No. 14-1343

In the Supreme Court of the United States

GUSTAVO REVELES, PETITIONER

v.

JEH JOHNSON, SECRETARY OF HOMELAND SECURITY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, protects federal employees from discrimination on the basis of race, color, religion, sex, or national origin in personnel actions. 42 U.S.C. 2000e-16(a). That anti-discrimination mandate is enforced through regulations issued by the Equal Employment Opportunity Commission (EEOC). Those regulations provide that, before filing an administrative complaint, a federal employee who believes that he has been discriminated against must contact an Equal Employment Opportunity counselor at his agency to attempt to resolve the matter informally. See 29 C.F.R. 1614.105(a). Under 29 C.F.R. 1614.105(a)(1), the employee "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."

The question presented is whether, when the agency argues that the employee's claim is untimely under 29 C.F.R. 1614.105(a), but the EEOC fails to make a specific finding on timeliness when it adjudicates the complaint, and then the employee sues in federal district court, the EEOC's failure to make a finding on timeliness prevents the agency for which the employee worked from relying on an untimeliness defense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the *Federal Reporter* but is reprinted at 595 Fed. Appx. 321. The opinion and order of the district court (Pet. App. 11a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2014. A petition for rehearing was denied on February 20, 2015 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on May 7, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, "[a]ll personnel actions affect-

ing employees or applicants for employment" in the federal government must be "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). Title VII gives the Equal Employment Opportunity Commission (EEOC) authority to enforce that anti-discrimination mandate within the federal government, including by issuing regulations for the processing of complaints of discrimination. 42 U.S.C. 2000e-16(b). The EEOC has established detailed procedures for the administrative resolution of such complaints, see 29 C.F.R. Pt. 1614, and an employee must exhaust those administrative remedies before filing suit in court, see *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 832-834 (1976).

As relevant here, the regulations require a federal employee who believes that he has been discriminated against on the basis of a protected ground to consult one of his agency's Equal Employment Opportunity (EEO) counselors before filing an administrative complaint. 29 C.F.R. 1614.105(a). The regulations provide that the employee "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1). This time limit is "subject to waiver, estoppel and equitable tolling." 29 C.F.R. 1614.604(c).[1]

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[1] The regulations also provide that the 45-day time limit may be extended in certain other circumstances that are not at issue here. See 29 C.F.R. 1615.105(a)(2); see also pp. 10-13, *infra* (explaining that petitioner's argument for relief from the 45-day deadline depends on the waiver doctrine).

If counseling does not resolve the matter, the employee may file a complaint with his agency—here, the Department of Homeland Security (DHS). See 29 C.F.R. 1614.106. If the employee requests a hearing on his complaint, an EEOC administrative judge (AJ) conducts a hearing, where the parties to the dispute are the employee and his employing agency. See 29 C.F.R. 1614.106(e), 1604.109. Either the employee or the agency may appeal the AJ's decision to the EEOC (specifically, to the EEOC's Office of Federal Operations). See 29 C.F.R. 1614.110(a) (agency appeal); 29 C.F.R. 1614.401 (employee appeal); see also 29 C.F.R. 1614.403. The EEOC then issues a decision, see 29 C.F.R. 1614.405, and if the employee is not satisfied with that decision, he may file suit against the employing agency in federal district court, where review is de novo. See 29 C.F.R. 1614.407; see also *Chandler* v. *Roudebush*, 425 U.S. 840, 863-864 (1976).[2]

2. Petitioner is a Hispanic male who was a supervisory border patrol agent at United States Customs and Border Protection (CBP) in the DHS. Pet. App. 1a-2a. As part of his job duties, petitioner had access to a government email account and a government computer. *Id.* at 12a-13a.

In 2006, DHS's Office of Inspector General (OIG) investigated petitioner and discovered sexually explic-

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[2] Different procedures apply when the employee files a complaint with his agency but does not request a hearing. In that situation, the agency investigates the complaint and issues a decision, see 29 C.F.R. 1614.106(e), 1614.107, 1614.108, 1614.110(b); the employee may appeal that decision to the EEOC, see 29 C.F.R. 1614.401, and (if the employee is not satisfied with the EEOC's decision), may file suit against the employing agency in federal district court, where review is de novo, see 29 C.F.R. 1614.407; *Chandler*, 425 U.S. at 863-864.

it photographs and videos in his email and stored on his government computer. Pet. App. 2a, 13a. The agency relieved petitioner of his law enforcement duties and placed him on administrative duty for one year. *Ibid.* The agency then proposed to terminate petitioner's employment for misuse of a government computer and lack of candor. *Id.* at 13a.

As an alternative to removal, petitioner voluntarily signed a "last chance agreement." Pet. App. 14a (capitalization omitted). As part of that agreement, petitioner agreed that he would not engage in any misconduct for 24 months. *Id.* at 2a, 14a. If petitioner engaged in any misconduct, the agreement called for "immediate removal from federal employment." *Id.* at 2a (quoting agreement). Petitioner reviewed the agreement with his attorney and signed it. *Id.* at 14a. After serving a 30-day suspension without pay, petitioner resumed his duties as a supervisory border patrol agent. *Id.* at 2a, 15a.

A few months later, a CBP supervisor sent an email to 39 CBP employees, including petitioner and three of petitioner's supervisors, thanking another agent for catching an error in a memo. Pet. App. 2a, 15a. That agent, Robert Galvan, responded to all recipients that he did not deserve the credit because another agent had found the error. *Ibid.* Petitioner then replied to all recipients in an email that called Galvan a "kiss-ass." *Ibid.*

Petitioner's immediate supervisor discussed the email with petitioner and concluded that petitioner should speak with his third-line supervisor, Jonathan Richards. Pet. App. 3a, 16a. Petitioner sent a memo to Richards, apologizing for the email and explaining that it was meant as a joke only for Galvan. *Ibid.*

After petitioner met with Richards, the agency placed petitioner on administrative leave. *Ibid.* The Chief Patrol Agent for petitioner's area then determined that petitioner's email was misconduct in violation of the last chance agreement and terminated petitioner's employment. *Id.* at 3a, 17a. Petitioner's termination occurred on March 11, 2008. *Id.* at 33a.[3]

3. About three months after his termination, petitioner spoke with another supervisory border patrol agent, Rene Valenzuela. Pet. App. 17a. Valenzuela told petitioner he had overheard a conversation between Richards and another supervisor, Christopher McLerran, about their lunch plans. *Id.* at 3a, 17a-18a. Accordingly to Valenzuela, in the course of that conversation, McLerran, a non-Hispanic, "made sexually and racially explicit comments regarding white sausage and white bread." *Id.* at 3a; see *id.* at 18a. According to petitioner (Pet. 10), Richards did not join in the comments but instead left the conversation.

When petitioner learned about this conversation, he concluded that he had been fired because he is Hispanic. Pet. App. 18a. Petitioner acknowledges (Pet. 9-10) that he "did not believe he had been discriminated against" at the time he was fired; he says the conversation with Valenzuela was the "first time

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[3] Petitioner initially appealed his termination to the Merit Systems Protection Board (MSPB), and an administrative judge dismissed the appeal, concluding that petitioner waived his right to an MSPB appeal in the last chance agreement, and that, in any event, petitioner failed to provide a non-frivolous argument that he was in compliance with that agreement. Pet. App. 3a. Petitioner later supplemented his MSPB appeal with his claim of national-origin discrimination, and the MSPB issued a final order denying petitioner's appeal. *Id.* at 3a, 19a. The MSPB proceedings are not at issue in this case.

he felt he had been discriminated against," Pet. App. 17a-18a.

Petitioner then met with an EEO counselor about his claim of national-origin discrimination. Pet. App. 3a, 19a. This meeting occurred on July 22, 2008, which all agree was more than 45 days after petitioner's termination. *Id.* at 5a, 19a.

4. Petitioner filed a discrimination complaint with DHS and requested a hearing before an AJ. Pet. App. 4a, 19a. In response to the complaint, DHS argued (*inter alia*) that petitioner's claim was untimely because he failed to contact an EEO counselor within 45 days of his termination, as required by 29 C.F.R. 1614.105(a)(1), and that, in any event, petitioner failed to make out a case of discrimination. See EEOC No. 451-2009-00106X Agency's Mot. to Dismiss the Compl. & Related Relief 3-8 (May 6, 2009) (DHS Mot. to Dismiss).

The AJ did not address timeliness and instead decided the case on the merits, concluding that DHS did not discriminate against petitioner. Pet. App. 4a; EEOC No. 451-2009-00106X Decision on Hr'g Compl. 5-8 (Oct. 12, 2010) (AJ Decision). Petitioner appealed to the EEOC Office of Federal Operations. Pet. App. 4a, 20a. The EEOC affirmed. See *ibid.*

5. Petitioner filed suit against DHS in federal district court, alleging that DHS discriminated against him on the basis of national origin in violation of Title VII. Pet. App. 4a, 12a. The government sought summary judgment on two grounds: (1) petitioner's claim is barred because he failed to contact an EEO counselor within the 45-day deadline specified in the regulations, and (2) petitioner's claim of discrimination fails on the merits. *Id.* at 20a.

The district court granted the government's summary-judgment motion on the ground that petitioner failed to exhaust his administrative remedies. Pet. App. 11a-40a. The court explained that, "[b]efore bringing a civil suit in federal court under Title VII," a federal employee must exhaust his administrative remedies by filing a charge with the EEO division of his agency. *Id.* at 32a. "As part of the charge-filing process," the court explained, the employee must contact an EEO counselor within 45 days of the allegedly discriminatory termination. *Id.* at 32a-33a (citing 29 C.F.R. 1614.105(a)(1)). In this case, the court noted, petitioner contacted an EEO counselor "approximately 134 days after his employment was terminated," and so he did not timely exhaust his administrative remedies. *Id.* at 33a-35a.

The district court also concluded that the exhaustion defense had not been waived. Pet. App. 37a-38a. The court explained that, "[t]o waive a timeliness objection, the agency must make a specific finding that the submission was timely," and "[a]n agency's docketing and acting on a complaint does not constitute a waiver of the timeliness requirement." *Id.* at 38a. The court specifically noted that petitioner did not "submit any evidence * * * that alleges that the timeliness issue was discussed and affirmatively decided in any of the EEO-related proceedings." *Ibid.*

6. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-10a. The court explained that federal employees who seek relief under Title VII must first exhaust their administrative remedies, which includes initiating contact with an EEO counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of person-

nel action, within 45 days of the effective date of the action." *Id.* at 5a (quoting 29 C.F.R. 1614.105(a)(1)). In this case, the court explained, petitioner was required to contact an EEO counselor within 45 days of his termination on March 11, 2008, and he failed to do so. *Ibid.* The court rejected petitioner's argument that the 45-day period began to run in June 2008 (when petitioner learned of the lunchtime conversation), rather than in March 2008. *Id.* at 5a-6a. The court explained that "the limitations period starts running on the date the discriminatory *act* occurs," not when the employee first perceives a potentially discriminatory motive. *Id.* at 6a (quoting *Merrill* v. *Southern Methodist Univ.*, 806 F.2d 600, 605 (5th Cir. 1986)).

The court of appeals also rejected petitioner's argument that the government had waived reliance on the 45-day deadline. Pet. App. 7a-9a. The court explained that "waiver requires a specific finding on the issue of timeliness," and in this case, the EEOC "did not make a specific finding, in its initial decision or on appeal, regarding the timeliness of [petitioner's] initial meeting with the EEO counselor." *Id.* at 9a.

7. Petitioner filed a petition for rehearing, which the court of appeals denied, with no judge in regular active service requesting a poll on the petition. Pet. App. 41a-42a.

ARGUMENT

Petitioner seeks review (Pet. 15-24) of the court of appeals' holding that he failed to timely exhaust his administrative remedies. The court of appeals' holding that petitioner's claim was untimely is correct. The court of appeals' unpublished, per curiam decision does not create binding circuit precedent, and it does

not conflict with any decision from another circuit. Further review is therefore unwarranted.[4]

1. The court of appeals correctly concluded that petitioner failed to timely exhaust his administrative remedies by meeting with an EEO counselor within 45 days of his termination.

a. The EEOC has the authority to investigate and decide Title VII complaints by federal employees, and it has established procedures for doing so. See 42 U.S.C. 2000e-16(b); see generally 29 C.F.R. Pt. 1614. An employee of a federal agency who believes he has been discriminated against must attempt to resolve his complaint with an agency EEO counselor before filing an administrative complaint. See 29 C.F.R. 1614.105(a). The employee must contact an EEO counselor within 45 days of "the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1). If the employee fails to comply with that time limit, his claim is untimely and should be dismissed. See 29 C.F.R. 1614.107(a)(2); see also *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (failure to notify an EEO counselor in a timely fashion precludes suit on the employee's claims absent defense of waiver, estoppel, or equitable tolling).

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[4] In *Green* v. *Brennan*, cert. granted, No. 14-613 (Apr. 27, 2015), this Court is considering the question of when the 45-day time period in 29 C.F.R. 1614.105(a) begins to run in the case of a constructive discharge. 14-613 Pet. at i. This case need not be held for *Green*, because this case does not involve when the 45-day period begins to run; rather, the question is, assuming that petitioner has not met the deadline, whether the agency's timeliness defense has been waived.

As the court of appeals explained (Pet. App. 5a-8a), petitioner failed to exhaust his administrative remedies because he failed to contact an EEO counselor within the prescribed time period. Petitioner's employment was terminated on March 11, 2008, and petitioner contacted an EEO counselor on July 22, 2008, more than 45 days after his termination. *Id.* at 5a, 33a; see *id.* at 33a (noting that petitioner contacted an EEO counselor "approximately 134 days after his employment was terminated"). Petitioner does not dispute that he contacted his agency's EEO counselor more than 45 days after his termination. See Pet. 10. Instead, his primary argument below was that the 45-day deadline should run from the date he learned of the possible discriminatory motive for his termination, rather than the date of his termination. See Pet. App. 5a-7a. The court of appeals rejected that argument, see *ibid.*, and petitioner does not renew it before this Court.

b. Instead, petitioner contends (Pet. 13-14, 16) that the agency waived its reliance on the 45-day deadline during the administrative proceedings. He is mistaken. Petitioner's argument fails to distinguish between the actions of the EEOC and DHS. DHS is the agency for which petitioner worked, and once petitioner filed his discrimination complaint and requested a hearing, DHS became an adverse party in the complaint process. See 29 C.F.R. 1614.109. The EEOC is the agency that acted as the adjudicator in the administrative complaint process; an EEOC AJ held a hearing and issued a decision, and that decision was reviewed by the EEOC's Office of Federal Operations. See *ibid.*; see also 29 C.F.R. 1614.403. In the administrative proceedings, DHS argued that petitioner's

complaint was untimely because he failed to contact an EEO counselor within the 45-day timeframe. See DHS Mot. to Dismiss 3-6. DHS also argued that petitioner's claim failed on its merits. See *id.* at 6-8. The EEOC, acting as the adjudicator, decided the complaint on the merits, without addressing timeliness. See AJ Decision 5-8.

The question here is whether the *EEOC's* failure to address timeliness in its decisions means that *DHS* has affirmatively waived reliance on the 45-day deadline and cannot rely on it in this litigation. It does not. Even if the EEOC's actions constituted a waiver, they should not bind DHS, which was a party to the administrative adjudication and a party to federal-court litigation. If DHS had made an affirmative determination that petitioner's complaint was timely, then it could be bound by that determination. See Pet. App. 38a; accord *Munoz* v. *Aldridge*, 894 F.2d 1489, 1494-1495 (5th Cir. 1990) (agency waived timeliness objection when it "ma[de] a specific finding during the administrative process that the administrative complaint was timely" and "argued on appeal that it was indeed timely and engaged in extensive discovery premised on the complaint's timeliness"); *Henderson* v. *United States Veterans Admin.*, 790 F.2d 436, 440-441 (5th Cir. 1986) (where the employee's agency "made a specific finding of timeliness in [the employee's] case, after the case was remanded to the agency by the EEOC for that particular finding," the employee's complaint was timely filed). But DHS did not make any affirmative determination that petitioner's complaint was timely in this case.

To the contrary: DHS properly raised its timeliness objection during the administrative proceedings,

and it promptly renewed its timeliness objection in district court. Contrary to petitioner's contention (Pet. 11, 12, 23), DHS argued in the administrative proceedings that petitioner's claim is untimely because he did not meet with an EEO counselor within 45 days of his termination. See DHS Mot. to Dismiss 3-6.[5] Petitioner was aware that DHS made this argument, because he responded to it in his filings before the AJ. See EEOC No. 451-2009-00106C Complainant's Resp. to the Agency's Mot. to Dismiss the Compl. & Related Relief 2-4 (May 12, 2009) (Complainant's Resp.).[6] Indeed, in his brief to the court of appeals, petitioner acknowledged that DHS argued to the AJ that his claim was untimely. See Pet. C.A. Br. 16 (available at 2014 WL 2556750).[7] DHS therefore

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[5] Specifically, DHS quoted the relevant regulation, 29 C.F.R. 1614.105(a)(1); explained that petitioner was required to contact an EEO counselor within 45 days of his termination on March 11, 2008; noted that petitioner did not contact an EEO counselor until July 22, 2008; and explained why petitioner was wrong to say that the 45-day deadline began running in June, rather than March. DHS Mot. to Dismiss 3-5. DHS then concluded that "Complainant's Formal Claim of discrimination should be dismissed as untimely." *Id.* at 6.

[6] In particular, petitioner acknowledged the government's argument that he "did not 'initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory,'" Complainant's Resp. 2 (quoting 29 C.F.R. 1614.105(a)(1)), and argued that he was not required to meet with an EEO counselor within 45 days of his termination because "[a]s of his date of termination he had no reason to believe that [third-line supervisor] J.R. Richard was engaging in discriminatory practices," *id.* at 3-4 (capitalization omitted).

[7] Petitioner argued: "During the Administrative process, the Appellee made the same arguments before the EEOC unsuccess-

did not affirmatively waive reliance on the 45-day deadline in the administrative proceedings. DHS also timely raised the argument that petitioner failed to exhaust administrative remedies in the district court, and the district court ruled on that ground. Pet. App. 20a, 32a-38a.

Petitioner appears to contend (Pet. 16) that DHS waived reliance on the 45-day deadline simply by accepting his complaint and referring it to an EEOC AJ. He is mistaken. Accepting a complaint is not the kind of affirmative relinquishment of a known right that constitutes waiver. See, *e.g.*, *Oaxaca* v. *Roscoe*, 641 F.2d 386, 390 (5th Cir. 1981) (rejecting the argument that a federal agency automatically waives a timeliness objection by accepting and investigating a tardy complaint). Petitioner has not identified any circuit that uses the rule he proposes.

c. The court of appeals correctly concluded that there was no waiver of the 45-day deadline in this case. But that court (and petitioner) focused on the actions of the EEOC (the adjudicatory body), rather than the actions of DHS (the adversary party). For the reasons set out above, whether there is a waiver depends on the actions of DHS, not the EEOC. See also Gov't C.A. Br. 18-20 (government's argument before the court of appeals focused on whether CBP—not the EEOC—made an affirmative finding that waived the 45-day deadline) (available at 2014 WL 3898586).

But even if the actions of the EEOC were relevant, they would not establish a waiver. As the court of appeals correctly noted, neither the EEOC AJ nor the

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fully attempting to have a finding by the EEOC Administrative Judge that Reveles was time barred." Pet. C.A. Br. 16.

Office of Federal Operations made any affirmative finding that petitioner's contact with the EEO counselor was timely. See Pet. App. 8a-9a. And it would be particularly odd to deem the EEOC's actions to be a waiver when the EEOC's findings are not binding in court. Once the employee alleging discrimination files suit in district court, the entire matter is reviewed de novo, including any EEOC finding on the timeliness of the complaint. See *Chandler* v. *Roudebush*, 425 U.S. 840, 863-864 (1976); see also, *e.g.*, *Smith* v. *Potter*, 445 F.3d 1000, 1011 (7th Cir. 2006) (holding that district court "properly refused to accord * * * any deference whatsoever" to EEOC's decision that plaintiff's administrative complaint was timely).

Accordingly, there is no basis for concluding that DHS waived its reliance on the 45-day deadline in this case. The court of appeals therefore correctly found that petitioner's complaint was time-barred.

2. Contrary to petitioner's contention (Pet. 15, 17-24), the decision of the court of appeals does not conflict with the decisions of another court of appeals. As an initial matter, the court of appeals' decision is unpublished and does not create binding circuit precedent, and it therefore could not give rise to the type of circuit conflict in precedential decisions that might warrant this Court's review. In any event, there is no conflict.

Petitioner's primary contention (Pet. 17-20) is that the decision below conflicts with the decisions in *Bowden* v. *United States*, 106 F.3d 433 (D.C. Cir. 1997), and *Ester* v. *Principi*, 250 F.3d 1068 (7th Cir. 2001). Neither case addresses the timing provision at issue here (29 C.F.R. 1614.105), and neither uses a legal rule that conflicts with the decision below. In

Bowden, the D.C. Circuit concluded that the Immigration and Naturalization Service (INS) waived the 30-day deadline for notifying an agency that it had failed to comply with the terms of a settlement agreement. 106 F.3d at 436, 438-439. The court found a waiver because the INS had "definitively responded to the merits of an employee's complaint without mentioning untimeliness, failed to raise untimeliness until the third round in court, and prolonged the litigation for years by shifting legal positions." *Id.* at 439. Here, by contrast, DHS raised petitioner's failure to comply with the 45-day deadline at the earliest possible opportunity before the EEOC and before the district court. *Bowden* did not set out any broad principle that simply accepting a complaint constituted a waiver; instead, the court said that "agencies do not waive a defense of untimely exhaustion merely by accepting and investigating a discrimination complaint," and the court cautioned that its holding was limited to the facts of that case and was not "intend[ed] to create a sweeping principle concerning waiver of administrative time limits under Title VII." *Id.* at 438-439.[8]

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[8] The D.C. Circuit's decision in *Brown* v. *Marsh*, 777 F.2d 8 (1985), is similar. In that case, the court concluded that the Army had failed to prove its defense of failure to exhaust administrative remedies and that even if it had, waiver would apply. *Id.* at 11-16. The court concluded that the Army waived a timeliness objection when the dispute was "extensively pursued at both the administrative and judicial level" for over ten years and the timeliness question was "raised sporadically" but was never fully pursued, and when the EEO counselor also wrote a letter stating that the Army should "waive possible issues of untimeliness." *Id.* at 15 (emphasis and citation omitted). The court rejected the rule that mere docketing and investigation of a complaint could constitute a waiver, *ibid.*, and it limited its holding to the "rather unusual circumstanc-

Ester is likewise inapposite. In that case, the Seventh Circuit held that the Department of Veterans Affairs had waived reliance on the 15-day deadline for filing an administrative complaint under 29 C.F.R. 1614.106 when it decided the merits of an employee's discrimination complaint without addressing its timeliness at any point during the lengthy administrative process. 250 F.3d at 1071-1072. The court based its decision on the "significant prejudice to plaintiffs who suddenly must defend a claim of untimeliness never before raised." *Ibid.* Those considerations do not apply here, where DHS raised the untimeliness defense before the AJ and the district court, and petitioner had the opportunity to respond and did respond. Further, the Seventh Circuit, like the court below, recognized that "agencies do not waive a timeliness defense merely by accepting and investigating a discrimination complaint." *Id.* at 1072 n.1. Unlike the employees in *Bowden* and *Ester*, petitioner could not have been surprised or prejudiced by the agency's renewal of this objection in district court.

None of the remaining circuit court decisions petitioner cites (Pet. 21) conflicts with the decision below. Petitioner relies (Pet. 19, 21) on a number of cases that state the principle that an agency's mere receipt and investigation of a complaint does not waive a timeliness objection. See *Horton* v. *Potter*, 369 F.3d 906, 911 (6th Cir. 2004) ("[W]hen an agency accepts and investigates a complaint of discrimination, as the Postal Service did in this case, it does not thereby

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es of this case," *id.* at 14. *Brown* is unlike this case because here, DHS promptly raised the 45-day deadline both before the EEOC and in the district court and because *Brown* involved other circumstances not present here.

waive a defense that the complaint was untimely."); *Boyd* v. *United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985) (holding that the Postal Service did not waive reliance on a timeliness objection by accepting the employee's complaint of discrimination, because "[t]he mere receipt and investigation of a complaint do[] not waive objection to a complainant's failure to comply with the original filing time limit when the later investigation does not result in an administrative finding of discrimination"); see also *Kurtz* v. *McHugh*, 423 Fed. Appx. 572, 577 (6th Cir. 2011) (unpublished) ("[A]gencies do not waive the defense of untimely exhaustion merely by accepting and investigating a complaint of discrimination."). Those decisions are consistent with the Fifth Circuit's decision in this case. See Pet. App. 9a ("[T]he docketing and acting on a complaint * * * does not alone constitute a waiver of the timeliness objection.").

In *Bruce* v. *United States Department of Justice*, 314 F.3d 71 (2002) (per curiam), the Second Circuit found a waiver because an EEO officer had conveyed an express determination of timeliness in a letter that bound the agency. *Id.* at 75 (noting that this is a case where "a government agency makes a specific finding of timeliness and communicates that to a complainant"). Here, DHS made no such determination; instead, it contested the timeliness of petitioner's EEO contact. Similarly unhelpful to petitioner is *Mercado* v. *Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41 (1st Cir. 2005), as *Mercado* is a non-government Title VII case, where different procedures apply. *Id.* at 45. The private employees in *Mercado* filed an untimely charge with the EEOC, and the EEOC issued "right-to-sue" letters to them with-

out "without making either a determination on the merits or a finding on timeliness." *Id.* at 43-44. The court of appeals held that the EEOC's issuance of the letters did not waive the untimeliness defense of the *private employer*, because all the agency did was accept and investigate the complaint, and the private employer promptly raised the defense in district court. *Id.* at 45.

The remaining appellate case cited by petitioner (Pet. 21) does not involve administrative exhaustion under Title VII at all. See *Hall* v. *Department of the Treasury*, 264 F.3d 1050, 1061 (Fed. Cir. 2001) (holding that agency waived its right to enforce a time limit for an employee's request for law enforcement service credits on the facts of that case). Accordingly, there is no disagreement in the circuits that warrants this Court's review.

3. In any event, this case presents a poor vehicle for further review for two reasons. First, the waiver issue was not the focus of the briefing or argument below. Petitioner's primary argument about timeliness before the court of appeals was that he was not required to contact an EEO counselor until he learned of a possible discriminatory animus three months after his termination. See Pet. C.A. Br. 14-18; Pet. C.A. Reply Br. 2-3 (available at 2014 WL 8117651). Petitioner did not directly make a waiver argument in his brief; the issue of waiver only came up because petitioner sought to "distinguish[] his case from *Pacheco* v. *Rice*," 966 F.2d 904 (5th Cir. 1992), and the district court interpreted that citation "as an argument on waiver." Pet. App. 8a. Moreover, petitioner acknowledged both that DHS argued to the AJ that his claim was time-barred and that "in the Adminis-

trative phase the Commission itself did not find Reveles' complaint was time barred." Pet. C.A. Br. 16. As a result, the court of appeals addressed the waiver argument only briefly, in a three-paragraph discussion. See Pet. App. 7a-9a. And as explained above, the court's discussion failed to distinguish between the actions of DHS and the actions of the EEOC in deciding whether there was a waiver (even though the government argued that the waiver question depended on the actions of DHS). See pp. 13-14, *supra*. This is therefore not a good case to address any legal questions regarding the waiver doctrine.

Second, petitioner is unlikely to succeed on the merits of his discrimination claim. The AJ thoroughly considered petitioner's claim and rejected it on the merits. The AJ concluded that (1) third-line supervisor Richards (who heard, but did not make, the allegedly discriminatory remark) had no input or influence over the Chief Patrol Agent's decision to terminate petitioner's employment, and (2) there was no evidence that the Chief Patrol Agent was motivated by any discriminatory animus. AJ Decision 5-7. There was a legitimate, non-discriminatory reason for petitioner's firing: after a year-long OIG Investigation revealed that petitioner had been misusing his government computer, he was given a chance to keep his job, but he engaged in further misconduct. Pet. App. 16a-17a. On appeal, the EEOC Office of Federal Operations affirmed, agreeing that petitioner's claim of discrimination lacked merit. See *id.* at 19a-20a. DHS argued that petitioner's claim fails on its merits before both the district court and the court of appeals. Thus, even if the Court were to grant the petition and conclude that the agency waived its timeliness objection,

that holding would be unlikely to change the outcome of petitioner's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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