No. 21-____

IN THE

Supreme Court of the United States

MICHAEL SIMKO,

Petitioner,

v.

UNITED STATES STEEL CORP.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, or under what circumstances, a claim that an employer unlawfully retaliated against an employee for filing a charge of discrimination with the EEOC under the remedial structure of Title VII may be addressed in an ensuing civil action, if the employee did not file a second formal administrative charge specifically alleging the retaliation.

RELATED PROCEEDINGS

Simko v. U.S. Steel Corp., No. 20-1091 (3d Cir. Mar. 29, 2021).

Simko v. U.S. Steel Corp., No. 2:19-cv-00765 (W.D. Pa. Dec. 13, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Simko respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-62a) is published at 992 F.3d 198. The district court's memorandum opinion and order (Pet. App. 63a-84a) is unpublished, but may be found at 2019 WL 6828421.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2021. Pet. App. 1a. A timely petition for rehearing was denied on May 11, 2021. Pet. App. 85a-86a. On March 19, 2020, this Court entered a standing order that extended the time to file a petition for a writ of certiorari in this case to October 8, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, are reprinted at Pet. App. 87a-92a.

Relevant portions of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112, 12117, and 12203, are reprinted at Pet. App. 93a-94a.

STATEMENT OF THE CASE

A. Legal Background

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, religion, or other impermissible grounds. *See* 42 U.S.C. § 2000e-2(a). The Act includes remedial provisions that apply not only under Title VII itself but also to claims arising under other statutes, such as the Americans with Disabilities Act of 1990. *See, e.g.*, 42 U.S.C. §§ 12117 and 12203(c), incorporating 42 U.S.C. §§ 2000e-4 *et seq.* The ADA prohibits both discrimination on the basis of disability, 42 U.S.C. § 12112(a), and retaliation for seeking to assert or protect rights under the Act, *id.* § 12203.

Under the Title VII structure, an aggrieved employee first files a "charge" with the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 2000e-5(b). In general terms, the EEOC notifies the employer, investigates the charge, and may seek to conciliate the dispute. *See id.* After the Commission has an opportunity to investigate, and if any attempt at conciliation fails, either the government or the charging party may file "a civil action." *Id.* § 2000e-5(f)(1); *see generally, e.g.*, *Ft. Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1846-1847 (2019) (describing process).

Title VII imposes no textual limit on the claims that may be made in such a civil action. But in implementing its provisions, courts have generally reasoned that the permissible scope of such an action must be limited to some extent by the original charge filed with the EEOC and later related developments. *See generally, e.g.*, 2 Barbara T. Lindemann *et al.*,

Employment Discrimination Law ch. 29.IV (6th ed. 2020); *Clockedile v. N.H. Dep't of Corrections*, 245 F.3d 1, 4 (1st Cir. 2001) (Boudin, J.). One early case, for example, held that a suit in court "may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970) (citation omitted). Another held that a suit "may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC." *Oubichon v. N. Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973). A claim not satisfying these standards may be dismissed.

Courts often refer to these inferred limitations on the scope of actions as "exhaustion requirement[s]." *E.g.*, *Clockedile*, 245 F.3d at 3-4. As the United States has explained, however, Title VII's charge-filing requirement "does not resemble" structures "in which Congress has channeled review of certain claims to agencies and restricted judicial review accordingly." U.S. Br. 27, *Ft. Bend Cnty. v. Davis*, *supra* (No. 18-525; filed Apr. 3, 2019). "Instead, individuals alleging discrimination merely must give the EEOC a right of first refusal before bringing their own suits." *Id. See also Woodford v. Ngo*, 548 U.S. 81, 98 (2006) (observing that 42 U.S.C. § 2000e-5(e) is not "in any sense an exhaustion provision"). Accordingly, while this petition quotes from court decisions that use "exhaustion" language, elsewhere we generally refer to the statutory provisions involved as charge-filing or claim-processing requirements.

In practice, construing Title VII's charge-filing requirement to limit the scope of claims in later litigation has given rise to a variety of questions. *See, e.g.*, *Clockedile*, 245 F.3d at 4. This case involves one such question, on which the courts of appeals have reached conflicting results: May a claim that an employer retaliated against an employee for filing a charge with the EEOC be addressed in the ensuing civil action, if the employee did not also file a further charge specifically alleging the retaliation?

B. Facts and procedural history

1. a. Petitioner Michael Simko began working for respondent U.S. Steel in 2005. Pet. App. 2a.[1] In 2012 he successfully bid for an opportunity to transfer from his job as a larryman in the blast furnace department to become a spellman in the transportation department. *Id.* 2a-3a.[2] During training for the spellman position, Simko requested that the company provide a new two-way radio to accommodate his partial hearing loss. *Id.* 3a. The company provided no accommodation; and although Simko completed the required training, his trainer

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[1] Because the district court granted U.S. Steel's motion to dismiss, the facts recited are drawn from the allegations in the complaint and from documents attached to the briefing on the motion to dismiss. *See* Pet. App. 2a n.1. There is no dispute over the procedural history relevant to the question presented.

[2] A "larryman" generally operates "larry cars," which are used to transport raw materials to the blast furnace where iron is produced for steelmaking. *See* C.A. App. 101. A "spellman" provides relief for locomotive operators and must be qualified to operate locomotives. *Id.* 102.

refused to certify him to perform the spellman duties because he could not hear. *Id.* 3a, 64a, 95a-97a. Simko returned to a larryman position in November 2012. *Id.* 64a.

In May 2013, Simko filed a timely charge with the EEOC, alleging that U.S. Steel discriminated against him on the basis of disability when it refused him a hearing accommodation and denied him the spellman position. Pet. App. 3a. The EEOC notified U.S. Steel of the charge, and in August 2013 the company denied the allegations of discrimination. *Id.* The Commission then took no action for an extended period. *See id.* 3a-4a.

In December 2013, U.S. Steel discharged Simko after an incident in which a larry car lost power. Pet. App. 4a. Simko challenged the discharge through his union, and in June 2014 he returned to work under a "last chance" agreement. *Id.* In August 2014 he was discharged again, this time after an alleged safety violation. *Id.*

b. In November 2014, Simko sent the EEOC a handwritten letter and additional documents to supplement his still-pending discrimination charge. Pet. App. 4a. Among other things, he explained that since filing his initial charge he had been "terminated twice and placed on [a] last chance agreement with no just cause by the company." *Id.* 5a (quoting C.A. App. 80-81). He added: "I believe anyone who familiarizes themself with the details of the case will clearly see it as retaliation for filing charges with the EEOC." *Id.* (court's emphasis and addition omitted).

The EEOC remained silent for another year. In late November 2015, however, an EEOC investigator wrote to Simko to seek more information. Pet. App.

5a. The investigator noted that "it appears as though you have been terminated by [U.S. Steel] on two separate occasions during 2014 and that you believe that the terminations were retaliatory against you." *Id.* (quoting C.A. App. 84; alteration in court's opinion). At this point, Simko retained counsel. *Id.* 6a. After further discussions with the investigator, counsel filed a formal amended charge, including the retaliation claim, on January 22, 2016. *Id.*

After receiving supplemental responses from U.S. Steel and conducting its own investigation, the EEOC determined that there was reasonable cause to believe the company had retaliated against Simko for seeking to assert his rights under the ADA—in particular, by disciplining him more severely than a non-disabled employee for similar alleged work-rule violations. Pet. App. 6a. The Commission's effort to conciliate the dispute failed, and in April 2019 it notified Simko of his right to sue. *Id.* Simko then filed this suit, alleging a single claim of retaliation in violation of the ADA. *Id.*; *see id.* 95a-100a.

2. The district court granted U.S. Steel's motion to dismiss. Pet. App. 63a-84a. That motion pointed out that Simko's charge amendment formally alleging retaliation was filed outside the statutory period for making that charge on a stand-alone basis. *See id.* 8a, 68a-69a, 82a-83a. Simko responded that for these purposes a claim of retaliation for the filing of an EEOC charge is properly treated as "within the

scope" of that initial charge. *Id.* 71a. But the district court rejected that argument.[3]

The court explained that the Third Circuit had expressly rejected the Fifth Circuit's "per se rule that all claims of retaliation are 'ancillary' to the original administrative complaint," opting instead for "a case-by-case approach." Pet. App. 74a. Under that approach, the district court concluded that Simko's retaliation claim was "not fairly within the scope of his original EEOC charge or the resulting [EEOC] investigation." *Id.* 79a; *see id.* 74a-81a. The court acknowledged that in this case the EEOC "did actually address retaliation[.]" *Id.* 71a; *see id.* 81a-82a. It nonetheless refused to treat Simko's claim as properly presented for litigation, based on the court's own assessment that the Commission's investigation was "untimely made" and "unreasonably broad." *Id.* 82a.

3. A divided panel of the Third Circuit affirmed. Pet. App. 1a-62a.

a. As relevant here, the court of appeals first rejected Simko's argument—now joined by the EEOC as amicus—that no separate administrative charge was required to litigate his retaliation claim. Pet. App. 13a; *see id.* 13a-27a. The court again expressly rejected "the broad per se rule followed by some courts of appeals that treat post-charge claims of retaliation as exhausted when they arise during the pendency of a prior charge." Pet. App. 16a (citing decisions from Second, Fourth, and Fifth Circuits).

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[3] The court also rejected arguments based on equitable tolling, waiver, or deference to the EEOC. Pet. App. 69a-71a.

Rather, it "adhere[d] to [its] precedent" requiring a "case-by-case" inquiry involving "a careful examination of the nature of the relevant claims." *Id.* 15a-16a (citation omitted).[4]

The court framed the "relevant test" as "a two-pronged inquiry into whether 'the acts alleged in the subsequent . . . suit are fairly within the scope of [1] the prior EEOC complaint, or [2] the investigation arising therefrom." Pet. App. 14a (citation omitted). Here, Simko's claim that U.S. Steel retaliated against him for the filing of his initial EEOC charge could not have been included in that charge itself. *See id.* 17a; *see also id.* 39a-40a & n.18 (dissent). The "central dispute" was thus whether the claim fell "'fairly within . . . the investigation arising' from" that charge. *Id.* 17a (citation omitted).

The court held that Simko's retaliation claim could not satisfy that requirement "simply based on the fact that the EEOC *actually did* investigate" the claim. Pet. App. 17a-18a. "To the contrary," the court explained, its test is "'objective' rather than 'subjective'": a court "must look only at the scope of the EEOC investigation that would *reasonably* grow out of, or arise from, the initial charge filed with the EEOC, 'irrespective of the actual content of the Commission's investigation.'" *Id.* 18a (citations omitted).

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[4] The court declined to consider whether Simko's November 2014 letter to the EEOC should be treated as the equivalent of a formal charge, or whether the Commission's failure to convert it promptly into such a charge should toll the statutory deadline. Pet. App. 9a-13a. The court considered those arguments not properly presented, and they are not at issue here. *See also id.* 36 n.2 (McKee, J., concurring in part and dissenting in part).

The court articulated "several principles," Pet. App. 22a, to guide this simultaneously hypothetical and "fact-specific" inquiry, *id.* 18a. First, a court must "closely examine the original charge's contents" and "determine the reasonable scope of the EEOC investigation that would likely occur." *Id.* 22a. Next, it must "parse the later claim and determine whether its allegations would be covered in that reasonable investigation." *Id.* A court may "look for factual similarities or connections"—but "factual overlap alone" is not sufficient, if the new allegations "do not fall within the 'gravamen' of the initial charge." *Id.* 22a-23a (citation omitted). Conversely, even if there is "no factual nexus," the court "may also consider whether the two sets of allegations advance the same theory of discrimination[.]" *Id.* 23a.

In the court's view, Simko's claim that he was ultimately terminated in retaliation for filing his original EEOC charge was "only tenuously related to the substance of" that charge. Pet. App. 23a-24a. The court acknowledged that a "reasonable investigation" of the initial charge "could also inquire into whether any other adverse actions were taken against him relating to his disability or his having filed a charge." *Id.* 24a. But it concluded that "in this case" such an investigation "would not have included an inquiry into Simko's post-charge firing," which was "too remote in time and substantively distinct from the allegations of disability discrimination[.]" *Id.* 24a; *see also id.* 25a-27a.

The court also rejected arguments based on the EEOC's policies and practices, the presumption of administrative regularity, and the Commission's express position on the facts of this case. Pet. App.

29a-33a. And it disagreed with Simko and the EEOC that an additional formal charge was unnecessary here because, in light of the EEOC's actual investigation, "the purpose of the ADA [and Title VII] statutory scheme was ultimately fulfilled: namely, the facilitation of an informal dispute resolution process between Simko and U.S. Steel." *Id.* 33a. The court pointed instead to "two other fundamental aims of the exhaustion requirement: prompt notice to the employer and swift dispute resolution." *Id.*; *see id.* 33a-34a. Accordingly, while acknowledging that the outcome was "unfortunate," the court held that Simko could not proceed on his retaliation claim. *Id.* 34a-35a.

b. Judge McKee dissented in part. Pet. App. 36a-62a. He accepted the Third Circuit's "prior rejection of a *per se* rule which would [make] all retaliation claims automatically relate back to the earlier claim upon which they [are] based[.]" *Id.* 55a-56a. But he did "not believe that the facts here justif[ied] concluding that the EEOC's investigation was unreasonably broad." *Id.* 40a-41a.

Judge McKee was "not as willing as [his] colleagues to brush aside the EEOC's own conclusion" about the reasonableness of including retaliation in its investigation. Pet. App. 47a-48a. He noted that, as the majority acknowledged, the EEOC's Compliance Manual instructed investigators to look for evidence of retaliation; to inform employers that the scope of inquiry could be expanded based on information received during the investigation; and that if they found indications of retaliation for the filing of a charge, they could investigate the retaliation on the

basis of the original charge. *Id.* 48a-49a, citing *id.* 30a (majority opinion).

The dissent further emphasized that "[h]aving actually investigated and attempted to conciliate the retaliation claim, the EEOC fulfilled the purpose of the exhaustion requirement." Pet. App. 51a. Simko's employer received notice; participated in the agency's investigation, including a site visit; was "invited to conciliate"; and "understood that it was facing a retaliation charge before Simko brought suit[.]" *Id.* Accordingly, there was "nothing to be served by requiring Simko to have filed a second complaint." *Id.* (brackets and citation omitted).

The dissent observed that "[a]n individual who alleges retaliation for the filing of a previous charge is not 'gaming the system[.]'" Pet. App. 61a. That sort of retaliation "must necessarily come after the charge is filed." *Id.* Here, it was "quite reasonable" for the EEOC, "after being alerted by Simko about retaliation for the filing of the initial charge, to also investigate the alleged retaliation." *Id.* 61a-62a. And that conclusion was "reinforced" where the Commission "actually investigated the discrimination, concluded that there was evidence of retaliation, and attempted to conciliate the dispute." *Id.* 62a.

REASONS FOR GRANTING THE PETITION

This case presents a recurrent question on which the courts of appeals are in persistent conflict: When, if ever, may a claim of retaliation for filing a charge of discrimination with the EEOC be addressed in an ensuing civil action, if the employee did not file a further charge specifically alleging the retaliation? Two circuits, including the court below, answer that

question on a case-by-case basis—but disagree over whether a suit may proceed where, as here, the EEOC actually investigated the retaliation claim. Two other circuits would always dismiss a suit in the absence of a second formal charge. And seven circuits would always allow a suit like Simko's to proceed.

This Court should hold that the majority rule is correct. At a minimum, the Court should hold that a retaliation claim is properly presented for litigation if the EEOC actually investigated it, as happened here. And in any event the Court should grant review and resolve the conflict to give claimants, employers, and courts the benefits of a clear and uniform rule.

I. The circuits are divided over how to treat allegations of retaliation for filing an EEOC charge.

A. Two circuits make case-by-case inquiries—but differ on the relevance of the EEOC's actual investigation.

The Third and Ninth Circuits both consider the question here case-by-case. Pet. App. 15a; *see Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 644-646 (9th Cir. 2003). But unlike the Third Circuit, the Ninth would have allowed the claim here to proceed.

The decision below sets out the Third Circuit's position in detail. Pet. App. 13a-23a. The court expressly recognized, but refused to adopt, the "broad per se rule followed by" some other courts, under which Simko would have prevailed. *Id.* 16a; *see* Part I.C, *infra*. Instead, because Simko's claim that U.S. Steel retaliated against him for the filing of his initial EEOC charge did not (of course) appear in that

charge itself, the court asked whether the claim fell "'fairly within . . . the [administrative] investigation arising' from the initial EEOC charge." Pet. App. 17a (quoting *Waiters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984)); *see also id.* 14a-15a.

The court explained that its test is "objective": a court must "look only at the scope of the EEOC investigation that *would reasonably* grow out of, or arise from, the initial charge filed with the EEOC," not at the actual scope of the real investigation. Pet. App. 18a (emphasis added); *see id.* 22a-23a. Applying that principle here, *id.* 23a-34a, the court concluded that although "the EEOC actually investigated and attempted to conciliate Simko's retaliation claim," *id.* 27a, the district court "correctly dismissed his complaint for failure to exhaust administrative remedies," *id.* 35a.

The Ninth Circuit, too, considers case-by-case whether retaliation claims are properly presented. *See Vasquez*, 349 F.3d at 644. Unlike the Third Circuit, however, the Ninth considers not only what investigation "could reasonably be expected to grow out of the charge" initially filed, but also "the scope of the EEOC's *actual* investigation." *Id.* at 644 (emphasis added); *see also B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002); *cf. Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1205 (9th Cir. 2016) (discussing similar issue in EEOC class action). Thus, the Ninth Circuit would have allowed Simko's claim to proceed.

B. Two circuits always require a new charge.

Other circuits that have addressed the question have rejected case-by-case analysis, instead adopting

one of two conflicting per se rules. On one side of that division, the Eighth and Tenth Circuits hold that an employee like Simko must always file a second formal administrative charge. They base that rule on this Court's decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Morgan considered the application of Title VII's time limit for filing charges with the EEOC—in most cases, within 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1); *Morgan*, 536 U.S. at 109. The Court granted review to resolve a conflict and held that a claimant could not recover for any older "discrete retaliatory or discriminatory act," even if it could be viewed as part of an "ongoing violation." *Morgan*, 536 U.S. at 110. The Court reasoned that each older "incident of discrimination" or "retaliatory adverse employment decision" was "a separate actionable 'unlawful employment practice'" subject to the statutory limitations bar. *Id.* at 114 (quoting 42 U.S.C. § 2000e-5(e)(1)).

In *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003), the Tenth Circuit held that *Morgan* required a similar act-by-act approach to the question presented here. The district court in that case had determined that certain retaliation allegations were not "like or reasonably related to" other allegations that had been properly exhausted. *Id.* at 1210. But the Tenth Circuit based its affirmance on *Morgan*, which it thought required holding that a plaintiff must *always* file a separate charge "to exhaust administrative remedies for each individual discriminatory or retaliatory act." *Id.* at 1211. *See also, e.g.*, *Sanderson v. Wyo. Highway Patrol*, 976 F.3d 1164, 1170-1171

(10th Cir. 2020); *Lincoln v. BNSF Ry.*, 900 F.3d 1166, 1181 (10th Cir. 2018).

A divided panel of the Eighth Circuit adopted the same rule in *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 850-853 (8th Cir. 2012) (per curiam) (agreeing with *Martinez*), *cert. dismissed*, 568 U.S. 1210 (2013) (No. 12-854). The court dismissed a plaintiff's suit because she had not filed a new EEOC charge, specifically alleging retaliation, when she was fired just days after filing her initial charge. *See also id.* at 857-861 (Bye, J., dissenting on this point).

In these courts Simko's retaliation claim would have been dismissed, as it was below. But the dismissal would have resulted from a categorical rule based on an interpretation of this Court's precedent and the statutory text—not from a case-by-case judicial assessment of the reasonableness of the EEOC's proceedings.

C. Seven circuits do not require a new charge.

Finally, seven circuits would have applied the opposite categorical rule. Those courts would have treated Simko's claim as properly presented because he alleged that U.S. Steel retaliated against him for filing his original charge of discrimination with the EEOC.

The Fifth Circuit, for example, has long held that it is "unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge" that is properly before the court. *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. Unit A Aug. 1981). In *Gupta*, for example, the plaintiff professor filed an EEOC charge alleging that his university employer

discriminated against him in compensation and other ways. *Id.* at 412. After the Commission issued a right-to-sue letter and Gupta sued, the university declined to renew his employment contract. *Id.* at 413. Gupta argued in court that the nonrenewal "was in retaliation for his filing charges with the EEOC," but he never filed a separate administrative charge to that effect. *Id.* The court held that no such charge was required. *Id.* at 413-414. It reaffirmed that analysis in *Gottlieb v. Tulane Univ.*, 809 F.2d 278, 283-284 (5th Cir. 1987), even where the alleged retaliation did not occur until after trial in the district court on the underlying discrimination claim.[5]

Other courts have adopted similar rules. In *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), the plaintiff filed an EEOC charge alleging racial discrimination in the denial of promotions. *Id.* at 1308. The employer later fired the plaintiff—after the EEOC had concluded its review and the plaintiff had filed suit. *Id.* The plaintiff amended his complaint to allege that he was fired in retaliation for filing the initial charge. *Id.* The Seventh Circuit allowed the claim to proceed, "adopting the rule that a separate administrative charge is not prerequisite to a suit complaining about retaliation for filing the first charge." *Id.* at 1312; *see also, e.g.*, *Ford v.*

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[5] The Fifth Circuit phrased its holdings in terms of "ancillary jurisdiction." *Gupta*, 654 F.2d at 414. As this Court has since made clear, the claim-processing rules at issue here do not affect subject-matter jurisdiction. *Ft. Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1851 (2019). The phrasing does not affect the analysis of the proper rule.

Marion Cnty. Sheriff's Off., 942 F.3d 839, 857 n.11 (7th Cir. 2019) ("[W]e have long held that a plaintiff need not file a new charge alleging post-charge retaliation by the employer.").

Similarly, in *Clockedile v. New Hampshire Department of Corrections*, 245 F.3d 1 (1st Cir. 2001), the plaintiff filed an EEOC charge alleging sexual harassment. *Id.* at 2. In the ensuing lawsuit she also alleged retaliation, pointing to acts that occurred after her administrative charge and even after she filed suit. *Id.* at 3, 5. Noting the "recurrent problem" of "whether (or to what extent) a lawsuit following a discrimination complaint can include a claim of retaliation not made to the agency," *id.* at 4, the First Circuit considered the positions adopted by other courts and the EEOC, which filed an amicus brief, *see id.* at 4-5 & n.3. It concluded that "claims of retaliation are homogeneous enough and sufficiently distinct from other problems to justify a general rule," and that "[o]n balance, . . . the cleanest rule is this: retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency—*e.g.*, the retaliation is for filing the agency complaint itself." *Id.* at 6. "Someday," the court remarked, "the Supreme Court will bring order to this subject; until then, this is a practical resolution of a narrow but recurring problem." *Id.*

The Second, Fourth, Sixth, and Eleventh Circuits have likewise held that a second EEOC charge is not required for a court to consider a plaintiff's claim that an employer retaliated for the filing of an initial charge, so long as the suit is otherwise timely. In *Duplan v. City of New York*, 888 F.3d 612 (2d Cir.

2018), for example, the Second Circuit explained that it has "long recognized" that "if a plaintiff has already filed an EEOC charge," the requirements for suit are "also met for a subsequent claim 'alleging retaliation by an employer against an employee for filing an EEOC charge.'" *Id.* at 624 (quoting *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003)); *see id.* at 622-625.

In *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 301-304 (4th Cir. 2009), the Fourth Circuit reaffirmed its adherence to a similar rule: "a claim of 'retaliation for the filing of an EEOC charge'" is actionable without a separate administrative charge because it "is indeed 'like or reasonably related to and grow[s] out of such allegations.'" *Id.* at 302 (quoting *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992)).[6] *See also Spengler v. Worthington Cylinders*, 615 F.3d 481, 489 n.3 (6th Cir. 2010) ("Retaliation claims are typically excepted from the filing requirement because they usually arise after the EEOC charge is filed."); *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988) (following *Gupta*).

In any of these circuits, the courts would have addressed the merits of Simko's retaliation claim.

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[6] *Jones* spoke in terms of subject-matter jurisdiction. *See* 551 F.3d at 301. In that respect it was abrogated by this Court's decision in *Fort Bend County v. Davis*, 139 S. Ct. at 1851. As with the Fifth Circuit's decision in *Gupta*, however, recognizing that Title VII's claim-processing rules are not jurisdictional in that sense does not affect the analysis of how they apply in particular situations.

D. The conflict is ripe for resolution now.

There is no prospect that further percolation will resolve the present conflict among the lower courts or aid in this Court's consideration of the issue. Most courts of appeals settled on their positions long ago. And while this Court's decision in *Morgan* caused the Eighth and Tenth Circuits to adopt a new rule, in the twenty years since that decision other courts have adhered to their prior decisions.

The Fourth Circuit has expressly rejected any change to its retaliation rule based on *Morgan*. *See Jones v. Calvert Group Ltd.*, 551 F.3d at 303 ("we do not read *Morgan* that broadly"). Other courts have continued to apply their existing rules, despite being well aware of *Morgan*. *See, e.g.*, *Duplan*, 888 F.3d at 622-625 & n.10 (discussing and applying existing doctrine on retaliation claims while citing *Morgan* for other reasons); *Ford*, 942 F.3d at 857 n.11; *Spengler*, 615 F.3d at 489 n.3; *Franceschi v. U.S. Dep't of Veterans Affs.*, 514 F.3d 81, 86 (1st Cir. 2008).[7]

To be clear, even these latter decisions were not mere rote applications of existing rules that were not challenged in particular cases. The Second Circuit's

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[7] Some decisions have noted the post-*Morgan* conflict without taking a definitive position. *See, e.g.*, *Williams v. Bd. of Ed. of Chi.*, 982 F.3d 495, 503 n.13 (7th Cir. 2020); *Haynes v. D.C. Water and Sewer Auth.*, 924 F.3d 519, 526-527 & n.1 (D.C. Cir. 2019); *Ariz. ex rel. Horne*, 816 F.3d at 1205-1206 & n.11; *see also Payne v. Salazar*, 619 F.3d 56, 65 (D.C. Cir. 2010) (Garland, J.) (noting issue); *cf. Duble v. FedEx Ground Package Sys., Inc.*, 572 F. App'x 889, 893 (11th Cir. 2014) (citing *Morgan* but distinguishing existing circuit precedent on facts of case), *cert denied*, 575 U.S. 1037 (2015) (No. 14-1028).

recent *Duplan* decision, for example, thoughtfully discusses the reasons for and limits of its rule. *See* 888 F.3d at 622-625. So, for all its flaws, does the Third Circuit's decision in this case. *See* Pet. App. 14a-23a (reviewing precedents and reasoning in detail); *id.* 15a, 23a-34a (conducting case-specific exhaustion inquiry); *cf. id.* 14a, 33a-34a (citing *Morgan* several times). Older cases, too, have discussed the reasons for treating retaliation claims like Simko's as properly presented. *See, e.g.*, *Clockedile*, 245 F.3d at 4-6; *Gupta*, 654 F.2d at 414; *infra* Part III. On the other side of the conflict, the Eighth and Tenth Circuits have fully aired their reasons for concluding that *Morgan* requires a different result. *See, e.g.*, *Richter*, 686 F.3d at 850-853; *id.* at 857-861 (Bye, J., dissenting on this point).

Under these circumstances, there is no reason to defer review. On the contrary, only this Court can assess the conflicting positions and, as Judge Boudin forecast, "bring order to this subject." *Clockedile*, 245 F.3d at 6.

II. This case is a good vehicle for review of this important question.

1. This case is a good vehicle for conducting that assessment. As it comes to this Court, the case presents a core factual scenario for consideration of the question presented.

Petitioner Simko filed a charge of disability discrimination with the EEOC. He alleges that, while that charge was pending before the Commission, his employer retaliated against him for making the initial filing. *See Duplan*, 888 F.3d at 622 (calling this "the paradigmatic case for which the 'reasonably

related' doctrine was adopted"). He did not file a timely second charge alleging the retaliation; but in its investigation of the initial charge the EEOC became aware of and actually investigated the issue.

In the process, the EEOC gave express notice to Simko's employer and sought its response. Indeed, the Commission ultimately found reasonable cause to believe retaliation had occurred, and sought to conciliate the parties' dispute over that precise unlawful practice. When conciliation failed, the Commission notified Simko of his right to sue. Simko then brought a timely civil action, alleging only the retaliation.

This clean factual presentation is important. Analysis in this area can be complicated by a variety of factors, many of which have produced their own decisional fissures. Some courts, for example, treat alleged retaliation of other sorts (such as for making an internal complaint to a supervisor) differently where it occurs before an initial EEOC charge has been filed, rather than in retaliation for (and thus necessarily after) that first filing.[8] Some courts will not treat a claim of retaliation for filing a charge as properly presented without a further charge if the alleged retaliation occurred after the conclusion of the EEOC's investigation of the first charge.[9] Some

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[8] *See, e.g.*, *Swearnigen-El v. Cook Cnty. Sheriff's Dep't*, 602 F.3d 852, 864-865, 864 n.9 (7th Cir. 2010); *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 482-483 (7th Cir. 1996) (noting conflict on this issue).

[9] *Compare Payne v. Salazar*, 619 F.3d at 65, *with, e.g.*, *Clockedile*, 245 F.3d at 5-6. An unpublished Eleventh Circuit decision suggests, conversely, that where the alleged retaliation

will not entertain a claim of retaliation for the filing of a particular charge if the plaintiff's ultimate civil action was not filed within the requisite time period after the receipt of a right-to-sue letter based on that specific charge.[10]

Here, none of these special situations would impede the Court from considering the core question presented. Moreover, in this case the EEOC, despite the absence of any formal second charge, actually became aware of the retaliation issue, specifically investigated it, found reasonable cause, and sought to conciliate it. The facts thus present the question of what amounts to adequate administrative claim-processing in the sharpest possible relief. *Compare, e.g.*, Pet. App. 27a-34a (majority opinion) *with id.* 36a, 40a-41a, 46a-62a (McKee, J., dissenting in part).

2. That issue also warrants this Court's review. The question presented here is a "recurrent problem" under the remedial provisions of Title VII. *Clockedile*, 245 F.3d at 4. It arises frequently, and has generated confusion and divergence in results. *See, e.g.*, *Redding v. Mattis*, 327 F. Supp. 3d 136, 139-140 (D.D.C. 2018) (discussing post-*Morgan* debate in district court opinions). Commentators have likewise discussed the issue, focusing on the sharp conflict between the Eighth and Tenth Circuits and others

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occurred while an initial charge was still pending before the EEOC, the plaintiff could not include a retaliation claim in later litigation where he "chose not to amend or file a new charge" with the Commission. *Duble*, 572 F. App'x at 893.

[10] *See, e.g.*, *Duplan*, 888 F.3d at 623-624; *but see Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 416-418 (4th Cir. 2014).

after *Morgan*. *See* Lawrence Rosenthal, *To File (Again) or Not to File (Again): The Post*-Morgan *Circuit Split Over the Duty to File an Amended or Second EEOC Charge for Claims of Post-charge Employer Retaliation*, 66 Baylor L. Rev. 531 (2014); Brandon Wheeler, Note, *Amending Title VII to Safeguard the Viability of Retaliation Claims*, 98 Minn. L. Rev. 775 (2013).

The EEOC, too, has recognized the importance of the question. Its Compliance Manual instructs that retaliatory acts may be challenged without a second formal charge, expressly rejecting the reasoning of contrary decisions. EEOC Compliance Manual, Section 2: Threshold Issues, § 2-IV(C)(1)(a) & n.185 (2009), https://perma.cc/CQ67-WTJC. And the Commission has filed briefs advancing that position in several cases, including this one. *See* Pet. App. 8a-9a, 28a-33a; EEOC C.A. Br. 26-32; *id.* at 30-31 (arguing that the Eighth and Tenth Circuits have misread *Morgan*). With the lower courts locked in disagreement, the view of the expert federal administrative agency clear, and the question continuing to arise, this Court should grant review to settle the matter.

III. The decision below is wrong.

Finally, the decision below is wrong.

1. The text and structure of Title VII's remedial provisions require that enforcement begin with the filing of a "charge" with the EEOC. *See* 42 U.S.C. §§ 2000e-5(b), (e)(1). The EEOC "shall serve a notice of the charge" on the employer "within ten days, and shall make an investigation thereof." *Id.* § 2000e-5(b). If the Commission determines there is "reasonable cause to believe that the charge is true," it must

"endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* If conciliation fails, the Commission "may bring a civil action" against the employer (or, for certain government employers, refer the matter to the Attorney General). *Id.* § 2000e-5(f)(1).

More commonly, the Commission notifies "the person aggrieved" that there will be no government suit. 42 U.S.C. § 2000e-5(f)(1). Within 90 days of that notice, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." *Id.* Similarly, if the Commission determines after investigation that there is not reasonable cause to believe a charge is true, it nonetheless provides the charging party with notice of the right to file an individual "civil action." *Id.* §§ 2000e-5(b), (f)(1). Moreover, if the charging party simply wishes to proceed directly, the Commission will provide a similar right-to-sue letter on request at any time once 180 days have passed from the filing of the charge, and in many cases even during the first 180 days. 29 C.F.R. § 1601.28(a).

The phrase "civil action" is different from, and normally broader than, the term "charge." And as the First Circuit has observed, "Title VII does not say explicitly that the court suit must be limited to just what was alleged in the agency complaint," or supply any precise rule for determining what connection is required between the two. *Clockedile*, 245 F.3d at 4. As noted above (*see supra* at 2-3), in construing the statute courts have generally "assum[ed] that some kind of a relationship must exist[.]" *Id.*; *see generally, e.g.*, 2 Barbara T. Lindemann *et al.*, *Employment*

Discrimination Law ch. 29.IV (6th ed. 2020). But in defining the metes and bounds of such a judicially inferred procedural limitation, courts may not impose technical rules that are inconsistent with Title VII's structure and objectives.

2. Title VII is designed to enable effective enforcement for employees (who are often proceeding, at least initially, without counsel), to provide employers with timely notice, and to give both parties an opportunity for resolution through administrative investigation and informal conciliation. *See, e.g.*, Pet. App. 13a-14a; *id.* 51a (McKee, J., dissenting in part); Lindemann, *Employment Discrimination Law* ch. 29.IV.A. Once an employee has filed an initial charge of discrimination, it does not serve those goals to require the employee to file second or successive formal charges in order to preserve the ability to challenge new acts of retaliation. And that is especially true where, as here, the EEOC learns of and investigates such acts even without any new charge.

As the Fifth Circuit explained in its influential *Gupta* decision, "[i]t is the nature of retaliation claims" of the sort at issue here "that they arise after the filing of the [initial] EEOC charge." 654 F.2d at 414. Requiring a "double filing" with the Commission in such cases serves "no purpose except to create additional procedural technicalities[.]" *Id.* That sort of "needless procedural barrier," *id.*, is especially problematic where, as is common, an employee is unrepresented during part or all of the time a charge is pending before the Commission. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002) ("Title VII [is] 'a remedial scheme in which laypersons, rather

than lawyers, are expected to initiate the process.'" (citation omitted)). Eliminating such a trap for the unwary or unrepresented can also help "deter employers from attempting to discourage employees from exercising their rights under Title VII" or the ADA. *Gupta*, 654 F.2d at 414; *see also, e.g.*, *Duplan*, 888 F.3d at 622-623; *Malhotra*, 885 F.2d at 1312 ("having once been retaliated against for filing an administrative charge, the plaintiff will naturally be gun shy about inviting further retaliation by filing a second charge complaining about the first retaliation"); *Jones v. Calvert Grp., Ltd.*, 551 F.3d at 302.

The Second Circuit has further explained that where, as here, alleged retaliation occurs while a charge is pending before the Commission, "the ongoing EEOC investigation on the first charge would be expected to uncover and address any related retaliation," without any need for a second formal charge. *Duplan*, 888 F.3d at 622. The EEOC itself has made the same point, including in its amicus brief below in this case. *See* EEOC C.A. Br. 27-29; *id.* at 29 (new-charge requirement "would create a procedural hurdle with no practical effect"); *see also Clockedile*, 245 F.3d at 4-5 (discussing and relying on EEOC amicus brief in that case). Certainly there is no practical significance to a second formal charge where, as here, the Commission *in fact* investigated the retaliation question—and, indeed, found reasonable cause and sought to conciliate the matter.

Moreover, in cases involving alleged retaliation while an initial charge remains pending, the employer has always been put on notice by that charge that there is a perceived problem, and can if it wishes seek some mutually agreeable pre-litigation

resolution. Thus, in terms of the purposes of the Title VII claim-processing structure, there is nothing further to be gained from "[f]orcing the parties into two concurrent agency proceedings." *See Duplan*, 888 F.3d at 622.

3. This Court's decision in *Morgan* does not counsel a different result. *Morgan* disapproved the use of a "continuing violation" theory that allowed new EEOC charges to reach back and include, for liability purposes, some older adverse actions that were otherwise expressly barred by the statutory period for filing charges. *See* 536 U.S. at 105, 107. The Court focused on text specifying that "[a] charge under this section shall be filed within" a specified period "after the alleged unlawful employment practice occurred." *Id.* at 109 (quoting 42 U.S.C. § 2000e-5(e)(1); brackets added, emphasis omitted). And it reasoned in part that the term "practice" generally applies "to a discrete act or single 'occurrence,' even when it has a connection to other acts." *Id.* at 111.

Nothing in *Morgan*'s analysis of the time-bar provision at issue there speaks to how principles not specified in the statutory text should limit the scope of a "civil action" brought under 42 U.S.C. § 2000e-5(f)(1). As the Fourth Circuit and others have pointed out, *Morgan* "does not purport to address the extent to which an EEOC charge," once timely made, "satisfies exhaustion requirements for claims of related, *post*-charge events." *Jones v. Calvert Grp., Ltd.*, 551 F.2d at 303 (emphasis added); *see also Ariz. ex rel. Horne*, 816 F.3d at 1205-1206; *Richter*, 686 F.3d at 858-861 (Bye, J., dissenting in part); EEOC C.A. Br. 31-32. In particular, a claim that an

employer retaliated against the charging party for filing an EEOC charge can, by definition, arise only *after* the charge was filed. Allowing litigation of that retaliation claim in court raises no concern about using the EEOC charge to "pull in" allegations based on otherwise time-barred pre-charge acts. *Compare Morgan*, 536 U.S. at 113.

4. In any event, even if *Morgan* suggested the need for some different analysis in this case, that would only be another reason for review. Unlike the Eighth and Tenth Circuits' decisions in *Richter* and *Martinez*, the decision below does not purport to rely on *Morgan*. Although it cited *Morgan* on other points, *e.g.* Pet. App. 14a, 33a-34a, the Third Circuit did not focus on statutory text, and it did not craft or apply any bright-line rule requiring a new formal charge to challenge any alleged act of retaliation. On the contrary, it adhered to its "case-by-case" approach to assessing the permissible scope of litigation claims, *id.* 15a, applying judicially crafted rules based on the court's view of some of the purposes served by the Title VII claim-processing structure, *e.g.*, *id.* 13a-15a, 22a-23a. And the court would have allowed Simko's retaliation claim to proceed if it thought that claim was "fairly within the scope of . . . the [EEOC] investigation arising" from his original charge. *Id.* 14a.

Yet, after extensive analysis, the court concluded that a retaliation claim the Commission *in fact* investigated and *in fact* sought to conciliate with the employer was nonetheless barred from court—because the investigation actually undertaken by the EEOC was, in the court's view, unreasonably broad. Pet. App. 28a-29a. *See also id.* 41a (McKee, J., dissenting in part); *id.* 82a-83a (district court). As

discussed above, that analysis conflicts even with the approach of the only other court that uses a case-by-case approach to the question. *See Vasquez*, 349 F.3d at 644 (allowing litigation of all claims "that fall within the scope of the EEOC's actual investigation"). And frankly, it is difficult to understand. At a bare minimum, a plaintiff's claim of retaliation for the filing of an EEOC charge should be recognized as properly presented for litigation if the retaliation issue was actually investigated by the Commission during its processing of the related charge.

* * *

Eight years after he filed his first EEOC charge, petitioner Simko has not had his day in court. The EEOC found reasonable cause to believe that U.S. Steel retaliated against him for filing that first charge, and tried but failed to conciliate the dispute. Simko then brought this civil action to obtain adjudication of his retaliation claim, just as contemplated by Title VII's remedial structure. And yet, the courts below dismissed his suit—because as a pro se claimant he did not file a separate formal administrative charge, and because reviewing judges decided that the EEOC's actual investigation of his first charge was unreasonably broad.

That outcome to this case is not compelled by—or even based on—anything in the text of Title VII. It is different from the outcome that would have resulted if Simko's case had arisen in any of eight other circuits. It perpetuates a deep and entrenched circuit conflict, involving a recurrent issue in an area of frequent litigation and great importance. It is contrary to the known position of the EEOC, as expressed in its brief below in this case. And by

creating traps for unwary and often unrepresented claimants while at best only complicating proceedings before the Commission and the courts, it manages to be not only unfair but also inefficient. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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