No. 15-1248

In the Supreme Court of the United States

MCLANE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
IRVING L. GORNSTEIN
Counselor to the Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

JAMES L. LEE
Deputy General Counsel
JENNIFER S. GOLDSTEIN
Associate General Counsel
MARGO PAVE
Assistant General Counsel
JAMES M. TUCKER
Attorney
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether a court of appeals should review for abuse of discretion or de novo a district court's decision concerning whether to enforce an administrative subpoena issued by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulations and rules: Page

In the Supreme Court of the United States

No. 15-1248

MCLANE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 804 F.3d 1051. The opinion and order of the district court (Pet. App. 18-33) is not published in the *Federal Supplement* but is available at 2012 WL 5868959.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2015. A petition for rehearing was denied on January 22, 2016 (Pet. App. 34). The petition for a writ of certiorari was filed on April 4, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

1. a. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, prohibits employment practices that discriminate on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2, 2000e-3. Discrimination on the basis of sex includes discrimination "because of or on the basis of pregnancy." 42 U.S.C. 2000e(k).

An employer may violate Title VII through disparate treatment, which occurs when an employer intentionally treats "some people less favorably than others because of their race, color, religion, sex, or national origin." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). An employer may also violate Title VII through a facially neutral policy that has a disparate impact on employees of a particular race, color, religion, sex, or national origin and cannot be justified by "business necessity." *Ibid.*; 42 U.S.C. 2000e-2(k).

b. Congress assigned "[p]rimary responsibility for enforcing Title VII" to the Equal Employment Opportunity Commission (Commission or EEOC). *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984) (citing 42 U.S.C. 2000e-5(a)). The Commission's responsibilities "are triggered by the filing of a specific sworn charge of discrimination," *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 190 (1990), which can be filed by or on behalf of "a person claiming to be aggrieved" by an employment practice or can be filed by an EEOC Commissioner, 42 U.S.C. 2000e-5(b). A charge is sufficient so long as it contains "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. 1601.12(b); see 42 U.S.C. 2000e-5(b) ("Charges shall

be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.").

When a charge is filed, the Commission must notify the employer. 42 U.S.C. 2000e-5(b); see *Shell Oil*, 466 U.S. at 62. It must then investigate "to determine whether there is reasonable cause to believe that the charge is true." *University of Pa.*, 493 U.S. at 190 (internal quotation marks omitted) (discussing 42 U.S.C. 2000e-5(b)). If the EEOC finds a charge substantiated, it must notify the employer and "endeavor to eliminate" the discriminatory practice "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). If those methods are unsuccessful, the Commission "may bring [a civil suit] against the employer." *University of Pa.*, 493 U.S. at 191 (discussing 42 U.S.C. 2000e-5(f)(1)).

c. In order "[t]o enable the Commission to make informed decisions at each stage of the enforcement process," Title VII "confers a broad right of access to relevant evidence." *University of Pa.*, 493 U.S. at 191. It provides that the Commission shall "have access to, for the purposes of examination * * * any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by" Title VII and "is relevant to the charge under investigation." 42 U.S.C. 2000e-8(a).

Title VII enables the Commission to obtain the information to which it is entitled by "authoriz[ing] the Commission to issue a subpoena and to seek an order enforcing it." *University of Pa.*, 493 U.S. at 191 (citing 42 U.S.C. 2000e-9). The statute does so by authorizing the Commission to "exercise all of the powers conferred upon the National Labor Relations Board by 29

U.S.C. § 161," *Shell Oil*, 466 U.S. at 63; see 42 U.S.C. 2000e-9 ("For the purpose of all * * * investigations conducted by the Commission * * * section 161 of title 29 shall apply.").

Under those authorities, the agency may issue "subpenas requiring the attendance and testimony of witnesses or the production of any evidence." 29 U.S.C. 161(1). An employer that does not wish to comply may petition the Commission to revoke the subpoena on the ground that it "does not relate to any matter under investigation" or that it "does not describe with sufficient particularity the evidence whose production is required." *Ibid.*; see 29 C.F.R. 1601.16(b)(1) (setting forth procedures and deadlines). If the Commission rejects the petition for revocation and the employer still "refuse[s] to obey [the] subpena," the Commission may apply to a district court "to issue to such person an order requiring such person to appear before the" Commission to produce evidence, with "any failure to obey such order of the court" subject to the penalties of contempt. 29 U.S.C. 161(2).

d. In *Shell Oil*, *supra*, and *University of Pennsylvania*, *supra*, this Court explicated the standard for district courts to apply in determining whether to enforce EEOC subpoenas. Drawing from seminal cases addressing other administrative-subpoena schemes, the Court held that a district court should "satisfy itself that the charge is valid and that the material requested is 'relevant' to the charge," and "assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." *Shell Oil*, 466 U.S. at 72 n.26 (citing *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950)); see

University of Pa., 493 U.S. at 191 (same).[1] If the subpoena requirements are satisfied, the Commission has "an unqualified right to acquire [the] evidence" sought in the subpoena. *University of Pa.*, 493 U.S. at 192 (emphasis omitted).

This Court noted that the requirement of relevance to a charge—as opposed to relevance to possible misconduct, whether charged or not—was an important feature of Title VII. *Shell Oil*, 466 U.S. at 68. But it noted that this relevance requirement was "not especially constraining." *Ibid.* It explained that "courts ha[d] generously construed the term 'relevant,'" to "afford[] the Commission access to virtually any material that might cast light on the allegations against the employer." *Id.* at 68-69. That approach, the Court explained, was one that Congress had "implicitly endorsed" because after this judicial consensus developed, Congress chose to "leav[e] intact the statutory definition of the Commission's investigative authority," even as it made sub-

---

[1] Courts of appeals have understood the *Morton Salt* and *Powell* framework that *Shell Oil* adapted for subpoena-enforcement decisions under Title VII to also permit a district court to deny enforcement of a subpoena when an employer demonstrates that compliance would be unduly burdensome. See, *e.g.*, Pet. App. 8; *Burlington N. R.R.* v. *Office of Inspector Gen.*, 983 F.2d 631 (5th Cir. 1993) (citing *Morton Salt*); *United States* v. *Westinghouse Elec. Corp.*, 788 F.2d 164 (3d Cir. 1986) (citing *Morton Salt* and *Powell*); *EEOC* v. *Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc) (citing *Morton Salt*); see also *EEOC* v. *Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014); *NLRB* v. *American Med. Response, Inc.*, 438 F.3d 188 (2d Cir. 2006); *EEOC* v. *Citicorp Diners Club, Inc.*, 985 F.2d 1036 (10th Cir. 1993); *EEOC* v. *Maryland Cup Corp.*, 785 F.2d 471, 475 (4th Cir.), cert. denied, 479 U.S. 815 (1986); *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981).

stantial revisions to other portions of the enforcement scheme. *Id.* at 69.

2. a. For more than eight years, beginning in 2000, Damiana Ochoa worked in the position of "cigarette selector" for petitioner, a supply chain services company. Pet. App. 3; J.A. 49. Ochoa performed that job in a grocery distribution center in Arizona that was operated by petitioner's southwestern subsidiary, McLane Sunwest. Pet. App. 19. After more than seven years in her post, Ochoa took a maternity leave. *Id.* at 2-3; J.A. 32-35, 42, 50.

Ochoa sought to return to work three months later, in October 2007, but, according to Ochoa, was told she would not be allowed to return to her job unless she passed a strength test. Pet. App. 3; J.A. 42. According to Ochoa, at petitioner's direction, she took a strength test on three occasions, but was unable to pass. Petitioner then fired her. Pet. App. 3.

Ochoa promptly filed a charge of discrimination, alleging that her termination resulted from discrimination based on gender, as a result of pregnancy, in violation of Title VII, and further alleging that petitioner's use of strength tests for employees who had taken medical leave violated the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq*. See J.A. 41-43 (Ochoa's January 2008 charge). Ochoa explained in the charge that petitioner had advised her that "before returning to work, [she] had to take a" strength test; that she took the test on three occasions and did not pass; and that she "believe[d she] ha[d] been discriminated against because of [her] sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended." J.A. 42-43. She added that the strength test was "given to all employees returning to work from

a medical leave and all new hires, regardless of job position," and that she "believe[d] the test violates the Americans with Disabilities Act of 1990, as amended." J.A. 43.

The Commission notified petitioner of Ochoa's charge, J.A. 44-46, and began an investigation. In response to the Commission's inquiries, petitioner "disclosed that it uses the strength test at its facilities nationwide for all positions that are classified as physically demanding," and that it requires any employee returning from an absence of more than 30 days, and any job applicant, to pass a strength test as a condition of employment. Pet. App. 3. Petitioner also provided the Commission with "general information about the test and the individuals who had been required to take it at the Arizona subsidiary where Ochoa worked," including "each test taker's gender, job class, reason for taking the test, and score received (pass or fail)." *Ibid.*

Petitioner refused, however, to comply with the Commission's request for pedigree information that would enable the Commission to identify and contact individuals who had been required to take the test—specifically, the test-takers' names, social security numbers, last known addresses, and telephone numbers. Pet. App. 3; see J.A. 62-66 (August 2009 EEOC request for pedigree information). While petitioner's own records identified the test-takers using their names and social security numbers, petitioner removed that information from the records it provided and instead identified test-takers "only by an 'employee ID number' created solely for purposes of responding to the EEOC's investigation." Pet. App. 3-4; see J.A. 450, 475. And petitioner also "refused to disclose, for those

employees who had taken the test and were later terminated, when and why their employment was terminated." Pet. App. 4.

After learning that the strength-test requirements at petitioner's Arizona facility reflected a nationwide policy—with all of petitioner's grocery facilities using "the same test for the same purposes"—the Commission expanded its investigation, seeking data regarding petitioner's use of the strength test at petitioner's grocery facilities nationwide. Pet. App. 4. In addition, the Commission repeated its requests that petitioner provide test-takers' identifying information and petitioner's reasons for terminating the employees fired after taking strength tests. See J.A. 79-92 (August 2010 request concerning Ochoa charge and concerning investigation under the Age Discrimination in Employment Act); J.A. 379-391 (November 2010 request concerning Ochoa charge).[2]

Petitioner ultimately provided data concerning strength testing in its grocery facilities nationwide, com-

---

[2] In August 2010, after receiving initial disclosures concerning petitioner's use of strength tests, the Commission initiated an inquiry into whether the testing had an unlawful impact on older employees in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* See J.A. 79-81. Under the ADEA, the Commission need not receive a charge of discrimination before initiating an investigation. 29 U.S.C. 211(a), 626(a). After petitioner declined to provide test-takers' identifying information and other data in connection with the ADEA charge, the Commission sought that information through subpoena, see J.A. 169-182, and then filed a complaint seeking enforcement of the subpoena, see Pet. App. 5. The district court declined to enforce the portion of the ADEA subpoena requiring disclosure of identifying information, and the Commission did not pursue an appeal. See *id.* at 5 n.1.

parable to the data it had provided for the Arizona facility where Ochoa worked. Pet. App. 4; see J.A. 337, 340-342. But it "again refused to provide either pedigree information or, for those test takers who were ultimately terminated, the reasons for termination." Pet. App. 4.

The Commission issued a subpoena in its investigation of the Ochoa charge seeking identifying information for the individuals that petitioner had required to take strength tests, as well as information concerning the reasons for the terminations of those who were fired after taking strength tests. Pet. App. 4; J.A. 92-106 (February 2011 subpoena). Petitioner again refused to provide test-takers' pedigree information—insisting instead that the Commission should determine whether the strength test was a valid job requirement without speaking to those who had taken it. Pet. App. 4; J.A. 340-342. It also declined to provide information concerning the reasons for the terminations of employees fired after taking strength tests. Pet. App. 4.

The Commission filed suit, seeking an order enforcing the Ochoa investigation subpoena. The Commission explained that the pedigree information it sought was relevant to whether petitioner engaged in gender discrimination through either disparate treatment or the use of a policy with an unlawful disparate impact. See J.A. 464, 505-506, 508-509. It explained that in order to assess the strength test, it was "important for the EEOC to be able to talk to actual people who took the test, whether they're men or women." J.A. 506. Such contact would shed light on whether the strength test was "being equally applied to all individuals." J.A. 508. In addition, the Commission explained, information from those who took the test was important to

assessing petitioner's contention that the test did not exert an impermissible disparate impact because it "measures actual work functions." J.A. 509; see *ibid.* ("[I]t makes sense that the EEOC would want to talk to people who actually perform these functions at their job to see if in fact this is the type of test that would measure what they do.").[3]

b. In a written opinion, the district court declined to enforce the Commission's subpoena insofar as it sought test-takers' identifying information. Pet. App. 18-33. The court wrote that there was "little dispute that Ochoa is an 'aggrieved party' within the meaning of [Title VII] and that the charge gives the E.E.O.C. jurisdiction to investigate [whether] the [test] discriminates on the basis of gender." *Id.* at 25.

The district court concluded, however, that test-takers' pedigree information was "not relevant at this stage to a determination of whether the [test] systematically discriminates on the basis of gender." Pet. App. 29. The court wrote that the Commission could analyze whether the test was discriminatory without contacting test-takers because "[t]he addition of the gender variable" to test data "will enable the E.E.O.C. to determine whether the [test] systematically discriminates on the basis of gender" using statistical analysis. *Ibid.* It suggested that if statistical analysis indicated

---

[3] The Commission also submitted a sworn affidavit from an official overseeing the office responsible for the investigation of Ochoa's charge, noting that the data the Commission had received from petitioner indicated a substantial disparity in strength-test outcomes for male and female employees—with slightly more than 88% of males passing, while just under 60% of females did so. J.A. 485; see J.A. 479-486. That difference satisfied the gauge of disparate impact known as the "four-fifths" rule. J.A. 485-486; see 29 C.F.R. 1607.4(D) (explaining "four-fifths" rule).

a disparate impact, "[a]t that point, pedigree information may become relevant to an investigation and the [Commission] may find it necessary to seek such information." *Id.* at 30.[4]

Without addressing the parties' arguments concerning the portion of the Commission's subpoena seeking disclosure of the reasons for the terminations of the employees who were fired after taking strength tests, the district court did not order disclosure of those reasons.[5] See Pet. App. 32-33.

c. A unanimous panel of the court of appeals reversed the district court's decision in part, vacated the decision in part, and remanded for further proceedings. Pet. App. 1-17.

The court of appeals noted that under circuit precedent, it reviewed "the district court's resolution of these issues de novo." Pet. App. 8. It observed, however, that "[w]hy we review questions of relevance and undue burden de novo is unclear." *Id.* at 8 n.3. It noted that in the "related context" of reviewing protective orders on the scope of an administrative subpoena, it applied abuse-of-discretion review. *Ibid.* (citing *McLaughlin* v. *Service Emps. Union, AFL-CIO, Local 280*, 880

---

[4] The district court dismissed the statistical evidence of disparate impact that the Commission put before the court on the ground that petitioner "has not yet produce[d] all of the requested information" to the EEOC, "most importantly whether an adverse employment decision occurred within 90 days of taking the test." Pet. App. 30 n.1.

[5] The district court also concluded that the Commission was not entitled to seek evidence of disability discrimination based on Ochoa's charge because Ochoa neither claimed to be disabled nor stated that she brought her charge on behalf of a disabled person. Pet. App. 25-27. The Commission did not appeal that portion of the district court's decision. *Id.* at 5 n.1.

F.2d 170, 174 (9th Cir. 1989)). And it observed that other courts "appear to review issues related to enforcement of administrative subpoenas for abuse of discretion." *Ibid.*

The court of appeals then concluded that the district court had erred in refusing to enforce the subpoena for pedigree information on the ground that the information was "not relevant at this stage of the EEOC's investigation." Pet. App. 9. To the contrary, the court of appeals explained, in an investigation of a charge "that [petitioner's] use of the strength test discriminates on the basis of sex," contacting others "who have taken the test to learn more about their experiences" would "cast light on the allegations against [petitioner]—whether positively or negatively." *Id.* at 10. "To take but one example," the court explained, the Commission "might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not." *Ibid.* Alternatively, the court noted, it "might learn the opposite." *Ibid.* "Either way," the court explained, "the EEOC will be better able to assess whether use of the test has resulted in a 'pattern or practice' of discrimination." *Ibid.*

The court of appeals explained that the contrary conclusions of petitioner and the district court rested on misapprehensions of statutory standards or of Ochoa's charge. Petitioner's contention that the pedigree information was irrelevant because Ochoa's charge alleged only "disparate impact" was "wrong," the court explained, because Ochoa's charge alleged sex discrimination through use of the strength test, but "does not allege discrimination based on any particular legal the-

ory, and it did not need to do so." Pet. App. 10-11 (citation omitted).

The court of appeals next rejected petitioner's contention that pedigree information enabling the Commission to contact those who took the test was not "relevant" to Ochoa's charge because "given all of the other information [petitioner] has produced, the EEOC cannot show that production of the pedigree information is 'necessary' to complete its investigation." Pet. App. 11. The court explained that this argument misconstrued the governing legal standard, which is relevance, "not 'necessity.'" *Ibid.*; see *ibid.* ("The EEOC does not have to show a 'particularized necessity of access, beyond a showing of mere relevance,' to obtain evidence.") (quoting *University of Pa.*, 493 U.S. at 188).

The court of appeals explained that the district court's conclusion that the pedigree information was irrelevant rested upon a similar, "invalid" conception of relevance. Pet. App. 12. It noted the district court had reasoned that the pedigree information sought by the EEOC was "irrelevant 'at this stage'" because the EEOC could first conduct a statistical analysis "to determine whether the [strength test] systematically discriminates on the basis of gender." *Ibid.* (brackets in original). In other words, the court explained, the district court appeared to find the pedigree information irrelevant on the theory "that the EEOC did not really need pedigree information to make a preliminary determination as to whether the use of the strength test has resulted in systemic discrimination." *Ibid.* That was error, the court of appeals explained, because "[t]he EEOC's need for evidence—or lack thereof—simply does not factor into the relevance determination." *Ibid.*

Finally, in rejecting petitioner's request to withhold social security numbers, the court of appeals observed that those identifiers would "help[] the EEOC determine whom to contact to learn more about [petitioner's] use of the test," and that petitioner did not press an undue burden argument. Pet. App. 14. Accordingly, the court concluded, the EEOC was entitled to the pedigree information it sought. *Ibid.*

As to the second class of information in dispute—petitioner's reasons for terminating employees who had taken strength tests—the court of appeals vacated the district court's decision and remanded the case. Pet. App. 15-16. The court noted that the district court had not addressed the parties' arguments concerning that data, which involved whether production would constitute an undue burden, and concluded that the district court should consider those arguments in the first instance.[6] *Id.* at 14-15.

SUMMARY OF ARGUMENT

A district court's decision on whether to enforce a Title VII administrative subpoena is subject to abuse-of-discretion, rather than de novo, review. The Ninth Circuit correctly ordered enforcement of the EEOC's subpoena for pedigree information in this case, however, because the district court's refusal to enforce the subpoena rested on a legal error, and, under the correct legal standard, refusing to enforce the subpoena would constitute an abuse of discretion.

I. Absent an "explicit statutory command," whether a district court's decision is subject to deferential or

---

[6] In a concurrence, Judge Milan D. Smith urged the EEOC to consider precautions to safeguard sensitive identity information, such as social security numbers. Pet. App. 16-17.

more searching review depends on the "history of appellate practice" and on considerations related to "the sound administration of justice." *Pierce* v. *Underwood*, 487 U.S. 552, 558-560 (1988). A history of appellate practice, reinforced by statutory text and by considerations of the sound administration of justice, supports abuse-of-discretion review of district courts' subpoena-enforcement decisions under Title VII.

A. Courts of appeals have all but uniformly applied abuse-of-discretion review to subpoena-enforcement decisions under the NLRA and Title VII, as well as to enforcement decisions under similar administrative-subpoena provisions. And courts likewise apply deferential review to enforcement decisions concerning pretrial and grand jury subpoenas. That established appellate tradition is a strong indication that abuse-of-discretion review governs decisions regarding whether to enforce EEOC subpoenas issued under Title VII.

The text of Title VII, when read in light of judicial precedent, confirms that an abuse-of-discretion standard applies. Congress directed that the NLRA's subpoena-enforcement procedures should apply to subpoena enforcement under Title VII, 42 U.S.C. 2000e-9, at a time when the NLRA was uniformly construed to impose abuse-of-discretion review on subpoena-enforcement decisions. Because Congress is presumed to be familiar with relevant judicial precedent, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982), Congress's decision to incorporate NLRA procedures is strong evidence that Congress intended that abuse-of-discretion review should govern subpoena enforcement under Title VII, as well.

B. Abuse-of-discretion review is also consistent with "the sound administration of justice." *Pierce*, 487 U.S. at 559.

Issues related to subpoena enforcement turn largely on the sorts of case-specific assessments for which searching appellate review would provide only limited benefits. With respect to relevance, whether specific materials "might cast light on the allegations against the employer" contained in a charge, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 69 (1984), involves consideration of the relationship between particular materials being sought from a particular employer and the particular matter under investigation. It thus involves the type of "fact-intensive" assessment of "unique factors" that is best suited to the district courts, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990), particularly because of the "impracticability of formulating a rule of decision" concerning subpoena enforcement, *Pierce*, 487 U.S. at 561, beyond the standard provided in *Shell Oil*. Other issues, such as whether a subpoena imposes an undue burden, involve similarly case-specific judgments.

De novo review would also lead to a greater number of appeals, delaying the resolution of cases. But quick resolution of subpoena-enforcement actions is integral to administrative-subpoena schemes, because delays in the enforcement of subpoenas impede investigations and undermine enforcement of the underlying statute. Indeed, this Court has made clear that interpretations of Title VII that "substantially slow the process by which the EEOC obtains judicial authorization to proceed with [subpoena-based] inquiries," are inconsistent with the statute's objectives. *Shell Oil*,

466 U.S. at 81; see *University of Pa.* v. *EEOC*, 493 U.S. 182, 194 (1990).

II. The court of appeals' decision to order enforcement of the EEOC's subpoena for pedigree information without a remand was correct under an abuse-of-discretion standard of review.

A. The district court's refusal to enforce the EEOC's subpoena for identifying information concerning test-takers was an abuse of discretion because it rested on a legally "invalid" understanding of relevance. Pet. App. 12. The district court denied enforcement of the EEOC's subpoena for pedigree information because it concluded —as petitioner had asserted—that the EEOC did not yet need the information it sought. That was error because "[t]he EEOC's need for the evidence—or lack thereof—simply does not factor into the relevance determination." *Ibid.*

B. Under an abuse-of-discretion standard, there is no need for a remand when "the record permits only one resolution" of the issue at hand. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982). That standard is satisfied here, because, under the correct legal standard, a district court would abuse its discretion in finding irrelevant the information that would enable the EEOC to interview those who were subjected to the challenged employment practice.

Such information is relevant to investigating disparate treatment because contacting other test-takers would shed light on whether petitioner was using strength tests in the same manner for male and female employees, or was instead treating male and female (or pregnant and non-pregnant) individuals differently. Pet. App. 10. A pattern of treating female employees differently from male employees would "cast light,"

Shell Oil, 466 U.S. at 69, on the allegation of discrimination here, see, *e.g.*, *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

Information that would enable the Commission to contact test-takers is equally relevant to whether petitioner's strength-testing requirements exerted an unlawful disparate impact. Whether an employer's policy exerts an unlawful disparate impact depends in part on whether—as petitioner has consistently asserted—the employer's practice is justified by business necessity. Communication with those whom petitioner required to take strength tests is relevant to that determination because it sheds light on whether the strength tests that petitioner required are a fair gauge of the abilities that are necessary to work in petitioner's grocery division. Because the information sought by the EEOC was plainly relevant, the court of appeals properly ordered enforcement of the EEOC's subpoena.

ARGUMENT

District courts' decisions whether to enforce administrative subpoenas, including subsidiary determinations of relevance, are properly reviewed for abuse of discretion. But while the court of appeals therefore erred in applying de novo review to the subpoena-enforcement decision in this case, no remand is necessary here, because the court of appeals was correct to order enforcement of the EEOC's subpoena without further delay, even under an abuse-of-discretion standard.

I. A DISTRICT COURT'S DECISION WHETHER TO ENFORCE AN EEOC SUBPOENA IS PROPERLY REVIEWED FOR ABUSE OF DISCRETION

Pierce v. *Underwood*, 487 U.S. 552 (1988), set forth a framework for determining whether a district court's decision is subject to deferential abuse-of-discretion review or to more searching scrutiny. *Pierce* explained that questions of law are reviewed de novo, questions of fact are reviewed for clear error, and "matters of discretion" are reviewed for abuse of discretion. *Id.* at 558. When the abuse-of-discretion standard applies, it "does not preclude an appellate court's correction of a district court's legal or factual error," because "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Highmark, Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014) (quoting *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

Whether a determination is a matter of discretion, *Pierce* explained, will turn in "some few" cases on an "explicit statutory command"; "for most other[]" cases on "a long history of appellate practice," 487 U.S. at 558; and, otherwise, on indirect cues from the statutory framework and on consideration of whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question," *id.* at 559-560 (citation omitted). Under *Pierce*'s framework, abuse-of-discretion review appropriately governs decisions regarding whether to enforce EEOC subpoenas and subsidiary relevance determinations.

A. Longstanding Practice, Reinforced By Statutory Text, Supports An Abuse-Of-Discretion Standard

As *Pierce* noted, unless a decision is one of the "few trial court determinations" for which there exists a "clear statutory prescription," whether a determination is reviewed for abuse of discretion depends in most cases on historical practice. 487 U.S. at 558. Here, neither Title VII nor the National Labor Relations Act provisions that Title VII incorporates contains any "relatively explicit statutory command" concerning the standard of review, *ibid.*; see 42 U.S.C. 2000e-9; 29 U.S.C. 161(1)-(2). As a result, history properly informs the standard.

1. A "long history of appellate practice," *Pierce*, 487 U.S. at 558, supports abuse-of-discretion review for district courts' decisions regarding whether "the court's process" may be "invoked to enforce [an] administrative summons" requiring the production of records, *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

With respect to the NLRA, a consensus in favor of abuse-of-discretion review of subpoena-enforcement decisions was settled years before the NLRA's subpoena-enforcement provisions were incorporated into Title VII in 1972. The Sixth Circuit was the first court of appeals to conclude that abuse-of-discretion review governed determinations whether to enforce administrative subpoenas under the NLRA—holding just six years after the NLRA's enactment that "[t]he enforcement of the subpoena is * * * confided to the discretion of the District Court," and that appellate review "extends no further than the determination as to whether or not there was an abuse of [the district court's] discretion." *Goodyear Tire & Rubber Co.* v. *NLRB*, 122 F.2d 450, 453-454 (1941). The Seventh Circuit

followed suit four years later—holding that both the decision whether to enforce the subpoena and the subsidiary determination whether documents were "relevant" were subject to abuse-of-discretion review. *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (1945) (stating that abuse-of-discretion review applied to enforcement decision, before finding employer could not meet the "burden of showing an abuse of discretion" in part because the district court did not abuse its discretion in "conclud[ing] that the documents which the Board wanted to be produced were relevant"), cert. denied, 326 U.S. 731 (1945). And the Second and Third Circuits followed suit in 1968 and 1965, respectively. *NLRB* v. *Consolidated Vacuum Corp.*, 395 F.2d 416, 419-420 (2d Cir. 1968) ("The test on review here is 'abuse of discretion.'"); *NLRB* v. *Friedman*, 352 F.2d 545, 547 (3d Cir. 1965) (adopting *Goodyear*).

Courts of appeals have also all but uniformly applied abuse-of-discretion review to administrative-subpoena enforcement decisions under other federal statutes, including Title VII. See *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295-296 (3d Cir. 2010) (ADA case), rev'd and remanded, 694 F.3d 351 (3d Cir. 2012); *EEOC* v. *Randstad*, 685 F.3d 433, 442 (4th Cir. 2012) (Title VII case); *United States* v. *Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (administrative subpoena issued by Department of Interior); *EEOC* v. *Roadway Express, Inc.*, 261 F.3d 634, 638 (6th Cir. 2001) (Title VII case); *EEOC* v. *Quad/Graphics, Inc.*, 63 F.3d 642, 644-645 & n.1 (7th Cir. 1995) (Title VII case); *United States EEOC* v. *Technocrest Sys., Inc.*, 448 F.3d 1035, 1038 (8th Cir. 2006) (Title VII case); *EEOC* v. *Dillon Companies, Inc.*, 310 F.3d 1271, 1274 (10th Cir. 2002) (ADA

case); *FTC* v. *Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015) (Federal Trade Commission subpoena), cert. denied, 136 S. Ct. 925 (2016); see also *EEOC* v. *Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 760 (11th Cir. 2014) (per curiam) (ultimate decision whether to enforce subpoena in light of benefits and "such equitable criteria as reasonableness and oppressiveness" reviewed for abuse of discretion).[7] The Ninth Circuit is the only court of appeals to take a different approach—doing so with virtually no explanation and without consideration of either historical practice or the functional factors that this Court has also considered in standard-of-review analysis. *United States EPA* v. *Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 445-446 (1988).

Courts of appeals have also consistently applied deferential review to underlying relevance determinations

---

[7] No conflict exists between these decisions and the decisions recognizing that district courts should themselves defer to agency appraisal of relevance unless they are "obviously wrong." See, *e.g.*, *Director* v. *Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997); *RNR Enters. Inc.* v. *SEC*, 122 F.3d 93, 97 (2d Cir.), cert. denied, 522 U.S. 958 (1997); *EEOC* v. *Lockheed Martin Corp.*, 116 F.3d 110, 113 (4th Cir. 1997); *EEOC* v. *Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991). The principle that agency assessments of relevance are entitled to significant weight reflects that agencies responsible for conducting investigations in a given area have expertise in what will aid an investigation and that "[t]he scope of the investigation * * * is very much dependent on the agency's interpretation and administration of its authorizing substantive legislation concerning which the agency may enjoy interpretative deference," *Vinson & Elkins*, 124 F.3d at 1307 (citation omitted). But district courts' giving weight to agencies' expert views is not inconsistent with circumscribed appellate scrutiny of determinations that district courts make after according agency views appropriate respect.

in subpoena-enforcement actions—either reviewing for abuse of discretion or using the "clear error" test that this Court has described as comparably deferential. *Cooter & Gell*, 496 U.S. at 400-401 ("In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions. * * * When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable."). Compare *Kronos*, 620 F.3d at 295-302 (abuse-of-discretion review of relevance), *Roadway Express, Inc.*, 261 F.3d at 641 (same), *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 649 (7th Cir. 2002) (same), *Technocrest Sys., Inc.*, 448 F.3d at 1038 (same), and *EEOC* v. *Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1159 (10th Cir. 2012) (same), with *NLRB* v. *American Med. Response, Inc.*, 438 F.3d 188 (2d Cir. 2006) (clear-error review of relevance), *EEOC* v. *Packard Elec. Div.*, 569 F.2d 315, 317-318 (5th Cir. 1978) (same), and *FTC* v. *Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (same); cf. *Royal Caribbean Cruises, Ltd.*, 771 F.3d at 760 (suggesting a combination of review for legal error and clear-error review applies). Determinations of relevance at trial under Federal Rule of Evidence 401 are correspondingly reviewed for abuse of discretion. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 388 (2008); *Old Chief* v. *United States*, 519 U.S. 172, 174 n.1 (1997); *United States* v. *Abel*, 469 U.S. 45, 54 (1984).

2. The long history of abuse-of-discretion review for administrative-subpoena-enforcement decisions is reinforced by the treatment of similar forms of judicial process. This Court held in 1974 that abuse-of-

discretion review governs decisions whether to enforce pretrial subpoenas *duces tecum* under Rule 17—embracing the longstanding practice of the courts of appeals. *United States* v. *Nixon*, 418 U.S. 683, 702 ("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues."); see *ibid.* (citing *Sue* v. *Chicago Transit Auth.*, 279 F.2d 416, 419 (7th Cir. 1960); *Shotkin* v. *Nelson*, 146 F.2d 402 (10th Cir. 1944)); see also *United States* v. *Morris*, 451 F.2d 969, 971 (8th Cir. 1971) ("It * * * has long been the rule in this Circuit that compulsory process under" Rule 17 "is not an absolute right but, rather is a matter within the wide discretion of the trial court.") (citations omitted); *Samora* v. *United States*, 406 F.2d 1095, 1099 (5th Cir. 1969) (noting that "[t]he trial judge has wide discretion" in ruling on motions for trial subpoenas); *Margoles* v. *United States*, 402 F.2d 450, 451 (7th Cir. 1968) ("It is clear that a court has discretion to quash a subpoena *duces tecum* if compliance would be unreasonable.").

And courts of appeal have likewise concluded that abuse-of-discretion review applies to decisions whether to enforce grand jury subpoenas—a type of court process that is closely related to administrative subpoenas, *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 216-217 (1946) (describing function of administrative agency issuing subpoena as "essentially the same as the grand jury's"). See *In re Grand Jury Subpoena*, 138 F.3d 442 (1st Cir.), cert. denied, 524 U.S. 939 (1998); *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir.), cert. denied, 475 U.S. 1108 (1986); *In re Impounded*, 241 F.3d 308, 312 (3d Cir.

2001); *In re Grand Jury Subpoena*, 646 F.3d 159, 164 (4th Cir. 2011); *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012); *In re Grand Jury Subpoenas Duces Tecum*, 695 F.2d 363, 365 (9th Cir. 1982); *In re Grand Jury Proceedings*, 616 F.3d 1186, 1201 (10th Cir. 2010).

3. The text of Title VII reinforces this history. Title VII expressly incorporated the NLRA's subpoena-enforcement mechanisms—specifying that "[f]or the purpose of all * * * investigations conducted by the Commission * * * section 161 of title 29 shall apply," 42 U.S.C. 2000e-9—at a time when subpoena-enforcement decisions under the NLRA were uniformly understood to trigger abuse-of-discretion review. Congress is "presumed to be aware of an administrative or judicial interpretation of a statute." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982). Accordingly, when Congress "adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Ibid.* (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978)). Thus, in *Lorillard*, this Court concluded that when Congress specified that certain ADEA provisions should be enforced in accordance with the "powers, remedies, and procedures" in specified sections of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and "every court to consider the issue" when the ADEA was enacted had construed the FLSA to provide for jury trials, it was appropriate to treat those sections of the ADEA as incorporating a jury-trial right. 434 U.S. 580; see *id.* at 581-582 & n.7 (relying on three FLSA decisions predating ADEA enact-

ment); see also *Cannon* v. *University of Chi.*, 441 U.S. 677, 694-695 (1979) (finding support for a private remedy in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, because Title IX was "patterned after Title VI of the Civil Rights Act of 1964," and at the time of Title IX's enactment, judicial consensus indicated that Title VI contained a private remedy).

That principle applies here. As noted above, in the decades between the enactment of the NLRA's subpoena-enforcement mechanisms and the incorporation of those NLRA procedures into Title VII in 1972, every court of appeals to address the question had held that subpoena-enforcement decisions under the NLRA were reviewed for abuse of discretion. *Friedman*, 352 F.2d at 547; *Consolidated Vacuum Corp.*, 395 F.2d at 419-420; *Northern Trust Co.*, 148 F.2d at 29; *Goodyear Tire & Rubber*, 122 F.2d at 453-454. Congress's direction that the NLRA framework apply to subpoena enforcement under Title VII, against the backdrop of that uniform NLRA interpretation, is strong evidence that Congress intended abuse-of-discretion review for subpoena-enforcement decisions under Title VII.

B. The Sound Administration Of Justice Favors Abuse-Of-Discretion Review

Practical considerations reinforce that abuse of discretion is the appropriate standard of review for decisions concerning administrative-subpoena enforcement. In deciding whether to apply abuse-of-discretion review, *Pierce* examined whether, "as a matter of the sound administration of justice," a trial or appellate court "is better positioned * * * to decide the issue in question." 487 U.S. at 559-560 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)). The considerations on which

this Court has relied in making that assessment support abuse-of-discretion review of enforcement decisions concerning administrative subpoenas, including subsidiary determinations of relevance.

1. In considering whether to apply deferential review to a category of decisions, this Court has considered whether de novo appellate review would carry substantial "law-clarifying benefits," *Pierce*, 487 U.S. at 561, on the one hand, or would instead involve review of case-specific assessments that would "provide only minimal help" in future cases, *Buford* v. *United States*, 532 U.S. 59, 66 (2001). Less searching appellate review is warranted when decisions turn on "multifarious, fleeting, special, narrow facts that utterly resist generalization," *Pierce,* 487 U.S. at 561-562 (citation omitted)—in other words, "fact-intensive, close calls," based on "unique factors," *Cooter & Gell*, 496 U.S. at 404 (citations omitted). There, district courts may be better able to make sound judgments because they "see[] many more" individual claims than appellate courts and are therefore likely to have a better "understanding of the significance of case-specific details." *Buford*, 532 U.S. at 64-65. And intensive appellate review would have only modest value because it would be "impracticab[le] [to] formulat[e] a rule of decision for the matter in issue." *Pierce*, 487 U.S. at 561.

A district court's decision whether to enforce a subpoena, including its subsidiary relevance determination, rests on the sort of case-specific analysis that this Court has indicated counsels in favor of abuse-of-discretion appellate review. Whether specific materials "might cast light on the allegations against the employer" contained in a charge, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 69 (1984), depends on an analysis of the

relationship between particular materials being sought from a particular employer and the particular matter under investigation. Accordingly, the subpoena-relevancy inquiry is "variable in relation to the nature, purposes, and scope of the inquiry," *Oklahoma Press Publ'g Co.*, 327 U.S. at 209, rather than susceptible to general rules of any greater specificity than the *Shell Oil* standard, cf. *Sprint/United Mgmt. Co.*, 552 U.S. at 387 (explaining that whether a piece of evidence is relevant at trial under the Federal Rules of Evidence is "determined in the context of the facts and arguments in a particular case" and "generally not amenable to broad *per se* rules"); see also Fed. R. Evid. 401 advisory committee's note (28 U.S.C. App. at 864) ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.").

Additional matters that courts consider as part of subpoena-enforcement determinations are also highly case-specific. The questions whether a subpoena is "too indefinite," or "has been made for an illegitimate purpose," *Shell Oil*, 466 U.S. at 72 n.26, and the question whether a subpoena is or is not "unduly burdensome," see Pet. App. 8 (citation omitted), depend on inquiries regarding, respectively, a particular subpoena's language, evidence of improper motive in a particular case, and the burdens of producing particular evidence for a particular employer. Subpoena-enforcement decisions thus turn on "fact-intensive" assessments reflecting "multifarious, fleeting, special, narrow facts that utterly resist generalization," *Cooter & Gell*, 496 U.S. at 404 (quoting *Pierce*, 487 U.S. at 561-562). Accordingly, the "special competence of the district court" in con-

sidering "particular set[s] of individual circumstances" because of the "many more" cases they see, *Buford*, 532 U.S. at 64, and the few "law-clarifying benefits" from searching appellate review, *Pierce*, 487 U.S. at 561, both counsel against de novo review on appeal.

2. While *Pierce* stated that certain types of case-specific determinations might warrant de novo review on appeal because they are unusually consequential, 487 U.S. at 563 (discussing decisions that typically involve large monetary awards), decisions that involve the disclosure of information are not the type one would "expect * * * to be reviewed more intensively" solely because of their consequences, *ibid.* To the contrary, court orders that lead to the disclosure of information are commonly reviewed for abuse of discretion. As noted, *supra*, pp. 23-24, this Court has held that decisions whether to enforce trial subpoenas for documents in criminal cases are reviewable only for abuse of discretion, *Nixon*, 418 U.S. at 701, and this Court has applied the same standard to evidentiary rulings that control whether information is disclosed at trial (including determinations of relevance), *Sprint/United Mgmt. Co.*, 552 U.S. at 384. Settled practice likewise applies abuse-of-discretion oversight to district courts' discovery orders, see Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 4.11[4] (4th ed. 2010) (compiling cases), and decisions to enforce grand jury subpoenas, see *supra,* pp. 24-25.

3. In determining standards of review, this Court has also examined whether the more frequent appellate litigation that would result from a de novo standard would undermine a statute's objectives. See *Cooter & Gell*, 496 U.S. at 404. Thus, when considering awards of attorney's fees under the Equal Access to

Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), this Court drew support for an abuse-of-discretion standard from its determination that a request for fees under the statute "should not result in a second major litigation." *Pierce*, 487 U.S. at 563 (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)). And the Court similarly concluded in *Cooter & Gell* that "discourag[ing] litigants from pursuing marginal appeals" served the "policy goals" of Federal Rule of Civil Procedure 11, which the Court found supported "reducing the amount of satellite litigation" concerning sanctions. 496 U.S. at 404.

The delays that would result from searching appellate review of subpoena-enforcement decisions weigh heavily against de novo review, because of the importance of speedy enforcement to administrative-subpoena systems generally and Title VII specifically. Just as this Court found "strong governmental interests in * * * avoiding procedural delays" in enforcement of grand jury subpoenas because delays "would assuredly impede [the grand jury's] investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws," *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 299, 302 (1991), courts have consistently recognized that delays in enforcement of administrative subpoenas frustrate investigations and undermine enforcement, see, *e.g.*, *Goodyear Tire & Rubber*, 122 F.2d at 451 (concluding that enforcement proceedings should be "of a summary nature," in order to avoid "great delay" before the material sought by the agency is disclosed); *Bowles* v. *Bay of N.Y. Coal & Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945); see also, *e.g.*, *United Air Lines, Inc.*, 287 F.3d at 649; *EEOC* v. *Roadway Ex-*

press, Inc., 750 F.2d 40, 42 (6th Cir. 1984) (per curiam); *In re EEOC*, 709 F.2d 392, 396 (5th Cir. 1983).

Moreover, swift enforcement is a critical objective of Title VII itself. Congress made that clear by directing district courts to "assign [a Title VII] case for hearing at the earliest practicable date and to cause the case to be in every way expedited." 42 U.S.C. 2000e-5(f)(5); see 42 U.S.C. 2000e-6(b) (same). And this Court's decisions addressing subpoena enforcement under Title VII have correspondingly recognized that swift enforcement of subpoenas is an important part of the statute's design. Thus, in rejecting the robust notice requirements sought by an employer in *Shell Oil*, this Court emphasized that the proposed requirements were undesirable because they would lead to additional litigation that would "substantially slow the process by which the EEOC obtains judicial authorization to proceed with its inquiries." 466 U.S. at 81. The Court invoked its cautionary statement that "judicial review of early phases of an administrative inquiry results in 'interference with the proper functioning of the agency,' and 'delay[s] resolution of the ultimate question whether the Act was violated.'" *Id.* at 81 n.38 (brackets in original) (quoting *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 241-243 (1980)). And the Court warned against opening avenues that would "place a potent weapon in the hands of employers * * * who wish * * * to * * * delay as long as possible investigations by the EEOC." *Id.* at 81. *University of Pennsylvania* v. *EEOC*, 493 U.S. 182 (1990), likewise emphasized that litigation delays undercut Title VII enforcement—concluding that a proposal that the Commission be required to "demonstrate a 'specific reason for disclosure'" of information was

undesirable because it would amount to a "litigation-producing obstacle" that might result in delays that "frustrate[] the EEOC's mission." *Id.* at 194.

Indeed, more frequent satellite litigation undermines Title VII not only because of the delays that satellite litigation engenders but also because of the resources that it consumes. This Court has explained that "[t]he 'primary objective' of Title VII is to bring employment discrimination to an end." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982) (citation omitted). The EEOC, it has noted, bears "[p]rimary responsibility" for achieving that objective, *Shell Oil*, 466 U.S. at 61-62, through the use of a "multi-step procedure" of investigation, conciliation and (if necessary) filing discrimination suits, *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1647 (2016). Because the Commission has finite resources, however, see, *e.g.*, J.A. 481 (noting Commission's Phoenix office had 26 investigators to investigate about 3200 charges per year), rules that encourage "marginal appeals" spawning "satellite litigation," *Cooter & Gell*, 496 U.S. at 404, diminish the resources available for the agency's core enforcement responsibilities.

Finally, an abuse-of-discretion standard does not impair Title VII's operation by preventing effective appellate oversight or necessitating a surfeit of remands for district courts to exercise discretion. When a district court applies a relevance standard other than the "not especially constraining" rule of *Shell Oil*, 466 U.S. at 66, abuse-of-discretion review permits the court of appeals to correct that error of law, *Highmark*, 134 S. Ct. at 1748 n.2 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law") (citation omitted). And because

Title VII's relevance standard reaches "virtually any material that might cast light on the allegations against the employer," *Shell Oil*, 466 U.S. at 68-69, when the usefulness of subpoenaed information to an investigation is plain—so that a district court would abuse its discretion by finding irrelevance—courts can (and do) order subpoenas enforced without the further delay of a remand. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982) (explaining that there is no need for a remand when "the record permits only one resolution" of a question); see also, *e.g.*, *Randstad*, 685 F.3d at 448; *Kronos*, 620 F.3d at 299; *EEOC* v. *United Parcel Serv.*, 587 F.3d 136, 139-140 (2d Cir. 2009). Abuse-of-discretion review therefore does not lead to inappropriate divergence in the legal principles governing Title VII actions or to frequent delay based on a need for remands.

II. ENFORCEMENT OF THE EEOC'S SUBPOENA FOR PEDIGREE INFORMATION WAS PROPER UNDER AN ABUSE-OF-DISCRETION STANDARD

The court of appeals' decision to order enforcement of the EEOC's subpoena without a remand was correct under an abuse-of-discretion standard of review. Because the district court applied an incorrect understanding of relevance in refusing to enforce the EEOC's subpoena on relevance grounds, the district court's decision was an abuse of discretion. See *Highmark*, 134 S. Ct. at 1748 n.2; *Koon* v. *United States*, 518 U.S. 81, 100 (1996). And because, in addition, a court would abuse its discretion by concluding that the pedigree information sought by the EEOC did not satisfy the liberal *Shell Oil* standard of relevance, no remand for further proceedings is necessary. See *Swint*, 456 U.S. at 291-292.

A. The District Court Abused Its Discretion When It Declined To Enforce The EEOC's Subpoena For Pedigree Information Based On An Erroneous Understanding Of Relevance

The district court's refusal to enforce the EEOC's subpoena for pedigree information on relevance grounds was an abuse of discretion because, as the court of appeals observed, it rested on a misunderstanding of the legal standard of "relevance" under Title VII. Pet. App. 12; see *Koon*, 518 U.S. at 100 (explaining that the "abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions" because a district court "by definition abuses its discretion when it makes an error of law"). Before the district court, the Commission explained that test-takers' identifying information was relevant because it would shed light on whether petitioner's strength test reflected actual job requirements (as relevant to disparate impact), and whether petitioner applied the testing regime evenhandedly to men and women (as relevant to disparate treatment). J.A. 506-509. Petitioner advanced a different conception of relevance, asserting that pedigree information was not relevant because it was not necessary to the EEOC's investigation. J.A. 518 ("They don't need it on a disparate treatment test, and they don't need it on a disparate impact."); J.A. 517 (contending that the EEOC could "run a disparate impact analysis" with the data that petitioner had already produced concerning "gender[,] test dates[,] reasons for test[,] the results of the test" and whether an adverse job action occurred within 90 days).

The district court adopted petitioner's legal approach, concluding that the pedigree information

sought by the EEOC was not relevant because the EEOC could conduct its investigation by first performing statistical analysis of the testing requirement. Pet. App. 28-30. It reasoned that test-takers' information was "not relevant *at this stage* to a determination of whether the [strength test] systematically discriminates on the basis of gender" because "[t]he addition of the gender variable will enable the E.E.O.C. to determine whether the [strength test] systematically discriminates on the basis of gender." *Id.* at 29 (emphasis added). It then stated that after the Commission made that preliminary determination, "pedigree information may *become* relevant to an investigation and the [Commission] may find it necessary to seek such information." *Id.* at 30 (emphasis added).[8]

As the court of appeals explained, the district court's basis for deeming pedigree information irrelevant was "invalid," Pet. App. 12, because it rested on a mistaken understanding of the legal standard for relevance. While the district court "appeared to conclude that the EEOC did not really *need* pedigree information to make a preliminary determination as to whether use of the strength test has resulted in systemic discrimination" because the EEOC could first use statistical analysis to shed light on the charge, "[t]he EEOC's need for the evidence—or lack thereof—simply does

---

[8] The district court also dismissed the evidence the Commission submitted of a significant statistical disparity in strength-test results for male and female test-takers, see p. 10 note 3, *supra*, on the grounds that petitioner was still in the process of producing information to the Commission, Pet. App. 30. The district court did not separately address the Commission's explanation that the pedigree information was relevant to determining whether petitioner implemented its strength-test program in a manner that constituted disparate treatment. *Id.* at 28-30.

not factor into the relevance determination." *Ibid.* (emphasis added). That is plain from *Shell Oil*, which imposed no necessity test and instead explained that the EEOC was entitled to use subpoenas to obtain "virtually any material that might cast light on the allegations against the employer." 466 U.S. at 68-69. And it is reinforced by *University of Pennsylvania*, which declined to require a "judicial finding of particularized necessity" prior to enforcement of even a subset of EEOC subpoenas—those seeking "confidential peer review materials"—because that requirement would be inconsistent with "the plain language of the text of § 2000e-8(a), which states that the Commission '*shall* . . . *have* access' to 'relevant' evidence." 493 U.S. at 192.[9]

Petitioner's defense of the district court's reasoning lacks merit. Petitioner errs in contending (Br. 32-34) that the district court did not actually adopt the need-based understanding that petitioner had pressed before the district court, and that the court may have simply regarded an agency's need for certain information as evidence of the information's relevance. The district court's conclusion that the EEOC could first conduct statistical analysis was the *reason* the court concluded that, "at this stage," pedigree data was not relevant. Pet. App. 29-30 (noting that EEOC

---

[9] Petitioner suggests (Br. 33) that *University of Pennsylvania* is irrelevant because it "dealt with the scope of a peer review privilege, not the EEOC's subpoena power." But the Court declined to recognize a peer-review privilege in *University of Pennsylvania* precisely because it concluded that the proposed privilege (requiring a showing of necessity in some cases) was inconsistent with EEOC's broad subpoena power, which requires a showing of relevance but not necessity. 493 U.S. at 192.

could perform statistical analysis; that if the statistical analysis indicated a disparity, "[a]t that point, pedigree information may become relevant to an investigation"; and that "[*c*]*onsequently*, the [Commission's] application * * * is denied") (emphasis added). That explanation rested entirely on the court's perception that the EEOC did not yet need the pedigree information. Moreover, the district court offered no other explanation—beyond the erroneous need requirement that petitioner urged it to adopt—for why, in its view, the materials the Commission sought would not shed light on the charge under investigation.[10] The court of appeals was thus correct in concluding that the basis for the district court's determination of irrelevance was legally "invalid." *Id.* at 12.

---

[10] As an additional possible basis for the district court's conclusion that pedigree information was irrelevant, petitioner points (Br. 31) to the court's statement that "[j]udging by the [Commission's] filings and the discussion at the hearing, the primary motivation for obtaining the pedigree information related to the ADA charge." Pet. App. 28. But the EEOC sought the pedigree information to investigate both Title VII and ADA claims. See J.A. 507-510. Whether the EEOC's "primary" motive related to one claim or another has no bearing on whether the information the Commission sought was *relevant* to the ADA claim, the Title VII claim, or to both. And the district court justifiably did not make any finding that the EEOC acted with an improper motive. See *Powell*, 379 U.S. at 58 (explaining that abuse of process would occur if a summons were issued "for an improper purpose, such as to harass the [subpoena recipient] or to put pressure on him to settle a collateral dispute," but that "[t]he burden of showing an abuse of the court's process is on the" subpoena recipient).

B. Under An Abuse-Of-Discretion Standard, No Remand To The District Court Was Necessary

When a district court decision that is reviewable for abuse of discretion is premised on "an erroneous view of the law," there is no need for a remand to the district court to exercise its discretion under the correct legal framework if "the record permits only one resolution" of the issue at hand. *Swint*, 456 U.S. at 292. Applying that principle here, there is no need for a remand that would delay enforcement of a plainly valid subpoena to obtain information that the Commission has now sought from petitioner for more than seven years. See J.A. 62-66 (August 2009 EEOC request); J.A. 79-92 (August 2010 request); J.A. 379-391 (November 2010 request); J.A. 92-106 (February 2011 subpoena).

1. Pedigree information that would enable the Commission to contact test-takers is clearly relevant to the EEOC's investigation of disparate treatment. As the court of appeals explained, contacting other test-takers would shed light on whether petitioner was using strength tests in the same manner for male and female employees, or was instead treating male and female (or pregnant and non-pregnant) individuals differently. Pet. App. 10. To take "one example," "the EEOC might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not. Or it might learn the opposite." *Ibid.*; cf. *Merritt* v. *Old Dominion Freight Line, Inc.*, 601 F.3d 289, 296-297 (4th Cir. 2010) (disparate-treatment case involving evidence that an employer terminated a female employee for failing a

physical ability test, but used the test "selectively, excusing injured male employees" from taking it).

A pattern of treating female applicants or employees differently from male employees with respect to the use of strength tests would cast light on whether petitioner's firing of Ochoa reflected disparate treatment on the basis of gender. *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015) (prima facie case of pregnancy discrimination under Title VII supported by evidence that employer did not accommodate pregnant employee but "did accommodate others 'similar in their ability or inability to work'"); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 (1973) (noting that evidence "as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks"); see *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998) (explaining that to prove harassment is "because of . . . sex," a plaintiff may "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace"); *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 358 (6th Cir. 1969) ("We consider an employer's 'pattern of action' relevant to the Commission's determination of whether there is reasonable cause to believe that the employer has practiced racial discrimination * * * and the existence of patterns of racial discrimination in job classifications or hiring situations other than those of the complainants may well justify an inference that the practices complained of here were motivated by racial factors."); see also *Shell Oil*, 466 U.S. at 69 & n.20 (stating that Congress in 1972 "implicitly endorsed" the understanding of rele-

vance accepted in lower courts, and citing *Blue Bell Boots*).

Petitioner nevertheless contends (Br. 44) that evidence relevant to disparate treatment does not bear on Ochoa's charge, because a disparate-treatment theory "would seem to be inconsistent with" Ochoa's charge stating that all employees returning from leave were required to take a strength test. But as the court of appeals explained, that claim of inconsistency is flatly incorrect: While "Ochoa alleges that [petitioner] requires all employees returning from medical leave to take the strength test before they can return to work," she did "not allege that the test is neutrally *applied*." Pet. App. 13. Instead, Ochoa alleged that petitioner's termination of her employment after she did not pass the strength test constituted gender discrimination—without specifying (or ruling out) a disparate-impact or disparate-treatment theory of how that discrimination occurred. *Ibid.*[11] Evidence concerning whether or not petitioner used the strength test differently with respect to male and female employees would thus shed light on the charge that Ochoa set out: that she "ha[d] been discriminated against because of [her] sex, female," when she was fired after failing the test. J.A. 42-43.

Nor is petitioner correct to contend (Br. 45) that contacting test-takers outside of the facility where Ochoa worked could not shed light on whether Ochoa was

---

[11] As the court below noted (Pet. App. 11), and petitioner concedes (Br. 44), there is no legal requirement that a person filing a charge of discrimination with the EEOC specify a particular legal theory. See 29 C.F.R. 1601.12(b); see also *Shell Oil*, 466 U.S. at 68 ("[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit.").

subjected to disparate treatment. Petitioner asserted that Ochoa's firing did not reflect disparate treatment based on gender or pregnancy because Ochoa was terminated pursuant to a nationwide policy of requiring a strength test of employees who returned from leave and firing those who did not pass the test. See J.A. 51 (company's explanation of nationwide policy); J.A. 55 (company's explanation that Ochoa was terminated "in accordance with [petitioner's] policies and procedures" after being unable to pass the strength test); see also Pet. App. 4. Under those circumstances, it was highly relevant to the EEOC's investigation of the Ochoa charge whether petitioner had in fact implemented a nationwide policy of the type that petitioner described and whether petitioner applied that policy equally to men and women. *Kronos*, 620 F.3d at 297-299 (concluding that "[a]n employer's nationwide use of" a particular test for job applicants "supports a subpoena for nationwide data on that practice" in an EEOC investigation of disability discrimination); *United Parcel Serv., Inc.*, 587 F.3d at 139-140 (explaining that because UPS's Appearance Guidelines "apply to every UPS facility in the country," information regarding "how religious exemptions to the UPS Appearance Guidelines are (or are not) granted nationwide" was relevant in investigation of individual charges of religious discrimination based on failure to provide exemptions). Evidence of whether petitioner's nationwide employment rules for its grocery division were applied evenhandedly to men and women thus would—at a minimum—shed light on Ochoa's claim.

2. The pedigree information that the Commission has sought for years is equally relevant to whether petitioner's strength-testing requirements exerted an un-

lawful disparate impact. Whether petitioner's strength-testing policy violates Title VII on disparate-impact grounds depends not only on whether the policy has a disparate impact, but also on whether—as petitioner has consistently asserted, see, *e.g.*, J.A. 60-61, 340-342—the policy is justified by business necessity. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977); 42 U.S.C. 2000e-2(k)(1)(A). Communications with those whom petitioner has required to take a strength test are relevant to whether use of the test was supported by business necessity, because in determining whether a test "measures actual work functions," information from individuals who took the test and from "people who actually perform these functions at their job" would shed light on whether "this is the type of test that would measure what they do." J.A. 509 (EEOC explanation to district court); see Gov't C.A. Br. 39-44.

Petitioner repeats (Br. 44) its contrary assertion that communication with test-takers would shed no light on whether petitioner's strength-testing requirement "was justified by a legitimate rationale." But the arguments that petitioner has made in support of that position (Pet. C.A. Br. 32-33) lack merit. In the court of appeals, petitioner contended that interviewing those who actually took the test and performed the job functions based on which the test was justified would have no value because the test "is *not* designed to mimic job duties" but instead "evaluates overall strength in shoulders and legs." *Id.* at 32. But that assertion only underscores the relevance of communications with test-takers to shed light on whether a test that does *not* mimic job responsibilities fairly measures the attributes necessary for positions in petitioner's grocery

department. Because pedigree information that would enable the Commission to undertake the rudimentary investigative technique of interviewing test-takers is plainly relevant under *Shell Oil*, and because a district court would abuse its discretion by finding otherwise, no remand for further proceedings is necessary in this case.

3. Finally, no remand is warranted based on petitioner's suggestion (Br. 36-37) that issues regarding the burden of producing pedigree information remain open. As the court of appeals correctly noted, petitioner did not press its argument pertaining to burden at the appellate stage. See Pet. App. 14. Petitioner did not preserve a burden argument, either by asserting burden as an alternative ground for affirmance (in a court applying de novo review to subpoena-enforcement determinations), or by asking the court to remand the case for further proceedings regarding burden if the court found in favor of the EEOC on relevance. See Pet. C.A. Br. 1-49.[12] There is no basis

[12] Petitioner's failure to preserve that argument is unsurprising. In order to avoid providing the EEOC with names and social security numbers for test-takers, petitioner removed that data from its records. J.A. 450, 475. Petitioner thus expended more resources to withhold that pedigree information than would have been necessary to produce it. And because petitioner maintained a separate, searchable database that contained the additional identifying data that the EEOC sought concerning test-takers who were employees, see J.A. 510-511, 523, petitioner's burden argument concerning pedigree information ultimately centered on the approximately 2000 applicants required to take strength tests, J.A. 448-462, 521-522. After the EEOC explained that the information in the relevant applications could be inputted into a database at little cost, J.A. 487-493, 512-513, the district court advised the parties that if it found the material that the EEOC sought relevant, the burdens of producing applicant data were "not going to

for a remand to address a burden argument that petitioner forfeited.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
IRVING L. GORNSTEIN
Counsel to the Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General

JAMES L. LEE
Deputy General Counsel
JENNIFER S. GOLDSTEIN
Associate General Counsel
MARGO PAVE
Assistant General Counsel
JAMES M. TUCKER
Attorney
U.S. Equal Employment Opportunity Commission

DECEMBER 2016

---

convince [the court] that there's enough burden that they don't have to comply," J.A. 523.

APPENDIX

1. 29 U.S.C. 161 provides in pertinent part:

Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

(1) Documentary evidence; summoning witnesses and taking testimony

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the

Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

* * * * *

2. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter * * * if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;

* * * * *

3. 42 U.S.C. 2000e-5 provides in pertinent part:

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.

* * * * *

(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 ag-

grieved 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.

* * * * *

4. 42 U.S.C. 2000e-8(a) provides:

Investigations

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

5. 42 U.S.C. 2000e-9 provides:

Conduct of hearings and investigations pursuant to section 161 of title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply.