No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,

Petitioner,

v.

DENNIS CLINE, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 923-2776

WILLIAM J. KILBERG
Counsel of Record
THOMAS G. HUNGAR
WILLIAM M. JAY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. The Decision Below Is In Clear And Irreconcilable Conflict With The Decisions Of This Court And Lower Federal Courts On A Pure Question Of Law That Merits This Court's Review 1

A. The Lower Federal Courts Are Divided Over The Pure Question of Statutory Interpretation Presented By This Case 2

B. The Sixth Circuit's Construction Conflicts With This Court's Precedents And Will Have A Dramatic And Deleterious Impact On ADEA Litigation Absent This Court's Review 5

II. The Decision Below Is In Clear Conflict With Congressional Purpose And Intent 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Barnett v. Dep't of Veterans Affairs, 153 F.3d 338 (6th Cir. 1998) 8

EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) 3

Hamilton v. Caterpillar Inc., 966 F.2d 1226 (7th Cir. 1992) 2,3,4

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 2,7

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 7

Lawrence v. Town of Irondequoit, No. 01-CV-6306L, __ F. Supp. 2d __, 2002 WL 32001763 (W.D.N.Y. Oct. 29, 2002) 4

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 6,7,8

O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996) 2,6,7,8

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 6

Schiltz v. Burlington N. R.R., 115 F.3d 1407 (8th Cir. 1997) 8

Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988) 5,6

State Police for Automatic Ret. Ass'n v. DiFava, 317 F.3d 6 (1st Cir. 2003) 5

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 10

Turlington v. Atlanta Gas Light Co., 135 F.3d 1428 (11th Cir. 1998) 8

Vanasco v. Nat'l-Louis Univ., 137 F.3d 962 (7th Cir. 1998) 8

Williams v. Raytheon Co., 220 F.3d 16 (1st Cir. 2000) 8

Statutes and Rules

ADEA § 2, 29 U.S.C. § 621 10

ADEA § 2(a)(1), 29 U.S.C. § 621(a)(1) 9

ADEA § 2(a)(2), 29 U.S.C. § 621(a)(2) 9

ADEA § 2(a)(3), 29 U.S.C. § 621(a)(3) 9

ADEA § 2(b), 29 U.S.C. § 621(b) 9

ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1) ..... *passim*

ADEA § 11(*l*), 29 U.S.C. § 630(*l*) 3

ADEA § 12(a), 29 U.S.C. § 631(a) 9

29 C.F.R. § 1625.2(b) 3,4

Other Authorities

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) 10

REPLY BRIEF FOR PETITIONER

As the petition makes clear, this case squarely presents the legal question whether the ADEA permits plaintiffs to sue for reverse age discrimination. That issue is a pure question of statutory construction on which the lower federal courts have taken irreconcilably opposed positions. The majority of federal courts to consider the issue have held that the ADEA does not prohibit employers from favoring older employees over younger employees; in the decision below, the Sixth Circuit held precisely the opposite. The Sixth Circuit's erroneous interpretation of the statute, if allowed to stand, will affect virtually every case filed under that statute, both by opening the door to a new form of ADEA litigation and by making defense against conventional ADEA suits vastly more difficult. Review is warranted so that this Court can resolve the square conflict over the proper construction of the ADEA and restore the interpretation that faithfully carries out Congress's expressed purpose of protecting older workers.

I. The Decision Below Is In Clear And Irreconcilable Conflict With The Decisions Of This Court And Lower Federal Courts On A Pure Question Of Law That Merits This Court's Review

Notwithstanding the Sixth Circuit's forthright admission that its decision conflicts with those of numerous other federal courts, including the First and Seventh Circuits (Pet. App. 6a-7a), respondents attempt to obscure the sharpness of the divide among the circuits by citing various immaterial factual distinctions among the cases. Respondents' efforts are unavailing; the court below was clearly correct in acknowledging the circuit conflict over the question presented, and that question plainly warrants plenary review.[1]

[1] Respondents also contend that this case does not involve "reverse" discrimination because "[r]everse discrimination in-

Equally without merit are respondents' attempts to harmonize the decision below with this Court's precedents. As even the concurring judge below conceded (Pet. App. 16a), the panel majority's holding is unquestionably in "tension" with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), and it also runs counter to the reasoning adopted in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). *See* Pet. 11-13. For these reasons as well, this Court's review is necessary in order to bring coherence and consistency to this important area of the law and to alleviate the burden imposed on nationwide employers who now find themselves placed in the impossible position of being obligated to comply with mutually inconsistent interpretations of the same far-reaching federal statute.

A. The Lower Federal Courts Are Divided Over The Pure Question of Statutory Interpretation Presented By This Case

Without disputing General Dynamics' showing that the reasoning and holding of *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226 (7th Cir. 1992), are directly at odds with the reasoning and holding of the decision below, respondents offer spurious factual distinctions in an effort to explain away the

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volves a claim brought by someone *outside* the protected class." Opp. 3. Respondents' semantic quibble is utterly without significance, of course, because the fundamental question that divides the circuits and that is squarely presented in this case is whether the ADEA creates a cause of action for employees who are at least 40 years of age and who claim that they have been discriminated against because of their relative youth. Most of the courts that have considered such claims characterize them as "reverse" discrimination claims, for obvious reasons, and General Dynamics has accordingly adopted the same shorthand formulation, but the fundamental question is the same regardless of the label respondents or the court below may seek to apply.

conflict. Respondents' efforts cannot conceal the existence of a clear circuit split over the question presented here.

First, respondents suggest that *Hamilton* is somehow distinguishable because the employer in that case conferred *new* benefits on employees who were at least 50 years old, whereas General Dynamics preserved existing benefits for employees over 50 while ceasing to provide them for younger employees. Opp. 5-6. Respondents' proffered distinction is preposterous, and finds no support in the categorical language used by the court below. If reverse discrimination is actionable under the ADEA, as the court below held, it is equally actionable whether it takes the form of the extension of additional benefits to favored older employees or the withdrawal of existing benefits from disfavored younger employees. The ADEA does not distinguish between the discriminatory conferral or denial of benefits, but instead forbids all discrimination against protected individuals "because of . . . age." ADEA §§ 4(a)(1), 11(*l*), 29 U.S.C. §§ 623(a)(1), 630(*l*).[2] The only question relevant here is whether the statute also forbids discrimination because of *youth*; the court below held that it does, whereas the Seventh Circuit in *Hamilton* held that it does not.

Respondents also attempt to distinguish *Hamilton* based on a fact-specific affirmative defense that the Seventh Circuit's opinion in that case never discusses. According to respondents, "the discussion in *Hamilton* about reverse age discrimination" – *i.e.*, the entire body of the court's opinion – was "unnecessary" because the defendants in that case could have made out a defense under 29 C.F.R. § 1625.2(b). Opp. 6. But § 1625.2(b) applies only "if an employer has a rea-

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[2] *See, e.g.*, *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1391-92, 1393-94 (9th Cir. 1984) (holding an employer liable under the ADEA for creating a new severance benefit for which only employees under 55 were eligible).

sonable basis to conclude that [additional] benefits will counteract problems related to age discrimination." There is no support whatsoever for respondents' assertion that the factual predicates for such a defense could have been satisfied in *Hamilton*; indeed, this defense was not mentioned in the Seventh Circuit's opinion, and there is no reason to believe it was even advanced.[3] The Seventh Circuit instead held, cogently and persuasively, that the plaintiffs' underlying legal theory – reverse discrimination – is not actionable under the ADEA. 966 F.2d at 1227-28. That holding is the sole basis for the Seventh Circuit's decision, and it is squarely at odds with the Sixth Circuit's decision below.

Even the court below forthrightly acknowledged that its decision created the circuit split detailed in the petition but now denied by respondents. Pet. App. 6a-7a. Indeed, the Sixth Circuit explicitly wrote that it thought the Seventh Circuit's "*Hamilton* opinion fail[ed] to properly interpret the ADEA." *Id.* at 7a. This straightforward statement makes plain that these decisions announce diametrically opposed constructions of § 4(a)(1) and that these opposing answers to the controlling legal question cannot be reconciled based on any purported factual distinction.

Nor did the court below attempt to draw such an irrelevant factual distinction between its decision and the contrary holdings of "the majority of [other] courts" that had pronounced upon the issue.[4] Rather, it acknowledged that these

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[3] Far from relying on the regulation's affirmative defense to support its holding, the Seventh Circuit instead discussed other aspects of § 1625.2 and concluded that it "exceeds the scope of the statute." *Hamilton*, 966 F.2d at 1228.

[4] That majority has since expanded. *See Lawrence v. Town of Irondequoit*, No. 01-CV-6306L, __ F. Supp. 2d __, 2002 WL 32001763, at *10 (W.D.N.Y. Oct. 29, 2002) (rejecting a reverse discrimination theory and disagreeing with the decision below).

other cases had also presented "the question before us," but it rejected their reasoning in favor of its own distorted reading of § 4(a)(1). Pet. App. 6a-7a. Thus, respondents' attempt to criticize and distinguish the First Circuit's decision in *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988) (Breyer, J.), is wholly without merit. *See* Opp. 7-9. Then-Judge Breyer's opinion for the First Circuit clearly and unambiguously adopted the construction of the ADEA advanced by General Dynamics here, stating that the Act "does not forbid treating older persons *more* generously than others" covered by the Act. 848 F.2d at 278. Indeed, in a recent decision construing the ADEA, the First Circuit reaffirmed *Schuler*'s holding in this regard. *State Police for Automatic Ret. Ass'n v. DiFava*, 317 F.3d 6, 15 (1st Cir. 2003). Respondent notes that *Schuler* involved a severance plan rather than a collective bargaining agreement, and asserts that there was no "direct evidence" of age discrimination in that case, but those proffered distinctions are specious at best. The *Schuler* court's construction of the ADEA is squarely in conflict with the decision below, as the Sixth Circuit itself recognized.

B. The Sixth Circuit's Construction Conflicts With This Court's Precedents And Will Have A Dramatic And Deleterious Impact On ADEA Litigation Absent This Court's Review

As the petition discusses, the Sixth Circuit's announcement of a reverse discrimination rule has implications for virtually every ADEA case. The definition of discrimination under § 4(a)(1) necessarily controls the composition of the prima facie test that courts apply in ADEA cases. Thus, the holding that § 4(a)(1) forbids discrimination on the basis of youth conflicts with this Court's most recent refinement of the prima facie test and with the lower federal courts' application of that test. Similarly, the definition of discrimination

under § 4(a)(1) affects employers' attempts to defend against both disparate treatment and disparate effect claims.

The question whether a given employment practice can be said to discriminate within the meaning of § 4(a)(1) is logically antecedent to the question of how a given plaintiff will *prove* that it discriminates. This Court reiterated in *O'Connor*, for example, the essential connection between the ADEA's definition of discrimination on the basis of age and the prima facie case by which courts frequently structure the presentation of proof in ADEA cases.[5] As the Court noted, "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" 517 U.S. at 311-12 (citation omitted).

Because the question whether reverse discrimination is actionable under the ADEA is independent of the method of proof being utilized in a given case, respondents are incorrect in their assertion that the decision below cannot meaningfully conflict with decisions in other cases that happened to involve methods of proof other than direct evidence. They are equally mistaken in their prediction that the distortive effect of the erroneous decision below will be limited to a single category of ADEA cases.

Respondents rely on the purported distinction between "direct evidence" cases and cases involving other forms of proof to distinguish the opinion below from this Court's decision in *O'Connor*, Opp. 10; then-Judge Breyer's opinion for the First Circuit in *Schuler*, *id.* at 7; and, indeed, the run

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[5] This Court has reserved the question whether the burden-shifting evidentiary framework first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies in ADEA actions. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *O'Connor*, 517 U.S. at 311.

of ADEA litigation, *id.* at 18-19.[6] But as the petition conclusively demonstrates, the Sixth Circuit's decision was premised on a construction of § 4(a)(1) that is fundamentally incompatible with the construction underlying these other decisions, regardless of the form of proof employed, as well as with congressional purpose and intent.[7]

In *O'Connor*, for example, this Court held that "the fact that a replacement is *substantially younger* than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." 517 U.S. at 313 (emphasis added). This formulation of a key element of the plaintiff's prima facie

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[6] Respondents' proffered distinction is untenable even on its own terms, because it misreads the governing law in seeking to separate "direct evidence" cases from "disparate treatment" cases. Opp. 18. As this Court has made clear in cases such as *Hazen Paper*, "direct evidence" is not a category separate and apart from "disparate treatment," but rather a subset thereof. Discrimination claims can generally be separated into "disparate treatment" and "disparate impact" theories. *Hazen Paper*, 507 U.S. at 609. "Disparate treatment" requires "'[p]roof of discriminatory motive . . . , although it can *in some situations* be inferred from the mere fact of differences in treatment,'" as the establishment of an unrebutted prima facie case permits. *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)) (emphasis added). Thus, disparate treatment claims comprise those proven via direct evidence as well as those proven via circumstantial evidence presented within the burden-shifting *McDonnell Douglas* framework.

[7] Indeed, as *amici* point out, allowing reverse discrimination suits under the ADEA would have a significant impact even in the direct evidence context, because it would preclude employers from offering age-based benefits specifically calculated to assist older workers. *E.g.*, Central States Amicus Br. at 2-3, 8; EEAC Amicus Br. at 13-16.

case necessarily reflects the Court's understanding that the ADEA prohibits discrimination against *older* workers in favor of *younger* workers. Several courts of appeals have adopted a similar understanding, expressly incorporating the "substantially younger" element discussed in *O'Connor* into the test that an ADEA plaintiff must satisfy in order to make out a prima facie case. *See, e.g.*, *Williams v. Raytheon Co.*, 220 F.3d 16, 20 (1st Cir. 2000); *Barnett v. Dep't of Veterans Affairs*, 153 F.3d 338, 341 (6th Cir. 1998); *Vanasco v. Nat'l-Louis Univ.*, 137 F.3d 962, 965 (7th Cir. 1998); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998); *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1412-13 (8th Cir. 1997). These courts' adoption of this test reflects their understanding of § 4(a)(1) as prohibiting only discrimination that favors younger over older workers, an understanding that is incompatible with the decision below.

Similarly, because the Sixth Circuit's interpretation of § 4(a)(1) necessarily applies to *all* allegations of discrimination under that section, not merely to direct-evidence cases, employers' efforts to defend against conventional age discrimination suits will become more difficult, *regardless* of the form of proof involved in the case. Respondents blithely opine (Opp. 18-19) that cases incorporating the *McDonnell Douglas* test will not be affected, but as demonstrated in the petition (without rebuttal from respondents), the rule adopted by the Sixth Circuit in fact has a direct and deleterious effect on those cases as well, both because it dramatically lessens the plaintiff's prima facie burden in a manner inconsistent with *O'Connor* and the court of appeals cases cited above, and also because it eliminates the ability of employers to rebut a plaintiff's prima facie case (whether based on the *McDonnell Douglas* framework, "direct evidence," or a disparate effects theory) by demonstrating that older workers are in fact treated *more* favorably than either the plaintiff class or the purported beneficiaries of the alleged discrimination. *See* Pet. 21-23; EEAC Amicus Br. at 17-19.

This difficulty is even more pronounced in disparate impact litigation, in which intent is irrelevant. As the petition describes in detail (Pet. 21-23), and as respondents do not even attempt to dispute, permitting employees to sue for both age discrimination and reverse discrimination significantly increases the number of employer actions that will have a disparate impact on *some* cohort of workers over 40, even if older cohorts are treated *more* favorably. *See also* EEAC Amicus Br. at 19 n.7. The far-reaching and harmful implications of the decision below, and the court of appeals' failure to apply the teachings of this Court, further demonstrate the need for this Court's review.

II. The Decision Below Is In Clear Conflict With Congressional Purpose And Intent

As the petition demonstrates, the Sixth Circuit's holding that the ADEA creates a cause of action for reverse discrimination is utterly at odds with congressional purpose and intent. Considered as an integrated whole, the ADEA plainly protects older workers from discrimination based on their relatively advanced years; it does not protect individuals who happen to be over 40 against a converse form of discrimination based on their relative youth.

Respondents challenge the petition's reliance on the phrase "older workers," claiming that it "is not mentioned in § 623(a)(1), § 631(a) or any other section of the statute." Opp. 13. To the contrary, however, the ADEA's statement of purpose expressly codifies Congress's intent to protect "older workers" and "older persons" "relative to the younger ages." ADEA § 2(a)(1)-(3), (b), 29 U.S.C. § 621(a)(1)-(3), (b). Respondents also err in suggesting that "older workers" must be given a meaning identical to the term "individual" used in §§ 4(a)(1) and 12(a). Opp. 11, 13-14. Respondents are clearly "individuals" within the meaning of the latter provisions, because they are at least 40 years old; but it is equally clear that they are not "older workers" or "older persons"

than the employees protected by General Dynamics' decision to preserve retiree medical benefits for individuals who were at least 50 years old. The question is not respondents' membership in the protected class, but the illegality of the alleged "discrimination."

On this point, respondents do not even attempt to counter the petition's construction of § 4(a)(1), the only construction that faithfully interprets that provision in relation to the ADEA as an organic whole rather than in artificial isolation. Respondents do not dispute that the term "age" is susceptible of at least two plausible constructions when considered in isolation. Pet. 14. And respondents do not attempt to quarrel with the elementary principle that legislative findings are particularly useful tools to "give[] content" to the statute's other terms. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). Applying that principle and construing § 4(a)(1) in light of the duly enacted statement of congressional findings and purpose in § 2, which focus on the protection of "older workers" from unfair, age-based stereotypes about their continued productivity, it becomes clear that the term "age" as used by § 4(a)(1) can be plausibly defined only as "[t]he quality or state of being old." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 40 (1976); *see also* Pet. 14 (listing comparable definitions from other sources).

By adhering to its crabbed reading of a single line of statutory text, the court below frustrated the congressional intent that is apparent from consideration of the ADEA as a whole. Review is warranted to correct that error and restore the construction of § 4(a)(1) as Congress enacted it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 923-2776

WILLIAM J. KILBERG
Counsel of Record
THOMAS G. HUNGAR
WILLIAM M. JAY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Petitioner

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