No. 19-446

In the Supreme Court of the United States

VF JEANSWEAR LP, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, prohibits the U.S. Equal Employment Opportunity Commission (EEOC) from continuing to investigate a charge of discrimination after it issues the charging party a right-to-sue notice and that party files a lawsuit raising some of the allegations in the charge.

2. Whether the court of appeals correctly held that the district court abused its discretion in declining to enforce a subpoena issued by the EEOC based on the district court's view that information requested in such a subpoena must be relevant not only to the allegations in the charge, but also to the personal harm suffered by the charging party.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 477. The order of the district court (Pet. App. 5-25) is unreported but is available at 2017 WL 2861182.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2019. A petition for rehearing was denied on July 10, 2019 (Pet. App. 26). The petition for a writ of certiorari was filed on October 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*), generally prohibits employment discrimination "because of * * * sex." 42 U.S.C. 2000e-2(a)(1) and (2); see

42 U.S.C. 2000e-3(b) ("based on * * * sex"). The Equal Employment Opportunity Commission (EEOC or Commission) has "[p]rimary responsibility for enforcing Title VII," *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984); see 42 U.S.C. 2000e-5(a), and has authority to issue "procedural regulations to carry out the provisions" of the statute, 42 U.S.C. 2000e-12(a).

"Title VII sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *Shell Oil*, 466 U.S. at 62 (citation omitted). That procedure begins with the filing of a charge of discrimination, either by or on behalf of an aggrieved individual or by an EEOC Commissioner. See 42 U.S.C. 2000e-5(b); 29 C.F.R. 1601.7(a). Charges must be "in writing," made "under oath or affirmation," and contain the information and be in the form that the EEOC specifies. 42 U.S.C. 2000e-5(b); see 29 C.F.R. 1601.12(b) (stating that "a charge is sufficient" when, at a minimum, it is "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of"); *Shell Oil*, 466 U.S. at 62-63.

Once the EEOC receives a charge of discrimination, it "shall make an investigation thereof." 42 U.S.C. 2000e-5(b). The "EEOC must first notify the employer, and must then investigate 'to determine whether there is reasonable cause to believe that the charge is true.'" *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1164 (2017) (citations omitted); see 42 U.S.C. 2000e-5(b); *University of Pa.* v. *EEOC*, 493 U.S. 182, 190 (1990); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). The EEOC must make that reasonable-cause determination "as promptly as possible and, so far as practicable, not later

than one hundred and twenty days from the filing of the charge." 42 U.S.C. 2000e-5(b).

"In order 'to enable the EEOC to make informed decisions at each stage of the enforcement process,' Title VII 'confers a broad right of access to relevant evidence.'" *McLane*, 137 S. Ct. at 1164 (brackets and citation omitted). Specifically, the EEOC may access any evidence that "is relevant to the charge under investigation." 42 U.S.C. 2000e-8(a). The statutory term "'relevant'" has been "generously construed" to "afford[] the Commission access to virtually any material that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68-69; see *McLane*, 137 S. Ct. at 1169. Accordingly, when conducting an investigation, the EEOC may issue administrative subpoenas and request judicial enforcement of those subpoenas. 42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161); see *McLane*, 137 S. Ct. at 1165-1166; *Shell Oil*, 466 U.S. at 63.

If the EEOC "determines after such investigation that there is reasonable cause to believe that the charge is true," it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b); see *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 483 (2015). If such efforts fail, the EEOC may bring a civil action against the employer. 42 U.S.C. 2000e-5(f)(1); 29 C.F.R. 1601.27. If instead the EEOC "determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify" the charging party and the employer "of its action." 42 U.S.C. 2000e-5(b).

Alternatively, if the EEOC does not complete its administrative processing within 180 days after the charge is filed, it must notify the charging party. 42 U.S.C. 2000e-5(f)(1). The charging party may request a right-to-sue notice, which the EEOC must issue if requested. *Ibid.*; 29 C.F.R. 1601.28(a)(1); see *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1847 (2019) ("Whether or not the EEOC acts on the charge, a complainant is entitled to a 'right-to-sue' notice 180 days after the charge is filed."). The EEOC also may issue a right-to-sue notice at the charging party's request during the 180-day period if it determines that it probably "will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge." 29 C.F.R. 1601.28(a)(2). Once the EEOC issues the right-to-sue notice, the charging party may file a civil action against the employer within 90 days. 42 U.S.C. 2000e-5(f)(1). Courts may in their discretion permit the EEOC to intervene in the charging party's lawsuit. *Ibid.*

When the EEOC issues a right-to-sue notice, either during or after the 180-day period, it generally terminates its processing of the charge. See 29 C.F.R. 1601.28(a)(3). But the EEOC may continue to process the charge if at least one of several enumerated officials "determines at that time or at a later time that it would effectuate the purpose of [T]itle VII" to do so. *Ibid.*

2. a. In July 2014, one of petitioner's employees filed an EEOC charge alleging sex discrimination in violation of Title VII and the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (29 U.S.C. 206(d)), as well as age discrimination in violation of the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (29 U.S.C. 621 *et seq.*). D. Ct. Doc. 1-3, at 2

(June 7, 2016); see Pet. App. 5-6. The employee claimed that she had been forced to resign after more than 28 years at the company because petitioner demoted her to a position with less pay and responsibility and refused her request for a lateral transfer. See D. Ct. Doc. 1-3, at 2. As relevant here, the employee "alleged that because of her sex, she was harassed, demoted, underpaid, and not offered opportunities for promotion." Pet. App. 2. The employee "also alleged that female employees generally were discriminated against because of their sex." *Ibid.* Her charge stated that she "was not offered any higher level position than Executive Sales Representative" and that "[f]emales are not afforded the opportunity in top level positions. Top level positions are male dominated." D. Ct. Doc. 1-3, at 2. The employee's charge also states: "I believe I and a class of females have been discriminated against because of sex (female), in violation of Title VII." *Ibid.*

The EEOC served a copy of the employee's charge on petitioner and began its investigation. See D. Ct. Doc. 1-3, at 4. Before the 180-day period expired, however, the employee requested a right-to-sue notice. Pet. App. 6-7. The EEOC obliged and sent a copy of the notice to petitioner. *Ibid.* The notice explained that the EEOC was unlikely to complete its processing of the employee's charge within 180 days of the filing, but that the EEOC "would continue administrative processing of her gender and age discrimination claims." *Id.* at 7.

Although the charge contained allegations under the Equal Pay Act, see D. Ct. Doc. 1-3, at 2, the employee already had sued petitioner in state court alleging wage discrimination based on sex in violation of that statute, see 29 U.S.C. 206(d)(1), and retaliation for complaining about that discrimination, in violation of 29 U.S.C.

215(a)(3). D. Ct. Doc. 1-3, at 13-14; see Pet. App. 6. She could do that because unlike Title VII, the Equal Pay Act "has no requirement of filing administrative complaints" or receiving a right-to-sue notice from the EEOC before filing suit. *County of Washington* v. *Gunther*, 452 U.S. 161, 175 n.14 (1981). Petitioner removed that suit to federal court. Pet. App. 6. Upon receiving the right-to-sue notice from the EEOC, the employee amended her now-federal complaint to include the Title VII and age-discrimination claims. See D. Ct. Doc. 7-2, at 16-18 (Aug. 15, 2016). The amended suit, to which the EEOC was not a party, did not allege that petitioner had deprived women across the company of opportunities to advance to higher level positions. See *id.* at 9-20; Pet. App. 17-18 n.2 (observing that the private lawsuit "had nothing to do with systemic employment practices, management jobs, or promotion"). Instead, it alleged only individual claims. See D. Ct. Doc. 7-2, at 9-20.

b. Meanwhile, the EEOC continued its investigation of the charge. Even before issuing the right-to-sue notice, the EEOC had sent petitioner a request for information. See D. Ct. Doc. 1-3, at 22-25; Pet. App. 7. Petitioner complied in part with that request, providing only the information that it believed related to the charging employee's personal experience at the company. Pet. App. 7. Petitioner objected to the EEOC's request for information about its workforce as a whole, asserting that compliance with that request would be unduly burdensome and that the information sought was "not relevant to the issues involved in the Charge." *Ibid.*

In response, the EEOC narrowed its request, but petitioner continued to object on relevance grounds. Pet. App. 7. The EEOC then issued an administrative subpoena requiring petitioner to identify in an electronic

database "all supervisors, managers, and executive employees" at petitioner's facilities from "January 1, 2012, to present." *Ibid.*; D. Ct. Doc. 1-3, at 75. The subpoena requested each responsive person's name, sex, work location, date of hire, positions held and date in each position, date of termination (if no longer employed by petitioner), and information that would allow the EEOC to locate the individual. Pet. App. 7-8; D. Ct. Doc. 1-3, at 75.

After unsuccessfully petitioning the EEOC to revoke the subpoena, petitioner refused to comply. See Pet. App. 7. The EEOC ultimately filed this suit in federal district court under 42 U.S.C. 2000e-8(a) and 2000e-9 to enforce the subpoena. See Pet. App. 5, 7. In its briefs and at a hearing, the EEOC represented to the court that it would further narrow its request; for example, instead of seeking information about all supervisors, managers, and executives at the company, the EEOC agreed to accept information only about the supervisors, managers, and executives in the charging employee's sales department and at petitioner's corporate locations in Kansas and Greensboro, North Carolina. See 9/30/2016 Tr. 28-30.

3. The district court refused to enforce the EEOC's subpoena, even as narrowed. Pet. App. 5-25. The court acknowledged that under binding circuit precedent, the EEOC could continue to investigate a charge under Title VII even after issuing a right-to-sue notice to the charging party at her request. See *id.* at 10-12 (citing *EEOC* v. *Federal Express Corp.*, 558 F.3d 842 (9th Cir.), cert. denied, 558 U.S. 1011 (2009) (No. 08-1500)). And the court recognized that under this Court's decision in *Shell Oil*, *supra*, the EEOC's investigative authority entitled it to any evidence "relevant to the charge under investigation," Pet. App. 12 (citation omitted), and the

term "relevant" should be "generously construed," *id.* at 13 (citation omitted).

The district court nevertheless declined to enforce the subpoena based on its belief that the EEOC was entitled only to information relevant to the charging employee's allegations of discrimination that affected her personally. Pet. App. 17-19. In the court's view, the employee's allegations amounted only to "a one-off discriminatory demotion and unequal pay." *Id.* at 17. Accordingly, the court determined that the EEOC's "companywide search for systemic discrimination in promotions to top positions" was not relevant to that allegation. *Id.* at 19. The court acknowledged the employee's allegations in her charge of systemic, companywide discrimination, but gave them no weight in its relevance analysis because, in its view, the allegations were "just a tip not bearing on her own experience or detriment." *Id.* at 18.

4. The court of appeals reversed. Pet. App. 1-4. The court explained that the standard for "relevance" set forth in this Court's decision in *Shell Oil* "allows [the EEOC] 'access to virtually any material that might cast light on the allegations against the employer.'" *Id.* at 2 (citation omitted). The court of appeals also observed that in addition to alleging that "she was harassed, demoted, underpaid, and not offered opportunities for promotion" because of her sex, the employee "also alleged that female employees generally were discriminated against because of their sex." *Ibid.* "Specifically, she stated 'Females are not afforded the opportunity in top level positions. Top level positions are male dominated.'" *Ibid.*

The court of appeals therefore concluded that "[t]he district court abused its discretion when it held that the

subpoenaed information"—"a wide range of employment information from [petitioner] relating to its supervisors, managers, and executive employees"—"was not relevant to [the] charge." Pet. App. 2. The court found "no legal basis" for the district court's view that "the scope of the relevance inquiry [is limited] only to the parts of the charge relating to the personally-suffered harm of the charging party." *Ibid.* To the contrary, the court of appeals explained that the "EEOC subpoenas are enforceable so long as they seek information relevant to *any* of the allegations in a charge, not just those directly affecting the charging party." *Id.* at 2-3 (emphasis added).

ARGUMENT

Petitioner contends (Pet. 12-16) that the EEOC loses its authority under Title VII to investigate a charge of discrimination once it issues a right-to-sue notice and the charging party files a lawsuit. Petitioner also renews its contention (Pet. 17-22) that the EEOC's investigative authority under Title VII does not extend to allegations in a charge affecting employees other than the charging party. The court of appeals did not address the first contention, perhaps because it was foreclosed by circuit precedent, see *EEOC* v. *Federal Express Corp.*, 558 F.3d 842 (9th Cir.), cert. denied, 558 U.S. 1011 (2009) (No. 08-1500); and it correctly rejected the second.

On the first question, although petitioner is correct that the Fifth Circuit reached a contrary result more than two decades ago, that decision predates, and is inconsistent with, this Court's subsequent decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), as well as subsequent decisions of the Fifth Circuit itself. And this Court has recently denied review of the question.

Union Pac. R.R. v. *EEOC*, 138 S. Ct. 2677 (2018) (No. 17-1180); see *Federal Express Corp.* v. *EEOC*, 558 U.S. 1011 (2009) (No. 08-1500). On the second question, the lower court's factbound application of the well-established relevance standard does not conflict with any decision of another court of appeals. Further review is unwarranted.

1. The court of appeals correctly determined that the EEOC's authority to investigate charges of discrimination does not necessarily cease when the Commission issues, pursuant to the charging party's request, a right-to-sue letter while the Commission is still conducting its investigation, and the charging party then pursues a civil action raising fewer than all of the allegations included in the initial charge.

a. Title VII prohibits employment discrimination because of sex, 42 U.S.C. 2000e-2(a), and "entrusts the enforcement of that prohibition" against private employers "to the EEOC." *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1164 (2017) (citing 42 U.S.C. 2000e-5(a); *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984)). Following the 1972 amendments to the statute, Title VII gives the EEOC authority "to implement the public interest as well as to bring about more effective enforcement of private rights." *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 325-326 (1980); see *id.* at 331 ("The EEOC exists to advance the public interest in preventing and remedying employment discrimination."). Thus, this Court has long recognized that the Commission "does not function simply as a vehicle for conducting litigation on behalf of private parties." *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 368 (1977).

The EEOC's authority "is tied to charges filed with the Commission." *Shell Oil*, 466 U.S. at 64. Title VII's "integrated, multistep enforcement procedure," *Occidental Life Ins.*, 432 U.S. at 359, "generally starts when 'a person claiming to be aggrieved' files a charge of an unlawful workplace practice with the EEOC," *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 483 (2015) (quoting 42 U.S.C. 2000e-5(b)); see *McLane*, 137 S. Ct. at 1164. The statute provides specific requirements for a valid charge, see 42 U.S.C. 2000e-5(b); *Shell Oil*, 466 U.S. at 67, and it 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, *McLane*, 137 S. Ct. at 1164 (citation omitted). Moreover, where the EEOC has not entered a conciliation agreement, filed a civil action, or dismissed the charge within 180 days, the statute requires the Commission to "notify the person aggrieved," who may request a right-to-sue notice and thereafter file a civil action within 90 days. 42 U.S.C. 2000e-5(f)(l); see 42 U.S.C. 2000e-5(b); see also 29 C.F.R. 1601.28(a)(1).

Critically, however—and in contrast to those detailed provisions—nothing in Title VII expressly or implicitly limits the EEOC's investigative authority to that 180-day window, or to the period before a charging party requests a right-to-sue notice or initiates private litigation. Indeed, this Court has long understood that Title VII's requirement of issuance of a right-to-sue notice does not automatically terminate all of the EEOC's powers. In *Occidental Life Insurance*, the Court rejected the argument that the EEOC must "conclude its conciliation efforts and bring an enforcement suit within any maximum period of time." 432 U.S. at 360.

The Court explained that "a natural reading" of Section 2000e-5(f)(1) "can lead only to the conclusion that * * * a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit * * * within 90 days" of receiving a right-to-sue letter "or continue to leave the ultimate resolution of his charge to the efforts of the EEOC." *Id.* at 361.

Consistent with *Occidental Life Insurance,* the Commission has not treated the 180-day clock as an absolute limit on its investigative authority. The Commission's regulations provide that it may continue investigating and otherwise processing a charge after issuing a notice of right to sue when one of several enumerated officials determines "that it would effectuate the purpose of [T]itle VII * * * to further process the charge." 29 C.F.R. 1601.28(a)(3). Those regulations further provide that the Commission may issue a right-to-sue letter when fewer than 180 days have elapsed if the EEOC "has determined that it is probable that [it] will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge." 29 C.F.R. 1601.28(a)(2).

Petitioner's suggestion (Pet. 12-16) that the filing of a private lawsuit terminates the EEOC's investigative authority is without merit. Petitioner's view requires distinguishing between the issuance of a right-to-sue letter, which does not terminate the EEOC's authority under *Occidental Life Insurance, supra*, and the filing of a lawsuit, which petitioner claims (*e.g.*, Pet. 12-13) has that effect. That distinction, however, finds no foothold in the statute. Petitioner does not identify any specific statutory text that prohibits the Commission, once a

charging party has brought suit raising some of the allegations in the initial charge, from continuing to investigate the remaining allegations. See *Federal Express*, 558 F.3d at 853 ("[N]othing in § 706(f)(1) of Title VII indicates that the EEOC's investigatory powers over a charge cease when the charging party files a private action.").

Petitioner's view also is inconsistent with this Court's determination in *Waffle House, supra*, that the Commission's enforcement authority is not dependent on the conduct of a charging party. *Waffle House* held that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief. 534 U.S. at 297. In reaching that conclusion, the Court reiterated that, in light of the EEOC's role in serving the public interest, the Commission "does not function simply as a vehicle for conducting litigation on behalf of private parties." *Id.* at 287-288 (quoting *Occidental Life Ins.*, 432 U.S. at 368). Thus, the Court explained that "once a charge is filed, * * * the EEOC is in command of the process"; "[t]he statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake." *Id.* at 291. Where the agency decides that "public resources should be committed" to enforcement, "the statutory text unambiguously authorizes [the EEOC] to proceed." *Id.* at 291-292.

The same is true here. Once the employee filed her charge, the EEOC took "command of the process." *Waffle House*, 534 U.S. at 291. The EEOC's ensuing investigation was not, and could not be, controlled by the employee's decision to seek a right-to-sue notice and

then to file suit on fewer than all allegations included in her charge. Specifically, the employee's decision to litigate her individual claims of unequal pay and discriminatory demotion based on sex did not prevent the EEOC from continuing to investigate the companywide allegation in her charge that petitioner discriminated against women generally in top-level positions across the company.

Petitioner's attempt (Pet. 15) to distinguish *Waffle House* on the ground that it addressed only "the EEOC's authority to sue, not its authority to investigate a charge of discrimination," is without merit. As this Court has long recognized, conducting an investigation is a *prerequisite* to the EEOC's filing a lawsuit (or invoking its conciliation responsibilities). See *Shell Oil*, 466 U.S. at 68-69. If accepted, petitioner's position would in effect allow the charging party's conduct to prevent the EEOC from completing a charge investigation before bringing suit or attempting conciliation—contrary to this Court's observations in *Waffle House* that Title VII "clearly makes the EEOC the master of its own case," 534 U.S. at 291, and that the EEOC does not stand in an employee's shoes but instead pursues enforcement of Title VII in its own right, *id.* at 297.

Petitioner incorrectly asserts that the EEOC's continued investigation of a charge after issuing a right-to-sue notice would "nullify the statutory incentive for the EEOC to remedy unlawful employment practices through 'conciliation' and the statutory requirement that the EEOC attempt to make a 'determination on reasonable cause' within 'one hundred and twenty days.'" Pet. 16 (citation omitted). Although Title VII instructs the EEOC to make a reasonable-cause determination in 120 days if "practicable," 42 U.S.C. 2000e-5(b),

the statute does not divest the EEOC of authority after that time. And in the event that the EEOC continues to investigate charges after issuing a right-to-sue notice at the charging party's request, see 29 C.F.R. 1601.28(a)(3), and 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. Thus, allowing the EEOC to complete an investigation would neither serve as a disincentive to conciliation nor be tantamount to "permitting the EEOC to conduct indefinite investigations of a charge." Pet. 16.

b. The decision below accords with the decisions of the only two courts of appeals to consider the question in the eighteen years since *Waffle House.* In *Federal Express*, *supra*, the Ninth Circuit held that the EEOC may continue investigating and processing a charge following the instigation of private litigation. See 558 F.3d at 852-854. And in *EEOC* v. *Union Pacific Railroad*, 867 F.3d 843 (2017), cert. denied, 138 S. Ct. 2677 (2018) (No. 17-1180), the Seventh Circuit recently held the same. See *id.* at 851. In addition, courts of appeals addressing the EEOC's authority more generally have recognized that once a valid charge is filed, the EEOC's powers do not depend on the charging party's conduct.*

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* See, *e.g.*, *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 682 (8th Cir. 2012) ("Under *Waffle House* a court cannot judicially estop the EEOC from bringing suit in its own name to remedy employment discrimination simply because the defendant-employer happened to discriminate against an employee who, herself, was properly judicially estopped."); *EEOC* v. *Watkins Motor Lines, Inc.*, 553 F.3d 593, 597 (7th Cir. 2009) (private settlement and effort to withdraw charge do not strip EEOC of authority to investigate); *Marie* v. *Allied Home Mortg. Corp.*, 402 F.3d 1, 15-16 (1st Cir. 2005)

This Court declined to review the decisions in both *Union Pacific* and *Federal Express*. See *Union Pacific*, *supra* (No. 17-1180); *Federal Express*, *supra* (No. 08-1500). It should follow the same course here.

Petitioner correctly observes (Pet. 12-16) that five years before *Waffle House*, the Fifth Circuit held that "the EEOC may not continue to investigate a charge once formal litigation by the charging parties has commenced." *EEOC* v. *Hearst Corp.*, 103 F.3d 462, 469 (1997). But *Hearst* is inconsistent with this Court's decisions because the Fifth Circuit treated a charging party's conduct as defining the "distinct stages" of the EEOC's authority. *Id.* at 469. This Court made clear in *Occidental Life Insurance* that Title VII sets forth an "*integrated,* multistep enforcement procedure," 432 U.S. at 359 (emphasis added); and the Court ruled in *Waffle House* that, once a valid charge has been filed, the EEOC's authority to pursue that multistep enforcement procedure is not limited by the conduct of a charging party.

It is therefore unclear whether the Fifth Circuit would adhere to *Hearst* if the issue arose today. Following *Waffle House,* however, the Fifth Circuit has recognized in other contexts that the Commission's enforcement authority is independent of the charging parties' conduct. See *EEOC* v. *Jefferson Dental Clinics, PA*, 478 F.3d 690, 697 (2007) ("agree[ing]" with the

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(observing that "[t]he same logic" relied upon in *Waffle House* "applies to a preliminary EEOC investigation, which also cannot be halted by an arbitration agreement between the complaining employee and her employer"); *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1292-1293 (11th Cir. 2004) (identifying *Waffle House* and circuit court decisions as establishing that "the EEOC may pursue action on behalf of a sole person whose private suit has been resolved"), cert. denied, 546 U.S. 811 (2005).

EEOC's view that "under *Waffle House* the EEOC's interest 'in eradicating workplace discrimination' is unique and 'incompatible with a finding that the EEOC's authority to bring and maintain an enforcement action can be extinguished by a judgment in a private suit to which it was not a party'"); see also, *e.g.*, *EEOC* v. *Bass Pro Outdoor World, L.L.C.*, 865 F.3d 216, 226-227 (2017) (en banc) (per curiam) (rejecting argument that the EEOC's enforcement power "is derivative of individual[s]" because that argument "has been thrice rejected by the Supreme Court" in *Occidental Life Insurance, supra, General Telephone, supra*, and *Waffle House, supra*); *EEOC* v. *Board of Supervisors for the Univ. of La. Sys.*, 559 F.3d 270, 272-274 (2009) (rejecting argument that Eleventh Amendment bars EEOC from seeking victim-specific relief that would be unavailable to the private party in a private action). That tension in the Fifth Circuit's case law is better left to that court in the first instance.

Petitioner's suggestion (Pet. 15-16) that *Hearst* is consistent with *Waffle House* is incorrect. Petitioner relies on a question *Waffle House* left "'open,'" namely, "the 'question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek.'" *Ibid.* (citation omitted). But that question from *Waffle House* concerned the potential for the EEOC to obtain relief that would be *duplicative* of the relief obtained in a private lawsuit. See 534 U.S. at 296-297. Here, by contrast, the employee's lawsuit and the EEOC's continued investigation pose no threat of "double recovery," *id.* at 297 (citation omitted); the EEOC's investigation is into allegations of companywide discrimination against women, whereas the employee's private lawsuit raises

only individual claims related to her own demotion. Finally, petitioner's attempt to distinguish the court of appeals' earlier precedent in *Federal Express* on the ground that the charge there "involved a possible policy or pattern of discrimination affecting others," Pet. 14 (citation omitted), is misguided; the EEOC is investigating precisely such a companywide pattern here, cf. Pet. App. 18-19.

2. The court of appeals also correctly held that the district court abused its discretion in concluding that the subpoenaed information here is not relevant to the EEOC's Title VII investigation. Further review of that factbound determination is unwarranted.

a. Title VII provides that "[i]n connection with any investigation of a charge" of discrimination filed with the EEOC, the Commission shall have access to evidence that "is relevant to the charge under investigation." 42 U.S.C. 2000e-8(a). As this Court explained in *Shell Oil* and recently reiterated, the term "'relevant'" must be "'generously'" construed to "permit the EEOC 'access to virtually any material that might cast light on the allegations against the employer.'" *McLane*, 137 S. Ct. at 1169 (quoting *Shell Oil*, 466 U.S. at 68-69).

The court of appeals correctly determined (Pet. App. 2-3) that the district court abused its discretion in finding that the EEOC had not satisfied that standard here. As described above, the employee alleged in her charge both that she was not offered opportunities for promotion while working for petitioner *and* that women generally "are not afforded the opportunity in top level positions. Top level positions are male dominated." *Id.* at 2 (citation omitted). Accordingly, as part of its investigation, the "EEOC subpoenaed a wide range of employ-

ment information from [petitioner] relating to its supervisors, managers, and executive employees," *id.* at 1-2—information that might well "cast light on the allegations against [petitioner]" related to companywide policies or practices preventing women from attaining top-level positions, *McLane*, 137 S. Ct. at 1169 (citation omitted). See, *e.g.*, *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 298 (3d Cir. 2010) ("An employer's nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice."); *EEOC* v. *United Parcel Serv., Inc.*, 587 F.3d 136, 139 (2d Cir. 2009) (per curiam) (similar).

As the court of appeals observed (Pet. App. 2), the district court appeared to believe "that only [the charging employee's] personally-suffered harms could be considered" in its relevance analysis. To be sure, the district court also expressed its view that the employee's companywide allegations amount to "just a tip" or a "hunch[]," *id.* at 18, but the court ultimately based its decision on the ground that allegations of "discriminatory practice[s] not affecting the charging party," even if included in the charge, are "too removed" to allow the EEOC to investigate them. *Id.* at 19. The court of appeals correctly found "no legal basis" for that premise, explaining that the "EEOC subpoenas are enforceable so long as they seek information relevant to *any* of the allegations in a charge, not just those directly affecting the charging party." *Id.* at 2-3 (emphasis added). Here, the charge expressly includes allegations of companywide bias against women. See *id.* at 6. Under this Court's "generous[]" interpretation of relevance, *McLane*, 137 S. Ct. at 1169 (citation omitted), that is sufficient to authorize the EEOC's request for

companywide information. And to the extent the district court misapprehended the charge as alleging only a "one-off demotion from a sales job," Pet. App. 19; see *id.* at 17 ("one-off discriminatory demotion"), it erred in light of the plain text of the charge alleging companywide discrimination, see *id.* at 6. The court of appeals thus would have been justified in finding an abuse of discretion on that ground too. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling * * * on a clearly erroneous assessment of the evidence.").

b. Petitioner's suggestion (Pet. 18-20) that the decision below conflicts with decisions of other courts of appeals is incorrect. Instead, like the decision below, all of those decisions correctly recognize—as petitioner itself does (Pet. 17)—that this Court's decision in *Shell Oil*, *supra*, supplies the applicable standard for relevance. The various decisions petitioner cites simply reflect each court's factbound application of that standard to the circumstances present in those respective cases. None of them stands for the principle that an EEOC administrative subpoena may request information relevant only to the charging employee's personal harm, even when the employee alleges systemic or companywide discrimination in a validly filed EEOC charge.

For example, in *EEOC* v. *Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) (per curiam), the employee's charge alleged that his employer violated the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq.*)—which provides the "same enforcement powers, remedies, and procedures" as Title VII, *Waffle House*, 534 U.S. at 285—by refusing to renew his employment

contract after he was diagnosed with a medical condition. *Royal Caribbean*, 771 F.3d at 759. In response to the charge, the employer admitted that it had fired the employee because of his illness, but claimed that it was required to do so under the governing law and medical standards of the Bahamas. *Ibid.* In light of both that concession and the absence of any broader allegation in the charge of a companywide discriminatory policy or practice, the Eleventh Circuit upheld the district court's determination that a subpoena for "companywide data regarding employees and applicants around the world with any medical condition, including conditions not specifically covered by the [relevant Bahamian] medical standards or similar to" those of the charging employee, was overbroad. *Id.* at 761. The *Royal Caribbean* court explained that "[a]lthough statistical and comparative data in some cases may be relevant in determining whether unlawful discrimination occurred," it was unnecessary in that case because the employer "admit[ted]" that the employee "was terminated because of his medical condition." *Ibid.*

Similarly, in *EEOC* v. *TriCore Reference Laboratories*, 849 F.3d 929 (10th Cir. 2017), an employee alleged that the employer violated the ADA and Title VII by failing to provide a reasonable accommodation during her pregnancy. *Id.* at 934. The Tenth Circuit affirmed the district court's determination that the EEOC's request for a complete list of employees who had sought accommodations for disability was not relevant, because TriCore's response to the charge "referred only to [the charging party's] case and said nothing to suggest that its actions were based on a company policy or that it had

a pattern or practice of acting similarly when responding to other disabled employees' accommodation requests." *Id.* at 939.

Neither of those decisions suggests that when, as here, an employee's EEOC charge *does* allege broader companywide allegations, the EEOC nevertheless is precluded from seeking information related to those allegations. Indeed, such a rule would be inconsistent with this Court's admonition that "'unrelenting broad-scale action against patterns or practices of discrimination' [i]s essential if the purposes of Title VII [a]re to be achieved," and that "it is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired," *Shell Oil*, 466 U.S. at 69 (brackets and citation omitted); see *ibid.* (presupposing that the EEOC would "ha[ve] access to the most current statistical computations and analyses regarding employment patterns" as part of its investigatory authority) (citation omitted). Indeed, the Tenth Circuit itself has held that when a charge includes allegations suggesting broader discriminatory practices, the EEOC is entitled to information related to those broader allegations. See, *e.g.*, *Joslin Dry Goods Co.* v. *EEOC*, 483 F.2d 178 (1973).

Petitioner's suggestion (Pet. 19-20) that the decision below conflicts with the Third Circuit's decision in *Kronos*, *supra*, also is incorrect. There, the charging party alleged that her prospective employer used a certain hiring process that discriminated on the basis of disability. 620 F.3d at 292. The EEOC sought information about that hiring process, including information relevant to potential adverse impacts based on both disability and race. *Id.* at 293-294. The district court enforced the subpoena in part, but declined to enforce it insofar as it sought information related to race discrimination.

See *id.* at 294-295. The court of appeals affirmed, acknowledging that although the "EEOC's investigatory powers are expansive," the agency's "inquiry into discrimination based on race is wholly unrelated to [the employee's] charge," which alleged only discrimination based on disability. *Id.* at 302. Petitioner does not suggest that the EEOC's inquiry here is "wholly unrelated" to the *type* of discrimination alleged in the employee's charge; to the contrary, the subpoenaed information relates directly to the charge's allegation that "[t]op level positions are male dominated" and that "a class of females ha[s] been discriminated against because of sex." Pet. App. 6 (citation omitted).

The other decisions that petitioner cites (Pet. 21-22) likewise do not reflect a circuit conflict. Each of them permitted the EEOC to investigate acts or practices not directly affecting the charging party because in each case the requested information was relevant (under the "generous[]" *Shell Oil* standard, 466 U.S. at 68) to allegations of discrimination contained in the charge itself. See *EEOC* v. *Konica Minolta Bus. Sols. U.S.A., Inc.*, 639 F.3d 366, 368-370 (7th Cir. 2011); *EEOC* v. *Roadway Express, Inc.*, 261 F.3d 634, 636-639 (6th Cir. 2001); *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 358 (6th Cir. 1969).

Petitioner incorrectly asserts that those decisions conflict with Title VII's requirement that a charge be filed by "a person claiming to be aggrieved," 42 U.S.C. 2000e-5(b), which petitioner says somehow "limit[s] EEOC investigations to information relevant to the acts or practice affecting the charging party," Pet. 18; see Pet. 22 (asserting that the decision below would "nullify the statutory requirement that a charge be 'filed by or

on behalf of a person claiming to be aggrieved'") (citation omitted). Petitioner cites no precedent to support that assertion; and nothing in Title VII limits the scope of allegations an aggrieved employee may include in a sworn charge filed with the EEOC. Moreover, Title VII provides that "a member of the Commission" itself may file a charge, not just an aggrieved employee. 42 U.S.C. 2000e-5(b). In any event, the question here is whether, *after* an aggrieved employee or EEOC Commissioner has filed a valid charge, the agency may seek information relevant to the allegations in that charge. As explained above, every court of appeals has answered yes and applied the relevance standard set forth in *Shell Oil*, *supra*. That is what the court of appeals did here. See Pet. App. 2. Any error in its factbound application of that standard would not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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