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)

REPLY BRIEF OF PLAINTIFF-APPELLANT RICHARD M. VILLARREAL

JOHN J. ALMOND
MICHAEL L. EBER
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Tel: (404) 522-4700
Fax: (404) 525-2224
JAlmond@rh-law.com
MEber@rh-law.com

JAMES M. FINBERG
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151
Fax: (415) 362-8064
jfinberg@altber.com
cpitts@altber.com

Attorneys for Plaintiff-Appellant
[Additional Counsel on Inside Cover]

Additional Counsel for Plaintiff-Appellant

SHANON J. CARSON
SARAH R. SCHALMAN-BERGEN
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (800) 424-6690
Fax: (215) 875-4604

TODD M. SCHNEIDER
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY LLP
180 Montgomery Street, Suite 2000
San Francisco, California 94104
Tel: (415) 421-7100 ext. 306
Fax: (415) 421-7105

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INTRODUCTION

In its brief, R.J. Reynolds Tobacco Co. ("RJR") argues that hiring policies that disproportionately disqualify older job applicants can *never* be challenged on that basis under the Age Discrimination in Employment Act ("ADEA"), no matter how unnecessary and unrelated to job performance those policies might be. An accounting firm that wants its workforce to appear more hip, for example, could require that all auditor applicants demonstrate expertise in the use of social media platforms like Twitter and Instagram, even though such skills are irrelevant to that position's job responsibilities. Such a policy would have a disparate impact on older applicants and establish a significant barrier to employment for older workers, but it would be categorically lawful under RJR's theory simply because it involves hiring rather than promotions or transfers.

There is no basis in the statutory text, the Supreme Court's precedents, or the EEOC's regulations for this Court to create such a significant hole in the ADEA. Section 4(a)(2) of the ADEA, 29 U.S.C. §623(a)(2), permits challenges to the manner in which an employer "limits … [its] employees," including when it does so by establishing hiring criteria that "limit" employment in particular positions to individuals satisfying those standards.

Even without the categorical exemption RJR seeks the ADEA permits many hiring practices with a disparate impact on older workers, because they either do

not deprive individuals of employment, 29 U.S.C. §623(a)(2), or are "based on reasonable factors other than age," 29 U.S.C. §623(f)(1). There is no reason for this Court to insulate such practices from *all* review under the ADEA.

In arguing that Plaintiff-Appellant Richard M. Villarreal's EEOC charge was untimely, RJR asks this Court to abandon binding Circuit precedent. For 40 years, this Circuit has recognized that the limitations period in an employment discrimination action does not commence "until the facts that would support a charge of discrimination … [are] apparent or should [be] apparent to a person with a reasonably prudent regard for his rights." *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975). RJR does not dispute that the facts supporting any claim based on Villarreal's first application to RJR did not become apparent to him until less than 180 days before he filed his EEOC charge, or that those facts could not reasonably have become apparent to him earlier. His charge was therefore timely.

ARGUMENT

I. Hiring Practices That Disparately Disqualify Older Workers May Be Challenged Under §4(a)(2)

RJR asks this Court to hold that the ADEA categorically bars disparate impact claims by prospective employees. Its argument, however, ignores the text of §4(a)(2), the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S.

424, 91 S.Ct. 849 (1971), and the EEOC's longstanding interpretation of the ADEA.

A. Section 4(a)(2) Permits Challenges To "Limits" On Employment

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). RJR contends that because Congress did not insert the words "or applicants for employment" after "employees," only incumbent employees can bring claims under §4(a)(2). That argument misconstrues the statute's text and operation.

Section 4(a)(2) contains two distinct parts. The first defines the actions that are subject to challenge under §4(a)(2)—"limit[ing], segregat[ing], or classify[ing] [the employer's] employees." The second defines the conditions under which such actions are unlawful: They are prohibited if they "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." "[A]ny person aggrieved" thereby may bring suit. 29 U.S.C. §626(c)(1).

RJR does not dispute that Villarreal has properly alleged that its actions deprived individuals of employment because of age. Accordingly, the only question is whether RJR "limit[ed], segregat[ed], or classif[ied]" its employees. It

did. By restricting employment in the Territory Manager position to individuals who satisfied its guidelines and profile, RJR "limit[ed] … [its] employees" to individuals meeting those criteria. Such limitations can be challenged under §4(a)(2).[1]

RJR has not explained how a requirement that candidates for a particular position possess certain qualifications does not "limit" the employer's employees. Instead, RJR selectively emphasizes other language that does not modify that text.

RJR contends that limits on employment like RJR's guidelines and profile are not subject to attack under §4(a)(2) because they do not "adversely affect" an individual's "status as an employee." But §4(a)(2) is not limited to employment actions that "adversely affect" one's "status as an employee." Instead, §4(a)(2) prohibits actions that "deprive or tend to deprive *any individual* of employment opportunities *or* otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. §623(a)(2) (emphasis added); *see also United States v. Fleet*, 498 F.3d 1225, 1229 (11th Cir. 2007) ("'[A]ny' is a powerful and

[1] RJR's contrary circuit decisions addressed §4(a)(2) only in dicta and failed to recognize that an employer "limit[s] … his employees" by requiring that employees meet certain qualifications. Moreover, *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996), and *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994), were overruled by *Smith v. City of Jackson*, 544 U.S. 228, 232, 125 S.Ct. 1536, 1540 (2005), while *Smith v. City of Des Moines*, 99 F.3d 1446, 1470 n.2 (8th Cir. 1996), relied upon those decisions.

broad word. It does not mean some or all but a few, but instead means all."). In context, the "status as an employee" language *expands* §4(a)(2): That section prohibits actions that deprive individuals of employment *as well as* actions that "adversely affect [one's] status as an employee." Proof of RJR's misreading is found in §703(a)(2) of Title VII, which contains the very same language but indisputably permits disparate impact challenges by prospective employees. *See* 42 U.S.C. §2000e-2(a)(2).[2]

RJR also cites the inclusion of "fail or refuse to hire" claims in §4(a)(1) and the presence of the phrase "employees or applicants for employment" elsewhere in the ADEA. But none of the cited provisions include language comparable to §4(a)(2)'s "limit … employees" language. Instead, each involves different statutory language and a unique statutory context in which the explicit reference to applicants or hiring is necessary to bring prospective employees within its coverage. *See* 29 U.S.C. §623(a)(1) (unlawful "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"); 29 U.S.C. §623(d) (unlawful to "discriminate against … employees or applicants for employment"); 29 U.S.C. §§631(b), 633a ("personnel action[s] affecting

[2] Moreover, an individual denied employment *has* had his "status as an employee" adversely affected—he was denied that status.

employees or applicants for employment").[3] Because §4(a)(2)'s existing language permits challenges to qualifications for employment in particular positions, adding "or applicants for employment" to §4(a)(2) was unnecessary.

The text of §4(a)(2) does limit potential disparate impact challenges to a discrete set of employment practices. Under that section and the comparable §703(a)(2) of Title VII, employment practices may be challenged only if they both "limit, segregate, or classify" *and* result in a denial of employment opportunities or adversely affect employment status. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485 (9th Cir. 1993) (discussing §703(a)(2)). While limitations in "hiring or promotion" can be challenged because they "clearly deprive applicants of employment opportunities," even a "burdensome" term or condition of employment is not covered if it does not "'deprive any individual of employment opportunities' or 'otherwise adversely affect his status as an employee.'" *Id.*; *see also Nashville Gas. Co. v. Satty*, 434 U.S. 136, 144-45, 98 S.Ct. 347, 352-53 (1977) ("loss of income" that "has no direct effect upon either employment

[3] Section 4(c)(2) prohibits certain labor organization actions that "adversely affect [one's] status as an employee or as an applicant for employment." 29 U.S.C. §623(c)(2). Congress's decision to include "applicant for employment" in that section reflects the gatekeeper role that exists where labor organizations refer individuals for work, such as through union hiring halls. Such organizations have a unique ability to adversely affect one's status as an "applicant for employment" separate and apart from one's "status as an employee."

opportunities or job status" not subject to attack under §703(a)(2)). Unlike the workplace conduct policy in *Garcia* or the paid leave policy in *Nashville Gas*, RJR's guidelines and profile limited RJR's employees to certain individuals and deprived older persons of employment. They can therefore be challenged under §4(a)(2).

B. *Griggs* Permitted Disparate Impact Claims By Prospective Employees

In considering the meaning of §4(a)(2), this Court does not write on a blank slate; *Griggs* considered the same question 44 years ago. Interpreting the original language of §703(a)(2) of Title VII—identical in all relevant respects to §4(a)(2)—the unanimous Supreme Court concluded that Title VII prohibits criteria that serve "as a *condition of employment in or* transfer to jobs," that "operate to disqualify [members of a protected class] at a substantially higher rate than [non-protected] *applicants*," and that are not "significantly related to successful job performance." *Griggs*, 401 U.S. at 426, 91 S.Ct. at 851 (emphasis added); *see EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1279 n.16 (11th Cir. 2000) ("In *Griggs* … the plaintiffs showed that the objective and facially neutral requirements of possessing a high school diploma and passing a general intelligence test *in order to be hired or transferred* … had a disproportionate effect on white and black *applicants*.") (emphasis added); *id.* at 1282 n.18 ("[I]n *Griggs* the Supreme Court made clear that Title VII prohibited an employer from using neutral *hiring* and promotion

practices to 'freeze' in place a status quo achieved through prior decades of intentional discrimination."); *Ellis*, 73 F.3d at 1007 n.12 (*Griggs* "applied language similar to [§4(a)(2)] in Title VII to job applicants").

RJR contends that *Griggs* did not consider prospective employees' rights because the named plaintiffs were incumbent employees. But RJR's argument ignores that the Court expressly considered requirements imposed "as a condition of employment in *or* transfer to jobs." *Griggs*, 401 U.S. at 426, 91 S.Ct. at 851 (emphasis added). If *Griggs* were limited to claims brought by incumbent employees, it would have focused solely upon requirements for transfer. Instead, *Griggs* held unequivocally that:

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

- "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 432, 91 S.Ct. at 854.
- "[A]ny tests used must measure the person for the job." 401 U.S. at 436, 91 S.Ct. at 856.

Griggs neither qualified these statements nor suggested that employers remained free to implement policies that "'freeze' the status quo," create "artificial, arbitrary, and unnecessary barriers to employment," or "operate as 'built-in-headwinds' for minority groups" so long as the policies applied only to prospective employees.[4]

The broad language of *Griggs* reflects its procedural posture. Although the named plaintiffs were incumbent employees, they represented a class "defined as themselves and those Negro employees who subsequently may be employed … *and all Negroes who may hereafter seek employment*." *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1227 (4th Cir. 1970) (emphasis added). The Supreme Court recognized that *Griggs* remained a class action when before that Court. *Griggs*, 401 U.S. at 426, 91 S.Ct. at 851. Both the petitioners and the government argued

[4] Under RJR's analysis, Duke Power's diploma and testing requirements would have been lawful had Duke Power Company refused to hire *any* black employees prior to the enactment of Title VII, because there would have been no incumbent black employees.

that the issue before the Court in *Griggs* encompassed *all* barriers to employment, not just those affecting those who were already employed.[5] On remand, the district court prohibited Duke Power "from administering any personnel or aptitude tests or requiring any formal educational background which the defendant had in effect prior to March 8, 1971, *as a condition of consideration for employment or promotion or transfer*." *Griggs v. Duke Power Co.*, No. C-210-G-66, 1972 WL 215, at *1 (M.D.N.C. Sept. 25, 1972) (emphasis added).

[5] *See, e.g.*, Petitioners' Br. at *16-*19, *27, *Griggs*, 401 U.S. 424, 91 S.Ct. 849 (No. 70-124), 1970 WL 122448 (arguing that *Griggs* "presents the broad question of the use of allegedly objective employment criteria *resulting in the denial to Negroes of jobs* for which they are potentially qualified"; Title VII "reach[es] *all* deterrents to full black employment opportunity"; "'objective' criteria, such as tests and educational requirements, are potent tools for substantially reducing black job opportunities, *often to the extent of wholly excluding blacks*"; and "where a test or educational requirement is not job-related, *hiring and promotion* is done on the basis of educational and cultural background, which … is only thinly veiled racial discrimination") (emphasis added); Br. of U.S. and EEOC as Amicus Curiae at *2, *4, *Griggs*, 401 U.S. 424, 91 S.Ct. 849 (No. 70-124), 1970 WL 122637 (question presented was whether an employer may "require completion of high school or passage of certain general intelligence tests *as a condition of eligibility for employment* in, or transfer to, jobs formerly reserved only for white employees"; decision below would "sanction the use of *employment screening devices which … seriously limit employment and promotion opportunities* for Negroes and other minority groups") (emphasis added). RJR cites the petitioners' statement that "[t]he legality of [the testing] requirement for new employees [was] not in issue in [*Griggs*]," but they simply acknowledged that the business justifications for testing prospective employees might differ from those for testing existing employees. Petitioners' Br. at *44 n.53, 1970 WL 122448.

Any ambiguity about the scope of *Griggs* is resolved by its discussion of §703(h), 42 U.S.C. §2000e-2(h). That provision was added after opponents of Title VII asserted that it "would prohibit all testing and force employers to *hire* unqualified persons simply because they were a part of a group formerly subject to job discrimination." *Griggs*, 401 U.S. at 434, 91 S.Ct. at 855 (emphasis added). Section 703(h) addressed that criticism by permitting employers to use "'professionally developed ability test[s]'" that were job-related and "not 'designed, intended or used to discriminate because of race.'" 401 U.S. at 433, 436, 91 S.Ct. at 854-56 (citing 42 U.S.C. §2000e-2(h)). The very purpose of §703(h) was to clarify *how* Title VII applied to neutral *hiring* practices that disproportionately disqualified minorities. *Id.*

Accordingly, there is no support for RJR's strained interpretation of *Griggs*.

C. Congress's Post-*Griggs* Amendment Of Title VII Was Declaratory Of Existing Law

Ultimately, RJR's argument relies not upon the ADEA's text, but on Congress's 1972 decision to amend a different statute. According to RJR, §4(a)(2) should be interpreted to prohibit claims by prospective employees because Congress amended §703(a)(2) of Title VII *after Griggs* by adding "or applicants for employment" after "limit, segregate, or classify his employees." *See* 42 U.S.C. §2000e-2(a)(2). But because Title VII permitted disparate impact challenges to "condition[s] of employment" as originally enacted, *see Griggs*, 401 U.S. at 426,

91 S.Ct. at 851, the 1972 amendment cannot be interpreted as expanding Title VII to encompass such claims—must less as suggesting that §4(a)(2) should be construed contrary to *Griggs*.

RJR acknowledges that the Senate Report regarding the 1972 amendment stated that the amendment was "declaratory of present law," but fails to recognize the full import of that statement. S. Rep. No. 92-415, at 43 (1971); *see also* H.R. Rep. No. 92-238, at 30 (as amended, §703(a)(2) would be "[c]omparable to present Section 703(a)(2)"). According to RJR, the 1972 amendment significantly expanded §703(a)(2) to encompass a broad range of hiring decisions not previously subject to challenge, and in doing so overruled two contrary circuit court decisions.[6] But if the 1972 amendment worked such a substantial change in existing law, Congress would have acknowledged that change during its deliberations. Congress certainly would *not* have asserted that the amendment was "declaratory of" and "comparable to" existing law.

The circumstances surrounding adoption of the 1972 amendment are nothing like those in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343 (2009). The amendment in *Gross* was part of the Civil Rights Act of 1991, which

[6] In fact, neither *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), nor *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971), considered whether prospective employees could bring claims under §703(a)(2).

overhauled both Title VII *and the ADEA*. 557 U.S. at 174, 129 S.Ct. at 2349. As *Gross* explained, "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" 557 U.S. at 175, 129 S.Ct. at 2349 (quoting *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997)). The negative implication recognized in *Gross* does not apply to the 1972 amendment, because that bill made no changes to the ADEA.

Moreover, the Civil Rights Act of 1991 was passed to reverse several Supreme Court decisions that had interpreted the original language of Title VII narrowly. *See Gross*, 557 U.S. at 178 n.5, 129 S.Ct. at 2352 n.5. *Gross* concluded that Congress "acted intentionally" when it changed the original language of Title VII while leaving the same language intact in the ADEA. 557 U.S. at 174, 129 S.Ct. at 2349. By contrast, the 1972 amendment did not reverse any prior Supreme Court decision; it was *consistent* with *Griggs*. *See* H.R. Rep. No. 92-238, at 21-22 (1971) (amendment was "fully in accord with the decision of the Court" in *Griggs*).

RJR separately asserts that Villarreal's interpretation of §4(a)(2) deprives the 1972 amendment of "real and substantial effect" and renders the language added to Title VII thereby "superfluous." RJR Br. at 29-30. But as *Gross* emphasized, the question here is what the statutory text of the ADEA requires, not how Title VII

should be interpreted. Far from holding that the 1991 amendments required the recognition of a substantive difference between the ADEA and Title VII, *Gross* simply concluded that its interpretation of the ADEA would for that reason "focus on the text of the ADEA." *Gross*, 557 U.S. at 175, 129 S.Ct. at 2349-50.

In any event, recognizing that pre-amendment §703(a)(2) permitted challenges to an employer's qualifications for employment does not deprive the 1972 amendment of purpose or meaning, because the amendment protected the broad interpretation of Title VII in *Griggs* against future narrowing. The Civil Rights Act of 1991 similarly codified *Griggs* by defining the circumstances under which an "unlawful employment practice based on disparate impact" may be established. *See* 42 U.S.C. §2000e-2(k). Under RJR's theory, Congress's decision to add that provision to Title VII should have led the Supreme Court to conclude in *Smith* that the ADEA does not permit disparate impact claims. But *Smith* reached the opposite conclusion. *Smith*, 544 U.S. at 232, 125 S.Ct. at 1540 (majority opinion). This Court likewise should not interpret Congress's decision to protect the holding of *Griggs* as disapproving that decision.

D. This Court Should Defer To The EEOC's Interpretation Of The ADEA

The EEOC has consistently interpreted the ADEA as permitting disparate impact challenges by prospective employees to limitations on employment like RJR's Resume Review Guidelines and "Blue Chip TM" profile. *See* Opening

Brief ("Br.") at 29-31; EEOC Br. at 17-21. Should this Court conclude that the scope of §4(a)(2) is ambiguous, the Court should defer to the EEOC's interpretation under both *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984), and *Auer v. Robbins*, 519 U.S. 542, 117 S.Ct. 921 (1997).

RJR's arguments against deference are meritless. RJR first argues that §4(a)(2) clearly and unambiguously excludes claims brought by prospective employees. But the text of §4(a)(2) encompasses Villarreal's claim. At the very least, its language is ambiguous enough to warrant deference to the EEOC's considered judgment regarding its meaning. *See, e.g.*, *Smith*, 544 U.S. at 239-40, 125 S.Ct. at 1544 (plurality opinion); *Smith*, 544 U.S. at 243, 125 S.Ct. at 1546 (Scalia, J., concurring).

RJR also contends that the EEOC's regulations deserve no *Chevron* deference because they "do not address whether Section 4(a)(2) applies to applicants for employment." But RJR cannot dispute that the regulations on their face permit disparate impact ADEA claims by prospective employees. Both the Secretary of Labor's 1968 regulations and the EEOC's 1981 regulations interpreted the ADEA to permit disparate impact challenges by prospective employees. *See* EEOC Br. at 18-19 (discussing 29 C.F.R. §860.103(f)(1)(i) (1968), and 29 C.F.R. §1625.7(d) (1981)); *see also Smith*, 544 U.S. at 239-40, 125

S.Ct. at 1545 (discussing 1981 regulation). Nor can RJR dispute that the EEOC's current regulations provide that "*[a]ny employment practice* that adversely affects individuals … on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'" 29 C.F.R. §1625.7(c) (emphasis added). Although that regulation provides specific guidance regarding the ADEA's "reasonable factor other than age" ("RFOA") clause, 29 U.S.C. §623(f)(1), the Supreme Court recognized in *Smith* that the regulation interprets the ADEA as a whole. *See Smith*, 544 U.S. at 239-40, 125 S.Ct. at 1544 (plurality opinion) (Secretary of Labor and EEOC regulations "interpreted the ADEA to authorize relief on a disparate-impact theory); *Smith*, 544 U.S. at 244-45, 125 S.Ct. at 1547-48 (Scalia, J., concurring) (1981 EEOC regulation represents "the agency's final interpretation of the ADEA" and deserves deference).

The EEOC's interpretation deserves deference not only under *Chevron* but also under *Auer*, because it "reflect[s] the agency's fair and considered judgment on the matter in question," and is not a "*post hoc* rationalization" advanced solely for the purposes of this case. 519 U.S. at 462, 117 S.Ct. at 912; *see* EEOC Br. at 17-21.

It is undisputed that the EEOC has consistently interpreted the ADEA as permitting disparate-impact claims by prospective employees. *See* EEOC Br. at 17-21. RJR also admits that the EEOC has taken the specific position for at least

20 years that such claims are cognizable under §4(a)(2). *See* RJR Br. at 43 (discussing 1995 petition for certiorari); *cf.* EEOC Br. at 21. Because the EEOC's position reflects its "reasoned and consistent view of the scope of [§4(a)(2)]" and is supported by its "regulations" and "administrative practice," deference to that position is appropriate. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 473-74 (1988); *Pugliese v. Pukka Development, Inc.*, 550 F.3d 1299, 1305 (11th Cir. 2008) (deferring to interpretation "consistent with the position [the agency] has always held"); *cf. Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 103, 128 S.Ct. 2395, 2407 (2008) (Scalia, J., concurring) (deferring to EEOC's interpretation because "administration of the ADEA has been placed in the hands of the [EEOC]").[7]

E. Permitting Disparate Impact Challenges To Conditions Of Employment Promotes The ADEA's Purposes

Both RJR and its amici argue that the ADEA should be interpreted narrowly to categorically prohibit disparate impact challenges to qualifications for employment because, they contend, discrimination against older workers is less

[7] RJR contends that *Auer* deference is inapplicable because the EEOC's regulation "parrots" the relevant statutory text. RJR Br. at 42-43. But in fact it first clarifies the scope of §4(a)(2) by explaining that its provisions apply to "*any employment practice* that adversely affects individuals … on the basis of older age," and then provides a multi-faceted test for determining whether a particular factor is a reasonable factor other than age. 29 C.F.R. §1625.7(c) (emphasis added).

pernicious than discrimination against members of other protected classes, and because recognizing such claims would expose salutary employment practices to legal challenge. But those arguments misrepresent both the ADEA's purposes and its impact on employer practices.

The policy concerns raised by RJR and its amici disregard the fact that even without the categorical exemption RJR proposes, employers have many valid defenses to disparate impact claims targeting hiring practices. Merely participating in job fairs or attending recruiting events targeting veterans does not "limit" an employer's employees in a manner that deprives individuals of employment or adversely affects their employment status, so such actions cannot be challenged under §4(a)(2) *at all*. *See supra* Section I.A. Where employers *do* limit employment in particular positions to individuals satisfying specified criteria and those criteria disproportionately disqualify older applicants, any disparate impact challenge is subject to the strict limits announced in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989), and employers may escape liability by proving that their criteria are "based on reasonable factors other than age." *Meacham*, 554 U.S. at 87, 128 S.Ct. at 2398; *see also Meacham*, 554 U.S. at 102, 128 S.Ct. at 2406 (RFOA clause gives employers "a fair degree of leeway"); *Smith*, 544 U.S. at 233, 125 S.Ct. at 1540-41 (RFOA clause "significantly

narrows" ADEA's coverage as compared to Title VII).[8] Because employers have numerous defenses under existing law, there is no need to categorically exempt hiring practices from §4(a)(2) claims.

If an employer cannot establish *any* of these defenses, its unreasonable policy is precisely the kind of artificial barrier to the employment of older workers that Congress sought to eliminate. The ADEA was motivated to a significant extent by the problems facing *unemployed* older workers, as its statement of findings and purpose emphasized. 29 U.S.C. §621(a)(1), (3) (noting that "older workers find themselves disadvantaged in their efforts to retain employment, *and especially to regain employment when displaced from jobs*," and that "the incidence of unemployment" is higher among older workers, creating "grave" employment problems"); 29 U.S.C. §621(b) (purpose is "to promote employment of older persons based on their ability rather than age"). In making those express findings, Congress drew upon a report prepared by Secretary of Labor W. Willard Wirtz that similarly emphasized the obstacles older workers face when seeking employment. *See* U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment* 3 (1965) ("Wirtz Report") ("Any formal employment standard which requires, for example, a high school diploma will

[8] RJR has never sought such a ruling in this case.

obviously work against the employment of many older workers."); *id.* at 22.[9] Construing §4(a)(2) to categorically prohibit disparate impact claims by individuals seeking employment is inconsistent with this primary purpose of the ADEA.

Finally, to the extent there are meaningful differences between age discrimination and the forms of discrimination prohibited by Title VII, Congress accounted for those differences through the RFOA clause. Whereas Title VII requires that practices with a disparate impact be justified by business necessity, 42 U.S.C. §2000e-2(k)(1)(A)(i), the ADEA permits such practices if they are "based on reasonable factors other than age." 29 U.S.C. §623(f)(1). That RFOA provision—not §4(a)(2)—"reflects this historical difference" between age discrimination and other forms of prohibited discrimination. *Smith*, 544 U.S. at 241, 125 S.Ct. at 1545 (plurality). Because "Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, *when it put the RFOA clause in the ADEA*," *Meacham*, 554 U.S. at 102, 128 S.Ct. at 2406

[9] RJR argues that the Wirtz Report is irrelevant because it did not recommend recognition of a disparate-impact cause of action. RJR Br. at 36-37. But *Smith* rejected that argument. *Compare Smith*, 544 U.S. at 232, 235 n.5, 238, 125 S.Ct. at 1540, 1541 n.5, 1543 (plurality); *with Smith*, 544 U.S. at 256, 125 S.Ct. at 1554 (O'Connor, J., concurring).

(emphasis added), the "distinctive nature of age discrimination" cannot justify a narrow construction of other ADEA provisions.

II. Villarreal's Challenge To The Rejection Of His First Application Was Timely

A. Villarreal's Deadline To File An EEOC Charge Regarding His 2007 Application Was Equitably Tolled Until At Least April 2010

RJR does not dispute that the ADEA's deadline for filing an EEOC charge is subject to equitable tolling and is not a statute of repose. *See Cocke v. Merrill Lynch & Co., Inc.*, 817 F.2d 1559, 1561 (11th Cir. 1987). This Circuit's longstanding equitable tolling rule provides that the limitations period for filing an EEOC charge "does not start to run until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994).

In applying that rule, two issues are relevant: when did "the facts which would support a charge of discrimination" become apparent to the plaintiff, and when would "a person with a reasonably prudent regard for his rights" become aware of those facts. *Id.* RJR does not dispute that Villarreal did not become aware of the facts supporting his charge of discrimination until April 2010. And while RJR argues that Villarreal should have made further inquiries in 2007, RJR does not contend that those inquiries would have generated *any* meaningful

additional information regarding RJR's discriminatory hiring practices. Because Villarreal was not aware and could not reasonably have become aware of the facts supporting his claim of discrimination until April 2010 at the earliest, his deadline for filing an EEOC charge was tolled until at least that time.[10]

Rather than disputing these facts, RJR argues that equitable tolling is unavailable because Villarreal did not allege that RJR affirmatively misled him or that some other "extraordinary circumstance" exists. But that argument requires this Court to abandon the Circuit's longstanding rule that the limitations period does not run "until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Sturniolo*, 15 F.3d at 1025; *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1267 (11th Cir. 2003) ("The applicable limitations period did not begin to run until the facts supporting a cause of action became apparent or should have become apparent to a reasonably prudent person with concern for his or her rights."); *Reeb*, 516 F.2d at 931 (limitations period "did not begin to run … until the facts that would support a charge of discrimination … were apparent or should have been

[10] RJR questions whether the denial of Villarreal's motion to amend is properly before the Court, but Villarreal's Notice of Appeal explicitly identified that order for appeal. App. Vol. II, Dkt. No. 90, at 1. The issue presented thereby is whether the district court erred in concluding that amendment would be futile because the allegations in the proposed amended complaint failed to state a claim for equitable tolling. *See* Br. at 13.

apparent to a person with a reasonably prudent regard for his rights"); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1435 (11th Cir. 1998) ("ADEA's timing requirements might have been equitably tolled if, in the period prior to the 180 days before filing the initial EEOC charge, Turlington had no reason to believe he was a victim of unlawful discrimination."); *Hargett v. Valley Fed. Sav. Bank*, 60 F.3d 754, 765 (11th Cir. 1995). RJR's argument is contrary to the plain language of each of these precedents, which are binding under this Circuit's prior-panel-precedent rule. *See, e.g.*, *United States v. Parton*, 749 F.3d 1329, 1331 (11th Cir. 2014).[11]

RJR also faults Villarreal for failing to make inquiries in 2007 regarding "why he was not selected, or who was hired in his place." RJR Br. at 48. But in determining whether Villarreal was diligent, the question is not whether Villarreal pursued all possible avenues of inquiry, no matter how futile. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 653, 130 S.Ct. 2549, 2565 (2010) ("maximum feasible

[11] RJR's reliance on *Downs v. McNeil*, 520 F.3d 1311, 1324 (11th Cir. 2008), and *Bost v. Fed. Express Corp.*, 372 F.3d 1233 (11th Cir. 2004), is misplaced for reasons already explained. *See* Br. at 41-42, 45. The additional Eleventh Circuit authorities RJR now cites likewise offer no reason for this Court to disregard its longstanding precedents. Like *Downs*, neither *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), nor *Horsley v. Univ. of Ala.*, 564 Fed.Appx. 1006 (11th Cir. 2014), was an employment discrimination case. In both *Horsley* and *Mesidor v. Waste Mgmt., Inc. of Fla.*, _ Fed.Appx._, 2015 WL 1346121 (11th Cir. Mar. 26, 2015), as in *Bost*, the plaintiffs were aware of all relevant facts but ignored applicable deadlines.

diligence" not required). The question is whether "a person with a reasonably prudent regard for his rights" would have undertaken further inquiry and thereby learned the "facts sufficient to support a prima facie case of age discrimination." *Sturniolo*, 15 F.3d at 1025-26. Through its silence, RJR effectively admits that it would not have provided Villarreal with its Resume Review Guidelines, candidate profile, or applicant flow data had he asked for that information. RJR Br. at 48-49. Reasonable diligence does not require a person "to undertake repeated exercises in futility or to exhaust every imaginable option" solely to establish equitable estoppel in potential future lawsuits. *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002).[12]

RJR also contends that applying this Circuit's longstanding equitable tolling standard in this case would "eliminate the statute of limitations in failure-to-hire cases" because job applicants are less likely than existing employees to learn of an employer's discriminatory practices. RJR Br. at 53. But this Circuit has had no difficulty finding equitable tolling unavailable under that standard in "failure-to-

[12] RJR argues that Villarreal should have contacted Kelly Services, but Villarreal had no way of knowing about Kelly's involvement in the hiring process. RJR also faults Villarreal for failing to inquire about the status of his 2007 application, but Villarreal reasonably concluded that RJR had rejected that application when RJR failed to contact him. Because Villarreal's claim for equitable tolling is premised on his reasonable lack of knowledge regarding RJR's discriminatory practices—not any confusion about the rejection of that application—his inquiries regarding that application are irrelevant.

hire" cases, *see, e.g.*, *Hill v. Metro. Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1545 (11th Cir. 1988), and RJR and its amici do not claim that there has been a deluge of untimely cases filed since *Reeb* announced that equitable tolling standard forty years ago. In reality, most job applicants have far greater access to information about the hiring process than Villarreal did here.

Further, contrary to RJR's contentions, the laches defense would not automatically be invalid wherever equitable tolling applied. As the Supreme Court has emphasized, courts applying equitable doctrines like tolling *and* laches "have the discretionary power to locate a just result in light of the circumstances peculiar to the case." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121, 122 S.Ct. 2061, 2076-77 (2002) (citation omitted); *see also Erkins v. Bryan*, 785 F.2d 1538, 1543 (11th Cir. 1986) (laches requires "unequitable" delay in filing). The equitable factors warranting an extension of the charge-filing deadline here may not point in the same direction where a charge is filed five or ten years after the fact to the defendant's prejudice. RJR has never asserted that Villarreal's delay in filing his EEOC charge caused it any prejudice whatsoever.

As *Reeb* explained, the purpose of this Circuit's equitable tolling rule is to prevent the charge-filing deadline from shielding "[s]ecret preferences in hiring and even more subtle means of illegal discrimination" that "are unlikely to be readily apparent to the individual discriminated against." *Reeb*, 516 F.2d at 931.

There is no basis for this Court to abandon *Reeb*'s longstanding equitable tolling standard by transforming the charge-filing deadline into a statute of repose in all but the most extreme cases. Because "the facts which would support a charge of discrimination" were not apparent, and could not have become apparent, to Villarreal until April 2010, the deadline to file an EEOC charge regarding his November 2007 application was equitably tolled until that time under this Court's binding precedents.

B. Villarreal's Lawsuit Properly Encompasses All Applications Of RJR's Unlawful Pattern Or Practice Of Discrimination

Even if equitable tolling were not available, Villarreal's charge was timely because he challenges RJR's pattern or practice of discriminating against applicants over the age of 40; that pattern or practice was applied to him within the charge-filing period; and such a claim properly encompasses "all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." *Sharpe v. Cureton*, 319 F.3d 259, 267-68 (6th Cir. 2003).

As explained in Villarreal's opening brief, a pattern-or-practice claim like Villarreal's involves "a single unlawful unemployment practice" arising from the "cumulative effect of individual acts," and thus more closely approximates a "hostile work environment" claim than a "discrete act" claim. Br. at 49-52; *see Morgan*, 536 U.S. at 115, 117, 122 S.Ct. at 2073, 2075. Contrary to RJR's

assertions, such a rule does not eliminate timeliness considerations altogether. As with a hostile work environment claim, a representative pattern-or-practice claim is timely only if "an act contributing to the claim occur[red] within the filing period." *Morgan*, 536 U.S. at 117, 122 S.Ct. at 2074. If an employer ends its practice and no timely charge is filed, the employer is no longer subject to suit. *See City of Hialeah v. Rojas*, 311 F.3d 1096, 1102-03 (11th Cir. 2002).

To establish that a pattern-or-practice claim is timely, the plaintiff need only establish that the policy was applied within the filing period; he need not be pursuing *relief* for that act. *Cf. Morgan*, 536 U.S. at 118, 122 S.Ct. at 2075 ("In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment."). In this case, Villarreal alleges that RJR continued to apply its discriminatory policies at least until the date on which he filed his complaint, and that RJR applied that policy *to him* within the charge-filing period. App. Vol. I, Dkt. No. 1, at 8-9, 11, 13 ¶¶17-19, 24, 29; App. Vol. II, Dkt. No. 61-1, at 7-8, 10, 12-13 ¶¶16-18, 23, 31. Accordingly, his charge was timely.[13]

[13] Even if events occurring *after* the district court addressed this issue were relevant (which they are not), it is of no consequence that Villarreal voluntarily dismissed disparate treatment claims arising on or after November 19, 2009, because he can still establish *as a factual matter* that RJR's unlawful policy was applied to him and others within the charge-filing period. Further, Villarreal continues to seek relief for RJR's more recent acts of discrimination on a disparate (continued…)

In response, RJR contends that the Supreme Court and this Court have already held that the rearward scope of a pattern-or-practice claim is limited to 180 or 300 days. *See* RJR Br. at 55-56. But the Supreme Court expressly *declined* to decide that issue in *Morgan*. 536 U.S. at 115 n.9, 122 S.Ct. at 2073 n.9. If the mere fact that a pattern-or-practice claim involves separately actionable acts were enough to preclude representative plaintiffs from challenging all applications of an unlawful pattern or practice of discrimination, there would have been no reason to reserve that issue.[14]

Nor did this Court decide the issue in *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001). *Hipp* was decided before *Morgan*, and thus did not consider *Morgan*'s distinction between true pattern-and-practice claims like Villarreal's and cases challenging only discrete acts of unlawful discrimination. *Hipp* had no reason to consider that issue, because the plaintiffs in that case were not pursuing a proper pattern-or-practice claim. *Id.* at 1228-29. *Hipp*'s discussion

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(…continued)
impact theory, and has never limited his pattern-or-practice claim to a disparate treatment theory. App. Vol. I, Dkt. No. 40, at 19-22; Br. at 46 (pattern-or-practice claim challenges policy that "had the purpose *and effect* of discriminating against applicants over the age of 40") (emphasis added).

[14] *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955 (11th Cir. 2008), adopted *Morgan*'s ruling that individual plaintiffs challenging discrete acts of discrimination cannot rely on a "continuing violations" theory to revive stale claims, but did not answer the question left open in *Morgan*. *Id.* at 970.

of the rearward scope of that action nowhere referred to a pattern-or-practice claim, and context makes clear that *Hipp* did not intend to address such claims.[15]

Contrary to RJR's assertions, this Court has never answered the question left open by the Supreme Court in *Morgan*. In answering that question, this Court should follow the Sixth Circuit and conclude that Villarreal's timely pattern-or-practice claim properly encompasses all applications of RJR's unlawful hiring practices.

CONCLUSION

For the foregoing reasons, the decision below should be REVERSED.

Respectfully submitted,

Dated: May 28, 2015

/s/ P. Casey Pitts
JAMES M. FINBERG
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108

[15] *Hipp* could find no authority contrary to the position adopted therein, 252 F.3d at 1221, but the rule that a pattern-or-practice challenge properly encompasses all applications of that pattern or practice was well-established in other Circuits when *Hipp* was decided. *See, e.g.*, *EEOC v. Penton Indus. Pub. Co.*, 851 F.2d 835, 839 (6th Cir. 1988). *Hipp* also explained that the "continuing violation" theory's sole purpose, as applied therein, was to enable challenges to acts whose discriminatory nature was not immediately apparent, 252 F.3d at 1222-23, but a representative pattern-or-practice claim encompasses all applications of the unlawful policy not for that reason but because the "unlawful employment practice" in such a case is the pattern or practice of discrimination itself—not its constituent acts. *Cf. Morgan*, 536 U.S. at 115, 122 S.Ct. at 2073.

Tel: (415) 421-7151
Fax: (415) 362-8064
jfinberg@altber.com
cpitts@altber.com

JOHN J. ALMOND
MICHAEL L. EBER
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street N.E.
Atlanta, GA 30303
Tel: (404) 522-4700
Fax: (404) 525-2224
JAlmond@rh-law.com
MEber@rh-law.com

SHANON J. CARSON
SARAH R. SCHALMAN-BERGEN
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (800) 424-6690
Fax: (215) 875-4604

TODD M. SCHNEIDER
SCHNEIDER WALLACE COTTREL
BRAYTON KONECKY LLP
180 Montgomery Street, Suite 2000
San Francisco, California 94104
Tel: (415) 421-7100 ext. 306
Fax: (415) 421-7105

Attorneys for Plaintiff-Appellant
Richard M. Villarreal

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii), because this brief contains 6,962 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

Dated: May 28, 2015

/s/ P. Casey Pitts
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151
Fax: (415) 362-8064
cpitts@altber.com

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 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 caused physical copies of the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT RICHARD M. VILLARREAL to be filed with the Clerk of Court and served upon the following counsel by U.S. First Class Mail:

Eric S. Dreiband
Allison Marshall
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Attorneys for Defendants-Appellees

Dated: May 28, 2015

/s/ P. Casey Pitts
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151
Fax: (415) 362-8064
cpitts@altber.com