to be living in poverty than are other groups." Lahey, *supra*, at 31; *see also* Administration on Aging, US Department of Health & Human Services, *A Profile of Older Americans: 2014*, 5 (2014), https://aoa.acl.gov/aging_statistics/profile/2014/docs/2014-profile.pdf (thirty-five percent of older women in 2014 were widows).

Further, older workers are becoming increasingly likely to face layoffs or other job displacement relative to their younger counterparts. Adams & Neumark, *Age Discrimination in US Labor Markets*, *supra*, at 197-98; Henry S. Farber, *Job Loss in the Great Recession: Historical Perspective From the Displaced Workers Survey, 1984-2010*, 7 (2011), http://www.nber.org/papers/w17040.pdf. And when job displacement occurs, discrimination in hiring (among other factors) means that older workers also tend to face longer periods of unemployment than younger workers. Lahey, *supra*, at 46; *see also* Neumark, *Experimental Research on Labor*

Market Discrimination, *supra*, at 5; Lassus, et al., *supra*, at 81-82. Among those who lose their jobs, "older workers have the lowest reemployment probabilities, the longest time to reemployment, high probabilities of part-time employment and the largest wage losses." Barry T. Hirsch, et al., *Occupational Age Structure and Access for Older Workers*, 53 Indus. & Lab. Rel. Rev. 401, 402 (2000).

Because of those dynamics, older workers felt acutely the effects of the 2007-2009 Great Recession. During that time, unemployment durations "rose far more dramatically" for older than younger workers, and those who found new jobs tended to face much larger earnings losses than their younger counterparts. David Neumark & Patrick Button, *Did Age Discrimination Protections Help Older Workers Weather the Great Recession?*, 33 J. Pol'y Analysis & Mgmt. 566, 566 (2014); *see also* Jessica Z. Rothenberg & Daniel S. Gardner, *Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967*, 38 J. Soc'y & Soc. Welfare 9, 22 (2011) (unemployment rate for adults aged 55 or older more than doubled between June 2008 and June 2009, whereas it increased 70 percent for the population at large, and older adults spent an average of 30 weeks looking for a new job, compared to a national average of 22 weeks); Farber, *Job Loss in the Great Recession*, *supra*, at 23 (Great Recession "[j]ob losers aged 55-64 earn 16 percent less than do job losers aged 25-34. . . . The average earnings loss is much larger when the worker had accumulated substantial tenure on the lost job").

When older people cannot find work, one alternative is to claim Social Security benefits earlier than planned; indeed, many older Americans did just that during the Great Recession, as they have during other economic contractions. Matthew S. Rutledge & Norma B. Coe, *Great Recession-Induced Early Claimers: Who Are They? How Much Do They Lose?*, Center for Retirement Research at Boston College, 4 (2012), http://crr.bc.edu/wp-content/uploads/2012/04/wp_2012-12-508.pdf. But claiming Social Security earlier means a lower level of monthly benefits, making it more difficult for retirees to make ends meet, and with reverberations throughout the economy. *Id*.; Alicia H. Munnell & Matthew S. Rutledge, *The Effects of the Great Recession on the Retirement Security of Older Workers*, 650 The ANNALS of the Am. Acad. of Pol. & Soc. Sci. 124, 126 (2013) (discussing the effects of claiming social security early and explaining that "Social Security will provide less in the future than it does today"); Gary Koenig & Al Myles, *Social Security's Impact on the National Economy*, AARP Public Policy Institute, 5-7 (2013), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2013/social-security-impact-national-economy-AARP-ppi-econ-sec.pdf (analyzing multiplier effect of social security benefits). In contrast, stronger protections against age discrimination allow older workers to obtain new jobs more easily, delaying the age at which they claim Social Security benefits. Neumark & Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?*, *supra*, at 1. This is good for older workers and the

economy; the workers increase their savings and avoid having to accept a lower level of benefits, while also paying into the Social Security system for longer. Neumark & Song, *supra*, at 31-32; Maestas & Zissimopoulos, *supra*, at 158.

III. SOCIAL SCIENCE RESEARCH SUGGESTS THAT LIABILITY FOR DISPARATE IMPACT IN HIRING HELPS TO REDUCE AGE DISCRIMINATION

Social science evidence discussed above suggests that age discrimination in hiring remains significant. Social science evidence also suggests, as explained below, that discrimination can be reduced by legal intervention, at least where threat of legal liability is significant. Yet disparate treatment law alone does too little to prevent discrimination caused by neutral policies that reflect stereotyped assessments of merit. *See* Lauren B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* 59-60 (2016) (arguing that racial and gender segregation and other employment inequities persist because disparate treatment law allows organizations to adopt symbolic nondiscrimination policies without addressing the practices that perpetuate discrimination). This case is an example: assuming that people two or three years out of college and with less than eight years of sales experience would be better territory managers reflects stereotyped thinking about sales and about age, and it resulted in less than one percent of those hired being over 40, but proving the requirement was adopted with

the intent to exclude workers protected by the ADEA is not without difficulty. The availability of disparate impact claims is important to uncover and eliminate this form of age discrimination in hiring.

Further, given that workers can bring disparate impact claims regarding decisions made after hiring, the unavailability of disparate impact liability at the hiring stage could create perverse incentives for employers. Neumark, *Is It Harder for Older Workers To Find Jobs?*, *supra*, at 2. Where employers face greater risks of liability if they fire (or otherwise disadvantage) an older worker than if they simply do not hire older workers in the first place, they will be better off discriminating at the outset than hiring an older worker and risking a discrimination case later on. This risk is already present to a degree, due to the difficulty of winning failure-to-hire cases and the likelihood that damages will be smaller in failure-to-hire than in termination cases. Neumark & Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?*, *supra*, at 2; *see also* Lahey, *supra*, at 31 (reasoning that "firms that wish to retain only a certain type of worker without being sued would prefer to discriminate in the hiring stage" because "it is more difficult for workers to determine why they failed to receive an interview than it is for workers to determine why they have been fired"); Neumark & Button, *Did Age Discrimination Protections Help Older Workers Weather the Great Recession?*, *supra*, at 566. But permitting older workers to pursue disparate impact cases only after they have been hired would exacerbate

this dynamic. Disparate impact liability for discriminatory hiring practices may be the best mechanism to avoid this perverse incentive and change personnel policies that, as in this case, are based on stereotypes about the abilities of older workers.

Social scientific studies show that stronger age discrimination laws are associated with less age discrimination without reducing labor market efficiency. David Neumark & Wendy A. Stock, *Age Discrimination Laws and Labor Market Efficiency*, 107 J. Pol. Econ. 1081 (1999) (comparing age-earnings profiles in states with stronger and weaker age discrimination laws). One study found that older workers were less likely to claim Social Security benefits in states with stronger age discrimination laws, which suggests that older employees more easily find and retain employment where age discrimination laws are stronger. Neumark & Song, *supra* at 2. But because of the difficulty of measuring age discrimination and attributing differences in employment of older workers to differences in law, *see* Neumark & Button, *supra*, it is difficult to empirically demonstrate the impact of age discrimination law. It is possible, however, to extrapolate from the abundant research on race and gender to see that anti-discrimination law generally, and the disparate impact framework specifically, reduce employment discrimination in hiring.

Empirical social science research on employment discrimination has found that anti-discrimination laws are correlated with greater race and gender diversity

in formerly white male job categories. Formal personnel policies in the absence of legal accountability have been found to have no effects on the racial and gender diversity of managers, but nondiscrimination policies coupled with legal or supervisory accountability for results do have an effect. Frank Dobbin, et al., *Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity*, 80 Am. Soc. Rev. 1014 (2015). Class action suits by both women and Blacks increased their representation in management by about 20 percent in the year following the suit, although women's gains endured while Black gains eroded to about ten percent after an additional year. Sheryl Skaggs, *Legal Political Pressures and African American Access to Managerial Jobs*, 74 Am. Soc. Rev. 225 (2009); Sheryl Skaggs, *Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management*, 113 Am. J. Soc. 1148 (2008). Similarly, when a court order resulting from a discrimination charge or lawsuit includes managerial accountability for diversity gains, the access of white women, black men, and black women to managerial jobs increases. C. Elizabeth Hirsh, *The Strength of Weak Enforcement: The Impact of Discrimination Charges on Sex and Race Segregation in the Workplace*, 74 Am. Soc. Rev. 245 (2009); C. Elizabeth Hirsh and Youngjoo Cha, *Mandating Change: The Impact of Court-Ordered Policy Changes on Managerial Diversity*, 70 Indus. and Lab. Rel. R. 42 (2016).

Social scientists have also found that race and gender workforce segregation declined during the period when there was vigorous enforcement of employment discrimination laws. One would expect vigorous enforcement of age discrimination laws would similarly be effective in reducing age discrimination. Segregation of white men from black men and women of all races declined dramatically during the 1973 – 1980 period, after *Griggs*. Kevin Stainback and Donald Tomaskovic-Devey, *Documenting Desegregation: Racial and Gender Segregation in Private-Sector Employment Since the Civil Rights Act* xxii, 128-30 (2012). Segregation between white men and black men dropped rapidly from the late 1960s to 1980, net of shifts caused by changes in jobs and the economy. *Id.* at 128. The gender segregation between white women and white men began to decline slightly later than race segregation among men, but it too declined rapidly in the 1970s. *Id.* at 130. The rapid gender desegregation of the 1970s slowed after 1980 but continued to decline gradually between 1980 and 2000, and then stopped. *Id.* at 168.

To determine whether the declines in discrimination were the result of voluntary compliance or changes in attitudes independent of the threat of legal enforcement, Stainback and Tomaskovich-Devey compared firms subject to scrutiny by the Office of Federal Contract Compliance (OFCC) and other comparable firms. (The OFCC audits EEO data of federal contractors and, in theory, contractors can face adverse consequences for failing an audit.) Black men made larger

and faster gains in advancement into managerial, professional, and craft jobs in OFCC-reporting firms than in noncontractor firms during the period from the effective date of the Civil Rights Act to 1980. *Id.* at 143. *See also* Frank Dobbin, *Inventing Equal Opportunity* 49-50 (2009) (defense contractors that faced debarment for discrimination hired nearly ten times the number of blacks they hired prior to federal government threatening to debar companies that discriminated). During this period, class action suits were associated with increased black employment and movement into managerial jobs. Jonathan Leonard, *Employment and Occupational Advance Under Affirmative Action*, 66 Rev. Econ. & Stat. 377 (1984). The rapid decrease in occupational race segregation in the early 1970s may have been caused by the fact that class action suits result in legal commands to change firm behavior and also serve as a threat to other firms. John Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983 (1991).

As noted, it is difficult to extrapolate from the data on race and gender to age. Although social scientists have concluded that the pre-1980 "progress toward racial desegregation in the private sector . . . was produced by regulatory or political pressure rather than by changes in the industrial structure or labor supply," Stainback & Tomaskovic-Devey, *supra*, at 167, the regulatory pressure, attitude changes, and affirmative action did not extend from the Title VII context to the ADEA. The ADEA did not have the early enforcement

surge that Title VII did, as responsibility for its enforcement bounced from the Department of Labor to the EEOC, and in the case of age there was no comparable consensus about the need for affirmative action to head off social unrest. *Compare, e.g.*, John David Skrentny, *The Ironies of Affirmative Action* (1996). As a result, social science evidence about the effect of vigorous enforcement of age discrimination law is not as strong as the evidence about the effect of Title VII.

Nevertheless, the available data provide a basis for inferring that the availability of disparate impact hiring claims would eliminate stereotyped hiring criteria like the preference for recent college graduates at issue here. Consent decrees or court orders prohibiting use of discriminatory selection criteria reduce discrimination directly, as in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Litigation reduces discrimination indirectly when HR departments or in-house counsel fear litigation and direct firms to change policies that cannot be justified as being reasonable. Human resource organizations follow court cases closely and offer immediate updates to companies, frequently suggesting steps to take in response to court decisions. For example, after *Cline v. General Dynamics Land Systems*, 296 F.3d 466, 471 (6th Cir. 2002), *vacated*, 540 U.S. 581 (2004), when the Sixth Circuit held that workers over 40 could state a discrimination claim when they received worse treatment than workers over 50, organizations were quick to notify businesses even before this Court granted review and vacated the Sixth Circuit decision. *See* Gillian Flynn, *The Maturing of*

the ADEA, Workforce (October 2002), http://www.workforce.com/2002/09/27/the-maturing-of-the-adea (advising human resource departments to "ensure that [they] have a justifiable business basis" for a change in policies "before [they] enact" the policy to "insulate [the company] against a disparate-impact claim"); *see also* Jonathan Pont, *Ruling Gives a New Basis for Age-Bias Claims*, Workforce (April 26, 2005), http://www.workforce.com/2005/04/26/ruling-gives-a-new-basis-for-age-bias-claims/ (stating that after *Smith v. City of Jackson*, 544 U.S. 228 (2005), companies should review employment practices); Paul Salvatore, *Age Case Tops Supreme's List*, HUMAN RESOURCE EXECUTIVE ONLINE (April 2, 2005), http://www.hreonline.com/HRE/view/story.jhtml?id=4278238&ss=disparate+impact&s=54#ctx (advising HR departments to "carefully consider any practices or policies . . . that may, unintentionally, have a negative and disproportionate impact on employees over 40" in light of *Smith*); Paul Gallagher, *Age-Bias Claims to Rise?*, HUMAN RESOURCE EXECUTIVE ONLINE (June 23, 2008), http://www.hreonline.com/HRE/view/story.jhtml?id=104331306&ss=disparate+impact&s=36 (discussing need for companies to develop policies governing layoffs in light of *Meacham v. Knolls Atomic Power Laboratory*, 553 U.S. 84 (2008)).

Disparate impact liability does more than spread organizational awareness of the specific issues. Successful claims prompt broad changes in management practices. History demonstrates that anti-discrimination regulations "from the early 1960s stimulated corporate America to develop the precursors to today's diversity

programs." Frank Dobbin & Alexandra Kalev, *The Origins and Effects of Corporate Diversity Programs*, in *The Oxford Handbook of Diversity and Work* 253, 254 (Quinetta M. Roberson, ed., 2013). These changes only increased over time. For example, "Title VII lawsuits and affirmative action compliance reviews [have] led to increases in women's and minorities' share of management jobs, especially in periods and judicial circuits wherein civil rights enforcement was strong." Alexandra Kalev, et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 589, 612 (2006). The prospect of Title VII claims motivate companies to adopt structures or practices to comply with the law." Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 Wash. U. L. Rev. 1519, 1584 (2014) (discussing widespread adoption of anti-harassment policies). Similarly, here, allowing disparate impact in hiring claims under the ADEA will help prompt companies to make the necessary structural changes to avoid discrimination.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari on the first question presented.

Respectfully submitted,

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