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 REPLY BRIEF OF PLAINTIFF-APPELLANT RICHARD M. VILLARREAL

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INTRODUCTION

The Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA"), was enacted to eliminate age-based discrimination against older workers, particularly the discrimination older job applicants often face. *See* 29 U.S.C. §621(a)(1), (3). Disparate impact claims challenging facially neutral practices and policies that disproportionately harm older workers are crucial in realizing Congress's goal to "eradicate" such discrimination, because they permit challenges to "arbitrary" practices and policies that "unfairly" and "without sufficient justification" exclude older workers from economic opportunities and that may reflect "unconscious prejudices and disguised animus." *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2521-22 (2015). Notwithstanding the ADEA's fundamental goal of protecting older workers pursuing new employment opportunities from age discrimination, R.J. Reynolds Tobacco Co. ("RJR") argues in its en banc brief that §4(a)(2) of the ADEA, 29 U.S.C. §623(a)(2), prohibits disparate impact challenges to employer policies and practices that disproportionately and arbitrarily disqualify older job applicants. There is no reason for this Court to create such a significant gap in the ADEA.

RJR relies primarily on the absence of the words "applicants for employment" from §4(a)(2). But there was no need for Congress to include those

words. The plain language of §4(a)(2) encompasses any action by an employer to "limit, segregate, or classify [its] employees." By establishing criteria for employment like the "Resume Review Guidelines" and "Blue Chip TM" profile at issue here or the high school diploma requirement at issue in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971), an employer "limit[s] … [its] employees" to the individuals who satisfy its criteria. Such limitations may be challenged under §4(a)(2) if they "deprive … *any individual* of employment opportunities." 29 U.S.C. §623(a)(2) (emphasis added). The plain language of §4(a)(2) thus encompasses claims by individuals who are denied employment because they do not satisfy an employer's hiring criteria.

Ignoring this language, RJR argues that differences between §4(a)(2) and other unrelated ADEA provisions demonstrate that Congress intended to exclude limitations on employment applied during hiring from §4(a)(2). But RJR ignores the most relevant and revealing statutory difference: the distinction between "employees" and "individuals" that Congress drew *within §4(a)(2) itself*. *See United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003) (courts should respect "deliberate variation in terminology within the same sentence"). Had Congress sought to limit §4(a)(2) to harms suffered by existing employees, "any individual" would instead be "any existing employee" or "any employee." RJR also relies upon Congress's addition of the words "or applicants for employment"

to §703(a)(2) of Title VII in 1972, but that amendment was "declaratory of present law." S. Rep. No. 92-415, at 43 (1971). Indeed, before 1972, both the Supreme Court and the EEOC had interpreted the original, unamended language of §703(a)(2) (which Congress incorporated directly into §4(a)(2)) as permitting challenges to hiring practices. *See Griggs*, 401 U.S. at 426, 91 S.Ct. at 851; *id.* at 433 n.9, 91 S.Ct. at 854 n.9 (quoting 1966 EEOC guidelines).

As with RJR's unjustifiably narrow interpretation of §4(a)(2), this Court should reject RJR's request to abandon forty years of circuit precedent holding that the deadline for filing a charge of discrimination does not begin to run "until the facts that would support a charge of discrimination … were apparent or should have been apparent to a person with a reasonably prudent regard for his rights." *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975). Contrary to RJR's argument, the *Reeb* standard is not inconsistent with the standard this Court applies in other contexts, such as where a litigant fails to comply with known statutory deadlines. Instead, it simply acknowledges that in those unusual circumstances where a victim of unlawful employment discrimination has no reasonable means of discovering the employer's illegal behavior when it occurs but only learns of it subsequently, the employer's success in concealing its unlawful actions should not shield it from liability. *See, e.g., Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661-62 (11th Cir. 1993). The *Reeb*

standard also does not excuse a plaintiff's lack of diligence. Instead, like all due diligence requirements, it provides that plaintiffs need only undertake those inquiries that a person with a "reasonably prudent regard for his rights" would undertake. *Reeb*, 516 F.2d at 931. Where a plaintiff has no reason to suspect unlawful discrimination, or where further inquiries would be futile, no additional diligence is "due." *See, e.g.*, *Tucker v. United Parcel Service*, 657 F.2d 724, 726-27 & n.4 (5th Cir. Unit B Sept. 1981); *TRW Inc. v. Andrews*, 534 U.S. 19, 30, 122 S.Ct. 441, 448 (2001).

In his proposed amended complaint, Villarreal pleaded that he was unaware of RJR's unlawful discrimination until April 2010, that he filed his EEOC charge less than one month thereafter, and that no further inquiries he might have made when his 2007 application was rejected would have revealed RJR's discrimination. RJR may dispute the factual truth of those allegations in subsequent proceedings, but they must be accepted as true for purposes of this appeal and they satisfy this Circuit's standard for equitable tolling.

ARGUMENT

I. The ADEA Permits Disparate Impact Challenges To Discriminatory Hiring Criteria.

The parties do not disagree that disparate impact claims can be pursued under §4(a)(2) of the ADEA. In nonetheless arguing that §4(a)(2) protects only existing employees, RJR focuses on the language of other statutory provisions and

on words that do not appear in §4(a)(2), while largely ignoring that section's statutory text. None of RJR's arguments warrant disregarding the plain language of §4(a)(2), the Supreme Court's construction of identical language in *Griggs*, or the EEOC's longstanding interpretation of that section.

A. The Text Of §4(a)(2) Permits Challenges To Hiring Criteria That Disproportionately Disqualify Older Workers.

RJR's en banc brief nowhere addresses the central flaw in its reading of §4(a)(2): By adopting criteria that applicants must satisfy to be hired into particular positions, an employer "limit[s] … his employees" to the individuals who satisfy those criteria—which is all that §4(a)(2) requires. By "requiring a high school education for initial assignment to any department except Labor," for example, the defendant employer in *Griggs* "limit[ed] … employees" in its non-Labor departments to individuals possessing a high school education. 401 U.S. at 427, 91 S.Ct. at 851. *Griggs* recognized that such a "condition of employment" could be challenged under the language of §703(a)(2) of Title VII as originally enacted, which is identical in all relevant respects to §4(a)(2). *Id.* at 426 & n.1, 91 S.Ct. at 851 & n.1 (citing 42 U.S.C. §2000e-2(a)(2)); *see also EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1282 n.18 (11th Cir. 2000) (*Griggs* concluded that Title VII permits disparate impact challenges to hiring practices); En Banc Brief of Plaintiff-Appellant Richard M. Villarreal ("Br.") at 24-28 (refuting RJR's contrary arguments).

Because the text of §4(a)(2) permits challenges to such limitations on employment even without specifically referencing "applicants for employment," Congress's failure to include those words in §4(a)(2) does not render that section unavailable to prospective employees. To the contrary, Congress provided that an employer's conditions for employment in particular positions are unlawful 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). An individual who has been denied a job altogether has indisputably been "deprive[d] of employment opportunities."[1]

The fact that *other* provisions of the ADEA refer to hiring and applicants for employment does not narrow the scope of §4(a)(2)'s text. None of the provisions cited by RJR include language comparable to §4(a)(2)'s "limit … employees" language. Instead, each involves different language that would arguably exclude prospective employees absent the explicit reference to applicants or hiring. *See, e.g.*, 29 U.S.C. §623(d) (unlawful to "discriminate against … employees or

[1] RJR urges this Court to ignore the fact that the nearly identical language of the Genetic Information Nondiscrimination Act ("GINA") permits claims by both prospective and existing employees, but RJR relies upon GINA provisions governing *employment agency* practices (which correspond to §4(b) of the ADEA), rather than the provisions that govern *employer* practices and that are therefore analogous to §4(a)(2). *See* Br. at 22-23 n.2 (citing 42 U.S.C. §§2000ff(2)(A)(1), 2000ff-1(a)(2)); En Banc Brief of Defendants-Appellees R.J. Reynolds Tobacco Co. et al. ("RJR Br.") at 25 (citing 42 U.S.C. §2000ff-2).

applicants for employment"); *see also infra* at 12-13 (discussing 29 U.S.C. §§631, 633a).[2] RJR's argument is premised on its contention that differences in statutory language in "close proximity" provide meaningful evidence of congressional intent, RJR Br. at 14, but RJR ignores the statutory distinction between "employees" and "individuals" *within §4(a)(2) itself*. "This deliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent." *Williams*, 340 F.3d at 1236.[3]

Instead of acknowledging that hiring criteria that "limit" an employer's employees to a specific group and deprive others of employment opportunities because of their age are subject to challenge under §4(a)(2)'s plain language, RJR argues that §4(a)(2) prohibits claims by prospective employees because the employer actions subject to challenge thereunder are unlawful only if they "adversely affect [any individual's] status as an employee." 29 U.S.C. §623(a)(2).

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[2] Section 4(c)(2) prohibits certain labor organization actions that "adversely affect [one's] status as an employee or as an applicant for employment." 29 U.S.C. §623(c)(2). As the text of §4(c)(2) demonstrates, Congress's decision to include "applicant for employment" in that section reflects the gatekeeper role that exists where labor organizations refer individuals for work, such as through union hiring halls. *Id.* (prohibiting labor organizations from "fail[ing] or refus[ing] to refer for employment any individual … because of such individual's age").

[3] *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998), does not support RJR's argument. To the contrary, *Llampallas* emphasized that Title VII's protections extend to "'prospective employees.'" *Id.* at 1243 (citing *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997); *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 491 (7th Cir. 1996)).

But §703(a)(2) of Title VII contains the exact same language, and there is no dispute that hiring practices can be challenged thereunder. As the Supreme Court has explained, the "or otherwise adversely affect" language of §4(a)(2) and §703(a)(2) *expands* the statutes' coverage, rather than limiting the scope of their other provisions. *See Inclusive Communities Project*, 135 S.Ct. at 2519 ("otherwise adversely affect" is a "catchall" phrase); *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1224 (11th Cir. 2009) (use of disjunctive "or otherwise" "indicates alternatives and requires that those alternatives be treated separately") (citation omitted). Moreover, an individual whose application for employment has been rejected has had "his status as an employee" adversely affected—he was denied that status altogether.

Finally, RJR argues that *Smith v. City of Jackson* interpreted §4(a)(2) to permit claims by only existing employees. However, neither the *Smith* plurality nor Justice Scalia endorsed Justice O'Connor's argument that §4(a)(2) excludes applicants for employment. To the contrary, those five Justices concluded that Justice O'Connor's analysis of §4(a)(2) was unpersuasive and "quite wrong." *Smith v. City of Jackson*, 544 U.S. 228, 236 n.6, 125 S.Ct. 1536, 1542 n.6 (2005) (plurality opinion); *id.* at 243, 125 S.Ct. at 1546 (Scalia, J., concurring) (agreeing with plurality's reasoning). In noting that §4(a)(2)'s text "focuses on the effects of the action on the employee rather than the motivation for the action of the

employer," *id.* at 236, 125 S.Ct. at 1542, the plurality simply described the operation of §4(a)(2) as applied to the facts presented therein. Nothing in its statements regarding the "focus" of §4(a)(2) excluded other potential applications. Indeed, like the ADEA itself, *see* Br. at 22 (discussing 29 U.S.C. §626(c)(1)), the Supreme Court frequently uses a shorthand reference to "employees" to describe groups that include prospective as well as existing employees.[4] RJR's strained interpretation of the *Smith* plurality's opinion is precisely the kind of "over-reading" in search of "lurking … assumption[s]" that the Supreme Court has specifically instructed lower courts to avoid when interpreting *Smith*. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 97-100, 128 S.Ct. 2395, 2404-05 (2008).

[4] *See, e.g.*, *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2522 (2013) (describing Title VII's anti-retaliation provision as prohibiting "employer retaliation on account of an employee's having opposed, complained of, or sought remedies for, unlawful workplace discrimination"); *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 1310 (1996) (stating that the ADEA "bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older"); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706 (1993) ("[A] disparate treatment claim [under §4(a)(1) of the ADEA] cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.").

B. The 1972 Amendment To Title VII Was Declaratory Of Existing Law.

Rather than focusing on the text of §4(a)(2), RJR asks this Court to base its decision on a different statute, arguing that the 1972 addition of "applicants for employment" to §703(a)(2) of Title VII proves that the ADEA does not permit challenges by prospective employees to an employer's criteria for employment in particular positions. But as Villarreal has already explained, the 1972 amendment to Title VII was "declaratory of present law," and was simply intended to "make it clear" that discrimination against applicants for employment is unlawful. S. Rep. No. 92-415, at 43; *see, e.g.*, *United States v. Sepulveda*, 115 F.3d 882, 885 n.5 (11th Cir. 1997) ("[A]n amendment to a statute does not necessarily indicate that the unamended statute meant the opposite."). RJR contends that these statements should be discounted because the 1972 amendment was introduced before *Griggs* was decided, but that history simply strengthens the conclusion that Congress did not understand the amendment as expanding the scope of §703(a)(2): The Supreme Court's 1971 decision in *Griggs* brought the judicial branch into agreement with the executive and legislative branches that §703(a)(2), as originally enacted, permitted claims by prospective employees. *See Griggs*, 401 U.S. at 433 n.9, 91 S.Ct. at 854 n.9 (quoting 1966 EEOC guidelines); *see also* H.R. Rep. No. 92-238, at 22 (1971) (proposed amendment was "fully in accord with" *Griggs*).

RJR's argument that the 1972 amendment expanded the scope of Title VII to permit disparate impact claims by prospective employees cannot be reconciled with its argument that recognizing such claims imposes substantial costs on employers and threatens "settled and legitimate employment practices." RJR Br. at 19; *see also* En Banc Brief of the Retail Litigation Center ("RLC Br.") at 5-6. If the 1972 amendment significantly expanded Title VII to encompass a broad range of hiring decisions not previously subject to disparate impact challenges, Congress would have acknowledged that substantial change at some point during its deliberations. *See, e.g.*, En Banc Brief of the Chamber of Commerce ("Chamber Br.") at 22 (arguing that Congress does not "hide elephants in mouseholes") (citation omitted). Congress most certainly would not have asserted that the amendment was "declaratory of" and "comparable to" existing law.[5]

For these reasons, RJR's reliance on *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343 (2009), and *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 111 S.Ct. 1227 (1991), is misplaced. Neither decision suggests that courts should disregard both the plain meaning of statutory text and all other evidence of congressional intent simply because different statutes use different language.

[5] RJR cites *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971), in support of its argument, but the passing dicta RJR cites does not even purport to analyze the scope of §703(a)(2). *Id.* at 445.

Gross emphasized that the differences between Title VII and the ADEA with respect to the issue presented therein required the Court to focus its analysis "on the text of the ADEA" instead of Title VII precedents. 557 U.S. at 175, 129 S.Ct. at 2349-50. Likewise, *Arabian Am. Oil* did not "find it dispositive that Congress had amended the ADEA but not Title VII," as RJR claims. RJR Br. at 26. The Court instead explained that Title VII's failure to address the consequences of extraterritorial application, as it had done when amending the ADEA to apply overseas, fortified its conclusion that Title VII lacked the clear language necessary to overcome the presumption against extraterritoriality, and then cited the ADEA's amendment as evidence that Congress knows how to provide such language. *Arabian Am. Oil*, 499 U.S. at 248, 256-58, 111 S.Ct. at 1230, 1234-36.

Finally, no negative inference can be drawn from Congress's decision to incorporate the existing statutory text of Title VII into the ADEA instead of incorporating amendments to Title VII that were proposed in 1967 but that might never be adopted and that Congress in any event believed to be "declaratory of existing law." *See* RJR Br. at 27. The 1974 amendments to the ADEA, *id.* at 27-28, likewise do not suggest any congressional intent to limit the scope of §4(a)(2). Those amendments added an entirely new ADEA section providing that "[a]ll personnel actions affecting employees or applicants for employment" in specified federal government agencies "shall be made free from any discrimination based on

age." 29 U.S.C. §§631(b), 633a(a). Because the federal-sector provision and §623, its private-sector counterpart, "were enacted separately and are couched in very different terms," the Supreme Court has rejected attempts to draw negative inferences from comparisons of the two provisions. *Gomez-Perez v. Potter*, 553 U.S. 474, 486-87, 128 S.Ct. 1931, 1939-40 (2008); *see also In re Piazza*, 719 F.3d 1253, 1269 (11th Cir. 2013) (selective inclusion presumption is "less persuasive" in circumstances discussed in *Gomez* and can never overcome ordinary meaning of statutory language). In any event, because the federal-sector provision does not include §4(a)(2)'s language regarding "limit[ing] … employees," its reference to "applicants for employment" was necessary to permit claims by prospective employees, while no such language is necessary in §4(a)(2).

C. This Court Should Defer To The EEOC's Longstanding Interpretation Of §4(a)(2).

Accordingly, the text of §4(a)(2) authorizes disparate impact claims challenging hiring criteria like RJR's Resume Review Guidelines and Blue Chip TM Profile. At most, RJR's arguments demonstrate that §4(a)(2) is arguably ambiguous. But even if that were so, this Court would simply be required to defer to the EEOC's longstanding interpretation of that section as permitting disparate impact claims by prospective employees. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009) (requiring deference to agency's "reasonable, and therefore permissible, construction of [statutory]

language"); *see also Smith*, 544 U.S. at 239-40, 125 S.Ct. at 1544 (plurality opinion); *Smith*, 544 U.S. at 243, 125 S.Ct. at 1546 (Scalia, J., concurring).

RJR contends that the EEOC's regulations deserve no deference because "the EEOC has never engaged in any exercise of its authority to interpret §4(a)(2) to address whether it includes 'applicants for employment.'" RJR Br. at 39. But RJR cannot dispute that the Secretary of Labor's 1968 ADEA regulations and the EEOC's 1981 regulations expressly permitted disparate impact challenges by prospective employees. *See* En Banc Brief of the Equal Employment Opportunity Commission ("EEOC Br.") at 20-21 (discussing 29 C.F.R. §860.103(f)(1)(i) (1968), and 29 C.F.R. §1625.7(d) (1981)); *see also Smith*, 544 U.S. at 239-40, 125 S.Ct. at 1545 (discussing 1981 EEOC regulations). Nor can RJR dispute that the EEOC's current regulations provide that "*[a]ny employment practice* that adversely affects *individuals* … on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'" 29 C.F.R. §1625.7(c) (emphasis added). *Smith* squarely rejected RJR's assertion that the EEOC's regulations interpret only the ADEA's "reasonable factor other than age" ("RFOA") defense, 29 U.S.C. §623(f)(1), without interpreting §4(a)(2). *See* 544 U.S. at 239-40, 125 S.Ct. at 1544 (plurality opinion); *id.* at 244-45, 125 S.Ct. at 1547-48 (Scalia, J., concurring).

RJR further argues that the EEOC's regulations can be ignored because they purportedly conflict with four adjudicative decisions issued by the EEOC between 1979 and 1981. RJR Br. at 22 & n.2. But the regulations were issued after extensive notice and comment rulemaking, and thus deserve deference regardless of prior adjudicative decisions. *See, e.g.*, *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 863-64, 104 S.Ct. 2778, 2792 (1984). Moreover, there is no conflict between the decisions and the current regulations. The cited decisions addressed §703(a)(1) of Title VII, not the ADEA, and simply acknowledged that in prohibiting "discriminat[ion] against any individual," §703(a)(1) is broader than §703(a)(2), which more narrowly regulates only the manner in which an employer "limit[s], classif[ies], or segregate[s] his employees or applicants for employment."

The EEOC's interpretation also deserves deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997), because the EEOC has consistently interpreted the ADEA as permitting disparate-impact claims by prospective employees. *See* EEOC Br. at 20-24. Indeed, RJR admits that the EEOC has for 20 years taken the specific position that such claims are cognizable under §4(a)(2). *See* RJR Panel Br. at 43 (citing 1995 petition for certiorari); *cf.* EEOC Br. at 24. Because the EEOC's position "reflect[s] the agency's fair and considered judgment on the matter in question," and is not a "*post hoc* rationalization" advanced solely for the purposes of this case, this Court should defer to that position. *Auer*, 519 U.S. at

462, 117 S.Ct. at 912; *Pugliese v. Pukka Development, Inc.*, 550 F.3d 1299, 1305 (11th Cir. 2008) (deferring to interpretation "consistent with the position [the agency] has always held"); *cf. Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 103, 128 S.Ct. 2395, 2407 (2008) (Scalia, J., concurring) (deferring to EEOC because "administration of the ADEA has been placed in the hands of the [EEOC]").[6]

D. Construing §4(a)(2) In A Manner Consistent With The Statutory Text, *Griggs*, And The EEOC's Longstanding Interpretation Will Not Threaten Legitimate Employer Practices.

Finally, construing §4(a)(2) to permit challenges to hiring criteria will not unleash a flood of new litigation or threaten any legitimate employer practices that Congress sought to protect.

In arguing that Villarreal's construction of §4(a)(2) threatens to subject beneficial employer practices such as participating in career fairs targeting disadvantaged groups to expensive class litigation, *see, e.g.*, Chamber Br. at 11-16; RLC Br. at 5-10, RJR and its amici disregard the fact that §4(a)(2) only applies where an employer "limit[s], classif[ies], or segregate[s]" its employees in a

[6] RJR contends that *Auer* deference is inapplicable because the EEOC's regulations "restate" the relevant statutory text. RJR Br. at 43. But the EEOC's regulations first clarify the scope of §4(a)(2) by explaining that their provisions apply to "any employment practice that adversely affects individuals … on the basis of older age," and then provide a multi-faceted test for determining whether a particular factor is a reasonable factor other than age. 29 C.F.R. §1625.7(c).

manner that deprives individuals of employment opportunities or otherwise adversely affects their employment status. Where an employer chooses to *expand* its pool of potential employees by recruiting at events such as career fairs or conferences "intended to attract current students and recent graduates from underserved and diverse backgrounds," RLC Br. at 8, the employer has not *limited* its employees to a specified group, and therefore cannot be sued under §4(a)(2). The Chamber of Commerce characterizes this interpretation of §4(a)(2) as "atextual," but it is the Chamber that ignores the "limit, classify, or segregate" language of §4(a)(2). Indeed, if the Chamber is correct, many of the purportedly beneficial recruiting practices discussed in the Retail Litigation Center's amicus brief are already subject to attack under Title VII, because their very purpose is to help members of particular racial or ethnic groups procure employment. *See* RLC Br. at 8-9 (discussing employers' participation in recruiting events sponsored by the National Association of Asian MBAs, the National Black MBA Association, and the National Society of Hispanic MBAs). Yet employers continue to participate in such programs notwithstanding the availability of hiring-related disparate impact claims under Title VII.

To the extent that a prospective employer's hiring practices *do* limit employment opportunities in a manner that disparately disqualifies older workers, those practices are permissible so long as they are "based on reasonable factors

other than age." *Meacham*, 554 U.S. at 87, 128 S.Ct. at 2398. In describing the purported benefits of the hiring practices allegedly threatened by the plain text reading of §4(a)(2), RJR and its amici demonstrate why many of those practices should constitute RFOAs. Further, where the legitimate purposes served by a challenged practice are "plainly reasonable," it does not take a great deal of evidence "to persuad[e] the factfinder that the defense is meritorious." *Id.* at 101, 128 S.Ct. at 2406. "It will be mainly in cases where the reasonableness of the non-age factor is obscure for some reason, that the employer will have more evidence to reveal and more convincing to do in going from production to persuasion." *Id.*[7]

If an employer adopts employee selection criteria that disproportionately disqualify older workers and the employer cannot establish *any* of the disparate impact defenses, its policy is precisely the kind of artificial barrier to the employment of older workers that Congress sought to eliminate through passage of the ADEA. As noted already, the ADEA was motivated to a significant extent by the problems facing *unemployed* older workers. *See* 29 U.S.C. §§621(a)(1), (3), 621(b); *see also* U.S. Dep't of Labor, *The Older American Worker: Age*

[7] Contrary to RJR's contentions, ADEA lawsuits cannot be "alleged as class actions" or "impos[e] … class-wide liability" on defendants. RJR Br. at 18, 20; *see Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001) (describing "fundamental" difference between ADEA collective actions and Rule 23 class actions) (citation omitted).

Discrimination in Employment 3 (1965) (expressing concern regarding "formal employment standard[s]" that "work against the employment of many older workers"); En Banc Br. for AARP at 14-24.[8] There is no reason to conclude that Congress intended for such "arbitrary and, in practice, discriminatory" practices to be entirely exempt from attack under the ADEA. *Inclusive Communities Project*, 135 S.Ct. at 2522.

II. Villarreal Adequately Pleaded A Claim For Equitable Tolling.

In arguing that Villarreal failed to plead the elements of a proper claim for equitable tolling, RJR ignores both this Circuit's longstanding precedents and the procedural posture of this case.

A. The EEOC Charge-Filing Deadline Is Equitably Tolled Until The Facts Supporting The Charge Should Be Apparent To The Charging Party.

Since 1975, this Circuit and its predecessor have repeatedly recognized that the deadline for filing an EEOC charge does not begin to run until the facts supporting that charge "were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff." *Reeb*, 516 F.2d at 931; *see also Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1268 (11th

[8] *Smith* rejected RJR's argument that Secretary Wirtz's Report is irrelevant because it did not specifically recommend recognition of a disparate-impact cause of action. *Smith*, 544 U.S. at 232, 235 n.5, 238, 125 S.Ct. at 1540, 1541 n.5, 1543 (plurality).

Cir. 2003); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1435 (11th Cir. 1998); *Hargett v. Valley Fed. Sav. Bank*, 60 F.3d 754, 765 (11th Cir. 1995); *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994); *Ross*, 980 F.2d at 660; *Hill v. Metro. Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1545 (11th Cir. 1988); *Cocke*, 817 F.2d at 1560; *Nelson v. U.S. Steel Corp*., 709 F.2d 675, 677 n.3 (11th Cir. 1983).

RJR ignores this standard almost entirely, arguing that it determines only when the equitable-tolling period ends, not whether equitable tolling is available in the first instance. RJR Br. at 51. According to RJR, equitable tolling instead requires some "extraordinary circumstance" beyond the plaintiff's reasonable lack of awareness of the facts supporting his EEOC charge, such as "affirmative misconduct" or "deliberate concealment" by the employer. That argument is contradicted by *Reeb* itself, which "appl[ied] the familiar equitable modification to statutes of limitation" pursuant to which "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," while recognizing that a mere "*corollary*" of that rule is the principle that an employer that has wrongfully

concealed relevant facts "is estopped from asserting the statute of limitations as a defense." *Reeb*, 516 F.2d at 930 (emphasis added).[9]

Any ambiguity regarding *Reeb* was resolved in *Tucker v. United Parcel Service*, 657 F.2d 724 (5th Cir. Unit B Sept. 28, 1981). *Tucker* considered the timeliness of EEOC charges filed by black delivery drivers more than 180 days after they were dismissed and informed that they would not be rehired, but less than 180 days after they learned that UPS had retained some white drivers and later rehired others. *Id.* at 725, 727. Even though the black drivers did not assert that UPS had misled them, the panel concluded that equitable tolling was proper under *Reeb* because the facts supporting the drivers' discrimination claims were not apparent to them until well after they were dismissed. *Id.* at 726. In an opinion joined by Judge Tjoflat and Judge Clark, Chief Judge Godbold concluded that the time for filing an EEOC charge did not run while plaintiffs were reasonably unaware of UPS's discriminatory actions, and that the drivers' mere dismissal was insufficient to put them on notice that they might have been victims of discrimination. *Id.* As Chief Judge Godbold explained, "[i]t would be anomalous

[9] By arguing that employer misconduct is generally necessary to establish a claim for equitable tolling, RJR improperly conflates equitable tolling and equitable estoppel. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990). This Circuit "does not require employer misconduct" to establish a claim for equitable tolling. *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559, 1561 (11th Cir. 1987).

indeed if persons protected by [Title VII] from racial discrimination are required to presume that they are being discriminated against." *Id.*

In arguing that a charging party's reasonable lack of awareness of the facts supporting his claim does not toll the deadline for filing an EEOC charge, RJR asks this Court to overturn all of these prior decisions, but there is no reason to upset forty years of Circuit precedent. Contrary to RJR's contentions, the *Reeb* standard does not conflict with the "extraordinary circumstances" standard that this Court applies in other contexts, such as habeas. Instead, the *Reeb* standard properly balances the specific equities that are present where a victim of employment discrimination has no reasonable means of learning of the employer's unlawful actions and the employer is successful in preventing any disclosure of its actions until after the statutory filing deadline has run. *See Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985) (extraordinary circumstances present "if the employee could show that it would have been impossible for a reasonably prudent person to learn that his discharge was discriminatory"); *see also Jackson v. Astrue*, 506 F.3d 1349, 1353 (11th Cir. 2007) (extraordinary circumstances exist "when the plaintiff has no reasonable way of discovering the wrong perpetrated against her"); *Ross*, 980 F.2d at 661-62 ("extraordinary circumstances" absent because plaintiffs could not satisfy the *Reeb* standard). RJR and its amici contend that in the hiring context a victim's reasonable lack of knowledge that he suffered

unlawful discrimination is too common to be considered "extraordinary," but as the relative paucity of hiring cases under the ADEA and Title VII demonstrates, individuals whose applications for employment have been rejected for discriminatory reasons almost never learn of that discrimination. It is only in rare and "extraordinary" cases, such as where a whistleblower discloses the employer's unlawful actions to the victim or his counsel, that such victims become aware of the discrimination, file EEOC charges, and bring suit.

The *Reeb* standard is also consistent with the Supreme Court's precedents. Neither *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 104 S.Ct. 1723 (1984), nor *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453 (1990), considered when a victim of discrimination who is reasonably unaware of the facts supporting his claim must file an EEOC charge; instead, both cases involved plaintiffs who were aware of their claims and filed timely EEOC charges but failed to satisfy the deadline for filing suit after completion of the EEOC process.[10] And far from having been rejected by other courts, the *Reeb* standard has been "echoed by various circuits across the country." *Jones*, 331 F.3d at 1264; *see also* Br. at 43-44 (collecting decisions); *Wolfolk v. Rivera*, 729 F.2d 1114, 1117-18 (7th Cir. 1984) ("We adopt and apply the *Reeb* standard … because it strikes an appropriate

[10] *Bost v. Fed. Express Co.*, 372 F.3d 1233 (11th Cir. 2004), likewise involved a failure to satisfy known court-filing deadlines.

balance between fairness to the claimant and the importance of beginning the administrative process of investigation and conciliation in a timely manner."). RJR attempts to distinguish the numerous circuit decisions citing *Reeb* on their facts, but it cannot escape their express endorsement of *Reeb*.[11]

Nor does the *Reeb* standard excuse a plaintiff's lack of diligence. To the contrary, tolling is unavailable under that standard if a "reasonably prudent" plaintiff acting with proper regard for his rights would have undertaken further inquiries and become aware of the employer's discrimination. *See also Tucker*, 657 F.2d at 726 ("the sufficiency of facts to trigger the charge-filing period" under *Reeb* "may be measured subjectively or objectively"); c*f. Merck & Co., Inc. v.*

[11] None of the other circuit decisions cited by RJR conflicts with *Reeb*. Four do not involve claims of employment discrimination and are completely inapposite. *See Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014); *Cruz v. Maypa*, 773 F.3d 138, 145-46 (4th Cir. 2014); *Smithrud v. City of St. Paul*, 746 F.3d 391, 396 (8th Cir. 2014); *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66, 71-73 (1st Cir. 2005). In six of the others, the plaintiffs were fully aware of the facts supporting their claims of discrimination within the charge-filing period and sought equitable tolling on entirely different grounds. *See Lee v. Cook Cnty., Ill.*, 635 F.3d 969, 972 (7th Cir. 2011) (attorney error); *Harris v. Boyd Tunica, Inc.*, 628 F.3d 237, 239 (5th Cir. 2010) (same); *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011) (mental incompetency); *Dyson v. D.C.*, 710 F.3d 415, 421-22 (D.C. Cir. 2013) (agency delay or misdirection); *Zerilli-Edelglass v. N.Y.C. Trans. Auth.*, 333 F.3d 74, 80-81 (2d Cir. 2003) (same); *Montoya v. Chao*, 296 F.3d 952, 957-58 (10th Cir. 2002) (same). In the final two, the plaintiffs discovered the facts supporting their claims *within* the charge-filing period, but unjustifiably failed to file timely charges. *See Amini v. Oberlin Coll.*, 259 F.3d 493, 501 (6th Cir. 2001); *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 384-85 (3d Cir. 2007).

Reynolds, 559 U.S. 633, 653, 130 S.Ct. 1784, 1798 (2010) (courts consider when "a reasonably diligent plaintiff would have discovered [the relevant] facts … irrespective of whether the actual plaintiff undertook [such an] investigation").

Like all such due diligence requirements, *Reeb*'s diligence requirement is subject to two important conditions. First, a plaintiff with no reason to suspect discrimination has no obligation to undertake an investigation to determine whether he might have been subjected to unlawful discrimination. As *Tucker* explained, "[t]he 'prudent person' requirement of *Reeb* is not triggered by [a plaintiff] being notified of an otherwise unexceptional decision." 657 F.2d at 727; *see also id.* at 727 n.4 (rejecting "proposition that any employee claiming a Title VII violation from an adverse employment decision has a duty to investigate to determine if there were unrevealed discriminatory reasons for the decision"); *Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1222 (2013) ("Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded. And the law does not require that we do so."); *Venture Glob. Eng'g, LLC v. Satyam Computer Servs., Ltd.*, 730 F.3d 580, 588 (6th Cir. 2013) ("[D]oing nothing might be reasonable where nothing suggests to a reasonable person that wrongdoing is afoot."). Second, futility is a recognized exception to the requirement that a plaintiff conduct an investigation. "It is obviously unreasonable

to charge the plaintiff with failure to search for the missing element of [a] cause of action if such element would not have been revealed by such search." *TRW Inc.*, 534 U.S. at 30, 122 S.Ct. at 448 (quoting 2 Calvin W. Corman, Limitation of Actions § 11.1.6, at 164 (1991)).

In short, the standard that this Court and its predecessor have applied for more than 40 years when considering the circumstances here is consistent with the precedents of the Supreme Court, this Court, and other circuits. There is no reason for this Court to abandon its well-established precedents. The Court should instead reaffirm that *Reeb*, *Tucker*, and their progeny continue to govern the equitable tolling analysis in such cases.

B. Villarreal's Allegations Were Sufficient.

Because the issue on appeal arises from the denial of Villarreal's motion to amend his complaint, this Court must determine only whether the allegations in Villarreal's proposed amendment complaint establish "beyond a doubt" that Villarreal can prove "no set of facts" that would entitle him to equitable tolling. *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1288 & n.13 (11th Cir. 2005); *see also Richards v. Mitcheff*, 696 F.3d 635, 637-38 (7th Cir. 2012); *Secretary of Labor v. Labbe*, 319 Fed. Appx. 761, 764 (11th Cir. 2008).[12] There is no dispute

[12] This Court reviews the denial of Villarreal's motion to amend by evaluating whether the allegations in the proposed amended complaint would have been (continued…)

that Villarreal adequately pleaded that he was not aware of RJR's discriminatory hiring criteria until less than one month before the filing of his EEOC charge, or that he promptly and diligently filed his claim with the EEOC once he learned of RJR's practices. The only remaining question is whether the facts pleaded establish beyond a doubt that a reasonably prudent person in Villarreal's position would have learned of RJR's practices at some earlier point.

In this respect, Villarreal's proposed amended complaint alleges both that (1) Villarreal had no reason to suspect that he was a victim of discrimination when his 2007 application was rejected and thus no reasonable basis for conducting any further investigation at that time, *see* App. Vol. II, Dkt. No. 61-1, at 12-13 ¶¶27, 30; and (2) such an investigation would not have revealed RJR's practices and would therefore have been futile, App. Vol. II, Dkt. No. 61-1, at 12 ¶27. Finding that these allegations adequately state a claim for equitable tolling does not require this Court to disregard the due diligence requirement, as RJR contends, but simply applies the well-recognized principles described above, pursuant to which plaintiffs need only pursue investigations where there is a reasonable basis for suspecting unlawful discrimination and the investigations are reasonably likely to

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(…continued)
sufficient to survive a motion to dismiss. *Harris v. Ivax Corp.*, 182 F.3d 799, 802 (11th Cir. 1999); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999).

generate additional evidence of such discrimination. *See Tucker*, 657 F.2d at 727 n.4 (federal antidiscrimination statutes do not create "a duty of investigation" by all individuals "subjected to adverse employment decisions"); *TRW Inc.*, 534 U.S. at 30, 122 S.Ct. at 448 (diligence does not require plaintiff to undertake futile inquiries). RJR will have the right to challenge Villarreal's allegations as a factual matter in future proceedings. *See, e.g.*, RJR Br. at 56 (arguing that RJR "would have told [Villarreal] that it was seeking entry-level salesmen with less experience" had he asked in 2007).[13] But such factual disputes cannot be considered in reviewing the viability of Villarreal's proposed amended complaint. *See Berkovitz v. United States*, 486 U.S. 531, 540, 108 S.Ct. 1954, 1960-61 (1988).

RJR also faults Villarreal for failing to confirm what he reasonably (and correctly) concluded after RJR did not contact him about his 2007 application—namely, that RJR had rejected that application. If Villarreal's claim that his EEOC charge was timely turned upon any confusion about the timing of that rejection, the fact that he did not ask RJR to confirm his rejection would arguably be relevant. But merely confirming his rejection would not have given Villarreal any reason to

[13] RJR's new claim about what it would have done in 2007 is belied by the fact that, when it rejected Villarreal's subsequent applications, it informed him that it was pursuing other candidates without saying anything about its hiring criteria or the age or experience of any individual it hired instead of Villarreal. App. Vol. I, Dkt. No. 1, at 8-9 ¶¶18-19; App. Vol. II, Dkt. No. 61-1, at 8 ¶¶17-18.

suspect he was a victim of unlawful discrimination, let alone revealed RJR's hiring criteria or their effect on older applicants. *See Sturniolo*, 15 F.3d at 1026 (plaintiff's "mere suspicion of age discrimination" did not terminate tolling period); *Tucker*, 657 F.2d at 727 n.4. That Villarreal did not ask RJR to confirm the rejection of his application is thus irrelevant in determining whether, under the facts as pleaded in Villarreal's proposed amended complaint, it is beyond doubt that a reasonably prudent plaintiff in Villarreal's position would have discovered RJR's discriminatory practices prior to April 2010. Because Villarreal alleged precisely the opposite, the district court erred in concluding that his proposed complaint does not state a potentially viable claim for equitable tolling.

CONCLUSION

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

Respectfully submitted,

Dated: May 10, 2016

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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)(ii), because this brief contains 6,967 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 May 10, 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 REPLY 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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