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

REPLY BRIEF FOR PETITIONER

Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

John E. Egers, Jr.
Counsel of Record
JULIAN LAW FIRM
71 North Main Street
Washington, PA 15301
(724) 228-1860
johnegers@julianlawfirm.com

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Respondent agrees that the circuits are divided on the question presented. It argues only that the issue should "percolate" further in light of this Court's decision twenty years ago in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). But the Fourth Circuit has expressly rejected the Eighth and Tenth Circuits' holding that *Morgan* controls the issue. Other courts, including the Third Circuit here, have adhered to their prior rules despite being well aware of *Morgan*. And courts applying the majority rule would have allowed petitioner's claim to proceed. This case thus involves an entrenched conflict on a recurring question that has been thoroughly considered in the lower courts and controls the outcome here. There is no reason to defer review.

Respondent's vehicle arguments are also unavailing. This case presents a clear choice among governing legal rules, not fact-bound issues of application. And the undisputed procedural facts—including informal notice to the EEOC of potential retaliation and the Commission's actual investigation—aptly highlight the legal questions.

Finally, respondent does not defend the case-by-case legal standard used by the court below. It argues instead that, under *Morgan* and the statutory text, a claim like petitioner's should be rejected out of hand. Thus, the parties agree that Title VII's claim-processing provisions should be read to impose one of two clear rules: Where an employee alleges retaliation for the filing of a first EEOC charge, a second charge is either never or always required. Either way, the rule should be the same for all parties. And only this Court can produce that result.

I. The conflict is ripe for resolution.

Respondent argues primarily that there is "good reason to expect" the current conflict in the lower courts will dissipate as other courts of appeals "reconsider their approach in light of *Morgan*." BIO 3; *see id.* at 15-24. Twenty years after *Morgan*, that prediction is unfounded.

1. The Fourth Circuit has expressly rejected the argument that *Morgan* undercuts its rule that "a claim of 'retaliation for the filing of an EEOC charge'" is actionable without a separate charge. *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 302 (4th Cir. 2009) (quoting *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992)). The employer in *Jones* argued "that *Morgan* required Jones to file a new EEOC charge alleging that she was terminated in retaliation for her first charge." *Id.* at 303. And the Fourth Circuit was well aware of the Tenth Circuit's holding that *Morgan* requires that per se rule. *Id.* (citing *Martinez v. Potter*, 347 F.3d 1208, 1210-1211 (10th Cir. 2003)). But the Fourth Circuit was unmoved, explaining that it "d[id] not read *Morgan* that broadly." *Id.* Respondent never confronts this square rejection of its position. *Compare* Pet. 19 *with* BIO 22-23.

2. Respondent argues that the Third Circuit has "not had an opportunity to decide whether [*Morgan*] demands a different approach." BIO 19. In this case, respondent maintains, it "never attempted to argue" for the *Morgan* test, and thus "the Third Circuit never had occasion to decide" the issue. *Id.* at 26. And thus "[i]n a future case," the court "[might] well conclude" that it should abandon its case-by-case rule. *Id.* at 21. None of this is consistent with the record.

Petitioner's opening brief below asked the Third Circuit to adopt the majority per se rule that a second EEOC charge is never required to preserve a claim of retaliation for filing a first charge. *See* ECF Doc. 16 at 40-54. Indeed, he asked the court to hear the case initially en banc to address that issue. ECF Doc. 22. The EEOC, too, urged the court to adopt the majority rule. ECF Doc. 20 at 26-32. Both petitioner and the EEOC argued expressly that the Eighth and Tenth Circuits erred in reading *Morgan* to require the opposite per se rule. *See* ECF Doc. 16 at 52-53 & n.3; ECF Doc. 22 at 13-14; ECF Doc. 20 at 30-32.

Respondent, for its part, relied extensively on *Morgan*. Its brief below opened with the argument that, despite Simko's initial charge and the EEOC's actual investigation of alleged retaliation, "strict adherence to Title VII's statutory filing requirement and the directives in *Morgan* require[d] dismissal" in the absence of a separate formal retaliation charge. ECF Doc. 24 at 17; *see id.* at 12-17.

Rejecting these arguments from both sides, the Third Circuit "adhere[d] to [its] precedent" requiring a case-by-case approach. Pet. App. 16a; *see also id.* at 55a-56a (McKee, J., dissenting in part). And the full court denied rehearing en banc. *Id.* 85a-86a. There is thus no basis for respondent's assertion that the court "ha[s] not had an opportunity to decide" the issue here, BIO 19, or for its speculation that someday the court might change its mind, *id.* at 21.

3. Other courts have likewise had ample opportunity to reconsider their positions on this recurring question. As the petition points out, some have continued to apply their pre-*Morgan* rules with little discussion, while others have noted or reserved the

Morgan question. *Compare* Pet. 19 n.7 *with* BIO 19-21. But we are long past the point where any new decision could eliminate the existing three-way conflict over whether to use the majority per se rule first adopted in *Gupta v. East Texas State University*, 654 F.2d 411, 414 (5th Cir. 1981); the contrary per se rule based on *Morgan*, *see Martinez*, 347 F.3d at 1210-1211; *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 850-853 (8th Cir. 2012); or a facts-and-circumstances test of the sort used by the Third and Ninth Circuits and reaffirmed below, *see* Pet. 12-13.

Nor is there any reason to think that additional consideration by the lower courts would assist this Court in "bring[ing] order to this subject." *Clockedile v. N.H. Dep't of Corr.*, 245 F.3d 1, 6 (1st Cir. 2001). From the Fifth Circuit's decision in *Gupta* to the Second Circuit's in *Duplan v. City of New York*, 888 F.3d 612 (2d Cir. 2018), courts in the majority have spelled out their reasons for not requiring employees to file separate EEOC charges to preserve claims of retaliation for filing an initial charge. *See, e.g.*, Pet. 25-27. The Eighth and Tenth Circuits—and respondent—are clear in maintaining that a contrary per se rule follows from the text and purposes of Title VII and this Court's decision in *Morgan*. *See, e.g.*, BIO 31-35. The Third Circuit has extensively discussed its reasons and methodology for applying a fact-specific standard. *See* Pet. 20 (citing Pet. App. 14a-34a). And meanwhile, courts continue to apply these different circuit rules in adjudicating cases, with of course divergent results. *See, e.g.*, *Ayala v. U.S. Postal Serv.*, 2021 WL 4270868, at *11 (D.P.R. Sep. 20, 2021) (applying *Clockedile* and *Franceschi v. U.S. Dep't of Veterans Affs.*, 514 F.3d 81, 86 (1st Cir. 2008)); *Espinosa v. Thermacline Techs., Inc.*, 2021

WL 5023167, at *3 (W.D. Okla. Oct. 28, 2021) (applying *Martinez*). With an entrenched conflict over a clearly framed, well-ventilated, and frequently recurring issue, there is no reason to defer review.

II. Petitioner's case would have been decided differently under the majority rule.

Respondent ultimately concedes that several circuits have allowed retaliation claims to proceed without a separate charge "even after *Morgan*." BIO 21. It nonetheless argues that further percolation is warranted because none of those courts "would have allowed a claim like Petitioner's to proceed." *Id.* at 21-24. That is wrong. The facts of this case fall within the core majority rule.

1. Respondent mischaracterizes the Fourth Circuit's decision in *Jones*, suggesting that it applied a fact-specific test like the one used by the Third Circuit here. BIO 22-23. But *Jones* reaffirmed the per se rule that "a claim of 'retaliation for the filing of an EEOC charge as discrimination' is indeed 'like or reasonably related to'" the first charge, and thus never requires a separate charge. 551 F.3d at 302 (citation omitted). It looked to other courts that applied the same rule. *Id.* at 302-303. And it reasoned that "a plaintiff that has already been retaliated against one time for filing an EEOC charge will naturally be reluctant to file a separate charge, possibly bringing about further retaliation." *Id.* at 302. That reasoning applies across the board.

In *Jones*, the initial discrimination charge made to the Commission "did not give rise to any formal litigation." *Id.* at 304. The court therefore had to decide whether a claim of retaliation for the filing of

that initial charge could "relate[] back" to a *different* charge that had been made later before the EEOC. *Id.* In that analysis, the court looked to particular facts, as respondent describes. BIO 22-23. But petitioner's case involves relation back to his initial discrimination charge—the core rule described and reaffirmed in *Jones*. There is no question the Fourth Circuit would have applied that rule to the facts of this case.

2. Respondent's discussion of the Second Circuit's decision in *Duplan* takes the same wrong turn. *See* BIO 22. In *Duplan*, as in *Jones*, the plaintiff filed two charges with the EEOC—one in 2011 and one in 2014. *See Duplan*, 888 F.3d at 617-618. He received a right-to-sue letter for the 2011 charge, but never filed an action based on that charge. *Id.* at 618. He did, however, bring suit based on the 2014 charge. *Id.* The court allowed that action to proceed—including on claims of retaliation for the filing of the 2014 charge itself, as to which no *separate* charge was ever filed. *See id.* (describing "two additional instances of retaliation"); *id.* at 626-627. It rejected only the retaliation claims that depended solely on the 2011 EEOC charge, which Duplan had "long since abandoned" by not filing suit when he received the right-to-sue letter on that charge. *Id.* at 623.

Respondent argues that the Second Circuit would treat Simko as having similarly "abandoned his initial claim of discrimination." BIO 22 (quoting *Duplan*, 888 F.3d at 623). But that argument misappropriates language the court used to discuss Duplan's failure to file suit based on his 2011 charge. Here, Simko filed a timely civil action based on the right-to-sue letter he received. The proper compar-

ison is thus to Duplan's allegations of retaliation for the filing of his *2014* charge, as to which a timely suit was later filed.

The Second Circuit squarely held that "[t]hose allegations [were] deemed exhausted by the operation of the 'reasonably related' rule." 888 F.3d at 626. Indeed, the court described the scenario here as the "paradigmatic case" for operation of its rule. *Id.* at 622. And under that rule it is "well established" that a plaintiff may sue on claims of retaliation for filing an EEOC charge, "even though no separate or amended EEOC charge encompassing the subsequent retaliation was ever filed." *Id.*[1]

3. Respondent notes that *Spengler v. Worthington Cylinders*, 615 F.3d 481 (6th Cir. 2010), and *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2003), involved facts different from those here. BIO 23-24. But it offers no reason for surmising that those courts would not apply the rules they have articulated to petitioner's case. *Spengler* restates as settled law the core rule that a separate charge is not

[1] Contrary to respondent's suggestion, BIO 24, nothing requires a charging party to sue over some allegation included in his initial charge just to provide an "exhausted claim" to which a retaliation claim may then be "joined." The EEOC issues a right-to-sue notice if, after processing a charge, it decides not to sue on its own; and the "person claiming to be aggrieved" then has 90 days to bring a "civil action." 42 U.S.C. § 2000e-5(f). In that action, the plaintiff is the master of his complaint. Simko received a right-to-sue notice based on the proceedings arising out of his initial discrimination charge, C.A. App. 116, and chose to pursue the retaliation claim as to which "[t]he EEOC found reasonable cause to believe that violations of the statute(s) occurred," *id.*

required where retaliation occurs "after the EEOC charge is filed." 615 F.3d at 489 n.3. And *Vasquez* confirms that the Ninth Circuit applies a facts-and-circumstances test—under which it deems preserved any claim within the scope of the EEOC's "actual" investigation. 349 F.3d at 644. Respondent suggests no reason for believing that the Ninth Circuit, applying that precedent, would not have treated Simko's claim as preserved. *See* Pet. 13. And it nowhere grapples with the clear divergence between the Ninth Circuit and the Third on the significance of the Commission's actual investigation. It simply asserts in passing and without explanation that there is no conflict. *Compare* BIO 28 *with* Pet. 12-13, 28-29.

III. This case is a good vehicle for resolving the question presented.

In arguing that this case would be a poor vehicle for review, BIO 25-29, respondent first reprises its argument that the conflict among the circuits does not affect the outcome here, *id.* at 25-26. The assertion that it is "clear" petitioner's claim was going to fail even under the Third Circuit's fact-specific approach is curious, given that the court itself divided over that question in lengthy majority and dissenting opinions. But even more oddly, it ignores the majority rule petitioner invokes, under which his claim would proceed to the merits. *See, e.g.*, *supra* Part II; Pet. App. 16a (recognizing rule but refusing to adopt it); *Jones*, 551 F.3d at 303 (reaffirming rule after *Morgan*). This case squarely presents the question whether courts should be using that majority rule, respondent's preferred rule adopted by the Eighth and Tenth Circuits, or some fact-specific test.

Respondent next notes that potential equitable arguments might have resolved this case on its facts. BIO 26-27. As it observes, however, *id.* at 27, the court of appeals concluded that those arguments were not properly presented for appellate review, and they are irrelevant here. *See* Pet. 8 n.4. As the case comes to this Court it involves, as respondent observes, an allegation of retaliation for the filing of an initial EEOC charge that did not result in a second *formal* charge, but did come to the attention of the EEOC by other means, and indeed was then investigated. *See* BIO 27-28; *see also* Pet. i. But those features do not make this case a "poor vehicle" or "serious outlier." BIO 28. On the contrary, they are predictable, expected, and even desired aspects of a system in which "laypersons, rather than lawyers, are expected to initiate the process," *see Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002) (citation omitted), and in which employees often proceed *pro se* before the Commission.

Indeed, the underlying facts here make this case a *good* vehicle. First, they cleanly present the central legal question at issue. *See* Pet. 20-22. And second, they provide a concrete and representative context for assessing the types of concerns that have led most courts to hold an employee like Simko need not file a second formal charge to preserve a claim that his employer retaliated against him for filing his first charge. *See* Pet. 25-27.

In its amicus brief in the Third Circuit, the EEOC itself explained not only why the majority per se rule is correct but also why the core facts here are not unusual. It noted, for example, that the Commission both "instructs charging parties to notify it 'if

any attempt at retaliation is made'" and "directs its investigators to 'be alert' to retaliation during their investigations." ECF Doc. 20 at 28 (citation omitted). And it explained that it "prioritizes [allegations of] retaliation for the filing of a charge in part because 'employer retaliation against [the charging party] can, if not stopped, hinder EEOC's ability to enforce the law.'" *Id.* (citation omitted).

The Commission also confirmed that "even without a retaliation charge, if the EEOC becomes aware of retaliation for the filing of a charge, it notifies the respondent [employer] that it is expanding its investigation." ECF Doc. 20 at 28. And it argued that "[i]n light of the EEOC's practice, requiring a new charge when a respondent retaliates for the filing of the original charge would create a procedural hurdle with no practical effect." *Id.* at 29. Thus, the EEOC has already addressed these issues in this very case, refuting respondent's presentation.

IV. The Court should resolve the conflict over this recurring question.

On the merits, respondent first argues that the Third Circuit correctly applied its fact-specific test in this case. BIO 29-31. Petitioner of course disagrees (as did the dissent below, *see* Pet. App. 36a-62a), but he does not seek review on that fact-bound basis. Nor does respondent defend the Third Circuit's use of a fact-specific approach.

Petitioner instead asks this Court to adopt the categorical rule used by a majority of the circuits and supported by the EEOC. *See* Pet. 23-30. Respondent, for its part, argues for an equally clear but opposite per se rule. *See* BIO 29, 31-35. Nothing about this

disagreement lessens the need for review. On the contrary, the stark difference in the parties' positions mirrors the widespread, well-recognized, and well-articulated conflict among the courts of appeals, only confirming the need for this Court's intervention. *See, e.g.*, *Jones*, 551 F.3d at 303 ("we do not read *Morgan* that broadly"); *Richter*, 686 F.3d at 857-861 (Bye, J., dissenting from court's holding that *Morgan* required switching from the first per se rule to the second); *see also* ECF Doc. 20 at 26-32 (EEOC amicus brief below). Whatever the proper rule, it should be the same for all parties. And only this Court can produce that result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

John E. Egers, Jr.
Counsel of Record
JULIAN LAW FIRM
71 North Main Street
Washington, PA 15301
(724) 228-1860
johnegers@julianlawfirm.com

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