No. _____

In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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March 30, 2007

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QUESTION PRESENTED

Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The Petitioner here and appellee below is Federal Express Corporation (d/b/a FedEx Express).

The Respondents here and appellants below are Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics. By virtue of the allegations of their Complaint in the District Court, the Respondents seek to represent a putative class of persons similarly situated, but no motion for class certification has yet been filed and no class has been certified.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The parent company of Petitioner Federal Express Corporation (d/b/a/ FedEx Express) is FedEx Corporation, whose stock is publicly traded on the New York Stock Exchange under the symbol FDX.

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The opinion of the Court of Appeals for the Second Circuit is reported at 440 F.3d 558, and is reprinted in the Appendix to the Petition ("Pet. App.") at 3a–23a. The District Court's opinion is not reported, but is available at 2002 WL 31260266, and 2002 U.S. Dist. LEXIS 19100, and is reprinted at Pet. App. 31a–42a.

JURISDICTION

The Court of Appeals for the Second Circuit issued its opinion on March 8, 2006. The Court of Appeals entered its order denying rehearing and rehearing en banc on October 31, 2006. On January 23, 2007, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until March 30, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* The pertinent provisions are reproduced at Pet. App. 62a–67a.

STATEMENT OF THE CASE

District court jurisdiction. The court of first instance, the United States District Court for the Southern District of New York, had jurisdiction of this matter pursuant to 28 U.S.C. § 1331.

Factual Background. In December 2001, Respondent Patricia Kennedy submitted to the EEOC an intake questionnaire, EEOC Form 283, in which she provided

information about allegations of age discrimination by her employer, Federal Express Corporation ("FedEx"). Pet. App. 43a–52a. The intake questionnaire did not include any indication that it constituted a charge of discrimination for purposes of the ADEA. Indeed, Form 283 states that it is a means for determining whether the EEOC has jurisdiction over "potential charges" and for providing "pre-charge filing counseling." *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2004), *cert. denied*, 543 U.S. 1020, 125 S. Ct. 656 (2004). Nor did the EEOC treat Kennedy's intake questionnaire as a charge: the EEOC did not assign the intake questionnaire a charge number, did not notify FedEx of the intake questionnaire, and did not commence an investigation based on the intake questionnaire—acts the EEOC is required to do if it receives a charge. *See* 29 U.S.C. § 626(d) ("Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.").

Then, in April 2002, Respondent Kennedy and thirteen other current and former FedEx employees initiated this lawsuit in the Southern District of New York, alleging that FedEx had implemented policies in 1994 and 1995 that violated the ADEA. R.1.[1] The Complaint did not allege that Kennedy or any of the thirteen other plaintiffs had filed a charge of discrimination; nor did it allege that the December 2001 intake questionnaire completed by Kennedy constituted a charge. *See* R.1.

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[1] Citations to record evidence refer to the docket number in the district court record.

Respondent Kennedy finally filed a formal charge of discrimination with the EEOC on May 30, 2002—one month after she had filed this lawsuit—using the EEOC's form for charges, Form 5. R.8, Ex. 7.[2] This charge was untimely because Kennedy had filed suit *before* filing the charge, despite the ADEA's requirement that an employee wait to file suit until sixty days *after* filing an EEOC charge to permit the EEOC time to investigate and to seek conciliation between the employee and employer. *See* 29 U.S.C. § 626(d) ("No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC].").

Lower Court Proceedings. FedEx moved to dismiss the complaint on the ground that none of the fourteen named plaintiffs had filed a timely or valid charge of discrimination with the EEOC, as required by the ADEA. R.4; 29 U.S.C. § 626(d). Because the charge filed by Respondent Kennedy in May 2002 was clearly untimely, the plaintiffs did not assert that charge as the basis for their suit. Instead, they argued, among other things, that the ADEA's charge requirement was satisfied by Respondent Kennedy's pre-charge intake questionnaire—even though the EEOC had not treated the intake questionnaire as a charge, the intake questionnaire was not served on FedEx as the ADEA requires for a charge, 29 U.S.C. § 626(d), and Kennedy filed a separate, formal charge against FedEx after suit was filed. R.8. Moreover, those

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[2] The filing of this charge triggered the EEOC's investigative machinery: it assigned the charge a number, gave FedEx notice of it on July 9, 2002, and sought information from FedEx for its investigation of the allegations. The EEOC closed its investigation of Kennedy's charge on November 13, 2002, because "Charging Party has filed a lawsuit . . . on the same basis and issues in a court of competent jurisdiction."

plaintiffs who had not filed anything with the EEOC argued that they should be allowed to "piggyback" on Kennedy's intake questionnaire in fulfillment of their own charge-filing requirements. The plaintiffs presented no evidence that Respondent Kennedy had believed, either reasonably or unreasonably, that the intake questionnaire she submitted constituted a charge. They submitted no proof that the EEOC had advised Kennedy that the intake questionnaire sufficed as a charge or otherwise misled her with regard to the effect of the intake form. In fact, the plaintiffs failed to submit any proof that Kennedy ever discussed the intake questionnaire with any EEOC representative. *See* R.8.

The District Court granted the motion to dismiss on the ground that no plaintiff had filed a timely charge of discrimination in fulfillment of the ADEA's charge-filing requirement. *Holowecki v. Federal Express Corp.*, 2002 WL 31260266, at *1, 6 (S.D.N.Y. 2002). The District Court rejected the plaintiffs' argument that Kennedy's submission of the intake questionnaire in December 2001 satisfied the charge requirement and, as a result, also rejected their argument that the other plaintiffs could "piggyback" on Kennedy's intake form in fulfillment of their own charge requirements. *Id.* at *4.

The Second Circuit reversed on appeal, however. It concluded that Respondent Kennedy could sue FedEx without having filed a timely charge of discrimination, without having had the EEOC investigate her allegations or seek to resolve them and, indeed, without having provided FedEx with notice of any sort before proceeding with suit. *Holowecki v. Federal Express Corp.*, 440 F.3d 558 (2d Cir. 2006). The Second Circuit then compounded this abrogation of pre-suit requirements under the ADEA by permitting eleven of the other named plaintiffs to "piggyback" on Kennedy's suit

without themselves having met any of the pre-suit requirements of the statute. *Id.* at 569. The sole basis for this abrogation of the statute's requirements was Kennedy's decision to complete the EEOC intake questionnaire, which had not been treated as a charge by Kennedy or the EEOC and which gave FedEx no notice of Kennedy's personal claims, much less those of the eleven other "piggybacking" plaintiffs. *Id.* at 568–69.

The Second Circuit viewed this misuse of an intake form as permissible because the form contained the minimal information found in an EEOC charge. *Id.* at 568. In so holding, the Second Circuit ignored the practical use of—and the express statutory purpose for—that required information: to give notice to the allegedly discriminating employer so that the claims might be resolved without a suit and to initiate the EEOC's apparatus for deciding whether to pursue suit itself or permit a private plaintiff to proceed on her own. *Id.* at 568–69; *cf.* 29 U.S.C. § 626(d).

FedEx timely petitioned for rehearing or rehearing *en banc*, but the Second Circuit denied that request on October 31, 2006. *See* Pet. App. at 1a–2a.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has not been, but should be, settled by this Court, *see* S. Ct. R. 10(b), and on which the Circuit Courts of Appeal are in conflict, *see* S. Ct. R. 10(a): When may a document that fails to fulfill the statutory functions of the pre-suit "charge" of discrimination required by the ADEA nevertheless constitute a charge? The answer to that question is of paramount importance to the continued vitality of Congress's vision that employers and employees engage in

voluntary, conciliatory efforts to resolve discrimination claims, and that employees exhaust administrative remedies, before a suit is filed.

This Court should grant certiorari review to resolve this dispute between the circuits and to draw the appropriate line between, on the one hand, respecting the system of adjudication created by Congress under which charges are the mechanism triggering notice to the employer and conciliation efforts by the EEOC, and, on the other hand, avoiding the potentially harsh effects of holding that no charge has been filed by employees who have been led to believe they have filed a charge. Allowing the decision of the Second Circuit to stand without articulating clear guidance on this issue will only foster continued division among the circuits and further slippage from the statutory framework envisioned by Congress.

I. THIS CASE RAISES THE IMPORTANT QUESTION OF WHEN A DOCUMENT THAT FAILS TO FULFILL THE FUNCTIONS OF A CHARGE MAY NEVERTHELESS CONSTITUTE A CHARGE.

The question presented in this case—whether and under what circumstances a document containing the minimum information required for a charge under the ADEA but failing to fulfill the congressionally intended functions of a charge may nevertheless suffice as a charge—is critically important because it determines two major issues: (1) who is permitted to bring a lawsuit alleging discrimination in violation of the ADEA; and (2) whether Congress's framework requiring charge-filing will be respected so that the EEOC can reduce age discrimination and, consequently, litigation over age discrimination.

Congress has determined that the EEOC is often in the best position to prevent, and resolve claims of, age discrimination. As a result of that determination, Congress requires an employee to file a timely charge of discrimination with the EEOC before she may bring a lawsuit alleging age discrimination. 29 U.S.C. § 626(d). This charge-filing requirement is designed to give the EEOC an opportunity, before suit is filed, to provide an employer with notice of the allegations of discrimination, to investigate such allegations, to seek conciliation between the employer and employee, and to decide whether it should pursue suit against the employer or allow the employee to file suit herself. *See, e.g.*, *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.2d 1208, 1220 (11th Cir. 2001); *Dezaio v. Port Auth. of N.Y. & N.J.*, 205 F.3d 62, 64–65 (2d Cir. 2000); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 542 (7th Cir. 1988); *Bihler v. The Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983). Thus, the filing of a charge triggers the EEOC's obligation to fulfill two important statutory duties: (1) "promptly notify[ing] all persons named in such charge as prospective defendants in the action"; and (2) "seek[ing] to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626(d). An employee who fails to bring a charge within the requisite time period, or to provide the EEOC with adequate time to perform its notice and conciliation duties after the filing of a charge, is barred from suing for age discrimination in court.[3] *See* 29 U.S.C. § 626(d) ("No civil action may be commenced" unless the

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[3] To be timely, the charge must be filed within 180 days after the occurrence of the alleged unlawful practice, except in states with their own age discrimination laws and remedial agencies, where the time is extended to 300 days. 29 U.S.C. §§ 626(d), 633(b). In addition, an employee must wait for sixty days after filing her charge before bringing suit in court. 29 U.S.C. § 626(d).

time requirements are met); *see also, e.g.*, *O'Neill v. N.Y. Times Co.*, 145 Fed. Appx. 691, 694 (1st Cir. 2005) (affirming dismissal of claim as time-barred where charge was filed more than 300 days after employee was put on notice of age discrimination); *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2004) (affirming dismissal of ADEA claims where employee filed suit before expiration of sixty-day post-charge waiting period). Obviously, then, the question of what constitutes a charge is crucial.

Yet the ADEA does not define what constitutes a charge. To ensure that it has information sufficient to fulfill its congressional mandates of notification and conciliation, the EEOC has established interpreting regulations specifying the minimum components of a charge under the ADEA. A charge must be filed with the EEOC and must be in writing. 29 C.F.R. §§ 1626.3, 1626.6, 1626.8. A charge must name the employer and generally describe the allegedly discriminatory acts. 29 C.F.R. § 1626.6. In addition, a charge should contain the full contact information for the employer and the person filing the charge, a "statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices," the approximate number of employees of the prospective defendant employer, and information about any state proceedings involving the alleged unlawful employment practice at issue. 29 C.F.R. § 1626.8. The EEOC has also established a formal charge form, EEOC Form 5, which, when completed, satisfies these regulations and unquestionably constitutes a charge under the ADEA.

Many times, however, an employee submits a document to the EEOC that may contain the minimum required information for a charge, but is not on the EEOC's formal charge form. For instance, an employee may send a letter to the EEOC naming the employer and generally describing

alleged discriminatory acts. *See, e.g.*, *Bihler v. The Singer Co.*, 710 F.2d 96, 97–98 (3d Cir. 1983); *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020, 1025–26 (8th Cir. 1994). More commonly—as in this case—an employee completes an intake questionnaire form, EEOC Form 283, which the EEOC uses to collect information about allegedly discriminatory practices. Such a form, when completed, will almost always contain the minimum required information for a charge.

At times, the EEOC treats such informal documents as charges, providing notice of them to prospective defendant employers and starting investigation and conciliation efforts. *See, e.g.*, *Philbin v. Gen. Elec. Capital Auto Lease, Inc.*, 929 F.2d 321, 322 (7th Cir. 1991) (EEOC assigned a charge number to employee's intake questionnaire and sent a Notice of Charge of Discrimination to employer); *Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 76 (5th Cir. 1982) (EEOC sent a Notice of Charge of Discrimination to employer based on employee's completion of intake questionnaire); *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1321 (11th Cir. 2001) ("after some prodding" by employee, EEOC treated her intake questionnaire as a charge and "issued belated notice of the charge" to her employer); *Sylvester v. Am. Online, Inc.*, 2006 WL 1793289, at *4 (D. Utah 2006) ("EEOC acted on the Intake Questionnaire to serve notice on AOL.").

Generally, however—and as in this case—the EEOC does not treat such informal documents as charges, neither providing notice of them to prospective defendant employers nor beginning investigation and conciliation efforts. *See, e.g.*, *Holowecki*, 740 F.3d at 561 (EEOC did not give employer notice of intake questionnaire and did not institute investigation or conciliation efforts); *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1240 (11th Cir. 2004) (same); *Casavantes v. Cal. State Univ.*, 732 F.2d 1441, 1443 n.2 (9th

Cir. 1984) (same); *Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 674 (8th Cir. 1996) (same); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 543 (7th Cir. 1988) (same); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1137–38 (7th Cir. 1993) (same).

This latter practice gives rise to the important question of whether and when an intake questionnaire or other pre-charge document that has not been treated as a charge by the EEOC can nevertheless constitute a charge for purposes of the ADEA. In other words, in what circumstances may an intake questionnaire or pre-charge document constitute a charge even when it fails to fulfill the congressional purposes for a charge; namely, even if it fails to trigger notice to the employer or investigatory and conciliatory efforts by the EEOC?

This question has important ramifications. Allowing intake questionnaires or other pre-charge documents failing to fulfill the functions of charges to constitute charges will lead to increased litigation because doing so passes the important process of pre-litigation conciliation. If the EEOC has not treated a document as a charge, efforts at conciliation will not occur and fewer claims will be resolved prior to litigation. Increased litigation is detrimental for all parties involved. It is bad for employees, who will be forced to wait longer for a resolution and incur the legal expenses of litigating their claims. It is bad for employers, who will be forced to defend themselves against allegations of which they received no notice. In addition, employers are significantly penalized if deprived of the opportunity to resolve claims without litigation because they may be liable for the employee's attorney's fees once suit is filed. *See Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1001 (10th Cir. 2005) ("Attorney fees may be awarded to the prevailing party in age-discrimination cases through the ADEA's incorporation of

remedies available under the Fair Labor Standards Act. *See* 29 U.S.C. § 626(b).").

And, increased litigation burdens courts, which will have to devote more resources to resolving disputes under the ADEA. *See U.S. v. Dieter*, 429 U.S. 6, 97 S. Ct. 18 (1976) (noting that the Court must be "wary of imposing added and unnecessary burdens on the courts of appeals"); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212, 114 S. Ct. 1461 (1994) (rejecting a proposed outcome because it would "burden the courts with additional litigation"); *cf. Davis v. U.S. Steel Supply*, 688 F.2d 166, 193 (3d Cir. 1982) (Sloviter, J., dissenting) ("The advantages . . . of a procedure whereby disputes may be resolved by conference, conciliation and persuasion are evident: an unrepresented claimant may seek and sometimes be awarded relief; the parties may informally resolve their differences without the bitterness engendered by litigation; and the courts are spared the additional burden of yet more lawsuits.").

Allowing intake questionnaires failing to fulfill the functions of charges to constitute charges also frustrates Congress's intention that suits alleging age discrimination be timely brought to prevent stale claims. Under the ADEA, a plaintiff is required to bring suit within ninety days of receiving notice that the EEOC proceedings have been terminated. *See* 29 U.S.C. § 626(e).[4] If the EEOC does not

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[4] Under the ADEA—unlike under Title VII, 42 U.S.C. §§ 2000e-5(f)(1), and the Americans with Disabilities Act, 42 U.S.C. §§ 12117—receipt of a notice of right to sue is not a condition precedent to bringing suit. *See* 29 U.S.C. § 626(d); *Julian v. City of Houston*, 314 F.3d 721, 725–27 (5th Cir. 2002); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1100 (11th Cir. 1996); *Seredinski v. Clifton Precision Prod. Co.*, 776 F.2d 56, 63 (3d Cir. 1985). The ADEA

view an intake questionnaire as a charge, however, it does not institute proceedings and, as a result, will never issue notice that its proceedings have terminated. Thus, there will be no limitation on how long an employee may wait before bringing suit. In other words, once an employee has submitted an intake form within the requisite time period for charges, she can wait indefinitely to bring her suit. This means that the employee could bring suit against the employer for actions that occurred years earlier and of which the employer never received notice.

Such delayed notice of alleged discriminatory acts is problematic because it deprives employers of the opportunity to detect and correct potentially discriminatory employment practices in a timely and efficient manner, thus undercutting the ADEA's primary goal of preventing unlawful discrimination. *See Zinger v. Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977) ("The primary purpose of the [ADEA] is to prevent age discrimination in hiring and discharging workers."). Moreover, it requires employers to defend themselves against claims based on incidents that occurred years earlier. These employers, having received no notice of the employee's allegations against them, may have destroyed the pertinent employment records under a reasonable record-retention policy, only to be informed later of the employee's stale claims against which they must defend.

Finally, the question of whether and in what circumstances intake questionnaires may constitute charges dramatically affects the EEOC's workload. If intake questionnaires constitute charges, they trigger the EEOC's

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requires only that suit be brought within ninety days if a notice of right to sue is received. 29 U.S.C. § 626(e).

statutory obligations with regard to charges. Thus, the EEOC will be required to provide notice to employers and to effectuate conciliation efforts based on intake questionnaires, rather than formal charges. Since 1997, the EEOC has processed between 75,000 and 80,000 charges per year, which is an unknown fraction of the probably much higher number of completed intake questionnaires that it receives. *See* U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1997 through FY 2006, http://www.eeoc.gov/stats/charges.html (last visited March 29, 2007).[5] Furthermore, the unanswered question of what constitutes a charge for ADEA purposes extends beyond intake questionnaires. If the formal charge process is abandoned, the EEOC will be required to treat every document that includes the minimal information required for a charge as a formal charge triggering the investigatory machinery of the agency. Some circuits have recognized the danger in this course. *See, e.g., Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992) (warning against treating intake questionnaires "willy nilly" as charges); *Bost,* 372 F.3d at 124 (same); *Steffen*, 859 F.2d at 542 (rejecting argument that would treat every questionnaire and most phone messages as charges). Therefore, concluding that intake questionnaires—and other pre-charge documents—constitute charges will lead to a significant increase in the EEOC's workload.

As demonstrated, whether and in what circumstances intake questionnaires and other pre-charge documents can constitute charges has important ramifications for employers, employees, the EEOC, and courts, as well as for the vitality

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[5] The EEOC does not report on its website the number of completed intake questionnaires it receives annually.

of Congress's vision for the ADEA. Moreover, this question is not only significant, but it has divided the circuits, as discussed next.

II. THE CIRCUITS ARE DIVIDED ON THIS IMPORTANT ISSUE.

Six federal circuits have addressed the question of whether and in what circumstances an intake questionnaire may constitute a charge under the ADEA, and other circuits have considered the subject with regard to different discrimination statutes.[6] The circuits have reached contradictory conclusions. *See Pijnenburg v. W. Ga. Health Sys., Inc.*, 255 F.3d 1304 (11th Cir. 2001) ("On appeal, plaintiff asks us to treat an 'intake questionnaire' as a charge. . . . [T]he circuits are divided on this point.); *see also Smith v. Video Servs. of Am., L.P.*, 2000 WL 1521606, at *3 (E.D. Pa. 2000) ("[T]he circuits are split regarding whether EEOC Intake Questionnaires can fulfill the charge-filing requirement . . . ."). Therefore, review by this Court is both necessary and appropriate. *See* S. Ct. R. 10(a) (a compelling reason for granting certiorari is when "a United States court

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[6] The charge-filing requirements for the ADEA and other discrimination statutes are similar, but not identical. For instance, a charge under the ADEA need not be verified, while a charge under Title VII and the ADA must be. *See Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 675 (8th Cir. 1996) ("Unlike Title VII, the ADEA does not require that a charge be verified."); *Zillyette v. Capital One Finan. Corp.*, 179 F.3d 1337, 1339 (11th Cir. 1999) (ADA plaintiffs must comply with same procedural requirements for suit as plaintiffs in Title VII cases). Therefore, while a decision in one context about whether an intake questionnaire constitutes a charge may be instructive, it does not necessarily determine the issue with regard to other contexts.

of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

A. Circuits suggesting that intake questionnaires are not charges at all.

Two circuits have suggested that an intake questionnaire simply does not constitute a charge for purposes of the ADEA. In *Dorn v. General Motors*, the Sixth Circuit rejected the plaintiffs' contention that their submission of an EEOC questionnaire constituted a charge. 131 Fed. Appx. 462, 470 n.7 (6th Cir. 2005). According to the *Dorn* court, "the questionnaire was not a formal charge of discrimination within the meaning of the ADEA" and "the statutory language requiring a formal charge, not an inquiry or complaint, is clear." *Id.*

Likewise, in *Bailey v. United Airlines*, the Third Circuit addressed an employee's claim that he had exhausted his administrative remedies pursuant to the ADEA because he had submitted an EEOC intake questionnaire within the applicable limitations period. 279 F.3d 194, 199 n.2 (3d Cir. 2002). Although the *Bailey* court concluded that the employee had waived the argument by failing to adequately raise it before the district court, it went on to state that, "even were the argument not waived, the intake questionnaire was not adequate to constitute a charge sufficient to toll the limitations period." *Id.*

B. Circuits concluding that intake questionnaires may be charges in limited circumstances.

Three other circuits—the Seventh, Eighth, and Eleventh—have specifically recognized that "an intake

questionnaire is not intended to function as a charge." *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir.); *accord Steffen*, 859 F.2d at 542 (7th Cir.); *Diez*, 88 F.3d at 676 (8th Cir.). These circuits have also recognized that where an intake questionnaire fails to fulfill the twin purposes of a charge—notice and conciliation—treating the document as a charge undermines Congress's purpose for the ADEA. *See Diez*, 88 F.3d at 676–77 (8th Cir.) ("If the EEOC . . . understands the claimant's lodging of the questionnaire to be preliminary, it does not notify the employer of the charge. This frustrates a major goal of the ADEA, which is to encourage pre-litigation resolution of claims."); *Steffen*, 859 F.2d at 542–43 (7th Cir.); *Bost*, 372 F.3d at 1240 (11th Cir.). These circuits have therefore concluded that an intake questionnaire can substitute for a charge under the ADEA only in limited circumstances.

First, the Seventh and Eleventh Circuits have determined that an intake questionnaire can equal a formal charge under the ADEA when it contains all the information that a charge would contain and the EEOC treats it as a charge. *See Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989). This approach, which the Seventh Circuit calls "substantial compliance," recognizes that when "the EEOC itself treats the Intake Questionnaire as the formal charge"—providing notice to the employer and instigating conciliatory efforts—"it is hard to see what more to ask of the employee." *Early*, 959 F.2d at 80–81. Similarly, the Fifth Circuit has concluded that, for purposes of Title VII, an intake questionnaire can be a charge where the EEOC has treated it as one. *See Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 78–79 (5th Cir. 1982) (concluding that an employee's completed intake questionnaire constituted a charge for purposes of Title VII because the EEOC had treated it as a

charge by providing notice of it to the prospective defendant employer).

Second, the Seventh and Eleventh Circuits will allow an intake questionnaire to constitute a charge—even if the EEOC has not treated it as a charge—if there is evidence showing that the employee reasonably believed the form sufficed for a charge. *See Steffen*, 859 F.2d at 544 (7th Cir.) ("[T]he EEOC informed Steffen that it would be treating the Intake Questionnaire as a charge but then failed to treat it as a charge."); *Bost*, 372 F.3d at 1240–41 (11th Cir.) (citing *Wilkerson*, 270 F.3d at 1320–21 (11th Cir.), where the court found that the employee could reasonably believe that the EEOC would protect her interests with regard to her charge based on its communications to her, and where the form itself indicated that it could be a charge). In other words, where it is reasonable for an employee to believe that her intake form constitutes a charge—particularly where that belief is based on communications from the EEOC about the effect of the form—the Seventh and Eleventh Circuits allow that document to constitute a charge. The Eighth Circuit has suggested, although never held, that it may also allow an intake questionnaire to constitute a charge under the ADEA

in these circumstances. *See Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 677 (8th Cir. 1996).[7]

Where there is no evidence of such a reasonable belief by the employee, however, the Seventh, Eighth and Eleventh Circuits do not allow an intake questionnaire that has not been treated as a charge by the EEOC to function as a charge. *See Steffen*, 859 F.2d at 542–44 (7th Cir.) (rejecting plaintiff's argument that an intake questionnaire constituted a charge even in the absence of evidence showing employee's reasonable belief it would be treated as a charge); *Perkins v. Silverstein*, 939 F.2d 463, 470 (7th Cir. 1991) (intake questionnaire did not constitute a charge where employee could not reasonably believe that it was a charge because the EEOC had told him that no further action would be taken on it); *Diez*, 88 F.3d at 677 (intake questionnaire was not a charge because there was no evidence that the state agency "led [employee] to believe he had done all that was necessary once he returned the questionnaire" and the questionnaire itself indicated that it was preliminary to a charge); *Bost*, 372 F.3d at 1240–41 (11th Cir.) ("This case lacks the exceptional circumstances relied on by the *Wilkerson* Court in concluding that the intake questionnaire in that case was a charge. . . . Bost clearly understood that the intake questionnaire was not

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[7] Similarly, although the Third Circuit later decided that an intake questionnaire did not constitute a charge for purposes of the ADEA, *see Bailey v. United Airlines, supra*, in an earlier case it was careful not to foreclose the possibility that a document other than a formal charge may constitute a charge. *Bihler v. The Singer Co.*, 710 F.2d 96, 99–100 (3d Cir. 1983). The *Bihler* court did not detail the circumstances in which that may be true, however, other than holding that it is not true, as a matter of law, when a reasonable person would not believe that the document at issue constituted a charge. *Id.*

a charge . . . there is no evidence of any misleading communication between Bost and the EEOC . . . [and] the questionnaire form itself did not suggest that it was a charge.").

Accordingly, in the Seventh, Eighth, and Eleventh Circuits, an intake questionnaire constitutes a charge only in certain, limited circumstances.

C. Circuits concluding that all intake questionnaires are charges.

The Second Circuit has reached yet a different conclusion. Unlike the Third and Sixth Circuits—which have never found an intake questionnaire to constitute a charge under the ADEA—and the Seventh, Eighth, and Eleventh Circuits—which have found intake questionnaires failing to fulfill the functions of notice and conciliation to constitute charges only where there are strong indications that the employee reasonably believed the questionnaire was sufficient—the Second Circuit's decision in this case allows any "written filing that complies with the ADEA and contains the information required by EEOC interpreting regulations" to suffice as a charge, even when that document does not fulfill the functions of a charge and there is no evidence that the employee reasonably believed it would suffice as a charge. *See Holowecki v. Federal Express Corp.*, 440 F.3d 558, 567–69 (2d Cir. 2006).[8]

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[8] In fact, the Second Circuit's abrogation of the charge-filing requirement is compounded further because it allows other plaintiffs—who never filed anything with the EEOC—to piggyback on another plaintiff's intake questionnaire to satisfy their own charge requirements. *See Holowecki*, 440 F.3d at 569.

By its decision, the Second Circuit has aligned itself with the Fourth and Ninth Circuits, which have held in the context of Title VII that documents failing to serve the functions of a charge may constitute a charge even in the absence of any evidence regarding the plaintiff's reasonable belief. In *Edelman v. Lynchburg College*, the Fourth Circuit held that a professor's letter to the EEOC, which the EEOC did not treat as a charge, constituted a charge because it included the requisite information for a charge. 300 F.3d 400 (4th Cir. 2002). The *Edelman* court did not require evidence of the employee's reasonable belief that the letter would suffice as a charge. *See id.* In fact, the Fourth Circuit concluded that the letter constituted a valid charge even though the evidence showed the opposite: just two weeks after Edelman had submitted his letter, the EEOC had informed Edelman that his letter was insufficient and that it would need more information from him. *See id.* at 403, 405.

In *Casavantes v. California State University*, the Ninth Circuit determined that an intake questionnaire, which the EEOC had not treated as a charge, nevertheless constituted a charge under Title VII because it was a "written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," as the EEOC's regulations require charges to do. 732 F.2d 1441, 1443 (9th Cir. 1984). Like the *Edelman* court, the *Casavantes* court reached this conclusion without regard to whether the employee had reasonably believed that the questionnaire he submitted was sufficient. *See id.*

Thus, in the Second Circuit—and likely in the Fourth and Ninth Circuits as well—any intake questionnaire containing the minimum information required for a charge will constitute a charge for purposes of the ADEA, regardless of whether the

EEOC or the employee considered the questionnaire to be a charge.

D. The *Bost/Holowecki* example.

The split between the circuits on this issue is most dramatically illustrated by comparing the Second Circuit's decision below with the Eleventh Circuit's decision in *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004). Although the facts of these two cases are identical, the Second and Eleventh Circuits reached opposite conclusions.

Both *Holowecki* and *Bost* were putative class actions involving allegations that FedEx violated the ADEA through unfair application of performance standards to older couriers.[9] *See Holowecki*, 440 F.3d at 561–62; *Bost,* 372 F.3d at 1236. In *Bost*, none of the named plaintiffs had filed a timely formal charge of discrimination with the EEOC. *See Bost*, 372 F.3d at 1243. And in *Holowecki*, only a few of the named plaintiffs had filed colorable charges, some of which were clearly untimely and others of which were of questionable timeliness. *See Holowecki*, 440 F.3d at 569–70. In both cases, however, a single named plaintiff had filed an intake questionnaire within the time limits required for charges. *See Bost*, 372 F.3d at 1236; *Holowecki*, 440 F.3d at 563. Therefore, the crucial issue for most of the plaintiffs in both cases was whether that intake questionnaire constituted a charge, such that they could proceed with their ADEA claims. *See Bost*, 372 F.3d at 1235; *Holowecki*, 440 F.3d at 568.

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[9] Not only was the defendant, FedEx, the same in both cases, but at least one of the named plaintiffs was also the same. Phyllis Nelson was a named plaintiff in both *Bost* and *Holowecki*. *See Bost*, 372 F.3d at 1236; *Holowecki*, 440 F.3d at 558.

Notably, the completed intake questionnaires in *Holowecki* and *Bost* were identical in every meaningful respect. In *Holowecki*, the relevant questionnaire was submitted by Respondent Kennedy and consisted of the two-page Form 283 plus a five-page, typewritten affidavit notarized by Audrey Marie Maccia.[10] Pet. App. at 43a–52a. In *Bost*, the relevant questionnaire was submitted by Anthony Bost and consisted of the two-page Form 283 plus a six-page, typewritten affidavit notarized by Audrey Marie Maccia. Pet. App. at 53a–61a. Both Kennedy and Bost asserted claims of discrimination against FedEx at its Dunedin, Florida, facility. Pet. App. at 43a–44a, 53a–54a. Specifically, the questionnaires submitted by Kennedy and Bost both alleged that FedEx discriminated against them because of their age by using a program known as "Best Practices Pays" to impose unattainable performance standards on older, but not younger, couriers. Pet. App. at 45a–51a, 55a–60a. Both questionnaires also asserted that FedEx has discriminated against its older couriers by unilaterally delaying their start times. Pet. App. at 48a–50a, 56a–60a. In fact, at least four sentences are identical—word-for-word—in the Bost and Kennedy questionnaires. *Compare* Pet. App. at 49a–50a with *id.* at 57a.

And the similarities did not end there. The actions of Kennedy, Bost, and the EEOC after the filing of the questionnaires were also identical in every relevant respect. Kennedy submitted her questionnaire to the EEOC on December 3, 2001, *see Holowecki*, 440 F.3d at 568; Bost submitted his questionnaire just two weeks later, *see Bost*,

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[10] The first page of Kennedy's Form 283 makes clear that it was a two-page document, *see* Pet. App. at 43a, but the *Holowecki* plaintiffs inexplicably produced only the first page in the proceedings below.

372 F.3d at 1236. Upon receiving the questionnaires, the EEOC did not treat either one like a charge: it did not assign them charge numbers, send FedEx notice of them, or use them to begin conciliation efforts. *See Bost*, 372 F.3d at 1240–41; *Holowecki*, 440 F.3d at 561. Then, in April 2002—approximately five months after filing her intake questionnaire and without having filed a formal charge—Kennedy, with the other *Holowecki* plaintiffs, filed suit against FedEx in the Southern District of New York. *See Holowecki*, 440 F.3d at 568. One month later, Kennedy filed a formal charge of discrimination with the EEOC. *Id.* at 563. Likewise, in May 2002—approximately five months after filing his intake questionnaire and without having filed a formal charge—Bost, with the other *Bost* plaintiffs, filed suit against FedEx in the Middle District of Florida. *Bost*, 372 F.3d at 1239. One month later, Bost, like Kennedy before him, also filed a formal charge of discrimination with the EEOC. *Id.*

In court, the *Holowecki* and *Bost* suits again proceeded in the same way. Because none of the named plaintiffs in either case had submitted a timely charge of discrimination, FedEx moved to dismiss both suits for failure to exhaust administrative remedies. *See Bost*, 372 F.3d at 1237; *Holowecki*, 440 F.3d at 561. And both the Southern District of New York and the Middle District of Florida granted FedEx's motions, concluding that the intake questionnaires did not constitute charges under the ADEA and, therefore, that none of the named plaintiffs had complied with the ADEA's time-limit requirements under 29 U.S.C. § 626(d). *See Bost*, 372 F.3d at 1237; *Holowecki*, 440 F.3d at 561. Then, the plaintiffs in both cases appealed: the *Holowecki* plaintiffs to the Second Circuit, and the *Bost* plaintiffs to the Eleventh Circuit. And that is where, for the first time, the cases diverged.

In *Bost*, the Eleventh Circuit agreed with the Middle District of Florida that Bost's intake questionnaire did not constitute a charge. 372 F.3d at 1235. The *Bost* court reached this conclusion because the EEOC had not treated Bost's questionnaire as a charge and because there was no evidence that Bost had reasonably believed the questionnaire was sufficient. *Id.* at 1240–41. Instead, the Eleventh Circuit noted, "the undisputed evidence show[ed] the opposite": Bost's subsequent filing of a formal charge showed that he did not believe the questionnaire was a charge; there was no evidence of any misleading communication by the EEOC; and the questionnaire form itself indicated "to a reasonable reader that the questionnaire was not a charge." *Id.* at 1241. Therefore, the Eleventh Circuit affirmed the dismissal of the *Bost* plaintiffs' ADEA claims. *Id.* at 1243.

Despite the likeness of the cases, however, the Second Circuit reached precisely the opposite conclusion in *Holowecki*. It determined that the intake questionnaire submitted by Kennedy constituted a charge merely because it contained the requisite information for a charge—regardless of the fact that the questionnaire had failed to fulfill the notice and conciliation functions of a charge and the complete lack of evidence that Kennedy had believed the questionnaire to be a charge.[11] *Holowecki*, 440 F.3d at 561, 568–69. Therefore, the Second Circuit reversed the dismissal of the *Holowecki* case and remanded for further proceedings. *Id.* at 570.

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[11] In fact, as in *Bost*, the evidence actually showed that Kennedy did not believe her intake questionnaire constituted a charge, as demonstrated by her subsequent completion and submission of a formal charge. *See Holowecki*, 440 F.3d at 569.

The conflicting outcomes of *Bost* and *Holowecki* are even more striking in light of the fact that both circuits purported to use the same test. Since the Third Circuit's decision in *Bihler v. The Singer Co.*, 710 F.2d 96 (3d Cir. 1983), *see supra note* 7, a number of federal circuit courts have used the term "manifest intent" to encapsulate the notion that a document not treated as a charge by the EEOC may suffice as a charge if there are manifestations of intent by the employee to spur the EEOC to initiate its notice-giving and investigatory processes. *See, e.g.*, *Bost*, 372 F.3d at 1240; *Holowecki*, 440 F.3d at 566; *Downes*, 41 F.3d at 1139; *see also Steffen*, 859 F.2d at 544; *Diez*, 88 F.3d at 676–77.

In its decision below, the Second Circuit claimed to adopt the manifest intent test. *See Holowecki*, 440 F.3d at 566–67. Yet it interpreted that test to mean that any document constitutes a charge so long as the employee exhibited an intent to "activate the administrative investigatory and conciliatory processes"—regardless of whether the employee reasonably believed that she had filed a charge. *See Holowecki*, 440 F.3d at 567. This departs from the manifest intent test as applied in *Bost*—as well as that applied in the Seventh and Eighth Circuits—which, though using the same language to describe their inquiry, also considered the reasonable reliance of the employee in believing that the form she submitted constituted a charge. *See Bost*, 372 F.3d at 1241; *see also Steffen*, 859 F.2d at 544; *Diez*, 88 F.3d at 676–77.

The contradictory results in *Bost* and *Holowecki*—based on precisely the same facts and purportedly the same test—flaunt the fundamental disagreement between the circuits on the issue of intake questionnaires. Such inconsistent application of the law will persist unless this Court provides guidance regarding whether and in what circumstances intake

questionnaires and other pre-charge documents may constitute charges for purposes of the ADEA.

III. THIS COURT HAS PREVIOUSLY RECOGNIZED THE IMPORTANCE OF THE QUESTION PRESENTED IN THIS CASE BUT HAS NOT RESOLVED IT.

This Court has never decided whether any document other than a formal charge can nevertheless constitute a charge, as the Second Circuit correctly pointed out below. *See Holowecki*, 440 F.3d at 566 n.5 ("The Supreme Court has not directly addressed the question of whether a written submission to the EEOC that is not on an EEOC charge form is an EEOC charge."). This Court has, however, recognized the importance of the question. In *Edelman v. Lynchburg College*, 535 U.S. 106, 122 S. Ct. 1145, 152 L.Ed.2d 188 (2002), where this Court upheld the EEOC's regulation permitting "an otherwise timely filer to verify a charge after the time for filing has expired," the Court inquired about the charge issue extensively at oral argument. One of the disputes in *Edelman* was whether a letter to the EEOC by the employee describing alleged discrimination constituted a charge for purposes of Title VII. This Court expressed concern that a document that had not been treated as a charge by the EEOC—of which no notice was given to the employer and following which no investigation was instituted—could constitute a charge. Tr. of Oral Arg. 7–8, 10, 13–14, 16–18, 32–33, *Edelman*, 535 U.S. 106 (No. 00-1072). And in its subsequent written opinion, this Court indicated doubt that the letter in *Edelman* was a charge, noting that "at the factual level their view [that the letter was not a charge] has some support." *Edelman*, 535 U.S. at 119.

Ultimately, however, this Court declined to decide the charge issue at that time because it was unclear in *Edelman* whether the EEOC had treated the letter at issue as a charge. Tr. of Oral Arg. 9, *Edelman*, 535 U.S. 106 (No. 00-1072) ("Did the EEOC consider this a charge? We don't know whether it did."); *Edelman*, 535 U.S. at 118–19 ("Our judgment does not . . . reach the conclusion drawn by the District Court, and the single judge on the Court of Appeals, that Edelman's letter was not a charge under the statute because neither he nor the EEOC treated it as one."). Because it was not clear whether the EEOC had treated the letter as a charge, this Court remanded the question of whether it constituted a charge to the Fourth Circuit. *See Edelman*, 535 U.S. at 118–19. On remand, the Fourth Circuit held that the letter was a valid charge, even though the EEOC had not treated it as such and there was no evidence that the employee reasonably believed it sufficed as a charge. *Edelman v. Lynchburg College*, 300 F.3d 400, 404–05 (4th Cir. 2000).

As the Fourth Circuit's post-remand *Edelman* decision and the Second Circuit's decision below demonstrate, this important issue will continue to divide the circuits unless this Court provides guidance. Therefore, this Court should now take the opportunity to decide this crucial question, *see* S. Ct. R. 10(b). And, in determining whether intake questionnaires or other pre-charge documents can ever constitute a charge as envisioned by Congress, the Court should also address what reliance is required by another plaintiff who seeks to piggyback on such a pre-charge document to satisfy his own charge-filing requirement.

CONCLUSION

Because this case presents an important issue of federal law on which the circuits are divided and which has not been, but should be, settled by this Court, the petition for a writ of certiorari should be granted.

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