EXTENDING DISPARATE IMPACT COVERAGE OF THE ADEA TO APPLICANTS: *VILLARREAL V. R.J. REYNOLDS TOBACCO CO.*

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I. INTRODUCTION

Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA) to protect older workers from discriminatory employment practices that are unrelated to the ability needed for the job.[1] The ADEA sought to meet the problem of the increased number of older workers who were unable to regain employment after job displacement.[2] Thus, the ADEA ultimately seeks to prohibit age discrimination in employment.[3] The ADEA was enacted three years after Title VII of the Civil Rights Act of 1964 and much of the language in the ADEA is similar, if not identical, to Title VII except that instead of race, religion, sex, national origin, and color, the ADEA applies to age.[4] Accordingly, courts have used case law from the rich area of Title VII and applied that precedent when interpreting provisions of the ADEA.[5]

Initially, courts faced the issue of deciding which types of claims plaintiffs could bring under the ADEA.[6] Whether the ADEA protected employees from intentional discrimination was undisputed.[7] Intentional discrimination is when an employer treats some employees less favorably because of a protected characteristic including race, age, religion, sex, national origin, or color.[8] In order to prevail under an intentional discrimination claim, the plaintiff must show that the employer acted with the intent to discriminate based on that protected

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1. Annotation, *Construction and Application of Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq.*, 24 A.L.R. Fed. 808 (1967); *see also* 29 U.S.C. § 621 (2012) ("(a) the congress hereby finds and declares that—(1) 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; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons.").

2. 29 U.S.C. § 621 (2012).

3. 29 U.S.C. § 621(b) (2012). ("It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from impact of age employment.").

4. Zachary L. Karmen, Annotation, *Disparate Impact Claims Under Age Discrimination Act of 1967, §§ 2 et seq., 29 U.S.C.A. §§ 621 et seq.*, 186 A.L.R. Fed. 1 (2016).

5. 29 U.S.C. § 621 (2012).

6. *See id.*

7. *See id.*

8. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1292 (11th Cir. 2015).

characteristic; this is a heavy burden to carry.[9] In contrast, questions remained as to whether plaintiffs could bring a disparate impact claim. Disparate impact occurs when an employer uses a facially neutral employment practice that applies equally to all employees, but results in treatment that falls more harshly on one group than another.[10] This is much more employee friendly and easier to prove because the employee is not required show that the employer acted with any intent to discriminate.[11]

In 2005, the Supreme Court held that disparate impact claims are cognizable under the ADEA.[12] However, it is still unclear as to whether applicants for hire are protected against disparate impact or if only current employees receive this benefit.[13] With regard to this issue, courts have focused on two provisions of the ADEA, sections 623(a)(1) and (2). These sections of the ADEA make it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.[14]

The Supreme Court held that disparate impact claims can only be brought under section 623(a)(2) while section 623(a)(1) is limited to intentional discrimination claims.[15] According to the Supreme Court, section 623(a)(1) clearly includes applicants because of the language "refuse to hire."[16] However, a contested issue is whether section 623(a)(2) also encompasses applicants.[17] Unlike section 623(a)(1), section 623(a)(2) makes no mention of refusal to hire.[18] The Eleventh Circuit was the first circuit court to address explicitly the issue in

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9. *Id.*

10. *Id.* An example of this would be a requirement that all employees must be at least six feet tall. This is a facially neutral employment practice but it results in treatment that falls more harshly on women because they are less likely to be six feet tall.

11. *See id.*

12. Smith v. City of Jackson, 544 U.S. 228, 233–34 (2005).

13. Karmen, *supra* note 4.

14. 29 U.S.C. § 623(a) (2012).

15. *City of Jackson*, 544 U.S. at 240.

16. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1292 (11th Cir. 2015).

17. *Id.* at 1293.

18. *See* 29 U.S.C. § 623(a).

Villarreal v. RJ Reynolds, and held that the ADEA does protect applicants from disparate impact.[19]

This Casenote discusses the importance of the Eleventh Circuit's decision in *Villarreal* and why the case was correctly decided. Part II sets out the background of the ADEA with respect to disparate impact claims under section 623(a)(2). Specifically, how the circuit courts and the Supreme Court have interpreted the provision and whether it only includes current employees or applicants for hire as well. Part III analyzes the Eleventh Circuit's majority and dissenting opinions in *Villarreal*. Finally, Part IV explains why the Eleventh Circuit's broad interpretation of section 623(a)(2) was correct. Importantly, Part IV emphasizes that Congress's intent with discrimination statutes—as well as the purpose of the ADEA—displays why section 623(a)(2) should have a broad interpretation that extends coverage to applicants for hire.

II. BACKGROUND OF DISPARATE IMPACT CLAIMS UNDER TITLE VII AND THE ADEA

Courts initially prohibited both employees and applicants from bringing disparate impact claims under the ADEA.[20] However, this changed in 2005 when the Supreme Court held that, like Title VII of the 1964 Civil Rights Act, the ADEA permits disparate impact claims.[21] This was a landmark decision for employees because it prohibited employers from using facially neutral policies to discriminate against employees. While the Court held that disparate impact claims are cognizable under section 623(a)(2),[22] that section does not specifically mention applicants as section 623(a)(1) does.[23] Three circuit court opinions and three concurring Supreme Court justices mentioned, in dictum, that section 623(a)(2) does not apply to applicants. Therefore, until *Villarreal*, applicants were barred from bringing disparate impact claims.

A. Disparate Impact Claims Under Title VII of the 1964 Civil Rights Act

The Supreme Court first allowed disparate impact claims to be brought under Title VII in *Griggs v. Duke Power Co.*[24] Duke

19. *Villarreal*, 806 F.3d at 1303.

20. Smith v. City of Des Moines, 99 F.3d 1466, 1468 (8th Cir. 1996); Ellis v. United Airlines, 73 F.3d 999, 1003 (10th Cir. 1996).

21. *See* Smith v. City of Jackson, 544 U.S. 228, 233–34 (2005).

22. *Id.*

23. 29 U.S.C. § 623(a).

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

implemented a policy that required a high school education and completion of two professional aptitude tests in order to qualify for placement in any department except the labor department.[25] These facially neutral requirements, which yet had no relation to the job itself, resulted in a disproportionate amount of African Americans being excluded from receiving jobs in any department but labor.[26] The appellate court held that, absent discriminatory intent, such hiring criteria was permissible under Title VII.[27] However, the Supreme Court reversed, holding that Congress required the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate to discriminate on the basis of an individual's race.[28] Therefore, Title VII not only forbids intentional discrimination but also those practices which are discriminatory in operation.[29] The high school diploma requirement and general aptitude tests had no relationship whatsoever to the demands of the job and overall performance.[30] Employees who had not completed high school or taken the aptitude tests continued to perform just as well as those who had.[31] The Court concluded that any test used to measure the person should be conducted on the basis of qualifications rather than race or any other impermissible classification.[32]

B. Disparate Impact Claims Under 29 U.S.C. § 623(a)(1) of the ADEA

Thirty-five years later, the Supreme Court extended the rationale from *Griggs* to a question under the ADEA. In *Smith v. City of Jackson*, the city adopted a new pay plan in which officers with less than five years of service received greater increases than those with more than five years of service.[33] This disproportionately affected older officers because the vast majority had more than five years of service.[34] A group of older officers filed suit under the ADEA claiming that they were adversely affected by the plan because of their age.[35] The Court

25. *Id.* at 427–28. The labor department was the lowest paying division within the company. *Id.* at 427.

26. *Id.* at 430.

27. *Id.* at 428.

28. *Id.* at 431.

29. *Griggs*, 401 U.S. at 431. Practices that are discriminatory in operation give rise to disparate impact claims.

30. *Id.*

31. *Id.*

32. *Id.* at 436.

33. Smith v. City of Jackson, 544 U.S. 228, 231 (2005).

34. *See id.*

35. *See id.*

noted that Congress enacted the ADEA just three years after Title VII of the Civil Rights Act of 1964 and, except for the word "age," the ADEA is identical to the language found in Title VII.[36] Because the Court followed a long-standing tradition of assuming that the language in the ADEA was derived from Title VII, *Griggs* served as important precedent.[37] The Court held that the language in both Title VII and the ADEA prohibits actions that "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such an individual's" race or age.[38]

Moreover, the language of Title VII and the ADEA does not simply focus on the intent of the employer.[39] Rather, the text focuses on the effects that employers' acts have on the employee; this focus opens the door for disparate impact claims.[40] Additionally, both the Department of Labor (DOL), which initially drafted the legislation, and the Equal Employment Opportunity Commission (EEOC), the agency which enforces the ADEA, interpreted the ADEA to permit disparate impact claims.[41] In light of the holding from *Griggs*—along with the DOL and EEOC interpretations—the Court held that disparate impact claims are permissible under the ADEA.[42]

C. Disparate Impact Claims Under 29 U.S.C. § 623(a)(2) of the ADEA

While the Supreme Court resolved the issue of whether a disparate impact claim was cognizable under section 623(a)(2), questions still remained as to whether an applicant could raise the disparate impact claim or if it was strictly limited to employees. Prior to *Smith v. City of Jackson*, the Eighth, Tenth, and Seventh Circuits all held that applicants could not bring disparate impact claims because applicants were excluded from section 623(a)(2).[43] In *Smith v. City of Des Moines*, a firefighter brought a disparate impact claim under the ADEA against the City of Des Moines.[44] The Eighth Circuit concluded that disparate

36. *Id.* at 233.

37. *Id.* at 234.

38. *Id.* at 234; 29 U.S.C.S. § 623(a)(1) (2012).

39. *See City of Jackson*, 544 U.S. at 236.

40. *See id.*

41. *Id.* at 239; 29 C.F.R. § 1625.7 (2016) (describing the standard for disparate impact claims).

42. *City of Jackson*, 544 U.S. at 240.

43. Smith v. City of Des Moines, 99 F.3d 1466, 1468 (8th Cir. 1996); Ellis v. United Airlines, 73 F.3d 999, 1003 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1075 (7th Cir. 1994).

44. *City of Des Moines*, 99 F.3d at 1468. The city began to use a breathing apparatus to measure the lung capacity of all firefighters. *Id.* Any firefighter who did not meet a certain benchmark had to take an exercise test in order to measure the body's capacity to use oxygen efficiently. *Id.* Smith failed both tests and the department suggested he file for retirement benefits. *Id.* Smith refused to file for retirement and the fire department eventually discharged him for failure to meet the department's

impact claims are cognizable under the ADEA.[45] However, the court determined, in a footnote, that applicants are excluded from disparate impact claims under the ADEA.[46] The court noted that confusion surrounded the difference between the ADEA and Title VII.[47] Section 623(a)(2) of the ADEA only mentions conduct that affects "employees" while the analogous language of Title VII protects "employees or applicants for employment."[48] Therefore, in ADEA cases involving applicants for hire, the plaintiffs are limited to intentional discrimination claims provided in section 623(a)(1).[49]

The Tenth Circuit reached a similar conclusion when determining whether applicants could bring disparate impact claims under the ADEA. In *Ellis v. United Airlines*, the plaintiffs brought a disparate impact claim under the ADEA for facially neutral hiring requirements.[50] Like the Eighth Circuit, the court buried its discussion of the relationship between section 623(a)(2) and applicants in a footnote, holding that it would not dwell on section 623(a)(2) because it does not address refusals to hire at all.[51] The Supreme Court in *Griggs* used the provision in Title VII that is nearly identical to section 623(a)(2) and applied it to applicants.[52] However, the court emphasized that following the *Griggs* decision, Congress expressly added "applicants" to the parallel Title VII provision but failed to do the same to section 623(a)(2) of the ADEA.[53] This displays that Congress did not intend for section 623(a)(2) to apply to applicants as Title VII expressly does.[54]

The final circuit court decision came from the Seventh Circuit in *EEOC v. Francis W. Parker School*.[55] The EEOC filed a disparate impact claim on behalf of a teacher who applied to an elementary school, alleging that by setting an extremely low salary limit, the school

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physical fitness standard. *Id.*

45. *Id.* at 1470.

46. *Id.* at 1470 n.2.

47. *Id.*

48. *Id.*

49. *Id.* at 1470 n.2.

50. Ellis v. United Airlines, 73 F.3d 999, 1003 (10th Cir. 1996). United Airlines employed a weight requirement when hiring flight attendants. *Id.* The height of the flight attendants were used to determine what weight should be maintained throughout the course of employment. *Id.* Once hired, United Airlines allowed for gradual weight gain based on age. *Id.* However, initial applicants, regardless of their age, had to meet a certain weight requirement that was used for much younger employees. *Id.* Therefore, older applicants were disproportionately affected by this policy. *Id.*

51. *Id.* at 1007 n.12.

52. *See id.*

53. *See id.*

54. *Id.*

55. EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1075 (7th Cir. 1994).

excluded a disproportionate amount of older applicants.[56] The court held that applicants cannot bring disparate impact claims and distinguished section 623(a)(2) from Title VII.[57] The language in Title VII included the phrase "applicants for employment" while the ADEA's near verbatim language omits applicants from section 623(a)(2).[58] The court held that while the decision may be said to create a practical difficulty, it is required by the statute.[59]

III. THE ELEVENTH CIRCUIT DECISION: *VILLARREAL V. R.J. REYNOLDS TOBACCO CO.*

In 2015, for the first time in the nearly five decades since the ADEA was enacted, a circuit court squarely faced the question of whether applicants can bring disparate impact claims under the ADEA.[60] Despite the three prior circuit courts opinions, the Eleventh Circuit held that it was an issue of first impression because the prior cases merely referenced this question in dicta.[61] This allowed the court to reach its own conclusion as to whether section 623(a)(2) encompassed applicants.[62] The court ultimately held that section 623(a)(2) does include applicants.[63] Therefore, applicants, like current employees, may bring disparate impact claims against employers under section 623(a)(2).[64]

A. The Majority Opinion

R.J. Reynolds employed regional sales representatives and used résumé review guidelines to help screen applicants for these positions.[65] Some of the guidelines utilized were related to the age of applicants.[66] The hiring managers were supposed to target applicants who were two to three years out of college and were directed to avoid applicants with eight to ten years of sales experience.[67] Not surprisingly, statistics

56. *Id.*
57. *Id.* at 1077.
58. *Id.* at 1078.
59. *Id.*
60. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1290 (11th Cir. 2015).
61. *Id.* at 1290, 1310.
62. *See id.* at 1290.
63. *See id.* at 1303.
64. *See id.* at 1290.
65. *Id.* at 1290–91.
66. *Villarreal*, 806 F.3d at 1291.
67. *Id.*

showed that R.J. Reynolds had a history of hiring younger applicants.[68] Villarreal initially applied for a position as a sales representative when he was 49 years old, but R.J. Reynolds never responded to his application.[69] Subsequently, Villarreal filed a charge for unlawful discrimination with the EEOC.[70] While this charge was pending, Villarreal applied for the position five more times and was rejected each time.[71] Villarreal then filed suit raising both intentional discrimination and disparate impact claims under the ADEA.[72] Like the Seventh, Eighth, and Tenth Circuits, the district court dismissed his disparate impact claim under the theory that only current employees could bring disparate impact claims.[73]

On appeal, the Eleventh Circuit noted that the question of whether section 623(a)(2) extends to applicants was an issue of first impression.[74] The court emphasized that in *Smith*, the Supreme Court adopted the Title VII interpretation and allowed current employees to bring disparate impact claims.[75] Importantly, *Smith* explained the key textual differences between section 623(a)(1) and (2).[76] Section 623(a)(1) targets the employer's conduct while 623(a)(2) focuses on the effects of such action on the employee.[77] This key difference, the court reasoned, permits disparate impact claims to be brought under section 623(a)(2) and only intentional discrimination claims to be brought under section 623(a)(1).[78] Even though the Eleventh Circuit discussed the implications that *Smith* had on the case, the court ultimately used the *Chevron* framework to decide the case.[79]

Villarreal argued that section 623(a)(2) covered his allegations against R.J. Reynolds because it is unlawful for an employer "to limit . . . his employees in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's age."[80] In contrast, R.J. Reynolds contended that 623(a)(2)

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Villarreal*, 806 F.3d at 1291.

73. *Id.*

74. *Id.* at 1290.

75. *See id.* at 1292.

76. *See id.* at 1293.

77. *Id.*

78. *Villarreal*, 806 F.3d at 1293.

79. *Id.* at 1299. Under the *Chevron* framework it is necessary to determine if the plain reading of the statute is ambiguous. *Id.* If the statute is ambiguous then the court will look to see how the agency that is charged with enforcing the statute interprets it. *Id.* If the agency's interpretation is reasonable then the court will defer to that interpretation, even if it is not the best interpretation. *Id.*

80. *Id.* at 1293.

is much more limited than Villarreal's interpretation.[81] Specifically, R.J. Reynolds noted that this provision limits the protected class to "his employees."[82] The later reference to "any individual" only encompasses those employees explicitly mentioned in the provision.[83] The court agreed that both of these interpretations were reasonable, so the plain language of the statue did not make clear whether applicants could bring disparate impact claims.[84]

Next, the court discussed both Villarreal's and R.J. Reynolds' arguments concerning the *Griggs* case and its precedential value.[85] Villarreal pointed to the Supreme Court's decision in *Smith*, as the Court noted that *Griggs* holds weighty precedential value because Title VII and the ADEA use the same language and serve the same purpose.[86] Villarreal argued that the plaintiff class in *Griggs* included applicants because, although the class action was brought by current employees, they brought the class action on behalf of all African American employees and those who may later seek employment.[87] However, the Eleventh Circuit noted that the *Griggs* Court declared that the class action was a group of incumbent employees.[88] R.J. Reynolds also responded that the only reference to applicants and hiring dealt with employees seeking promotions and transfers; therefore, job applicants, like Villarreal, were not encompassed within the class action.[89] Again, the Eleventh Circuit held that both arguments were reasonable so neither stance could be adopted.[90]

The court then addressed the legislative intent and emphasized that Congress amended Title VII shortly after the *Griggs* decision.[91] The amendment included the addition of the words "or applicants for employment" to the language that paralleled section 623(a)(2).[92] Notably, Congress failed to make a similar amendment to section

81. *Id.*

82. *Id.*

83. *Id.*

84. *See Villarreal*, 806 F.3d at 1293.

85. *See id.* at 1293–94.

86. *See id.*

87. *Id.* at 1294.

88. *Id.*

89. *Id.* at 1294–1295.

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

91. *Id.*

92. 42 U.S.C. § 2000e-2 (2012) ("(a) It shall be an unlawful employment practice for an employer (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

623(a)(2).[93] The district court held that because Congress explicitly amended Title VII while leaving section 623(a)(2) unchanged, section 623(a)(2) cannot be interpreted the same as Title VII—therefore, applicants are excluded.[94] However, the Senate Committee on Labor and Public Welfare noted that the change to Title VII was merely a declaration of present law.[95] In other words, the amendment to Title VII was merely a declaration that the statute was now in full accord with the *Griggs* decision.[96] In light of all of this information, the Eleventh Circuit held, "We will not assume that Congress chose not to pass legislation modifying the ADEA simply because it did make this one change in a broader restructuring of Title VII."[97]

R.J. Reynolds' final argument was that Congress distinguished between employees and applicants throughout the ADEA.[98] R.J. Reynolds pointed out that this explicitly showed that Congress knew how to reference job applicants and chose not to do so in section 623(a)(2).[99] The Eleventh Circuit took note of this argument but pointed out that section 623(a)(2) does not merely use applicant; instead, is uses a much more general term, "any individual."[100] The word "any" is extremely powerful as it does not encompass just a few people, but rather includes all people.[101] Using the same logic as R.J. Reynolds, the Eleventh Circuit noted that, "Congress could have made it unlawful for an employer to 'limit, segregate, or classify his employees in any way which would deprive or tend to deprive *any employee* of employment opportunities.' Instead it said 'any individual.'"[102]

Villarreal's final argument was that his reading of the statute comported with the purpose of enacting the ADEA.[103] The DOL provided a report to Congress, "The Older American Worker: Age Discrimination in Employment," which led to the enactment of the ADEA.[104] This report expressed concerns about older job applicants and provided measures to help older workers regain employment.[105]

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

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1296.

98. *Id.* at 1297.

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

100. *Id.*

101. *Id.*

102. *Id.* (emphasis added).

103. *Id.* at 1298.

104. *See id.*; WILLIAM WIRTZ, U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965).

105. *See* WIRTZ, *supra* note 104, at 21.

Importantly, the report referenced neutral screening practices in hiring, which shows that the DOL was concerned with disparate impact discrimination against applicants.[106] The report resulted in the passing of the ADEA which explicitly states that one of its purposes is to promote the employment of older people based on ability rather than age.[107] The Eleventh Circuit agreed that the ADEA was implemented to address discriminatory hiring based on age but, this legislative intent still fails to clarify whether Congress intended to give applicants the ability to bring disparate impact claims, or just intentional discrimination claims.[108] Therefore, the court declined to use the general purposes of the ADEA to solve the issue of whether applicants can file suit under section 623(a)(2).[109]

B. The Chevron *Framework*

After hearing both parties' arguments, the Eleventh Circuit held that the interpretation of section 623(a) was ambiguous.[110] Under *Chevron*, when a statute is ambiguous, the agency charged with enforcing the statute should fill in the gaps.[111] Since the EEOC enforces the ADEA, the court looked to see if its interpretation of section 623(a)(2) was reasonable.[112] Importantly, the court noted that the EEOC's interpretation did not have to be the best one; rather, it only needed to be reasonable to receive *Chevron* deference.[113]

The EEOC's interpretation of the statute did not distinguish between current employees and applicants for hire.[114] 29 C.F.R. § 1625.7(c), the regulation interpreting section 623(a)(2), states that "[a]ny employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a reasonable factor other than age."[115] The words "adversely affects" indicates that the statute is not only concerned with intentional

106. *Villarreal*, 806 F.3d at 1298.

107. *See id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1299.

111. *Id.*

112. *Villarreal*, 806 F.3d at 1299; 124 CONG. REC. H1457 (1978) (statement of President Jimmy Carter). ("All functions related to age discrimination administration and enforcement pursuant to Sections 6 and 16 of the Age Discrimination in Employment Act of 1967, as amended U.S.C. 625 and 634 are hereby transferred to the Equal Employment Opportunity Commission.").

113. *Villarreal*, 806 F.3d at 1299.

114. *Id.*

115. 29 C.F.R. § 1625.7(c) (2016).

discrimination but also disparate impact.[116] Therefore, the regulation extends disparate impact coverage to all "individuals within the protected age group."[117] The EEOC in its amicus curiae argued that the regulation established the agency's view that section 623(a)(2) extends disparate impact coverage to future applicants.[118] Additionally, the preamble to the final regulation supports the interpretation that both employees and applicants can bring disparate impact claims.[119] The preamble states, "To the extent that the difficulty in finding new work is attributable to neutral practices that act as barriers to the employment of older workers, the regulation should help to reduce the rate of the unemployment and, thus, help to reduce these unique burdens on society."[120] These "neutral practices" in hiring that disproportionately impact older workers are the exact practices that Villarreal challenged.[121]

The EEOC's interpretation affirmed the longstanding belief that the ADEA provided disparate impact claims for applicants.[122] Initially, the DOL was in charge of enforcing the ADEA.[123] Shortly after Congress enacted the ADEA, the DOL affirmed that pre-employment tests must be necessary for the specific work performed and that they applied equally to all applicants.[124] In 1981, when the EEOC took over enforcing the ADEA, it affirmed the DOL's interpretation that employment practices in which applicants are treated differently must be based on a business necessity.[125] This shows that the EEOC deliberately chose to continue enforcing the DOL's interpretation that neutral policies which disproportionately discriminate against applicants within the protected age class would be unlawful.[126] Therefore, since the EEOC's interpretation of section 623(a)(2) was considered reasonable, the court deferred to their reading of the statute, holding that applicants, like Villarreal, may bring disparate impact claims under section 623(a)(2).[127]

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116. *Villarreal*, 806 F.3d at 1299.

117. *See Id.*

118. *Id.*

119. *Id.* at 1301.

120. *Id.*

121. *See id.* at 1301.

122. *Villarreal*, 806 F.3d at 1302.

123. *Id.*

124. *See id.*

125. *See* 29 C.F.R. § 1625.7(d) (1981). "When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity."

126. *See Villarreal*, 806 F.3d at 1302.

127. *See id.* at 1303.

C. The Villarreal *Dissent*

Judge Vinson, in dissent, held that the plain language of 623(a)(2) only protects employees from disparate impact.[128] The phrase "his employees" in section 623(a)(2) limits the scope of the provision to only those actions an employer takes against an employee.[129] The limiting phrase is unambiguous because an applicant is simply not an employee.[130] Additionally, the interpretive canon of *expressio unius est exclusio alterius*, which notes that Congress acts intentionally when it omits language included in another provision that is in close proximity to the provision at issue, applies to sections 623(a)(1) and (2).[131] Section 623(a)(1) includes the language "failing or refusing to hire" based on age.[132] Section 623(a)(2) is the very next section and Congress omitted that exact language so it is incorrect to read section 623(a)(2) as having the same reach.[133] Additionally, Judge Vinson noted that the majority's interpretation that the phrase "any individual" is broad enough to cover applicants is only correct if read out of context.[134] In Judge Vinson's opinion, section 623(a)(2) does not use "any individual" in isolation, instead the provision protects only individuals whose status as "an employee" was adversely affected by the employer.[135] When reading section 623(a)(2) in context, the phrase "any individual" is limited to current employees and not applicants for hire.[136]

Judge Vinson further emphasized that deferring to the EEOC's interpretation was unnecessary because, as other courts had pointed out, the plain meaning of the statute is unambiguous.[137] The Eighth, Tenth, and Seventh Circuits had all previously held that section 623(a)(2) does not include applicants.[138] Additionally, Vinson noted that in *Smith*, Justice O'Connor held that section 623(a)(2) does not apply to applicants[139] and in a separate concurrence, Justice Scalia noted that it may actually be a mistake to conclude that section 623(a)(2) is not limited to only employees.[140] Importantly, Judge Vinson held that,

128. *Id.* at 1307 (Vinson, J., dissenting).
129. *Id.*
130. *Id.*
131. *Id.* at 1307–1308.
132. *Villarreal*, 806 F.3d at 1307 (Vinson, J., dissenting).
133. *See id.* at 1308.
134. *Id.*
135. *Id.*
136. *Id.* at 1308.
137. *Id.* at 1309.
138. *Villarreal*, 806 F.3d at 1309 (Vinson, J., dissenting).
139. *Id.*
140. *Id.* at 1310.

while the majority dismissed this language as mere dicta, the combination of the three circuit courts and the concurring justices from *Smith* was a lot of dicta to ignore.[141]

IV. ANALYSIS

Ultimately, the Eleventh Circuit was correct in departing from earlier cases and giving life to the ADEA's broad meaning. When looking at similar discrimination statutes like the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), Congress intends for these statutes to be read very broadly. When Congress has been asked to give its interpretation of a discrimination statute, it always comes back with a much broader reading than that which the courts have employed.[142] This history dictates that with discrimination statutes, like the ADEA, courts should interpret the provisions broadly based on the underlying purpose of the statute. Additionally, the history of the ADEA clearly suggests that an interpretation broad enough to include applicants under section 623(a)(2) is reasonable.[143] Both the DOL and EEOC rendered broad interpretations that do not distinguish applicants from employees when discussing who can bring disparate impact claims.[144] In light of all of these sources, the Eleventh Circuit correctly applied the ADEA in order to effectuate its remedial purpose.

A. Broad Interpretations of the ADA and Civil Rights Act of 1964

Recent history shows that Congress intends for discrimination statutes to be interpreted broadly, showcased by the 2008 amendments to the ADA and the 1991 amendments to Title VII.[145] In two cases, the Supreme Court interpreted the provision discussing who was disabled under the ADA so narrowly that the act was essentially meaningless.[146] In *Toyota Motor Manufacturing v. Williams* and *Sutton v. United Airlines* the Supreme Court narrowed the ADA to the point that it was nearly impossible to be classified as a person with a disability. In 2008, Congress finally stepped in to give life back to the ADA by passing the ADA Amendments Act of 2008 (ADAAA).[147] The purposes portion of

141. *Id.*

142. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991).

143. *See* WIRTZ, *supra* note 104, at 11.

144. *See* 29 C.F.R. § 1625.7(c) (2016).

145. *See id.*; 122 Stat. 3553.

146. *See* Sutton v. United Air Lines, 527 U.S. 471 (1999); Toyota Motor Mfg. Ky. v. Williams, 534 U.S. 184 (2002).

147. *See* 122 Stat. 3553.

the ADAAA is critical of the Supreme Court's decisions and states the following:

> (1) in enacting the ADA, Congress intended the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities'; and provide broad coverage; . . . (3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled; (4) the holdings of the Supreme court in *Sutton v. United Air Lines* and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, eliminating protection for many individuals whom Congress intended to protect; (5) the holding of the Supreme Court in *Toyota Manufacturing v. Williams* further narrowed the broad scope of protection intended to be afforded by the ADA.[148]

The purpose of the ADAAA was to reinstate a broad scope of protection for disabled Americans since the Court had narrowly defined this provision.[149] As noted earlier, this is analogous to how the Seventh, Eighth, and Tenth Circuits interpreted the ADEA. The ADEA was intended to protect older Americans who were not only working but also those trying to find work.[150] However, the courts did not provide disparate impact protection to applicants.[151] Instead of narrowly construing discrimination statutes such as the ADEA and ADA, courts should interpret them broadly to fulfill the underlying purpose of the statute and protect those whom Congress deemed in need of protection.

Another example of Congress stepping in to save a discrimination statute from being interpreted too narrowly is the passage of the 1991 Amendments to Title VII, which was initiated by the Supreme Court case, *Wards Cove Packing v. Antonio*.[152] Congress passed the 1991 Amendments as a result of the Supreme Court's extremely narrow interpretation of disparate impact under Title VII.[153] Within the findings provision of the Act, Congress concluded that:

148. *Id.*

149. *See id.*

150. *See* 29 U.S.C. § 621(a)(1) (2012).

151. *See* Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996); Ellis v. United Airlines, 73 F.3d 999 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994).

152. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

153. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991).

> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Antonio* has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.[154]

Again, as with the ADA, Congress was critical of the Supreme Court's attempt to narrow this discrimination statute.[155] This shows that when Congress passes discrimination statutes, it intends for the provisions found within to be interpreted broadly.[156] The purpose of the 1991 amendments to Title VII was to respond to a recent Supreme Court decision by expanding the scope of the statute to provide adequate protections to victims of discrimination.[157]

Discrimination statutes such as the ADEA, ADA, and Title VII are enacted in order to protect certain classes of citizens.[158] When courts interpret these provisions narrowly, they do not carry out the true meaning and purpose of the statutes. When Congress steps in with discrimination statutes, the applicability should be as broad as they intend; Congress broadens the interpretation in order to provide more adequate protections and remedies for those the statutes seek to serve.[159] The Eleventh Circuit's decision to extend disparate impact claims to applicants was correct because the ADEA's broad purpose of promoting employment for older workers based on ability rather than age was upheld.[160] As opposed to scrutinizing the statute under a microscope, as did Justice O'Connor in *Smith* and the *Villarreal* dissent, the *Villarreal* majority upheld the purpose of the statute by deferring to the EEOC's interpretation.[161]

B. The ADEA Should Be Read Broadly to Uphold the Purpose of the Statute in Light of the History of the ADEA

Courts should use a purposive approach when interpreting the ADEA to give the statute its full meaning. When using the purposive approach,

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154. *Id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.* § 2; ADA Amendments Act of 2008, 110 Pub. L. No. 325, 122 Stat. 3553 (2008).
159. *See* § 2, 105 Stat. 1071.
160. *See* 29 U.S.C. § 621 (2012).
161. *See* Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1303 (11th Cir. 2015).

courts will not look to a particular clause in which general words may be used, but instead will look at the whole structure, objective, and policy of the law as indicated by its various provisions.[162] Essentially, the purposive approach requires courts to determine the overall goal of the statute in order to effectuate the statute's meaning.[163]

Supporters of the purposive approach argue that the statute should be interpreted to serve its rational purposive policy.[164] As the reputable legal scholar Karl N. Llewellyn stated, "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."[165] This approach supports the democratic process by applying the law with its legislative purpose.[166] Taking a strict textualist approach by refusing to look at the legislative intent undermines the purpose of why Congress enacted that statute and fails to adequately protect those the statute seeks to serve.[167] When the legislature enacts a statute it does so with a purpose, which must be taken into consideration when interpreting the statute.[168] Social needs drive the creation of a statute, making the purpose relevant to consider when interpreting.[169] When interpreting a rule-based statute, like the ADEA, a court should give weight to the legislative intent.[170] Adjudication draws lines at what a statute permits and forbids; this can be derived from the legislative intent.[171] The ADEA is a rule-based statute that forbids employers from taking certain acts against older workers.[172] Therefore, courts should look to the legislative intent when determining what the statute forbids and allows.

Using a purposive approach requires the courts to consider the context and the background of the statute when interpreting statutory provisions.[173] Looking at the legislative history helps to ensure that the underlying purpose of the law is effectuated and that the interpretation

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162. William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1037 (1989).

163. *See id.*

164. *See id.*

165. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

166. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 83 (2002).

167. *Id.*

168. *See id.*

169. *See id.* at 76.

170. *See id.* at 79.

171. *Id.* at 79.

172. *See* 29 U.S.C. § 623(a) (2012).

173. *See* Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1154 n.13 (1998).

of that law and its purpose is reasonable.[174] The *Villarreal* majority opinion's discussion of the legislative history of the ADEA allows for a purposive approach. The DOL proposed "The Older American Worker" before Congress and this ultimately lead to the enactment of the ADEA.[175] In that report, the DOL discussed how applicants were negatively affected by disparate impact when attempting to gain employment.[176] The report also included a discussion of physical entrance examinations for workers.[177] While such a test may seem to be a neutral test for all workers, the health of older workers is considerably poorer.[178] This discussion demonstrates that the DOL had concerns about older applicants and the possibility of disparate impact discrimination through facially neutral hiring policies. This legislative history explicitly shows that one of the purposes of the ADEA was to eliminate disparate impact discrimination that older workers faced when applying for jobs.[179]

Importantly, the DOL gave its conclusions and recommendations on how to cure the plight of the older American worker.[180] The DOL suggested that narrowly posing the problem of age discrimination in employment would be not only unfortunate, but would also result in a superficial prescription because it would not protect older workers and this was the purpose of the ADEA.[181] The DOL's reasoning supports the conclusion that courts should read the ADEA broadly in order to effectuate its true purpose: to protect older workers, including applicants seeking to become employed. The DOL concluded that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring."[182] This conclusion further illustrates that the DOL realized that unintentional discriminatory employment practices can lead to limits on hiring due to age.[183] Therefore, applicants, like Villarreal, should be afforded the protection of being able to bring disparate impact claims to eliminate such facially neutral hiring practices that disproportionately affect older workers. Using the purposive approach will allow courts to interpret section 623(a)(2) as including applicants.

174. *See id.*

175. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1298 (11th Cir. 2015).

176. *See* WIRTZ, *supra* note 104, at 11.

177. *See id.*

178. *See id.*

179. *Id.*

180. *See id.* at 21.

181. *Id.* at 21.

182. WIRTZ, *supra* note 104, at 22.

183. *See id.*

The legislative history and the overall purpose of the ADEA clearly demonstrate that the ADEA was enacted to protect older applicants.[184] In order to give the ADEA the meaning that Congress intended, courts should refrain from interpreting its provisions narrowly. Allowing applicants to bring disparate impact claims under section 623(a)(2) comports with the overall goal of the statute, which is to protect workers from discrimination based on age.[185] The previous circuit court cases failed to interpret the true meaning of the statute and protect those that the statute was enacted to serve.[186]

Additionally, the EEOC's interpretation and the actual purpose of the ADEA together show that applicants should be permitted to bring disparate impact claims.[187] The EEOC's interpretation states that "[a]ny employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'"[188] As the majority in *Villarreal* correctly noted, this interpretation does not distinguish between applicants and employees.[189] Rather, the individual seeking to bring a disparate impact claim need only be someone within the protected age group.[190] This is significant because the EEOC is charged with enforcing the ADEA.[191] The EEOC's interpretation mirrored that of the DOL which was initially charged with enforcing the statute.[192] This exhibits that the longstanding interpretation of both the DOL and EEOC is that applicants can bring disparate impact claims.[193] Under the purposive approach, judges should give more weight to a statute's purpose the older it is.[194] The DOL's original interpretation of the statute best captures what Congress's intent was when it first enacted the ADEA because the interpretation was rendered shortly after the ADEA was passed.[195] As the EEOC did not depart from that interpretation, it is probative when determining Congress's intent.[196]

The purpose of the ADEA is to promote the employment of older

184. *See id.* at 11; 29 U.S.C. § 621(a)(1) (2012).

185. *See id.* at 11.

186. *See* Smith v. City of Des Moines, 99 F.3d 1466, 1468 (8th Cir. 1996); Ellis v. United Airlines, 73 F.3d 999, 1003 (10th Cir. 1996).

187. 29 C.F.R. § 1625.7(c) (2016).

188. *Id.*

189. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1299 (11th Cir. 2015).

190. *Id.*

191. *Id.* at 1290.

192. *See id.* at 1301–1302.

193. *See id.* at 1302.

194. Barak, *supra* note 166, at 78.

195. *Villarreal*, 806 F.3d at 1302.

196. *Id.*

persons based on their ability rather than age.[197] In order to do so, members of this at-risk class should have the necessary weapons to ensure that they will not be discriminated against. Allowing applicants to bring disparate impact claims will help eradicate hiring practices that discriminate, even unconsciously, against older workers. The Congressional finding section of the ADEA states:

> (1) 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; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems are grave; (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.[198]

Congress, therefore, was not merely concerned with older employees when it enacted the ADEA. Rather, Congress was equally concerned with older workers who were unemployed and seeking to regain employment, i.e., applicants.[199] Using the purposive approach requires courts to look at Congress's purpose before interpreting the statute.[200] Therefore, courts should not interpret section 623(a)(2) narrowly to only include current employees. In order to give the ADEA its full meaning—to protect both applicants and employees—courts must interpret section 623(a)(2) to include applicants as well. If, as some courts have wrongly allowed, applicants can only bring intentional discrimination claims, then they likely will not prevail because the burden is much higher.[201] Employers will be free to establish facially neutral hiring practices that discriminate disproportionately against older applicants. This in no way effectuates the purpose of the ADEA's enactment. Instead, courts should apply the purposive approach and look to the underlying purpose of the ADEA, which is to protect all

197. 29 U.S.C. § 621 (2012).

198. *See id.*

199. *See id.*

200. Eskridge, *supra* note 162, at 1037.

201. *See* Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1292 (11th Cir. 2015).

older workers, when determining if section 623(a)(2) applies to applicants.

C. The Remedial Purpose Canon Supports a Broad Interpretation of the ADEA

Under the remedial purpose canon, remedial legislation should be construed liberally in order to accomplish the beneficial purpose for which the legislation was enacted.[202] This interpretation promotes the suppression of the evil contemplated under the statute and the advancement of the remedy it provides.[203] However, this has been a controversial canon, especially in the Seventh Circuit with Judge Posner and Judge Easterbrook.[204] Judge Posner concedes that the remedial purpose canon would be fine if legislation was passed because the majority of legislators wanted to stomp out a harmful practice.[205] He argues that, unfortunately, this is not the case.[206] Instead, most legislation is passed as a compromise between legislators with different objectives[207] so a broad interpretation of a statute may conflict with the reason why certain legislators signed off on the statute.[208] Scholars also warn that the remedial purpose canon gives judges wide discretion and it can be used as a tool of manipulation, only using this canon when it helps the court reach the result he or she may wish to achieve.[209] Another criticism from Posner is that a broad construction of a remedial statute may be beneficial to a class of people but, at the same time, can be disadvantageous to another group.[210]

Supporters of the remedial purpose canon have countered Posner's arguments against its use. One justification is that the remedial purpose canon rarely will present problems with statutory compromises; courts have become accustomed to that type of legislation and can identify situations in which the canon should not be used.[211] For instance, a look at the legislative history will allow a court to determine if a given statute

202. Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 233–34 (1996).

203. Brian M. Saxe, Comment, *When a Rigid Textualism Fails: Damages for ADA Employment Retaliation*, 2006 MICH. ST. L. REV. 555, 586 (2006).

204. *See id.* at 588.

205. Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809 (1983).

206. *See id.*

207. *See id.*

208. *See id.*

209. *Id.*

210. Saxe, *supra* note 203, at 588.

211. *See* Watson, *supra* note 202, at 249.

was enacted as part of a compromise amongst the legislators.[212] This works well with a purposive approach under which courts review the legislative history and underlying purpose of the statute before interpreting a provision.[213]

Additionally, contrary to Judge Posner's criticism, promoting one group of people at the expense of another is not a problem under the ADEA, because the ADEA only protects older workers without causing harm to others.[214] For example, a broad interpretation of the ADEA does not require that employers hire and retain a certain percentage of employees over forty.[215] This would be problematic because it would certainly decrease protection of other protected classes of employees such as women, African Americans, and the disabled. Rather, a broad interpretation of the ADEA merely allows applicants to bring disparate impact claims against employers. This simply prohibits facially neutral discriminatory practices and gives older workers a fair shot at being hired.

The ADEA is undoubtedly a remedial statute because it seeks to correct a problem, discrimination in the workplace, for a subordinate group, older workers.[216] Even in the face of criticism courts have continuously used the remedial purpose canon to support liberal readings of statutes enacted to further social well-being by protecting against race, gender, and disability.[217] Two Supreme Court cases have even suggested that the remedial purpose canon be used when interpreting the ADEA.[218] Therefore, using the remedial purpose canon to interpret section 623(a)(2) as applying to applicants is sound practice.

To escape criticism, courts should use a more relaxed approach of the remedial purpose canon in certain cases. For example, the remedial purpose canon should not be used if the plain meaning of the statute is clear.[219] Ignoring this would give life to Judge Posner's fear that this canon gives judges far too much discretion; if the plain meaning is clear it would be frivolous to use the canon.[220]

Therefore, the remedial purpose canon should only be used if the statute is ambiguous.[221] Brian Saxe suggests that the remedial purpose

212. *See id.*

213. Eskridge, *supra* note 162, at 1037.

214. *See* 29 U.S.C. § 621(a) (2012).

215. *See id.*

216. *See id.*

217. Watson, *supra* note 202, at 238.

218. *See* United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977); Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979).

219. Watson, *supra* note 202, at 243.

220. *See id.*

221. Saxe, *supra* note 203, at 587.

canon only be used in the case of a tiebreaker,[222] when the court is unable to choose between two competing interpretations should the canon be utilized.[223] This is the weakest operation of the canon and limits its applicability to fewer cases.[224] In *Villarreal*, the court acknowledged that there is no plain meaning to section 623(a)(2).[225] As the majority noted, both parties presented many reasonable interpretations of the statute.[226] Since the plain meaning is not clear, the remedial purpose canon can be used to break the tie.

The canon also requires that courts interpret the statute broadly.[227] As with the purposive approach, a broad interpretation supports the Eleventh Circuit's decision. The beneficial purpose for which the ADEA was enacted was to end discrimination against older workers, whether they are current employees or applicants.[228] Suppressing the evil of discrimination against older workers will be more readily attainable if applicants can also bring disparate impact claims. This will force employers to revise their hiring procedures and eliminate facially neutral requirements that disproportionately affect older applicants. Ultimately, the ADEA should be construed broadly in order to effectuate the remedial purpose of the statute and protect older employers who are searching for employment.

V. CONCLUSION

Recently, the *Villarreal* decision was vacated and will now be heard, en banc, by the Eleventh Circuit.[229] The court should uphold the *Villarreal* decision because it was correctly decided. Unlike the Seventh, Eighth, and Tenth Circuits, the Eleventh Circuit should refrain from picking apart the ADEA to the point that it provides little protection from discriminatory practices because that is not the purpose of the statute.[230] The history of discrimination statutes displays that Congress intends for these statutes to be interpreted broadly,[231] but the

222. *Id.*

223. *See id.*

224. *Id.*

225. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1293 (11th Cir. 2015).

226. *Id.*

227. Watson, *supra* note 202, at 233–34.

228. *See* 29 U.S.C. § 621(a) (2012).

229. Villarreal v. R.J. Reynolds Tobacco Co., No. 15-10602, 2016 U.S. App. LEXIS 2879 (11th Cir. Feb. 10, 2016).

230. Smith v. City of Des Moines, 99 F.3d 1466, 1468 (8th Cir. 1996); Ellis v. United Airlines, 73 F.3d 999, 1003 (10th Cir. 1996).

231. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991).

Supreme Court interpreted provisions of both the ADA and Title VII so narrowly that the statutes could not serve Congress's intent.[232] In both instances, Congress had to step in and give life back to these statutes through amendments.[233] This shows that, when Congress enacts discrimination statutes, it intends for them to be interpreted broadly.

Courts should use a purposive approach when interpreting the ADEA in order to protect those that the statute was enacted to benefit, which will require the court to look at the legislative history in order to determine the purpose of the statute.[234] When looking at the legislative history of the ADEA, the purpose was to protect older workers and also those seeking to regain employment.[235] The DOL, which originally enforced the ADEA, did not distinguish between employees and applicants and the EEOC adopted this interpretation when it was charged with enforcing the ADEA.[236]

In light of the purpose of the ADEA, section 623(a)(2) can be interpreted to include applicants. If the ADEA is to help older workers regain employment then they should be able to bring disparate impact claims to eradicate those facially neutral hiring practices that disproportionately affect older workers. Additionally, the ADEA is a remedial act so courts should utilize the remedial purpose canon. While this has been subject to criticism by legal scholars and the Seventh Circuit,[237] a more stringent standard can be used:[238] if the plain meaning of the statute is unambiguous then the canon would serve no purpose.[239] Instead, the remedial purpose canon should only be used as a tie breaker when the court cannot decide between two competing interpretations.[240] Both Villarreal and R.J. Reynolds presented reasonable interpretations and the Eleventh Circuit could not decide which argument to adopt.[241] In a situation like this courts can, and should, use the remedial purpose canon. When employing a liberal construction of section 623(a)(2), it can be interpreted to include applicants because that supports the purpose of protecting older workers seeking to regain employment.

In conclusion, the Eleventh Circuit, sitting en banc, should affirm the *Villarreal* decision—whether it use the *Chevron* framework, purposive

232. *See* Sutton v. United Air Lines, 527 U.S. 471 (1999); Toyota Motor Mfg. Ky. v. Williams, 534 U.S. 184 (2002); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

233. *See* 122 Stat. 3553; § 2, 105 Stat. 1071.

234. Barak, *supra* note 166, at 76.

235. 29 U.S.C. § 621 (2012).

236. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1302 (11th Cir. 2015).

237. Saxe, *supra* note 203, at 588.

238. *Id.* at 587.

239. Watson, *supra* note 202, at 243.

240. Saxe, *supra* note 203, at 587.

241. *Villarreal*, 806 F.3d at 1293.

approach, or remedial purpose canon—and should extend protection against disparate impact to applicants for hire.