No. 16-971

IN THE

Supreme Court of the United States

RICHARD M. VILLARREAL,

Petitioner,

v.

R.J. REYNOLDS TOBACCO CO., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Age Discrimination in Employment Act ("ADEA") is modeled after Title VII, except that it substitutes age for the other protected categories. Like Title VII, the ADEA prohibits both disparate-treatment and disparate-impact forms of discrimination. In 1972, Congress amended Title VII to add "applicants for employment" to its disparate-impact provision, § 703(a)(2), but did not make the same change to the parallel provision of the ADEA, § 4(a)(2). As a result, § 4(a)(2) conspicuously refers only to "employees" and omits "applicants for employment" from its coverage.

The questions presented are:

1. Whether "applicants for employment" may bring disparate-impact claims under § 4(a)(2) of the ADEA.

2. Whether courts must defer to an amicus brief filed by the Equal Employment Opportunity Commission (EEOC) arguing that "applicants for employment" may bring claims under § 4(a)(2), even though the agency has never taken that position outside of litigation.

3. Whether a plaintiff is entitled to equitable tolling of the ADEA's 180-day statute of limitations when he admits that after filing his job application he did nothing for over two years until he was contacted by a lawyer seeking to recruit class-action plaintiffs.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit are:

Petitioner Richard M. Villarreal

Respondent R.J. Reynolds Tobacco Co.

Respondent Pinstripe, Inc.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent R. J. Reynolds Tobacco Company discloses that it is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc. R.J. Reynolds Tobacco Holdings, Inc., is a wholly owned subsidiary of Reynolds American Inc. ("RAI"), a publicly held corporation. Brown & Williamson Holdings, Inc., holds more than 10% of the outstanding stock of RAI. Brown & Williamson Holdings, Inc., is an indirect, wholly owned subsidiary of British American Tobacco p.l.c. ("BTI"). Louisville Securities Limited holds more than 10% of the outstanding stock of RAI. Louisville Securities Limited is an indirect, wholly owned subsidiary of BTI. BTI, a public limited company, through its ownership interest in Brown & Williamson Holdings, Inc., and Louisville Securities Limited, is an indirect holder of more than 10% of the outstanding stock of RAI.

Respondent Pinstripe, Inc., discloses that it now operates under the name of Cielo, Inc. Its parent corporation is Pinstripe Holdings, LLC.

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STATEMENT

A. Statutory Background

The ADEA's prohibitions are modeled after those of Title VII, except that the ADEA substitutes age as a protected category. Title VII prohibits disparate-treatment discrimination in § 703(a)(1) and disparate-impact discrimination in § 703(a)(2). The parallel provisions of the ADEA are § 4(a)(1) and § 4(a)(2). *See generally Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2517-18 (2015).

Unlike Title VII, however, the ADEA's disparate-impact provision does not refer to "applicants for employment." In 1972, Congress amended Title VII's disparate-impact provision to add "applicants for employment," while omitting that phrase from the ADEA counterpart. As a result, § 703(a)(2) of Title VII provides:

> It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his *employees or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (emphasis added). By contrast, the parallel provision of the ADEA, § 4(a)(2), reads as follows:

> It shall be unlawful for an employer . . . to limit, segregate, or classify his *employees* in any way which would deprive or tend to

> deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2) (emphasis added). As this comparison illustrates, the disparate-impact provision of Title VII includes "employees or applicants for employment," while the parallel provision of the ADEA, § 4(a)(2), includes only "employees."

The immediately adjacent provision of the ADEA, § 4(a)(1), which prohibits *intentional* discrimination, also, by its terms, covers job applicants. It makes it unlawful for any employer to "*fail or refuse to hire* or to discharge any individual" because of age. 29 U.S.C. § 623(a)(1) (emphasis added). Title VII similarly prohibits the intentional discrimination in "fail[ing] or refus[ing] to hire" "any individual." 42 U.S.C. § 2000e-2(a)(1).

B. Factual Background

In November 2007, when Petitioner Richard Villarreal was 49 years old, he submitted an online application for a sales position with Respondent R.J. Reynolds Tobacco Company (RJR) in Georgia. Pet. App. 76a. In the following years, Petitioner admittedly "did nothing to ascertain the status of his application," much less the reason for its rejection. Pet. App. 27a. Then, in April 2010, a plaintiff's lawyer from San Francisco contacted him and suggested that RJR had allegedly discriminated against him by filling the position with younger applicants who had less sales experience. Pet. App. 26a.

Prompted by that contact, Petitioner filed a charge with the Equal Employment Opportunity Commission (EEOC) in May 2010, alleging violations of the ADEA by Respondent RJR and its outside recruiting company, Respondent Pinstripe, Inc. Petitioner alleges that he subsequently submitted a series of new job applications in June 2010, December 2010, May 2011, September 2011, and March 2012, and that he added new EEOC charges against RJR and Pinstripe after each application was rejected. Pet. App. 3a.

C. Procedural Background

Petitioner filed this putative collective action against RJR and Pinstripe in June 2012. He brought disparate-treatment and disparate-impact claims under the ADEA relating to each of his applications.

1. The district court dismissed Petitioner's disparate-impact claims because the ADEA does not authorize "applicants for employment" to bring such claims. Pet. App. 83a-86a. The court noted that Congress had expressly added "applicants for employment" to the disparate-impact provision of Title VII, § 703(a)(2), while omitting that phrase from the parallel provision of the ADEA, § 4(a)(2). In light of that "textual difference," the court "presume[d] that Congress acted intentionally when it expanded the scope of § 703(a)(2) to include applicants and did not do the same with § 4(a)(2) of the ADEA." Pet. App. 86a.

The district court also dismissed all of Petitioner's claims based on his 2007 job application as time-barred. The court explained that "[t]he parties do not dispute that [the ADEA's] 180-day limitation period

applies to [Petitioner] or that his 2007 rejection falls outside that period." Pet. App. 87a. The court then held that neither the "continuing violation" doctrine nor "equitable tolling" "saved" Petitioner's untimely claims. Pet. App. 90a-91a.

Petitioner tried to appeal, but the Eleventh Circuit dismissed for lack of jurisdiction because the district court had not yet resolved his timely disparate-*treatment* claims based on his later applications. *See* Order, *Villarreal v. Careerbuilder, LLC, et al.*, Docket No. 14-12707 (11th Cir. Sep 22, 2014). In order to secure a final judgment, Petitioner then voluntarily dismissed his disparate-treatment claims, thereby enabling an immediate appeal.

2. A divided panel of the Eleventh Circuit reversed the district court's judgment. Judge Martin wrote for the majority. On the merits, the panel held that § 4(a)(2) of the ADEA is "ambiguous" as to whether "applicants for employment" may bring disparate-impact claims; the panel therefore "defer[red]" to the EEOC's amicus brief, which argued that such claims are cognizable under § 4(a)(2). Pet. App. 118a. As to timeliness, the majority held that the statute of limitations should be equitably tolled to allow Petitioner to file his otherwise time-barred claims. The panel did not reach Petitioner's alternative argument that his claims were timely because the "continuing violation" doctrine applied. *See* Pet. App. 135a n.16. Judge Vinson dissented from the panel's holdings on both the merits and equitable tolling.

3. The Eleventh Circuit granted rehearing en banc. The en banc court agreed with the district court on both the scope of § 4(a)(2) and equitable tolling, while

remanding for the panel to consider Petitioner's argument about the continuing-violation doctrine in the first instance.

First, by a vote of 8-3, the court agreed with the district court that Petitioner failed to state a claim under § 4(a)(2) of the ADEA. Writing for the majority, Judge William Pryor explained that § 4(a)(2) unambiguously applies only to "employees," not "applicants for employment." Pet. App. 16a-22a. The court explained that, while "Congress added language about applicants" to the parallel provision of Title VII, § 703(a)(2), which refers to "employees or applicants for employment," it did not add any such language to § 4(a)(2) of the ADEA, which refers only to "employees." Pet. App. 18a. Judge Rosenbaum joined this aspect of the majority opinion and also concurred to explain that "[t]he historical chronology of events relating to the enactment and amendments of the ADEA and Title VII further demonstrates that § 4(a)(2) does not cover disparate-impact hiring claims." Pet. App. 40a. Judge Jordan concurred in the judgment as to Petitioner's disparate-impact claim. His separate opinion likewise concluded that Petitioner cannot bring a claim under § 4(a)(2) of the ADEA because Petitioner "challenges only [RJR's] hiring practices, and not conduct that affects the company's current employees." Pet. App. 32a.

Second, by a vote of 6-5, the court affirmed the district court's decision that the doctrine of equitable tolling did not rescue Petitioner's time-barred claims. The court began by noting that equitable tolling requires a plaintiff to show both "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and

prevented timely filing." Pet. App. 23a (quoting *Menominee Indian Tribe v. United States*, 136 S. Ct. 750 (2016)). Applying that test, the court held that Petitioner "is not entitled to equitable tolling because he admitted facts that foreclose a finding of diligence." Pet. App. 26a. In particular, he admitted that, after applying for a job in 2007, he "did nothing for more than two years," until he was contacted by an attorney in 2010 seeking to recruit class-action plaintiffs. Pet. App. 26a-27a.

Finally, the en banc court observed that, as an alternative to his equitable-tolling argument, Petitioner "also argued before the panel that the continuing-violation doctrine makes [his] claim[s] timely, but the panel did not address this argument." Pet. App. 27a. The en banc court therefore did not decide that issue. Instead, it "exercise[d] [its] discretion" and remanded to the panel to resolve that question in the first instance. *Ibid.*

Judge Martin dissented from the en banc court's holdings on both § 4(a)(2) and equitable tolling. Pet. App. 46a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to review a decision that is not the subject of a final judgment and that does not conflict with the decision of any other court of appeals. This Court should deny his request.

As a threshold matter, the petition is premature because the Eleventh Circuit has not entered a final judgment disposing of Petitioner's appeal. Instead, it remanded for the panel to resolve an unaddressed question (about the applicability of the continuing-violation doctrine) in the first instance. Petitioner

accordingly must satisfy Rule 11's demanding standard for "certiorari before judgment" by demonstrating that "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Petitioner does not even mention this standard, which this case flunks.

Petitioner's substantive arguments fare no better. Every circuit that has considered whether § 4(a)(2) of the ADEA covers "applicants for employment" agrees with the Eleventh Circuit that the answer is "no." The plain language of § 4(a)(2), the ADEA's drafting history, and sound policy support that broad consensus. Against this backdrop, Petitioner's insistence that the decision below conflicts with this Court's decisions is wrong and mischaracterizes this Court's precedent.

Nor is there any reason for this Court to review the Eleventh Circuit's holding that Petitioner is not entitled to equitable tolling. As an initial matter, that issue may be mooted by the panel's forthcoming disposition of Petitioner's argument regarding the continuing-violation doctrine. In any event, this Court has repeatedly held that equitable tolling requires a plaintiff to show that he has pursued his rights diligently, and Petitioner concededly failed to exercise any diligence at all after initially applying for a job with RJR. The Eleventh Circuit's conclusion that equitable tolling does not apply to Petitioner is a straightforward application of this Court's settled precedent, and it does not conflict with the decisions of any other court of appeals.

I. PETITIONER CANNOT SATISFY THE STRICT STANDARD FOR CERTIORARI BEFORE JUDGMENT

As an initial matter, this Court should deny review because the Eleventh Circuit has not yet entered a final judgment disposing of the appeal, and Petitioner cannot overcome the high bar for certiorari before judgment.

1. Granting certiorari before judgment, 28 U.S.C. § 2101(e), "is an extremely rare occurrence," *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). By rule, "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11.

For purposes of Rule 11, the entry of "judgment" occurs when the appellate court issues a final judgment that fully disposes of the appeal. As this Court has explained, the term "judgment" in 28 U.S.C. § 2101(c) refers to the "appellate court's *final* adjudication" of the appeal—which "marks the time from which the period allowed for a certiorari petition begins to run." *Hibbs v. Winn*, 542 U.S. 88, 98–99 (2004) (emphasis added). And Rule 11 itself expressly ties certiorari before judgment to the time when a case is still "pending in a United States court of appeals." Until the court issues a final judgment disposing of the appeal, "the pendency of the appeal continue[s] to raise the question whether any further

action by the court might affect the relationship of the parties." *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007). "So long as that question remains open, there is no 'judgment' to be reviewed." *Id*. at 487.

2. Rule 11's strict standard applies here because the Eleventh Circuit has not yet entered a final judgment. Although the en banc court rejected Petitioner's equitable-tolling argument, it noted that Petitioner made an alternative timeliness argument based on "the continuing-violation doctrine," which the original panel did not consider. Pet. App. 27a. The en banc court remanded the case to "the panel to address the continuing-violation doctrine in the first instance" before disposing of the appeal. Pet. App. 27a-28a. Thus, while the Eleventh Circuit recorded a "judgment" on its docket when it issued its en banc opinion, the court did not "final[ly] adjudicat[e]" the appeal. *Winn*, 542 U.S. at 98-99. Until the court does so, there is "no 'judgment' to be reviewed," and Rule 11 governs. *Limtiaco*, 549 U.S. at 487.

Petitioner does not even mention that the case remains pending on appeal in the Eleventh Circuit, much less make any effort to satisfy Rule 11. Nor could he satisfy that Rule. There is no "imperative" need to grant certiorari prematurely that would justify deviating from the "normal appellate practice" of awaiting a final judgment from the appellate court. S. Ct. R. 11. To the contrary, the interlocutory nature of the decision below counsels against granting certiorari now. *See, e.g.*, *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari) (noting that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction");

Stephen M. Shapiro, et al., SUPREME COURT PRACTICE § 4.18 (10th ed. 2013).

II. THE FIRST AND SECOND QUESTIONS PRESENTED DO NOT WARRANT THIS COURT'S REVIEW

Petitioner does not allege any circuit split on the question whether applicants for employment may bring disparate-impact claims under § 4(a)(2) of the ADEA. Indeed, every circuit that has considered the question has agreed with the Eleventh Circuit that § 4(a)(2) does not extend to "applicants for employment." So has every member of this Court who has addressed the question—Justices O'Connor, Kennedy, and Thomas. That consensus is correct and does not merit review.

A. Every Circuit And Every Justice To Address The Issue Agrees That § 4(a)(2) Of The ADEA Does Not Apply To "Applicants For Employment"

Every court of appeals that has considered the issue agrees with the Eleventh Circuit that § 4(a)(2) of the ADEA covers existing employees but not "applicants for employment." As the Eighth Circuit explained in *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996), § 4(a)(2) "governs employer conduct with respect to 'employees' only, while the parallel provision of Title VII protects 'employees or applicants for employment;'" accordingly, under the ADEA, "applicants for employment" are "limited to relying on § [4](a)(1), which covers employees and applicants." *Id.* at 1470 n.2. The Seventh Circuit similarly concluded that § 4(a)(2) "omits from its coverage, 'applicants for employment.'" *EEOC v.*

Francis W. Parker Sch., 41 F.3d 1073, 1077-78 (7th Cir. 1994). The Tenth Circuit agrees. *See Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 n.12 (10th Cir. 1996) (holding that job applicants may sue only under § 4(a)(1) of the ADEA, but not under § 4(a)(2)).

So do several Justices of this Court. In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Court held that existing employees may bring disparate-impact claims under § 4(a)(2). The Court did not address whether § 4(a)(2) also covers "applicants for employment," but three of its members did: Justices Kennedy and Thomas joined Justice O'Connor's concurrence, which explained that, "of course," § 4(a)(2) "does not apply to 'applicants for employment' at all," since they are covered solely under the ADEA's disparate-*treatment* provision, § 4(a)(1). *See* 544 U.S. at 266 (O'Connor, J., concurring). Justice Scalia also noted that "perhaps the . . . attempt to sweep employment applications into the disparate-impact prohibition is mistaken." *Id.* at 246 n.3 (Scalia, J., concurring). No Justice expressed a contrary view. And while the four-Justice plurality did not focus on the question, it implicitly assumed that Justice O'Connor was correct, stating that § 4(a)(2) "focuses on the *effects* of the action *on the employee*." 544 U.S. at 236 (second emphasis added).

Given this consensus, there is no reason for this Court to consider the issue now. Moreover, plaintiffs in at least two cases are currently pressing the same reading of § 4(a)(2) as Petitioner does here. *See Kleber v. Carefusion Corp.*, No. 17-1206 (7th Cir.); *Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-0227, 2017 WL 661354 (N.D. Cal. Feb. 17, 2017). If a

circuit split ever develops, this Court will have ample opportunity to review it.

B. The Decision Below Is Correct

Petitioner overlooks the absence of a circuit split and claims that this Court should review the decision below because it conflicts with Supreme Court precedent. Not so. The decision below correctly interprets the ADEA and comports with decisions of this Court.

1. Section 4(a)(2) makes it unlawful for an employer "to limit, segregate, or classify *his employees* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]" 29 U.S.C. § 623(a)(2) (emphasis added). On its face, this provision does not refer to applicants, but instead applies only when an employer takes some action against "his employees" in a way that "adversely affect[s]" their "status as" "employee[s]."

By contrast, Congress amended the parallel disparate-impact provision of Title VII in 1972 to protect "employees or applicants for employment." 42 U.S.C. § 2000e-2(a)(2). Congress chose not to make the same change to the ADEA, leaving § 4(a)(2) applicable only to "employees." This Court has recognized that it "cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *see also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256 (1991) ("*Aramco*") (finding it dispositive that Congress had

amended the ADEA but not Title VII with respect to the contested issue).

Section 4(a)(2) also differs sharply from several other ADEA provisions that expressly apply to both "employees" and "applicants for employment." *See, e.g.*, 29 U.S.C. §§ 623(c)(2), 623(d), 631(b), 633a(a)-(b). Indeed, in 1974, Congress specifically amended the ADEA to add "applicants for employment" to § 633(a), while continuing to omit that phrase from § 4(a)(2). *See* Pet. App. 43a (Rosenbaum, J., concurring). This conscious drafting decision has meaning: "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *DHS v. MacLean*, 135 S. Ct. 913, 919 (2015).

The contrast between § 4(a)(2) and the immediately adjacent provision of the ADEA is also instructive. Section 4(a)(1) expressly prohibits an employer's intentional "fail[ure] or refus[al] to hire" an applicant because of age. Section 4(a)(2), however, says nothing about the failure or refusal to hire. Congress's decision to omit such language from § 4(a)(2) buttresses the conclusion that § 4(a)(2) does not apply to hiring practices at all.

Finally, this conclusion also makes sense as a policy matter. Allowing disparate-impact hiring claims based on age would make it presumptively unlawful to engage in a wide variety of common and benign hiring practices such as college-campus recruiting and even law-clerk hiring, which disproportionately exclude older applicants. Congress did not intend such an anomalous result.

2. Petitioner nevertheless contends that this interpretation of the ADEA conflicts with decisions of this Court. He is wrong.

a. Petitioner relies primarily on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which first authorized disparate-impact claims under Title VII. Pet. 15-17. He claims that *Griggs*, which was decided at a time when the text of § 703(a)(2) was identical to the now-current text of § 4(a)(2), interpreted § 703(a)(2) to authorize claims by "applicants for employment." Pet. 15-17. From there, he reasons that such applicants should likewise be able to bring claims under § 4(a)(2).

As the Eleventh Circuit explained, Petitioner's argument is based on a faulty premise. *Griggs* did not interpret § 703(a)(2) to apply to applicants for employment. It had no reason to consider the question: The case did not involve any applicants for employment, and the opinion expressly stated that "[a]ll the petitioners [were already] employed at the Company." Pet. App. 17a (quoting 401 U.S. at 426). Indeed, the phrase "applicants for employment" does not even appear in *Griggs*.

Of course, as the Eleventh Circuit recognized, § 703(a)(2) *now* covers "applicants for employment," but that is only because Congress specifically added that phrase one year after *Griggs* was decided. Pet. App. 18a. "When Congress acts to amend a statute," courts must "presume it intends its amendment to have real and substantial effect." *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014). Thus, by adding "applicants for employment" to § 703(a)(2), Congress signaled that the provision did

not previously cover such applicants. In any event, Congress' decision *not* to add "applicants for employment" to § 4(a)(2) of the ADEA is one that courts "cannot ignore." *Gross*, 557 U.S. at 174; *supra* pp. 12-13; *see Aramco*, 499 U.S. at 256; *accord Smith*, 544 U.S. at 237 n.7, 240.

b. Nor does the Eleventh Circuit's decision conflict with *Inclusive Communities Project*. Pet. 18. That case, which interpreted the Fair Housing Act, held that an anti-discrimination provision should be read to authorize disparate-impact claims if it "refers to the consequences of actions and not just to the mindset of actors." 135 S. Ct. at 2518. The Eleventh Circuit's decision is consistent with that principle: Indeed, all agree that § 4(a)(2) of the ADEA authorizes disparate-impact claims. The only question is its *scope*—a question that *Inclusive Communities Project* says nothing about.

c. Finally, Petitioner contends that the decision below conflicts with this Court's recognition in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 344 n.4 (1997), that the term "employees" can sometimes be read in certain contexts "to mean 'prospective employees.'" Pet. 19. As the Eleventh Circuit explained, however, there is no conflict. *Robinson* confirms that context matters; and here, § 4(a)(2) and its surrounding context indicate that the word "employees" means "employees," not "applicants for employment." *See supra* pp. 12-13.

C. The Eleventh Circuit's Interpretation of § 4(a)(2) Does Not Conflict With Any "Longstanding" View of the EEOC

Petitioner also argues that the decision below warrants review because it conflicts with the EEOC's "longstanding" administrative interpretation of § 4(a)(2). Pet. 20-21. He is wrong again.

The EEOC has not exercised its interpretative authority to construe § 4(a)(2) in a manner that would warrant deference. None of the regulations cited by Petitioner even mentions § 4(a)(2), much less addresses the question of whether that provision covers job applicants. *See* Pet. 20-21. And the EEOC has never sought any public comment, engaged in any rulemaking, or promulgated any other public guidance to address the issue. To be sure, it has advanced a view in amicus briefs in this case and other court filings. But it is well established that courts owe no deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *see also Gregory v. Ashcroft*, 501 U.S. 452 (1991) (refusing to defer to EEOC interpretation of the ADEA articulated only in the course of litigation). Indeed, an agency's interpretation typically merits deference only if the agency has analyzed the text in a "formal administrative procedure" such as a "rulemaking or adjudication," which ensures "fairness and deliberation." *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

To the extent the EEOC has a "longstanding" view that applicants can bring disparate-impact claims

under the ADEA, that view never derived from any administrative interpretation of § 4(a)(2). For decades, the EEOC maintained that "it is of no consequence . . . that subsection 4(a)(2) does not refer to applicants," because "[e]ven if applicants are not covered by subsection 4(a)(2), disparate impact theory applies to them by virtue of subsection 4(a)(1)." EEOC Reply Brief at 4, *Francis Parker Sch.*, 41 F.3d 1073 (No. 93-3395), 1994 WL 16045193. This Court unanimously rejected that reading of § 4(a)(1) in *Smith*. *See* 544 U.S. at 233-35 (plurality op.); *id.* at 246 (Scalia, J., concurring); *id.* at 249 (O'Connor, J., concurring). The EEOC has never engaged in any administrative process to explain how applicants can instead bring disparate-impact claims under § 4(a)(2), and its current litigating position is entitled to no special weight.

III. THE THIRD QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner also urges the Court to grant certiorari to consider whether he is entitled to equitable tolling. That issue does not merit review either.

As an initial matter, it would be premature for this Court to consider equitable tolling before the Eleventh Circuit enters a final judgment. If the panel agrees with Petitioner's alternative argument that his ADEA claims are timely under a "continuing violation" theory, the equitable-tolling issue would become moot. Pet. App. 27a-28a. And because the appeal has not been stayed, the panel could issue that ruling at any time, raising the specter of an

improvident grant of certiorari that may require dismissal.

In any event, the Eleventh Circuit's determination that Petitioner is not entitled to equitable tolling is a straightforward application of this Court's precedents and does not conflict with the decisions of any other court of appeals.

1. Just last year, this Court explained that "a litigant is entitled to equitable tolling of a statute of limitations *only if* the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016) (emphasis added). The Court unanimously rejected the argument that this two-element test is "overly rigid," emphasizing that both "distinct elements" are "require[d]"; they are "not merely factors of indeterminate or commensurable weight." *Id.* at 755-56 (citations omitted). As a result, courts must "reject[] requests for equitable tolling where a litigant failed to satisfy one" of the two elements, regardless of "whether he satisfied the other." *Id.* at 756.

Applying that test, the Eleventh Circuit properly rejected Petitioner's equitable-tolling argument because he "neither contested his lack of diligence before the district court, nor [did] he contest[] it on appeal." Pet. App. 27a. To the contrary, Petitioner's complaint "admitted" that after he applied for a job with RJR in 2007, he "did nothing for more than two years" to show *any* regard for his rights until a class-action lawyer seeking to recruit plaintiffs contacted

him in 2010. Pet. App. 26a. The Eleventh Circuit's determination that Petitioner was not entitled to equitable tolling simply applied the settled rule that equitable tolling requires diligence.

2. The Eleventh Circuit's application of *Menominee* to the facts in this case does not create a conflict with the decisions of this Court or any circuit.

a. Petitioner relies heavily on *Holland v. Florida*, 560 U.S. 631, 653 (2010). *See* Pet. 27-28. But the parties in *Holland* agreed that the petitioner had been diligent. 560 U.S. at 653. The only question was whether his attorney's "grossly negligent" misconduct constituted the type of "extraordinary circumstance" necessary to satisfy the second tolling element in a habeas case. *Id.* at 649-50. That question has no bearing here.

The decisions that Petitioner cites applying *Holland* likewise do not demonstrate a conflict. In each one, the court found diligence based on facts that are absent here. *See Doe v. Busby*, 661 F.3d 1001, 1010 (9th Cir. 2011) (petitioner "continually pleaded with [his] counsel" to file a timely petition); *Munchinski v. Wilson*, 694 F.3d 308, 331 (3d Cir. 2012) (petitioner "vigorously pursued relief in state and federal courts"); *Socha v. Boughton*, 763 F.3d 674, 687-88 (7th Cir. 2014) (petitioner made "repeated efforts to obtain an unjustifiably withheld file").

b. Petitioner next accuses the Eleventh Circuit of requiring him to exercise "maximum feasible diligence," while other circuits require only reasonable diligence. Pet. 30-31. But as explained above, Petitioner was not entitled to equitable tolling because he failed to exercise *any diligence at all*. That

holding does not conflict with cases finding "reasonable diligence" on different facts. *See Holmes v. Spencer*, 685 F.3d 51, 65 (1st Cir. 2012) (petitioner "did what he reasonably thought was necessary to preserve his rights"); *Busby*, 661 F.3d at 1010 (plaintiff was reasonably diligent because he took numerous steps to preserve his rights); *Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003) (emphasizing that "[t]he presence of extraordinary circumstances is not enough" for equitable tolling, and that a petitioner "must also show that he *acted* with reasonable diligence" (emphasis added)).

c. Petitioner also asserts that the decision below conflicts with two of this Court's cases applying the so-called "inquiry notice" doctrine. Pet. 31. But equitable tolling and "inquiry notice" are two entirely different doctrines. The latter may apply where a statutory discovery rule postpones the start of a charge-filing period until the plaintiff is on "inquiry notice" of an adverse action. By contrast, equitable tolling is an extra-statutory doctrine that serves to override the statutory time bar after the charge-filing period has expired. The Eleventh Circuit's holding regarding equitable tolling could not have created any conflict with this Court's cases addressing a distinct doctrine.

Petitioner's reliance on *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221 (2012), is misplaced. *See* Pet. 31. *Credit Suisse* said that "when a limitations period is tolled . . . the tolling *ceases* when [the relevant] facts are, or should have been, discovered by the plaintiff." 566 U.S. at 227 (emphasis added). The Court did not say that plaintiffs automatically *qualify* for equitable tolling

until they are put on inquiry notice of a violation. To the contrary, the Court emphasized that tolling first requires a threshold showing of both "diligen[ce]" and "extraordinary circumstances." *Id.* And Petitioner's citation of *United States v. Beggerly*, 524 U.S. 38 (1998), is similarly inapposite. *See id.* at 48 (interpreting *statute* that granted the benefits of tolling without requiring the ordinary equitable elements).

d. Finally, Petitioner insists that the decision below creates a conflict because it does not afford equitable tolling to every plaintiff who lacked timely knowledge of discrimination. Pet. 32-36. But no court has ever endorsed that sweeping theory, which would override Congress's choice to require ADEA charges within 180 days of when "the alleged unlawful practice occurred." 29 U.S.C. § 626(d). It also would defy this Court's precedent by eliminating both the diligence and extraordinary-circumstances requirements for equitable tolling. It is therefore unsurprising that all of the cases that Petitioner cites were decided well before this Court adopted its current test for equitable tolling, and thus do not discuss the relevant factors. *See, e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 473 (1986); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975); *Wolfolk v. Rivera*, 729 F.2d 1114, 1117-18 (7th Cir. 1984). Some of them also involved materially different facts, such as an employer who caused the late filing by "actively [seeking] to mislead" the plaintiff. *Reeb*, 516 F.2d at 930. These cases have no bearing here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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