No. 19-1476

In The
Supreme Court of the United States

VANTAGE ENERGY SERVICES, INC.,
VANTAGE DRILLING INTERNATIONAL,
AND VANTAGE INTERNATIONAL
MANAGEMENT COMPANY PTE. LTD.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Fifth Circuit's decision conflicts with *Holowecki*, which held that to constitute a charge a filing must both meet regulatory requirements and be reasonably construed as a request for remedial action. *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008). The unverified Intake Questionnaire submitted to the EEOC "on behalf of" Poston by his counsel cannot reasonably be construed as a request for remedial action. In addition, Poston's "inexcusable" delay in filing a verified charge is not saved by *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002). The EEOC argues that its launch of a new online intake process diminishes the significance of these concerns, but the opposite is true. Without guidance from this Court, a brand-new process is more likely to result in repeated disputes about what is a charge and what is not. The Court ***must*** resolve the foundational issue of what constitutes a charge under the ADA.

The Fifth Circuit's decision also conflicts with *Iqbal*'s holding that conclusory allegations do not suffice under Rule 9. *Ashcroft v. Iqbal*, 556 U.S. 662, 686-87 (2009). After contending in both courts below that the timely filing and notice requirements are conditions precedent subject to Rule 9(c), the EEOC now asserts a plaintiff need not plead compliance with such preconditions at all. The EEOC is wrong, and its arguments underscore the need for this Court's review of the pleading question.

ARGUMENT

I. What constitutes a charge under the ADA is a significant and recurring question of federal law that should be settled by this Court.

1. Poston's initial EEOC submission did not ask the EEOC to do anything. His lawyer sent a preliminary form (Intake Questionnaire) that would not begin an investigation (it was unverified) and would not disclose his identity (as an "on behalf of" filing). The Fifth Circuit's acceptance of Poston's submission as a charge conflicts with *Holowecki*.

a. The Intake Questionnaire at issue here still "does not give rise to the inference that the employee requests action against the employer" as *Holowecki* requires. The Intake Questionnaire states "this questionnaire may serve as a charge *if* it meets the elements of a charge." BIO 13 (emphasis added); Pet. App. 43a. This circular statement does nothing to clarify whether the Intake Questionnaire is a charge. Further, the statement is immediately preceded by language showing the form's purpose is *not* to request action against the employer: "**PRINCIPAL PURPOSE.** The purpose of this questionnaire is to solicit information about claims of employment discrimination, determine whether the EEOC has jurisdiction over those claims, and provide charge filing counseling, as appropriate

Pet. App. 43a. Similarly, Box 2 of the Intake Questionnaire says "I want to file a charge" but does not indicate that checking the box means a charge has been filed. Pet. App. 42a; *see Hull v. Emerson Motors/Nidec*, 532 Fed. Appx. 586, 588 (5th Cir. June 27, 2013) ("The February intake questionnaire indicates that Hull 'would like to file a charge,' but the questionnaire does not say that, by completing it, a charge has been filed."). The form makes clear that in some instances it is definitely not a charge (*e.g.*, Box 1 says "I have not filed a charge"). Pet. App. 42a. But there is never an instance where the form states a charge has been filed, and Box 1's clarity does not rescue Box 2's ambiguity. Finally, the Intake Questionnaire's lack of verification also indicates it was not a request for remedial action, as the EEOC will not begin its investigation until verification occurs. Pet. 16-17.

b. Poston's lawyer's cover letter accompanying the Intake Questionnaire confirms that it did not seek remedial action. The EEOC concedes "an affirmative indication (if not withdrawn) that a complaining party does not want the EEOC to disclose his identity could reflect that he does not seek actual remedial action from the agency." BIO 14. Here, throughout the letter, Poston's lawyer asserts the law firm is making a submission "on behalf of" Poston. Pet. App. 31a-32a. As a result (and as the EEOC has represented to Poston, Vantage, and multiple courts), Poston's identity as a complainant was not disclosed to Vantage. *See* ROA 74

(Feb. 25 letter from EEOC to Poston stating: "As required by our regulations, the identity as a complainant of any person on whose behalf the charge was filed will not be disclosed to the [employer]."); Pet. App. 44a (EEOC telling Vantage that attorney is "filing on behalf of other(s)" and withholding Poston's identity); ROA 119-20 (EEOC arguing to the district court that it "properly withheld the identity of" Poston due to the "on behalf of" submission); EEOC C.A. Reply 30. The EEOC now argues the "on behalf of" status of Poston's submission was negated by checking Box 2 which indicates that the complainant's name would be disclosed. BIO 14-15. But there is no dispute that the EEOC withheld Poston's identity precisely because of the "on behalf of" filing.

c. The EEOC argues Poston's lawyer's cover letter requested remedial action by asking the EEOC to "accept this letter as a complaint of employment discrimination brought against [petitioners]." BIO 14. However, the term "complaint" is not equivalent to a "charge" that triggers the EEOC's remedial process. Indeed, the Intake Questionnaire references the word "complaint" in describing ways an individual may have raised a discrimination concern *outside of* the charge process. Pet. App. 41a (question 14 asks if you have "filed a charge previously in this matter with EEOC or another agency," while question 15 requests information "if you have filed a complaint with another agency"); 36a ("If you complained about discrimination, participated in someone else's complaint, or filed a charge of discrimination. . . ."). The Seventh Circuit

explicitly held similar language meant a submission was not a charge. *Carlson v. Christian Brothers Services*, 840 F.3d 466, 468 (7th Cir. 2016) (a document stating it "authorize[s] the EEOC to look into the discrimination alleged" is "a far cry from a 'charge' as the word is ordinarily understood.").

The Fifth Circuit's conclusion that Poston's submission was sufficient as a charge conflicts with *Holowecki*, because the submission cannot reasonably be construed as a request for remedial action. The EEOC now suggests that "even if the court of appeals here had construed the ADA differently from *Holowecki's* interpretation of the ADEA, that difference would not necessarily be a conflict." BIO 12. If it is now the position of the federal agency enforcing these laws that *Holowecki* doesn't apply to the ADA and Title VII, that alone would warrant review by this Court.

d. The EEOC's denial that the Fifth Circuit's decision conflicts with *Carlson v. Christian Brothers Services* is similarly flawed. BIO 15-16. In *Carlson*, the EEOC argued the state agency's Complaint Information Sheet (CIS) was the same as the EEOC's Intake Questionnaire. The EEOC claims the Seventh Circuit disagreed with that argument. But it didn't. Instead, the Seventh Circuit said the CIS was not a charge:

> Despite all this, the EEOC has submitted an amicus curiae brief in which it argues that the plaintiff's CIS was the equivalent of a

> charge—thus ignoring what the Supreme Court said in *Federal Express Corp. v. Holowecki*—that a charge must request relief, and the plaintiff's CIS did not.

Carlson, 840 F.3d at 468 (internal citation omitted).

The EEOC now tells this Court the form in *Carlson* "was different from the EEOC's intake questionnaire." BIO 10. But the EEOC told the Seventh Circuit there was "no basis in common sense or precedent" to distinguish the two forms and "signing the CIS should carry the same legal significance as checking Box 2 of the form Intake Questionnaire." Pet. 14-15. The EEOC's argument to the Seventh Circuit accurately reflects that these forms are indistinguishable in practice, as the state agency in *Carlson* and the EEOC process the CIS and Intake Questionnaire, respectively, the same way. *Compare* Pet. App. 48a (EEOC prepared a charge based on the information provided and sent it for signature and return) *with Carlson*, 840 F.3d at 467 (agency "copies the information in the CIS on to an official charge form which the filer can sign and submit"). The Seventh Circuit held a form that "should carry the same legal significance" as the Intake Questionnaire was "merely a prelude to a charge, and not the charge itself" (*Carlson*, 840 F.3d at 468), while the Fifth Circuit held the Intake Questionnaire was a charge; thus the decisions conflict.

2. In addition to lacking a request for remedial action, Poston's Intake Questionnaire was not verified as required by the ADA. 42 U.S.C. § 2000e-5(b); 29

C.F.R. § 1601.9. The Fifth Circuit erred in holding the submission, "although verified outside of the filing period, was 'timely' by virtue of the relation-back regulation" under *Edelman*. Pet. App. 14a.

a. As an initial matter, the Court in *Edelman* did not endorse an unlimited deadline for verifying a charge. Rather, the case before it "simply challenge[d] relation back *per se*" (*Edelman*, 535 U.S. at 115 n.9) and the Court only purported to "sustain the regulation" regarding relation back. *Id.* at 109.

b. Moreover, the EEOC is wrong that the circumstances of *Edelman* parallel those of this case. BIO 18. Notably, *Edelman* did not involve inexcusable delay by the charging party. *Compare Edelman v. Lynchburg Coll.*, 300 F.3d 400, 403 (4th Cir. 2002) (Edelman promptly responded to the EEOC's requests but his interview was delayed for three months "[d]ue to the EEOC's delays") *with* Pet. App. 4a (the EEOC requested a verified charge from Poston's lawyer; three months later, it reached out again to Poston's lawyer because he still had not provided a verified charge). The EEOC obscures the facts of this case by stating the EEOC's final "warning" to Poston "promptly produced Poston's verified charge within 30 days." BIO 17-18. Calling Poston's response prompt ignores that Poston's verified charge was not received until nearly eight months after his initial submission, almost five months after the EEOC asked for it in May, and only after multiple EEOC requests. Pet. App. 3a-4a. The Fifth Circuit certainly did not view Poston's response as prompt,

instead referring to it as "dilatory" and "inexcusable." Pet. App. 14a.

The EEOC's representation that it "ensures such verification does not impermissibly delay its action by warning the charging party that it may dismiss his charge unless it receives a verified charge by a specific date" (BIO 17) is simply not credible in this case where the EEOC did not send its "warning" letter until after the filing deadline, seven months after the initial submission, and four months after requesting a verified charge. Pet. App. 47a-49a. To be sure, the EEOC's behavior here departs from its responses to this Court's inquiries in *Edelman* promising it would require diligence. *See* Pet. 22-23.

3. Finally, the EEOC says the charge-filing question will become less important because it launched a new, online intake process in 2017. BIO 18-19. However, this is precisely why the Court ***must*** resolve the foundational issue of what is a charge under the ADA. As the EEOC implements a new online system where the initial contact with the EEOC is never a signed Form 5 Charge, there will be endless disputes about what is a charge and what is not. Courts are already contending with such questions. *See*, *e.g.*, *Martinez v. Prairie Fire Development Group, LLC*, 19-CV-2143-JWL, 2019 WL 3412264, *3-5 (D. Kan. July 29, 2019) (plaintiff's timely online inquiry through the EEOC's Public Portal and scheduling of an interview were sufficient to deem her submission a charge as "the court sees no reason why an online inquiry should be treated differently from an intake questionnaire");

Muldrow v. South Carolina Department of Corrections, C.A. No. 2:19-3498-DCN-KDW, 2020 WL 4588893, *4-7 (D. S. C. April 7, 2020) (same).

II. The Fifth Circuit's decision on the pleading question conflicts with *Iqbal* and warrants review in this case.

1. The EEOC does not argue with the straightforward premise that Rule 9(c) should be interpreted consistently with Rule 9(b), an adjacent subsection of the same rule containing the same language with the same structure. In *Iqbal*, 556 U.S. at 686-87, the Court held conclusory allegations are not sufficient under Rule 9(b). Here, the Complaint alleged no *facts* about timeliness or notice (Pet. App. 5a; D. Ct. Doc. 1), yet the Fifth Circuit held that alleging "all conditions precedent . . . have been fulfilled" satisfied Rule 9(c). Pet. App. 6a. The decision below conflicts with *Iqbal*, which is a sufficient basis for granting review. Pet. 26-31; S. Ct. R. 10(c).

2. Throughout this litigation, the EEOC argued the timeliness and notice requirements of Section 2000e-5 are conditions precedent that should be pled in accordance with Rule 9(c). *See*, *e.g.*, D. Ct. Doc. 12, at 7-8; EEOC C.A. Br. 34 n.4, EEOC C.A. Reply 9-14. Now, the EEOC argues for the first time that the timeliness and notice requirements merely provide an affirmative defense; thus, an ADA plaintiff has no pleading obligation. BIO 19-25. The Court's normal practice is to "refrain from addressing issues not raised

in the Court of Appeals," and there is no reason to depart from such practice in this case. *E.E.O.C. v. Fed. Labor Relations Auth.*, 476 U.S. 19, 24 (1986); *see also City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts.").

3. Even if the Court considered this newly-raised argument, the Court still should review the pleading question presented. This Court's precedent is consistent with requiring an ADA plaintiff to plead timeliness and notice. The Court has said an employee "may bring a Title VII claim only if she has first filed a timely charge with the EEOC—and a court will usually dismiss a complaint for failure to do so." *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 487 (2015); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (describing timeliness and notice requirements as "prerequisites that a plaintiff must satisfy before filing suit"). A court would only "dismiss a complaint" for such a failure if there is a requirement that the complaint contain such information to begin with.[1]

[1] Requiring a plaintiff to plead satisfaction of these prerequisites reflects both statutory structure and common sense. Unlike a typical affirmative defense that is a separate bar to suit, the timeliness and notice requirements are integrated into the statutory provisions that are the source of the plaintiff's claim. *See Montes v. Vail Clinic*, 497 F.3d 1160, 1168 (10th Cir. 2007). Thus, contrary to the EEOC's argument (BIO 24), timeliness and notice are elements supporting an ADA plaintiff's claim for purposes of Rule 8(a)(2). Practically, a plaintiff has superior access to the evidence necessary to determine compliance with the statute, especially when, as here, the EEOC is the plaintiff. *Montes*, 497 F.3d at 1168.

The EEOC's reliance on *Zipes* and *Davis* (BIO 21-22) is misplaced. The holdings in *Zipes* and *Davis* that the timeliness and charge-filing requirements are not jurisdictional and are subject to waiver, estoppel, and equitable tolling are consistent with Rule 9(c)'s approach: a plaintiff must "allege generally" that the conditions precedent were satisfied and a defendant then may deny satisfaction of the preconditions "with particularity" or the plaintiff's allegations are assumed admitted. FED. R. CIV. P. 9(c); *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1008-10 (11th Cir. 1982).

Nonetheless, circuit courts conflict on this issue. The EEOC oddly suggests there is no division of authority on whether the timeliness and notice requirements are conditions precedent or affirmative defenses (BIO 19-20), while at the same time identifying circuit cases that conflict on that very question. BIO 22 (*Hardaway*), 24 (the Fifth Circuit's decision below and *Hildebrand*). Other circuit courts have inconsistently characterized Section 2000e-5's charge requirements as conditions precedent or affirmative defenses. *Compare Jackson*, 678 F.2d at 1008-10 (timeliness and notice are conditions precedent that must be pled under Rule 9(c)); *Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447, 451 (8th Cir. 1998) (condition precedent) (citing *Zipes v. Trans World Airlines*, 455 U.S. 385, 393(1982)); *Alexander v. Local 496, Laborers' Intern. Union of N. Am.*, 177 F.3d 394, 407 (6th Cir. 1999) (condition precedent); *with Hardaway v. Hartford Public*

Works Dept., 879 F.3d 486, 491 (2d Cir. 2018) (affirmative defense).

4. Finally, the EEOC argues this case is a poor vehicle to address the pleading question because it has "moved beyond the mere question of pleading" and because Rule 15 allows for leave to amend a pleading under certain circumstances. BIO 25-26. These arguments fail, because the same would be true for all cases challenging a plaintiff's exhaustion of administrative remedies via a Rule 12(b)(6) motion to dismiss. Courts routinely consider EEOC documents in resolving such motions. *See*, *e.g.*, *Carter v. Target Corp.*, 541 Fed. Appx. 413, 416 (5th Cir. 2013); *see also Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994) ("In deciding a 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record."). Here, Vantage had never seen the Intake Questionnaire the EEOC relies on until the EEOC filed it in opposing Vantage's motion to dismiss, which underscores that requiring a plaintiff to allege facts to support the satisfaction of conditions precedent is the common sense approach. This case arises in a common context and is an *ideal* vehicle for examining the pleading standards for conditions precedent. The EEOC has not put forward any reason to think otherwise.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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