No. 02-1080

In the Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, ET AL.,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the plain meaning of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, prohibits General Dynamics from withdrawing retirement health benefits from workers solely because of their age.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are named in Petitioner's Brief at pages ii-iii. Respondents do not have any corporate affiliations.

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The decision of the United States Court of Appeals for the Sixth Circuit, reported at 296 F.3d 466 (6th Cir. 2002), is reprinted at Pet. App. 1a-20a. The decision of the United States District Court for the Northern District of Ohio granting Petitioner's motion to dismiss, reported at 98 F. Supp. 2d 846 (N.D. Ohio 2000), is reprinted at Pet. App. 21a-25a. The order of the United States Court of Appeals for the Sixth Circuit, denying rehearing *en banc*, is set forth at Pet. App. 26a-27a.

JURISDICTION

The district court had federal question jurisdiction over Respondents' claims under the Age Discrimination in Employment Act of 1967 ("ADEA" or "the Act") pursuant to 28 U.S.C. §1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. §1291. The judgment of the court of appeals was entered on July 22, 2002. Petitioner filed a timely petition for rehearing, which the court of appeals denied on September 19, 2002. Pet. App. 26a-27a. On December 6, 2002, Justice Stevens extended the time within which to file a petition for a writ of *certiorari* to and including January 17, 2003. *See* Application No. 02A468. The petition for writ of *certiorari* was filed January 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Two provisions of the ADEA are pivotal in this litigation. The first is the ADEA's nondiscrimination mandate, section 4(a)(1), which provides in pertinent part:

It shall be 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. . . .

29 U.S.C. §623(a).

The second operative section is the ADEA's age limitation, section 12(a) of the Act, which provides:

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

29 U.S.C. §631(a).

STATEMENT OF THE CASE

Dennis Cline and his fellow employees ("Respondents" or "Employees") work or worked at Petitioner, General Dynamics Land Systems, Inc.'s ("General Dynamics") plants in Lima, Ohio, or Scranton, Pennsylvania, where they manufacture and assemble the M1 A-1 Abrams Tank and other equipment for the United States Armed Forces. JA at 8-9. Each individual Respondent suffered a unique and personal injury as a result of the Petitioner's discriminatory action, but the Employees can be broadly classified into three groups.

The first group consists of employees like Dennis Cline, who continue to work for Petitioner but will not receive health and medical benefits upon retirement, no matter how long they work for Petitioner. *Id*. at 8. The second group, known

as the "Babb" Group, are those who retired prematurely from General Dynamics to avoid having General Dynamics rescind their health and medical benefits. *Id*. at 8-10. The third group, referred to as the "Diaz" Group, are those individuals who retired after Petitioner's discriminatory policy went into effect. As a result, they have no health and medical benefits other than those obtained through private purchase or re-employment. *Id*.

The terms of Respondents' employment are governed by collective bargaining agreements negotiated between General Dynamics and the United Auto Workers ("UAW"). *Id*. at 9. Under the collective bargaining agreement that was in effect until mid-1997 ("CBA1"), General Dynamics provided full health benefits to all employees who retired with thirty years seniority. *Id*. at 9-10; Pet. App. at 3a. In 1997, General Dynamics and the UAW negotiated a new collective bargaining agreement ("CBA2"). JA at 9-10. Under CBA2, General Dynamics would provide health benefits on retirement only to workers who retired with thirty years of seniority and who were at least fifty years of age on July 1, 1997. *Id*.; Pet. App. at 3a; JA at 11-14. Respondents are workers who were over age forty and less than age fifty on July 1, 1997.

Respondents satisfied all statutory prerequisites and filed a timely suit in federal district court alleging violations of the ADEA and analogous state laws and requesting appropriate relief. *Id*.; Pet. App. at 3a; JA at 11-14. General Dynamics filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and the district court granted the motion. Pet. App. 21a-25a. The district court conceded that CBA2 "facially discriminates on the basis of age by creating two classes of employees: employees over the age of fifty, who are entitled to retiree health care benefits, and employees under the age of fifty,

who are not." *Id.* at 23a. However, the district court was unable to locate any other decision that had recognized a claim of what it termed "reverse age discrimination," and it declined to break new ground. The district court chose not to analyze decisions from other jurisdictions and simply held that reverse age discrimination claims are not cognizable. *Id*. at 24a.

The Employees appealed, and the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court. The Court of Appeals held that the statute means what it says. *Id.* at 11a. Judge Ryan, writing the lead opinion for the panel, thoroughly evaluated the merits of Respondents' claims and found that General Dynamics' policy violated the plain and unambiguous language of the statute. The opinion reasoned that the language of the ADEA is clear and prohibits all covered employers from discriminating "against any individual because of such individual's age." *Id*. (29 U.S.C. §623(a)(1))

Judge Ryan's opinion found numerous difficulties with Petitioner's reading of the ADEA. The opinion noted that General Dynamics was interpreting the statute rather than reading it. Petitioner's interpretation would transform the language from its statutory form -- "any individual" -- into Petitioner's term: "older workers." Pet. App. 6a. Judge Ryan then observed that even that significant alteration would be insufficient because the term "older worker" would have to be further modified to read "relatively older than any other group of employees with whom they are compared" for General Dynamics to prevail. *Id*. at 6a. The opinion concluded: "[w]e think the plain meaning of the statute will not bear that reading." *Id.*

Judge Ryan rejected the reasoning of *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), and those decisions following *Hamilton* because they erred by assigning undue weight to the "Statement of Findings and Purposes" in the ADEA and by discounting the ADEA's express prohibitions. *Id.* at 7a. It is a fundamental maxim of statutory construction that the more specific language of a statute should take precedence over generalized, hortatory language. *See Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996).

Judge Ryan also noted that references to "older workers" and "older persons" in the "Statement of Findings and Purposes" were simply not helpful in determining which older workers were entitled to the protection of the Act. Pet. App. 8a. Invoking both the statute's plain language and logic, the appellate court concluded that Congress had defined "older persons" as individuals age forty and older, and thus had chosen to protect all persons over age forty from discrimination based on their age. *Id.* Judge Ryan concluded that the plain-meaning interpretation of the ADEA would best advance Congress's avowed purpose of protecting "older workers" and "older persons." *Id.*

Judge Ryan stated that the issue before the court was not "reverse discrimination," a phrase which "has no ascertainable meaning in the law." *Id.* at 9a. Rather, the question was whether the ADEA prohibits such conduct. If so, then the conduct was discriminatory. If not, then the conduct did not amount to discrimination. *Id.* He noted that Respondents were "literally (statutorily) within the protected class." *Id.* Judge Ryan also relied upon the EEOC's interpretation of the statute, which he concluded was entitled to judicial deference. Judge Ryan observed that courts are not

permitted "to redraft anti-discrimination statutes so that they better advance the court's view of sound policy." *Id*.

Judge Cole wrote separately to emphasize that the ADEA's plain language is clear, unambiguous, and consistent with Congress' expressed purpose of protecting older workers. *Id*. at 12a, 18a. Accordingly, Judge Cole determined that there was no legally acceptable reason to look beyond the statutory language. His concurrence pointed out that the plain language does not create any internal conflicts or inconsistencies within the ADEA itself. *Id*. at 13a. Judge Cole argued cogently that the outcome was not absurd, either as a matter of reason or policy, and that it would not "open the floodgates" as the Seventh Circuit had suggested in *Hamilton*. *Id*. at 15a. He noted that courts applying state age discrimination laws in New Jersey, Oregon, Michigan, and Maine had permitted "reverse age discrimination," and the feared flood of cases had not materialized. *Id*. at 16a-18a.

Finally, Judge Cole determined that the panel's decision was consistent with the holding of this Court in *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996), for three reasons. Pet. App. 17a. First, *Consolidated Coin* is not a reverse age discrimination case but one that relies on the evidentiary framework this Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which permits an inference of unlawful discrimination to be drawn in appropriate cases. Pet. App. 17a. Second, *Consolidated Coin* itself demonstrates that persons within the protected age group of the ADEA can sue each other. *Id*. Third, both cases are consistent with the statute's plain language. *Id*. Accordingly, Judge Cole concurred in the judgment and joined Judge Ryan's opinion. *Id*. at 12a.

Judge Williams' dissent rested upon the Seventh Circuit's decision in *Hamilton*. *Id*. at 18a-19a. He also said:

> the ADEA was not intended to interfere with the collective bargaining process or with collective bargaining agreements. The courts should not stand watch over labor unions who represent employees of a company and interfere[1] with their negotiations with employers.

Id. at 19a.

General Dynamics petitioned the Sixth Circuit for a rehearing *en banc*, which was denied on September 19, 2002. Pet. App. 26a-27a. General Dynamics filed its answer to the complaint on October 25, 2002. This petition followed.

SUMMARY OF ARGUMENT

The plain language of the ADEA clearly and unambiguously provides that persons age forty and older may not be discriminated against because of their age. That is precisely what General Dynamics has done in this case. The CBA2 eliminates Respondents' eligibility for retirement health benefits for one reason alone - on the effective date of the contract, the Employees were not yet fifty. This is not an

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[1] Courts have the authority, and indeed the duty, to ensure that collective bargaining agreements do not violate federal anti-discrimination laws. *See Steelworkers v. Weber*, 443 U.S. 193 (1979). This duty is also mandated by the Supremacy Clause. U.S. Const. art. VI cl. 2. Although some degree of judicial deference to the collective bargaining process is proper, such deference cannot insulate flagrant and intentional violations of federal law.

age-based "attainment" goal, which the Employees will, if they live, have the possibility of reaching. It is the equivalent of a "snapshot," taken at a single moment in time, followed by a deliberate decision to allocate benefits based on the age of workers at the moment the "snapshot" was taken. When used in this fashion, age functions in precisely the same manner as sex, race, or any other immutable characteristic. It is beyond a workers' control, inalterable, and unrelated to job performance. Accordingly, CBA2 constitutes intentional and express age discrimination.

Petitioner terms the Employees' claim as one of "reverse discrimination," Brief for Pet'r at i, and therefore not prohibited by the ADEA. In fact, however, the Employees are indisputably within the protected class, and General Dynamics has rescinded their retirement health care benefits solely because of the Employees' ages. Such action is not "reverse discrimination–" it is simply age discrimination.

Petitioner also contends that the ADEA cannot possibly mean what it says, because the consequences of its plain meaning would be egregiously burdensome to employers. This conclusion is not supported by the evidence. However, even if true, this would be an insufficient reason to reject the plain meaning of the text. Substantial numbers of employers may wish to draw age-based lines in the allocation of benefits, yet their desires cannot override the dictates of the ADEA, in which Congress chose to make age-based line drawing presumptively unlawful. Unless some affirmative defense is available under the ADEA or another statute, employers may not withhold or condition employment benefits based on a worker's age.

The plain meaning of the ADEA is reinforced at every turn. The structure and content of other nondiscrimination

laws confirm it. The consistent, authoritative interpretations of the EEOC, expressed in a regulation, policy letter, and in opinions, ratify the plain meaning of the Act.

This Court's decision in *Consolidated Coin,* is also consistent with the plain meaning of the ADEA. In *Consolidated Coin*, this court adapted to age discrimination cases the *prima facie* proof scheme used where direct evidence is lacking. The Court refined the *prima facie* test to help the fact finder draw an inference of unlawful motivation in ADEA cases. In the present case, because the challenged conduct is a facially discriminatory policy, there is no issue regarding the employer's motivation.

Finally, a decision giving effect to the plain meaning of the ADEA will have little effect on the vast majority of employment benefit practices and early retirement practices, most of which are protected by specific exemptions in the ADEA, ERISA, or the Internal Revenue Code. The purported conflicts between the plain-meaning interpretation of the ADEA and general practices are thus illusory and will dissipate swiftly once this Court applies familiar canons of statutory construction.

In the last analysis, as the Sixth Circuit noted, a court's duty is to interpret the ADEA and not to rewrite it. Petitioner's interpretation of the Act is not acceptable because it would force sections 4(a)(1) and 12(a) to mean something other than what they say. The proper reading of the ADEA, as the Sixth Circuit held, is given by the plain meaning of the Act's operative provisions. The plain-meaning interpretation of the ADEA reads sections 4(a)(1) and 12(a) together to prohibit age discrimination against any worker age forty or older. Although this result may not have been clearly within the contemplation of Congress when the ADEA was enacted,

that does not render the statute or its interpretation absurd. As this Court recently observed, the mere fact that a statute can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998), quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (internal quotation omitted).

ARGUMENT

I. THE PLAIN MEANING OF THE ADEA PROHIBITS GENERAL DYNAMICS FROM WITHDRAWING RETIREMENT HEALTH BENEFITS FROM EMPLOYEES BECAUSE OF THEIR AGE.

A. Sections 4(a)(1) and 12(a) of the ADEA Plainly Express the Intent of Congress to Protect All Persons Age Forty and Older from Age Discrimination.

This Court has repeatedly held that the paramount goal in cases involving the construction of a statute is to give effect to Congress' intent. *See*, *e.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("Our objective ... is to ascertain the congressional intent and give effect to the legislative will."). To fulfill that obligation, this Court employs a presumption that a statute's "plain meaning" accurately embodies such intent. *See*, *e.g.*, *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (discussing the "'strong presumption' that the plain language of the statute expresses congressional intent"); *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); *United States v. Am. Trucking Ass'ns*, 310 U.S.

534, 542-43 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress… There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

These are the first principles of statutory interpretation, and they should control this litigation. This Court has consistently used plain meaning as its polestar in statutory interpretation. *See*, *e.g.*, *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148 (2003); *Amer. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). When "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Because the operative language of the ADEA is unambiguous, this Court should effectuate the clear intent of Congress, expressed in unequivocal language, to protect all persons age forty and over from age discrimination.

Petitioner seeks to narrowly focus this Court's attention upon the meaning of the term "age" in section 4(a)(1), and then struggles mightily to persuade this Court that when Congress used the term "age," it actually meant "old age" or "advanced years."[2] Brief for Pet. at 10-11, 16-28. This

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[2] At one point, Petitioner's brief calls into question the Sixth Circuit's use of "age" in section 4(a)(1) to mean chronological age and provides alternate definitions from dictionaries. Brief for Pet'r at 16. The point is disingenuous. Each dictionary cited by General Dynamics lists as a principal definition of "age" that is consistent

interpretation relies upon Petitioner's further construction of the terms "older workers" and "older persons," which appear in the ADEA's "Statement of Findings and Purposes," section 2 of the Act, 29 U.S.C. §621, and upon extensive policy arguments. However, neither section 2 of the Act nor the parade of invidious consequences imagined by Petitioner can ultimately bear the weight Petitioner would place upon them in its effort to rewrite the statute.

Petitioner's reliance on section 2 of the Act, Congress' "Statement of Findings and Purposes," is misplaced. First, assume *arguendo* that section 2 is inconsistent with either sections 4(a)(1) or 12(a) of the ADEA. Applying the ordinary canons of statutory construction resolves the inconsistency. The language of section 2 is, as the Sixth Circuit noted, hortatory and non-binding and is thus entitled to less weight than both the operative language of the ADEA's nondiscrimination mandate in section 4(a)(1) and the age limitation in section 12(a). This Court has consistently refused to read statements of findings and purposes to modify the operative provisions of a statute. *See*, *e.g.*, *Pa. Dep't of*

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with the lower court's understanding that the word means chronological age. In contrast, Petitioner's suggested alternative definitions are all secondary or tertiary definitions. *See Webster's Third New International Dictionary* 40 (1993); *Random House Unabridged Dictionary* 37 (2d ed. 1993); *American Heritage Dictionary of the English Language* 32 (4th ed. 2000); *The Compact Oxford English Dictionary* 28 (2d ed. 1999); *The New Lexicon Webster's Dictionary of the English Language* 15 (1987); *Encarta World English Dictionary* 29 (1999). Petitioner's claim that the word "age" is ambiguous would, taken to its logical conclusion, make any plain meaning reading of a statute impossible. If "age" is ambiguous then every other word in the English language is ambiguous.

Corr. v. Yeskey, 524 U.S. 206, 220 (1998); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994).

Second, the reference to "older workers" and "older persons" in section 2 is generalized, while section 12(a) specifically defines "individuals who are at least 40 years of age" as the persons entitled to the protection of the Act. The more specific language in a statute controls the more general. *See*, *e.g.*, *Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996). Thus, in the event of inconsistency, the traditional canons of statutory interpretation require that section 2 of the ADEA be subordinated to sections 4(a)(1) and 12(a).

Third, Petitioner's reliance on section 2 is misplaced because, as the Sixth Circuit held, there is no inherent inconsistency between these provisions. Inconsistency is avoided by reading section 12(a) to define section 2. Section 12(a) defines the class of "older workers" that Congress expressed its intention to protect in section 2 as those individuals who are at least forty years of age. This interpretation is reasonable, does not produce absurd results, and easily resolves any purported inconsistencies between section 2 and the operative text of the Act.

29 U.S.C. §623(i) also supports the plain-meaning interpretation of the ADEA. In section 623(i), Congress permitted employers to utilize a fractional pension accrual method that would entitle a worker hired at age fifty to larger pension contributions from their employer than a worker hired at age forty. It appears Congress recognized that such favorable treatment of older workers would otherwise be considered discriminatory and chose to expressly authorize that practice in section 623(i). If General Dynamics' interpretation of the ADEA is accepted, then section 623(i) would be superfluous. "A statute should be construed so that

effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant … ." *See*, Norman J. Singer, 2A STATUES AND STATUTORY CONSTRUCTION §46:06 (6th ed. 2000).

B. The CBA2 Clearly Discriminates on the Basis of Age.

Petitioner's single-minded focus on the meaning of the term "age" in section 4(a)(1) of the ADEA overlooks a second issue of equal importance. For this Court to interpret and apply section 4(a)(1), it must also consider the meaning of the phrase - "to … otherwise discriminate."

Used in its broadest sense, which can encompass affirmative action, consent decrees and redistricting, the question of what constitutes unlawful "discrimination" has given rise to difficult and divisive cases for this Court in both constitutional[3] and statutory[4] contexts. However, this case presents a narrower inquiry. To ascertain the meaning of the term "discriminate" in section 4(a) of the ADEA, this Court has looked to cases interpreting that same term in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. "[I]nterpretation[s] of Title VII … appl[y] with equal force in the context of age discrimination, for the substantive

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[3] *See, e.g., Gratz v. Bollinger*, 123 S.Ct. 2411 (2003) (undergraduate admissions program that assigns fixed points based on race violates equal protection clause); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (law school admissions program upheld as narrowly tailored to further compelling interest in diversity).

[4] *See*, *e.g.*, *Steelworkers v. Weber,* 443 U.S. 193 (1979) (upholding voluntary affirmative action plan against a Title VII challenge).

provisions of the ADEA 'were derived *in haec verba* from Title VII.'" *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (*quoting Lorillard v. Pons*, 434 U.S. 575, 584 (1978)). Although this Court has not yet determined whether certain aspects of the proof process in Title VII cases are applicable to cases brought under the ADEA,[5] there is no reason to differentiate between the two statutes when an employer adopts a policy that expressly classifies employees based upon a protected trait.

Employers "discriminate" within the meaning of Title VII when they meet out differential treatment, whether favorable or otherwise, based upon a statutorily protected characteristic. *See*, *e.g.*, *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976). Under Title VII, a finding of sex discrimination results when an employee is treated "in a manner which but for that person's sex would be different." *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978). Proof of discrimination generally requires a showing that similarly situated persons have received different treatment because of a statutorily protected characteristic. *See*, *e.g.*,

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[5] *Compare Reeves v. Sanderson Plumbing Prod, Inc.*, 530 U.S. 133, 142 (2000) (assuming *arguendo*, that the *McDonnell Douglas* framework used in Title VII cases is applicable to ADEA disputes) *with Consolidated Coin* (modifying the *McDonnell Douglas* framework for use in ADEA cases but noting that its application was "assumed" because the parties failed to contest it). It is also uncertain whether disparate impact analysis is available in ADEA disputes. *See, e.g., Adams v. Fla. Power Corp.*, 534 U.S. 1054 (2001) (dismissing as improvidently granted a case that raised the question whether disparate impact analysis applied to the ADEA); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here.").

Newport News Shipbldg & Dry Dock Co. v. EEOC, 462 U.S. 669, 683 (1983).

The decisions of this Court interpreting the term "discriminate" as it is used in Title VII and the ADEA comport with dictionary definitions of the term. The latter sources provide that to "discriminate" means to "distinguish" or "differentiate" or to make a "distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit." *See Random House Dictionary* 564 (2d ed. 1987); *see also Webster's Third New International Dictionary* 648 (1981) (defining "discrimination" as "the making or perceiving of a distinction or difference" or as "the act, practice, or an instance of discriminating categorically rather than individually.")

Applying both the statutorily-derived and dictionary-based meanings of the term "discriminate," there can be no doubt that General Dynamics has engaged in overt, express, and intentional discrimination. CBA2 provides in clear terms that Respondents will *never* be eligible for retiree health benefits solely because they were less than age fifty on July 1, 1997.[6]

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[6] This fact also differentiates Respondents from the plaintiffs in *Hamilton*. There, the employer was closing two plants and decided to offer early retirement incentives to certain older workers. The early retirement incentives at issue in *Hamilton* were supplemental benefits, and no workers were excluded from benefits they had previously been entitled to receive. Moreover, according to the district court in *Hamilton*, the incentive plan amounted to a bona fide employee benefit plan and thus would have been protected by section 4(f)(2) of the ADEA, 29 U.S.C. §623(f)(2). The Seventh Circuit chose not to decide that issue. Accordingly, it appears that the incentive plan in *Hamilton* was protected by an affirmative

General Dynamics has singled Respondents out for differential treatment because of their age, which is the statutorily protected characteristic under the ADEA. General Dynamics has chosen to treat the Respondents categorically (as a group of persons who were less than age fifty on July 1, 1997) rather than individually, and this difference in treatment is based upon a protected trait.

Under these conditions, age is transformed into an immutable characteristic and is functionally indistinguishable from sex, race, color, or national origin.[7] Age becomes not merely beyond a worker's control (as it always is), but also fixed, just as a snapshot photo freezes a moment in time. Used in this manner, age bears no relationship to job performance. This is precisely the sort of arbitrary age classification that Congress sought to eliminate by enacting the ADEA. *See* "Statement of Findings and Purposes," section 2(a)(2), 29 U.S.C. §621(a)(2) ("the setting of arbitrary age limits… may work to the disadvantage of older persons") and section 2(b), 29 U.S.C. §621(b) ("It is therefore the purpose of this chapter … to prohibit arbitrary age discrimination in employment….").

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statutory defense, and the Seventh Circuit could have ruled in favor of the employer without reaching the question of "reverse age discrimination."

[7] Ordinarily, as the Seventh Circuit observed in *Hamilton*, age does not have the characteristics of immutability. *See*, *Hamilton*, 966 F.2d at 1227 ("Age is not a distinction that arises at birth. Nor is age immutable. . . ."). However, "snapshot" classifications operate in such a way as to convert age into the functional equivalent of an immutable criterion.

Petitioner attempts to avoid the plain meaning of the ADEA by terming the Employees' claims as those of "reverse discrimination." Brief for Pet'r at i. As Judge Ryan recognized in his opinion for the Sixth Circuit opinion below, "the expression 'reverse discrimination'" is a misnomer. *See Id*. at 9a. Judge Ryan explained that "the fact that some members within the protected class were beneficiaries of the discriminatory action . . . does not somehow suspend the language of the statute . . . ." *Id*. at 10a. Because the Employees are at least forty years of age or older, they are within the protected class. General Dynamics' decision to rescind their retirement health care benefits because of the Employees' ages violates the ADEA. This Court should give effect to the clearly expressed intent of Congress and hold that the ADEA protects all persons age forty and over from arbitrary age discrimination.

II. THE PLAIN-MEANING INTERPRETATION OF THE ADEA IS SUPPORTED BY THE PARALLEL STRUCTURE OF OTHER NONDISCRIMINATION LAWS.

General Dynamics contends that if this Court adopts the plain-meaning interpretation of the ADEA, the outcome will be aberrational and anomalous, and Petitioner attempts to distinguish cases arising under Title VII. Brief for Pet'r at 20-21. In fact, the Title VII cases are clearly analogous here and provide further support for the plain-meaning interpretation of the ADEA adopted by the Sixth Circuit.

For example, *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75 (1998), held that men were entitled to sue under Title VII for same-sex sexual harassment. This was not characterized as a "reverse discrimination" case, nor was it problematic that Congress undoubtedly was not concerned

with male-on-male sexual harassment in the workplace when it enacted Title VII. As this Court stated: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id*. at 79.

Similarly, *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976) made clear that white persons could bring actions for race discrimination under Title VII. Again, the evil to be remedied in that case was understood to be an employer's action that was based upon the prohibited criterion. It did not matter that Congress was not contemplating discrimination against white persons when it enacted Title VII. This Court applied the plain language of the statute and determined that Title VII protects white persons when an employer singles them out for different treatment because of their race.

Most recently, in *Nev. Dep't of Human Res. v. Hibbs*, 123 S.Ct. 1972 (2003), this Court recognized the right of a man to sue for family leave to care for his ailing wife under the Family and Medical Leave Act of 1993 ("FMLA"). The Court acknowledged that a primary purpose of the FMLA was to remedy sexual stereotyping in the workplace and counter widely-held beliefs that women should carry a heavier share of family duties. *Id*. at 1975. Once again, *Hibbs* was neither framed nor understood as a case of "reverse discrimination." *Hibbs* was a case where the employee fell within the protected class and was thus entitled by the statute to time off from work to care for a family member.

In each of these cases, this Court has recognized that when Congress chooses to protect a particular characteristic (such as race, sex or age) and prohibits employers from acting on

that basis, then any person who is covered by the statute has a right of action when the employer so acts. All persons can sue for race and sex discrimination when they are singled out for adverse treatment on those grounds, and all persons age forty and over have a *prima facie* claim of age discrimination when a covered employer withholds benefits on the basis of age. An employer may raise affirmative defenses to such claims, but the essential element of the claim is the assertion that the employer has treated the claimant differently because of the protected trait.

Disability discrimination under the Americans with Disabilities Act ("ADA") operates somewhat differently. Under the ADA, only claimants who meet the statutory definition of "otherwise qualified individuals with a disability" have standing to sue. *See* 42 U.S.C. §12111(8); 29 U.S.C. §706(7). Thus, persons who are not disabled could not sue a "Helping Hands" workshop for refusal to hire them, because they do not fall within the protected class. This limitation in the ADA suggests that Congress knows how to draft a discrimination statute to limit reverse discrimination that Congress deems undesirable. Moreover, it demonstrates that Congress limits reverse discrimination when such limitations are deemed appropriate.

Congress limited the class of persons eligible to bring ADEA actions in section 12(a), which confines the protections of the Act to persons age forty and over. In so doing, Congress precluded persons under age forty from bringing an action for age discrimination,[8] just as it excluded nondisabled

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[8] Petitioner's curious decision to characterize discrimination against employees between the ages of forty and fifty as "youth discrimination" would be humorous if it were not so inappropriate. Congress has determined that members of the work force over the

persons from bringing suit under the ADA. However, Congress did not take the further step that Petitioner urges upon this Court of restricting the ADEA's protection to persons within the protected age group who are treated less favorably than younger workers. Nor did Congress envision the perverse outcome that General Dynamics advocates, where the ADEA would create an escalator of protections as individuals age, with relatively older employees receiving more protection against discrimination than younger employees who are within the protected age group. In short, the structure and operation of other nondiscrimination statutes reinforces the plain-meaning interpretation of the ADEA. This Court should interpret the ADEA consistently with the other federal nondiscrimination statutes by affirming the Sixth Circuit.

III. 29 C.F.R. §1625.2 CONFIRMS THE PLAIN-MEANING INTERPRETATION OF THE ADEA AND IS ENTITLED TO *CHEVRON* DEFERENCE.

A. 29 C.F.R. §1625.2 is Clear and Accords With the Plain Meaning of the ADEA.

As noted previously, Respondents contend that the plain meaning of the operative provisions of the ADEA, contained in sections 4(a) and 12(a), speak directly to the question presented and are unambiguous. However, were this Court

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age of forty are entitled to protection from arbitrary discrimination on account of their age. No re-characterization of them as youths can change that fact. Congress was well aware of the plight of middle aged workers when they determined the parameters of the protected age group and protected them from actions like those of the Petitioner. S. Rep. No. 90-723 (1967).

to determine that Congress has not directly addressed the issue of discrimination between persons in the protected age group, then this Court should defer to the reasonable interpretation of the agency charged with the duty to interpret and apply the ADEA, the Equal Employment Opportunity Commission (the "EEOC" or the "Commission"). As this Court held in *Chevron v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984):

> The power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-844. (Citations and footnotes omitted).

The EEOC has squarely addressed the issue of discrimination between members of the protected age group. The Commission has issued a regulation pursuant to notice-and-comment rulemaking procedures, and its regulation confirms that the plain-meaning interpretation of the ADEA is correct. The Commission's regulation provides as follows:

Discrimination between individuals protected by the Act.

(a) It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other is 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

(b) The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act.

29 C.F.R. §1625.2.[9]

Petitioner unsuccessfully attempts to characterize this regulation as ambiguous, unpersuasive, and non-binding.

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[9] This regulation has been applied in two EEOC opinions, both of which confirm the plain-meaning interpretation of the ADEA. *See*, *e.g*. *Garrett v. Runyon*, 1997 WL 574739 (EEOC Sept. 5, 1997) (holding that while a tie-breaker provision in collective bargaining agreement benefited older employees, 1625.2 provides protection from age discrimination to both the older and younger individuals who fall within the ambit of the ADEA); *Garrett v. Henderson*, 1999 WL 909980 (Sept. 30, 1999) (reaffirming previous decision over request for reconsideration).

Brief for Pet'r at 38-40. It is none of those things. The regulation is a clear and internally consistent explanation of the Commission's interpretation of the ADEA, and it is entitled to *Chevron* deference.

The regulation is not ambiguous. It clearly states that when an employer must choose between individuals, each of whom is within the protected age group, the employer cannot use age to distinguish between them. The regulation confirms that individuals over the age of forty are protected from age discrimination without regard to their relative ages.

Petitioner's suggestion that section 1625.2 merely means that the employer should not treat the advanced age of either employee as a negative factor is unpersuasive. The regulation frames the issue as requiring a choice between the employees in the protected age group - a decision to prefer one over the other. Section 1625.2 makes clear that the employer cannot base its decision upon age when allocating benefits or burdens between persons in the protected age group. Yet this is precisely what General Dynamics has done in CBA2. General Dynamics has permitted workers age fifty and over on July 1, 1997 to retain their eligibility for retirement health benefits and has eliminated Respondents' eligibility for such benefits solely because of their age. CBA2 clearly evinces age discrimination within the protected age group, which is expressly prohibited by the EEOC's regulation.

Moreover, section 1625.2(b) does not conflict with section 1625.2(a) as General Dynamics suggests. Brief for Pet'r at 39. Subsection (b) permits the employer to extend additional benefits to persons within the protected age group, but only if the employer "has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination." 29 C.F.R. §1625.2(b). Petitioner has

offered painfully little by way of factual proof or argument on this point and is not in a position to do so because of the procedural posture of this case. General Dynamics suggests that older workers need favorable treatment in benefit plans because they have fewer working years to recover from changes or that they should be "grandfathered" into retirement benefits on which they have relied. Brief for Pet'r at 42. However, neither argument is sufficient to bring their conduct within the ambit of section 1625.2(b).

First, section 1625.2(b) authorizes only the extension of *additional* benefits to older employees. It does not authorize the withdrawal or elimination of benefits from persons within the protected age group. Thus, the limited grant of flexibility to employers that section 1625.2(b) provides is simply not applicable here. General Dynamics cannot withdraw benefits from one group of protected employees and attempt to characterize that withdrawal as the extension of additional benefits to those not so excluded.

Petitioner's argument distorts the ordinary meaning of "additional." "Additional" means "existing or coming by way of addition." *Webster's Third New International Dictionary* 24 (1981). "Addition" means "something added," and its idiomatic equivalents are "over and above; besides." *American Heritage Dictionary 20* (3d ed. 1992). General Dynamics has not provided additional benefits to any subset of workers within the protected age group. Rather, the company has eliminated benefits from workers within the protected age group. Accordingly, section 1625.2(b) does not authorize CBA2.

Second, although it is true as a factual matter that an employer's oldest workers generally have fewer working years to recover from changes in their benefits, this truism

does not give General Dynamics a "reasonable basis" to assert that the provisions of CBA2 were intended to counteract problems associated with age discrimination. General Dynamics candidly concedes that the reason for imposing age-based criteria is "obvious. Retiree health insurance is extraordinarily expensive." Brief for Pet'r at 41. If General Dynamics adopted these age-based criteria as a cost-cutting measure, it cannot credibly assert at this juncture that it intended CBA2 as a means to combat "problems associated with age discrimination." Even if this contention were credited, it remains clear that CBA2 does not involve the extension of additional benefits and is thus not authorized by section 1625.2(b).

Third, the last sentence of section 1625.2(b) provides that the extension of additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act. This language reinforces two points: subsection (b) contemplates only the extension of *additional* benefits, not the withdrawal or elimination of benefits, and even the extension of additional benefits must not violate the substantive terms of the Act. In short, section 1625.2 has none of the flaws that Petitioner claims. Section 1625.2(b) is clear, unambiguous, directly on point, and reflects the consistently expressed views of the Commission. Section 1625.2 accords with the plain meaning of the ADEA and should be afforded *Chevron* deference.

B. 29 C.F.R. §1625.2 is Entitled to *Chevron* Deference.

The degree of deference that courts extend to agency regulations turns on four factors: (1) the scope of the rulemaking power afforded to the agency by Congress, (2) the use of notice-and-comment rulemaking procedures, (3)

whether that interpretive authority has been split between multiple agencies, and (4) whether or not the agency's regulation is based on a permissible or reasonable construction of the statute. Respondents will demonstrate that each of these factors militates in favor of full *Chevron* deference.[10]

First, Congress has extended broad rulemaking authority to the Commission with respect to the ADEA:

> **Rules and Regulations; exemptions.**
>
> In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.[11]

29 U.S.C. §628.

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[10] However, even if this Court chooses to apply the lower standard of deference set forth in *Skidmore v. Swift*, 323 U.S. 134 (1944), Respondents contend that section 1625.2 is highly persuasive and should be followed.

[11] The original grant of rulemaking power was given to the Secretary of Labor. The EEOC was substituted pursuant to Reorg. Plan No. 1 of 1978, §2, 43 Fed .Reg. 19,807 (May 9, 1978), 92 Stat. 3781, set out in App. 1 to Title 5, Government Organization and Employees, which transferred all functions vested by this section in the Secretary of Labor to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1-101 of Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978).

This grant of rulemaking authority over the ADEA is more expansive than the limited grant of rulemaking authority Congress provided the EEOC with respect to Title VII. *Compare*, §713(a) of Title VII, 42 U.S.C. §2000-12(a) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter."). The expansive terms of this grant indicate that Congress intended the EEOC to have the broadest possible range of rulemaking authority with respect to the ADEA.

Second, the EEOC engaged in notice-and-comment rulemaking when it enacted section 1625.2. These regulations were proposed in 1979, *see* 44 Fed. Reg. 68,860 (Nov. 30, 1979), and adopted in 1981.[12] In fact, some changes in the regulation's language resulted from the notice-and-comment process.[13] Notice-and-comment rulemaking is a significant factor suggesting that *Chevron* deference is warranted. *United States v. Mead*, 533 U.S. 218, 227-228 (2001).

Third, interpretive power over the ADEA is not split between multiple agencies but resides exclusively with the Commission. 29 U.S.C. §628. This singular grant of rulemaking authority eliminates the possibility of confusion that exists when multiple agencies are given interpretive authority and conflict may arise between them. *See*, *e.g.*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (refusing to apply *Chevron* deference where interpretive authority for the ADA was split between three agencies, none of whom had authority to interpret the term "disability"

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[12] *See,* 46 Fed. Reg. 47,726 (Sept. 29, 1981).

[13] The Commission explained in 46 Fed. Reg. 47,726 (Sept. 29, 1981) that it was making changes in response to public comments.

because it fell outside Titles I-V); *Skidmore v. Swift*, 323 U.S. 134 (1944) (where Administrator not clearly authorized to interpret Fair Labor Standards Act, his interpretive bulletins and informal rulings are not entitled to *Chevron* deference). When interpretive authority is not split between multiple agencies but resides in one clearly authoritative body, this Court generally applies *Chevron* deference. *See*, *e.g.*, *Chevron v. Echazabal*, 536 U.S. 73 (2002) (applying *Chevron* deference to EEOC regulation involving harm-to-self under the ADA); *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002) (upholding the EEOC's "relation back" regulation without specifying the degree of deference due); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (applying *Chevron* deference to administrative guidance issued by Justice Department); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988) (deferring to EEOC interpretation of Title VII).

Once *Chevron* deference is applied, there can be no question that section 1625.2 is relevant, reasonable, and should determine the outcome of this controversy. The regulation speaks directly to the question of discrimination between persons in the protected age group. It is unambiguous and explicit. The regulation prohibits an employer from using age as a basis to distinguish between persons within the protected age group, providing the lone exception for the extension of additional benefits, which is not applicable on these facts. In sum, in the event this Court looks beyond the operative language of sections 4(a) and 12(a) of the ADEA, this Court should defer to the Commission's reasonable resolution of this issue in section 1625.2. The EEOC's regulation thus provides this Court with an additional reason to affirm the decision of the Sixth Circuit.

Alternatively, under the standard set forth in *Skidmore v. Swift*, 323 U.S. 134 (1944), section 1625.2 should still be applied. *Skidmore* provides that:

> [T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistence with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140.

Although the delegation of interpretive authority was unclear in *Skidmore*, and the delegation in this case is both explicit and expansive, the teaching of *Skidmore* nonetheless requires that section 1625.2 be given substantial weight. As previously noted, this regulation was adopted pursuant to notice-and-comment rulemaking procedures, and the regulation was modified in response to public comments, serving to demonstrate the thoroughness of the EEOC's consideration of the issue. The validity of the EEOC's reasoning is evident, and the regulation is entirely consistent with the plain meaning of the substantive provisions of the ADEA. Finally, the regulation reflects the consistent view of the agency that Congress charged with responsibility to interpret the ADEA. Thus, even under the less deferential standard of *Skidmore*, section 1625.2 is directly applicable to this controversy, and this Court should afford it substantial weight.

IV. AN EEOC POLICY STATEMENT CONFIRMS THE PLAIN-MEANING INTERPRETATION OF THE ADEA AND IS ENTITLED TO *SKIDMORE* RESPECT.

The Policy Statement issued by the Chairman of the EEOC on June 30, 1988, further demonstrates the consistency of the EEOC's view on the issue of discrimination between persons in the protected age group. *See Cases Involving the Extension of Additional Benefits to Older Workers* (EEOC Policy Guidance, N-915.029, June 1988). The pertinent portion of this policy statement quotes the full text of section 1625.2, and proceeds to explain that regulation as follows:

> The (a) subsection of this interpretation sets forth the general rule against discrimination based on age within the protected age bracket or group. This is basically a reiteration of ADEA's sec. 4(a) prohibition with specific emphasis on the fact that discrimination on the basis of age is generally unlawful even between individuals who are within the Protected Age Group (PAG).

Id. at 2.

The letter then offers two examples of circumstances where an employer can legally provide additional benefits to older workers - severance pay following a non-discriminatory reduction in force, and subsidized preretirement survivor annuity coverage to employees who are eligible for early or normal retirement. Neither of these very specific exceptions helps General Dynamics. As previously noted, CBA2 did not provide additional benefits to older employees; instead, it withdrew benefits from employees within the protected age group.

This Court generally applies *Skidmore* to policy statements issued in the EEOC Compliance Manual. *See*, *e.g.*, *Nat'l RR Pass. Corp. v. Abner Morgan, Jr.*, 536 U.S. 101, 110 n.6 (2002) (applying *Skidmore* to EEOC interpretive guidelines in Compliance Manual); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (applying *Skidmore* to policy statements in the EEOC Compliance Manual, a letter from the general counsel, and testimony by the EEOC Chairman regarding the extraterritorial application of Title VII).

Applying the *Skidmore* test, this policy statement should be deemed persuasive. It is consistent with the EEOC's interpretation of the Act in section 1625.2, the reasoning of the policy statement is valid, and it provides additional evidence of the EEOC's strong commitment to protecting all members of the protected age group from unlawful discrimination based on their age. This policy confirms the plain-meaning interpretation of the ADEA and offers yet another reason to affirm the decision of the Sixth Circuit.

V. THIS COURT'S DECISION IN *CONSOLIDATED COIN* IS CONSISTENT WITH THE PLAIN MEANING OF THE ADEA.

In *Consolidated*, this Court modified the framework established by *McDonnell Douglas*, to ensure that it would function effectively in cases alleging age discrimination. The Court held that it was unnecessary for an ADEA plaintiff to show that he or she had been replaced by someone outside the protected age group (namely under the age of forty). *Consolidated Coin*, 517 U.S. at 312. The Court determined that an inference of unlawful age discrimination could be drawn where the plaintiff was replaced by someone "substantially younger." *Id.* at 313.

In *Consolidated Coin*, there was no direct evidence that the age of the plaintiff "actually motivated the employer's decision" as required by *Hazen Paper v. Biggins*, 507 U.S. 604, 610 (1993) ("liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision."). Accordingly, the plaintiff in *Consolidated Coin* had to prove inferentially the employer's intent to discriminate on the basis of age. Here, the Employees have no need to prove that General Dynamics' decision was based on their ages because CBA2 expressly excludes employees who are younger than fifty on July 1, 1997, from eligibility for retirement health benefits.

Consolidated Coin suggests that there is a weak inference of an employer's intent to discriminate on the basis of age where there is an insignificant age difference between the plaintiff and the replacement employee, even where the replacement is under forty years of age. 517 U.S. at 312. However, that case did not involve a situation where the plaintiff was younger than the individual who replaced him. Thus, the Court did not reach the issue presented here.

Finally, the harm suffered by the Employees in this case derives from a facially discriminatory CBA2 that expressly classifies workers based upon their age. This case thus involves a matter of arbitrary age discrimination, rather than one involving either age-based animus or prejudicial stereotyping. Congress specifically identified "arbitrary age limits" and "arbitrary age discrimination" as harms that the ADEA was intended to redress. *See* 29 U.S.C. §621 (a)(2), (b).

VI. CONSIDERATION OF SECTION 4(F)(2)(B)(I) IS NOT POSSIBLE ON THE PRESENT RECORD.

Petitioner has invoked section 4(f)(2)(B)(i), 29 U.S.C. §623(f)(2)(B)(i), which was added to the ADEA by the Older Workers Benefit Protection Act of 1990, P.L. 101-433, §103, 104 Stat. 978, 978-979 (1990)("OWBPA"). This provision modified the previous section 4(f)(2) exemption for bona fide employee benefit plans and was intended to overrule the Supreme Court's decision in *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989). Petitioner (and the AFL-CIO, in its brief *amicus curiae*), contends that this section provides an independent basis for reversing the decision of the United States Court of Appeals for the Sixth Circuit. However, this issue is not properly before the Supreme Court.

This matter came before the district court on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). It is well settled that a 12(b)(6) motion is limited to the pleadings in the case. In ruling on a 12(b)(6) motion, the court presumes that all well-pleaded allegations are true, resolves all doubts and inferences in the pleader's favor, and views the pleadings in the light most favorable to the non-moving party. *See*, *e.g.*, *Albright v. Oliver*, 510 U.S. 266, 267 (1994); *United States v. Gaubert*, 499 U.S. 315, 327 (1991); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the court may take judicial notice. *See* James Wm. Moore *et al.*, 2 MOORE'S FEDERAL PRACTICE §12.34[2] (3rd ed. 2000); Charles Alan Wright, *et al.*, 5A FEDERAL PRACTICE AND PROCEDURE, §1277 at 464 (2d ed. 1986). General Dynamics 12(b)(6)

motion responds directly to the complaint. It takes into account no evidence or exhibits outside the pleadings.

Further, the burden of proof needed to demonstrate that a benefit differential falls within section 4(f)(2)(B)(i) rests on General Dynamics. The Act explicitly and unequivocally states that the employer bears the burden of showing that any benefit differential is justified by significant cost considerations. "An employer … shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter … ." 29 U.S.C. §623(f)(2)(B). *See also*, 29 C.F.R. §1625.10. In effect, Congress has ensured that section 4(f)(2)(B)(i) must be treated as an affirmative defense. General Dynamics has not presented and cannot present any evidence in support of this affirmative defense.

Moreover, as an affirmative defense that depends upon the proof of facts outside the pleadings, section 4(f)(2)(B)(i) has not been argued below. This was Petitioner's litigation strategy. Petitioner cannot now attempt to raise and argue an issue that it chose not to present to the courts below.

The Employees filed their initial complaint on June 24, 1999, and an amended complaint on September 29, 1999. General Dynamics' motion to dismiss under Fed. R. Civ. P. 12(b)(6) was submitted in lieu of an answer to the amended complaint. General Dynamics' motion to dismiss relied exclusively on its theory that so-called "reverse discrimination" claims are not proper under the ADEA. Pet. App. 21a-25a. The district court granted the motion to dismiss, and Respondents appealed to the Sixth Circuit. The Sixth Circuit reversed the district court, and General Dynamics then filed an answer invoking section 4(f)(2)(B)(i) as an affirmative defense.

Because Petitioner did not raise section 4(f)(2)(B)(i) until after the Sixth Circuit's ruling, that defense was not before either the district court or the court of appeals as a possible ground for judgment. As neither the district court nor the court of appeals have had an opportunity to consider the section 4(f)(2)(B)(i) defense, it is not properly before the Supreme Court. This Court consistently refuses to hear issues that were not raised or addressed below. *See, e.g., Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115, n.5 (1998); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 n.2 (1989); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988); *Youngberg v. Romeo*, 457 U.S. 307, 317 n.19; *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Additionally, this issue goes beyond the Question Presented in the petition for certiorari, and this Court does not address issues that lie outside the scope of the Question Presented. *See*, *e.g.*, *Matsushida Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996). Whether the provisions of CBA2 are consistent with the bona fide employee benefit plan exemption established by section 4(f)(2)(B)(i) plainly exceeds the bounds of the Question Presented. As framed by Petitioner, the Question Presented for *certiorari* is:

> Whether the Court of Appeals erred in holding, contrary to decisions of the First and Seventh Circuits, that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, prohibits "reverse discrimination," i.e. employer actions, practices, or policies that treat older workers more favorably than younger workers who are at least forty years old."

Brief for Pet'r at i. Petitioner cannot bring the entire text of the ADEA before this Court by means of an inclusive-numbers citation.

Finally, one subgroup of the Employees (the "Babb group") consists of ten General Dynamics' workers who retired prior to July 1, 1997, to ensure their receipt of retirement health benefits under CBA1. Respondents contend that this retirement was involuntary and amounted to a constructive discharge. While the merits of this claim await the completion of discovery and the development of a record, it must be noted that the last paragraph of the section 4(f)(2)(B) exemption specifically provides that "no such employee benefit plan shall require or permit the involuntary retirement of any individual because of the age of such individual." Because Respondents contend that CBA2 forced at least some members of the plaintiff class into an involuntary retirement, and there is no record to enable this Court to resolve that issue, it would be premature for this Court to hold that the section 4(f)(2)(B)(i) exemption immunizes General Dynamics from ADEA liability. At least with respect to the Babb group, the section 4(f)(2)(B)(i) defense is unripe for judicial resolution by this Court.

For these reasons, the section 4(f)(2)(B)(i) defense does not provide an independent basis for reversing the decision of the United States Court of Appeals for the Sixth Circuit.

VII. THE PLAIN-MEANING INTERPRETATION OF THE ADEA WILL NEITHER DISRUPT SETTLED EXPECTATIONS NOR PROSCRIBE WIDESPREAD EMPLOYMENT PRACTICES.

Petitioners (and several *amici*) would have this Court believe that the consequences of affirming the Sixth Circuit

are so egregious as to make that option untenable. In fact, the consequences of affirmance would be far less dramatic and wide-ranging than Petitioners contend.

The ADEA contains a significant number of affirmative defenses that are likely to immunize a wide range of common employment practices. The first of these defenses is 29 U.S.C. § 623(f)(1), which immunizes any decision based upon a reasonable factor other than age ("RFOA"). This defense would enable an employer to condition eligibility for certain benefits on length of service, seniority, or any factor other than age. This Court's decision in *Hazen Paper* confirms that employers may utilize criteria having some correlation to age without triggering ADEA liability. 29 U.S.C. § 623(f)(1) also establishes the bona fide occupational qualification defense ("BFOQ"), which enables employers to set age-based classifications that are relevant to job performance. While these defenses have no bearing in the present case, the BFOQ defense would be available to an employer in one of the cases cited by Petitioner - *Koger v. Reno*, 98 F.3d 631 (D.C. Cir. 1996). In that case, the U.S. Marshals Service utilized an age-based sliding scale in conjunction with physical fitness standards for promotion decisions. Non-federal employers wishing to engage in similar practices could invoke the BFOQ defense.

Other defenses to ADEA liability include 29 U.S.C. § 623(f)(2)(A), which establishes the bona fide seniority system defense, 29 U.S.C. § 623(f)(2)(B), which immunizes bona fide employee benefit plans, and § 623(l)(1)(A), which permits the use of attainment goals in early retirement incentive plans (commonly known as "ERIP's"). If one looks to the studies cited by Petitioner, (*See*, Brief for Pet'r at 41) it appears that most employers utilize "attainment goals" to establish eligibility for retiree health benefits, rather than the

"snapshot" approach General Dynamics has taken. Accordingly, most of the employment practices General Dynamics cited would be protected by one or more affirmative defenses and would not be undermined by the plain-meaning interpretation of the ADEA.

Indeed, attainment goals present few of the difficulties associated with "snapshot" age classifications. Attainment goals provide employees with an opportunity to qualify for benefits as they age and reflect the typical judicial understanding of age as a fluid and transitory process experienced by all workers. "Snapshot" classifications, however, take a picture of the age of the workforce at a moment in time and thus effectively convert age into an immutable characteristic. When employers restrict benefits based on a "snapshot," age becomes a fixed attribute that for purposes of the employer's classification will never change. Thus, all General Dynamics employees who failed to qualify for retiree health benefits at the time CBA2 went into effect will be perpetually barred from such benefits. It is not surprising, then, that Congress chose to single out attainment classifications and immunize employers who utilized them from ADEA liability.

Finally, most of the concerns raised by the *amicus* brief submitted by the ERISA Industry Committee involve conflicts that will supposedly arise if practices authorized by ERISA are thought to be prohibited by the ADEA. The bulk of these concerns are illusory and would be resolved by the principle of statutory construction holding that conflicting statutes should be interpreted to allow a later enacted, more specific statute to amend an earlier, more general statute to cure any repugnancy between the two laws. *See*, *e.g.*, *Smith v. Robinson*, 468 U.S. 992 (1984); *Watt v. Ala.*, 451 U.S. 259, 267 (1981); *Radzanower v. Touche Ross & Co.*, 426 U.S.

148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The ADEA was enacted in 1967; ERISA was enacted in 1974. Other decisions suggest that a more specific statute will be given precedence over a more general one without regard to their temporal sequence. *See*, *e.g.*, *Busic v. United States*, 446 U.S. 398, 406 (1980); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973). Under either maxim, the later, more specific provisions of ERISA authorizing a particular employment practice would trump the earlier, more general nondiscrimination mandate of the ADEA.

The ERISA *amicus* also raises concerns about practices authorized by the Internal Revenue Code. *See*, Brief of Amicus Curiae ERISA Industry Comm. at 5-10, 16-18. Again, the familiar principle that the more specific statute controls the more general would appear to resolve the legality of many, if not all, of these practices. In fact, the only instances of plans cited by this *amicus* whose terms would be called into question by an affirmance appear to be those that provide advantageous benefits to older workers in the absence of express congressional provisions authorizing such treatment. These might include target benefit pension plans, age-weighted defined contribution plans, and fractional accrual defined benefit plans. Some of these plans may be protected under section 623(f)(2)(B) as bona fide employee benefit plans. Indeed, as described by *amicus*, some of these plans appear to be supported by age-related cost justifications, which are set forth in the regulations promulgated pursuant to section 623(f)(2)(B) and which were incorporated into the text of that exemption by OWBPA. *See generally*, 29 C.F.R. §1625.10. Where age-related cost justifications can be proven, such plans would be permitted under 29 U.S.C. § 623(f)(2)(B).

VIII. THE DECISIONS OF THE LOWER FEDERAL COURTS ARE INAPPOSITE.

Petitioner relies upon some decisions of the lower federal courts in its effort to characterize the Sixth Circuit's decision below as aberrational. When these decisions are examined, it is clear that most rely without analysis upon *Hamilton* and *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988). Both *Hamilton* and *Schuler* are inapposite, because neither decision would be affected by this litigation's outcome.

In *Hamilton*, the employer and the union negotiated a special early retirement program in response to the anticipated closure of several plants. *Hamilton*, 966 F.2d at 1226-27. Early retirement benefits had previously been available only to workers sixty years of age and older. *Id.* at 1227. The new program was supplemental, and it extended the benefits of early retirement to workers age fifty and older. *Id.* Thus, the employer in *Hamilton* provided additional benefits to workers age fifty and older, based upon its perception that workers over fifty would have the most difficulty finding new employment after the plant closings. Applying the plain-meaning interpretation of the ADEA, this program is clearly permissible.

The program in *Hamilton* was a bona fide employee benefit plan under section 4(f)(2), and the district court held that the employer was entitled to summary judgment on that basis. *See Hamilton*, 966 F.2d at 1227. The district court also ruled that "reverse age discrimination" was not prohibited by the ADEA. *Id.* The Seventh Circuit chose to address only the latter issue. *Id.* Thus, the program in *Hamilton* is permitted by the ADEA, and the section 4(f)(2) defense provides a separate and independent basis for the

Seventh Circuit's holding. As discussed previously, this affirmative defense is not available to General Dynamics.

Respondents have shown that the section 4(f)(2) defense, as amended by OWBPA and presently codified at 29 U.S.C. § 623(f)(2)(B)(i), has been authoritatively interpreted by the EEOC to permit an employer to furnish additional benefits to older workers where such benefits are designed to counteract problems related to age discrimination. *See* 29 C.F.R. § 1625.2(b). This is precisely what the program in *Hamilton* accomplished. It extended additional benefits to older workers in recognition of the fact that employees over fifty years of age who lose their jobs because of a plant closing are likely to experience greater difficulties finding new employment than employees who are younger than fifty. Thus, the employer in *Hamilton* offered additional benefits to older workers (using the generally accepted meaning of "additional" benefits) and had a reasonable basis for concluding that the provision of such additional benefits would counteract problems related to age discrimination.

General Dynamics cannot make such a showing. While a full analysis of the section 4(f)(2) defense must await a remand and the development of a record, CBA2 does not comport with the requirements of 29 C.F.R. § 1625.2(b). The withdrawal of benefits is not equivalent to the conferral of additional benefits. Moreover, General Dynamics' decision to eliminate Respondents' eligibility for retirement health benefits was apparently a cost-saving measure. Brief for Pet'r at 41. The withdrawal of retirement health benefits cannot be said to *counteract* problems related to age discrimination – it *is* age discrimination. Because CBA2 does not counteract problems related to age discrimination and does not involve the conferral of additional benefits, it fails to satisfy the requirements of section 1625.2(b).

General Dynamics' reliance on *Schuler* is similarly misplaced. The employer in that case announced a company-wide reorganization involving a reduction in force of 400 workers. The employer announced a severance plan and encouraged certain workers to consider that severance plan. The plaintiff, whose position was eliminated by the reorganization, declined the severance plan and was then offered and declined another position with the same pay and benefits as his previous job. He then brought an action alleging age discrimination.

Schuler is inapposite because it is a case that turns on the employer's motivation. The severance plan at issue was age neutral, and there was no evidence that it was offered in a discriminatory manner. The severance plan tied benefits to seniority, which is permissible under *Hazen Paper*, as well as under 29 U.S.C. §623(f)(2)(A). However, the issue of affirmative defenses to the ADEA was not resolved because the plaintiff presented no evidence of age discrimination, whether direct or circumstantial. Because the plaintiff had not been replaced by a younger worker, the *McDonnell Douglas* framework did not support an inference of age discrimination. The plaintiff attempted to introduce statistical evidence regarding the ages of workers who had accepted the age-neutral severance plan, but he was unable to show a statistically significant pattern. Finally, the employer offered both a legitimate nondiscriminatory reason and a RFOA defense. The First Circuit concluded, with ample justification, that the plaintiff had failed to carry his burden of proving that the employer acted with the intent to discriminate on the basis of age.

Schuler simply has no relevance to this dispute. The present case involves a facially discriminatory policy, presents no issue of the employer's motivation, does not rely on

McDonnell Douglas, and involves no statistical proof or claim of disparate impact. The plan in *Schuler* was age neutral, and would probably have been entitled to the bona fide employee benefit plan defense. Respondents are confident that *Schuler* was correctly decided, and the outcome in *Schuler* would not change regardless of this Court's disposition of the instant controversy.

Petitioner also cites *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988), *cert. denied*, 486 U.S. 1044. Yet, this too is inapposite. *Karlen* involved an early retirement plan that included complicated modifications of retiring employees' rights to receive different percentages of unused and accumulated sick leave and group health insurance upon retirement, depending upon the employee's age. *Id.* at 316-17. Differing benefits were available for the following age groups: 55-58, 59, 68-64, and 65-70, *Id.* at 316.

In reversing summary judgment for the employer's, Judge Posner held:

> Whether a worker takes early retirement because he fears he will be discriminated against on account of his age if he does not, or refuses to take early retirement and indeed is then discriminated against on account of his age, his rights under the Age Discrimination in Employment Act have been violated.

Id. at 317. Judge Posner explained:

> Nothing in the Age Discrimination in Employment Act forbids an employer to vary employee benefits according to the cost to the employer; and if, because older workers cost more, the result of the employer's

> economizing efforts is disadvantageous to older workers, that is simply how the cookie crumbles.
>
> But where, as in the present case, the employer uses age--not cost, or years of service, or salary--as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2). *See* 29 C.F.R. §1625.10(a)(1), (d)(1)-(3) (EEOC regulation interpreting section 4(f)(2)). Otherwise the inference of age discrimination will be strong--certainly strong enough to defeat a motion for summary judgment by the party having the burden of persuasion, that is, the defendant.

Id. at 319. Thus, according to the opinion in *Karlen*, with respect to discrimination within the protected age group, the employer must establish a basis other than age to justify different benefits.

Moreover, *Karlen* actually supports the subgroup of Respondents categorized as the "Babb Group." Like the other Respondents, these employees accumulated the necessary 30 years of seniority, were between 40-49, but retired from employment prior to CBA2's effective date to avoid losing their benefits. As stated in Judge Posner's opinion, "To withhold benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the Age Discrimination in Employment Act is aimed." *Id*. at 320.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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