No. 99-1823

IN THE
SUPREME COURT OF THE UNITED STATES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center ("Center")[1] is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who report misconduct in the workplace or testify in proceedings to enforce federal law. The Center supports employees who have suffered illegal retaliation due to the disclosure of matters in the public interest. The Center regularly assists employees who have filed viable claims of retaliation under state and federal anti-retaliation laws and participates in public education programs throughout the country. The Center also operates, *pro bono*, an Attorney Referral Service for whistleblowers (with attorney members in 38 states) and maintains an Internet web site at *www.whistleblowers.org*.

Persons assisted by the Center have a direct interest in the outcome of this case. Over twenty federal laws containing prohibitions against employee retaliation also contain administrative enforcement procedures either identical or substantially similar to the provisions at issue in this case. Affirming the decision of the Fourth Circuit could have the direct impact of undermining a carefully-constructed Congressional framework for protecting employee-

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[1] Pursuant to Rule 37.6, no monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief and that the Center's attorneys, Stephen M. Kohn, Michael D. Kohn, David K. Colapinto, authored this brief in its entirety. Counsel for all parties have consented to the filing of an *amicus curiae* brief by the National Whistleblower Center.

whistleblowers under numerous laws, in addition to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 2000e-3(a), specifically at issue here.

This case is of particular concern to the National Whistleblower Center. Almost all federal whistleblower protection laws rely upon an enforcement mechanism similar to the one employed by Congress in the ADA. Whistleblowers tend to be very unpopular plaintiffs, and are typically at a disadvantage *vis a vis* employers. Accordingly, Congress has enacted statutory schemes designed to carry out the federal policy of protecting whistleblowers, and has empowered a number of federal agencies to administer those laws and uphold the federal policies at stake. Similar to the powers given the Equal Employment Opportunity Commission ("EEOC") under the ADA, these federal agencies are authorized to seek relief in federal court for individual whistleblowers who serve the public interest, including the enforcement of back pay and reinstatement awards.

Any limitations on the power of these agencies to properly protect whistleblowers would fundamentally undermine the detailed Congressional framework which has created a safety net for employees who blow the whistle on public safety violations in a number of sensitive areas, such as nuclear safety, airline safety, mine safety, surface transportation safety, and environmental protection, among many others.

Since 1990 the Center has participated before this Court as *amicus curiae* in a number of cases that directly impact on the rights of employee whistleblowers, including *English v. General Electric*, 496 U.S. 72 (1990), *Haddle v. Garrison*, 525 U.S. 121 (1999), and *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000).

SUMMARY OF THE ARGUMENT

Since 1935 Congress has entrusted the executive branch of government with the discretion to enforce important public polices that can come under fire in the workplace. Over twenty statutes are based on this model, including the ADA. Congress recognized the case-by-case "difficulties" of enforcing these polices and consequently established agencies, such as the EEOC, to ensure that important federal policy would not be undermined by illegal employer action.

In granting executive agencies authority to vindicate congressionally-sanctioned policy, Congress also empowered these agencies, pursuant to Article I of the United States Constitution, with the authority to determine the "relation of remedy to policy," an authority this Court has long recognized. The lower court in this case failed to heed this Court's warning against "the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy," when it drastically limited the EEOC's enforcement authority.

The EEOC has the discretion to determine the relationship between remedy and policy in all cases in which it seeks to enforce the ADA and the important policies that Act stands for. In this case, the lower court abused its discretion when it determined that the EEOC may only seek prospective relief against employers who violate the ADA. The Fourth Circuit's holding directly undermines the well-established discretion the EEOC has to determine which remedies further the federal policies it is entrusted by Congress to enforce.

Moreover, in addition to the ADA, twenty other federal laws are based on enforcement principles either identical or similar to those in the ADA. Upholding the lower court ruling in this matter could threaten the administrative and judicial enforcement process in all of these laws. Such a result would

undermine the carefully constructed enforcement process established by Congress over a sixty-year period.

Finally, the decision of the lower court is completely inconsistent with the policies underlying the Federal Arbitration Act and this Court's decision in *Circuit City Stores v. Saint Clair Adams*, __ U.S. __, 121 S.Ct. 1302 (2001) . As this Court has recognized, one of the benefits of arbitration is permitting both employees and employers to enjoy the benefits of a fast, fair and inexpensive process to vindicate statutory rights. Under the process endorsed by the lower court, however, employees and employers could be forced to defend employment decisions in two separate ongoing proceedings - one before an arbitration panel and another before the EEOC. Instead of being inexpensive and in accordance with federal arbitration policy, the costs of such cases could easily double.

Additionally, the adjudication process in both cases may be distorted due to the application of the *res judicata* and collateral estoppel doctrines. Permitting multiple litigation of the same or similar claims in two separate fora would undermine all of the reasons why the *res judicata* and collateral estoppel rules exist.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT DOES NOT DISPLACE THE EEOC'S ADMINISTRATIVE AUTHORITY TO DETERMINE THE APPROPRIATE REMEDY NECESSARY TO EFFECTUATE FEDERAL POLICY IN A DISCRIMINATION CASE.

The lower court fundamentally misunderstood the EEOC's discretion to evaluate the remedy it would seek in a discrimination case with the EEOC's Congressionally-

mandated duty to effectuate the national policy of eliminating the harms caused by illegal discrimination. Its failure to properly weigh this Court's longstanding rule that agencies, such as the EEOC, have the primary duty to determine the relationship between remedy and policy in eradicating illegal employment practices mandates that the decision of the lower court be reversed.

The lower court erred when it held that the "public interest" in determining issues such as back pay and reinstatement, were "minimal," and somehow outside of the EEOC's "primary" mission of protecting "public" interests. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999). This holding is at war with the fundamental premises underlying most federal anti-discrimination laws. Since the enactment of the National Labor Relations Act in 1935, Congress has, on numerous instances, empowered Article I administrative agencies with the authority of protecting the public interest by policing employment practices which interfered with interstate commerce or other federal rights for which Congress, under the U.S. Constitution, had the authority to regulate. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937).

In upholding administrative agencies' authority to police employment practices made illegal by Congress, this Court has also recognized that part of that enforcement authority includes the power of agencies to seek judicial enforcement of orders of "reinstatement" or "payment for lost time." *Id.*[2] This Court has also firmly recognized that neither

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[2] Title VII of the Civil Rights Act of 1964, *as amended*, established the EEOC to implement "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in federal court." *Occidental*

(continued...)

an employee nor an employer may interfere with this power through the execution of a private contract. *J.I Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act").

The lower court's holding that an award of back pay to an employee somehow had only a "minimal" impact on the broader public interest cannot be sustained as a matter of law. Congress vested the EEOC with the discretion to determine the relationship between the remedy sought in an action filed by the Commission, and the Commission's obligation to advance the broader public interest. Again, sixty years ago this Court recognized the fundamental relationship between a "remedy" and the effectuation of a policy. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). In *Phelps Dodge*, this Court held that an administrative agency's "power to neutralize discrimination"

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[2] (...continued)
Life Insurance Company v. EEOC, 432 U.S. 355, 359 (1977). When Congress created the EEOC in 1964, it "established an administrative procedure" for resolving discrimination claims. In 1972 the EEOC was granted "additional enforcement power" to seek enforcement of discrimination laws in federal court. Despite its ability to file claims in federal court, "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination . . . ." *Id.*, pp. 367-68. This Court has noted the difference between suits which merely represent a private interest and those filed by administrative agencies in order to protect a public interest. *General Telephone Company v. EEOC*, 446 U.S. 318, 333 (1980) (noting "possible differences between the public and private interests" involved in Title VII litigation).

was not limited in cases in which an employee may already have obtained "compensatory" relief. The agency's power was not "limited" to remedying private harms, but extended to effectuating "public policy. *Id.*, pp. 192-93.

In the context of eradicating harmful employment practices prohibited by law, Congress empowered agencies to determine the "relation" between the necessary "remedy" in a particular case, to the "policy" for which the agency was established to enforce. *Phelps Dodge*, 313 U.S. at 194.

Although decided sixty years ago in the context of evaluating the powers of the National Labor Relations Board, the analysis of this Court in *Phelps Dodge* is equally applicable to the issued raised by the lower court in order to determine the scope of discretionary authority vested in the EEOC to determine what remedy to seek for an employee when weighing its duty to protect the public interest as a whole. This Court left no doubt that Article I agencies, such as the NLRB or EEOC, have the discretion to make this threshold determination, and that courts must be extremely limited in second-guessing that judgment, as a matter of law:

> Congress met these difficulties [*i.e.*, in determining the proper scope of a remedy] by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, the courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board

> implies responsibility – the responsibility of exercising its judgment in employing the statutory powers.

Phelps Dodge, 313 U.S. at 194.[3]

This holding is equally true in the context of the EEOC's exercise of its discretion in cases arising under the ADA. First, determining what relief is necessary to effectuate Congress' policy goals in any particular case is a "difficult" issue, and one which Congress left with the EEOC, if and when the EEOC chooses to exercise its discretion to file a claim. Just as with the NLRB, Congress clearly vested considerable discretion with the EEOC in formulating its demand for relief in any case filed in federal court.

Second, because of the relationship between remedy and policy, courts must be very wary of interfering with the EEOC's discretion in this area. Of course, a court can refuse to award any damage requested by the EEOC if such an award is not permissible under the act or is not supported by the evidence. However, removing the EEOC's authority to even request such relief in a complaint, or attempt to create a record that would justify such relief, unquestionably oversteps the bounds of judicial restraint, and upsets the regulatory and

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[3] Congress is "presumed to know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-99, 99 S.Ct. 1946 (1979). When Congress passed the Civil Rights Act of 1964 and the amendments thereto in 1972, it knew of agencies' authority to determine the appropriate remedy to effectuate federal policy, as set forth in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)(recognizing agency discretion in formulating a proposed remedy); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)(recognizing that private contracts must yield to a congressionally-sanctioned enforcement regime).

enforcement scheme developed by Congress.[4] This Court's warning to the lower courts "against the danger of sliding unconsciously" into the "spacious domain of policy" in which Congress granted the NLRB is equally applicable to the EEOC. It is well established that Congress empowered the EEOC with a "spacious domain" to enforce the ADA and thereby effectuate the federal policies Congress intended when it enacted the ADA into law.

Third, Congress' grant of "power" to the EEOC to investigate and file claims against employers concerning illegal employment practices also "implies responsibility." Clearly, the EEOC does not file such claims in every case. Even when claims are filed, the EEOC must act with proper "responsibility" in determining what relief to seek, and what forum should be used to obtain that relief.

Although this case arose in the context of the ADA, since 1935 Congress has used the NLRA as a model for passing

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[4] It is well-settled that "agency enforcement decisions" are generally "committed to agency discretion." *FEC v. Akins*, 524 U.S. 11, 26, 118 S.Ct. 1777 (1998), *citing Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1469 (1985). Consequently, there is no authority which would permit a district court to micro-manage or second-guess the types of relief the EEOC may request when engaging in its "multi-step enforcement procedure." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1997). In fact, permitting such micro-management at the complaint and discovery phase of a legal action could significantly add to the complexity and expense incurred by all parties engaged in the EEOC enforcement process.

numerous laws which effectuate other national labor polices.[5] Any decision by this Court limiting the discretion of the EEOC to determine the proper "remedy" in an employment case would have an extremely detrimental impact on numerous laws in addition to the civil rights statutes directly implicated in the Fourth Circuit's holding. *See*, *e.g.*, Aviation Whistleblower Protection Provision, 49 U.S.C. § 42121(c)(5) (Secretary of Labor discretion to file civil action to enforce law and seek compensatory damages); Clean Air Act Employee Protection, 42 U.S.C. § 7622(d) (Secretary of Labor discretion to file civil action to enforce law and seek compensatory and exemplary damages); Employee Polygraph Protection Act, 29 U.S.C. § 2005(b) (Secretary of Labor discretion to file civil suit obtaining lost wages and benefits for employees); Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3) and 216 (Secretary of Labor discretion to file civil action to enforce law); Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855 (Secretary of Labor duty to file civil action to enforce law); Mine Health and Safety Act, 30 U.S.C. § 818 (Secretary of labor discretion to file civil action to enforce law); Occupational Health and Safety Act nonretaliation provision, 29 U.S.C. § 660(c) (Secretary of Labor discretion to file civil action to enforce law); Safe Containers for International Cargo Act Employee Protection Provision, 46 U.S.C. § 1506

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[5] *See* Legislative History of Titles VII and XI of Civil Rights Act of 1964 at p. 3077 (GPO 1968), *reprinting* various legal memoranda placed into the Congressional Record by Sen. Clark during the 1964 debates concerning the Civil Rights Act. For example, one memorandum placed on the record by Sen. Clark noted that "starting with the National Labor Relations Act," Congress had "enacted comprehensive legislation regulation labor and management practices." The memorandum also noted that "prior statutes," which included the NLRA, were "directly analogous to the provisions of title VII."

(Secretary of Labor discretion to file civil action to enforce law); Safe Drinking Water Act Employee Protection Provision, 42 U.S.C. § 300j-9i(4); Surface Transportation Act Employee Protection Provision, 49 U.S.C. § 31105(d) (Secretary of Labor duty to file civil action to enforce law); Toxic Substances Control Act Employee Protection Provision, 15 U.S.C. § 2622(d) (Secretary of Labor duty to file civil action to enforce law).

Clearly, Congress was free to rely on this Court's holding in *Phelps Dodge* in empowering administrative agencies to protect employees under other laws, and entrusting those agencies to properly determine the relationship between "remedy" and "policy" in enforcing those other laws. Should this Court uphold the lower court's ruling, the power of these agencies to administer and enforce the vital national policies effectuated under numerous laws would be either directly undermined or, at a minimum, called into question.

The EEOC has the discretion to determine the relationship between remedy and policy in all cases in which it, in its discretion, seeks to vindicate the policies of the ADA. The lower court erred when it overturned the EEOC's exercise of that discretion.

II. INTERFERING WITH THE EEOC'S DISCRETION TO DETERMINE THE APPROPRIATE REMEDY TO EFFECTUATE FEDERAL POLICY WOULD DEFEAT CONGRESS' PURPOSE IN PASSING THE FEDERAL ARBITRATION ACT.

In *Gilmer*, this Court acknowledged that the EEOC retained certain powers to pursue claims under anti-discrimination laws, despite the existence of an arbitration agreement executed by two private parties. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). This

holding is fully consistent with the legislative history of the Civil Rights Act of 1964, as amended. *EEOC v. Frank's Nursery & Crafts*, 177 F.3d 448, 456-59 (6th Cir. 1999).

In this case, however, the lower court justified limiting the EEOC's right to request various remedies for victims of discrimination. The lower court held that a dual procedure for enforcing the national policy against illegal employment discrimination must be utilized. On the one hand, the EEOC could adjudicate broad class actions and seek "injunctive" relief for victims of discrimination in federal court, while on the other hand, issues of individual monetary relief arising from the same incident had to be resolved through arbitration. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, (4th Cir. 1999).

This holding is illogical and completely inconsistent with the Congressional purposes behind the Federal Arbitration Act and this Court's holding in *Circuit City Stores v. Saint Clair Adams*, __ U.S. __, 121 S.Ct. 1302 (2001) . If the holding of the lower court were followed, employees, employers and the government would, in many cases, have to bear the burdens and risks of dual adjudications. *Circuit City*, __ U.S. __, 121 S.Ct. 1313 (warning against judicial holdings which could result in the "bifurcation of proceedings" subject to arbitration, thereby increasing both litigation costs and the burden on the courts).

For example, an instance of discrimination could easily give rise to both an individual claim for relief (which, under the Fourth Circuit's holding, must be handled in an arbitral forum) and a claim for broad injunctive relief, which the EEOC would file in a federal court. Because many (if not all) of the facts relevant to one proceeding, would also be relevant to the other, the employer could find itself having to pay double-attorney fees. *Circuit City*, __ U.S. at __, 121 S.Ct. at 1313 (permitting parties to "avoid the costs of litigation" is a major "benefit" of arbitration). The employer would be forced to defend the same

alleged discriminatory action twice.

Moreover, because of the potential impact of *res judicata* and *collateral estoppel*, the EEOC may find itself forced to intervene in the arbitration proceeding, and the employee may be forced to intervene in the EEOC proceeding. Witnesses would have to testify twice, different forums could issue contradictory decisions on every issue, ranging from credibility determinations to controlling factual and a plethora of legal questions may be litigated concerning which requested remedy must be arbitrated or litigated. *See, e.g. Circuit City Stores, supra* (warning against judicial holdings which may create "complexity and uncertainty" and cast doubt on the "efficiency of alternative dispute resolution procedures").

To make matters even worse, Congress recognized that understanding employment discrimination was becoming "increasingly complex," especially to an "untrained observer." Equal Employment Opportunity Act of 1972, H. Rep. No. 92-238, *reprinted* 1972 U.S.C.C.A.N. 2137, 2144. To ensure that the "national policy of equal employment opportunity" could be enforced "in a meaningful way," Congress enhanced the enforcement authority of the EEOC in 1972. 1972 U.S.C.C.A.N. at 2138. Establishing a precedent which would permit dual litigation in multiple fora would undermine the national policy to promote equal employment opportunity by artificially adding complexity and uncertainty when none need exist. *Circuit City Stores* strongly counsels against interpreting the FAA in such a manner.

In short, the very reason for requiring arbitration in employment cases (*i.e.* lowing costs, efficient resolution, administrative convenience, etc.) and for applying the doctrines of *res judicata* and collateral estoppel in any case, would be fundamentally undermined by upholding an enforcement regime that not only permitted and encouraged the unnecessary bifurcation of proceedings, but essentially required such

duplication in *all* cases in which the EEOC determined that major issues impacting the public policy existed.

A claim of discrimination - like any other law suit - must be resolved in one proceeding. In the case below, the employee and the employer both agreed to an arbitration forum. However, the EEOC did not agree to that forum. In such a circumstance, the interests of the private parties must bend to the greater public interest, as represented by the EEOC. *J.I Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility").

Of course, the EEOC may exercise its discretion in choosing the forum in which a claim should be heard, and may very well prefer in any given case to have a claim resolved through arbitration. This decision rests in the sound discretion of the EEOC, and private parties may not invalidate the exercise of that discretion through private contract.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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