No. _____

IN THE

Supreme Court of the United States

MISCHELLE RICHTER,

Petitioner,

v.

ADVANCE AUTO PARTS, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must an employee file a new or amended charge alleging retaliation with the Equal Employment Opportunity Commission (EEOC) before filing suit under Title VII's anti-retaliation provision if the employer's act of retaliation is a result of the employee's filing of an earlier charge with the EEOC?

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INTRODUCTION

This case presents the question whether a worker must file with the Equal Employment Opportunity Commission (EEOC) a new or amended charge alleging retaliation before the employee can file suit under Title VII's anti-retaliation provision if the employer's retaliation occurred directly as a result of the employee's filing of an initial EEOC charge. Before this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the courts of appeals generally held that a worker was not required to file a new or amended EEOC charge. Many concluded that a plaintiff could raise such a retaliation claim for the first time in court because it grew out of, or was like or reasonably related to, the underlying charge. *See Clockedile v. N.H. Dep't of Corrs.*, 245 F.3d 1, 5-6 (1st Cir. 2001) (surveying case law).

In *Morgan*, this Court addressed the question whether a plaintiff could recover for discrete acts of discrimination or retaliation that occurred more than 180 or 300 days *before* the plaintiff filed a charge with the EEOC. 536 U.S. at 104-05. *Morgan* reasoned that, under Title VII, "'[a] charge . . . *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred*,'" *id.* at 109 (quoting 42 U.S.C. § 2000e-5(e)(1)), and that the term "unlawful employment practice" applies to each "discrete act or single 'occurrence,' even when it has a connection to other acts" that fall within the limitations period, *id.* at 111. Accordingly, discrete acts occurring outside the limitations period for filing a charge are time-barred. *Id.* at 114-15.

Since *Morgan*, a 4-2 circuit split has emerged regarding the impact of *Morgan* on the exhaustion of

claims based on retaliation occurring after and as a result of the filing of an earlier charge. The Eighth and Tenth Circuits have held that a worker must file a new or amended charge in these circumstances; otherwise, the worker fails to exhaust her administrative remedies. The Fourth and Sixth Circuits have expressly rejected the reading of *Morgan* adopted by the Eighth and Tenth Circuits. They hold that a Title VII plaintiff who suffers retaliation from filing an earlier charge may directly bring her retaliation claim in court. Since *Morgan*, the Second and Eleventh Circuits have so held as well, though they have done so without reference to *Morgan*.

This Court should grant certiorari to resolve the circuit split. The federal courts are in need of a uniform national standard, as evidenced not only by the circuit split, but also by widespread confusion among other federal courts.

Certiorari is also warranted because of the critical importance of the question presented, which arises with remarkable frequency in our nation's courts. The rule adopted by the Eighth and Tenth Circuits is at odds with the position of the EEOC, which participated as amicus in support of Ms. Richter before the Eighth Circuit. Moreover, the rule is neither required by this Court's decision in *Morgan* nor consistent with Title VII's remedial scheme. If allowed to stand, it will impose a needless procedural requirement on workers in the Eighth and Tenth Circuits, while permitting employers that engage in post-charge retaliation to evade liability for acts of which they plainly have notice.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reproduced in the appendix at 1a and reported at 686 F.3d 847. The Eighth Circuit's

denial of the petition for rehearing and rehearing en banc is reproduced in the appendix at 34a. The district court's unreported decision is reproduced at 28a of the appendix and is available at 2011 WL 2601201.

JURISDICTION

The court of appeals entered its judgment on August 1, 2012. Pet. App. 1a. Petitioner and Respondent each received an extension of time until August 29, 2012, to petition the court of appeals for rehearing. The court of appeals denied the timely petitions for rehearing on October 10, 2012. *Id.* at 34a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 2000e-5(e)(1) provides in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .

STATEMENT

1. An employee must generally file a Title VII charge with the EEOC within 180 days after an "unlawful employment practice occurs" to preserve her right to recover under the statute. 42 U.S.C. § 2000e-5(e)(1). The time period is extended to 300 days if the violation occurs in a jurisdiction with a local or state fair employment practices agency. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 113, 125 (1988); EEOC Compliance Man., Vol. II (Threshold Issues), § 2-IV.A.1 & n.172 (revised July 2005), *available at* http://www.eeoc.gov/policy/docs/threshold.html#2-IV.

A Title VII charge has the function of "plac[ing] the EEOC on notice that someone . . . believes that an employer has violated the [statute]." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). The timely filing provision is

not a jurisdictional prerequisite; rather, it operates as a limitations period intended to prevent plaintiffs from asserting stale claims. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982); *accord Edelman v. Lynchburg Coll.*, 535 U.S. 106, 112-13 (2002).

In *National Railroad Passenger Corp. v. Morgan*, this Court addressed whether, and under what circumstances, a plaintiff can recover for discrete acts of discrimination or retaliation that occurred more than 180 or 300 days before the plaintiff filed a charge with the EEOC. 536 U.S. 101 (2002). The Ninth Circuit had held under its "continuing violation" doctrine that a plaintiff could recover for pre-limitations period conduct where the conduct formed part of "a series of related acts one or more of which [we]re within the limitations period." *Id.* at 107 (internal quotation marks omitted).

Morgan rejected that application of the "continuing violation" doctrine, emphasizing that under Title VII, "'[a] charge . . . *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred*.'" *Id.* at 109 (quoting 42 U.S.C. § 2000e-5(e)(1)). It concluded that the term "unlawful employment practice" applies to each "discrete act or single 'occurrence,' even when it has a connection to other acts." *Id.* at 111. Accordingly, *Morgan* held that a Title VII plaintiff must file an EEOC charge alleging a discrete discriminatory or retaliatory act within the appropriate limitations period after the act occurs. *Id.* at 114-15. Otherwise, a claim based on that earlier act is time-barred.[1]

[1] *Morgan* applied a different rule to hostile work environment claims, 536 U.S. at 118, which are not at issue in this case.

2. Mischelle Richter worked as a store manager for Advance Auto Parts (AAP) from 1999 to 2009. Pet. App. 2a. On August 14, 2009, Ms. Richter's supervisor T.C. Hulett removed her from the store manager position, purportedly for failing to make timely bank deposits. *Id.* Mr. Hulett informed Ms. Richter that she had one week to apply for a separate position within AAP that would provide less pay and have different responsibilities. *Id.*

Ms. Richter believed that she was removed from the store manager position because of her sex and race. Accordingly, on August 18, 2009, she filed a charge of discrimination with the EEOC and the Missouri Commission on Human Rights. *Id.* Ms. Richter marked the boxes for "race" and "sex" discrimination and described her removal from the store manager position. *Id.* The charge instructed Ms. Richter to "notify EEOC . . . if retaliation [was] taken against [her] or others who oppose[d] discrimination or cooperate[d] in any investigation or lawsuit concerning this charge." Def.'s Mot. to Dismiss, Exh. 1 (D. Ct. Doc. 4-1), at 3 (emphasis omitted).

On August 23, 2009, Ms. Richter informed Lorne Hupp, a Regional Vice President of AAP, that she had filed a discrimination charge with the EEOC. Compl. ¶ 28 (D. Ct. Doc. 1). Mr. Hupp responded angrily. *Id.* Two days later, AAP terminated Ms. Richter's employment. Pet. App. 3a.

After she was terminated, Ms. Richter contacted an EEOC investigator and stated that she had "new info[rmation] on possible retaliation" by AAP. Pl.'s Opp. to Mot. to Dismiss, Exh. 1 (D. Ct. Doc. 10-2), at 3. She described how she had revealed the filing of her discrimination charge to AAP management, that management had reacted angrily, and that she had been

terminated two days later. *Id.* Ms. Richter asked to be advised whether the EEOC would take her case so that she could seek private counsel if it would not. *Id.* Ms. Richter contacted the EEOC again on a subsequent occasion, reminding the agency that she was terminated only after AAP management discovered her EEOC charge. *Id.*, Exh. 2 (D. Ct. Doc. 10-3), at 2.

In August 2010, the EEOC sent a letter to Ms. Richter closing her case. *Id.*, Exh. 3 (D. Ct. Doc. 10-4). The EEOC, although it did not specifically address Ms. Richter's allegation of retaliation stemming from the filing of her EEOC charge, stated that it had "reviewed the investigative file[,] including the additional information [Ms. Richter] submitted." *Id.* at 1. Later that month, the EEOC provided Ms. Richter with notice of her right to sue under Title VII. Pet. App. 2a-3a.

Ms. Richter sued AAP in federal district court for retaliation in violation of Title VII and for violations of Missouri law. The district court had jurisdiction over the Title VII claim based on 28 U.S.C. §§ 1331 and 1343 and supplemental jurisdiction over the state law claims based on 28 U.S.C. § 1367. The district court granted AAP's motion to dismiss. As relevant here, the district court, relying in part on *Morgan*, 536 U.S. 101, concluded that Richter failed to exhaust her administrative remedies under Title VII before filing her retaliation claim in court. Pet. App. 30a.

A divided panel of the Eighth Circuit affirmed dismissal of the Title VII claim, holding that Ms. Richter failed to exhaust her administrative remedies. *Id.* at 6a. The majority rejected Ms. Richter's argument that her retaliation claim was "excepted" from Title VII's exhaustion requirement and that nothing more was required to exhaust her claim because it was "like or

reasonably related to" the claim in the underlying charge. *Id.* at 6a-7a (internal quotation marks omitted).[2]

The majority emphasized that after *Morgan*, "'each discrete incident of [discriminatory or retaliatory] treatment constitutes its own unlawful employment practice for which administrative remedies must be exhausted.'" *Id.* at 6a (quoting *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003)). It disavowed pre-*Morgan* case law holding that an earlier discrimination charge filed with the EEOC satisfies the exhaustion requirement for a retaliation claim based on acts occurring after and as a result of the earlier charge. *Id.* at 7a-8a (discussing *Wentz v. Md. Casualty Co.*, 869 F.2d 1153 (8th Cir. 1989)). In so doing, the majority aligned itself with a decision of the Tenth Circuit and recognized that its holding exacerbated a circuit split. *Id.* at 9a.

Judge Bye dissented with respect to the Title VII claim. *Id.* at 19a. He agreed with the Fourth and Sixth Circuits that *Morgan* does not abrogate the rule that "post-filing acts of retaliation, resulting from filing the charge in the first instance, can be pursued without administrative exhaustion because they are like or reasonably related to the allegations in the charge." *Id.* at 21a-22a (citing *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 302 (4th Cir. 2009); *Delisle*, 94 F. App'x 247, 252-53 (6th Cir. 2004)). Judge Bye would have held that Ms. Richter's retaliation claim was like or reasonably related to her initial charge and accordingly deemed it exhausted. *Id.* at 26a.

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[2] The court of appeals reversed the district court's dismissal of Ms. Richter's state-law wrongful discharge claim and remanded. Pet. App. 19a. Proceedings on that claim continue in federal district court.

Ms. Richter submitted a petition for rehearing en banc challenging the dismissal of her Title VII claim, and the EEOC filed an amicus brief in support of that petition. A majority of the Eighth Circuit denied the petition for rehearing en banc; three judges would have granted it. *Id.* at 34a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided over Whether a Title VII Plaintiff Must File a New or Amended Charge to Recover for Retaliation that Occurs After and as a Result of an Earlier Charge.

Since *Morgan*, six circuits—the Second, Fourth, Sixth, Eighth, Tenth, and Eleventh—have considered whether a Title VII plaintiff must file a new or amended EEOC charge to recover for retaliation that occurs after and as a result of the filing of an initial charge. The courts have come to diametrically opposing conclusions, creating a 4-2 circuit split.

The Tenth Circuit first considered the impact of *Morgan* in *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003). The court concluded that *Morgan* abrogated earlier decisions permitting a plaintiff to include in a judicial complaint "any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC." *Id.* at 1210 (internal quotation marks omitted). *Martinez* thus held that a Title VII plaintiff failed to exhaust administrative remedies when he did not file a separate charge for retaliatory reprimand and termination, even though the plaintiff had filed a charge alleging earlier retaliatory treatment. *Id.* at 1210-11.

In subsequent cases, the Tenth Circuit has repeatedly applied *Martinez* to hold that a Title VII plaintiff must file a new or amended charge of retaliation

for retaliatory acts that occur after and as a result of an earlier charge. *See, e.g.*, *Duncan v. Manager, Dep't of Safety, City & County of Denver*, 397 F.3d 1300, 1314 (10th Cir. 2005); *Morris v. Cabela's Wholesale, Inc.*, 2012 WL 1925542, at *1, *3 (10th Cir. 2012). As discussed above, the Eighth Circuit in this case expressly followed *Martinez* to hold that Ms. Richter failed to exhaust her administrative remedies.

In contrast, since *Morgan*, the Second, Fourth, Sixth, and Eleventh Circuits have held—consistent with the EEOC's position, *see* EEOC Compliance Man., § 2-IV(C)(1)(a) & n.185—that a Title VII plaintiff may, without filing a new or amended charge, bring a retaliation claim based on acts occurring as a result of an initial charge. Two of these courts—the Fourth and Sixth Circuits—have directly grappled with *Morgan*. Those courts conclude that *Morgan* addresses a plaintiff's ability to recover for discrete acts occurring *before* Title VII's limitations period and does not speak to the question whether allegations of post-charge conduct are exhausted.

Before *Morgan*, the Fourth Circuit had long held that a plaintiff may bring a retaliation claim for the first time in court where she alleges that her employer retaliated against her for the filing of an initial charge. In *Nealon v. Stone*, the court of appeals grounded such a rule in the more "generally accepted principle that the scope of a Title VII lawsuit may extend to any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the [EEOC]." 958 F.2d 584, 590 (4th Cir. 1992) (internal quotation marks omitted).

More recently, in *Jones v. Calvert Group, Ltd.*, the Fourth Circuit held that *Nealon* remained "binding precedent." 551 F.3d 297, 303 (4th Cir. 2009). Applying the rule in *Nealon*, the Fourth Circuit held that a plaintiff's retaliatory termination claim was reasonably related to allegations of retaliatory conduct filed in an EEOC charge. *Id.* at 304. Although the retaliation claim at issue in *Jones* was slightly different from the one in *Nealon*—"in *Nealon*, the plaintiff claimed she suffered retaliation for filing the charge before the court, whereas [the plaintiff in *Jones*] claim[ed] she suffered a continuation of the retaliation she alleged in the charge"—the Fourth Circuit saw "no reason why that distinction should make any difference." *Id.* The court emphasized that *Morgan* did "not purport to address the extent to which an EEOC charge satisfies exhaustion requirements for claims of related, post-charge events." *Id.* at 303. It recognized, however, that the Tenth Circuit came to a contrary conclusion. *Id.*

Likewise, in *Delisle v. Brimfield Township Police Department*, a divided panel of the Sixth Circuit held that a Title VII plaintiff could properly assert a retaliation claim not alleged in an EEOC charge, where the underlying retaliatory conduct occurred after and as a result of the filing of an earlier retaliation charge. 94 F. App'x 247, 251-52 (6th Cir. 2004). The court of appeals reasoned that the post-charge retaliation alleged was "reasonably related" to the underlying charge. *Id.* at 254. The court considered and rejected the contention that *Morgan* required a contrary result. *Id.* at 252-53; *see also Smith v. Ky. State Univ.*, 97 F. App'x 22, 26 (6th Cir.

2004) (reaching the same holding as *Delisle* without discussion of *Morgan*).[3]

The Second and Eleventh Circuits have also held post-*Morgan* that a Title VII plaintiff need not file a new or amended charge to bring a claim in court based on retaliation that arises after and because of an earlier charge. *See Thomas v. Miami Dade Pub. Health Trust*, 369 F. App'x 19, 23 (11th Cir. 2010); *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003) (applying rule above to analogous situation in which retaliation occurs because a federal employee files a complaint with his agency's EEO office). Although neither court addressed the impact of *Morgan*, the Eleventh Circuit's decision came after an earlier case in which the court recognized a circuit split over *Morgan*'s impact on the exhaustion of discrete acts of retaliation. *See Bennett v. Chatham County Sheriff Dep't*, 315 F. App'x 152, 162 n.7 (11th Cir. 2008) (citing a conflict between *Martinez*, 347 F.3d 1208, and *Wedow v. Kansas City*, 442 F.3d 661 (8th Cir. 2006), which the panel in this case distinguished).

Beyond resolving the 4-2 circuit split, granting the petition for a writ of certiorari would bring much-needed

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[3] *Delisle* created an intra-circuit split on the question presented with respect to civil rights plaintiffs more generally. In *Sherman v. Chrysler Corp.*, issued shortly after *Morgan*, the Sixth Circuit held that a plaintiff asserting an Age Discrimination in Employment Act (ADEA) retaliation claim based on acts occurring after and as a result of an earlier charge failed to exhaust administrative remedies because she did not file a new or amended charge with the EEOC. 47 F. App'x 716, 721 (6th Cir. 2002). The court of appeals presumed that *Morgan* would bar a Title VII claim based on post-charge retaliation if the plaintiff failed to allege retaliation in a new or amended EEOC charge. *Id.* It then extended the presumption to hold that the plaintiff's ADEA retaliation claim was likewise barred for failure to exhaust administrative remedies. *Id.*

clarity to other courts of appeals and Title VII litigants. Since *Morgan*, the First and Seventh Circuits have stated in dicta, in reliance on pre-*Morgan* cases, that a Title VII plaintiff like Ms. Richter may bring a retaliation claim without filing a new or amended charge. *See Swearnigen-El v. Cook County Sheriff's Dep't*, 602 F.3d 852, 864 n.9 (7th Cir. 2010) (citing *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 545 n.2 (7th Cir. 1988)); *Franceschi v. U.S. Dep't of Veterans Affairs*, 514 F.3d 81, 86 (1st Cir. 2008) (citing *Clockedile*, 245 F.3d at 6); *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183, 189 (1st Cir. 2003) (same). Moreover, the Fifth and D.C. Circuits have noted the possible impact of *Morgan* on the exhaustion of retaliation claims, or Title VII claims more generally, that arise after the filing of an earlier charge. *See Weber v. Battista*, 494 F.3d 179, 183-84 (D.C. Cir. 2007); *Sapp v. Potter*, 413 F. App'x 750, 753 & n.2 (5th Cir. 2011). Courts and litigants in these circuits (and nationwide) would benefit from the certainty of a uniform rule.

II. The Decision Below Is Wrong and Cannot Be Reconciled with Title VII's Remedial Scheme.

Certiorari is also warranted because the rule adopted by the Eighth Circuit, in line with a decision of the Tenth Circuit, is wrong on the merits. As a preliminary matter, the Eighth Circuit erred by concluding that *Morgan* controls in the circumstances of this case. *Morgan* dealt only with the question whether a Title VII plaintiff could recover for discrete acts of discrimination or retaliation that occurred more than 180 or 300 days *before* the plaintiff filed a charge with the EEOC. *Morgan* did not address the question presented here.

Moreover, the text and purpose of Title VII's limitations provision do not limit a court's ability to

consider claims based on acts that grow out of, or are like or reasonably related to, acts alleged in a timely EEOC charge, where all acts fall within Title VII's limitations period. Section 2000e-5(e)(1), which bears in part the title "[t]ime for filing charges," operates as a limitations period. *Zipes*, 455 U.S. at 393-94. As the EEOC stated in its brief to the Eighth Circuit, although the legislative history of Title VII's limitations period "is 'sparse,'" the provision was "designed to prevent 'the pressing of stale claims.'" EEOC Ct. Appeals Br. at 9 (quoting *Zipes*, 455 U.S. at 394). It "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980).

The staleness concerns motivating the limitations provision are not an issue with respect to retaliation that occurs after and as a result of an earlier charge. Indeed, as the EEOC recognized in this case, "the challenged conduct is not long past but in fact even more recent than the conduct alleged in the underlying charge." EEOC Ct. Appeals Br. at 10 (internal quotation marks omitted).

The Eighth Circuit's rule is also inconsistent with Title VII's purposes. In fact, if permitted to stand, the rule adopted by the court of appeals will subvert the important public interest in Title VII's enforcement. The statute is designed as "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Commercial Office Prods. Co.*, 486 U.S. at 124. By requiring a worker to file a new charge with the EEOC in circumstances like those here, "two charges would have to be filed in a retaliation case[,] a double filing that would serve no purpose except to create additional procedural technicalities when a single filing

would comply with the intent of Title VII." *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981).

The "additional procedural technicalities" created by the Eighth Circuit's rule will bar many employees from ever receiving a day in court, even those employees who provide the EEOC with notice of post-filing retaliation during the pendency of an earlier charge. Indeed, the harsh effects of the rule are laid bare in this very case. Like many Title VII plaintiffs, Ms. Richter filed a charge without the benefit of counsel. After suffering from retaliation as a result of that charge, she did precisely as the EEOC charge form directed her to do: She provided the agency with new information about potential retaliation during the pendency of the administrative charge. Ms. Richter thus gave the EEOC notice of a retaliatory act, which served the same function as a formal charge form. Yet, under the Eighth Circuit's rule, she failed to exhaust her administrative remedies.

The Eighth Circuit's rule will also perversely reward the most unscrupulous employers, further impairing Title VII's remedial scheme. As the EEOC recognized in its brief, Title VII "'depends for its enforcement upon the cooperation of employees who are willing to file complaints.'" EEOC Ct. Appeals Br. at 11 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006)). However, "having once been retaliated against for filing an administrative charge, [a] plaintiff will naturally be gun shy about inviting further retaliation by filing a second charge complaining about the first retaliation." *Nealon*, 958 F.2d at 590 (internal quotation marks and alterations omitted). Even a plaintiff willing to file a second charge for retaliation may have to contend with the delay that serial charges would entail for litigation. The Eighth Circuit's rule could thus

"have the perverse result of promoting employer retaliation in order to impose further costs on plaintiffs and delay the filing of civil actions relating to the underlying acts" in the initial charge. *Butts v. City of N.Y. Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1402 (2d Cir. 1993), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

Finally, the Eighth Circuit's rule cannot be justified as necessary to provide notice to employers. Although the EEOC has a duty to give notice of the charge to the charging party's employer, 42 U.S.C. § 2000e-5(e)(1), where, as here, "the retaliation is official, there is no need to worry about notice: the employer should already know." *Clockedile*, 245 F.3d at 5-6. In any event, an employer is put on notice by the filing of the earlier charge, from which the retaliation directly results. *See* EEOC Ct. Appeals Br. at 8 (citing *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1209 (2d Cir. 1993)).

III. This Case Presents a Recurring Question of National Importance and Provides an Ideal Vehicle for Resolving It.

In 2011 alone, the EEOC received more than 70,000 charges alleging discrimination or retaliation under Title VII.[4] Given the volume of charges, it is unsurprising that the question presented here recurs with remarkable frequency in the federal courts.[5] Moreover, as the

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[4] EEOC, Title VII of the Civil Rights Act of 1964 Charges, FY 1997 – FY 2011, http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Jan. 2, 2013).

[5] *See, e.g.*, *Keeler v. Cereal Food Processors*, 250 F. App'x 857, 861 (10th Cir. 2007); *Dunlap v. Kan. Dep't of Health & Env't*, 127 F. App'x 433, 438 (10th Cir. 2005); *Uriostegui v. Klinger Constructors*

(*Footnote continued*)

discussion in Part II and the EEOC's participation before the Eighth Circuit make clear, the question presented is one of exceptional importance that will affect Title VII's remedial scheme. This Court's intervention will bring certainty to employees and employers alike and ensure that an employee's ability to recover for retaliation does not arbitrarily depend on the jurisdiction in which she lives.

This case also provides an ideal vehicle for resolving the question presented because the issue of administrative exhaustion is squarely raised by Ms. Richter's Title VII claim and was directly addressed by the district court and court of appeals, which both expressly considered the impact of *Morgan*.

CONCLUSION

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

Inc., 106 F. App'x 8, 10 (10th Cir. 2004); *O'Hazo v. Bristol-Burlington Health Dist.*, 599 F. Supp. 2d 242, 254 (D. Conn. 2009); *Sundaram v. Brookhaven Nat'l Labs.*, 424 F. Supp. 2d 545, 568-69 (E.D.N.Y. 2006); *Finch v. City of Indianapolis*, 2012 WL 3294959, at *15-*17 (S.D. Ind. 2012); *Fentress v. Potter*, 2012 WL 1577504, at *2 (N.D. Ill. 2012); *Lewis v. Denver Fire Dep't*, 2010 WL 3873974, at *5 (D. Colo. 2010); *Bhama v. Mercy Mem'l Hosp. Corp.*, 2009 WL 2595543, at *6-*7 (E.D. Mich. 2009); *Mandewah v. Wis. Dep't of Corrs.*, 2009 WL 1702089, at *3 (E.D. Wis. 2009); *Shamar v. City of Sanford*, 2008 WL 2783367, at *1 & n.3 (M.D. Fla. 2008); *Spellman v. Seymour Tubing, Inc.*, 2007 WL 1141961, at *1-*4 (S.D. Ind. 2007).

Respectfully submitted,

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