No. 08-1500

In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission (EEOC) plainly lacks authority to issue an administrative subpoena after the charging party has been issued a right-to-sue notice and joined a lawsuit encompassing his claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28a-55a) is reported at 543 F.3d 531. The amended opinion of the court of appeals (Pet. App. 1a-27a) is reported at 558 F.3d 842. The memorandum opinion and order of the district court (Pet. App. 56a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2009. The petition for a writ of certiorari was filed on June 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits various employment practices involving discrimination on the basis of "race, color, reli-

gion, sex, or national origin." 42 U.S.C. 2000e-2, 2000e-3. The Equal Employment Opportunity Commission (EEOC) is charged with "[p]rimary responsibility for enforcing Title VII." *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984) (citing 42 U.S.C. 2000e-5(a)).

"Title VII sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *Shell Oil Co.*, 466 U.S. at 62 (quoting *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977)(*Occidental Life*)). That procedure begins with the filing of a charge of discrimination, either by an aggrieved individual or by a Commissioner of the EEOC. 42 U.S.C. 2000e-5(b); 29 C.F.R. 1601.7(a). When a charge is filed, "[t]he EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Occidental Life*, 432 U.S. at 359; 42 U.S.C. 2000e-5(b) (EEOC "shall make an investigation thereof").

"To 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.* v. *EEOC*, 493 U.S. 182, 191 (1990). The EEOC "is entitled to inspect and copy '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.'" *Shell Oil Co.*, 466 U.S. at 63 (brackets in original) (quoting 42 U.S.C. 2000e-8(a)). In conducting such an investigation, the EEOC may issue administrative subpoenas and request judicial enforcement of those subpoenas. 42 U.S.C. 2000e-9; *Shell Oil Co.*, 466 U.S. at 63.

If the EEOC "determines after such investigation that there is reasonable cause to believe that the charge is true," it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b); see 29 C.F.R. 1601.20, 1601.24(a). If such efforts fail, the EEOC may then bring a civil action against the employer, 42 U.S.C. 2000e-5(f)(1); 29 C.F.R. 1601.27, in which the charging party may intervene as a matter of right, 42 U.S.C. 2000e-5(f)(1). If the EEOC does not bring an enforcement action, the individual employee may request a right-to-sue notice and bring a civil suit against the employer directly. *Ibid.* (providing for issuance of a right-to-sue notice on dismissal of a charge or failure to resolve a charge by conciliation within 180 days). Courts may in their discretion permit the EEOC to intervene in the charging party's lawsuit. *Ibid.*

When the EEOC issues a right-to-sue notice, it generally terminates its processing of the charge. Regulations provide, however, that issuance of the right-to-sue notice does not end the EEOC's processing where an enumerated official of the Commission "determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge." 29 C.F.R. 1601.28(a)(3). The EEOC has interpreted that regulation to permit continued investigation as part of further "process[ing] [of] the charge." 1 *EEOC Compliance Manual* § 6.4 (June 2006) (*EEOC Manual*).

2. Tyrone Merritt, an African-American man, began working for petitioner on September 24, 1998, in an entry-level job. Gov't C.A. Br. 2. Merritt was denied consideration for a management position because he

failed the "Basic Skills Test" (BST), a cognitive ability examination that petitioner required its employees to pass in order to qualify for a promotion. *Ibid.*

On November 27, 2004, Merritt filed a charge of discrimination with the EEOC against petitioner on "behalf of himself and similarly situated African American and Latino employees" in FedEx's Western Region who have been "denied promotion opportunities, unfairly disciplined, and denied compensation" as a result of their race. Pet. App. 4a. The charge alleged that the BST had a statistically significant adverse impact on African-American and Latino employees. *Ibid.* Merritt also alleged that petitioner had denied him promotions given to similarly situated Caucasian employees and had disciplined him more harshly, discriminatorily denied him fair compensation due to racially biased disciplinary evaluation policies and practices, and had denied him leave without pay given to Caucasian employees. *Ibid.*

On October 20, 2005, while the EEOC was still investigating the charge, Merritt requested a right-to-sue letter, which the EEOC issued him. Pet. App. 4a. Consistent with governing regulations, the EEOC stated in the notice that it intended to continue processing Merritt's charge. *Ibid.* On October 26, 2005, Merritt joined an already pending class action lawsuit against petitioner, *Satchell* v. *Federal Express*, No. 3:03-cv-0259 (N.D. Cal.). Pet. App. 4a. The class members in the *Satchell* lawsuit included African-American and Latino employees of petitioner's Western Region, which encompasses 11 states, but excluded employees outside that region. *Ibid.* The claims in *Satchell* included race-based allegations of disparate treatment and disparate impact discrimination under Title VII as to promotions, com-

pensation, discipline, and petitioner's use of the BST. *Id.* at 127a-128a.

On February 10, 2006, the EEOC issued to petitioner a subpoena duces tecum as part of its continuing investigation. Pet. App. 5a. The subpoena required petitioner to provide basic information about computer files it had maintained since January 1, 2003, containing personnel data. *Ibid.* Petitioner objected to the subpoena and filed a petition to revoke, which the EEOC denied. *Ibid.*

3. After petitioner refused to comply with the subpoena, the EEOC filed an enforcement action in the United States District Court for the District of Arizona. Pet. App. 5a. Petitioner defended by arguing that the EEOC was divested of jurisdiction to investigate after it issued Merritt a right-to-sue notice and Merritt joined the *Satchell* litigation.[1] *Id.* at 59a.

The district court rejected petitioner's arguments, concluding that the subpoena should be enforced because the agency did not "plainly lack[]" jurisdiction to issue it. Pet. App. 63a (quoting *EEOC* v. *Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001)). In reaching that conclusion, the court noted that Title VII entitles the EEOC to broad access to any information relevant to allegations raised in a charge, Merritt's charges "raise[d] the specter of a nationwide pattern of race-based discrimination," the *Satchell* lawsuit was limited to employees in just 11 states, and the EEOC's own regulations permitted it to continue processing a charge after issuing a right-to-sue notice when doing so would "effectuate the purpose of Title VII." *Id.* at 59a-63a (quoting 29 C.F.R. 1601.28(a)(3)).

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[1] Petitioner also argued that the subpoena was overly broad and sought irrelevant information. Petitioner does not renew those contentions in this Court. Pet. at 6 n.2.

4. The court of appeals unanimously affirmed.[2] Pet. App. 1a-27a. The court explained at the outset that its consideration of petitioner's challenge to the subpoena was limited by the applicable standard of review. An administrative subpoena should be enforced, the court noted, as long as "there is some plausible ground for jurisdiction, or, to phrase it another way, unless jurisdiction is plainly lacking." *Id.* at 11a (quoting *EEOC* v. *Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1430 (9th Cir. 1983)) (internal quotation marks omitted).

Applying that standard, the court held that there was "at the very least, a plausible ground for jurisdiction." Pet. App. 16a (citation omitted). The court noted that under Title VII, governing regulations, and the EEOC's interpretation of those regulations, the EEOC has authority to continue investigating a charge after issuing a right-to-sue notice when a designated official "determines * * * that [such investigation] would effectuate the purpose of [T]itle VII or the ADA." *Id.* at 14a (quoting 29 C.F.R. 1601.28(a)(3)). The court of appeals observed that the EEOC had followed that course here, and it reasoned that there was "nothing to suggest that the EEOC exceeded its authority in doing so." *Id.* at 16a. The court also concluded that, under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), the EEOC's interpretation of its authority was controlling because it was "neither plainly erroneous nor inconsistent with" the applicable regulation. Pet. App. 15a n.2. The court therefore concluded that "the EEOC did not 'plainly lack' the au-

[2] While the appeal was pending, the *Satchell* lawsuit settled for nearly $55 million dollars and injunctive relief. Pet. App. 126a; see *id.* at 118a-163a, 164a-168a.

thority to issue the subpoena." *Id.* at 16a (quoting *Children's Hosp. Med. Ctr.*, 719 F.2d at 1430).

The court next observed that "[t]he Fifth Circuit is the only other circuit to have addressed the question of whether the EEOC's authority to issue an administrative subpoena ceases when the charging party files suit." Pet. App. 16a. The court acknowledged that, in *EEOC* v. *Hearst Corp.*, 103 F.3d 462 (1997), the Fifth Circuit had reached a contrary conclusion, but the court explained that it disagreed with *Hearst* for several reasons. As an initial matter, the court reasoned that *Hearst* failed to "review the administrative subpoena under the deferential standard" applicable to this type of challenge. Pet. App. 17a n.3. The court also explained that, contrary to the Fifth Circuit's reasoning, the stages of EEOC's enforcement process are not "distinct" and mutually exclusive; rather, "Title VII confers upon the EEOC investigatory authority during *each* stage." *Id.* at 17a-18a. In addition, the court concluded that "*Hearst*'s notion that the charging party" has the power to eliminate the EEOC's authority to investigate is inconsistent with this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002) (*Waffle House*), which stated that "once a charge is filed, . . . under the [] statute the EEOC is in command of the process" and is "master of its own case." Pet. App. 18a, 19a (quoting *Waffle House*, 534 U.S. at 291). And the court reasoned that *Hearst* both failed to address the EEOC regulation permitting continued investigation and departed from a "straightforward reading of Title VII," *id.* at 22a, which nowhere "indicates that the EEOC's investigatory powers over a charge cease when the charging party files a private action," *id.* at 20a.

The court of appeals then dismissed petitioner's argument that because, in petitioner's view, Title VII prohibits the EEOC from filing suit based upon a charge once the charging party has initiated an action, the EEOC necessarily lacks the authority to continue any investigation after that point. Pet. App. 22a. Although it deemed the premise of that argument "a dubious statement of the law," *ibid.*, the court explained that this case does not implicate the question of whether the EEOC may also sue after the charging party has done so. "That question," the court explained," "should be decided in a case where the EEOC actually brings a duplicative lawsuit, not in an action to enforce an administrative subpoena." *Ibid.* (quoting *Karuk Tribe Hous. Auth.*, 260 F.3d at 1078, for the proposition that it is inappropriate to resolve "potential defenses to enforcement actions" when reviewing the validity of an administrative subpoena). Accordingly, the court of appeals concluded that "whether the EEOC may be barred from bringing a subsequent lawsuit based upon the Merritt charge is simply irrelevant to whether the EEOC could issue an administrative subpoena based upon that charge." *Id.* at 23a.

ARGUMENT

1. Petitioner primarily contends (Pet. 6-23) that review is warranted to resolve a conflict among the courts of appeals concerning whether the EEOC may file an enforcement action after the charging party receives a right-to-sue notice and initiates his own suit. This case, which involves only a challenge to an administrative subpoena, does not implicate that question. As the court of appeals recognized, a "party may not defeat agency authority to investigate with a claim that could be a de-

fense if the agency subsequently decides to bring an action against it." Pet. App. 11a (quoting *EEOC* v. *Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1429 (9th Cir. 1983)). Accordingly, the court of appeals explicitly stated: "[W]e need not decide whether the EEOC has the authority to bring [its own] lawsuit. That question should be decided in a case where the EEOC actually brings a duplicative lawsuit, not in an action to enforce an administrative subpoena." Pet. App. 22a; see *id.* at 23a ("[W]e conclude that whether the EEOC may be barred from bringing a subsequent lawsuit based upon the Merritt charge is simply irrelevant to whether the EEOC could issue an administrative subpoena based upon that charge.").

Because the court of appeals did not address the question of whether the EEOC can bring a subsequent action based on claims raised in Merritt's charge, review of that claim would be inappropriate in this case. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

Indeed, it is quite likely that this case will never present the question of whether the EEOC can sue based on Merritt's charge. Before filing an enforcement action, the EEOC must complete its investigation, determine whether there is reasonable cause to believe a violation occurred, attempt conciliation if cause is found, and then, if conciliation fails, decide whether to litigate. In the last fiscal year, the EEOC received 95,402 charges of discrimination and found reasonable cause as to just 3693 charges, or 4.6%. See EEOC, *All Statutes: FY 1997-1998* (Mar. 11, 2009) <www.eeoc.gov/stats/

all.html>. Out of those 3693 charges where the EEOC found reasonable cause, the EEOC successfully conciliated 1128, or 1.4%. *Ibid.* Although there were 2565 charges as to which the EEOC found reasonable cause but did not secure successful conciliation, the EEOC filed only 325 lawsuits last year. Therefore, the prospect that the EEOC would file a direct enforcement action, and that this case would actually present the question of whether the EEOC was allowed to do so despite the charging party's conduct, is speculative and remote. Any decision by this Court on that question would be advisory.

2. To the extent petitioner also directly challenges (Pet. 6-23) the court of appeals' conclusion that the EEOC does not "plainly lack[]" authority to issue an administrative subpoena in these circumstances, that issue does not independently warrant review. The decision below is correct, and although the Fifth Circuit reached a different conclusion more than a decade ago, the Fifth Circuit's decision is inconsistent with this Court's more recent cases. In addition, the issue does not arise with any significant frequency.

a. The court of appeals correctly concluded that the EEOC's investigative authority does not necessarily cease after the charging party receives a right-to-sue notice and files a civil action. "The EEOC exists to advance the public interest in preventing and remedying employment discrimination," *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 331 (1980); it "does not function simply as a vehicle for conducting litigation on behalf of private parties." *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 368 (1977). "To enable the Commission to make informed decisions at each stage of the enforcement process," Congress granted the EEOC "a broad right of

access to relevant evidence." *University of Pa.* v. *EEOC*, 493 U.S. 182, 191 (1990). As the court of appeals explained, nothing in Title VII purports to divest the EEOC of its authority to process a charge once it issues a right-to-sue notice. Pet. App. 15a-16a. Nor is there any basis for invalidating the EEOC's interpretation of the governing regulations as permitting further investigation as part of continued processing of the claim. That interpretation is not "plainly erroneous or inconsistent with the regulation." See *Auer* v. *Robbins*, 519 U.S.452, 461 (1997). Moreover, any conclusion that the charging party may by his conduct eliminate the EEOC's jurisdiction to investigate is in considerable tension with this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002). In that case, this Court explained that Title VII "clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake." *Id.* at 291. Thus, "[a]bsent textual support for a contrary view, it is the public agency's province * * * to determine whether public resources should be committed to the recovery of victim-specific relief." *Id.* at 291-292; see *id.* at 291 ("[O]nce a charge is filed, * * * under the statute * * * the EEOC is in command of the process."); *id.* at 297 ("We have recognized several situations in which the EEOC does not stand in the employee's shoes.").

b. Petitioner correctly observes that, in *EEOC* v. *Hearst Corp.*, 103 F.3d 462 (1997), the Fifth Circuit reached a different conclusion regarding the EEOC's authority to continue investigating after the charging party files suit. *Hearst*, however, does not create a conflict warranting this Court's review.

First, it is not clear that there remains a live split, because the Fifth Circuit might well reach a different outcome if it reconsidered the issue today. *Hearst* was decided on the basis of an incorrect, plenary standard of review. As the court below explained, challenges to an agency's authority to issue administrative subpoenas are reviewed under a deferential approach and must be rejected unless the agency "plainly lack[s]" jurisdiction. Pet. App. 17a & n.3; see, *e.g.*, *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) ("The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary [of Labor] in the discharge of her duties under the Act, and it was the duty of the District Court to order its production."); *FTC* v. *Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001) (reaffirming holding that "enforcement of an agency's investigatory subpoena will be denied only when there is 'a patent lack of jurisdiction' in an agency to regulate or to investigate"), cert. denied, 537 U.S. 820 (2002). *Hearst* did not apply that deferential standard. In addition, the reasoning in *Hearst* clashes with this Court's subsequent decision in *Waffle House*. See p. 11, *supra*. It is therefore possible that, if the Fifth Circuit were to address this question under the correct standard and in light of *Waffle House*, it would overrule its decision in *Hearst*, obviating any need for review by this Court.[3]

[3] Notably, *Hearst* was in tension with other Fifth Circuit rulings even when it was decided. In *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453 (1975), the charging party filed a Title VII action alleging racial discrimination after the EEOC completed its investigation and issued a right-to-sue notice. *Id.* at 454. When that action was dismissed, the EEOC filed its own Title VII action alleging racial discrimination "predicated on, but not limited to, the same charge."

Second, the issue on which petitioner seeks review rarely arises. Indeed, since the EEOC gained litigating authority 37 years ago in 1972, only two court of appeals cases—the decision below and *Hearst*—appear to have squarely addressed the question of whether the issuance of a right-to-sue notice and the filing of a suit by the charging party divest the EEOC of power to issue an administrative subpoena. Even at the district-court level, only a few decisions have engaged this question. That dearth of precedent is consistent with the fact, reflected in the EEOC's regulations and noted by the court of appeals, that the EEOC elects to continue processing a charge after issuing a right-to-sue notice only in the rare and exceptional case. See Pet. App. 14a-15a (discussing 29 C.F.R. 1601.28(a)(3), and 1 *EEOC Manual* § 6.4).

At the least, this Court would benefit from a fuller circuit-court treatment of this issue before addressing it. Thus, any conflict between the decision below and the

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Ibid. The district court dismissed the action, but the Fifth Circuit reversed. In doing so, the Fifth Circuit recognized that an EEOC investigation may lead to evidence of Title VII violations that extend beyond the specific allegations in a charge. *Id.* at 455. If that happens, the court said, the EEOC has the authority to bring suit to enforce Title VII as to these newly discovered violations, regardless of whether a charging party has initiated a private action. *Id.* at 455-456. Although in *Huttig Sash* the EEOC's investigation had already been completed when the charging party sued, *Huttig Sash* is at odds with *Hearst* because *Hearst* holds that a charging party's suit cuts off any ongoing EEOC investigation, which is prerequisite to a finding of reasonable cause, which, in turn, is a prerequisite to conciliation and any EEOC enforcement action. Thus, except where the EEOC has already completed its investigation, *Hearst* effectively precludes what *Huttig Sash* explicitly allows—the initiation, after a charging party sues, of an EEOC lawsuit predicated on violations ascertained during the course of a reasonable investigation of a charge.

Fifth Circuit's ruling in *Hearst* does not warrant further review of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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