No. 15-10602

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD M. VILLARREAL,

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

EN BANC BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, counsel for *Amicus Curiae* the Chamber of Commerce of the United States of America states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock.

Counsel further states a belief that the following is a complete list of persons and entities who, to the best of *Amicus Curiae* the Chamber of Commerce of the United States of America'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 of America
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. Villarreal
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 of America - *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 of America
16. Cielo, Inc. - Name under which Defendant-Appellee Pinstripe, Inc. now operates
17. Davis, Lorraine C. – Attorney for *amicus curiae* U.S. Equal Employment Opportunity Commission

18. Dick, Anthony J. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

19. Dreiband, Eric S. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

20. Eber, Michael L. - Attorney for Plaintiff-Appellant Richard M. Villarreal

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

22. Finberg, James M. - Attorney for Plaintiff-Appellant Richard M. Villarreal

23. Girouard, Mark J. - Attorney for *amicus curiae* Retail Litigation Center, Inc.

24. Goldstein, Jennifer S. - Attorney for *amicus curiae* U.S. Equal Employment Opportunity Commission

25. Greenberg Traurig, LLP - Former law firm for Defendant-Appellee Pinstripe, Inc.

26. Hunt, Hyland - Attorney for *amicus curiae* Chamber of Commerce of the United States of America

27. Ifill, Sherrilyn - Attorney for *amicus curiae* NAACP Legal Defense and Education Fund, Inc.

28. Johnson, Mark T. - Attorney for Plaintiff-Appellant Richard M. Villarreal

29. Jones Day - Law firm for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

30. Kohrman, Daniel B. - Attorney for *amicus curiae* AARP

31. Leasure, Amy B. - Attorney for *amicus curiae* Equal Employment Advisory Council

32. Levy Ratner, P.C. - Law firm for *amicus curiae* NAACP Legal Defense and Education Fund, Inc.

33. Livingston, Donald - Attorney for *amicus curiae* Chamber of Commerce of the United States of America

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40. Michael Best & Friedrich LLP - Former law firm for Defendant-Appellee Pinstripe, Inc.

41. Montag, Cody - Attorney for *amicus curiae* NAACP Legal Defense and Education Fund, Inc.

42. NAACP Legal Defense and Education Fund, Inc. - *Amicus curiae* in support of Plaintiff-Appellant Richard M. Villarreal

43. Nelson, Janai – Attorney for *amicus curiae* NAACP Legal Defense and Education Fund, Inc.

44. Nilan Johnson Lewis PA - Law firm for *amicus curiae* Retail Litigation Center, Inc.

45. NT Lakis, LLP - Law firm for *amicus curiae* Equal Employment Advisory Council

46. Pinstripe Holdings, LLC - Private company and parent corporation of Pinstripe, Inc., now operating as Cielo, Inc.

47. Pinstripe, Inc. - Private company and Defendant-Appellee, now operating as Cielo, Inc.

48. Pitts, P. Casey - Attorney for Plaintiff-Appellant Richard M. Villarreal

49. Postman, Warren - Attorney for *amicus curiae* Chamber of Commerce of the United States of America

50. Retail Litigation Center, Inc. - *Amicus curiae* in support of Defendant-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

51. Reynolds American Inc. (RAI) - Publicly held company and parent company

of Defendant-Appellee R.J. Reynolds Tobacco Company

52. R.J. Reynolds Tobacco Company - Private company and Defendant-Appellee

53. R.J. Reynolds Tobacco Holdings, Inc. - Private company and parent company of Defendant R.J. Reynolds Tobacco Company

54. Rogers & Hardin LLP - Law firm for Plaintiff-Appellant Richard M. Villarreal

55. Schalman-Bergen, Sarah R. - Attorney for Plaintiff-Appellant Richard M. Villarreal

56. Schmitt, Joseph G. - Attorney for *amicus curiae* Retail Litigation Center, Inc.

57. Schneider, Todd M. - Attorney for Plaintiff-Appellant Richard M. Villarreal

58. Schneider Wallace Cottrel Brayton Konecky, LLP - Law firm for Plaintiff-Appellant Richard M. Villarreal

59. Seyfarth Shaw LLP - Law firm for former Defendant CareerBuilder, Inc.

60. Smith, Dara - Attorney for *amicus curiae* AARP

61. Smith, Frederick T. - Attorney for former Defendant CareerBuilder, LLC

62. Story, Richard W. - Trial Judge, U.S. District Court for the Northern District of Georgia

63. Stroup, Robert H. - Attorney for *amicus curiae* NAACP Legal Defense and

Education Fund, Inc.

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

65. Swarns, Christina - Director of Litigation for *amicus curiae* NAACP Legal Defense and Education Fund, Inc.

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

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

68. Vann, Rae T. - Attorney for *amicus curiae* Equal Employment Advisory Council

69. Villarreal, Richard M. - Plaintiff-Appellant

70. Wheeler, Carolyn L. – Former attorney for *amicus curiae* U.S. Equal Employment Opportunity Commission

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

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

/s/ Hyland Hunt
Hyland Hunt

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of national concern to American business.

The Age Discrimination in Employment Act strikes a careful balance between prohibiting irrational barriers to the employment of older workers and preserving employers' ability to adopt sound hiring policies. Recognizing failure-to-hire disparate-impact claims under the Act and applying a broad equitable tolling rule to those claims would disrupt that balance. The Chamber's membership has a strong interest in preserving that appropriate balance.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

STATEMENT OF THE ISSUES

I. Whether § 4(a)(2) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(2), permits applicants for employment to bring disparate-impact claims on the basis of an employer's failure to hire the applicant.

II. Whether Mr. Villareal sufficiently pleaded equitable tolling to survive a motion to dismiss.

SUMMARY OF ARGUMENT

In the Age Discrimination in Employment Act of 1967 (ADEA), Congress carefully circumscribed the manner in which employers could be subject to liability based on a neutral employment practice that had a disparate impact based on age, imposing narrower liability than for race and other protected classes under Title VII of the Civil Rights Act. Congress had sound policy reasons for engaging in this careful line drawing, because age is different than the other classifications protected from employment discrimination. Most pertinent here, Congress did not face the same need to restrict the use of neutral employment practices that could operate to freeze a status quo of disparate employment outcomes due to a long history of racism or other bias in education and society. Older workers today were younger workers yesterday; their employment prospects under neutral employment criteria are not reduced by the headwinds of a lifetime of discrimination on account of age. Congress thus opted to significantly narrow the scope of disparate impact liability concerning older workers.

One of the careful lines drawn by Congress was to preclude disparate impact claims under the ADEA by job applicants, as opposed to employees. Many important, widespread hiring practices, including on-campus recruiting, could be expected to have a disparate impact simply because of the average age of the college student population. These programs have enormous benefits for

businesses. They are a key means for employers to access the cutting-edge advances from colleges and universities, and they permit companies to create robust programs for developing homegrown leaders. Although employers might often be able to avoid liability under the ADEA because of the reasonableness of these programs, Congress chose instead not to put employers to the choice of either shutting down college recruiting or facing ongoing, perpetual litigation scrutiny—as college students and recent graduates will always be younger, on average, than the general population. It makes sense for Congress to distinguish age in this context from the protected classes under Title VII; in the age context, one could not expect any disparate impact from college recruiting to reflect the vestiges of a long history of disparity in educational opportunities. Instead, any disparate impact reflects the simple fact that college students tend to be younger—not that older workers are being held back because of a lifetime of discrimination based on age. Congress thus made a considered, categorical choice that widespread hiring practices should not be subject to disparate impact liability when they not only further important values for employers, but also do not operate to perpetuate a status quo that reflects a history of institutional age discrimination.

Congress also carefully outlined relatively short deadlines for presenting age discrimination claims, to encourage the prompt end to practices that violate the statute and to strike a balance between providing a remedy for discrimination and

forcing employers to defend stale claims. Villarreal's equitable-tolling theory for reviving his untimely claims would eviscerate those deadlines, effectively subjecting employers to liability without any statute of limitations for any hiring claim. A rule that would apply in virtually any case cannot be justified as the sparing application of an equitable doctrine to adjust the statutory deadline in extraordinary cases. Moreover, such a radical re-working of the statutory scheme is unnecessary to protect workers. And it would impose tremendous burdens on businesses, burdens that Congress considered and rejected in enacting the ADEA's charge-filing rules.

ARGUMENT

I. SOUND POLICY UNDERLIES CONGRESS'S DECISION NOT TO PERMIT CLAIMS BY APPLICANTS THAT HIRING PRACTICES HAVE A DISPARATE IMPACT BASED ON AGE

Section 4(a)(2) of the ADEA makes it unlawful for an employer "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." 29 U.S.C. § 623(a)(2). For the reasons stated by R.J. Reynolds, the Chamber agrees that the text, structure, and history—as well as comparison to the text and history of the contrasting provision found in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2)—compel the conclusion reached by every court to have

considered the issue before the panel decision in this case: Congress chose not to make it an unlawful employment practice for employers to adopt hiring practices that may have a disparate impact on applicants by age.

That line drawing makes sense because, unlike with employee promotions or terminations, employers have long engaged in a wide range of legitimate hiring practices that are age neutral, but are likely to have a disparate impact based on age. Yet Villarreal's argument, breaking ranks with the Supreme Court and other Courts of Appeals, would stamp these policies as *prima facie* violations of the ADEA. The real-world implications of allowing such claims underscores the soundness of Congress's careful delineation of unlawful employment practices within Section 4(a)(2) and reinforces that Villarreal's position is incorrect.

1. Under either the ADEA or Title VII, "[t]o establish a *prima facie* case of discrimination by disparate impact, 'a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact.'" *Summers v. Winter*, 303 F. App'x 716, 719 (11th Cir. 2008) (quoting *Connecticut v. Teal*, 457 U.S. 440, 446, 102 S. Ct. 2525, 2530 (1982)); *see Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, 91 S. Ct. 849, 853 (1971). Because the very premise of disparate impact is that the employer does not act with discriminatory intent, invariably disparate impact claims are based on "'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion."

Summers, 303 F. App'x at 719 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 108 S. Ct. 2777, 2789 (1988)); *see In re Emp't Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1311-12 (11th Cir. 1999).

The ADEA and Title VII treat disparate impact claims in materially different ways. As the Supreme Court recognized in *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240, 125 S. Ct. 1536, 1544 (2005), "textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII." For example, "[u]nlike Title VII . . . , § 4(f)(1) of the ADEA, 81 Stat. 603, contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" 544 U.S. at 233, 125 S. Ct. at 1540-41; *see* 29 U.S.C. § 623(f)(1).

There are also textual differences with respect to the treatment of applicants for employment. While Section 4(a)(2) of the ADEA refers solely to "employees" in authorizing disparate impact claims, 29 U.S.C. § 623(a)(2), Title VII's comparable provision refers to "employees or applicants for employment," 42 U.S.C. § 2000e-2(a)(2). Nor is the omission of "applicants" in Section 4(a)(2) accidental. The ADEA expressly refers to "applicants for employment" in other provisions governing labor union practices and retaliation, underscoring that

Congress knew how to extend provisions to "applicants" when it wished to do so. *See* 29 U.S.C. § 623(c)-(d). Against this statutory backdrop, the omission of "applicants for employment" from the ADEA's disparate impact provision is dispositive and must be given effect. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original; citation and internal quotation marks omitted)). That is particularly true given that Congress has no trouble drawing lines when it comes to disparate impact claims. *See, e.g.*, *Smith*, 544 U.S. at 239 n.11, 125 S. Ct. at 1544 n.11 (noting that Equal Pay Act of 1963 bars disparate impact claims altogether); 42 U.S.C. § 1981a(a)(1) (permitting compensatory and punitive damages only for "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)").

Congress's decision to create narrower disparate impact liability under the ADEA than under Title VII stands on an important policy footing: age discrimination does not consign individuals to a lifetime of disadvantage, such that neutral policies could freeze in place the effects of prior discriminatory practices. Policies that give rise to disparate impact liability, by definition, are neutral on their face and often supported by valid business judgments having nothing to do

with a protected trait. These policies, unlike acts of intentional discrimination, are not inherently suspect. Rather, disparate impact liability is premised in large part on the view that neutral policies may need to be altered as an affirmative remedy to eliminate the vestiges of a lifetime of intentional discrimination.

Thus, in interpreting Title VII to authorize disparate impact claims, the Supreme Court in *Griggs* explained that its conclusion was based on its understanding that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained *if they operate to 'freeze' the status quo of prior discriminatory employment practices*." 401 U.S. at 430, 91 S. Ct. at 853 (emphasis added). Subsequent Supreme Court precedent reinforces that congressional purpose of actively combatting the vestiges of discrimination:

> We concluded [in *Griggs*] that Title VII prohibits "procedures or testing mechanisms that operate as '*built-in headwinds*' for minority groups." We found that Congress' primary purpose was the *prophylactic* one of achieving equality of employment "opportunities" and removing "barriers" to such equality.

Teal, 457 U.S. at 448-49, 102 S. Ct. at 2531 (emphasis added) (internal citations omitted); *see also id.* at 447, 102 S. Ct. at 2530-31 ("*Griggs* recognized that in enacting Title VII, Congress required 'the removal of artificial, arbitrary, and unnecessary barriers to employment' and professional development that had historically been encountered by women and blacks as well as other minorities.").

With respect to the ADEA, Congress did not face the same impetus to guard against neutral employment policies that could perpetuate and lock-in a status quo that had been created by decades of social and employment discrimination against a discrete, fixed group. Where neutral employment practices could operate to freeze a discriminatory society where it was, as with race discrimination, Congress chose to subject such practices to demanding scrutiny. *See Griggs*, 401 U.S. at 432, 91 S. Ct. at 854 (confronting disparate impact claims based on race to "diploma and test requirements"). But the workers who are older than 40 today were younger than 40 yesterday. Their educational achievements, social position, and employment prospects when they enter the protected class have not been shaped by discrimination *on account of their age*. Older workers did not face societal headwinds that might lock them into a lifetime of inferior job prospects absent judicial scrutiny of even neutral employment practices.

Accordingly, faced with the option of lumping together classes of persons facing uncommon barriers to employment, Congress had good reason to "reject[] proposed amendments that would have included older workers among the classes protected from employment discrimination" by Title VII. *Smith*, 544 U.S. at 232, 125 S. Ct. at 1540. A report by Secretary of Labor W. Willard Wirtz—on which Congress drew heavily in crafting the ADEA, *EEOC v. Wyoming*, 460 U.S. 226, 229-32, 103 S. Ct. 1054, 1057-58 (1983)—reflects the common understanding that

age discrimination is different. *See* U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment*, at 1-2 (1965) ("Wirtz Report"). The Wirtz Report explained that it "would be easy—and wrong" to "extend the conclusions derived from [Title VII] to the problem of discrimination in employment based on aging" because "'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example—race." *Id.* Congress thus sensibly crafted the ADEA to have a narrower scope: it did not permit disparate impact at all for hiring claims, and it gave employers a less-difficult defense to those disparate impact claims that can be asserted.

2. These core distinguishing features of the ADEA and Title VII are well illustrated by failure-to-hire disparate-impact claims. Businesses regularly recruit students and recent graduates from college and university campuses using a variety of means—including on-campus interviewing, on-campus recruiting, and internship and externship relationships with colleges and universities. *See, e.g.*, PAUL GILLIS, THE BIG FOUR AND THE DEVELOPMENT OF THE ACCOUNTING PROFESSION IN CHINA 165 (1st ed. 2014) (noting "the ubiquitous presence of the Big Four [accounting firms] on college campuses worldwide"); Press Release, Coll. Emp't Research Inst., Mich. State Univ., Rapid Growth in Job Opportunities for College Graduates (Oct. 7, 2014) (discussing on-campus recruiting activities

and state of college labor market).[2] Beyond simply hiring students and recent graduates, businesses also structure important training and development programs around recent-graduate recruitment. *See, e.g.*, *Grossmann v. Dillard Dep't Stores, Inc.*, 109 F.3d 457 (8th Cir. 1997) (discussing "Executive Development Program"); *O'Rourke v. CNA Ins. Cos.*, No. 88-cv-942, 1990 WL 207328 (N.D. Ill. Nov. 21, 1990) (discussing "rotational training program" used to "recruit and train recent college graduates with accounting degrees").

Many of these recruiting practices could be expected to have a disparate impact based on age. Although there has been considerable growth in the number of undergraduates who are "adult students"—"[t]hirty-eight percent of those enrolled in higher education are over the age of 25 and one-fourth are over the age of 30"—college students are overwhelmingly still under the age of 25. Frederick Hess, *Old School: College's Most Important Trend is the Rise of the Adult Student*, THEATLANTIC.COM, Sept. 28, 2011 (discussing National Center for Education Statistics report).[3] The demographic of professional schools is not much older; for example, half of law school applicants from 2005 to 2009 were between the ages of 22 and 24, and only five percent were over the age of 40. *See* Kimberly Dustman & Phil Handwerk, Law School Admissions Council, *Analysis of Law*

[2] *Available at* http://www.ceri.msu.edu/wp-content/uploads/2014/10/press-release-1-10-7-14.pdf.

[3] *Available at* http://www.theatlantic.com/business/archive/2011/09/old-school-colleges-most-important-trend-is-the-rise-of-the-adult-student/245823/.

School Applicants by Age Group: ABA Applicants 2005-2009, at 2 (Oct. 2010)[4]; *see also, e.g.*, Columbia Business School, *Class Profile* (last visited Apr. 20, 2016) (average age of MBA student for Class of 2015 is 28, and 80% of students are 25-31).[5]

Unlike with Title VII disparate impact claims, however, the fact that college- and university-age students are predominantly in their teens or twenties is not a product of institutionalized discrimination. *See* pp. 8-11, *supra*. Instead, it reflects the reality that higher education is a traditional path *to* the workforce taken early in an individual's career arc. Accordingly, there is no basis to deem on-campus recruiting an "artificial, arbitrary, and unnecessary barrier[] to employment" that "operate[s] invidiously" with respect to age, *Griggs*, 401 U.S. at 431, 91 S. Ct. at 853, and no provocation for extending disparate impact claims to applicants for employment under the ADEA for the "prophylactic [purpose] of achieving equality of employment 'opportunities,'" *Teal*, 457 U.S. at 449, 102 S. Ct. at 2531.

3. The practical consequences of ignoring Congress's considered and distinct treatment of ADEA disparate impact claims reinforce the conclusion that Villarreal's theory, adopted by the panel, errs by giving such claims the same

[4] *Available at* http://www.lsac.org/docs/default-source/data-%28lsac-resources%29-docs/analysis-applicants-by-age-group.pdf.

[5] *Available at* https://www8.gsb.columbia.edu/programs-admissions/mba/admissions/class-profile.

scope as Title VII disparate impact claims meant to eliminate "built-in headwinds" of discrimination.

First, on-campus recruiting is a critical part of many businesses' strategies for retaining and developing the best talent. Companies that hire the most new college graduates have a "common thread" of a "promote-from-within model," not because they prefer employees of a certain age, but rather because recruiting large numbers of recent graduates enables them to produce "[h]omegrown leaders" that "have a familiarity with the company and understand its future." Seth Cline, *The Companies Hiring the Most New College Grads*, FORBES.COM, July 21, 2010[6]; Gillis, *supra*, at 165 (practice of "hiring mostly new college graduates" allows "firms to instill their culture and professionalism before the recruits are influenced by experience in another organization"). Indeed, the Wirtz Report recognized that "[p]ersonnel polices are properly designed to establish an orderly system for assignment and promotion of already employed workers" even though such "[p]romotion-from-within policies" often "restrict[] outside recruitment to low-level jobs and younger workers." Wirtz Report, at 15. The Wirtz Report described such programs as a "mark of civilization" that "vastly enhance the dignity . . . of the later years of life," and did not recommend any changes be made with respect

[6] *Available at* http://www.forbes.com/2010/06/21/companies-hiring-college-graduates-leadership-careers-jobs.html.

this "institutional arrangement[] that indirectly restrict[s] the employment of older workers." *Id.* at 2, 15 (capitalization omitted).

Companies also look to recent graduates to bring cutting-edge advances in their fields from the classroom to the workplace. *See, e.g.*, *Sack v. Bentsen*, 51 F.3d 264 (1st Cir. 1995) (unpublished table decision) (rejecting ADEA disparate treatment claim because recent law school graduates "had more current legal knowledge, as evidenced by their recent legal education"); *Mistretta v. Sandia Corp.*, Nos. 74-536-M, 74-556-M, 75-150-M, 1977 WL 17, at *7 (D.N.M. Oct. 20, 1977) ("The available labor market for Sandia technical staff would be expected to come from recent graduates at all degree levels, in addition to the most recent exposure to advanced education, new techniques and new discoveries in the fields of science[.]"). These practices have become increasingly important in the Internet age, whether because employers are conducting "virtual" on-campus recruiting[7] or instead believe that in-person recruiting gives them a competitive edge.[8]

Notably, such beneficial effects of on-campus and recent-graduate recruiting are important to federal agencies also, and reflected in their recruitment programs. For instance, the Department of Justice's "Honors Program is 'the exclusive means

[7] John A. Byrne, *The Online MBA Comes of Age*, FORTUNE, May 29, 2013, http://fortune.com/2013/05/29/the-online-mba-comes-of-age/.

[8] Richard White, *Getting the Competitive College Recruiting Edge*, Monster.com (last visited Apr. 20, 2016), http://hiring.monster.com/hr/hr-best-practices/workforce-management/emerging-workforce/college-recruiting.aspx.

by which the Department hires' all of its entry-level attorneys, including 'recent law school graduates and judicial law clerks who do not have prior legal experience.'" *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 164 (D.C. Cir. 2013) (citation omitted). Likewise, in some years, the EEOC has run its own "Attorney Honor Program," for which the only eligible applicants are "third-year law student[s]," "full-time graduate law student[s]," and "Judicial Law Clerk[s]" whose "clerkship must be [their] first significant legal employment following [their] graduation." U.S. Equal Employment Opportunity Commission, *EEOC Attorney Honor Program* (last visited Apr. 20, 2016).[9] In short, the EEOC seeks to "hire[] recent graduates." *Id.* Judicial clerkship programs, too, "seek[] recent law school graduates." New Jersey Courts, *Law Clerk Recruitment* (last visited Apr. 20, 2016).[10]

As this Court's precedent has long recognized, "the bare fact that an employer encourages employment of recent college and technical school graduates does not constitute unlawful age discrimination." *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981) (disparate treatment case).[11] But if the en banc Court holds, as the panel did, that Section 4(a)(2) of the ADEA permits

[9] *Available at* http://www.eeoc.gov/eeoc/jobs/honorprogram.cfm.

[10] *Available at* http://www.judiciary.state.nj.us/lawclerks/.

[11] This Court has adopted decisions of the Fifth Circuit handed down prior to October 1, 1981, as binding precedent. *See Bonner v. City of Pritchard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

applicants for employment to bring disparate impact claims—which by definition do not involve disparate treatment because of age—the "bare fact" that a business has a practice or policy of hiring students and recent graduates may in fact expose businesses to claims of liability by virtue of the statistics discussed above.

Nor is there any reason to believe, as Villarreal suggests (Appellant En Banc Br. 37-38), that "non-exclusive" hiring programs focused on special populations—like college students—would be outside the scope of the disparate impact claim that Villarreal is proposing on the theory that such programs would "expand an employer's pool of applicants," rather than "limit" employment opportunities within the meaning of Section 4(a)(2). Even if an employer also accepts applicants through means other than on-campus recruiting, plaintiffs would surely argue that the fact that the employer focuses some or most of its recruiting on college students necessarily "limits" the employment opportunities for applicants submitting résumés through other means, with a disparate impact based on age. The scope of Villarreal's atextual disparate impact theory cannot be so easily cabined.

Congress's decision that these important, widespread hiring practices should not be deemed *prima facie* unlawful simply because of the average age of the college student population was one way among several in which Congress recognized that age is different from the classifications protected by Title VII.

Second, engrafting an atextual disparate-impact-hiring claim onto the ADEA would also impose unwarranted costs on businesses. The bare fact that a business has a practice or policy with a disparate impact based on age—such as on-campus recruiting—is likely to expose businesses to large collective action claims by virtue of mere statistics. Indeed, plaintiffs already attempt to shoehorn meritless on-campus recruiting claims into the ADEA's disparate treatment framework. *See, e.g.*, *Grossmann*, 109 F.3d at 459 (dismissing ADEA disparate treatment claim because fact that "Dillards recruits recent college graduates" as part of its "Executive Development Program" is "not evidence it discriminates against older workers"); *Stone v. First Union Corp.*, 203 F.R.D. 532, 549 (S.D. Fla. 2001) (decertifying class action alleging pattern or practice claim of disparate treatment regarding "recruiting on college campuses for graduates to enter a management training program"). Reinstating the panel's extension of the disparate impact framework would only invite a greater number of such claims premised on as little as the makeup of a college's or university's student body.

It is no answer that those claims would likely fail due to the affirmative defenses available to employers under the ADEA. As discussed (p. 7, *supra*), the ADEA "contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" *Smith*, 544 U.S. at 233, 125 S. Ct. at 1541; *see* 29 U.S.C.

§ 623(f)(1). As the Tenth Circuit has recognized post-*Smith*, "recruiting concerns are . . . reasonable business considerations" that qualify for that so-called "RFOA" defense. *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006); *accord Magnello v. TJX Cos.*, 556 F. Supp. 2d 114, 123 (D. Conn. 2008) ("Defendant asserts that it is appropriate and reasonable to recruit recent college graduates for a training program with entry-level pay. In light of the job requirements and pay level, plaintiff has not demonstrated that defendant's use of college recruitment is unreasonable.").[12] But the fact that the RFOA defense should ultimately insulate employers from liability is no answer to the fact that employers will incur risk and significant costs litigating these suits.

That consideration has particular force with respect to disparate impact claims brought by applicants for employment. In addition to the fact that *prima facie* claims are based on statistical evidence, courts have held that RFOA, "as an affirmative defense not anticipated in the pleadings, . . . provides no basis for relief on a motion to dismiss, as opposed to a motion for summary judgment." *Loffredo v. Daimler AG*, 500 F. App'x 491, 498 (6th Cir. 2012); *see Cummins v. City of Yuma, Ariz.*, 410 F. App'x 72, 73 (9th Cir. 2011) (applying rule that RFOA defense may only form basis for dismissal if plaintiff pleads necessary facts in complaint);

[12] These cases concern claims by terminated employees challenging reductions in force. As R.J. Reynolds notes, "Villarreal and his amici have not identified—and cannot identify—a single case concluding that Section 4(a)(2) covers *applicants* for employment." Appellees' Br. 27 (emphasis added).

Mabry v. Neighborhood Defender Serv., 769 F. Supp. 2d 381, 395 (S.D.N.Y. 2011) (same); *cf. Davis v. District of Columbia*, 949 F. Supp. 2d 1, 9-10 (D.D.C. 2013) (same for business necessity defense in Title VII case). Thus, employers typically must proceed through discovery—no trivial imposition—in order to prevail, barring plain deficiencies on the face of a complaint, *e.g.*, *Smith*, 544 U.S. at 241, 125 S. Ct. at 1545 (requiring employee to "isolat[e] and identify[] the *specific* employment practices that are allegedly responsible for any observed statistical disparities"); *Magnello*, 556 F. Supp. 2d at 123 ("Plaintiff offers as evidence only the percentage of individuals under 40 hired into the PASE program. However, plaintiff has adduced no evidence or statistical comparison that would give rise to an inference of causation between defendant's employment practice and the disproportionate impact upon applicants over 40.").

Third, disparate-impact hiring claims under the ADEA will not only impose direct costs on employers named as defendants, but will also create pressure for employers to abandon perfectly lawful and legitimate age-neutral hiring practices in order to avoid these burdens. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993, 108 S. Ct. 2777, 2788 (1988) (describing possibility that disparate-impact liability could cause employers to adopt worse alternatives as a "cost-effective means of avoiding expensive litigation and potentially catastrophic liability"). These policies have real benefits for employers and recent graduates,

and it is critical to keep the disparate impact "analysis within its proper bounds," *id.* at 994, 108 S. Ct. at 2788, in order to avoid an unnecessary abandonment of widespread hiring practices.

Fourth, Villarreal's argument invites courts to second-guess unnecessarily the reasonableness of age-neutral hiring policies. Congress's intent in guarding against discriminatory employment practices has never been to task the judiciary with micromanaging the employer-employee relationship. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361, 115 S. Ct. 879, 886 (1995) ("The ADEA . . . is not a general regulation of the workplace but a law which prohibits discrimination."). Because failure-to-hire disparate-impact claims involve facially neutral policies by definition, and typically will center on the RFOA defense, such claims will force courts to be armchair human resource managers, subjecting many routine hiring practices to *post hoc* judgments regarding reasonableness.

* * *

In light of the text and structure of Section 4(a)(2) of the ADEA, and the considerable consequences of permitting applicants for employment to make disparate impact claims under that provision, it is plain that Congress did not intend to subject employers to the potential cost of litigating such suits merely because they adopt routine, widespread, and important recruiting practices embraced by the private sector and the government alike. Simply put, "[Congress]

does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 910 (2001). Accordingly, this en banc Court should affirm the district court's judgment limiting disparate impact claims to current employees.

II. PERMITTING REVIVAL OF YEARS-OLD CLAIMS UNDER A NO-DILIGENCE EQUITABLE TOLLING RULE IS NOT NECESSARY TO PROTECT ACCESS TO ANTI-DISCRIMINATION REMEDIES AND WOULD APPLY IN VIRTUALLY EVERY CASE

In the ADEA, as with Title VII, Congress chose "what are obviously quite short deadlines . . . to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S. Ct. 2486, 2497 (1980). Those short deadlines reflect a compromise, including a judgment "that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Id.* at 820, 100 S. Ct at 2494 (discussing deadlines in the Civil Rights Act of 1964). They provide the employer with "prompt notice" of a claim and the "opportunity to gather and preserve evidence in anticipation of a court action." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 372, 97 S. Ct. 2447, 2457 (1977). Although the "time period for filing a charge is subject to equitable doctrines such as tolling or estoppel," they "are to be applied sparingly." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S. Ct. 2061, 2072 (2002).

The equitable tolling rule proffered by Villarreal and adopted by the panel does not apply the doctrine "sparingly." In opening the door to an equitable tolling analysis in almost any case, it upends the careful balance Congress struck between providing remedies for discrimination and limiting the burden to employers of addressing stale claims. An ordinary-circumstance, no-diligence tolling rule conflicts with decisions of the Supreme Court permitting equitable tolling only when the plaintiff has exercised due diligence but was unable to make a timely filing due to extraordinary circumstances, and cannot be justified as an application of the "discovery rule" as the EEOC suggests (En Banc Br. 26). Moreover, such a broad application of equitable tolling is unnecessary to protect potential claimants, invites forum shopping, and imposes unwarranted burdens on businesses.

1. As the panel's decision illustrates, the rule advocated by Villarreal would effectively permit tolling in every hiring case, because it affirmatively holds that no "extraordinary circumstances" are necessary. 806 F.3d 1288, 1304 n.13 (11th Cir. 2015). Said another way, the panel's decision holds that tolling is available in the ordinary course—and *assumes* that any investigation with respect to an employer's hiring practices would be "entirely futile," *id.* at 1305 & n.14, therefore excusing any obligation to exercise diligence. As described below (pp. 26-27, *infra*), the panel's assumption that any inquiry would be futile is not warranted. But more fundamentally, if no diligence or extraordinary circumstance is required,

then claims for failures to hire can be raised whenever some specific information regarding a hiring practice emerges at some point in the future, no matter how long ago an individual applied for a position. That effectively undoes the ADEA timely filing requirements enacted by Congress.

Villarreal argues (En Banc Br. 51) that it was unreasonable for him to make any inquiries because he was not employed by R.J. Reynolds and therefore did not have contacts from which to gather information. But Villarreal tellingly does not assert that he would have been unable to find contact information for R.J. Reynolds had he tried to obtain it. And, more broadly, not being an employee and not having contacts at the prospective employer are elements that would apply in virtually every failure-to-hire case under the ADEA, Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act of 2008, or any other federal statute adopting the same charge-filing procedures. That cannot be enough for an equitable tolling doctrine that must be "applied sparingly." *Morgan*, 536 U.S. at 113, 122 S. Ct. at 2072.

Nor can the no-diligence, ordinary-circumstances rule be cabined to the specific facts of this case. Instead, courts in this Circuit would be compelled to engage in an equitable tolling analysis in garden-variety, commonplace circumstances. As articulated by the panel, the availability of tolling does not depend upon Villarreal's lack of personal contacts within R.J. Reynolds, but upon

a blanket assumption that no inquiry would be useful for *any* applicant—personal contacts or no—because no employer would reveal relevant information about its hiring practices. *See* 806 F.3d at 1305 & n.14. Enforcing diligence and extraordinary circumstances requirements is the only way to maintain the balance enacted by Congress between providing a remedy and protecting employers from having to defend against stale claims that are years—or even decades—old.

2. Villarreal's argument for no-diligence tolling cannot be squared with Supreme Court precedent. The Supreme Court has oft and recently reiterated that equitable tolling applies only in circumstances where the plaintiff has exercised due diligence but was unable to make a timely filing due to extraordinary circumstances outside the plaintiff's control. In *Menominee Indian Tribe of Wisconsin v. United States*, the Supreme Court reiterated that a plaintiff must establish "two elements" for equitable tolling: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." 136 S. Ct. 750, 755 (2016) (internal quotation marks omitted). The Supreme Court emphasized that an "extraordinary circumstance" requires a circumstance "beyond [a litigant's] control." *Id.* at 756. Villarreal's rule would impermissibly reject one of the mandatory elements for tolling (extraordinary circumstances), and assume away the other (diligence). That divergence cannot be explained away by the difference between employment

discrimination cases and the habeas context in which the Supreme Court developed its equitable tolling rules; in *Menominee*, the Supreme Court noted, but did not decide "whether an even stricter test might apply to a nonhabeas case." *Id.* at 756 n.2.

In addition to attempting to distinguish the Supreme Court's equitable tolling precedent, the EEOC attempts (En Banc Br. 26) to dodge those cases by invoking the "discovery rule." That effort fails because the "discovery rule"—if it applies at all, *Morgan*, 536 U.S. at 114 n.7, 122 S. Ct. at 2073 n.7 (reserving the question)—postpones the running of the statute of limitations until a plaintiff is aware or should reasonably have been aware of the *injury* (*e.g.*, the non-selection or termination), not the alleged legal wrong. As the Ninth Circuit explained, joining seven other courts of appeals, an employment discrimination claim accrues under the discovery rule when "the plaintiffs received notice they would not be hired" or "when they should have realized they had not been hired," "even if at that point in time the plaintiffs did not know of the legal injury, *i.e.*, that there was an allegedly discriminatory motive underlying the failure to hire." *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1049-51 (9th Cir. 2008).

3. A no-diligence rule is not necessary to protect the ability of employees to pursue discrimination claims. A claimant need not be able to obtain detailed information to file a charge; a charge need only "generally allege the

discriminatory act(s)." 29 C.F.R. § 1626.6. Accordingly, there is no basis to assume that a diligent, unsuccessful applicant will be unable to obtain any material information about an employer's hiring decisions, whether through inquiries with the employer or otherwise. There is no basis to assume that any request for R.J. Reynolds to inform an unsuccessful applicant about the hiring process would be futile. Moreover, just as it has changed the pathway for submitting applications, the internet has opened up substantial amounts of information regarding companies and their employees. It is not difficult to discover basic demographic information about individuals who were hired for a territory manager position, permitting an unsuccessful applicant to become aware that the individuals who are hired are largely outside the protected age group. For example, a search on one professional networking site reveals nearly 1400 profiles including the job title "Territory Manager" for R.J. Reynolds.[13]

In establishing "quite short deadlines," Congress imposed an obligation upon employees to act diligently and to promptly investigate and present any claims they may have. *Mohasco Corp.*, 447 U.S. at 825, 100 S. Ct. at 2497. In light of the ready availability of substantial information regarding many employers, there is no reason to adopt a no-diligence rule for equitable tolling.

[13] *See* LinkedIn, https://www.linkedin.com/title/territory-manager-at-rj-reynolds (last visited Apr. 20, 2016).

4. Evisceration of the statute of limitations would impose costly burdens on employers, in contravention of Congress's carefully crafted deadlines. As just one example, the EEOC's regulations require employers and employment agencies to maintain records related to applicants and recruiting for only one year. *See* 29 C.F.R. §§ 1627.3(b)(1), 1627.4(a)(1); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 78, 104 S. Ct. 1621, 1636 (1984) (holding that in order to "enable employers to demonstrate that they have adhered to [Title VII's] dictates, it is important that employers be given sufficient notice to ensure that documents pertaining to allegations of discrimination are not destroyed"). Furthermore, the EEOC's regulations do not require employers to maintain *any* records with respect to the age of applicants. *Cf.* 29 C.F.R. § 1607.15 (requiring collection of applicant data for Title VII purposes). If the panel's tolling rule is reinstated, however, employers would be forced to create records regarding applicants' ages and preserve them in perpetuity—notwithstanding the possibility that inquiries into applicants' age would themselves be considered discrimination, 29 C.F.R. § 1625.5. Otherwise, employers would be left with no meaningful way to defend against a statistics-intensive disparate-impact claim. Moreover, as time goes on, witnesses' memories fade and it becomes increasingly difficult for an employer to demonstrate its compliance with the ADEA. Forcing employers to defend against

long-stale claims would thus impose indiscriminately the very harms that Congress intended to avoid through a short charge-filing deadline.

Adopting the outlier equitable tolling rule proposed by Villarreal will also invite forum shopping, opening the doors of courts within the Circuit to stale litigation from around the country. Collective actions under the ADEA can generally be filed in any district where the employer can be served with process. *See* 29 U.S.C. § 216(b). And, contrary to Villarreal's argument (En Banc Br. 43), his tolling rule conflicts with the law in other courts of appeals, which require a plaintiff to exercise diligence—something his rule assumes away. *See, e.g.*, *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.") (emphasis added); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) ("despite all due diligence"); *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1367 (D.C. Cir. 1998) (same).

Beyond being burdensome and unnecessary, the effective elimination of any statute of limitations is unproductive. Congress's choice to require the prompt filing of employment discrimination claims serves more than the employer's interest in preserving its ability to defend against untimely, unmeritorious claims. It also serves the goal of promptly starting an administrative process that may

result in voluntary conciliation so that "violations of the statute could be remedied without resort to the courts." *Shell Oil*, 466 U.S. at 78, 104 S. Ct. at 1635. By eliminating any requirement of reasonable inquiry into the circumstances surrounding a failure to hire, Villarreal's tolling rule would disserve the very anti-discrimination goals that the ADEA is designed to serve.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify that the foregoing brief complies with the type-volume limitation prescribed by this Court's rules. The brief contains 6,622 words in Times New Roman font, 14-point size.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I also certify that I deposited in an overnight delivery service the original and 20 copies of the brief to the Clerk of this Court and copies to counsel of record for the parties.

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