No. 13-2365

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

FREEMAN,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE FREEMAN AND AFFIRMANCE

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LOCAL RULE 26.1(b) DISCLOSURE STATEMENT

The undersigned certifies that the Chamber of Commerce of the United States of America ("the Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. It is not a publicly held corporation. The Chamber has no parent corporation, and no corporation or other publicly held entity has 10% or greater ownership in the Chamber. No publicly held corporation has a direct financial interest in the outcome of this litigation.

/s/ Eric S. Dreiband
Eric S. Dreiband

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INTEREST OF *AMICUS CURIAE*

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 3 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 curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members are subject to Title VII of the Civil Rights Act of 1964—the statute at the heart of this case. They devote extensive resources to developing employment practices and programs designed to comply with Title VII and other civil-rights statutes. The Chamber's members have a strong interest in the proper resolution this case.*

* All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case represents an attempt by the EEOC to rewrite Title VII's statutory procedures. First, the EEOC asserts that statutory burdens of proof mean something other than what they say. And, second, the EEOC claims that it can resurrect stale, time-barred claims regarding events that occurred years or decades before anyone filed a charge of discrimination. Congress rejected both positions when it amended Title VII in 1972 and 1991, and this Court should do the same.

First, as to the burden of proof, the EEOC must "demonstrat[e]" that there is "a particular employment practice that causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Because the EEOC did not isolate a *particular* employment practice, the district court properly entered summary judgment for the employer.

Second, the EEOC cannot recover for any alleged violations that occurred more than 300 days before the initial charge of discrimination. The plain language of the statute subjects the EEOC's claims to a 300-day limit, and the structure and purpose of the statute, as well as contemporaneous legislative materials, confirm that conclusion.

Finally, for claims not included in an initial charge, the 300-day limit runs from the date on which a defendant receives notice of the EEOC's expanded investigation. Although the EEOC was not required to file a new charge here, this Court's decision in *EEOC v. General Electric*, 532 F.2d 359, 372 (4th Cir. 1976),

determined that it would be an "abuse of discretion" to expand an employer's liability beyond that which it would face had a new charge actually been filed.

ARGUMENT

I. THE EEOC FAILED TO ESTABLISH THAT THERE IS A PARTICULAR EMPLOYMENT PRACTICE THAT CAUSES A DISPARATE IMPACT

Title VII requires a plaintiff in a disparate impact case to "demonstrat[e] that [an employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i). A plaintiff must (1) "isolat[e] and identif[y]" a specific employment practice, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) (internal quotation marks omitted); and (2) "demonstrate that each particular challenged employment practice causes a disparate impact," 42 U.S.C. § 2000e-2(k)(1)(B)(i). If the plaintiff satisfies these requirements, then the burden shifts to an employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." *Id.* § 2000e-2(k)(1)(A)(i). If the employer succeeds, a plaintiff may still prevail by demonstrating "that other tests or selection protocols would serve the employer's interest without creating the undesirable discriminatory effect." *Davis v. Cintas Corp.*, 717 F.3d 476, 495 (6th Cir. 2013).

In this case, the EEOC has not met its statutory burden. It has not identified or isolated a specific employment practice; rather, it merely has launched a

cumulative attack on several distinct policies. Accordingly, the district court correctly entered summary judgment in favor of the employer.

A. The EEOC Has Not Isolated Or Identified A Specific Employment Practice

In order to establish a prima facie case of disparate impact under Title VII, a plaintiff must first isolate and identify a specific employment practice. 42 U.S.C. § 2000e-2(k)(1)(A); *Wards Cove*, 490 U.S. at 656; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). "Identifying a specific practice is not a trivial burden." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101 (2008). It is a "requirement [that] has bite." *Id.* at 100. [1]

Although Title VII does not define "particular employment practice," the phrase typically refers to "a specific procedure, usually a selection criterion for employment." *Pouncy v. Prudential Ins.*, 668 F.2d 795, 800 (5th Cir. 1982). Specific criteria include rejecting applicants who lack a high school diploma, *Griggs v. Duke Power*, 401 U.S. 424, 427 (1971); do not achieve a minimum score on a test, *id.* at 428; do not meet specific height or weight requirements, *Dothard v. Rawlinson*, 433 U.S. 321, 324 (1977); or cannot run a certain distance within a specified time, *Easterling v. Connecticut*, 783 F. Supp. 2d 323, 331-32 (D. Conn. 2011). As these examples illustrate, a specific employment practice typically

[1] A plaintiff may avoid this requirement by demonstrating that "the elements of [an] [employer's] decisionmaking process are not capable of separation for analysis," 42 U.S.C. § 2000e-2(k)(1)(B)(i), but the EEOC does not rely on that exception here (EEOC Br. 31).

describes an employer's application of a particular policy—*i.e.*, a rule and its consequences—at a given point in time in the employment decisionmaking process. *See Davis*, 717 F.3d at 496-97; *Pouncy*, 668 F.2d at 800; *see also Wards Cove*, 490 U.S. at 657 ("a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack").

A plaintiff does not satisfy its statutory burden "by merely alleging a disparate impact, or pointing to a generalized policy that leads to such an impact." *Meacham*, 554 U.S. at 100 (internal quotation marks omitted). *See Smith v. City of Jackson*, 544 U.S. 228, 241-42 (2005) (plaintiffs failed to "isolat[e] and identif[y]" a "specific employment practice" when they brought an adverse impact challenge to a multi-step pay plan that was less generous to older workers). Nor can a plaintiff simply "bundle a number of discrete steps of a multi-phase hiring process together, based on a common characteristic," and declare them a specific employment practice. *Davis*, 717 F.3d at 496-97. For this reason, the Sixth Circuit in *Davis* rejected a plaintiff's argument that the statutory phrase, "particular employment practice," was "broad enough to comprise many different steps of a multi-step process, as long as those steps share a common characteristic." *Id.* at 495.

Title VII's isolation requirement is a vital "constraint[] that operate[s] to keep [the disparate impact] analysis within its proper bounds." *Watson*, 487 U.S.

at 994. It protects employers from "being potentially liable for the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Wards Cove*, 490 U.S. at 657 (internal quotation marks omitted). "Just as an employer cannot escape liability under Title VII by demonstrating that, 'at the bottom line,' his work force is racially balanced … , a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force." *Id.* at 656-57 (quoting *Connecticut v. Teal*, 457 U.S. 440, 450 (1982)). Without the isolation requirement, "any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his work force." *Id.* at 652.

The EEOC failed to isolate or identify a specific employment practice in this case. It claims to have identified two separate employment practices: credit-check and criminal-background policies. But in reality, all the EEOC has done is "bundle a number of discrete steps of a multi-phase hiring process together, based on a common characteristic." *Davis*, 717 F.3d at 496.

Indeed, the EEOC's references to Freeman's "credit background check policy" and "criminal background check policy" describe *several different* policies. As the district court found, Freeman presumptively disqualified applicants with

multiple accounts of $300 or more that were 90 days past due; presumptively disqualified applicants whose car had been repossessed within the past three years; and presumptively disqualified applicants who had defaulted on student loans. Dkt. No. 149 at 7 (Mem. Op.). Freeman likewise had multiple policies regarding the ramifications of an applicant's criminal history, including automatic disqualification of applicants who failed to disclose a conviction on the application; refusing to hire applicants with outstanding arrest warrants, provided that the individual did not resolve the warrant after having been given an opportunity to do so; and refusing to hire applicants convicted within the past seven years of certain types of crimes, except upon a discretionary determination that the nature of a particular conviction did not render an applicant unsuitable for employment. *Id.* at 6.

These separate policies are *not* like different questions on a standardized test, none of which is dispositive to an employer's decision: Each of the employer's policies imposes a *separate* and *independent* requirement for obtaining a job, and the employer disqualified job applicants for failing to meet any one of these standards. *See id.* at 6-7.

Particularly in light of Freeman's combination of "subjective criteria with the use of more rigid standardized rules … , the [EEOC] [wa]s … responsible for isolating and identifying the specific employment practices that are allegedly

responsible for any observed statistical disparities." *Watson*, 487 U.S. at 994. The EEOC did not satisfy this standard. Instead, the EEOC merely launched "a wide-ranging attack on the cumulative effects of [Freeman's numerous] employment practices[;]" it did not identify a "specific policy that allegedly caused a race-based imbalance." *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1284 (5th Cir. 1994).

B. The EEOC Failed To Meet Its Statutory Burden Of Proof

Congress amended Title VII in 1991 and "provide[d] statutory guidelines for the adjudication of disparate impact suits." Pub. L. No. 102-166, § 3(3), 105 Stat. 1071. Accordingly, a Title VII plaintiff must "demonstrat[e] that … a particular employment practice … causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(A)(i). "The term 'demonstrat[e]' means meets the burdens of production and persuasion." *Id.* § 2000e(m). "[P]laintiffs must do more than merely raise an inference of discrimination before the burden shifts; they must actually prove the discriminatory impact at issue." *Garcia v. Spun Steak*, 998 F.2d 1480, 1486 (9th Cir. 1993) (internal quotation marks omitted). If the plaintiff does not meet its burden, then the case ends; the defendant bears no burden to do anything unless and until the plaintiff satisfies its statutory duty. *Only* if a plaintiff succeeds in that endeavor does the burden shift to the employer "to demonstrate that the challenged

practice is job related for the position in question and consistent with business necessity." *Id.* § 2000e-2(k)(1)(A)(i).

Before this Court, however, the EEOC concocts the notion of an atextual burden-shifting scheme at the prima facie stage of the case. It asserts that a *defendant* bears the burden of disproving adverse impact once the EEOC establishes a "colorable" prima facie case of disparate impact, which apparently is something less than an actual prima facie case. There is no support in the case law for those contentions, which squarely conflict with Title VII. *See id.* § 2000e(m); *id.* § 2000e-2(k)(1)(A)(i).

Where, as in this case, "no reasonable factfinder" could conclude that the plaintiff met its initial burden, a defendant need not do anything. *See Purchase v. Astrue*, 324 F. App'x 239, 242 (4th Cir. 2009) (per curiam). The defendant *may* attempt to rebut the plaintiff's evidence in a variety of ways, *see Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 & n.46 (1977); but it is not *required* to do anything at all until the plaintiff "actually prove[s] the discriminatory impact at issue," *Garcia*, 998 F.2d at 1486 (internal quotation marks omitted). By suggesting that plaintiffs need only establish a "colorable prima facie case," (EEOC Br. 50), rather than "prov[e]" that "each particular employment practice causes a disparate impact," *Watson*, 487 U.S. at 994; § 2000e-2(k)(1)(B)(i), the EEOC rewrites "the evidentiary standards" that Congress set forth in Title VII—

standards intended as "safeguards" and "constraints that operate to keep [the disparate impact] analysis within its proper bounds," *Watson*, 487 U.S. at 994.

II. SECTIONS 706(e)(1) AND 707(e) OF TITLE VII LIMIT THE EEOC'S CLAIMS TO THE 300-DAY CHARGE-FILING PERIOD

A. Section 707(e) Explicitly Incorporates § 706's Procedures, Which Include The 300-Day Limit

Title VII's plain language limits the EEOC's claims under § 706 to a 300-day charge-filing period: "A charge under this section shall be filed … within three hundred days after the alleged employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). This charge-filing period serves as a time limitation that ensures "the fair operation of" Title VII, *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 371 (1977), and "protect[s] employers from the burden of defending claims arising from employment decisions that are long past," *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980).

This same charge-filing period also applies to pattern-or-practice claims brought by the EEOC under § 707 of Title VII: "All" § 707 actions "shall be conducted in accordance with the procedures set forth in [§ 706]." 42 U.S.C. § 2000e-6(e). For this reason, district courts throughout the nation have held that the 300-day charge-filing period is one of the "procedures set forth in" § 706. *See, e.g.*, *EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619, 623 (N.D. Ohio 2011); *EEOC v. Carolls Corp.*, No. 5:98-CV-1772, 2011 WL 817516, at *4

(N.D.N.Y. Mar. 2, 2011); *EEOC v. Bloomberg, L.P.*, 751 F. Supp. 2d 628, 646 (S.D.N.Y. 2010); *EEOC v. O'Reilly Auto. Inc.*, No. H-08-2429, 2010 WL 5391183, at *10-11 (S.D. Tex. Dec. 14, 2010); *EEOC v. Burlington Med. Supplies, Inc.*, 536 F. Supp. 2d 647, 659 (E.D. Va. 2008); *EEOC v. Custom Cos.*, No. 02-3768, 2004 WL 765891, at *8 (N.D. Ill. Apr. 7, 2004); *EEOC v. Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1260 (M.D. Ala. 1980); *see also EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867, 877-78 (N.D. Iowa 2009) (collecting cases).

B. The History, Purpose, And Structure Of Title VII Support This Reading

Although the plain text of the statute is sufficient to resolve this argument against the EEOC, the underlying issue is of significant concern to employers, and the EEOC has repeatedly pressed its expansive view of its authority in multiple district courts throughout the country. Accordingly, the Chamber believes it is important to present this Court with the history and broader purpose and structure of Title VII in order to refute the EEOC's attempt to gain greater freedom to bring stale cases against employers.

When Congress first enacted Title VII in 1964, it designed the Act's structural and temporal limits to protect employers from an overzealous EEOC. To that end, Congress expressly limited the EEOC's ability to investigate allegations of unlawful discrimination by requiring the filing of a charge with the EEOC, a condition that did not limit other agencies:

> [T]he Commission's power to conduct an investigation can be exercised only after a specific charge has been filed in writing. In this respect the Commission's investigatory power is significantly narrower than that of the Federal Trade Commission or of the Wage and Hour Administrator, who are authorized to conduct investigations … whether or not there has been any complaint of wrongdoing.

EEOC v. Shell Oil Co., 466 U.S. 54, 64-65 (1984) (quoting 110 Cong. Rec. 7214 (1964)).

Moreover, Congress provided "obviously quite short deadlines" by which a charge must be filed. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). The short "period [for] the filing of an initial charge" operates as a "statute of limitations" responsive to Congress' "concern for the need of time limitations in the fair operation of the Act." *Occidental*, 432 U.S. at 371-72. The charge-filing requirement thus reflected a critical compromise between competing interests: "the costs associated with processing and defending stale or dormant claims" and "the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco*, 447 U.S. at 820.

In 1972, when Congress first authorized the EEOC to bring its own pattern-or-practice cases, it remained concerned about exposing employers to stale claims. Specifically, then-EEOC Chairman William Brown III testified before Congress that no limitations period restrained the EEOC. *See* Equal Employment Opportunity Enforcement Procedures: Hearings on H.R. 1746 Before the H.

General Subcomm. on Labor of the Comm. on Educ. & Labor, 92d Cong. 89 (1971) (hereinafter "House Hearings"). Rep. John Erlenborn responded, "I just can't buy Chairman Brown's position that in the year 2050 a claim can run back to 1964, and I think that Congress should turn its attention to this problem." *Id.* at 286.

Congress did turn its attention to the problem, and through the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, made three amendments to Title VII. *First*, Congress added § 707(e) to Title VII and thereby extended the procedural limitations of § 706, including the charge-filing period, to "all" EEOC § 707 actions. These same procedural requirements do not apply to § 707 actions brought by the Department of Justice ("DOJ"), and thus reflect Congress' particular concern with constraining the EEOC's authority. *See United States v. City of Yonkers*, 592 F. Supp. 570, 583 (S.D.N.Y. 1984) ("[S]ection 707(e), which by its terms does not apply to the Attorney General, imposed these [§ 706] procedures on the Commission during the time it exercised public sector authority."); *see also United States v. Fresno Unified Sch. Dist.*, 592 F.2d 1088 (9th Cir. 1979) (indicating that the Attorney General must comply with the Reorganization Plan and that § 707(e) requires that the EEOC "conduct pattern or practice actions 'in accordance with the procedures set forth' in [§] 706'"); *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871, 875-76 (6th Cir. 1974) (Attorney General need not comply with § 706 procedures when

it brings a § 707 pattern-or-practice case); *United States v. New Jersey*, 473 F. Supp. 1199, 1201-05 (D.N.J. 1979) (§ 707(e) requires the EEOC, not the Attorney General, to comply with § 706 procedures before filing a pattern-or-practice case). *Second*, Congress added a two-year limit on back pay liability. 42 U.S.C. § 2000e-5(g)(1). *Third*, Congress amended § 706(b) of Title VII to require the Commission to notify employers of a charge within ten days so that the employer has "an opportunity to gather and preserve evidence in anticipation of a court action." *Occidental*, 432 U.S. at 372. These amendments all reflect Congress's response to then-Chairman Brown and, in particular, Congress's decision to delimit the EEOC's litigation authority and to protect employers against stale claims.

Finally, if there is no time limit to an EEOC pattern-or-practice claim, as the EEOC asserts, employers would be forced to keep records in perpetuity in order to defend themselves against such a claim. Such a record-keeping obligation would contradict Congress' intent to facilitate the prompt resolution of disputes and protect employers from the EEOC's overly broad view of its authority. Furthermore, the EEOC's regulations require employers to preserve records "for a period of one year," 29 C.F.R. §1602.14, a limit that would make no sense if the EEOC could resurrect claims from years or decades before the charge-filing period.

C. The EEOC's Arguments To The Contrary Fail

The EEOC's arguments in support of its attempt to dodge Title VII's charge-filing limits have no merit.

First, the EEOC argues that § 707(e)'s requirement that "actions shall be conducted in accordance with the procedures set forth in [§ 706]" incorporates only those provisions in § 706 that pertain to the EEOC's investigatory powers and administrative process, and not to the EEOC's authority as a litigant. (EEOC Br. 62.) It posits that when § 707(e) states that it must "investigate and act on" a pattern-or-practice claim and that "[a]ll such actions" must comply with § 706, this refers only to the EEOC's administrative functions.

The EEOC's position, if adopted, would mean that it is doing something other than "acting on" a charge by litigating this case. That interpretation is absurd. Congress used the words "investigate and act on," so "act[ing] on" a matter is clearly different from investigating it. This Court "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). Litigating a case in federal court is of course one way the EEOC "act[s] on" a case after it has investigated. Moreover, Title VII frequently uses the noun "action" to include civil litigation. *See, e.g.*, 42 U.S.C. § 2000e-2(n)(2)(B); *id.* § 2000e-2(n)(3); *id.* § 2000e-5(f)(3). Reading the terms "act on" and "actions" in § 707(e) to refer exclusively to the administrative process

is nonsensical because when Congress enacted § 707(e) in 1972, it supplemented the EEOC's investigation authority by permitting it, for the first time, to bring civil actions in federal court. Thus, § 707(e) reflects Congress's decision to authorize the EEOC to investigate and then "act on" a charge, including by both completing the administrative process and litigating in court. If Congress had intended the meaning the EEOC now posits, it would have qualified the word "procedures" with "administrative"; but it did not.

Second, the EEOC argues that interpreting § 707(e) to incorporate § 706(e)(1)'s 300-day limit "cannot be reconciled with" § 706(g)(1)'s two-year limitation on back pay. (EEOC Br. 62-63.) That is incorrect. "[T]he timeliness requirement does not dictate the amount of recoverable damages," and if a claimant suffers an injury within the charge-filing period, the claimant may recover up to two years of back pay. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 119 (2002). In any event, any such tension is inherent within § 706, which includes both the two-year back-pay limit and the 300-day charge-filing period. 42 U.S.C. §§ 2000e-5(e)(1), (g)(1).

Moreover, the fact that § 706(g)(1) plainly applies to EEOC civil actions brought under § 707(e), *EEOC v. O&G Springs & Wire Forms Specialty Co.*, 38 F.3d 872, 880 (7th Cir. 1994); *United States v. Lee Way Motor Freight*, 625 F.2d 918, 934 (10th Cir. 1979); *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539, 550

(W.D. Va. 2001)—a point the EEOC concedes (EEOC Br. 66)—confirms that § 706(e)(1) also applies to § 707. There is no reason to distinguish between these two requirements such that § 707(e) would incorporate one but not the other.

Third, the EEOC argues that its § 707 actions cannot have a limitations period because the § 707 actions brought by the DOJ have no such period. (EEOC Br. 63-64.) But Congress drew a clear distinction between the DOJ and the EEOC. The EEOC must comply with Title VII's multistep enforcement scheme in § 706 before it can file a § 707 case; the DOJ need not comply with § 706's pre-litigation process at all and is governed instead by the Reorganization Plan of 1978. *See* 42 U.S.C. § 2000e-6(e); *Yonkers*, 592 F. Supp. at 582-85 (§ 706's procedural requirements apply to the EEOC and do not apply to the DOJ, which is governed instead by the Reorganization Plan); Exec. Order No. 12,068, 43 Fed. Reg. 28,971 (June 30, 1978). Thus, although Congress conferred authority on the EEOC in 1972 to "institute exactly the same *actions* that the [DOJ] does under pattern or practice" for Rule 23 purposes, *General Tel. Co. v. EEOC*, 446 U.S. 318, 328-29 (1980) (emphasis added; internal quotation marks omitted), it instituted a very different *process* by which the EEOC would operate.

The dichotomy between the DOJ's and the EEOC's § 707 litigation authority reflects Congress's concern about the need to restrain the EEOC, a concern it never expressed about the DOJ. Early versions of the 1972 amendments

to Title VII were heavily criticized by numerous Members of both Houses of Congress because of the broad discretion it would give the EEOC to pursue litigation. *See, e.g.*, House Hearings at 193 (Sep. 15, 1971) (statement of Rep. Martin) (EEOC is being given "unlimited powers"); Equal Employment Opportunities Act of 1971: Hearings on S. 2515, S. 2617, and H.R. 1746, Before the S. Subcomm. on Labor of the S. Comm. on Labor & Public Welfare, 92d Cong. 513 (Nov. 1, 1971) (statement of Sen. Allen) ("We are being asked to endorse a blank legislative check to vest in … the [EEOC], totalitarian authority over employment practices of free enterprise, labor unions, and State and local governments."); *id.* at 1027 (Jan. 28, 1972) (statement of Sen. Ervin) ("The history of this Commission down to this date shows that virtually all the men who have been appointed to serve on [it] were men who were psychologically incapable of holding the scales of justice evenly, because they were so biased in favor of the policy of the bill that they could not appraise impartially the truth involved in the proceedings.").

In light of these concerns, Congress decided against conferring cease-and-desist authority on the EEOC in 1972. "The principal objection to [this] administrative approach [was] that it harkens back to the 'Star Chamber' proceedings outlawed in England more than 300 years ago. That is, the EEOC would, in effect, become investigator, prosecutor, trial judge and judicial review

board—all before you ever got to the Court of Appeals!" 117 Cong. Rec. 40290 (Nov. 10, 1971) (statement of Sen. Dominick). Instead, Congress permitted the EEOC to litigate in "a fair and impartial tribunal," namely, the federal courts. House Hearings at 220 (Sept. 15, 1971) (statement of Rep. Railsback). *Cf. Occidental*, 432 U.S. at 361-64 (discussing legislative history).

Fourth, the EEOC relies on several non-binding decisions from courts outside this circuit to support its position. (EEOC Br. 64-66.) No circuit has decided whether § 706(e)(1)'s 300-day limit applies to § 707, and the district court cases cited by the EEOC are based on reasoning that is not persuasive. Indeed, one of those cases has been repudiated by the very judge that decided it. *See EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1092-94 (D. Haw. 2012) (repudiating *EEOC v. Scolari Warehouse Markets, Inc.*, 488 F. Supp. 2d 1117 (D. Nev. 2007), in which the judge had been sitting by designation). Other decisions neglect to analyze the language of § 707(e). *See EEOC v. Sterling Jewelers, Inc.*, No. 08-CV-706, 2010 WL 86376, at *2 n.5 (W.D.N.Y. Jan. 6, 2010); *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 534-36 (D. Md. 2007). Some of the cases do not even apply here because they involved hostile environment or sexual harassment claims, *see EEOC v. Dial Corp.*, 156 F. Supp. 2d 926 (N.D. Ill. 2001); *EEOC v. Mitsubishi Motor Mfg.*, 990 F. Supp. 1059 (C.D. Ill. 1998), which are

governed by different standards than discrete actions such as "refusal to hire," *Morgan*, 536 U.S. at 114.

D. The Continuing Violation Exception Does Not Apply To The EEOC's Refusal-To-Hire Claims

As a fallback argument, the EEOC contends that even if § 706's 300-day limit applies to pattern-or-practice cases, it can still seek relief for individuals who were denied jobs outside of the 300-day charge filing period. (EEOC Br. 66-67.) This argument, too, fails.

In *Morgan*, 536 U.S. at 114, the Supreme Court held that the continuing violation exception does not apply to discrete acts, which include "refusal to hire." Each discrete act "constitutes a separate actionable 'unlawful employment practice,'" and "only incidents that took place within the timely filing period are actionable." *Id.* The fact that an employer may engage in a series of discrete acts, each of which constitutes a violation of Title VII, does not change anything: "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113-14.

The EEOC argues that challenges to a policy, such as the policies at issue here, are exempt from Title VII's charge-filing period. But a policy may be implemented through a series of discrete acts, as alleged in this case, and each discrete act is a separate unlawful practice that is not subject to the continuing

violation exception. *See Lewis v. Chicago*, 560 U.S. 205, 214 (2010) (adoption and application of unlawful policy constitute separate violations).

For that reason, this Court has already rejected the argument that challenges to a policy are exempt from the 300-day limit. In *Williams v. Giant Food Inc.*, 370 F.3d 423, 429 (4th Cir. 2004), the plaintiff argued that untimely failure-to-promote claims were actionable under the continuing violation exception. This Court explained that *Morgan* "foreclose[s]" that argument because "the continuing violation doctrine does not apply [to discrete acts of discrimination] and cannot save … untimely claims." *Id.* And although the plaintiff alleged that her claims were part of a 20-year pattern-or-practice of discrimination, this Court "declined to extend the limitations period for discrete acts of discrimination merely because the plaintiff asserts that such discrete acts occurred as part of a policy of discrimination." *Id.*; *see Belton v. City of Charlotte*, 175 F. App'x 641, 653 (4th Cir. 2006) (per curiam) (same). Other courts have reached similar results. *See, e.g.*, *EEOC v. Princeton Healthcare Sys.*, No. 10-4126, 2012 WL 5185030, at *4 (D.N.J. Oct. 18, 2012); *EEOC v. U.S. Steel Corp.*, No. 10-1284, 2012 WL 3017869, at *7 (W.D. Pa. July 23, 2012); *Kaplan*, 790 F. Supp. 2d at 625.

Unlike hostile-environment claims, the EEOC's refusal-to-hire claims occurred at precise points in time—when the employer refused to hire prospective applicants pursuant to its various credit-check and criminal-background-check

policies. These "discrete acts" are each a separate employment practice with a separate charge-filing period. *Morgan*, 536 U.S. at 105, 114-15; *see Lewis*, 560 U.S. at 214. The continuing violation doctrine does not apply, and "only incidents that took place within the timely filing period are actionable." *Morgan*, 536 U.S. at 113; *Belton*, 175 F. App'x at 653. *See also Villarreal v. R.J. Reynolds Tobacco Co.,* No. 2:12-CV-0138-RWS, 2013 WL 823055, at *8 (N.D. Ga. Mar. 6, 2013) (Plaintiff's pattern-or-practice "failure-to-hire claim clearly falls under the rule for discrete acts. Therefore, only those incidents that took place within the limitation period (180 or 300 days before Plaintiff's initial charge was filed with the EEOC) are actionable.").

Furthermore, even when the continuing violation doctrine applies, it permits only the inclusion of additional, but otherwise time-barred, *claims*; it does not allow the inclusion of otherwise time-barred *parties*. *See Hipp v. Liberty Nat'l Life Ins.*, 252 F.3d 1208, 1221 (11th Cir. 2001) (per curiam); *EEOC v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499, 524 (S.D. Tex. 2012). *Morgan* does not disturb the well-established rule that an individual without any claim inside of the charge-filing period is barred from bringing suit. *See* 536 U.S. at 117 ("[A]n act contributing to the claim" must "occur[] within the filing period."). Hence, the EEOC cannot "bootstrap" "additional claimants, whose stale claims would otherwise be time-barred … into a Title VII case by acts directed toward other

claimants which fell within the filing period." *EEOC v. Wyndham Worldwide Corp.*, No. C07-1531RSM, 2008 WL 4527974, at *7 (W.D. Wash. Oct. 3, 2008).

III. FOR CLAIMS NOT INCLUDED IN THE INITIAL CHARGE, THE 300-DAY LIMIT RUNS FROM THE DATE ON WHICH AN EMPLOYER RECEIVES NOTICE OF THE CLAIMS

Section 706(e)(1)'s 300-day charge-filing period generally runs from the date a charge is filed. When the EEOC pursues additional claims of discrimination that were not asserted in the charge, however, the charge-filing period runs from the date on which an employer receives notice of those new claims.

A. The EEOC May Expand Its Investigation Without Filing A New Charge, But The "Charge-Filing" Date For Any New Claims Is The Date On Which An Employer Receives Notice Of The Expanded Scope

Section 706(e)(1) provides that a charge must be filed within 300 days "after the alleged unlawful employment practice occurred" and that "notice of the charge" must be served on the employer within ten days. 42 U.S.C. § 2000e-5(e)(1). "[T]he specific purpose of the notice provision is to give employers fair notice of the existence and nature of the charges against them." *Shell Oil*, 466 U.S. at 77. Congress included the prompt notice provision in 1972 in order to ameliorate the unfairness to employers caused by the EEOC's tendency to delay notification. *See id.* at 75 ("In response to complaints regarding the unfairness of [the EEOC's] practice [of postponing notification of pending charges to employers], Congress adopted the present requirement that notice be given to an

accused employer within 10 days of the filing of the charge."). Delayed notification of pending charges prejudices employers, who must "be given sufficient notice to ensure that documents pertaining to allegations of discrimination are not destroyed." *Id.* at 78. Delayed notice also frustrates Title VII's goal of encouraging prompt voluntary compliance. *See id.* Accordingly, the EEOC's regulations "encourage complainants to identify with as much precision as they can muster the conduct complained of," *id.* at 72, requiring that charges include a "clear and concise statement of the facts … constituting the alleged unlawful employment practices," 29 C.F.R. § 1601.12(a)(3); *see id.* § 1601.15(b).

When the EEOC's investigation of a charge reveals additional forms of discrimination beyond those included in the original charge, the statutory language would technically require the filing of a new charge. *See EEOC v. Occidental Life Ins.*, 535 F.2d 533, 542 (9th Cir. 1976). Courts have created an equitable exception, however, to excuse the EEOC from this perfunctory task: "To require a new charge … and to begin again the administrative process thereon, would result in an inexcusable waste of valuable administrative resources and an intolerable delay in the enforcement of rights which require a 'timely and effective remedy.'" *General Elec.*, 532 F.2d at 365.

This exception streamlines the EEOC's administrative process, but courts have been careful to ensure that it does not prejudice defendants. In *General*

Electric, this Court observed that "there would be 'substantial prejudice' within the intent of [Title VII] if any date earlier than that on which the employer was given notice of the claimed discrimination was used as the critical date for calculating a claim for backpay." *Id.* at 372. For that reason, this Court held that, in the absence of "countervailing equities" justifying a different result, it would be "an abuse of discretion" not to limit the right to back pay to a period of two years before an employer was notified of claims pertaining to an expanded investigation. *Id.* In other words, employers should not be exposed to greater liability than they would have been if a new charge were required. *Id.* at 371-72. Thus, the fact that the EEOC need not file a new charge does not mean that employers can be saddled with exposure to more claims than would result if a new charge actually had been filed. *See Optical Cable*, 169 F. Supp. 2d at 547 (holding that "the date the EEOC notifies the defendant that it is commencing a pattern or practice case against [it]" is the charge-filing date for purposes of the 300-day limit); *Princeton Healthcare*, 2012 WL 5185030, at *5 (holding that "the statute of limitations begins to run … 300 days before … the EEOC notified [defendant] that it would be investigating [additional] violations"); *Arizona v. GEO Grp., Inc.*, No. 10-cv-01995-SRB, 2013 U.S. Dist. LEXIS 49277, at *62 (D. Ariz. Mar. 25, 2013) (same); *see also Hipp*, 252 F.3d at 1224 n.19 (where initial charge "did not put the EEOC and [defendant] on notice of the collective nature of the claims, … it cannot serve as the

representative charge"). Therefore, when the EEOC pursues discrimination claims that were not included in the original charge, the "charge-filing" date is the date on which the employer received notice of the expanded investigation. *See General Elec.*, 532 F.2d at 372; *Optical Cable*, 169 F. Supp. 2d at 547.

B. Freeman Is Not Liable For Alleged Discrimination Pertaining To Practices More Than 300 Days Before It Was Notified Of The EEOC's Expanded Investigation

Vaughn filed a charge on January 17, 2008, alleging that Freeman racially discriminated against her by rejecting her application for employment based upon her credit history. Dkt. No. 42 at 2 (Mem. Op.). The EEOC notified Freeman of Vaughn's charge. *Id.* But neither Vaughn's charge nor the EEOC's subsequent notice included allegations of discrimination with respect to Freeman's consideration of an applicant's criminal history. *Id.* at 9-10. Indeed, Vaughn *passed* the criminal-background checks. *Id.* at 9. At some point, the EEOC expanded its investigation to include Freeman's consideration of criminal history, but the employer did not receive notice of that expanded investigation until September 25, 2008—nearly *nine months* after Vaughn filed her initial charge. *Id.* at 11.

Permitting the EEOC to rely upon the date of Vaughn's initial charge would add at least ten claims to this proceeding. *Id.* at 7. It is unfair to impose liability on an employer for those claims because Freeman had no notice that it should

preserve records critical to its defense. *See Shell Oil*, 466 U.S. at 78 ("[T]o enable employers to demonstrate that they have adhered to [Title VII's] dictates, it is important that employers be given sufficient notice to ensure that documents pertaining to allegations of discrimination are not destroyed."); *Occidental*, 432 U.S. at 372 (Title VII's "prompt notice [provision] serves, as Congress intended, to give [defendants] an opportunity to gather and preserve evidence in anticipation of a court action."); *EEOC v. Propak Logistics, Inc.*, -- F.3d --, 2014 WL 1199493, at *1 (4th Cir. Mar. 25, 2014) (affirming award of attorney's fees to employer in case where EEOC sought to hold employer liable for actions occurring years before and where the relevant records had long since been destroyed). Freeman was required to preserve records relevant to Vaughn's charge until its final disposition; but until it received notice of the EEOC's expanded investigation, Freeman was only required to preserve records pertaining to *criminal history* claims for the preceding one year. 29 C.F.R. § 1602.14.

Permitting the EEOC to benefit from the delay between the initial charge and notice of its expanded investigation is especially prejudicial to employers where that delay is substantial. Long delays are not unusual. *See, e.g.*, *Propak Logistics*, 2014 WL 1199493, at *1 (over five years from charge to notice of expansion); *Optical Cable*, 169 F. Supp. 2d 539 (eight months from charge to notice of first expansion; 21 months from charge to notice of second expansion);

EEOC v. Sunoco, Inc., No. 08-MC-145, 2009 WL 197555 (E.D. Pa. Jan. 26, 2009) (14 months from charge to notice of expansion); *EEOC v. S. Farm Bureau Cas. Ins. Co.*, No. 00-2153, 2000 WL 1610617 (E.D. La. Oct. 26, 2000) (at least 18 months between charge and notice of expansion). Allowing the EEOC's expanded investigations to "relate back" to the date of an initial charge would allow it to escape § 706(e)(1) and would facilitate the type of prejudicial behavior that Congress specifically sought to prevent. *See Shell Oil*, 466 U.S. at 75. Such delays raise the specter of gamesmanship, prejudice employers, and thwart Title VII's goals: If an employer does not know of pending allegations, it cannot correct any discrimination; nor can it preserve evidence of its efforts to comply with Title VII.

CONCLUSION

This Court should affirm the district court's grant of summary judgment to Freeman.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,712 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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April 9, 2014

/s/ Eric S. Dreiband
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CERTIFICATE OF SERVICE

I hereby certify that this 9th day of April 2014, I caused a true and correct copy of the foregoing Brief of Amicus Curiae to be filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Emily J. Kennedy
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I certify that on April 9, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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