No. 23-2195

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HARRY A. BOLDEN,
Plaintiff-Appellant,

v.

CAEI, INC. and BALTIMORE GAS AND ELECTRIC COMPANY,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

Congress tasked the Equal Employment Opportunity Commission (EEOC) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Under Title VII, a plaintiff ordinarily must file a charge of discrimination with the EEOC (or an appropriate state or local counterpart) as a prerequisite to filing a civil action, and the plaintiff usually may bring the action only "against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1). This appeal invites this Court to decide, as a matter of first impression, whether to recognize a narrow exception to Title VII's naming requirement—the identity-of-interest exception—and, if so, when the exception should apply. The EEOC has a substantial interest in the proper resolution of these questions, and thus offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES[1]

1. Whether this Court should recognize the identity-of-interest exception to Title VII's naming requirement.

[1] The EEOC takes no position on any other issues in this appeal.

2. Whether the district court properly articulated the relevant factors in determining whether the identity-of-interest exception applied in this case.

STATEMENT OF THE CASE

A. Statement of the Facts.[2]

Harry Bolden, an African-American man, began working for CAEI, Inc. as a billing specialist in 2014. JA127, JA131, JA217, JA226. CAEI, which is now defunct, provided information and technology consulting and professional services to other companies. JA125.[3] One of its customers was Baltimore Gas and Electric Company (BGE), a gas and electric utility company. JA125, JA131. CAEI managed BGE's Collections Strategy Pilot, which "focused on collecting outstanding funds due on gas and electric bills from BGE's customers." JA125. During his entire time at CAEI, Bolden worked on a team that was "responsible for placing calls to BGE's customers for the Collections Strategy Pilot." JA126; *see also* JA127 ("CAEI

[2] Because this appeal arises from a grant of summary judgment, the EEOC presents these facts in the light most favorable to Bolden. *See EEOC v. McLeod Health, Inc.*, 914 F.3d 876, 880 (4th Cir. 2019).

[3] CAEI went out of business in 2018, after the relevant events here took place. JA125.

hired Mr. Bolden to work on the Collections Strategy Pilot…."); JA93 (Bolden "ultimately worked on the financial solutions program his entire tenure with CAEI").

Although CAEI formally employed Bolden, BGE wielded significant control over Bolden's employment. During one stage of Bolden's job application process, for instance, at least three individuals from BGE interviewed Bolden, and he "had to physically go to [BGE] to be interviewed by them." JA219, JA221. After CAEI hired Bolden, a BGE representative "was there for orientation," and provided leadership and motivational training. JA222. BGE managers worked alongside CAEI managers to supervise Bolden's work and conduct his performance evaluations. JA230, JA235-36. Although Bolden's direct supervisor, Angelique Watts, was a CAEI employee, she was "hand chosen by the BGE management team." JA170. BGE did quality checks on Bolden's customer calls and gave him performance awards. JA232, JA245-46. Bolden also used a "BGE e-mail address" for all work-related communications, including with customers. JA244.

Bolden alleges that he suffered various forms of discrimination and harassment while working on the Collections Strategy Pilot. In January

2016, Bolden reported this conduct to both CAEI and BGE representatives. JA172-73, JA262-63. The next month, in February 2016, CAEI fired him. JA128-29, JA269.

Bolden later dual-filed a charge of discrimination with the EEOC and Maryland Commission on Civil Rights (MCCR), naming only CAEI as the respondent. JA147-48. The MCCR investigated the charge and conducted a fact-finding hearing with Bolden and CAEI representatives. JA97, JA420-21. Notably, although BGE denies any involvement in Bolden's termination, the investigation revealed that CAEI had contacted BGE before firing Bolden and that BGE had conditionally approved CAEI's decision to fire Bolden. JA173 ("[CAEI] confirmed that [a] BGE manager informed [CAEI] that … if [Bolden] did not want to adhere to the changes [to his cubicle placement] he should not return."). During the MCCR's investigation, Bolden and CAEI also engaged in settlement discussions. JA334; *see* Code of Md. Regs. (COMAR) 14.03.01.07(B) (setting forth negotiated settlement process). When those discussions did not succeed, however, the MCCR's investigation continued. JA335-38.

After completing its investigation, the MCCR issued a Written Finding, which found "No Probable Cause" to believe that CAEI had

discriminated or retaliated against Bolden. JA178. There is no indication in the record that the MCCR attempted conciliation. *Cf.* COMAR 14.03.01.09(A)(1) (requiring MCCR to initiate conciliation process "[u]pon a written finding of probable cause"). The EEOC thereafter adopted the MCCR's findings and issued a right-to-sue letter. JA182.

B. District Court's Decision.

After receiving his right-to-sue letter, Bolden filed this action, asserting claims for sex and race discrimination, harassment, and retaliation under Title VII. JA2. In his operative complaint, Bolden named CAEI and BGE as defendants, alleging that both entities were his employers. JA73.[4]

At summary judgment, the district court ruled that Bolden had "failed to exhaust his administrative remedies" against BGE. JA388. Specifically, the court noted, Bolden "did not name BGE in his charge of discrimination." JA376. Accordingly, the court reasoned, Bolden could not

[4] By the time Bolden filed this action, CAEI was already defunct. CAEI did not respond to the complaint and appears not to have otherwise participated in the lawsuit. *See* JA368 n.1 (noting that "CAEI has not responded to the Complaint").

maintain his civil action against BGE "unless the [identity-of-interest] exception applies." JA376.[5]

The court began its analysis by acknowledging that, although district courts within the circuit recognize the identity-of-interest exception, "the Fourth Circuit has not formally adopted [it]." JA376 (citation omitted). To determine whether the exception applied here, the court thus invoked a four-factor test articulated by the Third Circuit in *Glus v. G.C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977). JA376. In turn, the court determined that all four factors weighed against Bolden. JA377-88. As a result, the court concluded, Bolden had "failed to generate evidence on which a reasonable juror could conclude that the [identity-of-interest] exception applies in this case." JA388.

[5] The district court used the term "substantial identity exception," JA376, rather than "identity-of-interest exception." These terms are interchangeable, and they both refer to the same concept. *See, e.g.*, *Waters v. Univar Sols. USA, Inc.*, No. 2:22-cv-02071, 2023 WL 1479095, at *3 (D.S.C. Feb. 2, 2023) (noting that "the 'substantial identity' test" is "also known as the 'identity of interest' test"); *Olvera-Morales v. Int'l Lab. Mgmt. Corp.*, No. 1:05-cv-00559, 2008 WL 53293, at *3 (M.D.N.C. 2008) (referring to "the 'identity of interest' or 'substantial identity' test"). We use the term "identity-of-interest" throughout this brief.

On this ground alone, the court granted summary judgment to BGE. JA388-89. The court later denied Bolden's motion for reconsideration. JA437-38. Bolden appealed. JA436.

ARGUMENT

I. This Court should recognize the identity-of-interest exception to Title VII's naming requirement.

Before pursuing Title VII claims in federal court, a plaintiff ordinarily must file a charge of discrimination with the EEOC (or an appropriate state or local counterpart). *See Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1846 (2019) (charge-filing requirement is non-jurisdictional prerequisite to filing civil action under Title VII). Generally, the plaintiff may bring a civil action only "against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1). The central purpose of this naming requirement is to notify the EEOC and the employer of the alleged discrimination, giving them an opportunity to resolve the matter through conciliation or voluntary compliance. *See Causey v. Balog*, 162 F.3d 795, 800 (4th Cir. 1998).

In enforcing these requirements, however, courts must liberally construe charges to avoid frustrating Title VII's remedial goals. *See Bonds v. Leavitt*, 629 F.3d 369, 379 (4th Cir. 2011); *Chacko v. Patuxent Inst.*, 429 F.3d

505, 509 (4th Cir. 2005). After all, Title VII "sets up a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (cleaned up); *see also Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.").

For these reasons, courts have fashioned several exceptions to Title VII's naming requirement. *See EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 482-84 (5th Cir. 2014) (cataloguing exceptions and collecting cases). Here, Bolden principally invoked the identity-of-interest exception. This exception generally "looks at whether the party that appeared before EEOC adequately represented the unnamed party's interests." *Id.* at 475.

The seminal case on the identity-of-interest exception is *Glus v. G.C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977). There, the Third Circuit authored a four-factor test to assist in determining whether a sufficient identity of interest exists between a named party and an unnamed party such that a plaintiff can maintain a civil action against the unnamed party. Under that test, relevant factors include:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC [charge];
>
> 2) whether, under the circumstances, the interests of a named [party] are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings;
>
> 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; [and]
>
> 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Id. at 888 (line breaks added). The Third Circuit later clarified that "[t]his four-prong test is not a mechanical one," and "no single factor is decisive." *Glus v. G.C. Murphy Co.*, 629 F.2d 248, 251 (3d Cir. 1980), *vacated on other grounds*, 451 U.S. 935 (1981), *and on remand aff'd in relevant part*, 654 F.2d 944 (3d Cir. 1981). "Instead each factor should be evaluated in light of the statutory purposes of Title VII and the interests of both parties." *Id.*

This Court has not expressly adopted or rejected the identity-of-interest exception. In *Alvarado v. Board of Trustees of Montgomery Community College*, 848 F.2d 457 (4th Cir. 1988), this Court discussed the exception and

cited *Glus* with approval. *Id.* at 461.[6] In the end, though, the panel found it unnecessary to decide whether to adopt the *Glus* test, and "thus intimate[d] no opinion on the validity of the exception in the Fourth Circuit." *Id.*; *see also Onan v. Cnty. of Roanoke*, 52 F.3d 321, at *2 n.7 (4th Cir. 1995) (unpub. table dec.) (noting that *Alvarado* did not decide whether to adopt "this broader [identity-of-interest] exception," and declining to do so again).

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[6] Although *Alvarado*, *Glus*, and other decisions discussed Title VII's charge-filing requirement as jurisdictional, the Supreme Court has since clarified that it is not. *See Fort Bend Cnty.*, 139 S. Ct. at 1846. Furthermore, while the district court here referred to the charge-filing requirement as an "exhaustion" rule, JA374-75, that characterization is inaccurate. As the government explained in *Fort Bend County*, "Title VII's charge-filing requirement is not 'in any sense an exhaustion provision.'" Br. for United States as Amicus Curiae at 26, *Fort Bend Cnty. v. Davis*, No. 18-525, 2019 WL 1489048 (U.S. Apr. 1, 2019) (quoting *Woodford v. Ngo*, 548 U.S. 81, 98 (2006)). Unlike agencies in other statutory schemes, the EEOC does not *adjudicate* claims in private-sector cases like this one. The EEOC investigates allegations of discrimination to determine whether reasonable cause exists and, if so, attempts conciliation. 42 U.S.C. § 2000e-5(b). But if those efforts fail, the EEOC does not and cannot render a decision. Instead, if the EEOC believes a claim has merit, it must file its own lawsuit in federal court. *Id.* § 2000e-5(f)(1). In that event, the court does not review the EEOC's findings; it considers the claim *de novo*. *See Chandler v. Roudebush*, 425 U.S. 840, 844-45 (1976); *see also Doe v. Oberweis Dairy*, 456 F.3d 704, 710 (7th Cir. 2006) ("Title VII imposes procedural requirements as a precondition to bringing a suit in federal court that is an original proceeding rather than one to review agency action. … Title VII does not incorporate anything like the full apparatus of exhaustion….").

Thus, no binding precedent answers whether or how a plaintiff may invoke the exception in this Circuit.

In the EEOC's view, this Court should recognize the identity-of-interest exception for three principal reasons. First, this exception comports with the general principle discussed above that courts must liberally construe charges to avoid frustrating Title VII's remedial purpose. As the Sixth Circuit has explained, "[t]he 'identity of interest' exception acknowledges the reality that laymen, unassisted by trained lawyers, initiate the process of filing a charge with the EEOC, and accordingly prevents frustration of the remedial goals of Title VII by not requiring procedural exactness in stating the charge." *Romain v. Kurek*, 836 F.2d 241, 245 (6th Cir. 1987). Consistent with this rationale, this Court has repeatedly stressed that the charge-filing requirement "should not become a tripwire for hapless plaintiffs," and it has cautioned courts not to "erect insurmountable barriers to litigation out of overly technical concerns." *Sydnor v. Fairfax Cnty.*, 681 F.3d 591, 594 (4th Cir. 2012); *see also Stewart v. Iancu*, 912 F.3d 693, 703 (4th Cir. 2019) ("We must be wary of 'overly technical concerns' laying a 'tripwire for hapless plaintiffs.'" (quoting *Sydnor*, 681 F.3d at 594)).

Second, nearly all circuits—including the Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits—recognize the *Glus* identity-of-interest exception in some form. *See Johnson v. Palma*, 931 F.2d 203, 209-10 (2d Cir. 1991); *Glus*, 562 F.2d at 888; *Simbaki*, 767 F.3d at 483-84; *Romain*, 836 F.2d at 245-46; *Eggleston v. Chi. Journeymen Plumbers' Loc. Union No. 130, U.A.*, 657 F.2d 890, 907-08 (7th Cir. 1981); *Greenwood v. Ross*, 778 F.2d 448, 451 (8th Cir. 1985); *Romero v. Union Pac. R.R.*, 615 F.2d 1303, 1311-12 (10th Cir. 1980); *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1358-59 (11th Cir. 1994). Although some circuits, like this Court, have not yet recognized the exception, none has rejected it. Thus, recognizing the identity-of-interest exception would bring the law of this Circuit in line with the majority view.

Third, and finally, district courts within this Circuit already widely recognize the identity-of-interest exception and apply the four-factor *Glus* test—and some have done so for many years. *See Alvarado*, 848 F.2d at 461 (noting that identity-of-interest exception "has been applied by several district courts in this Circuit" and collecting cases); *EEOC v. 1618 Concepts, Inc.*, 432 F. Supp. 3d 595, 604 (M.D.N.C. 2020) ("Although the Fourth Circuit has only discussed the [identity-of-interest] exception in dicta, other

courts in this district have applied the exception." (citations omitted)); *see also, e.g.*, *Mayo v. Questech, Inc.*, 727 F. Supp. 1007, 1011 (E.D. Va. 1989) ("In the absence of controlling Fourth Circuit authority, this Court finds persuasive the Third Circuit's analysis of the Title VII naming issue in [*Glus*]."); *McAdoo v. Toll*, 591 F. Supp. 1399, 1403 (D. Md. 1984) ("The Court agrees … with the four-part test propounded by the Third Circuit [in *Glus*]…."). This case presents an opportunity for this Court to ratify that well-established practice.

For these reasons, the EEOC encourages this Court to join its sibling circuits in recognizing the identity-of-interest exception. We add two important caveats, however. The first caveat is that this Court need not—and should not—treat the four *Glus* factors as exhaustive. As the Eleventh Circuit has explained, the identity-of-interest exception is not a "rigid test," and "[o]ther factors may be relevant depending on the specific facts of the case." *Virgo*, 30 F.3d at 1359; *see also Romero*, 615 F.2d at 1312 ("Depending on the facts, additional factors may be relevant.").

As a second important caveat, the identity-of-interest exception is only one of several judicially recognized exceptions to Title VII's naming requirement, and this Court should not foreclose the others. For instance,

many circuits recognize an actual-notice exception, which applies "where an unnamed party has been provided with adequate notice of the charge, under circumstances where the party has been given the opportunity to participate in conciliation proceedings aimed at voluntary compliance." *Eggleston*, 657 F.2d at 905. As the Fifth Circuit observed, most circuits that recognize the *Glus* identity-of-interest exception also recognize the *Eggleston* actual-notice exception. *Simbaki*, 767 F.3d at 483 (collecting cases).

Another—and sometimes overlooked—exception applies when the charge's substantive factual allegations sufficiently implicate, allude to, or reference the unnamed party, or when the unnamed party was involved in the discriminatory conduct alleged.[7] The Ninth Circuit set the stage for this exception in *Kaplan v. International Alliance of Theatrical and Stage Employees*, 525 F.2d 1354, 1359 (9th Cir. 1975), *abrogated on other grounds by Laughon v. Int'l All. of Theatrical Stage Emps.*, 248 F.3d 931 (9th Cir. 2001), and later decisions continue to apply it. *See, e.g.*, *Viswanathan v. Leland Stanford Junior*

[7] *See also* 29 C.F.R. § 1601.12(b) ("[A] charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.").

Univ., 1 F. App'x 669, 672 (9th Cir. 2001); *Ortez v. Wash. Cnty.*, 88 F.3d 804, 808 (9th Cir. 1996); *Sosa v. Hiraoka*, 920 F.2d 1451, 1459 (9th Cir. 1990); *Wrighten v. Metro. Hosps., Inc.*, 726 F.2d 1346, 1352 (9th Cir. 1984). Several other circuits—including some that recognize the identity-of-interest and actual-notice exceptions—have also endorsed this approach.[8]

As these decisions demonstrate, the various judicially recognized exceptions to Title VII's naming requirement are not mutually exclusive. Adopting one exception does not preclude a court from recognizing others. Accordingly, if this Court decides to recognize the identity-of-interest

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[8] *See, e.g.*, *Shehadeh v. Chesapeake & Potomac Tel. Co. of Md.*, 595 F.2d 711, 728 (D.C. Cir. 1978) (unnamed party was proper defendant where "charge plainly implicated [it] in the violation cited"); *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112, 1124 (5th Cir. 1981) (assessing whether unnamed parties were sufficiently "implicated in the discrimination alleged in appellants' original charges"), *vacated on other grounds sub nom. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Terrell*, 456 U.S. 955 (1982); *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1010 n.24 (11th Cir. 1982) (courts may "look[] beyond the express terms of the EEOC charges and examine[] the specific discriminatory conduct alleged to see if it implicated the defendants"); *see also Eggleston*, 657 F.2d at 906 ("[P]arties sufficiently named or alluded to in the factual statement are to be joined."); *Romero*, 615 F.2d at 1311 (recognizing that some courts allow a plaintiff to maintain Title VII action against unnamed party "where the defendant was informally referred to in the body of the charge"). *But see Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1481 (6th Cir. 1990).

exception, it should leave the door open for these additional exceptions rather than suggesting that the identity-of-interest exception is the exclusive one.[9]

II. The district court misstated several relevant factors in determining whether the identity-of-interest exception applied in this case.

If this Court were to recognize the identity-of-interest exception, the remaining question would be whether the district court correctly applied the four-factor *Glus* test in this case. On this front, the district court misstated several factors in nuanced, but significant, respects. Although the EEOC takes no position on whether these misstatements undermine the district court's conclusion that the *Glus* factors, as a whole, weighed against Bolden, we offer these comments to help clarify the appropriate analysis.

[9] In the district court, Bolden also arguably invoked the actual-notice exception, asserting that "BGE had *actual* and constructive notice of the charge." JA200 (emphasis added). The district court, however, found that it was "undisputed that BGE did not receive notice of the administrative action" until Bolden filed his civil action. JA387 & n.10. On appeal, Bolden expressly invokes the actual-notice exception. *See* Opening Br. of Appellant at 21-26.

1. First factor: whether the plaintiff could reasonably ascertain the unnamed party's role.

The district court determined that the first factor—which asks whether the plaintiff could have reasonably ascertained the unnamed party's role—weighed against Bolden because he "admits that he knew BGE and CAEI were separate companies" when he filed his charge. JA382. But whether Bolden knew BGE and CAEI were separate entities is beside the point. Under the *Glus* test, the relevant inquiry is whether the plaintiff could have reasonably ascertained the unnamed party's role *in the alleged discrimination*. *See Hafez v. Avis Rent A Car Sys., Inc.*, 242 F.3d 365, at *3 (2d Cir. 2000) (unpub. summary order) (assessing whether plaintiff "was aware of the role of the [unnamed defendants] in the alleged discriminatory and retaliatory incidents when he filed the EEOC charges"); *Szoke v. United Parcel Serv. of Am., Inc.*, 398 F. App'x 145, 155 (6th Cir. 2010) (assessing whether "reasonable efforts would have led [plaintiffs] to discover [unnamed party's] potential role in their age discrimination claim").[10]

[10] *See also Senecal v. B.G. Lenders Serv. LLC*, 976 F. Supp. 2d 199, 219 (N.D.N.Y. 2013) (assessing whether plaintiff "understood [unnamed party's] *role* in the alleged discrimination"); *Talley v. Leo J. Shapiro & Assocs., Inc.*, 713 F. Supp. 254, 259 (N.D. Ill. 1989) (assessing whether plaintiff

This focus makes sense. When multiple entities exercise control over a given employee, and the employee suffers a discriminatory or retaliatory employment action, it may often be unclear which entities participated in the challenged action until an investigation takes place. *Cf. Erwin v. Potter*, 79 F. App'x 893, 897 (6th Cir. 2003) ("[E]mployers generally do not announce that they are acting on prohibited grounds."). And it is a "generally accepted principle that the scope of a Title VII lawsuit may extend to 'any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission.'" *Hill v. W. Elec. Co.*, 672 F.2d 381, 390 n.6 (4th Cir. 1982) (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)); *see also Kaplan*, 525 F.2d at 1359 n.3 (relying on *Sanchez* for the proposition that "the permissible scope of the civil action" is

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"could have discovered the unnamed defendants' roles in the discrimination at the time she filed her EEOC charge"); *Eckerman v. KMBC-TV*, No. 08-cv-00994, 2009 WL 9837587, at *3 (W.D. Mo. July 17, 2009) (assessing "[w]hether Plaintiffs knew of [unnamed party's] role in the alleged discrimination before filing their [administrative] charges"); *Weber v. LDC/Milton Roy*, No. 85-cv-2054, 1986 WL 68543, at *11 (D.N.J. Dec. 8, 1986) (noting that "plaintiff was aware of [unnamed party's] role in the alleged discrimination").

defined by "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination" (citation omitted)).

That principle applies with equal force when determining whether an unnamed party is a proper defendant in a Title VII lawsuit. As the Fifth Circuit has explained, "[t]he reasonable limits [in scope] of an investigation potentially triggered by an EEOC charge define not only the substantive limits of a subsequent Title VII action, *but also the parties potentially liable in that action*." *Terrell*, 644 F.2d at 1123 (emphasis added). Thus, when "an investigation of the unnamed party 'could have reasonably grown out of [the EEOC] charge,'" the unnamed party may be a proper defendant. *Lewis v. Asplundh Tree Expert Co.*, 402 F. App'x 454, 457 (11th Cir. 2010) (alteration in original) (quoting *Hamm v. Members of Bd. of Regents*, 708 F.2d 647, 650 (11th Cir. 1983)).

Here, the district court did not assess whether Bolden could reasonably have ascertained BGE's role in the discriminatory or retaliatory conduct Bolden identified in his charge.

2. Second factor: whether the named and unnamed parties shared sufficiently similar interests.

The district court reasoned that the second factor—which considers the similarity of interests between the named and unnamed parties—weighed against Bolden because BGE and CAEI were separate legal entities, and there was no evidence that BGE had been aware of Bolden's charge. JA382-85. The court appeared to assume that to establish an adequate similarity of interest under this factor, a plaintiff must show that the named party and unnamed party were "closely interrelated," for example, because they have a parent-subsidiary relationship or common ownership or management. JA382-83 (citations omitted).

The second *Glus* factor is not so demanding. To be sure, interrelatedness may be *sufficient* to show an identity of interest between two defendants. *See, e.g.*, *1618 Concepts*, 432 F. Supp. 3d at 605. But such a showing is not *required*. After all, the overarching inquiry is whether the parties' interests were so similar that the named party could "adequately represent[] the unnamed party's interests," *Simbaki*, 767 F.3d at 482, and there is little reason to suppose that only interrelated corporate entities can meet that standard. As relevant here, for example, a contractual

relationship between two defendants may suffice to establish shared interests under some circumstances. *See, e.g.*, *Daniel v. T & M Prot. Res., Inc.*, 992 F. Supp. 2d 302, 312 (S.D.N.Y. 2014) (although named and unnamed parties were "separate entities," they had shared interests where one "contractually delegated" to the other "substantial responsibility" over staffing decisions); *Senecal*, 976 F. Supp. 2d at 224-25 (named and unnamed parties "share[d] an identity of interest with respect to conciliation and compliance" where "their interests in any such response were contractually linked").

Of course, this Court need not determine every set of circumstances under which parties share interests. Nor must it determine whether the contractual relationship between BGE and CAEI was enough since Bolden did not make that argument in the district court. But we urge this Court to avoid ruling categorically that the interests of named and unnamed parties are sufficiently similar *only* when the parties are closely interrelated.

3. Third factor: whether the unnamed party suffered actual prejudice.

The district court reasoned that the third factor—which considers whether the unnamed party suffered actual prejudice—weighed against

Bolden because BGE did not receive notice of or participate in the MCCR's administrative proceedings. JA385-87. In other words, according to the district court, an unnamed party's mere absence from the administrative proceedings before a state agency or the EEOC, by itself, is enough to show actual prejudice. The court seemed particularly troubled by BGE's absence from settlement efforts, noting BGE's argument that "it is unknown whether BGE's participation in the settlement discussions could have resulted in a complete resolution of the matter." JA386.[11]

That logic proves too much. The third *Glus* factor asks whether the unnamed party's "*absence from the EEOC proceedings* resulted in actual prejudice to [its] interests." *Glus*, 562 F.2d at 888 (emphasis added). If the absence itself constituted actual prejudice, then this factor would always disfavor plaintiffs, placing an ever-present thumb on the scale against them. Likewise, the theoretical possibility that an unnamed party might have obtained a better result in settlement or conciliation efforts is not

[11] As noted above, although settlement efforts took place between Bolden and CAEI, there is no indication that the MCCR attempted conciliation. *Compare* COMAR 14.03.01.07 (setting forth negotiated settlement process), *with* COMAR 14.03.01.09 (setting forth conciliation process).

enough to show actual prejudice. Indeed, not every investigation results in such efforts. *See, e.g.*, *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1242 (2d Cir. 1995) (because "there were no EEOC proceedings in the instant case," the unnamed party "could not have been prejudiced in any way"); *Rivera v. P.R. Home Attendants Servs., Inc.*, 922 F. Supp. 943, 948 (S.D.N.Y. 1996) ("Because the EEOC never conducted an investigation or conciliation efforts, the City suffered no prejudice as a result of not being named in the charge.").

In short, to establish actual prejudice, an unnamed party must do more than point to its absence from the administrative proceedings. It must "explain how [it] was harmed by either the alleged lack of notice or [its] alleged lack of participation." *Bridges v. Eastman Kodak Co.*, 822 F. Supp. 1020, 1024 (S.D.N.Y. 1993); *see also Goforth v. Del. Cnty. Bd. of Cnty. Comm'rs*, No. 09-cv-0203, 2009 WL 2588861, at *5 (N.D. Okla. Aug. 18, 2009) ("Although the [unnamed party] claims that it was prejudiced by not being permitted to participate in the EEOC proceedings, it has not identified any specific prejudice and it appears that the [named party] could adequately protect the [unnamed party's] interests.").

An unnamed party might be harmed, for example, when the named party inadequately represented or failed to protect its interests in any administrative proceedings that took place. Courts are well versed in similar types of analyses in other contexts. *See, e.g.*, *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (assessing for purposes of intervention whether nonparty's interests were "adequately represented" by other parties); *Monroe v. City of Charlottesville*, 579 F.3d 380, 384 (4th Cir. 2009) (assessing, for purposes of class certification, whether proposed representative party "will fairly and adequately protect the class's interests"). So too, perhaps, if the unnamed party had some critical piece of information, unknown to the named party, that could have facilitated settlement efforts.[12] But if this factor is to have any meaning, the unnamed party's absence from the

[12] Even when settlement discussions take place during the administrative proceedings, as they did here, it is unclear what harm an unnamed party suffers when the agency does not find probable cause to believe the charging party was discriminated against. *See Williams v. City of Columbus*, 892 F. Supp. 2d 918, 926 (S.D. Ohio 2012) ("[E]ven if the State had been absent from such a proceeding, there would have been no prejudice because Williams's charge was dismissed without finding probable cause."); *Sank v. City Univ. of N.Y.*, No. 94-cv-0253, 1995 WL 314696, at *7 (S.D.N.Y. May 24, 1995) ("[N]either defendants nor the facts suggest prejudice to the unnamed parties and since in the end there was no probable cause found it is hard to imagine what prejudice resulted.").

administrative proceedings, by itself, cannot be enough to establish actual prejudice.[13]

CONCLUSION

For the foregoing reasons, the EEOC encourages this Court to recognize the identity-of-interest exception to Title VII's naming requirement and to clarify the relevant factors for determining when the exception applies, as outlined above.

[13] The EEOC takes no position on the district court's assessment of the fourth *Glus* factor, which considers "whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party." *Glus*, 562 F.2d at 888.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,090 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 April 3, 2024, 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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