No. 12-1393

In The
Supreme Court of the United States

DEBRA SIMMONS-MYERS,
Petitioner,

v.

CAESARS ENTERTAINMENT CORPORATION, DBA HARRAH'S CASINO, *ET AL*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

Jeffrey D. Winchester
CAESARS ENTERTAINMENT CORPORATION
1 Caesars Palace Dr.
Las Vegas, NV 89109

Hyland Hunt
AKIN GUMP STRAUSS HAUER & FELD LLP
1700 Pacific Ave.
Suite 4100
Dallas, TX 75201

Donald R. Livingston
Counsel of Record
Kathleen O. Lawrence
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
dlivingston@akingump.com

QUESTION PRESENTED

If an employee files a Title VII charge with the EEOC alleging a discriminatory written coaching, and the employer later terminates the employee as part of a companywide reduction in force, must the employee exhaust administrative remedies through the EEOC before filing suit on the claim that she was terminated because of her sex, in violation of Title VII?

RULE 29.6 DISCLOSURE

Caesars Entertainment Corporation is a publicly traded corporation. Apollo Global Management, LLC is the only publicly held company that owns 10% or more of its stock.

BL Development Corporation is owned by Grand Casinos, Inc. Grand Casinos, Inc. is wholly owned by Caesars Entertainment Operating Company, Inc., which is wholly owned by Caesars Entertainment Corporation, a publicly traded entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS:

OTHER AUTHORITY:

In The
Supreme Court of the United States

No. 12-1393

DEBRA SIMMONS-MYERS,

Petitioner,

v.

CAESARS ENTERTAINMENT CORPORATION, DBA HARRAH'S CASINO, *ET AL*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

STATEMENT

1. Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*., requires an employee who believes that her employer has engaged in an unlawful employment practice to file a charge with the Equal Employment Opportunity Commission as a prerequisite to bringing suit. 42 U.S.C. § 2000e-5(f)(1). The charge must "be in writing under oath or affirmation." *Id.* § 2000e-5(b). As relevant here, the employee must file the charge within 300 days "after the alleged unlawful employment practice occurred." *Id*. § 2000e-5(e)(1).

The charge must contain a clear statement of the facts that constitute the alleged unlawful employment practice. 29 C.F.R. § 1601.12(a)(3). The charge form has boxes for the charging party to check signifying the basis for the claimed discrimination (*e.g.* race, disability, age, retaliation, sex). The form also asks the charging party to state whether the discrimination is a "continuing action," *see* Pet. App. 35, as, for example, where a past discriminatory pay decision has the continuing effect of lower pay checks.

Upon receipt of the charge, the EEOC must notify the employer and "make an investigation thereof." 42 U.S.C. § 2000e-5(b). If the EEOC determines that there is "reasonable cause to believe that the charge is true," then it must engage in attempts to resolve the charge without resort to judicial process, through "informal methods of conference, conciliation, and persuasion." *Id.* If the EEOC does not find reasonable cause, it must dismiss the charge and notify both the employee and employer. *Id.* To encourage early resolution of disputes, the EEOC has established administrative processes that include the mediation of charges pre-investigation, and settlements with respondents prior to the "reasonable cause" stage. *See* 29 C.F.R. § 1601.20.

If, after 180 days from filing the charge, the EEOC has not completed its processing of the charge and filed a lawsuit against the respondent, the charging party may obtain a notice of the right to sue from the EEOC and bring her own lawsuit. 42 U.S.C. § 2000e-5(f)(1).

The above-described administrative remedies must be timely invoked and exhausted before an employee may file a civil action. 42 U.S.C. § 2000e-5(f)(1); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109-110 (2002). As this Court has explained, Congress created this "'integrated, multistep enforcement procedure'" in Title VII in order to encourage the "prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618, 629, 630-631 (2007) (quoting *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977)), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-5(e)(3)(A).

2. In April 2009, petitioner Debra Simmons-Myers, a white female, was hired by Harrah's as a Remote Sales Manager, working from home to sell meeting and event packages to associations and groups. Pet. App. 2.[1] She had previously worked for Harrah's as an on-site Senior Sales Manager, before resigning in 2006. *Id.* After her re-hire, she was responsible for the Arkansas and Texas markets, which contain various hotels and resorts she had formerly promoted. *Id.* There were three other Remote Sales Managers for the Mid-South division, two black males and a black female. *Id.*

---

[1] BL Development Corporation, not Caesars Entertainment Corporation, was petitioner's employer. For the sake of simplicity, however, Harrah's is used in this brief to refer collectively to Caesars Entertainment Corporation and BL Development Corporation.

Every Remote Sales Manager was responsible for meeting quarterly sales goals after the first quarter of employment, and was subject to being discharged for failure to meet 80% of those goals for two quarters. Pet. App. 2-3. Petitioner did not meet 80% of her sales goals in the first two quarters subject to review (the second half of 2009). Instead of terminating her, Harrah's rated her "'Development Opportunity'" on her 2009 evaluation to give her an opportunity to improve, and her supervisor, Valerie Morris, warned her about the consequences of failing to meet sales goals. *Id.* at 3. When petitioner failed to meet her sales goal for the third consecutive quarter (the first quarter of 2010), she was issued a written coaching by the Director of Sales, Kim Thomas. *Id.*

On April 27, 2010, petitioner filed a Title VII charge of discrimination with the EEOC that challenged the written coaching. The charge alleged that the Director of Sales gave petitioner the coaching because of her sex and in retaliation for her March 2010 complaint to the human resources department concerning what she regarded as harassing emails from supervisor Morris. Pet. App. 35. Additionally, petitioner complained that both the quarterly sales targets and success rates of the male Remote Sales Managers were lower than hers. *Id.* at 19; *see also id.* at 35.

3. In the middle of 2010, Harrah's Mid-South division was required to cut $10 million in expenses. Pet. App. 4. The division decided to achieve this through a reduction in force that eliminated over one hundred jobs across fifty different kinds of positions.

Id. Because it was unprofitable, the Remote Sales Manager position was eliminated. *Id.* This resulted in the employment termination of petitioner, and every other Remote Sales Manager, on October 20, 2010. *Id.* at 4-5. Harrah's did not consider the performance of individual employees, and the decisions regarding the reduction in force were not made by petitioner's direct supervisors. *Id.* at 4.

4. At the time petitioner was informed that she had been terminated, her gender and retaliation charge relating to her written coaching was still pending with the EEOC. Pet. App. 5. Petitioner did not inform the EEOC that she had been terminated, file a second EEOC charge regarding her termination, or amend her pending charge. *Id.* On October 25, 2010, five days after her termination, she received a previously-requested right-to-sue letter. She then filed her lawsuit claiming, *inter alia*, that she had been unlawfully terminated on the basis of gender and retaliation, in violation of Title VII, and on the basis of race, in violation of Title VII and 42 U.S.C. § 1981.

5. The district court granted summary judgment in favor of Harrah's on petitioner's § 1981 race discrimination claim, evaluating that claim under the same framework that governs claims under Title VII. Pet. App. 28. [2] On the sex discrimination and

[2] The district court held, and the court of appeals affirmed, that petitioner failed to exhaust her claim for race discrimination under Title VII, because she did not check the box on her charge indicating she was complaining of race

retaliation claims related to petitioner's termination, the court held that petitioner had not exhausted her administrative remedies because the claims were not subject to a charge filed with the EEOC. Pet. App. 21-27.

The district court reasoned that the Fifth Circuit decision in *Gupta v. East Texas State University*, 654 F.2d 411 (5th Cir. 1981), holding that "a *retaliation* claim growing out of an earlier charge" may be filed in court notwithstanding the failure to present the claim to the EEOC, *id.* at 414 (emphasis added) (*see* Pet. App. 22-23), did not require treating the combined termination claim as having been administratively exhausted by the earlier-filed EEOC charge. The sex discrimination wrongful termination claim did not fall within the terms of *Gupta*, which specifically applied only to retaliation claims. To the extent the retaliation claim fell within the terms of *Gupta*'s holding, the district court concluded that *Gupta* had been abrogated by this Court's holding in *Morgan* that a claimant must "file an administrative claim as to each discrete discriminatory act." Pet. App. 21-22 (citing *Morgan*, 536 U.S. at 110-114); Pet. App. 25-26.

6. In an unpublished opinion, the Fifth Circuit affirmed, but applied different reasoning than the district court. The court of appeals held that the written coaching allegations in Petitioner's EEOC charge did not form a "continuing violation" with

---

discrimination or otherwise refer to race in her complaint to the EEOC. Pet. App. 7, 18-20.

petitioner's termination. Petitioner should have "file[d] a supplemental claim, or at the very least, amend[ed] her original EEOC charge" to address her termination. Pet. App. 8.[3]

The court of appeals found it unnecessary, to resolve whether *Morgan* affected *Gupta*'s holding that a retaliation claim could be considered reasonably related to the original charge such that an amendment to the charge was not required. Pet. App. 8 n.1 (declining to decide whether *Morgan* abrogated *Gupta*). Instead, the court of appeals held that because the sex discrimination claim was not exhausted, it would thwart the "administrative process and peremptorily substitute litigation for conciliation" to allow petitioner's retaliatory termination claim to proceed in court while petitioner exhausted administrative remedies with respect to the sex discrimination claim, as both claims addressed the same "inciting event." *Id.* at 9 (internal quotation marks and citation omitted). Accordingly, the court dismissed those claims without prejudice.

With respect to petitioner's claim that she was terminated on account of race in violation of § 1981, the court of appeals affirmed the district court, holding that petitioner "offered no evidence that others similarly situated were treated more favorably

---

[3] Petitioner abandoned all of the claims that were actually alleged in her EEOC charge (*i.e.* claims of gender discrimination and retaliation based on events that occurred during her employment). Pet. App. 11.

than she." Pet. App. 11. Specifically, the "only disparate treatment [petitioner] alleged was her termination," and that "cannot serve as the basis for a disparate treatment claim because the Remote Sales Manager position was eliminated in its entirety and all employees were fired, regardless of their race." *Id.*

ARGUMENT

The court of appeals' unpublished decision does not warrant further review. It hewed to this Court's well-settled decisions requiring Title VII claimants to exhaust EEOC administrative remedies as to discrete discriminatory acts before commencing suit. In addition, petitioner's gender and retaliation termination claims are effectively foreclosed because of the Court's finding that there is no evidence that others similarly situated were treated more favorably than petitioner during the reduction in force.

Contrary to petitioner's argument, this case does not warrant the Court's intervention to resolve any disagreement among the courts of appeals as to whether a charge can "never encompass and exhaust any post-charge violations," Pet. 10. At most one circuit has adopted that *per se* rule, and the remaining cases cited by petitioner show at best factbound disagreements between the courts of appeals as to when post-charge conduct is sufficiently related to the conduct alleged in the charge so as to deem exhaustion satisfied or excused. The intra-Executive Branch dispute outlined by petitioner adds nothing to petitioner's argument for review, as the

Executive Branch may plainly resolve any disagreement without this Court's intervention.

Finally, this case's distinctive facts make it a poor vehicle for certiorari review. It arises in two unique contexts. First, the court of appeals' decision does not bar petitioner from pursuing her sex discrimination and retaliation claims on the merits, so this Court's review is premature. In any event, however, the court of appeals' holding that no similarly situated employee was treated more favorably than petitioner establishes that those claims must fail. Second, petitioner failed to exhaust both a retaliation claim *and* a sex discrimination claim regarding her termination. Petitioner has identified no split in authority with respect to the court of appeals' holding that where a claimant brings exhausted and unexhausted claims to court regarding the *same* termination, dismissal is warranted so that all claims about the same event may be considered by the court together.

I. THE FIFTH CIRCUIT'S DECISION HEWED TO THIS COURT'S WELL-ESTABLISHED PRECEDENT

Under Title VII, an individual cannot bring suit for "an unlawful employment practice" unless the practice was subject to a charge of discrimination timely filed with the EEOC. 42 U.S.C. § 2000e-5(f)(1). What constitutes an unlawful employment practice "varies with the practice." *Morgan*, 536 U.S. at 110.

In *Morgan*, this Court concluded that "[e]ach discrete discriminatory act starts a new clock for

filing [EEOC] charges alleging that act." 536 U.S. at 113. In so holding, the Court specifically rejected assertions that under the "continuing violation" doctrine, exhaustion of administrative remedies with respect to one particular act permits a claimant to raise in a court suit, and without further resort to administrative remedies, additional acts that are plausibly related. *Id.* at 114.

The decision below is fully consistent with the principles announced in *Morgan* and this Court's other decisions, the statutory text, and the underlying purposes of Title VII.

First, although petitioner goes straight to an argument regarding statutory purpose, this Court has recently reiterated that it is "inappropriate in the context of a statute as precise, complex, and exhaustive as Title VII" to "infer that Congress meant anything other than what the text does say." *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013). "'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (citation omitted). This Court has already parsed the plain meaning of the precise text that governs here, noting that the "operative terms are 'shall,' 'after *** occurred,' and 'unlawful employment practice.'" *Morgan*, 536 U.S. at 109. Specifically:

> '[O]ccurred' means that the practice took place or happened in the past. The requirement,

> therefore, that the charge be filed 'after' the practice 'occurred' tells us that a litigant has up to 180 or 300 days *after* the unlawful practice happened to file a charge with the EEOC.

Id. at 109-110 (citation omitted). Although *Morgan* was addressing whether conduct that occurred prior to a charge fell within this statutory period, its interpretation of the plain text must necessarily have the same meaning for post-charge conduct. As this Court stated in *Ledbetter*, "*Morgan* is perfectly clear that when an employee alleges *** a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation." 550 U.S. at 639.

This limitation, of course, governs only with respect to *discrete* violations of Title VII. Petitioner's hypotheticals claiming that it would be absurd if a charge of retaliation could only encompass injuries that had occurred prior to the submission of a charge, Pet. 30-31, fails to separate the kind of discrete acts "such as termination, failure to promote, denial of transfer, or refusal to hire" that are "easy to identify," from hostile workplace claims that "cannot be said to occur on any particular day." *Morgan*, 536 U.S. at 114, 115. Even the Tenth Circuit—the only one to have adopted a remotely *per se* rule requiring separate exhaustion of post-charge conduct, *see* Part II, *infra*, only applies that rule to post-charge *discrete* acts. *See Martinez v. Potter*, 347 F.3d 1208, 1211 (10th Cir. 2003).

When discrete acts are at issue, *Morgan* is clear that there is no "ongoing violation," as petitioner puts

it (Pet. 31), but a series of separately actionable violations. 536 U.S. at 114 (rejecting treatment of "'serial violations'" as a "continuing violation[]"). This does not preclude a Title VII lawsuit from encompassing status-based discrimination that is reasonably related to, but not specifically listed in, the EEOC charge, if it would have necessarily been addressed in the EEOC investigation and settlement processes. *See* Pet. 32. But contrary to petitioner's position, *id.*, the timing of the conduct is relevant to this inquiry. For example, the Fifth Circuit has held that when the post-charge conduct occurs after the EEOC investigation has already concluded, then it is not reasonably related because the EEOC investigation necessarily would not have addressed it. *Sapp v. Potter*, 413 F. App'x 750, 752 (5th Cir. 2011). Where, as here, it is clear that based on timing alone the EEOC investigation would not have addressed petitioner's termination, coming just days before the EEOC closed its file, Pet. App. 5, the administrative charge of earlier conduct cannot have exhausted the later-arising sex discrimination claim.

Second, it is inconsistent with the policy underlying the exhaustion requirement to permit claimants to sue on new claims that were not addressed in the EEOC process. The purpose of the exhaustion requirement is not only to operate as a statute of limitations. *See* Pet. 30. It also serves Congress's purpose to promote "the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Ledbetter*, 550 U.S. at 630-631. Allowing a claimant to go straight to court on a discrete claim post-dating a

charge defeats the purpose of the administrative process to give the employer notice of the claim and the EEOC the opportunity to achieve an informal voluntary resolution. *See Occidental Life*, 432 U.S. at 367-368.

Moreover, the statute-of-limitations purpose of the exhaustion requirement would be frustrated by petitioner's rule that the timing of post-charge conduct is completely irrelevant to the exhaustion inquiry. If a claimant chooses to let the EEOC process go forward, the EEOC charge may be pending for some time. Under petitioner's rule, it is thus possible that a claimant would be able to sue based on conduct that would otherwise have been time barred, simply by making a showing that later conduct is in some way related to, or retaliation for, the first charge. Because there is no absolute time limit on the EEOC's process, and no statute of limitations outside the charge-filing timelines, the petitioner's view that post-charge conduct need not ever be filed with the EEOC results in effectively no statute of limitations at all. The charge-filing process therefore would not serve its intended function of providing the employer with "prompt notice" of the employee's claim regarding post-charge conduct and the "opportunity to gather and preserve evidence in anticipation of a court action" based on that conduct. *See Occidental Life*, 432 U.S. at 372.

Furthermore, lessening the procedural requirements for post-charge claims of retaliation "could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to

combat workplace harassment." *Nassar*, 133 S. Ct. at 2531-2532. As this Court has recognized, an "employee who knows that *** she is about to be fired for poor performance *** might be tempted to make an unfounded charge of racial, sexual, or religious discrimination." *Id.* at 2532. Then, "when the unrelated employment action comes, the employee could allege that it is retaliation," *id.*—without, under petitioner's theory of the law, ever proceeding through any administrative process. That ability to proceed straight to court on all retaliation claims, would certainly "raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent," which would be "inconsistent with the structure and operation of Title VII." *Id.*

In any event, as this Court has repeatedly cautioned, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

Third, the decision below will not undermine enforcement of Title VII. Petitioner argues that an employee who is retaliated against for filing one charge with the EEOC will be unwilling to file a second charge. *See* Pet. 33-34. The decision below will have no effect on that situation; the court of appeals expressly deferred addressing petitioner's post-discharge retaliation claims, leaving in place circuit law allowing claimants to sue on retaliation claims that are reasonably related to an EEOC charge without filing a second charge. Pet. App. 8

n.1. Petitioner's policy concerns are therefore inapposite in the context of this case.

Finally, it was not "implausible" for the court of appeals to dismiss petitioner's claims without prejudice in order for two inconsistent and alternative theories of discrimination related to precisely the same post-employment facts to be adjudicated together. Petitioner claims that she "obviously cannot 'return to the EEOC,'" Pet. 33 (quoting Pet. App. 9), because a charge challenging her termination would not now be timely filed. But "th[e] time period for filing a charge is subject to equitable doctrines such as tolling." *Morgan*, 536 U.S. at 113. Petitioner makes no argument that equitable tolling would be unavailable under these circumstances. *Cf. Granger v. Aaron's, Inc.*, 636 F.3d 708, 712 (5th Cir. 2011) (applying equitable tolling when claimant filed charge with the wrong administrative body). Moreover, petitioner does not claim that she sought to stay her case pending filing of charges with the EEOC regarding the unexhausted claims. *See Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 316 (5th Cir. 2004) (to prevent claims arising after a first charge but before suit from being precluded, claimants "could have requested a stay *** until they received their [right-to-sue] letters").

II. FACTBOUND APPLICATIONS OF THE "REASONABLY RELATED" TEST DO NOT WARRANT THIS COURT'S REVIEW

A. Petitioner Establishes At Best A Lopsided Circuit Split That Does Not Warrant This Court's Intervention

Petitioner asserts that there is a circuit split between five circuits that apply the "reasonably related" test to post-charge conduct (the First, Second, Fourth, Sixth, and Ninth Circuits) and three circuits that have repudiated that rule (the Fifth, Eighth, and Tenth Circuits). In reality, only the Tenth Circuit has adopted a different rule. The other circuits either have no settled circuit law or continue to articulate and apply the "reasonably related" test. Petitioner's purported circuit split reflects nothing more than different factbound judgments regarding when post-charge conduct is reasonably related to a prior charge.

1. Both the Eighth and the Fifth Circuits, as well as the Eleventh, continue to apply the "reasonably related" test to post-charge conduct. The Eight Circuit has not "disavowed" the "reasonably related" test (Pet. 18), but simply recognized that *Morgan* "'narrowed [the] view of what is 'like or reasonably related' to the originally filed EEOC allegations.'" *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 852 (8th Cir. 2012) (quoting *Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 672 (8th Cir. 2006)). Indeed, in *Richter*, the Eighth Circuit reaffirmed its holding in *Wedow* that a charge that "did clearly allege[] that retaliation had occurred and

was continuing to occur throughout the plaintiffs' ongoing employment" encompassed post-charge retaliation because the claims of post-charge retaliation "include[d] the same type of ongoing retaliation alleged" in the charge. *Id.* at 852 n.1 (internal quotation marks omitted).

Moreover, as petitioner acknowledges (Pet. 15-16), the Eleventh Circuit has specifically allowed post-charge retaliation to be considered exhausted if it "grow[s] out of an earlier charge." *Thomas v. Miami Dade Public Health Trust*, 369 F. App'x 19, 23 (11th Cir. 2010). It also has applied, in another unpublished decision, the "reasonably related" test to post-charge conduct. *Bennett v. Chatham Cnty. Sheriff Dep't*, 315 F. App'x 152, 161-162 (11th Cir. 2008). Accordingly, the Eleventh Circuit also applies the "reasonably related" test to post-charge conduct.

Finally, the only published, authoritative decision in the Fifth Circuit clearly allows some post-charge retaliation claims to go forward without a second charge. *Gupta*, 654 F.2d at 414. Moreover, in an unpublished decision that petitioner characterizes as having "precedential significance," Pet. 20, the Fifth Circuit has retained the "reasonably related" test. In *Sapp,* the Fifth Circuit specifically considered whether the post-charge conduct alleged by the plaintiff could "reasonably be expected to grow out of the charge of discrimination," 413 F. App'x at 752, which is precisely the test that petitioner claims is applied in what it terms the majority-view circuits, *see* Pet. 13-14 (Second Circuit applies test considering whether "the claim would fall within the reasonably expected scope of an EEOC investigation"). The *Sapp*

panel concluded that because the EEOC investigation had already ended by the time the post-charge conduct took place, it cannot reasonably have been expected to encompass that conduct. 413 F. App'x at 752. But it nonetheless applied the "reasonably related" rule.

2. The cases cited by petitioner from the First, Second, Fourth, Sixth, and Ninth Circuits demonstrate at most different factbound judgments as to when post-charge conduct is "reasonably related" to a prior charge, not a division of authority with respect to the governing legal test. Indeed, they do not even show a divergence on these facts, as none of the cases petitioner cites indicates those circuits would treat petitioner's claim that she was terminated because of her sex as encompassed within her prior charge.

Petitioner cites an unpublished decision of the Sixth Circuit as establishing that Court's law. Pet. 12 (citing *Delisle v. Brimfield Twp. Police Dep't*, 94 F. App'x 247 (6th Cir. 2004)). But the Sixth Circuit has also, in another unpublished post-*Morgan* case, relied on *Morgan* to reject the claim that post-charge retaliation was encompassed in a prior charge. *Sherman v. Chrysler Corp.*, 47 F. App'x 716, 721 (6th Cir. 2002). Accordingly, the law in the Sixth Circuit is undetermined, and there is no published statement of Sixth Circuit law.

Nor does petitioner's First Circuit authority establish that the First Circuit would, post-*Morgan*, treat a claim of a post-charge termination on the basis of *status* discrimination as exhausted through a

prior charge. In *Franceschi v. United States Department of Veterans Affairs*, 514 F.3d 81 (1st Cir. 2008), the court noted that a "claim of retaliation for filing an administrative charge with the EEOC" presented a "narrow exception[]" to the exhaustion rule, *id.* at 86. Although petitioner insists that this retaliation holding is "an application of a more general rule," Pet. 13, petitioner cites no case indicating that the First Circuit would, post-*Morgan*, hold that a discriminatory termination claim on the basis of status had been exhausted by a prior charge.

The Second Circuit has likewise not applied the "reasonably related" test to deem exhausted a post-charge status-based discrimination claim involving a discrete action like a termination. In *Alfano v. Costello*, 294 F.3d 365 (2d Cir. 2002), the primary case cited by petitioner (Pet. 13), the court rejected the claim that a charge alleging discriminatory counseling sufficed to exhaust claims related to retaliatory post-charge suspension and termination, where the facts showed it was unlikely the EEOC investigation would have addressed the termination. 294 F.3d at 381-382. Another Second Circuit case deemed a retaliatory constructive discharge claim sufficiently related to the charged conduct, but only because "most of the incidents" forming the basis of the constructive discharge claim were included in the EEOC charge. *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003). The final case cited by petitioner as reiterating the rule (Pet. 14), *Williams v. New York City Housing Auth.*, 458 F.3d 67, 70 & n.1 (2d Cir. 2006), does not address post-charge conduct at all.

The Fourth Circuit case cited by petitioner also establishes only that the Fourth Circuit considers retaliatory termination claims to be exhausted by a prior charge, but not necessarily status-based discrimination claims. *See Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 302 (4th Cir. 2009) (describing that court as adopting the position that "a 'plaintiff may raise the retaliation claim for the first time in federal court'") (citation omitted). And *Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002), in the Ninth Circuit, addresses pre-charge and post-charge conduct that involved similar facts and the same type of discrete act, *see id.* at 1104 (where charge claimed discriminatory refusal to promote to particular positions in one salary grade, it encompassed post-charge refusal to promote to any positions in that salary grade).

In this case, the court of appeals did not articulate the "reasonably related" test, but did not repudiate it, either. Pet. App. 8. The panel simply stated its conclusion that the termination in this case required a separate or amended charge. *Id.* That fact-specific application of the "reasonably related" test does not merit this Court's review.

3. Only the Tenth Circuit has adopted anything close to the *per se* rule that "a charge can never encompass and exhaust any post-charge violations," Pet. 10, although that court limits the rule to post-charge discrete discriminatory acts. *See Martinez*, 347 F.3d at 1210 (holding that *Morgan* "teach[es] that each discrete incident of such [discriminatory] treatment constitutes its own 'unlawful employment practice' for which administrative remedies must be

exhausted"). The cases cited by petitioner for the proposition that there is a circuit split almost universally describe it as a split between other circuits and the Tenth Circuit. *See, e.g.*, *Weber v. Battista*, 494 F.3d 179, 183-184 (D.C. Cir. 2007) (describing split *between* the Eighth and Tenth Circuits); *Bennett*, 315 F. App'x at 162 n.7 (same); *Fentress v. Potter*, No. 09c2231, 2012 WL 1577504, *2 (N.D. Ill. May 4, 2012) (describing a "three-to-one circuit split" with the Tenth Circuit holding the minority view); *Finch v. City of Indianapolis*, 886 F. Supp. 2d 945, 964 (S.D. Ind. 2012) (describing Tenth Circuit's view as unique among the courts of appeals).

Petitioner gives no compelling reason as to why this issue, involving at best a lopsided divide in authority, must be addressed now. The decision below, as well as many of the other appellate decisions cited by petitioner, are unpublished decisions that do not establish circuit precedent, and some of the courts of appeals have conflicting intra-circuit precedent that they can themselves resolve. Accordingly, further percolation is warranted.

Moreover, the Fifth Circuit's unpublished decision in this case presents no "serious barrier" (Pet. 34) to the enforcement of Title VII. As already discussed, the decision does not abrogate the fact-determinative rule that a retaliation claim may be sufficiently related to a charge that a separate or amended charge need not be filed. *See* Pet. App. 8 n.1. Finally, an employee may protect her interest, and further the carefully reticulated remediation and enforcement mechanism of Title VII, by simply

alerting the EEOC to the new discrete act. *See* Pet. App. 8. This poses no formidable procedural obstacle to enforcement of Title VII, but simply allows the administrative process to serve its investigatory and conciliation function.

B. Petitioners' Invitation To Address An Intra-Branch Dispute Does Not Warrant Review

Petitioner attempts to bolster her argument regarding a purported divide in authority among the courts of appeals by citing a supposed dispute in interpretation between the Department of Justice and the EEOC. Pet. 25-29. But resolving questions that can be resolved by entities other than the Court is not a "principal purpose for which [the Court] use[s] [its] certiorari jurisdiction." *See Braxton v. United States*, 500 U.S. 344, 347 (1991) (declining to decide interpretation of sentencing guidelines when the Sentencing Commission undertook proceeding to resolve the question). The Executive Branch is plainly competent to resolve its own interpretive disagreements, if any, without this Court's intervention.

Moreover, petitioner points to no evidence that any divergence within the Executive Branch has "compound[ed]" any "problems." Pet. 29. And the interpretation of *Morgan* expressed in the EEOC's Compliance Manual is highly unlikely to make a difference, as it is entitled to no special deference beyond its ability to persuade. *Nassar*, 133 S. Ct. at 2533; *Kentucky Ret. Sys. v. EEOC*, 554 U.S. 135, 150 (2008); *Morgan*, 536 U.S. at 110 n.6. In short,

petitioner's exegesis of the purported divergence of views within the Executive Branch adds nothing to petitioner's case for further review.

III. THE UNIQUE FACTS OF THIS CASE MAKE IT A POOR VEHICLE FOR CERTIORARI REVIEW

This case presents a poor vehicle for certiorari review in light of its procedural posture and unique factual context.

First, the court of appeals' decision has not barred petitioner from pursuing her sex discrimination and retaliation claims related to her termination. Pet. App. 8 (affirming dismissal of claims without prejudice). This Court's review is thus premature, because petitioner could exhaust her claims and file suit, obviating the necessity for this Court to decide the question presented. *Cf. Nike v. Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring in dismissal of writ as improvidently granted) (review not warranted when it is not "clear that reaching the merits of [petitioner's] claims now would serve the goal of judicial efficiency").

The record also establishes alternative grounds for affirmance that would short circuit the inquiry into the question presented. *See Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984) (declining to reach question on which certiorari was granted in light of alternative ground for affirmance). The district court and the court of appeals rejected petitioner's claim that her termination was motivated by race discrimination. That rejection turned on a finding that petitioner had "offered no evidence that others similarly situated

were treated more favorably than she," because "the Remote Sales manager position was eliminated in its entirety and all employees were fired." Pet. App. 11. That same finding compels rejection of petitioner's gender discrimination and retaliation claims with respect to that termination. Because petitioner was proceeding on each of her race, sex, and retaliation claims under the same framework and allocation of the burden of proof, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court would have to sustain the court of appeals' rejection of the gender and conduct-based discrimination claims no matter what. *Bennett v. Spear*, 520 U.S. 154, 166 (1997) ("A respondent is entitled *** to defend the judgment on any ground supported by the record[.]"). "[P]roof that the employer treated the plaintiff just like other employees negates an inference of retaliation and pretext." Barbara T. Lindemann & Paul Grossman, 1 EMPLOYMENT DISCRIMINATION LAW 1038-1039 (4th ed. 2007).

Second, this case presents a unique circumstance in which an employee failed to exhaust a claim that a termination was unlawful due to both status-based discrimination and retaliation. As petitioner concedes, "[m]ost disputes about post-charge violations concern *** retaliation," specifically retaliation for having filed an EEOC charge. Pet. 21. But the court of appeals in this case declined to decide the very question that petitioner identifies as the recurring one—the scope of the exhaustion requirement for post-charge retaliatory conduct—because it declined to decide whether *Morgan* affected circuit law on this point. *See* Pet. App. 8 n.1.

Given that the court of appeals declined to abrogate its prior precedent allowing unexhausted retaliation claims to go forward if they reasonably relate to the charged conduct, *Gupta*, 654 F.2d at 414, petitioner's fundamental quibble with the decision in this case is the Fifth Circuit's conclusion that when a termination is claimed to be unlawful for two reasons, one exhausted and one not, the better course is to dismiss both claims without prejudice so that they can be considered together following exhaustion. And on that point, petitioner makes no claim of any divide in authority warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

Jeffrey D. Winchester
CAESARS ENTERTAINMENT CORPORATION

Donald R. Livingston
Counsel of Record
Hyland Hunt
Kathleen O. Lawrence
AKIN GUMP STRAUSS HAUER & FELD LLP

Counsel for Respondents

August 27, 2013

APPENDIX TO THE BRIEF IN OPPOSITION

TABLE OF CONTENTS

United States Code

Title 42. The Public Health and Welfare

Chapter 21. Civil Rights

Subchapter VI. Equal Employment Opportunities

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

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

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

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the

Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as

evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[4] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during

[4] So in original. Probably should be subsection "(b)".

the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority

system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

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

hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the

person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending

final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

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

district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

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

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the

person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.