

No. _____

In the
Supreme Court of the United States

RACHEL MOSBY,
Petitioner,

v.

CITY OF BYRON, GEORGIA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Must a trial court apply this Court's holding in *Fort Bend* when a Title VII plaintiff timely argues that the defendant has waived its objection to a charge-filing requirement objection, and must the trial court ultimately decide whether the same has been waived before granting summary judgment because of the same?

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STATEMENT OF JURISDICTION

Rachel Mosby appealed to the United States Court of Appeals for the Eleventh Circuit, and that court affirmed the ruling of the United States District Court for the Middle District of Georgia on April 18, 2022. Mosby subsequently filed a petition for rehearing, which was denied by the Court of Appeals on June 24, 2022. App. 35a. Mosby now seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this Petition for a Writ of Certiorari within ninety days of the Court of Appeals' denial of Mosby's petition for rehearing.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

As provided by Title VII of the Civil Rights Act:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances

of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of

this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

42 U.S.C. § 2000e-5(b). Similarly, as provided by the related regulations: 1) “A charge shall be in writing and signed and shall be verified.” 29 C.F.R. § 1601.9; 2) “... and the term verified shall mean sworn to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgements, or supported by an unsworn declaration in writing under penalty of perjury.” 29 C.F.R. § 1601.3(a); and, 3) “... A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.” 29 C.F.R. § 1601.12(b).

STATEMENT OF THE CASE

1. In 2007, Rachel Mosby (hereinafter, “Mosby”) was hired by the City of Byron, Georgia (hereinafter,

“City”) to serve as its Fire Marshall. D. Ct. Dkt. 1 at 3. At the time, the City only had a small volunteer fire department. *Id.* However, in January 2008, the City established its first professional Fire Department, and Mosby was appointed as its first Fire Chief. *Id.*

For approximately eleven years, Mosby proudly served the Citizens of the City in this role. *Id.* She also grew the number of professional firefighters, created policy for the City, implemented cost cutting measures, obtained grant funding, and improved the City’s Insurance Service Office rating. *Id.* at 4-5. While Mosby was by no means perfect, her evaluations reflected the fact that she “Exceeds Standards” during her tenure. *Id.* at 6.

On June 4, 2019, the City Administrator sent an email to Mosby, asking to meet with her that afternoon. *Id.* at 12. When the two met, the City Administrator abruptly announced that Mosby was being fired; she was ordered to pack her belongings and leave the premises immediately. *Id.* at 12-13. She was then escorted off of the property by the Chief of Police. *Id.* at 13. The City handed a termination letter to Mosby, which provided three purported reasons for ending her eleven-year tenure. *Id.* at 13-15. Mosby contends that these three stated reasons stated were clearly false and the temporal nature of the alleged performance deficiencies compared to the termination were dubitable. *Id.*

Instead, just thirty-six days before she was fired, Mosby had been featured by a local media outlet in an evening TV broadcast, with the story then published online. *Id.* at 9. The coverage was focused on Mosby’s experience as a firefighter who had

recently “come out” as a transgender woman. D. Ct. Dkt. 1-1. While Mosby initially believed that her news had been well-received, in hindsight, she had been subjected to microaggressions in the workplace and other harassment, including one of the City’s senior officials telling Mosby that the City could simply get rid of her merely by using a performance evaluation. *Id.* at 6-7. Moreover, the City’s equal employment officer, the City Administrator, refused to address Mosby’s prior complaints of harassment, and the City had instituted a mandatory uniform policy and removed department’s heads right to appeal termination, both of which Mosby felt had been in response to her disclosure of her gender identity. *Id.* at 8-11.

2. On June 28, 2019, Mosby submitted her Charge of Discrimination (hereinafter, “Charge”) to the Equal Employment Opportunity Commission (hereinafter, “EEOC”). D. Ct. Dkt. 1-4. The letter consisted of a detailed, five-page letter drafted by counsel, an attached notice signed by Mosby of her legal representation, and eleven pages of exhibits. *Id.*¹ Mosby alleged that the City subjected her to harassment and hostile work environment based on sex, terminated her because of sex and disability, and failed to provide a reasonable accommodation based on known disabilities, all in violation of Title

¹ As is alluded to in the case law, when the EEOC receives a letter from counsel or an intake questionnaire, it was common practice for the EEOC to prepare a “Form 5” charge, which includes a verification, and then send it to the charging party to sign. *See, e.g., Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002); *Gad v. Kan. State Univ.*, 787 F.3d 1032 (10th Cir. 2015). The EEOC did not do that in this case.

VII of the Civil Rights Act and the Americans with Disabilities Act. *Id.* at 5.

Mosby received confirmation that the Charge had been delivered to the EEOC's Atlanta Office both by facsimile and Certified Mail. *See* D. Ct. Dkt. 10 at 1. Yet, after nearly four months had elapsed, neither she nor counsel had received any contact from the EEOC. *Id.* As a result, counsel sent correspondence to the Director of the Atlanta District Office, inquiring into the status of her case. D. Ct. Dkt. 10 at 2; D. Ct. Dkt. 10-2. The Director apologized for the lack of communication and assured counsel that someone would be in contact soon. D. Ct. Dkt. 10-3. Another week passed with no response from the EEOC. D. Ct. Dkt. 10 at 2. After counsel sent the October 22, 2019 letter to the Director, Mosby ultimately attempted to contact the EEOC about her case on at least eight more occasions. *Id.* 2-3. She never received any update about her case from the EEOC.

Having not heard from the EEOC by December 19, 2019, nearly 180 days after her Charge had been submitted, she requested a copy of the EEOC's investigative file and that a "Right to Sue" letter be issued. *Id.*; D. Ct. Dkt. 10-6. In requesting the Right to Sue, she explained that her request was premised on the fact that it was clear that the EEOC would not be able to complete its investigation within 180 days, due in part to the uncertainty whether the City had submitted or had even been asked by the EEOC to submit, its position statement. *Id.* at 2.

3. On February 18, 2020, Mosby received a Right to Sue letter from the Department of Justice.² D. Ct. Dkt. 1-5. She filed a civil action in the U.S. District Court for the Middle District of Georgia on April 28, 2020.

Mosby had to send a second request for the EEOC's file, which she received approximately a week later on May 11, 2020. D. Ct. Dkt. 10-1. Upon her review of the file, Mosby found *for the first time* that the City had not only been asked to submit a position statement, but had submitted one in September 2019. D. Ct. Dkt. 10-1 at 27-37. The City, through counsel, acknowledged reviewing the Charge that Mosby's attorneys executed. *Id.* at 28 ("According to the EEOC documents, [Mosby's] attorneys executed her Charge 410-2019-06614 on her behalf on June 28, 2019, alleging that [the City] discriminated against [Mosby] when it terminated her on June 4, 2019."). The City continued by responding substantively to the allegations on the remaining ten pages of its position statement. *Id.* at 28-37. Nowhere in the position statement does the City refer to the verification or lack thereof. *Id.*

On May 29, 2020, the City filed a Motion to Dismiss. D. Ct. Dkt. 5. The City argued that Mosby's claims for discrimination based on sex and disability were barred as a matter of law on the sole basis that her Charge did not contain a verification. *Id.* at 5-10. This is an argument that the City entirely failed to make at the EEOC. *See* D. Ct. Dkt. 10-1 at 27-37. The district court later converted this

² Pursuant to 42 U.S.C. § 2000e-5(f)(1), the Attorney General has enforcement powers concerning charges involving a government, governmental agency, or political subdivision.

part of the City's Motion to Dismiss to one for Summary Judgment, App. 33a-34a, since it would be necessary to examine matters outside of the pleadings. D. Ct. Dkt. 12. The other portions of the City's Motion – that Mosby's claims for deprivation of due process and defamation should be dismissed for failure to state a claim D. Ct. Dkt. 5-1 at 10-16 – were not similarly converted by the district court. *See* D. Ct. Dkt. 15 at 2.

Soon after the City filed its Motion, Mosby attempted to submit an Amended Charge of Discrimination to the EEOC on July 17, 2020. D. Ct. Dkt. 10-9 at 1-20. Specifically, the Amended Charge contained both a verification *and* a declaration in writing under penalty of perjury. *Id.* at 2. Several days later, an EEOC representative contacted counsel and said that the EEOC would not accept the Amended Charge because the case was closed, even though the Right to Sue had been issued by the Department of Justice, not the EEOC. D. Ct. Dkt. 14 at 2-3.

4. Ultimately, the district court found that Mosby's Charge did not contain a verification. D. Ct. Dkt. 15 at 5. The district court relied on a 2001 decision of the Eleventh Circuit Court of Appeals finding that the filing of the verification mandatory. *Id.* at 10-11. The district court's Order explains that it is unclear whether a subsequent opinion of this Court in *Fort Bend County, Texas v. Davis* allowing for waiver of mandatory charge-filing requirements was either on point or had overruled the Eleventh Circuit's precedent. *Id.* As a result, the district court granted Summary Judgment in favor of the City on Mosby's sex and disability discrimination claims.

App 13a-23a The City's Motion to Dismiss was also granted as to the remaining claims. App. 23a-32a

5. On April 18, 2022,³ a panel of the Eleventh Circuit affirmed the district court's decision. In so doing, it reasoned that it had previously affirmed summary judgment in favor of Title VII defendants when a lawsuit is filed based on an unverified charge. App. 4a-5a. The appellate court recognized that this Court held in *Fort Bend* that an employer may forfeit the issue of an employee's failure to comply with charge-filing requirements. App. 5a. However, it reasoned that this Court affirmed a decision by the Fifth Circuit, finding the employer forfeited the issue by waiting four years into the litigation and after a round of appeals to raise the issue. App. *Id.*

The Eleventh Circuit then compared the facts of the instant proceeding to those in *Fort Bend*. App. 5a-6a. The court concluded that, unlike in *Fort Bend*, Mosby had not tried to make a handwritten supplement in her Charge, which was filed by counsel, and the City raised the verification issue in a pre-answer motion to dismiss instead of after several appeals. *Id.* As a result, the Eleventh Circuit found that neither its precedents or this Court's holding in *Fort Bend* suggest that the City forfeited its failure-to-verify arguments or exhaustion

³ The Eleventh Circuit initially issued its Opinion on April 18, 2022. App. 36a-45a On June 10, 2022, the Eleventh Circuit, acting upon its own motion, issued a revised version of the Opinion, and said second Opinion was also dated April 18, 2022. Any references herein to the Opinion below are to the second Opinion issued that is also dated April 18, 2022. App. 1a-11a.

requirements, affirming the district court's grant of summary judgment. *Id.*

On May 20, 2022, Mosby filed her Petition for Rehearing, arguing in part, that the Eleventh Circuit erred by misinterpreting the facts and holding of this Court's decision in *Fort Bend*. On June 10, 2022, the Eleventh Circuit re-issued its initial Opinion upon its own motion, changing its discussion of the facts and holding of *Fort Bend* as described above. *Compare* App. 1a-11a, *with* App. 36a-45a. On June 24, 2022, the Eleventh Circuit issued an order denying Mosby's Petition for Rehearing. App. 35a.

REASONS FOR GRANTING THE PETITION

An employee subjected to discrimination based on sex or disability must first file a charge "in writing under oath or affirmation" and include information required by the EEOC. 42 U.S.C. § 2000e-5(b).⁴ According to EEOC regulations, a "charge must be in writing and signed and shall be verified." 29 C.F.R. § 1601.9. The regulations define "[v]erified" as meaning being "sworn to or affirmed" before an authorized person or supported by an unsworn declaration under penalty of perjury. 29 C.F.R. § 1601.3(a). A complainant is permitted to amend their charge to cure technical defects, including a failure to sign under oath or include a verification. 29 C.F.R. § 1601.12(b). However, that is only possible if the EEOC has not dismissed the case and issued the right to sue.

⁴ The requirements are the same under the ADA and Title VII. 42 U.S.C. § 12117(a).

Courts have often discussed the purposes of filing a charge of discrimination. For example, as the Eleventh Circuit has reasoned, a charge 1) provides notice to the employer that a complaint has been filed with the EEOC; and, 2) it initiates the EEOC's investigation into the complaint. *Pijnenburg v. W. Ga. Health Sys., Inc.*, 255 F.3d 1304, 1306 (11th Cir. 2001).

Similarly, courts have also considered the specific purposes of certain charge-filing requirements. In one case, this Court explained that the object of the verification requirement is to “protect employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury.” *Edelman*, 535 U.S. at 113 (citing *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 76 n. 32 (1984) (“The function of an oath is to impress upon its taker an awareness of his duty to tell the truth...”).

I. The Eleventh Circuit's Opinion Conflicts Not Only with That of Other Circuits but With This Court's Settled Precedent.

The question becomes whether Title VII's charge-filing requirements are jurisdictional or may be waived. As discussed herein, prior to 2019, there was a clear split amongst circuits as to whether said charge-filing requirements were jurisdictional in nature or mandatory in the sense that the defense could be forfeited if the objecting party waits too long to raise the point. This Court has seemingly resolved this issue, but despite that clear direction, the circuits continue to use disparate approaches concerning charge filing requirements, and the

authority in the Eleventh Circuit conflicts not only with other circuits but with the precedent of this Court.

A. There remains a clear circuit split as to whether Title VII's charging-filing requirements may be waived.

The Eleventh Circuit's decision reveals that there remains an intractable circuit split on a question of great importance: whether a trial court may ignore arguments that a party objecting to a mandatory claim-processing rule waived such arguments by waiting too long to raise the point.

While there was indeed a split amongst circuits prior to 2019, the Eleventh Circuit now stands with the minority of Courts of Appeals that handle Title VII's charge-filing requirements as jurisdictional.

1. There are now nine circuits that have treated Title VII's charge-filing requirements and administrative exhaustion as non-jurisdictional prerequisites to suit.

The First, Second, Sixth, Seventh, and D.C. Circuits all treated administrative exhaustion as nonjurisdictional. The First and Second Circuits have explicitly found that the nonjurisdictional requirements were subject to “waiver, estoppel, and equitable tolling.” *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 505 (1st Cir. 1996); *Frederique-Alexandre v. Dep't of Nat. & Env'tl. Res. of Puerto Rico*, 478 F.3d 433, 440 (1st Cir. 2007) (“[T]he exhaustion requirement is not a jurisdictional prerequisite, but rather is subject to waiver, estoppel, and equitable tolling.”); *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 385 (2d Cir.

2015) (“[T]he failure of a Title VII plaintiff to exhaust administrative remedies raises no jurisdictional bar to the claim proceeding in federal court.”). The remaining courts, while not necessarily discussing whether such arguments could be waived, held in certain terms that such requirements were not considered jurisdictional in nature. *Hill v. Nicholson*, 383 F. App’x 503, 508 (6th Cir. 2010) (“exhaustion is not a jurisdictional prerequisite”); *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000) (“as a general matter, the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement”); *De Medina v. Reinhardt*, 686 F.2d 997, 1012 (D.C. Cir. 1982) (court had jurisdiction over claim even though plaintiff had not filed a charge of discrimination).

The Third, Fifth, and Tenth Circuits went further, providing for the circumstances under which a party’s conduct subjects claim-filing requirements, such as the verification requirement, to waiver. In one case, the charging party sought to pursue claims of sex and disability discrimination, and after she submitted an intake questionnaire, the EEOC invited her to participate in an interview. *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 259 (3d Cir. 2006). Instead of going to the interview, the charging party filed a detailed, eight-page charge signed by her attorney with the EEOC. *Id.* The employer submitted a position statement soon thereafter, responding to the allegations and denying that the employer discriminated against her. *Id.* After the charging party submitted a rebuttal, the EEOC chose not to pursue the matter and issued a right to sue letter. *Id.* The employer raised the failure to

verify the charge for the first time in its motion to dismiss for failure to state a claim. *Id.*

The Third Circuit reasoned those equitable considerations required waiver under those circumstances because “the verification requirement is concerned only with protect[ing] an employer from *responding* to an unverified charge.” *Id.* at 263. That court also reasoned that once “an employer files a response on the merits, he forgoes the protection that the requirement affords.” *Id.* The court suggested the employer’s argument concerning verification was an afterthought, brought at the last minute to preclude consideration of the merits, and the argument could only prevail from “technical compulsion irrespective of considerations of practical justice.” *Id.* at 265 (quoting *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952)).

The Tenth Circuit also recognized the rule that the Third Circuit announced in *Buck. Gad v. Kan. State Univ.*, 787 F.3d 1032, 1038-41 (10th Cir. 2015). In remanding the case to the district court to properly consider the issue of waiver, the court also suggested that an employer that files an EEOC response on the merits but fails to identify a defect in the verification foregoes the protection that the requirement accords. *Id.* at 1039.

Similarly, and as discussed further below, the Fifth Circuit previously sought to resolve its own intra-circuit split on this issue by deciding that Title VII’s administrative exhaustion requirement is not jurisdictional. *Davis v. Fort Bend Cnty.*, 893 F.3d 300, 306-07 (5th Cir. 2018), *aff’d*, 139 S. Ct. 1843 (2019). While the Fifth Circuit remanded that case to the trial court for further proceedings consistent

with its opinion, it concluded that under the circumstances of that case, “... it is abundantly clear that [the defendant] has forfeited its opportunity to assert this claim.” *Id.* at 307.

Previously, the Fourth Circuit had long held that exhaustion was a jurisdictional prerequisite. *See, e.g., Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 416 (4th Cir. 2014); *David v. North Carolina Dep’t of Correction*, 48 F.3d 134 (4th Cir. 1995). However, that circuit appears to have changed its approach since this Court’s decision in *Fort Bend. Walton v. Harker*, 33 F.4th 165 (4th Cir. 2022); *Olavarria v. Cooper*, 776 F.App’x 128 (4th Cir. 2019) (vacating district court’s dismissal and remanding for further consideration in light of *Fort Bend*).

As a result, it would appear that nine circuits are now in agreement that Title VII’s charge-filing requirements are not jurisdictional in nature, and may be subject to waiver under some circumstances.

2. Indeed, since *Fort Bend*, the Eleventh Circuit appears to be the sole circuit that continues to treat Title VII’s charge-filing requirements as jurisdictional in nature.

As evidenced by the proceedings below, courts within the Eleventh Circuit continue to rely on a pre-*Fort Bend* decision from that circuit that treats the charge-filing requirements as jurisdictional. As the District Court explained, “... the only binding precedent available to the Court at the time of this decision clearly and distinctly holds that ‘the verification requirement for ... charges is mandatory.’” App. 23 (quoting *Vason v. City of Montgomery*, 240 F.3d 905, 907 (11th Cir. 2001)). “Since ‘verification is an absolute condition

precedent to suit’ under Title VII (and the ADA) in this circuit, Mosby’s lack of verification demands one simple ruling – she did not satisfy an absolutely condition precedent before filing her lawsuit.” App. 25 (quoting *Vason v. City of Montgomery*, 86 F.Supp.2d 1130, 1133 (M.D. Ala. 2000), *aff’d*, 240 F.3d 905).

In *Vason*, the plaintiff claimed that her former employer had subjected her to race and sex discrimination. *Id.*, 240 F.3d at 905-06. As revealed from the lower-court’s decision, the plaintiff wrote a letter to the EEOC, which described the discriminatory acts but was neither sworn nor included a verification. 86 F.Supp.2d 1130, 1132 (M.D. Ala. 2000), *aff’d*, 240 F.3d 905. The letter also requested that the EEOC issue a right to sue letter *immediately*, which it soon did thereafter, leaving the plaintiff with no additional contact with the EEOC. *Id.* The district court ultimately found that the verification requirement was an “absolute condition precedent to suit,” and granted summary judgment against the plaintiff. *Id.*, 86 F.Supp.2d at 1333.

On appeal, the Eleventh Circuit agreed that it was a matter of first impression, finding that the statute “mandates that charges be made under oath or affirmation,” and affirmed the district court because of the plaintiff’s failure to act accordingly. *Vason*, 240 F.3d at 905. In that decision, the Eleventh Circuit also refrained from considering whether the lack of a verification had been waived. *Id.*

As evidenced by the instant proceeding, the Eleventh Circuit and its lower courts continue to rely on *Vason*, a decision that treats charge-filing

requirements as jurisdictional in nature. This continued reliance not only means that there is a split amongst circuits concerning these important issues but that may be the sole outlier on this critical issue.

B. The question presented should have been settled by this Court's decision in *Fort Bend*.

Whether Title VII's charge-filing requirements are jurisdictional or subject to waiver was resolved by this Court's decision in *Fort Bend*.

This Court's 2019 decision resulted from a case in which the Fifth Circuit found such requirements not to be jurisdictional. In *Fort Bend*, the trial court considered whether one charge-filing requirement, exhaustion of administrative remedies, was subject to waiver or estoppel. No. 4:12-cv-131, 2016 WL 4479527, at *3-4 (S.D. Tex. 2016). The trial court found that the exhaustion requirement was jurisdictional and could be raised at any time and, therefore, found the plaintiff's arguments regarding waiver to be irrelevant. *Id.* at *4.

On appeal, the Fifth Circuit held that the exhaustion requirement was not a jurisdictional bar to suit, rather one that could be forfeited if not raised in a timely manner. 893 F.3d at 308. Indeed, the Fifth Circuit found that it was "abundantly clear" that the defendant forfeited its opportunity to assert the defense. *Id.* at 307-08. As a result, the appellate court reversed the grant of summary judgment, and the case was remanded "for proceedings consistent with" the opinion. *Id.* at 308.

Indeed, there are some situations where courts have found it appropriate to waive arguments

concerning a failure to meet Title VII's charge-filing requirements. As this Court reasoned:

We hold that Title VII's charge-filing instruction is not jurisdictional, a term generally reserved to describe the classes of cases a court may entertain (subject-matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction).... Prerequisites to suit like Title VII's charge-filing instruction are not of that character; they are properly ranked among the array of claim-processing rules that must be timely raised to come into play.

Fort Bend, 139 S. Ct. at 1846 (citation omitted). Moreover, by affirming the Fifth Circuit's decision to reverse and remand, this Court's unanimous decision should also be seen as requiring district courts to make findings of fact regarding whether waiver is legally appropriate. *See* 139 S. Ct. at 1852.

C. The Eleventh Circuit's precedent conflicts with the authoritative decision of this Court.

Review on certiorari is appropriate because the Eleventh Circuit's authority on the important matters addressed herein is not only inconsistent with other circuits but with this Court's decision in *Fort Bend*.

As with the instant proceeding, the employment discrimination plaintiff in *Vason* submitted a charge to the EEOC that was not under oath or verified. 240 F.3d at 906. After summary judgment was granted in favor of the employer, the plaintiff appealed and repeated her same argument – that the EEOC, not the defendant like here, waived Title VII's

verification requirement because the EEOC processed the unverified charge. *Id.* at 907. The Eleventh Circuit found that, as a matter of first impression, “the verification requirement for EEOC charges is mandatory,” and because the charge was not verified, the district court properly granted summary judgment dismissing that claim. *Id.* This was the end of the inquiry.⁵

Vason stands for the proposition that verification is effectively not only a mandatory requirement but an absolute prerequisite – a civil action cannot later go forward on a charge that initially lacked a verification.⁶

Nearly twenty years later, this Court reached a different conclusion. *See Fort Bend*, 139 S. Ct. 1843. The *Fort Bend* plaintiff handwrote “religion” on a copy of her previously-submitted EEOC intake questionnaire, but she did not amend her formal charge of discrimination. *Id.* at 1847. While not specifically addressed, this handwritten addition was unverified. After receiving the right to sue letter, the plaintiff filed a civil action that included a religious discrimination claim. *Id.* at 1847-48. Having been on appeal once and remanded to the district court, the employer argued for the first time that the court lacked jurisdiction over the religious

⁵ That is also where the district court ended the analysis. *Vason v. City of Montgomery, Ala.*, 86 F. Supp. 2d 1130, 1133 (M.D. Ala. 2000).

⁶ *See Gad v. Kan. State Univ.*, 787 F.3d 1032, 1041 (10th Cir. 2015) (explaining that the *Vason* court treated the verification requirement as jurisdictional); *contra Fort Bend*, 139 S. Ct. at 1850-52 (finding Title VII’s charge filing requirements are not jurisdictional; rather, mandatory, but subject to waiver).

discrimination claim because the plaintiff had not asserted it in her EEOC charge. *Id.* at 1848.

In its decision, this Court first analyzed and provided a background of the term “jurisdictional” in statutory construction. *Id.* at 1848-50. The Court “stressed” the distinction between “jurisdictional prescriptions” and “nonjurisdictional claim-processing rules,” whereby the latter “may be forfeited ‘if the party asserting the rule waits too long to raise the point.’” *Id.* at 1849 (quoting *Eberhart v. United States*, 546 U.S. 12, 15 (2005)). A unanimous Supreme Court found that “Title VII’s charge-filing requirement is not of jurisdictional cast.” *Id.* at 1850. The Supreme Court affirmed the Fifth Circuit’s decision, which found error when the district court considered “irrelevant” the plaintiff’s argument that the defendant waived the lack-of-verification defense and refrained from considering such waiver before dismissing the claim. *Id.* at 1852; *Davis v. Fort Bend Cnty.*, 893 F.3d 300, 302, 307-08 (5th Cir. 2018).

The necessary result is that Title VII’s charge-filing requirements are not jurisdictional, which means that a defendant can waive arguments concerning such deficiencies if not raised early enough. *See* 139 S. Ct. at 1849 (“... an objection based on a mandatory claim-processing rule may be forfeited ‘if the party asserting the rule waits too long to raise the point.’” (citation omitted)). Of course, a necessarily corollary of *Fort Bend* is that, assuming waiver is timely argued, it should be considered by a district court as it is a possibility.

Fort Bend would have necessitated a different result, or at least legal analysis, in *Vason*. Indeed,

this Court may not take issue with the Eleventh Circuit's description of the verification requirement in *Vason* as "mandatory." Compare *Fort Bend*, 139 S. Ct. at 1849, with *Vason*, 240 F.3d at 907. However, had *Vason* come after *Fort Bend*, the Eleventh Circuit should have concluded that (1) such an objection may be waived if not timely asserted; and, (2) potentially, the defendant waived the objection.⁷ This would not have been a novel approach for the Eleventh Circuit as it previously engaged in such similar analysis in the pre-*Fort Bend* unpublished decision of *Butler v. Grief, Inc.*, 325 F. App'x 748 (11th Cir. 2009).

Yet, *Vason* precludes consideration of any waiver argument by effectively treating charge-filing requirements as absolute and jurisdictional, regardless of how they are styled. Accordingly, the Eleventh Circuit's decision in *Vason*, and as repeated in cases such as the instant proceeding, is inconsistent with this Court's decision.

II. The Eleventh Circuit's Decision was Wrong.

The Court should also grant certiorari because the position taken by the Eleventh Circuit erred by affirming the district court's decision not to even *consider* whether the City waived the verification requirement argument by not raising such a defect before the EEOC.

The Eleventh Circuit's initial decision was erroneous because of its misinterpretation of *Fort*

⁷ Unlike here and *Fort Bend* where the argument is that the defendant waived the defense, the plaintiff in *Vason* argued that the EEOC waived the requirement when it processed the charge. 240 F.3d at 907.

Bend and misapplication to the instant proceeding. Specifically, in its initial decision, the Eleventh Circuit determined that this case was unlike *Fort Bend* because the City raised the lack-of-verification defense “in a pre-answer motion to dismiss instead of after an exhaustive series of appeals.” App. 6a, 40a. Further, the panel explained, “the [Supreme Court] held that an employer forfeited the issue of verification when the employer failed to raise it until approximately four years into the litigation ‘after an entire round of appeals all the way to the Supreme Court.’” *Id.* (quoting *Fort Bend*, 139 S. Ct. at 1847-48, 1852). However, the charge-filing requirement of a verification was not at issue in *Fort Bend*, and as a result, the initial Eleventh Circuit decision misconstrues the facts and holding of said precedent of the Supreme Court.

Instead, “[y]ears into the litigation, [the *Fort Bend* defendant] asserted for the first time that the District Court lacked jurisdiction to adjudicate [the plaintiff’s] religion-based discrimination claim because she had not stated such a claim in her *EEOC* charge.” 139 S. Ct. at 1848 (emphasis added). There is nothing contained in that decision reflecting that verification of a charge was at issue; nor was it addressed in the decisions below. *See* 139 S. Ct. 1843; *Davis v. Fort Bend Cnty.*, 893 F.3d 300 (5th Cir. 2018); *Davis v. Fort Bend Cnty.*, No. 4:10-cv-131, 2016 WL 4479527 (S.D. Tex. Aug. 24, 2016). While *Fort Bend* did involve Title VII’s charge-filing requirements, it was not about the lack of verification.

The holding of *Fort Bend* as stated in the Eleventh Circuit’s initial decision was erroneous. *See* App. 4a-6a. As discussed further below, by applying

the misinterpreted facts and holding of *Fort Bend* to the instant appeal, the result should also be seen as a mistake.

However, similarly, the Eleventh Circuit's revised decision remains incorrect, primarily because it should have found that the district court erred by refraining to apply *Fort Bend*, instead only applying a prior decision of the Eleventh Circuit. As discussed herein, this Court unanimously held that the charge-filing requirements, while mandatory instead of jurisdictional in nature, may be forfeited by a defendant if not timely asserted. *Id.* The Eleventh Circuit has previously interpreted *Fort Bend* in a similar way, finding, "[a] claim-processing rule is mandatory to the extent that a court must enforce the rule if a party properly raises it." *Serrano Garcia v. Att'y Gen.*, 803 F. App'x 318, 320 (11th Cir. 2020). However, the district court here concluded that the Supreme Court's holding in *Fort Bend* was not "clearly on point," meaning that it may not have overruled one of the Eleventh Circuit's prior decisions. App. 22a (discussing *Vason*, 240 F.3d 905).

The Eleventh Circuit should have concluded that the district court erred in its reliance on *Vason* to the extent that it is inconsistent with *Fort Bend*. Critically, in *Vason*, the plaintiff's admitted lack of a verification ended the inquiry for both the trial and appellate courts. As a result, the Eleventh Circuit continues to treat Title VII's charge-filing requirements as jurisdictional, a logical result that the Tenth Circuit has also noted. *See Gad*, 787 F.3d at 1041. While the other circuit acknowledged that this was not an explicit finding of the Eleventh Circuit, it reasoned that not considering the waiver

argument led to the implicit conclusion that the verification requirement was jurisdictional. *Id.*

The Eleventh Circuit erred in affirming the district court's misapplication of the existing precedent. Specifically, the district court found that "verification is an absolute condition precedent to suit," and as a result, "Mosby's Title VII and ADA claims are barred as a matter of law." App. 22a-23a. However, as this Court has held, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

In *Vason*, neither the Eleventh Circuit nor the lower court considered whether the mandatory verification requirement could be waived or the defense forfeited. Indeed, although not specifically dealing with the verification issue, the charge filing requirements generally are at the very heart of both the analysis and the holding of *Fort Bend*.⁸ The district court erred in finding *Fort Bend* not to be on point and that *Vason* precluded consideration of whether the verification defense was waived, and the Eleventh Circuit's affirmation of this decision was similarly incorrect.

Even if district courts were not to apply the rule adopted by the Third and Tenth Circuits, as discussed *supra*, the district court still erred in

⁸ Critically, the plaintiff in *Fort Bend* not only failed to submit a verification, she never actually filed a charge on the claim at issue; she merely handwrote "religious" on a copy of the intake questionnaire that she resubmitted to the EEOC. 139 S. Ct. at 1849.

granting summary judgment without having considered the issue of waiver in light of the procedural history of the case and the Court's binding precedent.

In this instance, the district court found that Mosby's Charge did not contain a verification. D. Ct. Dkt. 15 at 11. After applying the Eleventh Circuit's decision in *Vason* instead of *Fort Bend*, the district court explicitly refrained from considering whether there should be an exception the requirement or if the City had waived its objection. Similar to *Fort Bend*, the Eleventh Circuit should have found that the district court erred by not considering waiver and reversed and remanded for further proceedings. Instead, since the appellate court reviewed the district court's decision *de novo*, "apply[ing] the same legal standards as the district court," App. 3a (quoting *Custom Mfg. and Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 646 (11th Cir. 2007), the Eleventh Circuit's analysis and decision was as erroneous as the district court.

III. The Eleventh Circuit Sanctioned the District Court's Express Refusal to Apply this Court's Precedent.

A writ of certiorari is warranted as a result of the Eleventh Circuit's affirmation of the district court's refusal to apply the precedent of this Court. As discussed herein, the district court refused to apply *Fort Bend* to the facts of this case, finding that "its holding may not directly overrule the precedent set by the Eleventh Circuit in *Vason* concerning the mandatory requirement that a charge be verified." App. 21a-22a. Similarly, the district court reasoned that "whether *Fort Bend* overrules or abrogates

Vason can only be decided by the Eleventh Circuit, not [the district court].” App. 22a.

On appeal, the Eleventh Circuit not only refrained from addressing the district court’s misinterpretations of *Fort Bend* and *Vason*, the appellate court did not address the district court’s express refusal to apply this Court’s precedent. As a result, the Eleventh Circuit has sanctioned the lower court’s departure from the accepted and usual course of judicial proceedings, particularly the doctrine of *stare decisis*, that it calls for an exercise of this Court’s supervisory power.

CONCLUSION

For the foregoing reasons, Petitioner Rachel Mosby respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted, this 22nd day of September, 2022.

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