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)

UNOPPOSED MOTION OF THE RETAIL LITIGATION CENTER, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, 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.

The undersigned counsel further certifies to the belief that the certificate of interested persons filed by Defendants-Appellees is complete.

Respectfully submitted,

January 14, 2016

/s/ Joseph G. Schmitt
Joseph G. Schmitt

UNOPPOSED MOTION

The Retail Litigation Center (RLC) hereby moves for leave to file a brief amicus curiae in support of Defendant-Appellees' petition for rehearing *en banc*. All parties have consented to the filing of this amicus brief. A copy of the proposed brief is attached to this motion.

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 member 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 litigation, the RLC's members have a direct and ongoing interest in the issues presented in this appeal. In particular, the RLC believes that the panel incorrectly ruled that Section 4(a)(2) of the ADEA authorizes claims of disparate impact age discrimination in hiring.

This issue is of great importance to the RLC's members and many other private sector employers that routinely engage in college-campus recruiting, internship programs for new entrants into the workforce including disadvantaged youth, veterans recruiting programs, and other similar hiring practices that, if the panel's decision is allowed to stand, could create 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 matter that has 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.

CONCLUSION

For all of the foregoing reasons, the Retail Litigation Center respectfully requests that the Court grant its motion and accept the accompanying brief amicus curiae.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2016, I electronically filed the foregoing Unopposed Motion of the Retail Litigation Center for Leave to File a Brief Amicus Curiae in Support of Defendants-Appellees' Petition for Rehearing *En Banc* 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, and that all participants in the case are registered CM/ECF users and service will be accomplished by the Court's CM/ECF system.

January 14, 2016 /s/ Joseph G. Schmitt
Joseph G. Schmitt

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The undersigned counsel further certifies to the belief that the certificate of interested persons filed by Defendants-Appellees is complete.

Respectfully submitted,

January 14, 2016

/s/ Joseph G. Schmitt
Joseph G. Schmitt

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court with respect to the question of whether §4(a)(2) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(a)(2), authorizes disparate impact claims for failure to hire: *Smith v. City of Jackson*, 544 U.S. 228 (2005).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance; namely, whether §4(a)(2) of the ADEA authorizes unsuccessful applicants for employment to assert disparate impact claims.

January 14, 2016

/s/ Joseph G. Schmitt
Joseph G. Schmitt

ATTORNEY OF RECORD FOR
RETAIL LITIGATION CENTER

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STATEMENT OF THE ISSUE

1. Does §4(a)(2) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(a)(2), authorize unsuccessful applicants for employment to state disparate impact claims.

INTRODUCTION AND STATEMENT OF FACTS

The Retail Litigation Center ("RLC") is a public policy organization whose members include many of the country's largest and most innovative retailers.[1] The RLC's members are employers or representatives of employers subject to the ADEA. As potential defendants to disparate impact litigation brought by unsuccessful applicants, the RLC's members have a direct and ongoing interest in the issue presented in this matter.

In his complaint, Plaintiff-Appellant takes aim at a widespread practice—namely, employers recruiting college students, recent college graduates, and other candidates with limited work experience for entry-level positions. *See* Complaint ¶¶ 46-47 (asserting that practices of targeting "[r]ecent college grad[s]" or candidates "2-3 years out of college" or with "1-2 years' experience" had disparate impact based on age) (alteration in original). This issue is of great importance to

[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).

the RLC's members, as well as to the many other employers that routinely engage in college-campus recruiting, internship programs for disadvantaged youth and other new entrants to the workforce, veterans recruiting programs, and similar practices that, if the panel's decision were to stand, could impose significant potential liability on employers.

ARGUMENT

I. The Panel's Decision Is Inconsistent With Established Recruiting Practices And Detrimental To Legitimate Efforts To Benefit New Entrants To The Workforce.

Plaintiff-Appellant's Complaint takes aim at the commonplace and common sense hiring strategies of recruiting college students, recent college graduates, and candidates with limited work experience for entry-level positions. 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 targeting current students or recent graduates. By their very nature, these practices tend to attract a greater proportion of younger candidates than older candidates. The panel's holding that §4(a)(2) authorizes disparate impact claims by job applicants upsets these time-tested recruiting practices.

While such practices may ultimately be upheld as being based on "reasonable factors other than age" in a particular case, that would only occur after protracted discovery and litigation, not on a motion to dismiss for failure to state a

claim. The specter of substantial discovery, other litigation expenses, and potential liability from disparate impact class litigation is likely to lead employers to abandon such practices. This outcome would truly be unfortunate, because these programs currently 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 the panel's decision. 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 provide access to qualified interns from diverse racial, ethnic, and socio-economic backgrounds and provide those interns with support to transition into permanent positions.

The White House has created a similar program to encourage and assist public and private-sector employers in recruiting low-income and disadvantaged

[2] *See* http://www.inroads.org/employers/inroads-advantage (last visited January 10, 2016) (describing INROADS programs).

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 veterans recruiting programs, including programs administered by the 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 now easily argue that participation in these programs has a disparate impact on older applicants.[5]

The panel's endorsement of the theory that recruiting practices that target college students, recent graduates, and other new entrants into the workforce could give rise to disparate impact age discrimination liability creates a dilemma for

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[3] *See* http://www.dol.gov/summerjobs/Employers.htm (last visited January 10, 2016) (describing Summer Jobs+ program).

[4] *See* https://iris.custhelp.com/app/answers/detail/a_id/1489 (last visited January 10, 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 (visited January 10, 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").

employers. Do they continue to participate in beneficial programs like INROADS and Summer Jobs+, despite the threat of age discrimination class litigation and liability? Or do they abandon these tools for recruiting and retaining underserved and diverse candidates in order to mitigate the risks created by the panel's decision? 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 works to disadvantage 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 Panel Erred In Deferring To The EEOC's "Interpretation."

As Judge Vinson's dissent explained, Op. at 40-42 (Vinson, J., dissenting), and as set forth in detail in Defendants-Appellees' Petition for Rehearing *En Banc*, 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 all show that §4(a)(2) unambiguously excludes external applicants for employment. Thus, it is unsurprising that, as Judge Vinson observed, the panel's 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).

The panel compounded that error by relying on the EEOC's "reasonable factor other than age" (RFOA) regulation, 29 C.F.R. § 1625.7(c). Despite the panel's 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 does not apply here because §4(a)(2) clearly and unambiguously excludes applicants for employment. Even if §4(a)(2) were ambiguous, the EEOC's RFOA regulation would not apply here for the following reasons: 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 authorized.

Faced with the RFOA regulation's complete silence on those topics, the panel attempted to glean the EEOC's "interpretation" from three hypothetical examples found in the regulation's preamble. "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). Likewise, although the panel references *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 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 even purport to address. As such, the panel's deference to the EEOC's position impermissibly "permit[s] the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588.

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 that ultimately decide whether a regulation 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 panel determined that the EEOC had interpreted §4(a)(2) because the agency incorporated three hypothetical examples in the RFOA regulation's preamble. Those examples provide scant evidence for the Court to

conclude that the EEOC had, in fact, interpreted §4(a)(2), let alone done so in a considered and reasonable way. Moreover, as is discussed in more detail below, insofar as those examples may reflect the EEOC's assumption 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—that the theory of disparate impact age discrimination will extend to only a very few job actions.

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 in the RFOA regulation, the language of §4(a)(2) is not quoted, cited, or even referenced once in the preamble. As such, the three hypothetical examples are not based on an "interpretation" of §4(a)(2).

The first example, which addresses the "reasonable" prong of the RFOA defense, 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).[6]

In addition, this example—with its focus on an employer who uses a test inconsistently or unevenly—seems 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. Nothing about this example shows that the EEOC actually analyzed §4(a)(2) or construed it to impose disparate impact liability in the context of pre-employment tests of external applicants.

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[6] 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).

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 analysis of §4(a)(2), but rather to explain how the "business necessity" defense under Title VII functions differently than the RFOA defense under the ADEA. *Id*. That is, the example highlights how the ADEA diverges from Title VII, with its comprehensive administrative scheme 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 detailed technical standards on 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 examples, 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 are taken as evidence that the EEOC actually exercised its interpretive authority and assumed 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 revealed its 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 "a few" job actions if §4(a)(2) actually 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. Compl. ¶ 24.

Similarly, the preamble 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 pointed out, 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, for job applicants, employers have no “personnel files.” And tellingly, in rejecting that commenter’s concern, the Commission made no mention of the collection or availability of age information from *applicants* as opposed to from employees. 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 the 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 its 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"). Thus, were employers 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.

Even more problematic, especially for national retailers such as the RLC's members, at least seventeen states have enacted statutes that expressly prohibit inquiries about an applicant's membership in protected classes, including age.[7] On

[7] *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).

their face, those state laws also prohibit inquiries about race and gender, 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 by collecting from applicants the data necessary to conduct disparate impact analyses on age. But if they refuse to violate state law, the EEOC could view such refusal as evidence of age discrimination. *See* 77 FR 19080-02*18089 ("an employer that assesses the race- and sex-based impact of an employment practice would appear to act unreasonably if it does not similarly assess the age-based impact.").

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 disparate impact of their hiring practices—is correct, then employers would not be trapped between the rock and hard place created by the contrary assumption that the panel's decision now elevates to the status of law.

CONCLUSION

For all of the foregoing reasons, the Retail Litigation Center respectfully urges the Court to grant rehearing *en banc*.

Respectfully submitted,

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January 14, 2016

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the page limitation set forth in Rule 35-6 of the Eleventh Circuit Rules because it is 15 pages long, excluding the parts of the brief exempted by that Rule. This brief complies with the typeface and style requirements of Rule 32(a) of the Federal Rules of Appellate Procedure 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.

January 14, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2016, I electronically filed the foregoing brief of the Retail Litigation Center as Amicus Curiae in Support of Defendants-Appellees' Petition for Rehearing *En Banc* 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, and that all participants in the case are registered CM/ECF users and service will be accomplished by the Court's CM/ECF system.

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