No. 23-1719

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant-Appellee,

v.

FERRELLGAS, L.P.,
Respondent-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan

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 factual record. Accordingly, the EEOC does not believe oral argument is warranted.

STATEMENT OF JURISDICTION

The Equal Employment Opportunity Commission (EEOC or Commission) brought this action to enforce an administrative subpoena against Ferrellgas, L.P.[1] Application, R.1, Pg.ID#1-23. The district court had jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(f)(3), 2000e-9. The district court issued a final order enforcing the subpoena on July 10, 2023. Order, R.10, Pg.ID#165-73. Ferrellgas appealed on August 9, 2023. Notice of Appeal, R.11, Pg.ID#174-75. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court acted within its discretion in concluding that Ferrellgas forfeited its objections to the EEOC's administrative subpoena by failing to exhaust administrative remedies.

[1] Although Ferrellgas, L.P. is the named respondent in this action, the underlying dispute involves multiple Ferrellgas entities. *See infra* at 8. In this brief, the EEOC uses "Ferrellgas" generally to refer to these entities individually and collectively, and draws distinctions between the various entities when necessary for clarity.

2. Whether the district court acted within its discretion in concluding that the information requested in the subpoena is relevant to the EEOC's investigation of the charge of discrimination at issue.

3. Whether the district court acted within its discretion in concluding that Ferrellgas failed to show that the subpoena is unduly burdensome.

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 eliminate invidious employment discrimination. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982). To this end, Congress entrusted the EEOC with investigating complaints of unlawful discrimination, 42 U.S.C. § 2000e-5(b), and vested the agency with broad investigatory powers. Title VII grants the EEOC "access to … any evidence of any person being investigated" that "relates to unlawful employment practices" and "is relevant to the charge under investigation." *Id.* § 2000e-8(a). In this context, courts construe relevance "generously" to afford the EEOC "access to virtually any material that might cast light on the allegations against the employer." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984).

Title VII also empowers the EEOC to issue subpoenas requiring the production of evidence. 42 U.S.C. § 2000e-9 (incorporating subpoena powers from National Labor Relations Act, 29 U.S.C. § 161). The governing regulation allows the EEOC's district directors (and other designees) to sign and issue subpoenas on the agency's behalf and creates an administrative mechanism for employers to challenge such subpoenas. 29 C.F.R. § 1601.16(a), (b); *see also* 42 U.S.C. § 2000e-12(a) (authorizing EEOC to promulgate "suitable procedural regulations" to "carry out [Title VII's] provisions"). The regulation requires any person "who intends not to comply" with a subpoena to "petition the issuing director to seek its revocation or modification" within five business days after service of the subpoena. 29 C.F.R. § 1601.16(b)(1). The petition must "separately identify" each portion of the subpoena to which the employer objects and the basis for each objection. *Id.* § 1601.16(b)(2). In turn, the issuing director must either grant the petition "in its entirety" or submit a "proposed determination" to the Commission for a final decision. *Id.*

If the agency denies an employer's petition for revocation or modification (or the employer does not file a petition) and the employer still refuses to comply with the subpoena, the EEOC may seek a court order

enforcing it. 29 C.F.R. § 1601.16(c), (d); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 191 (1990). A subpoena enforcement proceeding is "a summary process designed to decide expeditiously whether a subpoena should be enforced." *EEOC v. Roadway Exp., Inc.*, 750 F.2d 40, 42 (6th Cir. 1984). A district court's role in this summary process is "straightforward" and limited. *McLane Co. v. EEOC*, 581 U.S. 72, 76 (2017). The court's task is not to "test the strength of the underlying complaint," but only to "satisfy itself that the charge is valid and that the material requested is relevant to the charge." *Id.* (cleaned up). "If the charge is proper and the material requested is relevant, the district court should enforce the subpoena unless the employer establishes that the subpoena is 'too indefinite,' has been issued for an 'illegitimate purpose,' or is unduly burdensome." *Id.* at 77 (citation omitted).

B. Factual and procedural background

1. Wells's charge of discrimination.[2]

In October 2019, April Wells, a Black woman, applied for a driver or service technician position with Ferrellgas, a propane distribution

[2] The EEOC draws these facts from the allegations in Wells's amended charge and Ferrellgas's position statement. Amended Charge, R.3, Pg.ID#50; Position Stmt., R.7-3, Pg.ID#87-93.

company. Amended Charge, R.3, Pg.ID#50.[3] The opening to which Wells applied was at a facility in Belleville, Michigan, which falls within Ferrellgas's East Lansing District. Amended Charge, R.3, Pg.ID#50; Position Stmt., R.7-3, Pg.ID#91. Ferrellgas advertised this opening on Indeed.com, a third-party recruiting platform, and Wells submitted her application through the same website. Amended Charge, R.3, Pg.ID#50; Position Stmt., R.7-3, Pg.ID#90.

Later that month, a Ferrellgas manager interviewed Wells. Amended Charge, R.3, Pg.ID#50; Position Stmt., R.7-3, Pg.ID#90. During the interview, the manager repeatedly suggested that Wells was not suitable because she was a woman. The manager told Wells that she had applied for "a man's job," and he commented that "usually women that apply are manly," whereas Wells was "a womanly woman." Amended Charge, R.3, Pg.ID#50. He also asked whether Wells was "sure [she] wanted to do this

[3] Although Wells stated that she applied for a "Service Technician" position and was hired as a "Driver," Ferrellgas claims that Wells applied to a "Driver" position and only later asked about a "Service Technician" position. *Compare* Amended Charge, R.3, Pg.ID#50, *with* Position Stmt., R.7-3, Pg.ID#90-91. In any event, there is no dispute that Wells sought or expressed interest in both roles.

kind of work," and inquired whether her "husband need[ed] a job because [the manager] would have hired him like yesterday." Amended Charge, R.3, Pg.ID#50.

Despite these comments, Ferrellgas invited Wells to interview with its district manager and later with its general manager. Amended Charge, R.3, Pg.ID#50; Position Stmt., R.7-3, Pg.ID#90-91. Like the first manager, both interviewers expressed misgivings about hiring women. The district manager told Wells she had applied for "a man's job," and he noted that Ferrellgas had "hired women in the past and it never worked out." Amended Charge, R.3, Pg.ID#50. The general manager likewise told Wells that "women don't usually work out" given "how hard the job [is]." Amended Charge, R.3, Pg.ID#50.

Ferrellgas nonetheless conditionally offered Wells a job as a driver, but "not [as] a service technician because it would cause chaos." Amended Charge, R.3, Pg.ID#50; *see also* Position Stmt., R.7-3, Pg.ID#91. Ferrellgas told Wells that she would make $18.00 an hour, although Wells "kn[e]w of other men that start[ed] out making more with less qualifications for the same position." Amended Charge, R.3, Pg.ID#50; *see also* Position Stmt., R.7-3, Pg.ID#90. Ferrellgas also told Wells that she had to "sign a statement

regarding a background check" and that "if it was not clear [she] would be terminated." Amended Charge, R.3, Pg.ID#50; Position Stmt., R.7-3, Pg.ID#91 (offer was "contingent upon … receiving a favorable background report").

Wells accepted the offer in December 2019, pending the outcome of her background check. Amended Charge, R.3, Pg.ID#50. A week later, Ferrellgas informed Wells that it was "letting her go" because she did "not comply with [Ferrellgas's] hiring guidelines." Position Stmt., R.7-3, Pg.ID#92; *see also* Amended Charge, R.3, Pg.ID#50.

2. The EEOC's investigation.

Wells filed a charge of discrimination with the EEOC, alleging that Ferrellgas discriminated against her in violation of Title VII. Charge, R.7-2, Pg.ID#86. In her amended charge, Wells set forth the allegations outlined above, asserting that Ferrellgas subjected her to "different terms and conditions of employment," paid her "lower wages," and fired her based on sex and race. Amended Charge, R.3, Pg.ID#50. After the EEOC received the charge, the agency began an investigation—as Title VII requires. Burgamy Decl., R.2-9, Pg.ID#45-46; *see* 42 U.S.C. § 2000e-5(b) (whenever a

charge is filed that alleges unlawful employment discrimination, EEOC "*shall* make an investigation thereof" (emphasis added)).

Throughout the investigation, Wells, the EEOC, and Ferrellgas's representatives themselves used various corporate names to refer to the company, including "Ferrell Gas Partners, L.P." (Charge, R.7-2, Pg.ID#86; Amended Charge, R.3, Pg.ID#50; Req. for Info., R.2-5, Pg.ID#36); "Ferrellgas Partners, LP" (Position Stmt., R.7-3, Pg.ID#89); "Ferrell Gas Partners" (Emails, R.7-12, Pg.ID#138-39); "Ferrellgas, Inc." (Req. for Info., R.2-5, Pg.ID#35; Req. for Info., R.7-4, Pg.ID#95); "Ferrellgas, L.P." (Emails, R.7-6, Pg.ID#104-05, 108; Emails, R.7-9, Pg.ID#119-20, 124); and simply "Ferrellgas" with no corporate moniker (Coverdale Ltr., R.2-6, Pg.ID#37; Position Stmt., R.7-3, Pg.ID#88). Nonetheless, Ferrellgas did not ask the EEOC to direct its communications to a particular legal entity or seek clarification about which entity or entities the EEOC was requesting information from.

As part of its investigation, the EEOC sent a "request for information" to Ferrellgas in May 2022, which asked the company to produce documents concerning applicants and interviewers for driver positions like the one Wells sought. Req. for Info., R.2-5, Pg.ID#35-36.

Ferrellgas refused. Coverdale Ltr., R.2-6, Pg.ID#37-38. When the EEOC offered to narrow the request, Ferrellgas refused again. Emails, R.2-8, Pg.ID#42-43; *see also* Burgamy Decl., R.2-9, Pg.ID#45.

As a result, the EEOC issued a subpoena to Ferrellgas in November 2022, which was addressed to "Ferrellgas, Inc."[4] Subpoena, R.2-1, Pg.ID#25-28; Burgamy Decl., R.2-9, Pg.ID#46. The subpoena sought a smaller subset of the documents and information the EEOC had previously requested, which included four categories:

- a list of all applicants who applied for driver positions Ferrellgas had filled at its East Lansing District between January 1, 2019, and August 31, 2020;
- the application materials submitted by such applicants, including resumes, applications, last known contact information, and any other documents showing their qualifications;
- a list of all applicants selected for interviews; and

[4] The EEOC had previously issued the same subpoena to Ferrellgas in October 2022, but Ferrellgas refused to comply in part because the subpoena was unsigned. Subpoena, R.2-7, Pg.ID#39-40; Burgamy Decl., R.2-9, Pg.ID#45-46. Accordingly, the EEOC signed and reissued the subpoena in November 2022. Subpoena, R.2-1, Pg.ID#26-27; Burgamy Decl., R.2-9, Pg.ID#46.

- the name and title of each Ferrellgas employee who conducted interviews for these driver positions from January 1, 2019, through January 5, 2022.

Subpoena, R.2-1, Pg.ID#26. The EEOC served the subpoena on Ferrellgas by uploading it to the EEOC's secure online portal[5] and by sending a copy by certified mail to Ferrellgas's counsel. Burgamy Decl., R.2-9, Pg.ID#46. Ferrellgas's counsel received the certified mail copy in December 2022. Burgamy Decl., R.2-9, Pg.ID#46; Return Receipt, R.2-2, Pg.ID#29-30.

When Ferrellgas did not respond to the subpoena or petition for revocation or modification, the EEOC contacted Ferrellgas's counsel several times to find out whether Ferrellgas intended to comply. For instance, a few weeks after issuing the subpoena, the EEOC investigator emailed Ferrellgas's counsel, asking whether Ferrellgas "intend[ed] to respond to the Subpoena for records." Emails, R.2-3, Pg.ID#31-32. In response, Ferrellgas's counsel indicated that Ferrellgas did not intend to comply because it "object[ed] to the current scope" of the subpoena.

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[5] The EEOC's online portal is an internet-based system that enables the agency and respondent employers to digitally send and receive documents to and from one another. EEOC, *Questions and Answers EEOC's Digital Charge System and Phase I – Respondent Portal* (Mar. 9, 2016), https://www.eeoc.gov/employers/questions-and-answers-eeocs-digital-charge-system-and-phase-i-respondent-portal.

Emails, R.2-3, Pg.ID#31-32; Burgamy Decl., R.2-9, Pg.ID#46. Roughly three weeks after that, an EEOC investigator left a voicemail for Ferrellgas's counsel to discuss the subpoena. Burgamy Decl., R.2-9, Pg.ID#47. Although the investigator and Ferrellgas's counsel exchanged several voicemails, they did not speak again. Burgamy Decl., R.2-9, Pg.ID#47.

Ultimately, Ferrellgas never complied with the subpoena. Burgamy Decl., R.2-9, Pg.ID#47. It likewise never petitioned the EEOC to revoke or modify the subpoena. Burgamy Decl., R.2-9, Pg.ID#47.

3. District court proceedings.

In January 2023, the EEOC filed an application in the district court, seeking an order to show cause why the subpoena should not be enforced. Application, R.1, Pg.ID#1-23. Although the subpoena had named "Ferrellgas, Inc.," the application named "Ferrellgas, L.P." as the responding party. *Compare* Subpoena, R.2-1, Pg.ID#26, *with* Application, R.1, Pg.ID#1.

The district court granted the application for two reasons. Order, R.5, Pg.ID#53. First, it determined that Ferrellgas had "forfeited its right to challenge the subpoena" by failing to petition the agency to revoke or modify the subpoena within five business days of service, as EEOC

regulations require. Order, R.5, Pg.ID#53-54 (citing 29 C.F.R. § 1601.16(b)(1)). Second, the court determined that the subpoena was enforceable because (i) the underlying charge of discrimination was valid and fell within the EEOC's investigative authority, (ii) the hiring information sought in the subpoena was relevant to the charge, and (iii) Ferrellgas failed to show that the subpoena was indefinite or made for an illegitimate purpose. Order, R.5, Pg.ID#54-56. Accordingly, the court ordered Ferrellgas to show cause why the subpoena should not be enforced, Order, R.5, Pg.ID#57, and Ferrellgas submitted a response, Response, R.7, Pg.ID#60-83.

The district court thereafter issued an order enforcing the subpoena and directing Ferrellgas to comply with it. Order, R.10, Pg.ID#165-73. In so ruling, the court considered and rejected each of Ferrellgas's arguments opposing enforcement.

At the outset of its analysis, the court again held that Ferrellgas had forfeited its objections to the subpoena. Order, R.10, Pg.ID#169. Although the subpoena and enforcement action used different corporate suffixes for Ferrellgas ("Inc." and "L.P.," respectively), the court attributed this incongruity to mere "clerical errors." Order, R.10, Pg.ID#169. The court

concluded that this slight difference did not alter its prior finding that Ferrellgas "forfeited its right to challenge the subpoena." Order, R.10, Pg.ID#169.

Notwithstanding that forfeiture, the court held that Ferrellgas's relevancy and burden objections also failed on their merits. The court again found that the materials sought by the subpoena were relevant to the charge under investigation, explaining that "information about applicants for positions Wells applied for in Wells's region is directly relevant to the allegations she lodged in her charge with the EEOC." Order, R.10, Pg.ID#169-71.

The court found similarly unavailing Ferrellgas's argument that enforcing the subpoena would impose an undue burden. Order, R.10, Pg.ID#171-72. Specifically, the court found that Ferrellgas failed to provide any information about "how complying with the subpoena would impact its normal daily operations," making it impossible to determine whether compliance would be "unduly burdensome in light of the company's normal operating costs." Order, R.10, Pg.ID#172 (citation omitted).

This appeal followed. Notice of Appeal, R.11, Pg.ID#174-75.

STANDARD OF REVIEW

This Court reviews a district court's decision to enforce an EEOC subpoena for abuse of discretion. *EEOC v. United Parcel Serv., Inc.*, 859 F.3d 375, 378 (6th Cir. 2017). Abuse of discretion is a "'highly deferential' standard," under which this Court will "disturb a decision only if it is based on clearly erroneous findings of facts, improperly applies the law, or relies on an incorrect legal standard." *In re Vill. Apothecary, Inc.*, 45 F.4th 940, 946 (6th Cir. 2022) (quoting *Doe v. Mich. State Univ.*, 989 F.3d 418, 426 (6th Cir. 2021)).

SUMMARY OF ARGUMENT

The district court acted well within its discretion in enforcing the EEOC's subpoena. Ferrellgas's scattershot arguments to the contrary are meritless.

As a threshold matter, the district court properly determined that Ferrellgas forfeited its objections to the subpoena by failing to exhaust administrative remedies. The EEOC's regulations require any party who intends not to comply with a subpoena to petition the agency to revoke or modify the subpoena within five business days of service thereof. 29 C.F.R. § 1601.16(b)(1). Here, Ferrellgas never filed such a petition—timely or

otherwise. The record also confirms that the EEOC properly served the subpoena by digital transmission and certified mail, both of which are acceptable methods of service. 29 C.F.R. § 1601.3(b) (digital transmission); 29 U.S.C. § 161(4) (certified mail). The other technical defects Ferrellgas identifies were harmless clerical errors, and they neither excuse Ferrellgas's forfeiture nor render the subpoena unenforceable. Because the district court's forfeiture ruling dooms the rest of Ferrellgas's appeal, this Court can and should affirm on this ground alone.

Even if this Court were to overlook Ferrellgas's forfeiture, the district court properly determined that the information requested in the subpoena is relevant to the EEOC's investigation of Wells's charge. In a subpoena enforcement proceeding, relevance is construed "generously" to afford the EEOC "access to virtually any material that might cast light on the allegations against the employer." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). Here, the EEOC's tailored request seeks information from Ferrellgas concerning applicants and interviewers for the same position Wells sought, in the same geographic region, and during the same timeframe. This information "might cast light" on whether Ferrellgas unlawfully discriminated against Wells based on sex or race. Relatedly, this

information may help the EEOC identify suitable "comparators" (i.e., individuals similarly situated to Wells, but outside her protected class) and potential witnesses. Accordingly, the information is plainly relevant to the EEOC's investigation. Ferrellgas's arguments to the contrary merely quibble with the district court's reading of Wells's allegations, but they offer no basis for disturbing the court's sound reasoning.

Finally, the district court properly determined that Ferrellgas failed to show that the subpoena is unduly burdensome. The sole piece of evidence Ferrellgas offers on this front is an unsigned and undated declaration, which this Court should decline to consider. Aside from that defect, the declaration is fatally flawed in two additional respects. First, the declaration provides no information about Ferrellgas's normal operating costs, making it impossible to assess the relative burden of compliance. Second, the declaration relies on facially implausible assumptions and inferences that vastly overestimate the time and effort Ferrellgas must expend to gather the requested information.

For these reasons, this Court should affirm the district court and order Ferrellgas to comply with the subpoena so the EEOC can continue its investigation.

ARGUMENT

I. The district court acted within its discretion in determining that Ferrellgas forfeited its objections to the subpoena by failing to exhaust administrative remedies.

The district court twice determined that Ferrellgas forfeited its objections to the EEOC's subpoena because it did not petition the agency for revocation or modification (as the governing regulation requires), and thus failed to exhaust administrative remedies. Order, R.5, Pg.ID#53-54; Order, R.10, Pg.ID#169. Ferrellgas's opening appellate brief barely confronts that ruling, mentioning it only once in a footnote. Appellant Br. at 15 n.1.

In any event, the record and applicable law confirm that the district court's determination was correct. Because that forfeiture ruling disposes of Ferrellgas's remaining arguments, this Court may affirm on this basis alone and need not address the other issues raised in this appeal. *See Music v. Arrowood Indem. Co.*, 632 F.3d 284, 287 n.3 (6th Cir. 2011) (court of appeals need not address forfeited objections); *Devs. Diversified of Tenn., Inc. v. Tokio Marine & Fire Ins. Co.*, 722 F. App'x 450, 458 n.5 (6th Cir. 2018) (where an issue is "independently sufficient to affirm the district court's judgment,"

court of appeals "need not address the remaining, alternative bases for the district court's judgment").

A. Ferrellgas failed to timely petition the EEOC to revoke or modify the subpoena.

The EEOC's regulations offer an administrative mechanism for challenging the agency's investigatory subpoenas. In relevant part, the governing regulation provides that any person served with a subpoena "who intends not to comply *shall* petition the issuing director to seek its revocation or modification." 29 C.F.R. § 1601.16(b)(1) (emphasis added). Such a petition must be filed "within five [business] days … after service of the subpoena." *Id.* Further, the petition must "separately identify each portion of the subpoena with which the petitioner does not intend to comply," and "state, with respect to each such portion, the basis for noncompliance with the subpoena." *Id.* § 1601.16(b)(2). Within eight days or "as soon as practicable" thereafter, the issuing director must then either grant the petition "in its entirety" or submit a "proposed determination" to the Commission for a final decision. *Id.*

This streamlined process gives the agency a valuable opportunity to consider a respondent's objections and, if necessary, narrow or clarify a

subpoena before initiating an enforcement proceeding in federal court. *See, e.g.*, *EEOC v. Roadway Exp., Inc.*, 261 F.3d 634, 637 (6th Cir. 2001) (EEOC partially granted petition to revoke or modify subpoena by "curtail[ing] requests"); *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1058 & n.4 (6th Cir. 1982) (EEOC modified subpoena to narrow temporal scope). Indeed, the process may even obviate the need for an enforcement action, thereby "conserve[ing] scarce judicial resources." *EEOC v. City of Milwaukee*, 919 F. Supp. 1247, 1255 (E.D. Wis. 1996) (quoting *EEOC v. Roadway Exp., Inc.*, 569 F. Supp. 1526, 1528 (N.D. Ind. 1983)).

Given the availability of this administrative remedy, many courts have held that when an employer fails to timely petition the EEOC to revoke or modify a subpoena, the employer "waive[s] its right to challenge the enforcement of the subpoena." *EEOC v. Aerotek, Inc.*, 498 F. App'x 645, 647-49 (7th Cir. 2013) (collecting cases).[6] As the Fifth Circuit has explained, "an employer served with an EEOC subpoena and making no effort to

[6] Strictly speaking, a party *forfeits* (rather than waives) its objections in this scenario. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (cleaned up).

exhaust the available administrative remedies may not thereafter challenge the subsequent judicial enforcement of that subpoena for any reason short of objections based on constitutional grounds." *EEOC v. Cuzzens of Ga., Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979); *see also EEOC v. Lutheran Soc. Servs.*, 186 F.3d 959, 964 (D.C. Cir. 1999) (although courts may excuse non-compliance with 29 C.F.R. § 1601.16(b)(1), the regulation's "mandatory language creates a strong presumption that issues parties fail to present to the agency will not be heard in court"); *cf. NLRB v. Midland Daily News*, 151 F.3d 472, 474 (6th Cir. 1998) (considering untimely objections to administrative subpoena because, unlike here, they were based on constitutional grounds).[7]

[7] Other examples abound. *See, e.g.*, *EEOC v. Kan. City Kan. Cmty. Coll.*, No. 2:23-mc-00202, 2023 WL 5955793, at *6 (D. Kan. July 21, 2023) (joining "numerous other courts, which have consistently held that when an employer fails to petition to revoke or modify the subpoena within five days, its objections are waived for failure to exhaust its administrative remedies"); *EEOC v. City of Long Branch*, No. 3:15-cv-01081, 2018 WL 3104435, at *2-4 (D.N.J. June 22, 2018) (respondent forfeited objections to EEOC subpoena by failing to timely petition for revocation or modification); *EEOC v. Sunoco, Inc. (R & M)*, No. 2:08-mc-00145, 2009 WL 197555, at *4-5 (E.D. Pa. Jan. 26, 2009) (same); *EEOC v. City of Milwaukee*, 54 F. Supp. 2d 885, 890-91 (E.D. Wis. 1999) (same); *EEOC v. Hennepin Cnty.*, 623 F. Supp. 29, 31-32 (D. Minn. 1985) (same); *EEOC v. Ohio Bureau of Emp. Servs.*, No. 2:81-cv-01265, 1982 WL 223, at *2 (S.D. Ohio Feb. 3, 1982) (same).

Consistent with these decisions, this Court has held that "reasonable claims-processing rules promulgated by an agency" may give rise to a "regulatory exhaustion" requirement. *Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs*, 987 F.3d 581, 587 (6th Cir. 2021). "So long as those agency regulations comport with the implementing statute," this Court "will honor their enforcement by the agency." *Id.*; *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 747 (6th Cir. 2019) (courts will enforce an agency's claim-processing rule requiring exhaustion when it "comport[s] with the statute under which it arose"); *see also* 42 U.S.C. § 2000e-12(a) (authorizing EEOC to promulgate "suitable procedural regulations" to "carry out [Title VII's] provisions").

Here, Ferrellgas does not contest that a party who fails to timely petition for revocation or modification forfeits its objections to the subpoena. Nor does Ferrellgas dispute that it never filed a petition for revocation or modification—timely or otherwise. The record confirms that it did not. Burgamy Decl., R.2-9, Pg.ID#47. Thus, because Ferrellgas failed to exhaust its administrative remedies, the district court correctly held that the company forfeited its objections to the subpoena. Order, R.5, Pg.ID#53-54; Order, R.10, Pg.ID#169.

B. The EEOC properly served the subpoena.

In attacking the district court's forfeiture ruling, Ferrellgas incorrectly asserts that the EEOC's method of service was improper and thus did not trigger the deadline to petition for revocation or modification. Appellant Br. at 14-16 & n.1. Contrary to that assertion, the record shows that the EEOC properly served the subpoena in two independently sufficient ways: by digital transmission and by certified mail.

First, the EEOC digitally transmitted the subpoena to Ferrellgas through the agency's online portal, which constitutes effective service under the EEOC's regulations. The relevant regulation provides that the terms "serve" and "issue," among others, "shall include all forms of digital transmission." 29 C.F.R. § 1601.3(b). The regulation enables the EEOC to serve documents by uploading them to its online portal, which gives electronic notice to recipients. *See Paniconi v. Abington Hosp.-Jefferson Health*, 604 F. Supp. 3d 290, 292-93 (E.D. Pa. 2022) (EEOC served document by posting it to online portal); *Mason v. Derryfield Sch.*, No. 1:22-cv-00104, 2022 WL 16859666, at *3 (D.N.H. Nov. 7, 2022) (same); *McDonald v. Saint Louis Univ.*, No. 4:22-cv-01121, 2023 WL 4262539, at *4 (E.D. Mo. June 29, 2023) (same); *see also* EEOC, *Respondent Portal User's Guide* (Jan. 28, 2016),

https://www.eeoc.gov/employers/eeoc-respondent-portal-users-guide (discussing "terms of consent for electronic service").[8]

Here, the record shows that the EEOC digitally transmitted the subpoena to both Ferrellgas and its counsel through the online portal. In its application to the district court, the EEOC explained that it served the subpoena "via the EEOC online portal on November 9, 2022," Application, R.1, Pg.ID#12, and provided a declaration confirming the same, Burgamy Decl., R.2-9, Pg.ID#46 ("The EEOC served the signed subpoena by uploading it to the EEOC online portal on November 9, 2022."). The record likewise shows that Ferrellgas and its counsel were registered to receive transmissions through the online portal. At least two individuals—Erin Yendrek, a senior employee relations representative at Ferrellgas, and Brent Coverdale, Ferrellgas's counsel—used the portal to send or receive documents on Ferrellgas's behalf. *See, e.g.*, Position Stmt., R.7-3, Pg.ID#88-

[8] In fact, the EEOC adopted this regulation to "explicitly provide for digital transmission *and service* of EEOC documents" through the agency's "secure online portal." 84 Fed. Reg. 5624, 5624 (Feb. 22, 2019) (emphasis added). The final rule allowing digital service became effective in 2020, well before the EEOC issued its subpoena in this case. 85 Fed. Reg. 65214, 65214 (Oct. 15, 2020).

93, 99-101 (signed by Yendrek and "submitted via secure online system" (capitalization omitted)); Ferrellgas Ltr., R.7-5, Pg.ID#99-101 (same); Emails, R.7-6, Pg.ID#105 (Yendrek confirming that information would "be submitted via the EEOC secure online system"); Coverdale Decl., R.7-15, Pg.ID#158 (confirming that Coverdale "upload[ed] … information to the EEOC online portal"); Coverdale Ltr., R.2-4, Pg.ID#33 (confirming that "Ferrellgas received electronic notification" of prior subpoena posted to portal).

Although the EEOC has consistently maintained that it served the subpoena via the online portal, Ferrellgas has never attempted to refute that assertion factually or legally. Indeed, Ferrellgas declined to address the digital transmission in its district court briefing and again in its opening appellate brief. *See generally* Appellant Br. at 14-16; Response, R.7, Pg.ID#66-68. Accordingly, Ferrellgas has forfeited any argument that the EEOC's digital transmission of the subpoena did not constitute effective service. *See Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014) (parties forfeit arguments not raised before the district court); *Courser v. Allard*, 969 F.3d

604, 621 (6th Cir. 2020) (parties forfeit arguments not raised in an opening appellate brief).[9]

Second, the EEOC also served the subpoena by certified mail. As Ferrellgas acknowledges, Appellant Br. at 14, EEOC subpoenas "may be served … by registered or certified mail." 29 U.S.C. § 161(4). Here, the record shows that the EEOC sent the subpoena by certified mail to Ferrellgas's counsel, who received the mail copy on December 7, 2022. Burgamy Decl., R.2-9, Pg.ID#3; Return Receipt, R.2-2, Pg.ID#29-30; *see also* Appellant Br. at 8 (acknowledging that subpoena was delivered on December 7, 2022).

Furthermore, the EEOC directed the subpoena to Ferrellgas's counsel because that was what Ferrellgas's counsel requested. *See Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*, No. 09-cv-0916, 2010 WL 4736259, at *2 (E.D. Wis. Nov. 16, 2010) ("When a party's attorney agrees to accept service of a subpoena, and the subpoena is delivered to that party's

[9] Although the district court also did not address whether the EEOC's digital transmission of the subpoena constituted effective service, this Court "may affirm the district court on any ground supported by the record." *United States v. Gill*, 685 F.3d 606, 609 (6th Cir. 2012).

counsel, service is proper."). When first appearing in this investigation, Ferrellgas's counsel sent a letter to the EEOC, which stated: "My firm is representing Ferrellgas in this matter, and *all further communications in this matter should be directed to my firm*." Coverdale Ltr., R.2-6, Pg.ID#37 (emphasis added).

Presented with this evidence, the district court reasonably found that the subpoena was served on Ferrellgas by at least December 7, 2022, when Ferrellgas's counsel received it. Order, R.5, Pg.ID#54. That finding is bolstered by the fact that Ferrellgas's counsel previously accepted service of a mailed subpoena in this investigation. As Ferrellgas itself notes, the EEOC earlier served a different subpoena by mailing it to Ferrellgas's counsel. Appellant Br. at 6; Coverdale Decl., R.7-15, Pg.ID#157. Ferrellgas complied with that subpoena without raising any concerns about proper service. Coverdale Ltr., R.7-11, Pg.ID#133-36. Simply put, Ferrellgas's own litigation conduct confirms that this manner of service was appropriate.

Ignoring these facts, Ferrellgas mistakenly argues that 29 U.S.C. § 161(4) required the EEOC to mail or personally deliver the subpoena to Ferrellgas itself. Appellant Br. at 14. But that statute merely describes how papers "*may* be served." 29 U.S.C. § 161(4) (emphasis added). It thus

identifies permissible methods of service, not exclusive ones. *See Corsair Special Situations Fund, L.P. v. Nat'l Res.*, 595 F. App'x 40, 45 (2d Cir. 2014) (statute stating that process "may be served" in specified manner merely "provides only one of many methods of giving notice and is not exclusive" (citation omitted)); *In re Pintlar Corp.*, 133 F.3d 1141, 1146 (9th Cir. 1998) (rule providing that party "may be served by any one of five specified methods" was "permissive, not mandatory").[10] After all, the word "may" is ordinarily permissive, not obligatory. *See Thompson v. Plante & Moran*, 99 F.3d 1140 (6th Cir. 1996) (unpub. table dec.) ("The use of the word 'may' clearly renders this section permissive."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) ("The traditional, commonly repeated rule is that … *may* is permissive[.]").[11]

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[10] Additionally, although the statute allows service "by registered or certified mail" or "by leaving a copy thereof at the principal office or place of business of the person required to be served," 29 U.S.C. § 161(4), it does not specify where service by certified mail should be directed or define "the person required to be served."

[11] For the first time on appeal, Ferrellgas suggests that personal service was required under Federal Rule of Civil Procedure 45. Appellant Br. at 14-15. But that rule does not apply to administrative subpoenas. The advisory committee's note to Rule 45 expressly states that the rule "does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority." *Goodyear Tire & Rubber Co. v.*

In short, the record shows that the EEOC properly served the subpoena on Ferrellgas. Accordingly, these arguments cannot save Ferrellgas from forfeiture.

C. The clerical errors Ferrellgas identifies do not excuse its forfeiture and were otherwise harmless.

Ferrellgas also latches onto two clerical errors: (1) the subpoena set a response date of October 25, 2022, which was before the subpoena was issued; and (2) the subpoena named "Ferrellgas, *Inc.*," while the enforcement action named "Ferrellgas, *L.P.*" Appellant Br. at 16-19. Though Ferrellgas makes much of these minor technical defects, these errors neither excuse Ferrellgas's forfeiture nor render the subpoena unenforceable.

To start, any error regarding the response date was harmless because it did not prejudice Ferrellgas in any way. *See United States v. Markwood*, 48 F.3d 969, 987 (6th Cir. 1995) (affirming district court order enforcing subpoena despite alleged technical defect where respondent "was not

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NLRB, 122 F.2d 450, 451 (6th Cir. 1941) (quoting Fed. R. Civ. P. 45 advisory committee's note (1937)); *see also United States v. Markwood*, 48 F.3d 969, 982 (6th Cir. 1995) ("Most of the Federal Rules of Civil Procedure are simply inapplicable to the pre-complaint enforcement of an administrative subpoena."); *EEOC v. Deer Valley Unified Sch. Dist.*, 968 F.2d 904, 906 (9th Cir. 1992) (distinguishing "administrative investigatory subpoenas" from Rule 45 subpoenas).

prejudiced thereby"); *Universal Truckload, Inc. v. Bridge*, No. 22-cv-10988, 2023 WL 3309840, at *3 (E.D. Mich. May 8, 2023) ("procedural defect" resulting from clerical error was "not per se sufficient to preclude execution of the subpoena"); *see also Tareco Props., Inc. v. Morriss*, 321 F.3d 545, 551 (6th Cir. 2003) (technical violation of procedural rules was "harmless" where it "did not prejudice [opposing party] in any way").

Certainly, Ferrellgas does not argue that it was prejudiced.[12] Nor does Ferrellgas suggest that it *would* have complied with the subpoena had there been a feasible deadline to do so. To the contrary, Ferrellgas insisted—and continues to insist—that it would not have complied with the subpoena *regardless* of the deadline. Indeed, although Ferrellgas objected to the subpoena on various grounds in its pre-enforcement communications with the EEOC, it raised no objections to the response date. Emails, R.2-3, Pg.ID#31-32; Coverdale Ltr., R.2-4, Pg.ID#33-34. On

[12] In the district court, Ferrellgas incorrectly suggested that the response date may have affected its deadline to petition for revocation or modification. Response, R.7, Pg.ID#66-67 n.1. As explained above, however, that deadline is triggered by *service* of the subpoena, not the response date. *See* 29 C.F.R. § 1601.16(b)(1). The response date thus had no impact on Ferrellgas's failure to exhaust administrative remedies. In any event, Ferrellgas does not make this argument on appeal.

these facts, Ferrellgas's professed concern about the response date is a red herring.

The district court also considered and rejected Ferrellgas's argument concerning the corporate suffixes. Order, R.10, Pg.ID#169. As the district court reasoned, although the subpoena named "Ferrellgas, *Inc.*," the record and the parties' interactions make clear that "Ferrellgas, *L.P.*" was at least *an* appropriate recipient as well. During the EEOC's investigation, Ferrellgas's main representative sometimes identified herself as an employee of "Ferrellgas, L.P." *See* Emails, R.7-6, Pg.ID#104-05, 108 (Yendrek signature blocks listing "Ferrellgas, L.P."); Emails, R.7-9, Pg.ID#119-20, 124 (same). When the EEOC filed this enforcement action, it named "Ferrellgas, L.P." Application, R.1, Pg.ID#1. And when the district court issued its order to show cause why the subpoena should not be enforced, it directed "Ferrellgas, L.P." to respond. Order, R.5, Pg.ID#52-57.

On these facts, the EEOC's use of "Inc." in the subpoena and "L.P." in the enforcement action was a harmless misnomer. *See Grooms v. Greyhound Corp.*, 287 F.2d 95, 96-98 (6th Cir. 1961) (petition that named "Pennsylvania Greyhound Lines, Inc." rather than "The Greyhound Corporation, Eastern Division" was "a clear case of misnomer"); *Morrel v. Nationwide Mut. Fire*

Ins. Co., 188 F.3d 218, 224 (4th Cir. 1999) ("As a general rule the misnomer of a corporation in a notice, summons ... or other step in a judicial proceeding is immaterial if it appears that [the corporation] could not have been, or was not, misled." (alterations in original) (citation omitted)); *Fed. Election Comm'n v. Club for Growth, Inc.*, 432 F. Supp. 2d 87, 91 (D.D.C. 2006) ("The plaintiff's notice defect, in inadvertently including 'PAC,' constitutes harmless error.").

Critically, Ferrellgas does not suggest that the EEOC's use of "Inc." rather than "L.P.," or vice versa, confused or misled the company in any meaningful way. Nor could it. During the EEOC's investigation, Ferrellgas used or responded to a wide range of corporate names, including "Ferrellgas, Inc.," "Ferrell Gas Partners, LP," "Ferrellgas Partners, LP," and "Ferrell Gas Partners." *See, e.g.*, Charge, R.7-2, Pg.ID#86 (naming "Ferrell Gas Partners, LP" as respondent); Position Stmt., R.7-3, Pg.ID#89 (referring to "Ferrellgas Partners, LP"); Req. for Info., R.7-4, Pg.ID#95-96 (referring to "Ferrellgas, Inc." and "Ferrell Gas Partners, LP"); Emails, R.7-12, Pg.ID#138-39 (referring to "Ferrell Gas Partners"). Often, Ferrellgas and its counsel referred to the company simply as "Ferrellgas," without any corporate moniker. *See, e.g.*, Coverdale Ltr., R.2-6, Pg.ID#37 ("My firm is

representing Ferrellgas in this matter…."); Position Stmt., R.7-3, Pg.ID#88 ("Ferrellgas submits this position statement…."). That same counsel represents Ferrellgas in this appeal.

Although the parties used multiple corporate names to refer to Ferrellgas during the investigation, the company never expressed any confusion or misunderstanding about which entity the EEOC was communicating with or requesting information from. Given these interactions, this Court should view Ferrellgas's belated insistence on a particular suffix with skepticism. Moreover, because Ferrellgas had actual notice of the subpoena, the EEOC's manner of service constituted substantial compliance. *See EEOC v. C&P Tel. Co.*, 813 F. Supp. 874, 875 n.1 (D.D.C. 1993) (as long as "the EEOC's method of service provided respondents with actual notice" then "the EEOC's manner of service, even if technically defective, constitutes substantial compliance"); *Sandsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank Bd.*, 878 F.2d 875, 882 (5th Cir. 1989) ("As [respondent] knew of the subpoena in time to challenge it, the

[agency's] manner of service, even if technically defective, constitutes substantial compliance.").[13]

It is especially notable that Ferrellgas has never argued that it is incapable of complying with the subpoena. It does not suggest, for instance, that it lacks custody, possession, or control over the requested documents. To the contrary, in its opening brief Ferrellgas explains precisely how it would "gather and review" these materials if required to do so. Appellant Br. at 25. In effect, Ferrellgas thus seeks to restart the entire subpoena process for the sole purpose of correcting clerical errors that would have no meaningful impact on the parties' dispute, which would inevitably result in another enforcement action in the district court and another appeal to this Court. Under these circumstances, "such a remand would be a waste of judicial resources." *Losantiville Country Club v.*

[13] To be clear, the EEOC has not determined which Ferrellgas entity, if any, would be an appropriate defendant in a lawsuit asserting substantive discrimination claims based on Wells's allegations. Indeed, one goal in any EEOC investigation is to determine which entity (or entities) might qualify as the charging party's employer. *See Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 (6th Cir. 1997) (describing theories under which one or more entities may qualify as an individual's employer).

Comm'r of Internal Revenue, 906 F.3d 468, 474 (6th Cir. 2018) (citation omitted).

In the end, Ferrellgas's assortment of procedural challenges fall far short of showing that the district court abused its discretion in holding that the company forfeited its objections to the subpoena. For this reason alone, the district court's decision should be affirmed.

II. The district court acted within its discretion in determining that the information requested in the subpoena is relevant to the EEOC's investigation of Wells's charge of discrimination.

Even if this Court were to overlook Ferrellgas's forfeiture, the company's relevancy and burden objections fare no better on their merits. When the EEOC investigates a charge of discrimination, Title VII grants the agency access to "any evidence" that is "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). As this Court has long recognized, the EEOC "is entitled to access to information 'relevant to the charge under investigation[.]'" *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969) (quoting 42 U.S.C. § 2000e-8(a)). Furthermore, this Court and others have "generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." *EEOC v. United Parcel Serv., Inc.*, 859 F.3d

375, 378 (6th Cir. 2017) (quoting *Roadway Exp., Inc.*, 261 F.3d at 639; *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984)); *see also EEOC v. Cambridge Tile Mfg. Co.*, 590 F.2d 205, 206 (6th Cir. 1979) ("Notions of relevancy at the investigatory stage are very broad….").

Here, the EEOC is investigating, among other things, Wells's allegations that Ferrellgas discriminated against her in its hiring process. To that end, the EEOC's subpoena seeks four narrow categories of information:

- a list of all applicants who had applied for driver positions Ferrellgas had filled at its East Lansing District between January 1, 2019, and August 31, 2020;
- the application materials submitted by such applicants, including resumes, applications, last known contact information, and any other documents showing their qualifications;
- a list of all applicants selected for interviews; and
- the name and title of each Ferrellgas employee who conducted interviews for these driver positions from January 1, 2019, through January 5, 2022.

Subpoena, R.2-1, Pg.ID#26.

This information is relevant in at least two respects. First, these materials will help show whether Ferrellgas discriminated on the basis of

sex or race against other applicants for the same position Wells sought (driver), in the same geographic region (East Lansing District), and during the same timeframe (between January 2019 and August 2020). Application, R.1, Pg.ID#20. In turn, this information "might cast light" on Wells's allegations that Ferrellgas discriminated against her on the same grounds.

This Court has long held that this type of evidence is relevant to an individual charge of discrimination because "the existence of patterns of … discrimination in job classifications or hiring situations other than those of the complainants may well justify an inference that the practices complained of … were motivated by [the same] factors." *Blue Bell Boots, Inc.*, 418 F.2d at 358. Other circuits have reached the same conclusion, holding that "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.").

Second, and relatedly, the information requested in the subpoena could help the EEOC identify suitable "comparators" (i.e., similarly situated individuals outside Wells's protected class who were treated differently). Application, R.1, Pg.ID#20. It is well established that an individual alleging disparate-treatment discrimination may rely on comparator evidence to prove her case. In the hiring context, for example, a plaintiff may establish a prima facie case of discrimination by showing that the employer to which she applied rejected her and instead hired individuals outside her protected class who held similar—or *worse*—qualifications for the same position. *See Alexander v. CareSource*, 576 F.3d 551, 559 (6th Cir. 2009); *Levine v. DeJoy*, 64 F.4th 789, 798 (6th Cir. 2023). Here, the information requested will reveal whether Ferrellgas hired, made offers to, or selected for interview individuals outside Wells's protected class, with qualifications similar to (or worse than) Wells, and for the same position Wells sought. It may also "allow [the EEOC] to identify potential witnesses to prove [Wells's] claim." *EEOC v. Fisher Sand & Gravel, Co.*, No. 2:12-cv-00649, 2012 WL 3996138, at *2 (D. Nev. Sept. 11, 2012).

Importantly, the subpoena's temporal and geographical scopes are tailored to Wells's allegations. Temporally, the subpoena seeks documents

concerning applicants for driver positions Ferrellgas filled between January 1, 2019, and August 31, 2020, and the identities of Ferrellgas employees who conducted interviews for those positions between January 1, 2019, and January 5, 2022. Subpoena, R.2-1, Pg.ID#26. That timeframe encompasses roughly one year before and nine months to two years after Wells filed her initial charge of discrimination in January 2020. Charge, R.7-2, Pg.ID#86. This Court has endorsed as reasonable far more expansive timeframes. *See EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 48 (6th Cir. 1994) (instructing district court to order employer to surrender documents "three years and 300 days prior to the date [the charging party] filed her charge").

Geographically, the subpoena seeks information and documents concerning applicants and interviewers for driver positions only in Ferrellgas's East Lansing District, which encompasses the Belleville, Michigan location to which Wells applied. Subpoena, R.2-1, Pg.ID#26; Position Stmt., R.7-3, Pg.ID#91; *see Mayo Clinic v. EEOC*, No. 0:14-cv-3844, 2015 WL 4727289, at *3, *6 (D. Minn. Aug. 7, 2015) (enforcing EEOC subpoena that sought information concerning applicants and interviewers for "same position" and "geographical region[]" to which charging party applied). This information is especially pertinent because the Ferrellgas

employees who interviewed Wells included the general manager and district manager for the East Lansing District. Position Stmt., R.7-3, Pg.ID#91-92. It stands to reason that the same managers may have been involved in the hiring processes for other applicants for driver positions in the same region.

In attacking the district court's relevancy determination, Ferrellgas does not argue that the district court applied an incorrect legal standard. Nor does Ferrellgas argue that the court misapplied the proper standard to the facts as the court found them. Instead, Ferrellgas takes issue with the district court's reading of Wells's charge. Appellant Br. at 21-22. Specifically, Ferrellgas insists that Wells's charge is limited to "her pay and termination," rather than Ferrellgas's hiring practices. Appellant Br. at 21.

On its face, the charge refutes that argument. In her amended charge, Wells alleges that multiple managers openly expressed misgivings about hiring women during the interview process. Amended Charge, R.3, Pg.ID#50. She also alleges that Ferrellgas declined to hire her as a service technician "because it would cause chaos." Amended Charge, R.3, Pg.ID#50. And although Ferrellgas conditionally "hired" Wells as a driver, it terminated her within a week, before she was fully onboarded. Amended

Charge, R.3, Pg.ID#50. These allegations put Ferrellgas's hiring practices squarely at issue.

Ferrellgas's own representations in this investigation confirm that Wells's allegations implicate the company's hiring practices. In its position statement responding to the charge, Ferrellgas stated that it "let[] [Wells] go" because she did "not comply with our hiring guidelines." Position Stmt., R.7-3, Pg.ID#92; *see also* Ferrellgas Ltr., R.7-5, Pg.ID#99 (claiming that Wells did not meet Ferrellgas's "hiring guidelines"). Ferrellgas also maintained that Wells's own actions "prevented [her] from *beginning* work at Ferrellgas," Coverdale Ltr., R.2-6, Pg.ID#38 (emphasis added), tacitly admitting that it had not completed—and never would complete—the hiring process for Wells. Indeed, in its own records, Ferrellgas included Wells on a list of individuals who "were *denied* hire" rather than "discharged after hire." Ferrellgas Ltr., R.7-5, Pg.ID#100 (emphasis added). Given these statements, Ferrellgas cannot show that the district court's reading of Wells's charge was clearly erroneous, as required to establish an abuse of discretion.[14]

[14] Ferrellgas cites another lawsuit Wells filed, which asserts pay discrimination claims under the Equal Pay Act and state law, as evidence

Ferrellgas's reliance on *EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012), is also misplaced. There, the Tenth Circuit held that individual charges of disability discrimination under the Americans with Disabilities Act filed by two employees in Colorado did not entitle the EEOC to "nationwide information" regarding the company's employment practices. *Id.* at 1156, 1159. The court suggested, however, that the EEOC "would have been entitled to information relating to other positions and offices *in Colorado*." *Id.* at 1158 (emphasis in original). In a later decision, the Tenth Circuit again acknowledged that the subpoena in *Burlington Northern* "might have been enforceable if it had been confined to Colorado positions and offices." *Centura Health*, 933 F.3d at 1208. In the same decision, the court affirmed the enforcement of an EEOC subpoena that "requested information pertaining only to the locations in Colorado where the charging parties worked" because the subpoena "adher[ed] to the geographical scope of [the] individual charge[]." *Id.*

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that her charge of discrimination under Title VII does not concern hiring. Appellant Br. at 7-8, 22. Wells's decision to pursue different claims under different statutes in a separate lawsuit has no bearing on whether the information requested in the EEOC's subpoena is relevant to the allegations Wells made in this investigation.

Here, the EEOC's subpoena does not seek nationwide or even statewide information about Ferrellgas's hiring practices. Instead, as explained above, the subpoena seeks information concerning only the specific region encompassing the location to which Wells applied. Subpoena, R.2-1, Pg.ID#26; Position Stmt., R.7-3, Pg.ID#91. Accordingly, *Burlington Northern* does not help Ferrellgas.[15]

The Tenth Circuit's decision in *EEOC v. Tricore Reference Laboratories*, 849 F.3d 929 (10th Cir. 2017), on which Ferrellgas also relies, is similarly inapposite. There, the court held that the EEOC could not rely on "relevance arguments" that "it did not present … in district court." *Id.* at 942. Here, however, the EEOC squarely argued in the district court that the information requested in the subpoena was relevant for the same reasons outlined above. Application, R.1, Pg.ID#19-22. Thus, once again, *Tricore* does not help Ferrellgas.

[15] Ferrellgas incorrectly asserts that the EEOC never explained why the requested documents were relevant to its investigation before issuing the subpoena. Appellant Br. at 23. In an email exchange that Ferrellgas itself provided as an exhibit, the EEOC explained that the applicant information would help the agency evaluate Wells's allegations of discrimination "in the hiring process." Emails, R.7-12, Pg.ID#138.

In short, Ferrellgas cannot establish that the district court based its relevancy ruling on clearly erroneous factual findings, improperly applied the law, or relied on an incorrect legal standard. Accordingly, this Court should not disturb that determination.

III. The district court acted within its discretion in determining that Ferrellgas failed to show that the subpoena is unduly burdensome.

Ferrellgas correctly concedes that it holds the burden to establish that the subpoena was unduly burdensome. Appellant Br. at 25; *see McLane Co. v. EEOC*, 581 U.S. 72, 77 (2017); *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 648-49 (7th Cir. 1995). "Courts will not find undue burden in an action to enforce an EEOC subpoena unless compliance would threaten to disrupt unduly or seriously hinder the normal operations of an employer's business." *EEOC v. Roadway Exp., Inc.*, 75 F. Supp. 2d 767, 772 (N.D. Ohio 1999), *aff'd*, 261 F.3d 634 (6th Cir. 2001). Furthermore, "[t]he cost of compliance is no defense to enforcement of a subpoena unless it is 'unduly burdensome in light of the company's normal operating costs.'" *Id.* (quoting *EEOC v. Md. Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986)); *see also EEOC v. Aerotek, Inc.*, 815 F.3d 328, 334 (7th Cir. 2016); *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993).

On the record here, Ferrellgas cannot satisfy its burden. The sole piece of evidence Ferrellgas offers on this front is a document that purports to be an unsworn declaration under 28 U.S.C. § 1746. Yendrek Decl., R.7-14, Pg.ID#152-55. The document is neither signed nor dated. It is therefore not a proper declaration, and this Court should decline to consider it. *See Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) ("Unsworn declarations are permitted to be used as evidence only if 'subscribed ... as true under penalty of perjury, and dated.'" (emphasis omitted) (quoting 28 U.S.C. § 1746)); *Blount v. Stanley Eng'g Fastening*, 55 F.4th 504, 515 (6th Cir. 2022) (affidavit lacking declarant's personal signature is "not a proper declaration under 28 U.S.C. § 1746"); *Sfakianos v. Shelby Cnty. Gov't*, 481 F. App'x 244, 245 (6th Cir. 2012) ("[A]n 'unsigned affidavit' is a contradiction in terms." (quoting *Mason v. Clark*, 920 F.2d 493, 495 (8th Cir. 1990))).[16]

Even if the declaration could be considered, it is critically flawed in two additional respects. First, it provides no information about Ferrellgas's

[16] It is not clear that the district court considered the declaration either. The court noted in passing that Ferrellgas "submitted an affidavit by one of its employees." Order, R.10, Pg.ID#169. In its undue burden analysis, however, the court did not cite or discuss the declaration. Order, R.10, Pg.ID#171-72.

normal operating costs, making it impossible to assess the relative burden of compliance. That omission is fatal to Ferrellgas's position. As the district court's reasoning suggests, assessing whether a burden is "undue" requires a relative comparison between the cost of compliance and the employer's normal operating costs. Order, R.10, Pg.ID#172. This understanding reflects the commonsense notion that employers with greater operating costs may more easily bear some additional expense than those with lesser operating costs. What is unduly burdensome to a small local business might not be unduly burdensome for a Fortune 500 company. *See United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 650 (5th Cir. 1999) (affirming order enforcing administrative subpoena where respondent failed to explain how "compliance cost and effort" was unduly burdensome "relative to [the company's] size").

Here, the declaration fails to supply any information that would allow the court to make a meaningful comparison. After estimating that one human resources employee would have to spend two weeks of fulltime work to compile the requested documents, the declaration then simply announces that this expense "would be in excess of normal operating costs and present a great burden." Yendrek Decl., R.7-14,

Pg.ID#155. The declaration does not explain what tasks this employee might have to forgo while compiling the requested information. Nor does it offer any information about the company's overall operating costs against which to compare its projected cost of compliance (this employee's salary for two weeks). Without these critical facts, the declaration's bald assertion of excess is insufficient to establish an undue burden defense. *See Roadway Exp., Inc.*, 75 F. Supp. 2d at 772 (rejecting undue burden defense where employer "simply made a broad allegation" that costs of compliance would be "extensive").

The district court did not, as Ferrellgas incorrectly asserts, require the company to provide a "specific dollar amount." Appellant Br. at 27. Instead, it faulted Ferrellgas for failing to provide *any* information about "how complying with the subpoena would impact its normal daily operations." Order, R.10, Pg.ID#172.[17]

[17] It bears mention that Ferrellgas's normal operating costs are quite large. According to the company's most recent annual report, Ferrellgas and its related entities made more than $2 billion in annual revenues and $136 million in annual net earnings, and their annual "operating expenses" exceeded $577 million. Ferrellgas Form 10-K, at 36 (Sept. 29, 2023), https://www.sec.gov/ix?doc=/Archives/edgar/data/922359/000155837023016157/fgp-20230731x10k.htm. Against these figures, Ferrellgas's claims of undue burden are not credible. This Court may take judicial notice of

In passing, Ferrellgas suggests that the cost of compliance must be weighed against the "apparent usefulness" of the requested information, Appellant Br. at 26, effectively asking this Court to revisit relevance. The Supreme Court has rejected this view. As the Court explained in *McLane Co.*, the relevance inquiry "requires the district court to evaluate the relationship between the particular materials sought and the particular matter under investigation—an analysis 'variable in relation to the nature, purposes and scope of the inquiry.'" 581 U.S. at 81 (citation omitted). But once relevance is established, it has no place in the undue burden inquiry: "[T]he decision whether a subpoena is overly burdensome turns on the nature of the materials sought and the difficulty the employer will face in producing them." *Id.* Ferrellgas's insistence that this Court reconsider relevance conflicts with the Supreme Court's ruling in *McLane Co.*

As a second critical flaw, the declaration relies on facially implausible assumptions and inferences that vastly overestimate the time and effort

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Ferrellgas's annual report. *See Stanley v. Arnold*, 531 F. App'x 695, 697 (6th Cir. 2013) (taking judicial notice of corporation's Form 10-K); *Cyntec Co., Ltd. v. Chilisin Elecs. Corp.*, 84 F.4th 979, 989 n.6 (Fed. Cir. 2023) (taking judicial notice of public Form 10-K because it is "readily verifiable and thus the proper subject of judicial notice").

Ferrellgas would need to expend to gather the requested information. For example, the declaration estimates that the "number of applicants covered by this subpoena" is "likely between approximately 350-500 individuals," and that "[h]iring processes typically involve two to three" Ferrellgas employees. Yendrek Decl., R.7-14, Pg.ID#154. From this, the declaration infers that "[i]f each [Ferrellgas employee] spends a half hour searching for records, this would be 700-1500 employee hours of work time diverted to responding to the EEOC's subpoena." Yendrek Decl., R.7-14, Pg.ID#154.

This calculation implausibly assumes that two to three *unique* Ferrellgas employees handled each *discrete* applicant—i.e., that no decisionmakers overlapped. That assumption would imply that, in total, 750 to 1,500 Ferrellgas employees were involved in the hiring process for 350 to 500 applicants. That assumption defies reason. The better assumption is that any given Ferrellgas employee involved in hiring processes handled *multiple* applicants. Correcting for that error would significantly reduce the number of employees whose records must be searched, as well as the aggregate work hours needed to gather the requested documents.

Ferrellgas also asserts that it "has no central database containing the requested documents." Appellant Br. at 25; Yendrek Decl., R.7-14, Pg.ID#154. The record and Ferrellgas's own statements at least partially contradict that assertion. According to Ferrellgas, Wells and other applicants for driver positions submitted their application materials through two third-party recruiting websites—Indeed.com and ZipRecruiter—or directly through Ferrellgas's "career page located on [its] website." Ferrellgas Ltr., R.7-5, Pg.ID#100; *see also* Position Stmt., R.7-3, Pg.ID#90; Amended Charge, R.3, Pg.ID#50. This suggests that the bulk of the documents requested in the EEOC's subpoena—namely, the list of applicants and their application materials—should be readily accessible in three centralized locations. For its part, Ferrellgas does not explain why it would be unable to pull the application materials from these sources.

On this record, the district court acted well within its discretion in determining that Ferrellgas failed to establish an undue burden defense.

CONCLUSION

For the foregoing reasons, the district court's order enforcing the EEOC's subpoena should be affirmed.

Respectfully submitted,

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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 9,659 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

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CERTIFICATE OF SERVICE

I certify that on November 9, 2023, 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 service will be accomplished via the appellate CM/ECF system.

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ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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