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 Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has fought to achieve racial justice and to ensure that America fulfills its promise of equality for all. To this end, LDF has litigated a range of employment discrimination cases in this Court, as well as the lower courts, appearing as counsel of record or *amicus curiae* in *Lewis v. City of Chicago*, 560 U.S. 205 (2010), *Ricci v. DeStefano*, 557 U.S. 557 (2009), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and others. Since 1964, LDF has also worked to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"), litigating on behalf of individual plaintiffs and plaintiff classes against private and public employers to challenge discriminatory employment practices, in such cases as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

Given its expertise in employment discrimination matters, LDF believes its perspective would be helpful to the Court in determining whether to grant certiorari.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Eleventh Circuit's new "rigid diligence" standard, job seekers who have no reason to suspect that a potential employer has discriminated against them must investigate the status of their employment applications—even if such investigations would be entirely futile—in order to justify the equitable tolling of employment discrimination claims uncovered at a later date. This requirement undermines the remedial purposes of the federal anti-discrimination laws and will significantly limit access to the courts for victims of employment discrimination. We urge this Court to grant the petition to review and reverse the Eleventh Circuit's unduly burdensome equitable tolling standard for employment discrimination plaintiffs.

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), and Title VII were enacted to detect and eliminate discrimination, including against older workers and workers of color. *See* 29 U.S.C. § 621(b) (noting that one of the purposes of the ADEA is to prohibit arbitrary age discrimination); *Griggs*, 401 U.S. at 429 (Title VII is intended "to achieve equality of employment opportunities"). Before a court may consider an ADEA or Title VII claim, a plaintiff must first seek redress through administrative channels.[2] In the

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[2] *See generally Lewis,* 560 U.S. at 210 ("Before beginning a Title VII suit, a plaintiff must first file a timely EEOC charge."); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 403-4 (2008)

private sector, a job applicant must file a charge with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of an alleged unlawful employment practice. *See* 29 U.S.C. § 626(d)(1)(A)-(B); 42 U.S.C. § 2000e-5(e)(1). However, these timely-filing requirements have always been subject to equitable tolling to ensure that the remedial purposes of the ADEA and Title VII are not frustrated by rigid procedural hurdles. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding that a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but is, instead, subject to waiver, estoppel, and equitable tolling, like a statute of limitations).

Allowing a plaintiff to pursue an ADEA or Title VII claim filed outside of the limitations period is particularly critical where, as here, an employer utilizes secret and unlawful hiring preferences that are unknown to the job applicant. As the Fifth Circuit recognized more than forty years ago in *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), the statute of limitations for bringing a charge of discrimination should be equitably tolled until such secret preferences become apparent, or should become apparent, to a reasonably prudent job applicant. *Id.* at 931. And in the time period when an applicant has no reason to believe discrimination has occurred, she "need not undertake an entirely futile investigation into hidden discriminatory practices in the name of 'due diligence.'" *Villarreal v.*

(finding that the ADEA requires the aggrieved individual to file a charge before filing a lawsuit).

R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1305 (11th Cir. 2015). This standard, which has been consistently reaffirmed by multiple courts of appeal for decades, strikes an appropriate balance between upholding principles of equity and access to justice for discrimination victims on one hand, and fostering finality and clarity about an employer's potential liability on the other.

The Eleventh Circuit's position upsets this careful balance. According to the court's ruling, a job applicant must investigate a potential discrimination claim against an employer, *even when she has no reason to believe discrimination has occurred*, in order to establish that she was diligent in pursuing her rights. If the applicant does not undertake such a blind and unprompted investigation, any later-discovered claim that the employer discriminated against her cannot be equitably tolled. This effectively imposes a new "rigid diligence" burden on plaintiffs seeking equitable tolling of claims arising from an employer's use of secret preferences in evaluating an application for employment.

Amicus curiae writes to urge certiorari review of this case for two key reasons:

First, in accordance with this Court's precedents, equitable tolling must be applied flexibly and fairly to fulfill the mandates of the ADEA and Title VII and to ensure effective enforcement of these anti-discrimination statutes. This requires courts to conduct a fact-intensive inquiry to determine whether the applicant was reasonably diligent in pursuing her rights. *See Holland v. Florida*, 560 U.S. 631, 650 (2010). In cases where an applicant has no reason to suspect she was the victim of discrimination, reasonable diligence does not require a futile investigation into the status or outcome of her

application. Instead, the duty to diligently pursue one's rights arises only *after* facts that would support a charge of discrimination are apparent, or should have become apparent, to a potential plaintiff with a reasonably prudent regard for her rights.

Second, there are significant problems with the Eleventh Circuit's new rigid diligence standard. It incorrectly imposes a "maximum feasible diligence" standard on plaintiffs when this Court has made clear that only reasonable diligence is required for equitable tolling. *Id.* at 653. And it misapprehends when the tolling standard in *Reeb* can apply—which is whenever an employer utilizes secret preferences or other subtle means of illegal discrimination in the hiring process, not just when an employer conveys false or misleading information to an applicant about her employment status.

Moreover, the Eleventh Circuit's new standard will severely undermine Congressional intent by improperly burdening job seekers with diligence requirements—before they have even a mere suspicion of discrimination—that are likely to prove futile. The rule will place unwelcome burdens on employers, who are likely to experience an increase in requests for application and hiring data. It will also severely tax the limited resources of the EEOC by prompting unsuccessful job applicants to file speculative claims to preserve their rights, before any facts supporting a charge of discrimination are apparent. Further, the reach of the Eleventh Circuit's rule is extraordinarily broad, extending beyond ADEA and disparate impact cases to any type of employment discrimination plaintiff seeking to equitably toll her claim.

ARGUMENT

I. EQUITABLE TOLLING MUST BE APPLIED FLEXIBLY AND FAIRLY TO EFFECTUATE CONGRESSIONAL INTENT.

Employment discrimination against older workers and workers of color remains entrenched within the American labor market, despite Congress's intention to eradicate such forms of invidious discrimination through the enactment of federal anti-discrimination laws. Discriminatory policies and practices by employers distort the functioning of the labor market, depriving American industry of the most qualified workforce, while simultaneously inflicting direct economic harm upon innocent individuals and families. In particular, race and age discrimination in the workplace remain disconcertingly prevalent. In 2016, more than 32,000 charges of race discrimination and more than 20,000 charges of age discrimination were filed with the EEOC.[3] In the next several decades, the older population of the United States is expected to become more racially and ethnically diverse.[4] Experience and history dictate that these older workers of color will face multiple dimensions of disadvantage based on both

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[3] *See* Charge Statistics, EEOC, FY 1997 – FY 2016, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[4] *See* Ortman, *et al.*, U.S. Census Bureau, *An Aging Nation: The Older Population in the United States, Population Estimates and Projections, Current Population Reports* (2014), www.census.gov/prod/2014pubs/p25-1140.pdf.

age[5] and race[6] discrimination. As a result, these workers, as well as the American economy and labor force, will need the strong protections of laws like the ADEA and Title VII.

In enacting the ADEA, Congress noted that "older workers find themselves disadvantaged in their

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[5] Joanna N. Lahey from Texas A&M University examined the entry-level or near entry-level labor market options for women ages 35 to 62 in Massachusetts and Florida. In the study, resumes were sent to employers and the response rates by age were measured. The study showed evidence of differential interviewing by age: a younger worker was 42 percent more likely than an older worker to be offered an interview in Massachusetts and 46 percent more likely to be offered an interview in Florida. Lahey, *Age, Women, and Hiring, An Experimental Study*, The Journal of Human Resources (2007), http://jhr.uwpress.org/content/43/1/30.full.pdf+html.

[6] In a field experiment by the National Bureau of Economic Research, economists Marianne Bertrand and Sendhil Mullainathan measured racial discrimination in the labor market. The economists responded to more than 1,300 employment ads posted in newspapers, sending out nearly 5,000 fictitious resumes. The resumes used names associated with either African Americans, *i.e.*, Lakisha Washington and Jamal Jones, or whites, *i.e.*, Emily Walsh and Greg Baker, based on naming data for babies born between 1974 and 1979. The results indicated large racial differences in callback rates: job applicants with white names needed to send about ten resumes to get one callback while those with names that are "remarkably common" in the black population needed to send around fifteen resumes to get one callback. The amount of discrimination found in the experiment was uniform across occupations and industries. Bertrand & Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, NBER Working Paper No. 9873 (2003), http://www.nber.org/papers/w9873.pdf.

efforts . . . especially to regain employment when displaced from jobs" and "the incidence of unemployment, especially long-term unemployment . . . is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave." 29 U.S.C. § 621(a). Accordingly, the ADEA was passed, in large part, to promote the employment of older persons based on their abilities rather than age. *Id.* at § 621(b). Likewise, Congress enacted Title VII in order "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (citing *Griggs*, 401 U.S. at 429 (additional citations omitted)). Accordingly, the statute not only prohibits discriminatory employment practices that are express and direct, but also those that are subtle and indirect. *McDonnell Douglas*, 411 U.S. at 801 ("Title VII tolerates no racial discrimination, subtle or otherwise.").

As employers attempt to evade liability under the ADEA and Title VII, the discriminatory hiring preferences confronting older workers (particularly older workers of color) are often subtle and indirect. These preferences may be facially race- or age-neutral and are typically unknown to the applicants and employees whose opportunities they constrain. For example, employers may limit their search to candidates who recently obtained a degree, because such applicants are more likely to be younger in age.

Other employers may decline to interview qualified applicants due to assumptions or implicit biases about the applicant's race, based on name, geography, or other resume information.[7] And many, like R.J. Reynolds, do not make these preferences known to applicants, who are then unaware of how their race or age impacted the employer's evaluation of their application and are thus unequipped to pursue an employment discrimination claim within the brief time period permitted for filing an EEOC charge under the applicable statutes.

For this reason, in *Reeb,* the Fifth Circuit held that the limitations period in employment discrimination cases is properly tolled "until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." 516 F.2d at 930. For decades, the Eleventh Circuit adhered to this rule of law, making clear that an applicant for employment does not need to file a charge—*or take any other step*—when there was "no reason to believe" discrimination had occurred. *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 (11th Cir. 1993), *cert. denied,* 513 U.S. 814 (1994). It is only after the facts that would support a cause of action are apparent, or should be apparent to a reasonably prudent person, that the obligations of due diligence are triggered. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 653 (2010) ("[T]he limitations period does not begin to run until the

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[7] Bertrand & Mullainathan, *supra* n.6 (study finding that applicants living in better neighborhoods receive more callbacks).

plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered 'the facts constituting the violation' . . . irrespective of whether the actual plaintiff undertook a reasonably diligent investigation."). *Reeb*'s equitable tolling standard has been a critical vehicle for ensuring that secret and unlawful hiring preferences are not shielded from legal challenge by the procedural rules governing the federal anti-discrimination statutes.

Other circuit courts have, either explicitly or implicitly, adopted the test set forth in *Reeb*. *See*, *e.g.*, *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995) ("[W]hen a reasonable person in the plaintiff's situation would not be expected to know of the existence of a possible ADEA violation, this excusable ignorance may provide the basis for the proper invocation of the doctrine of equitable tolling."); *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985) (tolling on equitable grounds might exist if the employee could show that it would have been impossible for a reasonably prudent person to learn that his charge was discriminatory, noting *Reeb*); *Boyd v. U.S. Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985) ("The time period for filing a complaint of discrimination begins to run when the facts that would support a charge of discrimination would have been apparent to a similarly situated person with a reasonably prudent regard for his rights."); *Vaught v. R.R. Donnelly & Sons Co.*, 745 F.2d 407, 410 (7th Cir. 1984) (stating that the tolling standard at issue comes from *Reeb*); *Stoller v. Marsh*, 682 F.2d 971, 974 (D.C. Cir. 1982) (noting that the time limits for filing an administrative complaint may be tolled if an employee did not at the time know or have reason to know that an employment decision was discriminatory in nature).

This approach embraces "the need for flexibility" and for "avoiding mechanical rules" that this Court recently emphasized in *Holland*, 560 U.S. at 650. In that case, this Court rejected a *per se* approach to equitable tolling, holding that the Eleventh Circuit was "too rigid" in its determination that attorney misconduct could not excuse a death sentenced prisoner's late filing of a federal habeas corpus petition. *Id.* at 649. This Court correctly explained that "[t]he flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices." *Id.* at 650 (internal quotations omitted). Thus, "the exercise of a court's equity powers must be made on a case-by-case basis" through a fact-intensive inquiry that determines whether equitable tolling is appropriate. *Id.* at 649-50, 653 (internal quotations omitted). *See also TCF Nat'l Bank v. Market Intelligence, Inc.*, 812 F.3d 701, 708 (8th Cir. 2016) (reasonable diligence for equitable tolling is dependent on the known facts and circumstances of a case); *Munchinski v. Wilson*, 694 F.3d 308, 330 (3d Cir. 2012) (noting that reasonable diligence is a fact-intensive inquiry).

A flexible and fact-intensive approach to equitable tolling is similarly necessary to satisfy the remedial purposes of the federal anti-discrimination statutes. It is well-established that courts must "look to the relevant statute for guidance in determining whether equitable tolling is appropriate in a given situation." *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006); *see also Zipes*, 455 U.S. at 398 (in applying charge-filing deadlines, courts must "honor the remedial purpose of the legislation as a whole"). Given that Congress sought to promote the employment of older persons in enacting the ADEA, the statute is clear

that courts may grant legal or equitable relief as appropriate to effectuate its purposes. 29 U.S.C. § 626(b). *See also Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1338 (11th Cir. 1999) ("The central purpose of [the ADEA] is to 'make the plaintiff 'whole,' to restore the plaintiff to the economic position the plaintiff would have occupied but for the illegal discrimination of the employer.'") (quoting *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988)); *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991), *cert. denied*, 502 U.S. 868 (1991) ("The filing deadline is thus subject to equitable modification, i.e. tolling or estoppel, when necessary to effect the remedial purpose of ADEA.") (citing *Clark v. Resistoflex Co., A Div. of Unidynamics Corp.*, 854 F.2d 762, 765 (5th Cir. 1988)); *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 200 (4th Cir. 1990) ("[T]he limitations period is not jurisdictional . . . and may equitably be tolled if a plaintiff proves that it would have been impossible for a reasonably prudent person to learn that his discharge was discriminatory.") (internal quotation omitted).

In fact, because the ADEA is "remedial and humanitarian legislation," numerous courts have held that it is to be "liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd*, 434 U.S. 99 (1977); *see also Naton v. Bank of California*, 659 F.2d 691, 696 (9th Cir. 1981) (concurring with the policy rationale set forth in *Dartt*); *Rabzak v. Cty. of Berks*, 815 F.2d 17, 20 (3d Cir. 1987) (noting that the charge-filing provisions of the ADEA should be liberally construed to effectuate the congressional purpose of ending discrimination and that Congress

envisioned that charges would mostly be filed by laymen unassisted by lawyers); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 93-94 (8th Cir. 1975) ("A procedural requirement of the [ADEA], of doubtful meaning in a given case, should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act."); *Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-0227, 2017 WL 661354, at *1 (N.D. Cal. Feb. 17, 2017) (affirming that the ADEA should be liberally construed, quoting *Naton* and *Dartt*).

Similarly, courts confronted with procedural ambiguities in Title VII's statutory framework have with virtual unanimity resolved them in favor of the complaining party. *See Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911, 914-15 (N.D. Ga. 1973) (noting that both Title VII and the ADEA are remedial and humanitarian in nature); *see also Franks v. Bowman Transp. Co.*, 495 F.2d 398, 404 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976) ("Congress did not intend to condition a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute."). Accordingly, a flexible and fair approach to equitable tolling fulfills the mandates of the ADEA and Title VII by ensuring that discrimination victims can access the courts to remedy employers' unlawful practices.

II. THE ELEVENTH CIRCUIT'S RIGID DILIGENCE STANDARD CONFLICTS WITH ESTABLISHED LAW, INAPPROPRIATELY BURDENS BOTH JOB SEEKERS AND EMPLOYERS, AND IS CONTRARY TO THE PURPOSES OF TITLE VII AND THE ADEA.

The Eleventh Circuit's new equitable tolling standard, which conflicts with the above-described established law governing the diligence required of an employment discrimination plaintiff, will have severely negative consequences for both job seekers and employers and will frustrate the purposes of the federal employment discrimination laws. The broad implications of this new standard merit this Court's review.

First, the Eleventh Circuit misapprehended the pleading requirements for a plaintiff to utilize equitable tolling. As this Court has repeatedly recognized, "maximum feasible diligence" is not required of a plaintiff seeking to equitably toll her claims. *Holland*, 560 U.S. at 653 (quoting *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996); *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008)). Yet, by requiring a plaintiff to investigate the status of her application when she has no reason to believe discrimination has occurred, the Eleventh Circuit now requires far more than reasonable diligence, in direct conflict with *Holland*. *See*, *e.g.*, *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011) ("The standard for reasonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief. It requires the effort that a reasonable person might be expected to deliver under his or her particular circumstances."). Moreover, the diligence that is

required of a plaintiff is *not* triggered until the plaintiff learns (or should have learned) of the facts underlying a potential claim. *See*, *e.g.*, *Credit Suisse Secs. (USA) LLC v. Simmonds*, 566 U.S. 221, 228 (2012) (limitations period is tolled until "a reasonably diligent plaintiff would have learned the facts underlying" a claim); *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transp., Inc.*, 522 F.3d 1190, 1197 (11th Cir. 2008) ("'[F]or statute of limitations purposes[,] a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should [not] receive identical treatment.' The determinative fact is whether the plaintiff had knowledge of the harm incurred.") (quoting *United States v. Kubrick*, 444 U.S. 111, 122 (1979)). Additionally, the question of whether an applicant acted with reasonable diligence should be resolved by a jury, not by a court deciding a motion to dismiss at the outset of a case. *See*, *e.g.*, *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 186 (1828) (reasonable diligence determination is a matter of fact for consideration of the jury); *In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d Cir. 2004) (the determination of reasonable diligence is "typically within the jury's province").

In setting out the parameters of its new rigid diligence standard, the Eleventh Circuit declined to apply *Reeb* to Mr. Villarreal's case because he did not allege that R.J. Reynolds actively misled him as to why he did not obtain the applied-for position. *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 972 (11th Cir. 2016). However, as many circuits have made clear, employer misconduct is *not* a prerequisite for equitable tolling of an employment discrimination claim. *See*, *e.g.*, *Browning v. AT&T Paradyne*, 120

F.3d 222, 226 (11th Cir. 1997) ("[E]quitable tolling does not require any misconduct on the part of the defendant."); *Rhodes*, 927 F.2d at 878 ("Equitable tolling focuses on the employee's ignorance, not on any possible misconduct by the employer."); *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559, 1561 (11th Cir. 1987) ("[E]quitable tolling does not require employer misconduct."). Indeed, this Court has long allowed the equitable tolling of fraud claims absent evidence of concealment by the defendant. *See*, *e.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (quoting *Bailey v. Glover*, 88 U.S. (1 Wall.) 342, 348 (1874)), which held that "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, *though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party*") (emphasis added).[8] In fact, although employer deception was

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[8] On the other hand, to show that a defendant should be equitably estopped from raising the statute of limitations as a defense, a plaintiff must demonstrate that the defendant actively took steps to prevent her from filing a claim. *See*, *e.g.*, *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 830 (2013) (Sotomayor, J., concurring) (distinguishing equitable tolling, which extends to circumstances outside of the control of both parties, from equitable estoppel, which may bar a defendant from enforcing a statute of limitations when its own deception prevented a reasonably diligent plaintiff from bringing a timely claim); *Chakonas v. City of Chicago*, 42 F.3d 1132, 1136 (7th Cir. 1994) ("[Equitable estoppel], quite distinct from equitable tolling, comes into play when a defendant takes active steps to prevent a plaintiff from suing on time.").

present in *Reeb* (which is unsurprising given that it involved a then-current employee of the defendant, who had to be informed that she was being terminated, rather than a job applicant like Mr. Villarreal, who was provided no information), the court did not find or even suggest that such deception was required to utilize its tolling rule. Instead, the court noted that employers who utilize secret hiring preferences "undoubtedly often attempt to cloak their policies with a semblance of rationality . . . [t]hese tendencies *may even extend* to the giving of misleading or false information to the victim," 516 F.2d at 931 (emphasis added). Furthermore, the court in *Reeb* made clear that its rationale was based on the difficulties of rooting out discriminatory preferences that are deliberately withheld from job applicants. *Id.*; *cf. Tucker v. United Parcel Serv.*, 657 F.2d 724, 726 (5th Cir. 1981) (applying *Reeb* without any evidence of employer misconduct). And while an employer utilizing secret hiring preferences may often *also* deliberately mislead an applicant as to the reasons why she was not hired, there is no need to apply a different equitable tolling test in such instances. Instead, the rule from *Reeb* should apply whenever an employer utilizes "secret preferences" or other subtle means of illegal discrimination that are unlikely to be readily apparent to the individual discriminated against. *Reeb*, 516 F.2d at 931.

Second, the Eleventh Circuit's rigid diligence standard will place significant burdens on job applicants, employers, and the government, requiring time-consuming and costly investigations that are not likely to expose discriminatory practices.

Mr. Villarreal's circumstances illustrate the burden and futility of the Eleventh Circuit's new standard. In 2007, Mr. Villarreal applied for the position of

Territory Manager at R.J. Reynolds by personally uploading his resume to the company website. *Villarreal v. R.J. Reynolds Tobacco Co.*, No. 12-138, 2013 WL 823055, at *1 (N.D. Ga. Mar. 6, 2013). He was not aware that, at the time he applied, R.J. Reynolds provided "resume review guidelines" to its recruiting services that specified that its targeted candidate was "2-3 years out of college" and someone who "adjusts easily to changes." *Id.* The guidelines instructed the recruiting services to "stay away from" various applicants, including those who had been "in sales for 8-10 years," like Mr. Villarreal. *Id.*

Mr. Villarreal received no response on his application from the company. The lack of response from an uninterested employer is a common experience for virtually anyone who has ever been in search of work, including those who are well-qualified for the positions they seek. Thus, when Mr. Villarreal was not contacted about the position, he correctly understood that his application had been rejected, and accepted it as a matter of course. He had no reason to suspect unlawful discrimination, because R.J. Reynolds never told the applicants what standards it was applying. Even if Mr. Villarreal had inquired about the status of his application and even if R.J. Reynolds had acknowledged that it had reviewed his application, the legally relevant facts would have remained the same: Mr. Villarreal would have had "no reason to believe" that he was the victim of unlawful discrimination. *Ross*, 980 F.2d at 660.

Likewise, if Mr. Villarreal had inquired about the status of his application and been informed that the company intended to pursue other candidates, as he was in 2010, 2011 and 2012, *Villarreal*, 2013 WL 823055, at *1-2, he would still have had no reason to

believe that his application was rejected on account of age discrimination. And even if Mr. Villarreal had, for some reason, strongly suspected age discrimination—although he had no basis for such a suspicion—he would not have had sufficient information upon which to state a cause of action. *See Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1266 (11th Cir. 2003) ("[Plaintiff's] suspicion, without more, is insufficient to establish pretext."). Accordingly, and adhering to the rule in *Reeb*, the Eleventh Circuit panel determined that Mr. Villarreal properly stated a claim for equitable tolling, since he alleged that he had no reason to believe that employment discrimination had occurred until shortly before his charge was filed and had no obligation to plead additional facts concerning diligence. *Villarreal*, 806 F.3d at 1306.

Despite Mr. Villarreal's lack of knowledge about the secret preferences utilized against him, the *en banc* Eleventh Circuit determined that he was not entitled to equitable tolling because he "did nothing" for more than two years between his initial application and the communication from his lawyer informing him of R.J. Reynolds's discriminatory hiring criteria. *Villarreal*, 839 F.3d at 972. But during this two-year period, Mr. Villarreal had *no reason to believe* that he had been rejected from employment because of his age and thus was not required to exercise diligence during this time to protect his rights. *See Jones*, 331 F.3d at 1267 (plaintiff's claims were equitably tolled even though she did not take action on a "mere suspicion" of discrimination).

Equitable tolling should *not* require unwarranted or unprompted investigations on the part of applicants who are unaware of an employer's secret and unlawful hiring criteria. But now, under the new

Eleventh Circuit rule, applicants who have no reason to suspect employment discrimination will be required, in order to protect their rights to obtain relief for later-discovered discrimination, to: (1) make impractical, and perhaps costly, efforts to gather information to prove a phantom claim, which will undoubtedly alienate prospective employers, or, even more absurdly, to (2) file a speculative charge of discrimination with the EEOC to avoid the running of the statute of limitations for the phantom claim. This standard, which will first require applicants to inquire as to whether their applications have been received and to follow up to determine whether they have been rejected for the job, is entirely impractical.[9] Even if an applicant was able to confirm that her application was received, or that she was rejected for the position, she would have insufficient information to pursue a discrimination claim.

Such a framework is likely to have damaging ripple effects. Employers will receive additional requests for data and other information from applicants.

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[9] Human resources departments and search agencies commonly request "no phone calls or e-mails" from applicants in their job postings. The Eleventh Circuit's rule—which would require applicants, even in this situation, to inquire into the status of their applications—is at odds with advice from hiring professionals to adhere to "no calls" requests. *See* Scott, *Calling to Follow-Up? Hand Me a Fork*, Clue Wagon (Feb. 3, 2009), http://www.cluewagon.com/2009/09/calling-to-follow-up-hand-me-a-fork-2/ (advising candidates not to call to follow-up on applications because, among other things, it demonstrates that the applicant "can't follow directions" or "thinks the rules only apply to other people" and is not "a good way to impress a company").

Employers who opt not to respond to such requests may fear opening their businesses up to possibly unwarranted, negative inferences, including baseless discrimination claims. Employers who *do* respond to such requests will do so at considerable expense of money, time, and human resources. And employers who are actually motivated by "secret preferences," *Reeb*, 516 F.2d at 931, will be highly unlikely to grant applicants access to evidence sufficient to make out a *prima facie* case of age discrimination.

Applicants themselves will need to spend time and resources on the unproductive task of requesting information, rather than devoting their efforts to seeking employment. Such efforts at diligence will likely, as recognized by the Eleventh Circuit panel majority, be futile. *Villarreal*, 806 F.3d at 1305. Alternately, applicants who opt not to engage in these fact-gathering efforts and instead file premature and unsupported charges of discrimination with the EEOC will significantly burden the agency's limited resources, as well as the resources of employers who will have to respond to such unsupported charges.

This rigid diligence standard creates a real risk of unfairness by erecting artificial barriers to the enforcement of the civil rights laws. This Court has rightly warned against the dangers of making it "difficult for a layman to invoke the protection of the civil rights statutes." *Green v. Brennan*, 136 S. Ct. 1769, 1778 (2016) (quoting *Delaware State Coll. v. Ricks*, 449 U.S. 250, 262 n.16 (1980)). The Eleventh Circuit's new standard imposes just this kind of difficulty because it is profoundly counterintuitive to ask laypersons to search for evidence of discrimination that they have no reason to believe has occurred. *See Tucker*, 657 F.2d at 726 ("It would be anomalous indeed if persons protected by the

statute from racial discrimination are required to presume that they are being discriminated against."). Moreover, it harms the Congressional purpose of eradicating employment discrimination, because once the premature and unsupported charges of discrimination are dismissed by the EEOC, applicants who later become aware of facts supporting a charge of unlawful age discrimination will likely be time barred—by the 90-day period in which to bring suit—from raising meritorious claims.

Ultimately, the repercussions of this rigid diligence standard frustrate the central purposes of Title VII and the ADEA altogether, *supra* at 11-13. *Cf. Zipes*, 455 U.S. at 398 (in applying charge-filing deadlines, courts must "honor the remedial purpose of the legislation as a whole"). And the implications of the rule are extraordinarily broad, extending beyond ADEA or disparate impact cases to any type of employment discrimination plaintiff seeking to toll her claim, including in cases where the plaintiff alleges intentional discrimination because of race, as observed by Judge Martin in her dissent. *Villarreal*, 839 F.3d at 990 (Martin, J., dissenting).

These practical problems demonstrate the wisdom of the Eleventh Circuit's previous, long-standing framework for evaluating claims of equitable tolling in employment discrimination cases, in which diligence is required only *after* the facts that would support a charge of discrimination are apparent or should have become apparent to a potential plaintiff with a reasonably prudent regard for her rights, regardless of whether the employer engaged in active deception. *Reeb*, 516 F.2d at 931. This Court should grant the petition for certiorari, reverse the Eleventh Circuit's decision, and clarify the appropriate diligence standard for equitable tolling claims when a

job applicant has no reason to believe that discrimination has occurred.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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