No. 15-10602

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD M. VILLARREAL,

Plaintiff-Appellant,

v.

R.J. REYNOLDS TOBACCO CO., et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, MACON DIVISION
CASE NO. 2:12-CV-00138-RWS

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF 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 11th Cir. R. 26.1-1, counsel for *amicus curiae* the Chamber of Commerce of the United States of America states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock. Counsel further states a belief that the certificates of interested persons filed by the parties and *amicus* in support of plaintiff-appellant are complete.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

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

The Age Discrimination in Employment Act strikes a careful balance between prohibiting irrational barriers to the employment of older workers and preserving employers' ability to adopt sound hiring policies. The Chamber's membership has a strong interest in preserving that appropriate balance.

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

STATEMENT OF THE ISSUES

I. Whether Section 4(a)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(2), permits applicants for employment to assert a failure-to-hire disparate impact claim.

II. Whether the equitable tolling or continuing violation doctrines permit adoption of a rule effectively eliminating any statute of limitations for claims that employers engage in hiring practices that discriminate based on age.

SUMMARY OF ARGUMENT

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

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

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

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

forcing employers to defend stale claims. Villarreal's two theories for reviving his untimely claims would eviscerate those deadlines, effectively subjecting employers to liability without any statute of limitations for any hiring claim. A rule that would apply in virtually any case cannot be justified as the sparing application of an equitable doctrine to adjust the statutory deadline in extraordinary cases. Moreover, as Villarreal's own case attests, given that he asserted (but dismissed) a timely disparate treatment claim based on the same purportedly unlawful policy that he challenges in his untimely claim, such a radical re-working of the statutory scheme is unnecessary to protect workers. And it would impose tremendous burdens on businesses, burdens that Congress considered and rejected in enacting the ADEA's charge-filing rules.

ARGUMENT

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

Section 4(a)(2) of the ADEA makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). For the reasons stated in the Brief for R.J. Reynolds, the Chamber agrees that the text, structure, and history—as well as comparison to the text and

history of the contrasting provision found in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(2)—compel the conclusion that Congress chose not to make it an unlawful employment practice for employers to adopt hiring practices that may have a disparate impact on applicants by age. The real-world implications of allowing such claims further underscores the soundness of Congress's careful delineation of unlawful employment practices within Section 4(a)(2).

1. Under either the ADEA or Title VII, "[t]o establish a *prima facie* case of discrimination by disparate impact, 'a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact.'" *Summers v. Winter*, 303 F. App'x 716, 719 (11th Cir. 2008) (quoting *Connecticut v. Teal*, 457 U.S. 440, 446, 102 S. Ct. 2525, 2530 (1982)); *see Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, 91 S. Ct. 849, 853 (1971). Because the very premise of disparate impact is that the employer does not act with discriminatory intent, invariably disparate impact claims are based on "'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion." *Summers*, 303 F. App'x at 719 (quoting *Watson v. F. Worth Bank & Trust*, 487 U.S. 977, 994, 108 S. Ct. 2777, 2789 (1988)); *see In re Emp't Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1311-12 (11th Cir. 1999).

Notwithstanding common use of statistical evidence, the ADEA and Title VII hardly treat disparate impact claims identically. As the Supreme Court

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

There are also textual differences with respect to the treatment of applicants for employment. While Section 4(a)(2) of the ADEA refers solely to "employees" in authorizing disparate impact claims, 29 U.S.C. § 623(a)(2), Title VII's comparable provision refers to "employees or applicants for employment," 42 U.S.C. § 2000e-2(a)(2). Nor is the omission of "applicants" in Section 4(a)(2) accidental. The ADEA expressly refers to "applicants for employment" in other provisions governing labor union practices and retaliation, underscoring that Congress knew how to extend provisions to "applicants" when it wished to. *See* 29 U.S.C. § 623(c)-(d). Against this statutory backdrop, the omission of "applicants for employment" from the ADEA's disparate impact provision is dispositive and must be given effect. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) ("[W]here Congress includes particular language in one section of

a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (citation and internal quotation marks omitted)). That is particularly true given that Congress has no trouble drawing lines when it comes to disparate impact claims. *See, e.g.*, *Smith*, 544 U.S. at 239 n.11, 125 S. Ct. at 1544 n.11 (noting that Equal Pay Act of 1963 bars disparate impact claims altogether).

Congress's decision to create narrower disparate impact liability under the ADEA than under Title VII stands on an important policy footing: age discrimination does not consign individuals to a lifetime of disadvantage, such that neutral policies could freeze in place the effects of prior discriminatory practices.

Policies that give rise to disparate impact liability, by definition, are neutral on their face and often supported by valid business judgments having nothing to do with a protected trait. These policies, unlike acts of intentional discrimination, are not inherently suspect. Rather, disparate impact liability is premised in large part on the view that neutral policies may need to be altered as an affirmative remedy to eliminate the vestiges of past intentional discrimination. Thus, in interpreting Title VII to authorize disparate impact claims, the Supreme Court in *Griggs* explained that its conclusion was based on its understanding that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot

be maintained *if they operate to 'freeze' the status quo of prior discriminatory employment practices*." 401 U.S. at 430, 91 S. Ct. at 853 (emphasis added). Subsequent Supreme Court precedent reinforces that congressional purpose of actively combatting the vestiges of discrimination:

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

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

With respect to the ADEA, Congress did not face the same impetus to guard against neutral employment policies that could perpetuate and lock-in a status quo that had been created by decades of social and employment discrimination against a discrete, fixed group. Where neutral employment practices could operate to freeze a discriminatory society where it was, as with race discrimination, Congress chose to subject such practices to demanding scrutiny. *See Griggs*, 401 U.S. at 432, 91 S. Ct. at 854 (confronting disparate impact claims based on race to "diploma and test requirements"). But the workers who are older than 40 today

were younger than 40 yesterday. Their educational achievements, social position, and employment prospects when they enter the protected class have not been shaped by discrimination *on account of their age*. Older workers did not face societal headwinds that might lock them into a lifetime of inferior job prospects absent judicial scrutiny of even neutral employment practices. Accordingly, faced with the option of lumping together classes of persons facing uncommon barriers to employment, Congress had good reason to "reject[] proposed amendments that would have included older workers among the classes protected from employment discrimination" by Title VII. *Smith*, 544 U.S. at 232, 125 S. Ct. at 1540. Instead, Congress sensibly crafted the ADEA to have a narrower scope: it did not permit disparate impact at all for hiring claims, and it gave employers a less-difficult defense to those disparate impact claims that can be asserted.

2. These core distinguishing features of the ADEA and Title VII are well illustrated by failure-to-hire disparate impact claims. As R.J. Reynolds points out (Br. 23), businesses regularly recruit students and recent graduates from college and university campuses using a variety of means—including on-campus interviewing, on-campus recruiting, and internship and externship relationships with colleges and universities. *See, e.g.*, PAUL GILLIS, THE BIG FOUR AND THE DEVELOPMENT OF THE ACCOUNTING PROFESSION IN CHINA 165 (1st ed. 2014) (noting "the ubiquitous presence of the Big Four [accounting firms] on college

campuses worldwide"); Press Release, Coll. Emp't Research Inst., Mich. State Univ., Rapid Growth in Job Opportunities for College Graduates (Oct. 7, 2014) (discussing on-campus recruiting activities and state of college labor market).[2] Beyond simply hiring students and recent graduates, businesses also structure important training and development programs around recent graduate recruitment. *See, e.g.*, *Grossmann v. Dillard Dep't Stores, Inc.*, 109 F.3d 457 (8th Cir. 1997) (discussing "Executive Development Program"); *O'Rourke v. CNA Ins. Cos.*, No. 88-cv-942, 1990 WL 207328 (N.D. Ill. Nov. 21, 1990) (discussing "rotational training program" used to "recruit and train recent college graduates with accounting degrees").

Many of these recruiting practices could be expected to have a disparate impact based on age. Although there has been considerable growth in the number of undergraduates who are "adult students"—"[t]hirty-eight percent of those enrolled in higher education are over the age of 25 and one-fourth are over the age of 30"—college students are overwhelmingly still under the age of 25. Frederick Hess, *Old School: College's Most Important Trend is the Rise of the Adult Student*, WWW.THEATLANTIC.COM, Sept. 28, 2011 (discussing National Center for

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

Education Statistics report).[3] The demographic of professional schools is not much older; for example, half of law school applicants from 2005 to 2009 were between the ages of 22 and 24, and only five percent were over the age of 40. *See* KIMBERLY DUSTMAN & PHIL HANDWERK, LAW SCHOOL ADMISSIONS COUNCIL, ANALYSIS OF LAW SCHOOL APPLICANTS BY AGE GROUP: ABA APPLICANTS 2005-2009, at 2 (Oct. 2010)[4]; *see also*, *e.g.*, *Class Profile*, COLUMBIA BUSINESS SCHOOL (last visited Apr. 29, 2015) (average age of MBA student for Class of 2014 is 28, and 80% of students are 25-30).[5]

Unlike with Title VII disparate impact claims, however, the fact that college- and university-age students are predominantly in their teens or twenties is not a product of institutionalized discrimination. *See* pp. 9-10, *supra*. Instead, it reflects the unremarkable reality that higher education is a traditional path *to* the workforce taken early in an individual's career arc. Accordingly, there is no basis to deem on-campus recruiting an "artificial, arbitrary, and unnecessary barrier[] to employment" that "operate[s] invidiously" with respect to age, *Griggs*, 401 U.S. at 431, 91 S. Ct. at 853, and no provocation for extending disparate impact claims to

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

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

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

applicants for employment under the ADEA for the "prophylactic [purpose] of achieving equality of employment 'opportunities,'" *Teal*, 457 U.S. at 449, 102 S. Ct. at 2531.

3. The practical consequences of ignoring Congress's considered and distinct treatment of ADEA disparate impact claims reinforce the conclusion that such claims should not be given the same scope as Title VII disparate impact claims meant to eliminate "built-in headwinds" of discrimination.

First, on-campus recruiting is a critical part of many businesses' strategies for retaining and developing the best talent. Companies that hire the most new college graduates have a "common thread" of a "promote-from-within model," not because they prefer employees of a certain age, but rather because recruiting large numbers of recent graduates enables them to produce "[h]omegrown leaders" that "have a familiarity with the company and understand its future." Seth Cline, *The Companies Hiring the Most New College Grads*, FORBES.COM, July 21, 2010[6]; Gillis, *supra*, at 165 (practice of "hiring mostly new college graduates" allows "firms to instill their culture and professionalism before the recruits are influenced by experience in another organization"). They also look to recent graduates to bring cutting-edge advances in their fields from the classroom to the workplace. *See, e.g.*, *Sack v. Bentsen*, 51 F.3d 264 (1st Cir. 1995) (unpublished table decision)

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

(rejecting ADEA disparate treatment claim because recent law school graduates "had more current legal knowledge, as evidenced by their recent legal education"); *Mistretta v. Sandia Corp.*, Nos. 74-536-M, 74-556-M, 75-150-M, 1977 WL 17, at *7 (D.N.M. Oct. 20, 1977) ("The available labor market for Sandia technical staff would be expected to come from recent graduates at all degree levels, in addition to the most recent exposure to advanced education, new techniques and new discoveries in the fields of science[.]").

Indeed, such beneficial effects of on-campus and recent-graduate recruiting are important to federal agencies also, and reflected in their recruitment programs. For instance, the Department of Justice's "Honors Program is 'the exclusive means by which the Department hires' all of its entry-level attorneys, including 'recent law school graduates and judicial law clerks who do not have prior legal experience.'" *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 164 (D.C. Cir. 2013) (citation omitted). Likewise, since 2000, the EEOC has run its own "Attorney Honor Program," for which the only eligible applicants are "third-year law student[s]," "full-time graduate law student[s]," and "Judicial Law Clerk[s]" whose "clerkship must be [their] first significant legal employment following [their] graduation." *EEOC Attorney Honor Program*, U.S. EQUAL EMPLOYMENT

OPPORTUNITY COMMISSION (last visited Apr. 29, 2015).[7] In short, the EEOC seeks to "hire[] recent graduates." *Id.*

As this Court's precedent has long recognized, "the bare fact that an employer encourages employment of recent college and technical school graduates does not constitute unlawful age discrimination." *Williams v. Gen. Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. 1981) (disparate treatment case).[8] But if this Court holds that Section 4(a)(2) of the ADEA permits applicants for employment to bring disparate impact claims—which by definition do not involve disparate treatment because of age—the "bare fact" that a business has a practice or policy of hiring students and recent graduates may in fact expose businesses to claims of liability by virtue of the statistics discussed above. Congress's decision that these important, widespread hiring practices should not be deemed unlawful simply because of the average age of the college student population was one way among several in which Congress recognized that age is different from the classifications protected by Title VII.

Second, engrafting an atextual disparate-impact-hiring claim onto the ADEA would also impose unwarranted costs on businesses. Plaintiffs already attempt to shoehorn meritless on-campus recruiting claims into the ADEA's disparate

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

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

treatment framework. *See, e.g.*, *Grossmann*, 109 F.3d at 459 (dismissing ADEA disparate treatment claim because fact that "Dillards recruits recent college graduates" as part of its "Executive Development Program" is "not evidence it discriminates against older workers"); *Stone v. First Union Corp.*, 203 F.R.D. 532, 549 (S.D. Fla. 2001) (decertifying class action alleging pattern or practice claim of disparate treatment regarding "recruiting on college campuses for graduates to enter a management training program"). An extension of the disparate impact framework would only invite a greater number of such claims premised on as little as the makeup of a college's or university's student body.

To be clear, those claims would likely fail in the end. As discussed (pp. 6-8, *supra*), the ADEA "contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" *Smith*, 544 U.S. at 233, 125 S. Ct. at 1541; *see* 29 U.S.C. § 623(f)(1). As the Tenth Circuit has recognized post-*Smith*, "recruiting concerns are . . . reasonable business considerations" that qualify for that so-called "RFOA" defense. *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006); *accord Magnello v. TJX Cos.*, 556 F. Supp. 2d 114, 123 (D. Conn. 2008) ("Defendant asserts that it is appropriate and reasonable to recruit recent college graduates for a training program with entry-level pay. In light of the job requirements and pay level, plaintiff has not demonstrated that defendant's use

of college recruitment is unreasonable.").[9] But the fact that the RFOA defense (or other defenses, *see, e.g.*, 29 U.S.C. § 623(f)(1) ("age is a bona fide occupational qualification"), should ultimately insulate employers from liability is no answer to the fact that employers will incur risk and significant costs litigating these suits.

That consideration has particular force with respect to disparate impact claims brought by applicants for employment. In addition to the fact that *prima facie* claims are based on statistical evidence, courts have held that RFOA, "as an affirmative defense not anticipated in the pleadings, . . . provides no basis for relief on a motion to dismiss, as opposed to a motion for summary judgment." *Loffredo v. Daimler AG*, 500 F. App'x 491, 498 (6th Cir. 2012); *see Cummins v. City of Yuma, Ariz.*, 410 F. App'x 72, 73 (9th Cir. 2011) (applying rule that RFOA defense may only form basis for dismissal if plaintiff pleads necessary facts in complaint); *Mabry v. Neighborhood Defender Serv.*, 769 F. Supp. 2d 381, 395 (S.D.N.Y. 2011) (same); *cf. Davis v. District of Columbia*, 949 F. Supp. 2d 1, 9-10 (D.D.C. 2013) (same for business necessity defense in Title VII case). Thus, employers typically must proceed through discovery—no trivial imposition—in order to prevail, barring plain deficiencies on the face of a complaint, *e.g.*, *Smith*, 544 U.S. at 241, 125 S. Ct. at 1545 (requiring employee to "isolat[e] and identify[] the *specific*

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

employment practices that are allegedly responsible for any observed statistical disparities); *Magnello*, 556 F. Supp. 2d at 123 ("Plaintiff offers as evidence only the percentage of individuals under 40 hired into the PASE program. However, plaintiff has adduced no evidence or statistical comparison that would give rise to an inference of causation between defendant's employment practice and the disproportionate impact upon applicants over 40.").

In light of the text and structure of Section 4(a)(2) of the ADEA, and the considerable consequences of permitting applicants for employment to make disparate impact claims under that provision, it is plain that Congress did not intend to subject employers to the potential cost of litigating such suits merely because they adopt routine, widespread, and important recruiting practices embraced by the private sector and the government alike. Simply put, "[Congress] does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 910 (2001). Accordingly, this Court should affirm the district court's judgment limiting disparate impact claims to current employees.

II. PERMITTING REVIVAL OF YEARS-OLD CLAIMS UNDER EITHER OF PLAINTIFF'S THEORIES WOULD ALTER THE CAREFUL BALANCE STRUCK BY CONGRESS IN THE ADEA'S CHARGE-FILING PROVISIONS

In the ADEA, as with Title VII, Congress chose "what are obviously quite short deadlines . . . to encourage the prompt processing of all charges of

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

Neither of the two rationales asserted by Villarreal for reviving untimely claims could be "applied sparingly"; both would result in effectively no statute of limitations at all, permitting the revival of claims dating back to the enactment of the ADEA. That would contravene the careful balance Congress struck between providing remedies for discrimination and limiting the burden to employers of addressing stale claims. As the Supreme Court has cautioned, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp.*, 447

U.S. at 826, 100 S. Ct. at 2497. Villarreal's attempt to work a dramatic departure from the ADEA's procedural requirements would impose tremendous and unwarranted burdens on businesses.

A. Adopting Villarreal's Equitable Tolling Rule Is Not Necessary To Protect Access To Anti-Discrimination Remedies And Would Abrogate The Statute Of Limitations In Virtually Every Case

As R.J. Reynolds explains (Br. 47-54), this Court has applied equitable tolling only in circumstances where the plaintiff has exercised due diligence but was unable to make a timely filing due to extraordinary circumstances—often involving an employer's misrepresentations regarding the circumstances surrounding an employee's discharge. *See, e.g.*, *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1265-66 (11th Cir. 2003) (applying equitable tolling where employer misrepresented that the reason for employee's termination was that her position was being eliminated); *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025-26 (11th Cir. 1994) (same). The point of these cases "was to close the loophole used by the malicious employer to avoid age discrimination liability" by delaying the hiring of a younger worker so that the charge-filing period would have expired before the terminated employee learned that the employer's stated reason for her termination was inaccurate. *Jones*, 331 F.3d at 1265. The doctrine ensures that no employer "may take advantage of his [or her] own wrong." *Id.* (alteration in original) (internal quotation marks and citation omitted). This Court has

consistently maintained, moreover, that a potential plaintiff must act "'with a reasonably prudent regard for his [or her] rights'" to support a claim for equitable tolling. *Id.* at 1264 (quoting *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975)).

The requirement that a potential plaintiff exercise reasonable diligence before invoking equitable tolling requires rejecting Villarreal's tolling claim here. Contrary to Villarreal's assertions, and as described below, it would not leave potential claimants without an effective remedy. Furthermore, enforcing a diligence requirement is the only way to maintain the balance enacted by Congress between providing a remedy and protecting employers from having to defend against stale claims that are years—or even decades—old.

Villarreal's proposed interpretation of equitable tolling would effectively permit tolling in every hiring case. Villarreal acknowledges that he did nothing to inquire into the reasons why he was not hired by R.J. Reynolds when he applied in 2007, the demographics of the individuals who were hired, further detail regarding what the recruiters were looking for in terms of applicants for the position, or anything else about the hiring process. In fact, he did nothing until he was contacted by an attorney two-and-a-half years later. *See* Appellant's Op. Br. 37.

Villarreal proposes a rule that equitable tolling is available because he was not employed by R.J. Reynolds and therefore did not have contacts from which to

gather more information, *id.*, and, he asserts, he "would have learned nothing material by making further inquiries of [R.J. Reynolds and the employment agencies] after they rejected his 2007 application," *id.* at 45. Those two elements—not being an employee, and a bare assertion that the employer would have revealed nothing had inquiries been made—would apply in virtually every failure-to-hire case under the ADEA, Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act of 2008, or any other federal statute adopting the same charge-filing procedures. Accordingly, those elements cannot be the basis of an equitable tolling doctrine that must be "applied sparingly." *Morgan*, 536 U.S. at 113, 122 S. Ct. at 2072. If those elements were sufficient, it would permit claims for *all* failures to hire by members of the protected class to be raised—no matter how old—whenever some specific information regarding a hiring practice emerges at some point in the future. That tolling rule would effectively undo the timely-filing requirements enacted by Congress in an entire category of cases.

Such a blanket rule is not necessary to protect the ability of employees to pursue discrimination claims. First, unlike *Reeb*, *Sturniolo*, *Jones*, and the other cases relied upon by Villarreal, this situation does not involve any allegations of a "loophole used by the malicious employer." *Jones*, 331 F.3d at 1265. There is thus no reason to assume, without any basis, that inquiries from Villarreal to the

employment agencies or R.J. Reynolds would have resulted in no further material information. Villarreal need not have been able to obtain detailed information; a charge need only "generally allege the discriminatory act(s)." 29 C.F.R. § 1626.6. If Villarreal had pursued some inquiry, perhaps he would be in a different position. But in establishing "quite short deadlines," Congress imposed an obligation upon employees to act diligently and to promptly investigate and present any claims they may have. *Mohasco Corp.*, 447 U.S. at 825, 100 S. Ct. at 2497. Villarreal's proposed rule would abrogate that obligation.

Moreover, as this Court has explained in the termination context, a "plaintiff who is aware that [he] is being replaced in a position [he] believes [he] is able to handle by a person outside the protected age group knows enough to support filing a claim." *Sturniolo*, 15 F.3d at 1025 (alterations in original) (internal quotation marks and citation omitted). The same could be said for an applicant who is aware that the individuals who are hired are largely outside the protected age group, and that sort of information is often available. Just as the internet has altered the manner in which applications are submitted, *see* Appellant's Op. Br. 37 (noting that Villarreal applied for the territory manager position through a website), it has opened up substantial amounts of information regarding companies and their employees. It is not difficult to discover basic demographic information about the individuals who were hired for the territory manager position. For example, a

search on one professional networking site reveals more than 1300 profiles including the job title "Territory Manager" for R.J. Reynolds.[10] In light of the ready availability of substantial information regarding many employers, there is no basis for adopting Villarreal's proposed no-inquiry, no-diligence rule for equitable tolling.

Finally, Villarreal's broad interpretation of the equitable tolling doctrine would impose costly burdens on employers, in contravention of Congress's careful efforts to balance the availability of remedies against "the costs associated with processing and defending stale or dormant claims." *Mohasco Corp.*, 447 U.S. at 820, 100 S. Ct at 2494. As just one example, the EEOC's regulations require employers and employment agencies to maintain records related to applicants and recruiting for only one year. *See* 29 C.F.R. §§ 1627.3(b)(1), 1627.4(a)(1); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 78, 104 S. Ct. 1621, 1636 (1984) (holding that in order to "enable employers to demonstrate that they have adhered to its dictates, it is important that employers be given sufficient notice to ensure that documents pertaining to allegations of discrimination are not destroyed"). If Villarreal's no-diligence tolling rule were adopted, however, then employers would be forced to preserve records regarding applicants in perpetuity, in order to have some opportunity to defend themselves against potential claims. As time goes on,

[10] *See* LinkedIn, https://www.linkedin.com/title/territory-manager-at-rj-reynolds (last visited Apr. 29, 2015).

evidence gets lost, witnesses' memories fade, and it becomes increasingly difficult for an employer to demonstrate its compliance with the ADEA. As R.J. Reynolds explains (Br. 53-54), the possibility of a laches defense is unlikely to cure the problems created by the dramatic expansion of equitable tolling that Villarreal proposes. The only way to preserve the balance struck by Congress is to hew to the statutory deadlines enacted by Congress, absent extraordinary circumstances. *See Mohasco Corp.*, 447 U.S. at 826, 100 S. Ct. at 2497.

Moreover, Congress's choice to require the prompt filing of employment discrimination claims serves more than the employers' interest in preserving their ability to defend against untimely, unmeritorious claims. It also serves the goal of promptly starting an administrative process that may result in voluntary conciliation so that "violations of the statute could be remedied without resort to the courts." *Shell Oil*, 466 U.S. at 78, 104 S. Ct. at 1635. By eliminating any requirement of reasonable inquiry into the circumstances surrounding a failure to hire, Villarreal's proposed tolling rule would disserve the very anti-discrimination goals that the ADEA is designed to serve. In light of these consequences, this Court should hew to its well-established equitable tolling precedents, which respect the balance struck by Congress, and reject Villarreal's expanded tolling rule.

B. Villarreal's Interpretation Of The Continuing Violation Doctrine Would Likewise Eviscerate The ADEA's Statute Of Limitations

As R.J. Reynolds explains (Br. 55-60), this Court's decision in *Hipp v.*

Liberty National Life Insurance Co., 252 F.3d 1208 (11th Cir. 2001), compels the rejection of Villarreal's claim that his allegation of multiple incidents of discriminating against other applicants based on age is sufficient to revive his untimely claim that he was denied hire in 2007. As with the denial of Villarreal's equitable tolling claim, that result is consistent with the balance struck by Congress in favor of prompt resolution of claims. Any other reading would effectively eliminate the statute of limitations in any case in which the plaintiff could allege some connection to a "policy" or "pattern" or "practice"—which would be most cases. *See Abrams v. Baylor Coll. of Med.*, 805 F.2d 528, 533 (5th Cir. 1986) ("If 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.").

There is no need to apply a "continuing violation" doctrine in order to provide redress for timely discrete acts of discrimination. First, Villarreal's own complaint demonstrates that such a re-working of the statutory scheme is unnecessary. Villarreal had an avenue for redress here. He re-applied to R.J. Reynolds after learning of the guidelines he contends are unlawful, was not hired, and filed a timely charge—but voluntarily dismissed his timely disparate treatment claims. *See* Appellees' Br. 59-60. Second, the *claim* that R.J. Reynolds failed to hire some applicants based on age does not by its "very nature involve[] repeated

conduct" and is not "based on the cumulative effect of individual acts." *Morgan*, 536 U.S. at 115, 122 S. Ct. at 2073 (describing hostile work environment claims). No accumulation of failures to hire is necessary to make out a claim. Rather, repeated conduct might be *evidence* that could help prove that R.J. Reynolds failed to hire Villarreal based on age. But such proof of conduct outside the charge-filing period is relevant and may be admitted, even if claims based on those discrete acts are time-barred. *See id*. at 112, 122 S. Ct. at 2071-72. Villarreal thus offers no reason to disturb this Court's holding in *Hipp*, shared by other courts of appeals, rejecting the argument that an alleged pattern or practice of discrimination converts a series of discrete acts into one continuing violation. *See, e.g.*, *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 157 (2d Cir. 2012) (collecting cases); *Williams v. Giant Food Inc.*, 370 F.3d 423, 429 (4th Cir. 2004).[11]

In addition to being unnecessary to provide full relief for timely claims, application of the continuing violation doctrine in these circumstances would also

[11] As R.J. Reynolds notes (Br. 59-60), Villarreal has never relied on his disparate impact claim to establish a purported continuing violation. But that, too, would be foreclosed by precedent. In *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 130 S. Ct. 2191 (2010), the Supreme Court established that even in a class-wide disparate impact case, each "use" of a challenged facially neutral employment practice is a discrete act separately actionable from adoption of the policy itself. *Id.* at 212, 214, 130 S. Ct. at 2197-99. Thus, under *Morgan*, multiple uses of a policy with a disparate impact do not collectively amount to a "continuing violation." *See Chin*, 685 F.3d at 158. That makes sense, because a policy is at issue in *every* disparate impact case, so applying the continuing violation doctrine would effectively eliminate the statute of limitations in any disparate impact case.

impose major burdens on employers. As with Villarreal's expansive view of equitable tolling, employers effectively would lose the ADEA's protection against stale claims, be forced to preserve records on applicants for decades, and potentially be subject to liability back to the date of the ADEA's enactment. That is not the procedural scheme that Congress's provision of a 180-day charge-filing period contemplates. *Cf. Mohasco Corp.*, 447 U.S. at 825-26, 100 S. Ct. at 2497 ("[I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days—rather than months or years—we may not simply interject an additional 60-day period into the procedural scheme."). Because it would purchase no greater fidelity to the purposes of remedying employment discrimination, has been rejected by this Court and other courts of appeals, and would impose unwarranted burdens on employers, this Court should reject Villarreal's attempt to invoke the continuing violation doctrine.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify that the foregoing brief complies with the type-volume limitation prescribed by this Court's rules. The brief contains 6,390 words in Times New Roman font, 14-point size.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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

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