No. 05-356

In the Supreme Court of the United States

ALFRIEDA S. CONNOR SCOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CONNOR, PETITIONER

v.

MIKE JOHANNS, SECRETARY OF AGRICULTURE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal employee who obtains an administrative decision finding discrimination under Title VII of the Civil Rights Act but who is not content with the remedy awarded may file a "civil action" under 42 U.S.C. 2000e-16(c) in district court seeking to challenge solely the amount of damages awarded in the administrative process or instead must litigate both liability and remedy de novo in such an action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 409 F.3d 466. The order of the district court (Pet. App. 10a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2005. On August 4, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 16, 2005, and the petition for a writ of certiorari was filed on September 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, Congress extended Title VII of the Civil Rights Act of 1964 to protect federal employees. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111 (42 U.S.C. 2000e-16). Before filing a Title VII suit in federal court, federal employees must exhaust their administrative remedies. See *Brown* v. *GSA*, 425 U.S. 820, 832 (1976). In the Civil Rights Act of 1991, 42 U.S.C. 1981a *et seq*., Congress expanded the authority of the Equal Employment Opportunity Commission (EEOC) to award appropriate remedies, including reinstatement, backpay, and compensatory damages. See *West* v. *Gibson*, 527 U.S. 212 (1999). In so doing, Congress intended to "encourag[e] quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." *Id*. at 219.

Like a private-sector employee, a federal employee "aggrieved by the final disposition of his complaint" in the administrative process "may file a civil action as provided in section 2000e-5." 42 U.S.C. 2000e-16(c). In *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), this Court explained that the "civil action" conferred in Section 2000e-16(c) "accord[s] a federal employee *the same right to a trial de novo* as private-sector employees enjoy under Title VII." *Id*. at 864 (emphasis added). Although the *Chandler* Court did not directly address the question whether a federal employee may limit a court's review to those aspects of an EEOC decision that he or she wishes to challenge, the Court indicated that prior administrative findings are not binding in district court, but may "be admitted as evidence at a federal-sector trial *de novo*." *Id*. at 863 n.39.

Unlike federal employees, federal agencies have no right to challenge adverse EEOC decisions in court. The EEOC's regulations specify that "[f]inal action that has not been the subject of an appeal or civil action shall be binding on the agency." 29 C.F.R. 1614.504(a). See *Gibson*, 527 U.S. at 222. Moreover, so long as a federal employee is not seeking any additional relief beyond that granted in an administrative decision, he or she may go into federal court to "enforce" a binding decision "without risking de novo review of the merits." *Girard* v. *Rubin*, 62 F.3d 1244, 1247 (9th Cir. 1995); accord *Moore* v. *Devine*, 780 F.2d 1559, 1563 (11th Cir. 1986). However, where a federal employee rejects an EEOC decision (or an agency's final action), and files a civil action in district court under Title VII, that action prevents the underlying administrative decision from becoming final and "binding on the agency." 29 C.F.R. 1614.504(a). Thus, as the EEOC's regulations make clear, a federal employee who obtains a favorable decision in the administrative process has several choices: (1) accept that decision and the remedy awarded therein; (2) "file a civil action for enforcement" of that decision in district court if he or she believes the agency is not fully complying with it; or (3) "commence *de novo* proceedings" in district court. 29 C.F.R. 1614.503(g).

2. In 1997, Harold Connor (the deceased individual whose estate petitioner represents) and several other African-American employees of the United States Department of Agriculture (USDA) filed a class action lawsuit under Title VII alleging, among other things, the denial of various promotions on account of race. An administrative judge (AJ) held that the USDA had not discriminated on a class-wide basis, but also concluded that the agency had unlawfully denied promotions to Connor

and another employee, Dr. Clifford Herron. The AJ awarded both Herron and Connor GS-15 positions, back pay, attorney's fees, and $10,000 each in compensatory damages. The USDA then issued final decisions accepting the AJ's findings and the relief awarded. Pet. App. 3a.

Following additional administrative proceedings that are not relevant here, both Herron and petitioner filed suit in the United States District Court for the District of Columbia seeking to challenge solely the $10,000 compensatory damage awards. Pet. App. 10a-11a; *id.* at 3a. In *Herron* v. *Veneman*, 305 F. Supp. 2d 64 (D.D.C. 2004), the district court held that a federal employee may not challenge the amount of compensatory damages awarded in an administrative decision without litigating the issue of liability in a trial de novo under Title VII. *Id.* at 74-79. Because Herron requested a trial only on damages, the court held that he failed to state a claim. *Id.* at 79. Following its decision in *Herron*, the district court granted summary judgment to the USDA in this case, because petitioner's suit arose from the same administrative action and involved "the same legal issues" as *Herron*. Pet. App. 11a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court began by emphasizing that "two types of civil actions may arise from Title VII's federal-sector administrative process." *Id.* at 4a. When federal employees prevail in the administrative process but do not receive their promised remedy, the court recognized that they "may sue to enforce the final administrative disposition." *Ibid.* (citing *Wilson* v. *Pena*, 79 F.3d 154 (D.C. Cir. 1996)). "In such enforcement actions," the court explained, "the [district] court reviews neither the discrimination finding nor the remedy imposed, examining in-

stead only whether the employing agency has complied with the administrative disposition." *Ibid.* In the alternative, when federal employees are "aggrieved by" the administrative disposition of their discrimination claims, the court stated that they may file a "civil action" under Title VII, 42 U.S.C. 2000e-16(c), in which "the district court considers the discrimination claim de novo." Pet. App. 4a (citing *Chandler*, *supra*).

Because petitioner sought to challenge only the compensatory damages award and sought "neither to enforce an administrative disposition nor to retry an unsuccessful discrimination claim," Pet. App. 4a, the court of appeals explained that petitioner's suit raised the question whether a district court may "review a final administrative disposition's remedial award without reviewing the disposition's underlying finding of liability," *ibid.* "According to Title VII's plain language," the court held, "the answer is no." *Ibid.*

The court of appeals pointed out that Title VII authorizes a court to award various remedies only "*[i]f the court finds* that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice." Pet. App. 5a (quoting 42 U.S.C. 2000e-5(g)(1)) (emphasis and brackets added by the court of appeals). Based on this provision, the court concluded that, "in a federal-sector Title VII case, any remedial order must rest on judicial findings of liability, and nothing in the statute's language suggests that such findings are unnecessary in cases where a final administrative disposition has already found discrimination and awarded relief." *Ibid.*

The court of appeals observed that this Court's decision in *Chandler* "reinforces this conclusion." Pet. App. 5a. *Chandler* explained that "courts should not defer to

final administrative determinations finding no discrimination," Pet. App. 5a, but rather should permit "[p]rior administrative findings made with respect to an employment discrimination claim" to "be admitted as evidence at a federal-sector trial *de novo*," *id.* at 5a-6a (quoting *Chandler*, 425 U.S. at 863 n.39). The court of appeals emphasized that *Chandler*'s statement regarding the treatment to be accorded administrative findings in a civil action "drew no distinction between discrimination claims resolved in favor of the complainant and those resolved against the complainant." *Id.* at 6a. "Were an administrative finding of liability conclusive," the court of appeals observed, it would have been "unnecessary, and indeed strange" for the *Chandler* Court to have stated that administrative liability findings may "be admitted as evidence." *Ibid.* (internal quotation marks omitted). The court of appeals also relied on *Chandler*'s conclusion that the purpose of the 1972 amendments to Title VII was "to accord [federal employees] the same right to a trial *de novo* as is enjoyed by private-sector employees." *Ibid.* (quoting *Chandler*, 425 U.S. at 848). "Requiring federal-sector plaintiffs to prove liability" is consistent with that purpose, the court of appeals explained, because private plaintiffs "must litigate both liability and remedy." *Ibid.*

The court of appeals observed that its holding was consistent with a recent decision by the Tenth Circuit, *Timmons* v. *White*, 314 F.3d 1229 (2003), which held "that Title VII does not permit courts to review administrative dispositions' remedial awards without first determining whether discrimination occurred." Pet. App. 6a. While stating that "the Fourth and Ninth Circuits have arrived at the opposite conclusion," the court stressed that "the decisions of those circuits are flawed." *Ibid.*

The court of appeals emphasized that, in *Pecker* v. *Heckler*, 801 F.2d 709 (1986), the Fourth Circuit did not distinguish between enforcement suits and civil actions challenging an administrative disposition, "failed to consider Title VII's plain language[,] and relied on two decisions that provide no support for its broad conclusion." Pet. App. 6a-7a (citing *Houseton* v. *Nimmo*, 670 F.2d 1375 (9th Cir. 1982), and *Moore* v. *Devine*, *supra*). The court of appeals further explained that, in *Morris* v. *Rice*, 985 F.2d 143 (1993), the Fourth Circuit "relied primarily on its earlier decision in *Pecker*." Pet. App. 7a. The court of appeals found the Ninth Circuit's decision in *Girard* v. *Rubin*, 62 F.3d 1244 (1995), equally unpersuasive, because it "suffers from precisely the same defects" as *Pecker* and *Morris*. Pet. App. 7a.

Finally, the court of appeals rejected petitioner's argument "that requiring relitigation of liability runs counter to Title VII's policy of encouraging resolution of discrimination complaints at the administrative level." Pet. App. 7a. The court expressed doubt that a rule requiring relitigation of liability would encourage federal employees to go to court at the earliest available opportunity, because federal employees must exhaust their administrative remedies and because they have strong incentives *not* to abandon the administrative process. *Id*. at 8a. Among other things, the court noted that participation in the administrative process "could produce a final disposition acceptable to the employee, or if not, it could yield valuable evidence the employee could use in a later lawsuit." *Ibid*. Likewise, the court rejected petitioner's argument that requiring plaintiffs to litigate both damages and liability in trials de novo under Title VII would encourage "disingenuous" behavior by federal agencies. *Ibid*. The court of appeals explained that it

saw "nothing disingenuous about an employing agency adopting an AJ's liability finding and then disputing liability in court, given that the decision to adopt the finding may well rest in part on the size of the remedial award." *Ibid.*

ARGUMENT

Petitioner seeks review of the court of appeals' determination that a federal employee who obtains a favorable administrative decision under Title VII may not file a civil action in district court seeking to challenge solely the amount of damages awarded in the administrative process but instead must litigate both liability and remedy de novo. Pet. 11-24. That issue does not warrant this Court's review, because it was correctly decided by the court of appeals and because the Fourth Circuit, the only court of appeals with case law that directly conflicts with the decision below, has granted rehearing en banc to consider whether that precedent should be overruled.

1. a. The court of appeals properly held that a federal employee who is not satisfied with the amount of damages awarded in an administrative decision under Title VII may not seek de novo review of that decision in district court limited solely to the issue of damages. Although federal employees "aggrieved by" an administrative decision (either in whole or in part) may bring a "civil action" in district court, 42 U.S.C. 2000e-16(c), the court may provide a remedy only "[i]f the court finds" that the defendant has unlawfully discriminated, 42 U.S.C. 2000e-5(g)(1).[1] Thus, as the court of appeals cor-

[1] That provision provides, in relevant part:

> **(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judcial orders**

rectly recognized, the language of Title VII plainly requires that "any remedial order must rest on *judicial* findings of liability." Pet. App. 5a (emphasis added). Under petitioner's theory that administrative findings of discrimination are *binding* in a civil action in which the employee challenges only the administrative remedy she received, "judicial findings of liability" would not only be unnecessary but precluded. That result is contradicted by the plain language of the statute.

Petitioner's position is also inconsistent with this Court's decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). *Chandler* demonstrates in at least three additional ways that federal employees may not pick and choose among favorable and unfavorable findings in the administrative process by seeking limited de novo review of the remedies awarded while simultaneously treating prior liability findings as conclusive in district court. First, *Chandler* states that the civil action authorized by Section 2000e-16(c) is a "trial *de novo*." *Chandler*, 425 U.S. at 846. That term is generally understood to encompass a new trial on the *entire* case, as if there had been no prior findings. See *id.* at 853-854, 861 (referring to trial de novo as "plenary trial[]" and rejecting a reading of the term "civil action" that would permit "fragmentary *de novo* consideration of discrimination

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> (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate.

42 U.S.C. 2000e–5(g)(1).

claims where appropriate") (internal quotation marks omitted); *Timmons* v. *White*, 314 F.3d 1229, 1233 (10th Cir. 2003) (citing definitions of "trial de novo" in cases and *Black's Law Dictionary* (7th ed. 1999)). Second, *Chandler* makes clear that Section 2000e-16(c) "accord[s] a federal employee the same right to a trial *de novo* as private-sector employees enjoy under Title VII." 425 U.S. at 864. That principle would be undermined if federal employees could treat the favorable components of administrative decisions as binding in district court, because private plaintiffs do not typically obtain any administrative resolution of their claims prior to arriving in district court and thus "must litigate both liability and remedy." Pet. App. 6a.

Third, allowing federal employees to seek review in district court limited solely to damages would be inconsistent with the *Chandler* Court's statement that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*." 425 U.S. at 863 n.39. See *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112-113 (1991) (citing *Chandler* for proposition that "[a]dministrative findings with respect to the * * * claims of federal employees enjoy no preclusive effect in subsequent judicial litigation"). As the court of appeals recognized, petitioner's contention that administrative findings with respect to liability are conclusive if a federal employee elects not to challenge them in district court cannot be reconciled with *Chandler*'s view that the findings may serve as potential "evidence" in a "trial *de novo*." See Pet. App. 6a.

b. Petitioner makes several attempts (Pet. 18-22) to overcome the plain language of Title VII and *Chandler*. None has any merit. She argues (Pet. 18) first that the

court of appeals' reliance on the language of Section 2000e-5(g)(1) conditioning the award of judicial remedies on a judicial finding of liability is misplaced, because, as the court of appeals recognized, it is well established that "a plaintiff can obtain a remedy without a de novo liability determination by the court" (Pet. 18) in an action seeking to enforce a final remedial order issued in the agency proceedings. However, the court of appeals' recognition that district courts have authority to *enforce* binding agency decisions is fully consistent with its holding that Section 2000e-16(c) does not authorize suits under Title VII seeking damages only. As the EEOC's regulations make clear, a court's authority to enforce administrative decisions flows from the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361—not Title VII. See 29 C.F.R. 1614.503(g). Thus, contrary to petitioner's argument, the existence of judicial authority to enforce agency decisions under the APA and the mandamus statute does not override the specific limitations set forth in Section 2000e-5(g)(1) on the courts' authority to award their own remedies in a "civil action" under Section 2000e-16(c).

In a footnote (Pet. 19 n.10), petitioner attempts to discount Section 2000e-5(g)(1) on several additional grounds, arguing that (1) that provision does not apply to suits brought by federal employees, (2) a court may make liability findings based on the agency's findings, and (3) a court's remedial authority is not limited to cases where it also finds liability, at least with respect to awarding attorney's fees. The first contention is baseless because it cannot colorably be argued that Section 2000e-5(g)(1) does not apply to suits brought by federal employees. See *Chandler*, 425 U.S. at 845-848 (applying

Section 2000e-5(g) in discerning the meaning of "civil action" under Section 2000e-16(c)). Petitioner's second contention—that the phrase "[i]f the court finds" in Section 2000e-5(g)(1) could be read to embrace a rule of preclusion—is contrary not only to common sense but also to *Chandler*. See 425 U.S. at 845 (reading the phrase "[i]f the court finds" and other language to "indicate[] clearly that [a] 'civil action'" under Title VII is "a trial *de novo*").

Finally, petitioner's argument that district courts have authority to award remedies such as attorney's fees without making independent findings on liability is incorrect. Although petitioner cites *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), as support for this proposition, Pet. 19 n.10, the plaintiff in *Carey* initially sought relief on the merits of her claims in addition to attorney's fees, see 447 U.S. at 58, and the question "[w]hether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees" was therefore "plainly not presented." *Id.* at 71 (Stevens, J., concurring). Moreover, this Court has since held in a related context that a suit for attorney's fees is not an action to enforce any of the civil rights laws listed in 42 U.S.C. 1988, and that federal courts are thus not authorized to entertain claims solely for attorney's fees. See *North Carolina Dep't of Transp.* v. *Crest Street Cmty. Council*, 479 U.S. 6 (1986). Following *Crest Street*, the Fourth Circuit has held that district courts lack jurisdiction to entertain Title VII suits solely for attorney's fees. See *Chris* v. *Tenet*, 221 F.3d 648 (4th Cir. 2000), cert. denied, 531 U.S. 1191 (2001).[2]

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[2] In light of this Court's decision in *Crest Street*, petitioner's reliance on earlier lower court decisions allowing Title VII suits solely for

Petitioner contends next that the court of appeals erred in relying on Congress's intent to "treat private- and federal-sector employees alike" as a justification for requiring federal employees who receive a favorable administrative determination on liability but who seek enhanced remedies to proceed with a trial de novo on both liability and remedies. Pet. 19 (quoting *Chandler*, 425 U.S. at 861). Petitioner points out that Congress "did provide federal employees with certain rights that go beyond those of private-sector employees—in particular, the right to receive *enforceable* remedies from the EEOC, which are *binding* on federal agencies." *Ibid.* But the right at issue here is the right to trial "*de novo*," *Chandler*, 425 U.S. at 863; Congress simply did not bestow on federal employees a right to file an action seeking only to modify administrative remedies. To the contrary, Congress gave federal employees "the right to file a *de novo* 'civil action' equivalent to that enjoyed by private-sector employees." *Ibid.* Cf. *University of Tenn.* v. *Elliott*, 478 U.S. 788, 795-796 (1986) (noting that it "would be contrary to the rationale of *Chandler*" to allow findings by state agencies to have preclusive effect on a private employee's Title VII claim in district court).

Finally, petitioner raises various policy arguments (Pet. 20-22), but they cannot overcome the plain language of Title VII. As this Court explained in *Chandler*, "[i]t may well be * * * that routine trials *de novo* in the federal courts will tend ultimately to defeat, rather than to advance, the basic purposes of the statutory scheme. But Congress has made the choice, and it is not for us to disturb it." 425 U.S. at 863-864. In any event, as the

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attorney's fees, Pet. 18 n.9 (citing *Fisher* v. *Adams*, 572 F.2d 406 (1st Cir. 1978), and *Booker* v. *Brown*, 619 F.2d 57 (10th Cir. 1980)), is misplaced.

court of appeals explained, petitioner's policy arguments are unpersuasive. See Pet. App. 8a.

2. Petitioner asserts that the circuits are "[d]eeply [d]ivided" on the question presented. Pet. 11. Although it is correct that there is a shallow conflict on this issue, that conflict does not warrant this Court's review.

There is a consensus among the courts of appeals that have recently addressed the question that federal employees who have obtained favorable liability findings in the administrative process under Title VII may not seek de novo review in district court limited solely to the question of damages. In addition to the decision by the District of Columbia Circuit below, both the Tenth Circuit and the Third Circuit have recently issued published decisions holding that federal employees who have prevailed in the administrative process under Title VII may not tailor a civil action in federal court solely to a request for enhanced remedies, see *Timmons*, *supra*; *Morris* v. *Rumsfeld*, 420 F.3d 287 (3d Cir. 2005), and no court of appeals (or district court) has rejected or even questioned the analysis in these decisions.

Petitioner thus relies exclusively on claims of conflict with older decisions in various circuits. Pet. 12-17. As the courts of appeals, *Timmons*, and *Morris* all recognized, however, those decisions are unpersuasive because they either failed to consider the pertinent language of Title VII and *Chandler* or failed to apprehend the critical distinction between actions brought merely to enforce an administrative decision and those brought to obtain new remedies from the district court. See Pet. App. 6a-7a (explaining why contrary decisions "are flawed"); *Morris*, 420 F.3d at 293 & n. 11 (same); *Timmons*, 314 F.3d at 1236-1237 (same). More importantly, as explained below, the vast majority of these decisions do not

squarely hold that a federal employee may bring suit under Title VII solely to seek more damages than the amount awarded in the administrative process, and therefore do not conflict with the decision below.

The only genuine conflict is with two Fourth Circuit decisions, *Pecker* v. *Heckler*, 801 F.2d 709 (1986), and *Morris* v. *Rice*, 985 F.2d 143 (1993). That conflict is not only shallow but may be resolved by the Fourth Circuit itself. The Fourth Circuit recently granted rehearing en banc to consider whether *Morris* and *Pecker* should be overruled. In *Laber* v. *Harvey*, No. 04-2132, a case in which an Army employee attempted to challenge the remedy he received in the administrative process without litigating liability in district court, the Fourth Circuit sua sponte granted rehearing en banc, directing counsel to "be prepared to discuss at oral argument whether existing circuit precedent should be overruled." Order at 1, *Laber* v. *Harvey*, No. 04-2132 (4th Cir. Aug. 3, 2005). In light of the Fourth Circuit's pending en banc reconsideration of this issue (oral argument was heard October 27, 2005), review by this Court predicated on a claim of conflict with Fourth Circuit decisions is unwarranted at this time.

None of the other decisions petitioner relies upon establishes a conflict among the circuits on the question presented. Petitioner contends (Pet. 13-14) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *Girard* v. *Rubin*, 62 F.3d 1244 (1995). But *Girard* did not hold that liability findings in an administrative decision are binding in a damages-only trial in district court; it held only that the government waived a timeliness defense by failing to appeal a prior (and separate) EEOC decision that the complaint was filed within the statute of limitations. 62 F.3d at 1247.

In an unpublished decision, the Ninth Circuit underscored the limited reach of *Girard* while affirming a district court holding that a jury was *not* bound by prior administrative findings favorable to plaintiff in a "trial de novo" under Title VII. See *Friel* v. *Daley*, No. 99-15733, 2000 WL 1208197 (9th Cir. Aug. 24, 2000) ("It is one thing to say that the government loses an affirmative defense by failing to appeal an adverse administrative ruling; it is far different to say that the plaintiff is relieved of proving all the elements of his claim."). Likewise, in a recent published decision, the Ninth Circuit treated the question whether administrative liability findings are subject to de novo review as an open question in that circuit. See *Farrell* v. *Principi*, 366 F.3d 1066, 1068 n.2 (2004) (comparing *Morris* with *Timmons* and reserving judgment on the issue). Thus, the Ninth Circuit itself has not treated *Girard* as dispositive on the question presented and that court has recognized that administrative findings are admissible, but not binding, in a *private* employee's Title VII suit. See *Plummer* v. *Western Int'l Hotels Co.*, 656 F.2d 502 (9th Cir. 1981).[3]

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[3] Petitioner cites both *Friel* and *Farrell* to support her broad reading of *Girard*. Pet. 14 n.6. But those decisions plainly indicate that *Girard* is limited to circumstances where the government waives its right to litigate an affirmative defense such as timeliness by not appealing a separate EEOC order. Petitioner's reliance on *Briones* v. *Runyon*, 101 F.3d 287 (2d Cir. 1996), Pet. 15, is misplaced for precisely the same reason. That case also involved waiver of a timeliness defense, *not* the question whether an administrative liability finding is conclusive in a trial de novo in district court. Indeed, as petitioner recognizes, Pet. 22-23 n.11, at least one district court in the Second Circuit has expressly held, relying on *Timmons*, that a federal employee may not seek damages in a trial de novo under Title VII without also litigating liability. *St. John* v. *Potter*, 299 F. Supp. 2d 125, 128 (E.D.N.Y. 2004).

Petitioner asserts that the court of appeals' decision in this case "is also irreconcilable with the decision of the Sixth Circuit in *Haskins*," Pet. 14, but in *Haskins* the court expressly noted that, where an employee seeks de novo review of his discrimination claims, "the district court is not bound by the administrative findings." *Haskins* v. *Department of the Army*, 808 F.2d 1192, 1199 n.4 (6th Cir.), cert. denied, 484 U.S. 815 (1987).[4] See *Morris*, 420 F.3d at 293 (distinguishing *Haskins*). Likewise, petitioner's reliance on *Gibson* v. *Brown*, 137 F.3d 992 (7th Cir. 1998), vacated, 527 U.S. 212 (1999), is misplaced not only because the decision was vacated but also because that case was an enforcement action. See 137 F.3d at 993-995 (employee filed suit to enforce agency decision and to obtain compensatory damages that he claimed could not be awarded by EEOC).

Finally, while acknowledging that the First Circuit "has not reached the precise issue posed by this case," Pet. 16; see *Rivera-Rosario* v. *USDA*, 151 F.3d 34, 37 (1st Cir. 1998), petitioner suggests that the decision below conflicts with First Circuit cases allowing the recovery of attorney's fees in district court without requiring the litigation of claims on the merits. Pet. 16-17 (citing *Fischer* v. *Adams*, 572 F.2d 406 (1st Cir. 1978)). As pre-

[4] While petitioner emphasizes the statement in *Haskins* that "the factual findings underlying an administrative liability determination must be accepted by the district court if the plaintiff so requests," 808 F.2d at 1200, that statement was made in the context of a case in which the government "did not challenge the liability determination," *ibid.* Indeed, contrary to petitioner's suggestion (Pet. 15 n.7) that the district court "found no liability," the court of appeals concluded that "the district court granted [the employee's] motion for partial summary judgment on the question of Title VII liability since the Army had 'admitted discrimination against the plaintiff.'" 808 F.2d at 1195 (citation omitted).

viously noted, see p.12 & note 2, however, old cases allowing suits solely for attorney's fees under Title VII are of dubious continuing validity in light of this Court's decision in *Crest Street*, and the purported conflict between those cases and the Fourth Circuit's more recent holding that district courts lack jurisdiction to entertain suits solely for attorney's fees, see *Chris*, 221 F.3d at 652, did not move this Court to grant the petition for certiorari in *Chris*. See 531 U.S. 1191 (2001). In any event, there is no conflict between the First Circuit and the District of Columbia Circuit on the distinct question presented by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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