No. 15-3452

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Equal Employment Opportunity Commission,
Petitioner-Appellee,

v.

Union Pacific Railroad Company,
Respondent-Appellant.

Appeal From the United States District Court
For the Eastern District of Wisconsin
Case No. 2:14-mc-00052-LA
The Honorable Lynn Adelman

BRIEF OF THE CENTER FOR WORKPLACE COMPLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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The Center for Workplace Compliance respectfully submits this brief *amicus curiae* contingent upon granting of the accompanying unopposed motion for leave to file.[1]

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

All of CWC's member companies are employers subject to the federal employment nondiscrimination statutes enforced by the U.S. Equal Employment Opportunity Commission (EEOC), including Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. Accordingly, as potential respondents to

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

discrimination charges subject to investigation and enforcement by the EEOC, CWC's members have a strong interest in the issues presented in this case.

As a national representative of large employers, CWC has perspective and experience that can help the Court assess issues of law and public policy that have been raised in this case, beyond the help that the lawyers for the parties can provide. *Cf. Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997). Accordingly, CWC seeks to bring these countervailing policy considerations to the Court's attention and assist the Court in putting the arguments of the Respondent-Appellant into proper perspective.

SUMMARY OF REASONS FOR GRANTING THE PETITION

Invoking the EEOC's purported "independent authority to investigate charges of discrimination," *EEOC v. Union Pacific RR. Co.*, 867 F.3d 843, 845 (7th Cir. (2017), the panel below erroneously held 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 [prevents] the EEOC from continuing its own investigation [of the charge allegations]." *Id.* Its holding is contrary to Title VII's plain text and misapplies this Court's binding precedent on questions of substantial importance to the employer community. Because it threatens to fundamentally alter Title VII enforcement and litigation, the decision below should be vacated and the Petition granted.

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, authorizes the EEOC to investigate charges of discrimination filed by

or on behalf of "aggrieved persons," or the Commission itself. 42 U.S.C. § 2000e-5(b). Once their discrimination claims were dismissed on the merits, the charging parties in this case no longer were aggrieved, i.e., no longer could "establish a link between the policy and the employment decision about which he or she is complaining." *Mlynczak v. Bodman*, 442 F.3d 1050, 1058 (7th Cir. 2006). It follows that their underlying discrimination charges no longer were sufficient to invoke the EEOC's authority to investigate.

The panel's unprecedented conclusion that a charge asserting claims that have been fully adjudicated can form the basis for a renewed EEOC investigation also is contrary to the principles established by this Court in *EEOC v. United Air Lines, Inc.*, 287 F.3d 643 (7th Cir. 2002). There, the Court *refused* to enforce an EEOC subpoena it deemed to be overbroad and that sought irrelevant information. It remanded the matter specifically on the question whether the charge was subject to a valid affirmative defense, thus extinguishing the EEOC's authority to investigate. *Id.*

Because the panel below failed to analyze the issue, its ultimate conclusion 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," *Union Pacific*, 867 F.3d at 849, is not well founded and should be reexamined by the full Court *en banc*. *En banc* review also is warranted because allowing the EEOC to reopen charge investigations in the manner contemplated would discourage prompt dispute resolution and encourage

abusive enforcement tactics. It also invariably would divert limited agency resources from more pressing enforcement priorities – including reducing its persistent charge backlog – to the disadvantage of charging parties and respondents alike.

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S DECISION IS CONTRARY TO TITLE VII'S PLAIN TEXT

A. Title VII Only Authorizes The EEOC To Act Upon The Discrimination Claims Of "Aggrieved Persons"

The EEOC is charged with enforcing, *inter alia,* Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* As relevant here, it provides:

> 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 … has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge … on such employer … within ten days, and shall make an investigation thereof.

42 U.S.C. § 2000e-5(b) (emphasis added). Thus, except in the case of a Commissioner charge, Title VII "requires the filing of charges with the EEOC by a 'person claiming to be aggrieved.'" *Stewart v. Hannon*, 675 F.2d 846, 849 (7th Cir. 1982).

The EEOC understands as much. In its Compliance Manual discussion on standing, it defines "aggrieved persons" to include individuals: (1) "subjected to alleged discrimination;" (2) "harmed by alleged discrimination against others;" or (3) filing on behalf of an aggrieved person. *See* EEOC Compl. Man., SECTION 2: THRESHOLD ISSUES, 2-V STANDING (May 2000), *available at*

https://www.eeoc.gov/policy/docs/threshold.html#2-V. As this Court has observed, "The *aggrieved person* must establish a link between the policy and the employment decision about which he or she is complaining." *Mlynczak v. Bodman*, 442 F.3d 1050, 1058 (7th Cir. 2006) (emphasis added).

Individuals whose Title VII discrimination claims have been fully adjudicated are no longer aggrieved, because either the discrimination to which they were subjected has been remedied, or the court has determined that they were not, in fact, "subjected to alleged discrimination." EEOC Compl. Man., SECTION 2: THRESHOLD ISSUES, 2-V STANDING, at A.1. (May 2000). As the EEOC conceded in its brief to the panel below, agency investigations "cannot be grounded on an invalid charge. That is beyond peradventure." EEOC Br. at 17.

Here, when the EEOC filed its subpoena enforcement action, the claims asserted in the underlying charges already had been litigated and dismissed on the merits. Once that occurred, the charging parties were no longer "aggrieved," making their charges invalid and providing no further basis for investigation. The panel's holding to the contrary accordingly was erroneous.

B. The Panel Failed To Acknowledge, Much Less Resolve, Whether An EEOC Investigation May Be Triggered Where The Charging Party No Longer Is Aggrieved

The panel below focused only on whether the underlying charges, when initially filed in 2011, met the statutory requirements of being in writing, submitted under oath or affirmation, and containing "such information and be in such form as the Commission requires," 42 U.S.C. § 2000e-5(b), concluding, "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." *Union Pacific*, 867 F.3d at 849.

The panel assumed the charges remained valid in September 2014 when the EEOC filed its subpoena enforcement action, based solely on the fact that the charges appeared to satisfy the statutory filing requirements in 2011. If the only timeframe relevant to confirming the EEOC's continuing authority to investigate is the date on which a charge originally was filed, then no other subsequent event – including a change in applicable law or the legal standing of the parties – would *ever* affect the EEOC's investigative authority. Because that cannot be so, the panel's contrary conclusion warrants full *en banc* review.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S BINDING PRECEDENTS AND IS INCONSISTENT WITH REGULATORY AND JUDICIAL INTERPRETATIONS OF TITLE VII

A. The Panel Below Misapplied This Court's Holding In *United Air Lines*

In *EEOC v. United Air Lines*, this Court declined to enforce an EEOC subpoena that it found to exceed the agency's authority. 287 F.3d at 655. It instructed the district court on remand to determine whether the charging party had any possibility of prevailing; if the answer was no, then no additional scrutiny of the subpoena would be warranted as the EEOC would have no basis for issuing it. *Id.*

The panel below ignored that guidance, citing instead to the Court's observation that the validity of a charge is "determined from the face of the charge,

not from extrinsic evidence." *Union Pacific*, 867 F.3d at 849 (citation omitted). Read in proper context, however, that statement cannot mean to preclude an analysis regarding whether subsequent adjudication precludes continued investigation, since the Court *explicitly instructed* the trial court that the EEOC subpoena should not be enforced if the allegations contained in the charge were subject to a valid defense. Had the panel below properly applied *United Air Lines,* it would have limited the relevant scope of the EEOC's investigation to confirming whether or not the issues resolved in litigation matched those raised in the underlying charges. *See United Air Lines, Inc.*, 287 F.3d at 651.

The EEOC itself mischaracterized *United Air Lines*, asserting that this Court merely "held that United's failure to 'point to any infirmities in the charge' was fatal to its claim." EEOC Br. at 18. In fact, the Court *declined* to enforce the EEOC's subpoena, remanding the case with specific instructions that the district court determine whether a valid affirmative defense precluded the agency's subpoena enforcement action.

Claim preclusion is a "valid affirmative defense" to a discrimination charge. Even the EEOC takes the position that claims or issues that have been fully adjudicated in court may not be "relitigated" through the charge investigation process:

> Pursuant to the doctrines of claim and issue preclusion, an individual may not relitigate a particular claim or issue in federal court that has been decided by a prior federal or state *court* decision… If a claim or issue cannot be litigated in federal court, then it serves little purpose for the EEOC to investigate the claim or issue on the merits. Thus, the Commission usually applies preclusion principles in the same manner

> as a federal court. A court decision has the potential of having a preclusive effect if it involved some of the same facts, or raised some of the same issues, in the EEOC charge.

EEOC Compl. Man., SECTION 2: THRESHOLD ISSUES, 2-VI A. The Two Major Types of Preclusion: Claim Preclusion and Issue Preclusion (May 2000), *available at* https://www.eeoc.gov/policy/docs/threshold.html#2-VI-A (footnotes omitted).

In this case, the EEOC moved to enforce its subpoena in September 2014, five months *after* the charging parties' subsequent lawsuit was dismissed. Under *United Air Lines,* that fact should have served as a "valid affirmative defense" precluding enforcement of the EEOC's subpoena.

B. The Notion That Title VII Permits The EEOC To Investigate After The Charge Allegations Have Been Resolved On The Merits Is Belied By The Agency's Own Enforcement Guidance

The idea that the EEOC freely may reopen an investigation of discrimination claims that have been fully adjudicated also is plainly inconsistent with the agency's own guidance – including its recordkeeping and retention regulations, which expressly allow charge respondents to destroy any relevant employment records as of the date "on which litigation is terminated." 29 C.F.R § 1602.14.

Section 1602.14 of the agency's Title VII procedural regulations provides:

> Where a charge of discrimination had been filed … the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. … The date of *final disposition of the charge or the action* means the date of expiration of the statutory period within which the aggrieved person may bring an action … or … the date on which such litigation is terminated.

29 C.F.R. § 1602.14 (2012 & Supp. 2017). The EEOC in Section 1602.14 effectively confirms that termination of charge-related litigation signals a definitive end to the matter – relieving the respondent of any obligation to retain relevant employment records. In addition, nowhere in published regulatory or sub-regulatory guidance has the EEOC ever directed or authorized the investigation of charges the merits of which have been fully adjudicated in court, and it has no published procedures in place governing post-disposition charge investigations.

Courts may permit the EEOC to intervene in a civil action filed after receipt of a right-to-sue notice, but only "[u]pon timely application" and certification by the EEOC "that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1). On its face, that provision pertains only to EEOC intervention in Title VII litigation; it in no way authorizes continued *administrative investigation* after a right-to-sue notice is issued. Although the panel below relied on an EEOC procedural regulation purporting to authorize the agency to retain jurisdiction to investigate as it deems appropriate, *Union Pacific*, 867 F.3d at 851, because that regulation directly conflicts with Section 2000e-5(f)(1), it is not entitled to judicial deference. The *en banc* Court should grant review to correct that error.

III. THE DECISION BELOW FRUSTRATES TITLE VII'S PURPOSES AND UNDERMINES EFFICIENT AND EFFECTIVE ENFORCEMENT

As *amicus* emphasized in its brief to the panel below, permitting the EEOC to continue investigating a charge after it has issued a right to sue notice, the charging party has sued, and a federal court has dismissed the case on the merits would impose substantial burdens on employers defending such actions. Despite the

significance of this issue to every employer subject to Title VII, the panel elected not to address it at all. For that reason, we respectfully urge the *en banc* Court to grant the Petition to consider, among other things, the important practical implications the panel decision and district court's ruling below will have on employers doing business within the Court's jurisdiction.

When faced with notice of a discrimination charge, most employers devote significant time and resources to managing the ensuing administrative investigation. Once a right-to-sue notice is issued and suit is filed, the employer's focus appropriately shifts to mounting an appropriate defense and managing litigation that often is far more detailed and complex than the underlying charge investigation. The EEOC's sole role in private sector investigations is to find facts, which under these circumstances the trial court already will have done. Neither the government nor the public derives any benefit from allowing the EEOC to resume investigation of adjudicated claims, especially where relevant employment records no longer exist. To the contrary, requiring employers to defend themselves under those circumstances would impose unjustifiable business burdens, waste precious agency and judicial resources better directly elsewhere, and would do nothing to advance the purposes of Title VII.

CONCLUSION

For all of these reasons, *amicus curiae* respectfully submits that the Petition for Rehearing *En Banc* should be granted.

Respectfully submitted,

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(s) *Rae T. Vann*

Attorney for Center for Workplace Compliance, *amicus curiae*

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