No. 17-1180

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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The brief in opposition does not contest the fundamental facts making this case worthy of review. It concedes that there is a square and acknowledged circuit split concerning whether the EEOC may continue an investigation after the charging party has initiated litigation. Opp. 13. It concedes that the EEOC's investigative authority "is tied to charges filed with the Commission," *id.* at 14 (citation omitted), but conspicuously never denies the agency's concession in *TriCore* that pattern and practice evidence is "now being sought for *all* cases," regardless of the charge. *See* Pet. 4 (emphasis added) (quoting *EEOC v. TriCore Reference Labs.*, No. 15-mc-00046WJ, 2016 WL 6823516, at *7 (D.N.M. Feb 8, 2016), *aff'd*, 849 F.3d 929 (10th Cir. 2017)). The petition demonstrated that the EEOC has been exercising precisely the "plenary" investigative authority that Congress deliberately withheld, *see EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984), based on a regulation in which the agency gave itself authority to investigate any charge indefinitely. The brief in opposition (like the decision below) relies on that regulation but offers no explanation of how it is consistent with Title VII or entitled to deference. The opposition also effectively concedes that its statutory interpretation renders the Commissioners' statutory authority to bring their own charges wholly superfluous.

The opposition offers essentially two reasons to deny review. First, it suggests that *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), tacitly abrogated the Fifth Circuit's decision in *EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997), *see* Opp. 16-17, 21-22. But

Waffle House merely held that a private arbitration agreement cannot displace the EEOC's *enforcement* authority; it did not and could not announce any holding regarding the EEOC's *investigative* authority.

Second, the opposition attempts to graft various limitations onto the decision below to somewhat temper the Seventh Circuit's extreme position—suggesting, for example, that the EEOC may continue to investigate allegations after litigation begins if the suit does not pursue those particular allegations. Those caveats have no basis in the Seventh Circuit's decision, the facts of this case, or the EEOC's actual practice. That the agency feels compelled to articulate them betrays the weakness of its position.

The Seventh Circuit's decision deepens an acknowledged circuit split on an issue *amici* confirm is of great national importance, and cannot be reconciled with the text and structure of Title VII. Certiorari should be granted.

1. The opposition admits the critical facts. The employees' charges alleged that Union Pacific "violated Title VII when it denied [them] the opportunity to take the test for the ASP position." Opp. 5. They did not allege anything discriminatory about the test, or indeed anything at all about the treatment of other Union Pacific employees. *Id.*; *see also* Pet. App. 45a-46a, 48a-49a. Nonetheless, after the employees had been litigating their charges in court for over a year, the EEOC served a subpoena on Union Pacific demanding nationwide information about the test those employees never took, based on suspicions derived not from the charges but from information voluntarily produced by Union Pacific. *See* Opp. 7-8.

The opposition accurately recites the statutory regime that is supposed to constrain the EEOC's investigative authority. It acknowledges that Title VII created an "'integrated, multistep enforcement procedure,'" that "starts when 'a person claiming to be aggrieved' files a charge of an unlawful workplace practice with the EEOC,'" that the EEOC's authority to investigate is not plenary but "'tied to charges filed with the Commission,'" and that the statute "mandates that the EEOC provide notice to the employer, investigate the charge, determine whether there is 'reasonable cause' to believe the allegation is true, and if so, engage in conciliation and mediation efforts" on a defined time table. Opp. 14 (citations omitted).

The opposition cannot explain how that carefully established structure could possibly be compatible with an open-ended power to investigate *other* employment practices, that were never alleged to be unlawful in the charge and that could not have "aggrieved" the charging employees, *see* 42 U.S.C. § 2000e-5(a), (b), without notice or time constraints whatsoever. The opposition forthrightly argues that the EEOC may expand its investigation beyond the allegations in the original charge without notice to the employer, if the agency uncovers evidence "suggesting a broad pattern or practice of discrimination" during its investigation. Opp. 19. It relies on this Court's statement in *General Telephone Co. v. EEOC* that "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." 446 U.S. 318, 331 (1980). But as the Tenth Circuit explained in *EEOC v. TriCore Reference Laboratories*, "*General Telephone* supports that the EEOC can expand its *charges* after

uncovering violations during a reasonable investigation," but "does not support that the EEOC can expand its *investigation* beyond the 'charge under investigation.'" 849 F.3d 929, 939 n.9 (10th Cir. 2017) (citation omitted). The EEOC's enforcement power and its power to investigate by issuing subpoenas are distinct. The EEOC's subpoena power is limited to information "relevant to the charge under investigation," and not simply any matter within the EEOC's purview.

The opposition's position nullifies the employer's statutory right to notice. *Shell* explained that the notice need not be highly detailed, but must (even in pattern or practice investigations) at least be sufficient to "alert the employer to the range of personnel records that might be relevant to the Commission's impending investigation and thus would ensure that those records were not inadvertently destroyed." 466 U.S. at 79. The EEOC now declares that if the suspected pattern or practice issue is not alleged in the charge, the notice requirement can be ignored altogether—leaving the employer to guess the scope of the investigation and its own document retention obligations.

If the EEOC uncovers evidence of unrelated discrimination while investigating a charge, *see* Opp. 25, and wants to subpoena information about that new topic, the 1972 amendments authorize the Commissioners to file their own charge. *See* 42 U.S.C. § 2000e-6. As the petition explained, the EEOC's position renders those provisions superfluous. The opposition effectively concedes this point. Citing only court of appeals decisions, it maintains that "it is well established that the Commission may . . . investigate (and when warranted, litigate) a potential pattern or

practice of discrimination under the authority vested in it by Section 2000e-5(b) and (f)(1)," even when the charge filed does not allege a pattern or practice of discrimination. Opp. 18. If that is "well established," then the courts of appeals have written an important part of Title VII entirely out of the law. Nor is it sufficient for the EEOC to send a letter simply stating that it has "expanded" its investigation. *See TriCore*, 849 F.3d at 939 ("The letter is not a 'charge' of discrimination, which is required for the EEOC to seek information . . . .").

The opposition suggests that if the EEOC "ultimately finds reasonable cause to believe that discrimination occurred, it would be required to engage in the full panoply of Title VII's pre-suit procedures, including conciliation." Opp. 20. But the opposition cannot mean that suggestion literally, because the statutory "pre-suit procedures" are supposed to start with a charge and notice to the employer, both of which are supposed to *precede* the investigation, and both of which the opposition suggests can be ignored altogether. And what is the point of "conciliation" when the employer is already litigating, or has already won?

The opposition argues that there is no textual basis to distinguish between issuing a right to sue notice, which it contends does not terminate the EEOC's investigative authority, and initiating a lawsuit. *Id*. at 15-16. But the statute provides that the EEOC may intervene in an employee's lawsuit *only* "upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1). If the EEOC may instead continue investigating and then bring its own separate lawsuit, that provision also becomes superfluous.

2. Like the Seventh and Ninth Circuits, the opposition repeatedly relies on a regulation in which the EEOC purports to give itself the authority to continue investigating a charge indefinitely if certain senior officials "determine[] . . . that it would effectuate the purpose of Title VII" to do so. 29 C.F.R. § 1601.28(a)(3). That regulation has no foundation in the statute. The government's continued reliance on it demonstrates a need to clarify or revisit principles of administrative deference, further supporting review.

3. The opposition attempts to downplay the acknowledged circuit split by arguing that this Court's decision in *Waffle House* somehow requires the conclusion reached by the Seventh and Ninth Circuits. *See* Opp. 13, 16-17, 20-22.

As the petition explained, *Waffle House* has nothing to do with the agency's investigative power; it dealt only with its enforcement power. *See* Pet. 16-17. The question presented was whether an arbitration agreement between private parties could prevent the EEOC from enforcing Title VII's antidiscrimination protections in court, when the charging employee never initiated an arbitration (or any other enforcement proceeding) himself. This Court held that the EEOC's enforcement power is not dependent on the employee's ability to proceed in court, and that private arbitration agreements cannot bind the EEOC. The agency's investigative subpoena authority derives from entirely different provisions of Title VII.

The opposition nonetheless argues that *Waffle House* stands for the sweeping proposition that nothing an employee does, and no ruling by a court on the merits of a charge, can affect the EEOC's

authority. Opp. 17. That position was explicitly rejected by *Waffle House* itself. This Court explained that the employee's conduct and agreements

> may have the effect of limiting the relief that the EEOC may obtain in court. If, for example, he had failed to mitigate his damages, or had accepted a monetary settlement, any recovery by the EEOC would be limited accordingly. . . . [I]t "goes without saying that the courts can and should preclude double recovery by an individual."

534 U.S. at 296-97 (citations omitted). And of course this Court explicitly declined to decide whether the EEOC's suit would have been barred if the employee had actually pursued a case in arbitration—which is the closest analogue to the question presented here. *Id.* at 297; Pet. 17.

4. The opposition cites three cases to support its claim that the Fifth Circuit would embrace a similarly expansive reading of *Waffle House*. The first, *EEOC v. Bass Pro Outdoor World, L.L.C.*, 865 F.3d 216, 226-27 (5th Cir. 2017)), is not even Fifth Circuit precedent. It is a non-precedential concurrence in the denial of rehearing *en banc* that the opposition contends "reject[s] [the] argument that the EEOC's enforcement power is 'derivative of individuals' because that argument 'has been thrice rejected by the Supreme Court.'" Opp. 22 (citation omitted). Notwithstanding its status as dicta, just like *Waffle House*, *Bass Pro* had nothing to do with the EEOC's investigative authority or even with any individual charges under Title VII. *See generally EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791 (5th Cir. 2016). The EEOC filed a Commissioner's charge

alleging a pattern or practice of discrimination, and the court's (precedential) opinion concerned the remedies available to the EEOC and the interaction between 42 U.S.C. §§ 2000e-5 and e-6. It had nothing to do with the issues presented in *Hearst*.

The opposition also cites *EEOC v. Board of Supervisors for the University of Louisiana System*, 559 F.3d 270 (5th Cir. 2009), and *EEOC v. Jefferson Dental Clinics, PA*, 478 F.3d 690 (5th Cir. 2007). Again, neither case had anything to do with the EEOC's investigative authority. *Board of Supervisors* concerned whether sovereign immunity barred the EEOC from suing a state university. 559 F.3d at 272. Acknowledging that sovereign immunity does not bar suits brought by the federal government, the university argued that it nonetheless should bar "make-whole" relief that the charging employee could not obtain. *Id.* at 273. The Fifth Circuit rejected that argument in a straightforward application of *Waffle House*, holding that the EEOC's power to seek certain relief in court is not necessarily dependent on the employee's right to do so. *Id.*

In *Jefferson Dental*, the employees did not wait for a right to sue letter but instead filed a tort (*not* Title VII) action in state court. The Fifth Circuit simply held that the EEOC was not bound by the *res judicata* consequences of their loss in state court, as a matter of Texas privity law, but could pursue its own federal action to the extent that it sought equitable relief in the broader public interest. 478 F.3d at 698-99. As in *Waffle House*, the Fifth Circuit recognized that the EEOC *could not* seek any victim-specific relief. *Id.* at 699 ("The EEOC's public interest does not justify giving the plaintiffs two chances to receive make-

whole relief."). Again, no issue of the EEOC's investigative powers was presented.

5. The opposition also betrays the weakness of its position by debuting an entirely new argument—that the EEOC's "authority to investigate charges of discrimination does not necessarily cease when . . . the charging party . . . pursues a civil action raising fewer than all the allegations included in the initial charge." Opp. 13. The opposition argues that the charging employees here only brought "retaliation" claims, not "racial discrimination" claims, in court, and therefore the EEOC remained free to investigate any pieces of the charge the employees did not sue on. *Id.* at 17.

First, neither the Seventh Circuit's decision in this case nor the Ninth Circuit's decision in *EEOC v. Federal Express Corp.*, 558 F.3d 842 (9th Cir. 2009), articulated any limitation of that nature.

Second, that distinction would not even work in this case. The charging employees here *did not* allege any discrimination in the test itself, and certainly did not allege any nationwide pattern or practice that could support the EEOC's subpoena. Furthermore their suit did, in fact, assert "racial discrimination" claims, in addition to "retaliation" claims. *See Burks v. Union Pac. R.R. Co.*, 1:12-cv-08164 (N.D. Ill. Oct. 11, 2012), ECF No. 1-1. When the employees amended their complaint, they re-styled their discrimination claims as harassment claims. *See id.*, ECF No. 10. The language in each is identical. Moreover, a harassment claim *is* a discrimination claim; that is why harassment is actionable under Title VII at all. *E.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

Third, the proposed distinction would invite unintended gamesmanship. Nothing in Title VII suggests Congress intended to permit employees to bring suit on some, but not all, of the allegations in a charge—leaving the agency free to continue investigating others left behind. The opposition appears to ground its proposal on a confused understanding of *res judicata* principles. Opp. 17 n.6. But of course those principles cut the other way, by requiring litigants to bring all claims arising from the same factual occurrence in the same case. *See United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316 (2011).

6. The petition demonstrated that the circuits have articulated very different principles for assessing the relevance of subpoenaed information. Some circuits squarely hold that because discrimination covered by Title VII is "'by definition class discrimination'" *any* suspected discrimination against members of the same general "class" of employees is always relevant. *EEOC v. Konica Minolta Bus. Sols. USA, Inc.*, 639 F.3d 366, 369 (7th Cir. 2011) (citation omitted). The Tenth and Eleventh Circuits have articulated a standard that is narrower and more consistent with this Court's insistence that the EEOC's investigative authority is not "plenary" and does not extend to any matter within the EEOC's jurisdiction. *See* Pet. 22-28. The opposition labors to distinguish those cases on the facts but never grapples with the important differences in the articulated standard.

The opposition's discussion of relevance also conspicuously evades the core issue, by offering a post hoc characterization of the charges as "involving the 'company-wide use of a test that allegedly facilitated

discrimination.'" Opp. 24-25 (citation omitted). Again, these charges were filed by employees who did *not* take the test and alleged no discrimination in its content. If the EEOC can recharacterize charges at such a high level of generality, then there are no practical limits on the agency's investigative discretion.

The Tenth and Eleventh Circuits firmly reject that position. Indeed, the opposition's discussion of *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014), all but admits that the Eleventh Circuit would reject this subpoena—recognizing that the requested information was "unnecessary in that case" because Royal Caribbean "'admit[ted]' that the employee 'was terminated because of his medical condition.'" Opp. 26 (citation omitted). Thus, there were no "contested issues that must be decided to resolve [the] charge." *Royal Caribbean*, 771 F.3d at 761. Here, there are no "contested issues" about the fairness of the tests that must be decided to resolve the charges because neither party took the test. *See* Pet. 26.

The opposition's attempts to make this subpoena seem relevant to the charge also ring hollow, when the opposition conspicuously never denies the agency's recent concessions that it seeks nationwide "pattern or practice" information *in every investigation*, as a matter of course, whether a pattern is alleged in the charge or not. *Id.* at 29. (Those concessions also indicate this Court should look skeptically on the opposition's assertions, without citation, that the EEOC rarely continues investigations after litigation commences.)

7. The opposition confirms what the recent case law makes plain: the EEOC has declared that it may

subpoena whatever it wishes, whenever it wishes, regardless of the content of the charges and even when a court has already adjudged the charge meritless. The petition explained, and *amici* confirm, that allowing the EEOC such an open-ended license to investigate poses significant practical problems for businesses throughout the country that would face conflicting rules. The fact that few of these disputes culminate in a published appellate decision is no reason to deny review. These circuit splits persist and only this Court may resolve them.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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