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)

BRIEF AMICUS CURIAE OF THE RETAIL LITIGATION CENTER, INC. IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND 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.

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

Respectfully submitted,

May 4, 2015

/s/ Joseph G. Schmitt
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STATEMENT OF INTEREST OF AMICUS CURIAE

The Retail Litigation Center (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 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

[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).

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 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 district court's decision were to be reversed, 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.

SUMMARY OF THE ARGUMENT

I. Plaintiff-Appellant's claims take aim at recruiting strategies that are regularly used by employers, including the country's leading retailers, to engage college students, recent college graduates, veterans, and other candidates with limited work experience. These commonplace strategies will often result in a greater proportion of younger candidates being recruited and hired than older candidates, but they also provide important social benefits, including creating employment opportunities for new entrants to the workforce such as underserved and diverse youth and veterans who are seeking to transition from a military to a corporate career. These programs can be the key enabler for individuals with limited workplace experience who are seeking to take the initial step towards a rewarding career. If the Court were to hold that Section 4(a)(2) of the ADEA authorizes disparate impact claims on behalf of job applicants, it would subject RLC's members in the retail industry and countless other employers to class litigation and potential liability for such 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 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) of the ADEA extends to applicants for employment and that the Court should defer to that interpretation. The EEOC's interpretation is not entitled to deference under *Chevron*, however, because it is contrary to the clear and unambiguous statutory text and because the regulation does not actually address whether Section 4(a)(2) extends to applicants for employment.

The EEOC also argues that its interpretation 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 conclude that the EEOC interpreted Section 4(a)(2) in its regulation, let alone that it did so in a reasoned 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, that the theory of disparate impact age discrimination will extend to only a very few job actions. Based on that second assumption, the Commission represented that the costs and burdens to employers of complying with its RFOA regulation would be 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 acknowledged. Thus, insofar as the EEOC can be said to have interpreted Section 4(a)(2), its interpretation is entitled to no deference because it either failed to analyze, or misrepresented, the actual costs and burdens that its 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 Be Detrimental To Legitimate Efforts To Benefit New Entrants To The Workforce, Including Underserved And Diverse Populations.

In his complaint, Plaintiff-Appellant takes aim at a ubiquitous hiring practice—namely, employers recruiting recent college graduates 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).

Strategies that target college students, recent college graduates, and candidates with limited work experience will often result in a greater proportion of younger candidates being recruited and hired than older candidates. Thus, if the Court were to hold that Section 4(a)(2) of the ADEA authorizes disparate impact claims on behalf of job applicants, it would subject countless employers to class litigation and potential liability for these commonplace, and common sense, recruiting practices that provide important social benefits.

The benefits of these strategies to the RLC's members, other employers, and the public as a whole include providing a ready source of qualified and active job seekers, allowing employers to better leverage their limited recruiting resources,

enabling employers to efficiently recruit entry-level employees who can be trained for higher level positions, and, as is illustrated below, helping employers reach traditionally underserved populations and improving racial and ethnic diversity in their workforce.

A ruling in Plaintiff-Appellant's favor may well cause the RLC's members and other employers to abandon practices such as, for example, participation in college job fairs, out of fear that such participation could give rise to disparate impact age discrimination litigation and liability. Such a result would deny companies the opportunity to meet large numbers of potential employees at a single location and would also harm students as well as colleges, which have a strong interest in helping their students obtain employment.

INROADS is a good example of the type of program that could be adversely affected if this Court reverses the district court's decision. The mission of INROADS is to develop and place talented underserved youth in business and industry and prepare them for corporate and community leadership. *See* http://www.inroads.com (last visited May 1, 2015) (describing INROADS programs). Employers, including many of the RLC's members, benefit from participating in INROADS programs, which provide them access to qualified interns from diverse racial, ethnic, and socio-economic backgrounds and provide the interns support to transition into permanent positions. These programs

ultimately decrease discrimination and help ameliorate the effect of past prejudice and discrimination. INROADS provides coaching and mentoring to program participants, as well as training and education related to nonverbal skills, communication skills, and professional development, enabling participants to better succeed in the corporate work environment. As noted, this relationship and the ongoing support that the INROADS programs provide ultimately lead to increased intern-to-employee conversion. If the Plaintiff-Appellant's position is correct, and Section 4(a)(2) authorizes disparate impact age discrimination claims when employers target their recruiting efforts toward recent college graduates or applicants with limited work experience, then participation in programS like INROADS could subject these employers to class litigation and potential liability for endeavoring to recruit and retain underserved youth and diverse recent college graduates.

The White House has created a similar program to encourage and assist both public-sector and private-sector employers in recruiting low-income and disadvantaged youth. This federal initiative, called Summer Jobs+, provides an online job bank where participating employers can post, and youth can search for, employment opportunities. *See* http://www.dol.gov/summerjobs/Employers.htm (last visited May 1, 2015) (describing Summer Jobs+ program). Many of the RLC's members participate in this program. If Plaintiff-Appellant is correct, and

recruiting programs that target youth can give rise to disparate impact age discrimination claims, then employers may well be discouraged from participating in government initiatives of this kind that serve the social good.

Like many of the nation's leading employers, the RLC's members also participate in a variety of events and conferences intended to attract current students or 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 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).

The RLC's members also participate in a variety of veterans' recruiting programs, including programs administered by the Veterans Employment Center and the Department of Veterans Affairs. The Veterans Employment Center 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. *See* https://iris.custhelp.com/app/answers/detail/a_id/1489 (last visited May 1, 2015) (describing veterans' recruiting programs). Members of the RLC have made such commitments. An enterprising plaintiff's attorney could argue that participation in these programs has a disparate impact on older applicants because the median and mean ages of veterans entering the job force are under 40. Bureau of Labor Statistics, U.S. Department of Labor, The Economics Daily, Demographics of Gulf War-era II veterans, http://www.bls.gov/opub/ted/2010/ted_20100805.htm (visited May 1, 2015) ("[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").

If Plaintiff-Appellant's theory of disparate impact liability were to prevail, then participation in any of these recruiting events and initiatives could subject an employer to costly class claims and significant potential liability. The unfortunate result may well be to cause employers to abandon their participation in these

programs, to the detriment of the employers and the diverse populations from which these programs help them recruit talent. These considerations fortify the conclusion that Congress acted deliberately when it omitted "applicants for employment" from Section 4(a)(2), as the contrary conclusion would work to disadvantage the very same populations whom Title VII and the nation's other civil rights laws were designed to protect.

Indeed, Plaintiff-Appellant's theory of disparate impact liability would also substantially increase the overall difficulty and cost of recruiting for entry-level positions for the RLC's members and for employers as a whole. Employers would be deprived of the ability to use efficient, time-tested recruiting tools such as internship programs, college job fairs, veterans' recruitment programs, and the other methods described herein. Disparate impact liability would threaten all of these programs and substantially increase the difficulty and cost of recruiting for entry-level positions.

II. The EEOC's Interpretation Deserves No Deference.

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.[2] They base this argument primarily on a handful of hypothetical examples contained in the preamble to the RFOA regulation, in which the EEOC appears to have assumed, without analysis or support, that disparate impact age discrimination claims may be brought by job applicants. Those examples provide slim evidence for the Court to conclude that the EEOC actually interpreted Section 4(a)(2) in its RFOA regulation, let alone that it did so authoritatively. Moreover, the assumption underlying those examples is contradicted by a second assumption that runs throughout the EEOC's 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 EEOC concluded that the costs and burdens to employers of complying with its RFOA regulation would be minimal. If, however, the ADEA does authorize disparate impact claims by job applicants, then those costs would be exponentially greater than the EEOC acknowledged. Either the EEOC meant what it said, and the costs of compliance are minimal because the ADEA does not authorize disparate impact claims by job applicants, or the EEOC did not mean what it said, in which case it misrepresented the true costs and burdens to employers of complying with its RFOA regulation.

[2] 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.

In either case, insofar as the EEOC can be said to have interpreted Section 4(a)(2), that interpretation is entitled to no deference.

In its amicus brief, the EEOC argues that its proposed "interpretation" can be found in its RFOA regulation and is entitled to deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *See* EEOC Br. at 19-20. This Court does not apply *Chevron* deference, however, "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). *Chevron* deference does not apply here because Section 4(a)(2) clearly and unambiguously excludes applicants for employment. Unlike Section 4(a)(1), which expressly prohibits an employer's "fail[ure] or refus[al] to hire" because of age, Section 4(a)(2) says nothing about hiring. Instead, it applies only when an employer "limit[s], segregate[s], or classif[ies] his *employees*" in a way that "adversely affect[s]" their "status as an *employee*." *Id*. (emphasis added).

In addition, as is addressed in more detail in the Defendants-Appellees' brief, the text of the ADEA as a whole confirms that Section 4(a)(2) does not apply to applicants for employment. While the ADEA refers to "applicants for employment" elsewhere, it omits that phrase from Section 4(a)(2), supporting the conclusion that when Congress used the word "individual" in Section 4(a)(2), it was unambiguously expressing a deliberate choice not to make that section apply

to applicants. Because Section 4(a)(2) is not ambiguous, *Chevron* deference is irrelevant. And even if Section 4(a)(2) were ambiguous, the EEOC's RFOA regulation would not be entitled to deference on this point, because it does not purport to interpret Section 4(a)(2) at all, let alone to analyze whether it extends to applicants for employment or authorizes disparate impact claims by such applicants.

Moreover, if there were any ambiguity in Section 4(a)(2), and if the EEOC had exercised its delegated authority in an effort to resolve such ambiguity by interpreting that section in its RFOA regulation, it must also show that its regulation was ambiguous—which it has not done—before the interpretation it proposes here would be entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous[.]").

Even in cases where an agency's interpretation receives *Auer* deference, it is the court that ultimately decides whether a given regulation means what the agency claims it says. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012). *Auer* deference is inappropriate "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).

The EEOC suggests that its supposed "interpretation" warrants deference under *Auer* based on scant evidence—namely, that the preamble to its RFOA regulation poses three hypothetical "examples" that refer to applicants. As is explained below, a close reading of the preamble reveals that the EEOC has not exercised its judgment, let alone done so in a fair, considered, or even reasonable manner.

As a threshold matter, like the regulation itself, the preamble does not purport to interpret Section 4(a)(2) or reflect the exercise of considered judgment regarding the meaning of the prohibitions in that section. *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 Section 4(a)(2); for that matter, the language of Section 4(a)(2) is not quoted, cited, or even referenced once in the preamble, let alone analyzed. In other words, the examples are based not on interpretation of Section 4(a)(2), but rather on an unexplained, and unexamined, assumption that the term "individual" in Section 4(a)(2) sweeps in external job applicants.

The first such 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 successfully, 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 arguably be able to proceed on a disparate impact theory under Section 4(a)(2), and external candidates, who may not. *See, e.g.*, *E.E.O.C. v. Allstate Ins. Co.*, 528 F.3d 1042, 1048 (8th Cir. 2008) ("rehire" policy could be challenged under disparate impact theory under Section 4(a)(2) only because it "deprive[d] a specific group of … employees of employment opportunities"), *reh'g en banc granted*, *opinion vacated* (Sept. 8, 2008).[3]

Moreover, 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

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

are applied neutrally. *See Smith*, 544 U.S. at 265-66 (O'Connor, J., concurring) ("Such a limitation makes sense in disparate treatment cases. A test that harms older workers and is unrelated to the job may be a pretext for—or even a means of effectuating—intentional discrimination."). That is to say, there is nothing about this example that shows that the EEOC actually analyzed Section 4(a)(2) and construed it to impose disparate impact liability in the context of hiring.

The next example posits a hypothetical physical fitness test that "disproportionately exclude[s] older and female applicants." *Id*. at *19086. Again, the example does not specify whether it refers to internal applicants only or if it is meant to include external applicants as well. Further, the example is offered to explain how the business necessity defense under Title VII functions differently than the RFOA defense under the ADEA. *Id*. (employer "would not need to perform a validation study to establish the RFOA defense. In contrast, to establish a Title VII business-necessity defense, the employer would need to validate the test to show that it accurately measured safe and efficient performance.").

That is, the example serves merely to illustrate the differences between the ADEA and Title VII, with its 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, effective September 25, 1978 ("Uniform Guidelines"). That scheme requires employers to track and analyze race-based and gender-based

adverse impact in hiring, mandates formal validation of selection processes and procedures that have adverse impact in order to prove their job-relatedness, and establishes detailed standards on how those requirements are to be achieved and documented. That the EEOC has promulgated no comparable comprehensive administrative scheme for the ADEA highlights the fundamental differences between that statute and Title VII when it comes to the question of hiring, as well as the improvidence of imposing such a scheme on employers based on a scant few hypothetical examples found in the preamble to an inapposite regulation.

The third, and final, such 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." *Id*. at *19087. Like the two examples above, it is not clear whether the EEOC meant to refer only to internal applicants or to include external applicants in this example as well. In addition, in focusing on relatedness to job requirements, the example seems to reflect an effort to import aspects of Title VII's "job-related and consistent with business necessity" standard, a standard which the Supreme Court has expressly rejected in the ADEA context. *See Meacham v. Knolls Atomic Power Lab*., 554 U.S. 84, 97 (2008) ("we are now satisfied that 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 Section 4(a)(2) in deciding to include it.

That the EEOC's position rests on just three hypothetical examples in the preamble to its RFOA regulation makes manifest the impropriety of giving any weight (let alone deferring) to the Commission's assumption that an entirely different provision of the statute, which is not even the subject of the RFOA regulation, somehow authorizes disparate impact claims on behalf of external job applicants.

Moreover, if the assumption underlying these examples is evidence that the EEOC actually did exercise its interpretive authority and conclude that Section 4(a)(2) extends disparate impact liability to hiring claims by external applicants, that assumption is contradicted by other assumptions that run throughout the same preamble. In particular, in assessing the economic consequences of requiring employers to perform disparate impact analyses as an element of the RFOA defense, the Commission appears to have assumed that such analyses would *not* extend to hiring claims. Most notably, the Commission attempts to show that the cost to employers of analyzing disparate impact due to age will be minimal, based on the assumption that only a "few job actions would be subject to disparate-impact analysis." *Id*. at *19091; *see also id*. at *19093 ("few job actions involve neutral employment practices that disproportionately harm older workers"; "[a]s

explained above, 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 assess disparate impact based on age—would extend well beyond "a few" job actions if Section 4(a)(2) does indeed encompass hiring claims. Plaintiff does not target just a few job actions. To the contrary, he claims that Defendants-Appellees' hiring practices resulted in "hundreds, if not thousands, of qualified applicants" over the age of 40 being denied jobs. (Compl. ¶ 24.) In this regard, most of RLC's retail member companies receive, consider, and act on job applications from thousands, and in some cases millions, of individuals in a year. Obviously, that is more than just "a few" job actions.

Similarly, the EEOC's preamble assumes that analyzing potential disparate impact based on age will not impose new or significant burdens on employers because those employers already assess adverse impact based on race and gender:

> [The Commission] 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.

Id. 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 an additional analysis would "take[] little time, the associated costs will be minimal."); *see also id*. at *19093 (disparate impact analysis "is already done by many employers pursuant to existing regulations and case law"); and *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.").

As one of the commenters to the EEOC's Notice of Proposed Rulemaking pointed out, conducting disparate-impact analysis like employers do under Title VII would require them to collect age information. The Commission disagreed, however, that obtaining age data necessary to assess disparate impact would be burdensome, because "[g]enerally, employees' birth dates are available to employers because they are recorded in personnel files." *Id*. at 19093. Tellingly, in rejecting the commenter's concern, the Commission made no mention of collecting age information from applicants as opposed to from current employees. That is, when it comes to the burdens of assessing disparate impact, the preamble assumes that such burdens would apply only with respect to current employees. In

other words, the EEOC appears to have assumed that the disparate impact theory of age discrimination would not extend to external applicants.

If it had actually been the EEOC's position, at the time it promulgated its RFOA regulation, that employers should also shoulder the burden of collecting and analyzing age information from external applicants, then the Commission clearly failed to consider the additional burdens of litigation and potential liability that such a practice would create under both federal and state law. In a separate regulation interpreting the ADEA, the EEOC takes the position that inquiring about an applicant's age does not create a *per se* violation of the Act. 29 C.F.R. § 1625.5. Nonetheless, the Commission leaves the door open to the possibility that it could find inquiries about applicants' age to create an inference of discriminatory intent. *See id*. ("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").

Certainly, plaintiffs have been more than willing to argue that inquiring about applicants' age or date of birth creates an inference of discriminatory intent—and some courts have been willing to accept that argument. *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) (fact that employer asked applicants to disclose age created a 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) (finding that 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). The EEOC has itself taken that position in litigation. *E.E.O.C. v. Timeless Investments, Inc.*, 734 F. Supp. 2d 1035, 1066 (E.D. Cal. 2010) (evidence that applicants were asked their age on their applications was "sufficiently specific and substantial evidence to indicate pretext" for disparate treatment claims).

Thus, were employers to collect information about applicants' age in order to assess the potential disparate impact of their hiring practices, they would do so only at the risk of private plaintiffs—and even 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 member companies, at least seventeen states have enacted statutes that expressly

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

On their face, those state laws also prohibit inquiries about race and gender. Of course, such inquiries are permitted—indeed, mandated—under Title VII's Uniform Guidelines, which would preempt the state law prohibitions. But as noted above, there is no parallel federal mandate requiring the collection of age data. As such, employers operating in these seventeen states (which nearly all of RLC's members do) would engage in an unlawful employment practice if they were to collect the data from applicants necessary to conduct meaningful disparate impact analyses on age.

Of course, if the assumption running throughout the EEOC's discussion of the costs and burdens of its 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 that the contrary assumption advanced in the EEOC's amicus brief in this case 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 each practice on employees of every age with its impact on employees of every other age. *Id*. 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 on behalf of age subgroups have 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 such 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, private plaintiffs continue to pursue such claims, and some courts have been willing to allow them to proceed. *See Karlo v. Pittsburgh Glass Works, LLC*, 880 F. Supp. 2d 629, 637 (W.D. Pa. 2012) (reading the ADEA to allow disparate impact "subgroup" class claims; certifying class of employees over 50 years of age). In fact, the EEOC has itself continued to instigate disparate impact litigation on the basis of age subgroups, even in the face of controlling circuit authority foreclosing such claims. *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 subgroup of workers over the age of 60).

In an environment where both private plaintiffs and the EEOC continue to pursue disparate impact claims on behalf of age subgroups, it would be imprudent for an employer *not* to assess the risk of subgroup claims. Of course, the costs, risks, and other burdens of doing so would be exponentially less if disparate impact

liability under the ADEA adheres to just "a few job actions," as the Commission assumes throughout its preamble, and not to 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. And 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 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 all of the foregoing reasons, the Retail Litigation Center respectfully urges the Court to affirm the district's court's Order for 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 5,903 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.

May 4, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2015, I electronically filed the foregoing brief of the Retail Litigation Center as Amicus Curiae in Support of Defendants-Appellees with the Clerk of Court for 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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