No. 24-1672

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In Re: AAM HOLDING CORP.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant-Appellee,
v.
AAM HOLDING CORP., agent of Flashdancers Gentlemen's Club,
59 MURRAY STREET ENTERPRISES, INC., agent of Flashdancers Gentlemen's Club,
Respondents-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

This is a routine subpoena enforcement action applying established legal precedent to an uncomplicated record. The EEOC therefore does not request oral argument.

STATEMENT OF JURISDICTION

The EEOC agrees with the bases for jurisdiction set out in the opening brief of AAM Holding Corp. and 59 Murray Street Enterprises (together, "FlashDancers").

STATEMENT OF THE ISSUES

1. Did the district court act within its discretion when it held that the subpoenas sought information that is relevant to the EEOC's investigation?

2. Did the district court act within its discretion when it held that FlashDancers had not submitted enough contextual evidence to prove that the subpoenas imposed an undue burden?

3. Can the EEOC continue carrying out its statutory obligation to investigate the allegations in a charge of discrimination after an individual files a private lawsuit based on that charge?

STATEMENT OF THE CASE

A. Statutory and administrative framework

Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, "to bring employment discrimination to an end." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982). Title VII prohibits, among other things, employment discrimination "because of . . . sex." 42 U.S.C.

§ 2000e 2(a)(1) and (2). Meanwhile, Congress charged the EEOC with "[p]rimary responsibility for enforcing Title VII." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 61-62 (1984). In doing so, Congress created "an integrated, multistep enforcement procedure that enables the Commission to detect and remedy instances of discrimination." *Id.* at 62 (cleaned up). Those steps can overlap, as "the beginning of another stage does not necessarily terminate the preceding stage, and Title VII confers upon the EEOC investigatory authority during *each* stage." *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 852 (9th Cir. 2009).

The EEOC's process generally begins with a charge of discrimination. When the EEOC receives such a charge, it "shall make an investigation thereof." 42 U.S.C. § 2000e-5(b). To enable the EEOC to do so, Congress gave it "access . . . and the right to copy any evidence . . . that relates to unlawful employment practices covered by this subchapter [that] is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a).

If the EEOC "determines after such investigation that there is reasonable cause to believe that the charge is true," it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b); *see*

Mach Mining, LLC v. *EEOC*, 575 U.S. 480, 483 (2015). Should such efforts fail, the EEOC may bring a civil action against the employer. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.27.

Title VII also provides a path for a charging party to file a lawsuit. A charging party may file a lawsuit within ninety days of receiving a notice from the EEOC. 42 U.S.C. § 2000e-5(f)(1). That notice may state that the EEOC concluded its investigation without finding reasonable cause to believe discrimination occurred. 42 U.S.C. § 2000e-5(b), (f)(1). The EEOC may also issue that notice if conciliation fails and the Commission does not file a lawsuit. 42 U.S.C. § 2000e-5(f)(1). Or, if the EEOC does not complete its administrative processing of the charge within 180 days, the charging party may request a right-to-sue notice. 42 U.S.C. § 2000e-5(f)(1); 29 C.FR § 1601.28(a)(1). "Whether or not the EEOC acts on the charge, a complainant is entitled to a 'right-to-sue' notice 180 days after the charge is filed." *Fort Bend Cnty. v. Davis*, 587 U.S. 541, 545 (2019). When the EEOC issues such a notice, it generally terminates the processing of the charge. *See* 29 C.F.R. § 1601.28(a)(3). But the EEOC may keep investigating the charge if it "determines at that time or at a later time that [further investigation] would effectuate the purpose of [T]itle VII." *Id.*

Title VII also gives the EEOC authority to issue subpoenas requiring the production of evidence. 42 U.S.C. § 2000e-9 (incorporating subpoena powers from the National Labor Relations Act, 29 U.S.C. § 161). When the EEOC issues a subpoena, the respondent can "petition . . . to seek its revocation or modification." 29 C.F.R. § 1601.16(b)(1). If the EEOC denies the petition and the respondent still does not comply, the EEOC may seek a court order to enforce the subpoena. 29 C.F.R. § 1601.16(c), (d); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 191 (1990).

"A district court's role in an EEOC subpoena enforcement proceeding . . . is a straightforward one." *McLane Co. v. EEOC*, 581 U.S. 72, 76 (2017). A subpoena enforcement action is not "an opportunity to test the strength of the underlying complaint." *Id.* Instead, the court should determine only if "the charge is proper and the material requested is relevant." *Id.* at 77. If it is, the court "should enforce the subpoena unless the employer establishes" an affirmative defense, such as that compliance would be unduly burdensome. *Id.*

B. Factual and procedural background[1]

Charging Party Eunice Raquel Flores Thomas filed a charge of discrimination in March 2022,[2] alleging widespread sexual harassment at FlashDancers. App. at 5-9. Flores Thomas alleged that she worked as a dancer at two adult entertainment clubs that FlashDancers operated from September 2019 to July 2021. *Id.* at 6. She described egregious sexual harassment, including FlashDancers forcing her to engage in sexual acts with customers, change clothes in front of video cameras, and "watch a customer having sex . . . with another dancer." *Id.* at 6-9. Meanwhile, Flores Thomas alleged, FlashDancers "perpetuated" the hostile work environment at both FlashDancers locations "through the policies and practices of [owners and managers Barry Lipsitz and [Barry Lipsitz] Jr." *Id.* at 6. Lipsitz Jr., along with the FlashDancers managers, "made clear that [Flores Thomas] was to do whatever the customers wanted." *Id.* at 6-8.

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[1] Citations take the following form: "App. at __" for citations to the Appellants' Appendix, "Dkt.__" for citations to the record below, and "R.__" for references to filings in this appeal.

[2] Flores Thomas filed one charge of discrimination naming AAM and 59 Murray Street as respondents, though she alleged that they "are different locations of the same integrated enterprise/single employer." App. at 56 n.1. The EEOC assigned a different charge number to each respondent, *id.*, so the record below sometimes references "charges of discrimination."

Flores Thomas's charge alleged that FlashDancers's subjected other dancers to harassment as well. She alleged "that "the hostile work environment . . . affected all women who have worked at [FlashDancers's] strip clubs," and estimated that "more than forty women" endured harassment there. *Id.* at 6. Continuing, she noted that FlashDancers's owners required all dancers to change while being monitored by video, "making sure to capture and preserve video of Ms. Flores Thomas, and all of the other dancers, getting fully or nearly naked." *Id.* at 7. Flores Thomas also alleged that she had seen a customer having sex with another dancer and that one of FlashDancers's owners told the dancers they "must be taking customers into the champagne rooms for any and all services requested by a customer." *Id.* at 8. Based on Flores Thomas's experience, that included having sex with customers. *See id.* at 7-8. She thus alleged that FlashDancers subjected other female dancers to "a hostile work environment and *quid pro quo* sexual harassment." *Id.* at 7.

After receiving FlashDancers's position statement on the charge, the EEOC requested more information. *See id.* at 19-20. That information included, any complaints of harassment FlashDancers received, any

relevant policies, a searchable database listing pedigree information[3] from January 2019 to the present for FlashDancers's employees, and the number of people FlashDancers employed from 2019 to 2022, among other things. *Id.* FlashDancers provided a limited response. FlashDancers said that it had not received any complaints of harassment, and it provided the number of employees for each of its two locations. *Id.* at 21-24. Each club employed at least 150 people each year—and in some years more than 200. *Id.* at 22-23. Although FlashDancers also provided various policies and declarations from its managers, FlashDancers refused to provide pedigree information for any employees. *Id.* at 23.

The EEOC issued subpoenas for pedigree information in November 2023. *Id.* at 31-36. FlashDancers refused to comply, *id.* at 37-41, and the EEOC petitioned the district court to enforce the subpoenas in March 2024. Dkt.1. After full briefing, the court granted the EEOC's petition in June 2024. *See* App. at 65-72. The court held that the requested pedigree information was relevant because the charge alleged discrimination against

[3] "Pedigree information" is information to identify and contact individuals. Here, that included name, age, sex, race, position at FlashDancers, dates of employment, and contact information (email, physical address, and phone number). App. at 20, 33, 36.

other women, and the information would cast light on their experiences. *Id.* at 67-69. It also rejected FlashDancers's undue burden argument. *Id.* at 69-71.

FlashDancers then moved to stay the court's order. Dkt.20. Meanwhile, at Flores Thomas's request and as required by 29 C.F.R. § 1601.28(a)(1), the EEOC issued Flores Thomas right-to-sue notices on July 3, 2024.[4] R.37.1 at 1, 5. The notices reflected that Flores Thomas requested the notices more than 180 days after filing her charge. They also stated that "[t]he EEOC will continue its investigation of this charge even though it issues this Notice of Right to Sue at your request." *Id.* The EEOC sent the notices to Flores Thomas, with copies to the attorneys for Flores Thomas and for FlashDancers. *Id.* at 1-8.

The parties completed briefing FlashDancers's motion to stay the district court's order on July 17, 2024, Dkt. 24, and the district court denied the motion three weeks later. App. at 73-83. Addressing likelihood of

[4] The EEOC filed an unopposed motion to supplement the record with the right-to-sue notices and the complaint in Flores Thomas's private lawsuit. R.37. That motion is pending. As Flash Dancers consented to the submission of the right-to-sue notices and requested the submission of the complaint, the EEOC cites the supplemental materials here only where they are material to the issues raised in FlashDancers's opening brief.

success on the merits, the court rejected FlashDancers's arguments that the subpoenas improperly requested information on male employees and information on race and age, holding again that the information was relevant to the EEOC's investigation. *Id.* at 76-77. The court similarly held that FlashDancers had not offered the evidence necessary to explain how compliance would cause an undue burden. *Id.* at 78.

A month later, FlashDancers asked this Court for a stay pending appeal. R.24.1. Then, on September 25, 2024, Flores Thomas filed a private lawsuit based on her charge of discrimination. R.37.1 at 9. The EEOC opposed FlashDancers's motion for a stay, R.28.1, and FlashDancers argued in its reply that Flores Thomas's lawsuit prevented the EEOC from enforcing the subpoenas. R.29.1 at 12. To date, FlashDancers has not complied with the subpoenas or the district court's order.

STANDARD OF REVIEW

This Court reviews a district court's decision to enforce or quash an EEOC subpoena for abuse of discretion. *McLane*, 581 U.S. at 85. This Court will only find an abuse of discretion if the district court "(1) base[d] its decision on an error of law or uses the wrong legal standard; (2) base[d] its decision on a clearly erroneous factual finding; or (3) reache[d] a

conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *Lilly v. City of New York*, 934 F.3d 222, 227 (2d Cir. 2019) (internal quotation marks omitted). FlashDancers did not make an argument based on Flores Thomas's request for a right-to-sue notice and subsequent private lawsuit below, but the question raises a legal issue that may be reviewed de novo. *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843, 847 (7th Cir. 2017).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in holding that the EEOC sought relevant information and rejecting FlashDancers's undue burden defense. As the district court held, the subpoenas here seek information that will help the EEOC determine whether FlashDancers subjected its female dancers to a hostile work environment because of sex. The subpoenas request information needed to contact FlashDancers's employees who may have endured the sexual harassment alleged in the charge or who may have information on whether that sexual harassment occurred. Meanwhile, the court carefully assessed the limited evidence FlashDancers offered to prove that compliance would be unduly

burdensome, and it held that FlashDancers had not provided the necessary contextual evidence to show that complying with the subpoenas would seriously hinder its operations. FlashDancers has not shown the district court abused its discretion in holding that the evidence did not meet that demanding, fact-intensive undue burden standard.

FlashDancers also argues on appeal that Flores Thomas's private lawsuit deprives the EEOC of its ability to investigate allegations of discrimination, but Title VII does not cabin the EEOC's authority in that fashion. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 287, 297-98 (2002), the Supreme Court held that a charging party's actions do not limit the EEOC's statutory authority to enforce Title VII. Since then, the only two courts of appeals to address the issue have both held that the EEOC may continue to investigate after a charging party files a private lawsuit.

ARGUMENT

I. The district court acted within its discretion when it held that the subpoenas seek information relevant to the EEOC's investigation.

Flores Thomas's charge alleges egregious harassment at two FlashDancers locations, and, as the district court held, the subpoenas seek information relevant to the investigation of that charge. FlashDancers

disagrees, but it does not argue that the district court misstated the Supreme Court's standard for relevance in an EEOC subpoena enforcement proceeding or clearly erred in assessing the facts in the record. Instead, it appears to ask this court to apply a more restrictive gloss on relevance and to ignore the allegations in Flores Thomas's charge that FlashDancers also harassed other dancers. Neither argument has merit. The court here applied the correct legal standard, and Flores Thomas's charge unmistakably alleges that FlashDancers harassed other women as well. FlashDancers thus has not shown and cannot show the district court abused its discretion in holding that the information sought here is relevant to the allegations in the charge.

A. The district court applied the correct test for relevance.

"Since the enactment of Title VII, courts have generously construed the term 'relevant.'" *Shell Oil Co.*, 466 U.S. at 68. The relevance requirement for EEOC subpoenas thus "is not especially constraining"; it includes "virtually any material that might cast light on the allegations against the employer." *Id.* at 68-69; *EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136, 139 (2d Cir. 2009) (applying *Shell Oil* relevance standard).

Relevance turns on the information's potential usefulness to the investigation, not the merits of the charge. "A district court is not to use an enforcement proceeding as an opportunity to test the strength of the underlying complaint." *McLane*, 581 U.S. at 76 (emphasizing *Shell*'s standard for relevance). Thus, "at the investigatory stage, the EEOC is not required to show that there is probable cause to believe that discrimination occurred or to produce evidence to establish a *prima facie* case of discrimination." *United Parcel Serv.*, 587 F.3d at 140. "Relevancy is determined in terms of the investigation rather than in terms of evidentiary relevance." *Fed. Exp.*, 558 F.3d at 854.

The district court applied that standard here. Relying on the Supreme Court's decision in *McLane*, it noted the "generous construction" of relevance and the Supreme Court's admonishment that "courts are not to test the strength of the underlying charge." App. at 67-68 (cleaned up). FlashDancers does not suggest that the district court abused its discretion in relying on *McLane*, nor could it. Instead, it attempts, incorrectly, to attack the specificity of Flores Thomas's charge and the connection between that charge and the information the EEOC seeks. In doing so, it misinterprets the charge and downplays the relevance of the information sought here.

B. Flores Thomas's charge alleges widespread harassment at FlashDancers.

FlashDancers does not dispute that Flores Thomas alleged that other women endured harassment at the locations at issue, instead suggesting that those allegations are "baseless" and that the EEOC had not identified evidence from the investigation supporting the charge. R.33.1 at 11. In doing so, FlashDancers misstates the function of a charge in general and the details in Flores Thomas's charge specifically.

A charge need only provide "fair notice" of the allegations "to ensure that the employer was given some idea of the nature of the charge;" it is not "a substantive constraint on the Commission's investigative authority." *Shell Oil*, 466 U.S. at 74-75; *see also EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364 (4th Cir. 1976) ("The charge is not to be treated as a common-law pleading that strictly cabins the investigation that results therefrom . . . ."); *EEOC v. Ferrellgas, L.P.*, 97 F.4th 338, 349 (6th Cir. 2024) ("[T]he Commission's regulations do not hold complaining individuals to the requirements of artful legal pleading . . . ."). An employer thus cannot attack the strength of the charge in a subpoena enforcement proceeding. *McLane*, 581 U.S. at 76. "[A]ny effort by the court to assess the likelihood that the Commission

would be able to prove the claims made in the charge would be reversible error." *Shell Oil*, 466 U.S. at 72 n.26.

An employer similarly cannot challenge a subpoena based on the adequacy of the EEOC investigation to date. "[T]he Supreme Court has made plain that courts may not condition enforcement of EEOC administrative subpoenas on a threshold evidentiary showing . . . ." *EEOC v. McLane Co.*, 804 F.3d 1051, 1057 (9th Cir. 2015), *vacated and remanded on other grounds sub nom. McLane Co. v. EEOC*, 581 U.S. 72 (2017). FlashDancers argues that to justify the EEOC's subpoena, Flores Thomas had to identify the other employees subjected to harassment, any witnesses to the harassment, and the specific dates of the harassment in her charge. R.33.1 at 12. But that is more detail than a charge requires, 29 C.F.R. § 1601.12(b); indeed, it is more detail than the EEOC must provide when it notifies an employer that there is reasonable cause to believe discrimination occurred. *Mach Mining*, 575 U.S. at 494 (reasonable cause determination need only "describe[] both what the employer has done and which employees (or what class of employees) have suffered as a result"); *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1199 (9th Cir. 2016) (determination adequately described discrimination and harassment

against a group of unnamed female employees). Arguments about "the dearth of evidence" or the "seeming lack of other investigation," meanwhile, are "not a district court's charge in considering relevance." *EEOC v. UPMC*, 471 F. App'x 96, 100 (3d Cir. 2012); *see also United Parcel Serv.*, 587 F.3d at 140.

The charge here alleges that FlashDancers subjected other dancers to a hostile work environment. Flores Thomas alleged that the harassment was "perpetuated through the policies and practices of" FlashDancers's owners and managers and that it "affected all women who have worked at [FlashDancers's] strip clubs." App. at 6. She also offered details, noting that FlashDancers recorded all the dancers "getting fully or nearly naked" as they changed clothes before and after their shifts. *Id.* at 7. She alleged that FlashDancers pressured her to perform sexual acts with its customers and that she had seen a FlashDancers customer having sex with another dancer. *Id.* at 7-8. The district court thus did not abuse its discretion in concluding that the charge "include[s] allegations that a class of employees experienced discrimination at both of [FlashDancers's] clubs." *Id.* at 69.

C. The pedigree information requested is relevant to investigating allegations of widespread harassment.

As the district court recognized, information identifying potentially aggrieved individuals and witnesses to the alleged discrimination is relevant to the EEOC's investigation here. The charge alleged harassment at two FlashDancers locations, App. at 6-9, and the subpoenas sought pedigree information to identify employees at those two locations, App. at 33, 36. Under well-established case law, that information is relevant to the EEOC's investigation of the charge.

Pedigree information is relevant where it allows the EEOC "to contact other . . . employees . . . to learn more about their experiences." *McLane*, 804 F.3d at 1056; *see also Ferrellgas*, 97 F.4th at 349 (holding application and hiring information relevant because it "could cast light on whether [the employer] discriminated against other job applicants"). And, even if other employees may not themselves be aggrieved individuals, they might have information that "might cast light on the allegations against [the employer]—whether positively or negatively." *McLane*, 804 F.3d at 1056-57. Indeed, this Court held that a district court "applied too restrictive a standard of relevance" when it determined the EEOC could

not access information identifying other individuals potentially subjected to similar discrimination. *United Parcel Serv.*, 587 F.3d at 138-39.

FlashDancers nonetheless argues that the subpoenas are overbroad, but it does so based on inapposite, out-of-circuit cases. In each case that FlashDancers cites, the courts relied on the absence of allegations of discrimination against others. In *EEOC v. TriCore Reference Laboratories*, 849 F.3d 929, 938-39 (10th Cir. 2017), the Tenth Circuit affirmed a district court decision to deny the EEOC access to a list of employees because the charge did not "allege[] anything to suggest a pattern or practice of discrimination beyond TriCore's failure to reassign [the Charging Party]." Similarly, in *EEOC v. Eberspaecher North America Inc.*, 67 F.4th 1124, 1135 (11th Cir. 2023), the Eleventh Circuit affirmed a district court decision that denied the EEOC access to a list of employees at facilities not named in the charge because information about the employer "fir[ing] other employees at other facilities" was not relevant to the facility identified in the charge.[5]

FlashDancers also relies on *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014), but that too involved a charge focused only

[5] The district court in *Eberspaecher* had ordered the employer to turn over information on all employees at the facility named in the charge, and the Eleventh Circuit did not disturb that holding. *Id.* at 1127.

on one individual. There, the charge only alleged discrimination against the charging party—and the employer did not dispute that it had fired him because of his medical conditions.[6] *Id.* at 759. In light of that concession and the absence of any broader allegation of discrimination, the Eleventh Circuit upheld the district court's decision that a subpoena for companywide data was overbroad: "[a]lthough statistical and comparative data in some cases may be relevant in determining whether unlawful discrimination occurred," it was unnecessary in that case because the employer "admit[ted]" that the employee "was terminated because of his medical condition." *Id.* at 761.

The district court cases that FlashDancers cites are no different. *EEOC v. Nestle Prepared Foods*, No. 5:11-MC-358, 2012 WL 1888130, at *3 (E.D. Ky. May 23, 2012) (relying on the lack of allegations of other violations); *EEOC v. Se. Food Servs. Co., LLC*, No. 3:16-MC-46-TAV-HBG, 2017 WL 2728422, at *5 (E.D. Tenn. June 23, 2017) ("[N]othing in the language of Ms. Cordero's charge indicates her desire to bring a claim on behalf of the other

[6] The employer in *Royal Caribbean* also "partially complied by providing records for employees or applicants who were United States citizens," leaving only the EEOC's request for "records regarding non-U.S. citizens" at issue in the subpoena enforcement action. *See id.* at 760.

employee or to allege a pattern of discriminatory behavior"). These cases simply do not address a charge, like Flores Thomas's charge, that explicitly alleges discrimination against herself and others.

At times, pedigree information might well be relevant to an individual charge, but this Court need not pass on that question here. Courts around the country have held that information on practices beyond those alleged in the charge may be relevant because "information concerning whether an employer discriminated against other members of the same class for the purposes of hiring or job classification may cast light on whether an individual person suffered discrimination." *EEOC v. Konica Minolta Bus. Sols. U.S.A., Inc.*, 639 F.3d 366, 369 (7th Cir. 2011); *see also EEOC v. Centura Health*, 933 F.3d 1203, 1207-08 (10th Cir. 2019) ("[E]vidence of a discriminatory policy … is relevant to individual charges … because it 'might cast light' on the charges under investigation."); *Ferrellgas*, 97 F.4th at 349 (information on "job applicants . . . in the same region and during the same timeframe . . . might illuminate whether [the employer] discriminated against [the charging party] . . . in her pay and termination"). Here, however, Flores Thomas's charge alleges harassment against at least forty women at FlashDancers, and pedigree information identifying

FlashDancers's other employees is relevant to investigating those allegations.

FlashDancers also argues that the EEOC cannot seek information on male employees, information on employees' ages or races, or information for years other than the years of Flores Thomas's employment. R.33.1 at 14. But again, this argument construes relevance too narrowly. Male employees may well have been witnesses or provide information that allows the EEOC to compare the working conditions for male and female employees. *See United Parcel Serv.*, 859 F.3d at 379 (rejecting argument that EEOC may only seek information on similarly situated employees); *see also McLane*, 804 F.3d at 1056-57. Information on age and race, meanwhile, may cast light on the identities of potential witnesses if an aggrieved individual identifies a witness by their approximate age or race. And the EEOC reasonably sought information on employees from before and after Flores Thomas's employment to determine the scope of the alleged ongoing harassment. *See EEOC v. Roadway Exp.*, 261 F.3d 634, 641-42 (6th Cir. 2001); *EEOC v. Kronos, Inc.*, 620 F.3d 287, 299 (3d Cir. 2010).

II. The district court acted within its discretion when it held that FlashDancers did not submit enough contextual evidence to prove compliance would impose an undue burden.

Determining whether an administrative subpoena is unduly burdensome "turns on the nature of the materials sought and the difficulty the employer will face in producing them." *McLane*, 581 U.S. at 81. Evaluating "whether the subpoena is unduly burdensome in light of the circumstances" is "well suited to a district judge's expertise." *Id.* Because of the "fact-intensive, close calls" involved in assessing burden, the undue burden inquiry is "better suited to resolution by the district court than the court of appeals." *Id.* (internal quotation marks omitted). The district court here carefully and correctly made those calls, and FlashDancers has not shown the district court abused its discretion in doing so.

A. The district court applied the correct test for undue burden.

"The burden of proving that an administrative subpoena is unduly burdensome is not easily met." *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986). An employer must show "the cost of gathering this information is unduly burdensome in the light of the company's normal operating costs" or "gathering the information would threaten its normal business operations." *Id.* at 479. And it requires more than evidence "that

compliance would be inconvenient and involve some expense." *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993). This well-settled standard tracks the one that this Court has long applied to administrative subpoenas, including where agencies derive their subpoena authority from 29 U.S.C. § 161. *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 n.4 (2d Cir. 2006) (applying standard to subpoena under 29 U.S.C. § 161); *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979) (applying the same standard to subpoena under the Federal Trade Commission Act).

FlashDancers suggests this Court instead rely on an outdated standard that conflicts with the Supreme Court's decision in *McLane*. According to FlashDancers, the burden "must be weighed against the relevance of the requested information." R.33.1 at 16. That approach would confuse and complicate the two-step approach to assessing an undue burden, requiring a district court to first rule on relevance and then consider relevance a second time in the undue burden analysis.

The Supreme Court did not adopt such a double-relevance inquiry. Instead, it described the district court's duty to assess "whether the evidence sought is relevant to the specific charge before it *or* whether the subpoena is unduly burdensome in light of the circumstances," *McLane*,

581 U.S. at 81 (emphasis added). And it did not include relevance in its test for undue burden, listing only "the nature of the materials sought and the difficulty the employer will face in producing them." *Id.* This Court similarly does not list relevance as a factor in undue burden, looking instead to whether "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *Rockefeller*, 591 F.2d at 190 (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc)). FlashDancers offers no reason for this Court to depart from this long-established standard.

Importing relevance into that standard would also clash with the allocation of the burden of proof. The EEOC has the burden to prove relevance, while the employer must prove undue burden. *See McLane*, 581 U.S. at 77-78; *Am. Med. Response*, 438 F.3d at 192-93. If, as FlashDancers suggests, relevance again plays a role in assessing undue burden, that assessment could shift the allocation of proof for that defense from the employer to the EEOC. Nothing in *McLane* or this Court's precedent suggests such a redistribution of the burden on FlashDancers's defense.

B. The district court acted within its discretion when it held that FlashDancers had not provided evidence that compliance would seriously hinder the company's normal operations.

As the district court held, FlashDancers did not "contextualize the burden that [the projected] cost would impose relative to [FlashDancers's] regular operations." App. at 70-71. While FlashDancers offered evidence of the time it believed it would take to comply with the subpoena, it did not supply the necessary evidence to show how that time would disrupt its operations.

As the Sixth Circuit recently noted, "[a]ssessing whether the burden of compliance is undue is a comparative exercise." *Ferrellgas*, 97 F.4th at 350; *see also Maryland Cup*, 785 F.2d at 478-79 (employer did not show estimated cost of $75,000 was undue burden in light of "normal operating costs"). Thus, asserting that compliance "would require between 700 and 1500 employee hours" and "two full weeks of work" for a human resources employee is not enough without context. *Ferrellgas*, 97 F.4th at 350. While the employer "provide[d] an estimate of the burden it might face, [it] offer[ed] up no baseline against which we can compare its estimates to decide whether the burden it faces is undue." *Id.*

FlashDancers offers a declaration asserting that it would take 300 hours to compile the relevant information, App. at 62-64, but, like the employer in *Ferrellgas*, FlashDancers provided no baseline and thus no context for its alleged burden. FlashDancers neither estimates the cost of compliance nor compares that cost to its normal operating costs. *See Maryland Cup*, 785 F.2d at 479 ("Maryland Cup has not shown that the cost of gathering this information is unduly burdensome in the light of the company's normal operating costs"). It also asserts that it cannot hire a vendor to assist because of cost and confidentiality concerns, but it does not estimate the vendor's cost nor does it explain why any vendor FlashDancers might hire would disclose confidential information. Finally, FlashDancers asserts that complying with the subpoena would take its employees away from other tasks, but "[m]erely pointing out that compliance with the subpoena will divert employee attention from ordinary tasks is insufficient." *Ferrellgas*, 97 F.4th at 350; *see also Konica Minolta*, 639 F.3d at 371 (company's assertion that it "would have to obtain, organize, and produce the materials" not enough to show undue burden).

Rather than providing that context, FlashDancers attacks the district court's reliance on other reporting requirements that may minimize the

alleged burden. FlashDancers concedes that it must report the name, address, and dates of employment for each employee to the Internal Revenue Service, *see* R.33.1 at 19-20, but FlashDancers has not provided that information for any employees to the EEOC. And, although FlashDancers has the burden of proof on this defense, it offered no evidence that it falls below the 100-employee threshold for collecting and reporting EEO-1 data, even as it provided evidence that it had more than 100 employees at each location every year from 2019 to 2022. *See* App. at 23-24.

FlashDancers also cites a district court case to suggest that the burden FlashDancers asserts here is sufficient, but it omits critical facts about that case. The court in *EEOC v. McCormick & Schmick's*, No. 07-mc-80065, 2007 WL 1430004, at **2, 7 (N.D. Cal. May 15, 2007), held that complying with a nationwide subpoena would be an undue burden for the company's leanly staffed restaurants , but in that case, the employer provided the comparative information that FlashDancers has not. The employer submitted evidence showing that it did not keep the subpoenaed information in a centralized location and compliance would take 8,925 hours. *Id.* It also showed that this diversion of time and resources was

significant because, based on the information provided, "its net profits are small" and copying the files "would also tie up the multi-function printer/fax/copy machine located in the office of each location . . . used to print menus each day, to scan invoices[,] and to fax documents to corporate offices." *Id.* Even then, the district court did not entirely excuse the employer from compliance. *Id.* (requiring employer to produce files from 30 restaurant locations and stressing that "[g]iven the scope and seriousness of these charges, . . . respondent cannot expect compliance to be painless").

Ultimately, "[t]here is a presumption in favor of requiring an employer's compliance with a subpoena when the Commission inquires into legitimate matters of public interest." *Konica Minolta*, 639 F.3d at 371. And FlashDancers has not shown that compliance would be an undue burden, much less that the district court abused its discretion in holding otherwise.

III. FlashDancers's speculative concerns about confidentiality do not excuse its noncompliance with the subpoenas.

More than thirty years ago, the Supreme Court held that an employer cannot assert its employment records are confidential in order to refuse to

comply with a subpoena. *Univ. of Pa.*, 493 U.S. at 192-94. As the Supreme Court explained, Congress struck a balance in Title VII, using the same statutory provision both to give the EEOC access to relevant information and to "make[] it 'unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding.'" *Id.* at 192 (describing and quoting 42 U.S.C. § 2000e-8). The Court rejected the employer's request "to go further than Congress thought necessary to safeguard" confidentiality and ordered the employer to comply with the subpoena. *Id.*

FlashDancers does not cite that decision or offer any reason why it does not control here. Indeed, it cites no authority in support of its suggestion that it can refuse to comply with the EEOC's subpoenas because it believes the information sought is confidential. But an employer may not refuse to provide information based on "its employees' privacy interests" under *University of Pennsylvania*. *McLane Co.*, 804 F.3d at 1058; *see also EEOC v. Ill. Dep't of Emp. Sec.*, 995 F.2d 106, 108 (7th Cir. 1993) (rejecting assertion of "[a]n unemployment-insurance privilege" as a basis for refusing to comply with an EEOC subpoena after *University of Pennsylvania*).

FlashDancers's alleged concerns are also speculative. It suggests, without evidence, that the EEOC would alert others about where FlashDancers's employees work and that providing pedigree information to the EEOC would make employees or prospective employees less likely to work at FlashDancers. Yet FlashDancers has not suggested how or why either scenario would occur, and 42 U.S.C. § 2000e-8 ensures that the EEOC will keep the information it receives confidential. "Congress has struck the balance between granting the EEOC access to relevant evidence and protecting confidentiality interests" and FlashDancers's "dissatisfaction with that balance does not entitle it to withhold information relevant to a charge of discrimination." *McLane*, 804 F.3d at 1058.

IV. Flores Thomas's private lawsuit does not bar the EEOC from investigating the allegations of discrimination in the charge.

The EEOC's authority to investigate discrimination under Title VII "is tied to charges filed with the Commission," *Shell Oil*, 466 U.S. at 64, but nothing in Title VII deprives the EEOC of its investigative authority when a charging party files her own lawsuit.

Title VII requires the EEOC to investigate charges of discrimination, but it also requires the EEOC to issue a right-to-sue notice to charging

parties in several situations. 42 U.S.C. § 2000e-5(b). One such situation occurs when the EEOC has not filed a lawsuit or entered a conciliation agreement within 180 days of receipt of the charge. *Id.* § 2000e-5(f)(1). If a charging party requests a right-to-sue notice after that time expires, the EEOC must issue that notice. *See* 29 C.F.R. § 1601.28.

The notice, however, does not prevent the EEOC from continuing its investigation. "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *General Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980). Thus, "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368 (1977); *General Tel.*, 446 U.S. at 326 ("[T]he EEOC is not merely a proxy for the victims of discrimination . . . ."); *see also EEOC v. Goodyear Aerospace*, 813 F.2d 1539 (9th Cir. 1987) (recognizing that the "EEOC's right of action is independent of the employee's private action rights"). EEOC regulations reflect that broader purpose: the EEOC will not end its investigation when it issues the right-to-sue notice if the EEOC "determines at that time or at a later time that it would effectuate the purpose of [T]itle VII . . . to further process the

charge." 29 C.F.R. § 1601.28(a)(3); *see also* EEOC Compliance Manual § 6.4(e), 2006 WL 4672976 (June 1, 2006) (EEOC will "[o]rdinarily continue investigating [after issuing right-to-sue notice] when the charge covers persons other than the [charging party] or involves . . . [a] possible pattern of discrimination affecting others.").

In *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 282, 297 (2002), the Supreme Court again held that a private party's actions do not limit the EEOC's enforcement authority. Addressing a case involving an individual's agreement to arbitrate employment-related disputes, the Court explained that "once a charge is filed . . . the EEOC is in command of the process"; "[t]he statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake." *Id.* at 291. When the Commission decides that "public resources should be committed" to enforcement, "the statutory text unambiguously authorizes [the EEOC] to proceed." *Id.* at 291-92. The Court held that the EEOC's authority is not "merely derivative" of the charging party. *Id.* at 297. A charging party signing an arbitration agreement thus

does not limit the EEOC's authority to pursue those broader interests.[7] *Id.* at 295; *see also Goodyear Aerospace*, 813 F.2d at 1542 (private party's settlement agreement does not moot EEOC lawsuit).

FlashDancers does not address these authorities, relying instead on *EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997). In *Hearst*, decided before *Waffle House*, the Fifth Circuit held that the EEOC loses the ability to investigate a charge of discrimination when a private party files a lawsuit based on that charge. *Id.* at 469. Despite the Supreme Court's description of the EEOC's administrative process as "an *integrated*, multistep enforcement procedure," *Shell Oil*, 466 U.S. at 62 (emphasis added) (cleaned up), the Fifth Circuit held that the EEOC's ability to investigate ended once it issued a right-to-sue notice, *Hearst*, 103 F.3d at 467-69, even though nothing in Title VII proscribes further investigation. *See* 42 U.S.C. § 2000e-5(f)(1). And, it reasoned that, because the charging parties "have moved their claims into the litigation stage," "the time for *investigation* has passed" and the

[7] If a charging party obtains monetary relief in arbitration or through a private settlement, a court can limit the monetary relief the EEOC recovers for a charging party to avoid a double recovery. *Waffle House*, 534 U.S. at 296-97. But the potentially limited monetary relief available does not affect the EEOC's ability to continue to pursue the public interest in eradicating discrimination or obtaining non-duplicative relief. *Id.* at 297.

EEOC's purpose in investigating whether discrimination occurred is "no longer served once formal litigation is commenced." *Hearst*, 103 F.3d at 469. But, as subsequent decisions make clear, Title VII does not vest a private party with the power to remove the EEOC of the ability to investigate allegations of discrimination.

The only two courts of appeals to consider EEOC's post-private-suit subpoena authority since *Waffle House* have disagreed with *Hearst.* In *EEOC v. Federal Express Corp.*, 558 F.3d 842, 850-54 (9th Cir. 2009), the Ninth Circuit held that the EEOC may keep investigating and processing a charge after a charging party files a private lawsuit. Relying on *Waffle House*, the Ninth Circuit observed that "the EEOC controls the charge regardless of what the charging party decides to do." *Id.* at 852. And it "disagree[d] with *Hearst*'s conclusion that Title VII's purposes are no longer served by a continuing investigation after the charging party has filed suit" because "[t]he EEOC's investigatory authority serves a greater purpose than just investigating a charge on behalf of an individual." *Id.* at 852. The Seventh Circuit similarly rejected the *Hearst* approach, concluding that "the text of Title VII, and more recent Supreme Court and Seventh Circuit opinions, do not support such a restrictive interpretation of the EEOC's enforcement

authority." *EEOC v. Union Pac. R.R.*, 867 F.3d 843, 848 (7th Cir. 2017) (relying in part on *Waffle House*). It explained that "the statute does *not* expressly (nor from the court's perspective, implicitly) limit the EEOC's investigatory authority to the 180-day window it has to issue a notice of right-to-sue letter if requested by the charging individual." *Id.* at 849.

Indeed, it is unclear whether the Fifth Circuit would adhere to *Hearst* if the issue arose today. Since *Hearst*, the Fifth Circuit has recognized that the Commission's "interest in eradicating workplace discrimination is unique and incompatible with a finding that the EEOC's authority to bring and maintain an enforcement action can be extinguished by a judgment in a private suit to which it was not a party." *EEOC v. Jefferson Dental Clinics*, 478 F.3d 690, 697 (5th Cir. 2007) (cleaned up); *see also EEOC v. Bass Pro Outdoor World, L.L.C.*, 865 F.3d 216, 226 (5th Cir. 2017) (separate opinion of Higginbotham, J.) (argument that the EEOC's enforcement power "is derivative of individual[s] . . . has been thrice rejected by the Supreme Court").

Here, the EEOC granted Flores Thomas's request for a right-to-sue notice because more than 180 days had passed since she filed her charge.

R.37.1 1, 5. Consistent with 29 C.F.R. § 1601.28(a)(3), it expressly informed Flores Thomas and FlashDancers that it would be "continu[ing] its investigation of this charge even though it issues this Notice of Right to Sue at [Flores Thomas's] request." *Id.* Flores Thomas later filed a private lawsuit based on her charge, but the EEOC continues to investigate the allegations in her charge. Under *Waffle House*, *Federal Express*, and *Union Pacific*, Flores Thomas's private lawsuit does not affect the EEOC's ability to do so.

CONCLUSION

For all these reasons, the district court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,307 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of November, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users and will be served through the ACMS system.

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