No. 15-10602

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD M. VILLARREAL,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

R.J. REYNOLDS TOBACCO CO., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia (Gainesville Division)
Case No. 2:12-cv-00138-RWS (Hon. Richard W. Story)

EN BANC BRIEF FOR AARP AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code (1951).

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

AARP has no parent corporation, nor has it issued shares or securities.

Undersigned counsel further certifies to the belief that the certificate of interested persons filed by the appellant is complete.

March 25, 2016

/s/ Daniel B. Kohrman
Daniel B. Kohrman

Counsel for Amicus Curiae AARP

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

AARP is a nonpartisan, nonprofit membership organization dedicated to addressing the needs and interests of people age 50 and older. Among other things, AARP strives through legal and legislative advocacy to preserve the means to enforce older workers' rights.

About one third of AARP members work or are seeking work, and, thus, are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (2012). Vigorous enforcement of the ADEA is of paramount importance to AARP, its working members, and the millions of older workers who rely on it to deter and remedy ageism in the workplace. While the ADEA has all but eliminated the most overt forms of discrimination, employers continue to engage in more subtle discriminatory behavior to deny older applicants fair treatment. Prospective employees need the disparate impact theory to fight the intractable hiring discrimination that contributes to older workers' overrepresentation among the long-term unemployed.

[1] AARP certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than AARP, its charitable Foundation, and its members, contributed money intended to prepare or submit this brief. Fed. R. App. P. 29(c)(5). Both parties have consented to the filing of AARP's brief.

AARP advocates vigilantly for the older workers' right to pursue disparate impact claims. AARP filed an amicus curiae brief in the U.S. Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228, 125 S. Ct. 1536 (2005), supporting age discrimination victims' right to pursue disparate impact claims under the ADEA, and another in *Meacham v. Knolls Atomic Power Lab*., 554 U.S. 84, 123 S. Ct. 2385 (2008), urging the Court to recognize that the statute's "reasonable factor other than age" (RFOA) provision is an affirmative defense for which the employer bears both the burdens of production and proof. AARP also filed an amicus brief before the panel in this case. AARP continues to advocate in the courts, in Congress, and in the regulatory arena to ensure that the disparate impact theory is an effective method of challenging and eliminating covert and indirect forms of age discrimination from the workplace.

In this case, AARP believes that that section 4(a)(2) of the ADEA protects prospective employees from employer policies or practices that have a discriminatory disparate impact on older individuals. Congress' concern about age discrimination in hiring practices was the driving force behind the enactment of the ADEA. Further, based on Secretary of Labor Willard Wirtz's report and other authorities, Congress was well aware that age bias in hiring included age-neutral policies disadvantaging older workers. Therefore, it is eminently reasonable to conclude that Congress intended disparate impact to be a tool available to address

hiring discrimination under the ADEA. Furthermore, AARP has a strong interest in preserving the continuing viability of equitable tolling in hiring discrimination cases, where applicants are almost always understandably unaware of the employer's reason for not hiring them during the statutory limitations period.

SUMMARY OF THE ARGUMENT

When Congress enacted the ADEA in 1967, the most pressing problem it sought to remedy was rampant age discrimination in hiring, including arbitrary age-neutral hiring criteria that unfairly disadvantaged older workers. Almost 50 years after its enactment, the ADEA's agenda is still not realized: older workers remain overrepresented among the long-term unemployed. Accordingly, the Court should reverse the district court's decision and recognize that, as the EEOC has consistently set forth in its regulations and advocacy, section 4(a)(2) of the ADEA grants older job-seekers a disparate impact claim.

This interpretation, accords with section 4(a)(2)'s text, which broadly covers "any individual" rather than only "employees," as well as the reasoning in *Smith v. City of Jackson*, 544 U.S. 228, 125 S. Ct. 1536 (2005), which first definitively recognized a disparate impact claim under section 4(a)(2). In addition, the EEOC's construction furthers Congress' goal of eradicating unemployment among older workers. The Court should embrace the panel's thorough and well-supported reasoning in reaching this conclusion.

Additionally, the Court should affirm a fair and practical equitable tolling standard that does not require plaintiffs in hiring discrimination cases to show that they undertook futile and speculative investigations into employers' motives for rejecting them. Especially in the current job market, where most job-seekers submit applications online, applicants almost never receive any confirmation that employers rejected them at all. Moreover, employers typically discourage applicants' efforts to learn whether or why they were rejected. Older workers already facing long periods of unemployment would be justifiably reticent to risk annoying a potential employer by inquiring, especially when instructed not to do so. And, employers who have covert discriminatory motives or biased hiring practices will certainly not reveal that information upon request. Requiring applicants to engage in this pointless exercise is impractical and unjust; rather, the Court should simply inquire whether, under the circumstances, the plaintiff did what a reasonably prudent applicant would do – even if that does not ultimately include any proactive attempts to learn the employer's hidden motives.

ARGUMENT

I. Interpreting Section 4(a)(2) of the ADEA to Cover Job Applicants' Disparate Impact Claims Is Reasonable Because It Is Consistent With the Act's Text and Hiring-Driven Purpose.

Section 4(a) of the ADEA forbids an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a). The Supreme Court held that section 4(a)(2) authorizes disparate impact claims in *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 232, 125 S.Ct. 1536, 1540-41 (2005). However, the Court did not address the question of whether applicants for employment could bring those claims. *Villarreal v. R.J. Reynolds Tobacco Co*., 806 F.3d 1288, 1292 (11th Cir. 2015) (vacated Feb. 10, 2016). The district court concluded that section 4(a)(2) cannot be read to cover applicants. *Villarreal v. R.J. Reynolds Tobacco Co.*, No. 2:12-cv-0138, 2013 U.S. Dist. LEXIS 30018 (N. D. Ga. March 6, 2013). This Court should reject that cramped reasoning and recognize that the statute's text, as interpreted by the Supreme Court, and the ADEA's legislative history support the EEOC's conclusion that job applicants may bring disparate impact claims under the ADEA.

A. Section 4(a)(2)'s Language and the Supreme Court's Constructions of That Language Strongly Support Interpreting the Act to Permit a Disparate Impact Claim for Applicants.

1. Section 4(a)(2)'s protection of a broad range of "any individual[s]" from a broad range of prohibited practices, which parallels Title VII as enacted, should be read to encompass disparate impact hiring claims.

The EEOC's interpretation of section 4(a)(2) as encompassing disparate impact claims for job applicants is a natural reading of the statute's text and is consistent with Supreme Court precedent. Like the original text of Title VII, section 4(a)(2)'s language is intentionally broad – certainly broad enough to cover applicants' disparate impact claims. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30, 91 S. Ct. 849, 853 (1971) (holding that the plain text of section 703(a)(2) of Title VII permitted a disparate impact claim challenging facially neutral hiring practices with a disparate impact on black employees and applicants); *Dothard v. Rawlinson*, 433 U.S. 321, 328-29, 97 S. Ct. 2720, 2726-27 (1977) (describing *Griggs* as protecting "applicants for hire"). As the Supreme Court explained in *Smith*, Congress used the identical language in sections 4(a)(2) of the ADEA and 703(a)(2) of Title VII, showing that Congress intended the two statutes' protections to be the same as to both *whom* they protect and *what* they protect. 544 U.S. at 233, 125 S. Ct. at 1540-41 ("Except for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of [§ 4(a)(2)]

in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII).").[2]

As to whom, both statutes protect a broad group: "any individual." 42 U.S.C. § 2000e -2(a)(2); 29 U.S.C. § 632(a)(2). As to what, as *Smith* explained, "[n]either § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that 'limit, segregate, or classify' persons; rather the language prohibits actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race or age." *Smith*, at 544 U.S. at 235, 125 S. Ct. at 1542 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991, 108 S. Ct. 2777, 2787 (1988)) (emphasis in original). Consequently, it makes perfect sense to interpret the two statutes as protecting the same people –

[2] While section 703(a)(2) was amended after it was incorporated *in haec verba* into the ADEA, *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S. Ct. 866, 872 (1978), to add the phrase "applicants for employment," the Court should not conclude that by not similarly amending the ADEA in 1972, Congress intentionally narrowed the scope of section 4(a)(2) to exclude prospective employees from its protections. As the panel explained in full, the 1972 amendment to Title VII was intended merely to express Congress' agreement with court decisions already applying section 703(a)(2) to applicants for employment. *Villarreal*, 806 F.3d at 1295-96 ("Congress has all kinds of reasons for passing laws, and presumably all kinds of reasons for not passing laws as well . . . . We will not assume that Congress chose not to pass legislation modifying the ADEA simply because it did make this one change in a broader restructuring of Title VII.").

including job applicants – from the same illegal conduct – practices that have a disparate impact on the protected group.

Even independent of Title VII's protections, section 4(a)(2)'s language itself can and should be read to prohibit hiring practices that have a disparate impact on older jobseekers. First, the phrase "any individual" is naturally broad enough to cover job applicants. *See* 29 U.S.C. § 623(a)(2). Indeed, the ADEA's other prohibitory sections use the same language. In addition to sections 4(a)(1) and 4(a)(2), the phrases "any individual" and "because of such individual's age" also appear in section 4(b), *id.* § 623(b) (prohibiting age discrimination by employment agencies); section 4(c)(1), *id.* § 623(c)(1); and section 4(c)(2), *id.* § 623(c)(2) (prohibiting age discrimination by labor organizations). Moreover, as the panel noted, "any individual" refers *solely* to job applicants in § 623(b), which deals with employment agencies that work only with applicants. *Villarreal*, 806 F.3d at 1297 n.7. The idea that "any individual" could not include applicants in section 4(a)(2) but *can* include them – or refer *only* to them – in the others is a stretch at best.

The only section in the ADEA's prohibitions that does not use the term "any individual" is the seldom-cited section 4(a)(3), which prohibits "reduc[ing] the wage rate of *any employee* in order to comply with this chapter." 29 U.S.C.

§ 623(a)(3). This section is the only prohibition in the ADEA that focuses on an employer's current employees, presumably because it is impossible to reduce the wage rate of anyone but current employees. Section 4(a)(3) demonstrates that Congress knew how to limit a prohibited practice to current employees by using only the term "employees" and not the broader term "any individual" in the textual description of the prohibited practice. By contrast, in section 4(a)(2), Congress prohibited employers from actions that "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) (emphasis added).

Of course, that Congress included the term "employees" in section 4(a)(2) in addition to "any individual" is not without legal significance. As this Court has held, "Th[e] deliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent." *United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003). It is reasonable to infer that Congress prohibited employers from taking actions regarding its employees generally that would discriminate against "any individual." It is less reasonable to follow Defendants' preferred interpretation: that "employees" in the first sentence limits the scope of the following phrase, "any individual," to those "individual[s]" that happen to be employees. Br. Appellee at 25-26. Congress did

more than simply decline to repeat "employees," and use "individual" instead. 29 U.S.C. § 623(a)(2). Just as crucially, Congress used the term "any" – a broad, unqualified modifier – rather than an internally-referential demonstrative adjective like "these," "those," or even "such," as in the final phrase of section 4(a)(2). *Id.* The use of such terms would have referred back to "employees" rather than outward toward the full spectrum of older individuals adversely affected by the employer's policies.

Indeed, as the panel noted, the legislative history reveals that section 4(a)(2) was internally described as a provision that would "limit, segregate, or classify *employees* so as to deprive *them* of employment opportunities or adversely affect *their* status" – and yet, Congress did not use this phrasing in the final version of the statute. *Villarreal*, 806 F.3d at 1298 n.8 (citing 113 Cong. Rec. 31,250 (1967)) (emphasis in opinion). Although Congress' inaction is, as discussed above, inconclusive, it certainly demonstrates that had Congress wished to limit its coverage to employees, it had a clear way to do so at its disposal. Instead, it wrote a broader statute with language that is readily susceptible to the more comprehensive interpretation that should be applied in a remedial statute "to effectuate its general purpose: ameliorating age discrimination in employment." *Sperling v. Hoffmann-LaRoche, Inc.*, 118 F.R.D. 392, 403 (D.N.J. 1988).

Finally, in light of this remedial purpose, even if the Court reads "employee" as limiting section 4(a)(2)'s subsequent language, that does not foreclose a construction that covers applicants. As the Supreme Court explained when it found the word "employee" in Title VII's retaliation prohibition ambiguous, if a statute "lacks any temporal qualifier," it need not be limited to current employees. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342, 117 S. Ct. 843, 846-847 (1997). The Court concluded that "employee" applied to former as well as current employees, and it implied that in context, "employee" could just as easily cover *prospective* employees. *Id.* at 342, 847; *cf. also Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168, 92 S. Ct. 383, 392 (1971) ("[A]pplicants for employment and registrants at hiring halls—who have never been hired in the first place—as well as persons who have quit or whose employers have gone out of business are 'employees' embraced by the policies of the [National Labor Relations Act]"). The unqualified term "employee" in section 4(a)(2) of the ADEA is similarly unbound by temporal qualifiers, so it, too, can reasonably be read to encompass both prospective and former employees. Thus, even Defendants' own view of section 4(a)(2) as focusing on "employees" does not render unreasonable the EEOC's view that this section covers job applicants.

2. *Smith v. City of Jackson* supports the conclusion that section 4(a)(2) protects job-seekers.

Defendants, like the district court, rely on Justice O'Connor's concurring opinion in *Smith v. City of Jackson* to declare unequivocally that section 4(a)(2) cannot encompass applicants' disparate impact claims. Br. Appellees at 16-17, 28. But, Justice O'Connor was not speaking for the Court in her concurrence, which has no precedential value. *See Alexander v. Sandoval*, 532 U.S. 275, 285 n.5, 121 S. Ct. 1511, 1526 n.5 (2001) ("[A majority's] holding is not made coextensive with the concurrence because their opinion does not expressly preclude . . . the concurrence's approach. The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found unnecessary (and did not wish) to address, under compulsion of [the] principle that silence implies agreement.").

The majority opinion in *Smith*[3] is more of an Achilles heel than a boon to the argument that section 4(a)(2) does not protect applicants. First, the Court's textual analysis of the differences between sections 4(a)(1) and 4(a)(2) of the ADEA inferred no significance from the absence of the terms "hiring" or "applicants" in section 4(a)(2). Second, the *Smith* majority noted two and only two textual differences between the ADEA and Title VII that "make it clear that even though

[3] Justice Scalia joined Parts I, II, and IV, making these portions of the opinion precedential, as they received a majority of votes. *Smith*, 544 U.S. at 229, 125 S. Ct. at 1539 (referring to the opinion of the Court with respect to Parts I, II, and IV).

both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact theory under ADEA is narrower than under Title VII." 544 U.S. at 240, 125 S. Ct. at 1544.

The only differences between the disparate impact under the ADEA and Title VII noted in *Smith* were: (1) the ADEA's reasonable factors other than age (RFOA) provision, 29 U.S.C. § 623(f)(1), is the employer defense to a disparate impact under the ADEA as opposed to "business necessity" under Title VII; and (2) the "*Ward's Cove*[4] pre-1991 interpretation of Title VII"s identical language [referring to 4(a)(2) and 703(a)(2)] remains applicable to the ADEA." 544 U.S. at 240, 125 S. Ct. at 1544. Limiting disparate impact claims under the ADEA to those brought by current employees would render the disparate impact theory under the ADEA narrower than under Title VII. Yet, *Smith* did not mention that as a distinction between the two. Instead, tellingly, *Smith* listed two age discrimination in hiring cases as "appropriate" ADEA disparate impact cases. 544 U.S. at 237, 238 n.8, 125 S. Ct. at 1543 n.8 (citing *Wooden v. Bd. of Ed. of Jefferson Cnty.*, 931 F.2d 376 (6th Cir. 1991) and *Faulkner v. Super Valu Stores,* Inc., 3 F.3d 1419 (10th Cir. 1993)).

[4] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989). This case addressed the burden-shifting framework for discrimination cases, and *Meacham v. Knolls Atomic Power Lab*., 554 U.S. 84, 123 S. Ct. 2385 (2008), later clarified that the RFOA provision in the ADEA is an affirmative defense.

Smith supports applying the disparate impact theory to combat age discrimination in hiring and in no way suggests that it cannot be used by older job applicants victimized by employer policies or practices that adversely affect their efforts to secure employment. *Smith* delineated the only two ways Congress narrowed the scope of the disparate impact theory under the ADEA. The Court should not accept Defendants' invitation to carve out additional limitations. *See Andrus v. Glover Const. Co*., 446 U.S. 608, 616-17, 100 S. Ct. 1905, 1910 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of contrary legislative intent.") (internal citation omitted).

B. The ADEA's Legislative History Shows Congress' Serious Concern About Age-Neutral Barriers That Hinder Older Workers' Efforts to Secure Jobs and Reflects Congress' Intent to Create a Disparate Impact Hiring Claim to Help Break Down Those Barriers.

The ADEA's legislative record powerfully supports the proposition that eliminating hiring discrimination against older workers was Congress' principal goal in passing the ADEA. Thus, it is only sensible to conclude that Congress intended to create the full panoply of protections for the group about which it was most concerned.

Interpreting the ADEA to allow disparate impact hiring claims for job-seekers is consistent with the ADEA's stated purposes, which grew out of

Congress' concern 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, especially long-term unemployment . . . is relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave." 29 U.S.C. § 621(a)(1), (a)(3) (emphasis added). When the ADEA was enacted, approximately half of all private job openings explicitly barred applicants over age 55, and a quarter barred those over 45. U.S. Dep't of Labor, The Older Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964, 6 (1965) (hereinafter "Wirtz Report"). Section 4(a)(1) has been instrumental in eliminating such job advertisements and other blatant forms of age discrimination in hiring. However, less obvious discriminatory practices persist. Older workers still experience far longer periods of unemployment and are disproportionately represented among the long-term unemployed. Bureau of Labor Statistics, Labor Force Statistics, Table A-36 in Employment and Earnings Online at http://1.usa.gov/1M6Sj0H and http://1.usa.gov/1P039pi. Despite the ADEA's protections, employers still engage in covert and indirect discriminatory behavior to deny older job applicants fair treatment. *See, e.g.*, Dan Kalish, *Covert Discrimination: What You Need to Know About Coded Job Listings*, PayScale.com (June 15, 2015), http://bit.ly/1QBb2bL

(describing use of coded phrases like "parseltongue" to weed out older applicants); Vivian Giang, *This is the latest way employers mask age bias, lawyers say*, Fortune (May 4, 2015), http://for.tn/1E10rvm (describing job postings with preferences for digital "native speakers," rather than older "digital immigrants").

To combat this type of discrimination, section 4(a)(2)'s protections are critical. Indeed, as the panel correctly recognized, the ADEA's architects identified a need to combat arbitrary age-neutral employer restrictions that impede job offers to older workers. *Villarreal*, 806 F.3d at 1298.

1. The Wirtz Report Focused Significantly on Hiring Practices That Had a Discriminatory Effect on Older Applicants.

For more than three decades, the Supreme Court has looked to the "Wirtz Report," a 1965 report to Congress, by U.S. Labor Secretary Willard Wirtz,[5] as the preeminent source for construing the legislative intent behind the ADEA.[6] In *Smith*, a majority of Justices found the Wirtz Report highly persuasive in establishing that the ADEA encompasses disparate impact claims. *Smith*, 544 U.S.

[5] DOL compiled the Wirtz Report after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

[6] *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 587-91, 124 S. Ct. 1236, 1240-43 (2004) (discussing the strong influence of the Wirtz Report on the ADEA's text).

at 238, 125 S. Ct. at 1543 (2005) ("[W]e think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-*Hazen Paper*[7] consensus concerning disparate impact liability.").

Indeed, *Smith* specifically suggests that the Wirtz Report anticipated the ruling in *Griggs*, in the context of unjustified hiring criteria:

> The congressional purposes on which we relied in *Griggs* have a striking parallel to . . . important points made in the Wirtz Report . . . just as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools . . . the Wirtz Report identified the identical obstacle to the employment of older workers. "Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if, despite his [or her] limited schooling, an older worker's years of experience have given him [or her] the relevant equivalent of a high school education." Wirtz Report 3. Thus, just as the statutory text is identical, there is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report.

Smith, 554 U.S. at 235 n.5, 125 S. Ct. at 1541 n.5 (internal citation omitted).

While the origins of race-related and age-related inequity attributable to an unnecessary high school diploma requirement differ, the impact is the same: poorer prospects of securing jobs, in some instances unrelated to a worker's ability to perform. Thus, one specific basis for approving disparate impact liability in *Griggs*

[7] *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993). As the Court noted in *Smith*, prior to *Hazen Paper*, every appellate court had "uniformly interpreted the ADEA as authorizing recovery on a 'disparate impact' theory in appropriate cases." 544 U.S. at 237, 125 S. Ct. at 1543.

and in *Smith* was a precise form of hiring discrimination identified in the Wirtz Report. *See also* Wirtz Report at 12 ("Even for many plant production jobs in the major industries, employers for a variety of reasons seek young workers with high school educations or equivalent vocational training.").

Another "striking parallel" between the Wirtz Report and *Griggs*, also involving hiring discrimination, concerns the disparate impact of testing requirements that are unrelated to job qualifications and performance. The Wirtz Report objected to arbitrary requirements that some job applicants "pass a variety of aptitude and other entrance tests." *Id.* at 14. Specifically, it noted that younger workers' "recency of education and testing experience," rather than any strong connection between test results and "average performance" or "steadiness of output," explained younger applicants' greater success in securing some jobs. *Id.* at 14-15. It reasoned that some jobs genuinely require workers with "better" or more "recent" education, but others do not. *Id.* For instance, "average performance of older workers compares most favorably in office jobs, where productivity ... r[i]se[s] with age." *Id.* at 14. Likewise, in *Griggs*, the Supreme Court faulted Duke Power for relying on aptitude test results as hiring criteria because of their lack of a "demonstrable relationship" to job performance, and grossly disparate pass rates favoring whites and disfavoring black applicants. 401 U.S. at 430-31 and 430 n.6, 91 S. Ct. 849, 854 and n.6.

More broadly, the overwhelming thrust of the Wirtz Report is employers' irrational resistance to hiring skilled and productive older workers. The Wirtz Report opens by lamenting tragedy "at the hiring gate":

> There is . . . no harsher verdict in most men's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is "You're too old," that a man turns away, in [a] poet's phrase, finding nothing to look backward to with pride and nothing forward to with hope.

Wirtz Report at 1.

A significant portion of the Wirtz Report focuses on "[t]he most obvious kind of age discrimination in employment" – *i.e.*, intentional discrimination – but plainly does not describe it as the *only* kind of hiring age bias. *Id.* at 6, 7-11. The Report focuses on both direct and indirect forms of hiring discrimination. For instance, it discusses the "many reasons why a particular older worker does not get a particular job," *id.* at 11, 12-16, and next, the impact on older worker hiring of employers' "personnel policies" and "seniority systems," as well as "workman's compensation laws," and "private pension, health and insurance plans." *Id.* at 15-17. The final sections also stress the challenges older workers face in finding and keeping work. *See id.* at 17-25. Nowhere does the Report indicate that initial hiring discrimination was a lesser problem than age bias in terminations or other aspects of employment, such as internal promotions. The Wirtz Report suggests that

ADEA claims for disparate impact hiring bias should receive priority, rather than being written out of the statute.

2. Congressional Consideration of the ADEA Shows Congress' Intent to Give Older Unemployed Job Applicants Strong Rights and Enforcement Mechanisms to Combat Age Discrimination in Hiring.

In reports accompanying legislation that became the ADEA, the congressional committees responsible for developing the ADEA stressed the objective of eliminating hiring discrimination to promote the employment of older workers. In particular, this focus on older individuals' unemployment suggests that Congress was particularly attuned to the need to eliminate discrimination in initial hiring, rather than in incumbent promotion.

The House Committee on Education and Labor, *see* H.R. Rep. 90-805 (1967) [hereinafter House Report], and the Senate Committee on Labor and Public Welfare, *see* S. Rep. 90-723 (1967) [hereinafter Senate Report], stated that "the purpose of [these bills] [was] to promote the employment of older workers based on their ability." House Report at 1; Senate Report at 1. Both reports cited the Wirtz Report's support for legislation banning age discrimination in hiring, emphasizing that the new statute would provide "a foundation for a much-needed vigorous, nationwide campaign to promote hiring without discrimination on the basis of age." House Report at 2; Senate Report at 2. Both committees also quoted President Johnson's message endorsing a draft ADEA of 1967 "transmitted to

Congress" by Secretary Wirtz, and praising it as a response to many older workers' pressing need to be hired. *Id.* The President's message, both Committees observed, highlighted the numbers of unemployed older workers, their substantial (40%) representation among "the long-term unemployed," and the large amount of federal expenditures on unemployment insurance for older workers. *Id.*

Moreover, in committee hearings, prominent ADEA supporters echoed themes in the Wirtz Report indicating that the proposed law was designed to address covert or indirect age hiring restrictions. The chief sponsor of the ADEA, Senator Yarborough, declared: "It is time that we turn our attention to the older worker who is not ready for retirement – but who cannot find a job because of his age, despite the fact that he is able, capable, and efficient. He is not ready for retirement – but *he is, in effect, being retired* nonetheless, regardless of his ability to do the job." *Age Discrimination in Employment: Hearing on S. 830 and S. 788 Before the S. Subcomm. on Labor, Comm. on Labor and Public Welfare*, 90th Cong. 22 (1967) [hereinafter 1967 Senate Hearings] (emphasis added). He added: "Our industrial system has *apparently almost unconsciously* placed a premium on youth." *Id.* Senator Javits quoted the Wirtz Report at length, including its call for Congress to enact a law that "declares, clearly and unequivocally, and implements, as far as is practical, *a national policy with respect to hiring on the basis of ability rather than age*." *Id.* at 26 (emphasis added). One committee witness, testifying

regarding disparate impact claims, spoke to the lack of empirical evidence that non-discriminatory factors other than age explain age-based disparities in hiring data. *Id.* at 175-89 (Statement of Dr. Harold L. Sheppard, Social Scientist, Upjohn Institute for Employment Research). Dr. Sheppard described what he called the "obstacle course set up by our public institutions and private employers" confronting older workers "becoming unemployed after many years of continuous employment." *Id.* at 176. The obstacle course, he said, "includes . . . conscious and *unconscious patterns of discrimination against older jobseekers*." *Id.* (emphasis added). Sheppard rebutted the assertion that "skill level is the simple explanation for the problems of older job seekers," summarizing the results of studies using "multiple classification analysis" (now known as multiple regression analysis) that "when every other factor was taken into account" to assess workers' unemployment, "age was still found to be significantly related to unemployment status." *Id.* at 181.

As the ADEA neared enactment, congressional leaders shepherding the law focused on the ADEA's potential to address older worker unemployment by combating age discrimination in hiring. Mr. Perkins, the manager of the House bill, proclaimed that it was "a bill to promote employment of middle aged and older persons on the basis of ability." 113 Cong. Rec. 34738, 34740 (1967). Perkins invoked conditions "[i]n [his] own district in Kentucky," in which "thousands of

former coal miners" learned that "age is a great handicap in finding a job." *Id.* He claimed the ADEA would redress "this longstanding misconception about the employability of older workers" despite their superior "reliability, productivity, and attendance." *Id.*

Finally, just days before the House agreed to final changes to the ADEA passed by the Senate, Rep. Burke offered grounds for Congress to conclude that age bias in hiring is especially serious:

> It is one of the cruel paradoxes of our time that older workers holding jobs are considered invaluable because of their experience and stability. But let that same worker become unemployed and he is considered "too old" to be hired. Once unemployed, the older worker can look forward to longer stretches between jobs than a young worker in the same position.

113 Cong. Rec. 34742 (daily ed. Dec. 4, 1967).

Nowhere in the record of the ADEA's enactment is there a hint that Congress intended older applicants to have less legal protection than current employees, when unemployed older individuals were at the forefront of legislators' minds throughout the enactment process. Indeed, Congress' preoccupation with unemployment and older job-seekers being unable to find work in the first instance cuts strongly against Defendants' cramped interpretation of the statutory language and *Griggs* as being solely concerned with incumbent employees. Br. Appellee 25-28, 30-33. Defendants' focus on statutory coverage – *i.e.*, their insistence that section 4(a)(2) only covers employees – advocates for a perplexing regime in

which the age-neutral hiring practices Congress sought to end could be challenged by current employees seeking internal promotion, but not by the unemployed older job-seekers Congress was so determined to protect. The Court should follow the reject this tortured construction and embrace the EEOC's interpretation, which avoids such an implausible result.

The Wirtz Report's focus on older job-seekers, which so closely paralleled the reasoning in *Griggs*, and Congress' express intent to give older job applicants, barred at the gates of employment, a full set of rights enforcement tools, supports a single conclusion. The ADEA gives job applicants, not just incumbent employees seeking promotion, a disparate impact claim.

II. Equitable Tolling Does Not Require Plaintiffs in Hiring Discrimination Cases to Show That They Conducted Futile and Entirely Speculative Investigations.

The Court should hold to this Circuit's longstanding view that "a limitations period 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," without unreasonably heightening plaintiffs' burden. *Sturnolio v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1026 (11th Cir. 1994)). Here, Mr. Villarreal's "failure to ask RJ Reynolds why he had not been hired is not fatal to his claim" because in a hiring discrimination case, "a plaintiff need not undertake an entirely futile investigation into hidden discriminatory practices in the name of

'due diligence.'" *Villarreal*, 806 F.3d at 1305. Likewise, requiring a showing of "extraordinary circumstances" – beyond a reasonably inability to learn of the employer's discriminatory practices to excuse a filing delay in a hiring discrimination case – makes no sense. Unlike other harms that are self-evident when they occur and, therefore, should be addressed immediately absent highly unusual events, "discriminatory hiring practices are 'unlikely to be readily apparent to the individual discriminated against.'" *Id.* at 1304 n.13 (citing *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975)).

Current job application and hiring processes are increasingly opaque and anonymous, making it ever more impractical to expect job applicants to investigate employer motives for rejecting them. To begin with, many job applicants never receive confirmation that they have been rejected, much less any information relevant to the possibility they have been subjected to discrimination. Defendant CareerBuilder's own 2013 nationwide survey of nearly 4000 full-time employees throughout the country showed that "[t]he vast majority (75 percent) of workers who applied to jobs using various resources in the last year said they never heard back from the employer." Jennifer Grasz, *Seventy-Five Percent of Workers Who Applied to Jobs Through Various Venues in the Last Year Didn't Hear Back From Employers, CareerBuilder Survey Finds*, CareerBuilder (Feb. 20, 2013), http://cb.com/1y8E5LC. This is not simply applicants' perception: 52% of

companies surveyed by CareerBuilder in 2015 admit that they "respond to less than half of the candidates that apply." *CareerBuilder – 2015 Candidate Behavior Study*, CareerBuilder, http://cb.com/1RXNCeI. And applicants typically have no idea when to start investigating any possible unlawful treatment, as 58% of employers say they do not tell applicants how long they should expect the application or interview process to take. *Id.*

Consequently, some "reasonably prudent" applicants with "concern for [their] rights," *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559, 1561 (11th Cir. 1987), are understandably unaware for quite some time that a possibly discriminatory employment action they may later wish to challenge has even happened It is unrealistic and impractical to expect these applicants to contact employers to whom they have submitted an unanswered application – and from whom they are likely to hear nothing at all – to assess the likelihood that they have encountered employment discrimination. Of course, many applicants may reasonably conclude that they have been rejected after an appropriate interval, as Mr. Villarreal did, but it is important to implement a flexible tolling standard that takes into account applicants' understandable uncertainty in these circumstances.

Further, proactive follow-up to determine the reasons for rejection (or even the status of an application) is typically neither welcome nor productive. Job postings with "No phone calls, please" instructions or other warnings not to contact

employers directly are commonplace. A web search for this phrase alone returns site upon site replete with contradictory advice about whether to follow a "no calls" directive and the dire consequences of making the wrong choice. *Compare* Kathleen Conners, *No Phone Calls, Please!*, Career Rocketeer (October 3, 2009), http://bit.ly/21rVJlO (advising applicants to call hiring managers directly) *with* Alison Green, *Should You Call When a job Posting Says "No Calls"?*, AskAManager (Sept. 6, 2009), http://bit.ly/1Xr3wPT (advising candidates that the author-manager is annoyed by calls after giving this directive, but indicating that others might not agree) *and* Peter Post, *"No phone calls, please" catch-22*, boston.com (Sept. 17, 2009), http://bit.ly/1QYIOCX ("If an employer says "No phone calls, please" what does calling say about your ability to follow directions? So, let's take making a phone call off the table right away."). Especially for older workers who are more likely to be unemployed for long periods of time, the risk of making a bad impression by seeming obtuse, officious, or desperate is a powerful deterrent.

Even applicants left in limbo that overcome a "no calls" instruction to seek answers and find that they were rejected usually do not succeed in learning why. In many cases, that is because even the most well-meaning employers do not know the answer. CareerBuilder's survey reflects that 58% of employers do not source the code from which their applications originate – or, in other words, they do not

even know who applied, let alone why each spurned applicant was rejected. *CareerBuilder – 2015 Candidate Behavior Study*, http://cb.com/1RXNCeI, at 9. Furthermore, because employers like R.J. Reynolds are increasingly outsourcing recruitment to services like CareerBuilder, a contact person answering an applicant's call would often lack direct access to the hiring criteria. *An Exploratory Study on the impact of Recruitment Process Outsourcing on Corporate Brand*, http://bit.ly/1TJww7e (literature review on use of recruitment services).

Employers are also increasingly relying on mathematical algorithms to select candidates – algorithms about which they often admittedly know little to nothing. *See, e.g.*, *Algorithmic Hiring: Why Hire by Numbers?*, http://mnstr.me/1nJI9Nq (describing algorithmic hiring); *Ethics of Algorithms*, Centre of Internet and Human Rights, http://bit.ly/1S0x8SI ("Algorithms perform complex calculations, which follow many potential steps along the way. They can consist of thousands, or even millions, of individual data points. Sometimes not even the programmers can predict how an algorithm will decide on a certain case."). More and more, entirely honest and transparent employers cannot accurately answer an inquiry about why an applicant was rejected, let alone give that applicant insight into whether the hiring criteria are discriminatory, upon request.

Compounding this problem, even employers who could accurately answer this question usually choose not to do so. For instance, only 27% of applicants

surveyed by CareerBuilder say their prospective employers explained why they were not hired, even after an interview. *CareerBuilder – 2015 Candidate Behavior Study*, http://cb.com/1RXNCeI, at 12. And finally, as the panel explained, even if a rejected applicant can cut through this thicket of uncertainty and confusion to reach a well-informed employer, if the employer actually did refuse to hire that applicant for invidious reasons, the company surely "has every incentive to hold this type of information close." *Villarreal*, 806 F.3d at 1305 n.14.

Under these circumstances, it is difficult to imagine what the dissent in the panel decision specifically believed reasonably prudent applicants in Mr. Villarreal's shoes should do to preserve their rights, other than "something." *Id.* at 1314 (Vinson, J., dissenting). Requiring plaintiffs to go through the futile exercise of violating the usual prohibitions on personal contact in search of an employer's motives in every instance in which they have heard nothing (but fear something), only to inevitably find either no information in the vast majority of cases or misleading information from the (presumably few) malfeasors, benefits no one. In fact, it particularly burdens employers, who would be inundated with an overwhelming volume of follow-up requests from a wide range of applicants who had otherwise not made personal contact with the employer.

But, that is the natural result of a diligence standard that requires plaintiffs to attempt to investigate their rejections when they have no reason to suspect

discrimination yet – that, or the equally undesirable result that plaintiffs file charges "just in case," when they have not actually gained enough information to state a discrimination claim, to avoid missing the filing deadline. On the other hand, this Court's historical, more flexible standard will continue to result in very few hiring discrimination cases, as it is truly the extraordinary case when someone like Mr. Villarreal learns of the employer's criteria that he alleges had a discriminatory effect. A tolling standard that creates these impossible and impractical hurdles serves no purpose other than keeping any worthy hiring claims that plaintiffs do ultimately uncover out of court.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

March 25, 2016 Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), because this brief contains 6,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

March 25, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2016, I electronically filed the foregoing Amicus Curiae Brief Supporting Plaintiff-Appellant with the Clerk of the Court of the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that twenty (20) copies of the brief were submitted via overnight mail to the Clerk of the Court. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

March 25, 2016

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