No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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 40 years old.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were plaintiffs-appellants in the court below and are respondents in this Court: John Alge, David Bayes, Gary Bish, Dan Brenamen, Lewis Browning, Anthony Ciminillo, Scott Danner, Hixey Deeble, Robert Dewald, Larry Dicke, Richard Dirmeyer, David Driggs, Ron Duran, Kenneth Emahiser, Donald Eversole, Earl Fast, Dennis Ferguson, Robert Feucht, William Fisher, Steven Flake, Vada Flinders, Robert Frye, Gregory Gebolys, Joseph Gibson, Robert Greenlee, Raymond Gourash, Steven Hammond, Nathan Heckathorn, David Hollon, Charles Huff, Gary Huff, Richard Huffman, Anthony King, Les Krotzer, Robert Kuhn, Gerald Lanning, David Laurence, William Legrant, Charles Lowery, Donald Mathias, Gregory Mayberry, Steven Mays, John McClellan, Danny McEowen, Stan Miller, James Munson, Vincent Napier, Robert Nye, Clayton Pitts, Dennis Powers, Eliseo Ramierz, John Rammel, James Reese, Leonard Risner, Patrick Roddy, Tom Saylor, John Schlosser, David Seibert, Marvin Shepherd, M.J. Shields, Doug Sipe, David Spires, Larry Stark, Kenny Stevens, Michael Strahm, Anthony Stubbs, Russ Theil, Thomas Tucker, Charles Wagner, Harley Wagner, John Wagner, Gregory Walters, Robert Waltermyer, Charles Wood, Michael Woodruff, Allan Young, Kyle Young, Rick Young, Robert Baker, Dean Becker, Gary Salyer, Daryl Beaupre, Terry Gibbs, Jon Cottrell, Terry Biddle, John Birkmeier, Margaret Boyd, Guy Burrows, Russell Clewley, Thomas Clifton, Daniel Cline, Jed Couts, James Culp, Sandra Daniel, Michael Deal, Dana DeCamp, Richard Diltz, Steven Freed, Daniel Geething, Patrick Goddard, Frank Guerrero, Alan Haunhurst, Robert Horning, Scott Hesse, Michael Hunsicker, Loren Hurless, Joanna Jacobs, Bobby Jordan, Bob Keiffer, Richard Kessler, Paul Kesner, Douglas Kraepel, Gary Lamberjack, David Luchini, Lester Lyons, Joella Marks, Jeffrey Martin, Kenneth

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RULE 29.6 STATEMENT

Petitioner is a subsidiary of General Dynamics Corporation, a publicly traded company. No corporation owns more than 10 percent of the stock of General Dynamics Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner General Dynamics Land Systems, Inc. ("General Dynamics"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 296 F.3d 466 (6th Cir. 2002). The opinion and order of the United States District Court for the Northern District of Ohio granting petitioner's motion to dismiss (App., *infra*, 21a-25a) is reported at 98 F. Supp. 2d 846 (N.D. Ohio 2000).

JURISDICTION

The district court had federal question jurisdiction over the plaintiffs' 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. General Dynamics filed a timely petition for rehearing, which the court of appeals denied on September 19, 2002. App., *infra*, 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 jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The ADEA's statement of findings and purpose, § 2 of the Act, provides in pertinent part:

(a) The Congress hereby finds and declares that—

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave . . . .
>
> * * *
>
> (b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621.

The ADEA's nondiscrimination provision, § 4(a) of the Act, 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 ADEA's age limitation, § 12(a) of the Act, provides:

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

29 U.S.C. § 631(a).

STATEMENT OF THE CASE

Congress adopted the ADEA in order to protect "older workers" against arbitrary discrimination arising out of invalid stereotypes about the presumed impact of aging on workplace performance. ADEA § 2(a)(1)-(3), 29 U.S.C. § 621(a)(1)-(3). The Act was intended to combat the discriminatory effect of such stereotypical views, which Congress deemed responsible for the fact that unemployment was, "*relative to the younger ages*, high among *older workers*." *Id.* § 2(a)(3), 29 U.S.C. § 621(a)(3) (emphases added).

In the decision below, a divided Sixth Circuit panel departed from this settled understanding of the ADEA and held, contrary to decisions of two other courts of appeals, that the ADEA forbids employers to treat older employees *more* favorably than their younger co-workers. The court of appeals' divergence from the text and purpose of the ADEA exacerbates a conflict among the federal courts and is inconsistent with this Court's decisions. Moreover, the decision below will impose serious and unwarranted new burdens, both on the older workers whose opportunities the Act was intended to secure and on the employers who seek to extend those opportunities without subjecting themselves to vexatious litigation. Review by this Court is necessary to avert these negative consequences of the Sixth Circuit's erroneous interpretation of the ADEA.

I. Factual Background

General Dynamics operates manufacturing plants at Lima, Ohio, and Scranton, Pennsylvania, at which the em-

ployees are represented by the United Auto Workers ("UAW"). This litigation arises from two collective bargaining agreements negotiated between General Dynamics and UAW. The agreement in force until mid-1997 ("CBA1") provided full health benefits to all employees who retired with 30 years' seniority. In early 1997, General Dynamics and UAW negotiated a new collective bargaining agreement ("CBA2"), which ended the practice of providing health benefits to all retirees effective July 1, 1997. Instead, CBA2 offered retiree health benefits only to those employees who were at least 50 years old as of July 1, 1997. App., *infra*, 3a.

Respondents are present and former employees of General Dynamics who were at least 40 but not yet 50 years old on July 1, 1997. *Id.* Respondents are therefore within the ADEA's protected class, which includes workers over 40. ADEA § 12(a), 29 U.S.C. § 631(a). Each of the respondents had qualified or could potentially have qualified for retiree health benefits under CBA1, but was ineligible for such benefits under CBA2. App., *infra*, 3a.

II. Proceedings In The District Court

Respondents filed a putative class action against General Dynamics in the United States District Court for the Northern District of Ohio. App., *infra*, 2a-3a, 21a. Respondents alleged that CBA2's limitation of retiree health benefits to employees over 50 amounted to age discrimination, and they sought damages under the ADEA and state law. *Id.* at 22a.

The district court granted General Dynamics' motion to dismiss. App., *infra*, 21a-25a. Because respondents' suit stemmed from the fact that they were too *young* to receive health benefits under CBA2, the district court observed that their ADEA claim was an assertion of "'reverse discrimination[,]' whereby older workers receive favorable treatment relative to younger workers." *Id.* at 23a. The court determined at the outset that respondents' complaint would stand

or fall based on whether reverse discrimination claims are cognizable under the ADEA. *Id.* at 23a-24a. Thus, the dispositive question before the court was whether the ADEA precluded General Dynamics from excluding respondents from the new retiree health insurance plan on the basis of their relative youth, in comparison to older employees who retained retiree health benefits under CBA2. *Id.* at 24a.

The district court held that reverse discrimination is not actionable under the ADEA. The court reasoned that the congressional purpose in enacting the ADEA was to "address the problems faced by *older* workers" by giving them a remedy for the discrimination they faced, not to prevent employers from affording those older employees more favorable treatment than other workers within the Act's over-40 protected class. App., *infra*, 24a. The district court also noted that "[e]very federal court to have addressed the issue has held that a claim of reverse age discrimination is not cognizable under ADEA." *Id.* Accordingly, the court dismissed respondents' complaint for failure to state a claim. *Id.*

III. Proceedings In The Court Of Appeals

Respondents appealed, and a divided panel of the Sixth Circuit reversed. App., *infra*, 1a-20a. Relying on what it termed the "plain" language of the statute, the court held that the only possible construction of the ADEA's operative provision, § 4(a)(1), bars basing employment decisions on chronological age in any way, insofar as those decisions affect workers older than 40. *Id.* at 6a-7a. The court of appeals accordingly refused to give weight to the congressional findings and declarations of policy contained in § 2 of the ADEA, which make clear that Congress intended to prohibit discrimination against "*older* workers." *See id.* at 8a-9a. The court acknowledged that its conclusion ran contrary to decisions of the First and Seventh Circuits, *id.* at 6a-7a (citing *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.); *Hamilton v. Caterpillar, Inc.*, 966 F.2d

1226, 1228 (7th Cir. 1992)), and "the majority of courts to consider the question." *Id.* Nonetheless, the court below opined that "we do not find the reasoning undergirding these opinions persuasive." *Id.* at 7a.

The court of appeals repeatedly stated that it was relying only on the "plain" language of § 4(a)(1), which it declared was controlling over any more general provision like the congressional findings and declarations set forth in § 2. The court also asserted, however, that its conclusion would be the same even if it looked to those provisions. App., *infra*, 8a-9a. Moreover, the court noted that the Equal Employment Opportunity Commission ("EEOC") had promulgated a regulation interpreting the ADEA to prohibit reverse discrimination against members of the protected class. *Id.* at 10a (citing 29 C.F.R. § 1625.2(a)). The court of appeals did not rely on that regulation as controlling authority, but stated that it found the EEOC's interpretation to be a "true rendering" of the ADEA's language. *Id.*

Judge Cole concurred, writing separately to note his discomfort with the "counterintuitive" result reached by the opinion he joined and his "serious doubts" that the majority's holding accorded with Congress's intent in enacting the ADEA. App., *infra*, 18a, 12a. Judge Cole also conceded that the majority's decision was in "implicit tension" with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), which held that a prima facie case of age discrimination under the Act includes a showing that the challenged employer action favored a person "substantially younger" than the plaintiff. *Id.* at 16a-17a (citing *O'Connor*, 517 U.S. at 313). Judge Cole stated that although *O'Connor*'s adoption of a "substantially younger" test "suggests that reverse age discrimination claims are not permitted under the ADEA," he was confident that this Court would reformulate the test to require a "substantial difference in age" instead. *Id.* at 17a-18a.

Judge Williams dissented. App., *infra*, 18a-20a. Noting that the panel majority stood virtually alone in its construction of the Act to permit reverse discrimination suits, he stated that he would have followed the holding of the Seventh Circuit, in the leading case expounding the majority view, that "the ADEA does not protect the young against the old, or even, we think, the younger *against* the older." *Id.* at 18a-19a (quoting *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1227 (7th Cir. 1992)) (citation omitted). He reasoned, as did the Seventh Circuit, that "age discrimination cannot be reversed as can sex or race discrimination because '[a]ge is not a distinction that arises at birth. Nor is age immutable.'" *Id.* at 19a (quoting *Hamilton*, 966 F.2d at 1227) (alteration in original). Although he thought there might be "room for argument" over the meaning of § 4(a)(1) considered in isolation, he stated that such ambiguity could and should be resolved by referring to the statement of findings and purpose in § 2 of the ADEA, 29 U.S.C. § 621. *Id.* That provision's repeated references to "older workers" and "older persons," he wrote, make clear "Congress's intent to prohibit employers from discriminating against older workers, as opposed to younger ones." *Id.*

Judge Williams also pointed out that the majority's decision threatened to upset the age-based benefit and early retirement programs that collective bargaining agreements across the country have established, in recognition of the fact that "a 50-year-old worker may need more protection or more benefits than a 40-year-old worker." *Id.* The inevitable result of the majority's contravention of this "common sense understanding" of benefits negotiation, he warned, would be that "bargaining for all workers, regardless of age, [will] suffer." *Id.*

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding that reverse discrimination is cognizable under the ADEA is squarely contrary to the deci-

sions of virtually every other court to consider the question, including the First and Seventh Circuits, and is in direct tension with this Court's precedents. Moreover, the decision below is clearly wrong, and works in polar opposition to Congress's purpose in adopting the ADEA. The Act was expressly intended to combat discrimination against "older workers" and to eradicate stereotypical views that disadvantage those employees who are relatively older than others in the workplace. The court of appeals' counterintuitive conclusion that the ADEA permits *younger* employees to challenge the beneficial treatment of *older* workers is nothing short of absurd, and runs directly counter to the clear meaning and intent of the ADEA.

The decision below poses a direct threat to employers' reasonable efforts to facilitate older workers' securing, retaining, or re-entering productive employment and to provide appropriate but cost-effective benefits packages responsive to the needs of older employees. In addition, the rule adopted by the court below threatens to make dramatically more burdensome the litigation of conventional age discrimination claims. The question presented is clearly one of recurring importance, and the Sixth Circuit's decision creates an intolerable dilemma for nationwide employers like petitioner, who are now obligated to conform their conduct to widely varying interpretations of the ADEA in different jurisdictions across the country. This Court should forestall these adverse consequences by granting certiorari to resolve the acknowledged circuit split created by the Sixth Circuit's deeply flawed construction of the ADEA.

I. Review Is Warranted Because The Lower Federal Courts Are Divided Over the Question Whether Reverse Discrimination Is Actionable Under The ADEA

The decision below creates a clear circuit split over the question whether the ADEA precludes the adoption of policies that favor older workers over younger workers. The

Sixth Circuit's holding is diametrically opposed to other decisions addressing the same issue on almost precisely the same facts. The decision below thus cannot be reconciled with the weight of authority holding that reverse discrimination is not actionable under the ADEA.

Indeed, as noted above, the Sixth Circuit correctly acknowledged that its holding was directly contrary to the Seventh Circuit's decision in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992). The facts of that case are virtually identical to those presented here: In the course of labor negotiations, Caterpillar agreed that in the event of a plant closing, it would establish a retirement benefit program open only to workers at least 50 years of age with at least 10 years of service. When the program took effect, a class of 40- to 49-year-old employees with the requisite ten years' seniority brought suit under the ADEA. *Id.* at 1227.

The *Hamilton* court rejected the ADEA claim as proceeding from a faulty premise. Age discrimination, the court explained, is not a distinction that "cuts both ways," like race or sex discrimination; age is neither an inborn characteristic nor an immutable one. *Id.* Moreover, "[t]here is nothing to suggest that Congress believed age to be the equal of youth in the sense that the races and sexes are deemed to be equal." *Id.* To the contrary, "[i]f the Act were really meant to prevent reverse age discrimination, limiting the protected class to those 40 and above would make little sense." *Id.* This interpretation of the Act was further bolstered by Congress's findings and statement of legislative purpose in § 2 of the Act, which make clear that Congress intended to address "the problems faced by 'older workers' and 'older persons.'" *Id.* at 1228 (quoting 29 U.S.C. § 621(a)). As the Seventh Circuit explained, "There is no evidence in the legislative history that Congress had any concern for the plight of workers arbitrarily denied opportunities and benefits because they are too *young*." *Id.* Accordingly, the Seventh Circuit held that

"[t]he ADEA does not provide a remedy for reverse age discrimination." *Id.*

As the court below acknowledged, App., *infra*, 7a, its holding is also inconsistent with the First Circuit's decision in *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988) (Breyer, J.). In *Schuler*, the court considered an ADEA claim by a worker who claimed that he had been forced into retirement on account of his age. He based his claim in part on the company's development of a severance plan that his supervisor encouraged him to accept (and that he ultimately did accept). *Id.* at 277-78. In an opinion by then-Judge Breyer, the First Circuit held that Schuler could not make out a claim of age discrimination based on the terms of the severance plan. Although the plan "offered greater benefits to those with more seniority," the court held that the ADEA "does not forbid treating older persons *more* generously than others." *Id.* at 278 (emphasis in original).[1]

As these decisions demonstrate, the courts of appeals are now sharply divided over the question presented in this petition. The conflict extends beyond the circuit court level as well; the numerous decisions of district courts that have considered the question have reached divergent results, with the majority holding that reverse discrimination is not actionable under the ADEA.[2] This Court's review is necessary to re-

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[1] The Ninth Circuit has also noted its skepticism regarding the notion of a reverse age discrimination claim, without deciding the issue. *See Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995).

[2] *Compare, e.g.*, *Dittman v. Gen. Motors Corp.-Delco Chassis Div.*, 941 F. Supp. 284, 287 (D. Conn. 1996) (holding that reverse discrimination is not actionable under the ADEA), *aff'd on other grounds*, No. 96-9442, 1997 WL 340267 (2d Cir. June 20, 1997); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140 (D. Me. 1995) (same), *aff'd in part and rev'd in part on other grounds*,

solve the conflict and provide a clear rule to guide federal and state courts considering the viability of reverse discrimination claims by employees covered by the ADEA.

II. The Ruling Below Is Inconsistent With Decisions Of This Court

In addition to creating a conflict with numerous decisions of the lower federal courts, the Sixth Circuit's decision in this case is also at odds with this Court's precedents. For this reason as well, plenary review is warranted.

In his concurring opinion below (App., *infra*, 16a), Judge Cole forthrightly and correctly noted the "implicit tension" between the rule the panel majority adopted and this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). In *O'Connor*, this Court addressed the question whether an ADEA plaintiff's prima facie case must include proof that the employee who was preferred over the plaintiff was outside the protected age group altogether. The Court held that a plaintiff need not show that his or her replacement was younger than 40, *i.e.*, entirely outside the Act's protected class. Rather, it was sufficient for the plaintiff to establish that the replacement was "substantially younger than the plaintiff." *O'Connor*, 517 U.S. at 313. The Court premised its "substantially younger" test on the need for a "logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" *Id.* at 311-12 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*,

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123 F.3d 1 (1st Cir. 1997); *and Wehrly v. Am. Motor Sales Corp.*, 678 F. Supp. 1366, 1381-82 (N.D. Ind. 1988) (same), *with Miss. Power & Light Co. v. Local Union Nos. 605 & 985, IBEW*, 945 F. Supp. 980, 985 (S.D. Miss.) (holding that reverse discrimination is actionable under the ADEA), *aff'd mem.*, 102 F.3d 551 (5th Cir. 1996).

450 U.S. 248, 254 n.7 (1981)). Thus, this Court did not formulate the "substantially younger" requirement arbitrarily, but instead did so in light of the underlying discrimination that the Act forbids and for which the ADEA prima facie case is intended to serve as a proxy, *i.e.*, discrimination against *older* workers based on their relatively advanced years.

The decision below cannot be reconciled with the test adopted in *O'Connor*. If, as the *O'Connor* Court held, an ADEA plaintiff cannot even make out a prima facie case absent proof that the preferred employee was "substantially *younger*" than the plaintiff, it necessarily follows that the ADEA does not proscribe employer policies that favor *older* workers over those "substantially younger." Judge Cole's blithe assumption that this Court did not mean what it said in *O'Connor* is no substitute for adherence to binding precedent. The panel's failure to give effect to the clear import of *O'Connor* merits this Court's review.

The decision below also runs counter to the reasoning adopted by this Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). In that case, this Court explained that Congress enacted the ADEA to eradicate the "inaccurate and stigmatizing stereotypes" that were causing "older workers" to be deprived of opportunities for employment, and that the "very essence of age discrimination" prohibited by the Act is "for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Id.* at 610. As the *Hazen Paper* Court took pains to reiterate, the ADEA encapsulates Congress's recognition that age discrimination, unlike other forms of disparate treatment such as race and sex discrimination, largely stems not from "animus" but from "stereotypes unsupported by objective fact" about the continued ability of "older workers." *Id.* at 610-11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)) (internal quotation marks omitted). Thus, the "pro-

hibited stereotype[s]" that the ADEA seeks to eliminate are those that are adverse to "[o]lder employees." *Id.* at 612. Accordingly, when employers instead extend *more favorable* treatment to "older workers," the problem addressed by Congress in the ADEA is simply not present.

O'Connor and *Hazen Paper* both teach that the ADEA seeks to remedy a specific societal ill. Its primary aim is to eradicate outmoded stereotypes about older Americans' proper place in the workforce. The Sixth Circuit's wooden reading of the ADEA subverts the very purpose of the Act as explicated in this Court's opinions. Review is warranted to resolve this tension.

III. The Ruling Below Is Inconsistent With Congressional Purpose And Intent

The court of appeals' holding that the ADEA permits *younger* employees to challenge favorable treatment of *older* employees is impossible to reconcile with Congress's purpose in enacting the ADEA. As this Court's decisions in *Hazen Paper* and *O'Connor* indicate, analysis of the statute as an integrated whole makes clear that the ADEA focuses on remedying discrimination against *older* workers arbitrarily based on their age. Thus, the statement of purpose that Congress wrote into the ADEA makes clear that it was intended to *benefit* older workers in particular, not to deprive employers of the ability to favor older employees in ways not offered to younger employees. Further, the existence of the minimum age limitation on the protected class belies the notion that the Act is intended to protect younger employees against their senior coworkers. Finally, the legislative history and the backdrop against which Congress passed the Act eliminate any possible doubt on this score. Consideration of each of these sources compels the conclusion that the court of appeals misconstrued the statute and contravened the congressional purpose that underlies the ADEA.

The court below gave no weight to any of these indicia of congressional intent because it concluded that the statutory text was so "plain" as to admit of only one possible interpretation. To the contrary, however, the term "age" is susceptible of at least two plausible constructions when considered in isolation. To be sure, "age" could be understood to refer merely to the number of years lived to date. Considerably more plausible, however, is the definition of "age" as referring to the "state of being old." *E.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 40 (1976) (defining "age," inter alia, as "[a]n advanced stage of life," "the latter part of life," and "[t]he quality or state of being old"); *accord* AMERICAN HERITAGE COLLEGE DICTIONARY 25 (3d ed. 1993) (defining "age," inter alia, as "[t]he state of being old; old age"); *see also Hamilton*, 966 F.2d at 1227 (differentiating "age" and "youth").

Thus, viewed in isolation, the term "age" in § 4(a)(1) could perhaps be read in the manner adopted by the court below. But "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989). The court of appeals' counterintuitive construction derived from the court's insistence on beginning and ending with a single definition of an isolated term, without reference to parallel portions of the same statute or to the legislative purpose codified at the statute's outset. As this Court has cautioned, however, in many cases such a myopic methodology "would defeat the object which the Legislature intended to accomplish"; a court cannot "'look merely to a particular clause in which general words may be used'" but must instead "'take in connection with it the whole statute . . . and the objects and policy of the law . . . .'" *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)).

In the case of the ADEA, the first logical referents in ascertaining the proper meaning of § 4(a)(1) are the legislative findings and declaration of purpose in § 2. Because these overarching provisions are "included in the [Act's] text," they are particularly useful tools to "give[] content" to the Act's other terms. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999); *accord Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002); *cf. United Air Lines, Inc. v. McMann*, 434 U.S. 192, 198 (1977) (noting the interrelationship between the ADEA's purposive and prescriptive provisions and stating that "the Act is the vehicle by which its purposes are expressed and carried out").

The congressional findings emphasize that the Act was intended to address the difficulty that age discrimination poses for "older workers" and "older persons," who faced disproportionately high rates of unemployment due to the persistence of discriminatory, age-based stereotypes about their competence. ADEA § 2(a)(1)-(3), 29 U.S.C. § 621(a)(1)-(3); *see Hazen Paper*, 507 U.S. at 610; *EEOC v. Wyoming*, 460 U.S. at 230-31. Congress found that those stereotypes led employers to set "arbitrary age limits," which "work *to the disadvantage of older persons*" who are seeking "to retain employment, and especially to regain employment when displaced from jobs." ADEA § 2(a)(1)-(2), 29 U.S.C. § 621(a)(1)-(2) (emphasis added); *see W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 410 (1985) ("[T]he policies and substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions."). The result of these discriminatory practices was that long-term unemployment became, "*relative to the younger ages*, high among *older workers*." ADEA § 2(a)(3), 29 U.S.C. § 621(a)(3) (emphases added).

These findings, the product of extensive inquiry by Congress and, at its direction, by the Secretary of Labor, *see EEOC v. Wyoming*, 460 U.S. at 230-31 (detailing the genesis

and drafting of the Act), underscore the precision with which Congress focused on the disadvantages that *older* workers face "relative to the younger ages." The court of appeals' interpretation of the ADEA simply cannot be squared with these clear indications of congressional intent set forth in the text of the Act itself.

Significantly, moreover, Congress also declared that a primary purpose of the ADEA was "to help employers and workers find ways of meeting problems arising from *the impact of age on employment*." *Id.* § 2(b), 29 U.S.C. § 621(b) (emphasis added). The reference to "age" in this provision makes sense only if the term is defined, as discussed above, as synonymous with "advanced years" or "the state of being old"; it is not chronological age *per se*, but the problems often associated with relatively *advanced* years that would have an "impact . . . on employment" felt by both employers and employees. Congress's use of the term "age" in this sense here, at the outset of the Act, confirms that it used the term in the same sense in the Act's operative provision. *See*, *e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("[I]dentical words used in different parts of the same act are intended to have the same meaning." (quotation omitted)).

Congress's decision to set the lower bound of its protected class at 40 similarly refutes the notion that the Act forbids discrimination against younger individuals in favor of older workers. Workers enter the protected class at 40, which "testimony indicated . . . to be the age at which age discrimination in employment becomes evident." H.R. REP. No. 90-805, at 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219. Even if Congress had discerned a pattern of employees' facing arbitrary classifications rooted in inaccurate stereotypes about youth rather than age, it could hardly have

understood such a pattern to become evident *only at age 40*. For Congress to have prohibited reverse discrimination against younger workers, but simultaneously to have denied that doctrine's protection to its most likely beneficiaries—those under 40—would be nothing short of absurd. Statutes ought not be construed in a manner that yields absurd results. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 (1993).[3]

Thus, considered in the statutory context in which Congress embedded it, the prohibition against discrimination "because of age" is susceptible of only one meaning—one that does not extend to discrimination against employees on account of their relative youth. The court of appeals' contrary determination improperly ignores the structure and context of the statute as a whole and violates fundamental canons of statutory construction adopted and repeatedly reaffirmed by this Court's decisions.

The legislative history of the ADEA serves only to bolster the majority view that "reverse discimination" is not actionable under the Act, and eliminates any possible doubt on this point. The President's message on the issue of age discrimination presaging his submission of a draft ADEA to Congress,[4] the comments of the Secretary of Labor on the

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[3] Indeed, some state courts have determined that their state age discrimination laws cover reverse discrimination by reasoning that, *unlike the ADEA*, the state laws' protected classes contain no lower limit, or set the threshold at 18. *See, e.g.*, *Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W.2d 845, 847 (Mich. Ct. App. 2000) (limited en banc); *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 950 (N.J. 1999); *Ogden v. Bureau of Labor*, 699 P.2d 189, 192 (Or. 1985) (in banc).

[4] *See* Special Message to the Congress Proposing Programs for Older Americans, 1 PUB. PAPERS 32, 37 (Jan. 23, 1967).

draft bill,[5] and the report of the committee that authored the bill that was ultimately enacted[6] all indicate that the ADEA was aimed at protecting *older* workers against employer practices and policies that favored *younger* workers—not the other way around.

The Sixth Circuit's rigid reading of a single provision of the Act threatens to produce precisely the opposite effect—to undermine the very protections and opportunities that Congress sought to secure. The court below pressed forward with this result, "whether specifically intended [by Congress] or not," App., *infra*, 12a (Cole, J., concurring), in the face of evidence from text, context, structure, and history that Congress can *only* have intended the term "age" to refer to the characteristic—relatively advanced years—shared by the "older workers" of the protected class.[7] Review is warranted

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[5] *Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 90th Cong. 47 (1967) (responses of Willard Wirtz, Sec. of Labor) [hereinafter *Hearings*] (describing the Act as "an over-age employment discrimination measure" and opposing a reduction in the age of coverage to 21, which would "change the nature of the proposal").

[6] *See, e.g.*, H.R. REP. NO. 90-805 (1967), at 6 (stating that the committee declined to lower the age limit to an age below 40 because to do so "would lessen the primary objective; that is, the promotion of employment opportunities for older workers"), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219; *see also id.* at 1 ("It is the purpose of H.R. 13054 to promote the employment of older workers based on their ability."), *reprinted in* 1967 U.S.C.C.A.N. at 2214.

[7] Thus, the EEOC regulation seemingly accepting the reverse-discrimination theory, 29 C.F.R. § 1625.2(a), can offer no support for the lower court's decision, because it is contrary to the text and structure of the Act and accordingly is due no defer-

to ensure that this intent is not frustrated and that the true meaning of the Act is furthered.

IV. The Question Presented Is An Important And Recurring One, And The Burdensome Impact Of The Decision Below Necessitates This Court's Review.

The Sixth Circuit's decision poses a serious threat to a wide variety of employer programs and policies that work to the benefit of older American workers. Indeed, the rule announced by the decision below threatens to effect a dramatic shift in the conduct of ADEA litigation writ large. Review by this Court is necessary to eliminate the grave consequences produced by this decision.[8]

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ence by this Court. *See, e.g.*, *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989).

[8] The reverse discrimination issue has already arisen in numerous federal courts from Maine to California. The question has already been presented at least to the court below, to the First and Seventh Circuits (which rejected it, as discussed above), and to the Ninth and Eleventh Circuits, which avoided resolving the issue by deciding their cases on narrower grounds. *Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995); *Edwards v. Bd. of Regents of the Univ. of Ga.*, 2 F.3d 382, 383 (11th Cir. 1993). As noted above, moreover, numerous district courts have also adjudicated the issue and have likewise reached divergent results. *See* cases cited *supra* note 2; *Stone*, 58 F.3d at 437 (noting the district court's holding that the ADEA does not prohibit reverse discrimination); *Conn v. First Union Bank of Va.*, Civ. Action No. 94-0901-R, 1995 U.S. Dist. LEXIS 9242, at *2-*7 (W.D. Va. Mar. 17, 1995) (holding that the ADEA does not prohibit reverse discrimination); *see also Greer v. Pension Ben. Guar. Corp.*, No. 00 CIV 1272 SAS, 2001 WL 137330, at *5 (S.D.N.Y. Feb. 15, 2001) (rejecting reverse discrimination claim under the ADEA on narrower grounds).

First and foremost, interpreting the Act to allow suits for reverse discrimination threatens to invalidate threshold-age requirements for a variety of employee benefits. In times of economic uncertainty, employers are faced with the need to scale back previously generous benefits programs; in many cases, the choice they face is between offering a retirement or other benefit only to some employees, and offering it to none. Threshold age classifications are common and important components of this scaling-back process.[9]

More generally, construing the ADEA to authorize reverse discrimination claims threatens to infuse a new across-the-board rigidity into employment decisions and remove employers' license to accommodate older workers' special needs. Because the Act applies to all the incidents of the employment relationship, employers seeking to facilitate the congressional purpose of welcoming older workers into gainful employment and encouraging them to remain will be pre-

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[9] To be sure, the ADEA provides affirmative defenses that might ultimately defeat liability in some such instances involving certain types of benefits programs. *See* ADEA § 4(f)(2), (*l*), 29 U.S.C. § 623(f)(2), (*l*). However, requiring employers to make out one of these fact-specific affirmative defenses in order to avoid liability for reverse discrimination would impose far greater uncertainty and litigation expense on employers, and there is no guarantee that such defenses would ultimately be successful in any, let alone all, such cases. *See, e.g.*, *Wehrly*, 678 F. Supp. at 1382-83 (referring to the "manifestly unreasonable" burden on employers that would be imposed by requiring them to make out affirmative defenses to a non-cognizable claim). The *in terrorem* effect of the Sixth Circuit's decision is thus unmitigated by the hypothetical availability of potential affirmative defenses in a limited category of cases. And as discussed *infra*, the disruption likely to be worked by the reverse-discrimination rule is not limited to the benefits context.

cluded from offering those older workers any preferential treatment or incentive. For example, law enforcement agencies that maintain rigorous physical fitness requirements will likely be precluded from relaxing those standards for older personnel to facilitate their retention. *See, e.g.*, *Koger v. Reno*, 98 F.3d 631, 634 (D.C. Cir. 1996) (describing the U.S. Marshals Service's use of a physical fitness component, with an age-based sliding scale, in promotion decisions). Thus, employers will face the same Hobson's choice as in the benefits context: Either extend the age-tailored preference to *all* employees—an option that will frequently be prohibitively expensive or, as in the physical fitness example discussed in *Koger*, simply unrealistic—or withdraw the preference altogether. Perversely, those most injured by this interpretation will be the very group of older workers whose employment opportunities Congress sought to *enhance* by adopting the ADEA.

Another significant consequence of the Sixth Circuit's reverse-discrimination rule is a substantial increase in the difficulty of defending *conventional* age discrimination suits. In many such cases, the defendant has most readily dispelled an inference of age discrimination by demonstrating that *older* workers were treated better than the plaintiff. This form of proof has been particularly important in disparate impact cases,[10] in which statistical evidence is frequently essential to the analysis, *e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988) (plurality opinion), and intent is largely irrelevant, *Griggs v. Duke Power Co.*, 401 U.S. 424,

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[10] This Court has not yet resolved the circuit split over whether a plaintiff may maintain an ADEA claim on a theory of disparate impact. *Hazen Paper*, 507 U.S. at 609-10; *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1324-25 & n.5 (11th Cir.), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed*, 122 S. Ct. 1290 (2002).

432 (1971). However, the ability to show that older workers were treated more favorably than their younger counterparts is important in disparate treatment cases as well. *See, e.g.*, *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 422 (6th Cir. 1999); *Koger*, 98 F.3d at 634 (noting such factors as the age-based sliding scale for physical fitness requirements as evidence that the Marshals Service acted to accommodate older deputy marshals, not to disfavor them). Yet under the Sixth Circuit's construction of the ADEA, this defense is no longer available to employers, because proof that older workers were favored simply establishes *another* ADEA violation rather than refuting the plaintiffs' initial claim.

Indeed, the union of the disparate impact and reverse discrimination theories in the ADEA will inexorably require employers to afford *absolute identity of treatment* to every worker over 40 in order to minimize the risk of ADEA liability. A number of cases permit ADEA plaintiffs to sue based on disparate impact on a *subset* of the Act's 40-and-over protected class,[11] even when the members of the protected class as a whole suffer no identifiable burden. Although this form of classifying by subset might make sense as a way of preventing discrimination directed against the very oldest workers, combining it with the reverse discrimination theory leaves it completely unbounded. Because age, unlike race or sex, does not confer membership in a discrete, readily ascertainable category, any workforce of any size contains a "virtually infinite number of age subgroups," *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999), and

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[11] *E.g.*, *Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129-30 (D. Del. 1994), *aff'd mem.*, 124 F.3d 186 (3d Cir. 1997); *Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 3-4 (D. Me. 1994), *aff'd on other grounds*, No. 95-1046, 1995 WL 414831, at *4 n.4 (1st Cir. July 14, 1995).

thus any employment practice that disproportionately impacts *some* identifiable cohort within the ADEA's protected class might now be actionable—if not on an age discrimination theory, then on a reverse discrimination theory. Employers will be forced to ensure at least rough proportionality across every age cohort over 40, lest they disproportionately disfavor one subgroup and thereby subject themselves to potential liability and litigation expense limited only by the ingenuity and resourcefulness of class action plaintiffs' lawyers.

Thus, the rule laid down by the Sixth Circuit's decision is fraught with unanticipated consequences that will adversely affect a wide range of employment decisions and reshape the conduct of even conventional age discrimination litigation. Review is warranted to forestall the burdensome effects unleashed by the Sixth Circuit's distortion of Congress's purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 16, 2003