No. 24-852

In the Supreme Court of the United States

ALAN RODEMAKER,

Petitioner,

v.

CITY OF VALDOSTA BOARD OF EDUCATION, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Plaintiffs alleging racial discrimination in employment often pursue claims under two statutes: 42 U.S.C. § 1981 and Title VII. Here, Petitioner sought relief in two separate lawsuits: a prior suit under § 1981 (*Rodemaker I*), which Petitioner lost in a final judgment on the merits, and the present suit under Title VII (*Rodemaker II*). The courts below held that under the doctrine of claim preclusion, the judgment in *Rodemaker I* bars this lawsuit.

Petitioner argues his Title VII claim should not be barred by claim preclusion because he did not yet have a right-to-sue letter when he filed *Rodemaker I*. The question presented is:

Whether this Court should create an exception to claim preclusion by allowing plaintiffs who elect to file a § 1981 lawsuit before receiving a right-to-sue letter to later relitigate the same alleged adverse action under Title VII.

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INTRODUCTION[1]

Adverse employment actions can (and frequently do) give rise to multiple potential claims, including Title VII, 42 U.S.C. § 1981, state-law discrimination claims, and breach of contract claims. These claims often have overlapping remedies: for example, a plaintiff who shows he was terminated because of his race may recover backpay and attorney's fees under either § 1981 or Title VII.

If a plaintiff filed suit under § 1981, lost, and later filed suit under Title VII, it would be a classic example of plaintiff taking two bites at the apple. Defendants would be required to win two out of two cases—and if they went to trial, convince two out of two juries—to avoid liability for one alleged adverse action, while plaintiffs would only have to win one of two cases to recover backpay and attorney's fees.

The doctrine of claim preclusion protects defendants from playing on such a slanted field, and it protects courts from expending judicial resources on needlessly duplicative civil actions. Claim preclusion accomplishes those objectives by "bar[ring] repetitious suits involving the same cause of action once a court of competent jurisdiction has entered a final judgment on the merits." *United States v. Tohono O'odham Nation*, 563 U.S. 307, 315 (2011) (internal quotation marks and citation omitted).

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[1] This brief in opposition is filed on behalf of all Respondents — the City of Valdosta Board of Education and its board members.

Here, Petitioner filed two separate lawsuits: the first alleging racial discrimination in violation of 42 U.S.C. § 1981 ("*Rodemaker I*"), then the present case ("*Rodemaker II*"), alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Both lawsuits challenged the same alleged adverse action, and both the district court and the court of appeals below held this second lawsuit is barred by claim preclusion. Petitioner does not dispute that *Rodemaker I* was a final judgment on the merits by a court of competent jurisdiction that involved the same parties or their privies. Petitioner argues, however, that *Rodemaker II* was not the "same cause of action" as *Rodemaker I*. Pet. at 19, 22-26.

Under established law, "[s]uits involve the same claim (or 'cause of action') when they . . . involve a 'common nucleus of operative facts.'" *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 590 U.S. 405, 412 (2020). Petitioner admits that "the claims here arose from a common nucleus of operative facts." Pet. at 20. Accordingly, the established test is clearly satisfied.

However, Petitioner asks this Court to create an exception to this test. Specifically, Petitioner argues that when a plaintiff files his § 1981 lawsuit, then later satisfies the charge-filing requirement of Title VII, he should be able to pursue the Title VII claim in a separate action and be immunized from *res judicata*.

Notably, Petitioner does not point to any extraordinary circumstances that prevented him from doing what most employment-discrimination plaintiffs do: filing their § 1981 and Title VII claims together. Petitioner could have filed them together by waiting for the right-to-sue letter before filing *Rodemaker I*, by

moving for a stay in *Rodemaker I* after defendants filed a motion to dismiss, or by asking for a right-to-sue letter 180 days after he filed his charge, then amending in *Rodemaker I*. Petitioner did none of those things, but instead elected to split his claims. Because he lost the first suit and the doctrine of claim preclusion bars the Title VII claim in this case, Petitioner asks this Court to create an exception to that doctrine and allow employment-discrimination plaintiffs to challenge adverse actions in two separate lawsuits.

Every court of appeals to consider this issue has rejected Petitioner's position and held that Title VII's charge-filing requirement does not give Petitioner two bites at the apple; as such, there is no circuit split that calls for the exercise of the Court's supervisory power. *See* Supreme Court Rule 10(a). Further, the problem Petitioner identifies—having to wait to file a § 1981 claim—is not a problem at all, let alone a problem so drastic as to require this Court's intervention to disturb the uniform decisions of the lower courts on this issue. Moreover, this case is a poor vehicle to address the issues Petitioner seeks to raise because the Court below did not address the question presented by the Petition, and Petitioner did not press his arguments below until the motion for panel rehearing.

STATEMENT

1. On January 28, 2020, Respondent City of Valdosta Board of Education decided not to renew Petitioner Alan Rodemaker's supplemental contract to coach football. It affirmed that decision in February 2020. Petitioner then filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 27, 2020, followed by an April 2020 lawsuit under 42 U.S.C. § 1981 against the individual boardmembers who voted against renewing his coaching contract ("*Rodemaker I*"), among other lawsuits.[2]

2. In May 2020, the boardmembers moved to dismiss the § 1981 claims for failure to state a claim. Petitioner did not request a stay while his charge was pending at the EEOC, but let the § 1981 case proceed. Beginning in September 2020, pursuant to 42 U.S.C. § 2000e-5(f)(1), Petitioner could have requested and received a right-to-sue letter for his March Charge of Discrimination, but he did not do so. In December 2020,

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[2] In addition to *Rodemaker I* and the present case, Petitioner filed three civil actions in state court related to his employment and the non-renewal of his coaching contract (two for defamation, one for the Georgia tort of false light) and another state-court action seeking to disqualify certain boardmembers from voting on any proposed settlement of these cases. All four have been finally resolved in defendants' favor by the Georgia state courts. Petitioner's wife also filed a claim alleging various state-law causes of action, among them a claim for loss of consortium based on Respondents' alleged violation of Title VII in the present lawsuit. Because the loss-of-consortium claim depends in part on the final resolution of the Title VII claim, that action remains stayed in the district court.

the District Court denied the boardmembers' motion to dismiss, and the boardmembers appealed. During the pendency of the appeal, in March 2021, the EEOC issued a right-to-sue letter. On June 8, 2021, the Eleventh Circuit Court of Appeals reversed the trial court, granting the motion to dismiss. Petitioner does not dispute that decision constituted a final judgment on the merits of *Rodemaker I*.

3. On June 18, 2021, Petitioner filed this action, *Rodemaker II*, asserting claims under Title VII and 42 U.S.C. § 1985 against the individual boardmembers and the Board of Education. Respondents moved to dismiss and for summary judgment, and in August 2022 the Court granted those motions.

On appeal to the Eleventh Circuit below, the arguments focused mostly on privity, an issue the Petition does not raise. Petitioner also argued that *Rodemaker I* and *Rodemaker II* were not "the same cause of action" for three reasons: (i) Title VII and § 1981 are different statutes; (ii) the School District was not a party to *Rodemaker I*; and (iii) Title VII allows for 'motivating factor' claims while § 1981 does not. Res.App.49a.

In response to those arguments, the court below noted that (i) the difference in statutes does not affect whether the "same nucleus of operative fact" test is satisfied, (ii) Petitioner could have joined the Board as a Defendant in *Rodemaker I*, and (iii) the two statutes' difference in standard of proof is not relevant to whether the claims arise from the same nucleus of operative fact. The panel also noted that Petitioner had made a fourth argument before the district court—that he could not have brought his Title VII claim and his § 1981 claim together because he would have had to add a party—and rejected it, noting that argument

improperly "fuses the privity element and the same cause of action element." Pet.App.24a. However, Petitioner did not press that argument before the court below.

Petitioner now acknowledges he could have brought his Title VII and § 1981 claims together by waiting until he received his right-to-sue letter before filing *Rodemaker I*. Pet. at 18. However, he now argues that being forced to do so to avoid claim preclusion would run afoul of congressional intent. *Id.* Elsewhere, the Petition appears to revert to the argument that it was not possible for him to raise his Title VII claim in the § 1981 lawsuit. Pet. at 21.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT ON THE ISSUES RAISED IN THE PETITION

Petitioner does not argue that a circuit split warrants this Court's review, and for good reason: The federal courts of appeals have uniformly rejected Petitioner's argument.

Title VII claims challenging an adverse action are often accompanied by § 1981 claims and state law breach of contract claims. In relatively rare cases, plaintiffs have filed breach of contract, § 1981, or other claims that do not have a charge-filing requirement, lost, then obtained their right-to-sue letter and filed a second suit. When the defense of claim preclusion is raised, plaintiffs in these cases have argued that the charge-filing requirement of Title VII (or the ADA or ADEA) made it unfeasible to file the claims together.

The Eleventh Circuit first rejected that argument in *Jang v. United Techs. Corp.*, 206 F.3d 1147 (11th Cir. 2000) and again rejected it below. Every other court of appeals that has addressed that argument by plaintiffs—the First, Second, Third, Fifth, Sixth[3], Seventh, Ninth, Tenth, and D.C. Circuits—has likewise rejected it. As such, this is a settled issue among the courts of appeals.

Those courts have identified several ways a would-be plaintiff can comply with Title VII's charge-filing requirement and avoid claim preclusion: (i) simply wait to file both claims until the Title VII charge-filing requirement has been satisfied, (ii) file the state-law or § 1981 claim first, then move for a stay until the charge-filing requirement is satisfied, then amend. These recognized and reasonable alternatives were available to Petitioner, but he elected not to use them.

In *Boateng v. InterAmerican Univ., Inc.* (1st Cir. 2000), the plaintiff filed two lawsuits for his denial of tenure. When defendants raised claim preclusion in the second action, plaintiff argued that claim preclusion should not apply because he could not have brought his Title VII claim in the first action because he did not yet have a right-to-sue letter. 210 F.3d 56, 63. The court observed that the Second, Sixth, and Seventh Circuits had "held Title VII claims to be precluded by a prior adjudication even though a right-to-sue letter had not been obtained until after final judgment had

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[3] Plaintiff cites a Sixth Circuit case from 1985 to support his argument (Pet. at 23), but two more recent cases made clear that the Sixth Circuit is in line with the others on this issue. *Whitfield v. Knoxville*, 756 F.2d 455, 458 (6th Cir. 1985); *Heyliger v. State Univ. & Cmty. Coll. Sys.*, 126 F.3d 849, 855 (6th Cir. 1997); *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1033 (6th Cir. 1998).

entered in the first action." *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 63 (1st Cir. 2000). The court then held plaintiff's claims barred by claim preclusion, noting that "[t]his conclusion seems particularly well justified because [plaintiff] largely controlled the timing of the relevant events (for example, he could have sued a few months later)." *Boateng*, 210 F.3d at 63. As discussed in more detail below, Petitioner controlled the timing of the relevant events in this action and in *Rodemaker I*.

The Second Circuit has also rejected Petitioner's argument. In *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 37 (2d Cir. 1992), the Second Circuit held that claim preclusion barred a plaintiff who had filed an LMRA action for wrongful termination before receiving a right-to-sue letter from filing a later, separate Title VII suit. The court noted plaintiff could have preserved her claims in both suits by seeking a stay in the first action while she awaited the right-to-sue letter or requesting the right-to-sue letter after 180 days had elapsed after she filed her charge. *Woods*, 972 F.2d at 41.

Similarly, the Third Circuit rejected Petitioner's argument and noted that "requesting a right to sue letter is not an onerous burden, and we believe that in many cases a motion to stay [the first filed] action will preserve all legal claims without undue prejudice to the plaintiff." *Churchill v. Star Enters.*, 183 F.3d 184, 193-94 (3d Cir. 1999). The court noted that the plaintiff had neither requested a right-to-sue letter nor sought a stay and affirmed the district court's application of claim preclusion. *Id.* at 191. Petitioner had the same options available to him in this action.

The Fifth Circuit, too, has "expressly rejected the argument that the failure to exhaust administrative remedies and receive the EEOC right-to-sue letter immunized the plaintiff from the preclusive effect of a prior judgment." *Zatarain v. WDSU-Television, Inc.*, 1996 U.S. App. LEXIS 44242, at *8 (5th Cir. Feb. 7, 1996) (citing *Miller v. United States Postal Service*, 825 F.2d 62, 64 (5th Cir. 1987)). It later expressly noted its "agree-[ment] with the Second Circuit's reasoning in *Woods* that a plaintiff who brings a Title VII action and files administrative claims with the EEOC must still comply with general rules governing federal litigation respecting other potentially viable claims." *Davis v. Dall. Area Rapid Transit*, 383 F.3d 309, 316 (5th Cir. 2004) (internal quotation marks omitted).

The Sixth Circuit, too, has taken this approach. In *Heyliger v. State Univ. & Cmty. Coll. Sys.*, 126 F.3d 849, 855 (6th Cir. 1997), an employee whose contract was not renewed filed an EEOC charge, then filed a state-court complaint alleging discrimination, lost, then received a right-to-sue letter and brought a Title VII claim. The court found the Title VII claim "reasonably could have been litigated" in the prior case and that claim preclusion barred the second case. The Sixth Circuit reaffirmed this holding in *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1033 (6th Cir. 1998).

The only circuit case Petitioner cites in his favor was decided by the Sixth Circuit before the two cited above. Pet. at 23 (citing *Whitfield v. Knoxville*, 756 F.2d 455, 458 (6th Cir. 1985)). In that case, plaintiff sought a TRO to prevent his involuntary retirement, and the state court ruled on it in under two months. Based on extraordinary facts of that case, the court allowed him to separately pursue a later Title VII action,

but the Sixth Circuit subsequently limited *Whitfield* to its facts. *Heyliger*, 126 F.3d at 855-56 (distinguishing *Whitfield* based on its unusual facts and holding that where plaintiff reasonably can bring his Title VII claim with his state-court claims, he must do so). Current law in the Sixth Circuit under *Heyliger* and *Rivers* is in harmony with that of the other circuits, and there is no split among the courts of appeals.

The Seventh Circuit has twice rejected Petitioner's argument. It observed that if plaintiffs could avoid claim preclusion simply by filing their other claims before their Title VII claim was exhausted, "then a significant fraction of legally questionable discharges would give rise to two suits. This inefficient manner of litigation—inefficient and, we add, unduly burdensome to employers and hence indirectly to other workers and to consumers as well as to stockholders—can be avoided without crippling Title VII's administrative remedies." *Herrmann v. Cencom Cable Assocs.*, 999 F.2d 223, 225 (7th Cir. 1993) (reversing the district court's application of res judicata on other grounds). The Seventh Circuit reaffirmed that reasoning in *Brzostowski v. Laidlaw Waste Sys.*, 49 F.3d 337, 339 (7th Cir. 1995), holding that "as a practical matter, [plaintiff] could have delayed the filing of his first suit or requested that the court postpone or stay the first case. What he cannot do, as he did here, is split causes of action and use different theories of recovery as separate bases for multiple suits." *Brzostowski*, 49 F.3d at 339 (7th Cir. 1995) (affirming dismissal of ADEA claim).

The Ninth Circuit held the same in *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714-15 (9th Cir. 2001), where it "join[ed] [its] sister circuits in

holding that Title VII claims are not exempt from the doctrine of res judicata where plaintiffs have neither sought a stay from the district court for the purpose of pursuing Title VII administrative remedies nor attempted to amend their complaint to include their Title VII claims."

The Tenth Circuit, too, held that a plaintiff's Title VII claim was barred by claim preclusion when she failed to include it in the first action by amending her complaint or by seeking a stay until she received her right-to-sue letter. *Wilkes v. Wyo. Dep't of Emp't Div. of Labor Standards*, 314 F.3d 501, 506 (10th Cir. 2002).

Finally, the D.C. Circuit rejected Petitioner's argument in *Ashbourne v. Hansberry*, 894 F.3d 298, 304 (D.C. Cir. 2018). There, the court observed that the plaintiff failed to "seek expedited issuance of a right-to-sue letter from the EEOC so that she could timely join the Title VII claims to the pending litigation" and "identified no reason why, with ordinary diligence, she could not have litigated or otherwise preserved her Title VII claims in the initial litigation." *Ashbourne v. Hansberry*, 894 F.3d 298, 305 (D.C. Cir. 2018).

As those cases demonstrate, ten of the thirteen courts of appeals have considered this issue, and all ten have rejected Petitioner's argument. As such, there is no circuit split that warrants this Court's review.

II. PETITIONER DOES NOT POINT TO ANY CONFLICTS BETWEEN THE SETTLED LAW OF THE COURTS OF APPEALS AND THIS COURT'S PRECEDENT

Petitioner argues the lower courts' resolution of this issue conflicts with this Court's precedent in two ways.

First, Petitioner argues his Title VII claim did not "accrue" until he received the right-to-sue letter and unaccrued claims are not subject to claim preclusion. Pet. at 21. However, under this Court's precedent a Title VII claim accrues at the time an employer takes an adverse action against the plaintiff employee. *Green v. Brennan*, 578 U.S. 547, 556 (2016); *see also Chardon v. Fernandez*, 454 U.S. 6, 9 (1981). For example, in a wrongful discharge case, "[t]he claim accrues when the employee is fired." *Green*, 578 U.S. at 556 (citations omitted). Similarly, in a constructive discharge case, the claim accrues when the employee resigns. *Id.* at 554. As such, Plaintiff's claim accrued in February 2020.[4] Never has the Court held a claim accrues when Petitioner receives the right-to-sue letter.

Petitioner also argues that "a plaintiff's exhaustion of his administrative remedies is itself an element of his cause of action[.]" Pet. at 25. Petitioner cites no authority for characterizing the right-to-sue letter as an element, and this Court has held that a plaintiff's failure to satisfy the charge-filing requirement is a waivable affirmative defense. *Fort Bend Cty. v. Davis*, 587 U.S. 541, 552 (2019). The Court's respective holdings in *Green* and *Davis*—that Title VII claims accrue at the time of the adverse action (not when the charge is later filed) and that failure to file the charge is a waivable affirmative defense—also imply that the charge-filing requirement is not an element of the Title VII claim, and Petitioner does not cite any decision

[4] The district court and court of appeals did not make any findings about when plaintiff's claim accrued because plaintiff never raised that argument below.

of this Court or the courts of appeals that suggests otherwise.

Second, Petitioner argues that this Court, in a case decided in 1983, "noted that a cause of action can be the commission of a separate 'legal wrong.'" Pet. at 24 (citing *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983)). In the footnote cited, the Court briefly discussed the "legal wrong" language as one of the tests used in 1944. *Id.* at 130 & n.12. Petitioner does not even try to apply that test to the facts of this case and has not alleged a separate legal wrong. Pet. at 24.

III. THE VAGUE INTERESTS PETITIONER INVOKES ARE NOT OF SUFFICIENT IMPORTANCE TO WARRANT THIS COURT UPENDING THE UNIFORM DECISIONS OF THE COURTS OF APPEALS

Nor has Petitioner presented any compelling reason to upend the settled law in the courts of appeals.

Under this Court's precedent, "[s]uits involve the same claim (or 'cause of action') when they . . . involve a 'common nucleus of operative facts.'" *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 590 U.S. 405, 412 (2020). As noted above, Petitioner admits that "the claims here arose from a common nucleus of operative facts." Pet. at 20. Petitioner appears to argue this Court should create an exception to that test in the § 1981 and Title VII context.

However, nothing about Title VII's charge-filing requirement impairs Petitioner's ability to pursue remedies under §§ 1981 and 1983. By statute, plaintiffs are entitled to receive the right-to-sue letter within 180 days of filing their charge. 42 U.S.C. § 2000e-5(f)(1); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977) ("If a complainant is dissatisfied with the pro-

gress the EEOC is making on his or her charge of employment discrimination, he or she may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court."). In Georgia, the statute of limitations for a §§ 1981 and 1983 claim regarding the making of contracts is two years, *Butt v. Zimmerman*, 2022 U.S. App. LEXIS 27893, at *2 (11th Cir. Oct. 6, 2022). As a practical matter, a plaintiff in Georgia will never be forced to choose between exhausting her Title VII claims and timely filing her § 1981 claims; it is perfectly feasible to file them together.

Here, Petitioner had an array of options to avoid splitting his claims: first, Petitioner could have waited to file his § 1981 and Title VII claims together but did not. Second, Petitioner could have sought a stay during the pendency of the motion to dismiss (May 2020 to December 2020) but did not.[5] Third, Petitioner could have requested his right-to-sue letter for his March 2020 Charge 180 days after it was filed—that is, in September 2020—and moved to amend, but he did not. Instead, he filed his § 1981 claim, allowed it to proceed to judgment, and now argues that judgment

[5] The district court noted in its order that "Rather than wait for the EEOC to investigate his discrimination claim and to issue a right to sue letter so that he could pursue his Title VII claims and his §§ 1981 and 1983 claim in a cohesive action, Plaintiff instead chose to rush to the courthouse to seek immediate justice for his allegedly unlawful termination. Even without the right to sue letter in hand, Plaintiff could have filed his civil rights action then requested a stay to await the letter and to amend his complaint. He did not[.]" Pet.App.48a-49a. Petitioner did not challenge that portion of the district court's ruling on appeal.

should not have the same preclusive effect that federal judgments normally do.

Petitioner zeroes in on one of those three options for bringing his claims together—waiting to file—and argues that if waiting is the only way to file § 1981 and Title VII claims in one action, that would, contrary to "Congress' intent[,]" "engraft a waiting period" onto the § 1981 claims. Pet. at 19. Petitioner cites no evidence to support his speculation about congressional intent, nor does he explain why waiting for a right-to-sue letter impairs any of the interests protected by § 1981. Essentially, Petitioner argues that when some but not all of a plaintiff's claims require exhaustion, plaintiff can split his claims into two separate lawsuits and be immunized from claim preclusion. Petitioner cites no decisions by this Court or any court of appeals that support that argument. Additionally, Petitioner's arguments about the waiting period seem to assume that the second and third options for bringing his claims together (stay and amendment, respectively), were unavailable. Neither the Petition nor the record supports that assumption.

Moreover, Petitioner's argument would upset the law in other areas: many causes of action have administrative or local remedies that must be exhausted or other preconditions to suit that must be satisfied. *See Fort Bend Cty. v. Davis*, 587 U.S. 541, 549 (2019) (listing examples). Under Petitioner's reasoning, plaintiffs in those cases could split their claims arising out of the same factual nucleus into two lawsuits—one suit for their claims that do not require exhaustion and a second suit for their claims that do require exhaustion—and avoid claim preclusion. Petitioner does not provide

any reason why this Court should work such a sea change in federal litigation.

IV. THIS CASE IS A POOR VEHICLE FOR DECIDING THE ISSUE PETITIONER SEEKS TO RAISE

This case is also an exceptionally poor vehicle for addressing these issues. That starts with Petitioner's question presented, which mistakes the holding of the court below. Petitioner argues the court of appeals "required petitioner to include within his § 1981 [and § 1981] complaint" a Title VII claim that, as of April 2020, was "inchoate" and "had not yet accrued." Pet. at i.

Petitioner's question presented thus assumes that the only way to file section § 1981 and Title VII claims together is to rush the Title VII claim. That ignores the obvious alternatives: waiting to file the § 1981 claim, seeking a stay, or asking for the right-to-sue letter after 180 days and amending. Because it ignores those obvious alternatives, the Petition's question presented—whether plaintiffs should be forced to rush their Title VII claims before satisfying Title VII's preconditions to suit—is far afield from the holding of the court below.

The Petition does not present the question of whether extraordinary circumstances can ever provide relief from claim preclusion; Petitioner does not argue such circumstances exist here.

Petitioner is therefore limited to the argument that this Court should categorically declare that plaintiffs who file § 1981 challenges to an adverse action and lose can relitigate them in a separate suit after receiving their right-to-sue letter. That is an argument

with potentially far-reaching implications, but it was never pressed below.

Rather, Petitioner argued to the district court that he could not have raised his Title VII claim in *Rodemaker I*, but that argument took up less than one page of his brief in response to Respondents' motion for summary judgment. In any event, he now appears to recognize he could have raised it by waiting or seeking a stay. Pet. at 18.

In the court of appeals, Petitioner pivoted to the argument that he could not have brought his Title VII claims in *Rodemaker I* because "to add the Title VII claims to the Section 1981 Case would have required the addition of the Title VII claim and the School District as a party." Res.App.49a. Again Petitioner addressed the issue in less than a page. Res.App.49a. Although the court of appeals considered Petitioner's argument to the district court that he could not have brought his Title VII claims in *Rodemaker I*, it did not have before it the arguments now advanced in the Petition. *See* Pet. at 23a-24a ("In the district court, Rodemaker argued that he could not have brought his Title VII claim in *Rodemaker I* . . . The district court rejected that argument, and properly so.").[6]

Petitioner's failure to timely present these issues to the court of appeals, combined with the narrow and fact-specific nature of his decision to split his claims, renders this case a poor vehicle for addressing the questions the Petition attempts to raise.

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[6] Petitioner did not press the arguments of the Petition until his Motion for Panel Rehearing.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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