(ORDER LIST: 589 U.S.)

MONDAY, APRIL 6, 2020

ORDERS IN PENDING CASES

19M119 WALSH, WILLIAM F. V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

19M120 REBENSTORF, GLENN W. V. GRANT, JEFFREY

19M121 CRENSHAW, PHILLIP E. V. JONES, SEC., FL DOC

19M122 WARREN, MORRIS J. V. ORMOND, WARDEN, ET AL.

19M123 LOWERY, MICHAEL L. V. DAVIS, DIR., TX DCJ

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

19M124 ARMSTRONG, ARCHIE G. V. PENNSYLVANIA, ET AL.

19M125 ARMSTRONG, ARCHIE G. V. UNITED STATES, ET AL.

19M126 ARMSTRONG, ARCHIE G. V. AMTRAK POLICE

19M127 ARMSTRONG, ARCHIE G. V. GEICO INSURANCE

The motions to direct the Clerk to file petitions for writs of certiorari out of time under Rule 14.5 are denied.

CERTIORARI DENIED

19-573 AL-AMIN, JAMIL A. V. WARD, COMM'R, GA DOC, ET AL.

19-659 SALGADO, MILADIS V. UNITED STATES

19-680 SEALEY, KENNETH, ET AL. V. GILLIAM, J. DUANE, ET AL.

19-690 NEVILLE, TINA V. DHILLON, CHAIR, EEOC, ET AL.

19-710 CT FINE WINE AND SPIRITS V. SEAGULL, MICHELLE A., ET AL.

19-956 CRAIG, DONALD E., ET AL. V. O'KELLEY, JANET T., ET AL.

19-986 VOSBURGH, MARY LOU, ET AL. V. BURNT HILLS SCH. DIST., ET AL.

19-990 SOUTHERN ILLINOIS STORM SHELTERS V. 4SEMO.COM, INC.

19-994 HILL, JEFFREY L. V. JOHNSON, LEANDRA G., ET AL.

19-996 WATERS, LINDSAY V. GEORGIA

19-998 COOK, VICKIE, ET AL. V. HOPKINS, TONYITA, ET AL.

19-1003 KINUTHIA, ISAAC G. V. VELARDE, BARBARA, ET AL.

19-1072 ROTHSTEIN, SCOTT V. UNITED STATES

19-1075 COPELAND, BRYAN A. V. UNITED STATES

19-1102 SMALL, DONTAE V. UNITED STATES

19-1103 INO THERAPEUTICS LLC, ET AL. V. PRAXAIR DISTRIBUTION, ET AL.

19-6410 RAGER, DONALD W. V. AUGUSTINE, WARDEN, ET AL.

19-6501 FELICIANOSOTO, ALVIN V. UNITED STATES

19-6800 MITCHELL, RODNEY D. V. UNITED STATES

19-6967 BOYD, MICHAEL E., ET AL. V. CA PUB. UTIL. COMM'N, ET AL.

19-7081 ADEBOWALE, ADEOYE O. V. WOLF, SEC. OF HOMELAND, ET AL.

19-7086 PREZIOSO, WALTER D. V. UNITED STATES

19-7088 CORTEZ-ROGEL, MARCOS V. UNITED STATES

19-7102 MENDEZ, RUBEN V. UNITED STATES

19-7104 PACHECO-ASTRUDILLO, JULIO C. V. UNITED STATES

19-7112 GALINDO-SERRANO, GABRIEL V. UNITED STATES

19-7131 HANNA, ERIC V. UNITED STATES

19-7493 KIRVIN, CHARLES T. V. GRANT, L., ET AL.

19-7513 SMITH, OMAR V. CLARKE, DIR., VA DOC

19-7529 WILLIAMS, VERONICA A. V. LITTON LOAN SERVICES, ET AL.

19-7532 WELSH, TRAVIS V. FLORIDA

19-7537 SPICE, DONALD A. V. MICHIGAN

19-7541 HURLES, RICHARD V. SHINN, DIR., AZ DOC, ET AL.

19-7542 PELMEAR, NOAH-WADE, ET AL. V. O'CONNOR, MAUREEN, ET AL.

19-7545 PALMER, WILLIE V. INCH, SEC., FL DOC, ET AL.

19-7546 JORGE, JUAN V. FLORIDA, ET AL.

19-7554 HILLYGUS, ROGER V. DOHERTY, FRANCES, ET AL.

19-7556 JACOBS, ERIKA V. MIHCS

19-7559 JACKSON, ELIJAH V. HUD, ET AL.

19-7563 SPEED, TERRY G. V. DAVIS, DIR. TX DCJ

19-7582 ARELLANO, RAUL V. PARAMO, WARDEN

19-7583 BYRD, TIFFANY R. V. BOUTTE, WARDEN

19-7591 PAYNE, LEO L. V. MANGUM, JESSICA

19-7595 MAJOR, RICKEY T. V. BAKER, WARDEN

19-7600 SUNDY, TIM V. FRIENDSHIP PAVILION, ET AL.

19-7605 KANE, VINCENT V. PENNSYLVANIA

19-7609 CASTILLO, JUAN M. V. BACA, WARDEN

19-7628 GUYN, GLEN G. V. KENT, WARDEN

19-7644 JONES, GEORGE V. GRIFFITH, WARDEN

19-7660 WEST, RONALD B. V. UNITED STATES

19-7666 WOODS, DONNIEL V. JOYNER, WARDEN

19-7676 JACKSON, ROBERT V. FLORIDA

19-7679 BROWNLEE, JONATHAN V. HEARNS, KEITH, ET AL.

19-7708 ALJINDI, AHMAD J. V. UNITED STATES, ET AL.

19-7723 BRAMMER, JAMES W. V. MADDEN, WARDEN

19-7734 DENNIS, ANDRE V. JOHNSON, ADM'R, NJ, ET AL.

19-7740 BELL, YOLANDA V. UNITED STATES

19-7759 EMERS, LYARRON T. V. ILLINOIS

19-7762 AMERSON, GALEN, L., ET AL. V. ATLAS LAW FIRM, P.C., ET AL.

19-7791 JACKSON, JERMAINE M. V. PENNSYLVANIA

19-7813 JAMERSON, MICHAEL C. V. LEWIS, WARDEN

19-7830 PANTALEON-AVILES, PABLO A. V. UNITED STATES

19-7835 RODRIGUEZ, MIGUEL V. UNITED STATES

19-7836 SALAHUDDIN, TAJUDDIN V. UNITED STATES

19-7838 SHOCKEY, ANTHONY V. UNITED STATES

19-7839 SANCHEZ, CHRISTOPHER V. UNITED STATES

19-7851 MARTINEZ-ALVARADO, LENIN V. UNITED STATES

19-7869 WILSON, RAYMOND D. V. UNITED STATES

19-7873 ALLEN, DERRICK M. V. UNITED STATES

19-7875 GAY, BYRON V. DAFFENBACH, WARDEN, ET AL.

19-7876 RICHARDSON, AARON V. UNITED STATES

19-7881 FARRINGTON, TAVARES L. V. UNITED STATES

19-7886 MAHON, DENNIS V. UNITED STATES

19-7887 JUVENILE FEMALE V. UNITED STATES

19-7896 HUGHES, NICHOLAS V. UNITED STATES

19-7898 MURPHY, RICHARD C. V. UNITED STATES

19-7909 KILMARTIN, SIDNEY P. V. UNITED STATES

19-7911 CORNELIUS, THOMAS W. V. UNITED STATES

19-7916 GELAZELA, MARK V. UNITED STATES

19-7917 FELDMAN, ISAAC V. UNITED STATES

19-7934 BETTS, KATHLEEN V. UNITED AIRLINES, INC.

19-7940 MORALES, LUIS F. V. UNITED STATES

19-7942 PARSONS, DANIEL D. V. BLADES, WARDEN

19-7949 DEVORE, KENNETH R. V. UNITED STATES

19-7950 VALENTINE, DAEJERRON L. V. NEBRASKA

19-7967 DURANT, KENNETH V. LAWRENCE, WARDEN

19-7970 SHADE, SHAWNTE L. V. WASHBURN, WARDEN

The petitions for writs of certiorari are denied.

19-678 U.S., EX REL. SCHNEIDER V. JPMORGAN CHASE BANK, ET AL.

The petition for a writ of certiorari is denied. Justice Kavanaugh took no part in the consideration or decision of this

petition.

19-726 JONES, MALLORY, ET AL. V. LAMKIN, RAMONE, ET AL.

The motion of National Fraternal Order of Police for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

19-7573 DONAHUE, SEAN M. V. SCALIA, SEC. OF LABOR, ET AL.

19-7597 WAZNEY, ROBERT W. V. NELSON, WARDEN

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

HABEAS CORPUS DENIED

19-7894 IN RE CHARLES S. RENCHENSKI

19-8026 IN RE JONATHAN A. HAMPTON

The petitions for writs of habeas corpus are denied.

MANDAMUS DENIED

19-7884 IN RE JAMES E. FRYE

The petition for a writ of mandamus is denied.

REHEARINGS DENIED

19-6427 SMITH, RAY A. V. CHAPDELAINE, WARDEN, ET AL.

19-6762 WIMBERLEY, FRED M. V. SACRAMENTO, RACHEL M.

19-6863 IN RE MELVIN BONNELL

19-6931 JOHNSON, ROBERT W. V. LINEBARGER GOGGAN BLAIR

19-7095 SMITH, DAVID L. V. USDC ED NC

The petitions for rehearing are denied.

19-6846 RILEY, JAMES W. V. METZGER, WARDEN, ET AL.

19-6856 RILEY, JAMES W. V. DELAWARE

The petitions for rehearing are denied. Justice Alito took no part in the consideration or decision of these petitions.

SUPREME COURT OF THE UNITED STATES

ARCHDIOCESE OF WASHINGTON *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18–1455. Decided April 6, 2020

The petition for a writ of certiorari is denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition.

Statement of JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, respecting the denial of certiorari.

Because the full Court is unable to hear this case, it makes a poor candidate for our review. But for that complication, however, our intervention and a reversal would be warranted for reasons admirably explained by Judge Griffith in his dissent below and by Judge Hardiman in an opinion for the Third Circuit. See 910 F. 3d 1248, 1250–1254 (CADC 2018) (Griffith, J., dissenting from denial of rehearing en banc); *Northeastern Pa. Freethought Society* v. *Lackawanna Transit System*, 938 F. 3d 424, 435–437 (CA3 2019) (noting disagreement with D. C. Circuit).

At Christmastime a few years ago, the Catholic Church sought to place advertisements on the side of local buses in Washington, D. C. The proposed image was a simple one—a silhouette of three shepherds and sheep, along with the words "Find the Perfect Gift" and a church website address. No one disputes that, if Macy's had sought to place the same advertisement with its own website address, the Washington Metropolitan Area Transit Authority (WMATA) would have accepted the business gladly. Indeed, WMATA admits that it views Christmas as having "'a secular half'" and "'a religious half,'" and it has shown no hesitation in taking

secular Christmas advertisements. Pet. for Cert. 1. Still, when it came to the church's proposal, WMATA balked.

That is viewpoint discrimination by a governmental entity and a violation of the First Amendment. In fact, this Court has already rejected no-religious-speech policies materially identical to WMATA's on no fewer than three occasions over the last three decades. See *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993). In each case, the government opened a forum to discussion of a particular subject but then sought to ban discussion of that subject from a religious viewpoint. What WMATA did here is no different.

WMATA's response only underscores its error. WMATA suggests that its conduct comported with our decision in *Rosenberger* because it banned religion as a *subject* rather than discriminated between religious and nonreligious *viewpoints*. But that reply rests on a misunderstanding of *Rosenberger*. There, the Court recognized that religion is not just a subject isolated to itself, but often also "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." 515 U. S., at 831. That means the government may minimize religious speech incidentally by reasonably limiting a forum like bus advertisement space to subjects where religious views are unlikely or rare. But once the government allows a subject to be discussed, it cannot silence religious views on that topic. See *Good News Club*, 533 U. S., at 110–112. So the government may designate a forum for art or music, but it cannot then forbid discussion of Michelangelo's David or Handel's Messiah. And once the government declares Christmas open for commentary, it can hardly turn around and mute religious speech on a subject that so naturally invites it.

That's not to say WMATA lacks a choice. The Constitution requires the government to respect religious speech, not to maximize advertising revenues. So if WMATA finds messages like the one here intolerable, it may close its buses to all advertisements. More modestly, it might restrict advertisement space to subjects where religious viewpoints are less likely to arise without running afoul of our free speech precedents. The one thing it cannot do is what it did here—permit a subject sure to inspire religious views, one that even WMATA admits is "half" religious in nature, and then suppress those views. The First Amendment requires governments to protect religious viewpoints, not single them out for silencing.

SUPREME COURT OF THE UNITED STATES

RANDY ETHAN HALPRIN *v.* LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 19–6156. Decided April 6, 2020

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

The facts underlying this petition are deeply disturbing. I write to explain why I nevertheless do not dissent from the denial of certiorari.

In December 2000, petitioner Randy Ethan Halprin and six others escaped from a Texas prison and robbed a sporting-goods store. During the robbery, Officer Aubrey Hawkins responded to a distress call and was fatally shot. The State of Texas tried Halprin and the other escapees separately for their roles in Officer Hawkins' death. Presiding over most of those trials, including Halprin's, was Judge Vickers Cunningham.

In 2003, a jury found Halprin guilty of capital murder and recommended the death penalty, and then-Judge Cunningham announced a death sentence. For the next decade, Halprin unsuccessfully sought appellate and collateral relief in the state courts. In 2014, he petitioned for a writ of habeas corpus under 28 U. S. C. §2254, to no avail.

Years after the trial, Cunningham—no longer a judge—ran for a position as a county commissioner. In May 2018, a news outlet published that Cunningham had created a living trust for his children that would have withheld payments had they married nonwhite non-Christians. (Halprin is Jewish, a fact that featured prominently at his

trial.) A former campaign staffer of Cunningham's also relayed to the news outlet that the former judge used the acronym "T.N.D."—short for "Typical N*** Deals"—to refer to criminal cases involving black defendants. Record 19–70016.1120.

These developments prompted Halprin's counsel to investigate whether Cunningham had harbored bias against Halprin. Witnesses recounted that, shortly after Halprin's trial, Cunningham had referred to Halprin with derogatory terms like "f***n' Jew"—and that the former judge had also referred to Halprin's accomplices using similar slurs. *Id.*, at 19–70016.1064. Halprin's counsel further discovered that Cunningham had told campaign staffers that he sought public office to "save" his city from "'n***s,' 'wetbacks,' Jews, and dirty Catholics." *Id.,* at 19–70016.1235.

On May 17, 2019, presented with this newly discovered evidence, Halprin filed another §2254 petition in Federal District Court. He asserted that Cunningham's bias constituted structural error depriving Halprin of his constitutional right to a fair trial. Halprin also requested that the federal court stay the proceedings so that he could exhaust his claim in state court, and then filed an application for habeas relief in the Texas Court of Criminal Appeals. (That court has since stayed Halprin's execution to allow a trial court to consider the claim of judicial bias.)

Meanwhile, the District Court transferred Halprin's recent §2254 petition to the Court of Appeals for the Fifth Circuit to determine whether it was an unauthorized "second or successive" petition. See 28 U. S. C. §2244(b).* The Fifth

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* Section 2244(b)(2)(B) provides in pertinent part:

"A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

Circuit recognized that Halprin had cited evidence of "horrible" "racism and bigotry" that, if true, would be "completely inappropriate for a judge." *In re Halprin*, 788 Fed. Appx. 941, 942, n. 2 (2019) (*per curiam*). Nevertheless, the Court of Appeals held, Halprin's filing was a second or successive petition under federal law because, "even if" Cunningham's prejudice were "unknown to Halprin at the time," the judicial-bias claim would have been "ripe" during the jury trial. *Id.*, at 943. The Fifth Circuit then concluded that Halprin could not satisfy §2244(b)'s "'strict'" requirements for authorizing a second or successive §2254 application. *Id.*, at 945. Granting Halprin's argument that judicial bias is "structural error" warranting an automatic retrial, the Fifth Circuit still found that Halprin could not show "by clear and convincing evidence that, absent such bias, no reasonable factfinder would have found Halprin guilty of the underlying offense." *Id.*, at 944–945.

In this Court, Halprin contests whether his recent federal petition is "second or successive" at all. Drawing on *Panetti* v. *Quarterman*, 551 U. S. 930 (2007), and *Magwood* v. *Patterson*, 561 U. S. 320 (2010), Halprin contends that his federal habeas claim cannot count as "second or successive" under §2244(b) because he never "'had a full and fair opportunity to raise the claim in [his] prior application'" to the Federal District Court. Pet. for Cert. 14. Halprin also urges the Court to exercise its "traditional equitable authority" to excuse defaulted claims that do not satisfy §2244(b)'s literal text. *Id.*, at 15 (internal quotation marks omitted).

Despite these potent arguments, the Court declines to grant certiorari. I do not dissent for two reasons. First, state-court proceedings are underway to address—and, if appropriate, to remedy—Halprin's assertion that insidious racial and religious bias infected his trial. For its part, the

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evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

State represents that "Halprin has not been deprived of an opportunity to bring his claim in state court" because the Texas Court of Criminal Appeals recently "stayed his execution and remanded his judicial bias claim to the trial court for review." Brief in Opposition 21–22; see also *id.*, at 28 ("[A]venues of relief remain, including state habeas proceedings"). Thus, were the Texas courts to agree with Halprin on the merits of his judicial-bias claim, this petition for a writ of certiorari about a federal procedural provision would become moot.

Second, this Court's denial "carries with it no implication whatever regarding the Court's views on the merits of" Halprin's claims. *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari). Though the Fifth Circuit has already interpreted §2244 to deny Halprin authorization to file a §2254 petition, this Court's denial of certiorari does not prevent Halprin from seeking direct review from a constitutional ruling by the Texas courts. Nor does it preclude Halprin from seeking an original writ of habeas corpus under this Court's Rule 20.

* * *

"[T]he Due Process Clause clearly requires a 'fair trial in a fair tribuna[l]' before a judge with no actual bias against the defendant." *Bracy* v. *Gramley*, 520 U. S. 899, 904–905 (1997) (citation omitted). I trust that the Texas courts considering Halprin's case are more than capable of guarding this fundamental guarantee.

SUPREME COURT OF THE UNITED STATES

VF JEANSWEAR LP *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

No. 19–446. Decided April 6, 2020

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting from the denial of certiorari.

This case presents the question whether the Equal Employment Opportunity Commission (EEOC) may continue to investigate an employer's purported wrongdoing after issuing a right to sue notice to a private party who, in turn, has initiated her own litigation. The Seventh and Ninth Circuits have determined that Title VII of the Civil Rights Act of 1964, 78 Stat. 253, grants the EEOC that power. See *EEOC* v. *Union Pacific R. Co.*, 867 F. 3d 843, 848 (CA7 2017); *EEOC* v. *Federal Express Corp.*, 558 F. 3d 842, 851–852 (CA9 2009). The Fifth Circuit, on the other hand, has concluded that the plain text of Title VII prohibits such investigations. See *EEOC* v. *Hearst Corp.*, 103 F. 3d 462, 469 (1997).

Though this split in authority is shallow, it directly implicates the EEOC's core investigative powers. If the Fifth Circuit is correct that issuing a right to sue notice terminates the EEOC's ability to investigate, then the EEOC may be wielding ultra vires power, impermissibly subjecting employers to time-consuming investigations. I would grant certiorari to determine whether the agency is operating within the confines of the authority granted by Congress.

I

A

A preliminary analysis of the text suggests that the

EEOC may lack the authority to continue an investigation after it has issued a right to sue notice. The basic provisions governing the EEOC's role in investigating discrimination claims are found in 42 U. S. C. §2000e–5. As relevant here, the EEOC's duties are triggered when it receives "a charge . . . filed by or on behalf of a person claiming to be aggrieved." §2000e–5(b); *University of Pa.* v. *EEOC*, 493 U. S. 182, 190 (1990). The EEOC must provide notice to the employer "within ten days, *and shall make an investigation* thereof." §2000e–5(b) (emphasis added). "If the Commission determines *after such investigation* that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* (emphasis added). Otherwise, it will dismiss the charge. *Ibid.* "The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." *Ibid.* But "[i]f a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section[,] . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge." §2000e–(5)(f)(1); see also *Fort Bend County* v. *Davis*, 587 U. S. ___ (2019).

Regardless of how the EEOC may approach this process in practice, these statutory provisions set out a clear timetable and a sequential series of steps for the EEOC to follow. After giving notice to the employer, it must engage in an investigation that comes to a definitive end either because the EEOC has entered into a conciliation process or

because it has dismissed the charge. Further, the EEOC must issue the right to sue notice after 180 days—60 days after the timeline contemplated by the statute for a reasonable cause determination, which triggers dismissal of a charge or conciliation efforts. Thus, at first glance, it appears that the more natural reading of these provisions is that Congress "expected the EEOC to complete investigations within 120 days[, l]eaving an additional 60 days for the EEOC to determine whether suit should be filed." *Hearst*, 103 F. 3d, at 467.

B

Whatever the correct interpretation of the text, however, the Ninth Circuit's approach in *Federal Express*, 558 F. 3d 842, is highly problematic. The Ninth Circuit began by asserting that it was bound to enforce an EEOC subpoena if the agency's jurisdiction was "plausible" and not "plainly lacking." *Id.*, at 848 (internal quotation marks omitted). Next, the court noted that the EEOC has, through regulation, interpreted its own statutory authority to allow the agency to continue processing a charge after it has issued a right to sue notice. *Id.*, at 850; see 29 CFR §1601.28(a)(3) (2019). To cap off its analysis, the Ninth Circuit gave weight to the fact that the EEOC had further interpreted its own *regulation* allowing "'further processing [of] the charge'" after issuing notice to "includ[e] further investigation." *Federal Express*, 558 F. 3d, at 850 (citing EEOC Compliance Manual §6.4 (2006)). Thus, under this dual layer of agency interpretation, the Ninth Circuit concluded that Title VII permitted the EEOC to continue with its investigation after issuing a right to sue notice. The Ninth Circuit acknowledged that its reading conflicted with the Fifth Circuit's decision in *Hearst*, 103 F. 3d 462. But it disagreed with the Fifth Circuit primarily because it viewed *Hearst* as conflicting with the EEOC's role in vindicating the public's

interest in eradicating employment discrimination.* *Federal Express*, 558 F. 3d, at 852.

The Ninth Circuit's analysis contains at least four flaws. Most egregiously, the Ninth Circuit failed to consider the most useful, and perhaps dispositive, evidence—the text of Title VII itself. Nor did it perform anything remotely resembling an independent assessment of that text. Even under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), courts are instructed to engage in their own analysis of the statute to determine whether any gap has been left for the agency to fill. *Id.*, at 843, n. 9; see also *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 447–448 (1987). The Ninth Circuit, by contrast, bypassed the statutory text entirely.

Second, the Ninth Circuit's approach to jurisdiction was highly suspect, if not outright erroneous. As the Ninth Circuit has elsewhere recognized, all administrative agencies "are creatures of statute, bound to the confines of the statute that created them." *United States Fidelity & Guaranty Co.* v. *Lee*, 641 F. 3d 1126, 1135 (2011). This fundamental principle applies not only to substantive areas regulated by an agency but also to the agency's underlying jurisdiction. There is no basis for applying a "plainly lacking" standard when assessing the authority of an agency to act, let alone to issue wide-ranging subpoenas that consume the time and resources of employers.

Third, reliance on and deference to the EEOC's regulation also seems inappropriate under this Court's *Chevron* framework. The regulation was originally promulgated before this Court's decision in *Chevron*. See 29 CFR §1601.28

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*The Ninth Circuit also relied in part on this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U. S. 279 (2002), where this Court held that an employee's agreement to arbitrate employment disputes did not prevent the EEOC from pursuing victim-specific relief in court. But that decision conflicts with the principle that the EEOC takes a plaintiff as it finds him. See *id.*, at 303–312 (THOMAS, J., dissenting).

(a)(3) (1978). The associated rulemaking contains no indication that the agency invoked its interpretive authority or even believed it was interpreting the statute at all. See 42 Fed. Reg. 42025, 42030–42031, 47831 (1977); see also 37 Fed. Reg. 9214–9220 (1973). Thus, it is hardly self-evident that, even under our precedents, *Chevron* deference should apply. See *Barnhart* v. *Walton*, 535 U. S. 212, 222 (2002).

Last but not least, the Ninth Circuit's invocation of the EEOC Compliance Manual not only assumes that the regulation is ambiguous—itself a dubious proposition—but also is premised on so-called *Auer* deference to the agency's interpretation of its own ambiguous regulation. *Auer* v. *Robbins*, 519 U. S. 452 (1997). This doctrine has rightly fallen out of favor in recent years, as it directly conflicts with the constitutional duty of a judge to faithfully and independently interpret the law. See *Kisor* v. *Wilkie*, 588 U. S. ___, ___ (2019) (GORSUCH, J., concurring in judgment); *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 112 (2015) (THOMAS, J., concurring in judgment).

II

Leaving the Seventh and Ninth Circuit's highly questionable interpretation undisturbed has wide-reaching ramifications for employers subject to litigation in those Circuits. In this case, for instance, a former salesperson employed by petitioner VF Jeanswear LP filed a charge with the EEOC, alleging that she was demoted on the basis of her sex and age in violation of Title VII. §2000e–2(a)(1). After she filed a complaint in state court, the EEOC issued her a right to sue notice, indicating that it would not finish processing her charge within the allotted 180-day timeframe. The former employee proceeded to litigate her claims in federal court, and the EEOC did not intervene.

Meanwhile, the EEOC continued with its own, far broader investigation, including a subpoena directing VF Jeanswear to "[s]ubmit an electronic database identifying

all supervisors, managers, and executive employees at VF Jeanswear's facilities during the relevant period," including information such as the "position(s) held and date in each position" and, "if no longer employed, [the] date of termination, and reason for termination." 2017 WL 2861182, *2 (D Ariz., July 5, 2017). Thus, the EEOC not only subjected VF Jeanswear to a second investigation, but it also issued a subpoena covering material that departed significantly from the employee's original, individualized allegations. As the District Court noted in refusing to enforce the subpoena, the EEOC sought information regarding positions for which the employee never applied, and amounted to "a companywide and nationwide subpoena for discriminatory promotion, a discriminatory practice not affecting the charging party." *Id.*, at *6.

Because the textual argument against the EEOC's power to issue this subpoena seems strong, and the argument supporting it particularly weak, I respectfully dissent from the denial of certiorari.