Testimony of

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Thank you, Chairmen Leahy and Ranking Member Sessions for inviting me to tell my story and state my position regarding the outcome of the Supreme Court decision in my case, Gross v. FBL.

I was born in 1948 in Creston, Iowa, and lived in Chariton, Iowa until first grade, when we moved to Mt. Ayr, Iowa. My father was an Iowa Highway Patrolman and my mother was a third grade teacher. Mt. Ayr is a small town in southern Iowa of about 1,700. (My dad always said the population never changed because whenever a baby was born, some guy sneaked out of town!) Mt. Ayr is in Ringgold County, which was always called the "poverty" county because it traditionally had the lowest per capita income in Iowa. It is the only county in Iowa without a single stoplight. The nearest "city" was Creston, population about 7,000, which was 30 miles away. Growing up in a small town in the 50's was like living in a Norman Rockwell painting. It's farm country.

I spent most of my summers when I was young working on my grandpa's farm, and was fortunate to have my dad, both grandfathers and many others as mentors and role models. One of the lessons I learned from all of them was to always find the hardest working person wherever I went, and make sure I worked at least 10% harder than that person. They assured me it was the "secret" to success. It's the same advice I passed on to my son. It was never that difficult, and it always worked for us.

Much of my childhood was defined by my health issues. I developed chronic ulcerated colitis at age five, and spent 25 years in constant chronic pain. I was kept alive for many years by heavy daily doses of cortisone. However, I learned how to deal with the pain at an early age and function at a very high level. For instance, my last two summers in high school, I started my days at 5:00 to take papers to nearby towns, came home and did chores (I always rented pastures and raised sheep and horses), then went to work for the county scooping gravel on roads all day until 5, when I headed to the hay fields to pick up hay bales until dark. During the school year, I delivered the papers, did chores, and then was a janitor for the vocational agriculture building before and after school. I was also president of the FFA (the largest chapter in the state), on the student council, editor of the paper, etc. On Sundays, I had rural paper routes that I started at 3:00 a.m. My sophomore year, I had a bad accident with my horse and missed an entire semester with a badly broken leg. I made up for that semester during the second semester.

I started going with my wife, Marlene, the week before our junior prom in 1965, and we've been together ever since. We were engaged to be married soon after high school graduation and one year later were married after I completed my freshman year of college and transferred to Drake University in Des Moines, Iowa. During my freshman year, in addition to a part-time job, I was class president, editor of the school paper, member of the student council and other organizations. I did not ask for nor accept a single cent of help from my parents in getting my college degree. They were very lean years for a young married couple.

By the time I graduated, we had our two children. I spent the last two years of college working more than full-time in a factory, and we got student loans for the amount I couldn't earn. I worked every spare minute to take care of my family and get my education, in spite of my bad health. I weighed 87 pounds when I graduated from Drake University with a B.S. degree in Personnel Management.

Upon graduation, I went to work as a claims adjuster for Farm Bureau (FBL). I had always had old "junker" cars that I kept pieced together and running the best I could, and was attracted by the company car. Also, aptitude tests that I took at that time scored very high for an adjusting career.

We moved to a rented farm house in southeast Iowa, and were there for about five years when Farm Bureau had an opening for a Regional Manager on the Federation side of the organization in southwest Iowa, closer to my home town. I took that job, and Marlene became a district sales Manager with Avon, so we both had company cars and life was finally comfortable, financially. I still had my strong work ethic, and excelled at this quasi-political job until 1978, when I was approached by a seed corn company with an offer to be a sales manager for Nebraska and Southwest Iowa..

In 1979, soon after I started my seed corn career, the doctors told me I probably only had a few more months to live because of the condition of my colitis. On December 19 of that year, they removed my entire colon and a large part of my small intestine. With that surgery, I became pain-free for the first time in my memory.

The family-owned seed corn company sold out to British Petroleum in the eighties, and most of the sales managers and I declined to go with them. I applied to Farm Bureau to come back as an adjuster, and was hired again in 1987.

I was assigned three counties, but volunteered to also work the two counties I was driving through to get to them, making me the highest volume adjuster in the company. I worked long hours and excelled at that, as well as taking professional classes at a rate never before attempted. By doing that, and also coming up with some better ways of doing things, I got noticed and promoted. Once I had all of my professional designations, (CPCU, CLU, ChFC, AIC and AU) I also began teaching several classes to other employees. To make a long story short, I kept adding value to the company and coming up with successful proposals and implementing them until I became Claims Administration Vice President. In 1997, I was asked to rewrite all of Farm Bureau's policies and combine them into a totally unique package policy. I did that in record time (working extremely long hours) and gave them the modular package policy they are now using as their exclusive product. In addition, I was writing a quarterly newsletter that was being circulated around the country and was managing the subrogation and call center departments (which I proposed and developed from scratch), the property claims area, the physical damage claims area, the work comp area, the medical claims review area, the claims information technology area, etc. all of which were functioning at extremely high levels.

My performance and contributions were reflected in my annual reviews, which were in the top 3-5% of the company for 13 consecutive years. That was my status with the company at the time of my first demotion in 2000, which also affected several others.

In 2003, all claims department employees over age fifty with a title of supervisor and above were demoted on the same day. In my case, I was replaced with a person I had hired who was in her early forties, but who did not have the required skills for the position as stated on the company job description, nor did she have my breadth of experience.

I filed an age discrimination suit in Federal Court, and a jury ruled in my favor after a very aggressive week-long trial in 2005. FBL appealed to the 8th Circuit on the "mixed motive" jury instruction, and we ended up in the U.S. Supreme Court in 2009. The High Court accepted certiorrari on the single issue of whether direct evidence was required to obtain a mixed-motive jury instruction. Rather than answer that question, however, they vacated the 8th Circuit's decision, ignored decades of precedent and the clear intent of the ADEA, and set a new standard of proof for age discrimination.

In the meantime, I endured seven years of retaliation at FBL, and retired in December, 2009 because the stress was exacting a physical toll.

I've learned that some of the platitudes I've heard over the years are true. One of those is that "justice delayed is justice denied". It's been more than seven years since the wholesale demotions that started my case. That is a long time to go to an office every day knowing that I would endure retaliation for exercising a legal right. This all began in January of 2003, in a much different economic environment. My employer merged with the Kansas Farm Bureau. However, they did not want to add any more employees who were over the age of 50, and offered all the Kansas employees who were over 50 with a certain number of years of employment a buyout, to purge them from the company. At the same time, in Iowa and the other states of operation, they demoted virtually everyone who was over 50 and was a supervisor or above. They claimed that this was not discrimination, but simply a reorganization.

Now, if I may, I want to put my case and life in context for what is the much larger and broader issue of age discrimination.

My family, on both sides, has always been very conservative, in lifestyle and politically. My great-uncle was H.R. Gross, congressman from Iowa's third district from 1948-1968. His moniker was "watchdog of the treasury". Prior to that, he was the news broadcaster for WHO radio in Des Moines, Iowa at the same time as Ronald Reagan.

I am a hard-working, patriotic 61 year old, as are my friends. I did not pursue this case just for myself. I had watched the new management at FBL push the envelope of what they could get by with further and further without being challenged. Most people are simply just not in a position to fight back, financially, emotionally or intellectually. I

was in that position, and I was raised to always stand up to bullies. Many of my friends are also farm or small town "kids" who now feel like they are the forgotten minority. Many of them have been forcibly retired or laid off. Some have been aggressively looking for work for months, only to find doors closed when they reveal the year they graduated. Others have accepted janitor jobs in spite of successful careers and college educations. They all know that age discrimination is very real and pervasive. They are coloring their hair and doing everything possible to look young enough to get an interview. This fight has become more about them than it is for me. I am just one person in this fight, but I know that what happens here will affect literally millions. That is what this is about, making the protection of the law for older people no less than the protection afforded to people of color, for women, or for people of different faiths.

One of the things I have always counted on was the rule of law. I believed it was consistent, it was blind, and it applied to all equally. If the rule of law had been applied to my case, I would have won at the Supreme Court level. Instead, they threw out 20 years of case law precedent and gutted the clear intent of congress and the ADEA. The jury in my case heard the law as written, listened to a week of testimony from both sides, and applied the law to the evidence. They didn't parse each word like the attorneys and judges tend to do, they just measured the law as stated against the evidence. As Souter said during the oral arguments, "juries are smarter than judges".

Age discrimination suits, I've learned, are very hard to win under any rule of law, and only a small percentage of them prevail. And, the process is onerous and not well known to anyone but lawyers who specialize in that area of practice. For instance, if a complaint is not filed with the Civil Rights Commission within three-hundred days and a Right to Sue letter is not issued by them, the claim is statutorily estopped. That process eliminates frivolous lawsuits not only because the short time frame is not well known, but also because the Commission will not grant a Right to Sue letter unless a prima facie case is shown. Once I received the Right to Sue Letter, it took two years to get to a jury trial. After a jury of my peers heard the evidence and the law and decided in my favor, the appeals process began four years ago. We are now facing the prospect that we could be starting all over with a new trial under a new set of rules, five years after the first trial. In that time, witnesses have moved out of state and memories have faded. While we are confident that our evidence will meet even the new higher standard, a new trial and new round of appeals could end up with this litigation consuming 20 percent of my life instead of the 10 percent it has already exacted. That, in itself, is unjust and extremely stressful.

I feel like my case has been hijacked by the high court for the sole purpose of rewriting both the letter and the spirit of the ADEA. I believe the overwhelming majority of my fellow citizens share my disappointment in activist judges, from either party, who use their personal ideology to misinterpret the law as clearly intended. In this case, the clear intent was to abolish discrimination in the workplace, not to make exceptions for it. I am especially mortified when the only people (judges) who are immune from age discrimination vis a vis their lifetime appointments, can rewrite laws that are designed to protect people in the "real" world.

As our former Iowa Lieutenant Governor recently stated in an editorial, "the party of Abraham Lincoln is against discrimination in all its forms". She (Joy Corning) happens to be a Republican, but this should be a non-partisan issue. The branch of government closest to the people long ago recognized that age discrimination was a problem, and they legislated against it. I relied on that legislation. Now, it appears, the Supreme Court has decided that age discrimination is not like all the other forms of discrimination and should have it's own set of (much tougher) rules. To accomplish this outcome, the Court had to disregard its own rules. They did not address the single issue upon which certiorari was granted, and they allowed the opposing side to introduce for the first time an entirely new argument that had not been previously raised nor briefed. This was clearly motivated by ideology, much like it was in the Lily Ledbetter case. In both instances, the Court seemed to be directly challenging the congress to write new and tighter legislation if they don't want 5 lifetime appointees to circumvent their clear intent. I don't know Lily Ledbetter, but I think all citizens owe both her and congress a "thank you" for correcting a clearly unjust ruling. It is my understanding, however, that while Ms. Ledbetter got an act named after her, she still did not receive justice in the way of an award. That was unfair both to her and to her attorneys who, judging from my own experience, put in countless hours fighting for her and for a common sense ruling.

My own attorneys, Beth Townsend and Mike Carroll from Des Moines, Iowa, have likewise been fighting tirelessly on my behalf for over seven years without a dime of compensation. They took this case on a contingency basis because they believe in me, in the evidence, and now in the need to get some essential corrective action from our elected representatives. This case has become much larger in scope than we ever imagined, and thus much more expensive. I have personally spent over $30,000 in costs and expenses. That is money that was intended to help my grandchildren get a college education so they wouldn't have to starve their way through like I did.

I have been encouraged by the comments made about my case by Senators Harkin and Leahy, Representatives Miller and Andrews, and others. And I am grateful to all who signed on as sponsors. However, I am also keenly aware of the current agenda faced by this congress. I am hopeful that each of you recognize that this also needs immediate attention. Headline after headline have proclaimed that it is now easier for employers to discriminate based on age, following the decision in my case. I am not at all comfortable with having my name associated with a decision that is now causing pain to other employees in my age bracket simply because I took a stand seven years ago. And, as expected, my employer is pushing for a new trial as quickly as possible to take advantage of the new court-made law before it can be corrected. For both reasons, I urge corrective legislation be taken as soon as possible, but there has recently become another reason that is even more compelling:

The tentacles of the Court's decision into other areas of employment discrimination are many, and growing. There have already been hundreds of Federal Court cases citing Gross v. FBL to deny access to the legal system, or to impose the new and much higher standards of proof on victims of workplace discrimination, ranging from the Americans

with Disabilities Act to the Juror Protection Act, and the list is growing monthly. This is an example of how one seemingly innocuous decision on one case, that went largely unnoticed by the public and media, can have serious negative consequences for all workplace discrimination victims, except those covered under Title 7. Congress has enacted legislation to prevent discrimination in each of those areas, and the courts are using Gross v. FBL to diminish the civil rights of millions by applying the decision universally. In one day, the civil rights advancements congress achieved over the past four decades were seriously set back by a 5 to 4 decision on an issue that was not presented to them through the appeals process.

I hope my story puts a real and human face on this issue for you. I am before you as a man who agonized over the decision to pursue this case, knowing it would not be an easy ride, and that I would effectively be burning my career bridges behind me once I was branded as "litigious". My wife and I prayed about it, decided it had to be done, and then we left the outcome in God's hands. We never dreamed it would end up here. If my experience eventually prevents anyone else from having to endure the pain and humiliation of discrimination, I will always believe that this effort was part of God's plan for my life.

What you do here with what the Court did to your law may or may not help me, but I know for sure you are in a position to help millions of your constituents who have stories like mine. Justice Thomas challenged you to clearly state that age has to be a "motivating factor" in age discrimination if that is what you intended. The Protecting Older Workers Against Discrimination Act does that, and I urge you on behalf of myself and millions of others who want to continue working, to pass it in the same bi-partisan spirit you've shown in the past on civil rights issues.

Sincerely and Respectfully,

Jack Gross, CPCU, CLU, ChFC, AIC, AU