No. 17-1180

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Equal Employment Opportunity Commission (EEOC) may continue to investigate a charge of discrimination under Title VII after a private party receives a right-to-sue letter and files suit raising fewer than all allegations included in the initial charge.

2. Whether the court of appeals correctly held that the district court did not abuse its discretion in concluding that subpoenaed information was relevant to the EEOC's Title VII investigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 867 F.3d 843. The decision and order of the district court (Pet. App. 19a-28a) is reported at 102 F. Supp. 3d 1037.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2017. A petition for rehearing was denied on November 21, 2017 (Pet. App. 29a). The petition for a writ of certiorari was filed on February 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits various employment practices involving discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2; see

42 U.S.C. 2000e-3. The Equal Employment Opportunity Commission (EEOC or Commission) is charged with "[p]rimary responsibility for enforcing Title VII." *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984) (citing 42 U.S.C. 2000e-5(a)).

"Title VII sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *Shell Oil Co.*, 466 U.S. at 62 (quoting *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U.S. 355, 359 (1977)). That procedure begins with the filing of a charge of discrimination, either by an aggrieved individual or by a Commissioner of the EEOC. 42 U.S.C. 2000e-5(b); 29 C.F.R. 1601.7(a). When a charge is filed, "the EEOC must first notify the employer," *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1164 (2017) (citing 42 U.S.C. 2000e-5(b)), "and must then investigate 'to determine whether there is reasonable cause to believe that the charge is true,'" *ibid.* (quoting *University of Pa.* v. *EEOC*, 493 U.S. 182, 190 (1990)); see *Occidental Life Ins. Co.*, 432 U.S. at 359. The statute instructs the EEOC to make its reasonable-cause determination "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." 42 U.S.C. 2000e-5(b).

"In order to enable the EEOC to make informed decisions at each stage of the enforcement process, Title VII confers a broad right of access to relevant evidence." *McLane*, 137 S. Ct. at 1164 (brackets, citation, and internal quotation marks omitted). Title VII provides that "[i]n connection with any investigation of a charge" of discrimination filed with the EEOC, "the Commission * * * shall at all reasonable times have access to * * * and the right to copy any evidence of any

person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation." 42 U.S.C. 2000e-8(a). This Court has "generously construed" the relevance standard to "afford[] the Commission access to virtually any material that might cast light on the allegations against the employer." *Shell Oil Co.*, 466 U.S. at 68-69; see *McLane*, 137 S. Ct. at 1169. In conducting its investigation, the EEOC may issue administrative subpoenas and request judicial enforcement of those subpoenas. 42 U.S.C. 2000e-9 (incorporating 29 U.S.C. 161); see *McLane*, 137 S. Ct. at 1165-1166; *Shell Oil Co.*, 466 U.S. at 63.

If the EEOC "determines after such investigation that there is reasonable cause to believe that the charge is true," it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b); see *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649 (2015). If such efforts fail, the EEOC may bring a civil action against the employer, 42 U.S.C. 2000e-5(f)(1); 29 C.F.R. 1601.27, in which the charging party may intervene as a matter of right, 42 U.S.C. 2000e-5(f)(1).[1]

If instead the EEOC "determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify" the charging party and the employer "of its action." 42 U.S.C. 2000e-5(b). If the Commission dismisses the charge or does not bring an enforcement action within 180 days, the Commission must issue a

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[1] Although the statute generally refers to the rights of the "person aggrieved," 42 U.S.C. 2000e-5(f)(1), because this case involves charges brought by individual employees, this brief refers to the "charging party," 29 C.F.R. 1601.28(d)(2).

right-to-sue notice upon the charging party's request. 42 U.S.C. 2000e-5(f)(1); 29 C.F.R. 1601.28(a)(1). The Commission also may issue a right-to-sue notice at the charging party's request during the 180-day period, if the EEOC "has determined that it is probable that [it] will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge." 29 C.F.R. 1601.28(a)(2). Following issuance of the notice, the charging party has 90 days to file a civil action against the employer. 42 U.S.C. 2000e-5(f)(1). Courts may in their discretion permit the EEOC to intervene in the charging party's lawsuit. *Ibid.*

When the EEOC issues a right-to-sue notice, it generally terminates its processing of the charge. But the Commission may continue to process the charge if one of several enumerated officials "determines at that time or at a later time that it would effectuate the purpose of [T]itle VII" to do so. 29 C.F.R. 1601.28(a)(3).

2. a. In January 2011, Frank Burks and Cornelius L. Jones, Jr., began working for petitioner Union Pacific Railroad Company as "Signal Helpers." Pet. App. 2a. A signal helper is an entry-level job that involves laying wires and cables, digging trenches, changing signal lines, and climbing poles. *Ibid.* Burks and Jones were the only African Americans in their orientation group. *Ibid.*

Once Burks and Jones completed their 90-day probationary periods, they became eligible to apply for promotion to the "Assistant Signal Person" (ASP) position (at times referred to as the "Assistant Signalman," see, *e.g.*, Pet. App. 46a, 49a). *Id.* at 2a-3a. Petitioner provides two methods by which Signal Helpers may seek promotion to the ASP position: a company-wide application process and an internal hiring pool limited to the

applicant's seniority district. 14-052 D. Ct. Doc. 4-3, at 3-4 (Aug. 25, 2014). In either case, when there is an open ASP position and an applicant possesses the required qualifications, petitioner invites the applicant to take a "Skilled Craft Battery Test." *Ibid.* Successful completion of the test is a prerequisite to promotion. *Ibid.*

Although Burks applied to take the test in October 2011, and Jones applied in both June 2011 and September 2011, neither was invited to take the test. Pet. App. 2a. On October 10, 2011, petitioner eliminated the Signal Helper position in the areas where Burks and Jones worked and terminated their employment. *Ibid.*[2]

In late October and early November 2011, respectively, Burks and Jones filed charges of discrimination with the EEOC. Pet. App. 44a-49a. Each alleged that petitioner had violated Title VII when it denied him the opportunity to take the test for the ASP position and terminated his employment. *Ibid.* In particular, each stated that petitioner had discriminated against him because of his race and in retaliation for engaging in prior protected activity. *Ibid.*[3]

The EEOC notified petitioner of the charges. Pet. App. 3a. In response, petitioner provided a position statement and attached tables showing the Signal Help-

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[2] Petitioner asserts (Pet. 5) that Jones and Burks were furloughed rather than terminated. It is undisputed, however, that neither returned to work for petitioner. See *ibid.*

[3] Petitioner states (Pet. 1, 5-6) that Burks and Jones alleged that they were denied the opportunity to take the test "as a result" of their earlier complaints of racial discrimination. But both charges specifically alleged racial discrimination, as well as retaliation, with respect to the opportunity to take the test. Pet. App. 44a-49a.

ers who had applied for ASP positions in the same district where Burks and Jones worked. *Ibid.* The tables revealed that of the 18 Signal Helpers who had applied for the ASP position in 2011, 11 were white, six were black, and one was Hispanic. *Ibid.* Ten of the 11 white applicants, and the sole Hispanic applicant, passed the test and were promoted. *Ibid.* By contrast, "[o]f the six black applicants, Burks and Jones [we]re the only [ones] who applied but were not administered the tests." *Ibid.* None of the other four black applicants was promoted, "although the table does not state the reason." *Ibid.*; see 14-052 D. Ct. Doc. 4-3, at 7-9.

In March 2012, the EEOC sent petitioner a request for information. Pet. App. 3a. The Commission sought a copy of the test petitioner used to promote Signal Helpers to the ASP position and company-wide information about persons who sought the ASP position during the relevant period. *Id.* at 3a-4a. Petitioner refused that request, and the Commission issued a subpoena in May 2012. *Id.* at 4a. Petitioner refused to comply, and in March 2013, the Commission brought suit to enforce the subpoena. *Ibid.* The parties settled the subpoena enforcement action, with petitioner agreeing to provide identification information, including test results, for all individuals who took the test for the ASP position during the relevant period. *Ibid.* To date, however, petitioner has not provided this information to the Commission. See *ibid.*

b. In July 2012—following issuance of the first subpoena, but before the EEOC had sued to enforce it—Burks and Jones requested right-to-sue notices. Pet. App. 4a; see 14-502 D. Ct. Doc. 4-7, at 17-18 (Aug. 25, 2014). Because more than 180 days had passed since the filing of the charges, the Commission was required

to issue the notices. 42 U.S.C. 2000e-5(f)(1); 29 C.F.R. 1601.28(a)(1). Two boxes on the pre-printed forms were checked: one indicating that "[m]ore than 180 days have passed since the filing of this charge," and the other specifying that "[t]he EEOC will continue to process this charge." 14-052 D. Ct. Doc. 4-7, at 17-18; see 29 C.F.R. 1601.28(a)(3). But see Pet. 1 (suggesting that the EEOC had concluded its investigation and taken "no action" at the time Burks and Jones requested right-to-sue notices).

In October 2012, Burks and Jones filed a joint civil action against petitioner. Pet. App. 4a. Burks alleged that petitioner had terminated him because of his race, while Jones alleged that he had suffered discrimination in the "terms, conditions, and privileges of his employment because of his race." Am. Compl. at 2-4, 9-12, *Burks* v. *Union Pac. R.R.*, No. 12-8164 (N.D. Ill. Oct. 16, 2012). Both men alleged that petitioner had retaliated against them for making internal complaints of racial discrimination by refusing to allow them to take the test and declining to promote them to the ASP position. *Id.* at 4-9, 12-14. Neither primarily contended that petitioner had discriminated against him based on race when it had failed to permit him to take the test or to promote him to the ASP position.[4] The EEOC was not a party to the private lawsuit.

In July 2014, the district court granted petitioner's motion for summary judgment, concluding that Burks

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[4] In support of his claim of "Racial Harassment," Jones briefly alleged that "he was frustrated and thwarted in his efforts to take the Skill Battery Test." Amended Complaint at 9-11, *Burks*, *supra* (No. 12-8164) (capitalization and emphasis omitted). Neither the district court nor the court of appeals addressed this allegation. See p. 8, *infra*.

and Jones had failed to offer sufficient evidence to support their retaliation claims. Pet. App. 4a; see *Burks* v. *Union Pac. R.R.*, No. 12-8164, 2014 WL 3056529, at *5-*7 (N.D. Ill. July 7, 2014). The court of appeals affirmed. *Burks* v. *Union Pac. R.R.*, 793 F.3d 694 (7th Cir. 2015). It observed that an analysis of Burks' and Jones' claims of "impermissible retaliation" required it to "delve rather deeply into the facts surrounding the [test] and [petitioner's] promotion procedures," but that "neither the plaintiffs' briefs nor materials in the record below fully explain[ed petitioner's] promotion procedures," leaving "gaps * * * in the factual background." *Id.* at 697.

3. During the pendency of Burks' and Jones' private action, the EEOC continued to investigate their allegations of racial discrimination regarding their inability to test for the ASP position. In January 2014, the EEOC issued petitioner a request for information about the company's electronic storage systems, including any applicant logs for the ASP position, as well as additional ASP testing information. See Pet. App. 5a; 14-052 D. Ct. Doc. 4-5, at 1-4 (Aug. 25, 2014). Petitioner again refused to provide the requested information. Pet. App. 5a. Consequently, in May 2014, the Commission served petitioner with a second subpoena, which requested essentially the same information the EEOC had sought in January 2014. *Ibid.*; 14-052 D. Ct. Doc. 4-6 (Aug. 25, 2014).

Petitioner continued to withhold the requested information, and the Commission filed the instant subpoena enforcement action in September 2014. Pet. App. 5a. The district court denied petitioner's motion to dismiss. *Id.* at 19a-28a. The court rejected petitioner's argument that "the issuance of the right-to-sue notices and the civil judgment in favor of [petitioner] divest[ed] the

EEOC of its investigative authority," explaining that petitioner provided no "textual support" for its reading of the statute. *Id.* at 21a, 23a (citation omitted). The court further rejected petitioner's argument that the information sought was not relevant to the allegations under investigation. *Id.* at 25a-27a. Subsequently, the court ordered petitioner to comply with the subpoena. 14-052 D. Ct. Doc. 32 (Nov. 9, 2015).

4. The court of appeals affirmed. Pet. App. 1a-18a.

a. The court of appeals first held that neither the issuance of a right-to-sue letter, nor the dismissal of the charging individuals' lawsuit, terminated the EEOC's authority to investigate. Pet. App. 6a-16a. The court determined that "the text of Title VII, and more recent Supreme Court" precedent, required it to reject petitioner's "restrictive interpretation of the EEOC's enforcement authority." *Id.* at 9a. The court explained that Burks' and Jones' initial charges met the "minimal" statutory requirements for valid charges, authorizing the EEOC "to conduct an investigation." *Id.* at 10a-11a. And once that investigation began, "the statute does *not* expressly (nor from the court's perspective, implicitly) limit the EEOC's investigatory authority to the 180-day window it has to issue a notice of right-to-sue letter if requested by the charging individual." *Id.* at 11a.

The court of appeals further explained that "nothing in Title VII supports a ruling" that once an investigation has appropriately begun, "the EEOC's authority is then limited by the actions of the charging individual." Pet. App. 11a. To the contrary, in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), this Court held that "[t]he statute clearly makes the EEOC the master of its case and confers on the agency the authority to evaluate the strength of the public interest at stake." Pet. App. 11a

(quoting *Waffle House*, 534 U.S. at 291). Although *Waffle House* considered a different issue—holding that the charging individual's arbitration agreement does not bar the EEOC from pursuing victim-specific judicial relief on his behalf—the Court's decision "necessarily rejected the notion" advanced by petitioner "that the EEOC's role is 'merely derivative' of the charging individual." *Id.* at 11a-12a (quoting *Waffle House*, 534 U.S. at 297).[5]

The court of appeals found additional support for its holding in the 1972 amendments to Title VII, which "granted the EEOC broader authority to investigate and initiate enforcement actions." Pet. App. 12a. The court noted that the Commission's regulation "expressly contemplates," in certain circumstances, "the continuation of an investigation *after* the issuance of a notice of right-to-sue." *Id.* at 12a-13a (citing 29 C.F.R. 1601.28(a)(3)). And the court rejected petitioner's contention that if the EEOC wishes to continue pursuing a charge once a right-to-sue notice has issued, it must serve a Commissioner's charge or intervene in the charging party's lawsuit. *Id.* at 13a-14a. The court explained that "the availability of alternative investigatory avenues hardly supports limiting the EEOC's use of its most effective avenue, especially given that both alternatives could undermine the full investigatory authority of the EEOC" through timeliness concerns or limits on civil discovery. *Ibid.* The court of appeals reasoned that accepting petitioner's argument would provide "unhealthy leverage to an individual litigant and an

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[5] *Waffle House* concerned enforcement of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, which is subject to the "same enforcement powers, remedies, and procedures" as Title VII. 534 U.S. at 285.

undue incentive to employers to purchase a stipulated dismissal with prejudice in order to prevent the EEOC from pursuing a larger public interest" in the "unusual or atypical" circumstances in which continuation of the investigation is warranted. *Id.* at 15a-16a.

The court of appeals recognized (Pet. App. 8a) that, although its decision is in accord with the Ninth Circuit's decision in *EEOC* v. *Federal Express Corp.*, 558 F.3d 842, cert. denied, 558 U.S. 1011 (2009), the Fifth Circuit had held, before *Waffle House*, that the EEOC's investigative authority ceases when the charging party files a civil action. See *EEOC* v. *Hearst Corp.*, 103 F.3d 462 (1997). The court of appeals observed that *Hearst Corp.* "did not explain why the EEOC's authority to investigate necessarily must be [so] limited," focusing instead on "[p]olicy concerns about delays in resolving charges." Pet. App. 8a-9a. Moreover, the court noted, *Waffle House* "necessarily rejected" *Hearst Corp.*'s assumption that "the EEOC's role is 'merely derivative' of the charging individual." *Id.* at 11a-12a (quoting *Waffle House*, 534 U.S. at 297).

b. The court of appeals also held that the district court did not abuse its discretion in finding that the subpoenaed information is relevant to the Commission's investigation. Pet. App. 16a-17a. The court of appeals explained that the statute gives the EEOC the right to "any evidence * * * relevant to the charge under investigation," 42 U.S.C. 2000e-8(a)—a standard that, this Court has held, "is not intended to be 'especially constraining,'" and includes "'virtually any material that might cast light on the allegations against the employer.'" Pet. App. 16a-17a (quoting *Shell Oil*, 466 U.S. at 68-69). The court acknowledged, however, that the relevance requirement "is designed to cabin the EEOC's

authority and prevent 'fishing expeditions.'" *Id.* at 17a (citation omitted).

Applying that standard to the particular facts of this case, the court of appeals determined that the district court did not abuse its discretion in finding the information relevant. Pet. App. 17a (citation omitted). The EEOC had received information "from [petitioner] itself that all other African-American Signal Helpers, not just * * * Burks and Jones, applying for a promotion to Assistant Signalman were turned down," and it therefore sought additional information about the test and the successful and unsuccessful applicants. *Ibid.* That additional information "might well 'cast light on the allegations against the employer.'" *Ibid.* Moreover, although petitioner contended that this information "extends beyond the allegations in the underlying charges," the court of appeals dismissed that argument as "premised on the same overly narrow view of the role of the EEOC" that the court had already rejected. *Ibid.*

ARGUMENT

Petitioner renews its arguments that the EEOC loses authority under Title VII to investigate a charge of discrimination when a private party receives a right-to-sue letter and files suit (Pet. 11-18); and that the district court abused its discretion in concluding that the subpoenaed information in this case is relevant to the EEOC's Title VII investigation (Pet. 18-28). The court of appeals correctly rejected both of those arguments, and its decision does not conflict with any decision of this Court. On the second question, the lower courts' factbound application of the well-established relevance standard also does not conflict with any decision of another court of appeals.

On the first question, petitioner is correct (Pet. 11-12) that the Fifth Circuit reached a different result more than two decades ago, but its decision predates, and is inconsistent with, this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002). Moreover, petitioner is incorrect that the question is a "recurring issue of national importance," Pet. 28, because it arises infrequently. Only two courts of appeals—the Ninth Circuit in *EEOC* v. *Federal Express Corp.*, 558 F.3d 842 (2009), and the Seventh Circuit here—have considered the question since *Waffle House*, and both have rejected petitioner's position in light of *Waffle House*. This Court previously denied review of the question, see *Federal Express Corp.* v. *EEOC*, 558 U.S. 1011 (2009) (No. 08-1500), and the same result is warranted here.

1. The court of appeals correctly determined that the EEOC's authority to investigate charges of discrimination does not necessarily cease when the Commission issues, pursuant to the charging party's request, a right-to-sue letter while the Commission is still conducting its investigation, and the charging party then pursues a civil action raising fewer than all the allegations included in the initial charge.

a. Title VII prohibits employment discrimination because of race, 42 U.S.C. 2000e-2(a), and "entrusts the enforcement of that prohibition" against private employers "to the EEOC." *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1164 (2017) (citing 42 U.S.C. 2000e-5(a); *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984)). Following the 1972 amendments to the statute, Title VII gives the EEOC authority "to implement the public interest as well as to bring about more effective enforcement of private rights." *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 325-326 (1980); see *id.* at 331 ("The EEOC

exists to advance the public interest in preventing and remedying employment discrimination."). Thus, this Court has long recognized that the Commission "does not function simply as a vehicle for conducting litigation on behalf of private parties." *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U.S. 355, 368 (1977).

As the court of appeals acknowledged, the EEOC's authority "is tied to charges filed with the Commission." Pet. App. 7a (quoting *Shell Oil Co.*, 466 U.S. at 64). Title VII's "integrated, multistep enforcement procedure," *Occidental Life Ins. Co.*, 432 U.S. at 359, "generally starts when 'a person claiming to be aggrieved' files a charge of an unlawful workplace practice with the EEOC," *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649 (2015) (quoting 42 U.S.C. 2000e-5(b)); see *McLane*, 137 S. Ct. at 1164. The statute provides specific requirements for a valid charge, see 42 U.S.C. 2000e-5(b); *Shell Oil Co.*, 466 U.S. at 67, and it mandates that the EEOC provide notice to the employer, investigate the charge, determine whether there is "reasonable cause" to believe the allegation is true, and if so, engage in conciliation and mediation efforts, *McLane*, 137 S. Ct. at 1164 (citation omitted). Moreover, where the EEOC has not entered a conciliation agreement, filed a civil action, or dismissed the charge within 180 days, the statute requires the Commission to "notify the person aggrieved," who may file a civil action within 90 days. 42 U.S.C. 2000e-5(f)(1); see 42 U.S.C. 2000e-5(b); see also 29 C.F.R. 1601.28(a)(1).

Critically, however—and in contrast to these detailed provisions—"once [the investigation has] begun, the statute does not expressly" or "implicitly" "limit the EEOC's investigatory authority to the 180-day window it has to issue a notice of right-to-sue letter if requested

by the charging individual." Pet. App. 11a (emphasis omitted). Indeed, this Court has long understood that Title VII's requirement of issuance of a right-to-sue notice does not automatically terminate all of the EEOC's powers. In *Occidental Life Insurance Co.*, *supra*, the Court rejected the argument that the EEOC must "conclude its conciliation efforts and bring an enforcement suit within any maximum period of time." 432 U.S. at 360. The Court explained that "a natural reading" of Section 2000e-5(f)(1) "can lead only to the conclusion that * * * a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit * * * within 90 days" of receiving a right-to-sue letter "or continue to leave the ultimate resolution of his charge to the efforts of the EEOC." *Id.* at 361.

Consistent with *Occidental Life Insurance Co.*, the Commission has not treated the 180-day clock as an absolute limit on its investigative authority. The Commission's regulations provide that it may continue investigating and otherwise processing a charge after issuing a notice of right to sue when one of several enumerated officials determines "that it would effectuate the purpose of [T]itle VII * * * to further process the charge." 29 C.F.R. 1601.28(a)(3); see 29 C.F.R. 1601.28(a)(2) (providing that the Commission may issue a right-to-sue letter when fewer than 180 days have elapsed if the EEOC "has determined that it is probable that [it] will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge").

b. Petitioner's contrary view (Pet. 11-18) requires distinguishing between the issuance of a right-to-sue letter, which does not terminate the EEOC's authority

under *Occidental Life Insurance Co.*, *supra*, and the filing of a lawsuit, which petitioner claims (*e.g.*, Pet. 11) has that effect. That distinction, however, finds no foothold in the statute. Petitioner does not identify any specific statutory text that 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. See *Federal Express Corp.*, 558 F.3d at 853 ("[N]othing in § 706(f)(1) of Title VII indicates that the EEOC's investigatory powers over a charge cease when the charging party files a private action.").

Petitioner's view also is inconsistent with this Court's determination in *Waffle House*, *supra*, that the Commission's enforcement authority is not dependent on the conduct of a charging party. *Waffle House* held that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief. 534 U.S. at 297. In reaching that conclusion, the Court reiterated that, in light of the EEOC's role in serving the public interest, the Commission "does not function simply as a vehicle for conducting litigation on behalf of private parties." *Id.* at 287-288 (quoting *Occidental Life Ins. Co.*, 432 U.S. at 368). Thus, the Court explained that "once a charge is filed, * * * the EEOC is in command of the process"; "[t]he statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake." *Id.* at 291. Where the agency decides that "public resources should be committed" to enforcement, "the statutory text unambiguously authorizes [the EEOC] to proceed." *Id.* at 291-292.

The same is true here. Once Burks and Jones filed their charges, the EEOC took "command of the process," *Waffle House*, 534 U.S. at 291; its investigation could not be controlled by Burks' and Jones' decision to seek right-to-sue notices and file suit on fewer than all allegations included in the initial charges and the EEOC's investigation. Nor was the EEOC's investigatory authority necessarily terminated by the federal court's grant of summary judgment to petitioner on Burks' and Jones' claims. The district court concluded that Burks and Jones had failed to offer sufficient evidence to support their *retaliation* claims. See *Burks* v. *Union Pac. R.R.*, No. 12-8164, 2014 WL 3056529, at *6 (N.D. Ill. July 7, 2014). Contrary to petitioner's repeated suggestion (Pet. 2, 10, 13, 15, 28, 30), in Burks' and Jones' private suit the federal courts did not consider whether they were subjected to *racial discrimination* vis-à-vis the ASP test and promotion process. See pp. 7-8, *supra*.[6] Burks' and Jones' decision to bring retaliation claims did not prevent the EEOC from continuing to investigate the allegations of racial discrimination in the initial charges.

c. Petitioner's remaining arguments lack merit. Petitioner relies (Pet. 13-14) on a House Report discussing the 1972 amendments to the statute. The Report states that out of "concern[] about the interrelationship between" the EEOC's "newly created cease and desist en-

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[6] Petitioner is thus incorrect to assert (Pet. 13) that the Commission would be "barred by *res judicata*" from seeking relief for the charging parties. See, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.").

forcement powers" and "the existing right of private action," a prior version of the bill included "a provision for termination of Commission jurisdiction once a private action has been filed." Pet. 14 (quoting H.R. Rep. No. 238, 92d Cong., 1st Sess. 12 (1971)). Petitioner fails to acknowledge, however, that the final version of the bill did not contain either a provision conferring cease-and-desist authority upon the Commission or a provision terminating its jurisdiction. See 42 U.S.C. 2000e-5 (Title VII enforcement provisions); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 104.

Petitioner also suggests (Pet. 14-16) that unless the statute is read to terminate the EEOC's investigatory authority upon the filing of a private action, the agency will be able to "end-run the Commissioner's charge process," rendering Title VII's provisions for Commissioner-initiated "pattern or practice" charges "superfluous" or "optional." But petitioner ignores that the EEOC's continued investigation may not relate to a pattern or practice at all. And petitioner is incorrect (Pet. 15) that an individual charge may not support a broader investigation. Although 42 U.S.C. 2000e-6(e) provides the Commission with "authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission," it is well established that the Commission may also investigate (and when warranted, litigate) a potential pattern or practice of discrimination under the authority vested in it by Section 2000e-5(b) and (f)(1). See *EEOC* v. *Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791, 800 (5th Cir. 2016); *Serrano* v. *Cintas Corp.*, 699 F.3d 884, 896 (6th Cir. 2012), cert. denied, 134 S. Ct. 92 (2013).

For similar reasons, petitioner is incorrect (Pet. 15) that the notice the EEOC must provide to the employer within ten days of the filing of the charge, see 42 U.S.C. 2000e-5(b), prohibits the Commission from continuing to investigate when its inquiry reveals evidence suggesting a broader pattern or practice of discrimination. As this Court held in *Shell Oil Co.*, *supra*, the notice requirement should not be interpreted stringently to "cut short" the EEOC's investigations. 466 U.S. at 71. Accordingly, this Court has recognized that the EEOC may investigate and bring enforcement actions regarding "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *General Tel.*, 446 U.S. at 331.[7] Indeed, even the cases on which petitioner relies (see Pet. 16, 28) recognize that "[n]othing prevents the EEOC from investigating the charges filed by" particular employees "and then—if it ascertains some violation warranting a broader investigation—expanding its search" as an "[a]lternative[]" to the filing of a Commissioner charge and the sending of an additional, concomitant notice. *EEOC* v. *Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1159 (10th Cir. 2012) (*BNSF*).[8]

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[7] See, *e.g.*, *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 297 (3d Cir. 2010) ("Once the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge."); *EEOC* v. *Recruit U.S.A., Inc.*, 939 F.2d 746, 756 (9th Cir. 1991) (similar); *EEOC* v. *Cambridge Tile Mfg. Co.*, 590 F.2d 205, 206 (6th Cir. 1979) (per curiam) (similar); *EEOC* v. *General Elec. Co.*, 532 F.2d 359, 365 (4th Cir. 1976) (similar).

[8] Petitioner cites (Pet. 15) *BNSF* for the broad rule that the Commission cannot expand its investigation by providing subsequent notice to the employer. But the court of appeals there held only that

Finally, petitioner is also incorrect (Pet. 16) that permitting the EEOC to continue investigating the original charges "effectively nullifies" the statute's reasonable-cause and conciliation requirements. Although the statute instructs the EEOC to make a reasonable-cause determination in 120 days if "practicable," 42 U.S.C. 2000e-5(b), it does not divest the Commission of authority after that time. And in the event the EEOC continues to investigate charges and ultimately finds reasonable cause to believe that discrimination occurred, it would be required to engage in the full panoply of Title VII's pre-suit procedures, including conciliation.

d. The decision below accords with the decision of the only other court of appeals to consider the question in the sixteen years since *Waffle House*. In *Federal Express Corp.*, *supra*, the Ninth Circuit held that the EEOC may continue investigating and processing a charge following the instigation of private litigation. See 558 F.3d at 852-854. In addition, courts of appeals addressing the EEOC's authority more generally have recognized that once a valid charge is filed, the EEOC's powers do not depend on the charging party's conduct.[9]

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the particular subpoena at issue—which requested information on "how BNSF keeps track of every current and former employee, across the country, since 2006"—was not relevant to the particular charges of disability discrimination made by two employees. 669 F.3d at 1157-1159.

[9] See, *e.g.*, *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 682 (8th Cir. 2012) ("Under *Waffle House* a court cannot judicially estop the EEOC from bringing suit in its own name to remedy employment discrimination simply because the defendant-employer happened to discriminate against an employee who, herself, was properly judicially estopped."); *EEOC* v. *Watkins Motor Lines, Inc.*, 553 F.3d

Petitioner correctly observes (Pet. 11-12) that five years before *Waffle House*, the Fifth Circuit held that "the EEOC may not continue to investigate a charge once formal litigation by the charging parties has commenced." *EEOC* v. *Hearst Corp.*, 103 F.3d 462, 469 (1997). But as the court below recognized (Pet. App. 11a-12a), *Hearst Corp.* is inconsistent with this Court's decisions because the Fifth Circuit treated a charging party's conduct as defining the "distinct stages" of the EEOC's authority. 103 F.3d at 469. This Court made clear in *Occidental Life Insurance Co.* that Title VII sets forth an "*integrated*, multistep enforcement procedure," 432 U.S. at 359 (emphasis added); and the Court ruled in *Waffle House* that, once a valid charge has been filed, the EEOC's authority to pursue that multistep enforcement procedure is not limited by the conduct of a charging party.

It is therefore unclear whether the Fifth Circuit would adhere to *Hearst Corp.* if the issue arose today. Following *Waffle House*, however, the Fifth Circuit has recognized in other contexts that the Commission's enforcement authority is independent of the charging parties' conduct. See *EEOC* v. *Jefferson Dental Clinics, PA*, 478 F.3d 690, 697 (2007) ("agree[ing]" with the

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593, 597 (7th Cir. 2009) (private settlement and effort to withdraw charge do not strip EEOC of authority to investigate); *Marie* v. *Allied Home Mortg. Corp.*, 402 F.3d 1, 15-16 (1st Cir. 2005) (observing that "[t]he same logic" relied upon in *Waffle House* "applies to a preliminary EEOC investigation, which also cannot be halted by an arbitration agreement between the complaining employee and her employer"); *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1292-1293 (11th Cir. 2004) (identifying *Waffle House* and circuit court decisions as establishing that "the EEOC may pursue action on behalf of a sole person whose private suit has been resolved"), cert. denied, 546 U.S. 811 (2005).

EEOC's view that "under *Waffle House* the EEOC's interest 'in eradicating workplace discrimination' is unique and 'incompatible with a finding that the EEOC's authority to bring and maintain an enforcement action can be extinguished by a judgment in a private suit to which it was not a party'"); see also, *e.g.*, *EEOC* v. *Bass Pro Outdoor World, L.L.C.*, 865 F.3d 216, 226-227 (5th Cir. 2017) (per curiam) (rejecting argument that the EEOC's enforcement power "is derivative of individuals" because that argument "has been thrice rejected by the Supreme Court" in *Occidental Life Insurance Co.*, *supra*, *General Telephone Co.*, *supra*, and *Waffle House*, *supra*); *EEOC* v. *Board of Sups. for the Univ. of La. Sys.*, 559 F.3d 270, 272-274 (5th Cir. 2009) (rejecting argument that Eleventh Amendment bars EEOC from seeking victim-specific relief that would be unavailable to the private party in a private action). That tension in the Fifth Circuit's case law is better left to that court in the first instance.

e. Review is unwarranted for an additional reason. Contrary to the assertions of petitioner (Pet. 28-32) and its amici (Ctr. for Workplace Compliance and Chamber of Commerce Amicus Br. 7), the question presented—*i.e.*, whether the EEOC loses its investigatory authority when it issues a right-to-sue notice and the private party brings suit on fewer than all the allegations in the initial charge—rarely arises because the EEOC continues processing a charge after issuing a right-to-sue notice only in exceptional circumstances. See Pet. App. 16a; 29 C.F.R. 1601.28(a)(3). Consistent with that practice, since the EEOC gained litigating authority in 1972, only three federal appellate decisions—*Hearst Corp.*, *Federal Express Corp.*, and the decision below—appear

to have squarely addressed the scope of the EEOC's authority following the issuance of a right-to-sue notice and the charging party's filing of a civil action. The fact that the issue does not arise often counsels against this Court's review.

2. The court of appeals also correctly held that the district court did not abuse its discretion in concluding that the subpoenaed information in this case is relevant to the EEOC's Title VII investigation.

a. Title VII provides that "[i]n connection with any investigation of a charge" of discrimination filed with the EEOC, the Commission shall have access to evidence that "is relevant to the charge under investigation." 42 U.S.C. 2000e-8(a). As this Court explained just last Term, it has "generously" understood that standard to "permit the EEOC 'access to virtually any material that might cast light on the allegations against the employer.'" *McLane*, 137 S. Ct. at 1169 (quoting *Shell Oil Co.*, 466 U.S. at 68-69).

The court of appeals correctly determined (Pet. App. 17a-18a) that the district court did not abuse its discretion in finding that standard satisfied here. Burks' and Jones' charges alleged racial discrimination in the denial of the opportunity to test for the ASP position. See *id.* at 44a-49a. In response to those charges, petitioner informed the EEOC "that all other African-American Signal Helpers" who applied for the promotion "were turned down," *id.* at 17a, while nearly all of the white and Hispanic applicants were permitted to take the test and received promotions, *id.* at 3a. At the same time, petitioner's submission did not state whether the black applicants who were permitted to take the test passed or failed it, or provide any explanation why they were not promoted. *Ibid.* In light of petitioner's submission,

the agency reasonably requested "additional information about the test being administered to become eligible for promotion and the successful and unsuccessful applicants"—information that "might well 'cast light on the allegations against the employer.'" Pet. App. 17a; see, *e.g.*, *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 298 (3d Cir. 2010) ("An employer's nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice."); *EEOC* v. *United Parcel Serv., Inc.*, 587 F.3d 136, 139 (2d Cir. 2009) (per curiam) (similar).

b. Petitioner contends (Pet. 18-28) that the courts of appeals are divided on the proper interpretation of *Shell Oil Co.*'s relevance standard, such that the Tenth and Eleventh Circuits "would not have enforced the subpoena in this case." Pet. 22. To the contrary, the cases petitioner cites reflect that courts have applied the same relevance test—and the same deferential standard of review—to the different facts and circumstances presented in each case.

For example, petitioner relies (Pet. 23-24) on *BNSF*, *supra*. There, two individuals located in Colorado alleged discrimination based on a perceived disability; the EEOC then sought "any computerized or machine-readable files" covering a two-year period that "contain[ed] electronic data about or effecting [sic] current and/or former employees . . . throughout the United States." 669 F.3d at 1156-1157 (citation omitted; second set of brackets in original). Although the Tenth Circuit held that the district court did not abuse its discretion in refusing to enforce the subpoena, it did not conclude that companywide information could never be relevant to the investigation of an individual charge. Instead, it expressly distinguished cases—like this one—involving

the "company-wide use of a test that allegedly facilitated discrimination" or "racial discrimination." *Id.* at 1158 (citing *Kronos Inc.*, 620 F.3d at 297; *EEOC* v. *Konica Minolta Bus. Solutions U.S.A., Inc.*, 639 F.3d 366, 367 (7th Cir. 2011)). And the court of appeals specifically allowed that if, in the course of investigating individual charges, the EEOC "ascertain[ed] some violation warranting a broader investigation," "[n]othing" would prevent it from "expanding its search." *Id.* at 1159.

Equal Employment Opportunity Commission v. *TriCore Reference Laboratories*, 849 F.3d 929 (10th Cir. 2017) (Pet. 24-25), is similar. There, a single employee alleged that TriCore did not provide a reasonable accommodation during her pregnancy. *Id.* at 934. The Tenth Circuit affirmed the district court's determination that the EEOC's request for a complete list of employees who had sought accommodations for disability was not relevant, because TriCore's response to the charge—unlike petitioner's response in this case—"referred only to [the charging party's] case and said nothing to suggest that its actions were based on a company policy or that it had a pattern or practice of acting similarly when responding to other disabled employees' accommodation requests." *Id.* at 939; see Pet. App. 3a, 7a. In addition, the court of appeals in *TriCore* determined that the EEOC's request for a complete list of employees who had been pregnant, while "potentially relevant," 849 F.3d at 941, was overbroad because it sought "information about pregnant employees who never sought an accommodation," *id.* at 942. Here by contrast, the EEOC requested information regarding the test itself and those who had sought to take it. Pet. App. 17a.

Petitioner's reliance on *EEOC* v. *Royal Caribbean Cruises*, 771 F.3d 757 (11th Cir. 2014) (per curiam),

fares no better. There, an employee alleged that the defendant violated the ADA by refusing to renew his employment contract after he was diagnosed with a medical condition. *Id.* at 759. In response to the charge, the employer admitted that it had fired the employee due to his illness, as required by the governing law and medical standards of the Bahamas. *Ibid.* In light of this concession, the court of appeals upheld the district court's determination that a subpoena for "company-wide data regarding employees and applicants around the world with any medical condition, including conditions not specifically covered by the [relevant Bahamian] medical standards or similar to" those of the charging employee, was overbroad. *Id.* at 761. The court of appeals explained that "[a]lthough statistical and comparative data in some cases may be relevant in determining whether unlawful discrimination occurred," it was unnecessary in that case because the employer "admit[ted]" that the employee "was terminated because of his medical condition." *Ibid.*; see *ibid.* ("This does not appear to be a case where statistical data is needed to determine whether an employer's facially neutral explanation for the adverse employment decision is pretext for discrimination."). *BNSF*, *TriCore*, and *Royal Caribbean* thus do not suggest that "[t]he Tenth and Eleventh Circuits would reject the subpoena here." Pet. 26.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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