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)

BRIEF FOR THE APPELLEES

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

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be heard in this appeal, which raises important questions regarding whether Section 4(a)(2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §623(a)(2), permits applicants for employment to assert a failure-to-hire disparate-impact claim; whether a letter from an attorney and a subsequent telephone call between that attorney and a putative plaintiff about time-barred allegations can provide the basis for equitable tolling; and whether the ADEA's charge-filing period limits the temporal scope of a failure-to-hire age discrimination collective action.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

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

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

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

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

STATEMENT OF THE ISSUES

1. Whether ADEA Section 4(a)(2), 29 U.S.C. § 623(a)(2), permits applicants for employment to assert a failure-to-hire disparate-impact claim.

2. Whether a letter from an attorney and a subsequent telephone call between that attorney and a putative plaintiff about time-barred allegations can provide the basis for equitable tolling.

3. Whether the ADEA's charge-filing period limits the temporal scope of a failure-to-hire age discrimination collective action.

STATEMENT OF THE CASE

Plaintiff-Appellant Richard M. Villarreal ("Villarreal") brought this ADEA failure-to-hire collective action on behalf of himself and other similarly-situated applicants for employment. He alleges that Defendants-Appellees R.J. Reynolds Tobacco Company ("RJRT") and Pinstripe, Inc. ("Pinstripe") (collectively, "Defendants") applied resume-review guidelines to his job application that (1) intentionally discriminated against him and similarly-situated applicants on the basis of age and (2) had a disparate impact on older applicants. The District Court dismissed Villarreal's disparate-impact claim because the ADEA does not authorize disparate-impact failure-to-hire claims by applicants for employment. In addition, the court dismissed as time-barred Villarreal's claims that arose before November 19, 2009. Villarreal filed an appeal, and this Court dismissed his appeal because there was no final judgment. On remand, Villarreal voluntarily dismissed his remaining claims, which consisted of the timely portion of his disparate-treatment claims. Villarreal now appeals the District Court's dismissal of his disparate-impact claim and his time-barred claims.

I. Statement of the Facts

The following facts are alleged in Villarreal's Complaint, Appendix Vol. I ("App. I"), Dkt. No. 1, and proposed Amended Complaint, Appendix Volume II

("App. II"), Dkt. No. 61-1, and assumed to be true only for purposes of this appeal. *See Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321 (11th Cir. 2012).

A. The Territory Manager Position

RJRT employs regional sales representatives known as "Territory Managers" to promote and sell its tobacco products. App. I, Dkt. No. 1, at 5 ¶ 10. No later than 2007, RJRT retained Kelly Services, Inc. ("Kelly Services"), a recruiting company, to review online applications for the Territory Manager position. *Id.* at 6-7 ¶¶ 13-14. RJRT provided Kelly Services with "resume review guidelines," which listed various qualities of a "targeted candidate," such as "willing[ness] to relocate," "leadership skill," "21 and over," "comfortable with tobacco industry," "2-3 years out of college," "adjusts easily to changes," "ability to travel 65-75% of time," and "bilingual candidates (is a plus, but not required)." *Id.* at 7 ¶ 15; App. I, Dkt. No. 1-1. The guidelines also described candidates whom reviewers should "stay away from," including "former employees of competitors," "candidates with DUI(s)," "candidates taking drastic pay cuts," and applicants who had been "in sales for 8-10 years." App. I, Dkt. No. 1-1.

In 2009, Defendant Pinstripe replaced Kelly Services as RJRT's staffing company and, since then, has recruited and screened applications for the Territory Manager position. App. I, Dkt. No. 1, at 9 ¶ 21. In addition, RJRT and Pinstripe conducted a survey of employees whom management nominated as "ideal new

hires" and developed a candidate profile that identified characteristics of RJRT's best Territory Managers, or "Blue Chip TMs." *Id.* at 10 ¶ 23. According to this profile, 15 percent of Blue Chip TMs had no prior experience; 52 percent had one-to-two years of experience; 15 percent had three-to-four years of experience; 12 percent had four-to-five years of experience; and nine percent had more than six years of experience. *Id.* at 10 ¶ 23; App. I, Dkt. No. 1-2. RJRT and Pinstripe used this profile to screen candidates for the Territory Manager position. App. I, Dkt. No. 1, at 10 ¶ 23.

B. Villarreal's 2007 Application

On November 8, 2007, Villarreal applied for the Territory Manager position by submitting an application and completing an online questionnaire. *Id.* at 6 ¶ 11. He was 49-years old at the time. *Id.* Villarreal alleges that Kelly Services applied RJRT's resume-review guidelines to his application, and that RJRT did not hire him. *Id.* at 6 ¶ 11, 8 ¶ 16.

C. Villarreal's May 2010 EEOC Charge

On April 20, 2010, lawyers from Altshuler Berzon LLP sent Villarreal a letter that informed him that he "may have been a victim of age discrimination" and solicited his participation in "a possible class action law suit." App. Vol. II, Dkt. No. 61-1, at 12 ¶ 29 & Ex. C. Villarreal called attorney P. Casey Pitts with Altshuler Berzon, who "informed [him] that RJ Reynolds used [resume-review]

guidelines when screening applications to the disadvantage of persons 40 years of age and older (including Mr. Villarreal)." *Id.* at 13 ¶ 30. Following this conversation, Villarreal filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") on May 17, 2010, alleging that RJRT discriminated against him on the basis of age when it rejected his November 8, 2007 application. App. Vol. I, Dkt. No. 1, at 12 ¶ 27.

D. Villarreal's June 2010 and Subsequent Applications

Villarreal applied again for the Territory Manager position in June 2010. *Id.* at 8 ¶ 17. RJRT rejected his application by e-mail, stating that it was "pursuing other individuals" for the position. *Id.* at 8 ¶ 18. Villarreal applied again in December 2010, May 2011, September 2011, and March 2012. *Id.* at 9 ¶ 20. RJRT never hired him. *Id.*

II. Procedural History

Villarreal filed this putative collection action against RJRT and Pinstripe on June 6, 2012. His two-count complaint alleges a failure-to-hire disparate-treatment claim (Count One), *id. at* 16-18, ¶¶ 36-43, and a failure-to-hire disparate-impact claim (Count Two), *id.* at 19-20 ¶¶ 44-50. Villarreal intends to bring a collective action on behalf of all applicants for the Territory Manger position dating back to at least September 1, 2007. *Id.* at 14 ¶ 31.

A. The District Court Dismisses Villarreal's Disparate-Impact And Time-Barred Claims

On August 24, 2012, Defendants responded to Villarreal's complaint by filing a partial motion to dismiss Villarreal's disparate-impact claims and all claims that arose before November 19, 2009—more than 180 days before Villarreal filed his May 17, 2010 EEOC charge—because those claims are time-barred. App. I, Dkt. Nos. 24-24-4. The District Court granted this motion on March 6, 2013.

The District Court dismissed Villarreal's disparate-impact claim because such claims are available only under ADEA Section 4(a)(2), 29 U.S.C. § 623(a)(2), which is "limited to 'employees' and does not encompass hiring claims." App. I, Dkt. No. 58, at 12. The court based its conclusion on "key textual differences" between ADEA Section 4(a)(1), which "does not encompass disparate-impact liability," and Section 4(a)(2), which authorizes disparate-impact ADEA claims. *Id.* at 13 (citing *Smith v. City of Jackson*, 544 U.S. 228, 236 n.6 (2005)).

Specifically, while Section 4(a)(1) "focuses on employers' actions to targeted individuals," Section 4(a)(2) "focuses on the *effects* of the action on the employee." *Id.* (quoting *Smith*, 544 U.S. at 236)). In addition, the court noted that, "[u]nlike § 4(a)(1), § 4(a)(2) does not mention hiring or prospective employees" and is "limited to employees' claims." *Id.*

The District Court also dismissed as time-barred Villarreal's claims related to hiring decisions that took place more than 180 days before his May 2010 EEOC charge, based on the ADEA's statutory charge-filing period. *Id.* at 21-22; *see also* 29 U.S.C. § 626(d)(1)(A). This decision also barred untimely claims by plaintiffs who may seek to opt-in to Villarreal's collective action. App. I, Dkt. No. 58, at 17.

The court rejected Villarreal's arguments that his untimely claims should be saved by either equitable tolling or the continuing-violation doctrine. Equitable tolling was not appropriate because Villarreal's complaint did not specify why "the facts necessary to support [his] charge of discrimination . . . could not have been apparent to him until less than a month before he filed his May 17, 2010 EEOC charge." *Id.* at 18 (quoting App. I, Dkt. No. 1, ¶ 28). The continuing-violation doctrine did not apply because, under *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the ADEA precludes recovery for "[d]iscrete acts such as . . . refusal to hire" that take place outside of the charge-filing period. App. I, Dkt. No. 58, at 20-21.

B. The District Court Denies Villarreal Leave To File An Amended Complaint

Villarreal next filed a motion for leave to amend his complaint, seeking to supplement his complaint to state a claim for equitable tolling. App. II, Dkt. No. 61, at 2. His proposed amended complaint alleged that "[t]he facts necessary to support Mr. Villarreal's charge of discrimination were not apparent to him" until he spoke with Mr. Pitts. App. II, Dkt. No. 61-1, at 12-13 ¶¶ 27-30.

Defendants opposed Villarreal's motion to amend his complaint on the grounds that amendment would be futile. App. II, Dkt. No. 63. The District Court agreed, finding that Villarreal did not allege "any due diligence on his part to determine the status of his 2007 application." App. II, Dkt. No. 67, at 5. Moreover, Villarreal's proposed amendments did not state a claim for equitable tolling because he failed to allege any extraordinary circumstances such as "misrepresentations or concealment that hindered [him] from learning of any alleged discrimination." *Id*. at 4-5 (citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005)).

C. The District Court Certifies Villarreal's Dismissed Time-Barred Claims As A Final Judgment

On May 20, 2014, the District Court directed entry of final judgment on "all claims based on hiring decisions made by Defendants before November 19, 2009" pursuant to Federal Rule of Civil Procedure 54(b). App. II, Dkt. Nos. 77-78.

Villarreal filed an appeal with this Court and asked it to reverse the District Court's March 6, 2013, order granting Defendants' partial motion to dismiss and the November 26, 2013, order denying leave to amend. App. II, Dkt. No. 84. The Defendants moved to dismiss the appeal because there was no final judgment. This Court granted Defendants' motion and dismissed the appeal for lack of jurisdiction on September 22, 2014. *Id.* On December 4, 2014, this Court denied Villarreal's motion for reconsideration. App. II, Dkt. No. 85.

D. Villarreal Voluntarily Dismisses His Timely Claims And Files A Second Appeal

At this point, the only claims that remained pending before the District Court were claims arising under the timely portion of Count One of the complaint—Villarreal's disparate-treatment claims based on alleged acts that occurred after November 19, 2009. In order to obtain a final judgment and move immediately on to an appeal, on January 14, 2015, Villarreal filed an unopposed motion to dismiss these remaining claims with prejudice, which the District Court granted on January 20, 2015. App. II, Dkt. Nos. 88-89. On February 9, 2015, Villarreal timely filed a notice of appeal. As a result, pending before this Court are: (1) Villarreal's appeal of the District Court's dismissal of Count Two of the complaint, which is Villarreal's disparate-impact claim; and (2) the untimely disparate-treatment claims of Count One of the complaint.

SUMMARY OF THE ARGUMENT

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

A. Disparate-impact claims are available only under ADEA Section 4(a)(2), and "Section 4(a)(2) . . . does not apply to 'applicants for employment' at all – it is only § 4(a)(1) that protects this group." *Smith,* 544 U.S. at 266 (O'Connor, J., concurring). Unlike Section 4(a)(1), which expressly prohibits an employer's "fail[ure] or refus[al] to hire" because of age, Section 4(a)(2) says nothing about any failure or refusal to hire. Instead, Section 4(a)(2) applies only when an employer "limit[s], segregate[s], or classif[ies] his employees" in a way that "adversely affect[s]" their "status as an employee."

B. The text of the ADEA as a whole confirms that Section 4(a)(2) does not apply to applicants for employment. The ADEA repeatedly refers to "applicants for employment" elsewhere but conspicuously omits that phrase from Section 4(a)(2). This creates a strong inference that Congress deliberately chose not to make Section 4(a)(2) apply to applicants for employment.

C. The text of the analogous provision of Title VII of the Civil Rights Act of 1964 also confirms that Section 4(a)(2) does not apply to applicants for employment. Congress modeled Section 4(a)(2) on Section 703(a)(2) of Title VII, and the two provisions were originally substantially identical. In 1972, Congress

added the phrase "applicants for employment" to Section 703(a)(2) of Title VII, but pointedly omitted that phrase from Section 4(a)(2).

D. Congress had strong policy reasons not to allow disparate-impact hiring claims under the ADEA. The Supreme Court has determined that age is often highly correlated with characteristics relevant to hiring, such as education and experience level, and imposing age-based disparate-impact liability in the hiring context would make it easy for plaintiffs with meritless claims to impose massive litigation costs on employers for many benign and common practices such as college campus recruiting.

II. Villarreal and his amici raise several arguments in support of their interpretation of Section 4(a)(2), but all of them fail.

A. Villarreal focuses on the fact that Section 4(a)(2) includes the phrase "any individual," but he ignores four key considerations. First, Section 4(a)(2) is phrased as a limitation on what an employer may do to "his employees," which limits and defines the subsequent reference to "any individual." Second, Section 4(a)(2) does not use the phrase "any individual" in isolation, but instead refers to "any individual" whose "status as an employee" may be "adversely affect[ed]." Third, unlike Section 4(a)(1), which specifically states that employers may not "fail or refuse to hire" because of age, Section 4(a)(2) makes no reference to hiring at all. And fourth, Section 4(a)(2) differs starkly from other parts of the ADEA and

Title VII Section 703(a)(2), which expressly authorize claims by "applicants for employment."

B. Villarreal fails to explain away Congress's decision to add "applicants for employment" to Title VII but not to the ADEA. His primary argument is that this amendment was meaningless, because Title VII already authorized claims by "applicants for employment" before Congress added that phrase in 1972.

1. Villarreal asserts that the Supreme Court's decision in *Griggs* interpreted the pre-1972 version of Title VII Section 703(a)(2) to include applicants for employment, but that is clearly incorrect. As the Supreme Court and the EEOC itself recognized at the time, *Griggs* involved only incumbent employees. Consequently, *Griggs* did not hold or even suggest that the pre-1972 version of Section 703(a)(2) applied to applicants for employment.

2. Villarreal and his amici claim support in the legislative history, which is not authoritative and in any event actually cuts against their position. Multiple legislative documents surrounding the enactment of the ADEA indicate that Section 4(a)(2) applied only to employees, not applicants for employment.

C. Villarreal cites several other statutes and regulations that authorize claims by applicants for employment, but none of these examples is analogous to Section 4(a)(2) of the ADEA; instead, they have different language, different histories, and were enacted in different contexts.

D. The EEOC's interpretation is not entitled to deference under *Chevron* because it is contrary to the clear statutory text, and, in any event, the EEOC has never promulgated regulations addressing whether Section 4(a)(2) extends to applicants for employment. Nor is the EEOC's interpretation entitled to *Auer* deference, because the general regulations do nothing more than parrot the relevant statutory language.

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

A. The charge-filing period in Georgia is 180 days, and Villarreal's claims are thus untimely to the extent they rest on hiring decisions made more than 180 days before he filed his May 2010 charge.

B. Villarreal argues that equitable tolling should apply because he did not know about Defendants' hiring practices until he spoke by telephone with a lawyer who was searching for plaintiffs to file a class-action case. But he has not alleged any facts that demonstrate he exercised due diligence nor does he allege any extraordinary circumstances to excuse his untimely filing; thus, he has failed to state a claim for equitable tolling. Moreover, if accepted, Villarreal's argument would eviscerate the limitations period in failure-to-hire and other cases.

C. Finally, Villarreal argues that he can avoid the limitations period under a "continuing-violation" theory, because even though his intentional-discrimination claims are based on acts that occurred outside the limitations period,

he challenges a policy that continued to exist within the limitations period. That is incorrect. The continuing-violation doctrine does not allow a plaintiff to pursue a failure-to-hire intentional-discrimination claim based on acts pre-dating the charge-filing period. And because Villarreal voluntarily dismissed his timely intentional-discrimination claims that were based on acts within the charge-filing period, none of his remaining disparate-treatment claims are timely.

ARGUMENT

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

The ADEA does not authorize disparate-impact claims by applicants for employment for four reasons. *First*, disparate-impact claims are available only under ADEA Section 4(a)(2), which authorizes claims only by existing employees, not by applicants for employment. *Second*, the ADEA repeatedly refers to "applicants for employment" but conspicuously omits that phrase from Section 4(a)(2). *Third*, Congress added the phrase "applicants for employment" to the functionally identical provision of Section 703(a)(2) of Title VII, but did not add that phrase to Section 4(a)(2). And *fourth*, Congress had strong policy reasons not to allow disparate-impact hiring claims under the ADEA.

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

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

> It shall be unlawful for an employer-
>
> (1) to *fail or refuse to hire* or to discharge *any individual* or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) *to limit, segregate, or classify his employees* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an *employee*, because of such individual's age; or
>
> (3) to reduce the wage rate of any *employee* in order to comply with this chapter.

29 U.S.C. § 623(a) (emphases added).

As Villarreal concedes, Section 4(a)(1) requires plaintiffs to plead and prove *intentional* age discrimination; it "does not encompass disparate-impact liability." *Smith*, 544 U.S. at 236 n. 6. By contrast, Section 4(a)(2) contains the ADEA's disparate-impact prohibition, and it "focuses on the effects of the action on the employee rather than the motivation for the action of the employer." *Id*. at 236.

That distinction matters because the disparate-impact provision of Section 4(a)(2) applies only to existing "employee[s]," *id.*, and does not authorize claims by applicants for employment. Unlike Section 4(a)(1), which expressly prohibits an employer's "fail[ure] or refus[al] to hire" because of age, Section 4(a)(2) says nothing about any failure or refusal to hire. Instead, Section 4(a)(2) applies only when an employer takes some action against "his employees" in a way that "adversely affect[s]" their "status as an employee." The ADEA further defines

"[t]he term 'employee'" as "an individual employed by an employer[.]" 29 U.S.C. § 630(f). Applicants for employment do not satisfy this definition, nor do they have any "status as an employee" that could be "affect[ed]" as contemplated by Section 4(a)(2).

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

at 236 n.6 (emphasis added). And Justice Scalia's concurrence likewise acknowledged that "perhaps the [EEOC's] attempt to sweep employment applications into the disparate-impact prohibition is mistaken." *Id*. at 246 n.3. Thus, *Smith* confirms that Section 4(a)(2) protects only "an 'employee' of the employer, which . . . is the best and likely only possibl[e] way to read the provision." *Mays*, 974 F. Supp. 2d at 1176-77.

Numerous courts have recognized the same point. *See Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1470 n.2 (8th Cir. 1996) ("Section [4](a)(2) of the ADEA governs employer conduct with respect to 'employees' only …"); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 n.12 (10th Cir. 1996) ("Section [4](a)(2) . . . does not appear to address refusals to hire at all"), *overruled on other grounds*, *Smith*, 544 U.S. at 232; *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1077-78 (7th Cir. 1994) (stating that the conclusion that ADEA Section 4(a)(2) "omits from its coverage, 'applicants for employment,' . . . is a result dictated by the statute itself"), *overruled on other grounds*, *Smith*, 544 U.S. at 232; *Mays*, 974 F. Supp. 2d at 1176-77 (same); *EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980, 989 (E.D. Mo. 2008) (a "disparate-impact hiring case . . . is no longer cognizable after *City of Jackson*"), *aff'd*, 528 F.3d 1042 (8th Cir. 2008), *reh'g en banc granted, opinion vacated* (Sept. 8, 2008).

B. The Text and Structure Of The ADEA Confirm That Applicants For Employment Cannot Assert Claims Under Section 4(a)(2)

The ADEA repeatedly and precisely distinguishes between "employees" and "applicants for employment." In fact, Section 4 itself distinguishes between "employees" and "applicants for employment" many times. For example, Section 4(c) makes it unlawful for a labor organization to "adversely affect [any individual's] status as an employee *or as an applicant for employment*, because of such individual's age." 29 U.S.C. § 623(c)(2) (emphasis added). Section 4(d) contains the ADEA's retaliation protections, and it specifically extends protection to "applicants for employment" and "applicant[s] for membership" in a labor organization. 29 U.S.C. § 630(d). Additionally, ADEA Section 12(b) contains the age limits for "any personnel action affecting employees *or applicants for employment*." 29 U.S.C. § 631(b) (emphasis added). Likewise, Section 15 expressly contains protections for "employees or applicants for employment," "employees and applicants for employment," and "an employee or applicant for employment." 29 U.S.C. §§ 633a(a) & (b).

All of these provisions fortify the conclusion that Congress acted deliberately when it omitted "applicants for employment" from Section 4(a)(2). Indeed, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015).

"The interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force" when Congress uses the omitted phrase elsewhere in "close proximity." *Id.* at 919. Here, Sections 4(a)(2), 4(c)(2), and 4(d) are in "close proximity" with one another; they are all part of Section 4. This close proximity thus strongly suggests that Congress "act[ed] intentionally when it omit[ted]" applicants from Section 4(a)(2). *Id.* Indeed the inference is especially strong because Congress "repeatedly" referred to "applicants for employment" throughout the ADEA but not in Section 4(a)(2). *Id.* at 919; *see also* 29 U.S.C. §§ 631(b), 633a(a)-(b), as cited and discussed above.

Congress "understood how to be more specific, but chose not to do so" when it included employees in Section 4(a)(2) and omitted applicants for employment. *Pugliese v. Pukka Dev., Inc*., 550 F.3d 1299, 1303 (11th Cir. 2008). This Court should respect Congress's decision.

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

As the Supreme Court has recognized, Title VII Section 703(a) served as the model for ADEA Section 4(a). *Lorillard v. Pons*, 434 U.S. 575, 584 & n.12 (1978). Indeed, as originally enacted, "[e]xcept for the substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of [Section

4(a)(2)] in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII)." *Smith*, 544 U.S. at 233.

Like Section 4(a)(2), Title VII Section 703(a)(2) made it unlawful for an employer "to limit, segregate, or classify his employees" in a way that would "adversely affect" an individual's "status as an employee." Section 703(a)(2) thus did not originally apply to "applicants for employment," while several other sections of Title VII explicitly did. *See, e.g.,* Section 703(c)(2), 42 U.S.C. § 2000e-2(c)(2) (1964) ("applicants for employment"); Section 704(a), 42 U.S.C. § 2000e-3(a) (1964) (same); Section 711(a), 42 U.S.C. § 2000e-10 (1964) (same).

In 1972, Congress amended Section 703(a)(2) of Title VII by "inserting the words 'or applicants for employment' after the words 'his employees.'" Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8(a), 86 Stat. 109, App. I, Dkt No. 24-3. With this amendment, Section 703(a)(2) now makes it unlawful for an employer:

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

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

By contrast, Congress has never amended ADEA Section 4(a)(2) to apply to "applicants for employment." As a result, "Section [4(a)(2)] governs employer

conduct with respect to 'employees' only, while the parallel provision of Title VII protects 'employees or applicants for employment.'" *City of Des Moines*, 99 F.3d at 1470 n.2 (comparing Section 4(a)(2) with Section 703(a)(2)).

Congress's decision to amend Section 703(a)(2) but not Section 4(a)(2) matters here. In *Gross v. FBL Financial Services, Inc*., the Supreme Court held that Congress' decision to amend Title VII but not parallel ADEA provisions indicated that Congress "acted intentionally." 557 U.S. 167, 174 (2009). The Court observed that Congress amended Title VII in 1991 by adding so called "mixed motive" claims to Title VII, but did not similarly amend the ADEA. The Court explained that "[w]e cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA," and thus held that the ADEA does not authorize mixed-motive claims. *Id*. at 173-74. Courts have applied the same principle outside the mixed-motive context. *See, e.g.*, *EEOC v. Arabian Am. Oil*, 499 U.S. 244, 256 (1991) (Congress's decision to address "conflicts with foreign laws and procedures" in the ADEA and not Title VII meant that Title VII did not "apply overseas"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; *Hardy v. Town of Greenwich*, 629 F. Supp. 2d 192, 200 (D. Conn. 2009) ("Congress applied the [§ 1991] amendments only to Title VII; if Congress had also intended to apply them to § 1981 or other discrimination laws more generally, Congress should have said so.").

The same rationale applies here. When Congress amended Section 703(a)(2) of Title VII to include "applicants for employment" but omitted that change from Section 4(a)(2) of the ADEA, it sent a clear signal. The resulting clear "textual difference[] between Title VII and the ADEA," *Gross*, 557 U.S. at 175 n.2, proves conclusively that Section 703(a)(2) protects "applicants for employment" while Section 4(a)(2) does not.

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

The limited scope of Section 4(a)(2) reflects Congress's sensible policy choice not to authorize ADEA disparate-impact hiring claims. As *Smith* recognized, "the differences between age and the classes protected in Title VII are relevant," and "Congress might well have intended to treat the two differently." 544 U.S. at 237 n.7. Indeed, there is less need for a relatively broad anti-discrimination law in the context of age because "intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII." *Id.* at 241. *Smith* likewise recognized that "age, unlike Title VII's protected classifications, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." 544 U.S. at 229. Moreover, many legitimate "employment criteria that are routinely used" in hiring have an "adverse impact on older workers as a group," *id*. at 241, because merit-based factors such as applicants' experience levels are "empirically correlated with age" in a way that

they are not correlated with race or sex, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608-11 (1993).

In light of these facts, allowing disparate-impact hiring claims based on age would make it far easier for plaintiffs to establish a prima-facie case even when their claims are meritless. The result would be far greater litigation costs for the sake of far fewer meritorious claims, to combat a form of discrimination that is not nearly as widespread or invidious as the types of discrimination covered by Title VII. For example, practically every employer that recruits on college campuses hires disproportionately younger workers as a result. *Cf. Sundaram v. Brookhaven Nat'l Labs*., 424 F. Supp. 2d 545, 577 (E.D.N.Y. 2006) ("[A]lthough recent graduates and post-doctorates will generally tend to be younger than those who received their degrees earlier, that factor is analytically distinct from age and is therefore a permissible consideration."). But if the ADEA authorized disparate-impact hiring claims, all employers recruiting on college campuses would be exposed to the threat of liability and massive litigation costs, because every older plaintiff would be able to establish a prima facie case and force the defendant into the burdensome discovery process. Congress did not intend that result. On the contrary, just as in *Smith*, the differences between age and the categories protected by Title VII, "*coupled with a difference in the text of the statute*," establish that the

"scope of disparate-impact liability under ADEA is narrower than under Title VII." *Smith*, 544 U.S. at 237 n.7, 240 (emphasis in original).

The limited scope of Section 4(a)(2) is consistent with several other ways in which the ADEA's protections are more narrow than Title VII's, particularly when "textual differences" indicate a difference in scope. *Gross*, 557 U.S. at 175 n.2. For example, the ADEA does not authorize mixed-motive claims but Title VII does. *Id.* at 180. The ADEA does not bar discrimination against *all* people over the age of 40, but Title VII bars discrimination against people of all races and both sexes. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584, 592, 611 n.5 (2004). The ADEA creates defenses for "bona fide occupational qualification[s]" ("BFOQ") and "reasonable factors other than age" ("RFOA"), 29 U.S.C. § 623(f)(1), whereas Title VII does not permit a BFOQ defense for race claims and contains no RFOA defense, 42 U.S.C. § 2000e-2(e). The ADEA is subject to the narrowing construction of *Wards Cove Packing Co. v. Atonio*, 490 U. S. 642 (1989), but Title VII is not . *See Smith*, 544 U.S. at 240. This case presents yet another example: Congress chose a narrower path by making disparate-impact hiring claims available under Title VII but not under the ADEA.

II. Villarreal And His *Amici* Misinterpret Section 4(a)(2)

Villarreal and his amici concede that Section 4(a)(1), which clearly covers applicants for employment, prohibits only *intentional* discrimination and does not

authorize disparate-impact claims. *See* Br. 19-20. They nonetheless try to show that applicants for employment may bring claims under the disparate-impact provision of Section 4(a)(2). All of their arguments fail.

A. Villarreal's Textual Arguments Fail

Villarreal does not address the multiple cases recognizing that Section 4(a)(2) does not cover applicants for employment. *See* Section I.A, *supra*. Instead he ignores those cases and asserts that Section 4(a)(2) authorizes claims by applicants for employment because it states that an employer's action against "his employees" is unlawful whenever it adversely affects "any individual." Br. 21. This argument ignores four key features of Section 4(a)(2) that limit its scope to "employees."

First, Section 4(a)(2) is specifically phrased as a limitation on what an employer may do to "his employees"—namely, the employer may not "limit, segregate, or classify *his employees*" in a certain way. The prohibition against limiting, segregating, and classifying "employees" thus limits and defines the subsequent reference to "any individual." That differs starkly from Section 4(a)(1), which makes no reference to "employees" at all and instead simply prohibits employers from "discriminat[ing] against any individual." Once again, it would be perverse to ignore that the term "employees" appears in Section 4(a)(2) but not in 4(a)(1). For this reason, "treat[ing] the term 'any individual' as synonymous with

an 'employee' of the employer . . . is the best and likely only possibl[e] way to read" Section 4(a)(2). *Mays*, 974 F. Supp. 2d at 1176-77.

Second, Section 4(a)(2) does not refer broadly to "any individual," but instead refers to "any individual" whose "status as an employee" may be "adversely affect[ed]" by the action of the employer. The text bars employers from taking certain actions against "employees" that would "deprive any individual of employment opportunities *or otherwise adversely affect his status as an employee*." (emphasis added). This language makes clear that Section 4(a)(2) cannot apply to *non-employees*, because an employer cannot "adversely affect" a non-employee's "status as an employee." The decision not to hire someone does not "*affect* his status as an employee," because he has no "status as an employee" to begin with. Accordingly, when Section 4(a)(2) refers to depriving employees of "employment opportunities," it clearly refers to *opportunities within the company* such as promotions, pay raises, and favorable transfers.

Third, unlike Section 4(a)(1), which specifically states that employers may not "fail or refuse to hire" because of age, Section 4(a)(2) makes no reference to hiring at all. Thus, because "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another," *MacLean*, 135 S. Ct. at 919, it would be perverse to ignore the glaring omission of "hiring" in Section 4(a)(2).

Fourth, Villarreal completely fails to explain the glaring textual differences between Section 4(a)(2) and other parts of the ADEA and Section 703(a)(2) of Title VII, all of which expressly authorize claims by "applicants for employment." These other provisions make clear that if Congress had intended for Section 4(a)(2) to apply to "applicants for employment," it would have included that phrase. *See* Sections I.B and I.C, *supra*.

In light of these clear textual indications that Section 4(a)(2) applies only to existing employees, there was no need for Congress to use the phrase "any existing employee" instead of "any individual" as suggested by Villarreal. Br. 21. Indeed, under the analogous provision of Section 703(a) of Title VII, this Court has already recognized that the term "any individual" cannot be read "literally," but must be limited by its statutory context. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). Although "Title VII prohibits discrimination against 'any individual,' . . . courts have almost universally held that the scope of the term 'any individual' is limited to employees." *Id.*; *accord Mays*, 974 F. Supp. 2d at 1176-77.

Villarreal and his amici have not identified—and cannot identify—a single case concluding that Section 4(a)(2) covers applicants for employment. They cite *Wooden v. Board of Education of Jefferson County*, 931 F.2d 376 (6th Cir. 1991), *Faulkner v. Super Value Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993), and *Hunter v.*

Santa Fe Protective Services, Inc., 822 F. Supp. 2d 1238 (M.D. Ala. 2011). But those cases did not consider the text of Section 4(a)(2), much less address whether Section 4(a)(2) covers applicants for employment. *Wooden* and *Faulkner* were decided before *Smith* and thus wrongly assumed that disparate-impact claims were available under Section 4(a)(1), and no party raised any issue about the scope of Section 4(a)(2) in *Wooden*, *Faulkner*, or *Hunter*.

Finally, Villarreal and his amici ignore the fact that the Supreme Court has consistently treated Section 4(a)(2) as limited to employees. For example, as already noted, in *Smith*, "both the plurality and Justice O'Connor's concurrence" "treat the term 'any individual" [in Section 4(a)(2)] as synonymous with an 'employee' of the employer." *Mays*, 974 F. Supp. 2d at 1176-77. Likewise in *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), while the Supreme Court did not expressly consider whether the ADEA's disparate-impact protections extend to applicants for employment, it did assume that Section 4(a)(2) protects only "employees." The Court explained that "[t]he factual causation that § [4](a)(2) describes as practices that 'deprive or tend to deprive . . . or otherwise adversely affect *[employees]* . . . because of . . . age' is typically shown by looking to data revealing the impact of a given practice *on actual employees*." *Id*. at 96 n.13 (use of bracketed "employees" in original, emphasis added).

B. Villarreal Fails To Explain Away Congress's Decision To Add "Applicants for Employment" To Title VII But Not To The ADEA

Villarreal acknowledges that Congress amended Title VII Section 703(a)(2) in 1972 to add the phrase "applicants for employment," and that Congress has never made any such amendment to the functionally identical language of Section 4(a)(2) of the ADEA. *See* Section I.C, *supra*. He also acknowledges the Supreme Court's teaching that courts "cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." *Gross*, 557 U.S. at 173-74. Nonetheless, Villarreal and his amici attempt to argue that the 1972 Amendment was had no effect whatsoever because Section 703(a)(2) *already* authorized claims by "applicants for employment" before Congress added that phrase. *See* Br. 32-33; EEOC Amicus Br. 15.

Villarreal's argument runs afoul of two basic principles of statutory interpretation. First, it contradicts the basic rule that "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014) (citation and internal quotation omitted); *Edwards v. Prime Inc.*, 602 F.3d 1276, 1299 (11th Cir. 2010) ("[C]hanges in statutory language generally indicate an intent to change the meaning of the statute.") (citation omitted). And second, it conflicts with the principle that "a statute ought, upon the whole, to be so construed that, if it can be

prevented, no clause is rendered superfluous, void, or insignificant." *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015) (internal quotations and citations omitted). The very purpose of Villarreal's argument is to render the clause "applicants for employment" in Section 703(a)(2) entirely "superfluous, void, and insignificant."

In an effort to buttress his counterintuitive and counter-textual claim that the 1972 Amendment was completely superfluous, Villarreal points to the Supreme Court's pre-1972 interpretation of Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and snippets of the 1972 legislative history. Villarreal is wrong about both points.

1. *Griggs* did not authorize disparate-impact claims by applicants for employment

Villarreal and his *amici* argue that Section 4(a)(2) should be read in light of *Griggs*, which he claims interpreted the pre-1972 version of Section 703(a)(2) to authorize disparate-impact claims by applicants for employment. Br. 14-15; EEOC Amicus Br. 10-11; AARP Br. 14-15. But *Griggs* did not involve applicants for employment and thus did not consider whether Section 703(a)(2) applies to such applicants.

Griggs was filed by four "incumbent Negro employees against Duke Power Company." 401 U.S. at 426. "All the petitioners [were] employed at the Company's Dan River Steam Station, a power generating facility located at Draper,

North Carolina." *Id.* Accordingly, the petitioners were not applicants for employment, but instead "applicants" for *job promotions and transfers*. That explains why the phrase "applicants for *employment*" does not appear anywhere in the *Griggs* opinion, and why the Court never addressed, even in dicta, whether Section 703(a)(2) applies to applicants for employment. In the few places where the *Griggs* opinion did mention "applicants" and "hiring," it did so only in passing references or in quoting agency regulations, without pausing to consider whether Section 703(a)(2) authorized claims by applicants for employment. *See* 401 U.S. at 426-28.

The *Griggs* petitioners themselves told the Court that their case began as a "class action . . . brought by a group of incumbent black workers against their employer, Duke Power Company." Petitioners' Br. at 4, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 70-124), 1970 WL 122448. They also explained that the challenged "[diploma and test] requirement applies only to certain interdepartmental transfers, [and] its real impact is only on those employees in departments who need to transfer for decent promotional opportunity." *Id.* at 31. "The only persons thus burdened [were] the four black workers involved in this petition." *Id.* The petitioners even stated expressly that "[t]he legality of [the testing] requirement for new employees is not in issue in this case." *Id*. at 44 & n.53.

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

Villarreal cites the Fourth Circuit's original decision in *Griggs* for the proposition that the case involved a class that included "all Negroes who may hereafter seek employment." Br. 25 (citing *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1227-28 (4th Cir. 1970)). But in fact, only a portion of the original case reached the Supreme Court, which considered only the claims of the four incumbent employees. *See* 401 U.S. at 431. On remand, the district court explained that the *Griggs* case "is no longer, if it ever was, a class action" because the Fourth Circuit "implicitly dissolved" its 1967 class-certification order before the case proceeded to the Supreme Court. *Griggs v. Duke Power Co.*, No. C-210-G-66, 1974 WL 146, at *1 (M.D.N.C. Jan. 10, 1974). The injunction thus applied only to the "selection of employees for *promotions, transfers, demotions or lay-offs* and the selection of *employees* for *training* for any of the job vacancies which may hereafter occur at the defendant's Dan River Steam Station." *Griggs v. Duke*

Power Co., No. C-210-G-66, 1972 WL 215 (M.D.N.C. Sept. 25, 1972) (emphases added); *accord Griggs v. Duke Power*, 515 F.2d 86-87 (4th Cir. 1975) ("Supreme Court granted relief" only to "four plaintiffs[.]").

In short, the Supreme Court's decision in *Griggs* decided promotion and transfer claims by four incumbent employees. It did not decide anything about any failure-to-hire claim by any applicant for employment, and it provides no support for Villarreal's argument that the pre-1972 version of Section 703(a)(2) authorized applicants for employment to bring failure-to-hire disparate-impact claims.

2. The legislative history cuts against Villarreal

Villarreal and his amici attempt to bolster their case by making selective use of legislative history. They thus ignore legislative documents explaining that the subsequently-enacted language of ADEA Section 4(a)(2) would make it unlawful "[t]o limit, segregate, or classify *employees* so as to deprive *them* of employment opportunities or adversely affect *their* status." 113 Cong. Rec. 31,250 (1967), (emphasis added); *see also* S. Rep. No. 90-723, at 4 (1967) ("summary of major provisions" describing Section 4(a)(2) as making it unlawful "[t]o limit, segregate, or classify *employees* so as to deprive *them* of employment opportunities or adversely affect *their* status . . .") (emphasis added); 113 Cong. Rec. 34,752 (1967) (explaining that under Section 4(a)(2), employers "could not . . . limit, segregate or

classify *employees* by age if it would adversely affect *their* employment opportunities") (emphasis added).

These legislative documents confirm what common sense and the text make clear: Section 4(a)(2) has never applied to "applicants for employment," and Section 703(a)(2) of Title VII did not apply to them until Congress added that phrase in 1972. *See McClure v. Salvation Army*, 460 F.2d 553, 556 (5th Cir. 1972) (applying the pre-1972 version of Section 703(a) and stating that "[i]f the provisions of Title VII are to apply to the relationship between [the defendant] and [the plaintiff], it is necessary that . . . [the plaintiff] be an 'employee'").

Villarreal and his amici cite two snippets to support their claim that the 1972 Amendment adding "applicants for employment" to Title VII Section 703(a)(2) had no legal effect. Br. 15 (quoting language from S. Rep. No. 92-415, at 43 (1971) and H.R. Rep. No. 92-238, at 21-22 (1971), stating that the 1972 amendment was "merely . . . declaratory of present law," and was "fully in accord with the decision of the Court" in *Griggs*). But those brief statements are not authoritative because Congress never voted on them, nor do they support Villarreal's theory that *Griggs* authorized disparate-impact claims by applicants for employment.

First, as the Supreme Court has made clear, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). "[I]t is the text of

the statute, and not statements put in some committee report or made on the floor—and certainly not someone's understanding of the circumstances which gave rise to the legislation—that has been voted on and approved by the people's elected representatives for inclusion in our country's laws." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1227 (11th Cir. 2001). Indeed, given how easily legislative history can be cherry-picked and manipulated (as illustrated here), the Supreme Court recently questioned whether "legislative history is ever relevant." *United States v. Woods*, 134 S. Ct. 557, 567 n.5 (2013).

Second, the legislative history is particularly unhelpful here. The statement that the 1972 Amendment was "fully in accord with" *Griggs* means only that the amendment was *consistent* with *Griggs*, not *redundant* of it. And while the Senate report does claim that the 1972 Amendment was merely "declaratory of present law," it does not cite *Griggs*. Likewise, the Conference Report that the Senate later adopted cites not to *Griggs* but instead to three other cases, none of which actually applied Section 703(a)(2). *See* Conf. Rep. on H.R. 1746, reprinted in 118 Cong. Rec. 7166, 7169 ("This subsection is merely declaratory of present laws as contained in the decisions in *Phillips* v. *Martin-Marietta Corp.,* 400 U.S. 542 (1971); *U.S. v. Sheet Metal Workers International Assn., Local 36,* 416 F. 2d 123 (8th Cir. 1969); *Asbestos Workers, Local 53 v. Vogler,* 407 F.2d 1047 (5th Cir. 1969)."). *Phillips* was an *intentional*-discrimination case brought under Section

703(a)(1). *Sheet Metal Workers* was decided under Section 703(c), which prohibits discrimination by unions and has different language than Section 703(a). And *Vogler* was decided under Sections 703(c) and 703(g). These cases accordingly said nothing about the scope of Section 703(a)(2) prior to 1972. By contrast, at least one court of appeals recognized that the original version of Section 703(a)(2) covered only employees. *See Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 445 (3d Cir. 1971) (stating that discrimination "by employers" was covered under "42 U.S.C. § 2000e-2(a)(2)", whereas discrimination "by potential employers" was covered under "42 U.S.C. §2000e-2(a)(1)"). This confirms that the 1972 Amendment adding "applicants for employment" was not the meaningless gesture that Villarreal claims.

Finally, Villarreal and his amici cite a single piece of legislative history of the ADEA, a report by former Secretary of Labor W. Willard Wirtz. Br. 27-28; AARP Amicus Br. 13; EEOC Amicus Br. 12. The Wirtz Report, however, did not recommend that Congress create a cause of action for disparate-impact claims by applicants for employment. The Wirtz Report instead expressed the view that when certain employment practices "unintentionally lead to age limits in hiring," noncoercive approaches should be tried. Wirtz Rep. at 22. For example, the Wirtz Report recommended that certain "proposals" about pensions "be given prompt and full consideration," and that a "comprehensive" review of "workmen's

compensation and disability insurance should be undertaken." *Id.* The Wirtz Report thus did not *at all* conclude that the ADEA should authorize disparate-impact hiring claims. If anything, the Wirtz Report undermines Villarreal's argument instead of supporting it.

C. The Other Statutes And Regulations Cited By Villarreal Bear No Resemblance To The ADEA

Villarreal points to other statutes and regulations that authorize disparate-impact claims by applicants for employment, but none are like ADEA Section 4(a)(2). For example, he cites the Family and Medical Leave Act's use of the phrase "any individual," *see* Br. 21, but that provision is broadly written and not limited by the "employee" language of Section 4(a)(2) of the ADEA. He also cites the Genetic Information Nondiscrimination Act, but that statute specifically defines "employee" as "including an applicant," 49 U.S.C. § 2000ff(2)(A)(i), whereas the ADEA defines "employee" only as "an individual employed by any employer," 29 U.S.C. § 630(f). In short, Villarreal's examples "have different language, different histories, and were enacted in different contexts. [The] interpretation of one, therefore, has no impact whatsoever on [the] interpretation of the other[s]." *MacLean*, 135 S. Ct. at 923.

D. The EEOC's Interpretation Deserves No Deference

The EEOC argues that its regulations promulgated under the ADEA should be interpreted to mean that the scope of Section 4(a)(2) extends to applicants for

employment, and that this interpretation is entitled to deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) and *Auer v. Robbins*, 519 U.S. 452 (1997). EEOC Amicus Br. 19-20. This argument fails for several reasons.

1. *Chevron* deference does not apply

At the outset, *Chevron* deference cannot apply because the text and structure of the statute make clear that Section 4(a)(2) does not include applicants for employment. It is black-letter law that an agency cannot promulgate (or reinterpret) regulations to stretch the scope of the underlying statute beyond its natural limits. "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron*, 467 U.S. at 842-43). Courts thus have "no occasion to determine whether [a regulation] would be entitled to deference" when "the statutory text unambiguously" forecloses the agency's interpretation. *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1168 n.11 (2014). Moreover, *Chevron* itself emphasizes that ambiguity should be assessed only *after* "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Thus, "deference to [an agency's] statutory interpretation is called for only [after] the devices of judicial construction have been tried." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

Here, the text and structure of Section 4(a)(2) make clear that it excludes applicants for employment. *See* Section I, *supra*. This Court should accordingly reject the EEOC's contrary interpretation, as the Supreme Court has repeatedly done in cases where the EEOC unsuccessfully sought deference for its flawed reading of the ADEA. *See, e.g., Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 149 (2008) (rejecting an "EEOC interpretation contained in an EEOC regulation and compliance manual"); *Cline*, 540 U.S. at 600 (rejecting EEOC ADEA regulation prohibiting discrimination against the young by the old); *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 170-71 (1989) (rejecting EEOC interpretation about "age-related reductions in benefits," noting that "[e]ven contemporaneous and longstanding [EEOC] interpretations must fall to the extent they conflict with statutory language"); *see also Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1315 (2005) (rejecting interpretation of the ADEA where the EEOC simply "assert[ed] its position in an amicus brief"); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489-90 (9th Cir. 1993) (rejecting EEOC interpretation of Section 703(a)(1) of Title VII and stating that "[w]e will not defer to "an administrative construction of a statute where there are compelling indications that it is wrong.") (citation omitted).

Even if Section 4(a)(2) were somehow ambiguous, *Chevron* deference still would not apply here because the EEOC's own regulations do not address whether

Section 4(a)(2) applies to applicants for employment. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991) (refusing to defer to EEOC ADEA interpretation articulated only in the course of litigation, rather than in a deliberative exercise of interpretive authority); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("We have never applied [*Chevron* deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.").

Here the only active regulatory provision cited by the EEOC in its amicus brief is 29 C.F.R. § 1625.7(c), which does not interpret Section 4(a)(2) at all. By its terms, that regulation interprets only Section 4(f)(1), which precludes disparate-impact liability where employers can show that the disparate impact "is based on reasonable factors other than age [RFOA]." Consequently, because the regulation is limited to defining the *substance* of Section 4(f)(1)'s RFOA defense, it cannot have any bearing on the entirely separate question of whether the *scope* of Section 4(a)(2) extends to applicants for employment. *Cf. Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (EEOC's interpretation of Title VII "lack[ed] . . . persuasive force" where agency's "generic . . . discussion" "fail[ed] to address the specific provisions of th[e] statutory scheme"); *El v. SEPTA*, 479 F.3d 232, 243-44 (3d Cir. 2007) (no deference for EEOC guidelines and policy documents that "do not speak to" the specific issue being litigated, and that "do[] not substantively analyze the statute" in support of the EEOC's position).

To be sure, the RFOA provision was relevant to the Supreme Court's interpretation of Section 4(a)(2) in *Smith*, because the question there was whether Section 4(a)(2) authorized disparate-impact claims *at all*. The Court explained that the RFOA defense plays its "principal role" in "disparate-impact" cases, thus providing strong evidence that Congress intended at least *some* disparate-impact claims to be available under Section 4(a)(2). *Smith*, 544 U.S. at 239 (plurality op.). Here, by contrast, the question is whether the *scope* of Section 4(a)(2) extends to claims brought by applicants for employment. On that question the RFOA provision is completely irrelevant, because it says nothing about *who may bring claims* under Section 4(a)(2).

2. *Auer* deference does not apply

The EEOC claims that the term "individual" in the RFOA regulation should be interpreted to refer to applicants for employment as well as existing employees, and that this interpretation is entitled to *Auer* deference. EEOC Amicus Br. 19. In fact, however, the EEOC is entitled to no deference on this point because the term "individual" in the RFOA regulation simply "parrot[s]" the relevant statutory language. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). *Gonzales* explained that "[a]n agency does not acquire special authority to interpret its own words when . . . it has elected merely to paraphrase the statutory language." *Id.*; *see also Ky. Ret. Sys.*, 554 U.S. at 149 (declining to defer to the EEOC's interpretation of its own

regulation that "d[id] little more than restate the terms of the [ADEA] itself"); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 962 (8th Cir. 2002) (*Auer* deference inappropriate "where the agency regulation does nothing more than mirror the ambiguous language of the statute"); *Cunningham v. Scibana*, 259 F.3d 303, 307 n.1 (4th Cir. 2001) (agency's interpretation of a regulation not entitled to *Auer* deference where the regulation "simply repeated the statutory language in the regulation").

Here, Section 4(a)(2) 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) (2012) (emphasis added). The EEOC claims that the term "individual" includes not only those who already have "status as an employee," *id.*, but also those who are applicants for employment. But the RFOA regulation does not address that question at all. Instead it merely parrots the statutory term "individual[]," stating that "[a]ny employment practice that adversely affects *individuals* within the protected age group on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'" 29 C.F.R. § 1625.7(c) (emphasis added).

Accordingly, "[s]ince the regulation gives no indication how to decide" the meaning of the statutory term "individual," "the [EEOC's] effort to decide [the meaning] now cannot be considered an interpretation of the regulation." *Gonzales*, 546 U.S. at 257. "[T]he existence of [the] parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Id.* Having declined to interpret the statutory term "individual" through notice-and-comment rulemaking, the EEOC cannot now promulgate an authoritative interpretation through an amicus brief.

The EEOC claims that its position warrants deference because it reflects the agency's "longstanding . . . interpretation" of the ADEA, because previous regulations authorized applicants for employment to bring disparate-impact claims. EEOC Amicus Br. 17. In fact, however, before *Smith* was decided, the agency did not rely on Section 4(a)(2) for its view that applicants for employment can bring disparate-impact claims, but instead relied on the now-discredited notion that disparate-impact claims were available under *Section 4(a)(1)*, which clearly covers failure-to-hire claims. The EEOC cites a single instance where the Solicitor General claimed that Section 4(a)(2) covered applicants for employment in a petition for certiorari in *EEOC v. Francis Parker School*. EEOC Amicus Br. 21. But in *Francis Parker*, the EEOC had previously argued that "it is of no consequence . . . that subsection 4(a)(2) does not refer to applicants," because

"[e]ven if applicants are not covered by subsection 4(a)(2), disparate impact theory applies to them by virtue of subsection 4(a)(1)." EEOC Reply Brief at 4, *EEOC v. Francis Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994) (No. 93-3395), 1994 WL 16045193. After the Supreme Court held in *Smith* that Section 4(a)(1) does not authorize disparate-impact claims, *see Smith,* 544 U.S. at 236 n.6, the EEOC switched gears and began insisting that disparate-impact claims *must* be available to applicants for employment under Section 4(a)(2). *See* EEOC Appellee Brief at 15 n.2, *EEOC v. Allstate Ins. Co.*, 528 F.3d 1042 (8th Cir. 2007) (07-1559), 2007 WL 6604487. The agency's flawed and waffling interpretation of the statute is thus the opposite of "longstanding," and is accordingly entitled to no deference.

The supposedly "longstanding" status of the EEOC's position is further undermined by the significant change the agency made to the RFOA regulations after *Smith* rejected the EEOC's view that Section 4(a)(1) authorized disparate-impact claims. As the EEOC notes, the pre-*Smith* RFOA regulation referred specifically to "employees or applicants" in the context of disparate-impact claims, 29 C.F.R. § 1625.7(d) (1981). That language was consistent with the agency's erroneous view that Section 4(a)(1), which applies to applicants for employment, authorized disparate-impact claims. But after *Smith* held that Section 4(a)(1) does not authorize disparate-impact claims, the agency removed the reference to "employees or applicants." 29 C.F.R. § 1625.7(d) (2012). *See also Meacham*, 554

U.S. at 93 n.9 (noting that "the Government has disavowed" the previous regulations "as overtaken by our decision in *Smith*"). The EEOC attempts to put a positive spin on this change by claiming that, despite the removal of the key term "applicants," the language of the new regulation is "even broader" because it now refers to "individuals." EEOC Amicus Br. 19. But merely parroting the generic statutory term "individual" plainly is not enough to broaden Section 4(a)(2) to cover applicants for employment.

Finally, the EEOC tries to establish the "longstanding" nature of its interpretation in two other ways, but neither proves the point. First, the EEOC cites the 1966 Title VII regulations and the 1968 ADEA regulations, *see* EEOC Amicus Br. 17-18, but those regulations did not take any position on whether disparate-impact claims were authorized under Section 4(a)(1) or 4(a)(2). Second, the EEOC claims that its interpretation dates back to *Weinrauch v. Dep't of Treasury*, Appeal No. 01790210, 1983 WL 500299 (EEOC June 10, 1983), but that is clearly wrong. *Weinrauch* applied the ADEA's federal-employee statute, which explicitly extends protections to "applicants for employment" in federal jobs. *See* 29 U.S.C. § 633a(a). The EEOC's position there accordingly said nothing about Section 4(a)(2), which applies to *private* employment.

III. All Claims Prior To November 19, 2009 Are Untimely

The District Court properly dismissed as untimely Villarreal's claims based on hiring decisions made more than 180 days before he filed his May 2010 EEOC charge.

A. The Charge-Filing Period In Georgia Is 180 Days

Before a plaintiff can file an ADEA lawsuit, the plaintiff "shall" file a "charge alleging unlawful discrimination" with the EEOC. 29 U.S.C. §§ 626(d)(1)(A) & 633(b); App. I, Dkt. No. 58, at 15 n.3. The ADEA's charge-filing period operates as a statute of limitations, such that "[a] claim is time barred if it is not filed within time limits." *Morgan,* 536 U.S. at 109. The bar applies in both individual actions and in collective actions like this one. Accordingly, "the rearward scope of an ADEA opt-in action should be limited to those plaintiffs who allege discriminatory treatment within 180 or 300 days before the representative charge is filed." *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1214 n.2, 1220-21 (11th Cir. 2001).

Here it is undisputed that Villarreal's charge-filing period was 180 days. *See* 29 U.S.C. § 626(d)(1); App. I, Dkt. No. 58, at 15 n.3. Villarreal's claims are thus untimely to the extent they rest on hiring decisions made more than 180 days before he filed his charge on May 17, 2010. The only timely claims are those that accrued after November 19, 2009.

B. Equitable Tolling Cannot Save Villarreal's Claims

Villarreal argues that the statute of limitations should be equitably tolled because he did not learn of RJRT's allegedly discriminatory 2007 hiring guidelines until he was contacted by a lawyer seeking to file a class-action lawsuit in April 2010. His argument fails because he failed to allege that he exercised due diligence to discover RJRT's hiring practices, and because he failed to plead the extraordinary circumstances necessary to trigger equitable tolling.

Equitable tolling "is an extraordinary remedy that should be extended only sparingly," *Bost v. Fed. Express Co.*, 372 F.3d 1233, 1242 (11th Cir. 2004) (citation & quotation marks omitted), and is appropriate only "in extreme cases where failure to invoke the principles of equity would lead to unacceptably unjust outcomes," *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (citation omitted). Accordingly, to state a claim for equitable tolling, a plaintiff must allege that: (1) he pursued his rights "with diligence"; and (2) "extraordinary circumstances" nonetheless prevented a timely filing. *Id.*; *see also Mesidor v. Waste Mgm't, Inc. of Fla.*, No. 14-13455, 2015 WL 1346121, at *1-2 (11th Cir. March 26, 2015).

Villarreal does not dispute that the allegations in his original complaint were insufficient to state a claim for equitable tolling or that the District Court's March 6, 2013, Order to that effect was correct on this point. Instead he relies on his

proposed amended complaint, but that too is deficient.[1] The amended complaint contains no allegation that he pursued his rights diligently or that any extraordinary circumstances existed to justify his failure to file a timely claim. These deficiencies are fatal.

1. Villarreal failed to allege due diligence

As the District Court concluded, Villarreal "has not alleged any due diligence on his part to determine the status of his 2007 application." App. II, Dkt. No. 67 at 5. He does not allege—nor could he—that he ever tried to contact RJRT or Kelly Services to inquire about the status of his November 2007 application, or why he was not selected, or who was hired in his place. Likewise, although he alleges that he applied online, he does not allege that he continued checking the website to see if the company was still advertising for the Territory Manager position for which he applied, which he also easily could have done. Accordingly, because he does not allege that he made *any effort* to discover RJRT's hiring practices before being contacted by a class-action lawyer, his claim fails at the threshold. *See Bost*, 372 F.3d at 1242 ("Equitable tolling is inappropriate when a plaintiff . . . failed to act with due diligence.").

[1] Although Villarreal briefly discusses the standard for review for denial of a motion for leave to amend, his statement of issues does not list the denial of his motion as an issue for appeal, and other than two references to the amendment not being futile, Br. 35, 46, he does not argue that the District Court erred in denying his motion to amend.

Villarreal argues that even with due diligence, he could not have learned the facts supporting his claim until counsel contacted him. But such speculation cannot excuse the fact that Villarreal has not alleged *any diligence at all*. As the District Court noted, if he had contacted RJRT or Kelly Services and they had stonewalled or provided inaccurate information, he might have had a case for equitable tolling. App. II, Dkt. No. 67, at 5-6. But instead he sat on his hands for two and a half years until an attorney contacted him out of the blue and told him that he might have a claim. That is the opposite of reasonable diligence.

2. Villarreal failed to allege "extraordinary circumstances"

Villarreal has also failed to allege anything like the "extraordinary circumstances" required for equitable tolling. He does not claim that RJRT engaged in fraud, concealed any facts, or misled him regarding why he was not selected. Instead he alleges only that he did not receive any communication from RJRT telling him why he was not hired, and he did not know whether his application was even reviewed. App. II, Dkt. No. 61-1, at 12 ¶ 28. Villarreal thus claims that he has sufficiently stated a claim for equitable tolling based solely on his allegation that he applied unsuccessfully for a job and did not know about the hiring standards until a lawyer contacted him while searching for plaintiffs to file a class-action suit. Br. 35-39. That argument is grossly deficient, and, if accepted, it would eviscerate the statute of limitations in failure-to-hire cases.

Villarreal ignores this Court's teaching that "equitable tolling is appropriate in situations where the defendant misleads the plaintiff, allowing the statutory period to lapse; or when the plaintiff has no reasonable way of discovering the wrong perpetrated against her . . . ." Additionally, "in order to apply equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment." *Cabello*, 402 F.3d at 1154-55 (citation & quotation marks omitted); *see also Mesidor*, 2015 WL 1346121, at *2 (equitable tolling unwarranted because the appellant failed to "show extraordinary circumstances such as fraud, misinformation, or deliberate concealment"); *Horsley v. Univ. of Ala.*, 564 Fed. App'x 1006, 1009 (11th Cir. 2014) (rejecting equitable tolling in employment discrimination case due to lack of "affirmative misconduct, such as fraud, misinformation, or deliberate concealment").

The cases that Villarreal cites, Br. 35-37, are not to the contrary because all of them relied on allegations or evidence that the employer affirmatively misled the plaintiff or otherwise caused the plaintiff's delay in filing. For instance, in *Reeb v. Economics Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), the court explicitly found that equitable tolling might apply only because the plaintiff alleged that the defendant "actively sought to mislead" her about the real reason for her discharge. On remand, the District Court rejected equitable tolling after finding

that the defendant had *not* attempted to conceal the alleged discrimination. *See Reeb*, No. 17533, 1977 WL 15386, at *1 (N.D. Ga. Mar. 30, 1977).

Likewise in *Jones v. Dillard's Inc.*, 331 F.3d 1259 (11th Cir. 2003), equitable tolling was available only because the employer falsely told the employee that her position was being discontinued, when in fact the employer replaced her with someone younger. *Id.* at 1265. The *Jones* court moreover noted that the "effect of *Reeb* was to close the loophole used by the malicious employer," by ensuring that "'where wrongful concealment of facts is alleged . . . a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense.'" *Id.* (quoting *Reeb,* 516 F.2d at 930).

Similarly, in *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023 (11th Cir. 1994), the plaintiff testified that his employer falsely told him that his position was being eliminated, when in reality he was replaced with a younger employee. *Id.* at 1025. The *Sturniolo* court thus held that equitable tolling might apply only because the employer might have made an affirmative misrepresentation. Accordingly, Villarreal is wrong to assert that nothing in *Sturniolo's* application of equitable tolling turned upon the employer's conduct, Br. 40 n.15.

Villarreal cites *Cocke v. Merrill Lynch & Co.,* 817 F.2d 1559 (11th Cir. 1987), to claim that the plaintiff need *never* make a showing of employer misconduct, but Villarreal is wrong again. In *Cocke*, the employer caused the

plaintiff's delay in filing by telling him that it was actively trying to find another position for him. *Id.* at 1561. This Court emphasized that equitable tolling, which "'often focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant,'" was appropriate until it was or should have been apparent to the employee "with a reasonably prudent regard for his rights that the employer [had] ceased to actively pursue such a position." *Id.* at 1561 (citation omitted).

Similarly, in *Browning v. AT&T Paradyne*, 120 F.3d 222 (11th Cir. 1997), extraordinary circumstances involving a misrepresentation by the EEOC drove the outcome. This Court found that equitable tolling was warranted because the EEOC misrepresented the applicable statute of limitations to the plaintiff's counsel. Calling its holding a "very narrow one," this Court said that it was only based "on this unique, specific set of facts." *Id.* at 227. In *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), the plaintiff argued that it was unclear when he was notified of his termination because he did not believe that the manager who first told him had authority to fire him. The court rejected the plaintiff's invocation of the equitable-tolling doctrine, emphasizing that statutes of limitation "protect important social interests in certainty, accuracy, and repose" and should not be "trivializ[ed] . . . by promiscuous application of tolling doctrines." *Id.* at 453.

In essence, Villarreal proposes a standard that is unsupported by the case law and would all but eliminate the statute of limitations in failure-to-hire cases. As courts have noted, plaintiffs in failure-to-hire cases almost *always* can say that they did not know the employer's true motivations until long after the fact, if ever. *See Stanley v. Lawrence Cnty. Comm'n*, No. 5:11-cv-01583-JEO, 2014 U.S. Dist. LEXIS 13034, at *15 (N.D. Ala. Jan. 7, 2014) (fact that employer did not notify plaintiff of decision to hire her "does not diminish her responsibility to diligently investigate and pursue her claim"); *Howard v. Intown Suites Mgmt., Inc*., No. 1:04-CV-759-TWT, 2006 WL 739168, at *2 (N.D. Ga. Mar. 17, 2006) (rejecting equitable tolling where the plaintiff did nothing before counsel contacted him, because allowing tolling would "eviscerate[] the statute of limitations in employment cases"). Yet accepting Villarreal's argument would mean that the limitations period in most *every* hiring case could be tolled indefinitely, or at least until the plaintiff was contacted by an attorney looking for clients to build a class action. Equitable tolling would no longer be an "extraordinary remedy" —it would become the norm. That is not and should not be the law. [2]

[2] Other courts have applied the same principles to reject equitable-tolling arguments in other failure-to-hire cases. *See, e.g., Lukovsky v. City and Cnty. of S.F.*, No. C 05-00389 WHA, 2006 WL 2038465, at *4 (N.D. Cal. July 17, 2006), *aff'd*, 535 F.3d 1044 (9th Cir. 2008) (citation omitted) (rejecting tolling based on a "revelation" that "did not come to light until 2004 when [a] fellow plaintiff … told [the plaintiff] about the possibility that Defendants had discriminated against him in 2000); *Amini v. Oberlin Coll*., 259 F.3d 493, 501 (6th Cir. 2001) (rejecting

Allowing equitable tolling in hiring cases for untold years without any allegation of due diligence or extraordinary circumstances such as employer malfeasance would be highly prejudicial to employers and contrary to the principles of equitable modification of limitations periods. *See, e.g. Reeb,* 516 F.3d at 930 (emphasizing absence of prejudice to the defendant); *Cocke*, F.2d at 1560 ("Equitable tolling is a type of equitable modification, which 'often focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.") (citation omitted). Villarreal suggests that his theory will not subject employers to unbounded liability because they will always be able to raise an equitable laches defense. Br. 43 n.17. On the contrary, if equitable tolling applies, an employer could hardly argue that the employee "unreasonabl[y] delay[ed]" filing, which is an essential element of laches. *See EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1202 (11th Cir. 2002) ("To apply laches in a particular case, the court must find both that the plaintiff delayed inexcusably in bringing the suit and that this delay unduly prejudiced defendants.") (citation omitted)).

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tolling where plaintiff failed to act "with the requisite diligence" by not contacting employer to learn whom it hired and did not allege employer misrepresentation or wrongdoing); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1391 n.10 (3d Cir. 1994) (rejecting tolling where firm did not, as promised, contact plaintiff when associate position became available; "[E]quitable tolling requires active misleading on the part of the defendant.").

C. The Continuing-Violation Doctrine Does Not Save Villarreal's Claims

Villarreal also argues that he can avoid the limitations period because, even though the acts of alleged discrimination against *him* occurred outside the charge-filing period, he has brought a "pattern or practice" claim challenging a policy that continues to be applied to *others*. *See* Br. 46. This argument is equally meritless.

Villarreal's brief makes no mention of this Court's decision in *Hipp,* a pattern-or-practice ADEA collective action that is dispositive of his continuing-violation argument. In *Hipp*, this Court explicitly rejected application of the continuing-violation theory in the pattern-or-practice context, explaining that it could "find no authority . . . for allowing one plaintiff to revive a stale claim simply because the allegedly discriminatory policy still exists and is being enforced against others." 252 F.3d at 1221.[3]

Villarreal overlooks the fact that an allegedly discriminatory hiring policy can be implemented only through a series of discrete acts, and as the Supreme

[3] Villarreal may not bring an individual pattern-or-practice discrimination claim. *Banks v. Ackerman Sec. Sys., Inc.*, No. 1:09-CV-0229-CC, 2009 WL 974242, at *3 (N.D. Ga. Apr. 10, 2009) ("The Eleventh Circuit has held that pattern and practice cases only may be brought by the EEOC or a class of plaintiffs.") (citing *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286-87 (11th Cir. 2000)); *Monaco v. City of Jacksonville*, No. 3:09-CV-1169-J-32PDB, 2014 WL 4926105 , at *6 (M.D. Fla. Sept. 30, 2014) (*Teamsters* pattern or practice theory "is not available to individual private plaintiffs"). Villarreal apparently recognizes this fact and argues only that the continuing-violation theory applies to his representative pattern-or-practice disparate-treatment claim. Br. 46-47.

Court explained in *Morgan*, 536 U.S. at 114, such a "serial violation" situation is not subject to the continuing-violation exception. Plaintiff also ignores numerous recent cases applying *Morgan* to hold that discrete acts cannot be aggregated under a continuing-violations theory to revive time-barred claims. Indeed, that was exactly this Court's holding in *Davis v. Coca-Cola Bottling Co. Consol.,* 516 F.3d 955, 970 (11th Cir. 2008) (holding plaintiff's pattern-or-practice claims based on "discrete acts" time-barred). *See also City of Hialeah v. Rojas*, 311 F.3d 1096, 1101-02 (11th Cir. 2002) (applying *Morgan* to a Title VII class action and determining that the plaintiff's claims were "time-barred.").[4]

Moreover, immediately following *Morgan*, several circuits held that a challenge to a long-standing policy does not enable plaintiffs to revive untimely claims based on discrete acts. *See, e.g.*, *Williams v. Giant Food, Inc.*, 370 F.3d 423, 429-30 (4th Cir. 2004) (alleged 20-year "pattern or practice" of discrimination did not extend the limitations period); *Davidson v. AOL*, 337 F.3d 1179 (10th Cir. 2003) (failure-to-hire challenge to company-wide policy; continuing-violation theory did not apply); *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003)

[4] Villarreal argues that *Davis* is not dispositive on this issue because the court went on to find the pattern-or-practice claims lacked merit, Br. 52 n.20, but that fact, as the court itself noted, does not affect its statute-of-limitations analysis. 516 F.3d at 970 n.33. Likewise, Villarreal attempts to distinguish *Rojas*, 311 F.3d 1096, in which the court applied *Morgan* to a Title VII class action, on the grounds that the discriminatory practice last applied to the plaintiff 18 years before he filed his charge. But if Villarreal's theory is correct, the passage of time should make no difference.

("it would eviscerate *Morgan*'s premise to circumvent the timely filing requirements merely because a plaintiff alleges that the acts were taken pursuant to a discriminatory policy").

More recently, numerous courts have explicitly held that the continuing-violation doctrine does not allow a plaintiff to pursue a pattern-or-practice failure-to-hire claim for acts that pre-date the charge-filing period. For example, in *EEOC v. Freeman*, No. RWT 09cv2573, 2010 WL 1728847 (D. Md. Apr. 27, 2010), *aff'd*, 778 F.3d 463 (4th Cir. 2015), the court rejected the EEOC's argument that the continuing-violation doctrine allows it to pursue stale claims in a pattern-or-practice Title VII failure-to-hire case challenging the use of credit and criminal histories to reject applicants. The court explained that "the continuing violation doctrine permits the inclusion of additional, but otherwise time-barred, *claims*—not the inclusion of otherwise time-barred *parties*." *Id.* at *6. The court also explained that "[a] pattern or practice of refusing to hire job applicants does not constitute a continuing violation." *Id.* "Linking together a series of decisions not to hire under the label of a pattern or practice does not change the fact that each decision constituting the pattern or practice is discrete." *Id; see also EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619, 625 (N.D. Ohio 2011) (rejecting the EEOC's continuing-violation theory because "in a pattern-or-practice case such as this, the discrete decisions to refuse to hire and to terminate employment cannot

be linked together to create a continuing violation."); *EEOC v. U.S. Steel Corp.*, No. 10-1284, 2012 WL 3017869, at *7 (W.D. Pa. July 23, 2012); *EEOC v. PBM Graphics, Inc.*, No. 1:11-cv-805, 2012 WL 2513512, at *13 (M.D.N.C. June 28, 2012); *EEOC v. Bloomberg, L.P.*, 751 F. Supp. 2d 628, 647 (S.D.N.Y. 2010).

Villarreal cites no post-*Morgan* cases in which a court has held that the continuing-violation doctrine enables a plaintiff to avoid the charge-filing limitations period in a pattern-or-practice failure-to-hire case. He purports to cite cases from "a number of circuits," Br. 46, but he actually cites only a single case from the Sixth Circuit, *Sharpe v. Cureton,* 319 F.3d 259 (6th Cir. 2003). And *Sharpe* is inapposite because it involved individual claims of retaliation, and the court determined that the continuing-violation doctrine did *not* save the plaintiff's untimely retaliation claims. In any event, to the extent it stands for the proposition Villarreal suggests, *Sharpe* is at odds with this Court's decision in *Hipp*, which is controlling here.

Villarreal's failure-to-hire claim based on his November 2007 application accrued at the time he applied and was not hired. Unlike a hostile work environment claim, where individual acts may not be actionable on their own, here each hiring decision was discrete and actionable by itself. Villarreal cannot obviate the charge-filing period simply by alleging a continuing policy or a pattern-or-practice of discrimination. As the Fifth Circuit has observed, "[i]f the mere

existence of a policy is sufficient to constitute a continuing violation, it is difficult to conceive of a circumstance in which a plaintiff's claim of an unlawful employment policy could be untimely." *Abrams v. Baylor Coll. of Med.*, 805 F.2d 528, 533 (5th Cir. 1986). In arguing that the continuing-violation doctrine saves his claim, Villarreal conflates issues of evidence admissibility with that of claim accrual and timeliness. As the Court in *Morgan* noted, evidence regarding time-barred hiring decisions "'may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue.'" 536 U.S. at 112 (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)). But, "linking together a series of decisions not to hire under the label of a pattern or practice does not change the facts that each decision constituting the pattern or practice is discrete." *Freeman*, 2010 WL 1728847, at *6.

In any event, the basis for any continuing-violation claim ceased when Villarreal dismissed his timely disparate-treatment pattern-or-practice claims. As he did in the court below, Villarreal argues only that the continuing-violation doctrine applies to his representative pattern-or-practice disparate-treatment claim, Count One of his complaint. The continuing-violation doctrine is predicated on the plaintiff showing that at least one act of discrimination against him occurred within the charge-filing period. *See Morgan*, 536 U.S. at 103. Here, before filing this appeal, Villarreal sought and obtained dismissal with prejudice of his timely

disparate-treatment claims. With that dismissal, he removed from the case the timely portion of his pattern-or-practice claim. As a result, the only portion of Villarreal's pattern-or-practice claim that is before this Court is the untimely portion of Count One of the complaint, and it cannot provide any basis to support Villarreal's continuing-violation theory. Villarreal has never argued that his disparate-impact claim (Count Two) provides any basis for his continuing-violation argument, and it is too late to do so now. Villarreal has forfeited any such argument.

CONCLUSION

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

Dated: April 27, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,718 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

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

Dated: April 27, 2015

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CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2015, 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 sent paper copies of the foregoing BRIEF FOR THE APPELLEES by UPS overnight mail to the Clerk of Court and by U.S. First Class Mail to the following:

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