

No. _____

In the
Supreme Court of the United States

ELENA MUKHINA,
Petitioner,
vs.

WALMART, INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

E. Travis Ramey
Counsel of Record
Appellate Advocacy Clinic
University of Alabama School of Law
Box 870392
101 Paul W. Bryant Drive, East
Tuscaloosa, Alabama 35487
(205) 348-4960

Counsel for Petitioner Elena Mukhina

QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 provides workers a private right of action for employment discrimination based on race, color, religion, sex, or national origin. Before bringing their claims in court, workers must first bring a charge alleging discrimination before the Equal Employment Opportunity Commission. This Court has long recognized that Title VII proceedings should not be onerous. It has acknowledged, for instance, that discrimination can present itself in a panoply of manners, including targeting a protected class’s characteristics instead of the class itself. Accordingly, multiple circuits have held that discrimination based on a foreign language can constitute discrimination based on national origin. This Court has also held that EEOC documents are construed liberally, erring in favor of workers. Many circuits have, to that end, held that an EEOC intake form can constitute a charge for purposes of administrative exhaustion even when workers also file a timely formal charge. And most circuits have held that it is the facts alleged in a charge—instead of any specific label—that determine whether it exhausts a claim.

The questions presented are as follows.

1. Can harassment targeting a person’s English language proficiency amount to national-origin discrimination under Title VII?
2. To what extent should courts consider documents other than a formal EEOC charge for purposes of Title VII administrative exhaustion?
3. Must workers specifically designate in an EEOC charge the type of discrimination alleged to exhaust a Title VII claim for that type of discrimination?

PARTIES TO THE PROCEEDING

Petitioner is Elena Mukhina.

Respondent is Walmart, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Alabama and the United States Court of Appeals for the Eleventh Circuit:

Mukhina v. Walmart, Inc., No. 22-361-JB-C, 2024 WL 39201 (S.D. Ala. Jan. 3, 2024).

Mukhina v. Walmart, Inc., 162 F.4th 1128 (11th Cir. 2025)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Elena Mukhina respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The United States District Court for the Southern District of Alabama granted Respondent Walmart, Inc.’s motion for summary judgment. *Mukhina v. Walmart, Inc.*, No. 22-361-JB-C, 2024 WL 39201 (S.D. Ala. Jan. 3, 2024). The United States Court of Appeals for the Eleventh Circuit affirmed the district court’s judgment. *Mukhina v. Walmart, Inc.*, 162 F.4th 1128 (11th Cir. 2025).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued final judgment on December 22, 2025. This Court granted Mukhina’s Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari on March 18, 2026. No. 25A1023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1), 42 U.S.C. § 2000e-5(b), and 42 U.S.C. § 2000e-5(f)(1) are reproduced in the Appendix to this petition.

INTRODUCTORY STATEMENT

On July 2, 1964, Congress passed the Civil Rights Act of 1964. Title VII of that Act conferred a private right of action for employment discrimination based on race, color, religion, sex, or national origin. And it created the EEOC, an agency “empowered ... to prevent any person engaging in any unlawful employment practice[.]” 42 U.S.C. § 2000e-5(a). The Act had survived sixty days of debate and a roughly fourteen-hour filibuster, culminating in an achievement as novel as it was historic: “Never in history had the Senate been able to muster enough votes to cut off a filibuster on a civil rights bill.” Civil Rights Filibuster Ended, U.S. SENATE (June 10, 1964), <https://tinyurl.com/427ur9fw>.

In the years since its passage, this Court’s decisions have helped ensure that Title VII secures its central promise: protecting marginalized workers. Those who perpetuate the corrosive effects of employment discrimination rarely state their intentions directly. But that reality has not stopped this Court from recognizing disparate treatment where disparate treatment exists. The *McDonnell Douglas* framework is one testament to that fact. *Price Waterhouse* is another. The list goes on. Employers who act based on discriminatory animus cannot escape Title VII by hiding it under a thin veil of pretext, stereotype, or facially neutral language.

And what is more, the Court has repeatedly recognized that EEOC proceedings should facilitate—not impede—workers asserting their rights. Because workers are generally unschooled in the art of legal pleading, the Court takes a liberal approach to interpreting workers’ EEOC filings. Thus, Title VII is worker friendly. This case is part of upholding that legacy.

This case concerns Petitioner Elena Mukhina, but it also affects millions like her who speak a foreign language or practice a minority religion. Mukhina grew up in the Soviet Union and came to the United States fleeing persecution. While working at Walmart, this asylee and practicing Russian Folk Christian faced daily harassment from coworkers and customers alike. People mocked her difficulties with English, compared her to Putin, and confronted her over the Russian invasion of Ukraine.

Mukhina did all she could to try to overcome the difficult environment. She brought it to management's attention four separate times. But instead of protecting her, supervisors joined in on the hostility. Management also denied her time off for New Year's Eve, a significant holiday for Russian Folk Christians, even after she explained the religious nature of the holiday.

Undeterred by management's hostility, Mukhina continued to insist on her right to a nondiscriminatory workplace. After her internal complaints went nowhere, Mukhina turned to Title VII's protections. She sounded the alarm with the EEOC and, upon receiving a right to sue letter, brought claims for national origin and religious discrimination.¹ Yet at every turn, the judicial system has penalized her—not for lack of substance or veracity, but for imprecision. The Eleventh Circuit held that Mukhina had faced harassment over her language barrier, not her national origin. And even if language-based harassment could constitute national-origin discrimination, the court concluded that it would not matter unless Mukhina uttered the magic words “national origin discrimination” to her supervisors. Moreover, although she

¹ And, not relevant here, for retaliation.

had reported the denial of her request for time off to celebrate New Year's Eve through an EEOC intake form, the court refused to consider that form, marking her religious-discrimination claim unexhausted. And the court reasoned that, even if it were to consider the form, Mukhina's description of New Year's Eve was cultural—not religious. Accordingly, it affirmed summary judgment for Walmart on both claims.

Mukhina's case shines light on the effects of an overly restrictive approach to Title VII. Under the Eleventh Circuit's approach, national-origin discrimination, however blatant, has no remedy so long as the discriminator targets a result of that origin—lack of proficiency in English. Furthermore, in holding that Mukhina did not exhaust her religious-discrimination claim, the court has set a “magic words” requirement for workers. Again, this punishes Mukhina for her language barrier—both as a layperson unschooled in legalese and as an immigrant unfamiliar with English.

Congress enacted Title VII to lift burdens like those Mukhina has faced, and this Court has guarded against them in the past. Mukhina respectfully requests certiorari in her case to reaffirm Title VII's protections.

STATEMENT OF THE CASE

This case arises from the severe harassment and discrimination that Mukhina faced while working at Walmart. Mukhina was born in the Soviet Union. (ECF 2 at 4; ECF 35-1 at 24.) For her entire life, she has been a practicing Russian Folk Christian. (ECF 2 at 3, 23–24; ECF 32-2 at 2, 14–15; ECF 35-1 at 22.) She speaks Russian fluently, but her English is limited. (ECF 33 at 2.) Her daughter interprets for her when necessary. (ECF 32-2 at 22.)

Mukhina fled persecution in Russia and received asylum in the United States in 2018. (ECF 35-1 at 22.) Shortly after arriving in the United States, she got a job at a Walmart in Washington state. (ECF 35-1 at 24.) She worked well in this role and received praise for her work. (ECF 35-1 at 24; ECF 2 at 7.) While at the Washington Walmart, she had only one negative interaction with a customer, and the store took immediate action to remedy the problem and create a safe work environment. (ECF 35-1 at 24; ECF 2 at 6.)

In August 2021, Mukhina and her daughter moved to Daphne, Alabama. (ECF 35-1 at 24.) Mukhina applied for a job at the Walmart there. (*Id.*) Walmart offered her a daytime position, (ECF 32-3 at 21), and she began working there in September 2021. (ECF 35-1 at 24.) On her second day of work, one associate said to another in her presence, “She doesn’t understand English at all. How is she going to work.” (ECF 2 at 10.) That was just the start of the discrimination she faced.

Mukhina often worked in the apparel department alone, requiring her to interact with customers without support. (ECF 33 at 3.) When customers discovered that she struggled with English, 30% of them “expressed their dissatisfaction, laughed, or mocked her.” (ECF 2 at 11; ECF 35-1 at 24–26.) Some customers sharply asked, “What are you doing here if you don’t speak English?” (ECF 2 at 11.) Others made comments about “Russia” and “Putin” that made her feel uncomfortable and unwelcome. (ECF 2 at 11; ECF 35-1 at 24–26.)

Customers antagonized Mukhina daily, sometimes more than once per day. (ECF 35-1 at 8; ECF 2 at 11.) One customer, after discovering her language difficulty,

followed her for fifteen minutes, berating her that “People like you should not work here ... if you don’t speak English and can’t explain anything to me, go back to your country and live there!” (ECF 2 at 11.) Another customer who knew Mukhina could not speak English sought her out in the store to harass her. (*Id.* at 12.) The customer ran around her, threw merchandise on the floor, and “left laughing.” (*Id.*) Others became furious, jumping up and down while yelling at her. (*Id.*) One screamed, “Talk to me in English! Or go back to your Moscow!” (*Id.*) Mukhina tried to communicate with customers by using an app on her phone, but one customer blared, “You don’t understand anything, and even got into the phone while talking to me! Russian bitch!” (*Id.*)

After two weeks of working in these conditions, Mukhina “shuddered at every customer who approached her, was afraid of them, and tried to hide somewhere deeper in the department” to avoid the torment. (ECF 2 at 13; ECF 35-1 at 8.) Her interactions with coworkers left her equally dismayed. (ECF 2 at 13; ECF 35-1 at 24–26.) When supervisors ordered her to work at the front of the store as a greeter (answering questions and checking receipts), she refused because she felt unsafe after the harassment she had endured. (ECF 32-2 at 6.)

Instead of remedying the hostile environment and discrimination, Mukhina’s supervisors became angry, complained about her, and turned away when she approached them. (ECF 35-1 at 24; ECF 2 at 13.) Mukhina asked her coworkers to speak slower so she could understand them; all but one refused. (ECF 2 at 14.) Some would laugh at her when she could not understand them and shout in her face as if she were deaf or disabled. (*Id.*; ECF 35-1 at 24, 26.) In late October 2021, Mukhina was working

alone in the jewelry department. (ECF 35-1 at 24; ECF 2 at 14.) She tried to help a customer, but he became angry when she could not understand him. (ECF 2 at 14.) He screamed expletives at her, waved his hands in her face, and made her so afraid she thought he would “hit her.” (*Id.*)

Exhausted by the constant ridicule, Mukhina approached her supervisor, Donald Bayard, and begged for help. (ECF 35-1 at 13, 24.) She used her daughter as an interpreter to explain how customers had harassed her. (ECF 35-1 at 13; ECF 32-2 at 9.) She explained that customers were mistreating her “all the time” and yelling at her, and that they did this because she did not speak English. (ECF 35-1 at 13–14.) She pleaded for Bayard to reassign her to night shift to minimize her interactions with customers. (ECF 35-1 at 13.) He agreed to find a replacement and to reassign her. (ECF 35-1 at 14.) When she expressed concern about how long this would take, he assured her that it would take less than a month. (*Id.* at 15.) He was wrong. For well over a month, customers and coworkers continued to harass her. (ECF 2 at 16.)

Still on day shift, Mukhina expressed concern to a supervisor over a merchandise-placement policy. (ECF 35-1 at 25; ECF 2 at 16–17.) In response, the supervisor turned to another associate and said, “Did she say something?” laughed, and walked away. (ECF 2 at 17.) When coworkers called for Mukhina over the radio, they refused to call her by name, like they did for every other associate. Instead, they called her by her job title. (*Id.*) Coworkers also refused to let her use a shopping cart to move apparel freight, even though other associates were allowed to do so. (ECF 32-2 at 6.)

Mukhina's supervisors not only failed to take corrective action to remedy the hostile environment, but they blamed her for it. At the end of November, her supervisor, Stephanie, told her she had to work in the jewelry department. (ECF 2 at 19.) Mukhina explained to Stephanie that customers constantly harassed her for not knowing English and the jewelry department role would only worsen the problem. (*Id.*) The supervisor's only response was: "Well, you really don't know English, that's why they treat you like that." (*Id.*)

After months of daily torment from customers and associates, Mukhina's stress spilled into her personal life. She became "terribly afraid" of people even outside of work. (ECF 2 at 18; ECF 35-1 at 25.) Fear of ridicule diminished her ability to understand English. (ECF 2 at 18; ECF 35-1 at 25.) And she began to suffer from stress-induced muscle spasms, a relapse of a previous condition. (ECF 2 at 18; ECF 32-2 at 19; ECF 35-1 at 25.)

Six weeks after first speaking with Bayard, Mukhina approached him again about moving to night shift. (ECF 35-1 at 17; ECF 2 at 19.) He had disregarded her previous request and complaints of customer harassment. (ECF 35-1 at 17; ECF 2 at 19.) This time, Mukhina explained that associates, as well as customers, harassed her daily because she did not speak English. (ECF 35-1 at 18, 20.) Bayard promised to speak with a manager to reassign Mukhina, but he never did. (ECF 35-1 at 19; ECF 2 at 20.) Only after she approached a new supervisor, Susan, did Mukhina finally receive a transfer to night shift. (ECF 35-1 at 25; ECF 2 at 20.) While coworkers still treated Mukhina with hostility, she was happier on night shift because she at

least avoided continued harassment by customers. (ECF 32-2 at 12–13; ECF 2 at 22.) Night managers even praised Mukhina for her work. (ECF 2 at 23.)

In mid-December 2021, Walmart scheduled Mukhina to work on New Year’s Eve, a religious holiday for Russian Folk Christians. (ECF 2 at 23.) She submitted a time-off request, hoping to celebrate the important holiday with her daughter. (ECF 35-1 at 44.) Manager Crystal Croll denied this request. (ECF 35-1 at 44.) Mukhina then brought her daughter, who explained to Croll that New Year’s Eve was “like Christmas” to Russians. (ECF 2 at 23.) Mukhina felt the comparison communicated her religious beliefs and practices. (ECF 32-2 at 91–93.) Croll responded that no one was allowed off for New Year’s Eve. (*Id.*) Later, Mukhina learned that another associate received four days off to celebrate Christmas with her family. (*Id.* at 25.)

Mukhina reported this discrepancy through Walmart’s official complaints portal. (ECF 2 at 25.) She then missed work to celebrate her religious holiday and received two attendance points. (ECF 6 at 7.) At the end of January, Mukhina had a telephone interview with Walmart to discuss her complaint. (ECF 2 at 27–28.) Walmart’s internal report cited no wrongdoing. (ECF 32-2 at 26.)

Throughout January 2022, Mukhina reemphasized her complaint about moving the apparel freight herself. (ECF 32-2 at 6, 12.) She even brought in a doctor’s report recommending she cease strenuous activity. (ECF 2 at 27.) Her supervisors eventually met this need at the end of February. (*Id.* at 28.) Mukhina was responsible for a large workload by herself, isolated from any of her coworkers. (ECF 32-2 at 10.)

When Russia invaded Ukraine, it raised the already significant tension around Mukhina. (ECF 2 at 29.) A coworker verbally attacked her. (ECF 2 at 29–30.) After realizing Mukhina was Russian, the other associate exclaimed a combination of “Russia,” “Ukraine,” and “F— you.” (*Id.*) Mukhina finally had enough of the intolerable conditions and took a few days off to reflect on her employment. (ECF 2 at 30.) She decided that Walmart was unwilling to remedy the environment at the store and had her daughter return her company cellphone. (*Id.*) Walmart fired her. (*Id.*)

Mukhina sought help from the EEOC for the discrimination she faced at Walmart. She completed an intake questionnaire. (ECF 35-1 at 22.) In it, she listed “National origin and/or ethnicity” as the reason for the complaint. (*Id.*) Mukhina stated that she was denied time off on New Year’s Eve. (*Id.*) She explained that New Year’s Eve “is like Christmas in America.” (*Id.*) Mukhina also filled out a formal charge sheet, in which she alleged retaliation and discrimination based on national origin. (ECF 35-1 at 26.) The narrative section of the charge did not include any details about her being denied time off on New Year’s Eve. (*Id.*) Mukhina received a right-to-sue letter. (ECF 2 at 2.)

Mukhina filed a pro se complaint against Walmart. (ECF 2 at 10.) She alleged that it had subjected her to a hostile work environment based on her national origin. (ECF 2 at 38.) She also alleged that it discriminated against her based on her religion by failing to provide reasonable accommodation. (ECF 2 at 39–40.) She also alleged that it retaliated against her for requesting accommodation and complaining about the alleged discrimination. (ECF 2 at 42.) Walmart moved for summary judgment on

all counts. (ECF 31.) The district court granted Walmart's motion. (Pet. App. 15A–36A.) It concluded that the *McDonnell Douglas* framework was the only way Mukhina could defeat Walmart's motion for summary judgment. (*Id.* 22A) The court then held that Mukhina had not made a prima facie case of discrimination or retaliation. (*See id.*) Mukhina timely appealed.

A three-judge panel of the Eleventh Circuit affirmed. First, the Eleventh Circuit held that Mukhina could not establish a hostile work environment. (*Id.* 5A–8A.) The Eleventh Circuit concluded that discrimination targeted at Mukhina's linguistic characteristics could not support an inference of national-origin discrimination without other evidence of national-origin animus because language is not strictly immutable. (*See id.* at 6A–7A.) Thus, the Eleventh Circuit held that the discrimination was not based on Mukhina's national origin. (*Id.*) The court also held Mukhina failed to establish a basis for holding Walmart liable. (*Id.* at 8A.) It reasoned that she told her supervisors only that the harassment concerned her language and did not explicitly say that the harassment concerned her national origin. (*Id.*)

Second, the Eleventh Circuit held that Mukhina failed to exhaust her administrative remedies for her religious-discrimination claim. (*Id.* at 8A–10A.) Because Mukhina filed a formal charge after her intake questionnaire, the court concluded that it could disregard the intake questionnaire. (*Id.* at 9A.) Although the intake questionnaire explained Walmart's failure to provide a religious accommodation, the charge did not. (*Id.*) The court also concluded that even if the intake questionnaire counted, a claim of religious discrimination would not be expected to grow out of it.

(*Id.* at 9A–10A.) In the court’s view, Mukhina’s explanation that New Year’s Eve is like “Christmas in America” was insufficient. (*Id.*)

Those holdings from the Eleventh Circuit raise grave implications for the continued efficacy of Title VII and its promise of equal treatment in the workforce. Mukhina seeks this Court’s review.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit’s restrictive approach to Title VII leaves no room for reasonable inference and punishes workers for not using precise magic words. The Eleventh Circuit’s rigid holding that language-based harassment does not constitute national-origin discrimination contradicts this Court’s precedent and differs sharply from other circuits. Its brightline rule against using intake forms in the administrative-exhaustion analysis deepens an open and acknowledged circuit split. Its decision also deepens a circuit split over the level of specificity needed in an EEOC charge to exhaust a claim. What is more, this case is a clean vehicle through which to resolve these important issues of federal law.

I. This Court should grant review and hold that language-based harassment can constitute national-origin discrimination under Title VII.

This case presents an important question about the scope of Title VII’s protection for those of foreign origin. The constant harassment that Mukhina suffered while working for Walmart presents that question in visceral detail. Her fluency in Russian and lack of proficiency in English flowed directly from her Russian origin. Yet the Eleventh Circuit held that language-based harassment is not national-origin

discrimination. In doing so, the Eleventh Circuit contradicts this Court’s precedent and differs sharply from several other circuits. This Court should grant review.

A. This case presents an exceptionally important question of federal law.

More than 74 million people in the United States do not speak English as their primary language.² Of that number, there are almost 30 million people in the U.S. who, like Mukhina, are not proficient in speaking, reading, writing, or understanding English.³ Yet these people must work and earn a living like everyone else. Thus, this case implicates the rights of a significant segment of the American workforce and population. Whether language can act as a proxy for national origin in employment discrimination cases affects millions.

Simultaneously, animus against people of foreign origin is growing rapidly. That is especially true in the employment context, given the perception among many Americans that immigrants are taking their jobs.⁴ The increasingly xenophobic climate in the United States, fueled in part by rhetoric from popular politicians and media outlets, makes this issue important for judicial resolution.⁵ The scope of Title

² See Table of American Census Bureau Data, MPI: Migration Policy Institute, <https://tinyurl.com/acs8u782> (last visited April 8, 2026) (providing 2024 statistics).

³ *Enrollment and Access Barriers for People with Limited English Proficiency*, MACPAC (July 2024), <https://tinyurl.com/4wn54dhz>.

⁴ Merve Armagan Bogatekin, Ivy Ho & Yan Wang, *Mapping American Attitudes Towards Refugees and Immigrants: Insights into Anti-Refugee and Anti-Muslim Sentiments*, Soc. Sci., Mar. 8, 2025 at 1, 12.

⁵ See *id.* at 11; see also Tony Cowser, *LA County Releases Annual Report on Hate Crimes: Highest Total of Hate Crimes Ever Reported*, County of Los Angeles (Dec. 11, 2024), <https://tinyurl.com/5ekydh8j> (noting a dramatic increase in anti-immigrant violence, hate, and harassment); Sam Levin, *Immigrant Students Experience More Bullying as ICE Raids Cause ‘Culture of Fear,’ Says Survey*, The Guardian (Dec. 10, 2025), <https://tinyurl.com/y2fxbhmp> (same).

VII's protection against national-origin discrimination will become increasingly important as animus rises against a significant segment of the population.

A ruling from this Court indicating whether language-based harassment can constitute national-origin discrimination is exceptionally important in this climate of increasing animus toward those of foreign origin. A person's language is intimately tied to her national origin. Patrick Wallace, *English-Only Rules in the Workplace: Examining the Need to Balance the Burdens of Proof under Disparate Impact Analysis*, 7 DePaul Bus. L.J. 223, 239, 243 n.166 (1994) (citing judges and scholars who make this argument). As one commentator observes, "[l]anguage is the lifeblood of every ethnic group" and penalizing a person "for practicing his native tongue is to strike at the core of ethnicity." James Harvey Domengeaux, Comment, *Native-Born Acadians and the Equality Ideal*, 46 La. L. Rev. 1151, 1167 (1986). Because a person's language is inextricably tied to her national origin, language-based harassment is an easy way for people to channel their animus against those of foreign national origin.

Increasing animus will continue to find an outlet in language discrimination, as it did among Mukhina's customers and coworkers. (See ECF 35-1 at 8, 24–26; ECF 2 at 11, 13.) The type of severe harassment that Mukhina faced at Walmart is unlikely to go away any time soon, and those of foreign origin will continue to suffer the corrosive effects of employment discrimination. Congress enacted Title VII because it "viewed economic equality as both a practical necessity and a moral imperative." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 388 (1977) (Marshall, J., concurring in part) (citing remarks from multiple senators who backed Title VII). But workplace

equality for those of foreign origin is an empty promise if workplace hostility continues for those who speak foreign languages.

Mukhina’s case demonstrates this in detail. The environment at Walmart became so abusive on account of her language that she ultimately had to leave her job and lose her only source of income. (ECF 2 at 30.) Courts that fail to recognize the close ties between language and national origin will therefore miss an important category of national-origin discrimination. They will miss a form of abuse that worsens the “terms, conditions, or privileges of employment” for millions of foreign-born workers. 42 U.S.C. § 2000e-2(a)(1). And those of foreign origin (like Mukhina) will continue to suffer marginalization within the workforce.

What is more, because tens of millions of people lack English proficiency in a climate of increasing hostility towards those of foreign origin, this issue implicates countless employers around the country and across almost every industry.⁶ Employers seeking to comply with Title VII lack a clear rule on how to handle work environments that become hostile towards those who speak foreign languages. If those who hold animus towards people of foreign national origin can hide their animus under the guise of language-based harassment, then employers will face uncertainty over where to draw the line between what conduct does and does not implicate Title VII. Employers facing this uncertainty must draw their own lines. The EEOC once provided clear guidance: national-origin discrimination is “the denial of equal

⁶ See Jill H. Wilson, *Investing in English Skills: The Limited English Proficient Workforce in U.S. Metropolitan Areas* 13–16 (2024) (highlighting the wide distribution of workers with low English proficiency across U.S. industries and regions).

employment opportunity ... because an individual has the ... linguistic characteristics of a national origin group.” 29 C.F.R. § 1606.1. But the Eleventh Circuit’s decision disregards that guidance. Whether language-based harassment can be national-origin discrimination is important for both the millions of people who speak foreign languages and the countless businesses who employ them.

The Eleventh Circuit’s decision undermines Title VII’s promise of equal employment opportunities for those of foreign national origin. A ruling on this issue is imperative to give full force to Title VII.

B. The Eleventh Circuit’s holding contradicts this Court’s precedent.

This Court should resolve this exceptionally important question of federal law by restoring Title VII’s protections. The Eleventh Circuit’s holding contradicts disparate-treatment principles that this Court has long recognized. It therefore undermines the protection that Title VII provides for millions of workers.

In denying Mukhina’s hostile-work-environment claim, the Eleventh Circuit relied on a confined concept of what constitutes national-origin discrimination. (Pet. App. 5A–8A.) That cramped view conflicts with this Court’s precedent and decisions from other circuits. To reach its decision, the Eleventh Circuit extended the rigid distinction it made between immutable and non-immutable traits in *EEOC v. Catastrophe Management Solutions* to Mukhina’s national-origin-discrimination claim. (*Id.* at 6A (citing *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016) (holding that the complaint failed because dreadlocks are not an “immutable characteristic of black persons”))). Under the Eleventh Circuit’s strict immutability/non-

immutability distinction, Title VII protects only the characteristics of a class that are “immutable.” (Pet. App. 6A–7A.) In other words, it is not only the protected class itself (i.e., race, sex, national origin) that must be immutable. (*See id.*) Instead, discrimination targeting traits that are closely associated with a protected class is insufficient evidence of discriminatory animus unless those traits are also strictly immutable. (*See id.*)

Thus, the Eleventh Circuit held that Mukhina’s claim failed because the harassment focused on the fact that she spoke Russian and not English. (Pet. App. 5A–8A.) In the court’s view, her claim could survive summary judgment only if the harassers also otherwise suggested that the reason for the harassment was her Russian origin. (*Id.*) The Eleventh Circuit’s view leaves no room for inference. Discriminatory animus can continue so long as the abusers do not directly state their intentions.

But the Eleventh Circuit’s treatment of Mukhina’s claim conflicts with how this Court has long approached disparate-treatment claims under Title VII. In *Price Waterhouse v. Hopkins*, for example, this Court refused to draw such a rigid distinction between the employer’s behavior-based gender stereotypes, which are not immutable, and illegal sex discrimination. *See* 490 U.S. 228, 250–51 (1989) (holding that comments about how the plaintiff talks, dresses, or styles her hair—all of which are mutable choices—can show discriminatory animus). Further, in *Ash v. Tyson Foods, Inc.*, this Court held that a facially race-neutral remark may be “probative of bias,” “depend[ing] on various factors including context, inflection, tone of voice, local custom, and historical usage.” *See* 546 U.S. 454, 456 (2006). And in *U.S. Postal Service*

Board of Governors v. Aikens, this Court made clear that it is error for a court to require direct evidence of discriminatory intent. 460 U.S. 711, 717 (1983). Instead, circumstantial evidence is sufficient in Title VII cases. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003). And as always, courts should draw reasonable inferences in favor of the nonmovant when ruling on a motion for summary judgment. *Tolan v. Cotton*, 572 U.S. 650, 651, 656–57 (2014) (admonishing the Fifth Circuit for not adhering to this principle).

In analyzing Mukhina’s hostile-work-environment claim, the Eleventh Circuit contradicts these principles. By holding that comments about foreign language do not establish national-origin discrimination on their own, the court contradicts the holding in *Price Waterhouse* that comments about mutable characteristics can show discriminatory animus. *See Price Waterhouse*, 490 U.S. at 250–51. It contradicts *Ash*’s holding that remarks that do not directly refer to the protected class can still be probative of discriminatory bias. *See Ash*, 546 U.S. at 456. And in contradicting these basic principles, the Eleventh Circuit effectively closes the door to circumstantial evidence to prove Title VII claims despite this Court’s pronouncements. *See, e.g., Desert Palace*, 539 U.S. at 99–100.

It also leaves no room for the reasonable inference that this language-based harassment suggests animus towards Mukhina’s foreign origin. If the harassers must state their intent to discriminate based on national origin, then only those plaintiffs who obtain direct admissions from their abusers will survive summary judgment.

That contradicts the entrenched principle that the non-moving party is entitled to reasonable inferences at summary judgment. *Tolan*, 572 U.S. at 651, 656–57.

By holding that Mukhina’s claim cannot survive summary judgment, the Eleventh Circuit effectively tells lower courts that comments about language can never lead to an inference of national-origin discrimination. (Pet. App. 5A–8A.) This not only contradicts basic Title VII principles, but as to entire category of discrimination, it also closes a door that this Court has been unwilling to shut. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 371 (1991) (recognizing that for certain ethnic groups, language should be treated as a surrogate for protected classes); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92–93 & n.5 (1973) (finding no evidence of national-origin discrimination, but recognizing that a refusal to hire people of a “Spanish-speaking background” would have constituted sufficient evidence), *abrogated on other grounds* by 8 U.S.C. § 1324(b).

By holding that language-based harassment is not national-origin discrimination, the Eleventh Circuit refused to apply basic Title VII principles, it failed to recognize the connection between language and national origin, and it shut the door to reasonable inferences at the summary judgment stage.

C. The Eleventh Circuit differs sharply from several sister circuits.

Not only does the Eleventh Circuit’s holding contradict this Court’s precedent, but it also differs sharply from several sister circuits. The Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits all recognize that evidence of language-based harassment on its own can show national-origin discrimination. These circuits would have likely ruled in Mukhina’s favor.

The Sixth Circuit, for example, recognizes linguistic discrimination as national-origin discrimination. See *In re Rodriguez*, 487 F.3d 1001, 1008–09 (6th Cir. 2007). In *Rodriguez*, for example, the plaintiff interviewed for a supervisor position at FedEx. *Id.* at 1005. The plaintiff was qualified for the position. *Id.* But the supervisor declined to hire him because another manager was concerned about the plaintiff’s accent and speech pattern and made disparaging comments about his “language” and “how he speaks.” *Id.* at 1005–06.

The Sixth Circuit held that the comments concerning Rodriguez’s linguistic traits were evidence of national-origin discrimination. *Id.* at 1008–09. It explained that its precedent recognizes that “accent and national origin are inextricably intertwined.” *Id.* (citing *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 549 (6th Cir. 1991)); see also *Berke v. Ohio Dep’t of Pub. Welfare*, 628 F.2d 980, 981 (6th Cir. 1980) (holding that denying the plaintiff two positions because of her Polish accent constituted national-origin discrimination because her accent “flowed from her national origin”). It also cited the EEOC regulation that recognizes linguistic discrimination as national-origin discrimination. *Id.* at 1008–09. The Sixth Circuit also concluded that treating comments about speech characteristics as national-origin discrimination accords with this Court’s statements on the subject. See *id.* at 1009 (citing *Hernandez*, 500 U.S. at 371; *Espinoza*, 414 U.S. at 92–93 & n.5.).

The Tenth Circuit also recognizes linguistic discrimination as national-origin discrimination. See *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) In *Carino*, a university hired Carino, who was of Filipino, as a supervisor

for a dental lab. *Id.* at 816. Less than a year after he started, the university changed his job title from supervisor to technician without his knowledge. *Id.* The university then hired someone else to become the lab supervisor, and it reclassified Carino a second time to a position where he was left “performing general functions in the lab.” *Id.* at 817. The Tenth Circuit held that because Carino’s accent was a significant factor in the university’s decisions regarding his employment, he could establish a Title VII claim. *Id.* at 819–20; *accord Zokari v. Gates*, 561 F.3d 1076, 1090 (10th Cir. 2009) (noting that “comments regarding a plaintiff’s accent may constitute circumstantial evidence of national origin discrimination”); *Amro v. Boeing Co.*, No. 97-3049, 1998 WL 380510, at *2 n.3 (10th Cir. July 8, 1998) (“We construe comments about foreign accent to constitute indirect evidence of national origin discrimination.”).

The Ninth Circuit has also recognized linguistic discrimination as national-origin discrimination. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185 (9th Cir. 2003), *opinion amended on denial of reh’g*, No. 00-35999, 2003 WL 21027351 (9th Cir. May 8, 2003). In *Raad*, a school district refused to hire Raad, an immigrant from Lebanon, for a full-time teaching position. *Id.* at 1189–90. The district stated that it based the decision on her qualifications. *Id.* at 1193. But Raad pointed to comments from hiring personnel suggesting that her accent was the real reason. *Id.* at 1194–95. The Ninth Circuit held that a fact-finder could infer from these comments regarding her accent that the district refused to hire her based on her national origin. *Id.* at 1195. The court noted the “close relationship between language and national origin” and that an EEOC regulation classifies discrimination based on “linguistic

characteristics” as unlawful under Title VII. *Id.*; accord *Fragante v. City & Cty. of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989) (“Accent and national origin are obviously inextricably intertwined in many cases.”).

The D.C. Circuit has also recognized linguistic discrimination as national-origin discrimination. See *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 567 (D.C. Cir. 2019). Iyoha grew up in Nigeria speaking Eshan, but he learned English, moved to the United States as an adult, and started working for the Architect of the Capitol. *Id.* at 564. He eventually applied for a promotion and interviewed with a panel of four people. *Id.* at 564–65. When he did not get the promotion, he brought a national-origin-discrimination claim. *Id.* He presented evidence that one of the interviewers made disparaging comments about his foreign accent and that those comments may have influenced the panel’s decision. *Id.* at 568. The district court granted summary judgment for the employer, concluding that comments about foreign accent do not support an inference of national-origin discrimination. *Id.* But the D.C. Circuit reversed. *Id.* at 574. It explained that foreign accent and national origin are often intertwined and cited *Hernandez* for the proposition that language can be a surrogate for discriminatory animus. *Id.* at 567 (citing *Hernandez*, 500 U.S. at 371). The D.C. Circuit admonished the district court for not viewing the interviewer’s comments about foreign accent in the light most favorable to Iyoha. *Id.* at 568.

The Seventh and Eighth Circuits have also explicitly left the door open for linguistic discrimination to constitute national-origin discrimination without deciding the issue. See, e.g., *Hasham v. Cal. State Bd. of Equalization*, 200 F.3d 1035, 1050

(7th Cir. 2000) (explaining that “accent is generally recognized as a manifestation of national origin”); *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 975–76 (8th Cir. 2012) (finding no evidence that plaintiff’s manager mocked her accent but explaining that comments about foreign accent can reveal national-origin animus). Unlike the Eleventh Circuit, the Seventh and Eighth Circuits make no categorical distinction between discrimination based on linguistic characteristics and discrimination based on national origin.

The Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits would have likely ruled in Mukhina’s favor on her national-origin-discrimination claim. The Eleventh Circuit held that evidence of discrimination based on a person’s linguistic mannerisms cannot support an inference of national-origin discrimination on its own. (Pet. App. 5A–8A.) But those other circuits recognize that this evidence on its own shows national-origin animus. Moreover, the derogatory comments in those other cases mostly involved the plaintiff’s foreign accent. Mukhina’s case presents an even stronger example of how comments about linguistic mannerisms suggest national-origin animus because the coworkers and customers who harassed her focused on the fact that she could only speak Russian. Mukhina spoke Russian not by preference or choice; it was the only language that she spoke fluently when she suffered the harassment at Walmart. Her use of Russian flowed directly from the fact that she was born, grew up, and spent most of her life in Russia. It is inextricably tied to her national origin. And it is a much less subtle indication of her national origin than merely speaking English with a Russian accent. Harassment based on the fact she spoke

Russian would allow a reasonable jury to find national-origin animus on the part of her abusers. By categorically barring this possibility, the Eleventh Circuit splits with several of its sister circuits. This Court should resolve the split.

* * *

Whether language-based harassment can be national-origin discrimination is an increasingly important issue that affects workers and employers across the United States. By categorically shutting the door on this type of discrimination, the Eleventh Circuit contradicts the basic employment-discrimination principles set out in this Court’s precedent. And in doing so, it differs sharply from several other circuits. This case provides a clean presentation of the issue. This Court should grant certiorari and resolve this exceptionally important question about Title VII.

II. This Court’s intervention is necessary to resolve the circuit split over whether courts can, as part of an administrative-exhaustion analysis, consider documents other than timely formal charges.

The Eleventh Circuit declined to factor Mukhina’s intake form into its exhaustion analysis. In doing so, it contributed to an open, deep, and acknowledged circuit split. This Court has recognized that intake forms can satisfy administrative-exhaustion requirements when a worker files an untimely formal charge with the EEOC. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 392 (2008). But since then, the circuits have divided over whether they can consider intake forms in the absence of a timeliness issue.

This Court first addressed whether intake forms could satisfy administrative exhaustion requirements when deciding whether an EEOC intake form could constitute a “charge” for purposes of administrative exhaustion under the Age

Discrimination in Employment Act of 1967. *Holowecki*, 552 U.S. at 392. The Court held that an intake form could be (and, in the case before it, was) a charge. *Id.* at 399–406. And it established the following test for whether a document constitutes a charge:

In addition to the information required by the [EEOC] regulations ... if a filing is to be deemed a charge it must 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.

Id. at 402.

The Court acknowledged that this is a “permissive standard” allowing a “wide range of documents” to constitute charges. *Id.* But it reasoned that a permissive standard is necessary because “[t]he ADEA, like Title VII,” establishes a system abundant with pro se filings. *Id.* at 402–03. To that end, the system should be “accessible” to the layman. *Id.* at 403. Additionally, the Court held that “[d]ocuments filed by an employee with the EEOC should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies.” *Id.* at 406.

The Court rejected the petitioner’s argument that the intake form was not a charge because the respondent later filed an untimely formal charge. *Id.* According to the Court, “[p]ostfiling conduct” does not nullify a prior document that satisfies the charge test. *Id.* Because the intake form followed EEOC requirements and could be reasonably construed as a request for agency action, it satisfied the Court’s test, regardless of the respondent’s formal charge. *Id.* And although the intake form at issue

was a charge when filed alongside an affidavit, the Court recognized that there may be situations where the form, standing alone, could constitute a charge. *Id.* at 405.

Like the ADEA, Title VII requires employees to bring a formal EEOC charge before filing a lawsuit. 42 U.S.C. § 2000e-5. And, as with the ADEA, the people filing these charges often proceed pro se. *See Holowecki*, 552 U.S. at 402–03. Thus, federal circuits tend to apply the *Holowecki* test when deciding whether a document is a charge for exhaustion purposes. *See, e.g., Aly v. Mohegan Council, Boy Scouts of Am.*, 711 F.3d 34 (1st Cir. 2013); *Patton v. Jacobs Eng’g Grp.*, 874 F.3d 437 (5th Cir. 2017); *Williams v. CSX Transp. Co.*, 643 F.3d 502 (6th Cir. 2011); *Green v. JP Morgan Chase Bank Nat’l Ass’n*, 501 F. App’x 727 (10th Cir. 2012). But, as new exhaustion questions have arisen, the circuits have departed from each other in how they apply *Holowecki* to answer those questions.

One question is whether an EEOC document can be a charge—or can be considered in any capacity—when the employee files a timely formal charge. A panel for the Seventh Circuit has acknowledged this ambiguity, noting that this Court “has not addressed the situation where the plaintiff has signed a formal charge of discrimination that narrows the allegations presented to agency officials.” *Wojtanek v. Pactiv LLC*, 492 F. App’x. 650, 653 (7th Cir. 2012) (ultimately leaving the question unresolved); *see also Klotzbach-Piper v. Nat’l R.R. Corp.*, 373 F. Supp. 3d 174, 188–89 (D.D.C. 2019) (“The more complicated question is whether an EEOC intake questionnaire can constitute a charge for exhaustion purposes when the plaintiff later filed a

formal EEOC charge that did not include some of the claims made in the questionnaire. ... [T]here appears to be a circuit split on the issue[.]” (citations omitted).

This Court came closest to addressing whether courts can consider an intake form despite a timely formal charge in *Fort Bend County v. Davis*, in which it held that Title VII’s charge requirement is not jurisdictional. 587 U.S. 541, 546–52 (2019). In that case, the worker raised a religious-discrimination claim with the EEOC by amending her intake form instead of her formal charge *Id.* at 546. This Court unanimously allowed the religious-discrimination claim to proceed, seemingly unbothered by the existence of a timely formal charge. *Id.* at 552–53.

Although there is discord over the specific rationale and approach, many circuits will consider documents other than a timely formal charge to some degree. Aside from the Eleventh Circuit, the split distills as follows.

Straightforward *Holowecki* test: In the First, Fifth, and Sixth Circuits, courts can consider an intake form along with a timely formal charge if the intake form is itself a charge under the *Holowecki* test. *See Aly*, 711 F.3d at 43–44; *Lavigne v. Cajun Deep Founds., L.L.C.*, 654 F. App’x 640, 644 (5th Cir. 2016) (citing *Holowecki*, 552 U.S. 398); *see also Williams*, 643 F.3d at 509–10. Even if the intake form is not itself a formal charge, the Fifth Circuit may consider it part of the timely formal charge for purposes of an exhaustion analysis. *Patton*, 874 F.3d at 443–44. The focus of the Fifth Circuit’s inquiry is whether, by filing the intake form, the plaintiff intended to “trigger the investigatory and conciliatory procedures of the EEOC.” *Id.* (citation and quotation marks omitted) (concluding that an intake form was part of

the timely formal charge when the plaintiff filed it together with the charge and the EEOC investigation encompassed claims in the intake form).

Pre-*Holowecki* Circuits: The D.C. Circuit held in a pre-*Holowecki* case that the intake form before it was not a charge, but in so doing, it used factors like those that *Holowecki* would later use: the content of the form and its adherence (or lack thereof) to EEOC regulations. *Park v. Howard Univ.*, 71 F.3d 904, 908 (D.C. Cir. 1995). Since *Holowecki*, the circuit has held that attachments filed along with a formal charge “are an integral part of the complaint and can independently identify claims for resolution regardless of whether the attachment is also referenced in the body of the complaint itself.” *Crawford v. Duke*, 867 F.3d 103, 107 (D.C. Cir. 2017). And the Ninth Circuit held in a pre-*Holowecki* case that “[i]f the charge itself is deficient in recording her theory of the case due to the negligence of an agency representative who completes the charge form, then the plaintiff may present her pre-complaint questionnaire as evidence that her claim for relief was properly exhausted.” *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1101–02 (9th Cir. 2002), *abrogated on other grounds by Davis*, 587 U.S. 541.

Brightline Rule Against Intake Forms: The Fourth Circuit is the only jurisdiction other than the Eleventh to adopt a brightline rule against consideration of intake forms when there is a timely formal charge. *Ballas v. Huntington Ingalls Industries, Inc.*, 711 F.3d 401, 408 (4th Cir. 2013). Panels for the Third and Tenth Circuits have taken a similar brightline position in non-precedential decisions. *See Barzanty v. Verizon PA, Inc.*, 361 F. App’x 411, 415 (3d Cir. 2010) (“A plaintiff cannot be allowed

to transfer the allegations mentioned only in the questionnaire to the charge itself.”) (citation omitted); *Green*, 501 F. App’x at 731 (citation omitted).

The Eleventh Circuit’s decision here deepens this split. And the circuits’ fracturing on the exhaustion issue creates significant risks. In Fiscal Year 2024, for instance, “[t]he EEOC received 88,531 new charges of discrimination.” Press Release, EEOC, EEOC Publishes Annual Performance and General Counsel Reports for Fiscal Year 2024 (Jan. 17, 2025). As this Court has acknowledged, *pro se* litigants are often the ones bringing these charges. *Holowecki*, 552 U.S. at 402–03. Accordingly, clarity and uniformity in the law is vital. Employees like Mukhina, an asylee who speaks limited English, are especially dependent on clear, consistent requirements.

Given the issue’s effect on thousands of workers every year, this Court should grant certiorari to resolve whether courts can consider documents other than a timely formal charge for purposes of an administrative exhaustion analysis.

III. The Eleventh Circuit’s specificity requirement for exhaustion deviates from most other circuits.

The Eleventh Circuit’s decision also deepens a circuit split over the level of specificity needed in an EEOC charge to exhaust a claim. Seven circuits hold that the facts alleged in a charge are the dispositive consideration in an exhaustion analysis. Two circuits consider whether a worker stated in the charge the specific type of discrimination alleged in their civil suit. Here, the Eleventh Circuit joined the minority.

In this case, the Eleventh Circuit held that, even if it considered Mukhina’s intake form, she would not have exhausted her religious-discrimination claim for two reasons. (Pet. App. 9A–10A.) First, it noted that Mukhina selected only “National

origin and/or ethnicity” as her specific legal theory on the form. (*Id.*) Second, although Mukhina likened New Year’s Eve to “Christmas in America” in her intake form and explained that it was an important Russian tradition, the court found that her description “connotes a cultural, not religious, practice.” (*Id.*) Thus, it reasoned that an allegation of religious discrimination “would not be expected to ‘grow out of’ the allegations in the intake questionnaire,” even though the form described the facts supporting Mukhina’s claim. (*Id.*)

Although a split exists on the issue, the Eleventh Circuit’s requisite level of specificity is out of step with most other circuits. Many circuits will allow a worker to bring a discrimination claim so long as it is “like or reasonably related” to allegations in the EEOC charge. *See, e.g., Fitzgerald v. Henderson*, 251 F.3d 345, 359-60 (2d Cir. 2001) (“reasonably related”); *Antol v. Perry*, 82 F.3d 1291, 1295 (3d Cir. 1996) (“fairly within the scope”); *Chaidez v. Ford Motor Co.*, 937 F.3d 998, 1005–06 (7th Cir. 2019) (“like or reasonably related”); *Sanderson v. Wyo. Highway Patrol*, 976 F.3d 1164, 1171 (10th Cir. 2020) (“can reasonably be expected to follow”). In analyzing Mukhina’s case, the Eleventh Circuit followed this approach, asking whether her religious-discrimination claim could “reasonably be expected to grow out of” her charge. (Pet. App. 8A.) But where it deviated from most other circuits is in requiring Mukhina to identify with specificity the type of discrimination she experienced in her charge.

A. Seven circuits hold that the facts alleged in a charge, instead of the specific type of discrimination alleged, are the dispositive consideration in an exhaustion analysis.

Most circuits conclude that, for purposes of an administrative-exhaustion analysis, the alleged facts in a charge are what matter.⁷ If the charge’s facts would prompt the EEOC to investigate a different type of discrimination than what the charge named, then the worker generally can bring a claim under the unnamed legal theory. *See, e.g., Deravin*, 335 F.3d at 200–01 (“A claim is considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made.”) (citation omitted); *Pacheco*, 448 F.3d at 789 (“[T]his court interprets what is properly embraced in review of a Title–VII claim somewhat broadly, not solely by the scope of the administrative charge itself, but by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.”) (citation modified).

Depending on the circuit, there are some nuances to this fact-based approach. The Third Circuit appears to consider both the charge’s narrative section and

⁷ *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003) (“[I]n determining whether claims are reasonably related, the focus should be on the factual allegations made in the EEOC charge itself, describing the discriminatory conduct about which the plaintiff is grieving.”) (citation modified); *Pacheco v. Mineta*, 448 F.3d 783, 789 (5th Cir. 2006) (“We engage in fact-intensive analysis of the statement given by the plaintiff in the administrative charge, and look slightly beyond its four corners, to its substance rather than its label.”) (citation omitted); *Dixon v. Ashcroft*, 392 F.3d 212, 217 (6th Cir. 2004) (“The determinative inquiry in this case, therefore, is whether Dixon alleged sufficient facts in his EEOC Complaint to put the EEOC on notice of his retaliation claim, despite that he did not check the appropriate box on the EEOC’s Complaint of Discrimination form.”); *Chaidez*, 937 F.3d at 1004–05 (“[W]e begin by focusing on the conduct described and individuals implicated in [the charges and complaint.]”); *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222–23 (8th Cir. 1994) (considering the narrative sections of the worker’s formal charge and intake form to determine whether she had alleged racial discrimination despite only checking the retaliation box); *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002) (“The crucial element of a charge of discrimination is the factual statement contained therein.”) (citation omitted).

attached legal theory when assessing administrative exhaustion. *See Hicks v. Assocs., Inc.*, 572 F.2d 960, 963–67 (3d Cir. 1978); *Barzanty*, 361 F. App’x at 414 (“[T]his standard does not necessarily preclude a plaintiff from asserting a claim for the mere failure to check a box on an EEOC Charge Form[.]”) (citation omitted). Meanwhile, the Seventh Circuit generally focuses on the alleged facts, but it may nonetheless strike a claim that is significantly broader than the original claim in the charge. *See Miller v. Am. Airlines, Inc.*, 525 F.3d 520, 525–26 (7th Cir. 2008) (no exhaustion of facial challenge to contract where charge had alleged that contract required comparable treatment, thus only suggesting disparate impact).

Finally, the Sixth Circuit has identified two situations in which it will consider legal theories not raised in the charge: (1) when the investigation “in fact reveals evidence of a different type of discrimination,” and (2) “where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim.” *Davis v. Sodexho, Cumberland Coll. Cafeteria*, 157 F.3d 460, 463 (6th Cir. 1998) (emphasis removed). When two claims “overlap,” “it is the substance of the charge and not its label that controls.” *In re Rodriguez*, 487 F.3d at 1013 n.1 (finding national-origin and race-discrimination claims overlapped).

This emphasis on narrative over technicality reflects a concern for pro se litigants. The Ninth Circuit, for instance, treats EEOC charges “with utmost liberality” because those who file them are often “unschooled in the technicalities of formal pleading.” *Freeman*, 291 F.3d at 636. The circuits have also recognized that the line between certain kinds of discrimination “may be so thin as to be indiscernible.”

Deravin, 335 F.3d at 202 (citation omitted); *accord Hicks*, 572 F.2d at 967 (“[T]here is a close nexus between the facts supporting the claims of race and sex discrimination.”); *In re Rodriguez*, 487 F.3d at 1013 n.1. And the Fifth Circuit has observed that workers may not know the motivations behind discriminatory conduct when they first file a charge, so they “may not fully comprehend the distinction between an act motivated by ‘sex discrimination’ and an identical act motivated by ‘national origin discrimination,’” and that they “may simply be unschooled and unsophisticated in the use of forms.” *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462–64 (5th Cir. 1970) (allowing worker to bring claim for national-origin discrimination when she only checked the box for sex discrimination). Thus, “given the potential overlap between forms of discrimination, and the ‘loose pleading’ which is permitted in the EEOC complaint,” courts should refrain from drawing a fine line between different discrimination claims for purposes of exhaustion. *Deravin*, 335 F.3d at 202.

B. Two circuits factor into their analysis whether the worker in his charge alleged the type of discrimination for which he brought a claim.

The Fourth and Tenth Circuits do not place dispositive weight on the worker’s failure to check a correct box. *See Sloop v. Mem’l Mission Hosp.*, 198 F.3d 147, 148–50 (4th Cir. 1999) (looking at both which boxes the worker checked and the narrative section of the charge); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1260 (10th Cir. 1998) (“[The worker’s] failure to mark the box for sex discrimination is not dispositive. ... [but] it certainly creates a presumption that she was not asserting claims represented by boxes not checked.”) (citations omitted); But, unlike their sister circuits, they do look at whether the worker identifies the type of discrimination alleged.

See Sloop, 198 F.3d at 149 (failure to exhaust where worker alleged discharge but did not state that the discharge fell under Title VII retaliation); *Gunnell*, 152 F.3d at 1260 (exhaustion where “[t]he allegation in the supplement, though sparse, identifies the type of discrimination complained of, the alleged harasser, and an approximate time period”) (emphasis added).

In this case, the Eleventh Circuit has adopted the minority position. Mukhina identified discriminatory conduct in her intake form: Walmart denied her time off for New Year’s Eve, which singled her out from other workers. (Pet. App. 9A.) And she explained in her form that New Year’s Eve, for her, was “like Christmas in America.” (*Id.*) Still more, she had already notified Walmart about her religious discrimination theory in her original ethics complaint with the company, as Walmart acknowledged in its internal investigation. (*See* ECF 34 at 116) (“Mukhina reported she explained to Croll this was a religious day in Russia and Croll still denied the request.”).

Despite Mukhina alleging discriminatory conduct in her intake form, and despite Walmart already knowing about her religious discrimination theory, the Eleventh Circuit required more from her. (Pet. App. 9A–10A.) It required that the intake form explicitly reference her religion. (*Id.*) By demanding that Mukhina, an immigrant dealing with a language barrier, either “check a certain box or recite a specific incantation,” the Eleventh Circuit has cast its lot with the minority of circuits. *See Pacheco*, 448 F.3d at 792.

C. The Court should reject the minority approach.

The minority approach the Eleventh Circuit has endorsed is unwise. Pro se litigants cannot always predict every applicable legal theory when they contact the

EEOC. And some kinds of discrimination are so intertwined that a layman may not know to draw lines between them. *See Deravin*, 335 F.3d at 202. Mukhina, for instance, is both a Russian and a Russian Folk Christian. Just as Christmas “has both religious and secular dimensions,” New Year’s Eve is a matter of both national and religious significance for her. *See Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 613 (1989), *abrogated on other grounds by Town of Greece v. Galloway*, 572 U.S. 565 (2014). So it is no surprise that she would liken it to Christmas in America. For Mukhina, that comparison reflects the holiday’s dual significance.

In its enforcement guidance, the EEOC acknowledges that national origin and religious discrimination “often overlap. ... As a result, the same set of facts may state claims alleging multiple bases of discrimination.” EEOC Enforcement Guidance on National Origin Discrimination, EEOC (Nov. 18, 2016), <https://tinyurl.com/49kvzjyx>. Further, it advises investigators that “[c]harges involving religion, like charges filed on other bases, may give rise to more than one theory of discrimination. ... Therefore, these charges could be investigated and analyzed under all theories of liability to the extent applicable.” EEOC Compliance Manual, Section 10: Religious Discrimination, No. EEOC-CVG-2021-3 (Jan. 15, 2021), <https://tinyurl.com/bdhb4m8x>. And aside from party and procedural information, the EEOC’s regulations require the charge to contain only “[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices.” 29 C.F.R. § 1601.12. Thus, a religious-discrimination claim would fall under “the scope of the EEOC

investigation that could reasonably be expected to grow out of” the facts in Mukhina’s intake form—even without a specific religion label. *Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 450–51 (5th Cir. 1983) (citation omitted).

Because most circuits have disagreed with the Eleventh Circuit on the subject, and because the EEOC supports the majority approach, this Court should grant certiorari to clarify the requisite level of specificity for purposes of exhaustion.

IV. Mukhina’s case is a clean vehicle through which to resolve these important issues of federal law.

This case provides a clean presentation of all three issues. If this Court holds that language can be a vehicle for national-origin discrimination, then the Eleventh Circuit should not have affirmed summary judgment on Mukhina’s national-origin-discrimination claim. And because Mukhina’s intake form includes the facts supporting her religious-discrimination claim, this case provides a clear-cut presentation of whether courts can use the intake form in the exhaustion analysis and what level of specificity is required to exhaust a claim.

A. This case is a clean vehicle for the language and national-origin issues.

This case provides a clean presentation of the question whether language-based harassment can constitute national-origin discrimination. Whether discrimination based on linguistic characteristics can constitute national-origin discrimination is dispositive for Mukhina’s hostile-work-environment claim. The Eleventh Circuit dismissed Mukhina’s hostile-work-environment claim for only two reasons, and both reasons assume that language cannot act as a proxy for national-origin discrimination. (Pet. App. 5A–8A.) So the issue is outcome determinative.

First, the Eleventh Circuit upheld summary judgment on Mukhina’s hostile-work-environment claim because it held the harassment she endured was not based on her national origin. (*Id.*) It decided this even though Mukhina suffered constant harassment based on her language. (Pet. App. 2A.) As a result, this case offers the Court an opportunity to hold that harassment based on language can constitute harassment based on national origin. Here, that means there is at least a genuine issue of material fact regarding whether Mukhina suffered harassment based on her national origin, which means the Eleventh Circuit erred by affirming the district court’s grant of summary judgment.

Second, the Eleventh Circuit concluded that Mukhina failed to establish a basis for holding Walmart liable because even though she informed her supervisors of the language-based harassment, she did not explicitly say the words “national origin discrimination.” (Pet. App. 8A.) But if this Court agrees with the Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits that language is inextricably tied to national origin, then there is at least a genuine issue of material fact as to whether Walmart knew that the ongoing language-based harassment concerned Mukhina’s national origin. That would mean that there is a basis for holding Walmart liable.

An employer is liable for harassing customers or employees if the employer fails to take immediate and appropriate corrective action when it knew or reasonably should have known about a hostile work environment. *See Beckford v. Dep’t of Corr.*, 605 F.3d 951, 957–58 (11th Cir. 2010) (noting that sister circuits uniformly apply this rule). On multiple occasions, Mukhina explicitly told supervisors about customers

and coworkers harassing her based on her language. (*See* ECF 2 at 19–20; ECF 35-1 at 13–14, 17.) After a few weeks on the job, she told one supervisor that customers were mistreating her “all the time” and yelling at her, and that they did this because she did not speak English. (ECF 35-1 at 13–14.) This supervisor did nothing, and Mukhina endured the same harassment for over a month. (ECF 2 at 19; ECF 35-1 at 17.) She then told a different supervisor that customers were harassing her for not knowing English, but this supervisor also did nothing. (ECF 2 at 19.) Mukhina then reported this ongoing harassment two more times before Walmart moved her to the night shift. (ECF 2 at 19–20; ECF 35-1 at 17.) Every time Mukhina reported harassment, she made it clear to Walmart that this harassment concerned the fact that she struggles with English proficiency. (*See* ECF 2 at 19–20; ECF 35-1 at 13–14, 17.)

The Eleventh Circuit affirmed the grant of summary judgment, not because Walmart did not know about this language-based harassment, but because the court concluded that language-based harassment cannot be a vehicle for national-origin discrimination. (Pet. App. 5A–8A.) Thus, it could not conclude that there was even a genuine issue of material fact regarding whether an employer’s knowledge of language-based harassment means that it knew about ongoing national-origin discrimination. (*See id.*) But if this Court recognizes language’s close connection to national origin, then there is at least a genuine issue of material fact as to whether an employer who knows about ongoing language-based harassment knows that this harassment is based on national origin. Here, that means that because Mukhina told her supervisors about language-based harassment on multiple occasions, there is a

genuine issue of material fact whether Walmart knew about ongoing national-origin discrimination. And because of this genuine issue of material fact, the Eleventh Circuit wrongly affirmed summary judgment. (Pet. App. 5A–8A.)

Thus, this case cleanly presents the question of whether language discrimination can be a proxy for national-origin discrimination. Both the Eleventh Circuit’s grounds for affirming summary judgment on Mukhina’s hostile-work-environment claim hinge on that court’s rigid distinction between language and national origin. *Id.* If this Court holds that language discrimination can be national-origin discrimination, then the Eleventh Circuit should not have affirmed summary judgment and should be reversed.

B. This case is a clean vehicle for both administrative-exhaustion issues.

This case also cleanly presents both administrative-exhaustion questions. First, Mukhina’s case implicates whether courts can consider intake forms when the worker has filed a timely formal charge. Her intake form contains the facts supporting her religious-discrimination claim. Thus, whether courts can consider the intake form could be dispositive of whether Mukhina exhausted her claim.

Second, if this Court decides that courts should consider intake forms, Mukhina’s case then poses the question of the level of specificity required to exhaust a claim. If workers need not label in their charges the type of discrimination they experienced, then the Eleventh Circuit erred in requiring Mukhina to refer explicitly to her religion. Had the Eleventh Circuit followed the majority approach and looked at the scope of a reasonable EEOC investigation resulting from the facts alleged,

Mukhina would have prevailed on her claim. The Eleventh Circuit reasoned that Mukhina’s description of New Year’s Eve as like “Christmas in America” evoked a “cultural” connotation. (Pet. App. 9A–10A.) But the EEOC has noted that certain religious practices—“wearing a hijab”—are “cultural.” Employment Discrimination based on Religion, Ethnicity, or Country of Origin, EEOC (Oct. 15, 2001), <https://tinyurl.com/akay3w8h>. Thus, the scope of a reasonable EEOC investigation into the facts alleged in the form likely would have included religious discrimination.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

E. Travis Ramey
Counsel of Record
Appellate Advocacy Clinic
University of Alabama School of Law
Box 870392
101 Paul W. Bryant Drive, East
Tuscaloosa, Alabama 35487
(205) 348-4960