No. _____

In The
Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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June 1, 2009

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QUESTION PRESENTED

If Title VII precludes the Equal Employment Opportunity Commission ("EEOC") from bringing a direct action against an employer once the employee elects to request the right-to-sue notice and files suit on the claims alleged in his charge, would it be inconsistent with Title VII to allow the EEOC to maintain perpetual jurisdiction to investigate the charge.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The Petitioner here and appellant below is Federal Express Corporation (d/b/a FedEx Express).

The Respondent here and appellee below is the EEOC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The parent company of Petitioner Federal Express Corporation (d/b/a FedEx Express) is FedEx Corporation, whose stock is publicly traded on the New York Stock Exchange under the symbol FDX.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 558 F.3d 842, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-27a. This opinion amended and replaced the Court of Appeals' original opinion which is reported at 543 F.3d 531, 2008 U.S. App. LEXIS 19242, and is reprinted at Pet. App. 28a-55a. The District Court's opinion is not reported, but is reprinted at Pet. App. 56a-64a.

JURISDICTION

The Court of Appeals for the Ninth Circuit issued its amended opinion on March 3, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The pertinent provisions are reproduced at Pet. App. 65a-72a.

STATEMENT OF THE CASE

This case represents a marked expansion of the investigatory jurisdiction of the EEOC beyond anything contemplated in the statutory framework or any court precedent to date. If left standing, the Ninth Circuit's interpretation of the EEOC's investigatory jurisdiction as never-ending will usurp Congress' intended role of the courts as the enforcer of Title VII.

District Court Jurisdiction. The court of first instance, the United States District Court for the

District of Arizona, had jurisdiction of this matter pursuant to 42 U.S.C. § 2000e-5(f)(3), 42 U.S.C. § 2000e-9, and 29 U.S.C. § 161(2).

Factual Background. On November 27, 2004, Tyrone Merritt ("Merritt") filed a charge of discrimination with the EEOC against Federal Express Corporation ("FedEx") on behalf of himself and similarly-situated African American and Latino employees in FedEx's fourteen-state Western Region.[1] R.11, Ex.1. Merritt alleged he was discriminated against on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. claiming he was denied promotions; issued harsher discipline than similarly-situated Caucasian employees; denied fair compensation and leave without pay; and subjected to an unfair cognitive ability test, the Basic Skills Test ("BST"), previously required for promotion to some positions at FedEx. R.11, Ex.1. After failing the BST a second time, Merritt filed a supplemental charge on June 29, 2005 reasserting and updating the BST and promotion claims on behalf of himself and similarly-situated employees in FedEx's Western Region. R.11, Ex.2.

The filing of this supplemental charge triggered an investigation by the EEOC. On July 8, 2005, the EEOC requested by letter that FedEx produce information related to the BST. FedEx fully complied with this request. R.11, Ex.'s 7-10.

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[1] Citations to record evidence refer to the docket number in the district court record.

Approximately three months later, Merritt, through counsel, requested a right-to-sue notice from the EEOC, which the EEOC issued to him on October 20, 2005. The right-to-sue notice indicated that more than 180 days had expired since the filing of the initial charge; notified Merritt of the 90 day time period to file suit; and stated the EEOC would "continue to process the charge." R.11, Ex.3.

On October 12, 2005, shortly before receiving the notice, Merritt joined as a representative plaintiff in a class action lawsuit pending in the United States District Court for the Northern District of California styled *Derrick Satchell et al. v. FedEx Express*, Case Nos. C03-2659 SI and C03-2878 SI ("*Satchell*"). R.11, Ex.5. This litigation encompassed claims and classes that were identical -- both geographically and temporally -- to those alleged by Merritt in his initial and supplemental charges. The court had previously certified classes on each of the alleged claims. R.11, Ex.5.

Nearly four months after Merritt joined the *Satchell* litigation as a class representative and while discovery continued in *Satchell* under the supervision of the court and pursuant to the *Federal Rules of Civil Procedure*, the EEOC revived its administrative investigation of Merritt's charges by serving FedEx with a subpoena *duces tecum* on February 10, 2006. R.2, Ex.A (Attachment 5). The subpoena sought identification of all computerized or machine-readable personnel databases maintained by the company since January 1, 2003. FedEx objected to the request and filed a timely petition with the EEOC to revoke or modify the subpoena, which the EEOC denied.

Lower Court Proceedings. The EEOC then filed an action to enforce the subpoena in the United States District Court for the District of Arizona. FedEx opposed this action asserting: (1) the EEOC's jurisdiction to investigate the charge ended when Merritt received a right-to-sue letter and joined the *Satchell* matter as a class representative, and (2) the information sought by the subpoena was irrelevant, overbroad, and unduly burdensome. After briefing and argument, the District Court granted the EEOC's application and ordered FedEx to comply with the subpoena, reasoning, in part, that even though Merritt had filed suit on his claims and was pursuing complete relief in the court system, the EEOC did not "plainly lack jurisdiction" to continue its investigation. R.14, p.6. FedEx timely appealed the District Court's decision to the Ninth Circuit.

While the appeal in the Ninth Circuit was still pending, Merritt, for himself and as a *Satchell* class representative, completed extensive discovery, motion practice and trial preparation, and ultimately entered into agreements to settle all individual and class claims that had been raised in his charge. *See* Pet. App. at 118a-163a. The *Satchell* court approved a Consent Decree memorializing the settlement of the class claims on September 14, 2007, and on July 16, 2008, the individual non-class claims were dismissed with prejudice pursuant to individual settlement agreements. *See* Pet App. at 164a-168a. As a result, all allegations raised by Merritt in his initial and supplemental charges, including his individual claims and the class claims covering similarly-situated employees in FedEx's Western Region, were fully resolved in the *Satchell* litigation.

On September 10, 2008, the Ninth Circuit issued an opinion affirming the District Court's ruling on the subpoena enforcement action, concluding that the EEOC maintains jurisdiction under Title VII to continue or revive the investigation of a charge even after the charging party requests a right-to-sue notice and elects to litigate all individual and class claims raised in the charge. *EEOC v. Federal Express Corp.*, 543 F.3d 531, 2008 U.S. App. LEXIS 19242, at *18 (9th Cir. Sept. 10, 2008).

The Ninth Circuit's opinion disregards the Fifth Circuit's analysis in *EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997). The Fifth Circuit held that under Title VII's sequential multistep enforcement procedure, the purpose of the administrative phase is no longer served, and thus the EEOC no longer retains jurisdiction to continue the investigation, once the charging party elects to enforce his claims in court. *Id.* at 468-70. The Ninth Circuit, however, declined to afford any meaning to Title VII's carefully crafted and logically sequenced enforcement steps, concluding instead that the EEOC has continuing jurisdiction to investigate a charge during any stage of Title VII's multistep enforcement procedure, notwithstanding the charging party's election to pursue (and achieve) court resolution of the exact individual and class claims raised in the EEOC charge and without consideration that the investigation would serve no purpose given that Title VII precludes the EEOC from bringing a subsequent direct action. *Federal Express Corp.*, 2008 U.S. App. LEXIS 19242, at *18-31.

FedEx timely petitioned for rehearing or rehearing en banc, but the Ninth Circuit denied that request and

instead issued an amended opinion on March 3, 2009.[2] *See EEOC v. Federal Express Corp.*, 558 F.3d 842 (9th Cir. 2009).

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has never been decided by this Court, *see* S. Ct. R. 10(b), and on which the Circuit Courts of Appeal are in conflict, *see* S. Ct. R. 10(a): If Title VII precludes the EEOC from bringing a direct action against an employer once the employee elects to request the right-to-sue and files suit on the claims alleged in his charge, would it be inconsistent with Title VII to allow the EEOC to maintain perpetual jurisdiction to investigate the charge? The answer is of paramount importance to fairly reconcile Title VII's administrative goals and the powers necessary for the EEOC to achieve those goals with the limitations logically implicated when the charging party elects to litigate and resolve his claims under the supervision of the courts and pursuant to the *Federal Rules of Civil Procedure*.

The decision below expands the EEOC's powers beyond anything contemplated within the statutory framework of Title VII and creates a split among the circuits which requires resolution of a previously-existing split on a related question. The question presented contains two issues and requires resolution

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[2] In amending the opinion, the court altered its initial analysis of the mootness issue which FedEx does not challenge in this Petition. Nor does FedEx directly challenge the court's determination of issues pertaining to the relevance and overbreadth of the subpoena requests.

of a multi-layered split among the circuits. As to the first issue of whether Title VII allows the EEOC to file a direct action once the charging party elects to litigate the claims alleged in his charge, the Seventh and Tenth Circuits have said the EEOC is limited to intervening in the charging party's lawsuit; the Third Circuit has said the EEOC may bring a separate direct action against the employer; and the Fifth and Sixth Circuits have said the EEOC may bring a separate action if the charging party's lawsuit does not incorporate all claims raised in the charge. This conflict should be resolved to provide the proper context for resolution of the precise question decided in the case below.

As to the second and underlying issue of whether Title VII allows the EEOC to maintain perpetual jurisdiction to investigate a charge after the charging party has elected to request the right-to-sue and files suit, the Fifth Circuit said there is no statutorily-sanctioned purpose while the Ninth Circuit in the case below held there are no limits on the EEOC's investigative jurisdiction.

I. REVIEW IS NECESSARY TO ADDRESS THE EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW THAT FLOWS FROM CONGRESS' INTENT TO PREVENT THE EEOC FROM EXERCISING UNCONSTRAINED INVESTIGATIVE JURISDICTION AND TO PRESERVE PLENARY POWER TO THE COURTS.

Congress deliberately divided the enforcement provisions of Title VII into four distinct stages: filing

and notice of charge, investigation, conference and conciliation, and enforcement. *See Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 359, 97 S. Ct. 2447 (1977). In doing so, Congress did not provide the EEOC with limitless authority to investigate all claims of discrimination but restricted its ability to investigate to only those allegations presented in a sworn charge. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 190, 110 S. Ct. 577 (1990) ("The Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination."). Indeed, this Court has long recognized that Congress sought to "prevent the Commission from exercising unconstrained investigative authority... ." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65, 104 S. Ct. 1621 (1984).

In direct conflict with this admonition and the Fifth Circuit's holding in *Hearst,* the Ninth Circuit in this case misinterpreted Title VII to permit the EEOC to revive an investigation of a charge even though the charging party filed suit against the employer and resolved all individual and class claims through a court-approved and monitored consent decree. *See Federal Express Corp.*, 558 F.3d at 851-54. The Ninth Circuit's holding means that once an employee files a charge of discrimination, the employer always remains subject to investigation of that charge even if the EEOC intervenes in the charging party's lawsuit (*see* 42 U.S.C. §2000e-5(f)(1)), and even after the employer remedies the alleged discrimination and resolves all individual and class claims alleged by the employee in his charge.

This conclusion runs directly contrary to Congress' conscious decision not to invest the EEOC with plenary power to enforce claims under Title VII. The

EEOC's investigatory authority is limited when compared with the plenary powers of other federal agencies such as the Office of Federal Contract Compliance Programs ("OFCCP"). The OFCCP's investigative authority need not be triggered by any specific charge of discriminatory employment practice against a contractor, but it has *ongoing* power to investigate or to initiate investigation of any government contractor or subcontractor. *See McDonnell Douglas Corp. v. Marshall*, 465 F. Supp. 22, 25 (E.D. Mo. 1978). By contrast, the EEOC's jurisdiction to investigate can only be triggered by the filing of a sworn charge of discrimination. *Shell Oil Co.*, 466 U.S. at 64 (citing 42 U.S.C. § 2000e-8(a)).

Although the EEOC does not possess plenary powers and may only conduct an investigation pursuant to a sworn charge, courts have granted it broad and virtually unrestricted power to obtain any evidence that "*might cast light* on the allegations against the employer." *Shell Oil Co.*, 466 U.S. at 68-69 (emphasis added). In fact, courts allow the EEOC to subpoena evidence concerning employment practices beyond those specifically challenged in the charge. *EEOC v. Roadway Express, Inc.*, 750 F.2d 40, 43 (6th Cir. 1984). Coupling this broad authority to obtain virtually any information related to a company's employment practices with the Ninth Circuit's decision to permit the EEOC to indefinitely retain jurisdiction to revive or continue the investigation of a charge, effectively gives the Commission the very plenary powers Congress deliberately withheld from it in passing Title VII.

Congress invested the courts, rather than the EEOC, with plenary power to enforce Title VII claims.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36; 94 S. Ct. 1011 (1974), this Court explained:

> Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. ... Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.

Id. at 44-45 (citations omitted).

Courts must supervise and administer Title VII claims under the discovery procedures mandated by the *Federal Rules of Civil Procedure*. *See Fed.R.Civ.P.* 26(b)&(c) (defining scope and limits of discovery and giving court discretion under the rules to control discovery process). The Ninth Circuit's ruling however allows the EEOC to sidestep these requirements. If, as the Ninth Circuit concludes, the EEOC may conduct an investigation of a charge during *any* stage of Title VII's multistep enforcement procedure (*see Federal Express Corp.*, 558 F.3d at 851-52), even in the instance where the Commission intervenes in the charging party's pending lawsuit against the employer, the EEOC is not bound by the discovery standards imposed by the *Federal Rules of Civil Procedure* because it still has broad investigatory power to seek

access to any evidence that might cast light on the employer's personnel practices.

For example, a court would not compel an employer to create documents in response to discovery requests propounded under *Fed.R.Civ.P. 34(a). See Rockwell Int'l Corp. v. H. Wolfe Iron and Metal Co., et al.,* 576 F. Supp. 511, 513 (W.D. Pa. 1983); *Alli v. Savitz,* No. 07-CV-10670, 2008 U.S. Dist. LEXIS 63571, at *4 (E.D. Mich. Aug. 20, 2008); *Precision Prefinishing, Inc. v. Sherwin-Williams Corp.,* No. 89-759-FR, 1990 U.S. Dist. LEXIS 10132, at *3 (D. Or. July 27, 1990). Neither would a court require an employer to produce documents at a particular location or to organize responsive documents for production in a format other than as they are maintained in the ordinary course of business. *Butler and Flynn v. Portland General Electric Co.,* No. 88-455-FR, 1990 U.S. Dist. LEXIS 1630, at *5-6 (D. Or. Feb. 9, 1990). The EEOC's subpoena-enforcement power, however, is more broadly-construed than the discovery license provided to litigants under *Fed.R.Civ.P. 34* and has been interpreted to require employers to create documents, organize materials or information into a particular format, and provide the documents to the EEOC at its specified location. *See e.g., EEOC v. Maryland Cup Corp.,* 785 F.2d 471, 477-79 (4th Cir. 1986).

Unless this Court reviews and reverses the Ninth Circuit's opinion in the case below, the EEOC will be able to disrupt the orderly litigation of employment claims by declining the opportunity to intervene, ostensibly remaining on the sidelines of a lawsuit brought against the employer by the charging party, until the charging party (or the EEOC) disagrees with the court's ruling on a discovery dispute, which the

EEOC can then circumvent by issuing an investigatory subpoena that would not be subject to the same standards and limitations as the challenged discovery request. This ignores Congress' mandate that the courts, and not the EEOC, are exclusively empowered to supervise the resolution of Title VII claims once those claims are the subject of a lawsuit.

II. REVIEW IS PROPER BECAUSE THE NINTH CIRCUIT'S DECISION BELOW CREATES A SPLIT AMONG THE CIRCUITS THAT EXACERBATES A PREVIOUSLY-EXISTING SPLIT WHICH MUST NOW BE RESOLVED.

In *Hearst*, the Fifth Circuit correctly concluded that the EEOC loses its jurisdiction to investigate a charge once the charging party receives a right-to-sue notice and elects to circumvent the administrative process by enforcing his claims in court. As support for this conclusion, the *Hearst* court first recognized that Congress deliberately divided the enforcement provisions of Title VII into four distinct and sequential stages: filing and notice of charge, investigation, conference and conciliation, and enforcement. *Hearst*, 103 F.3d at 468 (referring to *Occidental Life Ins. Co.*, 432 U.S. at 359).[3] The purposes of the investigatory

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[3] The Ninth Circuit in this case wrongly concluded that *Hearst* conflicts with this Court's holding in *Occidental Life Ins.* which did not address the issue at bar (unrestricted authority of EEOC to investigate after litigation commences) but rather a more narrowly defined issue: the EEOC's ability to bring *its own* enforcement action after conclusion of the investigatory and conciliation stages. *Occidental Life Ins Co.*, 432 U.S. at 406. Unlike *Hearst*, the charging party in *Occidental* did not file suit

stage are to determine whether "reasonable cause" supports the claims, *Occidental Life Ins. Co.*, 432 U.S. at 359, and to prepare the EEOC for action against the employer or to drop the matter entirely if the Commission finds the charge to be unfounded. *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378, 1380 (4th Cir. 1987) *vacated on other grounds*, 486 U.S 1019, 108 S. Ct. 1990 (1988).

Because Congress granted the EEOC investigative authority for the purpose of enabling it to promptly and effectively determine whether Title VII has been violated and to assist the agency in its efforts to resolve disputes through informal conciliation, the *Hearst* court correctly reasoned these purposes are no longer served once the charging party bypasses these phases and commences formal litigation. *Hearst*, 103 F.3d at 469. The objective of the investigatory phase -- to establish whether reasonable cause supports enforcement of the charge -- is no longer necessary once the charging party requests a right-to-sue notice and files suit, particularly when, as in this case, the

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but instead relied on the EEOC to enforce his claims. *Id.* at 357-58. When the EEOC filed its lawsuit nearly five months after the failure of conciliation efforts, the employer objected arguing that Title VII imposed a time limitation on the EEOC's power to file an enforcement action. This Court disagreed finding the Act imposed no such limitation. This Court did not decide or even address whether the EEOC has the power to investigate a charge after the charging party files suit, a difference fully noted and explained by the court in *Hearst*. *See Hearst*, 103 F.3d at 469 ("The case before us is not controlled by *Occidental*. We do not decide what independent enforcement authority remains with the EEOC now that the private parties have initiated their own enforcement proceedings. We conclude only that the time for *investigation* has passed.").

charging party's lawsuit covers all individual and class claims alleged in his charge.

Even though Title VII divests the EEOC of jurisdiction to investigate once the charging party files suit, the agency is not precluded from challenging the employer's personnel practices through other means. The *Hearst* court recognized that if the EEOC has any further interest in the charge, it may intervene in the charging party's lawsuit and pursue discovery through the courts.[4] *Hearst,* 103 F.3d at 469 & 470. *Hearst* also recognized that if the EEOC's interests extend beyond the charge (and charging party's subsequent lawsuit), it may file a Commissioner's charge or seek the same information pursuant to a different individual charge. *Id.*

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[4] To intervene, Title VII requires only that the EEOC certify that the charging party's case is of "general public importance." 42 U.S.C. §2000e-5(f)(1). Where the charge alleges systemic pattern and practice discrimination, such as the one filed in this case, the certification need only reference the class allegations presented on the face of the charge. *See Harris v. Amoco Production Co.*, 768 F.2d 669, 677 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S. Ct. 1186 (1986) ("[u]pon concluding that a private Title VII suit is important, the Commission need only say so to intervene."); *Reid v. Lockheed Martin Aeronautics Co.*, No. 1:00-CV-1182 & 1183, 2001 U.S. Dist. LEXIS 991, at *7 n.4 (N.D. Ga. Jan. 29, 2001) (although certification was conclusory, court deferred to EEOC's determination).

A. The circuits are split on the issue of whether Title VII allows the EEOC to file suit once the charging party elects to request the right-to-sue and files suit on the claims alleged in his charge.

Because the EEOC must find reasonable cause and attempt conciliation before it can file a direct action against an employer (as opposed to intervening in a charging party's lawsuit), the EEOC has argued that it must forever retain jurisdiction to investigate in order to preserve the option to file a direct action against the employer should it become so inclined. The circuits, however, are in conflict as to whether Title VII precludes the EEOC from filing a direct action against the employer based on the allegations raised in the employee's charge once the charging party files suit. The Seventh and Tenth Circuits adhere to the view that once the private litigant brings suit, the EEOC is barred from filing suit on the private litigant's charges. The EEOC may only intervene at that point. *See EEOC v. Continental Oil Co.*, 548 F.2d 884, 889-90 (10th Cir. 1977) (finding that a construction of 2000e-5(f)(1) authorizing separate actions would render inconsequential both the provision for permissive intervention, and the requirement of a certificate of general public importance); *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) (adopting reasoning of *Continental Oil*). The Third Circuit holds the opposite view that the EEOC's right to bring a direct action against the employer is in no way affected by the issuance of a right-to-sue letter or the actions of the charging party. *See EEOC v. N. Hills Passavant*

Hosp., 544 F.2d 664, 667-72 (3d Cir. 1976).[5] The Fifth and Sixth Circuits take a middle view starting from the general position that the EEOC is precluded from bringing suit once litigation of the charge is commenced by the private party, but making an exception where the scope of the EEOC's investigation of the individual's charge unearths violations not comprehended within the individual's suit. *See EEOC v. Huttig Sash & Door, Co.*, 511 F.2d 453, 454-56 (5th Cir. 1975); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1362-63 (6th Cir. 1975), *cert. denied*, 423 U.S. 994, 96 S. Ct. 420 (1975).

Resolution of this split of authority among the circuits is essential to determining the precise question in this case because if, once the charging party files suit, the EEOC may only intervene, then no statutorily-sanctioned reason exists to allow the agency to continue the investigation when all individual and class allegations presented in the employee's charge are included in the employee's lawsuit.

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[5] The Third Circuit was disinclined to limit the EEOC to intervention in part because the charging party's lawsuit had been dismissed as time-barred leaving no lawsuit into which the EEOC could intervene and also because the filing of a direct action by the EEOC had been a prerequisite to the EEOC's participation in settlement discussions between the charging party and the employer. *See EEOC v. Pic Pac Supermarkets, Inc.*, 689 F. Supp. 607, 610 (S.D. W.Va. 1988). Whether the charging party's lawsuit should have been dismissed as time-barred was questionable but was not before the Third Circuit.

B. The Ninth Circuit's analysis in *EEOC v. Federal Express Corp.* directly conflicts with the Fifth Circuit's decision in *Hearst* on the underlying question.

On the underlying question of whether the EEOC may continue or revive the investigation of a charge after the charging party elects to request the right-to-sue and files suit, the Ninth Circuit reached precisely the opposite conclusion of *Hearst*. *See EEOC v. Federal Express Corp.*, 558 F.3d 842 (9th Cir. 2009).

1. The Ninth Circuit misinterpreted Title VII's enforcement procedure.

The court first disagreed with *Hearst's* analysis of Title VII's multistep enforcement procedure concluding that the steps are not distinct or sequential, and that simply because "one stage of the enforcement procedure is going on does not mean that another stage has ceased." *Federal Express Corp.*, 558 F.3d at 851. According to the court, Title VII confers upon the EEOC investigatory authority during *each* stage of the process – meaning the agency has the power to investigate a charge before, during or even after conciliation or formal enforcement of the claims in court. *Id.* at 852.

This conclusion turns Title VII's multistage statutory scheme on its head and, if allowed to stand, will deprive the courts of the exclusive jurisdiction Congress invested in them to enforce Title VII. Under the Ninth Circuit's reasoning, the EEOC would have jurisdiction to obtain information from the employer by administrative subpoena even after the charging party files suit, the EEOC intervenes, and a court denies

discovery of the same information under the *Federal Rules of Civil Procedure.* As discussed more fully *supra*, to enforce the EEOC's administrative subpoena, the court must find only that the information sought might be relevant to the employer's personnel practices. As a result, the EEOC, during the course of a direct action against the employer, may obtain information via subpoena even after a court denies discovery of the same information under the *Federal Rules of Civil Procedure.*

At oral argument before the District Court in this case, the EEOC candidly acknowledged that it elected not to intervene in the *Satchell* litigation because the agency could obtain more information through an investigative subpoena than "once [the EEOC] is under the federal laws of discovery." Pet. App. at 112a. This result not only unfairly subjects the employer to dual proceedings on the same claims and the potential obligation to comply with discovery demands beyond the limitations imposed by the *Federal Rules of Civil Procedure*, but more importantly, circumvents the sequential enforcement plan established by Congress and affirmed by this Court in *Occidental. See Occidental Life Ins. Co.*, 432 U.S. at 359.

This central issue -- whether the separate stages of the enforcement process are distinct and must be completed sequentially -- is ripe for review because the courts are in disagreement. As noted, the Fifth Circuit in *Hearst* interpreted this Court's reasoning in *Occidental Life Ins. Co.* as requiring a completion of each sequential stage before the EEOC may proceed to the next step, while the Ninth Circuit relied on a statement from this Court's decision in *Univ. of Pa. v. EEOC*, 493 U.S. 182, 110 S. Ct. 577 (1990) for the

opposite conclusion, allowing the EEOC to conduct or revive an investigation during *each* stage of the enforcement process. *See Federal Express Corp.*, 558 F.3d at 851-52.

The Ninth Circuit's reliance on a single quote from *Univ. of Pa.* was misplaced because that case did not address the issue at bar, but instead considered the scope of the EEOC's authority to acquire relevant evidence as part of its administrative investigation of a charge. In that context, this Court noted that the Commission is given broad authority to obtain relevant evidence during the investigatory phase for the purpose of enabling it to make informed decisions at each *subsequent* stage of the enforcement process. *Univ. of Pa.*, 493 U.S. at 191. This phrase does not, however, confer authority on the EEOC to conduct a charge investigation *while* the parties are engaged in other phases of the multistep procedure, such as judicial enforcement.[6]

This fundamental question of statutory construction, which is necessary to a determination of the issue before the Court, and which the circuits have viewed differently, is ripe for review and should be settled.

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[6] The Ninth Circuit's reliance on this Court's ruling in *EEOC v. Waffle House,* 543 U.S. 279; 122 S. Ct. 754 (2002) is similarly misplaced because the question decided there concerned the impact on the EEOC of a charging party's action (agreement to arbitrate) which was not contemplated or specifically provided for by Congress in Title VII. The question presented here concerns the impact on the EEOC when a charging party elects the option specifically provided in Title VII to request the right-to-sue and litigate all individual and class claims raised in his charge.

2. The Ninth Circuit afforded undue deference to the EEOC's Title VII procedural regulations.

The Ninth Circuit criticized *Hearst* for not addressing 29 C.F.R. §1601.28(a)(3) which provides in pertinent part:

> Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless [the EEOC representative] determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge...

29 C.F.R. § 1601.28(a)(3) (2009). The absence of this regulation from *Hearst's* analysis is not surprising because the regulation's self-limiting language -- the Commission may continue to *process* the charge *after issuance of the right-to-sue notice* -- is inapposite to determining whether the EEOC may also continue to *investigate* a charge *after the charging party files suit.*[7] As demonstrated, *Hearst* found no textual support in Title VII to grant the EEOC such an expansion of power. Continued inconsistent application of the law on this point will persist unless this Court reviews and decides this issue.[8]

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[7] *See Robinson v. Int'l Broth. Of Elec. Workers Local 134,* No. 86 C 6643, 1989 U.S. Dist. LEXIS 3539, at *10 (N.D. Ill. Apr. 5, 1989)(finding 1601.28(a)(3) only empowers EEOC to issue a *second* right-to-sue notice to "further process" the charge).

[8] The Ninth Circuit's undue deference to the EEOC's interpretation of its regulation allows the EEOC to circumvent the

C. Because the district courts have also reached conflicting conclusions on the underlying question, this issue is ripe for review.

Review of this question is necessary because, like the Circuit Courts, district courts across the country have arrived at conflicting results. In facts similar to this case, the court in *EEOC v. Federal Home Loan Mortgage*, 37 F. Supp. 2d 769 (E. D. Va. 1999) embraced the reasoning of *Hearst* holding that the EEOC loses the power to investigate after the employee receives a right-to-sue letter and files a class action based on the pattern and practice claims asserted in the charge. *Id.* at 770-72. In denying the EEOC's attempt to continue the investigation into the defendant's nationwide policies and procedures, the court explained:

> [the EEOC] may not use its investigative powers in this suit at this time because those powers have expired. Were the rule otherwise, there would be significant potential for the disruption of the statutory scheme devised by Congress to redress discrimination in the workplace through both litigation and non-litigation solutions. Consider, for example, the disruption that might be caused by the issuance

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requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. If the EEOC can perpetually maintain an open investigation or can at any time declare an investigation re-opened to effectuate the purpose of Title VII, the EEOC may never have to disclose information to a charged employer in response to a FOIA request. *See* 29 C.F.R. §1610.17 (2009); 5 U.S.C. § 552(b)(3).

> of investigative subpoenas amidst an ongoing conciliation process.

Id. at 774.

The Southern District of California reached the same result in *EEOC v. Home Depot, Inc.*, No. 01-cv-1771 W (JAH), 2001 U.S. Dist. LEXIS 26308 (S.D. Cal. Nov. 8, 2001) finding the EEOC loses jurisdiction to investigate once the charging party files suit.

In contrast, the court in *EEOC v. Von Maur, Inc.*, No. 4:07-mc-19-RAW, 2007 U.S. Dist. LEXIS 86046 (S.D. Iowa Oct. 22, 2007) held the Commission has authority to continue investigating a charge after the charging party intervenes in the EEOC's class action against employer; and similarly, in *EEOC v. Sunoco, Inc.*, No. 08-MC-145, 2009 U.S. Dist. LEXIS 6070 (E.D. Pa. Jan. 27, 2009), the Eastern District of Pennsylvania determined the EEOC retains authority to enforce a subpoena after the charging party receives a right-to-sue notice and files suit especially if the right-to-sue indicates the EEOC intends to continue to process the claims raised in the charge. As evidenced by these conflicting decisions, guidance from this Court is necessary on this important issue.

CONCLUSION

This Court should grant certiorari review to resolve the important question of whether Title VII allows the EEOC to retain perpetual jurisdiction to investigate a charge even after the charging party has elected to litigate and the EEOC has foregone the opportunity to intervene. The answer will resolve the multi-layered conflict among the circuits and give guidance to the

district courts, several of which have also reached inconsistent conclusions. The unprecedented expansion of the EEOC's investigatory jurisdiction provided by the Ninth Circuit's opinion below was neither contemplated nor sanctioned by Congress and should be reviewed and reversed.

Respectfully Submitted,

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