No.

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title VII authorizes the Equal Employment Opportunity Commission to investigate charges of discrimination, and to issue subpoenas to employers for information relevant to the charge under investigation. This case presents two important questions on which the circuits are divided:

1. Whether the Seventh Circuit erred by holding, in conflict with decisions of the Fifth Circuit, that the EEOC may enforce a subpoena after the charging employee has initiated litigation, and even after the charging employee's claim has been adjudicated meritless in court.

2. Whether the Seventh Circuit erred by holding, in conflict with decisions of the Tenth and Eleventh Circuits, that a charge alleging only individual discrimination permits the EEOC to subpoena nationwide information about suspected discrimination against other employees in other employment practices.

RULE 29.6 STATEMENT

Petitioner Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation.

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The district court's opinion is reported at 102 F. Supp. 3d 1037 (Pet. App. 19a-28a). The Seventh Circuit's opinion is reported at 867 F.3d 843 (Pet. App. 1a-18a).

JURISDICTION

The Seventh Circuit denied Union Pacific's petition for rehearing *en banc* on November 21, 2017. Pet. App. 29a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 42 U.S.C. §§ 2000e-5, 2000e-6, 2000e-8, and 2000-e9 are reproduced at Pet. App. 30a-41a.

STATEMENT OF THE CASE

This case concerns the EEOC's efforts to enforce a subpoena against Petitioner Union Pacific Railroad Company. Two Union Pacific employees filed charges with the EEOC alleging that they were retaliated against for complaining about racist comments by coworkers and alleged discrimination in job assignments, and as a result were not permitted to take a test for promotion to the "Assistant Signal Person" position. The EEOC investigated their charges and took no action. After receiving their right to sue notices from the agency, the employees filed suit in federal court. That court dismissed all their claims on summary judgment and the Seventh Circuit affirmed. *See Burks v. Union Pac. R.R. Co.*, No 12 C 8164, 2014 WL 3056529 (N.D. Ill. July 7, 2014), *aff'd*, 793 F.3d 694 (7th Cir. 2015). Despite the final judicial resolution of their claims, the EEOC sought to enforce a subpoena to Union

Pacific demanding nationwide information about, among other things, the development, administration, and results of the test that the charging employees never took.

The Seventh Circuit's decision to enforce that subpoena deepens two existing circuit splits about the scope of the EEOC's investigative authority. These are matters of national importance that merit review by this Court.

First, the Seventh Circuit sided with the Ninth Circuit and against the Fifth Circuit in an acknowledged split concerning whether the EEOC has authority to continue investigating charges of discrimination after the complaining employee has initiated litigation. Following the structure and plain language of Title VII, the Fifth Circuit has held that after litigation begins the EEOC is limited to its statutory intervention rights. *See EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997). The Ninth Circuit disagrees. *See EEOC v. Fed. Express Co.*, 558 F.3d 842 (9th Cir. 2009). The Seventh Circuit's decision here aggravates that split by holding that the agency can continue investigating a charge, and issuing subpoenas, even after the charge has been finally adjudicated meritless by the federal courts.

Second, the Seventh Circuit's decision also deepens an existing conflict over the permissible *substantive* scope of an EEOC subpoena. This Court explained in *EEOC v. Shell Oil Co.* that "unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence 'relevant to the charge under investigation.'" 466 U.S. 54, 64 (1984) (quoting 42

U.S.C. § 2000e-8(a)). The Tenth and Eleventh Circuits accordingly have rejected subpoenas seeking nationwide information in response to a purely local discrimination charge, or information about employees who are not similarly situated and did not experience the same allegedly unlawful employment practice as the charging employee. *See, e.g., EEOC v. TriCore Reference Labs.*, 849 F.3d 929 (10th Cir. 2017); *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) (per curiam). The Seventh and Sixth Circuits, by contrast, have embraced the sweeping view that, since discrimination covered by Title VII is "by definition class discrimination," any potential discrimination against other employees in the same class is relevant and fair game for a nationwide subpoena. *See EEOC v. Roadway Express, Inc.*, 261 F.3d 634, 640 (6th Cir. 2001) (citation omitted); *EEOC v. Konica Minolta Bus. Sols.*, 639 F.3d 366 (7th Cir. 2011). Here, the Seventh Circuit allowed the EEOC to engage in a nationwide fishing expedition into the possibility of discrimination in the design or administration of a written test—when the charging employees alleged no such discrimination, and in fact never even took that test.

Together, those errors give the EEOC precisely the "plenary" investigative authority that this Court has held Congress intended to withhold. They also seriously undermine the intended structure of Title VII. With no real temporal or substantive limits on the agency's investigative power, the statute's careful timeline for distinct stages of investigation, conciliation and suit becomes meaningless. So do Title VII's separate provisions for a "Commissioner's charge" alleging a nationwide pattern or practice of

discrimination. Indeed, the EEOC recently acknowledged in other litigation that information about the possibility of a broader pattern or practice "was now being sought for all cases, including individual charges of investigation"—a practice, the court observed, that "does not appear to be justified under any reading of the relevant case law." *EEOC v. TriCore Reference Labs.*, No. 15-mc-00046WJ, 2016 WL 6823516, at *7 (D.N.M. Feb. 8, 2016), *aff'd*, 849 F.3d 929 (10th Cir. 2017).

This Court should grant review, resolve these conflicts, and reaffirm that the EEOC's subpoena authority does not continue indefinitely and is limited to the scope of the actual charge under investigation.

Statutory Framework

The 1972 amendments to Title VII created what this Court has called a "multistep enforcement procedure." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). The process begins with a charge of an "unlawful employment practice," which may be lodged by or on behalf of an "aggrieved" employee or by one of the Commissioners themselves, and may allege either individual discrimination or a broader "pattern or practice." 42 U.S.C. § 2000e-5(a), (b); *see also id.* § 2000e-6(e) (transferring the Attorney General's former power to bring suit on "pattern or practice" claims to the EEOC). The EEOC must "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" on the employer within 10 days. *Id.* § 2000e-5(b). Once a charge has been filed, the EEOC may demand from the employer documents and information "relevant

to the charge under investigation." *Id.* § 2000e-8(a); *see id.* § 2000e-9.

Within 120 days of the charge, the Commission must determine if there is "reasonable cause" to believe that "the charge is true." *Id.* § 2000e-5(b). If the EEOC does find "reasonable cause," then it must first attempt to eliminate the unlawful employment practice through "informal methods" such as "conference, conciliation, and persuasion." *Id.* If that fails, the EEOC may file suit. *Id.* § 2000e-5(f). In the alternative, it may issue a right-to-sue letter to allow the charging party to bring a private action. *Id.* § 2000e-5(f)(1). If the Commission sues, the aggrieved employee has a right to intervene. *Id.* If the employee sues, the Commission can intervene "upon certification that the case is of general public importance." *Id.*

Factual Background

In 2011, two former Union Pacific employees filed unlawful employment practice charges with the EEOC. Pet. App. 2a-3a. Both had been working at Union Pacific for under a year as "Signal Helpers," an entry-level position, when that position was eliminated and the two employees were furloughed. *Id.* at 2a. Both alleged that their supervisors treated them in a racially discriminatory manner. *Id.* at 2a-3a. One employee alleged that his supervisor used a racially charged phrase in his presence, though not directed at him. *Burks v. Union Pac. R.R. Co.*, No 12 C 8164, 2014 WL 3056529, *2 (N.D. Ill. July 7, 2014), *aff'd*, 793 F.3d 694 (7th Cir. 2015). The other alleged that his supervisor required him to work in inclement weather due to his race. *Id.* The employees complained to Union Pacific's Equal Employment Opportunity department, which found

no discrimination. *Id.* at *1-2. The employees alleged that because they filed these complaints, Union Pacific retaliated against them by not allowing them to take a test for promotion to "Assistant Signal Person." *Id.* at *4.

Soon after they were furloughed, the employees filed charges with the EEOC. Pet. App. 2a-3a. Both charges state that the "latest" date of any discrimination was October 10, 2011, when they were furloughed because their jobs were eliminated altogether. *Id.* at 45a, 48a. Neither charge checked a box indicating that any discrimination was "continuing." *Id.* Neither alleges that they took a test for promotion to Assistant Signal Person, or that there is anything unlawful about that test. *Id.* at 45a-46a, 48a-49a. The EEOC subsequently granted them right-to-sue letters and they filed suit in the Northern District of Illinois. *Id.* at 4a. The district court granted summary judgment and held that there was no evidence of racial discrimination or retaliation. *See Burks*, 2014 WL 3056529 at *6-7. The Seventh Circuit affirmed. 793 F.3d at 703.

In January 2014, seven months before the district court granted summary judgment, the EEOC issued Union Pacific a request for information based on the 2011 charges. Pet. App. 5a. Union Pacific objected to the request, and the EEOC served Union Pacific a subpoena in May 2014. *Id.* Though neither employee actually took the test for Assistant Signal Person, the subpoena sought detailed, company-wide information about the development, administration, and results of any tests for that position. *Id.* at 5a, 17a, 19a-20a; *see also* Decl. of Drake Van Thiel, Ex. F ¶¶ k-q, *EEOC v. Union Pac. R.R. Co.*, No. 2:14-mc-0052 (E.D. Wis. Aug. 25, 2014), ECF No. 4-6. Union

Pacific again objected. Pet. App. 5a. Then, in August 2014, six weeks *after* the district court dismissed the employees' case on the merits, the EEOC filed suit to enforce the subpoena in the Eastern District of Wisconsin. *See id.* at 19a.

Proceedings Below

Union Pacific moved to dismiss, arguing that enforcing the subpoena after the employees brought suit was contrary to the Fifth Circuit's decision in *Hearst*, and that the subpoena improperly sought information that went substantially beyond, and was not relevant to, the filed charges of discrimination. *Id.* at 20a-23a. In particular, Union Pacific noted that the subpoenas sought company-wide information about the development and administration of a test when neither charge alleged any pattern or practice of discrimination or any discrimination in the test itself. *Id.* at 25a, 45a-46a, 48a-49a.

The district court denied Union Pacific's motion. Acknowledging that only "two circuits ha[d] directly addressed an issue similar to this one," *id.* at 21a, the court sided with the Ninth Circuit's decision in *Federal Express* over the Fifth Circuit's decision in *Hearst* in holding that "the EEOC may continue to investigate a charge after the charging has filed suit because 'the EEOC is pursuing its obligation to serve the public interest,'" *id.* at 22a. (quoting *Fed. Express*, 558 F.3d at 852). The court acknowledged that "the charges do not specifically allege a pattern or practice" of discrimination related to the test, but nonetheless held that the requested information was sufficiently relevant to the charge because under Seventh Circuit authority "race discrimination . . . is by definition class discrimination" and therefore *any*

other potential race discrimination within Union Pacific would (if discovered) be relevant. *Id.* at 26a & n.3 (quoting *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002)).

On appeal, the Seventh Circuit recognized that this case presented it with an issue on which the circuits are divided. *Id.* at 1a. The panel affirmed and embraced the district court's reasoning *in toto*. *See generally id.* at 1a-18a. The panel expressly rejected the Fifth Circuit's holding that the "'integrated, multistep enforcement procedure' established by Title VII" does not contemplate continued investigation of an individual employee's charge after litigation has begun. *Id.* at 8a (quoting *Hearst*, 103 F.3d at 468). Instead, it held that enforcement of a subpoena required only a "valid" charge meeting the "minimal" requirements of Title VII, and that "while a valid charge is a requirement *for beginning* an EEOC investigation, nothing in Title VII supports a ruling that the EEOC's authority is then limited by the actions of the charging individual." *Id.* at 10a-11a.

The court of appeals also read *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), to reject any suggestion that the EEOC's investigative authority is "merely derivative" of the charging employee's claim. *Id.* at 11a-12a (citation omitted). And it reasoned that the 1972 "amendments to Title VII, which granted the EEOC broader authority to investigate . . . employment discrimination, expressly beyond the specific complaints of the private charging individual," supported the agency's ability to continue investigating even after the charging employee's claim has gone to litigation. *Id.* at 12a; *see also id.* at 9a (citing *Shell Oil* for the

proposition that "the EEOC's ability 'to investigate charges of systemic discrimination [should] not be impaired'").

Just as the Ninth Circuit had in *Federal Express*, the panel also highlighted an EEOC regulation which provides that a right to sue letter "shall terminate further proceeding of any charge" unless certain senior EEOC officials "determine[] . . . that it would effectuate the purpose of Title VII, the ADA, or GINA to further process the charge." *Id.* at 13a (quoting 29 C.F.R. § 1601.28(a)(3)). The panel acknowledged that the EEOC could pursue those objectives through either "a Commissioner's charge" or "interven[tion] in the charging individual's lawsuit," but held that "the availability of alternative investigatory avenues hardly supports limiting the EEOC's use of its most effective avenue." *Id.* at 13a-14a. And it specifically held that a facially valid charge allows the EEOC to investigate indefinitely—even after the charging employee's claim has been dismissed on the merits in court. *Id.* at 14a-16a.

The panel also affirmed the district court's conclusion that the scope of the subpoena was not overbroad relative to the charge, noting that Union Pacific's objections were "premised on the same overly narrow view of the role of the EEOC already rejected in this opinion above." *Id.* at 17a.

Union Pacific's timely petition for rehearing *en banc* was denied on November 21, 2017. *Id.* at 29a.

REASONS FOR GRANTING THE WRIT

As illustrated by this case and by its concessions in other recent litigation, the EEOC believes that the filing of any charge by an individual employee

inherently permits the agency to conduct a nationwide "pattern or practice" investigation, extending at least to the employer's treatment of all individuals in the same "class" and lasting essentially forever—even after the charging employee's claim has been adjudicated meritless in court. That position is plainly inconsistent with the structure of Title VII and with this Court's decision in *Shell Oil*, which make clear that the EEOC's subpoena power is not "plenary" but extends only to information relevant to the particular charge under investigation, that EEOC investigations play an important but time-limited role in a broader structure of remedies, and that the EEOC has all the authority it needs to investigate broader "systemic" concerns through a Commissioner's charge alleging a pattern or practice of discrimination.

The Seventh Circuit's decision here deepens a square and acknowledged circuit split over whether the EEOC may continue issuing subpoenas after litigation has begun. The Fifth Circuit would have refused enforcement of this subpoena on that ground alone. *See EEOC v. Hearst Corp.*, 103 F.3d 462, 468-69 (5th Cir. 1997). It also presents a second, distinct conflict concerning the permissible substantive scope of a subpoena. The Seventh and Sixth Circuits have taken the extraordinarily expansive view that because all discrimination violating Title VII is "class" based, *any* discrimination against members of the same class would be relevant to the charge. The Tenth and Eleventh Circuits, by contrast, have held that a subpoena must be confined to "the contested issues that must be decided to resolve that charge," and that the EEOC should use the Commissioner's charge process to investigate broader concerns.

EEOC v. Royal Caribbean Cruises, Ltd., 771 F.3d 757, 761 (11th Cir. 2014) (per curiam); *EEOC v. TriCore Reference Labs.,* 849 F.3d 929, 941-42 (10th Cir. 2017); *see also EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157-58 (10th Cir. 2012) ("*BNSF*"). The Tenth and Eleventh Circuits would not have permitted the EEOC to use purely individual discrimination and retaliation charges as a springboard to launch a nationwide investigation into the development and administration of a test that the charging employees did not even take.

These ongoing, unresolved conflicts as to the reach of the EEOC's investigative power mean greater cost, confusion and uncertainty that undermine a fair and efficient administration of the nation's discrimination laws. Only this Court may resolve these deepening conflicts and restore a measure of restraint and evenhandedness to EEOC investigations. Review should be granted

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT OVER THE EEOC'S AUTHORITY TO INVESTIGATE AFTER LITIGATION COMMENCES

A. The Seventh Circuit's Decision Deepens An Acknowledged Circuit Split About The EEOC's Power To Investigate After An Employee Files Suit

The Seventh Circuit recognized that its holding conflicts with the Fifth Circuit's decision in *Hearst.* Pet. App. 9a, 12a. *Hearst* reversed a district court's determination that the EEOC may enforce a subpoena after the charging parties had initiated litigation. *Hearst*, 103 F.3d at 463-64. The Fifth

Circuit reasoned that "Congress granted the EEOC broad investigatory authority so that the agency promptly and effectively could determine whether Title VII had been violated, and to assist the agency in its efforts to resolve disputes without formal litigation." *Id.* at 469. "These purposes are no longer served," the court explained, "once formal litigation is commenced." *Id.* "Instead, if the EEOC has any further interest it may intervene and pursue discovery through the courts; or if its interest extends beyond the private party charge upon which it is acting, it may file a Commissioner's charge." *Id.*

The Seventh Circuit rejected *Hearst*'s reasoning and elected instead to follow the Ninth Circuit's decision in *EEOC v. Federal Express Corp*, 558 F.3d 842 (9th Cir. 2009). *Federal Express* held that the EEOC may continue to investigate a charge indefinitely, even after the charging party has filed suit. *See* Pet. App. 9a. The Ninth Circuit deferred to an EEOC regulation, 29 C.F.R. § 1601.28(a)(3), which purports to allow the agency to continue "process[ing]" charges after issuing right-to-sue notices if EEOC officials determine that it would "effectuate the purpose of title VII." *Fed. Express*, 558 F.3d at 850 & n.2 (citation omitted). The court of appeals concluded that "[b]y continuing to investigate a charge of systemic discrimination even after the charging party has filed suit, the EEOC is pursuing its obligation to serve the public interest." *Id.* at 852.

That conflict is square and acknowledged, and there is no sound reason to defer this Court's review.

B. The Fifth Circuit's Decision In *Hearst* Aligns Most Closely With The Text And Purpose Of Title VII

The structure of Title VII strongly supports the Fifth Circuit's holding in *Hearst*. As Justice Marshall explained for this Court in *EEOC v. Shell Oil*, the statute conspicuously "establish[es] a linkage between the Commission's investigatory power and charges of discrimination." 466 U.S. 54, 65 (1984). The EEOC's role under Title VII is to investigate charges, determine if they have merit, attempt conciliation, and then either bring suit itself or authorize the employee to do so. Once litigation has begun, the EEOC's *investigative* function ends and its sole remaining role is the option to intervene if believes the case raises issues "of general public importance." 42 U.S.C. § 2000e-5(f)(1).

This case brings the point into sharper focus. By the time the EEOC sought to enforce this subpoena, the suit by the charging employees had been adjudicated and dismissed on the merits. Under a statute that ties investigative authority tightly to the particular charge under investigation, and does not provide "plenary" investigative power, the EEOC has no conceivable right to continue investigating after the charge has been conclusively resolved. There is no longer a lawsuit for the EEOC to intervene in, and any new lawsuit by the EEOC seeking personal relief for these two employees would be barred by *res judicata*.

While the statutory text and its purpose are plain enough, the legislative history of Title VII confirms that Congress expected the EEOC's role to end when litigation begins. The House Report discussing the 1972 amendments observed that:

> The committee was concerned about the interrelationship between the newly created cease and desist enforcement powers of the Commission and the existing right of private action. It concluded that the duplication of proceedings should be avoided. The bill, therefore, contains a provision for termination of Commission jurisdiction once a private action has been filed (except for the power of the Commission to intervene in the private actions).

Equal Employment Opportunity Act of 1972, H.R. Rep. No. 92-238, at 12 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 2137, 2148. In order to ensure that employers were not subject to overlapping discovery requests on multiple timelines, Congress understood that the Commission's investigations would "terminat[e]" once the employee initiates formal litigation.

That conclusion certainly does not, as the Ninth Circuit and Seventh Circuit apparently feared, impair the EEOC's ability to continue investigating bona fide concerns about broader "systemic" or "pattern or practice" discrimination revealed in the course of an investigation into individual claims. Title VII authorizes Commissioners to file their own charges, including "pattern or practice" charges, and plainly contemplates that they will use that procedure. The 1972 amendments to Title VII also conspicuously transferred to the EEOC the Attorney General's former power to bring suit to remedy any "pattern or practice" of discrimination. *See* 42 U.S.C. § 2000e-6(c). In the section detailing the appropriate "procedure" for such "[i]nvestigation and action by [the] Commission," Congress specified that after the

effective date of those amendments "the Commission shall have 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." *Id.* § 2000e-6(e) (emphasis added).

Congress clearly did not view this grant of authority as superfluous, or the requirement of an actual "charge of a pattern or practice of discrimination" as optional. And conducting "pattern or practice" investigations under the purported authority of a fully resolved and purely individual charge also is inconsistent with the broader structure of Title VII. Title VII requires the EEOC to provide employers with "notice of the charge . . . within ten days." *Id.* § 2000e-5(b). *Shell Oil* explained that the notice required is necessarily less specific in "pattern or practice" investigations, but nonetheless must *at least* "identify the groups of persons that [the Commissioner] has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been practiced." 466 U.S. at 72-73, 78-79. A charge that, like the one at issue here, alleges only isolated discrimination against one employee does not remotely provide the notice required by statute. And as the Tenth Circuit has noted, a letter later notifying the employer that the EEOC has "expand[ed]" its investigation is no substitute for the "notice of" the "charge" required by statute. *See BNSF*, 669 F.3d at 1157.

The agency's end-run around the Commissioner's charge process also effectively nullifies the statute's requirements that the EEOC attempt to eliminate any "alleged unlawful employment practice" through conciliation, that it reach a "reasonable cause" determination within 120 days, and that any subpoena be "relevant to the charge under investigation." 42 U.S.C. §§ 2000e-5(b), 2000e-8(a). All of these provisions presume a "charge" of specific "unlawful employment practice[s]" that the agency is investigating, and can still act to remedy.

Both the Seventh Circuit here and the Ninth Circuit in *Federal Express* concluded that this Court implicitly rejected the Fifth Circuit's *Hearst* decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). But *Waffle House* did no such thing.

Waffle House addressed whether the charging employee's agreement to arbitrate employment disputes prevented the EEOC from bringing an enforcement action in its own name. *Id.* at 285. This Court held that it does not, reasoning that the EEOC's enforcement authority is not "merely derivative" of the employee's private right to sue. *Id.* at 297-98.

The Seventh and the Ninth Circuits read far too much into that statement by inferring that the EEOC's *investigative* power can be entirely divorced from the resolution of the charging employee's claim. Unlike other federal agencies, the EEOC's subpoena power is expressly limited to information "relevant to the charge under investigation." *Waffle House* did not cast doubt on this Court's precedent that Congress established a meaningful "linkage" between the agency's investigative power and the particular charge under investigation, and *did not*

give the agency "plenary" power to investigate all matters within the scope of its jurisdiction. *Shell Oil*, 466 U.S. at 64-65. While *Waffle House* held that the EEOC can *file suit* in some circumstances where the employee could not, it never suggested that the agency can *investigate* without a charge to investigate. The text of Title VII, and this Court's decision in *Shell Oil*, clearly foreclose such a holding. In addition, the employee in *Waffle House* had not actually filed a suit or arbitration, and this Court specifically reserved whether a final judgment resolving the issues would preclude further EEOC action—which is far more analogous to the issue presented here. *See* 534 U.S. at 297 (noting that "[i]t is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim" but that the Court need not resolve that question).

The Seventh and Ninth Circuits also pointed to an EEOC regulation that purports to authorize continued investigation, even after litigation begins, if various EEOC officials determine that it would "effectuate the purpose of title VII, the ADA, or GINA." 29 C.F.R. § 1601.28(a)(3). That regulation has no grounding at all in the text or structure of Title VII, and is facially ambiguous about what exactly it means to authorize. In effect the Seventh and Ninth Circuits have deferred to the EEOC's aggressive reading of its own regulation (in litigation), *see Federal Express*, 558 F.3d at 850 n.2 (deferring under *Auer v. Robbins*, 519 U.S. 452 (1997)), without analyzing whether the resulting rule is within the agency's interpretive discretion under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The

opportunity to correct such a careless application of administrative deference principles is another reason to grant review.

II. REVIEW ALSO IS WARRANTED TO RESOLVE A CIRCUIT CONFLICT OVER THE PERMISSIBLE SUBSTANTIVE SCOPE OF AN EEOC SUBPOENA

In *Shell Oil*, this Court explained that the relevance of information sought by an EEOC subpoena is "generously construed" to include information that may "cast light on" the charge. 466 U.S. at 68-69. Nonetheless, this Court cautioned that "we must be careful not to . . . render[] that requirement a nullity." *Id.* at 69. The Seventh Circuit's decision in this case crosses that line, and conflicts with decisions of the Tenth and Eleventh Circuits.

A. The Sixth And Seventh Circuits Have Adopted An Overbroad Standard For Relevance That Gives The EEOC Nearly Plenary Investigative Power

As the district court's opinion makes clear, *see* Pet. App. 26a & n.3, the Seventh Circuit's holding that the information sought here was "relevant to the charge under investigation," 42 U.S.C. § 2000e-8(a), is grounded in prior precedent from both the Seventh and Sixth Circuits holding that discrimination under Title VII "is by definition class discrimination," and that therefore *any* discrimination against the same class of employees would "cast light on" the charge and is fair game for a subpoena. In practice, that principle has been invoked to nullify any meaningful limits on the EEOC's investigations.

Sixth Circuit. The Seventh Circuit rule invoked by the district court appears to have its origin in a single phrase in the Sixth Circuit's opinion in *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355 (6th Cir. 1969). In that case, the employer fired seven black employees in a two-week span, each of whom gave detailed and identical accounts of their treatment. *Id.* at 356. The employees alleged that not only were they discharged due to their race, but that the employer restricted employment opportunities within the company generally by "maintaining a discriminatory training and promotional program." Pet. App. 43a. As part of its investigation, the EEOC requested information regarding "records concerning every employee in every category of employment," not just information concerning the fired employees. *Blue Bell*, 418 F.2d at 358. The Sixth Circuit held that this information was relevant to the charges of discrimination because "[d]iscrimination on the basis of race is by definition class discrimination," and therefore "the existence of patterns of racial discrimination in job classifications or hiring situations other than those of the complainants may well justify an inference that the practices complained of here were motivated by racial factors." *Id.* On its face, that broadly stated dictum suggests that because the existence of a broader pattern or practice of racial discrimination would support any charge of individual race discrimination, the EEOC therefore is entitled to use its subpoena power in the service of a nationwide hunt for "pattern or practice" evidence in every investigation. But it is important to recognize that the actual facts of *Blue Bell* could not support such a broad holding. The charges the EEOC was

investigating in *Blue Bell* explicitly alleged a widespread pattern or practice of discrimination by the employer, touching every African American employee in the company.

Nonetheless, in *EEOC v. Cambridge Tile Manufacturing Co.*, the Sixth Circuit clarified and extended the *Blue Bell* holding in a way that broke any real requirement of a linkage between the investigation and the charge. 590 F.2d 205 (6th Cir. 1979) (per curiam). In *Cambridge*, an employee alleged that she had been fired for refusing the advances her male supervisor. *Id. at* 205. Two months later, another employee alleged that she was fired due to her race. *Id.* During its investigation of those two charges, the EEOC uncovered "evidence of possible sex discrimination in job classifications" and demanded broad statistical information about job classifications—despite the fact that the charge alleging sex discrimination concerned the conduct of a single employee. *Id.* at 205-06. Relying on the quoted section of *Blue Bell* above, the Sixth Circuit held that an employer's sex discrimination in one context will always be relevant to an employer's sex discrimination in another context. *See id.* at 206 ("'[A]n employer's "pattern of action" (is) relevant to the Commission's determination of whether there is reasonable cause to believe that the employer has practiced . . . discrimination.'" (second alteration in original) (quoting *Blue Bell*, 418 F.2d at 358)).

Most recently in *EEOC v. Roadway Express, Inc.*, the Sixth Circuit reaffirmed that:

> The *Blue Bell* case clearly holds that the EEOC is entitled to the evidence that it has requested even though this evidence focuses on the existence of patterns of racial

> discrimination in job classifications or hiring situations other than those that the EEOC's charge specifically targeted. The employer's pattern of action provides context for determining whether discrimination has taken place.

261 F.3d 634, 639 (6th Cir. 2001). In the Sixth Circuit, therefore, it is settled law that the possibility of *any* other discrimination by the employer is sufficiently relevant to the "context" of an individual investigation to support a subpoena—at least if it would involve discrimination against the same class of employees.

Seventh Circuit. The Seventh Circuit has followed the Sixth Circuit precedents and taken a similarly expansive approach to relevance.

In *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*, the charge alleged that the employee's branch manager disciplined him for not meeting sales quotas but did not discipline a similarly situated non-black employee. 639 F.3d 366, 367 (7th Cir. 2011). The employee also alleged that he was fired for complaining about that disparate treatment. *Id.* Once the EEOC began investigating, it discovered that the company only had six black employees (out of 120) and that all six worked in the same facility. *Id.* The EEOC then decided to investigate possible discrimination *in hiring*, and subpoenaed information relating to applications for employment at all of the company's Chicago facilities. *Id.* at 368.

Although acknowledging that the employee "was not saying that Konica had refused to hire him," the Seventh Circuit reasoned that the absence of any

hiring-related charge "does not make hiring data irrelevant." *Id.* at 369. "When the EEOC investigates a charge of race discrimination for purposes of Title VII," the Seventh Circuit reasoned, "it is authorized to consider whether the overall conditions in a workplace support the complaining employee's allegations." *Id.* Relying on Sixth Circuit precedent, the court of appeals held that "[r]acial discrimination is 'by definition class discrimination,' and information concerning whether an employer discriminated against other members of the same class for the purposes of hiring or job classification may cast light on whether an individual person suffered discrimination." *Id.* (citation omitted).

As in the Sixth Circuit, therefore, it has long been settled law in the Seventh Circuit that the EEOC may issue subpoenas investigating the possibility of *any* discrimination by the employer, because such discrimination, if found, would cast light on essentially any individual discrimination charge. The district court rested its decision enforcing the subpoena in this case squarely on these principles. *See* Pet. App. 25a-26a.

B. The Tenth And Eleventh Circuits Have Rejected The View That Any Individual Charge Authorizes A Broad-Ranging Investigation, And Would Not Have Enforced This Subpoena

The Tenth and Eleventh Circuits have firmly rejected the suggestion that any individual charge authorizes the EEOC to subpoena broad-ranging information about other employees and other employment practices. Those circuits would not have enforced the subpoena in this case.

Tenth Circuit. In the *BNSF* case, two job applicants filed charges alleging that BNSF did not hire them due to their perceived disabilities. 669 F.3d at 1155. Both had been given offers of employment contingent on passing a medical screening procedure, and neither was hired. *Id.* The EEOC sent the employer a letter explaining that it had broadened its investigation to include possible "pattern and practice discrimination," and demanding "any computerized or machine-readable files . . . created or maintained by you . . . during the period December 1, 2006 through the present that contain electronic data about or effecting [sic] current and/or former employees . . . throughout the United States." *Id.* at 1155-56 (alterations in original).

Consistent with the Sixth and Seventh Circuit case law, the EEOC argued that the requested information was sufficiently relevant because "[i]f a pattern or practice of disability discrimination at BSNF exists, the discrimination [the employees] allegedly suffered would appear to be part of it." *Id.* at 1157 (first alteration in original) (citation omitted). The Tenth Circuit disagreed, explaining that "[a]ny act of discrimination *could* be a part of a pattern and practice of discrimination, but not every charge of discrimination warrants a pattern or practice investigation," and that "[a]s the Supreme Court explained in *Shell Oil Co.*, we should not construe relevance so broadly as to render its requirement a nullity." *Id.* at 1157-58. The Tenth Circuit explained that "[t]he subpoena focuses on the charges filed by" the employees and that "[n]owhere in the document is there any reference to any other charge—by way of a reference to any other charging

party, an additional charge number, or anything else—that might indicate that an additional charge is at issue." *Id.* at 1157. It also noted that the EEOC's "incredibly broad request for information" amounted to a demand for "plenary discovery" into the employer's overall employment practices. *Id.* at 1157-58.

The Tenth Circuit emphasized that "[n]othing prevents the EEOC from investigating the charges filed by [the employees], and then—if it ascertains some violation warranting a broader investigation—expanding its search. Alternatively, nothing prevents the EEOC from aggregating the information it possesses in the form of a Commissioner's Charge." *Id.* at 1159. "But nationwide recordkeeping data is not 'relevant to' charges of individual disability discrimination filed by two men who applied for the same type of job in the same state, and the district court did not abuse its discretion in reaching that conclusion." *Id.*[1]

The Tenth Circuit recently applied a similarly careful analysis in *Tricore*. The employee filed a

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[1] The fact that district court rulings on agency subpoenas are reviewed for abuse of discretion does not minimize this conflict. To the contrary, it makes it even more critical that this Court's guidance about the governing law be consistent with the statute. And as this Court recently emphasized in *McLane Co. v. EEOC*, EEOC subpoenas can still implicate pure questions of law, and such questions are to be reviewed *de novo*. 137 S. Ct. 1159, 1168 n.3 (2017). The logical leap authorized by the Sixth and Seventh Circuit case law—that because any discrimination against the same class of employee would cast light on any individual charge, the EEOC always has authority to subpoena nationwide information about all employees—transforms the meaning of Title VII's language and is an error of law, not of discretion.

charge alleging that TriCore did not provide a reasonable accommodation to her pregnancy. The EEOC then notified TriCore that it was "expanding the scope of its investigation" and demanded information concerning all current and former employees at TriCore who had ever been pregnant, even if they had never requested an accommodation. 849 F.3d at 935.

The Tenth Circuit held that the EEOC had gone too far. Applying its earlier decision in *BNSF*, the Tenth Circuit noted that the EEOC's subpoena referenced only an individual charge that did not allege any pattern or practice of discrimination, and did not point to any other charge or charges providing the statutory basis for a pattern or practice investigation. *Id.* at 938-39. The Tenth Circuit then held that information concerning pregnant employees who *had not* requested accommodations had "no apparent connection" to the charge under investigation, and that the EEOC "did not proffer any reason to support how such evidence would support [the complaining employee's] charge beyond general assertions of relevancy." *Id.* at 941-42. The Tenth Circuit explained that a narrower subpoena more tightly focused on the complaining employee's charge might be within the EEOC's power—such as an inquiry into whether "other non-disabled, pregnant employees were granted accommodations" or whether TriCore gave accommodations to non-pregnant employees but not pregnant ones. *Id.*

Eleventh Circuit. In *Royal Caribbean*, a cruise-ship employee filed a charge alleging that he was discharged because of a medical condition. 771 F.3d at 759. Royal Caribbean admitted as much, but

argued that Bahamian law, to which Royal Caribbean ships were subject, required his termination. *Id.* Despite this, the EEOC issued a subpoena demanding company-wide information regarding every employee discharged for *any* medical reason. *Id.*

The Eleventh Circuit held that this information was not relevant to the charge. "The relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge, not relevance to issues that may be contested when and if future charges are brought by others." *Id.* at 761.

C. The Tenth And Eleventh Circuits Would Properly Refuse To Enforce This Subpoena

The Tenth and Eleventh Circuits would reject the subpoena here. Only by assuming that any racial discrimination against any employee, anywhere, automatically "'casts light on'" every individual charge of racial discrimination—as Sixth and Seventh Circuit precedent invite—could the panel find that information about the design of a test that the charging employees never took is somehow relevant to their charges. The Eleventh Circuit would say that these charges raised no "contested issues" about the fairness of the tests, and that the EEOC was clearly using the charges as an "expedient bypass" of the Commissioner's charge process. *Royal Caribbean*, 771 F.3d at 761-62 (citation omitted). The Tenth Circuit would say that the reality that "[a]ny act of discrimination *could* be part of a pattern or practice of discrimination" does not mean that every charge authorizes a nationwide

pattern or practice subpoena. *BNSF*, 669 F.3d at 1157-58. Data concerning results and development of a test cannot possibly "cast light on" an allegation that the employees were not permitted to take it—unless those words impose no meaningful limits at all. And nothing in the two charges the EEOC purported to be investigating alleges any pattern or practice of wrongdoing, let alone any pattern or practice related to the development and administration of the test.

The language of Title VII and this Court's decision in *Shell Oil* strongly support the Tenth and Eleventh Circuit approach to relevance in the context of EEOC subpoenas. By treating any potential discrimination as relevant to any charge of discrimination (at least within the same "class" of employees), the Sixth and Seventh Circuits have essentially given the EEOC the "plenary" authority to investigate all matters within its jurisdiction that Congress deliberately withheld.

Both the Tenth and Eleventh Circuits have recognized that the EEOC's practice of conducting "pattern or practice" investigations with only an individual charge is not consistent with the structure of Title VII, or necessary to the statute's objectives. As the Eleventh Circuit noted in *Royal Caribbean*, "[t]o the extent that the EEOC desires this information so that it may advocate on behalf of other potential victims of employment discrimination, . . . [t]he Commission has the ability to file a Commissioner's charge alleging a pattern or practice of discrimination that could support a request for that information." 771 F.3d at 762. The EEOC may not, however, "enforce a subpoena in the investigation of an individual charge merely as an

expedient bypass of the mechanisms required to file a Commissioner's charge." *Id.* The Tenth Circuit similarly admonished the agency in *BNSF* that "nothing prevents the EEOC from aggregating the information it possesses in the form of a Commissioner's Charge" if it wants to continue investigating more broadly. 669 F.3d at 1159.

The fact that the underlying claims were conclusively adjudicated by the time the subpoena issued both underlines and aggravates the circuit conflict. The Seventh Circuit never addressed how *any* evidence could be "relevant to the charge under investigation" if that same charge has been conclusively resolved. As discussed above, the employer in *Royal Caribbean* admitted that it terminated the employee because of his health status. 771 F.3d at 759. The Eleventh Circuit had no difficulty recognizing that the EEOC's demand for information about whether the employer "refused to renew other employee[s'] contracts for the same reason" could not possibly be relevant to any contested issue in the complaining employee's charge, because for the charging employee "[t]hat issue is settled." *Id.* at 761. *All* of the issues once raised by the charges here are "settled," and the subpoena ought to be unenforceable for that reason alone.

III. THE CONFLICT AMONG THE CIRCUITS IMPLICATES ISSUES OF NATIONAL IMPORTANCE THAT MERIT REVIEW

The scope of the EEOC's investigative authority is a recurring issue of national importance. The conflicts discussed above do not arise in the rare or unusual case. To the contrary, these issues commonly affect businesses across the country

because the EEOC pursues sweeping investigations untethered to particular charges as a matter of course.

For example, the EEOC's Compliance Manual apparently permits investigators to investigate "[l]ike and related class allegations involving bases/issues not directly affecting the charging party as well as like and related issues not alleged in the charge" whenever doing so is authorized by the agency's "Top Management Committee." *See TriCore*, 849 F.3d at 935 n.2 (quoting EEOC Compliance Manual, Sec. 22. 3, § 803). And the EEOC appears to be *routinely* using individual charges as a springboard for open-ended inquiries about possible patterns or practices nationwide, without following the procedures that Title VII established. EEOC counsel conceded as much to the district court in *EEOC v. TriCore Reference Laboratories*, which noted that the agency's "position does not appear to be justified under any reading of the relevant case law because it moots out the need for any showing of relevancy." No. 15-mc-00046WJ, 2016 WL 6823516, at *7 (D.N.M. Feb. 8, 2016), *aff'd*, 849 F.3d 929 (10th Cir. 2017). Another district court recently explained that it could "reach no other conclusion but that what the EEOC improperly seeks by subpoena in this case is the discovery of members of a potential class of employees who suffered from a pattern or practice of discrimination . . . rather than information which fleshes out [the] charge." *EEOC v. Austal USA, LLC*, Misc. No. 17-00006-WS-MU, 2017 WL 4563078, at *10 (S.D. Ala. Aug. 18, 2017), *recommendation adopted as op. at* 2017 WL 4562634 (S.D. Ala. Oct. 12, 2017). Just as in *Royal Caribbean*, the *Austal* decision explains

that "if, as is apparent in this case, the EEOC desires to conduct a broader pattern-or-practice investigation, it is empowered to file a Commissioner's charge. What it cannot do is use Cooper's charge as a backdoor means to obtain information that is more appropriately available through other administrative vehicles." *Id.*

If the reasoning of the Seventh Circuit decision stands, then any allegation of discrimination gives the agency a license to issue nationwide subpoenas long after the underlying individual charges have been adjudicated invalid, and that are not confined to the employment practice that the charging employee experienced and claimed was unlawful. As a practical matter, that holding effectively nullifies much of the structure that Congress carefully constructed in Title VII. The agency's investigation need not be confined to information genuinely "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). The requirement that a charge must be filed "by or on behalf of a person claiming to be aggrieved" by a particular "unlawful employment practice" becomes meaningless, because the agency can investigate any suspected practices whether they aggrieved, or even affected, any charging employee. *See id.* § 2000e-5(b). The timeline that Congress established for the EEOC's investigations, reasonable cause determinations, and enforcement actions (or "right to sue" letters) becomes largely optional, since the agency may continue investigating as long as it likes. The statutory requirement that the EEOC attempt conciliation before judicial enforcement proceedings is effectively gutted, because the EEOC has no obligation to conciliate allegations that are not actually the

subject of a charge. *Id.* § 2000e-5(b) ("If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."). And there will be no reason for the agency ever to use the "Commissioner's charge" procedure that Congress clearly intended to guide pattern or practice investigations. *Id.* §§ 2000e-5(b), 2000e-6.

As the Tenth Circuit explained in *BNSF* and *TriCore*, the EEOC's position also effectively guts the statute's notice requirement. That is a serious problem, both in practical terms and as a violation of Congress's obvious intent in Title VII. The statute specifically requires notice of the charge within ten days, "including the date, place and circumstances of the alleged unlawful employment practice." *Id.* § 2000e-5(b). This Court's decision in *Shell Oil* makes clear that the notice provision applies to "pattern or practice" investigations no less than to investigations of individual charges, and that the EEOC must at least "identify the groups of persons that [the Commissioner] has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been practiced." 466 U.S. at 73, 78-79. This Court contemplated, in other words, that the employer would receive notice of an actual Commissioner's charge alleging an actual pattern or practice of discrimination—not just a letter suggesting that the

EEOC has "expanded" its investigation and demanding broad categories of nationwide information without any "charge" at all. As the Tenth Circuit recognized in *BNSF*, notice of the agency's desire for some information plainly is not the "notice of" the "charge" that Title VII requires. *See BNSF*, 669 F.3d at 1157.

These conflicts have great practical significance for affected businesses nationwide. They create a situation in which the basic questions of when an EEOC investigation ends, and what it may subpoena, have completely different answers for a business in Chicago or San Francisco than for a business in Houston or Denver—and no clear answer at all for businesses operating nationwide. Union Pacific itself has substantial operations in the Fifth, Seventh, Ninth, and Tenth Circuits, and is therefore subject to two starkly conflicting legal regimes simultaneously. This problem has serious implications for businesses that must, for example, decide how to identify potentially relevant documents and how long to preserve them, upon pain of potential obstruction charges. *See, e.g.,* 18 U.S.C. § 1505 (criminalizing obstruction of any pending proceeding before an agency). The EEOC was created to ensure vigorous, consistent, and uniform enforcement of Title VII across the country. This Court's intervention is needed to restore the procedures that Congress intended.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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February 16, 2018

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner-Appellee,

v.

UNION PACIFIC RAILROAD COMPANY, Respondent-Appellant.

No. 15-3452

Argued February 6, 2017

Decided August 15, 2017

867 F.3d 843

OPINION

CONLEY, District Judge.

Union Pacific Railroad challenges the legal authority of the Equal Employment Opportunity Commission to continue an enforcement action after issuing a right to sue letter and subsequent resolution of the underlying charges of discrimination in a private lawsuit. The EEOC petitioned the district court to enforce its subpoena for Union Pacific's employment records related to these charges. After denying Union Pacific's motion to dismiss for lack of authority to maintain the investigation under Title VII and the EEOC's own regulations, the district court granted the petition, prompting this appeal. While an issue of first impression in this circuit, similar challenges have created a split in authority between the Fifth Circuit in *EEOC v. Hearst*, 103 F.3d 462 (5th Cir. 1997), and more recently the Ninth Circuit in *EEOC v. Federal Express Corporation*, 558 F.3d 842 (9th Cir. 2009).

Both the United States Supreme Court and this court have repeatedly recognized the EEOC's broad role in promoting the public interest by preventing employment discrimination under Title VII, including its independent authority to investigate charges of discrimination, especially at a company-wide level. Accordingly, we agree with the district court that neither the issuance of a right-to-sue letter nor the entry of judgment in a lawsuit brought by the individuals who originally filed the charges against Union Pacific bars the EEOC from continuing its own investigation.

I. Background

On January 3, 2011, Frank Burks and Cornelius L. Jones, Jr., began working at Union Pacific as "Signal Helpers," an entry-level job that involves laying wires and cables, digging trenches, changing signal lines, and climbing poles. Burks and Jones were the only African-American employees in their orientation group. After a 90-day probationary period, both became eligible for possible promotion to an "Assistant Signal Person" position. In June 2011, Jones applied to take the Skilled Craft Battery Test ("SCBT" or "the test"), a requirement to seek the promotion. After receiving no response, Jones reapplied in September 2011. Burks also applied to take the test in October 2011. Neither, however, were ever provided the opportunity to do so.

Instead, on October 10, 2011, Union Pacific eliminated the Signal Helper position in the zones where Burks and Jones worked, and both were terminated. That same month, Burks filed a charge with the EEOC, which states in pertinent part: "I have been denied the opportunity to take a test for

the Assistant Signalman position. On or about October 10, 2011, I was discharged again.[1] I believe that I have been discriminated because of my race, Black, and in retaliation for having engaged in protected activity." Jones filed a similar charge the following month.

After receiving notification from the EEOC that charges had been filed, Union Pacific responded with a position statement, attaching tables that listed Signal Helpers working in the same district as Burks and Jones and the results of those employees' applications for promotion. In particular, a table provided by Union Pacific showed that of the eighteen Signal Helper applicants, eleven were white, six were black, and one was Hispanic. Of the eleven white applicants, ten passed the test and were promoted, while one failed and was denied the promotion. The one Hispanic applicant passed the test and was promoted. Of the six black applicants, Burks and Jones are the only applicants who applied but were not administered the tests. Of the other four applicants, none were promoted, although the table does not state the reason.

In March 2012, the EEOC sent Union Pacific its first request for information seeking, among other items, a copy of the test used by Union Pacific to promote Signal Helpers to the Assistant Signalman position and company-wide information about

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[1] Burks' charge states that he was terminated *again* because he was also fired after 20 days on the job. After filing an EEOC complaint that alleged racial discrimination, however, Union Pacific opted to reinstate Burks, acknowledging that he had been inadequately coached before termination. Burks returned to work in May 2011.

persons who sought the Assistant Signalman position during the relevant period. After Union Pacific refused that request, the EEOC issued its first subpoena in May 2012 and brought suit to enforce it in March 2013. *EEOC v. Union Pacific R.R. Co.*, Misc. No. 13-mc-22 (E.D. Wis.). The parties then reached a settlement in which: (1) Union Pacific agreed to provide identification information, including test results, for all individuals who took the test for the Assistant Signalman position during the relevant period of time; and (2) the EEOC dismissed its enforcement action. However, the EEOC contends that Union Pacific never provided this promised company-wide information.

In July 2012, the EEOC issued a right-to-sue letter to both Jones and Burks on their charges. *See* 42 U.S.C. § 2000e-5(f)(1) (requiring the EEOC to provide a notice of right-to-sue to the charging individual within 180 days of the filing of the charge). Jones and Burks then filed a joint complaint, asserting discrimination claims in the United States District Court for the Northern District of Illinois. *Burks v. Union Pacific R.R. Co.*, No. 2012 C 8164 (N.D. Ill. Oct. 11, 2012).

In July 2014, the district court granted Union Pacific's motion for summary judgment in the Jones and Burks' lawsuit, finding insufficient evidence to support their claims of hostile work environment, retaliation for filing prior EEOC complaints, and racial harassment. *Burks v. Union Pac. R.R. Co.*, No. 12 C 8164, 2014 WL 3056529 (N.D. Ill. July 7, 2014); *see also* App. 017-034. Consistent with that finding, the district court dismissed Jones and Burks' claims with prejudice, and this court later

affirmed. *Burks v. Union Pac. R.R. Co.*, 793 F.3d 694 (7th Cir. 2015).

While Jones and Burks' action was still proceeding in district court, the EEOC issued Union Pacific a second request for information in January 2014, seeking information about Union Pacific's electronic storage systems, additional testing and computer information, and details about Signal Helpers across the company who were similarly situated to Burks and Jones. Union Pacific again refused, and the EEOC served a second subpoena in May 2014, which is the focus of this appeal.

After Union Pacific administratively petitioned to revoke or modify the subpoena, the EEOC brought an enforcement action in September 2014. The district court denied Union Pacific's motion to dismiss, rejecting its arguments that the EEOC lost its investigatory authority either (1) after the issuance of a right to sue notice to Jones and Burks or (2) when the district court granted judgment in favor of Union Pacific. The district court also rejected Union Pacific's challenge to the relevance of the material requested and granted the EEOC's motion to enforce its subpoena. This appeal followed.

II. Discussion

The appeal actually presents two issues. The first is a question of law—whether the EEOC is authorized by statute to continue investigating an employer by seeking enforcement of its subpoena after issuing a notice of right-to-sue to the charging individuals *and* the dismissal of the individuals' subsequent civil lawsuit on the merits—which we review *de novo*. *See EEOC v. United Air Lines*, 287

F.3d 643, 649 (7th Cir. 2002). The second—whether the information sought in the subpoena was relevant to the EEOC's investigation—we review under an abuse of discretion standard. *See McLane Co. v. EEOC*, 581 U.S. ——, 137 S.Ct. 1159, 1170, 197 L.Ed.2d 500 (2017); *United Air Lines*, 287 F.3d at 649.[2]

A. Enforcement Authority

Title VII was amended in 1972 to provide the EEOC with the authority to sue employers as a means "to implement the public interest as well as to bring about more effective enforcement of private rights." *Gen. Tel. Co. of Nw. v. EEOC,* 446 U.S. 318, 326, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980) (discussing 42 U.S.C. § 2000-5(f)(1)). Indeed, this amendment expressly recognized that the EEOC's critical role in preventing employment discrimination extends beyond the private charge filed by an individual. As the Supreme Court explained in *General Telephone*, "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment

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[2] Jurisdiction over the EEOC's petition for enforcement of the subpoena below is found both in 42 U.S.C. § 2000e-5(f) and § 2000e-8(c), which authorize a district court to adjudicate subpoena enforcement actions filed by the EEOC, and 28 U.S.C § 1345, which provides district courts with subject matter jurisdiction over suits filed by the United States or its agencies. *See EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593, 595 (7th Cir. 2009). Because the district court's October 15, 2015, order enforcing the subpoena is a final order, and Union Pacific filed a timely appeal, we exercise jurisdiction over this appeal under 28 U.S.C. § 1291.

discrimination." *Id.* at 326, 100 S.Ct. 1698; *see also EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (EEOC's "interests are broader than those of the individuals injured by discrimination.").

Certainly, as Union Pacific stressed in its appeal, "the EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence 'relevant to the charge under investigation.'" *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984) (citing 42 U.S.C. § 2000e-8(a)); *see also United Air Lines*, 287 F.3d at 650 (citing *Shell Oil* for proposition that "the authority of the EEOC to investigate is grounded in the charge of discrimination"). Union Pacific's appeal is premised on a theory, however, that the EEOC's investigatory authority also *ends* when the charging individual commences a lawsuit on his or her claim of employment discrimination. As a result, Union Pacific argues that the district court erred in allowing the EEOC to pursue an investigation, including its issuance and enforcement of a subpoena, after issuing Jones and Burks a right-to-sue letter, and even if the EEOC's authority extended beyond the issuance of the right-to-sue letter, any investigatory authority surely ended when the district court granted judgment in Union Pacific's favor on the individuals' claims themselves.

As mentioned, whether the issuance of a right-to-sue letter to the charging individual terminates the EEOC's authority to investigate is an issue of first impression for this circuit and has produced a split in the circuits that have considered the issue. In

EEOC v. Hearst, 103 F.3d 462 (5th Cir. 1997), the Fifth Circuit held that the EEOC's authority to investigate a charge ends when it issues a right-to-sue letter; in contrast, in *EEOC v. Federal Express Corporation*, 558 F.3d 842 (9th Cir. 2009), the Ninth Circuit held that the issuance of a right-to-sue letter does not strip the EEOC of authority to continue to process the charge, including independent investigation of allegations of discrimination on a company-wide basis.

Not surprisingly, Union Pacific primarily relies on the Fifth Circuit's decision in support of its appeal.[3] The *Hearst* court found relevant that the "'integrated, multistep enforcement procedure' established by Title VII is divided into four distinct stages: filing and notice of charge, investigation, conference and conciliation, and, finally enforcement." *Hearst*, 103 F.3d at 468 (citing *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977)). The court further found that these steps must always proceed as separate stages, rather than overlapping each other. *Id.* While acknowledging the EEOC's *ability* to continue an investigatory role by either intervening in an individual's lawsuit, by pursuing discovery or by filing a Commissioner's charge, 29 C.F.R. § 1601.11, the Fifth Circuit did not explain why the EEOC's authority to investigate necessarily must be limited to the pre-enforcement phase. On

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[3] The *amicus* brief submitted by the Equal Employment Advisory Council also relies heavily on the *Hearst* opinion. While we have reviewed the submission, the *amicus* brief does not add materially to the arguments presented by the appellant.

the contrary, if you read the entire *Hearst* opinion, particularly "Section A," which deals with whether the subpoena was untimely, the Fifth Circuit appeared most concerned about speeding up the EEOC process as a whole. *See Hearst*, 103 F.3d at 468 ("Notwithstanding that the 180-day period appears to be an important part of the statutory design, it has been rendered practically meaningless."); *see also Federal Express*, 558 F.3d at 853 n.4 (similarly observing that Fifth Circuit appears primarily motived by speed). Policy concerns about delays in resolving charges, while worthwhile, would seem an insufficient (if not irrelevant) basis to assess the statutory authority vested in the EEOC to investigate in parallel or independently, especially in light of the EEOC's broad obligation to the public interest. *Cf. Shell Oil*, 466 U.S. at 69, 104 S.Ct. 1621 (cautioning that the EEOC's ability "to investigate charges of systemic discrimination not be impaired").

Twelve years after the *Hearst* opinion, the Ninth Circuit in *Federal Express* rejected the Fifth Circuit's concept of distinct, linear stages of enforcement by the EEOC, holding that "the beginning of another stage does not necessarily terminate the preceding stage." 558 F.3d at 852. Today, we join in that holding, concluding that the text of Title VII, and more recent Supreme Court and Seventh Circuit opinions, do not support such a restrictive interpretation of the EEOC's enforcement authority.

To begin, Title VII sets forth the requirements and general process for: (1) the filing of a charge by an aggrieved individual or by an EEOC Commissioner, § 2000e-5(b), (e); (2) initiating an investigation of the charge by the EEOC, § 2000e-

8(a); (3) exploring conciliation efforts if appropriate, § 2000e-5(b); and (4) engaging in enforcement efforts through its own civil action or by issuing a right-to-sue letter to the private party, §§ 2000e-5(f)(1), 2000e-5(b). As previously noted, the Supreme Court explained in *Shell Oil* that a charge must meet the requirements of 42 U.S.C. § 2000e-5(b) to serve as a "prerequisite to judicial enforcement of a subpoena issued by the EEOC." *Shell Oil*, 466 U.S. at 65, 104 S.Ct. 1621.[4]

The requirements of the statute itself are minimal: the charge "shall be in writing, under oath or affirmation and shall contain such information and be in such form as the Commission requires." *Id.* at 67, 104 S.Ct. 1621 (quoting 42 U.S.C. § 2000e-5(b)). The applicable regulations further provide that a charge must contain "[a] clear and concise statement of the facts, including the pertinent dates, constituting the alleged unlawful employment practices." *Id.* (quoting 29 C.F.R. § 1601.12(a)(3)(1983)). As also previously explained, "[w]hether a specific charge is valid is determined from the face of the charge, not from extrinsic evidence." *United Airlines*, 287 F.3d at 650 (internal citation omitted); *see also Watkins Motor Lines, Inc.*, 553 F.3d 593, 597 (7th Cir. 2009) (requiring only the

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[4] In *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009), this court observed that, although the Supreme Court refers to a "jurisdictional prerequisite," the statutory requirement of a valid charge is not that, at least in the broadest sense, but rather it is a "mandatory case-processing rule[ ]." *Id.* at 595-96. As such, the lack of a valid charge does not deprive the court of subject matter jurisdiction over a subpoena enforcement action, though it would doom any enforcement action.

filing of a valid charge to authorize the EEOC to investigate). Since there seems no dispute that the charges filed in 2011 met these basic requirements, there is no reasonable dispute that the EEOC was expressly authorized to conduct an investigation.

In contrast, once begun, 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. Moreover, while a valid charge is a requirement *for beginning* an EEOC investigation, nothing in Title VII supports a ruling that the EEOC's authority is then limited by the actions of the charging individual.

Between the Fifth Circuit's decision in *Hearst* and the Ninth Circuit's more recent opinion in *Federal Express*, the Supreme Court also considered whether an arbitration agreement with the charging individual would bar the EEOC from pursuing victim-specific judicial relief on behalf of that employee. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002). In holding that the charging individual's agreement to arbitrate did not bar further action on the part of the EEOC, the Supreme Court addressed the interplay between an individual charge and the EEOC's continuing authority to investigate and pursue enforcement actions: "The 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." *Id.* at 291, 122 S.Ct. 754. As such, the Court necessarily rejected the notion—endorsed by the Fifth Circuit in *Hearst* and again proffered by the appellant here—that the EEOC's

role is "merely derivative" of the charging individual. *Id.* at 297, 122 S.Ct. 754.

Following *Waffle House*, this court similarly held in *Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009), that the withdrawing of a charge of discrimination by an employee does not strip *the EEOC* of its authority to pursue its investigation. "All *Shell Oil* requires is a valid charge. Once one has been filed, the EEOC rather than the employee determines how the investigation proceeds." *Id.* at 596; *see also EEOC v. Sidley Austin LLP*, 437 F.3d 695, 696 (7th Cir. 2006) ("The reason there was no bar [in *Waffle House*] was not that the arbitration clause was unenforceable but that the Commission was not bound by it because its enforcement authority is *not* derivative of the legal rights of individuals even when it is seeking to make them whole." (emphasis added)).

This understanding of the EEOC's independent authority is further confirmed by the amendments to Title VII, which granted the EEOC broader authority to investigate and initiate enforcement actions to address employment discrimination, expressly beyond the specific complaints of the private charging individual. As this court explained in *Watkins*, to limit the EEOC's investigation to the decisions made by the charging individuals would needlessly inhibit its ability to conduct "a pattern-or-practice investigation that might lead to relief for many persons in addition to [the charging individual]." 553 F.3d at 597. Accordingly, the EEOC has subsequently adopted a regulation that expressly contemplates the continuation of an investigation *after* the issuance of a notice of right-to-sue.

> Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless the District Director; Field Director; Area Director; Local Director; Director of the Office of Field Programs or upon delegation, the Director of Field Management Programs; or the General Counsel, determines at that time or at a later time that it would effectuate the purpose of title VII, the ADA, or GINA to further process the charge.

29 C.F.R. § 1601.28(a)(3); *see also Federal Express*, 558 F.3d at 850 & n.2.[5]

Perhaps Union Pacific's stronger argument is that the EEOC has other avenues available to pursue an investigation once a notice of right-to-sue letter has been issued—namely, the EEOC could (1) serve a Commissioner's charge or (2) intervene in the charging individual's lawsuit.[6] However, the

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[5] While Union Pacific challenges whether this regulation is entitled to *Chevron* deference based on its contrary construction of Title VII, "[t]he EEOC's interpretation of its own rules is entitled to deference." *Shell Oil*, 466 U.S. at 74 n.28, 104 S.Ct. 1621. Regardless, since the court has already rejected Union Pacific's construction, this challenge completely fails to get off the ground.

[6] "A Commissioner charge is a discrimination claim issued by an EEOC Commissioner; there is no private charging party." *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 644 (7th Cir. 1995); *see also EEOC v. A.E. Staley Mfg. Co.*, 711 F.2d 780, 785 (7th Cir. 1983) (explaining that one purpose of a Commissioner's charge is "to initiate an investigation where an

availability of alternate 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. For example, a Commissioner's charge filed after issuance of a notice of right-to-sue may be deemed untimely, *see Watkins*, 553 F.3d at 598, or limitations on discovery may be imposed in the charging individual's lawsuit, *see* Fed. R. Civ. P. 26(b)(1). In light of the absence of any textual support in Title VII for appellant's position, the EEOC's adoption of a regulation that expressly contemplates the continuation of an investigation after the notice of right-to-sue letter has been issued, and the Supreme Court's express guidance that the EEOC is the master of the charge in order to serve a public interest extending beyond that of a charging individual, therefore, we hold that the issuance of a right-to-sue letter does not bar further investigation on the part of the EEOC.

This leaves Union Pacific's alternative contention, that any authority the EEOC had to enforce a subpoena after the right-to-sue letter was issued ended when the charging individuals' lawsuit was dismissed on the merits. While this issue extends beyond that posed to the Fifth and Ninth Circuits, the answer—and the reasoning underlying the answer—would appear the same: the entry of judgment in the charging individual's civil action has no more bearing on the EEOC's authority to continue its investigation than does its issuance of a right-to-sue letter to that individual. In its opening

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individual is unwilling to file the charge for fear of retaliation by the employer" (internal citation omitted)).

brief, Union Pacific asserts flatly without offering any textual or legal support that "if a court rules that a charge is invalid, then an investigation of that charge is over." Appellant's Br. 10. To the contrary, the validity of the charge is judged on the face of the charge itself. *See United Airlines*, 287 F.3d at 650; *Watkins*, 553 F.3d at 597. Assuming the charge meets the requirements of 42 U.S.C. § 2000e-5(b), and the EEOC has not resolved or dismissed the charge, *see* 29 C.F.R. §§ 1601.21, 1601.19, the language of Title VII grants the EEOC control over its own investigation and enforcement efforts. Accordingly, the disposition of a civil action brought by charging individuals does not necessarily prevent the EEOC from continuing that investigation.[7] To hold otherwise would not only undercut the EEOC's role as the master of its case under Title VII, it would render the EEOC's authority as "merely derivative" of that of the charging individual contrary to the Supreme Court's holding in *Waffle House,* 534 U.S. at 291, 297, 122 S.Ct. 754. The policy implications of such a ruling are also disturbing, since it would give unhealthy leverage to an individual litigant and an undue incentive to employers to purchase a stipulated dismissal with prejudice in order to prevent the EEOC from pursuing a larger public interest where the circumstances warrant. Even an adjudication on the merits of the individuals' charges, as here, would leave the outcome to the narrower, private interests and resources of those individuals, rather than to the

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[7] For example, the charge of a larger pattern or practice of discrimination obviously extends beyond the interests of the two charging individuals.

judgment that the EEOC is required to exercise in pursuing leads uncovered as part of its own, independent investigation in the public interest.

Of course, in determining whether to enforce a subpoena, there is also the requirement of relevance, as discussed immediately below. And, although of little solace to Union Pacific here, the EEOC itself describes the continuation of its own investigation after the issuance of a right-to-sue notice as unusual or atypical. Appellee's Br. 29; *see also* 29 C.F.R. § 1601.28(a)(3) (describing exception to usual proceeding of terminating investigation upon issuance of notice of right-to-sue). Finally, in determining whether to enforce a subpoena, a district court could still consider the date of filing of the charge, the course of the investigation, the timing of the subpoena, and any civil actions brought by the charging individuals in determining whether the subpoena poses an undue burden. *See McLane*, 137 S.Ct. at 1170.

B. Relevance

Under Title VII, the EEOC is authorized to examine and copy "any evidence . . . relevant to the charge under investigation," and it may "petition the district courts to enforce the subpoenas it issues pursuant to this authority." 42 U.S.C. § 2000e-8(a); *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 645 (7th Cir. 1995) (citing 42 U.S.C. § 2000e-9). As the Supreme Court explained in *Shell Oil*, the requirement under § 2000e-8 that the EEOC is only entitled to "relevant" evidence is not intended to be "especially constraining." 466 U.S. at 68, 104 S.Ct. 1621; *see also United Air Lines*, 287 F.3d at 652 (describing the burden as "not particularly onerous").

Rather, "courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68-69, 104 S.Ct. 1621. Still, "[t]he requirement of relevance, like the charge requirement itself, is designed to cabin the EEOC's authority and prevent 'fishing expeditions.'" *United Air Lines*, 287 F.3d at 653.

Here, the EEOC received information from Union Pacific itself that all other African-American Signal Helpers, not just the original claimants Burks and Jones, applying for a promotion to Assistant Signalman were turned down for a promotion. Based on this, the EEOC sought additional information about the test being administered to become eligible for promotion and the successful and unsuccessful applicants, including computerized personnel information. While Union Pacific contends that the information sought extends beyond the allegations in the underlying charges, this argument is premised on the same overly narrow view of the role of the EEOC already rejected in this opinion above. Moreover, the information sought in the subpoena might well "cast light on the allegations against the employer," thus satisfying the relevance requirement, or at least the district court did not abuse its discretion in so finding.[8]

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[8] As the Supreme Court reiterated recently in *McLane Co. v. EEOC*, 581 U.S. ——, 137 S.Ct. 1159, 197 L.Ed.2d 500 (2017), "[i]f the charge is proper and the material requested is relevant, the district court should enforce the subpoena unless the employer establishes that the subpoena is 'too indefinite,' has been issued for an 'illegitimate purpose,' or is unduly burdensome." *Id.* at 1170 (quoting *Shell Oil*, 466 U.S. at 72

Accordingly, the district court's order enforcing the subpoena is AFFIRMED.

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n.26, 104 S.Ct. 1621). While Union Pacific argued to the district court that the petition should be dismissed because the EEOC unreasonably delayed in serving its subpoena, Union Pacific did not press this argument on appeal. Even if it had, the district court did not abuse its discretion in finding that Union Pacific contributed to the delay by refusing to provide information requested in the EEOC's first and second subpoena.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, Respondent.

Case No. 14–mc–0052.

Signed May 1, 2015

102 F. Supp. 3d 1037

DECISION AND ORDER

LYNN ADELMAN, District Judge

This is an action to enforce an administrative subpoena. Before me now is respondent's motion to dismiss.

In 2011, Frank Burks and Cornelius Jones ("complainants") filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that their former employer, respondent Union Pacific Railroad Company, discriminated and retaliated against them in violation of Title VII of the Civil Rights Act of 1964 by denying them the opportunity to take a test for the Assistant Signal Person position. The EEOC began investigating the charges and as part of their investigation issued a request for information to Union Pacific on January 28, 2014, requesting information about Union Pacific's data and software systems that store personnel information as well as information about Union Pacific's assessment program for Assistant Signal Person applicants in

2011. Union Pacific refused to produce the information, and the EEOC issued a subpoena on May 15, 2014. Union Pacific responded by filing a petition to revoke or modify the subpoena with the EEOC, which was denied on June 30, 2014. When Union Pacific still refused to comply, the EEOC filed this application for an order enforcing their subpoena.[1]

At some point during the EEOC investigation, the EEOC issued right-to-sue notices to complainants, who sued Union Pacific in the Northern District of Illinois for Title VII violations. On July 7, 2014, the judge in that case granted Union Pacific's motion for summary judgment and dismissed the case. Union Pacific has filed a motion to dismiss this subpoena enforcement action, arguing that the EEOC no longer has authority to investigate the charges because it issued right-to-sue notices and the complainants have lost their civil suit based on the same charges, and alternatively that the subpoena seeks information not relevant to the charges.

"Subpoena enforcement proceedings are designed to be summary in nature." *E.E.O.C. v. United Air Lines, Inc.,* 287 F.3d 643, 649 (7th Cir.2002) (quotation and citation omitted). I will enforce the EEOC's subpoena as long as it "seeks reasonably relevant information, is not too indefinite, and relates to an investigation within the agency's

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[1] This is the second subpoena the EEOC has sought to enforce during its investigation of these charges. *See E.E.O.C. v. Union Pac.,* No. 13–mc–0022 (E.D.Wis.). In the first enforcement action, the parties reached an agreement after I denied Union Pacific's motion to dismiss for improper venue.

authority." *E.E.O.C. v. Quad/Graphics, Inc.,* 63 F.3d 642, 645 (7th Cir.1995). Union Pacific first asserts that I should dismiss this action because the EEOC's continued investigation is outside its authority. *See E.E.O.C. v. Sidley Austin Brown & Wood,* 315 F.3d 696, 700 (7th Cir.2002) ("[A] subpoena may be challenged as unreasonable . . . [if] the agency clearly is ranging far beyond the boundaries of its statutory authority."). Specifically, Union Pacific argues that the issuance of the right-to-sue notices and the civil judgment in favor of Union Pacific divest the EEOC of its investigative authority.

Only two circuits have directly addressed an issue similar to this one. The Fifth Circuit in *E.E.O.C. v. Hearst Corporation* concluded that "in a case where the charging party has requested and received a right-to-sue notice and is engaged in a civil action that is based upon the conduct alleged in the charge filed with the EEOC, *that charge* no longer provides a basis for EEOC investigation". 103 F.3d 462, 469–70 (5th Cir.1997). In support of its conclusion, the Fifth Circuit stated that "Congress granted the EEOC broad investigatory authority so that the agency promptly and effectively could determine whether Title VII had been violated and to assist the agency in its efforts to resolve disputes without formal litigation" and that "[t]hese purposes are no longer served once formal litigation is commenced." *Id.* at 469.

The Ninth Circuit, however, came to the opposite conclusion in *E.E.O.C. v. Federal Express Corporation,* holding that "the EEOC retains the authority to issue an administrative subpoena against an employer even after the charging party

has been issued a right-to-sue letter and instituted a private action based upon that charge." 558 F.3d 842, 854 (9th Cir.2009). The Ninth Circuit disagreed with the reasoning in *Hearst,* emphasizing that "the EEOC controls the charge regardless of what the charging party decides to do" and concluding that the EEOC may continue to investigate a charge after the charging party has filed suit because "the EEOC is pursuing its obligation to serve the public interest." *Id.* at 852–53.[2]

I find the reasoning of *Federal Express* to be more persuasive and conclude that the issuance of right-to-sue notices, complainants' civil suit, and the judgment in favor of Union Pacific do not divest the EEOC of authority to continue its investigation. First, no federal statute or regulation supports Union Pacific's argument that the EEOC's authority to investigate a charge ends at a certain point, whether that be at the issuance of a right-to-sue notice, the commencement of private litigation, or the conclusion of private litigation. *Id.* at 854 ("[N]othing in section 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." (citing 42 U.S.C. § 2000e–5(f)(1))). Title VII requires the EEOC to investigate a charge, 42 U.S.C. § 2000e–5(b), which includes the power to issue administrative subpoenas, § 2000e–9, and

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[2] Both *Hearst* and *Federal Express* involved situations where the charging party had filed suit but the suit had not yet been resolved, which is different than the situation in this case, where Union Pacific has obtained a judgment in its favor. No circuit has addressed whether a judgment in private litigation on the underlying charges divests the EEOC of authority to investigate.

regulations make clear that the EEOC may continue an investigation after issuing a right-to-sue notice if an EEOC official "determines at that time or at a later time that it would effectuate the purpose of title VII . . . to further process the charge," 29 C.F.R. § 1601.28(a)(3), which the EEOC's District Director did in this case. "Absent textual support for a contrary view, it is in the [EEOC's] province—not that of the court—to determine whether public resources should be committed" to continued investigation. *E.E.O.C. v. Waffle House, Inc.,* 534 U.S. 279, 291–92, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002).

Second, the EEOC does not simply represent the interests of private parties; it also represents the public interest independent of the complainants' interests. *See id.* at 291, 122 S.Ct. 754 ("The 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."). Further, neither arbitration nor a settlement between complainant and the employer divests the EEOC of its authority to investigate. *See E.E.O.C. v. Watkins Motor Lines, Inc.,* 553 F.3d 593, 597 (7th Cir.2009) ("[I]f arbitration or . . . a given employee's failure to exhaust his remedies does not foreclose independent investigation by the EEOC, neither does a settlement."). Thus, "the [EEOC's] powers are independent of any resolution between employer and employee," *id.,* and I conclude that this includes private litigation that ends in judgment in favor of the employer.

It also is irrelevant that the charges in this case allege only individual discrimination rather than a pattern or practice of discrimination. Union Pacific

seems to argue that because complainants' charges allege individual instances of discrimination rather than a pattern of discrimination, the EEOC's independent public interest is not implicated and its investigation must be confined to the individual instances of discrimination. Thus, the argument follows, the EEOC has no authority in this case to continue to investigate because the individual claims have already been litigated and the charges do not implicate any broader interest. I disagree. Title VII invests the EEOC with broad authority to investigate valid charges of discrimination, *E.E.O.C. v. Shell Oil Co.,* 466 U.S. 54, 71–72, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984), and to bring a lawsuit based on that investigation. 42 U.S.C. § 2000e–5(f)(1). "The permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge." *E.E.O.C. v. Delight Wholesale Co.,* 973 F.2d 664, 668 (8th Cir.1992); *see also Watkins Motor Lines, Inc.,* 553 F.3d at 597 ("The [EEOC] is entitled to vindicate the interests of all employees."); *E.E.O.C. v. Tempel Steel Co.,* 723 F.Supp. 1250, 1252–53 (N.D.Ill.1989) ("The EEOC's role in the claims process is to investigate a claim thoroughly and reasonably and remedy *any* unlawful discrimination that it uncovers."). It follows that the scope of an EEOC investigation also encompasses areas that reasonably grow out of the investigation. *See United Air Lines,* 287 F.3d at 653 ("[E]vidence concerning employment practices other than those specifically charged by complainants may be sought

by an EEOC administrative subpoena."). Because the EEOC's investigation can encompass more than complainants' individual claims, the summary judgment decision in favor of Union Pacific does not deprive the EEOC of continuing authority to investigate the charges. *E.E.O.C. v. Von Maur, Inc.,* No. 09–mc–020, at 12 (S.D.Iowa Sept. 9, 2009). This conclusion is further supported by the legislative purpose behind the EEOC's authority. *See Shell Oil,* 466 U.S. at 69–70, 104 S.Ct. 1621 (stating that " '[u]nrelenting broad-scale action against patterns or practices of discrimination' was essential if the purposes of Title VII were to be achieved" (quoting H.R.Rep. No. 92–238 pp. 8, 14 (1971), 1972 U.S.C.C.A.N. 2137, 2149)).

Union Pacific also asserts that even if the EEOC has authority to investigate, I should dismiss this action because the subpoena seeks information that is not reasonably relevant to the charges, arguing that the charges allege individual instances of discrimination, not a pattern or practice, and thus the subpoena, which seeks information unrelated to the individual complainants' employment history, is not relevant. "[U]nlike other federal agencies that possess plenary [investigative] authority . . ., the EEOC is entitled to access only evidence 'relevant to the charge under investigation.'" *Id.* at 64, 104 S.Ct. 1621 (quoting 42 U.S.C. § 2000e–8(a)). However, this limitation is "not especially constraining. Since the enactment of Title VII, courts have generously construed the term 'relevant' and have afforded the [EEOC] access to virtually any material that might cast light on the allegations against the employer." *Id.* at 68–69, 104 S.Ct. 1621. Evidence concerning employment decisions regarding employees other

than the individual complainants or employment practices other than those specifically complained about in the charges may be relevant. *See United Air Lines,* 287 F.3d at 653 (citing with approval *Blue Bell Boots, Inc. v. E.E.O.C.,* 418 F.2d 355 (6th Cir.1969) and *E.E.O.C. v. Roadway Express, Inc.,* 750 F.2d 40, 43 (6th Cir.1984)). The EEOC's burden in showing that the evidence they seek is relevant to the charge is not onerous. *Id.* at 652.

I have already concluded that the scope of the EEOC's investigation may encompass a pattern or practice of discrimination if evidence of such a pattern reasonably grew from the original charges. Here, the EEOC received two separate charges from black men which alleged that they were denied promotion opportunities because of their race. During the course of the investigation, the EEOC also learned that of the ten Assistant Signal Person positions Union Pacific filled in complainants' district in 2011, none of those promoted were black. Thus, the EEOC is justified in seeking evidence related to a pattern or practice of discrimination despite the fact that the charges do not specifically allege a pattern or practice, and I conclude that such evidence is relevant to the charges.[3]

Union Pacific also argues that I should dismiss this action because the subpoena "seeks an extraordinary amount of information." Union Pac.'s Reply Mem. at 4 (ECF No. 12). I may only modify or

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[3] I also note that the charges allege race discrimination, which is "'by definition class discrimination,'" *United Air Lines,* 287 F.3d at 653 (quoting *Blue Bell Boots,* 418 F.2d at 358), further justifying the EEOC's investigation of a pattern or practice of discrimination.

exclude portions of the subpoena if Union Pacific "carries the difficult burden of showing that the demands are unduly burdensome or unreasonably broad." *F.T.C. v. Shaffner,* 626 F.2d 32, 38 (7th Cir.1980); *see also United Air Lines,* 287 F.3d at 653. Union Pacific has not met this burden. Aside from emphasizing that the subpoena is two pages long with seventeen separate requests and questioning where the EEOC derived its information from, Union Pacific has not made a sufficient showing that the subpoena is overly broad or will unduly burden it.

Finally, Union Pacific argues that I should dismiss the EEOC's petition based on the doctrine of laches, which is an equitable defense based on unreasonable delay. Union Pacific argues that the EEOC dragged its feet in investigating the charges and failed to intervene in the complainants' private suit, constituting unreasonable delay, and that Union Pacific would be prejudiced by having to comply with the EEOC's subpoena when it has already litigated the underlying discrimination charges. However, Union Pacific seems to be responsible for at least some of the delay in the investigation because if its refusal to cooperate with two subpoenas, requiring the EEOC to petition the district court to enforce them. Further, Union Pacific has not shown how complying with a subpoena will prejudice it; complying with a subpoena does not require Union Pacific to relitigate the charges; at this point at least, Union Pacific is not being prejudiced.

THEREFORE, IT IS ORDERED that respondent's motion to dismiss (ECF No. 7) is **DENIED.**

IT IS FURTHER ORDERED that a telephonic status conference is scheduled for **June 4, 2015 at 11:30 a.m.** for the purpose of discussing remaining enforcement issues. The court will initiate the call.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 21, 2017

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

WILLIAM M. CONLEY, *District Judge*[*]

No. 15-3452

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioner-Appellee,*	Appeal from the United States District Court for the Eastern District of Wisconsin.
v.	No. 2:14-mc-00052-LA
UNION PACIFIC RAILROAD COMPANY, *Respondent-Appellant.*	Lynn Adelman, *Judge.*

ORDER

No judge of the court having called for a vote on the Petition For Rehearing En Banc, filed by Respondent-Appellant on October 27, 2017, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition For Rehearing En Banc is DENIED.

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[*] Of the Western District of Wisconsin, sitting by designation.

42 U.S.C. § 2000e-5

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the

alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission 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 person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far

as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the

Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the

Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the

employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

* * *

42 U.S.C. § 2000e-6

§ 2000e-6. Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case.

Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972, the Commission shall have 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. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

42 U.S.C. § 2000e-8

§ 2000e-8. Investigations

(a) **Examination and copying of evidence related to unlawful employment practices**.

In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, 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-9

§ 2000e-9. Conduct of hearings and investigations pursuant to section 161 of title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply.

No. 18,924

In the United States Court of Appeals
For the Sixth Circuit

BLUE BELL BOOTS, INC., formerly, J.W. Carter Company

Appellant

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Appellee

Appeal from the United States District Court
for the Middle District of Tennessee,
Nashville Division

BRIEF FOR APPELLEE

FILED
NOV 29 1968
Carl W. Reuss, Clerk

* * *

COUNTER-STATEMENT OF FACTS

On November 8, 1966, the Commission received at its Atlanta, Georgia Regional Office, a letter from the Tennessee commission on Human Relations containing seven unsworn charges, written on EEOC charge forms, setting forth facts, if true, constituting

violations of Title VII, on the part of the J. W. Carter, Company, Inc., appellant's predecessor.[2] The seven Charging Parties, all former Negro employees of the company were discharged by it during the period October 4, 1966 through October 21, 1966. (P. 2 of Company's Petition below). Specifically, they charged that they had been discharged for reasons of their race and that the Company had restricted employment opportunities for Negroes by maintaining a discriminatory training and promotional program.[3] (Appendix A to Commission's Answer, p. 2 Aff.)

The charges were reviewed by an officer of the commission who concluded that they constituted a written statement sufficiently precise to identify the parties and to describe generally the actions and practices complained of. Accordingly, pursuant to Section 16.01.11 of the Commission's Rules and Regulations, 29 C.F.R. Section 1601.11, the unsworn charges were viewed as valid charges within the meaning of Section 706 of the Act. The Commission advised the Charging Parties that their charges had been reviewed and that a field representative of the Commission would contact them. (P. 3 Aff.)

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[2] P. 1 Affidavit (hereinafter Aff.) attached to the Commission's Answer.

[3] The unsworn charges were forwarded on or about November 17, 1966, to the Commission's New Orleans Regional Office which was at that time responsible for processing cases in Tennessee. (P. 2 Aff.)

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	Charge Presented To: ☐ FEPA ☒ EEOC	Agency(ies) Charge No(s): **440-2012-00416**
Iowa Civil Rights Commission and EEOC *State or local Agency, if any*		
Name *(indicate Mr., Ms., Mrs.)* **Frank Burks**	Home Phone *(incl. Area Code)* **(773) 261-0616**	Date of Birth **09-21-1962**
Street Address **1861 S. Central Park, Apt. 1, Chicago, IL 60623**	City, State and ZIP Code	
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)		
Name **UNION PACIFIC RAILROAD**	No. Employees, Members **500 or More.**	Phone No. *(include area code)* **(515) 433-5691**

Street Address **900 Story St., Boone, IA 50036**	City, State and ZIP Code	
Name	No. Employees, Members	Phone No. *(include area code)*
Street Address	City, State and ZIP Code	
DISCRIMINATION BASED ON *(Check appropriate box(es).)* ☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ GENETIC INFORMATION ☐ OTHER *(Specify)*	DATE(S) DISCRIMINATION TOOK PLACE Earliest Latest **10-10-2011** ☐ CONTINUING ACTION	
THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):* I began employment with Respondent on or about January 3, 2011. I was discharged from employment on or about February 9, 2011. I filed an internal EEO complaint with		

Respondent, and was reinstated on or about May 24, 2011. Subsequent to filing my complaint, I have been denied the opportunity to take a test for the Assistant Signalman position. On or about October 10, 2011, I was discharged again.

I believe that I have been discriminated against because of my race, Black, and in retaliation for engaging in protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY – *When necessary for State and Local Agency Requirements*

I declare under penalty of perjury that the above is true and correct.

Oct 31, 2011 — *Date*

s/ Frank Burks — *Charging Party Signature*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(*month, day, year*)

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	Charge Presented To: ☐ FEPA ☒ EEOC	Agency(ies) Charge No(s): **440-2012-00398**
Iowa Civil Rights Commission and EEOC *State or local Agency, if any*		
Name *(indicate Mr., Ms., Mrs.)* **Mr. Cornelius L. Jones, Jr.**	Home Phone *(incl. Area Code)* **(815) 847-2133**	Date of Birth **03-28-1970**
Street Address **425 Gramercy Dr, Apt. 4, Rockford, IL 61107**	City, State and ZIP Code	
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)		
Name **UNION PACIFIC RAILROAD**	No. Employees, Members **500 or More.**	Phone No. *(include area code)* **(515) 433-5691**

Street Address **900 Story St., Boone, IA 50036**	City, State and ZIP Code	
Name	No. Employees, Members	Phone No. *(include area code)*
Street Address	City, State and ZIP Code	
DISCRIMINATION BASED ON *(Check appropriate box(es).)* ☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ GENETIC INFORMATION ☐ OTHER *(Specify)*	DATE(S) DISCRIMINATION TOOK PLACE Earliest Latest **10-10-2011** ☐ CONTINUING ACTION	
THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):* I began employment with Respondent on or about January 3, 2011. My most recent position was Signal Helper. I previously filed EEOC charge #563-2011-01513.		

Subsequent to filing that charge, I have been denied the opportunity to take a test for an Assistant Signalman position. On or about October 10, 2011, I was discharged.

I believe that I have been discriminated against because of my race, Black, and in retaliation for having engaged in protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY – *When necessary for State and Local Agency Requirements*
I declare under penalty of perjury that the above is true and correct. Nov. 4, 2011 (*Date*) s/ X Cornelius L. Joseph Jr. (*Charging Party Signature*)	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (*month, day, year*)