October 31, 2008

United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

RE: *Equal Employment Opportunity Commission v. Federal Express Corporation*
No. 06-16864

Letter Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States Supporting Defendant-Appellant's Petition for Rehearing *En Banc*

To the Honorable Chief Judge and Circuit Judges of the U.S. Court of Appeals for the Ninth Circuit:

Pursuant to the Circuit Advisory Committee Note to Rule 29-1, the Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this letter as *amici curiae* joining in the arguments and factual statements of Defendant/Appellant Federal Express Corporation in support of its Petition for Rehearing *En Banc*. Both Plaintiff/Appellee Equal Employment Opportunity Commission (EEOC) and Defendant/Appellant Federal Express Corporation have consented to the filing of this letter brief.

This Court should review and reverse the panel decision and district court ruling below for three reasons. First, the panel decision and the district court's ruling both erroneously concluded that the EEOC has unlimited authority to continue to investigate a charge of discrimination after the charging party has received a Notice of Right to Sue from the agency and has pursued a private cause of action in federal court. They thus disregard the plain text of Title VII and this

Court's own prior interpretations of the EEOC's investigative authority under the Act, as well as the Fifth Circuit's reasoned analysis of the very question presented in this case.

Second, requiring employers to continue to defend EEOC charges after the agency has relinquished its jurisdiction by issuing a Notice of Right to Sue will impose significant burdens on employers without advancing, in any meaningful way, the purposes of Title VII. Indeed, extending such unfettered authority to the EEOC is counterproductive to its mission, because it enables the agency – often through field personnel to whom the final decision to continue an investigation under such circumstances has been delegated – to embark upon unfounded "fishing expeditions" rather than focusing upon the agency's growing inventory of pending charges representing thousands of "live" claims of discriminatory employment practices.

Finally, even assuming *arguendo* that the EEOC's jurisdiction was not "plainly lacking" after having issued a Notice of Right to Sue in this case, the information the agency sought to subpoena was not reasonably related to the specific allegations of the underlying charge and therefore should not have been enforced.

Interest of the *Amici Curiae*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes more than 300 of the nation's largest private sector companies, collectively providing employment to more than twenty million people throughout the United States.

EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing more than 3 million businesses and organizations of every size, sector, and region. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus* briefs in cases involving issues of national concern to American business.

All of EEAC's and many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as well as other equal employment statutes and regulations. Many of these companies do business within the Ninth Circuit and are regular respondents to EEOC charges of discrimination. Accordingly, the issues presented in the Petition regarding the scope of the EEOC's post-investigation subpoena authority are extremely important to the nationwide constituency *amici* represents.

Because of their interest in this matter, EEAC and the Chamber filed an *amici curiae* brief supporting Defendant-Appellant's appeal to this Court. This letter brief reiterates many of the arguments made by *amici* below, and addresses several problematic issues raised by the panel majority's opinion.

Title VII Does Not Authorize The EEOC To Continue To Investigate A Charge Of Discrimination After The Agency Has Issued A Notice Of Right To Sue And A Private Action Has Been Commenced

In affirming the district court's order enforcing the EEOC's subpoena in this case, the panel found that "Title VII, the relevant regulations, and the EEOC's interpretation of those regulations … mean that … even though the EEOC normally terminates the processing of the charge when it issues the right-to-sue notice, it can, under limited circumstances, continue to investigate the allegations in the charge, which includes the authority to subpoena information relevant to that charge." *EEOC v. Federal Express Corp.*, __ F.3d __, 2008 U.S. App. LEXIS 19242, at *19 (9th Cir. 2008). Nothing in Title VII grants the EEOC such authority, however, and to the extent the EEOC purports to confer that authority upon itself through a procedural regulation and internal enforcement guidance, its interpretation is not entitled to deference by this Court.

Title VII provides, in relevant part:

> If a charge filed with the Commission … is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge … the Commission has not filed a civil action under this section … or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission … shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. … *Upon timely application, the court may, in its discretion, permit the Commission … to intervene in such civil action upon certification that the case is of general public importance.*

42 U.S.C. § 2000e-5(f)(1) (emphasis added). This provision contains no language authorizing the EEOC to continue its administrative investigative activities after notifying a charging party of his or her right to sue. To the contrary, by granting courts the discretion to permit the EEOC to intervene in subsequently-filed civil actions, this language confirms that the issuance of a notice of right to sue operates to terminate the EEOC's administrative processing of the charge.

Had Congress intended by this provision to confer upon the EEOC independent, post-notice investigative authority – through which the agency presumably would retain the right to litigate in the public interest after finding reasonable cause and engaging in good faith (but unsuccessful) conciliation efforts – it would have done so, rather than outlining the circumstances under which the agency would be permitted to intervene in a private action. This provision makes clear that once the EEOC issues a notice of right to sue and a private lawsuit is filed, it *no longer has any right to act* upon the underlying charge, but may be *permitted*, in a court's discretion, to intervene in the pending litigation upon showing the matter "is of general public importance."

The EEOC regulation upon which the panel relied offers an entirely different interpretation. It provides:

> When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued … the Commission shall promptly issue such notice as described in Sec. 1601.28(e) to all parties …. Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge *unless the District Director; Field Director; Area Director; Local Director; Director of the Office of Field Programs or upon delegation, the Director of Field Management Programs; or the General Counsel, [sic] 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) (emphasis added).

In enacting Title VII, Congress conferred upon the EEOC "the authority from time to time to issue, amend, or rescind suitable procedural regulations" for the administration of the Act. 42 U.S.C. § 2000e-12(a). While "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," as the U.S. Supreme Court repeatedly has said, "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances …." *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). If Congress has "spoken to the precise question at issue," the agency may not attempt to impose its own interpretation of the matter, and "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted).

Title VII clearly sets forth the circumstances under which the EEOC must notify a charging party of his or her right to file a private cause of action, at which point the agency can only continue its involvement in the matter by successfully moving to intervene in the subsequent litigation. Despite this, Section 1601.28 of the EEOC's Title VII procedural regulations purports to give the agency the additional right to continue an investigation even after it has issued a right to sue notice. Because Section 1601.28 directly conflicts with Title VII, it is invalid, not entitled to deference, and thus cannot be used to justify expansion of the EEOC's post-notice investigative authority.

In explaining its rationale for expanding the EEOC's subpoena authority beyond the point at which it has jurisdiction to investigate, the panel said, "the steps in the EEOC's 'multistep' enforcement procedure are not 'distinct'…." 2008 U.S. App. LEXIS 19242, at *22. In *EEOC v. Pierce Packing Co.*, however, this Court strongly suggested that the steps are distinct *and* must be pursued chronologically in order to effectuate the purposes of Title VII. 669 F.2d 605, 608 (9th Cir. 1982).

The Court explained that the EEOC's functions "of investigation, decision of reasonable cause and conciliation are crucial to the philosophy of Title VII." *Id.* (citation omitted). It went on to observe:

> It is difficult to believe that Congress directed the Commission to make a determination of reasonable cause on the merits of a charge and nevertheless contemplated that the Commission could institute such litigation before it makes such a determination. Similarly, it is difficult to conclude that Congress directed the Commission to conciliate and then authorize it to initiate adversary proceedings before the possibility of voluntary compliance has been exhausted.

Id. (citation omitted). Extending that rationale to the instant case, it is difficult to believe that Congress would have directed the EEOC under the relevant circumstances to "promptly notify" a charging party of his or her right to pursue a private cause of action – and in the same provision specify the circumstances under which the EEOC would be permitted to intervene in such litigation – while simultaneously allowing the agency to continue, indefinitely, its investigation of the underlying charge.

As the Fifth Circuit pointed out in *EEOC v. Hearst*, Congress granted the EEOC "broad investigatory authority" for two reasons: 1) to help the agency promptly and effectively determine whether Title VII had been violated; and 2) to help the agency resolve the dispute without formal litigation. *EEOC v. Hearst Corp*., 103 F.3d 462, 469 (5th Cir. 1997). These two objectives are "no longer served once formal litigation is commenced." *Id*.

The Fifth Circuit reasoned that once the EEOC charging parties "moved their claims into the litigation stage … the time for *investigation* … passed." *Id*.

At that point, it noted, the EEOC's only recourse is to seek permission to intervene in the private suit or, if the agency's interest "extends beyond the private party charge upon which it is acting," to file a Commissioner charge or seek the same information on the basis of a different individual charge. *Id*. at 469-70. In any event, the court rightly concluded, the present charge "no longer provides a basis for [an] EEOC investigation." *Id*. at 470.

Because the plain language of Title VII does not confer upon the EEOC the authority to continue to investigate a charge of discrimination after it has issued a notice of right to sue and private litigation has commenced, jurisdiction was "plainly lacking," and therefore the panel decision and the district court's ruling below should be reversed.

Requiring Employers To Continue To Defend EEOC Charges After The EEOC Relinquishes Its Jurisdiction By Issuing A Right To Sue Notice Will Impose Significant Burdens On Employers Without Advancing The Purposes Of Title VII

As *amici* emphasized in their brief to the panel below, permitting the EEOC to continue investigating a charge after it has issued a right to sue notice and the charging party already has filed suit would impose substantial and unprecedented burdens on employers defending such actions. Despite the significance of this issue to every employer subject to Title VII, the panel elected not to address it at all. For that reason, we respectfully urge the *en banc* Court to grant the Petition so as to consider, among other things, the important practical implications the panel decision and district court's ruling below will have on employers doing business within the Court's jurisdiction.

When faced with notice of an EEOC charge of discrimination, most employers devote significant time and resources to manage the ensuing charge investigation and defend themselves before the agency. And the number of charges being filed with the agency only continues to grow as the economy wanes and forced layoffs occur. Through the third quarter of Fiscal Year 2007 (October 1, 2007 – September 30, 2008), the EEOC reports having received 72,693 charges, over 12,000 more than were received during the same period the preceding fiscal year. EEOC Enforcement Statistics Fact Sheet, Preliminary Data (3d Quarter, FY 2008) (cumulative).

Despite the large number of charge filings the EEOC receives each year, it finds reasonable cause to believe a violation has occurred in only a fraction of the cases. Of the 72,693 charges filed through the third quarter of FY 2007, for instance, 58.5% were dismissed for lack of reasonable cause; only 22% resulted in an actual reasonable cause determination. *Id.*

If the EEOC were permitted to continue to investigate charges on behalf of parties who obtained right to sue notices and are actively litigating the issues raised before the EEOC, the result would be substantially increased cost and burden to the employer. Companies would be forced to simultaneously defend the same claims in two different fora at significant cost, making the same witnesses and evidence available to the court and to the EEOC – which in private sector cases ultimately has no adjudicative authority in any event. Moreover, the different standards of relevance, timing, and scope of discovery in litigation and EEOC investigations present issues of fundamental fairness to employers, and undermine courts' control of the discovery process.

Indeed, as the Fifth Circuit pointed out in *Hearst*, the EEOC's primary aim is to determine whether discrimination may have occurred and, if so, to seek to eliminate the alleged discriminatory employment practices through "informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b). Litigation is, and has always been, an option of last resort. And where litigation already has been initiated with respect to the allegations of an earlier administrative charge, any opportunity the agency had to seek informal resolution has passed.

To require employers to defend themselves against a charge over which the EEOC, by issuing a right to sue notice, has relinquished jurisdiction to investigate, and which already is being litigated in federal court, would impose an unjustifiable burden and would do nothing to advance the purposes of Title VII.

Assuming The EEOC Was Legally Authorized To Continue To Investigate After Having Issued The Charging Party A Right To Sue Notice, The Information Sought Was Not Reasonably Related To The Specific Allegations Of The Underlying Charge

Title VII expressly limits the scope of an EEOC investigation to only the issues that bear upon resolution of the underlying charge. 42 U.S.C. § 2000e-8. It provides:

> In connection with any investigation of a charge filed under section [2000e-5 of this title], the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this [subchapter] and *is relevant to the charge under investigation.*

42 U.S.C. § 2000e-8(a) (emphasis added).[1] As the U.S. Supreme Court observed, "unlike other federal agencies that possess plenary authority to demand and see

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[1] Congress granted the same investigative authority to the EEOC that exists for the National Labor Relations Board (NLRB). 42 U.S.C. § 2000e-9. Section 11 of the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, provides:

> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas [sic] requiring … the production of any evidence in such proceeding or investigation ….

29 U.S.C. § 161(1). Section 11 further provides:

> Within five days after the service of a subpoena [sic] on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, ***and the Board shall revoke, such subpoena [sic] if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings ….***

Id. (emphasis added).

records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence 'relevant to the charge under investigation.'" *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984) (citation and footnote omitted) (emphasis added). Thus, "[i]n this respect the [EEOC's] investigatory power is significantly narrower than that of the Federal Trade Commission or of the Wage and Hour Administrator, who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrongdoing." *Id*. (citation omitted).

Applying *Shell Oil*, federal courts consistently have rejected the position advanced by the EEOC that Title VII has bestowed upon it a "carte blanche" for conducting wholesale inquiries into a company's every employment practice, whether relevant to resolution of an existing charge or not. *See*, *e.g.*, *Hearst*, 103 F.3d 462 (5th Cir. 1997); *EEOC. v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994) (EEOC does not have right to subpoena "any material which EEOC deems relevant in its discretion"; information request must satisfy relevancy test set forth in *Shell Oil*); *Harris v. Amoco Production Co.*, 768 F.2d 669 (5th Cir. 1985) (EEOC may not sue employer for age and gender discrimination where litigation grew out of race discrimination charge; proper course of action is to file a separate administrative charge to trigger investigative authority over new allegations). If the EEOC were permitted to subpoena records or information pertaining to issues outside the boundaries of the actual charge being investigated, "Congress' desire to prevent the Commission from exercising unconstrained investigative authority would be thwarted." *Shell Oil*, 466 U.S. at 65.

This is not to say that the EEOC may never act on evidence of possible discrimination which it inadvertently has uncovered during the course of an unrelated charge investigation. The proper course of action in such a situation is for the agency to issue a Commissioner charge setting forth the legal and factual basis for its discrimination claim. *Id*. at 69-70; *see also Hearst*, 103 F.3d at 469-70 ("[I]f [the EEOC's] investigation revealed a wider or continuing problem, the EEOC could simply file a Commissioner's charge and proceed with further investigation or a civil action"). Because it failed to do so in this case, there exists no "charge" whose facts justify production of the requested data.

For all of these reasons, the Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit that the Petition for Rehearing *En Banc* should be granted, and that this Court should reverse the panel decision and district court ruling below.

Respectfully submitted,

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