No. 06-1322

IN THE
Supreme Court of the United States

Federal Express Corporation,
Petitioner,
v.
Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, Nancy Trompics, individually and on behalf of all others similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

ROBERT K. SPOTSWOOD
KENNETH D. SANSOM
EMILY J. TIDMORE
SPOTSWOOD SANSOM & SANSBURY LLC
940 Concord Center
2100 Third Avenue North
Birmingham, AL 35203
(205) 986-3620

WALTER E. DELLINGER
PAMELA HARRIS
JONATHAN HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5319

CONNIE LEWIS LENSING
Counsel of Record
R. JEFFERY KELSEY
EDWARD J. EFKEMAN
FEDERAL EXPRESS CORPORATION
LEGAL DEPARTMENT, LITIGATION
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125-8800
(901) 434-8432

Counsel for Petitioner

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement contained in the Petition for Writ of Certiorari, Pet. iii, remains accurate. *See* SUP. CT. R. 24.1(b), 29.6.

TABLE OF CONTENTS

Contents

Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Statutes

Cited Authorities

Page

Regulations

Other Authorities

Cited Authorities

The Court should reject the bold invitation of both Respondents and the Government to jettison the congressional mandate of pre-litigation notice to employers of discrimination claims under the Age Discrimination in Employment Act ("ADEA"). The ADEA explicitly provides a framework for employers and employees to resolve disputes informally through the EEOC. The only way for that process to begin is through notice to the employer that its employee is charging it with discrimination. Notice is such a fundamental element of the ADEA that ignoring it, as Respondents and the Government do, unfairly and impermissibly distorts the careful balance of interests drawn by Congress in the text of the ADEA.

Respondents offer a definition of charge that completely ignores the notice component and permits an employee to bypass the informal resolution process altogether. The Government's proposal permits a document to morph into a charge at some indefinite time after its receipt—especially if no later document is timely filed—and, accordingly, permits the requirement for prompt notice to be jettisoned. Neither proposition survives analysis under the ADEA. Both ignore the inescapable fact that the text of the statute makes notice and opportunity for conciliation essential elements of the charge process. Without those elements, the employer is forever deprived of its opportunity under the ADEA to avoid litigation, a result that cannot be squared with the text and purpose of the statute or the legitimate needs of employees, employers, or the EEOC. Notice to the employer and efforts to achieve informal resolution of claims are central to the statutory scheme, and a charge without notice cannot be the predicate for litigation under the ADEA.

Requiring notice as a precondition to litigation is a clear and definite rule that conforms to the text of the statute and regulations and effectuates the central purposes of the ADEA. Existing doctrines of equitable tolling of charge-filing requirements amply safeguard the interests of employees who have diligently sought to protect their right to sue under the ADEA. Nothing more is required to protect employees from potential governmental errors in the processing of charges of discrimination under the ADEA.

I. THE TEXT, STRUCTURE, LEGISLATIVE HISTORY, AND PURPOSE OF THE ADEA REQUIRE PROMPT NOTICE TO THE EMPLOYER.

Both Respondents' and the Government's positions ignore the explicit requirement of notice to the employer in the ADEA. Congress viewed notice and the consequent opportunity for conciliation as a central part of the legislation when the ADEA was originally adopted and reaffirmed their importance in later amendments to the statute. Notice and conciliation allow the parties to accomplish an essential purpose of the ADEA: to identify and to prevent age discrimination without costly and time-consuming litigation. This Court should reject the requests of Respondents and the Government to allow employees to proceed directly into litigation without any prior notice to, and therefore without any possibility of conciliation with, the employer.

A. A charge has no function without notice to the employer.

Congress created the ADEA as a mechanism by which employees can raise claims of age discrimination with their employers and seek informal resolution of those claims: as the statute recites, "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The reasons to encourage informal resolution are evident. Litigation is costly to both parties, especially when the dispute is not addressed in a timely manner, and avoidable litigation unnecessarily burdens courts. And, of course, a mutually-satisfactory resolution is superior to the uncertain outcome of a trial. Thus, notice followed by an opportunity for informal resolution benefits both employers and employees.

Only if this informal process is unsuccessful—after a minimum effort period of sixty days—did Congress intend to entitle an employee to file a lawsuit and progress to the more formal resolution of litigation. *See* 29 U.S.C. § 626(d). The EEOC's regulations acknowledge the conciliation process and its role in the statutory scheme:

> Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion. Upon failure of such conciliation the Commission will notify the charging party. Such notification enables the charging party or any person aggrieved by the subject matter

> of the charge to commence action to enforce their rights without waiting for the lapse of the 60 days.

29 C.F.R. § 1626.12. A charge, therefore, involves the informal process that *must* occur before an employee can proceed to the formal process of litigation, and the informal process *cannot*, by definition, occur without the participation of the employer.

The Government does not dispute the requirement or purpose of notice to the employer. Instead, it responds that "the notice and conciliation requirement serve different objectives than the charge-filing requirement," U.S. *Amicus* Br. 7, but it does not state what different objective the charge-filing requirement could possibly have. Without notice that an employee has raised a claim of age discrimination, an employer cannot attempt voluntary resolution or make remedial efforts. Without notice to the employer, the EEOC cannot mediate a settlement of the claim. Without notice, *nothing* can take place to address an employee's concerns about her claim of age discrimination informally.[1] If this is what Congress

---

[1] Respondents incorrectly argue that an employee has no obligation under the ADEA other than to file a document with minimal contents and wait sixty days to file a lawsuit. While an employee is not obliged to serve her employer with notice of her filing, she may not simply abdicate any responsibility for monitoring the EEOC's processing of a charge. The language of the statute—"conciliation," "conference"—and the context of the ADEA's informal resolution process—cooperation, mediation—place a charging party on notice that she is an integral part of the process. That is why courts have found it appropriate to (Cont'd)

intended, then the sixty-day waiting period has no meaning. Indeed, if an opportunity for informal resolution is not a pre-condition to private litigation, then the charge- filing requirement has no meaning.[2] Notice is paramount to the essential purpose of the ADEA, and without it there is no "charge" within the meaning of the statute.

B. The 1978 amendments to the ADEA reaffirmed the requirement of notice to the employer.

Respondents place great emphasis on the 1978 amendments to the ADEA, through which they claim "Congress sought to facilitate the ability of individuals to bring suit." Resp. Br. 27. While Congress made changes to the ADEA's procedure to permit more claims to be decided on their merits rather than being dismissed on procedural grounds, the history of the amendments belies any desire to rush employees to the courthouse and bypass the EEOC and its informal resolution

---

(Cont'd)
impose on the employee the burden of proving that equitable tolling of the charge-filing requirement is warranted. *See infra* Section III.B. That rule provides incentives for employees to communicate with the EEOC throughout the charge-filing process.

[2] As the Government notes, the initiation of a public enforcement action under the ADEA does not even require a "charge"; only a "complaint" is necessary. *See* U.S. *Amicus* Br. 14 n.5; *see also infra* note 11 (noting that "charge" and "complaint" differ only in function). Thus, the only conceivable function of a charge, as opposed to a complaint, is the opportunity to avoid private litigation through notice and conciliation.

process. To the contrary, the 1978 amendments demonstrate Congress' increased desire to avoid litigation by ensuring a greater opportunity for early involvement by the EEOC and employers.

In 1978, Congress was concerned about the short time frame—180 days from the alleged discrimination—within which the notice of intent to sue then required by the ADEA had to be filed. *See* S. Report No. 95-493, at 12 (Oct. 12, 1977). The Senate felt that 180 days was too short a time in which to require an employee to file such a notice because employees often have not decided whether to sue within that brief period. *See Hiscott v. Gen. Elec. Co.*, 521 F.2d 632, 634 (6th Cir. 1975) (the Senate criticized this case, where an employee's ADEA suit was dismissed because, although he had filed information alleging discrimination with the EEOC within 180 days, he had not indicated a specific intent to sue); *Powell v. Sw. Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974) (same). Moreover, because courts were treating the 180-day period as jurisdictional, they were refusing to allow equitable modifications to it. *See* 123 Cong. Rec. 34294, 34296 (Oct. 19, 1977) (remarks of Sen. Williams); *see, e.g.*, *Hiscott*, 521 F.2d at 633–34. Thus, if an employee missed the 180-day limit for filing notice of intent to sue, he was forever barred from suing, regardless of whether he had a good excuse for missing the deadline.

In response to these concerns, the Senate wanted to eliminate the 180-day requirement altogether, while retaining the notice-of-intent-to-sue and the 60-day waiting period requirements. *See* S. Report No. 95-493, at 25 (Oct. 12, 1977). In conference, however, the Senate's proposal was rejected, and the final amendment simply

changed the statute from requiring a "notice of intent to sue" to requiring a "charge." *See* 124 Cong. Rec. S4449 (Mar. 23, 1978) (remarks of Sen. Williams). This change effectively overruled cases like *Hiscott* and *Powell* by allowing employees to meet the 180-day requirement by giving information to the EEOC in the form of a "charge," without having to decide at that early juncture whether they intended to sue. At the same time, the purpose for the notice requirement—early EEOC involvement and attempts at conciliation—was still fulfilled. *See* 124 Cong. Rec. H2269, 2272 (Mar. 21, 1978) (remarks of Rep. Quie). Thus, "the compromise d[id] not upset the balance of interests struck by the original act." *See id.*

Accordingly, the 1978 amendments to the ADEA do not support Respondents' argument. Instead, the compromise struck in 1978 shows a continued congressional commitment to the statutory scheme of the ADEA, whereby prompt notice and attempts at conciliation occur before suit.[3]

---

[3] By contrast, both Respondents' and the Government's arguments show a lack of commitment to the informal process. In fact, the Government assumes that litigation is inevitable, as shown by its proposed remedies for employers who received no notice, such as a mere stay of litigation or a limitation on adverse inferences from an employer's pre-notice destruction of documents. U.S. *Amicus* Br. 28. This assumption highlights why a system that requires no notice to the employer runs contrary to the ADEA's purpose of facilitating informal resolution.

C. The distinctly different pre-litigation requirements under Title VII illustrate why a charge under the ADEA must include notice to the employer.

Respondents borrow much of their argument from Title VII history and analogy. In doing so, they ignore a crucial difference in the statutory schemes relevant to the issue of notice to the employer. Under Title VII, an employee cannot file a lawsuit until she has received a Notice of Right to Sue from the EEOC indicating that the informal process has concluded. 42 U.S.C. § 2000e-5(f)(1). In order to issue such a notice, the EEOC must have opened a case, assigned a charge number and, most importantly, informed the employer about the employee's claims. In virtually every case under Title VII, therefore, the employer has received notice of the claims.

Under the ADEA, on the other hand, an employee need not wait to receive a Notice of Right to Sue before filing suit. The statute allows an employee to file a lawsuit after a sixty-day period for informal resolution efforts. *See* 29 C.F.R. § 1626.12 (expressing the EEOC's intention to complete notice and conciliation efforts well within sixty days). If submissions that do not result in notice to the employer are deemed to be charges and allow employees to proceed directly to litigation, the sixty days of informal resolution will not occur—a result not intended under this statutory framework. The employer would thus lose the opportunity to avoid a public and costly lawsuit. The employer also may not be warned early enough to preserve and protect the records necessary to defend the claim or to interview witnesses

who might be unavailable later. *See Edelman v. Lynchburg College*, 535 U.S. 106, 119 (2002) (noting and leaving open on remand "the significance of the delayed notice to the [employer]").

Title VII's notion of "charge" therefore does not translate fully to a discussion of a charge within the meaning of the ADEA. Because the ADEA lacks Title VII's additional statutory procedures guaranteeing notice as a matter of course, it is even more important to enforce strictly the notice requirement contained in § 626(d). The arguments of Respondents and the Government fail to account for this difference between Title VII and the ADEA, resulting in proposed rules by each that do not satisfy the text or purpose of the ADEA.

II. A DOCUMENT MUST RESULT IN PROMPT NOTICE TO THE EMPLOYER TO SATISFY THE STATUTORY REQUIREMENTS FOR A CHARGE.

Neither the statute nor the EEOC's regulations set forth an explicit definition of a "charge" under the ADEA.[4] Petitioner, Respondents, and the Government have proposed various rules of law regarding what constitutes a charge under the ADEA. Only Petitioner's proposed rule is faithful to the actual text of the statute as well as the legislative history and stated purpose of the ADEA.

---

[4] The only regulation that purports to state what the term "charge" means is so minimalist that neither Respondents nor their *amici* contend that it, by itself, is sufficient. *See infra* note 11 and accompanying text.

A. Petitioner's position is the only one that gives effect to the text and purpose of the ADEA.

A charge under the ADEA is a document that provides prompt notice to the employer about an employee's claim of age discrimination and initiates the informal resolution process. This definition is the only one that is consistent with the language of the statute as drafted by Congress, 29 U.S.C. § 626(d); the regulations promulgated to implement the statute, *see* 29 C.F.R. §§ 1626.11, 1626.12; and current guidance from the EEOC Compliance Manual, *see* U.S. *Amicus* Br. 21 ("[T]he EEOC Compliance Manual has for a number of years directed staff to treat any qualifying submission as a charge and provide notice to the employer."). More fundamentally, it is the only concept of "charge" that Congress intended to carry out its design for informal resolution, *see* Pet. Br. 12–15; Section I *supra*; *see also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").[5]

---

[5] Petitioner acknowledges that there may be the rare case when an employee has diligently pursued her rights but is nevertheless unable to timely satisfy the charge-filing requirements of § 626(d) because of inaction by the EEOC. As discussed in Section III.B *infra*, the existing doctrine of equitable tolling sufficiently protects employees from unfairness in these rare circumstances. Such doctrines are inapplicable in this case, however, as the EEOC's inaction as to Kennedy's intake questionnaire did not prevent Kennedy from filing a timely charge of discrimination. *See infra* note 13.

B. The Government's proposal to define a charge based on "intent" is a convenient litigating position that is contrary to the statute, inconsistent with prior positions of the EEOC, and unworkable in application.

The Government argues that notice to the employer—present in both the plain language of the statute as well as the EEOC's regulations—is not necessary, and instead focuses on the intent of the person submitting the document—a factor found in neither the statute nor the regulations. This "intent" argument is so fundamentally flawed that it is fairly characterized as a convenient litigating position that is designed, for this case, to rescue Kennedy from her intake questionnaire's failure to satisfy § 626(d), and, for this case and others, to give the EEOC unbridled freedom to declare if and when a document is a charge. The Government's argument jettisons notice and conciliation, the fundamental functions of a charge. It also does not represent a consistently held position of the EEOC and is based on neither EEOC interpretive regulations warranting deference nor an EEOC interpretation of the statute that is sufficiently faithful to warrant deference. Finally, the Government's position will produce unreliable and manipulable results. It should be rejected for all these reasons.

1. The Government's argument should be rejected because the EEOC itself has been inconsistent regarding whether intent is required for a charge.

Respondents and the Government accuse Petitioner of attacking the EEOC's regulations either directly or indirectly. The EEOC's regulations, taken as a whole, are not incompatible with the ADEA, however. The regulations clearly require prompt notice to the employer, 29 C.F.R. § 1626.11, and "informal methods of conciliation, conference and persuasion," *id.* § 1626.12. If those methods are unsuccessful, the regulations provide that an employee can file suit without waiting the full sixty days. *Id.* The issue is not the content of the regulations. Rather, it is the EEOC's proposed practice of not following the regulations, adding an intent requirement, and deleting the notice requirement—and, even worse, attempting to do so retroactively.

The Government's concession of an "admittedly uneven past practice in processing submissions at the field office level," U.S. *Amicus* Br. 8, is a modest one. In fact, the Seventh Circuit sharply criticized the EEOC for this inconsistency more than nineteen years ago. *See Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988). The *Steffen* court found that "[t]he inconsistencies between . . . how the EEOC treats Intake Questionnaires in practice[] and what [it] argues on appeal have led to a situation that is unfair to both employees and employers." *Id.*

Unfortunately, the EEOC's position is just as inconsistent today. The February 21, 2002 memorandum

included in the Government's brief was not only written after Kennedy first submitted her intake questionnaire, but also fails to establish any criteria by which a field agent might determine an employee's intent. U.S. *Amicus* Br. 4a–5a. Even as late as 2006, the EEOC did not argue that intent is required for a charge. U.S. *Amicus* Br. 17 n.8. The EEOC's August 13, 2007 memorandum reverses this position and indicates that an employee's intent should be considered, but the criteria for determining intent remain unclear. U.S. *Amicus* Br. 6a–7a. Notably, both the 2002 and the 2007 memoranda were issued shortly after this Court had granted certiorari in cases where the EEOC had not initially deemed the document at issue to be a charge—the August 2007 memorandum after the Court agreed to hear this case, and the February 2002 memorandum after the Court agreed to hear *Edelman v. Lynchburg College*, 533 U.S. 928 (June 25, 2001) (granting certiorari). This fact casts doubt on the Government's contention that its current argument is not just a "convenient litigating position." U.S. *Amicus* Br. 22; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

Nor has the EEOC maintained a consistent public position about the role of "intent" in meeting the charge requirements. For two and a half years before September 18, 2007, the EEOC website indicated in "Frequently Asked Questions" that a charge is filed "when the completed, signed Form 5 is received back in the EEOC field office and a charge number has been issued." U.S. *Amicus* Br. 18 n.9. In response to this lawsuit, the EEOC has apparently added a sentence noting that an "intake questionnaire . . . can also constitute a charge

. . . if it contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the EEOC to act." *Id.*; *see* U.S. Equal Employment Opportunity Comm'n, *FAQs* (visited Oct. 25, 2007) <https://eeoc.custhelp.com/cgi-bin/eeoc.cfg/php/enduser/std_alp.php?p_sid=r9xBKEAh&p_lva=&p_sp=&p_li=>. Yet, confusingly, the sentence "Your charge is filed when the completed, signed Form 5 is received back in the EEOC field office," remains. *Id.*

In addition, the EEOC has promulgated intake forms that only muddy the waters further by stating that they are charges when they are "the only timely written statement of allegations of employment discrimination." U.S. *Amicus* Br. 3 n.2. In other words, one of these new documents may not be a charge when filed, but can later become a charge if no Form 5 "Charge of Discrimination" is submitted and, as a result, the intake questionnaire must be treated as a charge to preserve an employee's claim. Of course, in many instances, that determination cannot be made until long after the intake questionnaire was submitted, such that "prompt" notice and conciliation—the essential functions of a charge—cannot occur. Moreover, no approach could be further divorced from any notion of "intent." The EEOC has attempted to refine the procedure so that consistent compliance with the statute is impossible.

2. The Government's argument should be rejected because the inconsistent and extra-regulatory positions of the EEOC are not entitled to deference.

The changing positions of the EEOC should be given no deference for two reasons. First, they have been so inconsistent over time that they should not be deferred to as established "interpretations" of the statute or the regulations. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–58 (1991) (declining to defer to an EEOC interpretation that "has been neither contemporaneous with its enactment nor consistent since the statute came into law"); *Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) (refusing to give deference to EEOC interpretation of ADEA), *superseded on other grounds by* Pub. L. No. 101-433, 104 Stat. 978 (Oct. 16, 1990). The agency cannot flatly rewrite the regulations with guidance memoranda, or even its Compliance Manual, and then claim deference to its "interpretation." *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2177 n.11 (2007) (declining to defer to the EEOC's Compliance Manual or adjudicatory positions).

Second, the EEOC's unilateral injection of intent into the statutory and regulatory scheme and its deletion of the notice requirement is so far removed from the purpose of the ADEA that it should be afforded no deference. As discussed above, notice to the employer is paramount to the ADEA's purpose of preventing and eliminating age discrimination by informal means. Replacing notice to the employer with an amorphous intent requirement defeats this purpose. "No deference . . . is due an agency interpretation that is inconsistent

with the language of the statute, contrary to the statute's intended effect, arbitrary, or otherwise unreasonable." *Parisi by Cooney v. Chater*, 69 F.3d 614, 617 (1st Cir. 1995); *see Homan & Crimen, Inc. v. Harris*, 626 F.2d 1201, 1211 (5th Cir. 1980) (citing *Morton v. Ruiz*, 415 U.S. 199 (1974) ("Because the agency's interpretation is inconsistent with the congressional purpose, it is entitled to no deference and in fact must be rejected.")).

3. The Government's argument should be rejected because its "intent" rule will result in inconsistent determinations of what constitutes a "charge" and is subject to manipulation.

Even if the substitution of intent for notice and conciliation was a consistently maintained position of the EEOC that could be squared with the statute, which it is not, the Government's argument for an intent-based rule would fail because it is so unreliable in its execution. While the test is posed as objective, it is actually profoundly subjective. While the test is posed as giving employees control, it actually gives unassailable interpretive discretion to the EEOC. While the test is posed as a means of avoiding inconsistent treatment of similar documents, in reality it virtually guarantees such inconsistent treatment. Moreover, regardless of how it is posed, the test is inherently amenable to manipulation. For these reasons, this Court should reject the Government's proposed "intent" test.

a. *Subjectivity*

Although the Government asserts that its proposed test looks at "objective intent," the Government's failure to identify a single "objective" criterion for determining intent shows that its test is actually wholly subjective. Similarly, the Second Circuit determined intent based on the "forceful tone and content" of the attached affidavit—hardly an objective factor. And, even the most forceful tone is not probative of an intent to initiate notice and conciliation, but rather probative only of disgruntlement. Virtually every employee coming into an EEOC office will be sufficiently troubled by perceived discrimination at his workplace to compose a sharp narrative. Part of the role of the intake questionnaire is "pre-charge filing counseling," JA 265, in order to weed out the "catchpenny claims of disgruntled, but not necessarily aggrieved, employees." *Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002) (noting the burdens of responding to a claim of discrimination and the importance of some assurance—in that case, through verification—that employers need respond only to legitimate claims). The level of disgruntlement when a questionnaire is completed has no bearing on whether a document is a valid charge.

Perhaps due to the truly subjective nature of the inquiry it proposes, the Government actually frames its intent test in the negative. U.S. *Amicus* Br. 24 ("*Neither* the pre-printed intake questionnaire that respondent used *nor anything* respondent wrote on the form or in her affidavit *indicates that she did not intend* the submission to be a charge," and "*nothing* respondent wrote in her intake questionnaire or accompanying

affidavit manifests a belief that the December 3, 2001, submission is *not* a charge . . . .") (emphasis added). The question as the Government poses it, therefore, is whether the employee clearly expressed a *lack* of intent to file a charge. If not, then the submitted document is, in fact, a charge. This analysis rises to new levels of subjectivity, as it requires an EEOC field agent to review the document for what the employee did not write and to draw conclusions from what is not included in the document.

b. *EEOC, not employee, control*

The Government claims that Petitioner's position unfairly holds employees responsible for "conduct outside [their] control." U.S. *Amicus* Br. 7. Yet the Government's proposed rule does the same thing. It gives to its many field agents the duty of inferring intent from a submitted document, which, according to the 2007 guidance memorandum, they are free to do "from a plain reading of the correspondence." U.S. *Amicus* Br. 7a. The EEOC "does not make a determination whether a submission is a charge until it has reviewed the information and concluded that it meets the form and content requirements of its regulations and manifests the requisite intent." U.S. *Amicus* Br. 24. Whether or when an EEOC field agent reads an intake questionnaire to demonstrate "intent" is not in the control of the employee who submitted the document.[6]

---

[6] Other parts of the process are also inherently out of the employee's control. For instance, oral allegations of discrimination made via telephone or in person can constitute a (Cont'd)

Kennedy's intake questionnaire aptly illustrates how the determination of "intent" is in the eye of the beholder. For instance, the Government finds evidence of Kennedy's "intent" from a checked box on her intake questionnaire that she had not "filed an EEOC charge in the past." U.S. *Amicus* Br. 23. A field agent reviewing the file could just as easily find a lack of intent from that checked box, however, because Kennedy re-executed and re-submitted the same form—with the box still checked—two months after originally submitting it, which tends to show that Kennedy did not intend for or believe the questionnaire to be a charge when she submitted it in December 2001. JA 265; Resp. Br. 5. The Government also finds "intent" in Kennedy's checking of the box indicating consent to disclosure of her identity to her employer. U.S. *Amicus* Br. 23; JA 265. It is fair to conclude, however, that most would find a lack of "intent" from the lengthy expression of concern about confidentiality in the attached affidavit: "I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential . . . ." JA 266; *see also* U.S. *Amicus* Br. 4. In fact, a finding of no intent is consistent with the EEOC's Compliance Manual, which indicates that a document "express[ing] concerns about confidentiality" is not a charge. *See* 1 EEOC Compl. Man. § 2.2(b).

(Cont'd)

charge only if they are reduced to writing. 29 C.F.R. § 1626.8. Whether such allegations are reduced to writing, however, and, if so, whether that writing accurately reflects the caller's intent, are within the EEOC's, not the employee's, control.

Because the "beholder" in these circumstances is the EEOC, not the employee, the Government's proposed "intent" test would also hold employees responsible for conduct outside their control.

c. Inconsistency

While the Government presents its test as a means of avoiding inconsistent treatment of similar documents, *see* U.S. *Amicus* Br. 13, in reality it virtually guarantees such inconsistent treatment. In this very case, the same document has been viewed differently by different parties allegedly applying an "intent" test. Kennedy submitted a Form 283 "Intake Questionnaire." Unlike a Form 5 "Charge of Discrimination," the intake questionnaire used by Kennedy does not contain an implied request that the EEOC initiate an ADEA action by giving notice and attempting conciliation. *See* Pet. Br. 4. Instead, it implies a request only for "pre-charge filing counseling" and determination of jurisdiction. *See id.*[7]

It is unsurprising, then, that field agents twice did not treat Kennedy's intake questionnaire as a charge, a determination with which the District Court agreed.

---

[7] According to the Government, it has changed its questionnaire form to indicate that it is used for "charge filing counseling," rather than for "pre-charge filing counseling," and that it will be deemed a charge if it is the only timely document available. *See* U.S. *Amicus* Br. at 3 n.2. Even this new language, however, implies a request only for counseling, not to proceed with an ADEA action by proceeding with a charge. And while the new form does state that it will be a "charge" in certain circumstances, it fails to advise employees that the EEOC must give prompt notice of the questionnaire to their employers.

Yet the Second Circuit below and the Government before this Court purport to apply the "intent" test to the same document and see things differently. Meanwhile, the Eleventh Circuit Court of Appeals applied an "intent" test to an intake questionnaire virtually identical to Kennedy's and found that it was not a charge. *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1240–41 (11th Cir. 2004). The Court should not enshrine a test that yields results, like these, that are "all over the map."

d. *Manipulability*

Finally, regardless of how it is posed, the Government's intent test is plainly subject to manipulation because it allows the "intent" underpinning a document to be determined well after the document's submission, rather than "promptly." *See also supra* Part II.B.1. For instance, in this case, the EEOC did not treat Kennedy's intake questionnaire as a charge when it was first submitted in December 2001, nor when it was resubmitted in February 2002. Five years later—and after the Court had decided to review the matter—the EEOC changed its mind, indicating in a memorandum that it had twice handled Kennedy's intake questionnaire incorrectly and that the questionnaire had been a charge all along. The potential for *post hoc* application of the Government's proposed test prevents an EEOC decision from ever being final because the EEOC can change its determination about whether a document constitutes a charge at any stage.[8] This unfettered discretion is

[8] Furthermore, courts will review the EEOC's determination and decide for themselves "from a plain reading (Cont'd)

certainly an advantage to the EEOC—and a likely reason for the Government's advocacy of an "intent" test. The shifting nature of a document's status, however, benefits neither the employee nor the employer and certainly does not fulfill Congress' intent to require prompt notice and conciliation.

For good reasons, exemplified by the specific document in this case, neither Petitioner, nor Respondents, nor any of the other *amici* support a rule that involves intent.[9] Only the Government advocates the test, which runs contrary to the language and purpose of the ADEA.[10] If the Government can accept a

(Cont'd)
of the document" what an employee intended. Different courts will decide the question differently, due to the inherently vague nature of the exercise.

[9] Although Petitioner did not object to the use of the so-called "manifest intent test" below or in *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004), it cannot now support a test that is unfaithful to the text and purpose of the ADEA, particularly after experiencing first-hand the vagaries of its application and increasingly evident inconsistencies.

[10] It is ironic that the Government proposes this unworkable test, when the EEOC could easily promulgate a set of forms clearly indicating what is, and what is not, a "charge" within the meaning of the ADEA. For example, the EEOC could use one preliminary form indicating that it *will not* result in notice and efforts at conciliation and, accordingly, *will not* satisfy the charge-filing requirements of § 626(d), and a second form indicating that it *will* result in notice to the employee's employer and the initiation of informal resolution, such that it *will* satisfy the charge-filing requirements of § 626(d). Rather than taking
(Cont'd)

"functional definition" using an employee's intent, it should not object to the functional definition included in the statute, which requires notice and an opportunity for informal resolution. The Court should reject the Government's proposed "intent" test.

C. Respondents' rudimentary definition of a charge ignores the text, structure, and purpose of the ADEA.

The Court should also reject Respondents' proposed rule, which would grant the status of "charge" to any document satisfying the minimal requirements specified in 29 C.F.R. §§ 1626.6 and 1626.8(b). Resp. Br. 18–19. This rule is both unworkable and unfaithful to the statute.

First, like the Government's proposed "intent" rule, Respondent's proposed "form and content" rule would illegitimately permit courts to determine that the charging requirements of § 626(d) have been met even where the employer has received no notice and no attempts at informal resolution have been made. Second, Respondents' rule reads two regulations specifying the *form* and *contents* of a charge as though those regulations were intended to exhaust what a charge *is*. Resp. Br. 18. This reading is inconsistent with the text

(Cont'd)

such simple steps to clarify the issue, however, the EEOC has actually made it more confusing. *See supra* Section II.B.1; *supra* note 7; *cf. Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988) ("We hope that in the future the EEOC will give better assistance to employees that will avoid needless disputes over what should be simple, uncomplicated procedures.").

of the regulations themselves. Only 29 C.F.R. § 1626.3 purports to state what the term "charge" "means," but its requirements are so minimal that neither Respondents nor the Government argue that it exhausts what a charge "is."[11] The other regulations address only the "form," and "contents" of a charge, without purporting to state what a charge "is." *See* 29 C.F.R. §§ 1626.6, 1626.8. In addition, Respondent's reading is inconsistent with the position of the promulgating agency that something more—admittedly, a "something more" with which Petitioner profoundly disagrees—is required for a charge.[12]

---

[11] Indeed, Section 1626.3 defines "charge" and "complaint" in the same way, except that a "complaint" is whatever is not a charge. *See* 29 C.F.R. § 1626.3. Thus, Section 1626.3 can never, by itself, identify a "charge." *See* 29 C.F.R. § 1626.3; U.S. *Amicus* Br. 14–15 n.5; *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79–80 (7th Cir. 1992) (understanding the regulations to say that an intake questionnaire is, quite simply, a "complaint," distinguishable from a charge by its failure to result in notice to the employer).

[12] Petitioner and the Government agree that "something more" is required but disagree as to what that "something more" must be. If the Court were ever to craft a rule under which the "something more" could be anything other than the notice and opportunity for conciliation required by Congress, as argued by Petitioner, it should craft a rule requiring *objective* evidence that the document should have been treated as a charge at the time it was submitted, rather than the shockingly unreliable indicia of "intent" proposed by the Government. The best such evidence would be use of the Form 5 "Charge of Discrimination." Concrete evidence of contemporaneous communications from the EEOC that the document would function as a charge through notice and conciliation or that the employee expressly requested that it so function might also be considered in rare circumstances. No such evidence is presented by the record in this case.

Third, Respondents' "form and contents" rule gives no credence to the legitimate concern about "intake counseling" underlying the flawed "intent" rule proposed by the Government. The Government is so concerned about maintaining an intake counseling process that it has articulated an extra-regulatory "intent" rule to ensure that not every document with the form and contents specified in 29 C.F.R. §§ 1626.6 and 1626.8 is treated as a charge. *See* U.S. *Amicus* Br. 18 (articulating important reasons not to treat every such submission as a charge). Respondents' "content" rule leaves no room for such intake counseling. Indeed, Respondents' rule would go much further in manufacturing "charges" than even the opinion of the Second Circuit, which, like the Government's proposed rule and that of the great majority of courts, *see* Pet. 15–18, requires more than mere form and contents, *see id.* at 15a.

For all these reasons, the Court should decline Respondents' invitation to foist the status of "charge" on every document meeting the minimal requirements of 29 C.F.R. §§ 1626.6 and 1626.8.

III. REQUIRING NOTICE AND CONCILIATION BEFORE SUIT DOES NOT UNFAIRLY INFRINGE ON EMPLOYEES' RIGHTS.

The Court should give no credence to the alarmist defense raised by Respondents and their *amici*, who claim that employees will lose their rights to have their claims heard on the merits if the statute's requirement that notice and conciliation occur before suit is brought is strictly enforced. These arguments are not applicable under the facts in the instant case. Moreover, it is not

necessary for this Court to disregard Congress' intent in order to remedy any unfairness because equitable doctrines already exist to address the rare case where an employee's right to sue is unfairly foreclosed by the EEOC's failure to treat a particular document as a charge.

A. Kennedy's claim would not have been "eliminated" by requiring all of the requirements of § 626(d) to be met before she could bring suit.

Respondents and their *amici* are incorrect in asserting that Kennedy's right to file suit would have been "eliminated" had the notice and conciliation requirements of § 626(d) been enforced in this case.

Kennedy filed a Form 5 "Charge of Discrimination" with the EEOC that resulted in notice to FedEx. JA 275. Her counsel, however, filed this lawsuit before Kennedy filed her charge, which dictated dismissal of the lawsuit under the statute. 29 U.S.C. § 626(d) ("*No civil action may be commenced* by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.") (emphasis added).

Had Kennedy's counsel simply dismissed the premature lawsuit, he could have re-filed suit on the basis of Kennedy's Form 5 "Charge of Discrimination" after the expiration of the sixty-day notice and conciliation period (assuming the informal methods of resolution were unsuccessful). Kennedy's counsel never

filed suit based on Kennedy's Form 5 "Charge of Discrimination."

Accordingly, Kennedy's claim was not and would not have been "eliminated" by enforcement of the notice and conciliation provisions of the ADEA. Rather, her claim is now barred only because of her counsel's decision not to file suit based on her charge.

B. Existing equitable remedies are sufficient to address the rare exception when an employee's rights may be unfairly forfeited by the EEOC's inaction.

Although it may be possible for exceptional circumstances—not present in this case—to arise in which an employee's claim might be barred by the EEOC's failure to give notice of a particular document, it is unnecessary for this Court to ignore the statutory requirements for a "charge" to deal with such rare circumstances. Congress made clear in its 1978 amendments to the ADEA that equitable doctrines apply to the charge-filing requirements of § 626(d), and equitable doctrines, in particular equitable tolling, already exist to address any unfairness that might result from strict enforcement of § 626(d)'s notice and conciliation requirements.

Generally, no unfairness would result if the EEOC failed to give notice and conciliation of a document that fully met its requirements for the form and contents of a charge because the employee could simply submit another document, which the EEOC could then treat as a charge by providing prompt notice to the employer

and an opportunity for conciliation. In those occasional circumstances where such a subsequent document would be untimely because the 180- or 300-day limit for filing a charge has passed, however, the availability of equitable tolling in appropriate circumstances gives the employee ample opportunity to "redress [her] grievance[]" by equitably extending the time in which she may file another charging document. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).[13] Accordingly, Respondents and the Government err in asserting that enforcement of the ADEA's notice requirement raises a due process concern. *See* Resp. Br. 34; U.S. *Amicus* Br. 26–27.[14]

Because equitable doctrines are exactly that—equitable—they provide the necessary means for balancing between fairness to the employee and fairness to the employer. As this Court has previously said in the context of Title VII, the application of equitable doctrines in appropriate circumstances "honor[s] the remedial

---

[13] Equitable tolling was unnecessary in the present case, however, because Kennedy's May 2002 Form 5 "Charge of Discrimination," which resulted in notice to FedEx, was filed within 300 days of the alleged discrimination and was, therefore, timely for purposes of the ADEA.

[14] Moreover, an employee who has not filed a Form 5 "Charge of Discrimination" has not done everything in her "power" to bring suit as required by statute and the EEOC. *See Logan*, 455 U.S. at 444 (Powell, J., concurring). Thus, even if that employee's claim were barred, she has been deprived of no property interest. *See id.* at 437 (majority opinion) ("The State may erect reasonable procedural requirements for triggering the right to an adjudication.").

purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982). In light of the existing equitable doctrines in place to address any potential unfairness in the ADEA, this Court should reject the invitation of Respondents and their *amici* to "negat[e] the particular purpose of the filing requirement," *Zipes*, 455 U.S. at 398, by ignoring the notice and conciliation requirements of § 626(d).

CONCLUSION

For the foregoing reasons, the Second Circuit's decision should be reversed with instructions to affirm the district court's decision dismissing the claims of Kennedy and those Respondents attempting to piggyback on Kennedy's intake questionnaire.

Respectfully submitted,

ROBERT K. SPOTSWOOD
KENNETH D. SANSOM
EMILY J. TIDMORE
SPOTSWOOD SANSOM & SANSBURY LLC
940 Concord Center
2100 Third Avenue North
Birmingham, AL 35203
(205) 986-3620

WALTER E. DELLINGER
PAMELA HARRIS
JONATHAN HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5319

CONNIE LEWIS LENSING
Counsel of Record
R. JEFFERY KELSEY
EDWARD J. EFKEMAN
FEDERAL EXPRESS CORPORATION
LEGAL DEPARTMENT, LITIGATION
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125-8800
(901) 434-8432

Counsel for Petitioner