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 PLAINTIFF-APPELLANT RICHARD M. VILLARREAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following is a complete list of persons and entities who, to the best of Plaintiff-Appellant's knowledge, have an interest in the outcome of this case, pursuant to Eleventh Circuit Rule 26.1-1:

1. AARP - Amicus curiae in support of Plaintiff-Appellant Richard M. Villarreal
2. Akin Gump Strauss Hauer & Feld LLP - Law firm for amicus curiae Chamber of Commerce of the United States
3. Almond, John J. - Attorney for Plaintiff-Appellant Richard M. Villarreal
4. Altshuler Berzon, LLP - Law firm for Plaintiff-Appellant Richard M. Villarreal
5. Beightol, Scott - Former Attorney for Defendant-Appellee Pinstripe, Inc.
6. Benson, Paul - Former Attorney for Defendant-Appellee Pinstripe, Inc.
7. Berger & Montague, P.C. - Law firm for Plaintiff-Appellant Richard M. Villareal
8. British American Tobacco p.l.c (BTI) - A publicly traded company with ownership interest in Brown & Williamson Holdings, Inc., the indirect holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellee R.J. Reynolds Tobacco Company

9. Brown & Williamson Holdings, Inc. - Private company and holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellee R.J. Reynolds Tobacco Company
10. Brusoski, Donna J., attorney for amicus curiae U.S. Equal Employment Opportunity Commission
11. Campbell, R. Scott - Former Attorney for Defendant-Appellee Pinstripe, Inc.
12. CareerBuilder, LLC - Private company and former Defendant
13. Carson, Shanon J. - Attorney for Plaintiff-Appellant Richard M. Villarreal
14. Chamber of Commerce of the United States - Amicus curiae in support of Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
15. Chen, Z.W. Julius - Attorney for amicus curiae Chamber of Commerce of the United States
16. Cielo, Inc. - Name under which Defendant-Appellee Pinstripe, Inc. now operates
17. Dick, Anthony J. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
18. Dreiband, Eric S. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
19. Eber, Michael L. - Attorney for Plaintiff-Appellant Richard M. Villarreal

20. Finberg, James M. - Attorney for Plaintiff-Appellant Richard M. Villarreal
21. Girouard, Mark J. - Attorney for amicus curiae Retail Litigation Center, Inc.
22. Goldstein, Jennifer S. - Attorney for amicus curiae U.S. Equal Employment Opportunity Commission
23. Greenberg Traurig, LLP - Former law firm for Defendant-Appellee Pinstripe, Inc.
24. Hunt, Hyland - Attorney for amicus curiae Chamber of Commerce of the United States
25. Johnson, Mark T. - Attorney for Plaintiff-Appellant Richard M. Villarreal
26. Jones Day - Law firm for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
27. Kohrman, Daniel B. - Attorney for amicus curiae AARP
28. Livingston, Donald - Attorney for amicus curiae Chamber of Commerce of the United States
29. Lopez, P. David - General Counsel for amicus curiae U.S. Equal Employment Opportunity Commission
30. Marshall, Alison B. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

31. McArthur, Nikki L. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
32. McCann, Laurie - Attorney for amicus curiae AARP
33. McClain, Sherron T. - Former attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
34. Michael Best & Friedrich LLP - Former law firm for Defendant-Appellee Pinstripe, Inc.
35. Nilan Johnson Lewis PA - Law firm for amicus curiae Retail Litigation Center, Inc.
36. Pinstripe Holdings, LLC - Private company and parent corporation of Pinstripe, Inc., now operating as Cielo, Inc.
37. Pinstripe, Inc. - Private company and Defendant-Appellee, now operating as Cielo, Inc.
38. Pitts, P. Casey - Attorney for Plaintiff-Appellant Richard M. Villarreal
39. Postman, Warren - Attorney for amicus curiae Chamber of Commerce of the United States
40. Retail Litigation Center, Inc. – Amicus curiae in support of Defendant-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

41. Reynolds American Inc. (RAI) - Publicly held company and parent company of Defendant-Appellee R.J. Reynolds Tobacco Company
42. R.J. Reynolds Tobacco Company - Private company and Defendant-Appellee
43. R.J. Reynolds Tobacco Holdings, Inc.- Private company and parent company of Defendant R.J. Reynolds Tobacco Company
44. Rogers & Hardin LLP - Law firm for Plaintiff-Appellant Richard M. Villarreal
45. Schalman-Bergen, Sarah R. - Attorney for Plaintiff-Appellant Richard M. Villarreal
46. Schmitt, Joseph G. - Attorney for amicus curiae Retail Litigation Center, Inc.
47. Schneider, Todd M. - Attorney for Plaintiff-Appellant Richard M. Villarreal
48. Schneider Wallace Cottrel Brayton Konecky, LLP - Law firm for Plaintiff-Appellant Richard M. Villarreal
49. Seyfarth Shaw LLP - Law firm for former Defendant CareerBuilder, Inc.
50. Smith, Dara - Attorney for amicus curiae AARP
51. Smith, Frederick T. - Attorney for former Defendant CareerBuilder, LLC
52. Story, Richard W. - Trial Judge, U.S. District Court for the Northern District of Georgia

53. Sudbury, Deborah A. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

54. Todd, Kate Comerford - Attorney for amicus curiae Chamber of Commerce of the United States

55. U.S. Equal Employment Opportunity Commission - Amicus curiae in support of Plaintiff–Appellant Richard M. Villarreal

56. Villarreal, Richard M. - Plaintiff-Appellant

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58. White, Deborah R. - Attorney for amicus curiae Retail Litigation Center, Inc.

59. Wojdowski, Haley A. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

STATEMENT REGARDING EN BANC ORAL ARGUMENT

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

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

RULES

CONGRESSIONAL MATERIALS

ADMINISTRATIVE MATERIALS

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Plaintiff-Appellant does not adopt by reference any part of the brief of any other party.

STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

Because this matter arises under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, the district court had subject-matter jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1343(a)(4).

The district court entered final judgment on January 20, 2015, and Plaintiff-Appellant filed his Notice of Appeal on February 9, 2015. This Court has appellate jurisdiction under 28 U.S.C. §1291. Plaintiff-Appellant's appeal is timely under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF EN BANC ISSUES

(1) Whether the text, history, and purpose of §4(a)(2) of the Age Discrimination in Employment Act, 29 U.S.C. §623(a)(2), make it clear that Congress intended to permit challenges to hiring criteria whose effect is to deny employment to individuals 40 or older because of their age.

(2) Whether the EEOC's longstanding construction of §4(a)(2) as permitting such claims is reasonable and thus deserves deference.

(3) Whether this Court should continue to apply the equitable tolling principle established in *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), and repeatedly reaffirmed by this Court, that the EEOC charge-filing deadline is tolled while the charging party did not know and could not reasonably have learned that he had been a victim of unlawful discrimination.

(4) Whether, under that standard, Plaintiff-Appellant Richard M. Villarreal adequately pleaded a claim for equitable tolling by alleging facts which establish that a reasonably prudent person could not have become aware of the basis for Villarreal's ADEA claims until less than one month before the filing of his EEOC charge.

STATEMENT OF THE CASE

This is a collective action under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA"), challenging a policy of unlawful age discrimination applied in hiring regional sales representatives. Over the three-year period before the filing of Villarreal's EEOC charge, Defendant R.J. Reynolds Tobacco Company ("RJR") hired over 1,000 individuals to fill "Territory Manager / Sales Representative / Trade Marketing" positions throughout the country. Because of RJR's exclusionary "Resume Review Guidelines" and "Blue Chip TM" candidate profile, which instructed recruiting services Pinstripe and Kelly Services to target less experienced salespeople and "stay away from" those with more experience, almost all of the individuals hired—all but 19 of 1,024—were 39 years of age or younger, and hundreds of qualified older applicants were rejected. Villarreal alleges that, by applying hiring criteria whose purpose or effect was to discriminate against prospective employees because of age, RJR violated the ADEA.

I. FACTUAL BACKGROUND

A. RJR's Hiring Criteria Discriminated Against Individuals 40 Or Older.

From September 2007 through July 2010, RJR recruited and hired more than 1,000 individuals to fill Territory Manager positions around the United States. Appendix Volume I ("App. Vol. I"), Complaint, Dkt. No. 1, at 5 ¶10; Appendix

Volume II ("App. Vol. II"), Proposed First Amended Complaint, Dkt. No. 61-1, at 5 ¶9. A Territory Manager is assigned to a specific geographic region and is responsible for working with various tobacco retailers in that area to increase sales of RJR's products. App. Vol. I, Dkt. No. 1, at 5-6 ¶10; App. Vol. II, Dkt. No. 61-1, at 5 ¶9. Territory Managers also market and promote RJR's products directly to consumers. App. Vol. I, Dkt. No. 1, at 6 ¶10; App. Vol. II, Dkt. No. 61-1, at 5 ¶9.

RJR used recruiting services Kelly Services and Pinstripe to review applications for the Territory Manager position. App. Vol. I, Dkt. No. 1, at 6-7, 9 ¶¶13, 21; App. Vol. II, Dkt. No. 61-1, at 6, 8-9 ¶¶12, 20. In 2007 and 2008, RJR provided Kelly with "Resume Review Guidelines" to use when determining which candidates to refer to RJR for further interviews. App. Vol. I, Dkt. No. 1, at 7, 10 ¶¶14, 22; App. Vol. II, Dkt. No. 61-1, at 6, 9 ¶¶13, 21. The guidelines listed criteria for the "targeted candidate," including "2-3 years out of college" and "adjusts easily to changes." App. Vol. I, Dkt. No. 1, at 7 ¶15 & Exh. A; App. Vol. II, Dkt. No. 61-1, at 6-7 ¶14 & Exh. A. The guidelines instructed Kelly to "stay away from" various applicants, including those who had been "in sales for 8-10 years." App. Vol. I, Dkt. No. 1, at 7 ¶15 & Exh. A; App. Vol. II, Dkt. No. 61-1, at 7 ¶14 & Exh. A.

In 2009, after Pinstripe replaced Kelly, RJR and Pinstripe developed a profile of the "ideal" candidate for the Territory Manager position. App. Vol. I,

Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt. No. 61-1, at 9 ¶22. To create this profile, Pinstripe surveyed recent hires who were identified as ideal Territory Managers. App. Vol. I, Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt. No. 61-1, at 9 ¶22. Pinstripe's profile named the ideal candidate the "Blue Chip TM." App. Vol. I, Dkt. No. 1, at 10 ¶23 & Exh. B; App. Vol. II, Dkt. No. 61-1, at 9 ¶22 & Exh. B. Because RJR had discriminated on the basis of age in hiring Territory Managers since at least September 2007, the ideal candidate profile accorded a strong preference to younger applicants. App. Vol. I, Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt. No. 61-1, at 9 ¶22. The profile stated that 67% of the "Blue Chip TM" candidates had two years of work experience or less, while only 9% had more than five years of experience. App. Vol. I, Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt. No. 61-1, at 9 ¶22. Pinstripe used this profile, along with the "Resume Review Guidelines," when making hiring decisions. App. Vol. I, Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt. No. 61-1, at 9-10 ¶22.

Through Kelly and Pinstripe, RJR applied these criteria in making thousands of hiring decisions. App. Vol. I, Dkt. No. 1, at 11 ¶24; App. Vol. II, Dkt. No. 61-1, at 10 ¶23. As a result, the company hired almost no applicants over the age of forty: Of the 1,024 people RJR hired to fill the Territory Manager position from September 2007 to July 2010, only 19 (1.85%) were over 40. App. Vol. I, Dkt. No. 1, at 11 ¶24; App. Vol. II, Dkt. No. 61-1, at 10 ¶23. This was true even though

a much higher percentage of those who applied were over 40. The 2000 Census, for example, reported that more than 54% of individuals occupying positions similar to the Territory Manager position were over 40. App. Vol. I, Dkt. No. 1, at 11 ¶25; App. Vol. II, Dkt. No. 61-1, at 10 ¶24. Pinstripe likewise referred a disproportionately low number of older applicants to RJR. App. Vol. I, Dkt. No. 1, at 12 ¶25; App. Vol. II, Dkt. No. 61-1, at 10-11 ¶24. Over 49% of the 25,729 persons who applied for the Territory Manager position from February to July 2010 had ten years or more of sales experience. App. Vol. I, Dkt. No. 1, at 12 ¶25; App. Vol. II, Dkt. No. 61-1, at 11 ¶24. Pinstripe forwarded only 7.7% of those applications to the company for further consideration, while referring 45% of candidates with one to three years of experience. App. Vol. I, Dkt. No. 1, at 12 ¶25; App. Vol. II, Dkt. No. 61-1, at 11 ¶24.

B. Plaintiff Was Rejected For The Territory Manager Position Due To His Age.

Villarreal is a 58-year-old resident of Cumming, Georgia. App. Vol. I, Dkt. No. 1, at 3 ¶4; App. Vol. II, Dkt. No. 61-1, at 3 ¶4. He has significant sales experience and is well-qualified for the Territory Manager position. App. Vol. I, Dkt. No. 1, at 7 ¶15; App. Vol. II, Dkt. No. 61-1, at 6-7 ¶14. He applied for the Territory Manager position on six separate occasions between November 2007 and April 2012, but was rejected each time due to the preference for younger employees resulting from RJR's Resume Review Guidelines and Blue Chip TM

profile. App. Vol. I, Dkt. No. 1, at 3-4, 8, 9 ¶¶4, 16, 19, 20; App. Vol. II, Dkt. No. 61-1, at 3, 7, 8 ¶¶4, 15, 18, 19.

The first time that Villarreal applied for the Territory Manager position, on November 8, 2007, he was 49 years old, had more than eight years of sales experience, and was well-qualified for the position. App. Vol. I, Dkt. No. 1, at 6, 8 ¶¶11, 16; App. Vol. II, Dkt. No. 61-1, at 5-7 ¶¶10, 15. He learned of the position through the CareerBuilder website and uploaded his resume on RJR's website. App. Vol. I, Dkt. No. 1, at 6 ¶11; App. Vol. II, Dkt. No. 61-1, at 5 ¶10. Kelly Services applied RJR's Resume Review Guidelines when reviewing Villarreal's application, and rejected him due to his extensive sales experience and age. App. Vol. I, Dkt. No. 1, at 8 ¶16; App. Vol. II, Dkt. No. 61-1, at 7 ¶15. Neither Kelly Services nor RJR contacted Villarreal regarding his application or told him why his application had been rejected. App. Vol. I, Dkt. No. 1, at 6, 13 ¶¶12, 28; App. Vol. II, Dkt. No. 61-1, at 6, 12 ¶¶11, 28.

C. Plaintiff Learned Of RJR's Discriminatory Practices In 2010.

In April 2010, attorneys from Altshuler Berzon LLP contacted Villarreal. App. Vol. II, Dkt. No. 61-1, at 12-13 ¶¶29-30. They informed him that RJR had used the discriminatory Resume Review Guidelines when screening his November 2007 application. App. Vol. II, Dkt. No. 61-1, at 13 ¶30. This was the first time Villarreal learned about the Resume Review Guidelines and about RJR's practice

of discriminating against individuals age 40 or older when filling the Territory Manager position. App. Vol. II, Dkt. No. 61-1, at 13 ¶30. Those facts were not apparent to him, and could not have been apparent to him, before April 2010. *Id.* at 12 ¶ 27. Until that time, he had no reason to believe that his 2007 application for the Territory Manager position had been rejected because of his age. *Id.* at 12-13 ¶¶ 27, 30. In fact, he had never had any personal contact with RJR or its recruiters. App. Vol. I, Dkt. No. 1, at 13 ¶28; App. Vol. II, Dkt. No. 61-1, at 12 ¶28. Villarreal did not know who had reviewed his application, much less that RJR and its recruiters had relied on discriminatory criteria when making hiring decisions. App. Vol. II, Dkt. No. 61-1, at 12, 13 ¶¶28, 30.

Villarreal applied for the Territory Manager position again in June 2010. App. Vol. I, Dkt. No. 1, at 8 ¶17; App. Vol. II, Dkt. No. 61-1, at 7 ¶16. One week later, he received an email from RJR rejecting his application. App. Vol. I, Dkt. No. 1, at 8 ¶18; App. Vol. II, Dkt. No. 61-1, at 8 ¶17. The email stated that RJR intended to pursue other candidates, and said nothing about RJR's hiring guidelines. App. Vol. I, Dkt. No. 1, at 8-9 ¶¶18-19; App. Vol. II, Dkt. No. 61-1, at 8 ¶¶17-18. Villarreal applied for the Territory Manager position again in December 2010, May 2011, September 2011, and March 2012; each application was rejected. App. Vol. I, Dkt. No. 1, at 9 ¶20; App. Vol. II, Dkt. No. 61-1, at 8 ¶19.

II. PROCEDURAL HISTORY

On May 17, 2010, less than one month after first learning of RJR's discriminatory practices, Villarreal filed an EEOC charge alleging that RJR and its recruiters had discriminated against him on the basis of age in rejecting his November 2007 application. App. Vol. I, Dkt. No. 1, at 12 ¶27; App. Vol. II, Dkt. No. 61-1, at 11 ¶26. Villarreal subsequently amended his EEOC charge to include RJR's rejections of his later applications. App. Vol. I, Dkt. No. 1, at 13 ¶29; App. Vol. II, Dkt. No. 61-1, at 13-14 ¶31. On June 6, 2012, after receiving Notices of Right to Sue, Villarreal filed a collective action on behalf of all rejected applicants for the Territory Manager position who were age 40 or older at the time of application and who applied after RJR began discriminating on the basis of age. App. Vol. I, Dkt. No. 1, at 13-14 ¶¶30-31; App. Vol. II, Dkt. No. 61-1, at 14-15 ¶¶32-33.

The complaint alleged two violations of the ADEA. App. Vol. I, Dkt. No. 1, at 16-20 ¶¶36-50; App. Vol. II, Dkt. No. 61-1, at 16-21 ¶¶38-52. First, Villarreal alleged that RJR and its recruiters had engaged in a pattern or practice of intentional age discrimination. App. Vol. I, Dkt. No. 1, at 17-18 ¶¶41-42; App. Vol. II, Dkt. No. 61-1, at 18 ¶¶43-44. Second, he alleged that the defendants had applied hiring criteria—specifically, the "Resume Review Guidelines" and "Blue Chip TM" profile— that disproportionately disqualified individuals age 40 or

older. App. Vol. I, Dkt. No. 1, at 19-20 ¶¶45-50; App. Vol. II, Dkt. No. 61-1, at 19-20 ¶¶47-52.

Defendants thereafter filed a partial motion to dismiss. App. Vol. I, Dkt. No. 24. They argued that the ADEA does not authorize disparate impact claims challenging an employer's hiring decisions, and that all claims arising more than 180 days before Villarreal filed his EEOC charge, including those involving Villarreal's November 2007 application, were time-barred. App. Vol. I, Dkt. No. 24-1, at 5, 9.

The district court granted Defendants' motion. App. Vol. I, Dkt. No. 58. As to Villarreal's disparate impact claim, the court concluded that §4(a)(2) of the ADEA permits disparate impact claims but "is limited to employees and does not encompass hiring claims." *Id.* at 12. On the timeliness issue, the court acknowledged that "a limitations period does not start to run until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Id.* at 18 (quoting *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994)). The court concluded, however, that the facts necessary to invoke such tolling were pleaded with insufficient specificity because the original complaint did not disclose how Villarreal became aware of Defendants' unlawful conduct. *Id.* at 17-19. The court stated that "without knowing which facts alerted Plaintiff to his discrimination

claim or how he learned those facts," it "[could not] determine whether or when those facts should have become apparent to a reasonably prudent person." *Id.* at 18-19.

Villarreal sought leave to file an amended complaint that "specifically describe[d] what facts he learned, when he learned them, and why he could not possibly have learned those facts earlier." App. Vol. II, Dkt. No. 61, at 2. The proposed amended complaint described Villarreal's April 2010 communications with Altshuler Berzon LLP, the facts regarding RJR's hiring practices disclosed in that conversation, and the reasons why he had not learned those facts earlier. App. Vol. II, Dkt. No. 61-1, at 12-13 ¶¶29-30.

The district court denied Villarreal's motion to amend as futile. App. Vol. II, Dkt. No. 67, at 4-6. The court acknowledged that Villarreal had plausibly alleged that he was unable to discover the basis for a charge of discrimination during the charge-filing period. *See id.* at 5 (recognizing it "may be true" that "'even if [Villarreal] had undertaken the inquires . . . he would not have discovered the facts necessary to support a charge of discrimination'") (quoting App. Vol. II, Dkt. 66, at 11). Nonetheless, the court reasoned that Villarreal "ha[d] not alleged any misrepresentations or concealment that hindered Plaintiff from learning of any alleged discrimination" and that he "ha[d] not alleged any due diligence on his part to determine the status of his" November 2007 application. *Id.* at 5. Absent those

allegations, the court concluded, Villarreal's "proposed amendments do not assert a claim that can be saved by equitable tolling." *Id.* at 6.

On November 30, 2015, a panel of this Court reversed the district court's rulings on both issues. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1290 (11th Cir. 2015). The panel majority concluded that the ADEA's statutory language "can reasonably be read in more than one way" and that deference must be given to the EEOC's "view that §4(a)(2) protects any individual an employer discriminates against, regardless of whether that individual is an employee or job applicant." *Id.* at 1293, 1299, 1301.

The panel majority also concluded that the district court had misapplied Circuit precedent in concluding that Villarreal's pre-November 2009 claims were time-barred. *Id.* at 1303. The majority explained that the limitations period in employment discrimination cases is tolled "'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.* at 1303-04 (quoting *Reeb*, 516 F.2d at 930). The district court misapplied this standard both by concluding that tolling requires a showing of "misrepresentation by the employer," and by faulting Villarreal for failing to "undertake an entirely futile investigation into [RJR's] hidden discriminatory practices in the name of 'due diligence.'" *Id.* at 1304-05. Because the complaint included a "facially plausible claim" that a "reasonably prudent

person could not have discovered [RJR's] allegedly discriminatory practices" until shortly before Villarreal filed his EEOC charge, Villarreal's complaint "stated a claim for equitable tolling" sufficient to survive a motion to dismiss. *Id.* at 1306 & n.15.

Judge Vinson, sitting by designation from the U.S. District Court for the Northern District of Florida, dissented.

STANDARD OF REVIEW

This Court reviews *de novo* the dismissal of a complaint under Rule 12(b)(6). *Harris v. Ivax Corp.*, 182 F.3d 799, 802 (11th Cir. 1999). In doing so, the Court accepts all factual allegations as true. *Berkovitz v. United States*, 486 U.S. 531, 540, 108 S.Ct. 1954, 1960-61 (1988).

The district court's denial of leave to amend as futile is also reviewed *de novo*. *Harris*, 182 F.3d at 802. An amendment is futile only if the proposed complaint would be subject to dismissal under Rule 12. *See Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999).

SUMMARY OF ARGUMENT

The district court's holding that prospective employees may not pursue disparate impact claims under §4(a)(2) of the ADEA is inconsistent with the statutory text, the ADEA's central purposes, and the Supreme Court's interpretation of identical language in Title VII, which all show that Congress

intended for §4(a)(2) to protect prospective as well as current and former employees from arbitrary age discrimination. At the very least, it is reasonable to construe §4(a)(2) in that manner, so this Court should defer to the EEOC's longstanding interpretation of the ADEA as permitting such claims.

Section 4(a)(2) provides that an employer may not "limit … 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." 29 U.S.C. §623(a)(2). By establishing and applying hiring criteria like the Resume Review Guidelines and Blue Chip TM profile, an employer "limit[s] … his employees" to individuals satisfying those criteria. If an employer requires that employees possess a high school diploma, for example, the employer has "limit[ed] … his employees" to high school graduates. Under §4(a)(2), such requirements are unlawful if they deprive "*any* individual"—not just current or former employees—of employment opportunities because of age. *Id.* (emphasis added). Because Villarreal challenges limitations on RJR employment that deprived him of employment opportunities because of his age, his claim falls squarely within the text of §4(a)(2).

This plain reading of the relevant statutory language is also compelled by the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971). *Griggs* interpreted the then-*identical* language of Title VII as

permitting disparate impact challenges by prospective employees, holding that Title VII outlaws "condition[s] of employment in *or* transfer to" particular jobs that "operate to disqualify Negroes at a substantially higher rate than white *applicants*." *Id.* at 425-26, 91 S.Ct. at 851 (emphasis added). This Court has repeatedly recognized that *Griggs* permitted disparate impact challenges to "[facially] neutral hiring … practices." *Villarreal*, 806 F.3d at 1294 n.3 (citing, *inter alia*, *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1279 n.16, 1282 n.18 (11th Cir. 2000)).

Construing §4(a)(2) to permit claims by prospective employees is also the only construction consistent with the stated purposes of the ADEA. As its statutory findings make clear, Congress enacted the ADEA to eliminate the barriers that older workers face when seeking employment. *See, e.g.*, 29 U.S.C. §621(a)(3) (describing "grave" problems facing unemployed older workers). Interpreting §4(a)(2) to prohibit disparate impact claims by prospective employees is contrary to that fundamental purpose. Just last term, the Supreme Court reiterated that the central goal of the ADEA and other landmark civil rights statutes "to eradicate discriminatory practices within … our Nation's economy" can be realized *only* if those statutes are construed to permit disparate impact claims. *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2521-22 (2015). Such claims facilitate the elimination of

"arbitrary and, in practice, discriminatory" practices "that function unfairly to exclude [members of a protected class] … without sufficient justification." *Id.* at 2522. They also "play[] a role in uncovering discriminatory intent" by "permit[ting] plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment," and allow plaintiffs to challenge discriminatory outcomes that "result from covert and illicit stereotyping." *Id.* Given Congress's central concern with the problems facing older jobseekers, there is no reason why the ADEA would deprive such individuals of the crucial disparate impact cause of action while providing it to current and former employees.

For these reasons, it is clear that Congress intended to permit prospective employees like Villarreal to bring claims under §4(a)(2). At the very least, that construction of §4(a)(2) is reasonable. Indeed, the EEOC has recognized for more than half a century that the statutory text of §4(a)(2) permits disparate impact claims by prospective employees, and it continues to take that position in both formal regulations and litigation. *Villarreal*, 806 F.3d at 1298-1303. That reasonable construction of the ADEA deserves deference under both *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984), and *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997). *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 243-44, 125 S.Ct. 1536, 1546-47 (2005)

(Scalia, J., concurring in the judgment); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009) (courts must defer to agency's "reasonable, and therefore permissible, construction of [statutory] language").

The Court should also reaffirm this Circuit's longstanding rule that the deadline for filing a charge of discrimination with the EEOC is tolled until the facts which would support a charge of discrimination are apparent or should have become apparent to the charging party. *See Reeb*, 516 F.2d at 931; *Sturniolo*, 15 F.3d at 1025; *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1267-68 (11th Cir. 2003). As Judge Wisdom explained more than forty years ago, that rule prevents the charge-filing deadline from protecting "[s]ecret preferences in hiring and even more subtle means of illegal discrimination" that "because of their very nature, are unlikely to be readily apparent to the individual discriminated against." *Reeb*, 516 F.2d at 931. Just as this Court should not adopt an interpretation of the ADEA that would significantly undermine Congress's goal of eradicating discriminatory barriers that older workers face when seeking employment, it should not abandon well-established Circuit precedent intended to prevent the procedural components of Title VII and the ADEA from becoming shields for unlawful discrimination.

Under that well-established standard, Villarreal adequately pleaded the components of a claim for equitable tolling. There is no dispute that Villarreal properly alleged that he was unaware until April 2010 of the facts underlying his

EEOC charge, and that he diligently pursued his claim as soon as he learned those facts. The only remaining issue—which is factual and thus cannot be answered in this procedural posture—is whether a reasonably prudent person would have learned those facts earlier. Villarreal plausibly alleges that the facts necessary to support his charge "could not have been apparent to him" until April 2010. And, tellingly, RJR has never even suggested that he could have discovered the relevant facts before 2010.

Under the specific factual circumstances of this case, Villarreal was not required to engage in a futile investigation into that decision—or to file a premature EEOC charge lacking any suspicion of discrimination—to protect his rights. By alleging that he applied for the Territory Manager position through an RJR website but was never contacted about the position (and thus correctly inferred he had not been hired); that no one at RJR provided any details about its processing of applications, its reasons for denying his application, or the guidelines third parties used in screening applications; and that he had no reasonable means of learning those facts through further investigation, Villarreal plausibly alleged that a reasonably prudent person would not have learned of the facts supporting his claims any earlier. No more was required to survive a motion to dismiss.

ARGUMENT

I. The ADEA Permits Disparate Impact Claims By Prospective Employees.

RJR cannot dispute that the ADEA permits disparate impact claims as a general matter. *See Smith*, 544 U.S. at 236, 239, 125 S.Ct. at 1542, 1544; *Inclusive Communities Project*, 135 S.Ct. at 2517-18. Nor can RJR dispute that the statutory language that *Griggs* construed as permitting disparate impact challenges to "condition[s] of employment" in particular jobs is identical in all relevant respects to the language of the ADEA. The district court's conclusion that the ADEA insulates discriminatory conditions of employment from legal challenge simply because those conditions are applied when hiring new employees is contrary to the text of §4(a)(2), *Griggs*, and the ADEA's express purpose of protecting older workers seeking employment—all of which establish that Congress intended to permit such challenges. At the very least, the EEOC's longstanding interpretation of §4(a)(2) as permitting such claims is reasonable, and must be given deference by this Court.

A. Section 4(a)(2) Permits Challenges To "Limit[s]" On Employment That Deprive "Any Individual" Of Employment Opportunities.

The ADEA's stated purpose is to "promote employment of older persons based on their ability rather than age." 29 U.S.C. §621(b); *see also Smith*, 544 U.S. at 241, 125 S.Ct. at 1545 (majority opinion) ("[T]he ADEA reflects Congress'

intent to give older workers employment opportunities whenever possible…."). In enacting the ADEA, Congress was particularly concerned about discrimination involving older job applicants, finding that "older workers find themselves disadvantaged in their efforts to retain employment, *and especially to regain employment when displaced from jobs*," and that "the incidence of unemployment, especially long-term unemployment … is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave." 29 U.S.C. §§621(a)(1), (3) (emphasis added).[1]

To accomplish Congress's goals, the ADEA specified three "[e]mployer practices" constituting illegal age discrimination. Section 4(a) makes it "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,

[1] Similar concerns were also expressed in the agency report on which Congress relied in crafting the ADEA. *See* U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment* (1965) (hereinafter "Wirtz Report"). The report noted that "[a]ny formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if … an older worker's years of experience have given him the relevant equivalent of a high school education"; catalogued the discriminatory effects of "institutional arrangements that indirectly restrict the employment of older workers"; and concluded that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to *age limits in hiring*." *Id.* at 3, 15, 22 (emphasis added).

> 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).

Subsections 4(a)(1) and 4(a)(2) address different forms of discrimination. Section 4(a)(1) prohibits *intentional* discrimination on the basis of an individual's age, permitting claims challenging an employer's "disparate treatment" of older workers. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609-10, 113 S.Ct. 1701, 1706 (1993).

Section 4(a)(2), by contrast, is not limited to intentional discrimination. Its text "focuses on the *effects* of the action … rather than the motivation for the action of the employer," and thus permits challenges to employment practices "'that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another[.]'" *Smith*, 544 U.S. at 236, 239, 125 S.Ct. at 1542, 1544 (plurality opinion) (quoting *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1854-55 n.15 (1977)). Like the comparable language of §703(a)(2) of Title VII, §4(a)(2) prohibits "'employment procedures or testing mechanisms that operate as built-in headwinds for [protected] groups and are

unrelated to measuring job capability.'" *Id.* at 234-35, 125 S.Ct. at 1541-42 (plurality opinion) (quoting *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854).

The plain language of §4(a)(2) permits disparate impact claims targeting an employer's hiring criteria. By establishing and applying such criteria, an employer "limit[s] … his employees" to individuals who satisfy the specified standards. If an employer decides to make a high school diploma a prerequisite to be hired for a particular position, for example, the employer thereby "limit[s] … [its] employees" to high school graduates. *Cf. Griggs*, 401 U.S. at 427, 432, 91 S.Ct. at 851, 854 (concluding that comparable language of §703(a)(2) invalidated employer's "policy of requiring a high school education for initial assignment to [all but one] department").

The fact that such limitations on an employer's employees are applied in hiring rather than promotions or terminations does not exempt them from §4(a)(2). To the contrary, §4(a)(2) uses the broadest possible language to identify those adverse effects that can trigger liability: Covered practices are unlawful under §4(a)(2) if they "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." 29 U.S.C. §623(a)(2) (emphasis added). As this Court has previously recognized, the word "any" is "powerful and broad;" it "does not mean some or all but a few, but instead means all." *United States v. Fleet*, 498 F.3d

1225, 1229 (11th Cir. 2007). Accordingly, far from covering only those harms suffered by current or former employees, §4(a)(2) prohibits limitations on employment that deny "*any* individual" employment opportunities because of age.

Section 4(a)(2)'s "powerful and broad" definition of unlawful employer practices is reinforced by §7(c)(1), which provides a right of action to "[a]ny person aggrieved" by a violation of the ADEA. 29 U.S.C. §626(c)(1). Indeed, §7(c)(1) demonstrates the word "employee" does not inherently exclude prospective employees from statutory coverage: That section refers to "any person aggrieved" as "such employee," but can only reasonably be construed to apply to claims by prospective as well as current or former employees. *Id.* (providing that "[a]ny person aggrieved may bring a civil action" under the ADEA, except that the right to do so "shall terminate upon the commencement of an action by the [EEOC] to enforce the right of *such employee*") (emphasis added); *EEOC v. Eastern Airlines, Inc.*, 736 F.2d 635, 639 (11th Cir. 1984) (§626(c)(1) applies to ADEA lawsuits by applicants).[2]

[2] The Supreme Court has likewise noted that the meaning of the term "employee" in federal employment discrimination laws is not intrinsically limited to current employees, and must instead be construed in light of its statutory context and purposes. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46, 117 S.Ct. 843, 848-49 (1997) (concluding that the term "employees" in §704(a) of Title VII encompasses "former employees"). Because an employer "limit[s]" its current employees by setting restrictive criteria for employment, this Court need not consider whether, as with §7(c)(1), the term "employees" in §4(a)(2) is best construed to encompass

Had Congress intended to exclude claims by prospective employees, as the district court and Judge Vinson concluded, §4(a)(2) would have said that an employer may not "limit, segregate, or classify his employees in any way which would deprive or tend to deprive *any current employee* of employment opportunities . . . because of such individual's age." Instead, the plain language of §4(a)(2) permits "any individual" deprived of employment opportunities by an employer's "limits" on employment in a particular position to challenge those limitations. The district court's reading of §4(a)(2) impermissibly excises that critical language—as well as Congress's decision to distinguish between "employees" and "individual[s]" within the very same sentence—from the statute. *See Friends of the Everglades*, 570 F.3d at 1224 ("[W]e are not allowed to add or subtract words from a statute; we cannot rewrite it.").

Here, Villarreal alleges that he was denied employment as a Territory Manager because RJR "limit[ed] … employees" within that position to individuals

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prospective employees like Villarreal. Notably, however, Congress has used language almost identical to that of §4(a)(2) where it indisputably intended to permit claims by both prospective and current employees. *See* 42 U.S.C. §2000ff-1(a)(2) (making it unlawful for employer "*to limit, segregate, or classify the employees of the employer* in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee") (emphasis added); *id.* §2000ff(2)(A)(i) ("employee" includes "applicant").

who satisfied the employment criteria established by its Resume Review Guidelines and the Blue Chip TM profile. That claim falls squarely within the text of §4(a)(2).

B. *Griggs* Held That Language Identical To That Of §4(a)(2) Permits Disparate Impact Claims By Prospective Employees.

The Supreme Court's interpretation of identical statutory language in *Griggs* confirms that §4(a)(2) permits disparate impact claims by prospective employees. When *Griggs* was decided, the language of Title VII was identical to that of §4(a)(2) except for the substitution of "race, color, religion, sex, or national origin" for "age." *Smith*, 544 U.S. at 233, 125 S.Ct. at 1540 (majority opinion). *Griggs* considered whether that language prohibited an employer "from requiring a high school education or passing of a standardized general intelligence test *as a condition of employment in* or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white *applicants*, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." *Griggs*, 401 U.S. at 425-26, 91 S.Ct. at 851 (emphasis added). The Supreme Court held that hiring practices and policies that have a disparate impact on a protected class and lack a relationship to the jobs in question cannot be imposed as "condition[s] of employment" for those jobs. *Id.* at 426, 91 S.Ct. at 851; *see also id.* at 427-28, 91

S.Ct. at 851-52 (employer required high school education "for *initial* assignment to any department except Labor" and required that "*new employees* … register satisfactory scores on two professional prepared aptitude tests") (emphasis added).

Griggs nowhere limited its decision to current employees or suggested that Duke Power could continue to apply the challenged requirements when hiring new employees. To the contrary, the plaintiffs filed a class action on behalf of "all Negroes who may hereafter seek employment" at Duke Power, among others, and the case remained a class action before the Supreme Court. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1227-28 (4th Cir. 1970), *rev'd*, 401 U.S. 424, 91 S.Ct. 849 (1971); *Griggs*, 401 U.S. at 426, 91 S.Ct. at 851. The petitioners and the government argued before the Supreme Court that the questions presented encompassed *all* barriers to employment, not just those affecting current employees.[3] On remand, the district court prohibited Duke Power "from

[3] *See, e.g.*, Petitioners' Br. at *16-*19, *27, *Griggs*, 401 U.S. 424, 91 S.Ct. 849 (No. 70-124), 1970 WL 122448 (arguing that *Griggs* "presents the broad question of the use of allegedly objective employment criteria *resulting in the denial to Negroes of jobs* for which they are potentially qualified"; Title VII "reach[es] *all* deterrents to full black employment opportunity"; "'objective' criteria, such as tests and educational requirements, are potent tools for substantially reducing black job opportunities, *often to the extent of wholly excluding blacks*"; and "where a test or educational requirement is not job-related, *hiring and promotion* is done on the basis of educational and cultural background, which … is only thinly veiled racial discrimination") (emphasis added); Br. of U.S. and EEOC as Amicus Curiae at *2, *4, *Griggs*, 401 U.S. 424, 91 S.Ct. 849 (No. 70-124), 1970 WL 122637 (question presented was whether an employer may "require completion of high school or

administering any personnel or aptitude tests or requiring any formal educational background which the defendant had in effect prior to March 8, 1971, *as a condition of consideration for employment or promotion or transfer*." *Griggs v. Duke Power Co.*, No. C-210-G-66, 1972 WL 215, at *1 (M.D.N.C. Sept. 25, 1972) (emphasis added).

If *Griggs* were limited to claims brought by incumbent employees, as RJR has contended, the decision would have focused solely upon requirements for internal transfer or promotion. Instead, *Griggs* held unequivocally that:

- Title VII prohibits "practices, procedures, or tests neutral on their face" that "operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430, 91 S.Ct. at 853.
- Title VII requires "the removal of artificial, arbitrary, and unnecessary barriers to employment [that] operate invidiously to discriminate on the basis of … impermissible classification." *Id.* at 431, 91 S.Ct. at 853.
- "[A]n employment practice which operates to exclude Negroes [that] cannot be shown to be related to job performance … is prohibited." *Id.*

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passage of certain general intelligence tests *as a condition of eligibility for employment* in, or transfer to, jobs formerly reserved only for white employees"; decision below would "sanction the use of *employment screening devices which … seriously limit employment and promotion opportunities* for Negroes and other minority groups") (emphasis added).

- "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432, 91 S.Ct. at 854.
- "[A]ny tests used must measure the person for the job." *Id.* at 436, 91 S.Ct. at 856.

The Supreme Court neither qualified these statements nor suggested that employers remained free after *Griggs* to implement policies that "'freeze' the status quo," create "artificial, arbitrary, and unnecessary barriers to employment," or "operate as 'built-in-headwinds' for minority groups" so long as those policies are applied only to prospective employees.

This Circuit and its predecessor have already recognized that *Griggs* authorized disparate impact claims by applicants for employment. *See Villarreal*, 806 F.3d at 1294 n.3 (citing *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1279 n.16, 1282 n.18 (11th Cir. 2000); *Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant*, 491 F.2d 1364, 1371-72 & n.17, 1373 & n.25 (5th Cir. 1974); *United States v. Ga. Power Co.*, 474 F.2d 906, 911 (5th Cir. 1973)). As Judge Marcus explained in *Joe's Stone Crab*, *Griggs* "made clear that Title VII prohibited an employer from using neutral hiring and promotion practices to 'freeze' in place a status quo achieved through prior decades of intentional

discrimination." 220 F.3d at 1282 n.18; *see also id.* at 1279 n.16 ("In *Griggs* … the plaintiffs showed that the objective and facially neutral requirements of possessing a high school diploma and passing a general intelligence test in order to be hired or transferred … had a disproportionate effect on white and black applicants."); *see also Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 n.12 (10th Cir. 1996), *overruled by Smith*, 544 U.S. 228, 125 S.Ct. 1536 (*Griggs* "applied language similar to [§4(a)(2)] in Title VII to job applicants").

Griggs's interpretation of the ADEA's language is consistent with numerous subsequent decisions of the Supreme Court. In *Dothard v. Rawlinson*, for example, the Court explained that a plaintiff may establish a prima facie violation of Title VII under *Griggs* by showing that the "facially neutral standards in question select *applicants for hire* in a significantly discriminatory pattern." 433 U.S. 321, 329, 97 S.Ct. 2729, 2726-27 (1977) (emphasis added); *see also Inclusive Communities Project*, 135 S.Ct. at 2517 (*Griggs* recognized that disparate impact theory and defenses apply to "hiring criteria"). Likewise, *Smith* specifically cited two cases involving "failure-to-hire" claims as "appropriate" ADEA disparate impact cases. *See* 544 U.S. at 237 & n.8, 125 S.Ct. at 1543 & n.8 (plurality opinion) (citing *Wooden v. Bd. of Ed. of Jefferson County*, 931 F.2d 376 (6th Cir. 1991), and *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993)).

C. The Post-*Griggs* Amendment Of Title VII Was Declaratory Of Existing Law.

In concluding that §4(a)(2) does not permit claims by prospective employees, the district court relied primarily not on the text of §4(a)(2), but on Congress's addition of the phrase "or applicants for employment" to Title VII after *Griggs* was decided. *See* 42 U.S.C. §2000e-2(a)(2). The district court's rationale was that Congress "acted intentionally when it expanded the scope of §703(a)(2) to include applicants and did not do the same with §4(a)(2) of the ADEA." App. Vol. I, Dkt. No. 58, at 15. But Congress did not "expand the scope" of §703(a)(2) when it amended Title VII. Instead, that amendment *confirmed Griggs*'s interpretation of Title VII. The Senate Committee on Labor and Public Welfare explained that the addition to §703(a)(2) would "make it clear" that discrimination against applicants is unlawful and "would merely be declaratory of present law." S. Rep. No. 92-415, at 43. The House Report quoted extensively from *Griggs* and explained that "the provisions of the bill [were] fully in accord with the decision of the Court" in *Griggs*. H.R. Rep. No. 92-238, at 21-22 (1971); *see also id.* at 30 (as amended, §703(a)(2) is "[c]omparable to present Section 703(a)(2)"). Accordingly, in amending Title VII, Congress simply *endorsed Griggs*'s holding that the original version of §703(a)(2) of Title VII—in language *identical* to that of ADEA §4(a)(2)—permitted prospective employees to pursue disparate impact claims.

The circumstances surrounding adoption of the 1972 amendment are nothing like those considered in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343 (2009). Those amendments were part of the Civil Rights Act of 1991, which overhauled *both* Title VII *and* the ADEA. *Id.* at 174, 129 S.Ct. at 2349. As *Gross* explained, "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Id.* at 175, 129 S.Ct. at 2349 (quoting *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997)). The 1972 bill amending Title VII, by contrast, made no changes to the ADEA.

Moreover, the Civil Rights Act of 1991 was passed to *reverse* the Supreme Court's narrow construction of Title VII in several prior decisions. *See Gross*, 557 U.S. at 174, 129 S.Ct. at 2349. *Gross* concluded that Congress's failure to amend the comparable language in the ADEA reflected a congressional judgment that the two statutes should not be interpreted in the same manner going forward. *Id.* The 1972 amendment *codified Griggs* rather than reversing prior Supreme Court decisions.

Nor does recognizing that pre-amendment §703(a)(2) permitted challenges to qualifications for employment deprive the 1972 amendment of meaning. By codifying *Griggs*, the amendment protected *Griggs*'s broad interpretation of Title VII against future narrowing. The Civil Rights Act of 1991 similarly codified

Griggs by defining the circumstances under which an "unlawful employment practice based on disparate impact" may be established. *See* 42 U.S.C. §2000e-2(k). Yet *Smith* concluded that the ADEA, which was not similarly revised, nonetheless permits disparate impact claims. *Smith*, 544 U.S. at 232, 125 S.Ct. at 1540 (majority opinion).

D. *Smith* Did Not Decide The Issue Here.

In his dissent, Judge Vinson suggested that the outcome here is controlled not by *Griggs* but by Justice O'Connor's assertion in *Smith* that §4(a)(2) "does not apply to 'applicants for employment[.]'" *Id.* at 266, 125 S.Ct. at 1559 (O'Connor, J., concurring in the judgment). But Justice O'Connor's concurrence—which *disagreed* with *Smith*'s core holding that the ADEA permits disparate impact claims—was joined by only Justices Kennedy and Thomas. Justice Scalia noted Justice O'Connor's position but declined to take any position. *Id.* at 246 n.3, 125 S.Ct at 1548 n.3 (Scalia, J., concurring) ("*[P]erhaps* the agency's attempt to sweep employment applications into the disparate impact prohibition is mistaken.") (emphasis added); *cf. In re St. Laurent*, 991 F.2d 672, 680 n.9 (11th Cir. 1993) ("declin[ing] to accord much weight" to dictum where "the Court merely articulated an argument, not a conclusion"). The four-Justice plurality in *Smith* simply did not address the issue. Judge Vinson contended that the plurality's silence was "notable," *Villarreal*, 806 F.3d at 1309, but that silence merely

reflected the fact that *Smith* involved a claim brought only by current employees and presented the Court with no reason to consider whether prospective employees could also pursue such claims.[4] As the panel majority explained, although this Court has recognized the persuasive power of "well thought out, thoroughly reasoned, and carefully articulated" dicta in majority opinions from the Supreme Court, *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006), this Court need not defer to "a single sentence in a minority opinion, via the assumption that other Justices implicitly approved of th[at] sentence." *Villarreal*, 806 F.3d at 1296 n.4; *cf. United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("We are controlled by the decisions of the Supreme Court. Dissenters, by definition, have not joined the Court's decision.").

Judge Vinson also relied upon three pre-*Smith* circuit court decisions which concluded (twice in a footnote) that §4(a)(2) only protects current employees. *See* 806 F.3d at 1309 (citing *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 n.2 (8th Cir. 1996); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 n.12 (10th Cir. 1996); and *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1077-78 (7th Cir. 1994)).

[4] Judge Vinson cited the *Smith* plurality's statement that §4(a)(2) "focuses on the effects of the action on the employee," *Smith*, 544 U.S. at 236, 125 S.Ct. at 1542 (plurality opinion) (emphasis omitted), but as the panel majority explained, the plurality "was simply explaining how the statute works for claims like the ones then before [the Court]." *Villarreal*, 806 F.3d at 1296 n.4.

But as Judge Vinson himself acknowledged, *Ellis* and *Frances W. Parker School* were overruled by *Smith*. Moreover, the interpretation of §4(a)(2) in *Francis W. Parker School* (which both *City of Des Moines* and *Ellis* cited and followed) flowed from a fundamental misunderstanding of *Griggs*—namely, the mistaken belief that the 1972 amendment to Title VII had provided "the basis for [*Griggs*'s] holding" *in 1971*. *Francis W. Parker School*, 41 F.3d at 1077. As described above, Congress added "or applicants for employment" to §703(a)(2) *after Griggs* was decided, and that amendment was "declaratory of present law." S. Rep. No. 92-415, at 43. The Seventh Circuit's factual error reveals the lack of any substantial analysis in its decision; as the panel majority explained, "when an issue is superfluous" to the issues presented, "even obvious errors escape notice." *Villarreal*, 806 F.3d at 1296 n.5. This Court should not accord any weight to such unpersuasive dicta.

E. The EEOC's Interpretation Of §4(a)(2) Is Consistent With The Best Reading Of The Statute And At The Very Least Deserves Deference As A Reasonable Interpretation.

For the foregoing reasons, the statutory text of §4(a)(2) is best interpreted to permit disparate impact claims by prospective employees as well as current or former employees. That Congress intended to permit such claims is made even more apparent by the ADEA's statutory purpose of eliminating the obstacles older workers face when seeking employment. As the Supreme Court recently

reiterated, the disparate impact claims permitted by statutes like the ADEA provide essential protections without which Congress's goal of "eradicat[ing]" discrimination from the American economy—including discrimination resulting from facially neutral practices that unfairly harm minorities or older individuals "without any sufficient justification," and that may reflect "unconscious prejudices," "disguised animus," or "covert and illicit stereotyping"—cannot be achieved. *Inclusive Communities Project*, 135 S.Ct. at 2521-22. Given the ADEA's central purpose, there is no reason to believe that Congress sought to insulate such discriminatory practices from attack simply because they arise in the context of hiring rather than promotion or termination. *See Chisom v. Roemer*, 501 U.S. 380, 396, 403, 111 S.Ct. 2354, 2364, 2368 (1991) (remedial statutes should be given the "broadest possible" interpretation and limitations must be explicit and unambiguous).

At the very least, that interpretation of §4(a)(2) is reasonable, and this Court should defer to the longstanding EEOC interpretation of §4(a)(2) as permitting such claims. *See Chevron*, 467 U.S. at 845, 104 S.Ct. at 2783; *Auer*, 519 U.S. at 461, 117 S.Ct. at 911; *Friends of Everglades*, 570 F.3d at 1221 (courts must defer to agency interpretation if it is within the "ballpark of reasonableness").

The EEOC's current ADEA disparate impact regulations, which interpret §4(a)(2) as well as the other related provisions of the ADEA, are located at 29

C.F.R. §1625.7. *See Smith*, 544 U.S. at 240, 125 S.Ct. at 1544 (plurality opinion) (regulation interprets §4(a)(2) and "set[s] forth the standards for a disparate impact claim"); *Villarreal*, 806 F.3d at 1300 (explaining that *Smith* forecloses any argument that the EEOC's regulations do not interpret §4(a)(2)). Those regulations do not distinguish in any way between prospective and current employees. Instead, they provide that employment practices that disparately impact individuals age 40 or older and that are not justified by a "reasonable factor other than age" are prohibited whether they are applied in hiring new employees or in dealing with current employees. *See* 29 C.F.R. §1625.7(c) (as amended March 30, 2012) ("*Any* employment practice that adversely affects *individuals* within the protected age group on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'") (emphasis added); *see also Villarreal*, 806 F.3d at 1301 (preamble to regulation clarifies any ambiguity).

Moreover, the EEOC has interpreted the ADEA to permit disparate impact claims by prospective employees since it was first assigned responsibility for administering that statute in 1981. *See id.* at 1301-03 & n.11; *see also Smith*, 544 U.S. at 243-44, 125 S.Ct. at 1546-1547 (Scalia, J., concurring) (quoting 29 C.F.R.

§1625.7(d) (2004)).[5] Indeed, at the time of the ADEA's enactment, the EEOC had already interpreted the identical language of Title VII as permitting such claims. *Griggs*, 401 U.S. at 433, 433 n.9, 91 S.Ct. at 854 n.9 (quoting 1966 EEOC guidelines requiring that ability tests "fairly measure[] 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") (emphasis added). "Because [the EEOC's] guidelines form part of 'the background against which Congress enacted' the ADEA, they are a clue into Congress's intent in using the same language in the ADEA." *Villarreal*, 806 F.3d at 1302 n.10 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147, 120 S.Ct. 1291, 1308 (2000)).

The EEOC's regulations are entitled to "great deference" when interpreting the ADEA and Title VII. *Griggs*, 401 U.S. at 433-434, 91 S.Ct. at 854-855; *Smith*, 544 U.S. at 243-47, 125 S.Ct. at 1546-1549 (Scalia, J., concurring) (deferring to EEOC's interpretation of §4(a)(2) in "absolutely classic case for deference to agency interpretation" based on EEOC's "express authority to promulgate rules and regulations interpreting the ADEA"); *Meacham v. Knolls Atomic Power Lab.*,

[5] The Department of Labor interpreted the ADEA in the same manner when it was responsible for enforcing the statute. *Villarreal*, 806 F.3d at 1301-02 (citing 33 Fed. Reg. 9173 (1968)).

554 U.S. 84, 103, 128 S.Ct. 2395, 2407 (2008) (Scalia, J., concurring) (deferring to EEOC's interpretation because "administration of the ADEA has been placed in the hands of the [EEOC]"). Thus, if this Court concludes notwithstanding the above that §4(a)(2) can reasonably be interpreted in more than one way, it must, like the panel majority, defer to the EEOC's reasonable interpretation.

F. RJR's Policy Arguments Are Unfounded.

RJR and its amici argue that the ADEA should be interpreted narrowly because permitting disparate impact challenges to hiring criteria, they say, would expose salutary employment practices to potential legal challenge. Their arguments, however, misapprehend the ADEA's purposes and its impact on employer practices.

Even without the categorical exemption that RJR asks this Court to adopt, employers have numerous valid defenses to ADEA disparate impact claims. First, §4(a)(2) does not apply to all practices with a disparate impact on older workers, but only to practices that involve "limit[ing], classif[ying], or segregat[ing] … employees" in a manner that "deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." RJR's amici have contended that the panel majority's conclusion would threaten employers' ability to participate in job fairs or recruiting events targeting particular groups (such as veterans or disadvantaged youth), but an employer that *expands* its

pool of prospective employees by participating in such events does not "limit" its employees within the meaning of §4(a)(2)—let alone in a manner that "deprive[s] … any individual of employment opportunities" or "adversely affect[s] his status as an employee." Non-exclusive recruiting practices that expand an employer's pool of applicants cannot be challenged under §4(a)(2), even if that section is construed (as it should be) to permit challenges to an employer's limitations on employment in a particular position.

Where employers *do* limit their employees through hiring criteria that have a disparate impact on older applicants, any resulting challenge is subject to the strict limits on disparate impact claims announced in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989), and employers may escape liability by proving that their criteria are "based on reasonable factors other than age." *Meacham*, 554 U.S. at 87, 128 S.Ct. at 2398. As the Supreme Court has repeatedly emphasized, the ADEA's "RFOA" defense is less difficult to establish than the "business necessity" defense that applies under Title VII. *See id.* at 102, 128 S.Ct. at 2406 (RFOA clause gives employers "a fair degree of leeway"); *Smith*, 544 U.S. at 233, 125 S.Ct. at 1540-41 (majority opinion) (RFOA clause "significantly narrows" ADEA's coverage as compared to Title VII). The employer's burden is not necessarily weighty. "[T]he more plainly reasonable the employer's 'factor other than age' is, the shorter the step for that employer from producing evidence

raising the defense, to persuading the factfinder that the defense is meritorious." *Meacham*, 554 U.S. at 101, 128 S.Ct. at 2406. Accordingly, should an employer prefer to hire individuals with little prior work experience for certain positions (such as lower paying entry-level positions), the employer can avoid liability under the ADEA by establishing that its policy has a reasonable and legitimate business justification.

If an employer cannot establish *any* of the statutory defenses available under the ADEA, its discriminatory policy is precisely the kind of unreasonable, arbitrary, and artificial barrier to the employment of older workers that Congress sought to eliminate through passage of the ADEA. *See supra* Section I.A. Construing §4(a)(2) to deny disparate impact claims to individuals challenging such discriminatory barriers to employment would be inconsistent with this primary purpose of the ADEA, and entirely unnecessary given the broad leeway afforded to employers under the RFOA standard.

II. Villarreal Adequately Pleaded A Claim For Equitable Tolling.

Just as this Court should not undermine Congress's goal of eradicating age-based employment discrimination through an unduly narrow construction of §4(a)(2), it should not abandon longstanding equitable tolling precedents of this Circuit ensuring that the remedial purposes of Title VII and the ADEA are not frustrated by unnecessarily rigid procedural hurdles. Instead, the Court should

reaffirm this Circuit's well-established rule that the deadline for filing a charge of discrimination with the EEOC is tolled until the facts which would support a charge of discrimination became apparent or should have become apparent to the charging party. *Reeb*, 516 F.2d at 931; *see also infra* at 41-42 (collecting prior published 11th Circuit decisions reaffirming *Reeb*).

The Court should also conclude that Villarreal adequately pleaded an equitable tolling claim under that standard by alleging that he was unaware of the facts supporting his charge until April 2010, and that no investigation he might have undertaken when his first application was denied would have revealed RJR's discriminatory practices to him any earlier. The Court should not require plaintiffs to engage in futile and unwarranted investigations into prospective employers' decision-making processes to protect their rights under the ADEA and Title VII.

A. Under Longstanding Circuit Precedent, The EEOC Charge Filing Deadline Is Tolled Until The Facts Supporting A Charge Of Discrimination Are Apparent Or Should Have Become Apparent To The Charging Party.

In this Circuit, it is well-established that "a limitations period does not start to run until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Sturniolo*, 15 F.3d at 1025 (citing *Reeb*, 516 F.2d at 931). This standard was first announced more than 40 years ago in an opinion by Judge Wisdom. *Reeb*, 516 F.2d at 931. The plaintiff in *Reeb* had been terminated from her job and

discovered only after the expiration of the limitations period that she had been replaced by a less-qualified male employee. *Id.* at 926. Recognizing that remedial legislation should be construed broadly, Judge Wisdom concluded that, because the plaintiff had no basis for suspecting discrimination until she learned the identity of her replacement, her suit was not time-barred. *Id.* at 928. As Judge Wisdom explained, permitting equitable tolling until a plaintiff becomes aware of the factual basis for his or her claims is crucial in the context of employment discrimination, where "[s]ecret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against." *Id.* at 931.

This Circuit has repeatedly applied the *Reeb* standard to determine whether equitable tolling is available in federal employment discrimination cases under both Title VII and the ADEA. *See, e.g.*, *Jones*, 331 F.3d at 1268 (reversing summary judgment for employer because, during the charge-filing period, plaintiff had no evidence to support her suspicion of age discrimination); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1435 (11th Cir. 1998) ("ADEA's timing requirements might have been equitably tolled if, in the period prior to the 180 days before filing the initial EEOC charge, Turlington had no reason to believe he was a victim of unlawful discrimination."); *Hargett v. Valley Fed. Sav. Bank*, 60 F.3d 754, 765 (11th Cir. 1995) (reversing summary judgment for employer

because plaintiff had no reasonable basis for knowing about retaliation until after charge-filing period); *Sturniolo*, 15 F.3d at 1025 (reversing summary judgment for employer because "evidence exists to support Sturniolo's assertion that the facts which would support his claim were not apparent to him until [after the charge-filing period]"); *Ross v. Buckeye Cellulose Corp*., 980 F.2d 648, 660 (11th Cir. 1993) ("In order for equitable tolling to be justified in this case, the facts must show that, in the period more than 180 days prior to filing their complaints with the EEOC, appellants had no reason to believe that they were victims of unlawful discrimination."); *Hill v. Metro. Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1545 (11th Cir. 1988) ("The 180 days begins running from the date the employee knows or reasonably should know that he or she has been discriminated against."); *Cocke v. Merrill Lynch & Co., Inc.*, 817 F.2d 1559, 1560 (11th Cir. 1987) ("Whatever the eventual outcome may be, . . . the factual issues upon which an equitable tolling decision would be based should be tried, and not decided on summary judgment."); *Nelson v. U.S. Steel Corp*., 709 F.2d 675, 677 n.3 (11th Cir. 1983) ("The 180 day period begins to run only when the complainant first learns or should have learned of the alleged discrimination.").[6]

[6] *See also Shedrick v. Dist. Bd. of Trustees of Miami-Dade Coll*., 941 F.Supp.2d 1348, 1365 (S.D. Fla. 2013) (Rosenbaum, J.) ("[T]he running of [Title VII's limitations] period may be tolled until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent

The *Reeb* standard has also been "echoed by various circuits across the country." *Jones*, 331 F.3d at 1264. *See, e.g.*, *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 410-11 (7th Cir. 1984) ("The tolling standard at issue here comes from the seminal case of *Reeb*[.]"); *Wilkerson v. Siegfried Ins. Agency, Inc.*, 683 F.2d 344, 345 (10th Cir. 1982); *Stoller v. Marsh*, 682 F.2d 971, 974 (D.C. Cir. 1982) (citing *Reeb*); *see also Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 268 (7th Cir. 1995) ("A plaintiff may toll the statute of limitations if, despite all due diligence, he is unable to obtain enough information to conclude that he may have a discrimination claim."); *Dring v. McDonnell Douglas Corp*., 58 F.3d 1323, 1329 (8th Cir. 1995) ("[W]hen a reasonable person in the plaintiff's situation would not be expected to know of the existence of a possible ADEA violation, this excusable ignorance may provide the basis for the proper invocation of the doctrine of equitable tolling."); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1193 (9th Cir. 2001) ("We will apply equitable tolling in situations where, despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim.") (quotation and alteration omitted); *Boyd v. U.S. Postal*

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regard for his or her rights.") (marks omitted); *cf. Calhoun v. Ala. Alcoholic Beverage Control Bd.*, 705 F.2d 422, 425 (11th Cir. 1983) (reversing dismissal of race discrimination claims as time-barred where plaintiffs alleged that facts supporting their cause of action "were not apparent, and would not have been apparent to a reasonably prudent person," until less than one year before end of limitations period).

Serv., 752 F.2d 410, 414 (9th Cir. 1985) ("The time period for filing a complaint of discrimination begins to run when the facts that would support a charge of discrimination would have been apparent to a similarly situated person with a reasonably prudent regard for his rights."); *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998) ("[E]quitable tolling allows a plaintiff to avoid the bar of the limitations period if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.").[7]

Under the well-established *Reeb* standard, "mere suspicion of age discrimination, unsupported by personal knowledge of discrimination," is insufficient to terminate the tolling period. *Sturniolo*, 15 F.3d at 1026. The limitations period is instead tolled until the plaintiff has "knowledge of facts sufficient to support a prima facie case of age discrimination." *Id.* The plaintiff in *Sturniolo*, for example, suspected that he had been the victim of age discrimination when he was terminated, but several months passed before he learned that he had been replaced by a younger employee. *Id.* at 1025. Because "[a]t the time of discharge, Sturniolo had no facts sufficient to support a claim of age discrimination," the limitations period for his EEOC charge was tolled until he

[7] Although some Circuits now require evidence of employer misconduct or deception in addition to satisfaction of the *Reeb* standard, *see, e.g.*, *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1389 (3d Cir. 1994), this Circuit has expressly disclaimed such a requirement, *see infra* at 56.

"learned that a younger individual had replaced him" and thus "possessed enough information to support a claim of age discrimination." *Id.* at 1026. Likewise, in *Jones v. Dillard's*, this Court explained that the purposes of the ADEA are not advanced by requiring an employee to "act[] on a mere suspicion" and reiterated this Circuit's long-settled rule that the limitations period is tolled until the plaintiff is aware of the specific facts supporting his or her claim. *Jones*, 331 F.3d at 1264, 1267-68.

In his dissent, Judge Vinson argued that the Court should apply the "extraordinary circumstances" equitable tolling standard that this Circuit has previously used in habeas and social security cases, rather than the *Reeb* standard. *See* 806 F.3d at 1312. But as this Court has already recognized, the *Reeb* standard in fact identifies a specific set of "extraordinary circumstances" in which tolling is proper. *See Ross*, 980 F.2d at 661-62 ("extraordinary circumstances" absent where plaintiffs provided no "evidence that [they] actually were—or that similarly-situated people with a reasonably prudent regard for their rights would be—unaware that they were victims of unlawful discrimination in the period more than 180 days prior to filing their complaints with the EEOC"); *see also Jackson v. Astrue*, 506 F.3d 1349, 1353 (11th Cir. 2007) ("extraordinary circumstances" present "when the plaintiff has no reasonable way of discovering the wrong perpetrated against her."); *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir.

1985) ("An 'extraordinary' circumstance permitting tolling of the time bar on equitable grounds might exist if the employee could show that it would have been impossible for a reasonably prudent person to learn that his discharge was discriminatory."). In other words, where there is no reasonable way for a victim of unlawful employment discrimination to discover discrimination at the time it occurs but the employer's practices are exposed through other means at some point thereafter, that itself may constitute an extraordinary circumstance.

There is nothing unusual about this Court's use of a context-specific tolling standard in lieu of mechanically applying the same general standard in qualitatively different contexts. "Equity eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Because "[t]he application of equitable principles is, in essence, relief from the harshness of mechanical rules," it is "inconsistent with the concept of equity to lay down hard and fast rules governing when such relief would be available." *Dring*, 58 F.3d at 1330. "A case-by-case analysis, the 'balancing of the equities,' is thus the usual approach when a party seeks to be excused from the indiscriminate sweep of a rigid statute." *Id.*

In cases involving individuals who are affirmatively seeking relief from the government (such as social security claimants or asylum seekers) or who were the target of the challenged government action (such as habeas petitioners), it is

reasonable to presume that the plaintiff knew all of the facts necessary to support the underlying claim (e.g., when the plaintiff was convicted, denied post-conviction relief, or deemed ineligible for benefits), and particularly extenuating circumstances are required to justify a failure to act within prescribed timelines.[8]

When applying equitable tolling principles in the context of the federal employment discrimination laws, by contrast, courts must "honor the remedial purpose of the legislation as a whole." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 102 S.Ct. 1127, 1135 (1982). As Judge Wisdom emphasized, there is no reason to categorically presume that a victim of unlawful employment discrimination—particularly an individual whose application for employment was rejected on the basis of the employer's "secret preferences"—is or should be aware of the employer's unlawful practices. *Reeb*, 516 F.2d at 931. The *Reeb* standard promotes the remedial purposes of Title VII and the ADEA by ensuring that the

[8] It is particularly appropriate to require such compelling circumstances in the context of habeas petitions challenging state court convictions, because such petitions implicate the states' interest in the finality of their criminal convictions and the deference owed by federal courts to state court proceedings. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 1490 (2000). Far from suggesting that the habeas tolling standard applies to claims arising under Title VII and the ADEA, *Menominee Indian Tribe of Wisconsin v. United States* acknowledged that the equitable tolling analysis used in habeas cases does not necessarily apply in other contexts and applied the habeas standard to the Indian Self–Determination and Education Assistance Act claims therein only because the tribe had not argued for another standard. 136 S.Ct. 750, 756 n.2 (2016).

charge-filing requirement does not become a shield to protect unlawful hiring preferences. *Id.* The standard "makes good sense because discriminatory hiring practices are 'unlikely to be readily apparent to the individual discriminated against' and 'an employee or applicant for employment may not know any relevant facts at the time of the discriminatory act.'" *Villarreal*, 806 F.3d at 1304 n.13 (quoting *Reeb*, 516 F.2d at 931). Where the specific circumstances of a Title VII or ADEA plaintiff's claim for equitable tolling do *not* justify the *Reeb* approach—such as when the facts established through discovery show that the plaintiff did know or reasonably should have known about the discrimination during the relevant period—this Court has not applied that standard. *See, e.g.*, *Pac. Harbor Capital, Inc. v. Barnett Bank, N.A.*, 252 F.3d 1246, 1252 (11th Cir. 2001) ("Equitable tolling is defeated, even on summary judgment, when it is shown that indisputably the plaintiffs had notice sufficient to prompt them to investigate and that, had they done so diligently, they would have discovered the basis for their claims.") (quotation omitted); *Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004) (tolling unavailable where plaintiffs failed to amend complaint in timely manner after being ordered to do so by court).

In short, this Circuit's longstanding treatment of claims for equitable tolling arising in the employment discrimination context reflects the unique circumstances presented in such cases, as well as this Circuit's recognition that "[e]quitable

tolling is, well, equitable in nature, and decisions regarding it must be made 'on a case-by-case basis' in light of 'specific circumstances.'" *Hutchinson v. Florida*, 677 F.3d 1097, 1098 (11th Cir. 2012) (quoting *Holland v. Florida*, 560 U.S. 631, 649-50 (2010)); *see also Gregory v. Ga. Dep't of Human Resources*, 355 F.3d 1277, 1280 (11th Cir. 2004) (citation omitted) (courts should be "extremely reluctant to allow procedural technicalities to bar claims" of unlawful employment discrimination). Consistent with that principle, this Court should reaffirm that the *Reeb* standard governs the availability of equitable tolling in the circumstances at issue here.[9]

B. Villarreal Adequately Pleaded The Elements Of A Claim For Equitable Tolling Under *Reeb*.

The equitable tolling standard recognized in *Reeb* and repeatedly affirmed by this Circuit applies fully here, and Villarreal adequately pleaded all of the

[9] The equitable tolling standard established by *Reeb* and followed in subsequent decisions such as *Sturniolo* and *Jones* does not subject employers to unbounded liability for their past acts of discrimination. The very nature of "secret" hiring preferences ensures that such preferences will be revealed and become subject to legal challenge only in extraordinary circumstances (such as where an inside source reveals the employer's unlawful preferences). In the rare instances where such preferences do ultimately come to light, if the delay results in significant prejudice to the employer (such as where the evidence necessary for the employer to mount a defense has been destroyed), courts retain the equitable discretion to "locate a just result in light of the circumstances peculiar to the case." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 121, 122 S.Ct. 2061, 2077 (2002) (citation omitted). RJR has *never* contended that it suffered any prejudice due to the delay in Villarreal's filing of his EEOC charge.

elements of a claim for equitable tolling, particularly in his proposed amended complaint.

This Court has repeatedly recognized that the availability of equitable tolling in particular cases generally depends upon factual determinations that must be resolved at trial. *See Sturniolo*, 15 F.3d at 1026; *Cocke*, 817 F.2d at 1560-61. As the panel majority emphasized, the issue presented here is not whether Villarreal will ultimately be entitled to equitable tolling, but simply whether his complaint and proposed amended complaint were sufficient to survive a motion to dismiss and permit the parties to litigate that question on the merits. The panel answered that question by asking whether Villarreal stated a "plausible" claim for equitable tolling, *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012)—i.e., whether, under the facts alleged in Villarreal's complaint, it is plausible that the RJR's discriminatory hiring preferences were not apparent to Villarreal and could not have become apparent to him through reasonable investigation until less than 180 days before the filing of his EEOC charge. *Villarreal*, 806 F.3d at 1306 n.15. As the panel recognized, Villarreal easily satisfies that standard.[10]

[10] Because a purported failure to file a timely EEOC charge is an affirmative defense and not an element of a plaintiff's claim for relief, the "plausibility" standard does not apply to Villarreal's tolling-related allegations. RJR must instead show that it is "beyond a doubt" from the face of the complaint "that [Villarreal] can prove no set of facts that toll the statute." *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1288 & n.13 (11th Cir. 2005); *see also Richards v.*

There is no dispute that Villarreal was unaware of the facts underlying his EEOC charge prior to April 2010. The only remaining question is whether it is "plausible" that RJR's discriminatory hiring preferences could not have become apparent to him at some earlier point in time. The facts pleaded by Villarreal establish the plausibility of that allegation. In his proposed amended complaint, Villarreal alleged that when his 2007 application was rejected, he could not have known that RJR was using discriminatory hiring guidelines because he applied through a website, was never told why he was rejected, and did not even know whether his application had been reviewed or that Kelly Services had conducted that review for RJR. App. Vol. II, Dkt. No. 61-1, at 12 ¶28. Villarreal was not employed by RJR, so he had no existing work relationships that he could call upon to help him discover that information, and he had not personally interacted with any RJR representative. *Id.* Rather than learning of RJR's discriminatory practices through his own inquiries, he was able to learn of those practices only after an attorney from Altshuler Berzon LLP contacted him in April 2010 to inform

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Mitcheff, 696 F.3d 635, 637-38 (7th Cir. 2012) (plausibility standard does not apply to "a pleading on the subject of the statute of limitations"); *Secretary of Labor v. Labbe*, 319 Fed. Appx. 761, 764 (11th Cir. 2008) (reversing grant of motion to dismiss on statute of limitations grounds where Court could not "conclude beyond a doubt that the [plaintiff] can prove no set of facts that toll the statute"). Nonetheless, Villarreal's tolling allegations satisfy even the heightened "plausibility" standard.

him that applications for the Territory Manager position, including his own, had been screened using guidelines designed "to target candidates under 40 years of age and to reject candidates 40 years of age and over." App. Vol. II, Dkt. No. 61-1, at 8, 12-13 ¶¶18, 29-30.[11]

The plausibility of Villarreal's claim for equitable tolling under the *Reeb* standard is made evident by the fact that RJR has never even claimed that Villarreal could have discovered its hiring practices before April 2010. Indeed, it is most *implausible* to conclude that the facts necessary to support Villarreal's claim would have been revealed to him at some earlier point had he made further inquiries of RJR. Such a conclusion would require this Court to believe—without the benefit of any factual record—that, had Villarreal simply asked, RJR would have revealed the ages of all applicants for the Territory Manager position whom RJR hired instead of Villarreal, as well as the Resume Review Guidelines that Kelly Services had used (at RJR's instruction) in making those determinations.

[11] In order to comply with the district court's order that he plead the facts that "alerted Plaintiff to his discrimination claim [and] how he learned those facts," App. Vol. I, Dkt. No. 58, at 18-19, Villarreal disclosed protected attorney-client communications. Because the district court had not asked for further details, and to protect his attorney's work product from disclosure, Villarreal did not describe how his counsel had learned of RJR's discriminatory actions. Nonetheless, Villarreal could include those facts in a second amended complaint were this Court to conclude that doing so is necessary to state a plausible claim for equitable tolling.

Rather than accepting such fictions, it is far more plausible to believe that, had Villarreal been able to identify a point of contact at RJR whom he could ask for such information, that person would merely have informed him that RJR had chosen to hire someone else. Indeed, that is precisely what RJR told Villarreal when it rejected Villarreal's subsequent applications. App. Vol. I, Dkt. No. 1, at 8-9 ¶¶18-19; App. Vol. II, Dkt. No. 61-1, at 8 ¶¶17-18. There is no reason to believe RJR would have acted differently in 2007.[12]

In addition, this Court should not, in the name of "diligence," require unsuccessful job applicants like Villarreal to engage in entirely futile investigations into the surrounding circumstances merely to preserve their rights to pursue claims should the employer's unlawful practices subsequently come to light. "Due diligence … does not require a [plaintiff] to undertake repeated exercises in futility or to exhaust every imaginable option[.]" *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002); *cf. United States v. Moreno*, 789 F.3d 72, 80 (2d Cir. 2015) ("[D]elay cannot be attributable to a failure of diligence if diligence would have

[12] Both the district court and Judge Vinson faulted Villarreal for not inquiring about the status of his November 2007 application. App. Vol. II, Dkt. No. 67, at 5; *Villarreal*, 806 F.3d at 1314 (Vinson, J., dissenting). Because Villarreal's claim for equitable tolling does not depend in any way upon the specific date on which he became aware that his application had been rejected, that issue is a red herring. Villarreal reasonably inferred that his application must have been rejected after he submitted it electronically but was not contacted, and he would have learned nothing more by confirming that reasonable and accurate conclusion.

been futile."); *NLRB v. IBEW Local 112*, 992 F.2d 990, 994 (9th Cir. 1993) ("Because it would have been futile for the discriminatees to search for work through standard Local 112 procedures, the discriminatees' noncompliance with such procedures does not constitute a failure to exercise due diligence."); *United States v. Diacolios*, 837 F.2d 79, 83 (2d Cir. 1988) ("Due diligence surely does not require [the pursuit of] that which is futile."). Because under the facts as pleaded no further inquiries regarding Villarreal's application were reasonably likely to generate useful information, no additional diligence on his part was "due." This Court should not reject that factual allegation before Villarreal has had a fair chance to develop an evidentiary record regarding the futility of further investigation.

Moreover, a plaintiff's obligation "to inquire into [a] matter with due diligence" is triggered only by the receipt of "information sufficient to alert a reasonable person to the possibility of wrongdoing." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 475-76 (6th Cir. 2013). Here, there is no allegation or evidence that Villarreal had any information before April 2010 that alerted him to the possibility of wrongdoing, and it would unduly and unnecessarily burden both employers and employees for this Court to require that unsuccessful job applicants mount a futile investigation into the circumstances of their rejection—even when they have no reason to suspect unlawful

discrimination—simply to avoid forfeiting their right to bring suit should their prospective employers' discriminatory practices later be revealed.

Nor should this Court require unsuccessful job applicants to file premature EEOC charges, unprompted by any suspicion of discrimination, to preserve those rights. Doing so would create a host of problems for employers, employees, and the government—requiring the EEOC to investigate unsupported charges of discrimination and burdening employers with the obligation to respond to those charges and participate in those investigations—while rarely resulting in the disclosure of unlawful practices. *Cf. Sturniolo*, 15 F.3d at 1026 (plaintiff not required to file EEOC charge based upon "mere suspicion of age discrimination").

If anything, the facts pleaded in Villarreal's amended complaint present an even stronger case for equitable tolling than cases such as *Sturniolo* involving individuals who *suspected* discrimination but lacked the facts necessary to establish a prima facie case of unlawful discrimination. Villarreal filled out an online job application, received no response, and rightly concluded that he had not been hired. He had no reason to suspect that he had been a victim of discrimination, and there is no reason whatsoever to believe under the facts as they are currently pleaded that any investigation he conducted at that time would have resulted in the disclosure of those practices. Accordingly, it is more than merely

plausible that RJR's "[s]ecret preferences in hiring," *Reeb*, 516 F.2d at 931, were not and could not have been apparent to him before April 2010.

Rather than reject the equitable tolling claim as implausible, the district court ruled that Villarreal failed to state a claim for tolling because he had not alleged that RJR's "misrepresentations or concealment … hindered [him] from learning of any alleged discrimination." App. Vol. II, Dkt. No. 67, at 5.[13] But that argument erroneously conflates "the doctrines of equitable tolling and equitable estoppel." *Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997); *see also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451-52 (7th Cir. 1990). This Circuit has repeatedly emphasized that "equitable tolling does *not* require employer misconduct." *Cocke*, 817 F.2d at 1561 (emphasis added); *see also Browning*, 120 F.3d at 226 ("[E]quitable tolling does not require any misconduct on the part of the defendant."). Even Judge Vinson's dissent agreed that such allegations are not required. *Villarreal*, 806 F.3d at 1313 n.11.[14]

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[13] The district court acknowledged that Villarreal had plausibly alleged that he was unable to discover the basis for a charge of discrimination during the charge-filing period. *See* App. Vol. II, Dkt. No. 67, at 5 (allegation "may be true").

[14] Nothing in *Sturniolo*'s application of this Circuit's equitable tolling standard depended upon the employer's conduct. Rather, *Sturniolo* noted the employer's actions only to identify the point at which the plaintiff finally acquired "knowledge of facts sufficient to support a prima facie case of age discrimination." 15 F.3d at 1026. The same was true in *Reeb*, where the employer's actions provided an *additional* argument in favor of tolling. *See Reeb*, 516 F.2d at 930. *Reeb*

In short, Villarreal has plausibly alleged that a reasonably prudent person in his position would not have learned of RJR's discriminatory practices before April 2010. If RJR later produces evidence that Villarreal was alerted to the possibility of wrongdoing before April 2010, and that reasonable investigations undertaken at that time would have revealed RJR's unlawful practices, RJR may still be able to defeat Villarreal's claim for equitable tolling. The parties should be permitted to litigate that issue on the merits. It should not be resolved prematurely on the pleadings.

CONCLUSION

For the foregoing reasons, the district court's decision should be REVERSED.

Respectfully submitted,

Dated: March 25, 2016

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characterized the principle that a "party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense" as a mere "corollary" to the general rule that "the statute does not begin to run 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.*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), because this brief contains 13,954 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

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CERTIFICATE OF SERVICE

I hereby certify that on March 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 caused physical copies of the foregoing EN BANC BRIEF OF PLAINTIFF-APPELLANT RICHARD M. VILLARREAL to be filed with the Clerk of Court, and to be served upon the following counsel by U.S. First Class Mail:

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