No. 19-446

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

REPLY BRIEF

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The EEOC does not deny that the Ninth Circuit's ruling here exposes employers such as Petitioner VF Jeanswear, LP ("Jeanswear") to different requirements depending on whether a charge of discrimination is filed in Phoenix or Dallas. In Phoenix, the EEOC can force an employer to participate in a burdensome EEOC investigation even after litigation has begun. In Dallas, the EEOC's post-litigation remedy is to intervene in the lawsuit and pursue discovery through the courts. Alternatively, the EEOC could file a Commissioner's charge against the employer. But the EEOC in Dallas could not do what the EEOC did here: enforce a subpoena in the investigation of an individual charge as an expedient bypass of the mechanisms required to file a Commissioner's charge. This open, entrenched circuit split between the Ninth and Fifth Circuits merits this Court's review because it exposes national employers like Jeanswear to inconsistent requirements and undermines the multi-step investigation and enforcement process that Congress established.

This Court should also review the Ninth Circuit's holding that the EEOC can investigate acts or practices *not* "directly affecting the charging party." Pet. App. 3. Congress tied the EEOC's investigative authority to the charge, and it required that a charge be "filed by or on behalf of a person claiming to be aggrieved" by "an unlawful employment practice." 42 U.S.C. § 2000e-5(b). The Ninth Circuit eliminated this requirement by permitting the EEOC to seek information about practices that could not have aggrieved the charging party here. Bell was a salesperson who alleged that she had

been unfairly demoted and underpaid. The EEOC used that charge as a pretext for demanding information about Jeanswear's supervisors, managers, and executives even though Bell "never held a management position, never applied for one, and never was refused or demoted from one." Pet. App. 13. The Ninth Circuit's opinion requiring Jeanswear to produce this information "render[ed] nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant' to a charge." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 72 (1984). Yet that limitation continues to restrain the EEOC's investigative authority in the Third, Tenth, and Eleventh Circuits. This Court should review the Ninth Circuit's anomalous rule and reaffirm the limits Congress placed on EEOC investigations.

ARGUMENT

A. The Court Should Review the Circuit Split over the EEOC's Ability to Continue an Investigation after Litigation Has Begun

1. The EEOC devotes much of its brief to arguing that "the Commission's enforcement authority is not dependent on the conduct of a charging party," Opp. 13, but that point is not in dispute. This case is about the EEOC's investigative authority, not its enforcement authority. As the Fifth Circuit recognizes, "the time for *investigation* has passed" once "private parties have initiated their own enforcement proceedings." *EEOC v. Hearst Corp.*, 103 F.3d 462, 469 (5th Cir. 1997). Whether the EEOC retains "independent *enforcement*

authority," *id*. (emphasis added), is a separate question not implicated here.

To be sure, "conducting an investigation is a prerequisite to the EEOC's filing a lawsuit," Opp. 14, but Jeanswear has never suggested that the charging party can control or limit the EEOC's investigation once a charge is filed. Congress directed the EEOC to make a reasonable cause determination within "one hundred and twenty days from the filing of the charge," 42 U.S.C. § 2000e-5(b), and it gave the EEOC at least "one hundred and eighty days from the filing of such charge" to conduct its investigation, *id*. § 2000e-5(f)(1). During that 180-day period, the EEOC is in exclusive control of its investigation and has the sole right to file a civil action against the employer. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002) ("The EEOC has exclusive jurisdiction over the claim *for 180 days.*" (emphasis added)). But if the EEOC takes no action within that 180-day period, the charging party gains the right to file her own lawsuit, thereby shifting the proceedings from the investigation stage to enforcement. That potential for the charging party to bring an enforcement action after 180 days does not undermine the EEOC's investigative authority during that six-month period. While the EEOC may prefer a longer period of exclusivity, that preference cannot override the statutory text. Congress directed the EEOC to make a reasonable cause determination within 120 days and gave the EEOC at least 180 days to conduct its investigation.

Of course, the expiration of that 180-day period does not necessarily end the EEOC's investigative authority. As this Court explained, "a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC" has the option to "file a private action" *or* "continue to leave the ultimate resolution of his charge to the efforts of the EEOC." *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 361 (1977). Congress gave the charging party this choice so that "he or she may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court" if the charging party "is dissatisfied with the progress the EEOC is making on his or her charge of employment discrimination." *Id.*

Bell was evidently dissatisfied with the EEOC's progress here, and she chose to shift from investigation to enforcement by filing a private enforcement action. Recognizing the significance of that decision would not, as the EEOC claims, circumscribe EEOC investigative or enforcement authority; it would honor the timeline Congress established. The EEOC has at least 180 days to conduct its investigation. After that, the charging party can begin the enforcement process.

2. The EEOC is wrong to claim there is "no foothold in" Title VII for the Fifth Circuit's holding in *Hearst* and Jeanswear's position here that "a private lawsuit terminates the EEOC's investigative authority." Opp. 12. The structure of Title VII establishes an "integrated, multistep enforcement procedure." *Occidental Life*, 432 U.S. at 359. Once the procedure advances to the enforcement step because the charging

party filed a private lawsuit after waiting at least 180 days, the EEOC "may intervene and pursue discovery through the courts; or if its interest extends beyond the private party charge upon which it is acting, it may file a Commissioner's charge." *Hearst Corp.*, 103 F.3d at 469. But Congress did not authorize the EEOC to (1) fail to complete its investigation within 180 days, (2) decide not to intervene in Bell's private lawsuit, and then (3) demand that Jeanswear produce burdensome materials as part of the EEOC's ongoing, indefinite investigation.

Contrary to the EEOC's suggestion, this Court did not sanction that type of simultaneous enforcement and investigation when it recognized that the "multistep enforcement procedure" is "*integrated.*" Opp. at 16 (quoting *Occidental Life*, 432 U.S. at 359). The word "integrated" does not imply that multiple steps in that process—here, investigation and enforcement—can proceed at the same time. Rather, this Court described the procedure as integrated because the steps are "linked or coordinated." *New Oxford American Dictionary* at 903 (3d ed. 2010) (defining "integrated" to mean "with various parts or aspects linked or coordinated"). Each step leads to the next. The procedure begins with the charge, which authorizes the EEOC's investigation and limits the scope of that investigation. The investigation, in turn, leads to enforcement, because, among other possibilities, the EEOC decided to file a public enforcement action based on the results of that investigation, or the charging party was dissatisfied with the lack of progress and decided to file a

private lawsuit. This Court's recognition that the investigation and enforcement stages are linked as part of an integrated whole does not suggest that those two steps overlap in time.

3. The EEOC is wrong to argue that the Fifth Circuit has retreated from its holding in *Hearst* that the "EEOC may not continue to *investigate* a charge once formal litigation by the charging parties has commenced." 103 F.3d at 469. The EEOC makes that argument based on cases addressing the EEOC's enforcement authority, not its investigative powers. *See* Opp. 16–18. There is no dispute about the EEOC's independent enforcement authority because Title VII "specifically grants the EEOC exclusive authority over the choice of forum and the prayer for relief once a charge has been filed." *Waffle House*, 534 U.S. at 298. This specific grant of authority means that the "EEOC's authority to bring and maintain an *enforcement action*" cannot "be extinguished by a judgment in a private suit to which it was not a party." *EEOC v. Jefferson Dental Clinics, PA*, 478 F.3d 690, 697 (5th Cir. 2007) (emphasis added). But the relationship between public and private enforcement actions has nothing to do with the issue here: the EEOC's ability to keep *investigating* a charge of discrimination once litigation has begun.

4. The EEOC defends the Ninth Circuit's ruling here by making a novel argument not embraced by that court or, to Jeanswear's knowledge, by any court. The EEOC argues that it can continue investigating a charge after litigation has begun because no "specific

statutory text . . . prohibits the Commission, once a charging party has brought suit raising some of the allegations in the initial charge, from continuing to investigate the remaining allegations." Opp. 12–13. This argument is novel because it suggests that the EEOC can bifurcate its investigation, separating "some of the allegations" from "the remaining allegations." *Id.* at 13. Under that theory, an enforcement action arising from certain allegations in a charge would not terminate the EEOC's investigation into the remaining allegations in the charge. The investigation into the remaining allegations would continue indefinitely.

This argument contradicts Title VII's command that the EEOC investigate to determine whether there is "reasonable cause to believe that *the charge* is true," 42 U.S.C. § 2000e-5(b) (emphasis added)—not whether every *allegation* in the charge is true. Congress linked the EEOC's investigative powers to "charges of discrimination," *Shell Oil*, 466 U.S. at 65, and it established a "detailed, multi-step procedure" that "generally starts when 'a person claiming to be aggrieved' files a charge," *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 483 (2015) (quoting 42 U.S.C. § 2000e-5(b)). No statutory provision or court holding supports the EEOC's new argument that the EEOC can continue investigating one allegation in a charge while other aspects of the charge are being litigated.

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 EEOC admits, as it must, that its investigative authority "is tied to charges filed with the Commission." Opp. 11 (quoting *Shell Oil*, 466 U.S. at 64). Congress established the "linkage between the Commission's investigatory power and charges of discrimination" to "prevent the Commission from exercising unconstrained investigative authority." *Shell Oil*, 466 U.S. at 65. That linkage is codified in Title VII's "integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life*, 432 U.S. at 359.

The EEOC also admits that 42 U.S.C. § 2000e-5(b) "provides specific requirements for a valid charge." Opp. 11. Under that subsection, the EEOC's investigative authority begins "[w]henever a charge is filed by or on behalf of a person *claiming to be aggrieved*, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice." 42 U.S.C. § 2000e-5(b) (emphasis added). This statutory language authorizes two categories of persons to file a valid charge—individuals and EEOC Commissioners—and it imposes an additional requirement on charges filed by individuals: they must claim to be aggrieved by the unlawful employment practice.

Despite this clear statutory language, the courts of appeals are divided on whether an individual can file

a valid charge about acts or practices *not* affecting them. As Jeanswear explained in its Petition (at 18–20), the Third, Tenth, and Eleventh Circuits have enforced the statutory requirement by limiting EEOC investigations of individual charges to information relevant to employment practices allegedly aggrieving the charging individual. The Sixth, Seventh, and Ninth Circuits, by contrast, permit the EEOC to pursue investigations of acts or practices not affecting the charging party.

The EEOC claims that these decisions are all consistent, "factbound application[s]" of the same standard, Opp. 20, but that claim cannot withstand scrutiny. Under Sixth Circuit precedent, for example, the EEOC is "entitled 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) (emphasis added). Likewise, the Ninth Circuit held in this case 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." Pet. App. 2–3.

In the Eleventh Circuit, by contrast, the "relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge, not relevance to issues that may be contested when and if future charges are brought by others." *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d

757, 761 (11th Cir. 2014) (per curiam). The EEOC claims that the Eleventh Circuit's holding merely recognizes that the requested materials were "*unnecessary* in that case" Opp. 21 (emphasis added), but this argument based on necessity is misplaced. As this Court recognized (and the EEOC acknowledged in this case), the governing standard is relevance, not necessity. *See, e.g.*, *Univ. of Pennsylvania v. EEOC*, 493 U.S. 182, 188 (1990). The Eleventh Circuit did not withhold materials as somehow unnecessary—it held that the EEOC had no right to access them because they were not relevant to the acts or practices that allegedly aggrieved the charging party. That holding tracks Third and Tenth Circuit law, but it conflicts with the Sixth, Seventh, and Ninth Circuits' contrary holdings.

This circuit split shows that the EEOC is wrong to claim that Jeanswear "cites no precedent," Opp. 24, to support its assertion that § 2000e-5(b) "limit[s] EEOC investigations to information relevant to the acts or practice affecting the charging party," Opp. 23 (alteration in original) (quoting Pet. 18). In any event, while Third, Tenth, and Eleventh Circuit precedent supports Jeanswear's position here, Jeanswear relies principally on the plain language of § 2000e-5(b). That subsection makes clear that only EEOC Commissioners can file a valid charge regarding practices not aggrieving them.

In apparent recognition of the tension between the statutory text and the Ninth Circuit's holding here, the EEOC argues that "nothing in Title VII limits the scope of allegations an aggrieved employee may

include in a sworn charge filed with the EEOC." Opp. 24; *accord* Pet. App. 2–3. The EEOC appears to concede here that only an *aggrieved* employee can file a valid charge of discrimination with the EEOC, but it argues that this aggrieved employee could make valid allegations about any unlawful act or practice—including acts or practices not aggrieving the employee. Thus, a cashier working for the nation's largest retailer could file a valid charge of discrimination for practices allegedly affecting only the CEO as long as the cashier was aggrieved by some other practice allegedly affecting cashiers.

This rule would give the EEOC nearly unconstrained investigative authority because *every* employee aggrieved by *any* unlawful employment act or practice would gain the power that Congress reserved for EEOC Commissioners: the ability to launch an EEOC investigation of acts or practices affecting others. *Cf. Royal Caribbean Cruises, Ltd.*, 771 F.3d at 762 (holding that "the EEOC 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").

That result would be inconsistent with 42 U.S.C. § 2000e-5(f)(1). That subsection authorizes the EEOC to "bring a civil action" against an employer "named in the charge," and it provides that the "person or persons aggrieved shall have the right to intervene in [that] civil action." 42 U.S.C. § 2000e-5(f)(1). This right to intervene establishes that the acts or practices identified in a valid charge must aggrieve the charging party.

Otherwise, § 2000e-5(f)(1) would grant the charging party the right to intervene in a lawsuit having nothing to do with them. For example, if the cashier discussed above could file a valid charge about practices affecting only the CEO, then that cashier would have the right under § 2000e-5(f)(1) to intervene in an EEOC lawsuit based on those alleged practices. That result would make no sense.

The EEOC's position and Ninth Circuit's holding are also inconsistent with the portions of § 2000e-5(f)(1) authorizing a private civil action against an employer when the EEOC has not entered a conciliation agreement, filed a civil action, or dismissed the charge within 180 days. Section 2000e-5(f)(1) provides that this lawsuit can be filed either "(A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice." This phrasing confirms that only EEOC Commissioners are empowered to file charges of discrimination regarding acts or practices aggrieving others.

* * *

Congress made a deliberate choice to deny the EEOC the "plenary authority to demand to see records relevant to matters within their jurisdiction." *Shell Oil*, 466 U.S. at 64. Rather than give the EEOC plenary investigative authority, Congress gave the EEOC "access only to evidence 'relevant to the charge under investigation.'" *Id*. (quoting 42 U.S.C. § 2000e-8(a)). The

Ninth Circuit's ruling here overrides that congressional choice in every practical sense because it permits virtually all employees to file a valid EEOC charge about any employment practice they believe merits EEOC attention. That permissive rule leaves no meaningful limit on the EEOC's investigative authority. This Court should grant certiorari and reestablish the limits Congress placed on EEOC investigations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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