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Petition for a Writ of Certiorari. Lavigne v. Cajun Deep Foundations, L.L.C., 137 S.Ct. 1328 (2017) (No. 16-464), 2016 WL 5929996

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16 No. 464

In The
Supreme Court of the United States

TERRANCE J. LAVIGNE,

Petitioner,

v.

CAJUN DEEP FOUNDATIONS, L.L.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) To establish a prima facie case of discriminatory termination, is a plaintiff required to show that he was replaced by someone outside his or her protected group?*

(2) Under Title VII of the Civil Rights Act of 1964, a plaintiff prior to bringing a civil action must first file a charge with the EEOC, usually within 300 days of the action complained of. The Question Presented is:

> Where a claimant files a timely Title VII charge asserting that employer conduct was the result of a particular unlawful motive, may the claimant after the end of the charge-filing period amend that charge, or bring a civil action, asserting that the conduct was also the result of a second unlawful motive?

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* The petition in *Riley v. Elkhart Community Schools*, No. 16-___, presents the related question of whether to establish a prima facie case of discrimination in hiring or promotion, a plaintiff is required to show that the position at issue was filled by someone outside his or her protected group.

PARTIES

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Petitioner Terrence Lavigne respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on July 6, 2016.

OPINIONS BELOW

The July 6, 2016, opinion of the court of appeals, which is unofficially reported at 2016 WL 3626719, is set out at pp. 1a-25a of the Appendix. The July 10, 2014 opinion of the district court, which is reported at 32 F.Supp.3d 718 (M.D.La. 2014), is set out at pp. 26a-65a of the Appendix.[1]

JURISDICTION

The decision of the court of appeals was entered on July 6, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

[1] The petition concerns the rejection of Lavigne's claims of unlawful termination. The district court rejected those claims in its 2014 opinion. The district court subsequently tried, and ultimately rejected, claims of discrimination in pay and in the imposition of discipline. The district court decisions regarding the non-termination claims are reported at 2016 WL 3626719 (M.D.La. July 20, 2015), and 86 F.Supp.3d 524 (M.D.La. 2015).

STATUTES AND REGULATIONS INVOLVED

The statues and regulations involved are set out at pp. 73a-75a of the Appendix.

STATEMENT

Factual Background

For a number of years prior to 2011 petitioner Terrance Lavigne, who is African-American, worked as a foreman for Cajun Deep Foundations. Foreman is the lowest level supervisor position in the firm; the higher level managers hold the position of superintendent and general superintendent. There has never been a black superintendent or general superintendent.[2]

Lavigne was told by two white superintendents that he would never be promoted to the rank of superintendent because he was black. App. 62a. In December 2010 Lavigne complained to the general superintendent that he and his brother had been referred to as "boys" by one of the white superintendents. *Id.* The general superintendent took no action to address the use of that racial epithet.[3] Lavigne also complained to the company that he was not being paid the same wages as the white superintendents when he was carrying out superintendent duties.[4]

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[2] Record on Appeal ("ROA") 873, 1901-02, 2086, 2181, 2224.

[3] ROA 609, 611-21, 986-87.

[4] ROA 628, 806.

In February 2011, several months after Lavigne's complaint about the "boy" epithet, he was involved in a minor mishap in which a construction vehicle he was operating struck a girder. The company suspended Lavigne for three days and placed him on probation. App. 3a. Lavigne contended that the company only imposed that discipline because of his race and earlier complaint.

In March 2011 Cajun Deep fired Lavigne. The ostensible reason for the dismissal was that Lavigne had allegedly violated company policy by failing to report several moving violations for which he had been ticketed, and that this violation came to light when Lavigne was on probation. Lavigne insisted the company knew that he had not violated that policy. Lavigne testified that in compliance with company policy he had earlier reported one moving violation to the general superintendent (the official who later fired him),[5] and had previously reported the other moving violation to a supervisor (the one who later used the "boy" epithet and told Lavigne he could not be a superintendent because he was black).[6] See App. 60a n.13.[7]

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[5] The general superintendent was Gene Landry. ROA 673-74, 676-77.

[6] The white superintendent in question was Seth Gillen. ROA 609, 611, 676-77, 786-87.

[7] The company also invoked a third infraction, but Lavigne pointed out that the state record on which the defendant relied made clear this was not a moving violation, and thus was not covered by the company's reporting requirement. App. 60a n.13.

A week after Lavigne was dismissed, he visited the New Orleans EEOC office and filled out an "Intake Questionnaire" regarding his treatment by Cajun Deep. Based on the information in that Questionnaire, an EEOC official prepared a formal EEOC charge; under normal agency practice an EEOC official, not the charging party, actually prepares such a charge. In August 2011 the EEOC sent the charge to Lavigne, who signed and returned it to the agency. App. 34a. The charge alleged that Cajun Deep had discriminated against Lavigne on the basis of race. The body of the charge contained two general allegations of racial discrimination, and one paragraph that referred more specifically to Lavigne's claim that he had been punished for the accident because of his race, and that he had been paid less because of his race. App. 22a-23a, 36a.

The EEOC office in New Orleans took no steps to investigate Lavigne's charge. After seven months of inaction, the New Orleans office transferred the charge to the Houston EEOC office, explaining that it was doing so because the Houston office would be able to handle the matter without further delay.[8] Within a few days after receiving Lavigne's charge file, an investigator in the Houston EEOC office contacted Lavigne and suggested that the charge be amended. The EEOC then drafted the proposed amendment and sent it to

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[8] ROA 984.

Lavigne, who signed the amendment and returned it to the Houston office.[9]

The EEOC-drafted amendment supplemented the original charge in two ways. It elaborated the earlier general allegations of racial discrimination by adding another specific instance of racial discrimination, asserting that Lavigne's dismissal was racially motivated. The amendment also alleged that the dismissal was the result of an additional unlawful motive, an intent to retaliate against Lavigne because of his earlier discrimination complaint to the company. App. 23a, 36a-37a. The EEOC thoroughly investigated Lavigne's specific allegation that his dismissal was unlawful, including both his claim of racial discrimination and his claim of illegal retaliation. App. 24a.

Proceedings Below

Lavigne commenced this action in federal district court, alleging that he had been fired because of his race and in retaliation for his earlier complaint to the company about racial discrimination.[10]

The district court granted summary judgment rejecting the claim of discriminatory dismissal, on the ground that following Lavigne's termination his former position had been filled by an African-American.

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[9] ROA 985, 1152.

[10] The complaint also alleged that Lavigne had been paid less because of his race, and that he had been disciplined for the same reason. Those claims were tried to the court, which ultimately rejected both on the merits. See n.1, *supra*.

"[T]he district court held that Plaintiff had failed to state a prima facie case of discrimination because he had not shown ... that he had been replaced by someone outside of his protected group." App. 15a.[11] Because the district court concluded that Lavigne had not established a prima facie case, it did not address the conflicting evidence regarding whether the company's key proffered justification for firing Lavigne – his asserted failure to report moving violations – was a fabrication concocted to cover up an unlawful discriminatory motive. See App. 60a n.13.

The district court dismissed Lavigne's retaliation claim on a different ground. Title VII requires that, prior to commencing a civil action, an aggrieved individual must file a charge with the EEOC. Lavigne's original charge had alleged only racial discrimination, and the amendment (which asserted the existence of a retaliatory motive) had been filed by Lavigne (and drafted by the EEOC) after the expiration of the 300 day charge-filing period established by Title VII. Although the EEOC regulations provide that certain amendments relate back to the date of the original charge, Fifth Circuit precedent generally bars relation-back where an amendment asserts a new type of unlawful motive (here retaliation, in addition to the original claim of racial discrimination). App. 35a. Because the amended charge added such a new asserted

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[11] Lavigne first contacted the EEOC on March 28, 2011. App. 19a. The company hired a new black foreman on April 13, 2011. App. 61a. The parties disagreed about whether that new foreman was given Lavigne's duties. App. 16a, 61a.

unlawful motive, the district court held that the amendment could not relate back. App. 38a-41a.[12]

The court of appeals affirmed the dismissal of both termination claims,[13] again on distinct grounds. With regard to the claim of racial discrimination, the court of appeals applied the longstanding Fifth Circuit rule that in a discriminatory dismissal case a plaintiff cannot establish a prima facie case unless he can show that he was replaced by a person outside the protected class at issue. The Fifth Circuit concluded that Lavigne could not establish a prima facie case because, it believed, he had been replaced by another African-American. App. 15a.

The court of appeals, like the district court, rejected Lavigne's retaliation claim on the ground that he had failed to file a timely retaliation claim with the EEOC. The court of appeals applied a well-established Fifth Circuit rule that an amendment to an EEOC charge generally does not relate back if it asserts a new, additional type of discriminatory motive. App. 16a-18a. One member of the court of appeals dissented, arguing that the amendment should relate back. App. 23a-25a.

[12] The district court concluded that Lavigne's claim of racial discrimination regarding his dismissal was within the scope of the original racial discrimination charge. App. 33a-38a.

[13] The court of appeals also affirmed the district court's rejection of Lavigne's pay and discipline claims. App. 10a-15a.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN IMPORTANT CIRCUIT CONFLICT REGARDING WHETHER A PLAINTIFF CLAIMING DISCRIMINATORY TERMINATION MUST PROVE THAT HE OR SHE WAS REPLACED BY A PERSON OUTSIDE HIS OR HER PROTECTED GROUP

This case presents a recurring important issue regarding discriminatory terminations: whether a plaintiff alleging that he or she was fired on the basis of race or some other protected characteristic is required, in order to establish a prima facie case, to show that he or she was replaced by someone who was not a member of that protected group (the "replacement requirement").[14] In the instant case the court of appeals, applying a long series of Fifth Circuit precedents, rejected the claim of the black plaintiff because it believed the employer had hired a black replacement to fill the plaintiff's position. Several other circuits apply a similar requirement, and have rejected discrimination claims because of the race, gender or national origin of a plaintiff's replacement. "This [C]ourt has not directly addressed the question of whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material...." *St. Mary's Honor*

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[14] The petition in *Riley v. Elkhart Community Schools*, No. 16-___, presents the related question of whether a plaintiff alleging that he or she was denied a job or promotion based on a protected characteristic is required to show, in order to establish a prima facie case, that the position was filled by someone who was not a member of his or her protected group.

Center v. Hicks, 509 U.S. 502, 527 n.1 (1993) (Souter, J., dissenting).

A. There Is A Deeply Entrenched and Well Recognized Circuit Conflict About This Issue

Five circuits, including in this instance the Fifth Circuit, apply some variant of the replacement requirement. Seven circuits have rejected this interpretation of Title VII and other federal prohibitions against intentional discrimination. The conflict is widely recognized by courts and commentators.

(1) The court of appeals decision in this case applied a long line of Fifth Circuit precedents requiring the plaintiff in a case alleging discriminatory termination, in order to establish a prima facie case, to show that he "was replaced by a person outside of his protected class." App. 15a (quoting *Wills v. Cleco Corp.*, 749 F.3d 314, 320 (5th Cir. 2014)). That requirement had previously been spelled out in at least 14 reported and 20 unofficially reported Fifth Circuit decisions. App. 66a-72a. E.g., *Finley v. Florida Parish Juvenile Detention Ctr.*, 574 Fed.Appx. 402, 404 (5th Cir. 2014) ("In order to show a prima facie case of discriminatory discharge, a plaintiff must first establish that [he] ... was replaced by someone outside of the protected class") (quoting *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 345 (5th Cir. 2007)).

In the instant case the court of appeals dismissed Lavigne's racial discrimination because it concluded that Lavigne's position had been given to another African-American. App. 15a-16a. In *Moore v. Duncanville Ind. School Dist.*, 358 Fed.Appx. 515 (5th Cir. 2009), the Fifth Circuit rejected the discrimination claim of the terminated Hispanic plaintiff because "his replacement was, like him, of Hispanic national origin and was therefore not 'outside of the protected class.'" 358 Fed.Appx. at 517 (quoting *Turner*, 476 F.3d at 345). In *Singh v. Shoney's, Inc.*, 64 F.3d 217 (5th Cir. 1995), the court of appeals dismissed the discrimination claim of the terminated white plaintiff on the ground that she "failed to make out a prima facie case of racial discrimination ... , because she was replaced by a white female." 64 F.3d at 219.

The Fourth Circuit also requires proof of replacement by someone outside the protected class as an element of a prima facie case. That circuit has repeatedly dismissed claims of discriminatory termination because of the race, gender or national origin of the plaintiff's replacement. E.g., *McCaskey v. Henry*, 461 Fed.Appx. 268, 270 (4th Cir. 2012) (race discrimination claim of black plaintiff dismissed because "a black man was promoted to fill her positon after her termination"); *Spease v. Public Works Comm'n of City of Fayetteville*, 369 Fed.Appx. 455, 456 (4th Cir. 2010) (race discrimination claim of black plaintiff dismissed because he "was replaced by another African-American male"); *Pickworth v. Entrepreneurs' Organization*, 261

Fed.Appx. 491, 493 (4th Cir. 2008) (pregnancy discrimination claim dismissed because "the record shows that [plaintiff's] replacement was pregnant at the time she was promoted to [the plaintiff's] former position."); *Garrow v. Economos Properties, Inc.*, 242 Fed.Appx. 68, 72 (4th Cir. 2007) (dismissing gender discrimination claim of female plaintiff because position filled by another woman); *Brown v. McLean*, 159 F.2d 898, 905 (1998) (gender discrimination claim of male plaintiff dismissed "because [the plaintiff] was replaced by a male").

The Sixth Circuit also holds that a plaintiff asserting a discriminatory dismissal must show that he or she was replaced by a person outside the protected class in order to establish a prima facie case. *Shazor v. Professional Transit Management, Ltd.*, 744 F.2d 948, 957 (6th Cir. 2014) ("replaced by someone outside of the protected class"); *Griffin v. Finkbeiner*, 689 F.3d 584, 592 (6th Cir. 2012) (same). In *Fuelling v. New Vision Medical Laboratories LLC*, 284 Fed.Appx. 247, 253-54 (6th Cir. 2008), the court of appeals held that the discrimination claim of the white plaintiff "clearly fails because she was replaced by a white female." In *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 253 (6th Cir. 1998), the gender discrimination claim of the dismissed female plaintiff was rejected because "her responsibilities were split between a number of female ... employees."

The Eleventh Circuit requires plaintiffs in discriminatory dismissal cases to show they were replaced by a person outside the protected class. *Ezell v.*

Wynn, 802 F.3d 1217, 1226 (11th Cir. 2015) ("to establish a prima facie case a plaintiff must show that she ... was replaced by someone outside the protected class"); *Hinson v. Clinch County, Georgia Bd. of Educ.*, 231 F.3d 821, 828 (11th Cir. 2000) ("[t]o establish a prima facie case, [plaintiff] has to show ... that she was replaced by someone outside the protected class").

In the Ninth Circuit as well an essential element of a "prima facie case of discriminatory discharge [is] replacement of the plaintiff by a person outside the protected class." *Srinivasan v. Devry Institute of Technology*, 1995 WL 242307 at *3 (9th Cir. April 25, 1995); see *Stonum v. CCH Computax, Inc.*, 1994 WL 424352 at *1 (9th Cir. Aug. 12, 1994) (same). In *Burks v. Dept. of Arizona Economic Security*, 12 Fed.Appx. 454, 458 (9th Cir. 2001), the court of appeals held that "[the female plaintiff] failed to establish a prima facie case of sex discrimination [because she] was replaced by another woman, and, therefore, she cannot meet the test established by this court...."

In all of these circuits a prudent attorney today would not file an action alleging a discriminatory termination if the employer had replaced the fired worker with someone of the same protected group. Lavigne brought the instant lawsuit only because he had a substantial – although ultimately unsuccessful – factual argument that he had actually been replaced by a white worker.

(2) Seven circuits have emphatically rejected this requirement that a plaintiff show that he or she

was replaced by a person who is not a member of the protected group in question. Those circuits have repeatedly reversed district court decisions that applied that requirement.

In *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990) (opinion joined by Breyer, J.), the First Circuit insisted that

> we have never held that the fourth element of a prima facie discharge case can be fulfilled only if the complainant shows that she was replaced by someone outside the protected group. Indeed, we have said precisely the opposite.... [T]oday we set any uncertainty to rest and rule that, in a case where an employee claims to have been discharged in violation of Title VII, she can make out [a] prima facie case without proving that her job was filled by a person possessing the protected attribute.

902 F.2d at 155; see *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 719 n.20 (1st Cir. 1994).

The Second Circuit expressly rejects the replacement requirement applied in other circuits.

> Although certain courts ... have required an employee, in making out a *prima facie* case, to demonstrate that she was replaced by a person outside the protected class, ... , we believe such a standard is inappropriate and at odds with the policies underlying Title VII.

Mieri v. Dacon, 759 F.2d 989, 966 (2d Cir. 1985).

> Were we to adopt a mechanical approach, we would be required to exempt from Title VII coverage an employer that, in furtherance of a broad-based policy of employment discrimination, discharged one hundred minority employees, retained nine hundred non-minority employees, and, by making additional overtime available to the nine hundred retained employees, found it unnecessary to replace any of the discharged employees.

759 F.3d at 996 n.9; see *Leibowitz v. Cornell University*, 584 F.3d 487, 502 n.2 (2d Cir. 2009).

The Third Circuit rejected a jury instruction that would have required a female plaintiff in a gender discrimination case to prove "that she was replaced by a man." *Pivrotto v. Innovative Systems, Inc.*, 191 F.3d 344, 351 (3d Cir. 1999). "It is inconsistent with Title VII to require a plaintiff to prove that she was replaced by someone outside her class in order to make out a prima facie case. We hold that it is error to require a plaintiff to do so...." 191 F.3d at 355.

In *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157 (7th Cir. 1996), the Seventh Circuit also rejected such a requirement.

> The district court remarked that [the white plaintiff's] replacement by a white employee prevented her from establishing a prima facie case of discrimination. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), shows that this understanding of a prima facie case is erroneous.... That one's

> replacement is of another race, sex, or age may help raise an inference of discrimination, but it is neither a sufficient nor a necessary condition.

82 F.3d at 158; see *Bates v. City of Chicago*, 726 F.3d 951, 954 n.4 (7th Cir. 2013).

The Eighth Circuit has repeatedly rejected district court opinions imposing a replacement requirement. In *Walker v. St. Anthony's Medical Center*, 881 F.2d 554, 557-58 (8th Cir. 1989), the court of appeals held that "[a]lthough ... the district court[] belie[ved] that [the plaintiff] was required to show that she was replaced by an individual from outside the protected class in question, no such per se requirement has traditionally been imposed in cases brought under Title VII." 881 F.3d at 558; see *Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940, 944-45 (8th Cir. 1994); *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994).

The Tenth Circuit also holds that a plaintiff can establish a prima facie case of a discriminatory termination even though he or she was replaced by a person in the same protected group.

> A non-white employee who claims to have been discharged as a result of racial discrimination can establish ... [a] prima facie case without proving that her job was filled by a person who does not possess her protected attribute.... [T]he district court erred as a matter of law when it held that [the Hispanic plaintiff] failed to make out her prima facie

> case ... because she was replaced by an Hispanic woman.

Perry v. Woodward, 199 F.3d 1126, 1138-40 (10th Cir. 1999); see *Nguyen v. Gambro BCT, Inc.*, 242 Fed.Appx. 483, 488 (10th Cir. 2007).

The District of Columbia Circuit's rejection of the replacement requirement dates from its decision in *Stella v. Mineta*, 284 F.3d 135, 146 (D.C. Cir. 2002). "[W]e hold ... that a plaintiff in a discrimination case need not demonstrate that she was replaced by a person outside her protected class in order to carry her burden of establishing a prima facie case...." See *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 n.2 (D.C. Cir. 2008); *Mastro v. Potomac Elec. Power Co.*, 447 F.2d 843, 851 (D.C. Cir. 2006).

(3) The disagreement among the courts of appeals is widely recognized. "Federal courts construing Title VII have ... struggled with ... whether replacement by an individual outside the protected class is a necessary element [of a prima facie case]. Those courts have reached varying results...." *Williams v. Pemberton Township Public Schools*, 323 N.J.Super. 490, 501 (App.Div. 1999). The Third Circuit decision in *Pivritto* pointed out that the Fourth Circuit standard conflicted with the majority rule. 191 F.3d at 354 n.6; *see Stith v. Chadbourne & Parke, LLP*, 160 F.Supp.2d 1, 11 and n.4 (D.D.C. 2001) (describing conflict).

In *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1410 n.3 (10th Cir. 1984), the Tenth Circuit rejected the "stricter" Fifth Circuit standard. In *Clayton v. Meijer,*

Inc., 281 F.3d 605, 610 (6th Cir. 2002), the Sixth Circuit rejected the First Circuit standard. In *Mieri* the Second Circuit rejected the Fifth Circuit decision in *Lee v. Russell County Bd. of Ed.*, 684 F.2d 769, 773 (11th Cir. 1982). 759 F.3d at 995-96. Commentators have repeatedly described the conflict.[15]

The conflict has been aggravated to some degree by the fact that federal agencies have taken inconsistent positions. In *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308 (1996), the United States advised this Court that a prima facie case of discriminatory discharge under Title VII does not require proof that the plaintiff was replaced by a person outside the protected class.[16] But *O'Connor* did not resolve that

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[15] Note, Dubious Protected Class Distinctions: Eliminating the Role of Replacement Identity in a Discharged Title VII Plaintiff's Case, 44 B.C.L.Rev. 1295, 1296-1306 (2003); C.R. Senn, Minimal Relevance: Non-Disabled Replacement Evidence in ADA Discrimination Cases, 66 Baylor L.Rev. 65, 78 (2014) ("the federal circuits are split on whether ... replacement evidence is (and should be) a legally necessary element of [a] ... plaintiff's prima facie case"); Note, The Replacement Dilemma: An Argument for Eliminating A Non-Class Replacement Requirement in the Prima Facie Stage of Title VII Individual Disparate Treatment Discrimination Claims, 101 Mich.L.Rev. 1338, 1340-43 and nn.18-25 (2003) ("Lower courts are inconsistent in deciding whether an employee must show that her job replacement is someone outside her protected class to sustain her prima facie burden under Title VII"); Note, A Matter of Class: The Impact of Brown v. McLean on Employee Discharge Cases, 46 Vill.L.Rev. 421, 429-30 and nn.41-47 (2001).

[16] Brief for the United States and Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, available at 1995 WL 793447 at *16-*17.

issue under Title VII, and subsequent to 1995 the Department of Justice in defending Title VII claims against federal agencies has endorsed such a requirement,[17] while the EEOC has advanced the opposite interpretation of Title VII.[18] A grant of certiorari would prompt the Solicitor General to frame a single, consistent Executive Branch position on this issue.

B. The Replacement Requirement Is Clearly Inconsistent With Title VII

The replacement requirement effectively defines what discrimination is, and is not, unlawful under Title VII. Under prevailing practice in the lower courts, a Title VII claim will almost invariably be dismissed if the plaintiff cannot establish a prima facie case. Any legal standard establishing a requirement for a prima facie case thus effectively excludes from the protections of Title VII cases in which that requirement would not be met. In a circuit that imposes a replacement requirement, an employer which engages in intentional discrimination can avoid liability by

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[17] Brief for Appellee, *Fuentes v. Postmaster General*, No. 07-10426 (5th Cir.), available at 2007 WL 5129524 at *19, *22; Brief of Defendant-Appellee United States, *Greene v. Potter*, No. 06-30953 (5th Cir.), available at 2007 WL 3389323 at *19; Brief of Appellee, *Lopez v. Martinez*, No. 05-11300 (5th Cir.), available at 2007 WL 3000609.

[18] Enforcement Guidance on *O'Connor v. Consolidated Coin Caterers Corp.*, available at 1996 WL 33161340 at *3 and n.4; Brief of the EEOC as Amicus Curiae, *Miles v. Dell, Inc.*, No. 04-2500 (4th Cir.), available at 2005 WL 2038371 at *19.

replacing a terminated worker with another person from the same protected group.

The United States correctly advised this Court in *O'Connor* that intentional discrimination could indeed occur even though a terminated worker was replaced by a person from the same protected group.

> There are some situations in which an employer might discriminate on the basis of (for example) race by refusing to hire a black person, even if another black person is ultimately hired for the same or similar position. An employer engaging in racial discrimination might ... reassign a few minority employees to conceal discrimination.... Such actions would constitute prohibited discrimination, even if the persons eventually chosen to fill the positions were black.

Brief for the United States and the Equal Employment Opportunity Commission As Amici Curiae Supporting Petitioner, *O'Connor v. Consolidated Coin Caterers Corp.*, No. 95-354, available at 1995 WL 793447 at *17. The lower courts have recognized that there are a wide variety of circumstances in which, despite such same-group replacement, intentional discrimination would indeed occur. *Carson v. Bethlehem Steel Corp.*, 82 F.3d at 158; *Pivritto v. Innovative Systems, Inc.*, 191 F.3d at 353; *Perry v. Woodward*, 199 F.3d at 1137.

An employer "cannot purge [unlawful racial discrimination against one worker] by hiring another person of the same race later." *Carson*, 82 F.3d at 158.

"Title VII does not permit the victim of a ... discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were [treated more favorably.]" *Connecticut v. Teal*, 457 U.S. 440, 455 (1982). "Irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of ... discrimination.'" *Id.* at 455 (quoting *Teamsters v. United States*, 431 U.S. 324, 432 (1977)). "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he treats favorably other members of the employees' group." *Id.* at 455. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579 (1978) (emphasis in original).

II. THERE IS AN IMPORTANT CIRCUIT CONFLICT REGARDING WHETHER A TITLE VII CHARGE MUST IDENTIFY ALL OF AN EMPLOYER'S UNLAWFUL MOTIVES

This case also presents an issue central to the administration of Title VII and other federal anti-discrimination statutes. Prior to commencing a suit under Title VII, a claimant must file a charge with EEOC. It is common for a claimant, after filing a charge asserting that the employer acted with one

particular unlawful motive, to later assert that the employer action in question was also the result of another unlawful motive.[19] Title VII forbids conduct based on any of six different unlawful motives.[20]

The courts of appeals are sharply divided regarding whether a claimant can later assert the existence of such an additional unlawful motive. The question arises in two different contexts. In some cases the claimant seeks to amend his or her original EEOC charge to assert the existence of an additional motive for employer conduct, but does so after the expiration of the 300 day charge-filing period. In other cases the claimant does not amend his or her charge, but simply includes in a subsequent civil action a claim that the employer conduct that was the subject of the EEOC charge was also the result of an additional unlawful motive.

A. There Is A Deeply Entrenched and Well Recognized Circuit Conflict About This Issue

(1) Three circuits hold that a Title VII suit is limited to the particular unlawful motive asserted in the

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[19] This problem also arises in cases in which the initial and later-asserted motives are forbidden by different statutes, such as the Age Discrimination in Employment Act or the Americans With Disabilities Act.

[20] Title VII generally forbids actions taken for the purpose of discriminating on the basis of race, color, national origin, religion or gender, or for the purpose of retaliating against an individual because he or she engaged in certain protected activity.

original EEOC charge, and that an amendment to such a charge asserting an additional motive for the employer conduct at issue does not relate back to the date the original charge was filed. These decisions refer to such a claim of an additional unlawful motive as raising a "new theory" or "new legal theory," and hold that an amendment with such a new theory generally does not relate back and that the additional unlawful motive thus cannot be included in a Title VII action.

The decision below applies the longstanding Fifth Circuit rule[21] that generally "amendments that raise a new legal theory do not 'relate back' to an original charge of discrimination." App. 17a (quoting *Manning v. Chevron Chemical Co.*, 332 F.3d 874, 878-79 (5th Cir. 2003)). "[D]iscriminat[ory] and retaliat[ory] [motives] are distinct, and the allegation of one in an EEO charge does not exhaust a plaintiff's remedies as to the other." App. 17a (quoting *Bouvier v. Northrup Grumman Ship Sys. Inc.*, 350 Fed.Appx. 917, 921 (5th Cir. 2009)). In the Fifth Circuit a charging party is ordinarily limited to the unlawful motive that was identified by checking the relevant box on the EEOC charge form.[22] The Fifth Circuit recognizes a "narrow exception" to this requirement, limited to instances in which

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[21] The Fifth Circuit has applied this stringent rule on numerous occasions. *Thibodeaux v. Texas*, 2016 WL 4547230 at *2 (5th Cir. Aug. 31, 2016); *Carter v. Target Corp.*, 541 Fed.Appx. 413, 419 (5th Cir. 2013); *Bouvier v. Northrup Grumman Ship Systems, Inc.*, 350 Fed.Appx. 917, 921 (5th Cir. 2009); *Teffera v. North Texas Tollway Authority,* 121 Fed.Appx. 18 (5th Cir. 2004).

[22] The EEOC actually prepares these forms, based on an Intake Questionnaire filled out by the charging party.

the discursive portion of a charge sets out facts stating a claim that some additional unlawful motive was present. *Manning*, 332 F.3d at 879. The court below explained that in this case this meant that Lavigne would have had to allege in the body of his original charge each of the factual elements of a retaliation claim. App. 17a (quoting *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 331 (5th Cir. 2009)). Lavigne's retaliation claim was barred because the "original Charge of Discrimination does not allege these facts" (App. 18a), and because the "Retaliation" box on the EEOC charge form had not been checked. *Id.*

The court of appeals acknowledged that the EEOC regulations expressly permit relation back of certain amendments to a Title VII charge. App. 17a. In the instant case it was the EEOC itself which proposed that Lavigne's charge be amended, and which drafted the amendment. The EEOC then accepted the amendment which Lavigne had signed, and proceeded to investigate the retaliation claim. In the Fifth Circuit's view, the EEOC should never have done any of those things, and ought instead have rejected any such amendment if proposed by Lavigne himself. The Fifth Circuit holds that the investigative authority of the EEOC is limited to the claims of discrimination that are within the scope of a timely EEOC charge. *EEOC v. Mississippi College*, 626 F.2d 477, 481-84 (5th Cir. 1980).

The Tenth Circuit also holds that a claimant cannot amend his original claim after the 300 day charge-filing period to assert the existence of an additional unlawful purpose, or bring a Title VII suit asserting

such an unlawful purpose. *Simms v. Oklahoma*, 165 F.3d 1321 (10th Cir. 1999). In *Simms* the plaintiff's original charge alleged he had been denied a promotion because of his race; the amended charge asserted that the promotion denial was also the result of a retaliatory motive. The EEOC accepted the amendment, investigated the charge and found reasonable cause to believe the allegation was true. 165 F.3d at 1325. The Tenth Circuit dismissed the retaliation claim.

> [A]n amendment will not relate back when it advances a new theory of recovery, regardless of the facts included in the original complaint.... Prohibiting amendments that include entirely new theories of recovery furthers the goals of the statutory filing period – giving the employer notice and providing opportunity for administrative investigation and conciliation.

165 F.3d at 1327.

The Seventh Circuit imposed the same restriction in *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567 (7th Cir. 1998). The plaintiff in that case had filed a timely EEOC charge alleging that he had been fired because of his age; after the deadline for filing a new charge had expired, the plaintiff attempted to amend his original charge to assert that the dismissal was also the result of discrimination on the basis of disability. 147 F.3d at 574. The Seventh Circuit held that such an amendment was impermissible because it asserted "an additional basis of legal liability" for the dismissal. "[A]n untimely amendment that alleges an entirely

new theory of recovery does not relate back to a timely filed original charge," 147 F.3d at 575.

(2) Four circuits reject the restrictive rule applied in the Fifth, Seventh and Tenth Circuits. The leading case to the contrary is the Eighth Circuit decision in *Washington v. The Kroger Company*, 671 F.2d 1072 (8th Cir. 1982). The original charge in that case asserted that the plaintiff had been denied certain desirable duties because of her gender; several years later she filed a new charge (in what the courts treated as an amendment) that she had also been denied those duties because of her race. The Eighth Circuit held the amendment related back under the governing EEOC regulation. 29 C.F.R. § 1601.12(b).

> It is true that the nature of the discrimination alleged in Washington's first charge and the basis for it differ somewhat from the discrimination and motive alleged in the second charge. But ... [t]he fact that the second complaint filed with the EEOC alleges a basis for discrimination different from that alleged in the first EEOC charge is not dispositive here, where the aggrieved person is a non-lawyer who may be unaware of the true basis for the alleged discriminatory acts until an investigation has been made ... [P]rocedural requirements should not be applied with an unrealistic or technical stringency to proceedings initiated by uncounseled complainants.

671 F.2d at 1075-76.

The First Circuit permits Title VII actions asserting the existence of additional unlawful motive even in the absence of an amended charge. In that circuit a charge is sufficient to exhaust not only a claim regarding the motive specified in the charge, but also a claim about any other unlawful motive that might have been unearthed if the EEOC investigated the employer conduct. "The scope of the civil complaint is ... limited by the charge filed with the EEOC *and* the investigation which can reasonably be expected to grow out of that charge." *Powers v. Grinnell Corp.*, 915 F.2d 34, 38 (1st Cir. 1990) (emphasis added) (opinion joined by Breyer, J.) (quoting *Less v. Nestle Co.*, 705 F.Supp. 110, 112 (W.D.N.Y. 1988)). "[T]he scope of investigation rule permits a district court to look beyond the four corners of the underlying administrative charge to consider ... alternative bases or acts that would have been uncovered in a reasonable investigation." *Thornton v. United Parcel Service*, 587 F.3d 27, 32 (1st Cir. 2009).

In *Hicks v. ABT Associates*, 572 F.2d 960 (3d Cir. 1978), the Third Circuit held that an amendment to an EEOC charge relates back when it asserts a new unlawful motive for the employer conduct that was the subject of the original charge.

> [I]nstances of sex discrimination [asserted in the amendment] ... arise from the same acts which support claims for race discrimination [in the original charge].... If relation back were not permitted in these circumstances, a charging party might be faced with the often difficult burden of analyzing without the

> benefits of any discovery his employer's motivation for an action immediately after that action occurred.

572 F.3d at 965. In *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208 (3d Cir. 1984), the Third Circuit applied that principle to a case in which the original charge had not been amended, and the allegation of an additional unlawful motive first appeared in the complaint. "Howze's new retaliation claim 'may fairly be considered [an] explanation[ ] of the original charge....'" 750 F.2d at 1212 (quoting *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 399 (3d Cir. 1976). *Howze* treated the plaintiff's "[original] discrimination and [subsequent] retaliation claims [as] alternative allegations regarding the employer's failure to promote the plaintiff." *Barzanty v. Verizon Pennsylvania, Inc.*, 361 Fed.Appx. 41, 414 (3d Cir. 2010.). District courts in the Third Circuit have repeatedly interpreted *Howze* to mean that where a Title VII charge asserts that an adverse action was taken for a discriminatory motive, it is sufficient to encompass a subsequent claim that that particular action was also the result of a retaliatory motive.[23] In addition, in the Third Circuit a claim regarding an additional motive is sufficiently exhausted

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[23] *Mondero v. Lewes Surgical & Medical Associates, P.A.*, 2014 WL 6968847 at *6-*7 (D.Del. Dec. 9, 2014); *Walker-Robinson v. J.P. Morgan Chase Bank*, 2012 WL 3079179 at *7-*8 (D.N.J. July 27, 2012); *Pina v. Henkel Corp.*, 2008 WL 819901 at *5-*6 (E.D.Pa. March 26, 2008); *Rouse v. II-VI, Inc.*, 2007 WL 1007925 at *9 (W.D.Pa. March 30, 2007); *Foust v. FMC Corp.*, 962 F.Supp. 650, 654 (E.D.Pa. 1997).

whenever the charge *in fact* resulted in an EEOC investigation of that possible unlawful motive. *Antol v. Perry*, 82 F.3d 1291, 1295 (3d Cir. 1996) (opinion joined by Alito, J.).

In the Eleventh Circuit a charge asserting one form of discrimination is sufficient to exhaust other additional discrimination or retaliation claims that are "inextricably intertwined" with the particular allegations of the charge itself. *Harrison v. International Business Machines*, 378 Fed.Appx. 950, 953 (11th Cir. 2010); *Green v. Elixir Industries, Inc.*, 407 F.3d 1163, 1169 (11th Cir. 2005); *Gregory v. Georgia Dept. of Human Resources*, 355 F.3d 1277, 1280 (11th Cir. 2004). Two claims are "inextricably intertwined" when they assert alternative unlawful motives for the same employer conduct. *Harrison*, 378 Fed.Appx. at 953. That circuit recognizes that a reasonable EEOC investigation of employer conduct could encompass any unlawful purpose that led to the disputed action. "An EEOC investigation of [the motive asserted in the original charge] ... would have reasonably uncovered any evidence of [another unlawful motive]." *Gregory*, 355 F.3d at 1280.

(3) The Fourth Circuit at one time held that an amendment to an EEOC charge that adds a new theory of recovery – i.e., alleges an additional unlawful motive – does not relate back to the original charge. *Evans v. Technologies Applications & Services Co.*, 80 F.3d 954 (4th Cir. 1996). That decision necessarily involved an interpretation of the applicable EEOC relation-back regulation. 29 C.F.R. § 1601.12(b). In 2012

the Fourth Circuit abandoned its earlier interpretation of § 1601.12(b), after the EEOC filed a brief setting forth the agency's construction of that regulation. *EEOC v. Randstad*, 685 F.3d 433 (4th Cir. 2012).

Section 1601.12(b) provides that an amendment "to clarify and amplify allegations [in the original charge]" will relate back to the date on which the original charge was filed. The Fourth Circuit recognized that the

> EEOC interprets the phrase "clarif[ies] and amplif[ies] allegations" as encompassing amended charges in which ... the charging party makes no new factual allegations, but rather solely revises his or her charge to allege that the same facts constitute a violation of a different statute ... Interpreting § 1601.12(b) as applying to amended charges that alter solely the statutory basis or legal theory of recovery is entirely consistent with th[e] purposes [of the time limit].... [W]e defer to the EEOC's promulgation of § 1601.12(b) and its interpretation thereof.

Randstad, 685 F.3d at 444. In addition, the Fourth Circuit has long held that a charge is sufficient to exhaust a claim regarding a motive not set out in the charge, even if that charge was never amended, if the EEOC's investigation of the charge in fact considered that additional possible unlawful motive. *Hentosh v. Old Dominion University*, 767 F.3d 413, 416 (4th Cir. 2014); *Webster v. Rumsfeld*, 156 Fed.Appx. 571, 580 n.3 (4th

Cir. 2005); *King v. Seaboard Coast Line Railroad. Co.*, 538 F.2d 581, 583 (4th Cir. 1976).

(4) The Ninth Circuit applies a general rule limiting an employment discrimination action to the motive asserted in the original charge, and declining to permit relation back of an amended charge that asserts the existence of an additional motive. *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667 (9th Cir. 1988). But in the Ninth Circuit – unlike the Fifth, Seventh and Tenth – a plaintiff can pursue a claim involving a type of discriminatory motive not asserted in the original charge (whether amended or not) if the EEOC's investigation actually looked into whether that additional unlawful motive was present.

> The ... scope of a Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation.... We therefore must examine proceedings before the EEOC to determine the scope of ... [the plaintiff's] case.... We conduct this inquiry into allegations occurring not only before, but also after the filling of [the] EEOC charge.

Sosa v. Hiraoka, 920 F.2d 1451, 1457 (9th Cir. 1990); see *EEOC v. Farmer Brothers Co.*, 31 F.3d 891, 899 (9th Cir. 1994) (additional claim exhausted if it "fell within the scope of EEOC's *actual* investigation") (emphasis in original; quoting *Sosa*); *Stephenson v. United Airlines, Inc.*, 9 Fed.Appx. 760, 761 (9th Cir. 2001) ("The district court must examine both the EEOC charge and the EEOC investigation to determine if claims are exhausted.... Exhausted claims include those actually

investigated"). In the instant case, as the defendant conceded, the EEOC did indeed investigate Lavigne's retaliation claim. App. 24a.

(5) This circuit conflict is well recognized. The First Circuit has noted that

> the courts ... have sometimes allowed court claims that go beyond the claim or claims made to the agency, and sometimes not. The outcomes and rationales vary markedly where the claimant offers ... an entirely new theory.... [T]he courts are far more divided, and the law more confused, on how to handle situations in which a plaintiff advances in court claims based on ... alternative theories that were never presented to the agency.

Clockedile v. New Hampshire Dept. of Corrections, 245 F.3d 1, 4 (1st Cir. 2001) (contrasting decision in the Third Circuit with decision in the Seventh Circuit). The Tenth Circuit recognizes that

> [s]ome courts have held that [the] language [of § 1601.12(b)] encompasses claims based on different legal theories that derive from the same set of operative facts that included in the original charge.... Other courts have concluded that an amendment will not relate back when it advances a new theory of recovery, regardless of the facts included in the original complaint.

Simms v. Oklahoma, 165 F.3d at 1326-27 (contrasting decision in the Eighth Circuit with decisions in the Fourth and Ninth Circuits). In *Fairchild* the Seventh

Circuit acknowledged that relation back of an amendment that asserts a new motive "has some support in decisions from other circuits," but rejected the Eighth Circuit rule in *Washington v. Kroger Co.*, 147 F.3d at 574-75. A series of district court decisions have described this conflict as well.[24]

B. The Pleading Requirement Imposed by The Fifth, Seventh and Tenth Circuits Undermines The Title VII Administrative Scheme and Is Inconsistent With Title VII and The Applicable EEOC Regulations

This issue is of great practical importance both to charging parties and to the EEOC itself. The EEOC receives about 90,000 charges a year. Most of these

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[24] *Ramos v. Vizcarrondo*, 120 F.Supp.3d 93, 104 (D.P.R. 2015) ("[the] circuits have addressed [the issue] and have arrived at differing results ... [about amendments] with additional legal theories"); *Adames v. Mitsubishi Bank Ltd.*, 751 F.Supp. 1565, 1573 (E.D.N.Y. 1990) ("While some courts have not permitted plaintiffs such broad latitude in adding separate bases for the alleged discrimination, ... the majority of courts have allowed plaintiffs considerable latitude in fleshing out the factual circumstances surrounding their initial complaint"); *Dumas v. Kroger Ltd. Partnership I*, 2012 WL 3528972 at *2 (E.D.Ark. Aug. 14, 2012) ("though some Courts of Appeals have taken the view that an amendment will not relate back if it advances a new theory of recovery, that is not the Eighth Circuit's view"); *EEOC v. Schwan's Home Service*, 692 F.Supp.2d 1070, 1081 n.9 (D.Minn. 2010) ("[C]ourts around the country have reached different results as to whether claims premised on different legal theories that stem from the same set of operative facts stated in the original charge relate back to the original charge").

claims involve covert unlawful motives. An unlawfully motivated employer typically misrepresents its reasons for the adverse action in question, and the victimized employee must file his or her administrative charge at a point when he or she has only limited evidence, and no formal discovery, regarding what the covert unlawful purpose may have been. In Fifth, Seventh and Tenth Circuits, where the scope of a charge is limited to the particular unlawful motive identified in the original charge, and an amendment asserting an additional motive will not relate back, an employer's ingenuity in hiding its illegal motive can effectively immunize its violations of federal law.

As the EEOC has repeatedly explained in the lower courts, the Commission's practice is to investigate any potentially unlawful motive that may be behind the particular employment action covered by a charge.[25] A rule barring relation back of an amendment asserting the existence of additional unlawful motives, the EEOC has warned,

> undermines the EEOC's ability to perform the enforcement role that Congress has assigned to it, because it will hamper the Commission's ability to inquire thoroughly into the circumstances surrounding an allegation

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[25] Brief of EEOC as Appellant, *EEOC v. Southern Farm Bureau Casualty Ins. Co.*, No. 00-31482 (5th Cir.), available at 2001 WL 34105288 at *18-*22; Reply Brief of EEOC as Appellant, *EEOC v. Southern Farm Bureau Casualty Ins. Co.*, No. 00-31482 (5th Cir.), available at 2001 WL 34105287 at *5, *11-*13.

> of discrimination the EEOC had already begun to investigate.

Opening Brief of Appellant EEOC, *EEOC v. Randstad*, No. 11-179 (4th Cir.), available at 2011 WL 4369366 at *27-*28. The EEOC interprets its relation-back regulation to provide that an amendment which asserts an additional motive will relate back. "[T]he relation-back regulation permits a charging party ... to amend his charge to 'clarify' and 'amplify' his original allegations by adding an additional potential explanation for the discrimination he experienced." Reply Brief of Appellant EEOC, *EEOC v. Randstad*, No. 11-179 (4th Cir.), available at 2011 WL 5838294 at *14 (quoting 29 C.F.R. § 1601.12(b)).

Nothing in the Title VII or the relevant regulations limits a charging party's claims to the particular unlawful motive that might have been asserted in the original charge. Section 706(b) of Title VII provides in general terms that a claimant must first file with the EEOC a "charge ... alleging that an employer ... has engaged in an unlawful employment practice." 42 U.S.C. § 2000e-5(b). The applicable EEOC regulation requires only that a charge "describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). Section 706(b) directs the EEOC, upon receipt of a charge, to notify the employer of the "date, place and circumstances of the alleged unlawful employment practice." None of these provisions requires the charging party to specify which unlawful motive was behind the underlying adverse action. As the EEOC has explained,

"an amendment [asserting an additional unlawful motive] does not assert a 'stale' claim [if] it does not allege any new discriminatory incidents. It merely clarifies that there is another possible explanation for the employment action referenced in the original charge...." Opening Brief of Appellant EEOC, *EEOC v. Randstad*, 2011 WL 4369366 at *26.

Correctly identifying the unlawful motive behind an adverse action will often be beyond the ability of the injured worker. Title VII establishes the EEOC charge processing system precisely so that the Commission can bring to bear its experience and investigative abilities, which charging parties will lack. The very purpose of that administrative process would often be thwarted if an amendment could not encompass, the EEOC could not permissibly investigate, and a subsequent lawsuit could not include, motives which the charging party himself was initially unable to detect.

Correct categorization of an unlawful motive at times requires significant legal expertise; in the instant case, for example, the district court held that reprisals taken because an individual complained about racial discrimination constitute a form of racial discrimination under Title VI, but are classified as retaliation under Title VII. App. 40a. The Fifth Circuit below characterized Lavigne's retaliation claim as a "new legal theory" (App. 17a), and faulted him for not having raised that new legal theory at an earlier stage. "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404

U.S. 522, 527 (1972). "Whatever [the plaintiff's] level of education, there is no question that he should not be held to the level of understanding the distinctive legal nuances" that may separate the different types of Title VII violations. *Green v. Elixir Industries, Inc.*, 407 F.3d 1163, 1168 (11th Cir. 2005).

This Court has emphasized that "a charge is not the equivalent of a complaint initiating a lawsuit." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). But if the charge filing process were governed by the standards applicable to a civil action, Lavigne's amended charge would indeed have related back. Rule 15 of the Federal Rules of Civil Procedure provides that an amendment to a complaint relates back if it "asserts a claim ... that arose out of the conduct ... or occurrence set out ... in the original pleading." Fed. R. Civ. Proc. 15(c)(1)(B). A charge amendment which asserts an additional unlawful motive for employer conduct covered by the original charge is a classic example of a claim that arises out of the conduct or occurrence in the original pleading. The Fifth, Seventh and Tenth Circuits impose on uncounseled laymen seeking assistance from the EEOC a pleading burden that is utterly inconsistent with the intent of Congress to create an informal and readily accessible administrative process.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

This case presents an excellent vehicle for resolving both questions presented. The court of appeals rejected Lavigne's racial discrimination in dismissal claim solely on the ground that Lavigne could not prove that his replacement was white. The court of appeals rejected Lavigne's retaliation claim only on the ground that the asserted retaliatory motive was a different "legal theory" than the motive asserted in plaintiff's original Title VII charge. Because Lavigne attempted to amend his original charge to include a claim that the dismissal was retaliatory, this case presents a vehicle for deciding both whether such an amendment relates back to the date of the original charge, and also whether the original charge itself was sufficient to exhaust Lavigne's claims even if no amendment had been filed.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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