No. 21-522

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

BRIEF IN OPPOSITION

Rodney M. Torbic
UNITED STATES STEEL CORPORATION
600 Grant Street
Room 1844
Pittsburgh, PA 15219

Leon F. DeJulius, Jr.
Counsel of Record
JONES DAY
250 Vesey Street
New York, NY 10281
(212) 326-3939
lfdejulius@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Respondent

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.

RULE 29.6 STATEMENT

Respondent United States Steel Corporation ("U. S. Steel") is a publicly held corporation. It does not have any parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 4

A. Legal Framework 4

B. Factual Background 7

C. Procedural History 9

REASONS FOR DENYING THE PETITION 15

I. FURTHER PERCOLATION IS WARRANTED IN LIGHT OF *MORGAN*, AND THERE IS NO SPLIT WITH RESPECT TO THE OUTCOME OF THIS CASE 15

A. Two Circuits Have Followed *Morgan* and Held that Each Retaliatory Act Must Be Charged to the EEOC 16

B. Six Circuits Have Not Yet Definitively Reconsidered Their Pre-*Morgan* Approach, But May Do So When the Question Is Squarely Presented 18

C. None of the Post-*Morgan* Cases on Which Petitioner Relies Allowed a Retaliation Claim to Proceed on Facts Like These 21

TABLE OF CONTENTS
(continued)

Page

II. THIS CASE IS A POOR VEHICLE.......................... 25

III. THE DECISION BELOW IS CORRECT................... 29

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

CASES

Abeita v. TransAmerica Mailings, Inc.,
159 F.3d 246 (6th Cir. 1998) 23

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 5

Antol v. Perry,
82 F.3d 1291 (3d Cir. 1996)................................. 21

Baker v. Buckeye Cellulose Corp.,
856 F.2d 167 (11th Cir. 1988) 18, 20

Clockedile v. N.H. Dep't of Corr.,
245 F.3d 1 (1st Cir. 2001) 18, 21

Colgan v. Fisher Sci. Co.,
935 F.2d 1407 (3d Cir. 1991) (*en banc*)................. 5

Del. State Coll. v. Ricks,
449 U.S. 250 (1980) 7, 33

Duble v. FedEx Ground Package Sys., Inc.,
572 F. App'x 889 (11th Cir. 2014)....................... 20

Duplan v. City of New York,
888 F.3d 612 (2d Cir. 2018)................................. 22

Ford v. Marion Cnty. Sheriff's Off.,
942 F.3d 839 (7th Cir. 2019) 19

Fort Bend Cnty. v. Davis,
139 S. Ct. 1843 (2019) 22

Franceschi v. U.S. Dep't of Veterans Affs.,
514 F.3d 81 (1st Cir. 2008)............................ 20, 21

TABLE OF AUTHORITIES
(continued)

Page(s)

Gottlieb v. Tulane Univ.,
809 F.2d 278 (5th Cir. 1987) 18

Gupta v. E. Tex. State Univ.,
654 F.2d 411
(5th Cir. Unit A Aug. 1981) 18, 20

Haynes v. D.C. Water & Sewer Auth.,
924 F.3d 519 (D.C. Cir. 2019) 20

Hicks v. ABT Assocs., Inc.,
572 F.2d 960 (3d Cir. 1978)............... 11, 13, 21, 31

Ingels v. Thiokol Corp.,
42 F.3d 616 (10th Cir. 1994) 17, 19

Jones v. Calvert Grp., Ltd.,
551 F.3d 297 (4th Cir. 2009)) 22, 23

Malhotra v. Cotter & Co.,
885 F.2d 1305 (7th Cir. 1989) 18

Martinez v. Potter,
347 F.3d 1208 (10th Cir. 2003) ....*passim*

Mohasco Corp. v. Silver,
447 U.S. 807 (1980) 35

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) ....*passim*

Nealon v. Stone,
958 F.2d 584 (4th Cir. 1992) 22

Ostapowicz v. Johnson Bronze Co.,
541 F.2d 394 (3d Cir. 1976)................................. 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Park v. Howard Univ.,
71 F.3d 904 (D.C. Cir. 1995) 20

Payne v. Salazar,
619 F.3d 56 (D.C. Cir. 2010) 20

Richter v. Advance Auto Parts, Inc.,
686 F.3d 847 (8th Cir. 2012)
(*per curiam*) ....*passim*

Robinson v. Dalton,
107 F.3d 1018 (3d Cir. 1997).................... 14, 21, 30

Sanchez v. Standard Brands, Inc.,
431 F.2d 455 (5th Cir. 1970) 18

Spengler v. Worthington Cylinders,
615 F.3d 481 (6th Cir. 2010) 23

United Air Lines, Inc. v. Evans,
431 U.S. 553 (1977) 6

Vasquez v. Cnty. of Los Angeles,
349 F.3d 634 (9th Cir. 2003) 23, 24

Waiters v. Parsons,
729 F.2d 233 (3d Cir. 1984)............................ 12, 21

Wedow v. City of Kansas City,
442 F.3d 661 (8th Cir. 2006) 16

Wentz v. Md. Cas. Co.,
869 F.2d 1153 (8th Cir. 1989) 16, 17, 19

Williams v. Bd. of Educ. of City of Chi.,
982 F.3d 495 (7th Cir. 2020) 19, 24

TABLE OF AUTHORITIES
(continued)

Page(s)

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 5

STATUTES

42 U.S.C. § 12112 .... 4, 32

42 U.S.C. § 12117 .... 1, 5

42 U.S.C. § 12203 5

42 U.S.C. § 2000e–2.. 32

42 U.S.C. § 2000e–3.. 32

42 U.S.C. § 2000e–5...*passim*

INTRODUCTION

To pursue a claim under the Americans with Disabilities Act of 1990 ("ADA"), a plaintiff must first file a "charge" with the Equal Employment Opportunity Commission ("EEOC") within 180 (or, in some states, 300) days of the "alleged unlawful employment practice." 42 U.S.C. §§ 12117(a), 2000e–5(e)(1). The EEOC then notifies the employer; investigates the charge; and, if it finds the allegations credible, attempts to resolve the dispute informally. *Id.* § 2000e–5(b). If the EEOC's conciliation efforts are unsuccessful, the EEOC or the plaintiff may file suit in federal court. *Id.* § 2000e–5(f)(1).

In applying these claim-processing rules, courts initially struggled to understand whether an EEOC charge that was timely with respect to some conduct could exhaust claims regarding other conduct "fall[ing] outside of th[e] statutory time period." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108 (2002). This Court answered that question in *Morgan*. The plain meaning of § 2000e–5(b), it reasoned, makes clear that "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id.* at 114. So each such incident or decision "starts a new clock for filing charges alleging that act." *Id.* at 113.

In this case, Petitioner Michael Simko filed a timely charge alleging that Respondent U. S. Steel had discriminated against him in violation of the ADA in connection with a job transfer. Pet.App. 3a. Petitioner now argues that that discrimination charge satisfied the ADA's claim-processing

requirements for a different claim: that U. S. Steel unlawfully retaliated against him when it terminated him nearly two years later. *Id.* at 6a. Although Petitioner submitted handwritten correspondence informing the EEOC of the allegedly retaliatory termination, he failed to file a formal charge regarding his termination until 221 days after the statutory time period had expired. *Id.* at 4a–6a.

The Third Circuit affirmed dismissal of his claim on that basis. In so doing, the court first found that Petitioner had forfeited and abandoned what were arguably his two best arguments: that his handwritten correspondence qualified as a timely charge, and that the statutory time period should have been equitably tolled. *Id.* at 9a–13a. The court then rejected on the merits Petitioner's argument that his original charge was sufficient to exhaust his retaliation claim. "Even interpreting [Petitioner's original] charge liberally" under pre-*Morgan* circuit precedent, the court found that his retaliation claim did not "fall fairly within the scope" of that charge or a reasonable investigation following therefrom. *Id.* at 16a–17a. There is nothing certworthy—or even remarkable—about that ruling.

In attempting to pique this Court's interest, Petitioner relies primarily on pre-*Morgan* rulings to argue that courts apply different standards in determining whether a retaliation claim has been exhausted by an earlier charge. *See* Pet. 12–18. Two courts that have directly confronted the question post-*Morgan*, however, have recognized that a "plaintiff [must] exhaust administrative remedies for each individual discriminatory or retaliatory act[.]" *Martinez v. Potter*, 347 F.3d 1208, 1211 (10th Cir.

2003); *see also Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 851 (8th Cir. 2012) (*per curiam*). And although some courts, like the Third Circuit, have continued to apply more liberal standards, there is good reason to expect that most of them will reconsider their approach in light of *Morgan* when the issue is both raised and outcome determinative. (Neither was true below.) Further percolation, accordingly, is well warranted. In any event, there is no post-*Morgan* division of authority with respect to the *outcome* of the exhaustion inquiry on facts like these, where the alleged retaliatory conduct is so far removed from the allegations of the charge.

Even if this Court were nevertheless interested in this issue, this case is an inappropriate vehicle for at least three reasons. *First*, the Third Circuit found that Petitioner's claim was untimely even under its more generous, case-by-case standard. So it never even considered whether *Morgan* compelled a different approach. For the same reason, this case would provide no opportunity for this Court to decide between the Third Circuit's case-by-case rule and the Eighth and Tenth Circuit's *Morgan*-based rule, either. *Second*, the Question Presented is about what happens when a plaintiff fails to file a second charge informing the EEOC about the allegedly retaliatory conduct. Pet. i. But Petitioner *did* tell the EEOC about his allegedly retaliatory termination—both in handwritten correspondence submitted within 300 days of the incident and in a formal amended charge filed 521 days thereafter. He simply forfeited the arguments that the handwritten correspondence qualified as a charge and that the EEOC's failure to promptly convert that correspondence into a charge

justified equitable tolling of the 300-day filing period. *Third*, as a result of Petitioner's correspondence and amended charge, the EEOC eventually investigated his allegations of retaliation. That fact—on which Petitioner repeatedly relies—distinguishes this case from others and confounds any analysis of the consequences of Petitioner's failure to file a timely charge.

Moreover, the decision below is clearly correct. The Third Circuit was right to conclude that Petitioner's claim fails even under its lenient, fact-specific approach, because "[t]he original EEOC charge and [Petitioner's] civil complaint … address discrete adverse employment actions that occurred approximately two years apart and involved different supervisors in different departments." Pet.App. 24a. Because this is an easy case under that lenient standard, the court had no occasion to consider whether *Morgan* compels a stricter one. But it does. Consistent with the text of § 2000e–5(e)(1), this Court's ruling in *Morgan*, and the purposes of the charging process, "each retaliatory adverse employment decision" must be separately charged to the EEOC in a timely manner. *Morgan*, 536 U.S. at 114.

Certiorari should be denied.

STATEMENT

A. Legal Framework

1. The ADA prohibits employers from discriminating against employees "on the basis of disability." 42 U.S.C. § 12112(a). The Act also prohibits employers from retaliating against employees for reporting or opposing disability

discrimination. *See id.* § 12203(a). Before a plaintiff may make a discrimination or retaliation claim under the ADA, however, he must follow the claim-processing procedures set forth in 42 U.S.C. § 2000e–5(e)(1). *See id.* § 12117(a) (providing that Title VII's procedural framework applies to ADA claims).

That statute "'specifies with precision' the prerequisites that a plaintiff must satisfy before filing suit." *Morgan*, 536 U.S. at 109 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)). As relevant here, it provides that a plaintiff "must file a charge within the statutory time period and serve notice upon the person against whom the charge is made." *Id.* The applicable "statutory time period" varies state-to-state. In some states, the charge must be filed within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e)(1). In others, including Pennsylvania, a longer, 300-day period applies. *Id.*; *see Colgan v. Fisher Sci. Co.*, 935 F.2d 1407, 1413–15 (3d Cir. 1991) (*en banc*).

An ADA or Title VII claim "is time barred" if a charge "is not filed within these time limits." *Morgan*, 536 U.S. at 109; *see* 42 U.S.C. § 2000e–5(e)(1). "The application of equitable doctrines, however, may either limit or toll the time period within which an employee must file a charge." *Morgan*, 536 U.S. at 105; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

2. In *Morgan*, the Supreme Court considered whether "a plaintiff may sue on claims that would ordinarily be time barred" but were related "to incidents that [fell] within the statutory period or [were] part of a systematic policy or practice of discrimination that took place, at least in part, within the limitations period." 536 U.S. at 105. In answering that question, the Court focused on the "critical sentence" in the statutory text, which provides that "[a] charge … *shall be filed* within [180 or 300] days *after the alleged unlawful employment practice occurred*." *Id.* at 109 (quoting 42 U.S.C. § 2000e–5(e)(1)) (emphases in original). "Shall," the Court reasoned, "makes the act of filing a charge within the specified time period mandatory." *Id.* And "[t]he requirement … that the charge be filed 'after' the practice 'occurred' tells us that a litigant has up to 180 or 300 days after the unlawful practice happened to file a charge with the EEOC." *Id.* at 109–10.

Consistent with that text, the Court went on to hold that "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'" that starts the statutory clock running anew. *Id.* at 114. Accordingly, "discrete acts that fall within the statutory time period," the Court recognized, "do not make timely acts that fall outside [that] time period." *Id.* at 112 (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977)). In other words, a plaintiff cannot "use a termination that fell within the limitations period to pull in" an otherwise time-barred claim arising from a prior promotion

denial. *Id.* at 113 (citing *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980)).

B. Factual Background

1. In August 2012, Petitioner was working as a "Larryman" in the Blast Furnace Department of a U. S. Steel plant in Pennsylvania. Pet.App. 2a–3a. In that role, Petitioner was responsible for operating "larry car[s]," which are vehicles used to transport raw materials as part of the steelmaking process. C.A. App. 101. When an opportunity arose for Petitioner to transfer to a "Spellman" position in the Transportation Department, he took it. Pet.App. 3a. In that role, Petitioner would have been responsible for relieving locomotive operators and, as a result, had to be qualified to operate locomotives. C.A. App. 102.

While Petitioner was in training for the Spellman position, he alleges that he requested a new two-way radio to accommodate his partial hearing loss. Pet.App. 3a. Although U. S. Steel provided Petitioner both with a new microphone and with an earbud that improved the radio's sound quality, *see* D.Ct. Dkt. No. 12-10, at 7, Petitioner alleges that U. S. Steel did not grant his request for a new radio, Pet.App. 3a. Thereafter—and despite being provided additional time for training—it became apparent that Petitioner was unable to fulfill the responsibilities of the new job. *See* D.Ct. Dkt. No. 12-10, at 7. So the individual overseeing Petitioner's training declined to certify him for the role. Pet.App. 3a. Petitioner then returned to his prior position as a Larryman in the Blast Furnace Department. *Id.*; *see also id.* at 64a.

Petitioner filed a timely charge with the EEOC alleging that U. S. Steel had unlawfully discriminated against him on the basis of a disability when it denied him the Spellman position. *Id.* at 3a. Petitioner did not check a box to indicate alleged retaliation, and did not otherwise suggest that he had been retaliated against. *Id.* at 17a. The EEOC notified U. S. Steel of the discrimination charge, and U. S. Steel denied Petitioner's allegations of discrimination. *Id.* at 3a. The EEOC took no further action on Petitioner's charge. *Id.* at 3a–4a.

2. More than a year after Petitioner returned to the Blast Furnace Department, he was found operating a larry car in an area that he was told to avoid and providing rides to other workers in violation of safety protocols. *See* D.Ct. Dkt. 12-10, at 3. U. S. Steel initially discharged Petitioner in connection with that incident. Pet.App. 4a. But Petitioner's union negotiated a "last chance agreement," pursuant to which Petitioner was permitted to return to work a few months later. *Id.* Petitioner's "last chance" ran out on August 19, 2014, when he was first suspended, and then formally discharged, in connection with another safety violation. *Id.*

A few months later, on November 14, 2014, the EEOC received a handwritten letter from Petitioner, together with a set of documents relating to his last chance agreement and subsequent termination. *See id.* at 4a–5a. At the end of that letter, Petitioner suggested that he had been retaliated against for filing a charge with the EEOC. *Id.* at 5a; C.A. App. 80–82. But petitioner did not file an amended charge formally alleging that his termination had been

retaliatory. And the 300-day statutory time period for Petitioner to file a charge based on his termination came and went.

3. On November 23, 2015, an EEOC investigator wrote to Petitioner seeking more information. Pet.App. 5a. The investigator characterized Petitioner as having alleged that he had "been terminated by [U. S. Steel] on two separate occasions during 2014 and that [he] believe[d] that the terminations were retaliatory." *Id.*

On January 22, 2016—521 days after his termination—Petitioner finally filed an amended EEOC charge. *Id.* at 6a. Unlike Petitioner's original charge, the amended one addressed not only Petitioner's failure to secure the Spellman position but also his subsequent termination. *Id.* And this time, both the "discrimination" and "retaliation" boxes were checked. *Id.*

Three years after that, the EEOC issued a determination of reasonable cause that U. S. Steel had retaliated against Petitioner and, after a failed attempt at conciliation, issued Petitioner a notice of his right to sue. *Id.*

C. Procedural History

1. Once Petitioner received that notice, he filed suit. *Id.* He did *not* allege disability discrimination (the only claim raised in his initial charge). *Id.* He alleged only that U. S. Steel had discharged him in retaliation for his interactions with the EEOC. *Id.*

The District Court "construe[d] [Petitioner's] allegations in the light most favorable to [him]" and afforded him the benefit of "all reasonable inferences." *Id.* at 67a. Nevertheless, it found that

Petitioner had failed to file a timely EEOC charge with respect to his retaliation claim, and so granted U. S. Steel's motion to dismiss. *Id.* at 63a–84a.

In so doing, the District Court carefully considered Petitioner's argument that the limitations period should be equitably tolled in light of Petitioner's November 2014 handwritten correspondence and the EEOC's subsequent delay. *Id.* at 69a–70a. Petitioner, the District Court noted, had not argued that the handwritten letter itself constituted a "charge." *Id.* at 69a. And his original charge demonstrated that he knew how to file a formal charge if he wished to do so. *Id.* Accordingly, the District Court concluded that "[t]he EEOC's mere failure to act on the handwritten letter [did] not justify equitable tolling." *Id.* at 70a.

The District Court also considered whether Petitioner's original charge could be construed to encompass a retaliation claim, and whether the fact that the EEOC ultimately did investigate retaliation somehow rendered Petitioner's amended charge timely. *Id.* at 71a–82a. Relying on pre-*Morgan* circuit precedent, the court explained that a charge and resulting "investigation [can] reasonably encompass different types of discrimination if they are based on the same set of underlying facts." *Id.* at 79a. But "a new claim is not fairly within the scope of an EEOC investigation"—and so not exhausted by a prior charge—"if it is based on different facts and a different kind of discrimination." *Id.*

The District Court then applied that objective, case-by-case standard to the facts of this case. *See id.* at 79a–82a. It concluded, "after a careful analysis,"

that Petitioner's retaliation claim was "not fairly within the scope of his original EEOC charge." *Id.* at 79a. Whereas Petitioner's charge spoke only to his failure to obtain the Spellman position in the Transportation Department in November 2012, his retaliation claim concerned his discharge from the Blast Furnace Department "almost two years later, in August 2014." *Id.* at 80a.

The fact that the EEOC actually investigated the retaliation claim, the court continued, made no difference. *Id.* at 81a. A subjective standard that turned on what the EEOC decided to investigate would unfairly "penalize a plaintiff if the 'EEOC's investigation is unreasonably narrow or improperly conducted.'" *Id.* (quoting *Hicks v. ABT Assocs., Inc.*, 572 F.2d 960, 966 (3d Cir. 1978)). On the flipside, that standard would unfairly penalize "the employer … if the EEOC's investigation is unreasonably broad." *Id.* at 82a. And it would allow "the charging party [to] greatly expand an investigation simply by alleging new and different facts when he [is] contacted by the Commission following his charge." *Id.* (quoting *Hicks*, 572 F.2d at 967).

2. The Third Circuit affirmed. "It is undisputed," the court emphasized, "that [Petitioner] filed his amended EEOC charge of retaliation 521 days after … his final discharge." *Id.* at 8a. The court then addressed and rejected three arguments that his retaliation claim should nevertheless be allowed to proceed. *See id.* at 9a.

First, the court declined to reach the argument—pressed both by Petitioner and by the EEOC, which participated on appeal as an amicus supporting

Petitioner—that Petitioner's November 2014 correspondence should be construed as a charge. *Id.* at 9a–12a. That argument, the court explained, "was never asserted in the District Court." *Id.* at 9a. And the District Court's decision to raise the issue *sua sponte* was "insufficient to preserve [it] for [appellate] review." *Id.* at 10a.

Second, the court declined to address the argument—advanced on appeal only by the EEOC—that the filing period should have been equitably tolled. *Id.* at 12a–13a. Petitioner had abandoned that argument on appeal. *Id.* And the EEOC's amicus filing was inadequate to preserve it for appellate review. *Id.*

Third, the court considered and rejected Petitioner's argument "that he was not required to file a timely retaliation charge because his retaliation claim was encompassed within his still-pending original charge of disability discrimination." *Id.* at 13a. The ADA's pre-suit requirements, it reasoned, are "essential parts of the statutory plan, designed to correct discrimination through administrative conciliation and persuasion if possible." *Id.* at 13a–14a (quoting *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398 (3d Cir. 1976)). In order to determine whether a charge satisfies those requirements with respect to a claim that arose after that charge was filed, courts must consider whether that claim is "fairly within the scope of [1] the prior EEOC [charge], or [2] the investigation arising therefrom." *Id.* at 14a (quoting *Waiters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984)).

"Even interpreting [Petitioner's original] charge liberally under [that] fact-specific approach," the Third Circuit concluded that his retaliation claim did not "fall fairly within the scope" of that charge or a reasonable investigation flowing therefrom. *Id.* at 16a–17a. Petitioner "concede[d] that his retaliation claim fail[ed] the first prong of [that] analysis." *Id.* at 17a. With respect to the second, the Third Circuit rejected Petitioner's "primar[y] argu[ment]" that "the fact that the EEOC *actually did* investigate [Petitioner's] retaliatory discharge claim, albeit more than two years after he filed his initial charge," sufficed. *Id.* at 17a–18a. Instead, the court considered "the scope of the EEOC investigation that would reasonably grow out of, or arise from, the initial charge"—"irrespective of the actual content of the Commission's investigation." *Id.* at 18a (quoting *Hicks*, 572 F.2d at 966).

Here, "the scope of a reasonable investigation arising out of [Petitioner's] initial charge would certainly [have] include[d] an inquiry into whether [Petitioner] was qualified for the Spellman position, U. S. Steel's reasons for passing him over, and identification of the person who secured the position and why he or she was chosen." *Id.* at 24a. But it "would not have included an inquiry into [Petitioner's] post-charge firing," which "occurred approximately two years [later] and involved [a] different supervisor[] in [a] different department[]." *Id.*

In the alternative, the court found that Petitioner's "retaliation claim should still be dismissed" "[e]ven if [the] exhaustion inquiry turned on the actual—rather than reasonable—scope of

investigation arising from a charge." *Id.* at 27a. The investigation that implicated Petitioner's retaliation claim, the court reasoned, flowed not from Petitioner's original charge, but rather from Petitioner's subsequent correspondence. *Id.* at 27a–28a.

3. Judge McKee dissented. *Id.* at 36a–62a. As an initial matter, however, he agreed with the panel majority that Petitioner had forfeited any argument based on his handwritten correspondence or equitable tolling. *Id.* at 36a n.2; *see also id.* at 50a n.58. In Judge McKee's view, Petitioner's "procedural default" was unfortunate—particularly as to the handwritten correspondence—because he believed the EEOC had "very likely erred in failing to construe the correspondence as a formal charge." *Id.* at 50a n.58; *see also id.* at 36a n.2 (characterizing that argument as Petitioner's "strongest").

Judge McKee also agreed with the panel majority's standard for assessing whether Petitioner's original charge was sufficient to exhaust his retaliation claim. *See id.* at 38a (quoting the two-part standard from *Robinson v. Dalton*, 107 F.3d 1018, 1025 (3d Cir. 1997), on which the majority relied); *see also id.* 25a (majority op.) ("Our dissenting colleague cites the appropriate test repeatedly"). Judge McKee diverged from the majority only with respect to the application of that standard and, in particular, the relevance of the EEOC's actual investigation.

Unlike the panel majority, which focused on what an objectively reasonable investigation would have uncovered, Judge McKee would have "look[ed] to see

whether the EEOC actually investigated the unexhausted claim." *Id.* at 46a. That the EEOC ultimately did so, he reasoned, created a "presumption" that Petitioner's retaliation claim was exhausted by the original charge. *Id.* at 48a. Moreover, Judge McKee repeatedly emphasized that Petitioner had "put the EEOC on notice that he suspected retaliation was the reason for his firing[.]" *Id.* at 56a; *see also, e.g.*, *id.* at 59a, 61a–62a.

REASONS FOR DENYING THE PETITION

I. FURTHER PERCOLATION IS WARRANTED IN LIGHT OF *MORGAN*, AND THERE IS NO SPLIT WITH RESPECT TO THE OUTCOME OF THIS CASE.

Since *Morgan*, two Courts of Appeals have relied on that decision to hold—contrary to prior circuit precedent—that "each retaliatory adverse employment decision" must be charged within the statutorily prescribed time period. *Morgan*, 536 U.S. at 114. Six others have not yet had occasion to definitively decide whether *Morgan* compels a stricter standard than the one they had applied previously. To be sure, at least four circuits have allowed uncharged retaliation claims to proceed even after *Morgan*. But most of those courts have not squarely addressed whether their approach is consistent with *Morgan*. Moreover, Petitioner's claim would fail under any approach save the extreme, *per se* rule he requested below. Since *Morgan*, however, that rule has yet to be applied by any Court of Appeals to allow a claim like Petitioner's to proceed. So further percolation is warranted. And any post-*Morgan* disagreement about the governing rule is not outcome determinative here.

A. Two Circuits Have Followed *Morgan* and Held that Each Retaliatory Act Must Be Charged to the EEOC.

As Petitioner acknowledges, the Eighth and Tenth Circuits have followed *Morgan* and held that employees must file a charge alleging that a particular employment action was retaliatory in order to pursue a retaliation claim based on that action in federal court. *See* Pet. 13–15. Notably, both courts had previously endorsed a more lenient approach, but recognized that *Morgan* compelled a different result.

1. The Eighth Circuit did so in *Richter*. The case involved a plaintiff who had "filed a charge … alleging that she [had] suffered an adverse employment action because of her race (white) and her sex (female)." 686 F.3d at 849. "On the forms, [the plaintiff] checked the boxes for 'race' and 'sex,' but did not check the 'retaliation' box." *Id.* And "[t]he narrative portion of [the] charge" addressed a demotion that took place on August 14, 2009. *Id.* That charge, the court held, did not exhaust the plaintiff's retaliation claim, which concerned her termination eleven days later. *See id.* at 850–51. Per *Morgan*, the court reasoned, "[e]ach discrete act is a different unlawful employment practice for which a separate charge is required." *Id.* at 851 (citing *Morgan*, 536 U.S. at 114); *see also Wedow v. City of Kansas City*, 442 F.3d 661, 672–73 (8th Cir. 2006).

In so holding, the Eighth Circuit acknowledged that it had treated retaliation claims differently before *Morgan*. Specifically, in *Wentz v. Maryland Casualty Co.*, 869 F.2d 1153 (8th Cir. 1989), it had

"held that although the plaintiff did not include a retaliation claim in the charge that he filed with the EEOC, his claim for unlawful retaliation was 'properly before this court,' because it 'grew out of the discrimination charge he filed with the EEOC.'" *Richter*, 686 F.3d at 852 (quoting *Wentz*, 869 F.2d at 1154). "After *Morgan*, however, [the Eighth Circuit] disavowed *Wentz*." *Id.* "The overriding message of *Morgan* was to follow statutory text." *Id.* And although the facts of *Morgan* "concerned discrete acts of an employer that occurred *prior* to the filing of an EEOC charge," the court recognized that "the rule of *Morgan* 'is equally applicable ... to discrete claims based on incidents occurring after the filing of [a charge].'" *Id.* at 852–53 (quoting *Martinez*, 347 F.3d at 1210–11).

2. Like the Eighth Circuit, the Tenth Circuit had previously held that a prior discrimination charge was sufficient to exhaust retaliation claims involving "new acts occurring during the pendency of the charge before the EEOC." *Martinez*, 347 F.3d at 1210 (discussing *Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1994)). In *Martinez*, however, the Tenth Circuit recognized that *Morgan* had "effected fundamental changes to the doctrine allowing administratively unexhausted claims in Title VII actions." *Id.* It therefore held that a "plaintiff [must] exhaust administrative remedies for each individual discriminatory or retaliatory act[.]" *Id.* at 1211. "[U]nexhausted claims involving discrete employment actions," it reasoned, are simply "no longer viable." *Id.* at 1210. And the court applied that rule to hold that a plaintiff could not pursue a retaliation claim based on incidents—including a

termination—about which he had never filed a charge. *Id.* at 1210–11.

B. Six Circuits Have Not Yet Definitively Reconsidered Their Pre-*Morgan* Approach, But May Do So When the Question Is Squarely Presented.

Most of the other cases on which Petitioner relies—including all of Petitioner's authority from the Fifth Circuit—predate *Morgan*. Of those circuits that have addressed this issue since *Morgan*, five—the First, Third, Seventh, Eleventh, and D.C. Circuits—have done so in cases that, like the decision below, did not squarely present the question whether *Morgan* compels a different approach. Indeed, at least two courts have expressly suggested that they may reconsider their approach when they have the opportunity to do so.

1. Most of the cases on which Petitioner relies were decided years (or even decades) before *Morgan*. That is true of all three cases on which Petitioner relies from the Fifth Circuit. *See* Pet. 15–16 (discussing *Gupta v. E. Tex. State Univ.*, 654 F.2d 411 (5th Cir. Unit A Aug. 1981), and *Gottlieb v. Tulane Univ.*, 809 F.2d 278, 283–84 (5th Cir. 1987)); *id.* at 3 (citing *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)). And that is true of the primary cases on which Petitioner relies from the First, Seventh, and Eleventh Circuits. *See id.* at 17 (discussing *Clockedile v. N.H. Dep't of Corr.*, 245 F.3d 1 (1st Cir. 2001)); *id.* at 16 (discussing *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989)); *id.* at 18 (citing *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988)).

The continuing vitality of these pre-*Morgan* rulings is doubtful. Both the Eighth and Tenth Circuits had allowed unexhausted retaliation claims to proceed before this Court decided *Morgan*. *See Richter*, 686 F.3d at 852 (citing *Wentz*, 869 F.2d at 1154); *Martinez*, 347 F.3d at 1210 (citing *Ingels*, 42 F.3d at 625). But as both courts later recognized, *Morgan* changed the game. *Richter*, 686 F.3d at 852–53; *Martinez*, 347 F.3d at 1210. Because *Morgan* "effected fundamental changes to the doctrine allowing administratively unexhausted claims in Title VII actions," *Martinez*, 347 F.3d at 1210, there is good reason to expect that courts will see this issue differently when they squarely confront it in the wake of *Morgan*.

2. The First, Third, Seventh, Eleventh, and D.C. Circuits have addressed this issue since *Morgan* but have not had an opportunity to decide whether that ruling demands a different approach. Indeed, some of those courts have expressly suggested that they may reconsider the applicable standard in light of *Morgan* when the opportunity arises.

In *Ford v. Marion County Sheriff's Office*, 942 F.3d 839 (7th Cir. 2019), for example, the Seventh Circuit addressed exhaustion only in a footnote. *Id.* at 857 n.11. And since then, the Seventh Circuit has expressly recognized that its old rule may no longer be valid post-*Morgan*—though it had "no occasion to consider the merits of [that] argument" because the defendant had not raised it. *See Williams v. Bd. of Educ. of City of Chi.*, 982 F.3d 495, 503 n.13 (7th Cir. 2020).

Similarly, the D.C. Circuit has recognized that *Morgan* may "preclude the [case-by-case] approach" it had endorsed in *Park v. Howard University*, 71 F.3d 904 (D.C. Cir. 1995). *Haynes v. D.C. Water & Sewer Auth.*, 924 F.3d 519, 527 n.1 (D.C. Cir. 2019). But it did not reach that question because the plaintiff could not "even meet the standard set forth in *Park*." *Id.*; *see also Payne v. Salazar*, 619 F.3d 56, 65 (D.C. Cir. 2010) (declining to "decide whether *Morgan* did in fact overtake that line of cases" because the plaintiff's claim failed even under the case-by-case standard).

Likewise, in *Duble v. FedEx Ground Package System, Inc.*, 572 F. App'x 889 (11th Cir. 2014), the Eleventh Circuit relied on pre-*Morgan* circuit precedent in deciding whether a retaliation claim had been exhausted by a prior charge. *Id.* at 892–93 (discussing *Gupta*, 654 F.2d 411, and *Baker*, 856 F.2d 167). The court acknowledged *Morgan*, but had no occasion to reconsider its approach because it concluded that the plaintiff's retaliation claim had not been exhausted even under the more lenient pre-*Morgan* standard. *See id.* at 893 (holding that the plaintiff's retaliation claim had not been exhausted because he "chose not to amend or file a new charge" after he was terminated and there was no claim properly before the court to which a retaliation claim could attach).

The First Circuit did something similar in *Franceschi v. United States Department of Veterans Affairs*, 514 F.3d 81 (1st Cir. 2008). The court described a pre-*Morgan* standard, whereby a retaliation claim may be deemed exhausted when it is "reasonably related to" an exhausted claim that is

properly before the court. *Id.* at 86 (quoting *Clockedile*, 245 F.3d at 6). But it found that the plaintiff had not satisfied even that standard because "there [was] nothing properly before the court to which the retaliation claim [could] be bootstrapped." *Id.* at 87.

The decision below fits that bill, too. In holding that Petitioner's retaliation claim was insufficiently related to his original charge, the Third Circuit applied a case-by-case rule derived primarily from four pre-*Morgan* precedents: *Hicks*, 572 F.2d 960; *Waiters*, 729 F.2d 233; *Antol v. Perry*, 82 F.3d 1291 (3d Cir. 1996); and *Robinson*, 107 F.3d 1018. *See* Pet.App. 18a–22a (discussing these four cases in detail). Because the court found that Petitioner did not satisfy even that more lenient, pre-*Morgan* standard, it did not need to consider whether *Morgan* compels a stricter one. And it did not even acknowledge the Eighth and Tenth Circuit's holdings in *Richter* or *Martinez*. In a future case where the distinction matters, the Third Circuit may well conclude that *Morgan* demands a different approach.

C. None of the Post-*Morgan* Cases on Which Petitioner Relies Allowed a Retaliation Claim to Proceed on Facts Like These.

Although four other circuits—the Second, Fourth, Sixth, and Ninth—have allowed unexhausted retaliation claims to proceed even after *Morgan*, most have done so without expressly addressing the impact of *Morgan* on their analyses. More importantly, *none* of those courts applied an extreme, *per se* rule that would have allowed a claim like Petitioner's to proceed. Accordingly, there is no post-

Morgan division of authority with respect to the outcome of this case.

In *Duplan v. City of New York*, 888 F.3d 612 (2d Cir. 2018), for example, the Second Circuit held that "retaliation claims arising during or after an EEOC investigation are deemed exhausted when a plaintiff seeks to join them to a timely filed lawsuit on his original, exhausted claims[.]" *Id.* at 624. Notably, however, the court declined to recognize a "similar exception [for] a plaintiff … who deliberately abandoned his underlying claim of discrimination by failing to file a timely suit on those claims." *Id.* Because Petitioner "has long since abandoned his initial claim of discrimination" by "fail[ing] to timely bring a lawsuit on that claim," *id.* at 623, his retaliation claim would not be deemed exhausted in the Second Circuit, either. *See* Pet.App. 82a ("In this case, [Petitioner] has no timely claim to which to bootstrap his retaliatory discharge claim.").

In *Jones v. Calvert Group, Ltd.*, 551 F.3d 297 (4th Cir. 2009), abrogated by *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019), the Fourth Circuit applied pre-*Morgan* precedent pursuant to which a retaliation claim can be deemed exhausted if it is "reasonably related to the allegations" of the underlying charge. *Id.* at 302–04 (citing *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992)). As the Third Circuit found, however, Petitioner's claim does not satisfy that standard. Indeed, the facts of *Jones* only underscore the weaknesses of Petitioner's claim here. The plaintiff in *Jones*, unlike Petitioner, had filed a timely "charge alleg[ing] a pattern of conduct by her employer in retaliation for her filing [a prior] charge." *Id.* at 304. That charge, unlike Petitioner's, further

"indicated that the retaliatory behavior was ongoing." *Id.* The Fourth Circuit therefore held that the plaintiff's "retaliatory termination [claim] was merely the predictable culmination of [her employer's] alleged retaliatory conduct[.]" *Id.* Because Petitioner never timely charged retaliation to the EEOC at all—much less did he allege a pattern of ongoing retaliatory behavior—the Fourth Circuit, like the Third, would likely have found his retaliation claim unexhausted.

Similarly, in *Spengler v. Worthington Cylinders*, 615 F.3d 481 (6th Cir. 2010), the Sixth Circuit held that a plaintiff had exhausted a retaliation claim, despite not checking the box for "retaliation," because his charge "set[] forth sufficient facts to put the EEOC on notice of [that] claim." *Id.* at 490. Here, the Third Circuit found the exact opposite. Pet.App. 17a (explaining that the narrative portion of Petitioner's charge "contained no reference to conduct that could be construed as retaliatory"). Moreover, the Sixth Circuit's passing statement that "[r]etaliation claims are typically excepted from the filing requirement because they usually arise after the EEOC charge is filed" relied on pre-*Morgan* authority the continuing vitality of which the court did not reconsider. *Spengler*, 615 F.3d at 489 n.3 (citing *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 254 (6th Cir. 1998)).

Finally, in *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2003), the Ninth Circuit found that most of the plaintiff's retaliation claims were *not* exhausted, because a "reasonable investigation by the EEOC would not have encompassed [the] allegedly retaliatory acts." *Id.* at 645. The sole exception the

court recognized was for a retaliation claim regarding adverse employment actions that—unlike Petitioner's termination here—were specifically discussed in the charge. *See id.* at 645–46.

* * *

In short: Although courts often allowed retaliation claims regarding uncharged conduct to proceed before this Court decided *Morgan*, at least two have course corrected since then. *See Richter*, 686 F.3d at 852–53; *Martinez*, 347 F.3d at 1210. And there is good reason to expect that others will do so in an appropriate case. *See, e.g.*, *Williams*, 982 F.3d at 503 n.13. Moreover, Petitioner identifies no case in which a retaliation claim was allowed to proceed where (1) there was no exhausted claim to which the unexhausted one could be joined, (2) the charge did not include allegations regarding the allegedly retaliatory conduct, and (3) the charge involved conduct as "remote in time and substantively distinct" from the alleged retaliation as Petitioner's here. Pet.App. 24a. To the contrary, post-*Morgan* courts have consistently found that retaliation claims are *not* exhausted in circumstances like these. *See, e.g.*, *Vasquez*, 349 F.3d at 645 (finding that aretaliation claim involving different supervisor, different conduct, and a different time period were not exhausted). Accordingly, further percolation is warranted. And to the extent there is some post-*Morgan* division of authority about the applicable standard in the meantime, this case does not squarely implicate it.

II. THIS CASE IS A POOR VEHICLE.

Even if the Court were inclined to take up the Question Presented, this case is not an appropriate vehicle for answering it. That is true for at least three independent reasons. First, the retaliation Petitioner alleges is so far removed from the allegations of discrimination underlying Petitioner's original charge that his claim is untimely even under the Third Circuit's generous, case-by-case approach. Second, Petitioner specifically informed the EEOC of the alleged retaliation in subsequent correspondence, and the EEOC has said it made a mistake in failing to convert that correspondence into a charge in a timely manner. Third, the EEOC actually investigated the alleged retaliation as a result of that correspondence. In each of these respects, this case differs from the mine-run of cases in a way that renders it a poor candidate for this Court's review.

A. This petition is a poor vehicle for clarifying the exhaustion standard applicable to post-charge retaliation claims, first and foremost, because Petitioner's claim fails even under the Third Circuit's lenient, "fact-specific approach." Pet.App. 16a–17a. As that court recognized, "[t]he original EEOC charge and [Petitioner's] civil complaint … address discrete adverse employment actions that occurred approximately two years apart and involved different supervisors in different departments." *Id.* at 24a. So even assuming, as the Third Circuit did, that a plaintiff need not always file a separate retaliation charge, Petitioner's retaliation claim is so far afield from the charged conduct that a separate charge was required. Indeed, it was so clear that Petitioner's claim failed under the Third Circuit's flexible, pre-

Morgan standard that U. S. Steel never attempted to argue—and the Third Circuit never had occasion to decide—that *Morgan* compels a stricter one.

For the same reason, this case would offer no occasion for this Court to decide between the Third Circuit's fact-specific standard and Eighth and Tenth Circuits' bright-line rule, either. The difference between those two approaches is simply not outcome determinative here. And the only approach that would be—a rule whereby a prior charge is *always* sufficient to exhaust a retaliation claim and a plaintiff need *never* charge retaliation—is one that no Court of Appeals appears to have definitively endorsed in the wake of *Morgan*. *See supra* Part I. For good reason: *Morgan* expressly recognized that "each retaliatory adverse employment decision" must be specifically charged to the EEOC. *Morgan*, 536 U.S. at 114.

If this Court is interested in clarifying the proper approach to post-charge retaliation claims, it should take a case (1) in which the Court of Appeals actually considered and decided the question whether *Morgan* compels a stricter approach, and (2) in which the alleged retaliation more closely relates to the charge at issue, such that the answer to that question matters. Neither is true here.

B. Moreover, Petitioner's primary argument before the Third Circuit—which was also endorsed by the EEOC and regarded by the dissent as his "strongest," Pet.App. 36a n.2—was that his "November 2014 correspondence," which included allegations of retaliation in connection with his termination, "itself constituted a timely EEOC

charge." *Id.* at 9a. Indeed, the EEOC even said that it had "'made a mistake' by failing to help [Petitioner] convert his November 2014 correspondence into a charge in a timely manner." *Id.* at 8a n.6. And the EEOC also argued that, as a result of its "mistake," equitable tolling of the statutory filing deadline was warranted. *See id.* at 9a. The Third Circuit properly refused to consider the first argument because Petitioner had "never raised [it] before the District Court." *Id.* at 10a. And it properly refused to consider the second argument because Petitioner had "abandoned" it on appeal. *Id.* at 13. On both points, the panel was unanimous. *See id.* at 36a (agreeing with the majority with respect to forfeiture).

Petitioner's November 2014 correspondence and amended charge, however, are what caused the EEOC to investigate Petitioner's allegedly retaliatory termination. *See id.* at 28a ("[T]he investigation arose from [Petitioner's] handwritten correspondence."). And that investigation, in turn, was Exhibit A in support of Petitioner's and the dissent's argument that filing an amended charge was "unnecessary." *Id.*; *see also id.* at 17a–18a, 27a–33a; *id.* at 47a–61a (McKee, J., dissenting). So Petitioner's correspondence and amended charge are inextricably intertwined with his argument that the initial charge sufficed to exhaust his claim.

The Question Presented in his Petition, however, is limited to cases in which "the employee *did not* file a second formal administrative charge specifically alleging the retaliation." Pet. i (emphasis added). Because Petitioner *did* subsequently inform the EEOC of the alleged retaliation—and, indeed, ultimately filed an amended (albeit untimely)

charge—it is not clear that this case even implicates the Question Presented. At the very least, Petitioner's subsequent correspondence and amended charge render this case a poor vehicle for answering it. If the Court is interested in this issue, it should take in a case in which it is clear that no subsequent retaliation charge was filed.

C. Finally and relatedly, the fact that the EEOC ultimately investigated the alleged retaliation also renders this case a poor vehicle. Petitioner, the EEOC, and Judge McKee have all treated that fact as outcome determinative. *See, e.g.*, Pet.App. 17a–18a ("[Petitioner] and the EEOC primarily argue that this prong may be satisfied simply based on the fact that the EEOC *actually did* investigate [Petitioner's] retaliatory discharge claim[.]"); *id.* at 48a (McKee, J., dissenting) ("[S]ince the EEOC actually investigated [Petitioner's] retaliation claim, we must begin with the presumption that the investigation was reasonable."); Pet. 22, 25–26, 28–29 (relying on the EEOC's actual investigation). But this case is a serious outlier in that respect. Indeed, Petitioner appears to identify no other case in which the EEOC acknowledged that it had investigated the retaliation at issue.

The question of whether the EEOC's actual investigation of an otherwise untimely claim changes the statutory calculus is not certworthy: That question has not divided the Courts of Appeals, and it does not appear to arise with any meaningful frequency. But this case would be a poor vehicle even as to that, narrower question because the Third Circuit held that Petitioner's "retaliation claim should *still* be dismissed" "[e]ven if [the] exhaustion

inquiry turned on the actual—rather than reasonable—scope of investigation arising from a charge[.]" Pet.App. 27a (emphasis added).

* * *

Petitioner himself maintains that the Question Presented "arises frequently." Pet. 22. There is thus no reason that the Court cannot wait for a case that presents it more cleanly—*i.e.*, a case in which the alleged retaliation is sufficiently related to the underlying claim that the claim would be allowed to proceed under a case-by-case approach, in which it is clear Petitioner did not submit a subsequent charge alleging retaliation, and in which the EEOC did not actually investigate the alleged retaliation.

III. THE DECISION BELOW IS CORRECT.

The Third Circuit correctly found that Petitioner's retaliation claim was not exhausted by his initial charge even under its lenient, case-by-case approach. So it had no occasion to decide whether *Morgan* demands a stricter rule, as the Eighth and Tenth Circuits have held. In any event, the stricter rule is the right one: "Each incident of discrimination and each retaliatory adverse employment decision" must be timely charged to the EEOC in order for a plaintiff to pursue a claim in court. *Morgan*, 536 U.S. at 114.

A. Even assuming that there are some cases in which alleged retaliation is so closely connected to a prior discrimination charge that no further charge is required, the Third Circuit correctly found that this case is not one of them. In the decision below, the Third Circuit adhered to pre-*Morgan* circuit precedent endorsing a "highly fact specific" standard,

whereby courts "must 'examine carefully the prior pending EEOC complaint and the unexhausted claim on a case-by-case basis.'" Pet.App. 15a–16a (quoting *Robinson*, 107 F.3d at 1024); *see supra* at 11–13, 20–21. "Even interpreting [Petitioner's original] charge liberally under [that] fact-specific approach," the court concluded that his retaliation claim did not "fall fairly within the scope" of that charge or the investigation that would reasonably have flowed therefrom. *Id.* at 16a–17a.

The original charge, the court emphasized, did not so much as hint at retaliation. Petitioner had "failed to check the box indicating a claim of retaliation and his narrative contained no reference to conduct that could be construed as retaliatory." *Id.* at 17a. Moreover, the court found that Petitioner's "allegations of retaliation [were] too remote in time and substantively distinct from the allegations of disability discrimination for a reasonable EEOC investigation based on the original charge to encompass the later events." *Id.* at 24a.

That conclusion was clearly correct. Petitioner's original "charge was based on the Transportation Department's failure to accommodate his hearing disability and its alleged discrimination against him by its refusal to approve him for the Spellman position in August 2012." *Id.* at 23a. Petitioner's retaliation claim, by contrast, relates to "his discharge from the Blast Furnace Department in August 2014." *Id.* at 23a–24a. The charge and the retaliation claim "thus address discrete adverse employment actions that occurred approximately two years apart and involved different supervisors in different departments." *Id.* at 24a. "[T]he legal

theories in the original charge and amended charge are not the same, the incidents are not the same, the individuals involved are not the same, the work locations are not the same, and the time-periods are not the same." *Id.* at 17a (internal quotation marks omitted). So even assuming (as the Third Circuit did) that a discrimination charge can encompass a retaliation claim where there is "'a close nexus' of supporting facts," *id.* at 25a (quoting *Hicks*, 572 F.2d at 967), no such nexus exists here.

There is no unfairness in that result. Petitioner had already successfully filed one EEOC charge, and nothing prevented him from filing an amended charge within 300 days of his termination. *See id.* at 12a. Petitioner also had two colorable arguments that he simply forfeited and abandoned: that his November 2014 correspondence qualified as a timely charge, and that the charge-filing deadline should have been equitably tolled in light of the EEOC's failure to promptly convert that correspondence into a charge. *See id.* at 9a–13a. Petitioner's decision to forfeit and abandon his "strongest argument[s]," *id.* at 36a n.2, is perhaps unfortunate. But it only confirms that this Court's intervention is unnecessary.

B. In any event, the text of the relevant statutory provisions, this Court's decision in *Morgan*, and the purposes of the claim-processing regime all compel the conclusion that a plaintiff must file a timely charge regarding "each retaliatory adverse employment decision" before he may pursue a retaliation claim based on that decision in federal court. *Morgan*, 536 U.S. at 114.

1. Section 2000e–5(e)(1) provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e)(1). The phrase "unlawful employment practice," in turn, is fleshed out "in great detail" in § 2000e–2(a) and § 2000e–3(a), which describe "numerous discrete acts," *Morgan*, 536 U.S. at 111, that constitute unlawful discrimination or retaliation under Title VII. And the ADA contains parallel provisions. *See* 42 U.S.C. § 12112(a) (acts that constitute unlawful discrimination on the basis of disability); *id.* § 2000e–3(a) (acts that constitute unlawful retaliation).

Consistent with the plain text of those provisions, retaliation is a distinct "unlawful employment practice," so—like any other purportedly unlawful employment practice—it must be charged to the EEOC within the statutory time limit. To be sure, that time limit is not jurisdictional, so it can be waived or equitably tolled. *Morgan*, 536 U.S. at 113. But there is no textual basis for excusing plaintiffs altogether from filing a charge alleging each discrete incidence of retaliation—just as they must file a charge alleging each discrete incidence of discrimination. *See id.* at 109 ("[O]ur most salient source for guidance is the statutory text.").

2. If there were any ambiguity in that text, *Morgan* resolved it. *Morgan* carefully considered "[w]hat constitutes an 'unlawful employment practice'" within the meaning of § 2000e–5(3). 536 U.S. at 110. And it concluded, consistent with the textual analysis above, that "practice" refers to "a discrete act or single 'occurrence'" of discrimination or retaliation. *Id.* at 111. Accordingly, *Morgan* held

that "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113. And it thus definitively refuted Petitioner's contention that "Title VII imposes no textual limit on the claims that may be made in … a civil action." Pet. 2.

That holding controls this case. Although the Court's analysis focused primarily on related discrimination and hostile work environment claims, the plaintiff in *Morgan* had also alleged retaliation. 536 U.S. at 105, 108. Moreover, the Court repeatedly made clear that retaliation claims are no different than a discrimination claim on this metric. *See id.* at 105 ("We hold that the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period."); *id.* at 110 ("A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'"); *id.* at 114 ("Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'"). Regardless of a plaintiff's legal theory, he must therefore file a timely charge regarding each discrete act on which he bases his claim. *See id.* at 112. He may not, as Petitioner has attempted to do here, rely on a timely charge alleging a discriminatory transfer "to pull in" an untimely claim regarding an allegedly retaliatory termination. *Id.* at 113 (discussing *Ricks*, 449 U.S. 250).

3. That result serves the purposes of § 2000e–5's claim-processing regime, which include (1) "facilitation of an informal dispute resolution process," (2) "prompt notice to the employer," and (3)

"swift dispute resolution." Pet.App. 33a (citing *Morgan*, 536 at 109).

With respect to informal resolution, the EEOC needs to know the nature of a claim in order to effectively investigate and conciliate. That means the charge must at least specify the allegedly discriminatory or retaliatory acts at issue. This case proves the point. "[A] reasonable investigation arising out of [Petitioner's] initial charge would certainly include an inquiry into whether [he] was qualified for the Spellman position, U. S. Steel's reasons for passing him over, and identification of the person who secured the position and why he or she was chose." *Id.* at 24a. It "would not have included an inquiry into [Petitioner's] post-charge firing," a separate adverse employment action that occurred nearly two years later. *Id.* Although Petitioner's subsequent correspondence put the EEOC on notice of his retaliation claim, that does nothing to show that his *original charge* gave the EEOC the information it needed to investigate and conciliate that claim. *See Richter*, 686 F.3d at 853 ("Exempting retaliation claims from the administrative framework established by Congress could frustrate the conciliation process[.]").

Requiring plaintiffs to charge retaliation to the EEOC serves the statutory goals of "prompt notice to the employer" and "prompt processing," too. *Morgan*, 536 U.S. at 109, 121 (citations omitted). Again, this case proves the point. Because Petitioner did not charge retaliation to the EEOC, "U. S. Steel did not receive any notice of [his] retaliation claim until well after the end of the 300-day filing period." Pet.App. 33a. Indeed, "U. S. Steel did not receive even

informal notice of the retaliatory discharge claim until some point between 161 days and 186 days after the filing period expired." *Id.* at 34a. And it received formal notice 221 days too late. *Id.* This dispute remains ongoing more than seven years later.

To be sure, plaintiffs have a countervailing interest in pursuing retaliation claims. But "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). And here, those requirements impose no insurmountable burden on plaintiffs. If a plaintiff wishes to pursue a retaliation claim, he need only file a charge with the EEOC within 300 (or, in some states, 180) days of the allegedly retaliatory conduct. The Question Presented is limited to cases like this one, in which the plaintiff has already successfully done exactly that with respect to an underlying discrimination claim. *See* Pet. i; *see also* Pet.App. 12a ("[Petitioner] knew how to file a formal EEOC charge, as he had done in May 2013."). So if that plaintiff later suffers another adverse employment action and wishes to assert a discrimination or retaliation claim based on that action, he need only repeat the process.

CONCLUSION

The petition for certiorari should be denied.

December 8, 2021

Respectfully submitted,

Leon F. DeJulius, Jr.
Counsel of Record
JONES DAY
250 Vesey Street
New York, NY 10281
(212) 326-3939
lfdejulius@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Rodney M. Torbic
UNITED STATES STEEL
CORPORATION
600 Grant Street
Room 1844
Pittsburgh, PA 15219

Counsel for Respondent