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 OF THE RETAIL LITIGATION CENTER, INC. AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

The following is a complete list of persons and entities who, to the best of *Amicus Curiae* Retail Litigation Center, Inc.'s knowledge, have an interest in the outcome of this case, pursuant to Eleventh Circuit Rule 26.1-1:

1. AARP – Amicus curiae in support of Plaintiff–Appellant Richard M. Villarreal.

2. Akin Gump Strauss Hauer & Feld LLP – Law firm for amicus curiae Chamber of Commerce of the United States.

3. Almond, John J. – Attorney for Plaintiff-Appellant Richard M. Villarreal.

4. Altshuler Berzon, LLP – Law firm for Plaintiff-Appellant Richard M. Villarreal.

5. Beightol, Scott – Former Attorney for Defendant-Appellee Pinstripe, Inc.

6. Benson, Paul – Former Attorney for Defendant-Appellee Pinstripe, Inc.

7. Berger & Montague, P.C. – Law firm for Plaintiff-Appellant Richard M. Villarreal.

8. British American Tobacco p.l.c. (BTI) – A publicly traded company with ownership interest in Brown & Williamson Holdings, Inc., the indirect holder

of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellee R.J. Reynolds Tobacco Company.

9. Brown & Williamson Holdings, Inc. – Private company and holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellee R.J. Reynolds Tobacco Company.

10. Brusoski, Donna J. – Attorney for amicus curiae U.S. Equal Employment Opportunity Commission.

11. Campbell, R. Scott – Former Attorney for Defendant-Appellee Pinstripe, Inc.

12. CareerBuilder, LLC – Private company and former Defendant.

13. Carson, Shanon J. – Attorney for Plaintiff-Appellant Richard M. Villarreal.

14. Chamber of Commerce of the United States of America – Amicus curiae in support of Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

15. Chen, Z.W. Julius – Attorney for amicus curiae Chamber of Commerce of the United States.

16. Cielo, Inc. – Name under which Defendant-Appellee Pinstripe, Inc. now operates.

17. Davis, Loraine C. – Attorney for amicus curiae U.S. Equal Employment Opportunity Commission.

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

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

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

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

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

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

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

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

26. Hunt, Hyland – Attorney for amicus curiae Chamber of Commerce of the United States.

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

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

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

30. Kohrman, Daniel B. – Attorney for amicus curiae AARP.

31. Leasure, Amy Beth. – Attorney for amicus curiae Equal Employment Advisory Council.

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

33. Livingston, Donald – Attorney for amicus curiae Chamber of Commerce of the United States.

34. Lopez, P. David – General Counsel for amicus curiae U.S. Equal Employment Opportunity Commission.

35. Lossia, Dana E. – Attorney for amicus curiae the NAACP Legal Defense and Education Fund, Inc.

36. Marshall, Alison B. – Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

37. McArthur, Nikki L. – Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

38. McCann, Laurie – Attorney for amicus curiae AARP.

39. McClain, Sherron T. – Former attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

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

41. Montag, Coty – Attorney for amicus curiae the NAACP Legal Defense and Education Fund, Inc.

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

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

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

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

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

49. Postman, Warren – Attorney for amicus curiae Chamber of Commerce of the United States.

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

51. Reynolds American Inc. (RAI) – Publicly held company and parent company of Defendant-Appellee R.J. Reynolds Tobacco Company.

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

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

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

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

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

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

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

60. Smith, Dara – Attorney for amicus curiae AARP.

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

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

63. Stroup, Robert H. – Attorney for amicus curiae the NAACP Legal Defense and Education Fund, Inc.

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

65. Swarns, Christina – Director of litigation for amicus curiae the NAACP Legal Defense and Education Fund, Inc.

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

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

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

69. Villarreal, Richard M. – Plaintiff-Appellant.

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

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

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

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April 25, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae discloses the following:

Retail Litigation Center, Inc. is not a publicly-held corporation or other publicly-held entity, Retail Litigation Center, Inc. has no parent corporation, and no publicly-held company owns 10% or more stock in Retail Litigation Center, Inc.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Retail Litigation Center, Inc. (RLC) respectfully submits this brief with the consent of the parties. This brief urges the Court to affirm the district court's ruling below and, therefore, supports the position of the Defendants-Appellees, R.J. Reynolds Tobacco Co., *et al.*[1]

The RLC is a public policy organization that identifies and participates in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases.

The RLC's members are employers or representatives of employers subject to the Age Discrimination in Employment Act, as amended, 29 U.S.C. §§ 621 *et seq*. (ADEA), as well as other federal and state labor and employment statutes and regulations. As potential defendants to disparate impact age discrimination

[1] The RLC certifies that no party or counsel for a party authored this brief in whole or in part; no party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and no person other than Amicus Curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

litigation by unsuccessful job applicants, the RLC's members have a direct and ongoing interest in the issues presented in this appeal. The RLC believes that the district court ruled correctly that Section 4(a)(2) of the ADEA does not authorize claims of disparate impact age discrimination in hiring. This issue is important to the RLC's members and many other private sector employers that routinely engage in college-campus recruiting, internships for new entrants into the workforce (including disadvantaged youth), veterans recruiting programs, and other similar hiring practices that, if the district court's decision were to be reversed, could result in significant potential liability under a disparate impact theory of age discrimination.

Because of its interest in the application of the nation's equal employment laws, the RLC has filed numerous briefs amicus curiae in cases before the U.S. Supreme Court and U.S. circuit courts of appeal involving the proper construction and interpretation of federal employment discrimination laws. Thus, the RLC has both an interest in, and a familiarity with, the issues and policy concerns involved in this case. The RLC seeks to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of its experience in these matters, the RLC is well situated to brief the Court on the

relevant concerns of the retail business community and the significance of this case to employers.

STATEMENT OF THE ISSUE

I. Does §4(a)(2) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(a)(2), create a disparate impact cause of action for unsuccessful applicants for employment.

SUMMARY OF THE ARGUMENT

I. Plaintiff-Appellant's claims take aim at recruiting strategies that are used by employers, including the nation's leading retailers, to engage college students, recent college graduates, and other candidates with limited work experience for entry-level positions. These practices provide important social benefits, such as creating employment opportunities for new entrants to the workforce, including underserved and diverse youth and veterans seeking to transition from the military. If the Court were to hold that Section 4(a)(2) of the ADEA creates a disparate impact cause of action for job applicants, it would subject the RLC's members in the retail industry and countless other employers to class litigation and potential liability for these time-tested recruiting practices, which in turn would discourage employers from participating in programs that are intended to benefit—and in fact do benefit—a broad range of new entrants into the workforce.

II. Plaintiff-Appellant and amicus curiae the Equal Employment Opportunity Commission ("EEOC" or "Commission") argue that the Commission's 2012 "reasonable factor other than age" ("RFOA") regulation, 29 C.F.R. § 1625.7(c), should be interpreted as supporting the theory that Section 4(a)(2) of the ADEA extends to applicants for employment and that the Court should defer to that interpretation. Such a reading of the RFOA regulation is not entitled to deference because (1) it is contrary to the clear and unambiguous statutory text and (2) because the RFOA regulation does not purport to interpret Section 4(a)(2) at all, let alone address the question of whether it extends to applicants for employment.

Plaintiff-Appellant and the EEOC also argue that the EEOC's position is entitled to *Auer* deference based on a few hypothetical examples presented in the preamble to the RFOA regulation. Those examples provide scant evidence for the Court to find that the EEOC actually interpreted Section 4(a)(2) in its RFOA regulation or that it did so in a fair and considered way. Moreover, the assumption that underlies those few examples – that job applicants may be able to bring disparate impact claims under the ADEA – directly contradicts a second assumption that runs throughout the preamble; namely, that the theory of disparate impact age discrimination will extend to only a *very few* job actions. Based on that second assumption, the preamble to the RFOA regulation represents the costs and

burdens to employers of complying with that regulation as being minimal. If, however, Section 4(a)(2) of the ADEA does authorize disparate impact claims by job applicants, then those costs and burdens would be exponentially greater than the EEOC has acknowledged. Thus, insofar as the EEOC can be said to have interpreted Section 4(a)(2) based on a few hypothetical examples, its interpretation is entitled to no deference because it either failed to analyze, or misrepresented, the actual costs and burdens that such an interpretation would impose on employers.

ARGUMENT

I. Disparate Impact Failure-To-Hire Claims By Applicants For Employment Are Inconsistent With Long-Established Recruiting Practices And Would Undermine Legitimate Efforts To Benefit New Entrants To The Workforce, Including Underserved And Diverse Populations.

Plaintiff-Appellant's Complaint takes aim at the common hiring practice of recruiting college students, recent college graduates, and candidates with limited work experience for entry-level positions. *See* Complaint ¶¶ 46-47 (asserting that practices of targeting candidates "2-3 years out of college" or "[r]ecent college grad[s]" and candidates with "1-2 years' experience" had disparate impact based on age) (alteration in original).

Like many of the nation's leading employers, the RLC's members participate in college-campus recruiting, job fairs, conferences, and a variety of other events and programs designed to engage current students, recent graduates,

and veterans. By their very nature, these practices tend to attract a greater proportion of younger candidates than older candidates. As such, a holding that §4(a)(2) of the ADEA authorizes disparate impact claims by job applicants would upset these time-tested, commonplace, and common sense recruiting practices by subjecting countless employers to the threat of class litigation and liability.

Despite taking direct aim at college recruiting and related practices in his Complaint, Plaintiff-Appellant now argues that those practices would *not* be imperiled by a ruling in his favor, so long as they expanded the pool of prospective employees. (Plaintiff-Appellant's En Banc Br. at 37-38.) Of course, this argument ignores the fact that employers' recruiting budgets are not unlimited and that any decision to focus those limited resources on practices that tend to attract less-experienced applicants necessarily reduces the resources available for other recruiting efforts.

Plaintiff-Appellee also argues that college recruiting and other beneficial recruiting practices are not threatened by his theory of disparate impact liability because a fact finder might, in a particular case, ultimately determine that a practice was based on "reasonable factors other than age." (*Id*. at 38-39.) This argument sidesteps the reality that such a finding would only be reached after protracted discovery and litigation, not on a motion to dismiss for failure to state a claim. Thus, despite the availability of the RFOA defense, the specter of

substantial discovery, other litigation expenses, and potential liability from disparate impact class litigation is likely to lead employers to abandon these practices.

That outcome would be unfortunate. These practices provide a ready source of qualified and active job seekers, allow employers to better leverage their limited recruiting resources, enable employers to efficiently recruit entry-level employees they can train for higher-level positions, and, as is illustrated below, provide important social benefits by helping employers reach traditionally underserved populations and improve racial and ethnic diversity in their workforce.

INROADS is one example of the type of program that could be adversely affected by a holding that §4(a)(2) authorizes disparate impact claims by job applicants. The mission of INROADS is to develop and place talented underserved youth in business and industry and to prepare them for corporate and community leadership.[2] Employers, including many of the RLC's members, benefit from participation in INROADS programs, which afford access to qualified interns from diverse racial, ethnic, and socio-economic backgrounds and provide those interns with support to transition from intern to employee.

[2] *See* http://www.inroads.org/employers/inroads-advantage (last visited April 18, 2016) (describing INROADS programs).

The White House has created a similar program to encourage and assist public and private-sector employers in recruiting low-income and disadvantaged youth. This initiative, called Summer Jobs+, provides an online job bank where participating employers can post, and youth can search for, employment opportunities.[3] Many of the RLC's members participate in this program as well.

The RLC's members also participate in a variety of events and conferences intended to attract current students and recent graduates from underserved and diverse backgrounds. These include participation in periodic recruiting events sponsored by the following organizations, to name just a few: the Association of Latino Professionals in Finance & Accounting, the Consortium Graduate School of Management (whose mission is to reduce the under-representation of African Americans, Native Americans, and Hispanic Americans in education and business); the nation's various Historically Black Colleges and Universities; Lime (a development program for disabled students designed to, among other things, connect them with corporate internship opportunities); Management Leadership for Tomorrow (a program for minority students designed to prepare them for career success post-graduation); the National Association of Asian MBAs; the National Association of Black Accountants; the National Black MBA Association; the

[3] *See* http://www.dol.gov/summerjobs/Employers.htm (last visited April 18, 2016) (describing Summer Jobs+ program).

National Society of Hispanic MBAs; Reaching Out MBA (an annual conference of LGBT graduate and business students); and the Service Academy Career Conference (a job fair for military service academy alumni).

In addition, the RLC's members participate in a variety of veterans recruiting programs, including programs administered by the federal Department of Veterans Affairs and the Veterans Employment Center. The latter encourages employers to create recruiting programs for veterans and to make commitments to hire a particular number of veterans within a specified period of time.[4] Members of the RLC have made such commitments. Because the average age of veterans entering the job force is under 40, an enterprising plaintiff's attorney could argue that participation in these programs has a disparate impact on older applicants, were the Court to rule in Plaintiff-Appellant's favor.[5]

Simply put, a holding in Plaintiff-Appellant's favor would place the RLC's members and other employers on the horns of an untenable dilemma. Do they continue to participate in college job fairs and beneficial programs like those

[4] *See* https://iris.custhelp.com/app/answers/detail/a_id/1489 (last visited April 18, 2016) (describing veterans' recruiting programs).

[5] *See* Bureau of Labor Statistics, U.S. Department of Labor, Demographics of Gulf War-era II veterans, http://www.bls.gov/opub/ted/2010/ted_20100805.htm (last visited April 18, 2016) ("[a]mong recent veterans, 63 percent of men and 72 percent of women were under the age of 35, compared with 37 percent of nonveteran men and 29 percent of nonveteran women").

sponsored by INROADS, the White House, the Veterans Employment Center, and the other organizations listed above, or do they abandon them in order to mitigate the risks created by such a holding? If companies abandoned participation in job fairs and other programs, both students and colleges (which have a strong interest in helping their students obtain employment) would be harmed, as would underserved and diverse candidates.

This dilemma fortifies the conclusion that Congress acted deliberately when it omitted "applicants for employment" from §4(a)(2) of the ADEA, because the contrary conclusion would work to disadvantage not only employers and new entrants to the workforce, but also the very populations whom Title VII and the nation's other civil rights laws were designed to protect. Certainly that was not Congress's intent.

II. The EEOC's "Interpretation" Is Not Entitled To Deference.

As Judge Vinson explained in his dissent to the original panel decision, Op. at 40-42 (Vinson, J., dissenting), the plain and clear language of §4(a)(2), the structure of the ADEA as a whole, and the history of amendments to both the ADEA and Title VII show that §4(a)(2) unambiguously excludes external applicants for employment. Thus, it is unsurprising that, as Judge Vinson observed, a finding of ambiguity (where none exists) conflicts with the views of every Justice in *Smith v. City of Jackson*, 544 U.S. 228 (2005), as well as with the holding of

every federal court of appeals and district court that has considered the issue. *See* Op. at 39 (Vinson, J., dissenting). Nonetheless, Plaintiff-Appellant and amicus curiae the EEOC argue that the EEOC's "reasonable factor other than age" (RFOA) regulation, 29 C.F.R. § 1625.7(c), should be interpreted as supporting the theory that Section 4(a)(2) extends to applicants for employment, and that the Court should defer to that interpretation.[6]

Despite their invocation of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), this Court does not apply *Chevron* deference "when a statutory command of Congress is unambiguous or the regulation is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1320 (11th Cir. 2011). Thus, *Chevron* deference cannot be granted here, because §4(a)(2) clearly and unambiguously excludes applicants for employment. Even if §4(a)(2) were ambiguous, the EEOC's RFOA regulation cannot be relied on in this case because it relates to an entirely different section of the ADEA and does not purport to interpret §4(a)(2); it does not analyze whether that section extends to applicants for employment; and it does not address whether disparate impact claims by applicants are permitted.

[6] While the discussion that follows focuses on the question of whether the EEOC's RFOA regulation is entitled to deference as it relates to the issue presented on this appeal, the RLC joins the positions articulated by Defendants-Appellees in their brief as to why Plaintiff-Appellant's other arguments in support of his disparate impact hiring claim must fail.

Faced with the RFOA regulation's complete silence on those topics, the EEOC, in its brief, attempts to shoehorn an "interpretation" into three hypothetical examples found in the regulation's preamble. (En Banc Br. of Amicus Curiae EEOC at 22-23.) "Of course, the framework of deference set forth in *Chevron* does apply to an agency *interpretation* contained in a regulation." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (emphasis added).

Although the EEOC also makes reference to *Auer v. Robbins*, 519 U.S. 452 (1997), deference under *Auer* is unwarranted where "[n]othing in the regulation even arguably" addresses a topic, and thus the regulation is not ambiguous with respect to that topic. *Christensen*, 529 U.S. at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous"). Again, the RFOA regulation itself makes no reference to §4(a)(2), is entirely silent on the topic of disparate impact claims by applicants, and thus simply cannot be characterized as "ambiguous" with respect to the meaning of statutory language that it does not purport to address. As such, any deference to the EEOC's position based on the three hypothetical examples in the preamble would impermissibly "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588.

Moreover, even in those cases where an agency's interpretation of a regulation is appropriately analyzed under the *Auer* framework because the

regulation is ambiguous, it is still the courts who must ultimately decide whether a regulation actually means what the agency claims it says. *See Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2166 (2012). Thus, *Auer* deference is unwarranted "when the agency's interpretation is plainly erroneous or inconsistent with the regulation" or "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment." *Id*. (internal quotation marks omitted).

As noted, the EEOC argues that the incorporation of three hypothetical examples in the regulation's preamble proves that the agency interpreted §4(a)(2) in its RFOA regulation. However, those examples provide scant evidence for the Court to conclude that the EEOC did, in fact, interpret §4(a)(2). Furthermore, as is discussed in more detail below, insofar as those examples may reflect an assumption on the EEOC's part that job applicants should be able to bring disparate impact claims under the ADEA, that assumption directly contradicts a second assumption that runs throughout the preamble—namely, that the theory of disparate impact age discrimination will extend to only a *very few* job actions. This internal inconsistency provides ample reason to suspect that the Commission's position now does not reflect a "fair and considered judgment" at the time that the regulation was promulgated.

Like the RFOA regulation itself, the preamble does not purport to interpret §4(a)(2). *See* Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, 77 FR 19080-02, at *19082 (regulation was "designed to conform existing regulations to recent Supreme Court decisions and to provide guidance about the application of the RFOA affirmative defense"). Nowhere in the preamble is there a discussion of the meaning of the term "individual" in §4(a)(2). For that matter, just like with the RFOA regulation, the language of §4(a)(2) is not quoted, cited, or even referenced once in the preamble.

The first example from the preamble on which Plaintiff-Appellant and the EEOC rely addresses the "reasonable" prong of the RFOA defense. It poses a hypothetical situation where candidates for jobs in a meat processing plant are required to pass a physical strength test. *Id*. at *19084. The preamble suggests that it would be reasonable for the employer to design a test that accurately measures the ability to perform the job, but that "[i]t would be manifestly unreasonable, however, for the employer to administer the test inconsistently, evaluate results unevenly, or judge test-takers unreliably." *Id*. Notably, this example does not distinguish between internal candidates, who because they are "employees" may proceed on a disparate impact theory under the express language of §4(a)(2), and external candidates, who may not. *See E.E.O.C. v. Allstate Ins. Co.*, 528 F.3d 1042, 1048 (8th Cir. 2008) ("rehire" policy could be challenged for disparate impact

under §4(a)(2) because it "deprive[d] a specific group of … *employees* of employment opportunities") (emphasis added), *reh'g en banc granted, opinion vacated* (Sept. 8, 2008).[7]

In addition, this example—with its focus on an employer who uses a test "inconsistently" or "unevenly"—appears to contemplate a claim of *disparate treatment*, not one of disparate impact, where the focus would be on policies or practices that are applied neutrally. That is, nothing about this example shows that the EEOC was actually analyzing §4(a)(2) or construing it to impose disparate impact liability in the context of pre-employment tests of external applicants.

The next example posits a hypothetical physical fitness test that "disproportionately exclude[s] older and female applicants." 77 FR 19080-02 at *19086. Again, the example does not specify whether it refers to internal applicants, and so reaches just "employees" referenced in §4(a)(2), or if it is meant to sweep in external applicants as well. Further, the example is offered not as an analysis of §4(a)(2), but rather to explain how the RFOA defense under the ADEA functions differently than the "business necessity" defense under Title VII. *Id*. That is, the example highlights how the ADEA diverges from Title VII, with its

[7] Because the *Allstate* case settled after the Eighth Circuit granted rehearing *en banc*, the full court did not have an opportunity to reconsider whether former employees applying for rehire are also foreclosed from bringing disparate impact hiring claims under §4(a)(2).

comprehensive administrative scheme as set forth in the Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. § 50.14, 29 C.F.R. § 1607 ("Uniform Guidelines"), when it comes to hiring claims.

The Uniform Guidelines require employers to collect race and gender information about applicants and then analyze race and gender-based adverse impact in hiring, mandate formal validation of selection processes that have adverse impact, and establish highly detailed technical standards for how those requirements are to be achieved and documented. That the EEOC has promulgated no comparable comprehensive administrative scheme for the ADEA makes manifest the improvidence of imposing disparate impact liability on employers under that statute, to say nothing of doing so based on a scant few hypothetical examples found in the preamble to an inapposite regulation.

The third, and final, example in the preamble also focuses on the "reasonable" element of the RFOA defense. It suggests that an employer "whose stated purpose is to hire qualified candidates could reasonably achieve this purpose by ensuring that its hiring criteria accurately reflect job requirements." 77 FR 19080-02 at *19087. Like the other two examples, it is not clear whether the EEOC meant to refer to internal candidates only or to include external candidates as well. In addition, in focusing on relatedness to job requirements, the example appears to reflect an effort to import aspects of Title VII's "job-related and

consistent with business necessity" standard into the ADEA, an approach that the Supreme Court has expressly rejected in the ADEA context. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 97 (2008) ("the business necessity test should have no place in ADEA disparate impact cases"). In any event, like the other two hypotheticals, there is nothing about this example that suggests the EEOC actually interpreted §4(a)(2) in deciding to include it.

Even if these three examples were taken as evidence that the EEOC actually had exercised its interpretive authority and arrived at an assumption that §4(a)(2) extends disparate impact liability to hiring claims by external applicants, that assumption is contradicted by another assumption that runs throughout the preamble. In particular, in assessing the economic and administrative burdens of requiring employers to perform disparate impact analyses as an element of the RFOA defense, the Commission betrayed an apparent belief that such analyses would *not* extend to hiring claims. Most notably, the Commission attempted to show that the cost to employers of analyzing disparate impact due to age would be minimal because only a "few job actions would be subject to disparate impact analysis." 77 FR 19080-02 at *19091; *see also id.* at *19093 ("few job actions involve neutral employment practices that disproportionately harm older workers"; "a disparate impact analysis is appropriate in only a small proportion of job actions.") The Court need look only to the allegations in the Complaint to see that

employers' potential exposure—and thus the need to proactively analyze potential disparate impact based on age—would extend well beyond just "a few" job actions if §4(a)(2) encompasses hiring claims from external applicants. Plaintiff-Appellant does not target just a few job actions; rather, he claims that Defendants-Appellees' recruiting practices resulted in "hundreds, if not thousands, of qualified applicants" over the age of 40 being denied jobs. (Complaint ¶ 24.)

Similarly, the preamble to the RFOA regulation assumes that analyzing potential disparate impact based on age will not impose new or significant burdens on employers because they already assess adverse impact based on race and gender:

> [The EEOC] does not anticipate that this final rule will motivate large numbers of employers to perform additional disparate impact analyses for the following reasons.… [T]he current regulation assumed that employers would routinely analyze job actions susceptible to disparate impact claims for potential adverse effects on older workers, and many employers, especially larger ones, already do so.

77 FR 19080-02 at *19091 (assuming also that because "[l]arger businesses already routinely employ sophisticated methods of detecting disparate impact on the basis of race, ethnicity, or gender, and therefore already possess the expertise and resources required to analyze age data for impact," performing additional analyses of age would "take[] little time, the associated costs will be minimal.").

As one of the commenters to the EEOC's Notice of Proposed Rulemaking for the RFOA regulation observed, conducting disparate impact analysis like

employers do under Title VII would require them to collect age information. The Commission disagreed that doing so was necessary or would impose any burden, because "[g]enerally, employees' birth dates are available to employers because they are recorded in personnel files." *Id.* at 19093. Of course, unlike for current employees, employers have no "personnel files" to consult for job applicants. And tellingly, in rejecting that commenter's concern, the Commission made no mention of the collection or availability of age information from applicants. In other words, when it comes to assessing (or attempting to minimize) the burdens of complying with the RFOA regulation, the EEOC itself appears to assume that a disparate impact theory of age discrimination does *not* extend to external applicants.

Moreover, if it had actually been the EEOC's position at the time it promulgated the RFOA regulation that employers should shoulder the burden of collecting and analyzing age information from external applicants, then the Commission clearly failed to acknowledge the risk of additional litigation and potential liability under both federal and state law that would follow. For example, in a separate regulation addressing the ADEA, the EEOC takes the position that it could find inquiries about an applicant's age to create an inference of discriminatory intent. *See* 29 C.F.R. § 1625.5 ("because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination against older individuals, employment application forms that

request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act"). If employers were to collect information about applicants' ages in order to assess the potential disparate impact of their hiring practices, they would do so only at the risk of private plaintiffs—or the Commission itself—leveraging that fact as proof of discriminatory animus against older workers. Indeed, the Commission has taken that very position in recent litigation. *See E.E.O.C. v. Timeless Investments, Inc.*, 734 F. Supp. 2d 1035, 1066 (E.D. Cal. 2010) (accepting EEOC's argument that asking applicants to disclose their age on applications was "sufficiently specific and substantial evidence to indicate pretext" for disparate treatment claims).[8]

Even more problematic, especially for national retailers, at least seventeen states have enacted statutes that expressly prohibit inquiries about an applicant's

[8] In addition, plaintiffs have been more than willing to argue that inquiring about applicants' age or date of birth creates an inference of discriminatory intent. *See, e.g.*, *Carden v. Chenega Sec. & Prot. Servs., LLC*, No. CIV. 2:09-1799 WBS, 2011 WL 1807384, at *7 (E.D. Cal. May 10, 2011) (that employer asked applicants to disclose age created genuine dispute as to whether employer's reason for failing to hire plaintiff was pretext for age discrimination); *Burton v. Texas Parks & Wildlife Dep't*, No. A-09-CA-298-LY, 2009 WL 1231768, at *4 (W.D. Tex. May 1, 2009) (holding allegation that employer required applicants to disclose age supported claim of discrimination under ADEA; denying employer's Rule 12(b)(6) motion to dismiss); *Cf. Triola v. Snow*, 305 F. Supp. 2d 264, 269 (E.D.N.Y. 2004) (concluding that plaintiff could not establish that action took place in circumstances giving rise to inference of discrimination, in part because application did not call for applicants to disclose date of birth).

membership in protected classes, including age.[9] On their face, those state laws prohibit inquiries about race and gender as well. But such inquiries are permitted—indeed, mandated—under Title VII's Uniform Guidelines, which preempts the state law prohibitions. As noted above, there is no parallel comprehensive federal administrative scheme mandating the collection of age data. As such, employers operating in those seventeen states would engage in an unlawful employment practice were they to collect from applicants the data necessary to conduct disparate impact analyses based on age. Of course, if the assumption running throughout the EEOC's discussion of the costs and burdens of its RFOA regulation—that employers are *not* required to collect data on or analyze the potential age-based impact of their hiring practices—is correct, then employers would not be trapped between the rock and hard place that the assumption advanced by the EEOC in its amicus brief would otherwise create.

Finally, also on the topic of costs and burdens of the RFOA regulation, one of the commenters expressed the concern that the regulation would require employers to compare the impact of an employment practice on employees of

[9] *See* Alaska Stat. §18.80.220(a)(3); Cal. Gov't Code §12940(d); Colo. Rev. Stat. §24-34-402(1)(d); Haw. Rev. Stat. §378-2(a)(1)(C); Kan. Stat. §44-1113(a)(4); Me. Rev. Stat. tit. 5, §4572(1)(D)(1); Minn. Stat. §363A.08, subd. 4; Mo. Stat. §213.055(3); N.H. Rev. Stat. §354-A:7(III); N.J. Stat. §10:5-12(c); N.Y. Exec. Law §296(1)(d); Ohio Rev. Code §4112.02(E)(1); Or. Rev. Stat. §659A.030(1)(d); R.I. Gen. Laws §28-5-7(4)(i); Utah Code §34A-5-106(1)(d); Wash. Rev. Code §49.44.090(2); W. Va. Code §5-11-9(2); *and* Wis. Stat. §111.322(2).

every age with its impact on employees of every other age. 77 FR 19080-02 at *19093. The EEOC dismissed that concern because, in its view, "neither existing law nor this regulation would require [an employer] to compare the practice's impact on individuals of every age with its impact on individuals of every other age" and thus a "prudent employer" would not be expected to take the step of assessing impact against age subgroups. *Id.*

The circuit courts of appeal that have considered the question of whether the ADEA authorizes disparate impact claims by employees on behalf of age subgroups have uniformly concluded that it does not. *See EEOC v. McDonnell Douglas Corp*., 191 F.3d 948, 950–51 (8th Cir. 1999) (proposed class of employees age 55 and older); *Lowe v. Commack Union Free School Dist*., 886 F.2d 1364, 1373 (2d Cir. 1989) (proposed class of applicants age 50 and older), *cert. denied*, 494 U.S. 1026 (1990). In refusing to permit employees to advance subgroup disparate impact claims under the ADEA, the Eighth Circuit noted the following:

> [I]f disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer ... to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force.

McDonnell Douglas Corp., 191 F.3d at 951. Nonetheless, even in the face of controlling circuit authority foreclosing such claims, the EEOC continued to

instigate disparate impact litigation on behalf of age subgroups of employees. *See E.E.O.C. v. City of Independence, Mo*, No. 04-0877-CV-W-FJG, 2005 WL 2898021, at *6 (W.D. Mo. Oct. 31, 2005) (noting that despite Eighth Circuit's ruling in *McDonnell Douglas Corp.*, EEOC was "still attempting to carve out or create sub-groups"; dismissing the EEOC's disparate impact claim on behalf of a subgroup of workers over the age of 60). In an environment where the EEOC may continue to pursue disparate impact claims on behalf of age subgroups of employees, it would be imprudent for an employer *not* to assess the risk of subgroup claims. The costs, risks, and other burdens of doing so would undeniably be exponentially less if disparate impact liability under the ADEA adheres to just "a few job actions" involving employees, as the Commission assumes throughout its preamble, and not to a broad range of potential hiring claims.

The EEOC's RFOA regulation does not purport to interpret the (unambiguous) language of Section 4(a)(2). Nor does the preamble to the regulation purport to do so. Insofar as a handful of hypothetical examples referenced in the preamble may assume the possibility of disparate impact hiring claims by external applicants, that assumption contradicts other assumptions that the Commission made when attempting to minimize or dismiss concerns about the costs and burdens that its regulation imposes on employers. For all of these reasons, the EEOC's position that its RFOA regulation interprets Section 4(a)(2) to

authorize disparate impact claims by external applicants is entitled to no deference at all, and must be rejected.

CONCLUSION

For the foregoing reasons, the RLC respectfully urges the Court to affirm the district court's Order granting Summary Judgment to Defendants-Appellees R.J. Reynolds Tobacco Co., *et al.*

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,449 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font, in text and footnotes, using Microsoft Word 2013.

April 25, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2016, I electronically filed the foregoing En Banc Brief of the Retail Litigation Center, Inc. as Amicus Curiae in Support of Defendants-Appellees' with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the Court's CM/ECF electronic filing system.

I also certify that the following parties are not registered CM/ECF users and service will be accomplished via U.S. Mail.

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