No. 15-10602

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD M. VILLARREAL,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant

v.

R.J. REYNOLDS TOBACCO CO., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia (Gainesville Division)
Case No. 2:12-cv-00138-RWS (Hon. Richard W. Story)

EN BANC BRIEF OF DEFENDANTS-APPELLEES R.J. REYNOLDS TOBACCO CO., et al.

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Villarreal v. R.J. Reynolds Tobacco Co., No. 15-10602

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Defendants-Appellees hereby certify that, to the best of their knowledge, the Certificate of Interested Persons and Corporate Disclosure Statement contained in Plaintiff-Appellant's En Banc Brief constitutes a complete list of all persons and entities known to have an interest in the outcome of this case, except for the following additions:

1. Equal Employment Advisory Council - Amicus curiae in support of Defendant-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

2. Rae Thiesfield Vann - Attorney for amicus curiae Equal Employment Advisory Council

3. Norris Tysse Lampley & Lakis, LLP - Law firm for amicus curiae Equal Employment Advisory Council

STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled en banc oral argument in this matter for June 21, 2016.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Appellees do not adopt by reference any part of the brief of any other party.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§626(b) & (c), and under 28 U.S.C. §1331 and 28 U.S.C. §1343(4).

The District Court granted Defendants-Appellees' partial motion to dismiss on March 6, 2013, later dismissed Plaintiff-Appellant's remaining claims, and entered a final judgment against Plaintiff-Appellant on January 20, 2015. Plaintiff-Appellant timely filed his Notice of Appeal on February 9, 2015. A panel of this Court reversed in a 2-1 decision, and this Court granted rehearing en banc on February 10, 2016. This Court has appellate jurisdiction under 28 U.S.C. §1291.

STATEMENT OF EN BANC ISSUES

1. Whether §4(a)(2) of the Age Discrimination in Employment Act (ADEA) authorizes "applicants for employment" to assert disparate-impact claims.

2. Whether plaintiffs in failure-to-hire cases should be allowed to obtain equitable tolling of the statute of limitations without alleging either reasonable diligence or extraordinary circumstances.

STATEMENT OF THE CASE

I. Statement Of Facts

Plaintiff Richard Villarreal alleges that he submitted an online application for a Territory Manager position with defendant R.J. Reynolds Tobacco Company (RJR) in November 2007, when he was 49 years old. In the following years, Villarreal admits that he did nothing to ascertain even the status of his application, much less the reason for its rejection. Then, in April 2010, a plaintiff's lawyer contacted him about a "possible class action law suit," based on the claim that RJR had sought to fill the position with less-experienced applicants in violation of the ADEA. Appendix Volume I ("App. Vol. I"), Dkt. No. 1 ¶¶ 27-28; Appendix Volume II ("App. Vol. II"), Dkt. No. 61-1 ¶¶ 29-30 & Ex. C. Villarreal filed a charge with the Equal Employment Opportunity Commission (EEOC) in May 2010, alleging ADEA violations by RJR and its outside recruiting company, Pinstripe, Inc. Villarreal subsequently submitted a series of new applications for a Territory Manager position in June 2010, December 2010, May 2011, September

2011, and March 2012, adding new EEOC charges after each application was rejected. App. Vol. I, Dkt. No. 1 ¶¶ 19-20, 29 & Ex. C. The EEOC declined to prosecute any of Villarreal's charges.

II. Procedural History

Villarreal filed this putative collective action against RJR and Pinstripe in federal district court on June 6, 2012. He alleged disparate-treatment and disparate-impact claims relating to each of his 2007 and 2010-12 job applications.

The district court dismissed Villarreal's disparate-impact claims on the ground that the ADEA does not authorize disparate-impact hiring claims, and also dismissed all of his 2007 claims as time-barred under the 180-day statute of limitations. App. Vol. I, Dkt. No. 58. Villarreal moved to amend his complaint to allege that the limitations period for his 2007 claims should be equitably tolled, but the court denied that amendment as futile because he still did not seek to allege that he exercised any diligence with respect to his 2007 application or that any extraordinary circumstances prevented a timely filing. App. Vol. II, Dkt. No. 67, at 4-6. Villarreal tried to appeal, but the appeal was dismissed for lack of a final judgment. App. II, Dkt. No. 84. Villarreal was thus left with only his timely disparate-treatment claims based on his 2010-12 applications. He then voluntarily dismissed those claims, thereby enabling an immediate appeal on the disparate-impact and equitable-tolling issues.

On appeal, the panel majority reversed. It held that §4(a)(2) of the ADEA is ambiguous as to whether "applicants for employment" may bring disparate-impact claims, and thus deferred to the EEOC's amicus brief favoring such claims. Op. at 21-30. Next, the majority revived Villarreal's untimely 2007 claims under the doctrine of equitable tolling. The panel reasoned that a "less stringent standard" of equitable tolling—requiring neither reasonable diligence (*id.* at 36 n.15) nor exceptional circumstances (*id.* at 32 n.13)—was appropriate for failure-to-hire cases, and perhaps for all employment-discrimination cases, because "an employee or applicant for employment may not know any relevant facts at the time of the discriminatory act." *Id.* Judge Vinson strongly dissented on both points. On February 10, 2016, this Court granted rehearing en banc.

SUMMARY OF THE ARGUMENT

I. The ADEA does not authorize disparate-impact claims by applicants for employment.

A. As Villarreal concedes, disparate-impact claims are available only under §4(a)(2) of the ADEA. And as every other court to consider the issue has recognized, "Section 4(a)(2) . . . does not apply to 'applicants for employment' at all—it is only §4(a)(1) that protects this group." *Smith v. City of Jackson*, 544 U.S. 228, 266 (2005) (O'Connor, J., concurring). Unlike §4(a)(1), which expressly prohibits an employer's "fail[ure] or refus[al] to hire" because of age, §4(a)(2) says nothing about any failure or refusal to hire. Instead, §4(a)(2) applies only when an employer "limit[s], segregate[s], or classif[ies] his employees" in a way that "adversely affect[s]" their "status as an employee."

B. The text and structure of the ADEA as a whole confirm that §4(a)(2) does not apply to applicants for employment. The ADEA explicitly refers to "hir[ing]" in §4(a)(1) (the immediately adjacent provision), and it repeatedly refers to "applicants for employment" in several neighboring provisions, while conspicuously omitting both from §4(a)(2). Congress thus deliberately chose not to make §4(a)(2) apply to hiring or applicants for employment.

C. A comparison to the verbatim text of Title VII also strongly indicates that §4(a)(2) does not apply to applicants for employment. Congress modeled

§4(a)(2) of the ADEA on §703(a)(2) of Title VII, and the two were originally identical in all relevant respects. In 1972, Congress added "applicants for employment" to §703(a)(2), but never added that phrase to §4(a)(2). Instead, in 1974, it added "applicants for employment" to a *different* ADEA section. Thus, again, Congress clearly signaled that §4(a)(2) does not cover applicants.

D. Congress had strong policy reasons to refrain from imposing age-based disparate-impact liability in hiring. Doing so would impose massive litigation costs on employers for many benign and common entry-level hiring practices, including college-campus recruiting. While many such hiring practices might ultimately be upheld as based on reasonable factors other than age, employers would bear the burden of proving that defense typically after protracted discovery in large class-action cases. Employers would thus be forced to choose between abandoning settled and legitimate employment practices, paying large sums to settle dubious or extortionate claims, or enduring years of costly discovery and the vagaries of litigation.

II. Villarreal's contrary arguments fail.

A. Villarreal focuses on §4(a)(2)'s reference to "any individual," but he ignores the context that limits the meaning to any *individual employee*. This Court has already recognized under the parallel text of Title VII that the term "any individual" cannot be read "literally" but must be limited by its context, as "courts

have almost universally held that the scope of the term 'any individual' is limited to employees." *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242-43 (11th Cir. 1998). Here, in particular, that limitation is quite clear. Section 4(a)(2) is phrased as a prohibition on what an employer may do to "his employees" that would adversely affect their "status as an employee."

B. Villarreal contends that there is no significance to Congress's decision to exclude the phrase "applicants for employment" from §4(a)(2) while adding it to the parallel provision of Title VII, because Congress did not amend the two statutes *simultaneously*. That is doubly wrong. The Supreme Court has held that textual differences between the two statutes cannot be ignored regardless of the timing of amendments. Moreover, Congress *did* consider and amend Title VII and the ADEA in the same timeframe, and ultimately decided to add "applicants for employment" to a *different* section of the ADEA, but not to §4(a)(2).

C. Villarreal contends that adding "applicants for employment" to §703(a)(2) of Title VII was superfluous because it simply codified the Supreme Court's 1971 decision in *Griggs v. Duke Power*, which he claims *already* authorized claims by applicants for employment. In fact, however, the addition was proposed in 1967, and thus could not have been designed to codify the *Griggs* decision of 1971. Moreover, *Griggs* was about four incumbent employees, and said nothing about applicants for employment. The legislative history actually

contradicts Villarreal's theory, because multiple legislative documents confirm that §4(a)(2) as written did not apply to "applicants for employment."

D. *Chevron* deference cannot save the EEOC's interpretation because the statutory text forecloses it. The EEOC's reading also merits no deference because it contradicts the agency's reading of the parallel text of Title VII, and the agency has never given any public notice or engaged in any deliberative process to interpret the text of §4(a)(2) outside of litigation.

III. The District Court properly dismissed Villarreal's untimely claims.

Villarreal admits that he failed to file within the 180-day period after his 2007 application. Nonetheless, he argues that the deadline should be tolled until 2010, when he was contacted by a class-action lawyer.

Equitable tolling does not apply here because Villarreal does not allege either of the required elements of reasonable diligence or extraordinary circumstances. He does not allege that he tried to ascertain even the *status* of his application between 2007 and 2010, much less that he exercised any diligence to protect his legal rights. Nor does he identify any unusual circumstances that would distinguish this case from the type of garden-variety case that Congress envisioned when it enacted the ADEA's statute of limitations. Accordingly, tolling the limitations period here would contradict the fundamental rule that equitable tolling should be applied only in rare circumstances. Such a ruling would be

unprecedented. It would eviscerate the statute of limitations, defy Supreme Court precedent, and make this Court a dramatic outlier among all of its sister circuits, inviting plaintiffs to flock to this jurisdiction to file class-actions and other claims that would be time-barred anywhere else.

ARGUMENT

I. The ADEA Does Not Authorize Disparate-Impact Claims By Applicants For Employment

The ADEA's hiring provision, §4(a)(1), expressly prohibits the "fail[ure] or refus[al] to hire" because of age. 29 U.S.C. §623(a)(1). As the Supreme Court has held, however, that provision "does not encompass disparate-impact liability," but instead covers only *intentional* age discrimination. *Smith*, 544 U.S. at 236 n.6. Disparate-impact claims are authorized solely under ADEA §4(a)(2), which does not mention hiring but refers to "employees." *See* 29 U.S.C. §623(a)(2). Thus, as the Supreme Court has explained, §4(a)(2) "focuses on the effects of the action *on the employee* rather than the motivation for the action of the employer." *Smith*, 544 U.S. at 236 (emphasis added).

Section 4(a)(2) clearly does not cover "applicants for employment" for four reasons. *First*, §4(a)(2) is phrased exclusively as a prohibition on discriminatory acts that an employer may take against "his employees" that would affect their "status as an employee." *Second*, the ADEA specifically addresses "hir[ing]" in the adjacent §4(a)(1), and also refers specifically to "applicants for employment" in

multiple neighboring provisions, but pointedly omits any mention of hiring *or* applicants from §4(a)(2). *Third*, §4(a)(2) was modeled word-for-word on §703(a)(2) of Title VII, which Congress subsequently amended to add "applicants for employment" in a bill proposed in 1967 and enacted in 1972. By contrast, Congress never added "applicants for employment" to §4(a)(2), despite many contemporaneous and subsequent amendments to the ADEA—including an amendment introduced in 1972 and enacted in 1974 adding "applicants for employment" to a *different* part of the ADEA. And *fourth*, Congress had strong policy reasons not to amend the ADEA to allow job applicants to bring age-based disparate-impact claims. Doing so would saddle employers with massive litigation costs for claims that are mostly meritless, because age is highly correlated with experience and many other legitimate hiring criteria in a way that Title VII categories such as race and sex are not.

A. The Text Of §4(a)(2) Authorizes Disparate-Impact Claims Only By Employees, Not By Applicants For Employment

Section 4(a) of the ADEA has three subsections, each of which targets different conduct. Section 4(a) states:

> 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;

> (2) *to limit, segregate, or classify his employees* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an *employee*, because of such individual's age; or
>
> (3) to reduce the wage rate of any *employee* in order to comply with this chapter.

29 U.S.C. §623(a) (emphases added).

Section 4(a)(2) applies only to existing "employee[s]," *id.*, and does not authorize claims by applicants for employment. Unlike §4(a)(1), which expressly prohibits an employer's "fail[ure] or refus[al] to hire" because of age, §4(a)(2) says nothing about any failure or refusal to hire. Instead, §4(a)(2) applies only when an employer takes some action against "his employees" in a way that "adversely affect[s]" their "status as an employee." The ADEA further defines "[t]he term 'employee'" as "an individual employed by an employer[.]" 29 U.S.C. §630(f). Applicants for employment do not satisfy this definition, nor do they have any "status as an employee" that could be "affect[ed]" as contemplated by §4(a)(2). Accordingly, the term "any individual" in §4(a)(2) is plainly defined and delimited by the surrounding statutory context, which makes clear that it applies to any individual *employee*, but not individual *applicants for employment*. Indeed, as this Court has already recognized under the parallel text of Title VII, the term "any individual" cannot be read "literally" but must be limited by its statutory context.

Llampallas, 163 F.3d at 1242-43. Accordingly, "courts have almost universally held that the scope of the term 'any individual' is limited to employees." *Id.*

In light of the clear text and context of §4(a)(2) of the ADEA, it is no surprise that in the Supreme Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), "both the plurality and Justice O'Connor's concurrence described the ADEA's subsection [4](a)(2) . . . as protecting the employer's employees, period," *Mays v. BNSF Ry. Co.*, 974 F. Supp. 2d 1166, 1176-77 (N.D. Ill. 2013). Justice O'Connor's concurrence, joined by Justices Kennedy and Thomas, expressly stated that "Section 4(a)(2), of course, does not apply to 'applicants for employment' at all—it is only §4(a)(1) that protects this group." *Smith*, 544 U.S. at 266. The plurality opinion likewise stated that "the text [of §4(a)(2)] focuses on the effects of the action *on the employee* rather than the motivation for the action of the employer." *Id*. at 236 (emphasis added). Indeed the plurality opinion closely analyzed the text of §4(a)(2) and noted that it contains "an incongruity between the employer's actions—which are focused on *his employees* generally—and *the individual employee* who adversely suffers because of those actions." *Id.* at 236 n.6 (emphasis added). "Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects *the employee* because of that employee's age." *Id.* Justice Scalia's concurrence likewise acknowledged that "perhaps the [EEOC's]

attempt to sweep employment applications into the disparate-impact prohibition is mistaken." *Id.* at 246 n.3. Thus, *Smith* confirms that §4(a)(2) protects only "an 'employee' of the employer, which . . . is the best and likely only possibl[e] way to read the provision." *Mays*, 974 F. Supp. 2d at 1177.

Except for the panel majority here, every other court (and indeed every other judge) to ever say anything about this issue has recognized the same point. In *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996), the Eighth Circuit explained that §4(a)(2) "governs employer conduct with respect to 'employees' only, while the parallel provision of Title VII protects 'employees or applicants for employment;'" accordingly, under the ADEA, "applicants for employment" are "limited to relying on §[4](a)(1), which covers employees and applicants," whereas employees "may rely on either subsection." *Id.* at 1470 n.2. In *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996), the Tenth Circuit held that job applicants may sue only under §4(a)(1) of the ADEA, but not under §4(a)(2). The court concluded that "[w]e do not dwell on Section [4](a)(2) because it does not appear to address refusals to hire at all." *Id.* at 1007 n.12. In so ruling, the court explained that the disparate-impact provision of Title VII "expressly" applies to applicants, whereas §4(a)(2) does not. *Id.* In *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), the Seventh Circuit similarly concluded that §4(a)(2) "omits from its coverage, 'applicants for employment.'" The court explained that

"[i]n light of the ADEA's nearly verbatim adoption of Title VII language, the exclusion of job applicants from subsection [4(a)](2) of the ADEA is noteworthy." *Id.* at 1077-78. Finally, in *Smith v. City of Jackson*, 351 F.3d 183, 188 (5th Cir. 2003), the Fifth Circuit observed that "Title VII extends protection also to 'applicants' for employment, while the ADEA does not." Other courts have uniformly agreed. *E.g.*, *Mays v. BNSF Ry. Co.*, 974 F. Supp. 2d 1166, 1176-77 (N.D. Ill. 2013)*; EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980, 989 (E.D. Mo. 2006), *aff'd*, 528 F.3d 1042 (8th Cir. 2008), *reh'g en banc granted, opinion vacated* (Sept. 8, 2008).[1]

B. The Immediate Context Confirms That Applicants For Employment Cannot Assert Claims Under §4(a)(2)

"Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (citation omitted). And here, the ADEA specifically addresses "hir[ing]" in §4(a)(1) but then conspicuously omits any mention of it in the immediately following §4(a)(2). The statute also repeatedly distinguishes between "employees" and "applicants for employment," including

[1] *Ellis*, 73 F.3d at 1009-10, *Francis Parker*, 41 F.3d at 1076-77, and *Smith*, 351 F.3d at 187, also determined that the ADEA does not authorize disparate-impact claims at all. The Supreme Court in *Smith* overruled that portion of those decisions but, as explained above, reinforced their conclusion that §4(a)(2) does not authorize claims by applicants. Moreover, *City of Des Moines* agreed that §4(a)(2) does not authorize claims by applicants and also held, consistent with *Smith*, that §4(a)(2)authorizes employees to file disparate-impact claims. 99 F.3d at 1470.

multiple times in §4 itself. For example, §4(c) makes it unlawful for a labor organization to "adversely affect [any individual's] status as an employee *or as an applicant for employment*, because of such individual's age." 29 U.S.C. §623(c)(2) (emphasis added). Section 4(d) contains the ADEA's retaliation protections, and it specifically extends protection to "applicants for employment" and "applicant[s] for membership" in a labor organization. 29 U.S.C. §623(d). Additionally, ADEA Section 12(b) contains the age limits for "any personnel action affecting employees *or applicants for employment*." 29 U.S.C. §631(b) (emphasis added). Likewise, Section 15 expressly contains protections for "employees or applicants for employment," "employees and applicants for employment," and "an employee or applicant for employment." 29 U.S.C. §§633a(a) & (b). All of these provisions fortify the conclusion that Congress acted deliberately when it omitted any mention of "hir[ing]" or "applicants for employment" from §4(a)(2).

"The interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force" when Congress uses the omitted phrase in "close proximity." *MacLean*, 135 S. Ct. at 919. Here, §§4(a)(1), 4(c)(2), and 4(d) are in "close proximity" to §4(a)(2). They are all part of §4. This close proximity strongly suggests that Congress acted intentionally when it omitted any mention of hiring or applicants from §4(a)(2). Congress "understood how to be more specific, but chose not to do so" when it referred only to "employees" in

§4(a)(2). *Pugliese v. Pukka Dev., Inc*., 550 F.3d 1299, 1303 (11th Cir. 2008). This Court should respect that decision.

C. Congress Specifically Authorized "Applicants for Employment" To Bring Disparate-Impact Claims Under Title VII But Not Under The ADEA

Section 703(a) of Title VII served as the model for §4(a) of the ADEA. *See Lorillard v. Pons*, 434 U.S. 575, 584 & n.12 (1978). As originally enacted, "[e]xcept for the substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of [§4(a)(2)] in the ADEA is identical to that found in §703(a)(2) of the Civil Rights Act of 1964 (Title VII)." *Smith*, 544 U.S. at 233. In 1972, Congress amended §703(a)(2) by "inserting the words 'or applicants for employment' after the words 'his employees.'" Pub. L. No. 92-261, §8(a), 86 Stat. 109 (1972) (Statutory & Legislative Addendum 06A ("Leg.Add.")).

With this amendment, §703(a)(2) now makes it unlawful for an employer:

> to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a)(2) (emphasis added).

By contrast, Congress has *never* amended ADEA §4(a)(2) to apply to "applicants for employment." As a result, "Section [4(a)(2)] governs employer conduct with respect to 'employees' only, while the parallel provision of Title VII

protects 'employees or applicants for employment.'" *City of Des Moines*, 99 F.3d at 1470 n.2 (comparing §4(a)(2) with §703(a)(2)).

This stark difference between the text of Title VII and the ADEA cannot be ignored. In *Gross v. FBL Financial Services, Inc*., the Supreme Court held that Congress' decision to amend Title VII but not parallel ADEA provisions indicated that Congress "acted intentionally." 557 U.S. 167, 174 (2009). The Court observed that Congress amended Title VII by adding so called "mixed motive" claims to Title VII, but did not similarly amend the ADEA. The Court explained that "[w]e cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA," and thus held that the ADEA does not authorize mixed-motive claims. *Id*. at 173-74. Likewise, in *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 256 (1991), the Supreme Court held that Congress's decision to address "conflicts with foreign laws and procedures" in the ADEA and not Title VII meant that Title VII did not "apply overseas."

The same rationale applies here. Because "Congress expressly added applicants to the parallel provision in Title VII [§703(a)(2)], but not to the ADEA [§4(a)(2)]," it "indicat[ed] an intent that [§4(a)(2)] not apply to applicants." *Ellis*, 73 F.3d at 1007 n.12. This Court should not ignore such a clear "textual difference[] between Title VII and the ADEA." *Gross*, 557 U.S. at 175 n.2.

D. Congress Had Strong Policy Reasons To Limit ADEA Disparate-Impact Claims To Existing Employees

The limited scope of §4(a)(2) reflects Congress's sensible policy choice not to impose disparate-impact liability for hiring claims under the ADEA. As *Smith* recognized, "the differences between age and the classes protected in Title VII are relevant," and "Congress might well have intended to treat the two differently." 544 U.S. at 237 n.7. Indeed, there is far less need for a broad anti-discrimination law in the context of age because "discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII." *Id.* at 241. *Smith* likewise recognized that "age, unlike Title VII's protected classifications, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." 544 U.S. at 229. In particular, the hiring of *new* employees is uniquely correlated with age because many entry-level jobs are suited for applicants who have recently completed their education or other job training.

In light of these facts, allowing age-based disparate-impact *hiring* claims would impose far greater costs on employers for the sake of far fewer meritorious claims. For example, many employers seek to recruit on college campuses, while others (as is alleged here) seek to fill particular positions—particularly entry-level positions—with recent college graduates. App. Vol. I, Dkt. No. 1 ¶ 33. Indeed, for over a generation, the Justice Department has proudly advertised its Honors

Program—a hiring program limited to "graduating law students" and "recent law school graduates" (http://www.justice.gov/legal-careers/entry-level-attorneys). Likewise, even the EEOC advertises similar hiring programs for "recent graduates" (https://www.eeoc.gov/eeoc/jobs/honorprogram.cfm), as do many federal judges in their own law-clerk hiring. Such programs obviously produce a disparate impact based on age, as relatively few individuals graduate from college or law school after age 40. Indeed, many legitimate "employment criteria that are routinely used" in hiring have an "adverse impact on older workers as a group," *Smith*, 544 U.S. at 241, because legitimate factors such as experience levels are "empirically correlated with age," unlike race or sex. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608-11 (1993).

Such programs have long been immune from ADEA scrutiny (assuming no intentional age discrimination), yet Villarreal asks this Court to declare open season on all of them. While many such programs may be upheld based on "reasonable factors other than age," *see Smith*, 544 U.S. at 233, employers will bear the burden of proving that defense, not on a motion to dismiss, but typically after protracted discovery. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93 (2008). Moreover, because disparate-impact claims are inevitably alleged as class actions, they multiply both the costs of discovery and the likelihood of coercive *in terrorem* settlements. Accordingly, Villarreal's interpretation would

subject employers to a Hobson's choice of either abandoning settled and legitimate employment practices, paying large sums to settle dubious or extortionate claims, or enduring years of costly discovery and the vagaries of litigation.

Congress did not intend that result. On the contrary, just as in *Smith*, the differences between age and the Title VII categories, "*coupled with a difference in the text of the statute*," establish that the "scope of disparate-impact liability under ADEA is narrower than under Title VII." *Smith*, 544 U.S. at 237 n.7, 240 (emphasis in original). Here the textual difference could hardly be clearer, as Congress expressly added "applicants for employment" to the disparate-impact provision of Title VII but not the ADEA.

The limited scope of §4(a)(2) is consistent with several other ways in which the ADEA's protections are narrower than Title VII's. For example, the ADEA does not authorize mixed-motive claims but Title VII does. *Gross*, 557 U.S. at 180. The ADEA does not bar discrimination against *all* people over the age of 40, but Title VII bars discrimination against people of all races and both sexes. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584, 592, 611 n.5 (2004). The ADEA creates defenses for "bona fide occupational qualification[s]" ("BFOQ") and "reasonable factors other than age" ("RFOA"), 29 U.S.C. §623(f)(1), whereas Title VII contains no RFOA-like defense and no BFOQ defense for race claims, 42 U.S.C. §2000e-2(e). The ADEA is subject to the narrowing construction of *Wards*

Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), but Title VII is not. *See Smith*, 544 U.S. at 240. This case presents yet another example: Congress chose to make disparate-impact hiring claims available under Title VII but not the ADEA.

Finally, Villarreal and his amici quote liberally from the Supreme Court's recent decision authorizing disparate-impact liability under the Fair Housing Act (FHA), *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). But that case has no relevance here, because it simply held that disparate-impact claims are available when a provision "refers to the consequences of actions and not just to the mindset of actors." *Id.* at 2518. That is undisputed here, as everyone agrees that §4(a)(2) authorizes disparate-impact claims. The question is whether "applicants for employment" may bring such claims. *Inclusive Communities* did not address that issue because it involved housing, and the statute said nothing about "employees" or "applicants for employment." If anything, the most relevant passage was the majority's statement that "disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." *Id*. at 2518. By imposing massive litigation costs and the threat of class-wide liability on every entry-level hiring practice with an age-based disparate impact, Villarreal's position would precisely imperil free enterprise.

II. Villarreal Misinterprets §4(a)(2)

Villarreal concedes that the ADEA's explicit "hir[ing]" provision in §4(a)(1) prohibits only *intentional* discrimination and thus, unlike §4(a)(2), does not authorize disparate-impact claims. *See* Br. 19-20. He also concedes that §4(a)(2) makes no mention of "hiring" or "applicants for employment," but nonetheless asks this Court to read §4(a)(2) to cover failure-to-hire claims brought by applicants. This Court should not embrace that distortion of the statute.

A. Villarreal's Textual Arguments Fail

Villarreal argues that §4(a)(2) authorizes claims by applicants for employment because, even though it targets an employer's discriminatory acts against "his employees," it also refers to "any individual" who might be harmed. Br. 21-23. This argument ignores several crucial features of the text and context that clearly limit the phrase "any individual" to any *individual employee*, as opposed to any individual more broadly.

Under the parallel provision of §703(a) of Title VII, this Court has already recognized that "any individual" cannot be read "literally" to include anyone under the sun, but instead must be limited by context. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). Thus, although "Title VII prohibits discrimination against 'any individual,' . . . courts have almost universally held that the scope of the term 'any individual' is limited to employees." *Id.* at 1243.

While *Llampallas* concerned the distinction between employees and non-employees rather than employees and applicants, its logic applies strongly here because it illustrates that the term "any individual" must be read in context.

Under both Title VII and the ADEA, the words "any individual" cannot be ripped out of context and read to include literally *anyone* who might be adversely affected by an employer's conduct. Courts must "construe *statutes*, not isolated provisions." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (emphasis added) (internal quotation marks and citation omitted). The EEOC itself has recognized this, and has repeatedly held that, under the parallel text of §703(a)(2), the term "any individual" does not literally refer to *any* individual, but instead refers only to the category of individuals who are "limited, segregated, or classified" by the employer.[2] In §703(a)(2), that category includes "employees *or applicants for employment*." Applying the same logic to the ADEA §4(a)(2), the relevant category of "individual[s]" must be limited solely to "employees," since §4(a)(2) does not mention applicants for employment.

[2] *See* EEOC Dec. No. 79-9, 1978 WL 5820 (EEOC Oct. 20, 1978) (stating that "Section 703(a)(2) . . . limit[s] its prohibitions to discrimination against 'employees' or 'applicants for employment.'"); EEOC Dec. No. 79-33, 1979 WL 6938 (EEOC Jan. 16, 1979) (same); EEOC Dec. No. 79-32, 1979 WL 6937 (EEOC Jan. 16, 1979) (same); EEOC Dec. No. 81-22, 1981 WL 17719 (EEOC May 3, 1981) (same). *See also* EEOC Compliance Manual §618.1(b) (2006) ("Overall, §703(a)(1) is broader than §703(a)(2) . . . .").

The text of §4(a)(2) does not refer to "any individual" in isolation. Instead, it is specifically phrased as a prohibition on what an employer may do *to* "his employees" to affect them in their capacity "*as* employees." 29 U.S.C. §623(a)(2) (emphasis added). The employer may not "limit, segregate, or classify *his employees*" in a way that would adversely affect any individual's "status as an employee." These terms, which appear in the same sentence as "any individual," make clear that "any individual" refers to any *individual employee*. After all, when an employer decides not to hire an "applicant for employment," that decision does not in any way "limit" any of his "employees" as that term is defined in the statute—*i.e.*, any "individual employed by [the] employer." 29 U.S.C. §630(f).

Villarreal claims that if Congress wanted §4(a)(2) to refer only to existing "employees," it would have needed to refer to "*current* employees" instead of referring to "employees" alone. Br. 23. But that modifier is unnecessary because the statute already defines "employees" as "individual[s] employed by [the] employer." 29 U.S.C. §630(f). The unmodified noun "employees" thus clearly refers to people already "employed by the employer."

To be sure, as the AARP points out, Amicus Br. 11, the Supreme Court has recognized that a person "employed by the employer" can sensibly be read to mean a *former* employee, i.e., someone who "*was* employed." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342 (1997). But it cannot sensibly be read to mean someone who *has*

never been employed. To cover the never-employed, Congress would have needed to add "applicants for employment" or "potential" employees to §4(a)(2), but it chose not to. Tellingly, Congress *did* make that precise change to the verbatim text of §703(a)(2), thus confirming that such an amendment was necessary to cover "applicants for employment" in addition to current employees.

Villarreal also ignores §4(a)(2)'s proviso that an employer's "limit[ing]" of his employees is unlawful only if it "deprive[s] any individual of employment opportunities *or otherwise adversely affect[s] his status as an employee*." (emphasis added). This language cannot apply to *non-employees*, because it would be nonsensical to speak of "adversely affect[ing]" the "status as an employee" of someone who *has never been an employee.*[3] The decision not to hire someone cannot "affect his status as an employee" because, by definition, that person has never been "employed by the employer," and thus never had any "status as an employee" to begin with. Once again, the contrast with a nearby provision is instructive: unlike §4(a)(1), §4(c) specifically prohibits labor organizations from "adversely affect[ing] [any individual's] status as an employee *or as an applicant*

[3] Contrary to the EEOC's argument, Amicus Br. 8, the term "otherwise" makes clear that "depriv[ing] . . . employment opportunities" is not a freestanding basis for liability but is simply one among various "other[]" ways of affecting someone's "status as an employee." Accordingly, when §4(a)(2) refers to depriving individuals of employment opportunities, it clearly means depriving any individual *employee* of opportunities *within the company*—i.e., promotions, pay raises, and favorable transfers.

for employment." 29 U.S.C. §623(c)(2) (emphasis added). Because §4(a)(2) refers solely to "status as an employee," without mentioning status as an *applicant*, it is limited to employees.

To be sure, the meaning of the term "employee" will often depend on context. Thus, for example, the AARP observes that the term "employees" under the National Labor Relations Act (NLRA) includes workers applying for new jobs. Amicus Br. 11. But that is because the NLRA expressly states that " [t]he term 'employee' . . . shall not be limited to the employees of a particular employer," but includes those "whose work has ceased" and "who ha[ve] not obtained any other regular and substantially equivalent employment." 29 U.S.C. §152(3). The ADEA contains no such expansive language. Likewise, Villarreal cites the Genetic Information Nondiscrimination Act (GINA), but unlike the ADEA that statute specifically defines "employee" as "including an applicant." 42 U.S.C. §2000ff(2)(A)(i). Moreover, the analogous provision of the GINA, §203(a)(2), differs sharply from the ADEA because it broadly prohibits "limit[ing], segregat[ing], or classify[ing] *individuals*," whereas the ADEA refers exclusively to limiting, segregating, or classifying "*employees*."[4]

[4] Similarly, the reference to "status as an employee" can be read differently in the context of §703(a)(2) of Title VII, which expressly prohibits "limiting, segregating, [or] classifying . . . applicants for employment" in a way that affects their "status as an employee." 42 U.S.C. §2000e-2(a)(2) (emphasis added). Because this provision expressly prohibits employers from discriminating against "applicants

B. Supreme Court Authority Forecloses Villarreal's Effort To Ignore The Difference Between The ADEA And Title VII.

The Supreme Court has made clear that courts "cannot ignore" textual differences between Title VII and the ADEA, which indicate that Congress intended the statutes to apply differently. *Gross*, 557 U.S. at 173-74; *accord Smith*, 544 U.S. at 240-41. *See* Section I.C, *supra*. Villarreal does not dispute that Congress amended §703(a)(2) of Title VII to add the phrase "applicants for employment," and that Congress has never made any such amendment to the verbatim text of §4(a)(2) of the ADEA. Instead, he echoes the panel majority by arguing that this textual difference makes no difference because Congress did not *simultaneously* amend the ADEA when it amended Title VII. *See* Br. 30; Op. at 13. Both the premise and the conclusion of his argument are wrong.

Even if Congress had never made any other amendments to the ADEA, its decision to add "applicants for employment" solely to §703(a)(2) but not to §4(a)(2) would be dispositive. For example, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256 (1991), the Court found it dispositive that Congress had amended the ADEA but not Title VII with respect to the contested issue, regardless of whether it had made any *other* contemporaneous changes to Title VII. Similarly, in *Smith*, the Supreme Court emphasized that, without regard to the timing of any amendments,

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for employment," the context makes clear that it includes *future* employees. But of course, that crucial context is conspicuously absent from §4(a)(2), which pointedly excludes "applicants for employment."

the "*difference in the text of the statute[s]*" establishes that the "scope of disparate-impact liability under ADEA is narrower than under Title VII." 544 U.S. at 236 n.7. The same is true here. What matters is that Congress has enacted two parallel disparate-impact provisions with text that is otherwise functionally identical, but only one of which includes "applicants for employment."

In any event, Congress *did* consider and ultimately amend the text of the ADEA at the same time it added "applicants for employment" to §703(a)(2) of Title VII. First, a bill was introduced to add "applicants for employment" to §703(a)(2) in 1967, in the same session and in the same year the ADEA was enacted. *Compare* S. 1026, 90th Cong. §306 (1st Sess. 1967) (proposing Title VII amendment) (Leg.Add.14A-15A), *with* S. 830, 90th Cong. §4(a)(2) (1st Sess. 1967) ("Age Discrimination in Employment Act of 1967"). In fact, six of the ADEA's nine Senate co-sponsors were also co-sponsors of the proposed amendment to add "applicants" to Title VII. It is thus clear that Congress deliberately enacted §4(a)(2) *without* covering applicants while simultaneously considering a proposal that applicants be covered under §703(a)(2).

Second, when Congress finally amended Title VII in 1972 to add "applicants for employment" to Title VII, a bill was also reported out of committee that same year, 1972, to add "applicants for employment" to a *different* part of the ADEA.

Congress soon enacted that bill into law in 1974.[5] But once again, Congress pointedly decided *not* to add "applicants for employment" to ADEA §4(a)(2). Thus, by adding "applicants for employment" to Title VII in 1972, and adding "applicants for employment" to a *different* part of the ADEA in a bill reported that same year, Congress again clearly signaled its deliberate choice *not* to include applicants under §4(a)(2). While Congress has amended §4 of the ADEA many times since—in 1978, 1982, 1984, 1986, 1989, 1990, 1996, 1998, 2006, and 2008—it has *never* eliminated the critical difference between §703(a)(2) and §4(a)(2). *See* 29 U.S.C.A. §623 (listing amendments).

C. The 1972 Amendment Adding "Applicants for Employment" To Title VII Was Not Superfluous

Villarreal argues that §703(a)(2) of Title VII *already* covered "applicants for employment" before Congress added that phrase in 1972. Br. 24-29. In particular, he contends that the Supreme Court's 1971 decision in *Griggs* authorized applicants for employment to bring claims under §703(a)(2), and that the 1972 amendment simply "codif[ied]" that holding. Br. 29-30. This is wrong at every turn. In fact, *Griggs* involved only four incumbent employees, and thus said nothing about applicants for employment. Moreover, the bill to add "applicants for

[5] *See* S. 1861, 92d Cong. (1972) (ultimately in Pub. L. No. 93-259, §28(b)(2) (1974)).

employment" to §703(a)(2) was introduced in 1967, and thus could not possibly have been intended to "codify" anything *Griggs* may have said in 1971.

1. *Griggs* did not address applicants for employment

Contrary to Villarreal's mischaracterization, *Griggs* did not involve any applicants for employment, and thus the Supreme Court's opinion paid no attention to whether such applicants were covered under §703(a)(2).

Griggs was filed by four "incumbent Negro employees against Duke Power Company." 401 U.S. at 426. "All the petitioners [were] employed at the Company's Dan River Steam Station," and thus were not applicants for *employment*, but for *job promotions and transfers*. That explains why the phrase "applicants for *employment*" does not appear anywhere in the *Griggs* opinion, and why the Court never addressed, even in dicta, whether §703(a)(2) applies to applicants for employment. In the few places where the opinion did mention "applicants" and "hiring," it did so only in passing references or in quoting agency regulations, without pausing to consider whether §703(a)(2) authorized claims by applicants for employment. *See* 401 U.S. at 426-28.

The *Griggs* petitioners themselves told the Court that their case began as a "class action . . . brought by a group of incumbent black workers against their employer." Petitioners' Br. at 4, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 70-124), 1970 WL 122448. They also explained that the challenged

"[diploma and test] requirement applies only to certain interdepartmental transfers, [and] its real impact is only on those employees in departments who need to transfer for decent promotional opportunity." *Id.* at 31. "The only persons thus burdened [were] the four black workers involved in this petition." *Id.* The petitioners even stated that "[t]he legality of [the testing] requirement for new employees is not in issue in this case." *Id*. at 44 & n.53.

The EEOC and the Solicitor General likewise characterized the case as being brought by "employees" who "alleg[ed] that the Company's testing, transfer, and seniority practices violated the rights of *incumbent Negro employees* under Title VII of the Civil Rights Act of 1964 by conditioning eligibility for *transfer* out of the Labor Department on educational or testing requirements." Br. of the United States and EEOC as Amicus Curiae at 7, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 70-124), 1970 WL 122637 (emphasis added).

Villarreal cites the Fourth Circuit's original decision in *Griggs* for the proposition that the case involved a class that included "all Negroes who may hereafter seek employment." Br. 25 (citing *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1227-28 (4th Cir. 1970)). But in fact, only a portion of the original case reached the Supreme Court, which considered only the claims of the four incumbent employees. *See* 401 U.S. at 431. On remand, the district court explained that the *Griggs* case "is no longer, if it ever was, a class action" because the Fourth

Circuit "implicitly dissolved" its 1967 class-certification order before the case proceeded to the Supreme Court. *Griggs v. Duke Power Co.*, No. C-210-G-66, 1974 WL 146, at *1 (M.D.N.C. Jan. 10, 1974). The post–Supreme Court injunction thus applied only to the "selection of employees for *promotions, transfers, demotions or lay-offs* and the selection of *employees* for *training* for any of the job vacancies which may hereafter occur." *Griggs v. Duke Power Co.*, No. C-210-G-66, 1972 WL 215, at *1 (M.D.N.C. Sept. 25, 1972) (emphases added). As the Fourth Circuit subsequently observed, the "Supreme Court granted relief" only to "four plaintiffs[.]" *Griggs v. Duke Power*, 515 F.2d 86-87 (4th Cir. 1975).

Villarreal points out that the Supreme Court used broad language to refer to "barriers" and "conditions" of employment, without "qualify[ing] these statements" or addressing whether they applied to "prospective employees." Br. 26-27. But that simply confirms that the Court *had no reason* to address non-employees, because the case did not involve them and nobody raised any issue about whether the statute covered them. Accordingly, there was no basis for Congress to assume that *Griggs* provided any guidance, much less a definitive *holding*, about whether §703(a)(2) covered applicants for employment, because *no such applicants were before the Court*, and not a single sentence of the Court's opinion suggested any attention to that issue.

Finally, Villarreal cites a number of post-1972 cases stating that the disparate-impact theory adopted in *Griggs* applies in the hiring context. Br. 27-28. But those cases were all decided well *after* Congress added "applicants for employment" to Title VII §703(a)(2). Accordingly, none paid any attention to whether *Griggs* itself authorized such applicants to bring claims under §703(a)(2) *before* Congress added that phrase.

2. The legislative history contradicts Villarreal's theory

Villarreal's reliance on cherry-picked legislative history is misleading at best. Most prominently, Villarreal quotes a Senate Report stating that the addition of "applicants for employment" to Title VII was merely "declaratory of present law," which he portrays as "codify[ing]" the *Griggs* decision. Br. 28-29. In fact, however, the amendment to add "applicants for employment" to §703(a)(2) was first proposed in a bill introduced in February 1967,[6] and the quoted language from the Senate Report was authored in 1968. *See* S. Rep. No. 90-1111, at 17 (Leg.Add.11A). Accordingly, neither the amendment nor the report possibly could have contemplated any "codification" of *Griggs*, which was not decided until 1971.

[6] The 1967 bill proposing to add "applicants for employment" to §703(a)(2) failed to pass that year, but was reintroduced in each of the following years through 1971. *See* S. 1026, 90th Cong. § 306 (1967) (Leg.Add.14A-15A); S. 3465, 90th Cong. § 6 (1968) (Leg.Add.16A-17A); S. 2453, 91st Cong. § 8 (1969) (Leg.Add.18A-19A); 116 Cong. Rec. 34,573-76 (1970) (passing S. 2453) (Leg.Add.20A-21A); S. 2515, 92nd Cong. § 8 (1971) (Leg.Add. 22A-23A).

In March 1971, the Supreme Court decided *Griggs*, which extended §703(a)(2) to cover disparate-impact claims. *See* 401 U.S. at 426 n.1 (citing §703(a)(2)). Then, in July 1971, the Third Circuit recognized that §703(a)(2) did not cover applicants for employment: The court stated that section "[703](a)(2)" applied to discrimination "by employers," whereas discrimination "by potential employers" was covered under "[703](a)(1)." *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 445 (3d Cir. 1971).

In March 1972, eight months after the Third Circuit's decision in *Hackett*, Congress amended §703(a)(2) to include "applicants for employment,"[7] and simultaneously amended §703(c)(2) to include "applicants for membership" in a labor union. This amendment had nothing to do with *Griggs*. It was accompanied by a verbatim copy of the language from the 1968 Senate Report stating that these changes to §§703(a)(2) and (c)(2) were "declaratory of existing law." Br. 29 (citing S. Rep. No. 92-415, at 43). But the amendment was also accompanied by an updated Conference Report, which likewise did not mention *Griggs* but stated that "[t]his subsection is merely declaratory of present laws as contained in the decisions in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971); *U.S. v. Sheet Metal Workers International Assn., Local 36*, 416 F. 2d 123 (8th Cir. 1969); *Asbestos Workers, Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969)." Conf. Rep.

[7] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §8(a), 86 Stat. 109 (Leg.Add.05A-06A).

on H.R. 1746, reprinted in 118 Cong. Rec. 7166, 7169 (Leg.Add.12A-13A). None of the three cited cases applied §703(a)(2), much less addressed whether that provision previously covered "applicants for employment." Instead, all three cases involved the application of §§703(a)(1) and 703(c)(1) to applicants for employment and applicants for membership in a labor union. Thus, the Conference Report confirms that the purpose of the 1972 amendment was to extend §§703(a)(2) and 703(c)(2) to be co-extensive with §§703(a)(1) and §§703(c)(1), which *already* declared it unlawful to discriminate against applicants for employment and union membership, respectively.

Villarreal also quotes a House Report, which stated that the 1972 amendments generally were "fully in accord with" *Griggs*. Br. 29 (quoting H.R. Rep. No. 92-238, at 21-22 (1971) (Leg.Add.42A-43A)). But the quoted passage was solely about amendments to testing requirements under §703(h). It did not mention §703(a)(2), much less discuss whether that subsection applied to "applicants for employment." Instead, the report clearly stated that the amendments to *the §703(h) testing requirements* were "fully in accord with" *the general disparate-impact theory* adopted by *Griggs*. Moreover, although a later passage in the report stated that §703(a)(2) as amended would be "[c]omparable" to the previous version, that clearly did not mean *identical*. The same report said that the amendment would be "[c]omparable to present Section 702," even though

it "deleted" an "exemption currently provided to certain employees" under that section. (Leg.Add.44A). The report also said §706(e) would be "[c]omparable to present Section 706(d)" even though it "expanded" the statutory "filing period[s]" under that section. (Leg.Add.45A).

Turning to the ADEA, Villarreal and his amici cite a report by former Secretary of Labor W. Willard Wirtz. Br. 19 n.1; AARP Amicus Br. 16-20; EEOC Amicus Br. 14. The Wirtz Report, however, did not recommend that Congress create a cause of action for disparate-impact claims by applicants for employment. The Wirtz Report instead expressed the view that when certain employment practices "unintentionally lead to age limits in hiring," noncoercive approaches should be tried. Wirtz Rep. at 22. The Wirtz Report thus did not *at all* conclude that the ADEA should authorize disparate-impact hiring claims. If anything, the Wirtz Report undermines Villarreal's argument instead of supporting it.

At the same time, Villarreal ignores the legislative history that is directly on point, such as the Senate's "summary of major provisions" of the ADEA, which described the ultimately-enacted text of §4(a)(2) as making it unlawful "[t]o limit, segregate, or classify *employees* so as to deprive *them* of employment opportunities or adversely affect *their* status . . ." S. Rep. No. 90-723, at 4 (1967) (Leg.Add.36A-37A) (emphasis added). Contrary to the suggestion of the panel majority and the AARP, Op. 20 n.8; Amicus Br. 10, this was not *alternative* language that Congress

rejected. It was a "summary" of the very text of §4(a)(2) that ultimately became law. Other sources likewise explained that §4(a)(2) would make it unlawful to "limit, segregate or classify *employees* by age if it would adversely affect *their* employment opportunities." 113 Cong. Rec. 34,752 (1967) (Leg.Add.39A) (remarks of Rep. Dwyer) (emphases added).

D. The EEOC's Interpretation Deserves No Deference

The interpretation advanced in the EEOC's amicus brief is not entitled to controlling deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). That interpretation not only contradicts the plain meaning of the statutory text, but also contradicts the agency's reading of the parallel language of Title VII. Moreover, the agency has never engaged in rulemaking or any other deliberative process to interpret §4(a)(2) that would entitle it to deference.

1. The statutory text forecloses the EEOC's interpretation

"[N]o deference is due to agency interpretations at odds with the plain language of the statute itself," and "[e]ven contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989). "[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Moreover, to assess whether a statute is ambiguous, courts must first "employ[] traditional tools of statutory construction,"

id. at 843 n.9, and thus "deference . . . is called for only [after] the devices of judicial construction have been tried." *Cline*, 540 U.S. at 600. That is so because the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown* & *Williamson*, 529 U.S. at 132-33. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *cf. MacLean*, 135 S. Ct. at 915 ("Congress's use of the word 'law,' in close connection with the phrase 'law, rule, or regulation,' provides the necessary 'clear showing' that 'law' does not include regulations in this case.").

Here, the plain meaning of the statute is dispositive because Congress deliberately omitted "applicants for employment" from §4(a)(2), and thus "directly spoke[] to the precise question at issue." *Chevron*, 467 U.S. at 842. *See supra* Section I. Every other court to address the issue has reached the same conclusion, and "[t]he very strength of this consensus is enough to rule out any serious claim of ambiguity." *Cline*, 540 U.S. at 593-94. In similar cases, the Supreme Court has repeatedly rejected the EEOC's sweeping misreading of the ADEA. For example, in *Kentucky Retirement System v. EEOC*, 554 U.S. 135, 143, 149 (2008), the Court refused to defer to an EEOC "regulation and compliance manual" that interpreted unlawful age "discriminat[ion]" to include "mak[ing] age in part a condition of

pension eligibility." *Id.* at 143, 149. Similarly, in *Cline*, the Court refused to defer to an EEOC regulation because the "context" and "social history" showed unambiguously that "discriminat[ion] . . . because of [an] individual's age" did not include discrimination favoring the old over the young. 540 U.S. at 596. And in *Betts*, the Court refused to defer to an EEOC regulation because the text and "context" of ADEA §4(f)(2) clearly "connote[d]" a subjective intent element. 492 U.S. at 170-71. Here, this Court should follow the Supreme Court's lead. Section 4(a)(2)'s text and context clearly foreclose the EEOC's attempt to insert "applicants for employment" where Congress deliberately excluded them.

2. The EEOC's interpretation would not merit deference even if the statute were ambiguous

Even if §4(a)(2)'s exclusion of "applicants for employment" left any ambiguity, the EEOC is not entitled to deference here for two further reasons. First, and most importantly, the EEOC's interpretation of §4(a)(2) is unreasonable because it contradicts the agency's interpretation of the parallel text of §703(a)(2) of Title VII. As noted above, the EEOC has repeatedly held that §703(a)(2) applies only to the category of individuals who are "limited, segregated, or classified" by the employer, and does not literally include "any individual" who might assert a claim. *See supra* 22 & n.2. The EEOC has not and cannot explain why the same interpretation does not govern the text of §4(a)(2), which prohibits employers from limiting, segregating, or classifying only "employees." Because the agency's

reading here is inconsistent with its reading of the verbatim text of §703(a)(2), its position is "arbitrary [and] capricious," and not entitled to any deference. *Chevron*, 467 U.S. at 844; see also *Frank Diehl Farms v. Sec'y of Labor*, 696 F.2d 1325, 1330 (11th Cir. 1983) (noting this Court's "reluctan[ce] to defer to an agency's more recent interpretation as authoritative when it conflicts with earlier pronouncements of the agency").

Second, outside of litigation, the EEOC has never engaged in any exercise of its authority to interpret §4(a)(2) to address whether it includes "applicants for employment." As the Supreme Court has made clear, *Chevron* deference does not apply where the EEOC tries to interpret a provision through an amicus brief. Courts do not defer "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *see also Gregory v. Ashcroft*, 501 U.S. 452 (1991) (refusing to defer to EEOC interpretation of the ADEA articulated only in the course of litigation). Indeed, an agency's interpretation typically merits deference only if the agency has analyzed the text in a "formal administrative procedure" such as a "rulemaking or adjudication," which ensures "fairness and deliberation." *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

Here, the EEOC has never engaged in any such procedure. The agency is not authorized to conduct adjudications under §4(a)(2), and it has never sought any

public comment, engaged in any rulemaking, or promulgated any other public guidance addressing whether the text of §4(a)(2) can be read to include "applicants for employment." The U.S. Department of Labor issued ADEA regulations in 1968, and the EEOC promulgated ADEA regulations in 1981 and 2012, but in none of these rulemakings has either agency said anything about whether §4(a)(2) covers job applicants.[8] The government has never made any reference to the scope or text of §4(a)(2) anywhere in the federal register, in the preamble, or in the text of the regulations themselves. Instead, the government's rulemakings have focused on §4(f) of the ADEA, which does not address *who* may bring disparate-impact claims, but provides only that a disparate impact is not unlawful if caused by "reasonable factors other than age [RFOA]." 29 U.S.C. §623(f)(1). The RFOA regulations have never addressed the text of §4(a)(2). Indeed, the preamble to the current rule and the final rule do not even cite §4(a)(2), much less consider whether it can be read to cover applicants for employment. *See* 77 Fed Reg. 19080.

The EEOC's lack of attention to the scope of §4(a)(2) was particularly noteworthy in the 2012 rulemaking after the Supreme Court's ruling in *Smith*. Before *Smith*, the EEOC contended that "it is of no consequence . . . that

[8] 33 Fed. Reg. 9172-73, 12227-28 (1968); 46 Fed. Reg. 47724-28 (1981); 77 Fed. Reg. 19080-95 (2012). Similarly, while the EEOC argues that the 1966 guideilnes interpreted the original text of Title VII §703(a)(2) to authorize disparate-impact claims by applicants for employment, Amicus Br. 20, in fact those guidelines did not even *mention* § 703(a), but solely interpreted §703(h). *See* EEOC Guidelines on Employment Testing Procedures, *(*Aug. 24, 1966) (Leg.Add.27A-34A).

subsection 4(a)(2) does not refer to applicants," because "[e]ven if applicants are not covered by subsection 4(a)(2), disparate impact theory applies to them by virtue of subsection 4(a)(1)." *EEOC Reply Brief at 4*, *EEOC v. Francis Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994) (No. 93-3395), 1994 WL 16045193. In *Smith*, however, the Supreme Court made clear that disparate-impact claims are available solely under §4(a)(2), and all eight Justices either expressly stated or strongly suggested that §4(a)(2) does not apply to applicants for employment—a conclusion reinforced by five decisions in the Fifth, Seventh, Eighth, and Tenth Circuits, in two of which the EEOC was a party. *See supra* 12-13.

The EEOC recognized that its previous regulations had been "overtaken by . . . *Smith*," and thus "disavowed" them. *Meacham*, 554 U.S. at 93 n.9. But even then, despite being on notice that courts uniformly read §4(a)(2) to exclude applicants for employment, the agency *still* took no steps to interpret §4(a)(2) in its new rulemaking. Instead, once again, the rulemaking addressed *solely* the §4(f) RFOA defense. Neither the preamble nor the regulation even cited §4(a)(2), and the preamble explained that the new regulation was "designed to conform existing regulations to recent Supreme Court decisions and to provide guidance about the application of the RFOA affirmative defense." 77 Fed Reg. at 19082. Although the preamble made passing reference to "applicants" in the illustrative examples of the RFOA defense, it did not specify whether it was discussing applicants for

employment or applicants for *job promotions or transfers*. *See* Amicus Br. of Retail Lit. Center at 14-17. Much less did it attempt to explain how §4(a)(2) could encompass applicants for employment. *See* 77 Fed. Reg. 19080, at 19084-87.

The EEOC argues that, under *Smith*, "[the] RFOA regulation" is "relevant to the meaning of section 4(a)(2)," Amicus Br. 22, but *Smith* was driven almost entirely by "the text of the statute." 544 U.S. at 240. To the extent that the RFOA regulation had any relevance, that was only because it interpreted the RFOA defense to play its "principal role" in "disparate-impact" cases, thus indicating that §4(a)(2) must authorize *some* disparate-impact claims. *Id.* at 239 (plurality op.); *see also id*. at 246 (Scalia, J., concurring). Here, by contrast, the question is whether the *scope* of §4(a)(2) encompasses job applicants. On *that* question, the regulation explaining how the RFOA defense works is irrelevant.

The EEOC argues that the RFOA regulation actually *does* address who can bring claims under §4(a)(2) because it discusses how the RFOA defense should apply to claims brought by "individuals." Amicus Br. 22-23 (claiming deference under *Auer v. Robbins*, 519 U.S. 452 (1997)). Contrary to the EEOC's assertion, however, the generic use of the term "individuals" does not add anything to the statutory text of §4(a)(2), which already authorizes claims by "any individual" (while making clear by context that it means any individual *employee*). *See supra* Section I & II.A-B. The regulation sheds no light on whether "individual" should

be interpreted more broadly. And as the Supreme Court has held, the EEOC does not receive deference to reinterpret regulations that "do little more than restate the terms of the statute itself." *Ky. Ret. Sys.*, 554 U.S. at 149; *see also Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("An agency does not acquire special authority to interpret its own words when . . . it has elected merely to paraphrase the statutory language."). Accordingly, "[s]ince the [RFOA] regulation gives no indication how to decide" the meaning of the term "individual," "the [EEOC's] effort to decide [the meaning] now cannot be considered an interpretation of the regulation" worthy of any deference. *Id.*

Because the EEOC has never engaged in any rulemaking or otherwise issued any public guidance regarding its textual interpretation of §4(a)(2), deferring to that interpretation now in an amicus brief would "frustrat[e] the notice and predictability purposes of rulemaking." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (citation omitted). "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in [litigation] and demands deference." *Id.*

III. Equitable Tolling Does Not Apply Because Villarreal Failed To Allege Diligence or Extraordinary Circumstances

The ADEA requires that a plaintiff "shall" file a charge "within 180 days after the alleged unlawful practice occurred." 29 U.S.C. §626(d)(1)(A). Congress enacted that "short" deadline "to encourage the prompt processing of all charges of employment discrimination." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (citation omitted). As the Supreme Court has recognized, this type of limitation reflects a "judgment" by Congress "that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 820 (1980).

Villarreal does not dispute that the claims stemming from his 2007 job application fall outside the statutory time bar. Thus, the only question is whether this is the type of exceptional case that would justify judicial override of the statute of limitations. It is not, because Villarreal failed to allege either of the two elements required for equitable tolling: he does not allege that he acted with any diligence to protect his rights, or that any extraordinary circumstance prevented him from filing on time. Instead he admits that after applying for a job in 2007, he did nothing until receiving a letter from a lawyer in 2010 looking to recruit class-action plaintiffs. Although he alleges that any effort would have been "futile," that is pure speculation because he never even *tried* to inquire into the *status* of his job

application, so he cannot have any basis to say what would have happened if he *had* tried. In fact, had he bothered to ask, RJR would have told him that it was seeking less-experienced applicants.

A. Equitable Tolling Requires Reasonable Diligence And Extraordinary Circumstances

"[A] litigant is entitled to equitable tolling of a statute of limitations *only if* the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016) (emphasis added) (citation and internal quotation marks omitted). The Supreme Court has rejected the argument that this test is "overly rigid," emphasizing that both "distinct elements" are "require[d]" for equitable tolling; they are "not merely factors of indeterminate or commensurable weight." *Id.* at 755-56 (citations omitted). As a result, courts must "reject[] requests for equitable tolling where a litigant failed to satisfy one" of these two elements, regardless of "whether he satisfied the other." *Id*. at 756. *Accord Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-20 (2012); *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014); *Holland v. Fla.*, 560 U.S. 631, 649 (2010); *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984).[9]

[9] Although the EEOC now takes a different position, the Government argued to the Supreme Court in *Menominee* that, without qualification, "[e]quitable tolling is

First, at the threshold, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin*, 466 U.S. at 151. This requirement recognizes that "equity aids the vigilant and not those who slumber on their rights." *Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (citation omitted). A plaintiff who fails to pursue his rights diligently is "responsible for [his] own delay," and is thus disqualified from invoking the equitable powers of the court. *Menominee*, 136 S. Ct. at 756 (citation omitted). That is true not only because a plaintiff who acts in a dilatory fashion is unworthy of equitable solicitude, but also because trial courts should not be subjected to the "burden of trying stale claims when a plaintiff has slept on his rights." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). Thus, when a job applicant declines to take even the most basic steps to monitor the status of his job application, it is

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appropriate *only if* the litigant seeking tolling establishes that it was pursuing its rights diligently and that some extraordinary circumstance stood in its way and prevented timely filing." 2015 WL 6406723, at *21 (emphasis added) (internal citations and quotation marks omitted). The Government has also recognized that the same equitable-tolling standard applies in employment-discrimination cases, at least when the shoe is on the other foot. *See, e.g.*, Br. for Appellees, *Casey v. U.S. Dep't of Health and Human Svcs*. (1st Cir. 2015) (No. 15-1115), 2015 WL 5092453, at *56 (Title VII discriminatory termination) ("[E]quitable tolling should suspend the running of the limitations period only in 'exceptional circumstances.'"); Br. for Appellee, *Kannikal v. Holder* (3d Cir. 2014) (No. 14-1803), 2014 WL 3898549, at *16 (Title VII discriminatory termination) ("Equitable tolling of a statute of limitations is applied 'sparingly' and is unavailable 'where the claimant failed to exercise due diligence in preserving his legal rights.'") (citations omitted). Courts "cannot rely significantly on the EEOC's" position when it is "inconsistent with positions for which the Government has long advocated." *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015).

impossible to say that any extraordinary circumstance "stood in his way" and prevented him from filing a timely claim. *Menominee*, 136 S. Ct. at 755. In such a case, the plaintiff would not have filed a timely claim under *any* circumstances, and his lack of timeliness is attributable solely to his own lack of diligence.

Second, even where a plaintiff acts with reasonable diligence, equitable tolling still requires extraordinary circumstances to ensure that it does not become the norm for every "garden variety claim." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). As this Court too has recognized, equitable tolling is "an extraordinary remedy which should be extended only sparingly," *Bost v. Fed. Express Co.*, 372 F.3d 1233, 1242 (11th Cir. 2004) (citation omitted), and only in "extreme cases" after a plaintiff who has pursued his rights "with diligence" was nonetheless prevented by "extraordinary circumstances" from filing on time. *Downs v. McNeil*, 520 F.3d 1311, 1318-19 (11th Cir. 2008) (citations omitted). Because "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law," *Baldwin*, 466 U.S. at 152 (citation omitted), "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396 (2007). Typically, an "extraordinary circumstance" must be an "external obstacle" that is "outside [the] control" of the plaintiff. *Menominee*, 136 S. Ct. at 756. The Supreme Court has recognized that

extraordinary circumstances include "affirmative misconduct on the part of a defendant," *Baldwin*, 466 U.S. at 151, "a party's infancy or mental disability, absence of the defendant from the jurisdiction, [and] fraudulent concealment." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 n.17 (2014). As this Court has made clear, a plaintiff must at least *plead* extraordinary circumstances because "[t]he plaintiff bears the burden of showing that such extraordinary circumstances exist." *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006).

Underlying all of this, the guiding principle is that equitable tolling is the exception, not the rule. It must be reserved for *extraordinary* cases, and cannot displace the filing period that Congress contemplated in the *typical* case.

B. This Court's Precedent Is Not To The Contrary

Villarreal badly distorts this Court's precedent to contend that equitable tolling should be available without *any* reasonable diligence or *any* extraordinary circumstances, as long as the plaintiff can plausibly show that "he was unaware of the facts supporting his charge," and that any steps he "*might* have undertaken" would have been "futile." Br. 40, 53 (emphasis added). That sweeping rationale is flatly inconsistent with the precedent of both the Supreme Court and this Court, which is bound to follow the rule that both "elements" of equitable tolling are "require[d]." *Menominee*, 136 S. Ct. 755-56. Contrary to Villarreal's suggestion, neither this Court nor any other has ever authorized tolling in a case like this one,

where the plaintiff simply applied for a job, displayed no interest in the outcome, and then brought an untimely claim years later after being contacted by a plaintiff's lawyer, without alleging any extraordinary circumstances to justify his delay.

Villarreal endorses the panel majority's conclusion that a "less stringent" standard for equitable tolling applies in employment-discrimination cases. Op. at 32 n.13. That is incorrect. In fact, this Court has applied the ordinary equitable-tolling standard in an ADEA case, *see Bost*, 372 F.3d at 1242, and the Supreme Court has done likewise in the analogous context of Title VII, *see Baldwin*, 466 U.S. at 151-52; *Irwin*, 498 U.S. at 96.[10] Moreover, all of the equitable-tolling cases cited in the panel majority's opinion involved extraordinary circumstances: all but one involved employer misconduct, and the only exception involved the even more unusual circumstance of a plaintiff who missed a filing deadline due to misinformation provided by the EEOC.[11] Accordingly, the panel majority and

[10] Because *Baldwin* and *Irwin* applied the strict standard in employment-discrimination cases, Villarreal and the EEOC are wrong that *Menominee* reserved whether a less-stringent standard might apply outside habeas. Br. 47 n.8; EEOC Amicus Br. 26-27 n.8. In fact, the Court stated that "an *even stricter* test [for equitable tolling] might apply to a nonhabeas case." *Menominee*, 136 S. Ct. at 756 n.2 (emphasis added). A "more generous" tolling standard was so implausible that the petitioner did not "argue" for it, and the Solicitor General argued both elements are required, without exception. *Id*.

[11] *See, e.g.*, *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1261-64 (11th Cir. 2003) (employer "lied" by telling plaintiff it was "eliminating" her position, but later hired a "28-year-old woman" described as "young and pretty"); *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1024-26 (11th Cir. 1994) (employer deception caused filing delay); *Hargett v. Valley Fed. Sav. Bank*, 60 F.3d 754, 765 (11th Cir.

Villarreal are incorrect to assert that this Court has ever applied equitable tolling "without requiring 'extraordinary circumstances.'" Op. 32 n.13; Br. 41-42. That is not only false but it could not possibly be true, because it would put this Court squarely in conflict with binding Supreme Court authority.[12]

Villarreal relies primarily on the former Fifth Circuit's decision in *Reeb*, but he mischaracterizes both the facts and the holding of that case. The plaintiff in *Reeb* alleged that she was induced to miss the filing deadline due to the extraordinary fact that her employer had "misled" her by giving her a false "rationale for her termination," thus "conceal[ing] the alleged discrimination from

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1995) (tolling for retaliation claim where employer's wrongful conduct created misleading impression that refusal to rehire was based on *discriminatory* motive, thereby concealing true *retaliatory* motive); *Cocke v. Merrill Lynch & Co., Inc.*, 817 F.2d 1559, 1561-62 (11th Cir. 1987) (employee falsely told that "the employer [was] trying to place him in another job"); *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975) (employer deception); *Browning v. AT&T Paradyne*, 120 F.3d 222, 227 (11th Cir. 1997) (plaintiff missed deadline due to misinformation from EEOC).

[12] Villarreal cites several additional cases, but none provides any support for allowing equitable tolling without any reasonable diligence or extraordinary circumstances. Br. 41-42(citing *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1435 (11th Cir. 1998) (denying equitable tolling because plaintiff failed to exercise diligence, not reaching question of whether extraordinary circumstances were present); *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660-61 (11th Cir. 1993) (finding no evidence to support equitable tolling); *Hill v. Metro. Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1545-46 (11th Cir. 1988) (affirming dismissal of claims as time-barred without mentioning equitable tolling); *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 677 n.3 (11th Cir. 1983) (using shorthand to summarize *Reeb*'s holding in dicta in a footnote without applying any equitable-tolling analysis)).

her." 516 F.2d at 926, 930-31. There was no suggestion that she failed to evince a reasonably diligent concern for her rights, because she reasonably relied on the employer's affirmatively deceitful "rationale for her termination." *Id.* at 926.

It was only "*[i]n these circumstances*" that the court applied equitable tolling. *Id.* at 930 (emphasis added). Because the circumstances were extraordinary and there was no failure of diligence, equitable tolling applied. The court *then* needed to determine when the equitable-tolling period should *end*, and the ordinary filing period resume. On that *subsidiary* question, *after* determining that equitable tolling applied, the court announced that the ordinary filing period would not resume "until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Id.*

Accordingly, *Reeb* did not announce a new rule that equitable tolling is available in every *ordinary* case "until [the] plaintiff becomes aware [or should become aware] of the factual basis for his or her claims." Br. 41. Instead, it simply confirmed that tolling can be justified in the extraordinary situation when an employer affirmatively "cloak[s] [its] policies" through "the giving of misleading or false information to the victim." 516 F.2d at 931. As the court explained, the operative principle was that an employer "responsible for such wrongful concealment [should be] estopped from asserting the statute of limitations as a defense . . . [as] 'no man may take advantage of his own wrong.'" *Id.* at 930

(citation omitted). And if there was any doubt, the former Fifth Circuit itself emphasized four years later that "[t]he rationale underlying [*Reeb*] is that it is unfair to allow a defendant to conceal facts that support the plaintiff's cause of action and then to rely on the statute of limitations to bar the suit when a duly diligent plaintiff was unable to discover those facts." *Chappell v. Emco Mach. Works*, 601 F.2d 1295, 1303 (5th Cir. 1979). Thus, as this Court later put it, "[t]he effect of *Reeb* was to close the loophole used by the malicious employer to avoid age discrimination liability." *Jones*, 331 F.3d at 1261.[13]

To be sure, this Court has recognized that the element of extraordinary circumstances "does not *require* employer misconduct." *Cocke*, 817 F.2d at 1561 (emphasis added). Such misconduct is simply the most common *type* of extraordinary circumstance. For that reason, "'courts evince a reluctance to toll the filing period absent misconduct or bad faith attributable to the defendant,'" *id.* (citation omitted), and "'*usually* require some affirmative misconduct, such as deliberate concealment,'" *Cabello v. Fernandez–Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005) (emphasis added) (citation omitted). Equitable tolling certainly

[13] Villarreal similarly mischaracterizes *Sturniolo*, which simply followed *Reeb* by authorizing equitable tolling in the extraordinary circumstance where an employer caused the plaintiff to miss the filing deadline by affirmatively lying to him about the reason for his termination, and there was no failure of diligence because the plaintiff reasonably relied on the employer's explanation, without any "cause to doubt" it. *See* 15 F.3d at 1025.

can apply in the absence of misconduct, but only if there is some *other* unusual circumstance to ensure that tolling "is reserved for extraordinary facts." *Id.* at 1154-55.

Finally, Villarreal argues that replacing the statute of limitations with a more lax, "context-specific tolling standard" is necessary to avoid "protect[ing] unlawful hiring preferences," and to serve "the remedial purpose" of anti-discrimination law. Br. 46, 48 (citation omitted). This plea should be rejected for what it is: a naked call for judicial override of the statutory deadline Congress enacted. The ADEA requires filing "within 180 days after the alleged *unlawful practice occurred*"—not 180 days after the applicant learned the details of the employer's hiring policy. 29 U.S.C. §626(d)(1)(A) (emphasis added). This mandatory deadline "[e]mbod[ies] the recognition that the defendant's interest in promptly facing the plaintiff's claims along with the court's interest in hearing only claims that a plaintiff has diligently pursued can trump the plaintiff's right to assert even the most meritorious of claims." *Arce*, 434 F.3d at 1261. "[E]ven if one has a just claim . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Burnett*, 380 U.S. at 428 (citation omitted); *see also Mohasco*, 447 U.S. at 820. By enacting the limitations period, Congress decided that it was worth barring even some meritorious claims for the sake of the "important social interests in certainty, accuracy, and repose." *Cada v. Baxter Healthcare Corp.*, 920

F.2d 446, 452-53 (7th Cir. 1990) (Posner, J.). This Court is bound to respect that legislative judgment. It should not "trivialize" those concerns through the "promiscuous application of tolling doctrines" in precisely the type of ordinary, unexceptional case that Congress contemplated when it enacted the time bar. *Id.* at 453.[14]

C. Villarreal Is Ineligible For Equitable Tolling

Villarreal concedes that he did not file a timely charge within 180 days of his 2007 application. He admits that he did nothing, much less exhibit any diligent concern for his rights, between 2007 and 2010, when he was contacted by a plaintiff's lawyer looking to put together a class-action suit. He also does not allege any misconduct by RJR or any other extraordinary circumstances that would distinguish this case from every "garden variety" case that Congress contemplated when it enacted the statute of limitations. *Irwin*, 498 U.S. at 96. Accordingly,

[14] The EEOC argues that a "discovery rule" should apply here, Amicus Br. 26, but that confuses the *judicial* doctrine of equitable tolling with the *statutory* question of when a claim accrues under the ADEA. *See Amini v. Oberlin Coll.*, 259 F.3d 493, 499-500 (6th Cir. 2001) (discussing the two doctrines and the confusion they invite). Villarreal has waived any argument about a statutory "discovery rule" by never raising it, and for good reason: Even in circuits that apply a discovery rule, claim-accrual occurs when the plaintiff discovers his application was rejected, regardless of when he discovers *why*. *See Lukovsky v. City & Cty. of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008) (collecting cases); *cf. Stafford v. Muscogee Cty. Bd. of Educ.*, 688 F.2d 1383, 1388 (11th Cir. 1982) (Title VII filing period begins when plaintiff "knew or should have known . . . that he did not receive an appointment to any of the positions for which he applied"). Here, Villarreal knew or should have known his 2007 application was rejected well before he filed in 2010, and he does not allege otherwise.

because Villarreal fails to allege *either* of the two required elements of equitable tolling, he cannot escape the time bar.

Villarreal argues that when a plaintiff alleges that he had "no reasonable way" to "discover discrimination" within the statutory time limit, "that [by] itself" should qualify as an "extraordinary circumstance." Br. 46. But to read "extraordinary circumstances" to include this thoroughly *ordinary* circumstance would be no different than eliminating the element altogether. The result would be the same: equitable tolling would cease to be a "rare remedy to be applied in unusual circumstances," *Wallace*, 549 U.S. at 396, and instead would become the norm whenever a plaintiff alleges that discovering why he was not hired would have been impossible. That is not only a "common state of affairs," *id.*, but describes the vast *majority* of untimely claims of hiring discrimination. Accepting Villarreal's position would thus eviscerate the statute of limitations for the ADEA and every other employment-discrimination statute and place the filing period in the hands of plaintiff's lawyers looking to assemble an otherwise time-barred class or collective action. Congress did not intend that bizarre outcome and no court has ever endorsed it.

Even under the standard Villarreal advocates, his complaint fails because he does not allege any "factual matter" to establish "plausible grounds to infer" that it would have been futile to inquire why he was not hired in 2007. *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 556 (2007). Instead, he baldly asserts that "the facts necessary to support [his] charge of discrimination . . . could not have been apparent to him," because, until he was contacted by counsel in 2010, he had "no reason or means to know" that RJR was using the challenged hiring criteria. App. Vol. II, Dkt. No. 61-1 ¶¶ 27, 29-30. This assertion is baseless because Villarreal did not even *try* to inquire about his application. If he had, RJR would have told him that it was seeking entry-level salesmen with less experience. Given his utter lack of diligence, he cannot have any factual basis to contend otherwise.

D. Allowing Equitable Tolling In These Circumstances Would Eviscerate The Statute of Limitations and Make This Circuit A Mecca For Time-Barred Plaintiffs

"[N]either this circuit nor any other court has ever tolled a statute of limitations in order to accommodate lawyers putting together a cause of action, and allowing tolling in such a situation effectively eviscerates the statute of limitations." Op. at 54 (Vinson, J. dissenting). Like this Court, every other circuit has followed the Supreme Court in holding that equitable tolling applies only rarely, when a plaintiff pursues his rights diligently but extraordinary circumstances prevent a timely filing.[15]

[15] *Dyson v. D.C.*, 710 F.3d 415, 421-22 (D.C. Cir. 2013); *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66, 71-73 (1st Cir. 2005); *Zerilli-Edelglass v. N.Y.C. Trans. Auth.*, 333 F.3d 74, 80-81 (2d Cir. 2003); *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 384-85 (3d Cir. 2007); *Cruz v. Maypa*, 773 F.3d 138, 145-46 (4th Cir. 2014); *Harris v. Boyd Tunica, Inc.*, 628 F.3d 237, 239 (5th Cir. 2010); *Amini*, 259 F.3d at

Accepting Villarreal's position here would thus defy unanimous Supreme Court authority, create a lopsided circuit split, and invite rampant forum shopping, with plaintiffs flocking to this circuit to file nationwide class actions and other claims that would be time-barred anywhere else. Villarreal argues that other circuits have applied some version of the lax standard he advocates, Br. 43-44, but he badly misreads the cases he cites. In fact, none of the cases (save one) applied equitable tolling *at all*, much less do they support tolling without reasonable diligence or extraordinary circumstances. In the one cited case where the court *did* apply equitable tolling, it relied on the extraordinary circumstance of the government causing an asylum applicant to miss the deadline by "provid[ing] incorrect advice." *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1181 (9th Cir. 2001). The court emphasized that the applicant "was diligently pursuing his rights," but "was prevented" from timely filing "by circumstances beyond his control and going beyond 'excusable neglect.'" *Id.* at 1194. Villarreal's citations only get worse from there. None provides any support for authorizing tolling without reasonable diligence *or* extraordinary circumstances, much less in such an aggressively *ordinary* case as this one.

501; *Lee v. Cook Cty., Ill.*, 635 F.3d 969, 972 (7th Cir. 2011); *Smithrud v. City of St. Paul*, 746 F.3d 391, 396 (8th Cir. 2014); *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011); *Montoya v. Chao*, 296 F.3d 952, 957-58 (10th Cir. 2002); *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014).

CONCLUSION

For these reasons, the decision of the District Court should be affirmed.

Dated: April 25, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 11th Cir. R. 35-8 and Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,978 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

Dated: April 25, 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on April 25, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter. On that same date, I arranged for hand-delivery of paper copies of the foregoing EN BANC BRIEF OF DEFENDANTS-APPELLEES to the Clerk of Court, and delivery by UPS overnight mail by U.S. First Class Mail to the following:

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STATUTORY & LEGISLATIVE ADDENDUM

ADDENDUM TABLE OF CONTENTS

Reproduction of Relevant Authorities – Excerpts:

their employers, and organizations representing older Americans.

''(c) PROPOSED GUIDELINES.—Not later than 5 years after the date of the enactment of this Act [Oct. 31, 1986], the Equal Employment Opportunity Commission shall propose, in accordance with subchapter II of chapter 5 of title 5 of the United States Code, guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of police officers and firefighters to perform the requirements of their jobs.''

§ 623. Prohibition of age discrimination

(a) Employer practices

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;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

1984—Subsec. (f). Pub. L. 98–459 inserted provision defining ''employee'' as including any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

1974—Subsec. (b). Pub. L. 93–259, §28(a)(1), (2), substituted in first sentence ''twenty'' for ''twenty-five'' and, in second sentence, defined term ''employer'' to include a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, and deleted text excluding from such term a State or political subdivision thereof.

Subsec. (c). Pub. L. 93–259, §28(a)(3), struck out text excluding from term ''employment agency'' an agency of a State or political subdivision of a State, but including the United States Employment Service and the system of State and local employment services receiving Federal assistance.

Subsec. (f). Pub. L. 93–259, §28(a)(4), excepted from the term ''employee'' elected public officials, persons chosen by such officials for such officials' personal staff, appointees on policymaking level, and immediate advisers with respect to exercise of constitutional or legal powers of the public office but excluded from such exemption employees subject to civil laws of a State government, governmental agency, or political subdivision.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–433 applicable only to any employee benefit established or modified on or after Oct. 16, 1990, and other conduct occurring more than 180 days after Oct. 16, 1990, except as otherwise provided, see section 105 of Pub. L. 101–433, set out as a note under section 623 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–592 effective Jan. 1, 1987, with certain exceptions, but not applicable with respect to any cause of action arising under this chapter as in effect before Jan. 1, 1987, see section 7 of Pub. L. 99–592, set out as an Effective and Termination Dates of 1986 Amendment note under section 623 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–459 effective Oct. 9, 1984, see section 803(a) of Pub. L. 98–459, set out as a note under section 3001 of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–259 effective May 1, 1974, see section 29(a) of Pub. L. 93–259, set out as a note under section 202 of this title.

TRANSFER OF FUNCTIONS

Functions vested by this section in Secretary of Labor or Civil Service Commission transferred to Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, §2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

§ 631. Age limits

(a) Individuals at least 40 years of age

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

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(Pub. L. 90–202, §12, Dec. 15, 1967, 81 Stat. 607; Pub. L. 95–256, §3(a), (b)(3), Apr. 6, 1978, 92 Stat. 189, 190; 1978 Reorg. Plan No. 1, §2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub. L. 98–459, title VIII, §802(c)(1), Oct. 9, 1984, 98 Stat. 1792; Pub. L. 99–272, title IX, §9201(b)(2), Apr. 7, 1986, 100 Stat. 171; Pub. L. 99–592, §§2(c), 6(a), Oct. 31, 1986, 100 Stat. 3342, 3344; Pub. L. 101–239, title VI, §6202(b)(3)(C)(ii), Dec. 19, 1989, 103 Stat. 2233.)

AMENDMENTS

1989—Subsec. (a). Pub. L. 101–239 struck out ''(except the provisions of section 623(g) of this title)'' after ''in this chapter''.

1986—Subsec. (a). Pub. L. 99–592, §2(c)(1), which directed that ''but less than seventy years of age'' be struck out was executed by striking out ''but less than 70 years of age'' after ''40 years of age'' as the probable intent of Congress.

Pub. L. 99–272 inserted ''(except the provisions of section 623(g) of this title)'' after ''this chapter''.

Subsec. (c)(1). Pub. L. 99–592, §2(c)(2), which directed that ''but not seventy years of age,'' be struck out was executed by striking out ''but not 70 years of age,'' after ''65 years of age'' as the probable intent of Congress.

Subsec. (d). Pub. L. 99–592, §6(a), (b), temporarily added subsec. (d) which read as follows: ''Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1141(a) of title 20).'' See Effective and Termination Dates of 1986 Amendments note below.

1984—Subsec. (c)(1). Pub. L. 98–459 substituted ''$44,000'' for ''$27,000''.

Pub. L. 95–256, §3(a), designated existing provisions as subsec. (a), substituted ''40 years of age but less than 70 years of age'' for ''forty years of age but less than sixty-five years of age'', added subsecs. (b) and (c), and temporarily added subsec. (d). See Effective and Termination Dates of 1978 Amendment note below.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–239 applicable to items and services furnished after Dec. 19, 1989, see section

6202(b)(5) of Pub. L. 101–239, set out as a note under section 162 of Title 26, Internal Revenue Code.

EFFECTIVE AND TERMINATION DATES OF 1986 AMENDMENTS

Amendment by Pub. L. 99–592 effective Jan. 1, 1987, with certain exceptions, see section 7(a) of Pub. L. 99–592 set out as a note under section 623 of this title.

Pub. L. 99–592, §6(b), Oct. 31, 1986, 100 Stat. 3344, provided that: ''The amendment made by subsection (a) of this section [amending this section] is repealed December 31, 1993.''

Amendment by Pub. L. 99–272 effective May 1, 1986, see section 9201(d)(2) of Pub. L. 99–272, set out as an Effective Date of 1986 Amendment note under section 1395p of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98–459, title VIII, §802(c)(2), Oct. 9, 1984, 98 Stat. 1792, provided that: ''The amendment made by paragraph (1) of this subsection [amending this section] shall not apply with respect to any individual who retires, or is compelled to retire, before the date of the enactment of this Act [Oct. 9, 1984].''

EFFECTIVE AND TERMINATION DATES OF 1978 AMENDMENT

Pub. L. 95–256, §3(b), Apr. 6, 1978, 92 Stat. 190, provided that:

''(1) Sections 12(a), 12(c), and 12(d) of the Age Discrimination in Employment Act of 1967, as amended by subsection (a) of this section [subsecs. (a), (c), and (d) of this section] shall take effect on January 1, 1979.

''(2) Section 12(b) of such Act, as amended by subsection (a) of this section [subsec. (b) of this section], shall take effect on September 30, 1978.

''(3) Section 12(d) of such Act, as amended by subsection (a) of this section [enacting subsec. (d) of this section], is repealed on July 1, 1982.''

TRANSFER OF FUNCTIONS

''Equal Employment Opportunity Commission'' substituted for ''Secretary'', meaning Secretary of Labor, in subsec. (c)(2) pursuant to Reorg. Plan No. 1 of 1978, §2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, which transferred all functions vested by this section in Secretary of Labor to Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

§ 632. Omitted

CODIFICATION

Section, Pub. L. 90–202, §13, Dec. 15, 1967, 81 Stat. 607; 1978 Reorg. Plan No. 1, §2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781, which required the Equal Employment Opportunity Commission to submit to Congress an annual report on the Commission's activities including an evaluation and appraisal of the effect of the minimum and maximum ages established by this chapter, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 123 of House Document No. 103–7.

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

(Pub. L. 90–202, §14, Dec. 15, 1967, 81 Stat. 607.)

TRANSFER OF FUNCTIONS

Functions vested by this section in Secretary of Labor or Civil Service Commission transferred to Equal Employment Opportunity Commission by Reorg. Plan No. 1 of 1978, §2, 43 F.R. 19807, 92 Stat. 3781, set out in the Appendix to Title 5, Government Organization and Employees, effective Jan. 1, 1979, as provided by section 1–101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provi-

ations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

(A) the interrelation of operations;

(B) the common management;

(C) the centralized control of labor relations; and

(D) the common ownership or financial control,

of the employer and the corporation.

(Pub. L. 88–352, title VII, §702, July 2, 1964, 78 Stat. 255; Pub. L. 92–261, §3, Mar. 24, 1972, 86 Stat. 103; Pub. L. 102–166, title I, §109(b)(1), Nov. 21, 1991, 105 Stat. 1077.)

AMENDMENTS

1991—Pub. L. 102–166 designated existing provisions as subsec. (a) and added subsecs. (b) and (c).

1972—Pub. L. 92–261 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows: ''This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.''

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102–166 inapplicable to conduct occurring before Nov. 21, 1991, see section 109(c) of Pub. L. 102–166, set out as a note under section 2000e of this title.

§ 2000e–2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase ''unlawful employment practice'' shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency

Public Law 92-261

AN ACT

To further promote equal employment opportunities for American workers.

March 24, 1972
[H. R. 1746]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Employment Opportunity Act of 1972".

Equal Employment Opportunity Act of 1972.

SEC. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

78 Stat. 662.

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

(2) Subsection (b) is amended to read as follows:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers."

80 Stat. 408.

68A Stat. 163. 26 USC 501.

(3) In subsection (c) beginning with the semicolon strike out through the word "assistance".

(4) In subsection (e) strike out between "(A)" and "and such labor organization", and insert in lieu thereof "twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen or more thereafter,".

(5) In subsection (f), insert before the period a comma and the following: "except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision."

(6) At the end of subsection (h) insert before the period a comma and the following: "and further includes any governmental industry, business, or activity".

(7) After subsection (i) insert the following new subsection (j):

"Religion."

"(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

SEC. 3. Section 702 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e–1) is amended to read as follows:

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with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection." Information, availability.

SEC. 7. Section 710 of the Civil Rights Act of 1964 (78 Stat. 264; 42 U.S.C. 2000e–9) is amended to read as follows:

"INVESTIGATORY POWERS

"SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply." 51 Stat. 150; 84 Stat. 930.

SEC. 8. (a) Section 703(a)(2) of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e–2(a)(2)) is amended by inserting the words "or applicants for employment" after the words "his employees".

(b) Section 703(c)(2) of such Act is amended by inserting the words "or applicants for membership" after the word "membership".

(c)(1) Section 704(a) of such Act is amended by inserting a comma and the following: "or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs," after "employment agency". 78 Stat. 257. 42 USC 2000e-3.

(2) Section 704(b) of such Act is amended by (A) striking out "or employment agency" and inserting in lieu thereof "employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs.", and (B) inserting a comma and the words "or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee" before the word "indicating".

(d) Section 705(a) of the Civil Rights Act of 1964 (78 Stat. 258; 42 U.S.C. 2000e–4(a)) is amended to read as follows: Equal Employment Opportunity Commission.

"SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b), shall appoint, in accordance with the provisions of title 5, United States Term.

SEC. 5. The term "administrative costs" as used in this Act includes, but is not limited to, all costs of (1) conducting an exploratory program to determine the character of the mineral deposits in the land, (2) evaluating the data obtained under the exploratory program to determine the fair market value of the mineral rights to be conveyed, and (3) preparing and issuing the instrument of conveyance. "Administrative costs."

SEC. 6. Moneys paid to the Secretary for administrative costs shall be paid to the agency which rendered the service, and deposited to the appropriation then current. Moneys paid for the minerals or mineral interests conveyed shall be deposited into the general fund of the Treasury as miscellaneous receipts.

Approved April 2, 1974.

Public Law 93-259

AN ACT

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes.

April 8, 1974
[S. 2747]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fair Labor Standards Amendments of 1974.

SHORT TITLE; REFERENCES TO ACT

SECTION 1. (a) This Act may be cited as the "Fair Labor Standards Amendments of 1974". 29 USC 201 note.

(b) Unless otherwise specified, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the section or other provision amended or repealed is a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201–219).

INCREASE IN MINIMUM WAGE RATE FOR EMPLOYEES COVERED BEFORE 1966

SEC. 2. Section 6(a)(1) is amended to read as follows: 29 USC 206.

"(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;".

INCREASE IN MINIMUM WAGE RATE FOR NONAGRICULTURAL EMPLOYEES COVERED IN 1966 AND 1974

SEC. 3. Section 6(b) is amended (1) by inserting ", title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974" after "1966", and (2) by striking out paragraphs (1) through (5) and inserting in lieu thereof the following: 29 USC 1681.

"(1) not less than $1.90 an hour during the period ending December 31, 1974,

"(2) not less than $2 an hour during the year beginning January 1, 1975,

"(3) not less than $2.20 an hour during the year beginning January 1, 1976, and

"(4) not less than $2.30 an hour after December 31, 1976."

Report to Congress.

employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

"(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.".

Reports to Congress.

Ante, p. 69.

AGE DISCRIMINATION

SEC. 28. (a)(1) The first sentence of section 11(b) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630(b)) is amended by striking out "twenty-five" and inserting in lieu thereof "twenty".

(2) The second sentence of section 11(b) of such Act is amended to read as follows: "The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.".

(3) Section 11(c) of such Act is amended by striking out ", or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance".

"Employee."

(4) Section 11(f) of such Act is amended to read as follows:

"(f) The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.".

29 USC 634.

(5) Section 16 of such Act is amended by striking out "$3,000,000" and inserting in lieu thereof "$5,000,000".

(b)(1) The Age Discrimination in Employment Act of 1967 is amended by redesignating sections 15 and 16, and all references thereto, as sections 16 and 17, respectively.

29 USC 621 note, 634.

29 USC 633.

(2) The Age Discrimination in Employment Act of 1967 is further amended by adding immediately after section 14 the following new section:

"NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

29 USC 633a.

"SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in

section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

Reports.

"(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

"(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

"(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions.

"(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

"(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

"(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law."

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Calendar No. 1095

90TH CONGRESS 2d Session } SENATE { REPORT No. 1111

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT

MAY 8 (legislative day, MAY 7), 1968.—Ordered to be printed

Mr. CLARK, from the Committee on Labor and Public Welfare, submitted the following

REPORT

together with

MINORITY, INDIVIDUAL, AND SUPPLEMENTAL VIEWS

[To accompany S. 3465]

The Committee on Labor and Public Welfare, having had under consideration legislation to amend title VII of the Civil Rights Act of 1964, to further promote equal employment opportunities of American workers, reports an original bill and recommends that it do pass.

PURPOSE

The principal purpose of this bill is to grant to the Equal Employment Opportunity Commission authority to issue judicially enforceable cease and desist orders.

BACKGROUND

On February 4, 1964, this committee reported favorably to the Senate S. 1937, 88th Congress, second session, a bill to create an appropriate Federal instrumentality having the power to issue judicially enforceable orders to assure equal opportunity in employment. No further action was taken on this bill, but thereafter the Congress enacted the Civil Rights Act of 1964, title VII of which established the Equal Employment Opportunity Commission. Under that legislation the Commission was not given the power to issue judicially enforceable orders, but was limited essentially to the function of conciliation.

On February 15, 1967, the President sent to the Congress a message on equal justice in which he called upon the Congress to approve

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give the Commission exclusive authority to conduct the prehearing investigation.

This subsection also contains provisions relating to privileges of witnesses, immunity from prosecution, fees, process, service, and return, and information and assistance from other departments.

Section 6

Subsections (a) and (b).—These subsections would amend section 703(a)(2) and 703(c)(2) of the present statute to make it clear that discrimination against applicants for employment and applicants for membership in labor organizations is an unlawful employment practice. This subsection would merely be declaratory of present law.

Subsection (c).—This subsection would amend section 703(h) governing the permissible use of ability tests by an employer. Under this subsection, an employer lawfully could give and act upon the results of professionally developed ability tests only if they are applied on a uniform basis to all employees and applicants for employment in the same position and are directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the position concerned. The subsection would specifically bar the use of such tests if their administration or action upon their results was designed, intended or used to discriminate on prohibited grounds.

Subsection (d).—This subsection would add a new section (k) to section 703 of the present statute. This new subsection would provide that it is not an unlawful employment practice for an employer to observe a pension and retirement plan, the terms and conditions of which provide for reasonable differentiation between male and female employees, so long as the plan is not merely a subterfuge to evade the purposes of the title. The amendment would apply to the establishment of new plans as well as observance of existing ones. This amendment would overturn the Commission's guideline of February 23, 1968 (29 C.F.R. 1604.31), which declared that some such differentiations were unlawful. Differentiations based on sex now commonly found in pension and retirement plans related to such matters as optional of compulsory retirement age, survivors benefits, and vesting periods. The original intent of Congress in enacting title VII was not to prohibit differential treatment of male and female employees under retirement or pension plans similar to the differentiation made under social security. The purpose of the committee amendment is merely to reaffirm this original intent by clarifying the language of the act.

Subsection (e) (1) and (2).—These subsections would amend section 704(a) and (b) of the present statute to make clear that joint labor-management apprenticeship committees are covered by those provisions which relate to discriminatory advertising and retaliation against individuals participating in Commission proceedings.

Subsection (f)(1).—This subsection would amend section 705 of the present statute to permit a member of the Commission to serve until his successor is appointed but not for more than 60 days when Congress is in session unless the successor had been nominated and the nomination submitted to the Senate, or after the adjournment sine die of the session of the Senate in which such nomination was submitted. A similar provision is applicable to the General Counsel of the National Labor Relations Board (29 U.S.C. 153(d)).

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution was considered and agreed to, as follows:

Resolved, That the Committee on the Judiciary is authorized to expend from the contingent fund of the Senate, during the Ninety-second Congress, $10,000 in addition to the amount, and for the same purposes, specified in section 134(a) of the Legislative Reorganization Act of 1946.

ADDITIONAL EXPENDITURES BY THE COMMITTEE ON GOVERNMENT OPERATIONS

The Senate proceeded to the consideration of the resolution (S. Res. 257) authorizing additional expenditures by the Committee on Government Operations for routine purposes.

Mr. CANNON. Mr. President, this is $40,000 for the routine funds for the operation of the committee. That is in addition to the amounts provided under the Legislative Reorganization Act.

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution (S. Res. 257) was agreed to, as follows:

Resolved, That the Committee on Government Operations is authorized to expend from the contingent fund of the Senate, during the Ninety-second Congress, $40,000 in addition to the amount, and for the same purposes, specified in section 134(a) of the Legislative Reorganization Act of 1946.

PUBLIC DEBT LIMITATION

The PRESIDING OFFICER. The call of the calendar has been completed.

The Chair now lays before the Senate the unfinished business, which will be stated.

The assistant legislative clerk read as follows:

A bill (H.R. 12910) to provide for a temporary increase in the public debt limit.

MESSAGE FROM THE HOUSE—ENROLLED BILLS SIGNED

A message from the House of Representatives, by Mr. Berry, one of its reading clerks, announced that the Speaker had affixed his signature to the enrolled bill (H.R. 12067) making appropriations for foreign assistance and related programs for the fiscal year ending June 30, 1972, and for other purposes.

The PRESIDENT pro tempore subsequently signed the enrolled bill.

QUORUM CALL

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. WILLIAMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. MANSFIELD). Without objection, it is so ordered.

EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972—CONFERENCE REPORT

Mr. WILLIAMS. Mr. President, I submit a report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 1746) to further promote equal employment opportunities for American workers. I ask unanimous consent for the present consideration of the report.

The PRESIDING OFFICER (Mr. MANSFIELD). Is there objection to the proceeded to consider the report.

There being no objection, the Senate proceeded to consider ther eport.

(The conference report is printed in the House proceedings of the CONGRESSIONAL RECORD of March 2, 1972, at pp. 6643–6646.)

Mr. WILLIAMS. Mr. President, I ask unanimous consent that a section-by-section analysis, together with a statement, be printed in the RECORD.

The PRESIDING OFFICER. Without objection it is so ordered.

STATEMENT BY SENATOR WILLIAMS

I anticipate the Senate's overwhelming acceptance of the Conference Report on H.R. 1746, the Equal Employment Opportunity Act of 1972.

Today's action will represent a vital step toward the realization of equal employment opportunities for millions of Americans.

The conferees were all mindful of the importance of this measure; and while we did not have a lengthy conference, each difference between the Senate and the House bills was carefully considered. In some instances the Senate version prevailed, in others, we receded to the House. In the major provisions dealing with enforcement, the conferees adopted amendments that included provisions from both bills.

I am delighted that the report contains all of the key provisions of the Senate bill extending coverage. This will bring many millions of Americans under the protection of title VII—State and local government employees, employees of private and public educational institutions as well as employees in smaller businesses and unions than those covered by the existing law.

Furthermore, I think that the provision giving the EEOC the power to go to court is going to get the job done. This process may be somewhat slower and more cumbersome than the cease and desist procedure we originally sought. But, in the final analysis, I most firmly believe that we will get the desired enforcement.

Mr. President, this bill had a long journey through the Senate, but there were some historic "firsts" during the consideration of the measure.

It was the first time a Civil Rights bill was reported unanimously out of the Labor and Public Welfare Committee, and after five weeks of extended debate involving 38 roll call votes, fifty-three Senators signed the final successful cloture petition—a record for a Civil Rights bill—and 73 Senators voted in behalf of cloture—another Civil Rights record.

Mr. President, the House will consider this report within the next few days, favorably I am sure. I hope that upon completion of final Congressional action, the President will act as fast as humanly possible to sign the legislation and to seek the funding necessary to implement the enforcement procedure.

I would like to mention that unfortunately the Senator from New York (Mr. JAVITS) had no notice that this matter would come up today and is not able to be here for this vote. We did consult him when we learned of the leadership's plan to bring this conference report up today, and he urged us to proceed, even though he would miss the opportunity to cast his vote at this last stage of what has been a long, arduous struggle, in which he played a key role.

Mr. President, I attach an analysis of H.R. 1746 as reported from the conference, that the Senator from New York (Mr. JAVITS) and myself have prepared to be included in the RECORD.

SECTION-BY-SECTION ANALYSIS OF H.R. 1746, THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

This analysis explains the major provisions of H.R. 1746, the Equal Employment Opportunity Act of 1972, as agreed to by the Conference Committee of the House and Senate on February 29, 1972. The explanation reflects the enforcement provisions of Title VII, as amended by the procedural and jurisdictional provisions of H.R. 1746, recommended by the Conference Committee.

In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

SECTION 2

This section amends certain definitions contained in section 701 of the Civil Rights Act of 1964.

Section 701(a)—This subsection defines "person" as used in Title VII. Under the provisions of H.R. 1746, the term is now expanded to include State and local governments, governmental agencies, and political subdivisions.

Section 701(b)—This subsection defines the term "employer" as used in Title VII. This subsection would now include, within the meaning of the term "employer," all State and local governments, governmental agencies, and political subdivisions, and the District of Columbia departments or agencies (except those subject by statute to the procedures of the Federal competitive service as defined in 5 U.S.C. § 2102, who along with all other Federal employees would now be covered by section 717 of the Act.)

This subsection would extend coverage of the term "employer," one year after enactment, to those employers with 15 or more employees. The present standard for determining the number of employees of an employer, i.e., "employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year," presently applicable to all employers of 25 or more employees would apply to the expanded coverage of employers of 15 or more employees.

Section 701(c)—This subsection eliminates the present language that provides a partial exemption for agencies of the United States, States or the political subdivisions of States from the definition of "employment agency" to reflect the provisions of section 701(a) and (b) above. States agencies, previously covered by reference to the United States Employment Service, continue to be covered as employment agencies under this section.

Section 701(e)—This subection is revised to include labor organizations with 15 or more members within the coverage of Title VII, one year after enactment.

Section 701(f)—This subsection is intended to exclude from the definition of

SECTION 7

This section amends section 710 of the Civil Rights Act of 1964 by deleting the present section 710 and substituting therefor and to the extent appropriate the provisions of section 11 of the National Labor Relations Act (29 U.S.C. § 161). By making this substitution, the Commission's present demand power with respect to witnesses and evidence is repealed, and the power to subpoena witnesses and evidence, and to allow any of its designated agents, agencies or members to issue such subpoenas, as necessary for the conduct of any investigation, and to take testimony under oath is substituted.

SECTIONS 8 (a) AND (b)

These subsections would amend sections 703(a) and 703(c)(2) of the present statute to make it clear that discrimination against applicants for employment and applicants for membership in labor organizations is an unlawful employment practice. This subsection is merely declaratory of present laws as contained in the decisions in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971); *U.S.* v. *Sheet Metal Workers International Assn., Local 36*, 416 F. 2d 123 (8th Cir. 1969); *Asbestos Workers, Local 53* v. *Vogler*, 407 F. 2d 1047 (5th Cir. 1969).

SECTIONS 8(c) (1) AND (2)

These subsections would amend section 704(a) and (b) of the present statute to make clear that joint labor-management apprenticeship committees are covered by those provisions which relate to discriminatory advertising and retaliation against individuals participating in Commission proceedings.

SECTION 8(d)

This subsection would amend section 705 (a) of the present statute to permit a member of the Commission to serve until his successor is appointed but not for more than 60 days when Congress is in session unless the successor has been nominated and the nomination submitted to the Senate, or after the adjournment sine die of the session of the Senate in which such nomination was submitted.

The rest of the subsection provides that the Chairman of the Commission on behalf of the Commission, would be responsible, except as provided in section 705(b), for the administrative operations of the Commission and for the appointment of such officers, agents, attorneys, hearing examiners, and other employees of the Commission, in accordance with Federal law, as he deems necessary.

SECTION 8(e)

This subsection would provide a new section 705(b) of the Act which establishes a General Counsel appointed by the President, with the advice and consent of the Senate, for a four (4) year term. The responsibilities of the General Counsel would include, in addition to those the Commission may prescribe and as provided by law, the conduct of all litigation as provided in sections 706 and 707 of the Act. The concurrence of the General Counsel with the Chairman is required, on the reapointment and supervision of regional attorneys.

This subsection would also continue the General Counsel on the effective date of the Act in that position until a successor has been appointed and qualified.

The Commission's attorneys may at the Commission's direction appear for and represent the Commission in any case in court, except that the Attorney General shall conduct all litigation to which the Commission is a party to in the Supreme Court pursuant to this title.

SECTION 8(f)

This subsection would eliminate the provision in present section 705(g) authorizing the Commission to request the Attorney General to intervene in private civil actions. Instead, this subsection permits the Commission itself to intervene in such civil actions as provided in section 706. Where the respondent is a government, governmental agency or political subdivision, the Attorney General should be authorized to seek intervention.

SECTION 8(g)

This section amends section 714 of Title VII of the Civil Rights Act of 1964 by making the provisions of sections 111 and 1114 of Title 18, United States Code, applicable to officers, agents and employees of the Commission in performance of their official duties. This section also specifically prohibits the imposition of the death penalty on any person who might be convicted of killing an officer, agent or employee of the Commission while on his official duties.

SECTION 9(a), (b), (c), AND (d)

These subsections would raise the executive level of the Chairman of the Commission (from Level 4 to Level 3) and the members of the Commission (from Level 5 to Level 4) and include the General Counsel (Level 5) in the executive pay scale, so as to place them in a position of parity with officials in comparable positions in agencies having substantially equivalent powers such as the National Labor Relations Board, the Federal Trade Commission and the Federal Power Commission.

SECTION 10

Section 715—This section, which is new, establishes an Equal Employment Opportunity Coordinating Council composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission and the Chairman of the United States Civil Rights Commission or their respective designees. The Council will have the responsibility to coordinate the activities of all the various branches of government with responsibility for equal employment opportunity. The Council will submit an annual report to the President and Congress including a summary of its activities and recommendations as to legislative or administrative changes which it considers desirable.

SECTION 11

Section 717(a)—This subsection provides that all personnel actions of the U.S. Government affecting employees or applicants for employment shall be free from discrimination based on race, color, religion, sex or national origin. Included within this coverage are executive agencies, the United States Postal Service, the Postal Rate Commission, certain departments of the District of Columbia Government, the General Accounting Office, Government Printing Office and the Library of Congress.

Section 717(b)—Under this subsection, the Civil Service Commission is given the authority to enforce the provisions of subsection (a), except with respect to Library of Congress employees. The Civil Service Commission would be authorized to grant appropriate remedies which may include, but are not limited to, back pay for aggrieved applicants or employees. Any remedy needed to fully recompense the employee for his loss, both financial and professional, is considered appropriate under this subsection. The Civil Service Commission is also granted authority to issue rules and regulations necessary to carry out its responsibilities under this section. The Civil Service Commission shall also annually review national and regional equal employment opportunity plans and be responsible for review and evaluation of all agency equal employment opportunity programs. Agency and executive department heads and officers of the District of Columbia shall comply with such rules and regulations, submit an annual equal employment opportunity plan and notify any employee or applicant of any final action taken on any complaint of discrimination filed.

Section 717(c) and (d)—The provisions of sections 706(f) through (k), concerning private civil actions by aggrieved persons, are made applicable to aggrieved Federal employees or applicants for employment. Such persons would be permitted to file a civil action within 30 days of notice of final action by an agency or by the Civil Service Commission or an appeal from the agency's decision, or after 180 days from the filing of an initial charge with the agency, or the Civil Service Commission.

Section 717(e)—This subsection provides that nothing in this Act relieves any Government agency or official of his or its existing equal employment opportunity obligations under the Constitution, other statutes, or under any Executive Order relating to equal employment opportunity in the Federal Government.

SECTION 12

This section allows the Chairman of the Commission to establish ten additional positions at the GS–16, GS–17 and GS–18 levels, as needed to carry out the purposes of this Act.

SECTION 13

A new Section 718 is added which provides that no government contract, or portion thereof, can be denied, withheld, terminated, or superseded by a government agency under Executive Order 11246 or any other order or law without according the respective employer a full hearing and adjudication pursuant to 5 U.S.C. § 554 et. seq where such employer has an affirmative action program for the same facility which had been accepted by the Government within the previous twelve months. Such plan shall be deemed to be accepted by the Government if the appropriate compliance agency has accepted such plan and the Office of Federal Contract Compliance has not disapproved of such plan within 45 days. However, an employer who substantially deviates from any such previously accepted plan is excluded from the protection afforded by this section.

SECTION 14

This section provides that the amended provisions of Section 706 would apply to charges filed with the Commission prior to the effective date of this Act.

The PRESIDING OFFICER. The question is on agreeing to the conference report. All those in favor say "aye."

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD of West Virginia. Mr. President, I ask for the yeas and nays on the pending conference report.

The yeas and nays were ordered.

ORDER FOR VOTE ON EEOC CONFERENCE REPORT AT 2 P.M.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the vote on the pending conference report take place today at 2 p.m.

The PRESIDING OFFICER. Without objection, it is so ordered.

QUORUM CALL

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

PROPOSED CONSULAR CONVENTION

Mr. HRUSKA. Mr. President, in common with all Members of this body, this Senator has been giving a great deal of attention to the developments relating to the proposed Consular Convention between the United States and the Soviet Union. This measure is not, as some administration spokesmen allege, a "small matter" designed solely for the protection of U.S. citizens traveling in the Soviet Union. On the contrary, after careful study of the arguments presented thus far, and after consultation with some of my colleagues, I have come to the conclusion that for the Senate to consider the consular convention as an isolated agreement would be extremely unwise. It has become abundantly clear that the administration has taken a dual and contradictory approach in the presentation of the arguments on behalf of the convention.

Depending on the circumstances, it agrees that the convention is both important aud unimportant. In reality, the administration considers this measure to be linked with other "bridge building" proposals which are to be submitted to the Senate and the House on a piecemeal basis.

When taken together, the measures which the administration will submit to Congress will add up to a package which will have a tremendous impact on our overall foreign policy. The Consular Convention represents only the first small step which appears, on the surface, to be of small importance. But the next steps—which include the proposed treaty banning the military uses of outer space and, most important, the East-West trade bill, as well as others—when combined with the Consular Convention, are measures which are going to affect the basic philosophy of our relations with the Communist countries.

Because the administration realizes that the Congress would want to have a long, hard look at this series of proposals, it apparently does not wish them to be considered together. And for that reason, Mr. President, I urge my colleagues to consider what I suggest is a sound and constructive proposal designed to allow the Senate to give its most careful consideration—which we owe to the people of the United States—to this proposed fundamental shift in the basis of our foreign policy. In short, I shall propose in a formal speech later this week that the Senate withhold its approval of any of the administration's "bridge building" proposals until we have had an opportunity to look into their overall effect. Most of all, Mr. President, the Senate and the House should not be stampeded into approving individual measures which add up to a final result which will constitute a radical departure from our present foreign policy.

In due time it is my intention to present this view and approach to the Senate in formal fashion. This will by motion, resolution, or other proper method which will provide that the Senate defer final action on this consular treaty until hearings have been completed and opportunity afforded to debate the entire package which the administration proposes.

CIVIL RIGHTS ACT OF 1967

Mr. HART. Mr. President, on behalf of myself and Senators BREWSTER, BROOKE, CASE, CLARK, DODD, FONG, GRUENING, HARTKE, INOUYE, JAVITS, KENNEDY of Massachusetts, KENNEDY of New York, LONG of Missouri, MCCARTHY, MONDALE, MORSE, MUSKIE, PASTORE, PELL, PROXMIRE, RANDOLPH, RIBICOFF, SCOTT, TYDINGS, WILLIAMS of New Jersey, and YOUNG of Ohio, I send to the desk a bill to carry out the recommendations contained in the President's civil rights message.

Inasmuch as the minority leader has stated his objection to a request that any bill lie on the table for cosponsorship, I will not ask that this be done, although I had intended to do so.

Mr. JAVITS. Mr. President, has the Senator yet introduced the bill?

Mr. HART. I have not. I will do so now.

Mr. President, I introduce the bill and ask that it be appropriately referred.

The PRESIDING OFFICER. The bill will be stated by title.

The LEGISLATIVE CLERK. A bill (S. 1026) to assure nondiscrimination in Federal and State jury selection and service, to provide relief against discriminatory employment and housing practices, to prescribe penalties for certain acts of violence or intimidation, to extend the life of the U.S. Commission on Civil Rights, and for other purposes.

Mr. HART. Mr. President, I ask unanimous consent that the text of the bill and the explanation of the bill contained in the letter of the Acting Attorney General to the Vice President be printed at this point in my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 1026

A bill to assure nondiscrimination in Federal and State jury selection and service, to provide relief against discriminatory employment and housing practices, to prescribe penalties for certain acts of violence or intimidation, to extend the life of the United States Commission on Civil Rights, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1967."

TITLE I

SEC. 101. The analysis and sections 1861 and 1863 through 1869 of chapter 121 of title 28, United States Code, are amended to read as follows:

"CHAPTER 121—JURIES; TRIAL BY JURY

"Sec.
"1861. Declaration of policy.
"1862. Discrimination prohibited.
"1863. Jury commission.
"1864. Master jury wheel.
"1865. Drawing of names from the master jury wheel.
"1866. Qualifications for jury service.
"1867. Challenging compliance with selection procedures.
"1868. Maintenance and inspection of records.
"1869. Excuse or exclusion from jury service.
"1870. Definitions.
"1871. Fees.
"1872. Exemptions.
"1873. Challenges.
"1874. Issues of fact in Supreme Court.
"1875. Admiralty and maritime cases.
"1876. Actions on bonds and specialties.

"§ 1861. Declaration of policy

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to a jury selected from a cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all qualified citizens shall have the opportunity to serve on grand and petit juries in the district courts of the United States and shall have an obligation to serve as jurors when summoned for that purpose.

"§ 1862. Discrimination prohibited

"No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

"§ 1863. Jury commission

"(a) There shall be a jury commission for each district court of the United States composed of the clerk of the court and a citizen appointed by the court as a jury commissioner: *Provided,* That the court may establish a separate jury commission for any division of the judicial district by appointing an additional citizen as a jury commissioner to serve with the clerk for such division. The jury commissioner shall during his tenure in office reside in the judicial district or division for which appointed, shall not belong to the same political party as the clerk serving with him, and shall receive compensation to be fixed by the chief judge of the district at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties.

"(b) In the performance of its duties, the jury commission shall act under the supervision of the chief judge of the district.

"§ 1864. Master jury wheel

"(a) Each jury commission shall maintain a master jury wheel and shall place in the master wheel names selected at random from the voter registration lists of persons residing in the judicial district or division it serves: *Provided,* That the judicial council of the circuit, with such advice as the chief judge of the district may offer, shall prescribe some other source or sources of names for the master wheel in addition to the voter registration lists where necessary, in the judgment of the council, to protect the rights secured by section 1862 of this title: *Provided, further,* That in the district courts for the Districts of Puerto Rico and the Canal Zone, the chief judges of such courts shall prescribe some other source or sources of names of potential jurors in lieu of voter registration lists the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title.

"(b) The jury commission shall place in the master wheel the names of at least one-half of one per centum of the total number of persons listed on the voter registration lists for the district or division (or, if sources in addition to voter registration lists have been prescribed pursuant to subsection (a), at least one-half of one per centum of the total number of persons of voting age residing in the district or division according to the most recent decennial census): *Provided,* That in no event shall the jury commission place in the master wheel the names of fewer than one thousand persons.

"(c) The master jury wheel shall contain names of persons residing in each of the counties, parishes, or similar political sub-

sponsible for the unlawful employment practice), as will effectuate the policies of this title. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable."

SEC. 302. Section 707 of the Civil Rights Act of 1964 (78 Stat. 261; 42 U.S.C. 2000e–6) is amended by adding a new section (c) as follows:

"(c) Any record or paper required by section 709(c) of this title to be preserved or maintained shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying by the Attorney General or his representative. Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury. The United States district court for the district in which a demand is made or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper."

SEC. 303. Section 708 of the Civil Rights Act of 1964 (78 Stat. 262; 42 U.S.C. 2000e–7) is amended by designating all of present section 708 as subsection "(a)" thereof and adding new subsections "(b)" and "(c)" as follows:

"(b) Neither the Commission nor any court acting pursuant to this title shall dismiss or stay proceedings on the ground that a charge has been filed with the National Labor Relations Board arising from the same matters.

"(c) Nothing in this title shall preclude any person from pursuing any other available remedy for the enforcement of any law prohibiting discrimination in employment on account of race, color, religion, sex, or national origin."

SEC. 304. Sections 709(b)-(d) of the Civil Rights Act of 1964 (78 Stat. 263; 42 U.S.C. 2000e-8(b)(d) are amended to read as follows:

"(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may pay by advance or reimbursements such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements and under which no person may bring a civil action under section 706 in any cases or class of cases so specified, or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

"(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulation of orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applicants were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.

"(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested state and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any state or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under state or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection."

"SEC. 305. Section 710 of the Civil Rights Act of 1964 (78 Stat. 264; 42 U.S.C. 2000e–9) is amended to read as follows:

"(a) In conducting an investigation the Commission shall have access at all reasonable times to premises, records, documents, individuals and other evidence or possible sources of evidence and may examine, record and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation. The Commission may issue subpoenas to compel access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpoenas or interrogatories were issued or served in aid of a civil action in the United States district court for the district in which the investigation is taking place. The Commission may administer oaths.

"(b) Upon written application to the Commission, a respondent shall be entitled to the issuance of a reasonable number of subpoenas by and in the name of the Commission to the same extent and subject to the same limitations as subpeonas issued by the Commission. Subpeonas issued at the request of a respondent shall show on their face the name and address of such respondent and shall state that they were issued at his request.

"(c) Witnesses summoned by subpoena of the Commission shall be entitled to the same witness and mileage fees as are witnesses in proceedings in United States district courts. Fees payable to a witness summoned by a subpoena issued at the request of a respondent shall be paid by him.

"(d) Within five days after service of a subpoena upon any person, such person may petition the Commission to revoke or modify the subpoena. The Commission shall grant the petition if it finds that the subpeona requires appearance or attendance at an unreasonable time or place, that it requires production of evidence which does not relate to any matter under investigation, that it does not describe with sufficient particularity the evidence to be produced, that compliance would be unduly onerous, or for other good reason.

"(e) In case of contumacy or refusal to obey a subpoena, the Commission or other person at whose request it was issued may petition for its enforcement in the United States district court for the district in which the person to whom the subpoena was addressed resides, was served or transacts business.

"(f) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents or other evidence, if in his power to do so, in obedience to the subpoena or lawful order of the Commission, shall be fined not more than $5,000 or imprisoned not more than one year, or both. Any person who, with intent thereby to mislead the Commission, shall make or cause to be made any false entry or statement of fact in any report, account, record or other document submitted to the Commission pursuant to its subpoena or other order, or who shall willfully neglect or fail to make or cause to be made full, true and correct entries in such reports, accounts, records or other documents, or shall willfully remove out of the jurisdiction of the United States or willfully mutilate, alter or by any other means falsify any documentary evidence, shall be fined not more than $5,000 or imprisoned not more than one year, or both."

SEC. 306. Title VII of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is further amended as follows:

(a) Add the phrase "or applicants for employment" after the phrase "his employees" in section 703(a)(2) (78 Stat. 255; 42 U.S.C. 2000e–2(a)(2)).

(b) Add the phrase "or applicants for membership" after the word "membership" in section 703(c)(2) (78 Stat. 255; 42 U.S.C. 2000e–2(c)(2)).

(c) The fourth sentence of section 705(a) shall read as follows: "The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and shall appoint, in accordance with the civil service laws, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the Classification Act of 1949, as amended: *Provided*, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362 and 7521 of title 5, United States Code.

(d) Add the phrase "and to accept voluntary and uncompensated services, notwithstanding the provisions of Section 3679(b) of the Revised Statutes (31 U.S.C. 665(b))" to section 705(g)(1) between the word "individuals" and the semicolon.

(e) Strike out the phrase "intervention in a civil action brought by an aggrieved party

Calendar No. 1095

90TH CONGRESS
2D SESSION

S. 3465

[Report No. 1111]

IN THE SENATE OF THE UNITED STATES

MAY 8 (legislative day, MAY 7), 1968

MR. CLARK, from the Committee on Labor and Public Welfare, reported the following bill; which was read twice and ordered to be placed on the calendar

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A BILL

To further promote equal employment opportunities of American workers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Employment Opportunities Enforcement Act".

SEC. 2. Section 706 of the Civil Rights Act of 1964 (78 Stat. 259; 42 U.S.C. 2000e–5) is amended to read as follows:

"(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any

or agencies, section 11 of the National Labor Relations Act (29 U.S.C. 161) shall apply: *Provided*, That no subpena shall be issued on the application of any party to proceedings before the Commission until after the Commission has issued and caused to be served upon the respondent a complaint and notice of hearing under subsection (f) of section 706."

SEC. 6. Title VII of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is further amended as follows:

(a) Add the phrase "or applicants for employment" after the phrase "his employees" in section 703 (a) (2) (78 Stat. 255; 42 U.S.C. 2000e–2 (a) (2)).

(b) Add the phrase "or applicants for membership" after the word "membership" in section 703 (c) (2) (78 Stat. 255; 42 U.S.C. 2000e–2 (c) (2)).

(c) Strike out "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin" in section 703 (h) and substitute therefor the following: "to give and to act upon the results of any professionally developed ability test which is applied on a uniform basis to all employees and applicants for employment in the same position and is directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal

91ST CONGRESS
1ST SESSION

S. 2453

IN THE SENATE OF THE UNITED STATES

JUNE 19, 1969

Mr. WILLIAMS of New Jersey (for himself, Mr. BAYH, Mr. BROOKE, Mr. CASE, Mr. DODD, Mr. EAGLETON, Mr. FONG, Mr. GOODELL, Mr. GRAVEL, Mr. HARRIS, Mr. HART, Mr. HARTKE, Mr. HATFIELD, Mr. HUGHES, Mr. INOUYE, Mr. JACKSON, Mr. JAVITS, Mr. KENNEDY, Mr. MCCARTHY, Mr. MCGOVERN, Mr. MATHIAS, Mr. METCALF, Mr. MONDALE, Mr. MONTOYA, Mr. MUSKIE, Mr. PACKWOOD, Mr. PELL, Mr. PERCY, Mr. PROXMIRE, Mr. RIBICOFF, Mr. SCHWEIKER, Mr. SCOTT, Mr. STEVENS, Mr. TYDINGS, and Mr. YOUNG of Ohio) introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare

A BILL

To further promote equal employment opportunities for American workers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Employment Opportunities Enforcement Act".

SEC. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(a) Strike "twenty-five" wherever it appears therein and insert in lieu thereof "eight".

agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply: *Provided*, That no subpena shall be issued on the application of any party to proceedings before the Commission until after the Commission has issued and caused to be served upon the respondent a complaint and notice of hearing under subsection (f) of section 706."

SEC. 8. (a) Section 703 (a) (2) of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e–2 (a) (2)) is amended by inserting the words "or applicants for employment" after the words "his employees".

(b) Section 703 (c) (2) of such Act (78 Stat. 255; 42 U.S.C. 2000e–2 (c) (2)) is amended by inserting the words "or applicants for membership" after the word "membership".

(c) Section 703 (h) of such Act (78 Stat. 257; 42 U.S.C. 2000e–2 (h)) is amended by striking out "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin" and inserting in lieu thereof the following: "to give and to act upon the results of any professionally developed ability test which is applied on a uniform basis to all employees and applicants for employment in the same position

NOT VOTING—29

Aiken	Hruska	Muskie
Bayh	Inouye	Pell
Bellmon	Javits	Prouty
Bennett	Jordan, N.C.	Smith, Ill.
Cannon	McCarthy	Sparkman
Dodd	McGee	Tower
Goodell	Montoya	Tydings
Gore	Moss	Yarborough
Gravel	Mundt	Young, Ohio
Hartke	Murphy	

So the bill (S. 2453) was passed, as follows:

S. 2453

An act to further promote equal employment opportunities for American workers

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Employment Opportunities Enforcement Act of 1970".

SEC. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

(2) In subsection (b) strike out all before *"Provided further"*, and insert in lieu thereof the following:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has eight or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: *Provided,* That during the first year after the date of enactment of the Equal Employment Opportunities Enforcement Act of 1970, persons having fewer than twenty employees (and their agents) shall not be considered employers, and during the second year after such date, persons having fewer than fifteen employees (and their agents) shall not be considered employers:"

(3) In subsection (c) beginning with the semicolon strike out through the word "assistance".

(4) In subsection (e) strike out between "(A)" and "and such labor organization", and insert in lieu thereof "twenty or more during the first year after the date of enactment of the Equal Employment Opportunities Enforcement Act of 1970, (B) fifteen or more during the second year after such date, or (C) eight or more thereafter,"

(5) At the end of subsection (h) insert before the period a comma and the following: "and further includes any governmental industry, business, or activity".

SEC. 3. Section 702 of the Civil Rights Act of 1964 (78 Stat. 253, 42 U.S.C. 2000e-2) is amended to read as follows:

"EXEMPTION

"SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion."

SEC. 4. (a) Subsections (b) through (j) of section 705 of the Civil Rights Act of 1964 (78 Stat. 258, 259; 42 U.S.C. 2000e-4 (a)-(1)) and references thereto are redesignated as subsections (c) through (k), respectively.

(b) Section 705 of such Act is amended by inserting the following new subsection (b):

"(b) There shall be a General Counsel of the Commission who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Commission shall exercise general supervision over all attorneys employed by the Commission (other than trial examiners and legal assistants to Commission members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Commission, in respect of the investigation of charges, conference, conciliation, and persuasion endeavors, issuance of complaints, the prosecution of such complaints before the Commission, and the conduct of litigation as provided in sections 706 and 707 and shall have such other duties as the Commission may prescribe or as may be provided by law. In case of a vacancy in the Office of the General Counsel, the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted."

SEC. 5. (a) Subsections (a) through (e) of section 706 of the Civil Rights Act of 1964 (78 Stat. 259; 42 U.S.C. 2000e-5 (a)-(e)) are amended to read as follows:

"(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

"(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by an officer or employee of the Commission upon the request of any person claiming to be aggrieved, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a copy of the charge on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') as soon as practicable thereafter and shall make an investigation thereof. Charges shall be in writing, signed under oath, and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any officer or employee of the Commission who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year; or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

"(c) In the case of a charge filed by or on behalf of a person claiming to be aggrieved alleging an unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall take no action with respect to the investigation of such charge before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered or certified mail to the appropriate State or local authority.

"(d) In the case of any charge filed by an officer or employee of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law, unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and a copy shall be served upon the person against whom such charge is made as soon as practicable thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

"(f) If the Commission determines after attempting to secure voluntary compliance under subsection (b) that it is unable to secure from the respondent a conciliation agreement acceptable to the Commission, which determination shall not be reviewable in any court, the Commission shall issue and cause to be served upon the respondent a complaint stating the facts upon which the allegation of the unlawful employment practice is based, together with a notice of hearing before the Commission, or a member or agent thereof, at a place therein fixed

the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection."

(b) Section 709 of the Civil Rights Act of 1964 is amended by: (1) redesignating section 709(e) as 709(f) and (2) by adding immediately after section 709(d) as amended, the following subsection (e):

"(e) Any record or paper required by section 709(c) of this title to be preserved or maintained shall be made available by inspection, reproduction, and copying by the Commission or its representative, or to the Attorney General or his representative in connection with his authority under section 707, upon demand in writing directed to the person having custody, possession, or control of such record or paper. Unless otherwise ordered by a court of the United States, neither the members of the Commission nor its representative shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress or any committee thereof, or to a governmental agency, or in the presentation of any case or proceeding before any court or grand jury. The United States district court for the district in which a demand is made or in which a record or paper so demanded is located, shall have jurisdiction to compel by appropriate process the production of such record or paper."

SEC. 8. Section 710 of the Civil Rights Act of 1964 (78 Stat. 264; 42 U.S.C. 2000e–9) is amended to read as follows:

"INVESTIGATORY POWERS

"SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply: *Provided,* That no subpena shall be issued on the application of any party to proceedings before the Commission until after the Commission has issued and caused to be served upon the respondent a complaint and notice of hearing under subsection (f) of section 706."

SEC. 9. (a) Section 703(a)(2) of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e–2(a)(2)) is amended by inserting the words "or applicants for employment" after the words "his employees".

(b) Section 703(c)(2) of such Act is amended by inserting the words "or applicants for membership" after the word "membership".

(c)(1) Section 704(a) of such Act is amended by inserting "or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs," after "employment agency" in section 704(a).

(2) Section 704(b) of such Act is amended by (A) striking out "or employment agency" and inserting in lieu thereof "employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,", and (B) inserting a comma and the words "or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee" before the word "indicating".

(d)(1) The second sentence of section 705(a) is amended by inserting before the period at the end thereof a comma and the following: "and all members of the Commission shall continue to serve until their successors are appointed and qualified: *Provided,* That no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted".

(2) The fourth sentence of section 705(a) of such Act is amended to read as follows: "The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and shall appoint, in accordance with the provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearings examiners, and employees as he deems necessary to assist it in the performance of its functions and fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: *Provided,* That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code."

(e) Section 705(g)(1) of such Act is amended by inserting at the end thereof the following: ", and to accept voluntary and uncompensated services, notwithstanding the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b))".

(f) Section 705(g)(6) of such Act is amended to read as follows:

"(6) to intervene in a civil action brought by an aggrieved party under section 706."

(g) Section 713 of such Act is amended by adding at the end thereof the following new subsections:

"(c) Except for the powers granted to the Commission under subsection (h) of section 706, the power to modify or set aside its findings, or make new findings, under subsections (i), (k), and (l) of section 706, the rulemaking power as defined in subchapter II of chapter 5 of title 5, United States Code, with reference to general rules as distinguished from rules of specific applicability, and the power to enter into or rescind agreements with State and local agencies, as provided in subsection (b) of section 709, under which the Commission agrees to refrain from processing a charge in any cases or class of cases or under which the Commission agrees to relieve any person or class of persons in such State or locality from requirements imposed by section 709, the Commission may delegate any of its functions, duties, and powers to such person or persons as the Commission may designate by regulation, including functions, duties, and powers with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter: *Provided,* That nothing in this subsection authorizes the Commission to provide for persons other than those referred to in clauses (2) and (3) of subsection (b) of section 556 of title 5 of the United States Code to conduct any hearing to which that section applies.

"(d) The Commission is authorized to delegate to any group of three or more members of the Commission any or all of the powers which it may itself exercise."

(h) Section 714 of such Act is amended by striking out "section 111" and inserting in lieu thereof "sections 111 and 1114".

SEC. 10. (a) Section 5314 of title 5 of the United States Code is amended by adding at the end thereof the following new clause:

"(55) Chairman, Equal Employment Opportunity Commission."

(b) Clause (72) of section 5315 of such title is amended to read as follows:

"(72) Members, Equal Employment Opportunity Commission (4)."

(c) Section 5315 of such title is amended to add, as a new clause (73), the following:

"(73) General Counsel of the Equal Employment Opportunity Commission."

The remaining clauses, beginning with old clause (73), are redesignated accordingly.

(d) Clause (111) of section 5316 of such title is repealed.

SEC. 11. The amendments made by this Act to section 706 of the Civil Rights Act of 1964 (except those subsections designated by this Act as (o) and (q)(3) thereof) shall not be applicable to charges filed with the Commission prior to the enactment of this Act.

Mr. WILLIAMS of New Jersey. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. KENNEDY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. WILLIAMS of New Jersey. Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized to make technical corrections in S. 2453, as passed.

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMUNICABLE DISEASE CONTROL AMENDMENTS OF 1970—CONFERENCE REPORT

Mr. KENNEDY. Mr. President, on behalf of the Senator from Texas (Mr. YARBOROUGH), chairman of the Committee on Labor and Public Welfare, who is absent on official business, I submit a report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2264) to amend the Public Health Service Act to provide authorization for grants for communicable disease control and vaccination assistance. I ask unanimous consent for the present consideration of the report.

The PRESIDING OFFICER (Mr. JORDAN of Idaho). Is there objection to the present consideration of the report?

There being no objection, the Senate proceeded to consider the report.

(For conference report, see House proceedings of September 23, 1970, page 33279, CONGRESSIONAL RECORD.)

Mr. KENNEDY. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. KENNEDY. Mr. President, I wish to indicate to my colleagues that I do not think there will be extensive debate on this conference report. I would expect a vote in about 15 minutes.

Almost 1 year ago the Senate passed unanimously a comprehensive communicable disease control and vaccination assistance bill, S. 2264. The bill would authorize a program of project grants to continue Federal programs to combat a host of diseases such as rubella, diphtheria, venereal disease, tuberculosis, Rh disease, and many others. While great strides have been made in recent years in combating these diseases, it is essential for us to continue our efforts in order to prevent an unraveling of the significant progress that has been made.

Perhaps the most urgent need in this area is the need to prepare ourselves against the ominous prospect of an epi-

92D CONGRESS
1ST SESSION

S. 2515

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14, 1971

Mr. BYRD of West Virginia (for Mr. WILLIAMS) (for himself, Mr. BAYH, Mr. BROOKE, Mr. CASE, Mr. CHURCH, Mr. CRANSTON, Mr. EAGLETON, Mr. GRAVEL, Mr. HARRIS, Mr. HART, Mr. HARTKE, Mr. HUGHES, Mr. HUMPHREY, Mr. INOUYE, Mr. JACKSON, Mr. JAVITS, Mr. KENNEDY, Mr. MCGOVERN, Mr. MAGNUSON, Mr. METCALF, Mr. MONDALE, Mr. MONTOYA, Mr. MOSS, Mr. MUSKIE, Mr. NELSON, Mr. PELL, Mr. PERCY, Mr. PROXMIRE, Mr. RIBICOFF, Mr. SCOTT, Mr. SCHWEIKER, Mr. STEVENSON, and Mr. TUNNEY) introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare

A BILL

To further promote equal employment opportunities for American workers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Employment Opportunities Enforcement Act of 1971".

SEC. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(1) In subsection (a) insert "governments, govern-

upon the respondent a complaint and notice of hearing under subsection (f) of section 706."

SEC. 8. (a) Section 703 (a) (2) of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e–2 (a) (2)) is amended by inserting the words "or applicants for employment" after the words "his employees".

(b) Section 703 (c) (2) of such Act is amended by inserting the words "or applicants for membership" after the word "membership".

(c) (1) Section 704 (a) of such Act is amended by inserting "or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs," after "employment agency" in section 704 (a).

(2) Section 704 (b) of such Act is amended by (A) striking out "or employment agency" and inserting in lieu thereof "employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,", and (B) inserting a comma and the words "or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee" before the word "indicating".

(d) (1) The second sentence of section 705 (a) is amended by inserting before the period at the end thereof a

Calendar No. 805

92D CONGRESS
2D SESSION

S. 1861

[Report No. 92–842]

IN THE SENATE OF THE UNITED STATES

MAY 13, 1971

Mr. WILLIAMS introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare

JUNE 8, 1972

Reported by Mr. WILLIAMS, with amendments

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend the Fair Labor Standards Act of 1938, as amended, to extend its protection to additional employees, to raise the minimum wage to $2.25 an hour, to provide for an eight-hour workday, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That this Act may be cited as the "Fair Labor Standards Amendments of 1971".~~

~~DEFINITIONS AND APPLICABILITY TO PUERTO RICO AND THE VIRGIN ISLANDS~~

~~SEC. 2. (a) Section 3(d) of the Fair Labor Standards Act of 1938, as amended, is amended to read as follows:~~

agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, but such term does not include the United States, or a corporation wholly owned by the Government of the United States."

(2) Section 11(c) of such Act is amended by striking out "or any agency of a State or political subdivision of a State, except that such terms shall include the United States Employment Service and the systems of State and local employment services receiving Federal assistance."

(b)(1) The Age Discrimination in Employment Act of 1967 is amended by redesignating sections 15 and 16, and all references thereto, as section 16 and section 17, respectively.

(2) The Age Discrimination in Employment Act of 1967 is further amended by adding immediately after section 14 the following new section:

"NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

"SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title

5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

"(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

"(2) consult with and solicit the recommendations of interested individuals, groups, and organizations re-

GUIDELINES ON EMPLOYMENT TESTING PROCEDURES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

August 24, 1966

EEOC

GUIDELINES:

Title VII of the Civil Rights Act of 1964 provides that an employer may give and act upon the results of "any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate because of race . . ." (Sec. 703 (h)). The language of the statute and its legislative history make it clear that tests may not be used as a device to exclude prospective employees on the basis of race. The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

Evaluation of test results is but one of several methods available to an employer in screening applicants and selecting new employees. If the facts indicate that an employer has discriminated in the past on the basis of race, sex or other prohibited grounds, the use of tests in such circumstances will be scrutinized carefully by the Commission.

An employer committed to equal employment opportunity will take affirmative action to ensure that all of his personnel policies are valid and consistent with his commitment.

Employers have discovered that they may be inadvertently excluding qualified minority applicants through inappropriate testing procedures. Indeed such testing may discriminate in employment and promotion just as effectively as the once common "white only" or "Anglo only" signs. On the other hand, employers who use tests, but treat them as only one of several factors in the hire or promotion process, have found valuable employees in minority groups who would have been excluded if the tests were the sole and controlling factor.

Employers have appealed to the Commission for guidance in the search for sound testing procedures. The Commission, on its part, has consulted with a panel of outstanding psychologists, all of whom have broad practical experience in the testing field. The guidelines are based on their recommendations.

Following are the general guidelines of the Commission and the report of the psychologists. In developing the guidelines the Commission sought to provide employers with a scientifically sound, industrially-proven, and equitable basis for matching manpower re-

quirements with human aptitudes and abilities. The employer who conscientiously follows these guidelines will have taken a long step to ensure equal opportunity to all applicants and employees regardless of race, color, religion, sex or national origin.

THE COMMISSION ADVOCATES:

1. Use of a **total personnel assessment system** that is non-discriminatory within the spirit of the law and places special emphasis on:

   a) **Careful job analysis to define skill requirements.** Job descriptions should be examined and the essential requirements of the job determined before tests are selected. Job requirements often are stated in generalized terms such as "high school graduate," or "potential to advance to higher level." Such requirements may not necessarily be related to performance of a specific job in a given work setting.

   b) **Special efforts in recruiting minorities.** The Commission encourages employers to seek out minority group applicants, to objectively assess their potentialities as employees, and to hire "qualifiable" applicants.

   c) **Screening and interviewing related to job requirements.** Screening of applicants should be based on the qualifications required for a specific job. Interviewing and testing of minority applicants should be conducted by personnel thoroughly committed to equal employment opportunity policy as well as knowledgeable and skilled in intergroup relations. An inferior education and lack of opportunities for development of skills may cause minority group applicants to appear less confident or less knowledgeable to the uninitiated, but such persons may be fully productive workers in many jobs.

   d) **Tests selected on the basis of specific job-related criteria.** The Commission views tests as only one component of the personnel system – no better or worse than the selection system of which they are a part. "It is quite possible to take a test that has been professionally developed in one situation and misuse it in another situation." The characteristics of a test, apart from the situation in which it is used, are not sufficient evidence on which to judge its quality.

   The Commission will not recommend any particular test, but adopts the *Standards for Educational and Psychological Tests and Manuals,* prepared by a joint committee of the American Psychological Association, American Educational Research Association, and National Council on Measurement in Education

(published by The American Psychological Association). This publication, endorsed by the panel of psychologists, consulted by the Commission, was prepared by recognized spokesmen for the profession and establishes standards and technical merits of evaluation procedures.

e) **Comparison of test performance versus job performance.** The Commission encourages the use of job-related ability tests. Employers must be aware that when an applicant has not enjoyed equal educational and developmental opportunities, his score on a test may underestimate his job potential. The ultimate standard, however, is not the test score but performance on the job. Since cultural factors can so readily affect performance on so many tests, it is recommended that the test be judged against job performance rather than by what they claim to measure.

f) **Retesting.** Mindful of the special problems of minorities, employers are encouraged to provide an opportunity for retesting to those "failure candidates" who have availed themselves of more training or experience. A recent conciliation agreement signed by the Equal Employment Opportunity Commission and a State Employment Security Commission requests the ESC personnel assigned to local offices "to exercise a more liberal construction" of the agency's manual concerning testing. In particular, if an applicant during the course of an interview claims he has had more education or experience, then that person will be retested. It further provides that the State Bureau of Employment Security be requested to examine the feasibility of issuing less subjective regulations pertaining to retesting, so as to ensure every applicant maximum opportunity to qualify for job openings.

g) **Tests should be validated for minorities.** The sample population (norms) used in validating the tests should include representative members of the minority groups to which the tests will be applied. Only a test which has been validated for minorities can be assumed to be free of inadvertent bias. The Commission encourages employers to check these tests to make sure that hidden discrimination against minorities is not present.

II. **Objective Administration of Tests.** Since tests are assessment tools and their value depends upon the skill of their user, it is essential that tests be administered by personnel who are skilled not only in technical details, but also in establishing proper conditions for test taking. Members of disadvantaged groups tend to be particularly sensitive in test situations and those giving tests should be aware of this and be able to alleviate a certain amount of anxiety.

REPORT BY PANEL OF PSYCHOLOGISTS

The Equal Employment Opportunity Commission has asked us to advise it with respect to several issues concerning the development, introduction and administration of tests of aptitude and/or ability in industrial settings as related to problems of race relations. More particularly, the Commission has inquired concerning the processes by which tests should be developed and administered in an employment setting.

OBJECTIVE PERSONNEL ASSESSMENT SYSTEM

We recommend that the Commission advocate the use of a *total personnel assessment system* toward the attainment of equal employment opportunities for all Americans. The many components of an objective personnel assessment system, i.e., job analysis, development of criterion-related validity, psychological testing, recruitment, screening of applicants, interviewing, and the integration of pertinent personnel data, provide the employer with the basis for matching manpower requirements with human aptitudes and abilities that is most likely to be non-discriminatory within the spirit of the law.

The mutual interdependence of the respective components is definitive relative to the fairness and effectiveness of all aspects of the system. A sound testing program, for example, would be degraded by failure to admit appropriate applicants or by failure to use qualified personnel for the interpretation of test scores and additional relevant data obtained from other components of the assessment system. The final measure of the quality of fairness of a testing program must, therefore, hinge on the functional adequacy of the total personnel assessment system rather than any narrow evaluation of the quality of an individual system component.

PROFESSIONALLY DEVELOPED TESTS

We further recommend that the Commission adopt policies encouraging the development and application of various personnel selection and assessment procedures, and that guidelines, standards, and technical attributes of these evaluation procedures be stated in terms of principles and of sound objective assessment practices. To this end, the Commission may wish to consider the adoption of the published *Standards for Educational and Psychological Tests and Manuals,* issued jointly by the American Psychological Association, the American Educational Research Association, and The National Council on Measurement in Education (1966). It is of utmost importance that the

guidelines and operational policies encourage and facilitate use of objective and equitable personnel assessment systems.

PROFESSIONAL APPLICATION OF TESTS

Section 703(h) of Title VII of the Civil Rights Act of 1964 provides for the use of "professionally developed ability test(s)". It is also important to provide for the professional application of tests. It is quite possible to take a test that has been professionally developed in one situation and misuse it in another situation. Thus, the characteristics of a test, apart from the situation in which it is used, are not sufficient evidence on which to judge its "professional nature".

What then is the heart of this "professional nature"? It involves a process from the determination of behavioral requirements of the job through careful job analysis, the selection and/or development of instruments to measure these critically important abilities, the administration of these instruments to applicants for the job or employees on the job, the identification or development of measures of effective job performance (the criteria), to the comparison of individual employee scores with their criterion performance.

JOB ANALYSIS

Job analysis provides the systematic, precise identification of the skill requirements of the different categories of jobs. It is the matrix within which employee capabilities may be specified. The assessment system in industry is the procedure which matches skill requirements, determined through job analysis, with employee capabilities.

CRITERION-RELATED VALIDITY

While the earlier steps described above for a professional approach to testing are important, the crucial step is the final process of comparing test performance with job performance. Tests should be selected on the basis of validation against the performance requirements of the job, that is, criterion-related validity. In this sense a single test has a different degree of validity for each job-situation for which it may be used. In fact, a test may have varying validities for different aspects of the same job. It may accurately predict certain phases of job performance (e.g. number of accidents), but may fail to predict quality of output. If the scores from a given test, however, correlate (more than chance would indicate) with any important aspect of the job, the test may be said to have validity for that job. In this same sense several tests or a test battery may be required to predict the several required aspects of job performance.

For many jobs, schools or training courses have been established to

prepare the employee to perform the work. Test scores are often related to performance in the school (e.g. grades). It has frequently been found, however, that these course grades are not highly related to measures of job performance. Hence, it is recommended that wherever possible reliable measures of job performance should be used as criteria rather than the measures obtained during training. It should also be recognized that through time, jobs and job conditions frequently change. In these cases it will be necessary to revalidate the test. Maintaining current evidence of validity thus becomes a phase of the professional process.

In such validation the norm population must be relevant. It should be described in terms of those variables known to be relevant to the ability tested. The occupation and experience of workers in the norm population should be described. The decision to use the test should be based on data from a clearly adequate sample.

NORMS

When a person takes a test, many things may influence his score, quite apart from the aptitude or ability being measured. For example, language deficit can affect a score on an arithmetic reasoning test; as can other early learning experiences such as putting odd shaped blocks together. The extent to which any cultural factor operates independently of the trait being measured can affect test reliability and validity for that segment of the population whose culture differs appreciably from the normative groups. For such a person who is so affected, the test may underestimate his true potential and deprive the employer of a capable and willing worker.

Because of the possible adverse effects of culture on test scores, it is important that the population used in establishing norms be clearly described. Since, in practice, it is difficult to develop norms for each of the many homogeneous subdivisions (i.e. minority groups, etc.), the resulting problems of test interpretation demand a thorough appreciation of the factors involved on the part of the interpreter. The test user should, therefore, select instruments, when possible, which minimize cultural differences. Provisions also should be made for retesting when there is evidence that the applicant has availed himself of experience, i.e., formal training, etc., which would further reduce cultural handicaps. Any dynamic view of assessment must take into account not only the current status of the individual but also the rate at which he is progressing in the further development of those traits being measured.

Within this context, and where there is a strong indication that a cultural deficit is seriously affecting test reliability and validity, other methods of assessment such as job performance should be used. It

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would seem desirable, however, that the Commission encourage, that as rapidly as possible, validation studies be conducted with minority groups using measures of cultural background as moderator variables.

TRAINING OF PROFESSIONALS FOR SELECTION, ADMINISTRATION AND INTERPRETATIONS OF TESTS

Recognizing the benefits inherent in objective evaluation when properly developed, selected, administered, and interpreted, it then becomes necessary to consider the appropriate professional level required to perform each of those various functions. The matter of "professional development" of assessment instruments has been treated above, leaving open the questions of administration and interpretation of tests.

It would be impractical to outline a specific course of training which would qualify one to administer, score and interpret tests. Different tests demand different levels of competence for administration, scoring and interpretation. It is, therefore, the responsibility of the professional to recognize the limits of his competence and to perform only those functions which fall within his preparation and competence.

In the final analysis, tests are merely tools, and their value depends upon the skill of their user. Of central importance is the commitment of the employer to institute within his organization a total objective personnel assessment system fairly administered and professionally implemented so as to provide equal employment opportunities for all Americans.

Submitted May 17, 1966

DR. BRENT BAXTER, Vice President and Director of Research, American Institutes For Research.

DR. RICHARD F. DOCTER, Associate Administrative Officer, State and Professional Affairs, The American Psychological Association.

DR. GEORGE S. ELIAS, Associate Professor of Psychology and Education, Assumption College.

SHERMAN FEIN, Esquire , Fein, Cavanaugh, and Kimball.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1800 G STREET, NORTHWEST
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Calendar No. 707

90TH CONGRESS 1st Session | SENATE | REPORT No. 723

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

NOVEMBER 4, 1967.—Ordered to be printed
Filed under authority of the order of the Senate of November 2, 1967

Mr. YARBOROUGH, from the Committee on Labor and Public Welfare, submitted the following

REPORT

together with

INDIVIDUAL VIEWS

[To accompany S. 830]

The Committee on Labor and Public Welfare, to which was referred the bill (S. 830) to prohibit age discrimination in employment, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF THE LEGISLATION

It is the purpose of S. 830 to promote the employment of older workers based on their ability. This would be done through an education and information program to assist employers and employees in meeting employment problems which are real and dispelling those which are illusory, and through the utilization of informal and formal remedial procedures where the education program has failed in its objective the ending of employment discrimination based upon age. The prohibitions in the bill apply to employers, employment agencies, and labor organizations.

BACKGROUND

During recent years bills have been introduced in both the Senate and House to bar discrimination in employment on account of age. Also, during the last several years, significant legislation to bar discrimination in employment on the basis of race, religion, color, and sex have been enacted.

Section 715 of Public Law 88-352 (Civil Rights Act of 1964) directed the Secretary of Labor to make a study of the problem of age discrim-

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(6) While promotion, education, and persuasion are most effective, enforcement procedures are necessary to get the required attention of employers and others.

The provisions of S. 830 reflect substantial awareness and consideration of these conclusions. It is important to note also, that in a canvass of State officials regarding the advisability of Federal action against employment discrimination on account of age, most operating officials perceived advantages in a national policy against such discrimination and were in favor of the passage of Federal legislation.

COMMITTEE ACTION

The Subcommittee on Labor began public hearings on S. 830 on March 15, 1967. They lasted for 3 days, during which time the subcommittee heard from 19 witnesses. In addition, numerous statements were filed with the subcommittee by other interested persons and groups.

Support for the general purposes of the legislation was unanimous. In several instances testimony contained suggestions for changes in the original bill. A number of these suggestions as well as others were accepted by the subcommittee on April 26, 1967, and the bill was reported favorably to the Committee on Labor and Public Welfare. During the committee's consideration on three separate dates, additional amendments were approved and an amendment in the nature of a substitute was unanimously approved and ordered reported.

SUMMARY OF MAJOR PROVISIONS

Education and research program

Section 3 of the bill authorizes the Secretary of Labor:

1. To carry on a continuing program of education and information to reduce barriers to the employment of workers between 40 and 65 years of age;

2. To publish his findings for the promotion of the employment of these workers;

3. To foster through the public employment service and through cooperative effort, the development of public and private agencies for expanding employment opportunities for older workers; and

4. To sponsor and assist State and community informational and educational programs.

These functions can do much to correct age discriminatory employment practices and are therefore vital to the overall effectiveness of the bill. They are means of affecting salutary changes in attitude which will induce compliance with the simple justice the proposal espouses, thereby making enforcement measures unnecessary. This viewpoint was corroborated by many of the witnesses, including representatives of State agencies and labor and management.

Prohibition of age discrimination

Section 4 of the bill provides that:

A. It shall be unlawful for an employer of 50 or more persons (25 or more after June 30, 1968):

1. To fail or refuse to hire, or to discharge or discriminate against any individual as to compensation, terms, conditions, or privileges of employment, because of age;

2. To limit, segregate, or classify employees so as to deprive them of employment opportunities or adversely affect their status; or

3. To reduce the wage rate of any employee in order to comply with this act.

B. It shall be unlawful for an employment agency, including the U.S. Employment Service, to fail or refuse to refer any individual for employment, or to classify any individual for employment on the basis of age.

C. It shall be unlawful for a labor organization with 50 or more members (25 or more after June 30, 1968):

1. To discriminate against any individual because of age by excluding or expelling him from membership, or by limiting, segregating, or classifying its membership by age;

2. To fail to refer for employment any individual because of age, which failure may result in a deprivation of employment opportunities; or

3. To cause or attempt to cause an employer to discriminate against an individual because of age.

D. It shall be unlawful for an employer, employment agency, or labor organization:

1. To discriminate against a person for opposing a practice made unlawful by this act, or for participating in any proceeding hereunder; or

2. To use printed or published notices or advertisements indicating a preference, specification, or discrimination, based on age.

E. Exceptions to the forementioned unlawful practices:

1. Where age is a bona fide occupational qualification reasonably necessary to the particular business.

2. Where differentiation is based on reasonable factors other than age.

3. To comply with the terms of any bona fide seniority system or employee benefit plan which is not a subterfuge to evade the purposes of this act, except that no employee benefit plan shall excuse the failure to hire an individual.

4. To discharge or discipline an individual for good cause.

It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill and was favorably received by witnesses at the hearings.

Study, recommendations, and reporting

Section 5 directs the Secretary to study institutional and other arrangements giving rise to involuntary retirement and report his findings with appropriate legislative recommendations to the President and the Congress.

Section 13 directs the Secretary to make an annual report to the Congress regarding the activities carried on in the administration of this act, including an evaluation of the minimum and maximum ages established by the act, with his recommendations to the Congress.

Section 3(b) further directs the Secretary, not later than 6 months after the effective date of the act, to recommend to the Congress any

are, of course, many areas of study which should be pursued in order to solve this dilemma, but the most important single thing which we can do is to provide older workers with the opportunity to work and to support themselves as they have been doing all their lives.

Not only is employment important to the economic well-being of our older population, it is also important to their mental and physical health. In a recent position statement on the employment of older people the American Medical Association stated, "It is difficult to prove that physical or mental illness can be directly caused by denial of employment opportunities . . . However, few physicians deny that such a relationship exists." Many older persons, educated to the pioneer concept of work as a good in itself and leisure time as wasted time, are unable or unwilling to adapt to the creative use of their leisure time. They need to feel that they are in some way performing a contribution to society.

The bill which I introduced yesterday—The Older Workers Employment Act of 1967—attempts to attack this problem facing the older American on several fronts, combining all the best features of several earlier bills I introduced, including H.R. 9207 and H.R. 9893. It not only prohibits arbitrary discrimination against hiring older workers, but also offers meaningful job opportunities to many who could not otherwise find employment, provides for the construction of senior centers, and provides for the study and investigation of possible alternative answers to the problems now confronting us.

I am primarily concerned with emphasizing that the problem of the older worker is one of the greatest importance. Considered purely from the psychological point of view, if the involuntary unemployment of the older worker continues to increase, we shall have on our hands a great problem in the re-education of these people so that they may face the prospect of 20 to 25 years of retirement without anxiety and depression. Economic aspects of involuntary unemployment—or early retirement—are of even more serious consequence, for the importance of earned income in the budget of many of the elderly is paramount.

The bill which I have introduced is aimed at these problems. It will operate by "providing these age groups with opportunities for useful work, part-time and full-time, paid and volunteer, will bring them needed income, will benefit their physical and mental health; and will be a means of providing services needed by all age groups which are not now being provided."

Older workers often find it very difficult to surmount the assumption that they are unable physically or mentally to handle any new work because of their age. Title II of my bill would attempt to fight this discrimination by making it unlawful for employers, employment agencies, or labor organizations to discriminate against any individual solely because of age, except in cases where age is a bona fide occupational qualification. Violation of these prohibitions would be punishable by civil penalties. Administration of the bill would be in the Wage and Hour Division of the Department of Labor, with the Secretary of Labor empowered to carry on a continuing program of education and information.

The elimination of age discrimination in employment will be a major step towards the goal of a better life for older citizens, but while it insures that available jobs will not be refused to qualified applicants, it does not insure a job for every older worker who wants one. In this day of rapidly improving technology, many older workers find their skills outmoded and their jobs abolished as new and more efficient methods of production are adopted. In order to combat the tightening job market, it will be necessary to provide work opportunities for older persons. Title III of my bill will help to increase the availability of work by anticipating jobs on Federally supported programs and authorizing the Secretary of Labor to provide training for older workers to fill these jobs.

To create further job openings, the Older Americans Act of 1965 will be amended to provide for a Senior Service Corps. The Secretary of Health, Education and Welfare will be authorized to supply part-time paid jobs in community service programs to workers aged 60 and over who are unable to secure full-time employment or to those who need to supplement an inadequate retirement income. Such jobs would provide a viable solution to the problem facing the worker who has exhausted his other means of support, but has not as yet found suitable employment. Those senior citizens who do not need jobs, but desire to work in community service programs on a volunteer basis, would be encouraged to work in the Senior Service Corps, and they would be eligible to receive out-of-pocket expenses from the program.

The Act would be further amended to provide the authorization of a special grant program to provide for the construction and operation of senior citizen activity centers. Some of these have been operated by pioneering communities for a number of years and represent the most significant and promising new instrumentality yet devised to meet the many and varied needs of older people. A center facility, adequately staffed and effectively operated, permits older people to develop programs which explore their interests and provide new opportunities for self-improvement. Centers can provide intellectual and recreational stimulation, offer private and personal counseling, provide referral services, and offer information about other services available to the elderly in their communities.

Many communities which are anxious to begin such a program, do not have the available funds. My bill would provide "seed money" to enable communities to begin developing these programs.

In order to open the way to constructive and satisfying roles in employment and retirement, a great deal of further study is needed. Therefore, the Secretary of Labor and the Secretary of Health, Education and Welfare are authorized under Title IV of my bill to conduct and support research programs in such areas as: early or flexible retirement plans, continuing education and retraining program for workers who are employed in order to prepare them for new jobs, and advance planning of manpower requirements. In addition, there is authorized to be appointed by the President, a Commisssion on Lifetime Adult Education. This commission may hold hearings and study the aforementioned proposals in order to make legislative recommendations on these problems, and shall cease to exist after its report has been filed.

Finally, the Secretary of Labor is directed to study the feasibility and desirability of a transitional allowance system for older workers between the ages of 55 and 65 who are unemployed and have exhausted their unemployment compensation. Within two years of the Secretary's report, the President will be directed to submit a report to Congress on the means to eliminate the gaps and inadequacies in workmen's compensation and disability insurance systems, particularly as they adversely affect the employment of older workers.

Mr. Chairman, the problems which plague the older worker today are indeed serious. As the longevity of our population increases, we shall probably move into an era where the periods of education, work, and retirement in a man's lifetime will assume equal importance. By acting now to give each man the opportunity to work as long as he chooses and to enter retirement willingly, we will have taken a great step toward insuring a happy and satisfying working life culminating in a constructive and useful retirement. But we must act now, for today's older worker has no time to wait.

I urge the members of this excellent subcommittee to recommend an expanded program to solve the employment problems of the older worker and the senior citizen, so that they may be able to increase their standard of living, while at the same time aid in decreasing the growing poverty which has ensnarled so much of our nation.

Mrs. DWYER. Mr. Speaker, few if any bills which Congress has passed this year can surpass the pending legislation in the potential for removing discrimination and for promoting social justice.

Of the multitude of ways in which man discriminates against his fellow man, one of the most difficult to oppose effectively—and to overcome personally—is discrimination in employment because of age.

The bill before us, Mr. Speaker, marks a major step in the direction of eliminating this particular form of discrimination and of assuring greater equality of opportunity for all our people.

As a sponsor of very similar legislation during the past 3 years, together with a series of related bills aimed at advancing these same objectives, I wholeheartedly support the present bill. Its enactment into law will be a fitting and effective companion to the bill we enacted last year which made special provision for counseling, training, and placement services for older workers under the Manpower Development and Training Act, a bill which I was also privileged to cosponsor.

Few social probems have become so serious and widespread in so short a time, chiefly because of the unfortunate trend in much of business and industry which denies to persons over 40 or 45 or 55, as the case may be, the opportunity even to be considered for employment, regardless of their qualifications or capabilities.

Men and women who, through no fault of their own, find themselves out of work and over 40 have been the forgotten people of our time. They have been victims of the myth that holds they are too settled, too hard to retrain, and have too little time left to make valuable contributions to new employers. The facts are otherwise, however, and it is up to Congress to help relieve the anxieties that beset millions of the middle-aged and eliminate the obstacles that stand in the way of full opportunity for all.

When a man or woman of 55, for instance, loses his job, he faces the prospect of long months of frustration, fear, and insecurity as he searches for a new one. And the odds are heavily against his finding new employment similar in kind and pay to his former position—no matter how skilled and experienced and vigorous he may be. The cost of such an experience in terms of mental anguish, family suffering, lost income, and damaged self-respect is too high to measure. One must observe it at firsthand—as I am confident many of our colleagues have—to appreciate how painful and how unnecessary it all is.

A number of recent studies, Mr. Speaker, including those undertaken by

the Departments of Commerce and Labor, document the seriousness of age discrimination. Here are some of their findings:

First, over three-quarters of a million persons 45 years of age or older—most of them under 65—are looking for work and cannot obtain it; they comprise 27 percent of the unemployed but 40 percent of the long-term unemployed; and they account for three-quarters of the $1 billion in unemployment benefits which are disbursed annually.

Second, one-half of all the job openings that develop in the private economy each year—nationally—are closed to applicants over 55, and one-quarter are unavailable to persons over 45.

Third, though 24 of the States, including New Jersey, do have laws banning age discrimination, many of the laws have not been implemented and most of the States lack the resources to assure compliance.

Fourth, 26 of the 50 States have no laws at all prohibiting age discrimination in employment, and in those States more than half of all employers set specific age limits—usually between 45 and 55—beyond which workers will not be considered for employment regardless of ability.

Fifth, once a person over 45 loses a job, the chances against finding another like it are 6 to 1 against him. And the older a person is and the less education and training he has, the more hopeless his problem becomes. The number of older workers continues to grow, and should the economy fail to continue growing as rapidly as the working-age population, conditions for the older worker can only become much worse.

There are reasons, of course, why age discrimination is so disheartening widespread. They are not malicious reasons, for business and industry do not seek to persecute middle-aged workers. Employers are concerned, however, that older workers may be less physically capable, less adaptable to new conditions, that they sometimes lack special skills and training and have a shorter period of work expectancy, that pension plans cost more for older workers, and that younger workers can be employed for less money—all of which may add to the cost of doing business in a highly competitive field.

On the other hand, when older applicants are, in fact, more capable and dependable, as these studies have demonstrated is often the case, or when retraining and the acquisition of new skills is feasible—and the study made for the Bureau of Labor Statistics by the University of Michigan's Survey Research Center as well as the experience under experimental retraining programs demonstrate the adaptability and employability of older workers—then job discrimination hurts not only the deprived applicants but the employers and our economy and society as well.

This is especially true when discrimination consists of the blunt, blind refusal, rigid and unbending, to employ workers once they have passed an arbitrary age, however able or qualified they may be. As we have seen, such a closed-door policy only adds to long-term unemployment, higher relief costs, and extensive human suffering and despair.

The pending bill, Mr. Speaker, will deal wtih this problem directly and effectively. I would illustrate this contention by including herewith, as a part of my remarks, a portion of the November 13 issue of section 2 of the Prentice-Hall Lawyer's weekly report, "What's Happening in Washington." Though I do not share the fears of this analysis, assuming a responsible attitude on the part of business, this report indicates that the legislation is considered significant and potentially effective enough to warrant the immediate and active interest of private enterprise.

The report follows:

CONGRESS MOVES TO BAN AGE DISCRIMINATION IN EMPLOYMENT

Congress is putting the finishing touches on legislation to prohibit employers from arbitrarily discriminating in hiring because of applicant's age (S. 830 and H.R. 13054). The Senate has already passed S. 830, with some modifications to meet industry objections. The House is expected to act shortly. While being hailed by proponents as noncontroversial, *the legislation could open a Pandora's box for employers, some business spokesmen feel.*

How the legislation would work: It would cover workers *between 40 to 65.* You could *not:* discriminate because of age when *hiring or firing, or in compensation, terms, conditions or privileges of employment; limit, segregate or classify employees by age* if it would adversely affect their employment opportunities; specify age for eligibility *when advertising* for new employees, or *give preference because of age.*

However, there would be these *exceptions:* (1) When age is a *bonafide occupational qualification.* (2) Companies wouldn't have to take recently hired older workers into their *pension plans.* (3) *Seniority rules* that apply to newly hired older workers.

Not excepted from the bills are *management training programs.* Congress feels that such a broad exception could be a big loophole in age-job discrimination. However, the committees handling the bill did recognize that age might be a *legitimate consideration* for management training.

Enforcement could be tough. Unlike the roundabout method the Equal Employment Opportunity Commission has to follow (through individual suits and referring violations to Justice for action), the Secretary of Labor would be able to start injunction proceedings on his own. Proceedings for willful obstruction of administration of the Act could result in fines of up to $500, a year in jail, or both. However, private citizens who want to prosecute under the Act would have to give the Secretary 60 days in which to seek compliance through conciliation before they could start suit. The Secretary will issue Regulations on record keeping, investigations and the like, when the bill becomes law.

What to do. Start now to look over your age policies in hiring, for promotions and other job benefits. If age is a factor in personnel decisions, be prepared to prove the reasons aren't discriminatory.

Mr. Speaker, about 40 million older workers would be protected by this legislation. The protection is needed, and the pending bill would provide it in a reasonable, workable, and just way. I urge our colleagues to pass this bill.

The SPEAKER pro tempore. The question is on the motion of the gentleman from Kentucky that the House suspend the rules and pass the bill H.R. 13054.

The question was taken.

Mr. ERLENBORN. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER pro tempore. Evidently a quorum is not present.

The Doorkeeper will close the doors, the Sergeant at Arms will notify Members, and the Clerk will call the roll.

The question was taken; and there were—yeas 344, nays 13, not voting 75, as follows:

[Roll No. 422]

YEAS—344

Adams	Dow	Irwin
Addabbo	Dowdy	Jacobs
Albert	Downing	Jarman
Anderson, Ill.	Dulski	Joelson
Anderson, Tenn.	Duncan	Johnson, Calif.
	Eckhardt	Johnson, Pa.
Andrews, Ala.	Edwards, Ala.	Jones, Ala.
Andrews, N. Dak.	Edwards, Calif.	Jones, N.C.
	Edwards, La.	Karsten
Arends	Ellberg	Karth
Ashbrook	Erlenborn	Kastenmeier
Ashmore	Esch	Kazen
Ayres	Eshleman	Kee
Baring	Evans, Colo.	Keith
Barrett	Everett	Kelly
Belcher	Evins, Tenn.	King, Calif.
Bennett	Fallon	King, N.Y.
Berry	Farbstein	Kirwan
Bevill	Fascell	Kluczynski
Biester	Feighan	Kornegay
Bingham	Fino	Kuykendall
Blackburn	Fisher	Kyl
Blanton	Flood	Kyros
Blatnik	Flynt	Laird
Boggs	Foley	Langen
Bolton	Ford, Gerald R.	Leggett
Bow	Ford, William D.	Lennon
Brademas		Lipscomb
Brasco	Fraser	Lloyd
Bray	Friedel	Long, La.
Brinkley	Fulton, Pa.	Long, Md.
Brock	Fulton, Tenn.	McCarthy
Brooks	Fuqua	McClory
Brotzman	Galifianakis	McClure
Brown, Calif.	Gallagher	McCulloch
Brown, Mich.	Gardner	McDade
Brown, Ohio	Garmatz	McDonald, Mich.
Broyhill, N.C.	Gathings	
Broyhill, Va.	Gettys	McEwen
Buchanan	Giaimo	McFall
Burke, Fla.	Gibbons	McMillan
Burke, Mass.	Gilbert	Macdonald, Mass.
Burleson	Gonzalez	
Burton, Calif.	Goodell	MacGregor
Burton, Utah	Goodling	Machen
Bush	Gray	Mahon
Byrne, Pa.	Green, Pa.	Mailliard
Byrnes, Wis.	Griffiths	Marsh
Cabell	Gross	Martin
Cahill	Grover	Mathias, Calif.
Carey	Gubser	Matsunaga
Carter	Gurney	May
Casey	Hagan	Mayne
Cederberg	Haley	Meeds
Chamberlain	Hall	Meskill
Clancy	Halpern	Michel
Clark	Hamilton	Miller, Calif.
Clawson, Del	Hammer-schmidt	Miller, Ohio
Cleveland		Mills
Cohelan	Hanley	Minish
Collier	Hanna	Mink
Conable	Hansen, Idaho	Minshall
Conte	Hansen, Wash.	Mize
Conyers	Harrison	Moore
Corbett	Harsha	Moorhead
Corman	Harvey	Morris, N. Mex.
Cowger	Hathaway	Morse, Mass.
Cramer	Hawkins	Mosher
Culver	Hays	Moss
Cunningham	Hébert	Murphy, Ill.
Daniels	Hechler, W. Va.	Murphy, N.Y.
Davis, Ga.	Helstoski	Myers
Davis, Wis.	Henderson	Natcher
Dawson	Herlong	Nedzi
de la Garza	Hicks	Nix
Delaney	Holifield	O'Hara, Ill.
Dellenback	Holland	O'Hara, Mich.
Denney	Hosmer	O'Konski
Dent	Howard	Olsen
Derwinski	Hull	Patman
Devine	Hungate	Patten
Dingell	Hunt	Pelly
Dole	Hutchinson	Pepper
Donohue	Ichord	Perkins

92D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 92-238

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971

JUNE 2, 1971.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HAWKINS, from the Committee on Education and Labor, submitted the following

REPORT

together with

MINORITY AND SEPARATE VIEWS

[To accompany H.R. 1746]

The Committee on Education and Labor, to whom was referred the bill (H.R. 1746) to further promote equal employment opportunities for American workers, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF LEGISLATION

The basic purpose of H.R. 1746 is to grant the Equal Employment Opportunity Commission authority to issue, through well established procedures, judicially enforceable cease and desist orders. The bill would transfer the functions and responsibilities of the Office of Federal Contract Compliance (now in the Department of Labor—pursuant to Executive Order 11246) to the Equal Employment Opportunity Commission; and transfer the Attorney General's authority in practice or pattern discrimination suits to the Equal Employment Opportunity Commission. The bill would broaden jurisdictional coverage by deleting the existing exemptions of State and local government employees and of certain employees connected with educational institutions. The bill would extend some protection to Federal employees. One year after enactment, coverage is extended to employers and labor unions with eight or more employees or members, a reduction from the present requirement of 25 employees or members.

48-006

When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. In a study conducted by Theodore Kaplow and Reece J. McGee, it was found that the primary factors determining the hiring of male faculty members were prestige and compatability, but that women were generally considered to be outside of the prestige system altogether.[6]

The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their fuure development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the provisions of the Act.

EMPLOYERS AND LABOR UNIONS WITH EIGHT OR MORE EMPLOYEES OR MEMBERS

The bill amends section 701 of the Act, by changing the jurisdictional reach of Title VII to include all employers and labor unions with eight or more employees or members, effective one year after enactment (section 2 of the bill). The present coverage is 25 or more employees or members.

The committee feels that discrimination in employment is contrary to the national policy and equally invidious whether practiced by small or large employers. Because of the existing limitation in the bill proscribing the coverage of Title VII to 25 or more employees or members, a large segment of the Nation's work force is excluded from an effective Federal remedy to redress employment discrimination. For the reasons already stated in earlier sections of this report, the committee feels that the Commission's remedial power should also be available to all segments of the work force. With the amendment proposed by the bill, Federal equal employment protection will be assured to virtually every segment of the Nation's work force.

TESTING

Section 8 of the bill amends subsection 703(h) of the Act and perfects the Title VII provisions dealing with testing and apprenticeship training. Tests, while they are a useful and necessary selection device for management purposes, often operate unreasonably and unnecessarily to the disadvantage of minority individuals. General intelligence tests commonly used by employers as selection devices for hiring and promotion deprive minority group members of equal employment opportunities.[7] Culturally disadvantaged groups—groups

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[6] See generally, Kaplow and McGee, *The Academic Marketplace*, Anchor Edition (Garden City: 1965).

[7] See e.g., M. Culhane, "Testing the Disadvantaged," *The Journal of Social Issues* (April, 1965); D. Goslin, *The Search for Ability: Standarized Testing on Social Perspective*, (New York: Russell Sage Foundation (1963)); R. Krug, "The Problem of Cultural Bias in Selection," *Selecting and Training Negroes for Management Positions*, Princeton: Educational Testing Service (1965).

which because of low incomes, substandard housing, poor education, and other "atypical" environmental experiences—perform less well on these types of tests on the average than do applicants from middle class environments. The net result is that members from culturally disadvantaged groups are screened out of employment and training programs merely because of their failure to score well on such tests. Such tests are often irrelevant to the job to be performed by the individual being tested and uncritical reliance on test results may not aid management decisions and selection of personnel, but will screen out the disadvantaged minority individual.

In a report issued in 1970, *Personnel Testing and Employment Opportunity*, the Commission describes the ways in which employment tests can discriminate against minority groups. An aptitude test that fails to predict job performance in the same way for both minorities and whites, or fails to predict job performance at all is an invalid test. If such a test is weighted to differentiate between blacks and whites, it is similarly discriminatory. Tests may discriminate in the social sense if they deny equal opportunity for consideration. A test which tends to discriminate generally operates in the following manner: (a) when scores on it tend to differentiate between identifiable sub-groups where sub-grouping itself is not a relevant factor, and either (b) scores for the lower group underpredict performance on the job when the standards of the upper group are applied, or (c) scores on the test do not predict job performance of either group.

The Supreme Court recently examined the problem of employment testing and its relationship to employment discrimination in its decision in *Griggs* v. *Duke Power Co.*, ——— U.S. ———, 91 S. Ct. 849 (1971). In its decision, the court held that employment tests, even if valid on their face and applied in a non-discriminatory manner, were invalid if they tended to discriminate against minorities and the company could not show an overriding reason why such tests were necessary. At page 5 of its opinion, the Court stated:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices.

The Court stated further, on page 6 of its opinion, that:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity only in the sense of the fabled offer of milk for the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account . . . . The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business neces-

sity. If an employment practice which excludes Negroes cannot be shown to be related to job performance, the practice is prohibited.

The provisions of the bill are fully in accord with the decision of the Court and with the testing guidelines established by the Commission. The addition of the requirement for a bona fide occupational qualification which is reasonably necessary to perform the normal duties of the position to which it is applied requires that employers, who use employment tests as determinants for qualifications of employees for a particular job, must determine whether the test is necessary for the particular position to which it is applied. Even after such determination, if the use of the test acts to maintain existing or past discriminatory imbalances in the job, or tends to discriminate against applicants on the basis of race, color, religion, sex or national origin, the employer must show an overriding business necessity to justify use of the test.

Section 8 perfects Title VII's provisions with respect to testing and apprenticeship training. With regard to testing, the amendment is limited to tests for particular positions; it is not intended to apply to tests given to ascertain potential ability to undertake apprenticeship or other learning capacities. Of course, tests given for apprenticeship and related status must satisfy the requirement that the test, its administration or action upon the results, is not designed, intended, used, or have the effect of discriminating because of race, color, religion, sex or national origin.

FEDERAL EMPLOYMENT

The bill adds a new section 717 (section 11 of the bill) which, in paragraphs (a) and (b), gives the Equal Employment Opportunity Commission the authority to enforce the obligations of equal employment opportunity in Federal employment.

The Federal service is an area where equal employment opportunity is of paramount significance. Americans rely upon the maxim, "government of the people," and traditionally measure the quality of their democracy by the opportunity they have to participate in governmental processes. It is therefore imperative that equal opportunity be the touchstone of the Federal system.

The prohibition against discrimination by the Federal Government, based upon the due process clause of the fifth amendment to the Constitution, was judicially recognized long before the enactment of the Civil Rights Act of 1964.[8] And Congress itself has specifically provided that it is "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin. . . ." (5 U.S.C. § 7151 (Supp. II 1965, 1966)).

The primary responsibility for implementing this stated national policy has rested with the Civil Service Commission, pursuant to Executive Order 11246 (1964) as clarified by Executive Order 11748.

In his memorandum accompanying Executive Order 11478, President Nixon stated that "discrimination of any kind based on factors

[8] See *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S. Ct. 693 (1954), and cases cited therein.

plaints of discrimination in Federal employment and establish appropriate procedures for an impartial adjudication of the complaints.

An employee of a Federal agency may have recourse to a civil action, as provided in section 715 (discussed infra), if he is not satisfied with the disposition of his complaint.

Section-by-Section Analysis

Section 1

This section contains the enacting clause and style of the Act.

Section 2, Jurisdiction

Section 701(a).—This subsection defines "person" to include State and local governments, governmental agencies and political subdivisions.

Section 701(b).—This subsection would extend coverage of employers to those with eight or more employees at the end of the first year. This subsection would broaden the meaning of "employer" to include State and local governments and the District of Columbia departments or agencies (except those subject by statute to procedures of the Federal competitive service as defined in 5 USC 2102).

Section 701(c).—This subsection eliminates the exemption for agencies of the States or of political subdivisions of States from the definition of "employment agency" in order to conform with the expanded coverage of State and local governments in section 701(a) and (b).

Section 701(e).—This subsection is revised to include coverage of labor organizations with eight or more members after the first year.

Section 701(h).—This subsection is revised to include "any governmental industry, business, or activity" in the definition of "industry affecting commerce."

Section 3. Educational Institutions

Section 702.—Comparable to present Section 702. The exemption currently provided to certain employees (primarily teachers) of educational institutions is deleted.

Section 4. Employment

Section 706(a).—New Section. The Commission is empowered to prevent any person from engaging in any unlawful employment practice as set forth in Sections 703 or 704.

Section 706(b).—Comparable to present Section 706(a). The requirement that aggrieved person's charges be made under oath is deleted. Charges shall contain such information as the Commission requires. Charges may also be filed on behalf of persons aggrieved. The Commission shall make its finding as to reasonable cause as promptly as possible, and so far as is practicable, not later than 120 days from the filing of the charge, or when deferral is applicable under subsection (c) or (d), from the date on which the Commission is authorized to take action with respect to the charge. If reasonable cause is not found, the Commission shall dismiss the charge, giving prompt notification to the parties. The conciliation and confidentiality provisions are retained.

Section 706(c).—Comparable to present Section 706(b). Charges of persons in FEPC States may be filed with the Commission, but the lat-

ter may take no action until 60 days after commencement of proceedings in the appropriate State or local agency (120 days if a new agency). The latter proceeding shall be deemed to have commenced at the time a written statement of the facts is sent to such agency by certified mail.

Section 706(d).—Comparable to present Section 706(c).

Section 706(e).—Comparable to present Section 706(d). The 90 day filing period is expanded to 180 days, and the 210 day period to 300 days (or 30 days after receiving notice of termination of proceedings, whichever comes earlier). Provision is added requiring that a copy of the charge be served on the respondent as soon as practicable after filing.

Section 706(f).—Comparable to present Section 706(e). After attempting to secure voluntary compliance under subsection (b), if the Commission determines (which determination is not reviewable in any court) that it is unable to secure from the respondent a conciliation agreement acceptable to the Commission and the person aggrieved, the Commission shall issue and cause to be served upon the respondent a complaint stating the facts upon which the allegation of the unlawful employment practice is based, together with a notice of hearing before the Commission, or a member or agent of it, at a specified place not less than 5 days after service of the complaint and notice. Any member of the Commission who filed a charge in any case shall not participate in a hearing on any complaint arising out of such charge, except as a witness.

Section 706(g).—New Section. Respondent has the right to file an answer to the complaint and with the Commission's permission, may amend his answer at any time if deemed reasonable. Respondent and the person aggrieved shall be parties and may appear at any stage of the proceedings with or without counsel. The Commission may grant others the right to intervene or file briefs or make oral arguments as amicus curiae, or for other purposes as it considers appropriate. All testimony shall be taken under oath and shall be reduced to writing.

Section 706(h).—New Section. If the Commission finds that respondent has engaged in an unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served upon the respondent and aggrieved person an order requiring the respondent to cease and desist from such unlawful employment practice and take such affirmative action (including reinstatement or hiring with or without back pay) as will effectuate the policies of the Act. Interim earnings or amounts earnable with reasonable diligence operate to reduce the backpay otherwise allowable. Such order may further require the respondent to make reports from time to time showing the extent to which he has complied with the order. If the Commission finding is that no unlawful employment practice occurred, it shall state its findings of fact and so notify the respondent and complainant of an order dismissing the complaint.

Section 706(i).—New Section. After a charge has been filed and until the record has been filed in court, the proceedings may at any time be ended by agreement between the Commission and the parties and the Commission may at any time, upon reasonable notice, modify or set aside, in whole or in part, any order or finding issued or made by