No. 04-4178

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

SUNDANCE REHABILITATION CORPORATION,

Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

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

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The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief as *amici curiae* pursuant to Fed. R. App. P. 29 with the consent of both parties. The brief urges this Court to reverse the decision below and, thus, supports the position of Defendant-Appellant SunDance Rehabilitation 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 combating employment discrimination. Its membership now comprises more than 320 of this nation's largest private sector employers, collectively employing over 20 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 a strong grasp of the practical, as well as legal ramifications of EEO 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 ("the Chamber") is the world's largest business federation. It represents an underlying membership of over three million businesses, state and local chamber of commerce, and professional organizations of every size and in every

industry sector, and from every region of the country. The Chamber routinely 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 members 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.*, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), and other employment laws and regulations. Collectively, they make and implement millions of employment decision each year, including hires, promotions, transfers, disciplinary actions, terminations and others. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comply with the above-listed statutes and other applicable legal requirements.

Despite these efforts, however, each employment transaction is a potential subject of a discrimination charge and/or lawsuit. As large corporations, EEAC's members and many of the Chamber's members are likely targets of such charges and suits, particularly when they find it

necessary to terminate employment relationships. Consequently, in hopes of reducing the costs and disruptions that inevitably attend charges and litigation, many EEAC and Chamber members from time to time offer individuals whose employment is being terminated special severance pay and/or other valuable consideration if they are willing to agree, freely and voluntarily, to sign releases waiving potential claims growing out of their employment.

The practical value of such agreements to employers—and, hence, the amount of consideration they are likely to offer in exchange for them—are directly dependent on the comprehensiveness of the releases. What an employer is bargaining for in such situations is closure with respect to any and all potential claims or controversies that might arise out of an employment relationship that has come to an end. It is worth relatively little to an employer to obtain a release of potential claims in one forum if essentially the same claims can be brought against the employer in another.

The district court's decision in this case, therefore, is of serious concern to EEAC's and the Chamber's members. By declaring it to be a *per se* act of unlawful retaliation for an employer simply to offer departing employees the opportunity to relinquish their right to file charges with the Equal Employment Opportunity Commission (EEOC) in exchange for

severance pay or other valuable consideration to which they otherwise would not be entitled, the decision below effectively precludes employers from ever obtaining fully comprehensive release agreements. It also disserves the interests of individuals who would welcome the opportunity to gain severance pay in exchange for signing releases, but will be unlikely to be offered nearly as much additional consideration for releases—if, indeed, they are offered any at all—as long as this decision stands.

Because of its interest in these issues, EEAC and the Chamber over the years have filed *amicus curiae* briefs in a number of cases in this and other courts involving the legality and enforceability of waivers and releases under the equal employment opportunity laws.[1] EEAC also participated on the Negotiated Rulemaking Committee that developed the regulations on waivers and releases of rights and claims under ADEA, which the EEOC adopted in July 1998 pursuant to the Older Workers Benefit Protection Act (OWBPA).[2] In addition, EEAC and the Chamber have filed *amicus curiae*

[1] *E.g.*, *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986) (*en banc*) (Knowing, voluntary release of ADEA claims was not void because it had not been supervised by EEOC); *Gorian v. Brown-Forman Corp.*, 963 F.2d 323 (11th Cir. 1992) (same).
[2] 29 C.F.R. § 1625.22.

briefs on issues of retaliation under the employment laws.[3] Thus, EEAC and the Chamber have a long and ongoing interest in, and familiarity with, the issues and policy concerns presented in this case.

STATEMENT OF THE CASE

In March 1999, SunDance Rehabilitation Corporation (SunDance) terminated the employment of speech pathologist Elizabeth Salisbury as part of a company-wide reduction in force. *EEOC v. SunDance Rehab. Corp.*, 328 F. Supp.2d 826, 829 (N.D. Ohio 2004). In a letter notifying her of the termination, the company offered Salisbury 80 hours' severance pay if she would continue working through her termination date and sign a "Separation Agreement and General Release." *Id.* The release included, among other things, a promise not to "pursue any proceeding, action, complaint, claim, charge or grievance against [the] Company . . . in any administrative, judicial or other forum . . . ." *Id.*

Salisbury chose not to sign the release. *Id.* Shortly thereafter, she filed a charge with the EEOC alleging that, a few months earlier, she had been denied a promotion because of her sex. *Id.* at 829-30. She also alleged in her

[3] *E.g., Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002) (Discharge of employee for refusing to sign agreement to submit claims arising under Title VII, ADEA or ADA to binding arbitration did not constitute unlawful retaliation).

charge that the Company had asked her to sign a release agreement in order to get 80 hours' severance pay, but that she had not signed it because she "believe[d] it violates the [l]aws administered by the EEOC." *Id.* at 830.

The EEOC investigated and found that there was "not reasonable cause" to believe SunDance had discriminated against Salisbury on the basis of sex. *Id.* The agency concluded, however, that by conditioning its offer of severance pay on Salisbury's signing a general release, SunDance had retaliated against her in violation of Title VII, the ADEA, the ADA, and the EPA. *Id.* The EEOC subsequently brought this action against SunDance for unlawful retaliation under all four statutes. *Id.*

The district court granted summary judgment in the EEOC's favor, holding that SunDance's release was "facially retaliatory" in violation of all four laws. *Id.* at 838. The court awarded money damages, including severance pay, to Salisbury "and other similarly-situated employees, ordered SunDance to provide a "corrective notice" to these employees, and suspended the statute of limitations for filing claims until the date of actual delivery of the notice. *Id.* at 839-40. SunDance has appealed to this Court.

SUMMARY OF ARGUMENT

The court below erred as a matter of law in holding that an employer commits unlawful retaliation by merely offering employees the opportunity to sign agreements in which they freely and voluntarily relinquish their right to file EEOC charges in exchange for valuable consideration to which they otherwise would not be entitled. The essential elements of unlawful retaliation simply are not present in such situations: there has been no protected activity, nor has there been any adverse employment action.

The theory advanced by the EEOC and adopted by the district court in this case is fairly described by the oxymoron "anticipatory retaliation." It has no basis in law. Its essence, as expressed by the district court, is that retaliation occurs "even before either party takes any action (engaging in protected activity or adverse employment action), [because] the policy by its terms authorizes the employer to take adverse employment action once an employee does engage in some protected activity." *EEOC v. SunDance Rehab. Corp.*, 328 F. Supp.2d 826, 837 n.8 (N.D. Ohio 2004). The law, however, does not hold an employer liable for things that *might* happen in the future when the employer has not yet done anything that is either discriminatory or retaliatory.

The district court's reliance on *EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424 (7th Cir. 1992), and *EEOC v. Cosmair, Inc., L'Oreal Hair Care Division*, 821 F.2d 1085 (5th Cir. 1987), is misplaced. Those cases provide no support for a finding of unlawful retaliation here. Each involved a situation in which an employer "'stopped providing [the employee] benefits to which he was otherwise entitled simply because he filed a charge, . . .'" *Board of Governors*, 957 F.2d at 429 (quoting *Cosmair*, 821 F.2d at 1089). In *Board of Governors*, the employer ceased processing an employee's pending grievance through an existing, collectively-bargained grievance procedure because the employee filed an EEOC charge, 957 F.2d at 426, and in *Cosmair*, the employer agreed to give an employee severance pay and then "stopped performing its part of the bargain when the employee filed a charge [with the EEOC]." 821 F.2d at 1087. Here, in contrast, SunDance did not deny Salisbury any benefit to which she ever was entitled. Rather, it offered her an entirely new benefit—80 hours severance pay to which she had no present entitlement—if she would agree voluntarily to a comprehensive release of claims. The decision to reject the offer was Salisbury's alone, and it left her in exactly the same position she was in before SunDance made the offer—*i.e.*, no worse off and

with her right to file an EEOC charge fully intact. These facts cannot support a finding of unlawful retaliation.

This Court need not consider whether the release agreement SunDance invited Salisbury to sign would have been enforceable if she had signed it. For it is well recognized that "simply because an agreement is unenforceable or even 'illegal' does not mean that employers who require employees to sign the agreements as a condition of employment are guilty of violating Title VII, the ADEA, or the ADA." *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1316 (11th Cir. 2002) (citing *Borg Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 837 (D.C. Cir. 2001)). Since *requiring* employees to sign such agreements is not unlawful, *a fortiori* merely *inviting* employees to sign releases voluntarily in exchange for additional severance pay cannot be unlawful, irrespective of whether the releases would have been enforceable or not.

As applied to release agreements like the one at issue in this case, the EEOC's "anticipatory retaliation" theory not only lacks a valid basis in law, but also runs counter to a strong federal policy—the policy favoring voluntary resolution of employment-related disputes. Severance-and-release agreements like the one SunDance proposed to Salisbury and her colleagues afford employers and willing employees a means of trying to resolve

potential employment-related issues up front, through voluntary agreements, instead of possibly having to deal with such issues later in the context of administrative proceedings and/or lawsuits. To the extent that employers and employees find their terms mutually acceptable, such agreements serve not only their interests, but also the public's interest in voluntary resolution of issues that otherwise could clog the agencies and courts. If such agreements cannot lawfully include waivers of the right to file administrative charges, however, fewer employers will be likely to offer them, those that do offer them will be unlikely to offer nearly as much consideration, and employees will lose opportunities for additional severance pay.

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT AN EMPLOYER COMMITS UNLAWFUL RETALIATION BY MERELY OFFERING EMPLOYEES THE OPPORTUNITY TO WAIVE THEIR RIGHT TO FILE EEOC CHARGES IN EXCHANGE FOR VALUABLE CONSIDERATION TO WHICH THEY OTHERWISE WOULD NOT BE ENTITLED

A. The Essential Elements of Unlawful Retaliation Include a Protected Activity and an Adverse Employment Action

The antiretaliation provisions of Title VII,[4] the ADEA,[5] the ADA[6] and the EPA[7] are basically all the same. They make it unlawful for an employer to discriminate against an employee because the employee has either opposed a practice made unlawful under the statute or participated in proceedings to enforce the statute, such as by filing a charge, giving testimony or providing other assistance. Although none of the statutes expressly uses the term "retaliation," it is widely understood that retaliation is the target of their ban on discrimination because of a protected activity.

In this Circuit, it is well settled that a party claiming unlawful retaliation has the burden to show the following essential elements of the

[4] 42 U.S.C. § 2000e-3(a).
[5] 29 U.S.C. § 623(d).
[6] 42 U.S.C. § 12203(a).
[7] 29 U.S.C. § 215(a)(3).

violation: (1) that a current, former or prospective employee engaged in a protected activity; (2) that the employer knew of the protected activity; (3) that the employer took an adverse employment action against the individual; and (4) that there was a causal connection between the protected activity and the adverse action. *See, e.g., Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 877 (6th Cir. 1991). Although other circuits phrase the elements slightly differently, all agree that a protected activity and an adverse employment action because of that activity are essential elements of the violation.[8] These elements accurately capture the essence of the conduct the statutory antiretaliation provisions are designed to prohibit—*i.e.*, reactive measures taken by employers as reprisals or pay-backs for protected activities engaged in by employees.

B. The Oxymoronic "Anticipatory Retaliation" Theory Urged by the EEOC and Adopted by the District Court Improperly Dispenses with Essential Elements of Unlawful Retaliation

The violation alleged in this case, however, does not involve either a protected activity engaged in by an employee or an adverse action taken by

[8] *See* Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 672 & n.169 (3d ed. 1996 & Supp. 2002) (noting that the Sixth Circuit alone lists the employer's knowledge of the employee's protected activity as an essential element of retaliation, while other circuits treat such knowledge as subsumed within the element of causal connection, but that all circuits

an employer as a reprisal or pay-back Rather, the violation alleged by the EEOC and found by the court below consists solely of an employer's act of offering an employee the opportunity to sign, in exchange for valuable consideration, an agreement that, if accepted, would have resulted in a voluntary waiver of the individual's right to file EEOC charges against the employer in the future regarding the individual's past employment. There is no allegation that any individual was unduly pressured or coerced to sign the agreement or that any employee suffered any loss of any right or benefit as a consequence of declining to sign the agreement. On the contrary, Ms. Salisbury, on whose behalf the EEOC brought this suit, freely opted not to sign, and she remained thereafter in exactly the same position as if SunDance never had proposed the agreement in the first place. That is, she was no worse off, and her right to file EEOC charges remained fully intact.

In declaring the proposed agreement to be "facially retaliatory," the court below simply dispensed with the requirement that a party alleging unlawful retaliation must establish the essential elements of the violation, as outlined above. The court declared that "[t]he thrust of the facial retaliation claim is that even *before either party takes any action* (engaging in protected

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require the elements of protected activity, adverse action, and causal connection).

activity or adverse employment action), the policy by its terms authorizes the employer to take adverse employment action once an employee does engage in some protected activity." 328 F. Supp.2d at 837 n.8 (emphasis added).

In other words, in the view of the EEOC and the court below, to establish that an employer has unlawfully retaliated against an employee because the employee has engaged in a statutorily protected action, it is not necessary to show either that the employee actually has engaged in any statutorily protected activity or that the employer actually has taken any adverse employment action. Rather, it is only necessary to show that the employer has proposed an agreement that, if voluntarily accepted and signed by an employee, would give the employer the authority to take action in the future, if, in the future, the signer were to file an EEOC charge.

This theory fairly may be described by the term "anticipatory retaliation." But unlike the usual, dictionary concept of "retaliation," which involves a *reactive* step taken in *response* to an act *already* taken by another person,[9] the theory of the EEOC and the court below prohibits a *proactive* step taken in *anticipation* of a possible action that has *not yet* happened, but

[9] The American Heritage Dictionary of the English Language (4th ed. 2000) & WordNet 2.0 (Princeton Univ. 2003) *available at* http://www.dictionary.com.

could occur in the future. In short, it stands the ordinary concept of retaliation directly on its head.

This oxymoronic "anticipatory retaliation" theory cannot be squared with the plain language of the statutory antiretaliation provisions. Section 704(a) of Title VII, for example, makes it unlawful to discriminate against an individual because of actions already taken by the individual, as expressed in the statute's used of the past tense—*i.e.*, "because he *has opposed* any practice made an unlawful employment practice by this subchapter, or because he *has made* a charge, testifi*ed*, assist*ed*, or otherwise participat*ed*" in a proceeding under that statute. 42 U.S.C. § 2000e-3(a) (emphasis added). The antiretaliation provisions of the other statutes at issue similarly use exclusively the past tense to describe the protected activities for which retaliation is prohibited. None of the statutes, by its terms, applies to actions an employer *might take* in the future against an individual because of something the individual *might do* in the future.

In this case, moreover, the EEOC and the court below have effectively erased the element of discrimination from the statutes' antiretaliation provisions, for it is clear that SunDance committed no act of discrimination at all. On the contrary, SunDance treated all employees affected by its companywide reduction-in-force equally by proposing the same severance-

and-release terms to all of them. Whether to accept the offer and receive severance pay or reject it and retain the right to file charges was entirely the employees' own decision, not an act of discrimination by the employer.

C. The *Board of Governors* and *Cosmair* Decisions Provide No Support for a Finding of Unlawful Retaliation Where, as Here, No Employees Lost Any Right or Benefit to Which They Ever Had Been Entitled

The reliance by the EEOC and the court below on *EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424 (7th Cir. 1992), and *EEOC v. Cosmair, Inc., L'Oreal Hair Care Division*, 821 F.2d 1085 (5th Cir. 1987), is misplaced. Each of those cases involved a situation in which an employer "'stopped providing [the employee] benefits to which he was otherwise entitled simply because he filed a charge, . . .'" *Board of Governors*, 957 F.2d at 429 (quoting *Cosmair*, 821 F.2d at 1089). Thus, they provide no support for a finding of a violation in this case, in which the employer did not stop providing any employee any benefit to which he or she ever was entitled.

In *Board of Governors*, the Seventh Circuit found that a university professor had an existing right under a collective-bargaining agreement to pursue a dispute over a denial of tenure through an internal grievance-and-arbitration procedure, but after he filed a charge of age discrimination with the EEOC, the employer ceased processing his pending grievance because it

had learned of his EEOC claim. The Seventh Circuit held that the employer's policy of terminating an internal grievance proceeding when an employee filed an EEOC charge was "facially discriminatory," because its effect was to cause the employee to lose an *existing* contractual right because he had filed a charge. 957 F.2d at 429-30 ("Under the collective bargaining agreement . . . an employee has a contractual right to an in-house grievance procedure. However, an employee loses that right if he files a charge of discrimination").

In *Cosmair*, an employer's human resources director offered to continue an employee's salary and medical benefits for 37 weeks following the termination of her employment if she signed an agreement releasing the company from all claims, including claims of discrimination. The employee signed the release agreement, but later filed an EEOC charge. When the employer received notice of the charge, it discontinued the employee's severance benefits. As the Fifth Circuit put it, "Cosmair stopped performing its part of the bargain when the employee filed a charge of age discrimination with the … EEOC." 821 F.2d at 1087. Thus, like *Board of Governors* and unlike this case, *Cosmair* dealt with an action by an employer that took away a benefit to which an employee already was entitled.

Moreover, and significantly, the Fifth Circuit explained in *Cosmair* that, in its view, the release in that case "did not obligate [the employee] not to file a charge." *Id.* at 1089. Therefore, the court concluded that "[h]is filing of a charge did not constitute a breach" of the release, and "Cosmair was not relieved of its obligation to perform." *Id.* It was for that reason, the court said, that the employer's action of "discontinuing payments was unlawful retaliation." *Id.* It is thus clear that a crucial basis for the court's finding of unlawful retaliation in *Cosmair* was its determination that the employee had a *present entitlement* to the severance benefits when the employer ceased providing them.

In this case, in contrast, SunDance did not take away, discontinue or deny any right or benefit to which Salisbury ever had any entitlement. Thus, *Board of Governors* and *Cosmair* are simply inapposite.

None of the four statutes in issue here expressly makes it unlawful for an employer to ask employees—or even to require them as a condition of employment—to waive their right to file charges with the EEOC. Indeed, the only one of the four statutes that even mentions waivers is the ADEA. As amended by the Older Workers Benefit Protection Act of 1990 (OWBPA), the ADEA spells out certain conditions waivers or releases must meet in order to be enforceable with respect to age discrimination claims.

One of its provisions states in pertinent part that "[n]o waiver agreement may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the [EEOC]."[10] Notably, however, neither that provision nor any other provision of the ADEA or the other statutes at issue states that asking or requiring an employee to sign such a waiver is a *violation* of the ADEA; in the case of the ADEA, the statute only affects the *enforceability* of the release to the extent a waiver agreement is used to interfere with an individual's filing of a charge or participation in an EEOC investigation.

No issue of enforceability is presented in this case, however. Salisbury opted not to sign the severance-and-release agreement SunDance had proposed, so there was no agreement to be enforced. Even assuming, however, solely for purposes of argument, that the release would have been unenforceable as against ADEA claims if Salisbury had signed it, it does not follow as a matter of law or logic that SunDance violated the ADEA or any other law by simply proposing that agreement.

On the contrary, it has been recognized that "simply because an agreement is unenforceable or even 'illegal' does not mean that employers who require employees to sign the agreements as a condition of employment

[10] 29 U.S.C. § 626(f)(4).

are guilty of violating Title VII, the ADEA, or the ADA." *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1316 (11th Cir. 2002) (quoting *Borg Warner Protective Servs. Corp. v. EEOC*, 245 F.3d 831, 837 (D.C. Cir. 2001)) (EEOC policy statement declaring mandatory, binding arbitration agreements unenforceable did not amount to determination that such agreements are unlawful and, therefore, was not "final agency action" subject to judicial review). If *requiring* employees to sign such agreements as a condition of employment is not unlawful, then *a fortiori* merely *inviting* employees to sign releases in exchange for valuable consideration, as SunDance did in this case, cannot be unlawful, even if the releases, if signed, might not have been fully enforceable.

II. THE "ANTICIPATORY RETALIATION" THEORY UNDERCUTS THE STRONG FEDERAL POLICY FAVORING VOLUNTARY RESOLUTION OF EMPLOYMENT-RELATED ISSUES

It has long been recognized that the federal employment statutes at issue in this case embody a strong policy favoring voluntary resolution of employment-related issues over administrative enforcement proceedings and litigation. *See, e.g., Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims"). *Accord Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)

("Cooperation and voluntary compliance were selected as the preferred means for achieving [equal employment opportunity]"); *Hutchings v. U.S. Indus., Inc.*, 428 F.2d 303, 309 (5th Cir. 1970) ("[I]t is clear that Congress [in enacting Title VII] placed great emphasis upon private settlement and the elimination of unfair practices without litigation . . . on the ground that voluntary compliance is preferable to court action") (citations omitted).

Severance-and-release agreements such as the one SunDance proposed to Salisbury advance this federal policy by providing an "up-front" means of voluntarily disposing of any and all disputed issues that might have arisen during an employment relationship, so that they do not emerge later in the form of charges and lawsuits. When their terms are mutually acceptable, such agreements benefit both parties, while also serving the public interest.

Employees who choose to sign such agreements benefit through receipt of valuable consideration, often in the form of severance pay or additional severance pay or other benefits, which can help to "tide an employee over while seeking a new job, . . . " *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987) (citations omitted). Many welcome this opportunity, for unless an employer has willingly obligated itself to pay termination benefits, employees ordinarily are entitled to no

more at termination than accrued wages and benefits due, unless they can prove through litigation that their termination was somehow unlawful.

Employees who are dissatisfied with the amount of consideration offered in exchange for a release are free to reject the offer and seek a larger amount through negotiation or litigation, assuming there is a basis for suit. At the same time, however, the many who have no dispute with the employer or are satisfied that the additional consideration is sufficient to resolve any pending issues may look forward to receiving the increased payments without having to endure the delay and uncertainties of contested lawsuits.

Employers also benefit from such agreements, principally by obtaining closure with respect to the myriad of potential claims that otherwise would remain open in the wake of every terminated employment relationship until the expiration of all of the statutes of limitations on all the applicable laws. Such closure is valuable even if there are no potential claims that have any merit, for the alternative of possibly having to respond to charges and/or lawsuits and undergo investigations, discovery proceedings, and perhaps trials can be extremely disruptive and costly, regardless of the final outcome.

Society at large benefits from severance-and-release agreements, as well, because such agreements afford a means of satisfactorily resolving potential disputes that otherwise could clog the courts and administrative agencies, including the EEOC.

Employers are less likely to offer such agreements, however—and certainly are less likely to offer as much consideration in exchange for them—if the agreements cannot lawfully provide closure against the possibility that the signers will file EEOC charges. Most employers would see little point in paying a high price in severance benefits to foreclose the possibility of claims in one forum if the same claims can be raised in another through the filing of administrative charges.

Thus, if the decision of the court below stands, its ultimate victims will be individual employees who, as a result, will not be offered the option to gain substantial financial benefits when their jobs are terminated as part of reductions-in-force or corporate restructurings. These are the vast majority of individuals who have no real quarrel with their employers and would willingly sign waivers in return for extra benefits. Such employees will be harmed if employers are discouraged from offering generous severance benefits that serve as the bridge between unemployment and their next job.

CONCLUSION

For the reasons set forth above, the decision of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Ann Elizabeth Reesman, hereby certify that this Brief *Amici Curiae* of the Equal Employment Advisory Council and The Chamber of Commerce of the United States in Support of Defendant-Appellant and in Support of Reversal complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). This brief is written in Times New Roman fourteen-point typeface using MS Word 2000 word processing software and contains 4,882 words.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April 2005, two (2) true and correct copies of the foregoing Brief *Amici Curiae* of the Equal Employment Advisory Council and The Chamber of Commerce of the United States in Support of Defendant-Appellant and in Support of Reversal were served via First Class U.S. Mail, postage prepaid, addressed as follows:

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I further certify that an original and 6 copies of the foregoing brief were filed on this day via First Class U.S. Mail, postage prepaid, addressed to Leonard Green; Clerk of the Court; United States Court of Appeals for the Sixth Circuit; Potter Stewart United States Courthouse; 100 East Fifth Street, Room 532; Cincinnati, OH 45202.

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