

No. 09-7036

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

MONICA BROOKS et al.
Plaintiff-Appellants,

v.

DISTRICT HOSPITAL PARTNERS, L.P.,
Defendant-Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CORRECTED JOINT BRIEF IN SUPPORT OF PLAINTIFF-APPELLANTS
SUBMITTED BY THE WASHINGTON LAWYERS' COMMITTEE FOR
CIVIL RIGHTS & URBAN AFFAIRS, THE METROPOLITAN
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, AND THE
IMPACT FUND AS *AMICUS CURIAE*
IN FAVOR OF REVERSAL**

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Rule 26.1 Corporate Disclosure Statement

The Washington Lawyers' Committee for Civil Rights & Urban Affairs is a 501(c)(3) non-profit corporation. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of the corporation.

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11/12/09
Date

/s/
Susan E. Huhta

The Metropolitan Washington Employment Lawyers Association is a professional association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of the association.

11/12/09
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/s/
Les Alderman

Certificate as to Parties, Rulings and Related Cases

A. Parties and Amici

The Washington Lawyers' Committee for Civil Rights & Urban Affairs, the Metropolitan Washington Employment Lawyers Association, and the Impact Fund seek to participate as *amicus curiae*. All other parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellant.

B. Rulings Under Review

The appeal at issue involves the district court's dismissal of the claims of Monica Brooks and Tracee Taylor, who sought to intervene as named plaintiffs in the proposed class action, for failure to exhaust administrative remedies. The district court decisions relevant to this ruling include the court's: (1) Order Denying Plaintiff's Renewed Motion For Class Certification (December 1, 2008) [JA000333]; (2) Order Denying Plaintiff's Motion For Reconsideration (January 13, 2009) [JA000515]; and (3) Order Dismissing Plaintiffs' Claim on Show Cause (March 10, 2009) [JA000571].

C. Related Cases

This case has never previously been before this Court. There are no related cases of which amici are aware.

/s/
Susan E. Huhta

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INTEREST OF *AMICUS CURIAE*

The Washington Lawyers' Committee for Civil Rights & Urban Affairs (the "Lawyers' Committee"), the Metropolitan Washington Employment Lawyers Association ("MWELA") and the Impact Fund all have a strong interest in ensuring that the federal law relating to the exhaustion of administrative remedies and adjudication of class actions is interpreted in a manner that best effectuates the goals of Title VII of the Civil Rights Act of 1964, as amended.

The Lawyers' Committee, a non-profit, public interest organization, seeks to eradicate discrimination and fully enforce the nation's civil rights laws through the provision of legal assistance to the residents of Washington, D.C., Maryland, and Virginia. In the Lawyers' Committee's 40-year history, its attorneys have represented thousands of individuals who alleged discrimination under both federal civil rights statutes and local civil rights laws. The largest and oldest of the Lawyers' Committee's projects is the Equal Employment Opportunity Project, which represents victims of employment discrimination in individual cases and class actions against both public and private entities. From these cases, the Lawyers' Committee has amassed expertise in the issues of law and procedure that have been raised in the present matter. The Lawyers' Committee has participated in numerous cases as *amicus curiae*, most often before this Court, the Court of Appeals for the Fourth Circuit, and the District of Columbia Court of Appeals.

MWELA is a local affiliate of the National Employment Lawyers Association. MWELA is comprised of over 250 members who represent plaintiffs in employment and civil rights litigation in the Washington, D.C. metropolitan area. MWELA's purpose is to bring into close association plaintiffs' employment lawyers in order to promote the efficiency of the legal system, elevate the practice of employment law, and promote fair and equal treatment under the law. MWELA has participated in numerous cases as *amicus curiae* before this Court, the Court of Appeals for the Fourth Circuit, and the appellate courts of the District of Columbia, Maryland, and Virginia. MWELA's member attorneys frequently represent employees in Title VII class action cases.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country, assisting in employment discrimination and other civil rights cases. It offers training programs, advice and counseling, and amicus representation regarding class actions and related issues. The Impact Fund is lead counsel in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2002), and other major civil rights class action lawsuits.

SUMMARY OF ARGUMENT

In its May 29, 2007 decision permitting external applicants Brooks and Taylor to intervene in the suit originally filed by internal applicants Marable *et al.*,

the district court correctly applied this Circuit's precedents when it held that Brooks and Taylor, who themselves had not personally exhausted their administrative remedies, could vicariously exhaust those remedies through the charge filed by Marable and other internal applicants. The court based its holding on the fact that the EEOC charge of the internal applicants was reasonably related to the claims of Brooks and Taylor (both challenged the racially discriminatory effect of Defendant-Appellee George Washington University Hospital's ("GWUH's") testing requirements for multi-skilled technician candidates), and because the EEOC's investigation of the charge actually encompassed an investigation of potential discrimination against external applicants. Mem. Op. May 29, 2007, p. 5-6 [JA000227 – JA000228]. The district court subsequently erred, however, when it held on December 1, 2008 that Brooks and Taylor could not rely on the internal applicants' charge for purposes of certifying a class consisting of only external applicants, on the grounds that neither they nor any other external applicants had exhausted administrative remedies and the court appeared not to have presently before it information regarding the precise scope of the original Marable charge. Mem. Op. Dec. 1, 2008, p. 4-8 [JA000336 – JA000340].

In requiring that an external applicant actually exhaust administrative remedies, notwithstanding that a charge filed by other plaintiffs in the case fully

complied with Title VII's statutory obligation of notice and an opportunity to conciliate the claims of the external applicants, the district court took an overly restrictive view of the exhaustion requirements necessary to sustain a class action. It thereby violated the general principle that fairness and liberality should govern the interpretation of Title VII's requirements, and the concomitant principle that once the underlying purposes of the exhaustion requirement (notice and opportunity to conciliate) have been met, the exhaustion obligations should not be used as a means of preventing certification of systemic claims that might otherwise be appropriate for class adjudication.

If upheld, the district court's ruling will inappropriately preclude future victims of employment discrimination with otherwise meritorious Title VII claims from seeking redress in court, and will limit the circumstances in which future systemic discrimination can be remedied through class adjudication. For these reasons, Amici urge this Court to reverse the district court and hold that Brooks and Taylor may vicariously exhaust their remedies through the class charge filed by the internal candidate plaintiffs and may therefore seek to certify a class of external applicants.

ARGUMENT

A. Relevant Legal Principles

In *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982), the Supreme

Court held that exhaustion of administrative remedies is not a jurisdictional prerequisite to bringing a Title VII lawsuit, and is subject to waiver, estoppel, and equitable tolling. In so holding, the Supreme Court made clear that Title VII's administrative exhaustion requirements are to be interpreted liberally to effectuate its purpose of eradicating employment discrimination. *Id.* at 397. As the Court explained:

In *Love v. Pullman Co.*, 404 U.S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.* at 527. That principle must be applied here as well.

Zipes, 455 U.S. at 397.

In *Foster v. Gueory*, 655 F.2d 1319 (D.C. Cir. 1981), this Court articulated the standard for determining whether a Title VII plaintiff must exhaust his or her administrative remedies, or whether he or she can vicariously exhaust those remedies by "piggybacking" on the charge of another plaintiff:

Where the two claims are so similar that it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges, then it would be "wasteful, if not vain," [*Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968)], to require separate EEOC filings. However, where the two complaints differ to the extent that there is a real possibility that one of the claims might be administratively settled while the other can be resolved only by the courts, then the rationale of *Oatis* does not apply. In such a case each plaintiff should be required to separately file an EEOC charge in order to effectuate

the purpose of Title VII's provisions for administrative relief.

655 F.2d at 1322. The appellants in *Foster* were non-union member pile drivers who sought to intervene in the union members' class action which constituted African American pile drivers who claimed that discriminatory practices lead to their exclusion from employment. *Id.* at 1321. This Court found that the intervenors were not required to exhaust their remedies separately because, although they were not union members, they faced the same discriminatory employment practices. *Id.* at 1323. It reasoned that, since the "same discriminatory treatment constitutes the basis for both appellants' and the original plaintiffs' Title VII claim for relief[,] ... the EEOC charge filed by one of the original plaintiffs served the principal functions of the EEOC filing requirement, enabling the EEOC to provide the alleged wrongdoer with notice and to permit possible conciliation." *Id.* at 1322. It then concluded that "[i]f it was impossible for the EEOC to effectuate a settlement of the original plaintiffs' claims, there is no reason to believe that the EEOC would be successful in settling appellants' claims." *Id.*

In *Foster*, this Court determined that the standard it announced would fully satisfy the principal purposes underlying Title VII's administrative exhaustion requirement – to permit "the EEOC to provide the alleged wrongdoer with notice and to permit possible conciliation." *Id.* at 1323; *accord Zipes*, 455 U.S. at 398

(“particular purpose of the filing requirement” is “to give prompt notice to the employer.”); *Calloway v. Partners National Health Plans*, 986 F.2d 446, 449 (11th Cir. 1993) (purpose of exhaustion requirement is to give the EEOC a chance to settle the claim(s)); *Tolliver v. Xerox*, 918 F.2d 1052, 1057 (2nd Cir. 1990) (purpose of exhaustion requirement is “to afford the agency the opportunity to seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion”) (internal quotations and citation omitted). Underscoring the standard’s exclusive focus on the purposes underlying Title VII’s exhaustion requirement (notice and opportunity to conciliate), the *Foster* Court cited with approval decisions from other jurisdictions where one plaintiff was permitted to vicariously exhaust her administrative remedies by relying on the charge of another, notwithstanding that they were not both members of a Rule 23 class. *Foster*, 655 F.2d at 1322 (citing *Allen v. Amalgamated Transit Union Local 788*, 544 F.2d 876 (8th Cir. 1977) and *Wheeler v. American Home Products Corp.*, 582 F.2d 891 (5th Cir. 1977)). Indeed, in *Foster*, the Court permitted this “piggybacking” notwithstanding that class certification had been denied to the original named plaintiffs. *Id.* at 1322.

Since *Foster*, this Court has continued to uphold its core holding that the question of vicarious exhaustion is to be determined with exclusive reference to whether there has been prior notice and opportunity to conciliate at the

administrative stage. *See, e.g., Cook v. Boorstin*, 763 F.2d 1462, 1466 (D.C. Cir. 1985) (where nonexhausting intervening plaintiffs’ claims were encompassed within the “pattern and practice” administrative charge of named plaintiffs, vicarious exhaustion permitted); *De Medina v. Reinhardt*, 686 F.2d 997, 1012 (D.C. Cir. 1982) (intervening plaintiff did not need to file a separate EEOC charge where another plaintiff in the case had already done so, even after class claims dismissed, where each alleged receiving the same discriminatory treatment, the same theory of discrimination, the same injury, and similarly situated employment). District courts within this Circuit have likewise applied *Foster*’s standard to cases with myriad administrative and procedural histories. *See, e.g., Howard v. Gutierrez*, 571 F. Supp. 2d 145, 158 (D.D.C. 2008); *DL v. District of Columbia*, 450 F. Supp. 2d 11, 13 n.2 (D.D.C. 2006); *Moore v. Chertoff*, 424 F. Supp. 2d 145, 151 (D.D.C. 2006); *Hartman v. Duffy*, 158 F.R.D. 525, 535 (D.D.C. 1994); *see also Kifafi v. Hilton Hotel Ret. Plan*, No. 98-1517, 2004 U.S. Dist. LEXIS 28928, at *16-20 (D.D.C. Sept. 27, 2004) (emphasizing that the rule of *Foster* and its progeny apply in discrimination suits under Title VII, including “situations where no class action had been certified”).

Foster was and is fully consistent with the trend in other Circuits to dispense with overly technical requirements and allow vicarious exhaustion where the purposes animating the Title VII exhaustion provisions are satisfied. *See, e.g.,*

Tolliver 918 F.2d at 1057-60 (vicarious exhaustion of ADEA claims permitted even where non-exhausting plaintiff files an entirely new case, so long as another plaintiff has filed a charge of discrimination giving employer fair notice of allegations, there was opportunity to conciliate both claims, and complaints arose within same general time frame); *Calloway* 986 F.2d at 449-450 (permitting unsuccessful Title VII intervenor to rely upon another plaintiff's filing because the purposes of the EEOC charge-filing requirement, opportunity to conciliate and fair notice, are paramount); *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 196-97 (6th Cir. 1995) (emphasizing importance of satisfying the purposes of the exhaustion requirement rather than the means by which exhaustion occurred); *McDonald v. United Airlines, Inc.*, 587 F.2d 357, 361 (7th Cir. 1978) (member of putative class allowed to rely upon charge filed by former litigant who had accepted settlement offer because defendant had been fairly put on notice). This trend reflects the fact that strict compliance with exhaustion requirements is not a jurisdictional requirement, is not grounded in the text of Title VII, and indeed, contradicts both the statutory purpose and the underlying remedial logic of Title VII. In particular, other Circuits have permitted plaintiffs to vicariously exhaust even where they were not part of the same class as the exhausting plaintiff, *see, e.g., Tolliver*, 918 F.2d at 1058-1060, or part of the same lawsuit, *see, e.g., Calloway*, 986 F.2d at 449-450. The focus consistently remains upon the all-important "critical

factor...the similarity of the two plaintiffs' complaints." *Foster*, 655 F.2d at 1322.

B. The District Court Failed to Properly Apply the Rule of *Foster*

In the case at bar, it would appear that the district court denied class certification because, when the plaintiffs' renewed motion for class certification was ripe for decision, the potential class involved only outside applicants, none of whom had exhausted administrative remedies. As the district court explained its reasoning:

Each plaintiff in a Title VII class action, however, need not file an EEOC charge so long as one member of the class has met the filing prerequisite . . . In determining whether a proposed class member must file her own administrative charge, this Circuit consistently favors a bright-line rule: "Exhaustion of administrative remedies by at least one named plaintiff is a condition precedent to sustaining a class action under Title VII." Applying this rule here, the Brooks plaintiffs' proposed class cannot be certified because no class member has filed the requisite charge with the EEOC.

See Mem. Op. Dec. 1, 2008, p. 4-5 [JA000336 – JA000337] (citations omitted).

This aspect of the district court's holding was error, for the following reasons.

First, as the district court previously had held, the claims of Brooks and Taylor met the *Foster* test for applying the vicarious exhaustion doctrine to the fully-exhausted charge brought by Marable and the other internal applicants. Mem. Op. May 29, 2007, p. 5-6 [JA000227 – JA000228]. Indeed, in its order permitting intervention, the district court found that Brooks and Taylors' claims were encompassed by the EEOC's investigation of the Marable charge. *Id.* at 6

[JA000228] (“the EEOC investigation ultimately encompassed all of those who took the test – including external applicants – and GWUH was well aware that the investigation examined any discrimination against external applicants.”). The court further found that the Marable charge gave GWUH clear notice of the issues raised by Brooks and Taylor’s claims. *Id.* Once it was determined that their claims were encompassed by the Marable charge, and that GWUH had notice of the claims, under the clear standard of *Foster*, Brooks and Taylor had no additional hurdles to jump with respect to exhaustion.

Second, the district court held in essence that the only charge that Brooks and Taylor could possibly rely upon would be that of another external applicant. As Appellants point out in their brief, this aspect of the district court’s holding in effect imposes a Federal Rule of Civil Procedure 23 commonality standard on the question of vicarious exhaustion – a requirement that is squarely at odds with the holding of *Foster*. Indeed, the *Foster* court permitted the non-union member appellants to rely upon the exhausted claims brought by the union member pile drivers via the single-filer rule, and thus recognized that a plaintiff can vicariously exhaust her administrative remedies through the administrative charge of another even if the two do not fit within the same certified class, or even any certified class. *See Foster*, 655 F.2d at 1322.

Finally, while it is true that the case law is replete with language to the effect

that “a class may not be certified unless one member of the class has exhausted,” the district court erroneously assumed that this was a “bright-line rule” separate and independent of the standard of *Foster*. Mem. Op. Dec. 1, 2008, p.5 [JA000337]. Amici submit that such language is in fact best understood with reference to the factual context in which it appears. Indeed, none of the cases cited by the district court in support of its “bright line” rule involved the question presented in this case: whether vicarious exhaustion is permissible where the case includes a plaintiff not included in the class to be certified but whose charge encompassed the class claims. See Mem. Op. Dec. 1, 2008, p. 4-5 [JA000336 – JA000337].¹ The facts at bar demonstrate that *Foster*’s standard for vicarious

¹ For example, in *Thomas v. Reno*, 943 F. Supp. 41, 41-43 (D.D.C. 1996), the court rejected vicarious exhaustion where the original exhausting plaintiff had previously reached a settlement agreement with the agency. In these factually distinct circumstances, the court held that to permit the new plaintiff to substitute for the exhausting plaintiff two full months after she had settled with the agency “would make a mockery of the Settlement Agreement.” *Id.* at 43. The district court further cited to *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1434 (D.C. Cir. 1988), a case that only underscores this Circuit’s focus on the purposes behind the exhaustion requirement rather than arcane technicalities. In *Berger*, black construction workers were denied membership into an iron workers union and alleged racial discrimination in violation of Title VII. 843 F.2d at 1406. This Court determined that the employees should not have been allowed to file a class action for lack of a suitable class representative with a valid claim. *Id.* at 1409-10. But *Berger* did not consider vicarious exhaustion at all; rather, the plaintiffs’ claims failed because none of them was young enough to meet the union’s entrance requirements for its apprentice program, and the age restrictions were not encompassed within any EEOC charge. *Id.* There was no question in *Berger* of whether the plaintiffs could have piggybacked on such a charge, if one had existed. Indeed, following the principles of *Foster*, the *Berger* Court laments the lack of

exhaustion can be met even where no member of the class at issue has exhausted, such as where the EEOC investigated the class claims in the context of a highly similar and overlapping charge of another non-class member. *Foster* also recognizes the doctrine's applicability to cases where no class certification was filed at all. 655 F.2d at 1322 ("The rationale of the above cases has been extended to situations where no class action has been certified, but where the court was nonetheless able to treat as a class a plaintiff who had satisfied the EEOC filing requirements and one or more plaintiffs who had not satisfied that requirement.")²

notice afforded to the defendant. *Id.* at 1434. Likewise, in none of the other cases cited by the district court here was the question presented of whether an individual could rely on the charge of another in pursuing a class claim where the exhausting plaintiff was not or would not be included within the class. See *Hartman v. Duffey*, 88 F.3d 1232, 1235 (D.C. Cir. 1996); *Foster*, 655 F.2d at 1321-1322; *Contreras v. Ridge*, 305 F. Supp. 2d 126, 132 (D.D.C. 2004).

² *Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983) is not to the contrary. Although in *Kizas*, this Court refused to permit named plaintiffs in a putative class action to rely on the charge of an individual outside of the class, the facts are distinguishable from those at bar. First, *Kizas* involved federal sector claims, which as the decision recognizes, are subjected by Title VII to heightened administrative exhaustion obligations. *Id.* at 543. Second, in that case, the exhausting plaintiff had never actually appeared in the litigation before the court, having chosen instead to file his own Title VII lawsuit in a separate forum. *Id.* at 546-47. Third, the exhausting plaintiff had never pursued class claims, either at the administrative level or in his separate litigation, *id.*, thus suggesting the possibility that the defendant was never put on notice of claims of the non-exhausting named plaintiffs or the class they sought to represent. Here, however, no such difficulties exist. While the internal applicants' claims have been severed, they were done so relatively late in the proceedings, only after Brooks and Taylor were allowed to intervene and only after the rulings on class certification. Furthermore, unlike in

C. The District Court Violated its Obligation to Liberaally Interpret Title VII's Exhaustion Requirement

The Supreme Court in *Zipes* made clear that Title VII's administrative exhaustion requirements are to be interpreted liberally to effectuate its purpose of eradicating employment discrimination. 455 U.S. at 397. When determining whether exhaustion requirements have been satisfied, notions of "fairness, and not excessive technicality," should govern the interpretation of Title VII's requirements. *Cronas v. Willis Group Holdings Ltd.*, No. 06-Civ-15295, 2007 U.S. Dist. LEXIS 68797, at *7 (S.D.N.Y. Sept. 17, 2007) (*citing Love*, 404 U.S. at 526-27). Once the underlying purposes of the exhaustion requirement (notice and opportunity to conciliate) have been met, those obligations should not otherwise be used as a means of preventing certification of systemic claims that are otherwise appropriate for class adjudication.³ *Cronas* at *7-8 ("The [Second] Circuit has applied the single-filing rule to both class and individual actions, finding that the

Kizas, the charge at issue here was undoubtedly a class charge which undoubtedly encompassed the claims of the external applicants.

³The importance of class action litigation to the enforcement of Title VII cannot be overstated. "Because the Civil Rights Act of 1964 attacks class-based discrimination, it is particularly appropriate that suits to remedy violations of the Act be brought as class actions." *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 917 (7th Cir. 1976), *aff'd sub nom. United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *see also* Lex K. Larson, *Employment Discrimination*, 2d Ed., § 81.01 (Matthew Bender & Co., 2000) ("employment discrimination, by its very nature, is often class discrimination and therefore particularly suited to the class action device.").

relevant inquiry for application of the rule is not the type of action involved, but whether ‘the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim,’ in order to ‘afford[] sufficient notice to the employer to explore conciliation with the affected group.’”) (*quoting Tolliver*, 918 F.2d at 1058). Indeed, “it would frustrate the Congressional purpose expressed in Title VII if there were a rule which produced different results for the discriminatory practices in situations governed by the same policy.” *Wheeler*, 582 F.2d at 897-898. *See also Cook*, 763 F.2d at 1472 (“If our nation is to move with speed toward genuine equality of opportunity [in the workplace], employers...cannot be allowed to escape the requirements of Title VII by a litigation strategy of divide and conquer”).

Here, the district court’s determination that Brooks and Taylor could not rely on the exhausted charge of the internal applicants in pursuing a class action on behalf of external candidates violated its obligation to liberally construe Title VII’s exhaustion requirements. Indeed, the district court itself had previously – and correctly – found that all purposes of the exhaustion requirement had been satisfied, and thus its refusal to permit vicarious exhaustion under the specific facts of this case erroneously elevated form over function. The result is that an entire class of external applicants – who may very well have been victims of substantial race discrimination – have been denied their day in court. If the district court’s

holding is permitted to stand, future victims of discrimination may similarly be denied redress. For these reasons, the decision should be reversed.

CONCLUSION

The rule permitting vicarious exhaustion was adopted precisely to facilitate Title VII class action adjudication, and came about in recognition of the importance of Title VII's goal of eliminating discrimination and the statute's reliance on private enforcement. Where, as in the case at bar, all purposes served by Title VII's exhaustion requirement have been met, exhaustion requirements must be read liberally to fully effectuate the goals of Title VII, as the Supreme Court held in *Zipes*, 455 U.S. at 397. Should the lower court's decision stand, the purposes of Title VII's exhaustion requirement will be no better served, but individual and class adjudication of otherwise meritorious Title VII claims will be unreasonably curtailed.

For the foregoing reasons, Amici urge this Court to reverse the district court's decision.

Respectfully submitted,

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