

No. 25-352

IN THE
Supreme Court of the United States

DR. JASMINE YOUNGE,

Petitioner,

v.

FULTON JUDICIAL CIRCUIT DISTRICT
ATTORNEY'S OFFICE, GEORGIA,

Respondent.

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

REPLY BRIEF

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INTRODUCTION

The argument in the brief in opposition is atypically narrow. Respondent neither questions petitioner's description of the holding of the Eleventh Circuit (Pet. 9, 33), nor denies the existence of the circuit conflict described by the petition. (Pet. 10-26). Respondent does not advance such arguments because it is precluded from doing so by its position in the courts below.

In the court of appeals and district court, respondent urged the court to hold that under the Eleventh Circuit decision in *Hassan v. U.S. Postal Service*, 842 F. 2d 260 (11th Cir. 1988), a defendant may raise by a motion for summary judgment an affirmative defense which it never pled. Doc. No. 122, 2-3; Response Br. For Appellee, 11-12, 18, 20, 26-31. That was an accurate description of the holding in *Hassan*, and the court of appeals and district court applied the very legal standard advanced by respondent. App. 9a-11a, 13a-14a n. 8, 46a-51a, 72a-80a. Unable to deny that any of that occurred, respondent understandably does not now dispute the petition's summary of the opinions below.

When petitioner objected in the court of appeals that respondent should not be permitted to raise on summary judgment an affirmative defense that it had never pled, respondent replied that the contrary holding in *Hassan* was "the majority rule espoused by the other courts of appeal." Response Br. For Appellee, 18; see *id.* at 26 ("majority of the Circuit Courts of Appeal"). Having maintained below that that *Hassan* is only the "majority" view, respondent understandably does not now claim that *Hassan* is instead the unanimous view of all the courts of appeals.

The only argument that respondent now advances is that this case is not an appropriate vehicle for resolving the conflict regarding the rule in *Hassan* because—according to respondent—its answer in the district court *did* plead the Title VII affirmative defense, or at least gave notice that the respondent “may” someday assert that defense. That contention has multiple fatal flaws, the most fundamental of which are that respondent in the courts below repeatedly (and accurately) described its answer in precisely the opposite manner,¹ and that the courts below held that respondent had neither pled that defense nor included such notice in its answer.

A. Respondent Conceded In The Court of Appeals That Its Answer Did Not Plead The Affirmative Defense

The brief in opposition insists that the answer did plead the Title VII affirmative defense. “The personal staff defense was adequately plead [sic] in defendant’s answer to the amended complaint.” Br. Opp. 3 (bold and capitalization omitted). “[Defendant] invoke[d] the defense in the Answer.” Br. Opp. 1. “The ‘personal staff’ defense was adequately raised in the Answer.” *Id.* at 5-6; see *id.* at 5 n. 1.

But in the Eleventh Circuit, respondent expressly acknowledged that the answer had not pled that affirmative defense. “The Defendant does not dispute

1. The brief in opposition recounts that District Attorney Howard received a letter from Younge mentioning her pregnancy one or two days *after* he had told her she was going to be fired. Br. Opp. 3. But the courts below found that Younge had informed Howard about that pregnancy *before* he announced he intended to fire her. App. 5a, 3a, 87a-90a, 108a.

that the personal staff exception was not raised in the first responsive pleading. Rather, Defendant raised the defense in his Motion for Summary Judgment.” Response Br. of Appellee, at 11. Respondent repeatedly described this case in the court of appeals as being one involving “the failure to raise an affirmative defense.” *Id.* at 1; see *id.* at 1 (“the defendant’s failure to comply with [Rule] 8(c)”), 29 (“failure to comply with Rule 8(c)”), 25 (“belatedly rais[ing] an affirmative defense”), 28 (same).

B. Respondent Conceded In The Courts Below That It Did Not Give Notice of Its Intent to Raise the Affirmative Defense Until A Year After Its Answer

The brief in opposition asserts that “the Answer ... was sufficient to provide fair notice that the defense may rely on [Younge’s status as personal staff] in its defense.” Br. Opp. 1; see *id.* at 2 (“[answer provided] notice of the intent to rely on Younge’s status as a member of the district attorney’s personal staff”).

But in the district court respondent told the Magistrate Judge precisely the opposite.

During oral argument, I inquired about Defendant’s failure to raise the employee exemptions earlier in the litigation, and defense counsel explained that the employee exemptions came to his attention when he began drafting the summary judgment motion in February or March [2022]. Defense counsel stated ... that Defendant did not put Plaintiff on notice of its intent to rely on the ‘personal staff’ exemption until a hearing that the district judge held on an unrelated issue on March 14, 2022.

App. 72a. That March 2022 hearing was nearly a year after respondent filed its answer and the deadline for amendments had passed.

C. Respondent Has Changed Its Position Regarding What Legal Issue Is Presented By This Case

The petition asks the Court to grant certiorari to resolve the conflict about whether, as *Hassan* and opinions in several other circuits hold, a defendant can use a summary judgment motion to raise an affirmative defense which has not been pled. Pet. i. The brief in opposition insists that this case does not present that legal issue at all. “The factual circumstance that the Petition is premised on is not found in *this* case.” Br. Opp. 6 (emphasis in original). “Because the Petition does not account for the Answer in which the defense expressly provided notice that Younge was part of the district attorney’s personal staff, the arguments within the Petition are *inapplicable* to this case.” Br. Opp. 2 (emphasis added).

But in the Eleventh Circuit, respondent described this case as presenting precisely the legal issue in the petition. Respondent’s court of appeals brief opened with a “Statement of the Issues” presented by the appeal, the first of which was:

Where a plaintiff has notice that an affirmative defense will be raised at trial, the defendant’s failure to comply with Fed. R. Civ. P. 8(c) does not cause the plaintiff any prejudice and, where the failure to raise an affirmative defense does not prejudice the plaintiff, it is not error for the trial court to hear evidence on the issue. *Hassan v. U.S.P.S.*

Response Brief for Appellee, at 1. (The “notice” referred to was not until the March 2022 hearing and in the summary judgment motion itself, both a year after the filing of the answer).

And in the court of appeals respondent itself insisted that the case was governed by *Hassan*. Respondent objected to what it described as “Younge’s demand that the Court ignore the precedent that deals with the precise question at issue” (*id.* at 31), citing *Hassan*. “[N]one of Younge’s arguments provide legitimate grounds for this Court to ignore the precedent that speaks to the precise issue being addressed.” *Id.* (citing *Hassan*). Respondent’s brief in the court of appeals five times characterized *Hassan* as the “binding precedent” *Id.* at 1 (two assertions), 13, 27, 28. And that brief cited *Hassan* a total of 28 times. *Id.* at 1, 11 (two citations), 12, 13, 18 (three citations), 20 (four citations), 22, 26 (five citations), 28, 29 (two citations), 30 (two citations), 31 (three citations).

And, of course, all the courts below agreed that this case turned on application of the rule in *Hassan*. App. 11a-12a, 13a-14a n. 8, 46a, 48a, 73a-74a.

D. Respondent Did Not Raise Its New Objection In The Courts Below

Respondent never raised in its briefs in the courts below the arguments regarding its answer that it advances for the first time in this Court. Those lower court briefs did not argue that the answer pled the Title VII affirmative defense or that it somehow provided notice that respondent intended to do so. In this Court the linchpin of the brief in opposition is a passage in the answer that used the phrase “personal staff.” The brief in opposition refers to

that passage 15 times. But in its briefs in the lower courts, respondent did not mention that passage at all.

The magistrate judge pointed out that respondent in the court below did not argue either that it had pled the Title VII affirmative defense, or that it had in some other manner provided timely notice that it intended to do so. “Defendant makes no argument that it pled the exemptions as affirmative defenses.” App. 72a. “Defense counsel stated ... that Defendant did not put Plaintiff on notice of its intent to rely on the ‘personal staff’ exemption until a hearing that the district judge held on an unrelated issue on March 14, 2022.” *Id.* And the district judge reiterated that “[a]s the Magistrate Judge noted, ‘Defendant makes no argument that it pled the exemptions as affirmative defenses.’” App. 42a.

This Court “rarely address[es] an argument raised for the first time in this Court.” *FDA v. R.J. Reynolds Vapor Co.*, 606 U.S. 226, 240 (2025). This is “a court of final review not first view.” *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). Respondent does not claim that it ever raised in the courts below the arguments regarding its answer on which the brief in opposition now relies, and respondent does not suggest that there is any reason for this Court to permit respondent to raise those arguments in the first instance in this Court.

E. The Courts Below Held That Respondent Did Not Plead The Title VII Affirmative Defense

The courts below repeatedly held that respondent had failed to plead the affirmative defense and had failed to otherwise provide notice of any intent to raise that defense, until a year after respondent had filed its

answer and the deadline for amendments had passed. Respondent did not file a cross-petition seeking review of those determinations, and offers no reason why this Court should revisit the conclusions of these lower courts. See *Glossip v. Gross*, 576 U.S. 863, 882 (2015).

The court of appeals repeatedly pointed out that respondent had failed to plead the affirmative defense in its answer. “In its answer, the DA’s office asserted several affirmative defenses, but did not assert that Younge was ‘personal staff’ of an elected official exempt from Title VII’s protections.” App. 5a-6a. “The DA’s Office did not plead the personal-staff exemption in its answer.” App. 11a; see *id.* at 2a, 3a, 6a, 9a, 13a. The district judge similarly held that “[a]s Plaintiff correctly points out, Defendant did not plead the ‘personal staff’ affirmative defense in its Answer, nor did Defendant seek to amend its Answer to include this defense.” App. 45a. And the magistrate judge reached the same conclusion. “[T]he Court’s own review of Defendant’s Answer ... indicates that Defendant did not plead the exemptions as affirmative defenses.” App. 72a.

More broadly, the court of appeals concluded that “the DA’s Office failed to raise Title VII’s personal-staff exemption until after discovery closed [in 2022].” App. 2a. “[A]fter discovery had closed, the DA’s Office notified Younge and the district court of its intent to raise the personal-staff exemption at summary judgment.” App. 6a (emphasis added). The district court noted that “[d]uring the hearing ... the Magistrate Judge determined that Defendant did not put Plaintiff on notice of its intent to reply on the ‘personal staff’ exemption until a hearing that this Court held on an unrelated [discovery] issue on March 14, 2022.” App. 42a.²

2. Respondent asserts that it raised the affirmative defense at “hearings [plural] before the district court prior to the submission

“Defendant first expressed its intent to rely on the defense at a hearing eleven months after the Scheduling Order deadline for amendments.” App. 45a. “The Magistrate Judge expressed concern about ‘Defendant’s failure to raise the employee exemptions earlier in the litigation; and noted that ‘by the time Defendant expressly mentioned its intent to rely on the “personal staff” exemption, discovery had closed approximately two months prior’” App. 48a. Similarly, the magistrate judge emphasized that “Defendant did not purposefully put Plaintiff on notice of its intent to reply on the employee exemptions until March 14, 2022” (App. 73a n. 4), and that “discovery did not put Younge on notice that Defendant would raise the employee exemptions as affirmative defenses.” App. 74a.

Counsel for respondent candidly acknowledged to the magistrate judge that the reason he had not raised the Title VII affirmative defense before March 2022—a year after filing the answer—was because until that time he was unaware of that Title VII exemption. The magistrate judge recounted that “[d]uring oral argument, I inquired about Defendant’s failure to raise the employee exemptions earlier in the litigation, and defense counsel explained that the employee exemption[] came to his attention when he began drafting the summary judgment motion in February or March [2022].” App 72a.³

of the motion for summary judgment.” Br. Opp. 6. That occurred at only a single district court hearing, the discovery hearing in March 2022, a year after the answer was filed and the scheduling order deadline for amendments had passed. App. 42a, 45a.

3. Tr. Dec. 9, 2022, at 23

THE COURT: Well, tell me about your defense and when you decided you were going to raise it. Because

Because counsel for respondent was admittedly unaware of the Title VII exemption until at least February 2022, its earlier March 2021 answer could not have been intended as a reference to that Title VII provision. The full text of the sentence in the answer on which the brief in opposition now relies makes clear that the sentence, and the phrase “personal staff,” were instead referring to a non-federal issue related to county personnel practices⁴.

it looks to me like it might have been really late, possibly after the close of discovery.... So when did you decide?

MR. GREEN: Sure. So Your Honor is correct, I started working on the motion for summary judgment and I realized this was an issue. And that was, I don't know, February or March [2022].

4. Paragraph 33 of the amended complaint alleged that Younge had been told she could not file a complaint with county officials because she was a member of Howard's “executive staff.” ECF No. 3, at 8; Br. Opp. 4. The particular passage on which respondent relies was in a response to the allegation of paragraph 33 in the complaint that county officials had used the phrase “executive staff.”

33. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 33 of the Amended Complaint and hence denies same and demands strict proof from Plaintiff. By way of further answer Defendant admits that as Deputy Chief of Staff to the District Attorney Plaintiff was a member of the District Attorney's executive and/or personal staff.

ECF No. 53, at 10.

The point of the answer's reference to “personal staff” was to set out respondent's view that if Younge had indeed been told she

As the court of appeals noted, and respondent acknowledged, the Fulton County Personnel Practices and Procedures use its own idiosyncratic definition of the phrase “personal staff.” App. 33a; Br. Opp. 2. Respondent does not contend that the county’s particular standard of who are “personal staff” under the county’s own personnel practices is the same as the multi-factor Title VII standard regarding the federal statutory exemption.⁵

could not file a complaint, county officials would have said that was because Younge was “personal staff” (a term of art under county practices), not because she was “executive staff.” Response Br. of Appellee 21 n. 5. The county policy limiting who can file an internal complaint excludes “personal staff,” but does not bar complaints by “executive staff.”

Respondent’s quotation from the second sentence in this portion of its answer omits the key words “executive and/or.” Br. Opp. 4. The answer’s use of the words “executive and/or”—replaced in the brief in opposition by an unexplained ellipsis—is inconsistent with respondent’s assertion that the answer “unequivocally stated” that Younge was personal staff. Br. Opp. 3; see *id.* at 6 (“unequivocal”). The word “admits” in that sentence is inconsistent with respondent’s assertion that this sentence was intended as an assertion of an affirmative defense.

5. The standards are clearly different. *Compare* App. 15a-29a (Title VII standard) *with* Fulton County Guidebook, Definitions, p. 2, available at <https://fultoncountyga.gov/-/media/PERSONNEL-POLICIES-AND-PROCEDURES-July-2025-Update-v2.pdf> (visited February 24, 2026).

CONCLUSION

The deeply embedded conflict regarding the rule in the 1988 decision in *Hassan* has persisted for almost four decades and has been exhaustively vetted. The issue has been addressed in eleven of the twelve geographical circuits, and the resulting opinions have given rise to a three-way division among the courts of appeals. This case is a particularly appropriate vehicle for addressing this recurring question, because here a proposed belated amendment asserting the unpled Title VII affirmative defense would have been barred not only by the Rule 15 standard regarding amendments, but also by the more stringent Rule 16 standard regarding modification of scheduling orders.

It is important that Federal Rules of Civil Procedure be applied evenly. The Federal Rules of Civil Procedure sought to “prescribe[] identical procedure for all actions.” *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 257 (1949). This Court has repeatedly granted review when conflicts have arisen regarding those Rules. *Kemp v. United States*, 596 U.S. 528 (2022) (conflict regarding Rule 60(b)(1)); *Nutraceutical Corp. v. Lambert*, 586 U.S. 188 (2019) (conflict regarding Rule 23(f)); *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538 (2010) (conflict regarding Rule 15(c)). The time has come to resolve this complex conflict regarding the relationship among Rules 8(c), 15(a)(2), 16(b)(4) and 56(a).

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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