No. 19-0410

In the Supreme Court of Texas

APACHE CORPORATION,

Petitioner,

v.

CATHRYN C. DAVIS,

Respondent.

On Petition for Review from the Court of Appeals
for the Fourteenth District of Texas, Houston
No. 14-17-00306-CV

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

GREENBERG TRAURIG, LLP

Allison Stewart
State Bar No. 24102538
stewarta@gtlaw.com
2200 Ross Avenue, Suite 5200
Dallas, Texas 75201
T: (214) 665-3600
F: (214) 665-3601

GREENBERG TRAURIG, LLP

Dale Wainwright
State Bar No. 00000049
wainwrightd@gtlaw.com
300 West 6th Street, Suite 2050
Austin, Texas 78701
T: (512) 320-7200
F: (512) 320-7210

COUNSEL FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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Apache	Petitioner Apache Corporation
Davis	Respondent Cathryn C. Davis
Chamber	Amicus Curiae The Chamber of Commerce of the United States
EEOC	Equal Employment Opportunity Commission

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.[1]

And the Chamber routinely files amicus briefs in cases involving the interpretation of federal and state labor laws and regulations. Many if not all the Chamber's members are employers, or representatives of employers, subject to federal and state nondiscrimination and retaliation statutes. As potential respondents to discrimination charges subject to investigation and enforcement by the EEOC and its various state partners, the issue presented

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[1] The Chamber has no direct financial interest in the outcome of this litigation. No counsel for a party wrote this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Chambers or its counsel made a monetary contribution intended to fund its preparation or submission.

in this case is extremely important to the constituencies that the Chamber represents.

ISSUE PRESENTED

Did the court of appeals create an improper exception to the requirement that employees exhaust administrative remedies to permit an age discrimination allegation to be converted at trial, relying on a "reasonably expected to grow out of" approach, to a logically unrelated gender discrimination allegation against the employer?

INTRODUCTION

After considering evidence extrinsic to Davis's EEOC charge, the court of appeals affirmed the trial court's judgment that Davis exhausted her administrative remedies on each of the claims she brought in her lawsuit, including her claim for retaliation based on gender discrimination complaints. The Chamber of Commerce of the United States of America submits this amicus curiae brief to urge the Court to reject the court of appeals' consideration of Davis's unsworn, unattached, and unexplained allegations outside of her EEOC charge. Doing so prevents the unprecedented enlargement of the "reasonably expected to grow out of" approach to determining exhaustion of remedies. It also protects the requirements and purposes of administrative-complaint process, which is designed to protect and advance the interests of both employers and employees.

For those reasons, the Court should reverse the court of appeals' judgment.

SUMMARY OF THE ARGUMENT

The process for filing an administrative complaint for unlawful employment practices against an employer is well established. An aggrieved party must submit to the administrative agency a written complaint (*i.e.* a charge), under oath, that alleges the unlawful employment practice and the

relevant facts on which the complaint is based. Where the agency finds reasonable cause to believe that unlawful discrimination has occurred, the agency seeks to resolve the matter informally. Where its efforts to achieve voluntary compliance prove unsuccessful, the agency will notify the charging party of her right to sue.

Not until the complainant has exhausted all administrative remedies may she file a lawsuit. In other words, courts do not (and should not) hear unexhausted claims. This detailed administrative enforcement process is designed to give the employer the necessary information to properly investigate the allegations, and to give the parties opportunity to efficiently and informally resolve their dispute without litigation.

To determine whether administrative remedies have been exhausted, courts consider the scope of the charge and the administrative investigation. Although construction of the charge is liberal, courts must not construe it to include facts initially omitted. Because claimants are typically laypersons, they are not expected to recite all the elements of their claim or perfectly complete the forms. At the same time, claimants must give their employer adequate notice of the alleged unlawful employment practice, thus allowing for internal investigation and possible resolution of the behavior or circumstances. Consideration of claims that were not the subject of an EEOC

charge—like those in Davis's December 2012 email and purported electronic response to the Texas Workforce Commission—violates the Labor Code and the policies and protections behind the administrative-complaint process.

Here, the court of appeals inappropriately expanded the scope of considerations for determining exhaustion of remedies *from* the charge, attachments to the charge, and allegations that are rationally related to the claims in the charge *to* allegations that were omitted from the charge entirely and had no relation to the allegations that *were* in the charge. This Court should reverse the court of appeals and correct the court of appeals' unprecedented and unviable approach by confirming that reasonable notice to employers is still mandated by the Labor Code, Texas precedent, and public policy.

ARGUMENT

I. The Court Of Appeals Improperly Expanded The Legal Standard For Determining Exhaustion Of Administration Remedies.

A. *Administrative-complaint process.*

The Texas Labor Code requires individuals who claim to be aggrieved by an unlawful employment practice to exhaust their administrative remedies before filing a lawsuit. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 (Tex. 2010). The Labor Code sets forth the claimant's filing requirements to exhaust administrative remedies.

As part of that process, Section 21.201(c) requires a complaint to state under oath "the facts on which the complaint is based, including the date, place, and circumstances of the alleged unlawful employment practice." TEX. LAB. CODE § 21.201(c). Once filed, a complaint may be amended to "cure technical defects or omissions" including to "amplify an allegation made in the complaint." *Id.* § 21.201(e). And once corrected, amendments to the complaint may be made to allege "additional facts that constitute unlawful employment practices relating to or arising from the subject matter of the original complaint." *Id.* § 21.201(f). In short, the Labor Code provides multiple opportunities—in the filing process alone—to ensure the claimant includes the conduct relevant to the statutory mandates.

When a court considers facts extrinsic to the complaint, including unsworn evidence outside of the charge, the provisions and the administrative exhaustion requirement of the Labor Code are violated. Indeed, such an approach undermines the filing requirements set forth above because it allows aggrieved parties to submit facts *not* under oath in contradiction to Section 21.201(c), that were never brought in the claim-filing process in contradiction to Section 21.201(a), and without the burden of filing permissible amendments permitted to claimants in Sections 21.201(e) and (f).

Under those circumstances, other provisions of the Labor Code are subject to abandonment. For instance, the 180-day statute of limitations provision is made ineffective if claimants can continuously introduce unsworn allegations beyond the scope of their original charge without regard to timing. *See id.* § 21.202. Such a dismantling of the Labor Code's firm requirements—like occurred in this case—should be reversed.

B. *Post-administrative-process lawsuit.*

When the administrative process is complete and a claimant files a lawsuit under the Labor Code, she is limited to the "specific issue" made in her administrative complaint and "'any kind of discrimination like or related to the charge's allegations.'" *ATI Enterprises, Inc. v. Din*, 413 S.W.3d 247, 252 (Tex. App.—Dallas 2013, no pet.) (quoting *Parker v. J.C. Penney Co.*, No. 05-03-01701-CV, 2005 WL 317758, at *3 (Tex. App.—Dallas Feb. 10, 2005, no pet.) (mem. op.)).

Courts construe the initial EEOC charge liberally and are permitted to "look slightly beyond its four corners, to its substance rather than its label." *Pacheco v. Mineta*, 448 F.3d 783, 789 (5th Cir. 2006). However, courts "will not construe the charge to include facts that were initially omitted." *Harris v. Honda*, 213 Fed. Appx. 258, 261 (5th Cir. 2006); *see also Sw. Convenience Stores, LLC v. Mora*, 560 S.W.3d 392, 401 (Tex. App.—El Paso 2018, no

pet.); *City of Sugar Land v. Kaplan*, 449 S.W.3d 577, 582 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Accordingly, to determine whether administrative remedies were exhausted, courts consider the scope of the EEOC charge itself as well as the scope of the EEOC investigation, which "can reasonably be expected to grow out of the charge of discrimination." *Pacheco*, 448 F.3d at 789. In practice, courts have used this approach to, among other things:

- Consider the factual allegations contained in a claimant's intake questionnaire *filed with* his formal EEOC charge. *Patton v. Jacobs Eng'g*, 874 F.3d 437, 443 (5th Cir. 2017).[2]

- Hold a "disparate-impact investigation could not reasonably be expected to grow out of [claimant's] administrative charge because: (1) it facially alleged disparate treatment; (2) it identified no neutral employment policy; and (3) it complained of past incidents of disparate treatment only." *Pacheco*, 448 F.3d at 792.

- Determine a claimant's later-asserted disability discrimination claim was not reasonably expected to grow out of his age discrimination claim when he did not make a factual allegation related to his disabilities in his original EEOC charge. *City of Sugar Land*, 449 S.W.3d at 582.

- Conclude a charge reasonably gave rise to an investigation based on "both national origin and race" although the claimant, who complained she was discriminated against for being

[2] The Texas Legislature intended Chapter 21 of the Labor Code (often referred to as the Texas Commission on Human Rights Act) to correlate with federal law in employment discrimination cases. *See City of Sugar Land*, 449 S.W.3d at 583 n. 1. Thus, Texas state courts look to analogous federal cases when applying the Labor Code. *Id.*; *see also Lopez v. Tex. State Univ.*, 368 S.W.3d 695, 711 n. 1 (Tex. App.—Austin 2012, pet. denied).

"Hispanic," only checked the "national origin" box in her EEOC charge. *Lopez*, 368 S.W.3d at 701.

- Decline consideration of unsworn allegations from a claimant's intake questionnaire "as a matter of course." *Id.* at 705.[3]

- Find retaliation claims (for filing the underlying racial discrimination charge) were reasonably expected to grow out of the same underlying discrimination charge. *Tex. Dep't of Transp. v. Esters*, 343 S.W.3d 226, 231 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

These legal precedents demonstrate two key principles in determining exhaustion of remedies. First, courts focus on the charge and attachments to the charge, which adheres to the Labor Code and the policies and procedures of the administrative-complaint process. Second, to the extent claims are not explicitly made in the charge, the courts analyze whether the allegations are rationally related to another claim, which protects laypersons who commit technical errors in their EEOC charge (*e.g.* checking the "wrong box") but respects the employer's right to notice of the allegations.

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[3] Here, the court of appeals for Austin concluded consideration of intake questionnaires should be limited to circumstances where "(1) the facts set out in the questionnaire are a reasonable consequence of a claim set forth in the EEOC charge, and (2) the employer had actual knowledge of the contents of the questionnaire during the course of the EEOC investigation." *Id.* The court reasoned that approach (as opposed to the "as a matter of course" approach) was "more in keeping with the requirement that claims asserted in litigation be reasonably related to claims stated in the charge and with the underlying purpose of the charge requirement to put employers on notice of the existence and nature of the charges against them." *Id.*

C. *Violations of the Labor Code here.*

Here, Davis submitted her charge to the EEOC and, in it, alleged she had been discriminated against for her age and retaliated against for making complaints about age discrimination. Op. 12. Davis's charge did not attach, quote, or explain any extrinsic materials, including her December 2012 email or her purported electronic response to the Texas Workforce Commission. *Id.* 16. To conclude Davis had exhausted her administrative remedies on her claim for retaliation based on complaints of gender discrimination, the court of appeals considered unsworn allegations in Davis's December 2012 email and Davis's purported electronic response to the Texas Workforce Commission despite expressly observing that there was:

- "no mention in Davis's charge that she had made a complaint of gender discrimination,"
- "no mention of any discriminatory treatment toward women," and
- "no mention that Apache retaliated against her for making a complaint of gender discrimination." Op. 16. *Compare Patton*, 874 F.3d at 443.

The court's conclusion is unprecedented in this jurisdiction in several, material respects. To start, it relied on unsworn evidence way outside the four corners of Davis's charge—evidence not filed or submitted with Davis's charge and not quoted or otherwise explained in her charge. *See* Op. 16-17.

In so doing, the court improperly construed Davis's charge "to include facts that were initially omitted" and permitted Davis to purse an entirely different allegation at trial. *See City of Sugar Land*, 449 S.W.3d at 582. Moreover, far from simply permitting Davis's claims for age discrimination (and associated retaliation for complaining about age discrimination) to grow, the court allowed Davis, and future claimants, to plant an entirely new and different seed for the first time in her lawsuit—retaliation for complaining about *gender* discrimination claim. *Cf. Natl'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (explaining each discrete incident of discrimination or retaliation constitutes a separate actionable unlawful employment practice to be individually assessed by the EEOC); *Harris County Hosp. Dist. v. Parker*, 484 S.W.3d 182, 193 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (same).

Unlike national origin and race discrimination and associated retaliation claims, there is no natural or logical connection between age and gender discrimination. *Compare Lopez*, 368 S.W.3d at 701 (concluding a charge reasonably gave rise to an investigation of both national origin and race when the claimant complained she was discriminated against for being "Hispanic"); *Esters*, 343 S.W.3d at 231 (finding retaliation claims for racial charge were reasonably expected to grow out of the underlying racial

discrimination claim). Yet, the court of appeals here manufactured a bridge to traverse that chasm when it concluded the "retaliation claim for making a complaint of gender discrimination [was] factually related to the retaliation for making a complaint of age discrimination such that the claim could be reasonably expected to grow out of the investigation." Op. 18.

Again, the court based its conclusion on the unsworn allegations in Davis's December 3, 2012 email and Davis's purported electronic response to the Texas Workforce Commission, which were not attached, quoted, or otherwise explained in her charge. *See* Op. 18. Such an approach turns the court's construction of the Davis charge from permissibly liberal to arbitrary and nearly limitless, which thwarts the law's exhaustion requirements.

II. The Court Of Appeals' Expansion Of Administrative Exhaustion Undermines Voluntary Compliance And Proactive Prevention Efforts.

As a matter of policy, administrative complaints and exhaustion of administrative remedies: (1) provide the charged party notice of the claim; (2) narrow the issues for a more efficient and effective adjudication of the dispute; (3) allow the EEOC to review, assess, and seek changes to employment practices that may be impending equal employment opportunity and nondiscrimination; (4) allow the EEOC to counsel would-be charging parties about their rights and assist them in crafting proper

charges while applying considerable subject matter expertise; and (5) give the EEOC and the employer an opportunity to resolve the dispute. *See Pacheco*, 448 F.3d at 789; *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 878–79 (5th Cir. 2003). These policies are violated when the court finds administrative exhaustion based on allegations and evidence that were not included in the initial allegation or the EEOC charge.

Other appellate courts have warned of this approach. For example, in *Southwest Convenience Stores, LLC v. Mora*, the court addressed this issue in rejecting a claimant's request to apply a standard that would allow consideration of "what questions the EEOC should have asked in their investigation, and the information those questions would have elicited." 560 S.W.3d 392, 401–02 (Tex. App.—El Paso 2018, no pet.). The court reasoned that "allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge." *Id.* (quoting *Marshall v. Federal Express Corp.*, 130 F.3d 1095, 1098 (D.C. Cir. 1997)).[4]

[4] For instance, plaintiff argued that if she had been asked why she demoted herself, then she would have explained her supervisor's alleged history of sexual harassment. *See id.*

Mora is instructive to this Court's review and the question whether, here and going forward, courts should consider unsworn, unattached, and unexplained allegations in determining exhaustion. Consideration of Davis's extrinsic allegations resulted in precisely the type of situation the *Mora* court warned against: one where the charged party, Apache, was deprived of notice of the charge's scope and the EEOC's investigatory and conciliatory role was circumvented. Indeed, without proper submission of Davis's allegations, the EEOC could not review, assess, or seek changes to the allegedly wrongful employment practices. Similarly, the EEOC could not counsel Davis, a layperson, about her rights and assist her in crafting the proper charges while applying their subject matter expertise.

Without notice of the claim, Apache and the EEOC did not have the opportunity to resolve Davis's retaliation for complaints about gender discrimination claim during the administrative proceedings. *See Lopez*, 368 S.W.3d at 701 (explaining one of the policies for the administrative-complaint requirement is to give the employer and administrative agency an opportunity to resolve the dispute). Instead, the dispute (*i.e.* Davis's retaliation for complaints about gender discrimination claim) was raised for the first time in her lawsuit. Davis's condoned failure to raise her gender

discrimination complaint in her charge but assert the claim in her lawsuit renders the administrative process's narrowing of the issues useless.

Furthermore, it nullifies the process's efficiencies because it permits Davis to skip the administrative process, which is purposefully designed to be more efficient, and go straight into litigation, which is a much lengthier process and sought to be avoided.

This Court should reject this approach to administrative exhaustion and reverse the court of appeals on this question. Claimant's failure to comply with, and courts failure to enforce, the state Labor Code requirements carry real-world consequences. Without sufficient notice of an alleged unlawful employment practice, the employer remains unaware of possible issues in their company, deprived of the opportunity to correct conduct or change practices. The EEOC may lose its ability to bring a civil lawsuit against private employers in its own name. For instance, if a claimant complains of race discrimination in his EEOC charge, then files a lawsuit for both race and gender discrimination over 180 days after the relevant conduct, the EEOC is barred from pursuing the gender discrimination claim. *See* TEX. LAB. CODE § 21.202. Undoubtedly, these outcomes affect other individuals too because employees may continue to work in a discriminatory environment without oversight or support from the EEOC. The

administrative-complaint process protects against this kind of cycle. So, when the process is disrupted, like it was here, the protections begin to unnecessarily deteriorate.

PRAYER

The Chamber supports Apache's petition for review because rejecting the court of appeals' expansion of the "reasonably expected to grow out of" approach to determining exhaustion of administrative remedies enforces the Labor Code, supports the policies behind exhaustion of remedies, and prevents the needless deterioration of the administrative-complaint process. Such guidance is needed so that businesses, small and large, may confidently rely on the Labor Code as written and this Court's precedents to investigate, resolve, or, as necessary, adjudicate employment law claims. Employees will also benefit from the requested guidance so that the outlier opinion by the court of appeals will not create confusion or uncertainty in their obligations under the Labor Code.

For these reasons, Amicus Curiae the Chamber of Commerce of the United States of America respectfully submit that the decision below should be reversed.

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: */s/ Dale Wainwright*

Dale Wainwright
State Bar No. 00000049
wainwrightd@gtlaw.com
300 West 6th Street, Suite 2050
Austin, Texas 78701
T: (512) 320-7200
F: (512) 320-7210

Allison Stewart
State Bar No. 24102538
stewarta@gtlaw.com
2200 Ross Avenue, Suite 5200
Dallas, Texas 75201
T: (214) 665-3600
F: (214) 665-3601

COUNSEL FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations of TEX. R. APP. P. 9.4(i)(3) because this brief consists of 3,271 words as determined by Microsoft Word Count, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ Dale Wainwright
Dale Wainwright

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served on counsel of record by using the Court's CM/ECF system on the 19th day of March 2021, addressed as follows:

Patrick W. Mizell
pmizell@velaw.com
Catherine B. Smith
Andrea Cohen
VINSON & ELKINS
1001 Fannin, Suite 2500
Houston, Texas 77002-6760
T: (713) 758-2392
F: (713) 615-5912

Counsel for Petitioner

Scott Newar
newar@newarlaw.com
440 Louisiana, Suite 900
Houston, Texas 77002
T: (713) 226-7950

Dennis Herlong
lawfirm@dennisherlong.com
440 Louisiana, Suite 900
Houston, Texas 77002
T: (713) 228-9222

Brian W. Zimmerman
bzimmerman@zimmerlaw.com
SPENCER FANE LLP
3040 Post Oak Boulevard, Suite 1300 Houston, Texas 77056
T: (713) 552-1234

Counsel for Respondent

/s/ Dale Wainwright
Dale Wainwright