No. _____

In The

Supreme Court of the United States

VF JEANSWEAR, LP,

Petitioner,

v.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSHUA WOODARD
JENNIFER R. YEE
SNELL & WILMER LLP
400 East Van Buren
Phoenix, AZ 85004
(602) 382-6000
jwoodard@swlaw.com
jryee@swlaw.com

JAMES M. POWELL
Counsel of Record
SAMUEL B. HARTZELL
WOMBLE BOND DICKINSON (US) LLP
300 North Greene Street
Suite 1900
Greensboro, NC 27401
(336) 574-8081
Jimmy.Powell@wbd-us.com
Sam.Hartzell@wbd-us.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether Title VII authorizes the Equal Employment Opportunity Commission to continue investigating a charge of discrimination after the Commission issues the charging party a right-to-sue notice and after the charging party pursues private litigation.

2. Whether the Equal Employment Opportunity Commission can rely on a charge of discrimination to demand information from an employer about acts or practices not affecting the charging party.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is VF Jeanswear, LP. The respondent is the Equal Employment Opportunity Commission.

CORPORATE DISCLOSURE STATEMENT

Petitioner VF Jeanswear, LP, was until May 22, 2019, a wholly owned subsidiary of VF Corporation, a publicly held company. VF Jeanswear, LP, now has one member, Kontoor Brands, Inc., a publicly held company.

RELATED CASES

EEOC v. VF Jeanswear, LP, No. 2:16-mc-00047-NVW, U.S. District Court for the District of Arizona. Judgment entered July 5, 2017.

EEOC v. VF Jeanswear, LP, No. 17-16786, U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 1, 2019. Petition for rehearing denied July 10, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The May 1, 2019, opinion of the U.S. Court of Appeals for the Ninth Circuit is set forth at 769 F. App'x 477 and reproduced in the Appendix at App. 1. The Ninth Circuit's July 10, 2019, denial of reconsideration and reconsideration en banc is reproduced at App. 26. The July 5, 2017, opinion of the U.S. District Court for the District of Arizona is set forth at 2017 WL 2861182 and reproduced at App. 5.

JURISDICTION

The Ninth Circuit filed its opinion on May 1, 2019, and denied VF Jeanswear, LP's petition for panel rehearing and rehearing en banc on July 10, 2019. App. 26. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 2000e-5 and 2000e-8 of Title 42 U.S.C., are reproduced at App. 27 and App. 39, respectively.

STATEMENT

The "EEOC's investigative authority is tied to charges filed with the Commission." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984). It "is entitled to access only to evidence 'relevant to the charge under

investigation.'" *Id*. (quoting 42 U.S.C. § 2000e-8(a)). This "linkage between the Commission's investigatory power and charges of discrimination" reflects "Congress' desire to prevent the Commission from exercising unconstrained investigative authority." *Id*. at 65.

Unlike other courts of appeals, the Ninth Circuit has granted the EEOC that unconstrained investigative authority. In this case, the EEOC issued Petitioner VF Jeanswear, LP ("Jeanswear") a subpoena for company-wide information, ostensibly to advance an investigation the EEOC was conducting into allegations that a former salesperson made in a charge of discrimination. But the EEOC moved to enforce that subpoena after it issued the salesperson a right-to-sue notice and after the salesperson pursued private litigation. And the subpoena seeks information about acts or practices that could not have affected the salesperson. The Ninth Circuit nonetheless reversed the district court's order here refusing to compel Jeanswear to produce this irrelevant information.

This Court should review the Ninth Circuit's rewriting of Title VII. As the Fifth Circuit has recognized, the Ninth Circuit's approach undermines the multistep enforcement structure that Congress erected. *See EEOC v. Hearst Corp.*, 103 F.3d 462, 469–70 (5th Cir. 1997). Congress established a timeline for EEOC investigations, reasonable cause determinations, and enforcement actions, but that timeline becomes irrelevant if the EEOC can continue an investigation indefinitely. Similarly, the statutory requirement that a charge be filed "by or on behalf of a person claiming to

be aggrieved" by an "unlawful employment practice" is meaningless if the EEOC can investigate employment practices not affecting the charging party. 42 U.S.C. § 2000e-5(b). That power to investigate any suspected unlawful employment practice would also render superfluous the procedures for filing a Commissioner's charge. *See id*.

Whatever the policy merits of the Ninth Circuit's position, it goes against the statutory text. And it exposes employers such as Jeanswear to different requirements depending on whether a charge of discrimination is filed in Phoenix or Dallas. This Court should review these important issues.

A. Statutory Framework

In 1972, Congress amended Title VII to "establish[] an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 359 (1977). There are four steps in that procedure: (1) filing of a charge; (2) investigation; (3) conference and conciliation; and (4) enforcement.

1. The four-step procedure begins when a charge of discrimination is filed with the EEOC "by or on behalf of a *person claiming to be aggrieved*, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice." 42 U.S.C. § 2000e-5(b) (emphasis added); *see also Univ. of Pa. v. EEOC*, 493 U.S. 182, 190 (1990) ("The

Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination."). The filing of this charge is a "jurisdictional prerequisite" to the EEOC's authority. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 (1984). And it is a mandatory precondition to the filing of a Title VII action in court. *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1846 (2019).

A charge must "be in writing under oath or affirmation" and contain the information the EEOC requires. 42 U.S.C. § 2000e-5(b). The EEOC's regulations provide that a charge is "sufficient" if the person making the charge submits "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

2. Once a charge is filed, the EEOC "shall make an investigation thereof" and serve a notice of the charge on the employer. 42 U.S.C. § 2000e-5(b). The "EEOC's investigative authority is tied to charges filed with the Commission." *Shell Oil Co.*, 466 U.S. at 64. Unlike other federal agencies, "the EEOC is entitled to access only to evidence 'relevant to the charge under investigation.'" *Id*. (quoting 42 U.S.C. § 2000e-8(a)). While this "limitation on the Commission's investigative authority is not especially constraining," Congress has not "eliminate[d] the relevance requirement." *Id*. This Court has therefore resisted interpretations of Title VII that "would render nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant' to a charge." *Id*. at 72.

The purpose of the EEOC's investigation is to determine whether there is reasonable cause to believe that the charge is true. *See* 42 U.S.C. § 2000e-5(b). Congress directed the EEOC to make this "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." *Id*.

If the EEOC determines that there is not reasonable cause to believe that the charge is true, it must notify the person claiming to be aggrieved and dismiss the charge. *See id.* The person claiming to be aggrieved then has 90 days to file a private civil action against the respondent. *See id.* § 2000e-5(f)(1). Alternatively, the person claiming to be aggrieved may file an action if the EEOC notifies that person that 180 days have elapsed but the EEOC has not dismissed the charge, filed a public enforcement action, or entered a conciliation agreement with the employer. *See id*. The EEOC may seek to intervene in the charging party's private civil action if the EEOC certifies that the case is of general public importance. *Id*.

3. The third step in the enforcement procedure is conference and conciliation. If the EEOC determines that there is reasonable cause to believe that a charge is true, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id*. § 2000e-5(b). This duty to "attempt conciliation of a discrimination charge prior to filing a lawsuit" is a "key component of the statutory scheme." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Congress chose

"cooperation and voluntary compliance" as its preferred way to bring employment discrimination to an end. *Id*. (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982)).

4. Finally, if the EEOC cannot secure a conciliation agreement acceptable to the EEOC, it may bring a civil action against the employer. *See* 42 U.S.C. § 2000e-5(f)(1).

B. Factual Background

Jeanswear is an apparel company that employed roughly 2,500 people in various positions and locations throughout the United States. App. 21. In early 2014, Jeanswear reassigned one of its salespersons, Lori Bell, to a different sales role. App. 6. Bell was dissatisfied with that reassignment and resigned. App. 5–6.

In June 2014, Bell sued Jeanswear for sex discrimination. App. 6. The next month, she filed a charge of discrimination with the EEOC. Bell wrote:

> – I had been working for [Jeanswear] since September 15, 1985, and last position held was Executive Sales Representative. On February 28, 2014, I was forced to resign my position due to being demoted and harassed and no reason given. . . . I was offered a position with less pay and less responsibilities. . . . I requested a lateral move but it was denied. . . . I was also subjected to harassing comments to include but not limited to my

> manager (WL) stating "isn't great to see all they young men being promoted in top positions and not gray hairs walking around like us". I was also subjected to less pay than similarly situated males performing substantially the same work. During my tenure with the [Jeanswear] I was not offered any higher level position than Executive Sales Representative, rather demoted to a lesser position and significantly less pay. Females are not afforded the opportunity in top level positions. Top level positions are male dominated.
>
> – I believe I and a class of females have been discriminated against because of sex (female), in violation of Title VII of the Civil Rights Act of 1964, as amended. I have also been discriminated against because of age (48), in violation of the Age Discrimination in Employment Act, as amended. I have also been discriminated against because of sex (female), in violation of the Equal Pay Act, as amended.

App. 5–6 (ellipses in original).

In December 2014, after 180 days had elapsed, the EEOC issued Bell a notice of right to sue. App. 6–7. The notice "indicated that it was unlikely the EEOC would be able to complete its processing within 180 days from the filing of the Charge, and it would continue administrative processing of her gender and age discrimination claims." App. 7. Bell then amended her complaint against Jeanswear and pursued private litigation in the U.S. District Court for the District of Arizona. *See Bell v. VF Jeanswear LP*, No. 2:14-cv-01916-JJT (D.

Ariz.). The EEOC did not try to intervene in that lawsuit.

One month before issuing Bell the right-to-sue notice, the EEOC sent Jeanswear a request for information about Bell's charge. App. 6–7. Jeanswear provided substantial information in response to that request. App. 7. But Jeanswear objected to the EEOC's request for detailed information on employees who were not employed in Bell's sales position.

In August 2015, the EEOC issued a subpoena to Jeanswear. The subpoena directed Jeanswear to "[s]ubmit an electronic database identifying all supervisors, managers, and executive employees at VF Jeanswear's facilities during the relevant period, January 1, 2012, to present," including information such as "position(s) held and date in each position" and "if no longer employed, provide date of termination, and reason for termination." App. 7–8. Jeanswear petitioned the EEOC to revoke this subpoena, but the EEOC declined to do so and then applied to the district court for an order enforcing the subpoena in full.

C. Proceedings Below

1. In July 2017, the district court denied the EEOC's application to enforce the subpoena. App. 25. The district court began its analysis by noting a circuit split over whether the EEOC can issue an administrative subpoena "after a charging party has been issued a right-to-sue notice and has brought a private action." App. 11; *compare EEOC v. Hearst Corp.*, 103 F.3d 462,

469 (5th Cir. 1997) ("the EEOC may not continue to investigate a charge once formal litigation by the charging parties has commenced"), *with EEOC v. Fed. Exp. Corp.*, 558 F.3d 842, 854 (9th Cir. 2009) ("the EEOC retains the authority to issue an administrative subpoena against an employer even after the charging party has been issued a right-to-sue notice and instituted a private action based upon that charge"). The district court was constrained to apply Ninth Circuit precedent permitting the EEOC to continue its investigation.

The district court then examined the charge of discrimination that Bell filed because the "EEOC's investigative authority is tied to charges filed with the Commission." App. 12 (quoting *Shell Oil Co.*, 466 U.S. at 64). As the district court found, Bell's charge "alleges that Jeanswear harassed and discriminated against Bell based on sex and age." App. 13. Bell "claimed to have been demoted from a sales position," and she "never held a management position, never applied for one, and never was refused or demoted from one." *Id*. While Bell "believed that she and a class of females had been discriminated against because of sex," *id.*, the specific acts or practices that she claimed to have been aggrieved by were "a one-off discriminatory demotion and unequal pay," App. 17.

The district court then considered whether the information that the EEOC requested about Jeanswear's supervisors, managers, and executives could shed light on Bell's demotion and unequal pay allegations. The district court first rejected unequal pay as a basis for

demanding that information because Bell "never held, sought, or was refused a managerial or 'top' position." App. 17–18. After rejecting unequal pay allegations as the basis for the subpoena, the court explained that the "crux" of its remaining "inquiry [was] whether Bell's charge of demotion is enough for a companywide and nationwide subpoena for discriminatory promotion, a discriminatory practice not affecting the charging party." App. 19.

The district court acknowledged the EEOC's argument that its "company-wide subpoena would provide relevant context and comparative data regarding those who have been hired for or promoted to [supervisory, managerial, and executive] positions." App. 18. But the court ultimately found that argument unpersuasive because accepting it "comes close to allowing universal investigation of any employer with a pending (or concluded) charge." App. 19.

The district court denied the EEOC's application on relevance grounds because, "even under a generous reading of relevance, the nationwide, companywide search for systemic discrimination in promotions to top positions is too removed from Bell's charge of one-off demotion from a sales job to be relevant in a practical sense." App. 19. The EEOC appealed to the Ninth Circuit.

2. On May 1, 2019, and following oral argument, the Ninth Circuit reversed the district court's judgment. App. 4. The court of appeals held that the district court abused its discretion when determining that the

EEOC's subpoena sought irrelevant information. The panel explained:

> In conducting its relevance analysis, the district court proceeded from the premise that only [Bell]'s personally-suffered harms could be considered. However, there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party.
>
> Indeed, we have held otherwise. EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those directly affecting the charging party. *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 855 (9th Cir. 2009).

App. 2–3. The panel reversed and remanded "with instructions to enforce the subpoena as written except as to information pertaining to age and reason for termination and except as to information predating 2012 for subparagraphs (f) and (g)." App. 4. The panel carved those topics out because the EEOC represented before the district and appellate courts that it no longer seeks that information. App. 3–4.

3. On June 14, 2019, Jeanswear petitioned for panel rehearing or rehearing en banc. The court of appeals denied that petition on July 10, 2019. *See* App. 26.

REASONS FOR GRANTING THE PETITION

A. The Court Should Resolve the Circuit Split Over the EEOC's Investigative Authority After Issuing a Right-to-Sue Notice

Review is warranted to resolve the circuit split over whether the EEOC can continue issuing and enforcing subpoenas to investigate a charge of discrimination after the EEOC issued the charging party a right-to-sue notice and after that party pursued private litigation.

The Ninth Circuit's decision in this case deepens an existing split with the Fifth Circuit. In *EEOC v. Hearst Corp.*, the Fifth Circuit held that, "in a case where the charging party has requested and received a right to sue notice and is engaged in a civil action that is based upon the conduct alleged in the charge filed with the EEOC, that charge no longer provides a basis for EEOC investigation." 103 F.3d 462, 469–70 (5th Cir. 1997) (emphasis omitted). The charging parties in that appeal were two employees of the Houston Chronicle who alleged that they had been sexually harassed by a third employee. *Id*. at 463. The EEOC began to investigate those allegations, and the newspaper provided the EEOC with the personnel files of the three employees. *Id*. The newspaper refused, however, to provide additional information not relevant to the charge. *Id*. The EEOC then issued subpoenas for that additional information. *Id*. While the newspaper's petition to revoke those subpoenas was pending, the EEOC issued the charging parties right-to-sue notices

permitting them to add sexual harassment claims to a lawsuit they had filed against their alleged harasser. *Id*.

The Fifth Circuit correctly recognized that "the time for *investigation* ha[d] passed" once the charging parties added those sexual harassment claims to their lawsuit. *Id*. at 469. Congress "deliberately divided" Title VII's enforcement structure "into distinct stages." *Id*. At the second stage, Congress gave the EEOC broad investigatory authority to "determine whether Title VII had been violated" and to "assist the agency in its efforts to resolve disputes without formal litigation." *Id*. But "[t]hese purposes are no longer served once formal litigation is commenced." *Id*. At that point, the EEOC "may intervene and pursue discovery through the courts," or it can "file a Commissioner's charge" if "its interest extends beyond the private party charge upon which it is acting." *Id*.

For over a decade, no court of appeals appears to have disagreed with the *Hearst* Court's holding. In 2009, however, the Ninth Circuit opened a split with the Fifth Circuit by "declin[ing] to adopt *Hearst*'s rationale as the law of this Circuit." *Federal Express*, 558 F.3d at 853. The Ninth Circuit rejected the Fifth Circuit's focus on the "multistep enforcement procedure," *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 359 (1977), because the Ninth Circuit did not view those steps as distinct. *Federal Express*, 558 F.3d at 851. Instead, the Ninth Circuit wrote, the "fact that one stage of the enforcement procedure is going on does not mean that another stage has ceased." *Id*.

The Ninth Circuit also emphasized the public purpose of EEOC investigations. "[T]he EEOC is not merely a proxy for victims of discrimination, but acts also to vindicate the public interest in preventing employment discrimination." *Id*. at 852 (quoting *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542 (9th Cir. 1987)). That public interest was implicated in *Federal Express* because the charge "involved a possible policy or pattern of discrimination affecting others." *Id*. at 850. The charging party's pursuit of private litigation did not vindicate that public interest. The Ninth Circuit concluded: The EEOC "is pursuing its obligation to serve the public interest" when it continues "to investigate a charge of *systemic discrimination* even after the charging party has filed suit." *Id.* at 852 (emphasis added).

In 2017, the Seventh Circuit joined the Ninth Circuit in "reject[ing] the Fifth Circuit's concept of distinct, linear stages of enforcement by the EEOC." *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843, 848 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2677 (2018). The Seventh Circuit began its analysis by characterizing the requirements in Title VII as "minimal." *Id*. at 849. The court of appeals then acknowledged that "a valid charge is a requirement *for beginning* an EEOC investigation," but it concluded that "nothing in Title VII supports a ruling that the EEOC's authority is then limited by the actions of the charging individual." *Id*. The Seventh Circuit concluded that the Fifth Circuit's approach in *Hearst* would "needlessly inhibit [the EEOC's] ability to conduct 'a pattern-or-practice investigation that might lead to relief for many persons in

addition to [the charging individual].'" *Id*. at 850 (second alteration in original) (quoting *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593, 597 (7th Cir. 2009)).

The *Union Pacific* Court relied on this threat to EEOC enforcement authority even though "the EEOC has other avenues available to pursue an investigation once a notice of right-to-sue letter has been issued—namely, the EEOC could (1) serve a Commissioner's charge or (2) intervene in the charging individual's lawsuit." *Id*. The Seventh Circuit rejected these "alternate investigatory avenues" as less "effective" than the EEOC's preferred approach. *Id*.

The Seventh Circuit also discussed this Court's opinion in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The issue in *Waffle House* was "whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the [EEOC] from pursuing victim-specific judicial relief" under Title I of the ADA. *Id*. at 282. This Court held that the arbitration agreement did not prevent the EEOC from seeking that relief because the EEOC's claim is not "merely derivative" of the employee's. *Id*. at 297. The Seventh Circuit read this holding as undermining the Fifth Circuit's reasoning in *Hearst*. *See Union Pac. R.R. Co.*, 867 F.3d at 849. But *Waffle House* addresses the EEOC's authority to sue, not its authority to investigate a charge of discrimination. And the employee in that case had not arbitrated his claim—the closest analogue to an employee filing a lawsuit based on a right-to-sue notice. This Court left "open"

the "question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek." *Waffle House, Inc.*, 534 U.S. at 297. The Fifth Circuit's holding in *Hearst* is therefore consistent with *Waffle House*, and the Seventh Circuit erred by suggesting that *Waffle House* called the circuit split here between the Fifth, Seventh, and Ninth Circuits into question.

Indeed, the Ninth Circuit's opinion here deepens that split. Unlike the charging party in *Federal Express*, Bell identified no "unlawful employment practice" related to supervisors, managers, and executives—much less a practice that would have "aggrieved" Bell in her sales role. 42 U.S.C. § 2000e-5(b). At most, she concludes her charge of "one-off discriminatory demotion and unequal pay" by stating that there is a gender imbalance in Jeanswear's top-level positions. App. 17. That statement about demographics in Jeanswear's workforce does not describe an unlawful practice.

This Court should review that deepening split now because the Ninth and Seventh Circuits' approaches nullify the statutory incentive for the EEOC to remedy unlawful employment practices through "conciliation" and the statutory requirement that the EEOC attempt to make a "determination on reasonable cause" within "one hundred and twenty days." 42 U.S.C. § 2000e-5(b). Congress established a "multistep enforcement procedure," and the courts of appeals had no authority to undermine that procedure by permitting the EEOC to conduct indefinite investigations of a charge. *Occidental Life Ins. Co. of California*, 432 U.S. at 359.

B. The Court Should Review the Ninth Circuit's Holding Permitting the EEOC to Seek Information About Acts or Practices Not Affecting the Charging Party

The Ninth Circuit also permitted the EEOC to exercise authority that Congress declined to give it when the court of appeals held that "EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those directly affecting the charging party." App. 2–3. This extraordinary holding contradicts the statutory language as well as the Supreme Court's observation that "Congress did not eliminate the relevance requirement" and its admonition not to "render[] that requirement a nullity." *Shell Oil Co.*, 466 U.S. at 69.

Congress authorized the EEOC to subpoena only evidence that is "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). The purpose of this language is to "establish[] a linkage between the Commission's investigatory power and charges of discrimination." *Shell Oil Co.*, 466 U.S. at 65. That linkage prevents the EEOC from embarking on a search for new forms of discrimination unrelated to the charge. As the Seventh Circuit recently explained, the "requirement of relevance, like the charge requirement itself, is designed to cabin the EEOC's authority and prevent 'fishing expeditions.'" *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843, 852 (7th Cir. 2017) (quoting *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002)).

Congress required that the charge be filed either by "a person *claiming to be aggrieved*" or by an EEOC Commissioner "alleging that an employer [or similar entity] has engaged in an unlawful employment practice." 42 U.S.C. § 2000e-5(b) (emphasis added). Consistent with this aggrieved-person requirement, the courts of appeals have limited EEOC investigations to information relevant to the acts or practice affecting the charging party.

For example, the Eleventh Circuit held in *EEOC v. Royal Caribbean Cruises, Ltd.* that relevance requires more than a connection to "issues that may be contested when and if future charges are brought by others." 771 F.3d 757, 761 (11th Cir. 2014). In that case, the charging party alleged that he was terminated because of a medical condition in violation of the Americans with Disabilities Act. *See id.* at 759. The employer agreed that it had terminated him because of that condition, but it argued that the Act did not apply for territorial reasons. *See id.* Despite this agreement that the employee was terminated for medical reasons, the EEOC sought information about *other* "non-U.S. citizens who had been discharged or denied employment because of a medical condition." *Id.* at 760. The district court declined to enforce the EEOC's subpoena for that information, and the Eleventh Circuit affirmed because that information was irrelevant to the charging party's claim of discrimination. The Eleventh Circuit explained that the EEOC can "file a Commissioner's charge alleging a pattern and practice of discrimination" if it believes such discrimination exists, but it

"may not enforce a subpoena in the investigation of an individual charge merely as an expedient bypass of the mechanisms required to file a Commissioner's charge." *Id*. at 762.

Similarly, the Tenth Circuit refused to enforce an EEOC subpoena that sought "information having no apparent connection to [the] charge." *EEOC v. TriCore Reference Labs.*, 849 F.3d 929, 942 (10th Cir. 2017). In *TriCore*, the charging party alleged that her employer had denied her request for an accommodation based on her pregnancy, *see id*. at 934, and the EEOC used that charge to demand information about pregnant employees who "never sought an accommodation," *id*. at 942. The Tenth Circuit affirmed the district court's conclusion that this information was irrelevant to the charge. *See id.* That holding is consistent with the Tenth Circuit's prior observation that "[a]ny act of discrimination could be part of a pattern or practice of discrimination, but not every charge of discrimination warrants a pattern or practice investigation." *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157–58 (10th Cir. 2012). A contrary conclusion would "construe relevance so broadly as to render its requirement a nullity." *Id*. at 1158 (citing *Shell Oil Co.*, 466 U.S. at 69).

In another example, the Third Circuit affirmed denial of an EEOC subpoena in which the EEOC was conducting an "investigation of race discrimination" based on a charge filed by "white female who has complained of disability discrimination." *EEOC v. Kronos Inc.*, 620 F.3d 287, 301 (3d Cir. 2010). The charging party in *Kronos* alleged discrimination based on her potential

employer's use of a customer service assessment in its hiring process. *See id.* at 292. The EEOC then issued a subpoena for information about that assessment, including documents relevant to a potential racial adverse impact. *See id*. at 300. The district court denied enforcement of that request for race-based information, and the Third Circuit affirmed that ruling because "the EEOC's subpoena for materials related to race constitutes an impermissible 'fishing expedition.'" *Id*. at 301.

In each of these cases, the court of appeals affirmed the district court's order denying enforcement of the request because the request sought information irrelevant to the specific practice that aggrieved the charging party. In *Royal Caribbean*, the EEOC could not demand information about other employees because the employer admitted it had terminated the charging party because of his disability. In *TriCore*, the EEOC's investigation was properly limited to women who, like the charging party, requested a pregnancy accommodation. And in *Kronos*, the EEOC improperly sought information about racial disparate impact based on charge filed by a white, disabled woman. Each of these holdings gives effect to the statutory language linking the EEOC's investigative authority to the specific charge of discrimination. The EEOC cannot wander into areas "wholly unrelated" to the act or practice allegedly aggrieving the charging party. *Kronos Inc.*, 620 F.3d at 302.

The Ninth Circuit is permitting the EEOC to wander into unrelated areas here. Given the statutory

language limiting party charges to persons "claiming to be aggrieved," the district court's analysis properly focused on the acts or practices that allegedly aggrieved Bell. 42 U.S.C. § 2000e-5(b). The Ninth Circuit, by contrast, focused on allegations *not* "directly affecting the charging party." App. 3.

The Sixth and Seventh Circuits have likewise permitted the EEOC to pursue investigations of acts or practices not affecting the charging party. In *EEOC v. Konica Minolta Bus. Sols. U.S.A., Inc.*, the Seventh Circuit affirmed enforcement of an EEOC subpoena for "records relating to the hiring of sales personnel." 639 F.3d 366, 368 (7th Cir. 2011). The court of appeals held that this "hiring data" was relevant to the charge even though the charging party "was not saying that [the employer] had refused to hire him." *Id*. at 369. The court explained that "information concerning whether an employer discriminated against other members of the same class for the purposes of hiring or job classification may cast light on whether an individual person suffered discrimination." *Id.*

The Sixth Circuit has taken the same approach. Its precedents "clearly hold[]" that the EEOC has a right to evidence that "focuses on the existence of patterns of racial discrimination in job classifications or hiring situations other than those that the EEOC's charge specifically targeted." *EEOC v. Roadway Exp., Inc.*, 261 F.3d 634, 639 (6th Cir. 2001). The Sixth Circuit has concluded that the EEOC is entitled to this evidence because "the existence of patterns of racial discrimination in job classifications or hiring

situations other than those of the complainants may well justify an inference that the practices complained of here were motivated by racial factors." *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969).

The Ninth, Seventh, and Sixth Circuits' interpretation of Title VII would nullify the statutory requirement that a charge be "filed by or on behalf of a person claiming to be aggrieved." 42 U.S.C. § 2000e-5(b). Every person is aggrieved in an abstract sense by all forms of discrimination. But that does not allow every member of the public to file a valid EEOC charge about every form of potential discrimination. The only persons Congress authorized to file valid charges about acts or practices not affecting them are the EEOC Commissioners. *Id*. The broad interpretation embraced here would expand that authorization to include every member of the public, thereby bypassing the mechanisms Congress "required to file a Commissioner's charge." *Royal Caribbean Cruises*, 771 F.3d at 762. It would also come close to giving the EEOC the "plenary authority to demand to see records relevant to matters within [its] jurisdiction" that Congress specifically chose to withhold. *Shell Oil Co.*, 466 U.S. at 64. The Court should review the Ninth Circuit's expansion of the EEOC's authority beyond the bounds set by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOSHUA WOODARD
JENNIFER R. YEE
SNELL & WILMER LLP
400 East Van Buren
Phoenix, AZ 85004
(602) 382-6000
jwoodard@swlaw.com
jryee@swlaw.com

JAMES M. POWELL
Counsel of Record
SAMUEL B. HARTZELL
WOMBLE BOND
DICKINSON (US) LLP
300 North Greene Street
Suite 1900
Greensboro, NC 27401
(336) 574-8081
Jimmy.Powell@wbd-us.com
Sam.Hartzell@wbd-us.com