No. 99-1823

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent concedes that "[i]n this case, there is a split among the courts of appeals that have decided the effect of a charging party's binding agreement to arbitrate employment-related disputes on the EEOC's ability to seek 'make-whole' relief in a judicial forum on behalf of the charging party." Br. in Opp. 10. Respondent also concedes that the split in the circuits is precisely the conflict that we identified in the Petition, with the Second and Fourth Circuits having ruled against the EEOC's ability to obtain "make-whole" relief in the circumstances of this case and the Sixth Circuit having permitted such relief. See Br. in Opp. 10-12. Respondent nonetheless argues that certiorari is not warranted because the issue is not sufficiently

important and because a number of other circuits have not yet addressed the issue.

I. THE CONFLICT IN THE CIRCUITS IS NOT LIKELY TO BE RESOLVED WITHOUT THIS COURT'S REVIEW

Respondent suggests that the Court should defer reviewing this issue until additional courts of appeals have addressed it, in order to determine whether the courts of appeals are "truly divided" on the issue. Br. in Opp. 13. But additional review by other circuits is unlikely either to reduce the existing conflict or to shed additional light on the issue.

First, there is no reason to believe that the conflict in the circuits will be mitigated over time. The Second Circuit first squarely addressed the issue in *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (1998), ruling against the EEOC's position. The following year, after taking specific account of the Second Circuit's decision, the Sixth Circuit in *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 465 (1999), ruled in favor of the EEOC's position, thereby creating the conflict in the circuits. After reviewing both of those decisions, the Fourth Circuit in this case sided with the Second Circuit's view in *Kidder, Peabody*. That see-saw pattern is likely to be repeated as more courts of appeals decide the issue. There is accordingly no reason to believe that the circuit split would become any less serious if review were delayed.

Second, the Sixth Circuit has already demonstrated that it will not alter its position in light of the views of other circuits. In *EEOC* v. *Northwest Airlines, Inc.*, 188 F.3d 695, 701-702 (1999), the Sixth Circuit reaffirmed its decision in *Frank's Nursery* that the EEOC is not bound by arbitration agreements to which it was

not a party. Having thus twice held that the EEOC's ability to litigate and obtain relief is not limited by such arbitration agreements, it is unlikely that the Sixth Circuit would alter its position on the issue. Accordingly, the conflict in the circuits is likely to persist, and further review is therefore warranted to resolve it.

II. THE QUESTION PRESENTED IS AN IMPORTANT ONE

Respondent argues (Br. in Opp. 15) that the question presented in this case is "an infrequently arising anomaly unworthy of this Court's review." The record of litigation before the courts of appeals belies that characterization, in that four published decisions—*Kidder*, *Peabody*, *Frank's Nursery*, *Northwest Airlines*, and this case—in cases involving EEOC enforcement actions have addressed the question presented in the last two years. Respondent does not dispute that an increasing number of employers are considering requiring employees to agree to mandatory arbitration of employment-related (including equal opportunity) disputes. See Pet. 15. The question presented thus is arising frequently in the courts of appeals, and it can be expected to arise with increasing frequency in the future.

Respondent states correctly (Br. in Opp. 14-15) that EEOC brings only a relatively small proportion of the employment discrimination cases filed in federal court in a given year, and the only EEOC enforcement actions that are affected by the issue in this case are those in which the employee has entered into an arbitration agreement. Respondent mistakenly suggests, however, that as a result "there is no evidence that there is any meaningfully substantial number of cases in which the EEOC's ability to seek make-whole

relief on behalf of the individual employee was affected by an agreement to arbitrate entered into by the employee with his employer." Br. in Opp. 14.

Although the EEOC does not litigate a great many cases, the EEOC does take care to select the cases that it will litigate and to concentrate its limited resources on cases that raise important or novel legal issues or otherwise are of general importance. Indeed, as *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318 (1980), establishes, Congress intended the EEOC to serve precisely this role. See Pet. 13-14. Under the Fourth Circuit's rule, the EEOC may well find itself unable to bring precisely the issues and cases deserving of its litigation efforts to the courts, since a complaining party's entry into an arbitration agreement can, as a practical matter, preclude an EEOC action. In this case, for example, the Fourth Circuit suggested that the EEOC may be barred from seeking even purely equitable relief. See Pet. App. 18a n.8. Because the EEOC is able to bring only a relatively small number of cases, it is all the more critical that it not be barred from bringing the cases it identifies as most important. The Fourth Circuit's rule would prevent the EEOC from performing the role defined for it by Congress.

III. THE COURT MAY WISH TO HOLD THE PETITION PENDING ITS DECISION IN *CIRCUIT CITY STORES, INC.* V. *ADAMS*

In our petition, we stated that the Court may wish to hold this case pending its disposition of the petition for a writ of certiorari in *Circuit City Stores, Inc.* v. *Adams*, No. 99-1379. On May 22, 2000, the Court granted the petition in *Circuit City*, which presents the question whether contracts of employment are covered

by the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, at all. As we explained in the petition (at 20-21), the resolution of that question could affect both the legal analysis and practical significance of this case. Now that the Court has granted the petition for a writ of certiorari in *Circuit City* and will resolve the question presented in that case, we continue to believe that it may wish to hold this case until it has decided *Circuit City*. If the Court affirms in *Circuit City* (and thereby holds that contracts of employment are not covered by the Federal Arbitration Act), it may be appropriate to grant the petition, vacate the judgment, and remand this case to the court of appeals for reconsideration in light of the absence of any governing federal policy concerning arbitration in this context. If the Court reverses in *Circuit City* (and thereby holds that most contracts of employment are covered by the Federal Arbitration Act), the petition for a writ of certiorari in this case should be granted.

* * * * *

For the reasons given above and in the petition, the Court may wish to hold this case pending its decision in *Circuit City Stores, Inc.* v. *Adams*, No. 99-1379, and then dispose of it accordingly. Alternatively, the petition should be granted now.

Respectfully submitted.

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