No. 15-1248

IN THE

Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and National Federation of Business Small Business Legal Center respectfully submit this brief *amici curiae* in support of the petitioner.[1]

[1] The parties have consented to the filing of this brief. Counsel for *amici curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit,

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or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this case concerning the proper standard of review that should be applied by appellate courts when reviewing a district court's determinations in an EEOC subpoena enforcement action.

Because they work closely with many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. EEAC, the Chamber, and NFIB collectively

have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important questions of Title VII's proper interpretation and application. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

Petitioner McLane Company (McLane) administers a physical capability test to all new hires, as well as to current employees returning from medical leaves of absence. Pet. App. 3. Damiana Ochoa was required to take the test before being allowed to return to work from maternity leave. *Id.* She took and failed the test three times, and therefore was not permitted to return to work. *Id.*

Ochoa subsequently filed an administrative charge with Respondent EEOC, alleging that use of the test discriminated against her on the basis of sex (pregnancy) in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. Pet. App. 2.

As part of its investigation of the Ochoa charge, the EEOC asked McLane to provide extensive information about the test, including, for each person who took it:

- name, sex, date of birth, social security number, and contact information;
- disability status;
- the reason why he or she was required to take the test;

- test score; and
- reason for termination, if applicable.

Pet. App. 3-4, 20-21. The EEOC's request for information was not limited to the McLane facility where Ochoa worked, but rather extended to all McLane facilities nationwide. *Id.*

The EEOC also expanded the scope of its investigation to include requests for information that purportedly would help the EEOC decide if McLane violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, even though Ochoa was not over 40 when she took and failed the test. Pet. App. 5.

McLane challenged the breadth and scope of the information requests. The EEOC responded by issuing two subpoenas: one relating to potential ADEA claims (the "ADEA Subpoena") and one relating to the Ochoa sex discrimination charge (the "Ochoa Charge Subpoena"). Pet. App. 4-5. In response, McLane provided a database of all individuals who took the test nationwide by sex, location, position, test date, reason for the test, score, and (for applicants) whether the test taker was deemed minimally qualified for the position. Pet. App. 3-4. Dissatisfied, the EEOC filed an action in the U.S. District Court for the District of Arizona to enforce the ADEA Subpoena. Pet. App. 19.

After it received briefing and held a hearing on the EEOC's request to enforce the ADEA Subpoena, the district court granted the EEOC's request in part, holding that the agency was entitled to nationwide statistical data, but not to personal pedigree information, pertaining to the approximately 14,000 employees that took the test. Pet. App. 19. Undeterred, the EEOC then proceeded to file a second action in the district court to enforce the Ochoa Charge Subpoena,

seeking the same pedigree information, as well as additional disability-related information. *Id.*

In opposition to this second subpoena enforcement action, McLane argued that the EEOC was not entitled to any disability-related information, because Ochoa does not claim either to be disabled or that she was discriminated against because of actual or perceived disability. Pet. App. 23-26. It also contended that the additional pedigree information sought by the EEOC, including (among other data) name, date of birth, social security number, last known address, and phone number, was not relevant to whether or not use of the test discriminated against Ochoa because of her pregnancy. Pet. App. 20-21. Finally, McLane argued that the information pertaining to the "reason for termination" for all those who took the test was overly broad and unduly burdensome. *Id.*

The district court refused the EEOC access to the disability-related information on the ground that Ochoa could not state a claim for disability discrimination. Pet. App. 25-27. It also found that the additional pedigree information sought in this case – in particular, the names, contact information, and social security numbers of individual employees – was not relevant to resolution of the Ochoa charge:

> [A]n individual's name, or even an interview he or she could provide if contacted, simply could not "shed light on" whether the [test] represents a tool of gender discrimination in the aggregate. The EEOC has provided nothing to the Court to allay the concerns raised by McLane that such data has been requested as a means of trolling for possible complainants.

Pet. App. 29. The district court also declined to require McLane to produce the "reason for termination" information. Pet. App. 30-31.

The EEOC appealed the district court's order denying enforcement of its subpoena for pedigree and termination information, but only as to the sex discrimination claims. Pet. App. 1, 5. It abandoned the argument that the subpoena should be enforced because of its relevance to potential disability discrimination. Pet. App. 5-6.

On appeal, the Ninth Circuit reviewed the district court's ruling *de novo* even though it conceded that it did not know why it applied this standard instead of a deferential standard like the other federal courts of appeals. Pet. App. 8 n.3. It ultimately reversed the district court, enforcing the EEOC's subpoena for nationwide pedigree information. Pet. App. 15-16. It reasoned that the information was relevant because it would allow the EEOC to identify and contact other test takers who might have information casting light on Ochoa's allegations against McLane. Pet. App. 10-14. It also found that information concerning McLane's termination of other test takers was relevant, but remanded on the issue of whether requiring production of such information would be unduly burdensome. Pet. App. 14-16.

After its petition for rehearing *en banc* was denied, McLane filed a Petition for a Writ of Certiorari with this Court on April 4, 2016. The Court granted the petition as to the question of what appellate standard of review should apply to district court administrative subpoena enforcement determinations.

SUMMARY OF ARGUMENT

The Ninth Circuit erred when it applied a *de novo* standard of review to the district court's determinations of relevance and burden in an EEOC administrative subpoena enforcement action. These determinations by a district court are primarily factual, and therefore should be reviewed on appeal for clear error.

A deferential standard of review promotes effectiveness and efficiency because the district court is closest to the factual and evidentiary issues at play and can more readily appreciate the full weight of the evidence through hearings, witness testimony, and its direct access to the parties. This is especially true for fact-intensive matters such as EEOC subpoena enforcement actions. For that reason, every other court of appeals to have considered the issue applies a deferential standard of review to administrative subpoena enforcement orders.

A *de novo* standard of review delays prompt resolution by, among other things, encouraging appeals and discouraging informal resolution of non-merits issues. EEOC investigations are already lengthy, due in large measure to the EEOC's tendency to demand extensive, frequently irrelevant information seemingly in hopes of identifying potential systemic issues affecting a broader class of employees that go beyond the underlying charge allegations. These often abusive investigation tactics are the result, at least in part, of the EEOC's strategic aim to ensure that at least 20% of its active litigation docket is made up of class-based, systemic cases. To achieve that benchmark, the EEOC often demands, as part of investigation of even the most straightforward individual claim, voluminous information that has no relevance to the charge under investigation in an effort to "fish" for possible targets

for systemic enforcement. Applying a *de novo* standard to review of agency subpoena enforcement determinations would only serve to further extend an already lengthy EEOC investigation process, undermining Title VII's goals of prompt investigation and resolution of discrimination claims.

ARGUMENT

I. REVIEW OF EEOC SUBPOENA ENFORCEMENT DETERMINATIONS FOR ABUSE OF DISCRETION ACCORDS WITH TRADITIONAL LEGAL PRINCIPLES AND FURTHERS IMPORTANT POLICY AIMS UNDERLYING TITLE VII

A. Traditional Principles Of Appellate Review Provide That Mixed Questions Of Law And Fact Underlying EEOC Subpoena Enforcement Actions Should Be Reviewed Under A Deferential Standard Of Review

According deference to district court's factual determinations, such as those made when ruling on complex and often nuanced administrative subpoena enforcement actions, facilitates efficient resolution of disputes. For that reason, the Ninth Circuit's application of the *de novo* standard to the district court's subpoena enforcement was erroneous and the ruling should be reversed.

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Appeals courts may not set aside a district court's

"[f]indings of fact" unless they are "clearly erroneous." *See* Fed. R. Civ. P. 52(a)(6); *see also Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831 (2015). This Court has observed that Fed. R. Civ. P. 52 "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Teva Pharms.* at 836-37 (first quoting *Anderson v. Bessemer City*, 470 U.S. 564 (1985); then quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)).

When reviewing mixed questions of law and fact, this Court likewise has held that "deferential review … is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (quoting *Miller v. Fent*on, 474 U.S. 104, 114 (1985)). Both factors typically are present when assessing questions of relevance and burden in connection with enforcement of an EEOC investigative subpoena.

Determining the relevance of documents requested during an EEOC investigation requires careful review of the underlying facts and whether the requested information stems from and is reasonably related to the underlying claim. *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 702 (1974) ("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues"). Furthermore, in conducting such an inquiry, a court often has to balance hardships and benefits that could result from its

determination. This weighing of burden-versus-need is necessarily a factual, discretion-based inquiry. *See EEOC v. Packard Elec. Div., Gen. Motors Corp.*, 569 F.2d 315, 318 (5th Cir. 1978) (determinations of burden in a subpoena enforcement action "imply a balancing of hardships and benefits, and the standard by which we review such matters of relative burdensomeness is 'abuse of discretion'"). For example, production of documents in response to any given document request may be unduly burdensome for one employer because of the nature of the request and the employer's recordkeeping systems but may create substantially less hardship for another. Therefore, a district court must exercise discretion in deciding when documents are relevant and, if so, at what point relevance is outweighed by the burden that would result if production is compelled.

1. A deferential standard of review promotes effectiveness and efficient resolution of collateral issues

Deference to district courts on determinations of relevance and burden that are central to an administrative subpoena enforcement action promotes both effectiveness and efficiency. First, a district court "[f]amiliar with the issues and litigants [is generally] better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990). An appellate court, on the other hand, evaluates questions of law based on a cold record that often fails to communicate critical insights that were conveyed to the district court judge. *Pierce*, 487 U.S. at 560; *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 433 (2d Cir. 1945) ("[I]n such cases the appeal must be decided upon an incomplete record, for

the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds") (L. Hand, Circuit Judge) (citation omitted). A deferential standard of review promotes efficiency as well because it "streamline[s] the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court." *Cooter & Gell*, 496 U.S. at 404. A *de novo* standard, on the other hand, delays prompt resolution by, among other things, encouraging second-bite appeals, even on issues that are ultimately collateral to the underlying claims being pursued by the EEOC. *Id.* (deferential review "discourage[s] litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation").

2. Deferential review is particularly appropriate for complex matters such as EEOC subpoena enforcement actions

Applying a deferential standard of review to mixed questions of law and fact is even more important when the question being decided is relatively complex and not susceptible to useful generalization. *Pierce*, 487 U.S. at 562. This Court has recognized that practical considerations favor deferential review when a question demands the application of a legal standard that requires a detailed understanding of complicated factual questions, such as in the EEOC subpoena enforcement context. *Teva Pharms.*, 135 S. Ct. at 838.

This case provides an excellent example of how EEOC subpoena enforcement actions often involve complex factual issues. Here, the EEOC initially sought nationwide information from McLane based on three different discrimination theories – sex,

disability, and age discrimination – even though the charging party only alleged sex discrimination in her charge. McLane initially provided only some of the requested information. In response, the EEOC issued two subpoenas – one purporting to seek information about a potential ADEA claim and one purporting to seek information about the charging party's sex discrimination allegations. Both subpoenas demanded data about more than 14,000 McLane employees, including pedigree information such as social security numbers. McLane responded to the subpoenas by again producing some information and objecting to other requests, which eventually resulted in it having to defend against two separate subpoena enforcement actions brought by the EEOC in federal court.

This level of factual and procedural complexity is common in EEOC subpoena enforcement actions. In *EEOC v. Wal-Mart Stores East, LP*, for instance, the EEOC issued a subpoena requesting employee information from 40 stores as part of the EEOC's investigation of allegations that the store's pre-employment physical abilities test had a disparate impact on women. Civ. No. 6:14-cv-228, 2016 WL 1242540, at *1 (E.D. Ky. Mar. 29, 2016), *appeal filed*, No. 16-2755 (6th Cir. June 2, 2016). In response, Wal-Mart produced data for three locations and declined to produce any personally identifiable data, arguing that compliance with the EEOC's overbroad demand would require sifting through data for more than one million applicants, at an estimated cost of $105,000 and 2,000 personnel hours. *Id.* at *1-*2. Adding to the complexity was the fact that the 2016 subpoena enforcement action was a continuation of a prior 2001 class action initiated by the EEOC that was resolved by consent decree in the same court. *Id.* at *1. The discrimination

charge underlying the 2016 action was based, in part, on allegations that the store's physical abilities test did not comply with the terms of the earlier consent decree. *Id.* Given the lengthy and convoluted history of that case, the district court was in a superior position as compared to the appeals court to analyze the multifaceted relevance and burden issues associated with enforcement of the EEOC's subpoena.

3. Every other court of appeals to have considered the issue applies a deferential standard of review to administrative subpoena enforcement actions

Accordingly, it is not surprising that every court of appeals that has addressed the issue, save for the court below, applies a deferential standard of review to administrative subpoena enforcement determinations. *See, e.g., FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015) ("We review a district court's decision to enforce an administrative subpoena for abuse of discretion") (citation omitted); *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 760 (11th Cir. 2014) ("We review the district court's balancing of the relative hardships and benefits of enforcement [in an administrative subpoena enforcement action] for abuse of discretion") (citation omitted); *EEOC v. Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010) (same); *Fresenius Med. Care v. United States*, 526 F.3d 372, 375 (8th Cir. 2008) (same); *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006) (In enforcing administrative subpoenas, the appellate court should affirm district court's finding of relevancy unless that determination is clearly erroneous) (citations omitted); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2002)

(ruling on relevancy and burden associated with administrative subpoena should only be reversed for abuse of discretion); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (same); *Reich v. Nat'l Eng. & Contracting Co.*, 13 F.3d 93, 98 (4th Cir. 1993) (appeals courts review a district court's administrative subpoena enforcement ruling under the clearly erroneous standard) (citation omitted).

The Ninth Circuit is alone in refusing to accord deference to a district court's administrative subpoena enforcement determination. Instead, it applies a *de novo* standard – even though it concedes that it does not have a good explanation for doing so. Pet. App. 8 n.3. To the extent the Ninth Circuit justifies its outlier approach by asserting that determinations of relevance and burden are pure questions of law, such an argument is untenable. As discussed above, a court's determinations of relevance, as well as its weighing of the burdens involved in producing the requested information, are primarily factual and discretionary in nature. For that reason, a district court's determinations of relevance and burden in administrative subpoena enforcement actions should be accorded deference on appeal. *See, e.g., Salve Regina College*, 499 U.S. at 233.

B. *De Novo* Review Of Subpoena Enforcement Determinations Undermines Prompt Investigation And Resolution Of Title VII Discrimination Claims

1. Title VII's relatively short limitations periods are intended to encourage prompt resolution of charges

A principal objective of Title VII is to promote prompt and efficient resolution of discrimination

claims. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("In pursuing the goal of 'bring[ing] employment discrimination to an end,' Congress chose '[c]ooperation and voluntary compliance' as its 'preferred means'") (citation omitted); *see also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be the "preferred means of enforcing Title VII") (citation omitted). To further that aim, Congress deliberately set a relatively short period within which charges alleging Title VII violations must be filed. 42 U.S.C. § 2000e-5(e) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred" or within three hundred days if "the person aggrieved has initially instituted proceedings with a State or local agency …").

As this Court has observed:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination ... [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days – rather than months or years – we may not simply interject an additional ... period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980) (footnote omitted); *see also Int'l Union of Elec. Workers*

v. Robbins & Myers, Inc., 429 U.S. 229, 240 (1976) ("Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation and footnote omitted).

There are also many practical reasons to encourage prompt investigations by the EEOC. Prompt resolution allows the affected employees to get relief faster and also can help to stop and correct a workplace problem before it becomes more serious or pervasive. In addition, the longer an investigation drags on, the more likely it is that evidence will be lost and memories will fade, which can impede an employer's ability to defend itself. As this Court pointed out in *Mohasco Corp. v. Silver*, the costs associated with processing and defending stale claims are significant and at a certain point "outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." 447 U.S. 807, 820 (1980).

2. *De novo* review would only extend already lengthy EEOC investigations

De novo review of a district court's administrative subpoena enforcement order can only serve to drag out already lengthy EEOC investigations, which in turn undermines prompt resolution of discrimination claims as contemplated in Title VII.

In Fiscal Year 2015, the EEOC spent on average ten months to complete a charge investigation. *See* EEOC,

What You Can Expect After You File A Charge.[2] Those delays have led, in turn, to a substantial charge backlog. For example, at the end of Fiscal Year 2016, the EEOC's pending inventory stood at more than 73,500 charges. EEOC, Performance and Accountability Report 55 (Fiscal Year 2016);[3] *see also* Press Release, Sen. Lamar Alexander, *Appropriations Committee Advances Bill Directing EEOC to Focus on "Massive" Backlog of 76,000 Unresolved Workplace Discrimination Cases* (Apr. 21, 2016) (noting that in Fiscal Year 2015, the EEOC went "far afield of [its] critical task, allowing its massive backlog of unresolved cases to climb to more than 76,000, while pursuing cases where there is no complaint …").[4]

As discussed below, a major factor contributing to the excessive length of charge investigations has been the EEOC's recent efforts to expand as many individual claims as possible into potential candidates for systemic litigation. *See, e.g.*, EEOC Strategic Enforcement Plan 5 (Fiscal Years 2017-2021) ("The Commission reaffirms its commitment to a nationwide, strategic, and coordinated systemic program as one of EEOC's top priorities").[5] Those efforts have resulted in the EEOC regularly seeking to obtain voluminous and often overly broad company-wide information, which can take an employer hundreds or

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[2] *Available at* https://www.eeoc.gov/employees/process.cfm (last visited Nov. 18, 2016).

[3] *Available at* https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf (last visited Nov. 18, 2016).

[4] *Available at* http://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=A8CDD86F-92C7-4FCC-87CE-202200174D5D (last visited Nov. 18, 2016).

[5] *Available at* https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf (last visited Nov. 18, 2016).

even thousands of hours to gather. This approach naturally leads to more pushback from employers and, in turn, greater EEOC subpoenas enforcement activity.

In Fiscal Year 2016, the EEOC filed 28 subpoena enforcement actions, compared to only 86 merits lawsuits – a ratio of approximately 3-to-1. EEOC, Performance and Accountability Report (Fiscal Year 2016), at 36. In comparison, the EEOC filed 383 merits lawsuits and only 32 subpoena enforcement actions in Fiscal Year 2005 – a ratio of approximately 12-to-1. EEOC, Performance and Accountability Report 11 (Fiscal Year 2005).[6] This notable decrease in merits litigation is further evidence that the EEOC is focusing more of its time and resources developing complex, systemic claims at the investigation stage.

Applying a *de novo*, rather than an abuse-of-discretion, standard of review only serves to lengthen this already drawn-out investigation process. When a *de novo* review standard applies, the party at the losing end of a determination is more likely to appeal, because it sees the appeal as a chance at a clean slate. *Cooter & Gell*, 496 U.S. at 404. That is particularly true of the EEOC, which does not directly bear costs of litigation in the same way as an employer.

Further extending the already lengthy investigation process by applying *de novo* review to rulings on investigation disputes does not comport with the prompt resolution goals of Title VII. *Mohasco Corp.*, 447 U.S. at 825-26. An abuse of discretion or clear error standard on the other hand would make an appeal on these sideshows less likely, allowing the

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[6] *Available at* https://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2005/par2005.pdf (last visited Nov. 18, 2016).

parties to focus on the merits and resolve these discrimination disputes more efficiently, as Congress intended.

II. THE DISTRICT COURT IS BETTER POSITIONED TO ENFORCE THE IMPORTANT STATUTORY LIMITATIONS ON THE EEOC'S INVESTIGATION AUTHORITY AND TO DISCOURAGE ABUSIVE INVESTIGATION TACTICS

A. The Scope Of An EEOC Subpoena Is Limited By The Facts Of The Underlying Charge

The EEOC is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)); *see also Univ. of Pa. v. EEOC*, 493 U.S. 182, 190 (1990). Upon the filing of a charge, Title VII directs that the EEOC "shall make an investigation thereof." 42 U.S.C. § 2000e-5(b). The statute also provides:

> In connection with any investigation of a charge filed under section 706 [42 U.S.C. § 2000e-5], 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-8(a) (emphasis added).

Thus, in conducting discrimination charge investigations, the EEOC does not possess unfettered discretion to seek out other forms of discrimination not alleged by the charging party and outside the scope of its reasonable investigation of the charging party's claims. To the contrary, its authority to compel the production of evidence is limited to materials "relevant" to the allegations *in the charge*. 42 U.S.C. § 2000e-8(a). Thus, "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*.'" *Shell Oil Co.*, 466 U.S. at 64 (citation and footnote omitted) (emphasis added).

Thus, in vesting the EEOC with primary responsibility for enforcing Title VII, Congress unambiguously restricted the EEOC's subpoena power to inspecting and copying evidence relevant to the charge under investigation. *Id.* As this Court emphasized in *Shell Oil*, "Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity." 466 U.S. at 69.

A district court is best positioned to thoroughly evaluate whether documents requested in an EEOC administrative subpoena are relevant to the allegations of the charge being investigated. The district

court benefits from the history of the investigation dispute including any compromises or shifts in position by the parties, questioning of the parties and counsel at hearings, and proximity to often nuanced and complex issues that may arise in subpoena enforcement actions.

When the EEOC exceeds its statutory authority by issuing subpoenas for information pertaining to issues outside the bounds of the allegations being investigated, it unilaterally dispenses with Title VII's statutory requirements, as explained by this Court in *Shell Oil*, and robs employers of the basic protections they afford. *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977). For all of the reasons outlined above, the district court is better positioned to evaluate whether the EEOC's document requests are relevant to the allegations in the underlying charge and its determination of such should be accorded deference.

B. The Nuances And Peculiarities Of The EEOC's Often Overreaching Investigation Tactics Can Be Lost In Translation On Appeal

District courts, unlike appellate courts, have a continuing relationship with the subject matter of an action, which puts them in a superior position to judge the nuances and particularities of subpoena disputes, including overreaching or bad faith by one of the parties. *Pierce*, 487 U.S. at 560 (district court often gets insight not conveyed to the appellate court through the lifeless record). The EEOC's regular disregard for the statutory constraints on its investigative and enforcement authority is well-documented, causing harm to employers as well as employees. *See, e.g., EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 761 (11th Cir. 2014); *EEOC v. United Air Lines,*

Inc., 287 F.3d 643, 655 (7th Cir. 2002). Indeed, a Senate report identifies ten cases since 2011 in which the EEOC has been required to pay attorneys' fees as a result of frivolous or mismanaged litigation positions, many of which stemmed from investigation missteps. *See EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns About Important Anti-Discrimination Agency*, U.S. Sen. Comm. on Health, Educ., Labor and Pensions, Minority Staff Rep. 1-3 (Nov. 24, 2014) (hereinafter *Minority Staff Rep.*);[7] *see also* Mary Kissel, *Chronicling EEOC's Abuses*, Wall St. J. (Nov. 24, 2014).[8]

The *de novo* standard applied by the court below encourages the EEOC's current practice of crafting vague and indefinite information demands for the purpose of conducting unfettered "fishing expeditions" – in direct contravention of its statutory mandate. *See Shell Oil*, 466 U.S. at 90. The EEOC holds great leverage over the employers it investigates, which is no surprise, given the "vast disparity of resources between the government and private litigants." *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 519 (4th Cir. 2012). As noted, the agency routinely capitalizes on its position of advantage by serving overly broad requests for information that are unconnected to the particular allegations of the charge under investigation. *See, e.g., EEOC v. Southern Farm Bureau Cas. Ins. Co.*, 271 F.3d 209, 211-12 (5th Cir. 2001); *Kronos*, 620 F.3d at 300-02 (3d Cir. 2010); *Royal Caribbean Cruises*, 771

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[7] *Available at* http://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf (last visited Nov. 18, 2016).

[8] *Available at* http://online.wsj.com/ articles/political-diarychronicling-eeoc-abuses-1416867954 (last visited Nov. 18, 2016).

F.3d at 761; *United Air Lines*, 287 F.3d at 655. An employer served with such a request often will find itself in an untenable position of either incurring substantial costs to produce the requested irrelevant information or incurring substantial costs to fight, just to risk losing and then being compelled to incur the costs to produce the documents anyway.

While the EEOC often targets large companies, employers with as few as 15 employees are subject to the laws the EEOC enforces, and thus also are potential targets of these abusive information requests. In one case, the EEOC was criticized for its "highly inappropriate" and "dogged pursuit" of a small business whereby it sought extremely broad categories of documents that were unrelated to any aggrieved person's charge of discrimination. *EEOC v. HomeNurse, Inc.*, 2013 WL 5779046, at *14 (N.D. Ga. Sept. 30, 2013). The district court refused to enforce the subpoena concluding that the agency's actions in that case "constitute[d] a misuse of its authority." *Id.* A number of courts have sanctioned the EEOC for similar prosecutorial abuses. *See, e.g., EEOC v. Freeman*, 778 F.3d 463, 472-73 (4th Cir. 2015); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 616 (6th Cir. 2013); *EEOC v. TriCore Reference Labs.*, 493 F. App'x 955, 960-61 (10th Cir. 2012); *EEOC v. West Customer Mgmt. Group, LLC*, 2014 WL 4435980, at *1 (N.D. Fla. Sept. 8, 2014); *EEOC v. U.S. Steel Corp.*, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013). The EEOC also has garnered considerable criticism from members of Congress, who have taken the agency to task for among other things "pursuing many questionsable cases through sometimes overly aggressive means."[9]

[9] Minority Staff Rep. at 3.

As noted, the EEOC has put a high priority on pursuing systemic litigation where alleged discrimination has a potentially broad impact on an industry, profession, company or geographic area. The agency's systemic case quotas further encourage disregard of the statutory limits on its investigative authority by demanding overly broad company-wide information that has no connection to the charge under investigation. These self-imposed systemic case quotas have no statutory basis, and undermine effective enforcement of employment discrimination laws by diverting valuable resources away from investigations of ripe claims contained in a filed charge, and towards unbridled fishing expeditions in search of the "big" systemic case.

The negative impact of these overly aggressive and abusive investigation tactics is evidenced by the drastic downturn in merits lawsuits filed just one decade since the program began – a drop from 383 lawsuits in 2005 to just 86 in 2016. EEOC, Performance and Accountability Report 11 (Fiscal Year 2005); EEOC, Performance and Accountability Report 36 (Fiscal Year 2016). Rather than focusing its efforts on promptly investigating and seeking appropriate remedies for discrimination victims, the agency too often devotes inordinate time and resources on expensive investigations, often untethered from the underlying charge, in an effort to "fish" for possible subjects for systemic enforcement. *De novo* review of subpoena determinations only encourages such conduct.

CONCLUSION

For all of the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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