No. 06-16864

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

FEDERAL EXPRESS CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for Amicus Curiae
The Chamber of Commerce
of the United States of America

Rae T. Vann
Laura Anne Giantris*
McGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W. Ste. 1200
Washington, DC 20005
(202) 789-8600

Attorneys for Amicus Curiae
Equal Employment Advisory Council

* Counsel of Record

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council and the Chamber of Commerce of the United States of America disclose the following:

1. The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America have no parent corporations and no subsidiary corporations.

2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or the Chamber of Commerce of the United States of America.

Respectfully submitted,

_____

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for Amicus Curiae
The Chamber of Commerce
of the United States of America

Rae T. Vann
Laura Anne Giantris*
McGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W. Ste. 1200
Washington, DC 20005
(202) 789-8600

Attorneys for Amicus Curiae
Equal Employment Advisory Council

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

OTHER AUTHORITIES

The Equal Employment Advisory Council (EEAC) and the Chamber of Commerce of the United States of America (the Chamber) respectfully submit this brief as *amici curiae* with the consent of all parties. The brief urges this Court to reverse the decision below, and thus supports the position of Defendant-Appellant Federal Express Corporation.

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 employment discrimination. Its members include over 310 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding 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. As employers, and as potential respondents to charges of discrimination under Title VII, both EEAC's and the Chamber's members have a direct and ongoing interest in the issues presented in this case.

EEAC and the Chamber seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that the parties have not raised. Because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Tyrone Merritt filed a charge of discrimination (the "Merritt Charge") against Federal Express Corporation (FedEx) alleging that a basic skills test used by the company (one that Merritt took and failed) discriminated on the basis of race and national origin, resulting in Merritt's disqualification from certain promotional opportunities. EEOC's Amended Memorandum of Points and

Authorities in Support of Application for Order to Show Cause Why an Administrative Subpoena Should Not Be Enforced (EEOC's Amended Memorandum) at 2. Merritt's charge further alleged that FedEx discriminated against him and others working in FedEx's Western Region[1] on the basis of race and national origin concerning promotions generally, as well as discipline, performance evaluations, compensation and leave. *Id*. While the investigation was pending, Merritt requested (and was granted) a Notice of Right to Sue from the agency. *Id*. He then proceeded to join a class action lawsuit against FedEx representing both himself and other "similarly situated" individuals. *Id.*

Notwithstanding the issuance of the Notice of Right to Sue and filing of the lawsuit, the EEOC continued with its investigation of Merritt's charge. *Id.* at 3. As part of the investigation, the EEOC issued an administrative subpoena directing the company to provide detailed information on all "computerized or machine-readable files" maintained by or for the company containing data on *any* personnel activity, including data on "applicants, hiring, promotions, testing, discipline, job analyses and evaluations, performance evaluations, demotions, employment history, amounts of pay, adjustment to pay, work assignments, adjustments to work assignments, training, transfers, terminations, job status." *Id*. at Ex. A, Attachment 5.

[1] FedEx's Western Region comprises Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, and parts of Utah, Washington, Wyoming and Texas. Opening Brief of Appellant at 4.

FedEx filed a "Petition to Revoke or Modify" the subpoena, which the EEOC denied. *Id.* at 3. The agency then sought judicial enforcement of the subpoena, and a federal district court in Arizona ruled in the EEOC's favor. *EEOC v. Federal Express Corporation*, No. CV 06-0276-TUC-RCC (D. Ariz. Sept. 8, 2006). The company filed this appeal.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 "sets forth 'an integrated, multistep enforcement procedure' that . . . begins with the filing of a charge with the EEOC." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)) (footnote omitted). That multistep procedure, including the EEOC's investigation of the charge, is designed in large measure to encourage the voluntary resolution of charges of employment discrimination. *EEOC v. Hearst Corp*., 103 F.3d 462, 469 (5th Cir. 1997). Where as here the charging party receives the agency's consent to file a lawsuit, however, and acts upon that notice by filing suit on the same claims in the charge, the authority of the EEOC to investigate terminates because the purposes of the investigation is "no longer served." *Id.*

Accordingly, the EEOC's authority to further investigate the charge at issue in this case was foreclosed when the charging party intervened in a private class action lawsuit advancing the same claims raised in his charge. If the EEOC has

interests that extend beyond the specific allegations in the charge, the agency must conduct an investigation pursuant to a different charge. *Id.* at 469-70.

Any other rule would unfairly, and unnecessarily, burden employers by forcing them to absorb the additional cost (and bear the additional disruption) of having to defend a claim in more than one forum simultaneously. This burden on employers is especially untenable given the reality that the EEOC's investigation will do nothing to effectuate its purpose – encouraging conciliation and avoiding litigation. This Court should decline the EEOC's invitation to read Title VII in such a senseless and wasteful manner.

Even assuming, *arguendo*, that the EEOC does possess authority to continue a charge investigation after a charging party has filed a private lawsuit, its investigation still must be guided by the specific allegations of the charge being investigated. The investigatory power granted to the EEOC under Title VII is not plenary, but is subject to a two-fold limitation: the agency is entitled *only* to information that (1) "relates to unlawful employment practices covered by [Title VII]," and (2) is "*relevant to the charge under investigation*." 42 U.S.C. § 2000e-8(a) (emphasis added). Thus, unlike some other federal agencies, the EEOC may compel the production only of information that is relevant to, and within the scope of a reasonable investigation of, a specific charge that has been filed with the agency.

An EEOC subpoena that demands information from a company concerning *all* employment practices, by definition, is overbroad if the charge under investigation challenges only *some* of the employer's practices. Therefore, the EEOC's request that FedEx provide a roadmap of *all* computerized employment records exceeds the bounds of "relevancy" where, as here, the charge focuses on a much narrower subset of alleged discriminatory employment practices (*i.e.*, those having to do with promotions, discipline, performance evaluations, compensation and leave).

The EEOC is not authorized to police an employer's compliance with equal opportunity laws in the absence of a charge that states with some degree of specificity the legal theory of the alleged violation and the factual underpinnings of such a claim. Title VII requires the agency to serve an employer with notice when a charge of discrimination has been filed. 42 U.S.C. § 2000e-5(e)(1). This statutory notice provision exists for good reason – it provides employers with "due process guaranties [SIC]." *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977). When the EEOC exceeds its statutory authority by issuing subpoenas for information pertaining to issues outside the bounds of the charge being investigated, it unilaterally dispenses with this statutory requirement, robs employers of the basic protections it affords, and subjects employers to unrestricted compliance audits each time they are notified of an EEOC charge

investigation. Such conduct thwarts "Congress' desire to prevent the Commission from exercising unconstrained investigative authority." *Shell Oil*, 466 U.S. at 65.

Accordingly, the court below improperly enforced the EEOC's subpoena and its decision should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT THE EEOC MAY CONTINUE TO INVESTIGATE A CHARGE AFTER THE CHARGING PARTY HAS FILED A LAWSUIT BASED ON THE SAME CLAIMS

A. Title VII Provides An "Integrated Multistep Enforcement Procedure" Designed To Bring About The Voluntary Resolution Of Charges Of Discrimination

The U.S. Equal Employment Opportunity Commission (EEOC) is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*., which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "Title VII sets forth 'an integrated, multistep enforcement procedure' that . . . begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v.*

EEOC, 432 U.S. 355, 359 (1977)) (footnote omitted).[2] Specifically, Title VII provides, in relevant part:

> Whenever a charge is filed . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge on such employer . . . within ten days, and shall make an investigation thereof . . . .

42 U.S.C. § 2000e-5(b).

When it first was enacted in 1964, Title VII gave the EEOC the limited authority to prevent and correct alleged employment discrimination through investigations and "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). In 1972, Title VII was amended giving the EEOC the right to sue respondents believed to have engaged in unlawful discrimination in its own name, both on behalf of alleged victims and in the public interest. Pub. L. No. 92-261, 86 Stat. 104 (codified as amended at 42 U.S.C. § 2000e-5(f)) (1972). Even still, while Title VII as amended authorized the EEOC to pursue a civil action against a respondent believed to have engaged in unlawful discrimination, the law continues to favor voluntary resolution of employment discrimination claims over litigation. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (In enacting Title VII, Congress "selected '[c]ooperation and voluntary compliance . . .

[2] A discrimination charge may be filed with the EEOC by or on behalf of any individual claiming to be aggrieved under Title VII, or by a member of the Commission itself where he or she has reason to believe unlawful discrimination has occurred but for which an individual charge alleging the specific type of discrimination has not been filed. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984).

as the preferred means for achieving' the goal of equality of employment opportunities") (quoting *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 44 (1974)). Accordingly, the EEOC may exercise its authority to bring lawsuits only after efforts "to secure from the respondent a conciliation agreement acceptable to the Commission" have failed. 42 U.S.C. § 2000e-5(f)(1).

B. Courts Unanimously Have Held That The EEOC's Authority To Investigate A Charge Terminates With The Filing Of A Lawsuit Because The Primary Purpose Behind The Agency's Authority Is "No Longer Served"

Whether the EEOC has authority to continue investigating a charge after the charging party has already filed a private suit is a question few courts have considered. Those that have conclude that once a charging party receives the agency's consent to file a lawsuit (via a formal "Notice of Right To Sue"), and acts upon that notice, the agency's authority to investigate terminates because the purpose of the investigation – to resolve the claim through conciliation without resort to litigation – is "no longer served." *EEOC v. Hearst Corp*., 103 F.3d 462, 469 (5th Cir. 1997). In *EEOC v. Hearst Corp*., for example, the U.S. Court of Appeals for the Fifth Circuit ruled that the EEOC could not continue to investigate charges of sex discrimination after the agency issued a right-to-sue notice and the charging parties had filed their own Title VII sexual harassment lawsuit. *Id.* at 469-70. In so ruling, the Fifth Circuit observed that 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. *Id.* at 469. These two objectives are "no longer served," the court concluded, "once formal litigation is commenced." *Id*.

The court further noted the four "distinct stages" of Title VII's multistep enforcement procedures: "filing and notice of charge, investigation, conference and conciliation, and finally, enforcement." *Id*. at 468. Once the charging parties "moved their claims into the litigation stage," the court explained, the "time for *investigation* . . . passed." *Id*. According to the court, the agency's only recourse once suit is filed is to intervene in the private suit or, if the agency's interest "extends beyond the private party charge upon which it is acting," it may file a Commissioner charge or seek the same information on the basis of a different individual charge. *Id*. at 469-70. Whatever its course, though, the present charge "no longer provides a basis for [an] EEOC investigation." *Id*. at 470.

In another case, *EEOC v. Federal Home Loan Mortgage Corp*., 37 F. Supp.2d 769 (E.D. Va. 1999), the Eastern District of Virginia relied on *Hearst* to rule that the EEOC had no authority to enforce an administrative subpoena once the charging party had initiated a private Title VII lawsuit alleging race discrimination against himself and a class of African-American employees. *Id*. at 773-74. According to the court, any other ruling would result in "significant

potential for disruption of the statutory scheme devised by Congress to redress discrimination in the workplace through both litigation and non-litigation solutions." *Id*. at 774. Therefore, "once the investigative stage has ended, the agency's authority to issue investigative subpoenas also ends." *Id*.

The instant action falls squarely within this line of cases. Mr. Merritt filed a charge, but then requested a Notice of Right to Sue so that he could pursue private litigation representing both himself and a class of similarly situated African-American employees. The EEOC's authority to further investigate the allegations in Mr. Merritt's charge was foreclosed when Mr. Merritt received that Notice of Right to Sue and intervened in a private class action lawsuit advancing the same claims contained in his charge. If the EEOC has interests related to the case that extend beyond the specific allegations in Mr. Merritt's charge, which the agency claims is the case, it must conduct an investigation pursuant to a different charge – either an individual or a Commissioner's charge.

C. Allowing The EEOC To Continue Charge Investigations After The Charging Party Has Already Filed Suit Would Unfairly, And Unnecessarily, Burden Employers By Forcing Them To Defend Duplicative Claims

Allowing the EEOC to proceed with the investigation of a charge after a charging party has already filed suit will work a gross injustice on employers, forcing them to absorb the additional (and unnecessary) cost of having to defend a single claim in more than one forum at the same time. Employers already expend

an extraordinary amount of time and resources each year defending against discrimination charges and lawsuits, most of which lack merit and ultimately fail. The EEOC received more than 75,000 discrimination charges in 2005, for example, with the agency finding "reasonable cause" to believe discrimination occurred in less than 6% of the cases investigated that year. Equal Employment Opportunity Comm'n, *All Statutes FY 1992 – FY 2005* (Jan. 27, 2006).[3]

Employment discrimination claims also accounted for close to 7% of all civil cases commenced in the U.S. District Courts in FY 2005.[4] Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts, Table C-2* (Sept. 30, 2005). Few of these cases ever reach a jury,[5] and of those that do, most result in a verdict for the employer.[6] Moreover, none of these figures take into account the many thousands of *additional* discrimination claims pursued in state court, or through state and local administrative agencies, each year.

Although employers frequently prevail in employment discrimination cases, success does not come easily – or cheaply. These cases often are fact-intensive, involving allegations of multiple acts of misconduct often spanning long periods of time, which makes them more costly and time consuming to defend than some

---

[3] *Available at* http://www.eeoc.gov/stats/all.html.
[4] *Available at* http://www.uscourts.gov/judbus2005/appendices/c2.pdf.
[5] Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. 429, 438-39 (July 2004), *available at* http://empirical.law.cornell.edu/articles/JELS.pdf.
[6] *Id.* at 442.

other types of claims.[7] Companies intending to make a proper response to an EEOC charge, therefore, typically will first conduct a thorough internal investigation. If the agency requests a written "Statement of Position," which it does in the vast majority of cases, the company will take great care to draft one that is both accurate and complete. And because every charge has the potential to lead to even more costly litigation (and so frequently do), companies routinely retain the services of in-house or outside counsel to conduct the internal investigation and represent the company before the EEOC, thereby dramatically increasing defense costs.

If the EEOC were permitted to continue charge investigations in cases that already are the subject of private litigation, the result would be *substantially* increased cost and burden to the employer. Companies placed in this untenable position would be forced to respond to extensive (and duplicative) information requests from both the EEOC and plaintiff's counsel. Moreover, because the charge is already the subject of private litigation, companies would have *no choice* but to retain legal counsel to oversee every aspect of the charge investigation and at a tremendous expense.

---

[7] A lawsuit that goes to trial can easily cost the employer anywhere from $100K to $250K. Douglas R. Shaller, *Five Fundamental Principles of Employment Practices Liability*, The CPA Journal (Oct. 1998), *available at* http://www.nysscpa.org/cpajournal/1998/1098/Departments/D641098.html

The EEOC's suggestion that "little, if any, additional effort would be required" of companies during investigations that run concurrently with litigation – because companies could simply provide "information it already gathered" as part of the lawsuit – grossly understates the problem. EEOC's Reply In Support Of Its Amended Application For Order To Show Cause Why An Administrative Subpoena Should Not Be Enforced (EEOC's Reply) at 11. EEOC charge investigations can be very involved and do not necessarily mirror the approach of private litigants, who do not possess the same set of investigative "tools" enjoyed by the agency. Unlike plaintiffs, for example, the EEOC can (and routinely does) subject employers to on-site investigations, where investigators visit and tour the company's facilities, interview witnesses and examine records. EEOC Compl. Man. § 25.1 (2001 & Supp. 2007). Likewise, the agency requires companies to participate in "fact-finding" conferences, where company representatives and witnesses appear at the agency's offices to testify and produce evidence in the presence of the charging party. EEOC Compl. Man. § 14.9 (2001 & Supp. 2007). The agency also considers live witness interviews, conducted by its own investigators, an "integral part of most investigations," both as a means of collecting information and assessing witness credibility. EEOC Compl. Man. § 23 (2001 & Supp. 2007).

Accordingly, an EEOC investigation that runs concurrently with the litigation of a charge will not necessarily involve the mere photocopying of documents produced in discovery, as the EEOC suggests. And notwithstanding any assertions to the contrary, *amici* think it highly improbable that the EEOC – as "master of its own case" – will forego the use of *any* investigative tool at its disposal, and allow plaintiffs' counsel to dictate the type and amount of evidence collected in its investigations, simply to lessen the burden to employers. Thus, any employer in the unfortunate position of having to defend in duplicative proceedings, in *addition* to having to respond to separate document requests beyond what likely would be permitted in court, also may have to shoulder costs associated with witness interviews (both in addition to and duplicative of depositions conducted in litigation), on-site investigations, fact finding conferences and any other investigative tact the agency chooses to take. All of this will occur at tremendous cost and disruption to the employer.

This burden on employers is especially untenable given the reality that the EEOC's investigation will do nothing to effectuate its primary statutory aim of encouraging conciliation and avoiding litigation. Indeed, no employer will have an incentive to conciliate a claim if the EEOC is powerless to litigate, which it is clearly not authorized to do once a charging party has requested a Notice of Right to Sue and initiated a private lawsuit. *EEOC v. Pacific Press Publ'g Ass'n*, 535

F.2d 1182, 1186 (9th Cir. 1976) ("initiation of a private action . . . terminated EEOC's opportunity to bring suit" on that charge).

This court should decline the EEOC's invitation to read the law in this senseless and wasteful manner.

D. Requiring The EEOC To Terminate A Charge Investigation With The Filing Of A Private Lawsuit Will Not Hinder In Any Way The Agency's Ability To Satisfy Its Statutory Mandate

The EEOC, as well as the court below, raises various concerns related to the agency's ability to fulfill its statutory mandate if not permitted to investigate charges that are already the subject of private litigation. With regard to this case specifically, the EEOC argues that unless it is allowed to continue with its investigation of the Merritt charge, it will be precluded from satisfying its statutory obligation to "conciliate in good faith," as well as from protecting the interests of a broader class of FedEx employees outside the Western Region. EEOC's Reply at 2, 7-8. These concerns are wholly unfounded.

While the EEOC's stated commitment to meeting its statutory obligation to conciliate in good faith in this case is both welcome and commendable (particularly in light of the fact that its commitment in this regard has not always been so evident, *see EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003)), as the Fifth Circuit explained in *Hearst*, Congress' purpose in devising the requirement in the first place was to resolve claims voluntarily, short of litigation.

Hearst, 103 F.3d at 469. Where a charge is already the subject of litigation, as the case is here, continued investigation will do nothing to effectuate this requirement. Accordingly, the agency's processing of the charge should terminate.

As for the EEOC's desire to investigate beyond the Western Region, termination of the Merritt investigation would in no way compromise the agency's ambitions in this regard. As the *Hearst* decision notes, the EEOC has two options. It may seek the same information on the basis of a different individual charge that is not the subject of private litigation. *Hearst*, 103 F.3d at 469-70. In this case, such a charge apparently is already pending at the EEOC. Opening Brief of Appellant at 31. Alternatively, the agency may pursue a Commissioner charge. *Hearst*, 103 F.3d at 469-70. What the agency cannot do, however, is continue with the investigation of a charge that should have been administratively closed by the agency once the charging party made the decision to pursue a private lawsuit. *Id.*; *EEOC v. Federal Home Loan Mortgage Corp.*, 37 F. Supp.2d 769, 774 (E.D. Va. 1999).

The district court below expressed an additional concern – that terminating the agency's investigation of the Merritt charge would somehow "curtail" the EEOC's ability to bring a Commissioner charge. *EEOC v. Federal Express Corp.*, No. CV 06-0276-TUC-RCC, slip op. at 5 (D. Ariz. Sept. 8, 2006) ("[L]imiting [the EEOC's] investigative powers would result in one of several untenable situations.

. . . [M]ost relevant here, would be the curtailing of charges brought by members of the EEOC"). It appears from the Order that the court mistakenly believed that a Commissioner charge must be "predicated on" an EEOC investigation. *Id*. In fact, the opposite is true.

The district court's Order reflects a fundamental misunderstanding of the EEOC's authority to investigate under Title VII. Before the EEOC can conduct *any* investigation, it first must have a valid charge of discrimination – executed by an individual charging party or by an EEOC Commissioner – which frames the investigation. 42 U.S.C. § 2000e-5; *see also Univ. of Pa. v. EEOC*, 493 U.S. 182, 190 (1990) ("[T]he Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination"). In other words, an investigation is not a precursor to a charge, but rather the charge gives the agency the authority to conduct the investigation in the first place. The EEOC has *no authority* to conduct unrestricted compliance audits for the purpose of identifying possible vehicles for Commissioner charges, as the district court's Order implies, and this court should soundly reject such a notion. *Shell Oil*, 466 U.S. at 64.

II. JUDICIAL ENFORCEMENT OF EEOC SUBPOENAS SEEKING IRRELEVANT INFORMATION WOULD GIVE THE AGENCY UNLIMTED AUTHORITY TO PROBE INTO LEGITIMATE BUSINESS PRACTICES

Assuming, *arguendo*, that the EEOC does possess the authority to continue a charge investigation after a charging party has already filed a private lawsuit, the district court below still should not have enforced the subpoena because of its inappropriately broad scope.

A. The EEOC's Investigative Authority Under Title VII Is Limited To Investigation Of Issues Related To The Underlying Charge Of Discrimination

Title VII expressly limits the scope of an EEOC investigation to the issues – and only those issues – that bear upon resolution of the specific allegations raised in the underlying charge. 42 U.S.C. § 2000e-8. Title VII 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). As the U.S. Supreme Court has observed, "unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only evidence '*relevant to the charge under investigation.*'" *Shell Oil*, 466 U.S. at 64 (emphasis added) (citation omitted). Thus, "[i]n this respect the

[EEOC's] investigatory power is significantly narrower than that of [some other federal agencies] who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrongdoing." *Id.* at 64-65 (citation omitted).

Indeed, the EEOC's own procedural guidelines counsel staff against the collection of evidence that exceeds the scope of the specific allegations raised in the charge of discrimination. The agency's *Compliance Manual* instructs investigators, for example, to collect evidence that is both "material to the charge" and "relevant to the issue(s) raised in the charge." EEOC Compl. Man. § 602.4 (2002 & Supp. 2007). Evidence is "material," the agency explains, "when it relates to one or more of the issues raised by a charge . . . or by a respondent's answer to it." *Id*. at § 602.4(a) (2002 & Supp. 2007). Evidence is "*relevant*," the manual reads, "if it tends to prove or disprove [a material] issue raised by a charge." *Id.* at § 602.4(b) (2002 & Supp. 2007).

Accordingly, in a case where the charging party alleges the employer denied "training, assignments, pay increases, retention rights, transfer, and promotion . . . to laid off employees eligible to retire but made available to younger employees," material evidence would include "information on [the charging party] and his/her performance; information on the ages, positions, and performance of laid off employees, remaining employees, and recalled employees; copies of company

benefit plans and policy statements; any actuarial data used to support benefit reductions; and testimony" but would *not* include "[v]oluminous data" that "has nothing to do with [the] employment practices [being] investigated." *Id.*

B. An EEOC Subpoena Demanding Information About *All* Employment Practices At A Company, Where The Charge Under Investigation Challenges Only *Some* Of Those Practices, Is By Definition Overbroad And Must Be Denied Enforcement

Even under the EEOC's own "materiality" and "relevancy" tests, an agency subpoena that demands information from a company concerning *all* employment practices would, by definition, be overbroad if the charge under investigation challenges only *some* of the employer's practices. Therefore, assuming the agency is even authorized to require a company to provide a "roadmap" to electronic employment records (which itself is not relevant to a charge under investigation, but prepared for the convenience of the agency),[8] the EEOC's request that FedEx

[8] While *amici* will assume for the purposes of this brief that an EEOC request for information about a company's computer architecture may properly be the subject of an EEOC subpoena, it is doubtful that this type of information would qualify as "relevant" in most charge investigations. The EEOC seeks information about FedEx's computer architecture in this case purely for the sake of convenience – so that its investigators could later "tailor its requests for . . . relevant records" – and not because the "roadmap" itself contains any information relevant to the investigation of the Merritt charge. EEOC's Reply at 11.

Amici would caution this Court against elevating efficiency over relevance. Taken to its logical conclusion, the EEOC's argument would suggest that the agency may gain access to virtually any employer information if, in its opinion, an examination of such evidence would speed the investigation. Such an outcome would fly in the face of Title VII, which unequivocally limits the agency's access

provide a roadmap of *all* computerized employment records exceeds the bounds of "materiality" and "relevancy" where, as here, the charge focuses on a much narrower subset of alleged discriminatory employment practices (*i.e.*, those having to do with promotions, discipline, performance evaluations, compensation and leave).

Nowhere in his charge does Mr. Merritt contend, for example, that FedEx discriminated against any employee with respect to hiring. Thus, under *Shell Oil*, the EEOC would not be entitled to information and documents relating to FedEx's hiring practices or any other policy or practice not at issue in the charge. If Mr. Merritt's charge does not provide the basis for an investigation into FedEx's hiring practices, it necessarily follows that the agency also would not have a right to (or even a need for) a roadmap to FedEx's electronic records related to hiring or other unchallenged employment policies and practices. Indeed, the EEOC itself seems to appreciate the impermissibly broad scope of its subpoena, having reassured the court below that it was not seeking "the content" of FedEx's entire electronic database, but rather had requested the roadmap in order to "tailor its request for substantive information . . . *and thereby obtain the relevant records*." EEOC's Amended Memorandum at 13; EEOC's Reply at 11.

---

to information "relevant to the charge." 42 U.S.C. § 2000e-8(a); *Shell Oil*, 466 U.S. at 64.

Notwithstanding this concession, the EEOC justifies its demand by citing to *EEOC v. Lockheed Martin Corp*., 116 F.3d 110 (4th Cir. 1997), where the Fourth Circuit affirmed a district court decision to enforce an EEOC subpoena that, like the subpoena in this case, required the company to describe in detail all of its electronic personnel databases. The EEOC's reliance on *Lockheed Martin* in this case is misplaced.

There the more than twenty separate charges under investigation alleged discrimination on the basis of *age*, and as the district court in Maryland noted below,[9] the EEOC's authority to investigate under the Age Discrimination in Employment Act (ADEA) is not "charge-driven" as it is under Title VII. The ADEA grants the agency authority to launch its own independent investigations (commonly referred to as ADEA "directed investigations"), for example, at any time, at its own discretion, and without a formal charge of discrimination from an employee or EEOC Commissioner.[10] Because of the agency's broad authority under the ADEA, some courts, including the Fourth Circuit, have enforced EEOC subpoenas even in situations where the agency *lacks jurisdiction* over the charge under investigation. *EEOC v. American & Efird Mills, Inc.*, 964 F.2d 300, 303

[9] *EEOC v. Lockheed Martin Corp*., 69 Fair Empl. Prac. Cas. (BNA) 1602 (D. Md. 1996), *aff'd*, 116 F.3d 110 (4th Cir. 1997).

[10] 29 U.S.C. § 211(a) (the EEOC is authorized to conduct investigations at its discretion to "determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter").

(4th Cir. 1992) (*per curiam*) (acknowledging the EEOC's "autonomous investigative and enforcement authority under the ADEA" and ruling that the EEOC could pursue its own age discrimination investigation, notwithstanding the fact that the charging party's charge was not timely filed) (citation omitted).

Although it did not say so expressly, it is against this legal backdrop that the Fourth Circuit decided the *Lockheed Martin* case. Accordingly, *Lockheed Martin* simply is not applicable here where the charge under investigation involves alleged violations of Title VII, not the ADEA. Because Title VII limits the EEOC's investigation to evidence "relevant to the charge under investigation," and the EEOC all but concedes that its subpoena exceeds the bounds of relevancy, the district court erred in enforcing it. *Shell Oil*, 466 U.S. at 64.

C. The EEOC's Authority To Investigate Under Title VII Is Not Plenary And May Not Be Misused To Generally Police Legitimate Business Practices Outside The Context Of A Charge

The EEOC is not authorized to police employers' compliance with Title VII in the absence of a charge that states with some degree of specificity the legal theory of the alleged violation and the factual underpinnings of such a claim. Title VII expressly requires the EEOC to serve an employer with notice of a discrimination charge, on which it is expected to base its investigation, within ten days of its filing date. 42 U.S.C. § 2000e-5(e)(1). The statutory notice provision exists for good reason – it provides employers with "due process guaranties [SIC]."

EEOC v. Bailey Co., 563 F.2d 439, 450 (6th Cir. 1977). Without this requirement, the employer has no way of knowing the allegations it must defend against and would be deprived of the opportunity to conduct a prompt internal investigation of the allegations. Such investigations allow employers to take appropriate corrective action in the event discrimination is confirmed, and if it is not, to defend against a meritless claim before the relevant evidence becomes stale.

When the EEOC exceeds its authority by subjecting an employer to a subpoena for information pertaining to issues outside the boundaries of the charge being investigated, it disposes with the statutory notice requirement and unfairly robs employers of the "due process guarantees" to which they are entitled. Such conduct also thwarts "Congress' desire to prevent the Commission from exercising unconstrained investigative authority." *Shell Oil*, 466 U.S. at 65. This Court should not permit the EEOC to unilaterally dispense with this important Congressionally mandated protection for employers and decline to enforce the EEOC's subpoena.

CONCLUSION

Accordingly, the district court's denial of the EEOC's subpoena enforcement action should be reversed.

Respectfully submitted,

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for Amicus Curiae
The Chamber of Commerce of
the United States of America

Rae T. Vann
Laura Anne Giantris*
McGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W. Ste. 1200
Washington, DC 20005
(202) 789-8600

Attorneys for Amicus Curiae
Equal Employment Advisory Council

* Counsel of Record

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 06-16864

I certify that: (check appropriate options)

Oversize Briefs:

The court granted permission to exceed the length limitations set forth at Fed. R. App. P. 32(a)(7) by an order dated _____,

OR

An enlargement of brief size is permissible under Ninth Circuit Rule 28-4.

The brief is:

X Proportionately spaced, has a typeface of 14 points or more and contains 5,889 words

or is

____ Monospaced, has 10.5 or fewer characters per inch and contains ____ words or _____ lines of text

or is

____ In conformance with the type specifications set forth at Fed. R. App. P. 32(a)(5) and does not exceed _____ pages

_____
Signature of Attorney or
Pro Se Litigant

CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the Brief *Amici Curiae* Of The Equal Employment Advisory Council And The Chamber Of Commerce Of The United States Of America In Support Of Defendant-Appellant And In Support Of Reversal were served today on the following counsel via first class U.S. Mail, postage prepaid, addressed as follows:

David A. Billions
Federal Express Corporation
3620 Hacks Cross Rd.
Bldg. B, 3rd Floor
Memphis, TN 38125

Ronald J. Stolkin
Alec Hillbo
Fennemore Craig, P.C.
3003 North Central Ave., Ste. 2600
Phoenix, AZ 85012

Mary Joleen O'Neill
Katherine J. Kruse
Sandra J. Padegimas
Sally C. Shanley
EEOC Phoenix District Office
3300 North Central Ave., Ste. 690
Phoenix, AZ 85012-2504

Anne Noel Occhialino
U.S. EEOC
Office of General Counsel
1801 L St., N.W. Rm. 7030
Washington, DC 20507

January 29, 2007

Laura Anne Giantris