No. _____

In The
Supreme Court of the United States

VANTAGE ENERGY SERVICES, INC.,
VANTAGE DRILLING INTERNATIONAL,
AND VANTAGE INTERNATIONAL
MANAGEMENT COMPANY PTE. LTD.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the combination of an unverified intake questionnaire submitted on behalf of the charging party and an inexcusably dilatory verified charge meets the statutory requirements of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*.

2. Whether the facial plausibility standard of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to alleging conditions precedent under Federal Rule of Civil Procedure 9(c).

PARTIES TO THE PROCEEDING

The petitioners are Vantage Energy Services, Inc., Vantage Drilling International f/k/a Offshore Group Investment Ltd., and Vantage International Management Company Pte. Ltd. The respondent is the Equal Employment Opportunity Commission.

CORPORATE DISCLOSURE STATEMENT

The parent company of petitioner Vantage Energy Services, Inc. is Vantage Holding Hungary Kft.

The parent company of petitioner Vantage International Management Company Pte. Ltd. is Vantage Holdings International.

Petitioner Vantage Drilling International f/k/a Offshore Group Investment Ltd. has no parent corporation, and no publicly held company owns ten percent or more of its stock.

STATEMENT OF RELATED CASES

Equal Employment Opportunity Commission v. Vantage Drilling Co. et al., No. 18-cv-254, U.S. District Court for the Southern District of Texas. Judgment entered May 29, 2019.

Equal Employment Opportunity Commission v. Vantage Energy Services, Inc. et al., No. 19-20541, U.S. Court of Appeals for the Fifth Circuit. Judgment entered April 3, 2020.

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 954 F.3d 749. Pet. App. 1a-15a. The final judgment of the district court is unreported. Pet. App. 16a.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2020. Pet. App. 1a-15a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") incorporates Title VII's statutory requirements for its enforcement procedure. 42 U.S.C. § 12117(a). Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) and § 2000e-5(e)(1), provides in pertinent part:

> (b) Whenever a charge is filed . . . alleging that an employer . . . 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 . . . 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.
>
> (e)(1) . . . such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred. . . .

29 C.F.R. § 1601.12(b), provides in pertinent part:

> 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.

Federal Rule of Civil Procedure 9(c)

Federal Rule of Civil Procedure 9(c) provides:

> In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

The above statutes, regulation, and rule, along with other pertinent provisions, are set forth in their entirety in the appendix. Pet. App. 17a-26a.

STATEMENT

In fiscal year 2019, the EEOC received over 200,000 field office inquiries, over 497,000 calls, and more than 33,000 emails, resulting in 72,675 charges.[1] The EEOC charge-filing process has nationwide impact for employers and employees; thus questions of federal law on the subject are important and far-reaching. This case presents the question of whether the combination of an unverified intake questionnaire and an inexcusably dilatory verified charge meets the statutory requirements of the ADA. Here, an attorney filed an unverified Intake Questionnaire "on behalf of" a former employee, ensuring that under standard procedure his identity would not be disclosed to the employer and an investigation would not begin. In conflict with *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), and the Seventh Circuit, the Fifth Circuit held the filing qualified as a charge. After submitting his Intake Questionnaire, the charging party delayed filing a verified charge in a manner the Fifth Circuit described as "inexcusable." Yet, the Fifth Circuit incorrectly held the late-filed verified charge cured the initial lack of verification.

If the Fifth Circuit's decision is allowed to stand, an employee may file an unverified intake questionnaire—in such a manner that the employer doesn't know the employee has made any complaint—and

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[1] Equal Employment Opportunity Commission, *Fiscal Year 2019 Annual Performance Report*, https://www.eeoc.gov/fiscal-year-2019-annual-performance-report#h_5419005324311581369928623 (last visited June 30, 2020).

then inexcusably delay before eventually filing an actual, verified charge which then results in the employer receiving notice and the EEOC beginning an investigation. Indeed, under the Fifth Circuit's ruling, an employee may blatantly ignore applicable ADA law and regulations even after being specifically warned by the EEOC for months that he has not actually filed a charge, all to the detriment of the employer and without any consequence to the delinquent charging party. Allowing charging parties and the EEOC to proceed with lawsuits despite inexcusable disregard for the standards set forth in the statute and this Court's decisions renders the text of 42 U.S.C. § 2000e-5 meaningless and threatens far-reaching consequences, which should not be imposed without this Court's input. *See* S. CT. R. 10(c).

This case also presents the question of whether the facial plausibility pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applies to pleading conditions precedent under Federal Rule of Civil Procedure 9(c). The Fifth Circuit found the Complaint's conclusory assertion that "All conditions precedent to the institution of this lawsuit have been fulfilled" was sufficient to plead timely exhaustion of administrative remedies under Rule 9(c). However, in *Iqbal* this Court held the "allege generally" language of Rule 9(b) does not relieve a plaintiff from his obligation to allege enough facts to state a claim that is facially plausible. Since then, courts have divided over whether *Iqbal*'s holding applies to Rule 9(c). Some take the more reasoned approach that the identical language of Rule

9(b) and Rule 9(c) should mean the same thing. Others take a narrow view that *Iqbal* does not apply because it did not directly address Rule 9(c). The question impacts cases in a variety of contexts, but has particular practical implications in the charge-filing context presented here, as the charging party and EEOC have access to information about the charge process that is not available to the employer in the early stages of litigation.

At this dismissal stage, the case raises pure questions of federal law, not facts, making it an ideal vehicle to bring clarity to jurisprudence regarding both the EEOC charge-filing process and pleading standards under Rule 9(c). The questions presented have substantial practical and policy implications and arise often. The Court should grant the petition.

A. Charge-Filing Procedure

The ADA requires that a charge "shall be in writing under oath or affirmation." 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117(a). The ADA also requires a charge be filed within 300 days of the alleged unlawful employment practice and the employer be served "notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" within ten days thereafter. 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117(a).

A charging party must file a charge within the statutory time period, or a later suit is time barred. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109

(2002) ("A claim is time barred if it is not filed within these time limits."); *Fort Bend County, Tex. v. Davis*, 139 S. Ct. 1843, 1852 (2019) ("In sum, a rule may be mandatory without being jurisdictional, and Title VII's charge-filing requirement fits that bill."). The timely charge-filing requirement applies not only in cases where the charging party is the plaintiff, but also where the EEOC is the plaintiff. *Occidental Life Ins. Co. of Calif. v. EEOC*, 432 U.S. 355, 371-72 (1977).

Under 29 C.F.R. § 1601.12(b), a charge may be amended to cure a failure to verify the charge and the amendment will relate back to the date the charge was first received. To relate back under the regulation, however, there must have been a prior "charge" to relate back to. *Id.* In *Edelman v. Lynchburg College,* 535 U.S. 106 (2002), this Court held 29 C.F.R. § 1601.12(b) was valid, but noted it was merely approving the regulation *per se* and not addressing what limitations apply. *Edelman,* 535 U.S. at 109, 115 n.9.

The ADA does not define "charge." In *Holowecki*, this Court held that, in order to constitute a charge under the Age Discrimination in Employment Act ("ADEA"), a filing with the EEOC must ***both*** satisfy charge-filing requirements and "be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee" as examined "from the standpoint of an objective observer." *Holowecki*, 552 U.S. 389, 402. This Court has not considered *Holowecki* in the context of the ADA.

For its part, the EEOC has issued regulations identifying what information must be included in a charge. 29 C.F.R. § 1601.12. The regulations confirm "a charge shall be in writing and signed and shall be verified."[2] 29 C.F.R. § 1601.9. Pursuant to the statute's requirement that a charge be filed, the EEOC created a document to satisfy that requirement, which it called Form 5, "Charge of Discrimination." ROA 30-31. The EEOC also created a document to help gather information necessary to file a charge, called an "Equal Employment Opportunity Commission Intake Questionnaire" ("Intake Questionnaire"). Pet. App. 33a-43a.

B. Pleading Standards

A court should grant a motion to dismiss when the complaint "fail[s] to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). A complaint must plead sufficient facts to state a claim for relief that is facially plausible. *Iqbal*, 556 U.S. at 678; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 566 U.S. at 678.

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[2] 29 C.F.R. § 1601.3(a) ("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").

Federal Rule of Civil Procedure 9 contains adjacent paragraphs with parallel structures. Rule 9(b) concerns pleading fraud or mistake and conditions of the mind. FED. R. CIV. P. 9(b). Rule 9(b) contrasts that when alleging "fraud or mistake" a party must state "with particularity" the circumstances, but that malice, intent, knowledge and other conditions of a person's mind "may be alleged generally." *Id*. Rule 9(c) concerns pleading conditions precedent. FED. R. CIV. P. 9(c). Rule 9(c) contrasts that a party may "allege generally" the performance of conditions precedent, but when denying them "a party must do so with particularity." *Id.*

In *Iqbal*, this Court addressed the pleading standard of Rule 9(b):

> But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

Id. at 686-87 (internal citation and quotation omitted).

In so holding, the Court rejected an argument that Rule 9(b) allowed the plaintiff to allege discriminatory intent with a conclusory allegation because the rule

expressly allowed him to allege intent "generally." *Id.* at 686. The Court said: "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id.*

C. Background

David Poston worked for Vantage International Management Company on the Titanium Explorer, a deep water offshore drilling rig. Pet. App. 2a. Poston was terminated on October 2, 2014. Pet. App. 35a.

Poston's verified Form 5 Charge of Discrimination (the "Charge") was filed with the EEOC on October 13, 2015 (376 days after Poston's termination). Pet. App. 4a; ROA 30-31. Thereafter, on November 9, 2015 (403 days after Poston's termination and 27 days after the Charge), the EEOC sent Vantage a copy of the Charge, identifying Poston as the Charging Party. Pet. App. 27a-29a.

More than three years after Poston's termination, the EEOC filed this lawsuit in January 2018 alleging Poston was terminated in violation of the ADA. Petitioners moved to dismiss under Rule 12(b)(6) for failure to exhaust administrative remedies. Given Poston's Charge was untimely on its face, the EEOC's response to the motion to dismiss was that Poston's unverified Intake Questionnaire (filed on February 20, 2015, i.e., 263 days prior to his Charge filing) was Poston's actual charge and that his untimely EEOC Form 5 Charge of Discrimination was just an amendment.

The Intake Questionnaire was accompanied by a letter from Poston's attorney to the EEOC. Pet. App. 30a-43a. The letter said the law firm was submitting the Intake Questionnaire on behalf of Poston. Pet. App. 32a. Box 2 of the Intake Questionnaire was checked. Pet. App. 42a. A few days later, the EEOC sent a form to Vantage indicating "Donald A. Mau Attorney . . . Is Filing on Behalf of Other(s)." Pet. App. 44a. Under "Circumstances of Alleged Discrimination" the boxes for Age and Disability were checked; the "Issues" section said only "Discharge." Pet. App. 46a. The form checked the box that "No action is required by you [the employer] at this time." Pet. App. 44a. The form did not include factual allegations, state the place of the alleged discrimination, or, importantly, even identify Poston. Pet. App. 44a-46a.

Almost three months later, the EEOC notified Poston's attorney that "individual charges needed to be drafted for each Charging Party in order for an investigation to begin." Pet. App. 47a-48a.

Another four months after that, the EEOC wrote to Poston's attorney: "As of today's date, we have not received charges of discrimination for any of the charging parties listed above," which included Poston. Pet. App. 48a. The EEOC further wrote: "Before we start the investigation process, however, the Charging Parties must sign and return the attached charges." *Id.* The EEOC's letter says again, "Before we initiate an investigation, we must receive the signed Charges of Discrimination (EEOC Form 5)." *Id*.

The district court granted petitioners' motion to dismiss for failure to exhaust administrative remedies. Pet. App. 16a. The EEOC appealed the dismissal.

D. Fifth Circuit Ruling

The Fifth Circuit reversed. The Fifth Circuit held the initial filing satisfied *Holowecki*'s request for remedial action requirement by checking "Box 2" on the Intake Questionnaire, despite numerous objective indications that it was a preliminary filing. *EEOC v. Vantage*, 954 F.3d 749, 755 (5th Cir. 2020); Pet. App. 9a-10a. In addition, while the Fifth Circuit correctly stated that the late-filed verified Charge—filed 76 days past the filing period despite the "EEOC's months-long requests"—was "inexcusable," the Fifth Circuit nevertheless excused it, holding the late-filed verified Charge satisfied the ADA's requirements by virtue of the relation-back regulation. *Id.* at 757; Pet. App. 14a-15a.

The Fifth Circuit also held the EEOC's allegation that "all conditions precedent" had been fulfilled (without any factual allegation that a charge was timely filed) was sufficient to plead exhaustion of administrative remedies under the pleading standard of Rule 9(c) for conditions precedent. *Id.* at 753 n.4; Pet. App. 6a. The Fifth Circuit did not address *Iqbal*, wherein this Court held the "alleged generally" pleading standard of Federal Rule of Civil Procedure 9(b) is subject to the facial plausibility standard of Federal Rule of Civil

Procedure 8 and does not permit bare assertions to survive a motion to dismiss. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with *Holowecki* and the Seventh Circuit and will have far-reaching consequences.

In *Holowecki*, this Court held that, in order to constitute a charge, a document must both meet charge-filing requirements **and** be reasonably construed as a request for remedial action. *Holowecki*, 552 U.S. at 402 (interpreting the ADEA). Thus *Holowecki* did not reduce any statutory or regulatory requirements for a filing to be a charge; rather, it added an additional requirement.

In *Holowecki*, the plaintiff filed an intake questionnaire with an attached six-page sworn affidavit alleging discrimination under the ADEA. *Id.* at 405. The Court held the verified affidavit requested remedial action when it said "[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application of *Best Practice/High–Velocity Culture Change*." *Id.* (emphasis in original). The Court did not evaluate the intake questionnaire in isolation, but held the "combination" of the intake questionnaire and remedial request in the attached, verified affidavit were "enough to bring

the entire filing within the definition of charge we adopt here." *Id.* at 406.

Here, the Fifth Circuit held checking "Box 2" on the Intake Questionnaire satisfied *Holowecki*'s request for remedial action requirement. *Vantage*, 954 F.3d at 755; Pet. App. 9a-10a. "Box 2" says:

> I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above. I understand that the EEOC must give the employer, union, or employment agency that I accuse of discrimination information about the charge, including my name. I also understand that the EEOC can only accept charges of job discrimination based on race, color, religion, sex, national origin, disability, age, genetic information, or retaliation for opposing discrimination.

Pet. App. 42a.

This Court has not endorsed "Box 2" as satisfying the request for remedial action standard, nor should it. First, "I want to file a charge" does not indicate that submitting the Intake Questionnaire means a charge has been filed. *See Hull v. Emerson Motors/Nidec*, 532 Fed. Appx. 586, 588 (5th Cir. 2013) ("The February intake questionnaire indicates that Hull 'would like to file a charge,' but the questionnaire does not state that, by completing it, a charge has been filed."). It certainly is not the same as "please force Federal Express to end their age discrimination plan," as in *Holowecki*.

Further, the remainder of the Intake Questionnaire confirms it serves as a preliminary document. As the Court noted in *Holowecki*: "Unlike EEOC Form 5, the intake questionnaire is not labeled a 'Charge of Discrimination.'" *Holowecki,* 552 U.S. at 405; *see* Pet. App. 33a, 42a. The Intake Questionnaire states its purpose is "to solicit information about claims of employment discrimination, determine whether the EEOC has jurisdiction over those claims, and provide charge filing counseling, as appropriate." Pet. App. 43a. The Intake Questionnaire also says: "**REMEMBER**, a charge of employment discrimination must be filed within the time limits imposed by law, generally within 180 days or in some places 300 days of the alleged discrimination. Upon receipt, this form will be reviewed to determine EEOC coverage." Pet. App. 33a (emphasis in original). These back-to-back sentences distinguish between "a charge" and "this form."

The Fifth Circuit's view that merely checking Box 2 meets the *Holowecki* request-to-act condition conflicts with the Seventh Circuit.[3] In *Carlson v. Christian Brothers Services*, 840 F.3d 466 (7th Cir. 2016), the Seventh Circuit evaluated whether a state department of human rights "Complaint Information Sheet" ("CIS") was a charge under *Holowecki*. *Carlson*, 840 F.3d at 467-68. In its amicus brief in *Carlson*, the EEOC argued the language in the CIS and the EEOC's "Box 2"

[3] The Third Circuit has also held checking Box 2 meets the request for remedial action requirement. *Hildebrand v. Allegheny County*, 757 F.3d 99, 113 (3d Cir. 2014) ("Under the revised form, an employee who completes the Intake Questionnaire and checks Box 2 unquestionably files a charge of discrimination.").

were so similar that there was "no basis in common sense or precedent" to distinguish between them and "signing the CIS should carry the same legal significance as checking Box 2 of the form Intake Questionnaire."[4] The EEOC further argued the CIS was the equivalent of a charge. *Carlson,* 840 F.3d at 468. The Seventh Circuit disagreed and found the plaintiff's untimely charge (filed 398 days after her termination) did not relate back to the timely-filed CIS. *Id*.

Like the Intake Questionnaire here, the CIS asked the complainant for basic information about her claim, allowed the agency to decide whether it had jurisdiction, and served as a pre-charge screening form. *Compare id.* at 467 *with* Pet. App. 33a-43a. Also, like "Box 2" of the Intake Questionnaire, the CIS stated it "authorizes EEOC to look into the discrimination alleged" and consented to the disclosure of her personal information. *Compare Carlson*, 840 F.3d at 468 *with* Pet. App. 42a. Consistent with *Holowecki*, the Seventh Circuit held the CIS "was merely a prelude to a charge, and not the charge itself." *Carlson*, 840 F.3d at 468. The Fifth Circuit erred in ignoring the similarity of the operative language in *Carlson* and Box 2 (as the EEOC put it, they "should carry the same legal significance").

In any event, checking "Box 2" cannot be outcome determinative to the exclusion of the filing as a whole.

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[4] Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff/Appellant and in Favor of Reversal at 16-17, *Carlson v. Christian Brothers Services,* 840 F.3d 466 (7th Cir. 2016) (No. 15-3807), *available at* https://ecf.ca7.uscourts.gov/n/beam/servlet/TransportRoom.

Holowecki, 552 U.S. at 398-99 (stating the proper test for a charge includes "whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights"). Here, objective indications in the initial filing demonstrate it was a preliminary communication. In contrast to the plaintiff in *Holowecki,* Poston was represented by an attorney during the filing process, and a reasonable and objective construction of his submission should take into account his represented status. *See Carlson*, 840 F.3d at 468-69 (plaintiff "can't plead ignorance of legal technicalities, because she was represented by counsel throughout").

The Intake Questionnaire was not verified when submitted, despite that verification is statutorily required for an ADA charge and the EEOC will not start its investigation or require a response from the employer until it receives a verified charge. 42 U.S.C. § 2000e-5(b); *Edelman*, 535 U.S. at 115 (the EEOC will refuse "to call for any response to an otherwise sufficient complaint until the verification has been supplied"); Pet. App. 48a. In addition, the Intake Questionnaire was submitted "on behalf of" Poston, which—according to the EEOC—precluded the EEOC from notifying Vantage of Poston's identity per EEOC standard practice. ROA 119-20. Given these standard procedures, the attorney's choice to contact the EEOC in this manner can only reasonably be seen as preliminary. In other words, a document cannot objectively be construed as a "request for remedial action" when by

operation of standard procedure it will not result in any action.[5] *Compare Holowecki,* 552 U.S. at 402 ("the filing must be examined from the standpoint of an objective observer to determine whether, by a reasonable construction of its terms, the filer requests the agency to activate its machinery and remedial processes") *with Edelman*, 535 U.S. at 115 n.9 (noting that the EEOC will **not** proceed with an investigation before verification occurs). In *Holowecki,* the Court inquired at oral argument about whether an intake questionnaire that indicated the charging party did not want her identity disclosed would be a charge under the request-to-act standard and the Government's attorney agreed it would not be a charge:

> JUSTICE STEVENS: Just to get one thing perfectly clear in my mind, does that mean if the intake questionnaire is checked not consent, that would not be a charge?
>
> MR. HEYTENS: Mr. Chief Justice, may I ask –in our view that if she had checked the box saying do not disclose for identity, this would not have been a charge. Thank you.

Tr. of Oral Arg. 46, 50-51, 57-58, *Holowecki,* 552 U.S. 389 (No. 06-1322).

In *Holowecki*, the EEOC's failure to give notice of the employee's initial filing to the employer was merely

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[5] *Holowecki* did not disturb *Edelman*'s endorsement of the relation back regulation; however, nothing in *Edelman* prevents a lack of verification from being considered along with other objective factors under the request-to-act standard.

an error. *Holowecki,* 552 U.S. at 400 ("In the very case before us the EEOC's Tampa field office did not treat respondent's filing as a charge, as the Government now maintains it should have done."); *see also Edelman,* 535 U.S. at 119 ("the Government's lawyer acknowledged at oral argument that the EEOC failed to 'comply with its obligation to provide the employer with notice' within 10 days after receiving Edelman's letter"). Here, in contrast, the EEOC says it did everything according to standard operating procedure, which resulted in a delayed investigation and Vantage not being notified of Poston's name or factual allegations until 403 days after his termination.[6] Thus, if the Fifth Circuit's decision stands, an employee may file an unverified document that doesn't begin an investigation and doesn't give the employer an opportunity to look into or remedy the allegations (or even preserve evidence), and that filing will preserve the employee's

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[6] To be clear, this argument does not hinge on whether or when the EEOC is required to disclose the charging party's name under its regulations. Vantage does not contend the definition of a charge depends upon "the EEOC's ***fulfilling*** its mandatory duty to notify the charged party and initiate a conciliation process." *Holowecki,* 552 U.S. at 403-04 (emphasis added). Rather, as discussed at oral argument in *Holowecki*, a charging party's signal on an intake questionnaire that they do not want their identity disclosed indicates the filing is not a charge. Tr. of Oral Arg. 46, 50-51, 57-58, *Holowecki*, 552 U.S. 389 (No. 06-1322). Here, although Box 2 was checked, the charging party's attorney filed an unverified Intake Questionnaire "on behalf of" Poston, ensuring that under standard procedure Poston's identity would not be disclosed and an investigation would not begin, thus indicating he was not filing a "charge," i.e., "a request to activate [the EEOC's] machinery and remedial processes."

claim indefinitely. Obviously, that was not what this Court intended in deciding *Holowecki* and does not comply with the spirit of the law.

The EEOC charge-filing process affects thousands of employees and employers each year. Congress's intention that allegations of disability discrimination be timely brought to prevent stale claims is frustrated when the Fifth Circuit takes an initial filing that by design does not trigger notice of the charging party's factual allegations or the investigation process and deems it a charge. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc*., 550 U.S. 618, 630–31 (2007), *overturned due to legislative action* (Jan. 29, 2009) ("Certainly, the 180–day EEOC charging deadline is short by any measure, but by choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.") (internal citations and quotation marks omitted). Notably, the timely administrative exhaustion requirement is the only statute of limitations applicable to the ADA. *Occidental Life Ins. Co. of Calif.*, 432 U.S. at 371-72 ("Congress did express concern for the need of time limitations in the fair operation of [Title VII], but that concern was directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator.").

In addition, deeming this type of initial filing a charge will require employers to defend against claims for incidents that occurred much earlier and for which records may have been lost and employees involved

may have moved on. *See Ledbetter*, 550 U.S. at 630–31 ("The EEOC filing deadline 'protect[s] employers from the burden of defending claims arising from employment decisions that are long past.' ") (internal citation omitted). Further, delayed notice of alleged discriminatory acts undercuts the goal of preventing unlawful discrimination by denying employers the chance to identify and correct potentially discriminatory practices in a timely and efficient manner.

II. This case raises an important question this Court has previously recognized but not resolved: whether an inexcusably dilatory verified charge relates back under the ADA.

At the outset of the *Holowecki* opinion, decided under the ADEA, this Court specifically cautioned that the differences between the ADEA and Title VII/ADA should not be glossed over:

> As a cautionary preface, we note that the EEOC enforcement mechanisms and statutory waiting periods for ADEA claims differ in some respects from those pertaining to other statutes the EEOC enforces, such as Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act of 1990. While there may be areas of common definition, employees and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination. This is so even if the EEOC forms and the same definition of charge

> apply in more than one type of discrimination case.

Holowecki, 552 U.S. at 393 (internal citations omitted).

Title VII/ADA requires a charge to be verified, while the ADEA does not. *Compare* 29 U.S.C. § 626(d) (not requiring verification for charges under the ADEA) *with* 42 U.S.C. § 2000e-5(b) (requiring that a Title VII/ADA charge be verified). Consequently, the EEOC's Title VII regulations (which apply to the ADA) require that a charge "shall be verified" whereas the EEOC's ADEA regulations do not have such a requirement. *Compare* 29 C.F.R. § 1601.9 (Title VII/ADA) *with* 29 C.F.R. § 1626.6 (ADEA).

It is undisputed that Poston's initial filing was not verified when submitted to the EEOC. The Fifth Circuit held this deficiency was cured by filing the verified Charge 376 days after Poston's termination under *Edelman* and 29 C.F.R. § 1601.12(b). *Vantage*, 954 F.3d at 756; Pet. App. 12a-13a. The Fifth Circuit's opinion ends as follows:

> In sum, Poston's EEOC intake questionnaire was sufficient as a charge and, although verified outside of the filing period, was "timely" by virtue of the relation-back regulation. We note that the dilatory response of Poston's counsel to the EEOC's months-long requests to file his client's *verified* charge is inexcusable. Counsel should never ignore applicable ADA law and regulations, especially when the agency reminds him. The Supreme Court's decisions in *Edelman* and *Holowecki*

> were designed to accomplish fair and efficient resolution of discrimination complaints filed more often than not by pro se individuals. That a plaintiff represented by counsel benefits from the Court's leniency is unfortunate.

Vantage, 954 F.3d at 757 (emphasis in original); Pet. App. 14a-15a.

This Court has not decided what limits apply to relation back, as the Fifth Circuit acknowledged. *Id.* at 756 n.8 ("That is not to say that *Edelman* has no outer limit.") (*citing Edelman,* 535 U.S. at 115 n.9); *Edelman,* 535 U.S. at 115 n.9 ("But this is not our case, which simply challenges relation back *per se* . . . "). Instead, *Edelman* only held "the EEOC's relation-back regulation to be an unassailable interpretation of § 706." *Id.* at 118; *see also Philbin v. General Elec. Capital Auto Leases, Inc.,* 929 F.2d 321, 324 (7th Cir. 1991) ("Recognition that the regulation was within the authority of the EEOC does not mean that every intake questionnaire which is subsequently verified will constitute a charge.").

In *Edelman,* the Court inquired about the lack of a deadline for amendments at oral argument. The Court expressed concern that an employer may be required to respond to allegations long after the events occurred "so long as the commission waits that long to get the verification," but was told that in practice "If you had an employee who refused to verify with reasonable promptness, I think the agency would undoubtedly dismiss the—the charge for lack of cooperation, and that would be the end of it." Tr. of Oral

Arg. 14-15, *Edelman,* 535 U.S. 106 (No. 00-1072). And in the subsequent written opinion, the Court stated its understanding that diligence would be required at the risk of no further EEOC action. *Edelman,* 535 U.S. at 115 n.9 ("our understanding is that the EEOC's standard practice is to caution complainants that if they fail to follow up on their initial unverified charge, the EEOC will not proceed further with the complaint"). Thus relation back was approved by this Court as a safeguard to protect inadvertent forfeiture by lay complainants, not to benefit "inexcusable" delay or failure to follow EEOC instructions. *Id.* at 115 ("Construing § 706 to permit the relation back of an oath omitted from an original filing ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently.").

This theme is seen in the continuum of cases addressed by the courts of appeal. On one end, the Eleventh Circuit did not allow cure by relation back where a plaintiff did not cooperate with the EEOC in filing his charge. *Butler v. Grief,* 325 Fed. Appx. 748 (11th Cir.), *cert. denied*, 558 U.S. 875 (2009). In *Butler*, the EEOC dismissed the plaintiff's charge under the ADA for failure to cooperate. *Id.* at 749. The charge was submitted by the plaintiff's attorney without verification and was not verified while pending before the EEOC. *Id.* In response to summary judgment, the plaintiff argued he could cure his lack of verification under *Edelman* and 29 C.F.R. § 1601.12(b). *Id.* The Eleventh Circuit affirmed dismissal, finding there was no longer a charge pending before the EEOC that was capable of

being verified and "the plaintiff's failure to cooperate with the EEOC disentitles that person to equitable relief."[7] *Id.* at 749-50; *see also McBride v. CITGO Petroleum Corp.,* 281 F.3d 1099, 1106-07 (10th Cir. 2002) (affirming summary judgment under the ADA where plaintiff failed to verify and return an enclosed copy of a charge of discrimination sent to her by the EEOC until a week after it had dismissed her claim for failure to cooperate); *Balazs v. Liebenthal,* 32 F.3d 151, 157 (4th Cir. 1994) (affirming summary judgment pre-*Edelman* where plaintiff attempted to amend a charge almost four months after the EEOC had closed its file and after litigation had begun); *Hull*, 532 Fed. Appx. at 588 (affirming summary judgment for failure to file a timely charge where plaintiff filed a timely intake questionnaire but "took no further steps for almost three months" and filed a charge after limitations had expired).

On the other end, the Seventh Circuit allowed relation back where the plaintiff "complied with all of [the EEOC's] instructions" but her verification was

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[7] In *Edelman*, this Court noted its expectation that the EEOC will require diligence from charging parties. Regardless of when the EEOC closes its file, a charging party who ignores the law despite the instructions of the EEOC should not benefit from relation back. *See McBride*, 281 F.3d at 1105-06 (court did not rely on the EEOC's determination that the plaintiff failed to cooperate but made its own evaluation as "the EEOC's determination is not dispositive . . . No deference may be accorded the EEOC or the complaint investigator's finding with respect to the plaintiff's compliance").

filed after the 300-day time period due to the EEOC's delay in drafting and sending her a formal charge. *Philbin,* 929 F.2d at 325. The Seventh Circuit held "the EEOC's inaction in completing and forwarding the formal charge in a timely fashion should not bar the plaintiff from proceeding on her Title VII claim." *Id.*; *see also Edelman v. Lynchburg College,* 300 F.3d 400, 404-05 (4th Cir. 2002) (emphasizing the "failures of the EEOC" and lack of evidence that plaintiff "prevented the EEOC from completing its statutory duties regarding the charge"); *Price v. Southwestern Bell Telephone Co.,* 687 F.2d 74, 79 (5th Cir. 1982) (emphasizing plaintiff was not warned by the EEOC that her charge had not been verified until after limitations had run).

Here, the Fifth Circuit found—on the face of the operative documents—that the charging party's attorney "ignore[d]" applicable ADA law, regulations, and the instructions of the EEOC in a manner that was "inexcusable." *Vantage,* 954 F.3d at 757. Nonetheless, the Fifth Circuit then promptly excused this "inexcusable" delay and held the "leniency" of *Edelman* and *Holowecki* applied to the plaintiff's benefit, despite the "inexcusable" lack of cooperation. *Id.* The Fifth Circuit's interpretation is contrary to this Court's understanding in *Edelman,* the rationale supporting relation back, and the guidance of the courts of appeals.

III. The decision below conflicts with *Iqbal* on an important question of federal law with practical consequences for litigants and courts.

The Complaint does not plead **any facts** regarding the timeliness of the charge or EEOC notice of the charge. Nonetheless, the Fifth Circuit found the Complaint's allegation that "All conditions precedent to the institution of this lawsuit have been fulfilled" sufficient to plead a timely charge and EEOC notice of the charge as conditions precedent under Rule 9(c). *Vantage*, 954 F.3d at 753 n.4; Pet. App. 6a.

This Court has held that Rule 8(a) requires a complaint must plead sufficient facts to state a claim for relief that is facially plausible. *Iqbal*, 556 U.S. at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. In the same case, this Court also held the "allege generally" standard of Rule 9 does not permit a plaintiff to evade the requirements of Rule 8 nor to satisfy his pleading obligation with a conclusory allegation. *Id.* at 686–87 ("Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8.").

Rule 9(c) (conditions precedent) and Rule 9(b) (fraud or mistake and conditions of the mind) are adjacent and strikingly similar. Namely, they both

distinguish between something that must be stated "with particularity" and something that may be "alleged generally." *Compare* FED. R. CIV. P. 9(c) *with* FED. R. CIV. P. 9(b). The identical language in Rule 9(b) (held to the plausibility standard of Rule 8 in *Iqbal*) and Rule 9(c) (at issue here), gives no basis on which to afford different readings of the same language, with the same structure, within adjacent subsections of the same rule. *See Chesapeake Square Hotel, LLC v. Logan's Roadhouse, Inc.*, 995 F. Supp. 2d 512, 517 (E.D. Va. 2014) ("The fact that these adjacent subsections within Rule 9 contain virtually indistinguishable language suggests that the pleading requirements likewise should be indistinguishable.").

The Fifth Circuit's decision conflicts with *Iqbal* in holding the conclusory allegation "all conditions precedent . . . have been fulfilled" satisfies Rule 9(c); however, the opinion does not address this conflict. Without acknowledging the section of the *Iqbal* opinion about Rule 9, the Third Circuit has held the plausibility standard of *Iqbal* does not apply to pleading conditions precedent to lawsuits under the ADEA. *Hildebrand v. Allegheny County*, 757 F.3d 99, 112 (3d Cir. 2014) ("*Iqbal* and *Twombly* interpreted Federal Rule of Civil Procedure 8(a), which governs the standard for pleading a claim for relief. The pleading of conditions precedent is governed by Rule 9(c), not Rule 8(a). Neither *Iqbal* nor *Twombly* purport to alter Rule 9."). For the reasons described above, *Hildebrand* conflicts with *Iqbal* and is based on too narrow a reading of that opinion.

After *Iqbal*, several other courts have held that a conclusory allegation of satisfying conditions precedent is sufficient, also without acknowledging *Iqbal*'s holding with respect to Rule 9(b) and sometimes without acknowledging *Iqbal* at all. *See, e.g., Myers v. Cent. Florida Investments, Inc*., 592 F.3d 1201, 1224 (11th Cir. 2010), *cert. denied*, 562 U.S. 890 (2010); *E.E.O.C. v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499, 522 (S.D. Tex. 2012), *on reconsideration*, 35 F. Supp. 3d 836 (S.D. Tex. 2014), *aff'd sub nom. Equal Employment Opportunity Comm'n v. Bass Pro Outdoor World, L.L.C*., 826 F.3d 791 (5th Cir. 2016); *Hamilton v. Geithner*, 743 F. Supp. 2d 1, 8 (D.D.C. 2010), *aff'd*, 666 F.3d 1344 (D.C. Cir. 2012); *In re ConAgra Foods Inc*., 908 F. Supp. 2d 1090, 1108-09 (C.D. Cal. 2012); *E.E.O.C. v. U.S. Steel Corp.*, CIV.A. 10-1284, 2012 WL 3017869, at *8 (W.D. Pa. July 23, 2012). Some courts have specifically cited *Hildebrand* in so holding. *See, e.g., In re Residential Capital, LLC*, 524 B.R. 563, 584 (Bankr. S.D.N.Y. 2015); *Evergreen Square of Cudahy v. Wisconsin Hous. & Econ. Dev. Auth.*, 105 F. Supp. 3d 907, 915 (E.D. Wis. 2015).

However, some courts have applied the plausibility standard of *Iqbal* to pleading conditions precedent under Rule 9(c). *See, e.g., Napster, LLC v. Rounder Records Corp.*, 761 F. Supp. 2d 200, 208–09 (S.D.N.Y. 2011) (finding conclusory allegation that plaintiff "has performed all of the terms and conditions required to be performed by it under the 2006 Agreement, and/or is otherwise excused from performance" was not sufficient under Rule 9(c) after *Iqbal*); *Dervan v. Gordian*

Group LLC, 16-CV-1694 (AJN), 2017 WL 819494, at *4-6 (S.D.N.Y. Feb. 28, 2017) ("The Court sees no principled basis on which to afford Rule 9(c)—an adjacent subsection whose structure substantially mirrors that of Rule 9(b)—a divergent reading."); *O.F.I. Imports Inc. v. Gen. Elec. Capital Corp*., 15-CV-7231 (VEC), 2017 WL 3084901, at *5 (S.D.N.Y. July 20, 2017) ("post-*Iqbal*, Rule 9(c)'s command that conditions precedent be alleged 'generally' requires plaintiffs to allege *plausibly* that they have satisfied conditions precedent") (emphasis in original); *Williams v. Bank of Am. Corp*., 3:15-CV-1449-J-39MCR, 2017 WL 11405030, at *7 (M.D. Fla. Sept. 1, 2017) ("Plaintiff failed to plead sufficient 'factual content that allows the court to draw a reasonable inference' that Plaintiff has satisfied all conditions precedent to filing his Title VII claims.") (*citing Iqbal*, 556 U.S. at 678; Fed. R. Civ. P. 9(c)); *Restrepo v. Wells Fargo Bank, N.A*., 09-22436-CIV, 2010 WL 374771, at *3 (S.D. Fla. Feb. 3, 2010) ("Plaintiff argues that it has pled that all conditions precedent to suit have been satisfied. However, under *Twombly* and *Iqbal* this is insufficient because it is a conclusory allegation which is not supported by factual allegations.").

Other courts have noted the uncertainty, but sidestepped deciding the issue. *See, e.g., Zam & Zam Super Mkt., LLC v. Ignite Payments, LLC*, 736 Fed. Appx. 274, 276 (2d Cir. 2018) (noting that "we have not interpreted Rule 9(c) since the Supreme Court's adoption of the plausibility pleading standard, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d

868 (2009), which has been applied to require specificity with respect to other provisions of Rule 9" but declining to resolve the issue); *Chesapeake Square Hotel, LLC*, 995 F. Supp. 2d at 515-18 (evaluating the arguments for and against applying *Iqbal* pleading requirements to Rule 9(c) but declining to decide because the pleading was sufficient even under the higher standard); *Fin. of Am. Reverse, LLC v. Carmona-Vargas*, 288 F. Supp. 3d 500, 503 (D.P.R. 2018) (stating it is unclear whether an allegation that all conditions precedent "have been performed" was sufficient under Rule 9(c) after *Iqbal*).

As demonstrated by the cases cited above, whether the plausibility standard of *Iqbal* applies to pleading conditions precedent under Rule 9(c) arises frequently in varying contexts and courts, demonstrating its importance to pleading-requirement jurisprudence. Here it is particularly important to require a plaintiff to plead factual content supporting the reasonable inference that statutory exhaustion requirements have been met. As this Court has held, a "claim is time barred if it is not filed within these time limits." *Morgan*, 536 U.S. at 109. Practically speaking, the plaintiff has knowledge of the charge filing process that a defendant cannot know at the early stages of a lawsuit. A conclusory allegation that "all conditions precedent . . . have been fulfilled" does not provide any basis upon which to assess whether a plaintiff can state a claim for relief or not. Were such a conclusory allegation to suffice, resources of both the parties and the judiciary will be wasted in sorting out lawsuits that are fatally

flawed at the outset. On the other hand, there is no practical downside of requiring a plaintiff to allege enough factual content that a court may draw a reasonable inference that he has done what the statute requires before bringing suit, such as timely filing a charge of discrimination.

The Court should grant the petition to resolve the conflict with its decision in *Iqbal* and clarify the requirements of the Federal Rule of Civil Procedure on this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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