No. 05-1481

In the Supreme Court of the United States

SIDLEY AUSTIN LLP, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may seek relief under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, for individuals who have not filed timely administrative complaints and therefore would be barred from bringing their own individual suits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 437 F.3d 695. The opinion of the district court (Pet. App. 4a-15a) is reported at 406 F. Supp. 2d 991.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2006. The petition for a writ of certiorari was filed on May 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, makes it unlawful,

subject to certain exceptions, for an employer to discriminate in employment because of an individual's age. 29 U.S.C. 623. The ADEA gives the Equal Employment Opportunity Commission (EEOC) authority to investigate possible violations of the Act that is commensurate with the authority that the Secretary of Labor has with respect to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq*. See 29 U.S.C. 626(a) (The EEOC "shall have the power to make investigations * * * in accordance with the powers and procedures provided in sections 209 and 211 of this title [sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended].").

The ADEA also gives the EEOC the authority to seek relief that is commensurate with the authority that the FLSA gives to the Secretary of Labor. 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section."). In addition, the ADEA specifies that in an action brought by the EEOC to enforce the Act's prohibitions, "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. 626(b).

The provision governing EEOC enforcement actions sets out only one requirement that the EEOC must satisfy before filing suit: "Before instituting any action under this section, the Equal Employment Opportunity

Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(b).

In a separate provision, the ADEA gives individuals a right to initiate a civil action in any court of competent jurisdiction for legal or equitable relief. 29 U.S.C. 626(c). No such action may be commenced, however, "until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. 626(d). Furthermore, such a charge "shall be filed— (1) within 180 days after the alleged unlawful practice occurred; or (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred." 29 U.S.C. 626(d).

2. In the Fall of 1999, petitioner, a law firm, informed 32 partners that, in order to remain with the firm, they would have to accept a downgrade to "counsel" or "senior counsel." Pet. App. 4a. Simultaneously, petitioner changed its age-65 mandatory retirement policy to a policy under which partners were expected to retire some time between the ages of 60 and 65. *Ibid.* In late 1999, the media began reporting extensively on those events, characterizing them as an effort by petitioner to remove older partners in order to create more opportunities for younger lawyers at the firm. *Ibid.* During the same period, the EEOC received confidential information from one of the ex-partners who asked the EEOC to investigate petitioner's actions. *Ibid.*

In July 2000, the EEOC notified petitioner by letter that it was investigating the firm for possible violations of the ADEA. Pet. App. 9a. The letter specifically

stated that the EEOC was acting pursuant to its own independent authority to conduct a directed investigation, and not pursuant to any charges that had been filed by any partner or former partner at petitioner's firm. *Id.* at 26a-27a.

When petitioner declined the EEOC's request for certain documents, the EEOC issued a subpoena. Pet. App. 5a. Petitioner opposed the EEOC's effort to enforce the subpoena, arguing that none of its partners are covered employees within the meaning of the ADEA. The district court ordered the subpoena enforced, and the court of appeals affirmed to the extent that the documents sought information related to the coverage question. *EEOC* v. *Sidley Austin Brown & Wood*, 315 F.3d 696, 699 (7th Cir. 2002).

3. After completing its investigation, the EEOC found reasonable cause to believe that petitioner had discriminated on the basis of age in violation of the ADEA. Pet. App. 5a. When efforts at conciliation failed, the EEOC filed suit in federal district court against petitioner, seeking both monetary damages and injunctive relief. *Ibid.*

In a motion for partial summary judgment, petitioner sought to preclude the EEOC from seeking victim-specific relief on the ground that none of the adversely affected partners had filed a timely charge. Pet. App. 5a. The district court denied petitioner's motion, holding that this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), "makes clear that EEOC's ability to seek monetary relief on behalf of individuals is derived from its own statutory rights to advance the public's interest and is unrelated to any individual's right." Pet. App. 9a.

Petitioner sought reconsideration or, in the alternative, certification of the issue to the court of appeals pursuant to 28 U.S.C. 1292(b). Pet. App. 10a. The EEOC opposed both requests. The district court denied reconsideration, but agreed to certify the issue to the court of appeals. *Id.* at 10a-15a.

4. The court of appeals agreed to decide the certified question and affirmed. Pet. App. 1a-4a. The court framed the question presented as whether "the EEOC may obtain monetary relief on behalf of individuals who, having failed to file timely administrative charges under the ADEA, are barred from bringing their own suits." *Id.* at 1a.

The court of appeals noted that a prior Seventh Circuit decision had held that the EEOC could not obtain relief in such circumstances. Pet. App. 2a. The court held, however, that its prior precedent could not be squared with this Court's subsequent decision in *EEOC* v. *Waffle House*, 534 U.S. 279 (2002). Pet. App. 2a. The court explained that in *Waffle House*, the Court held that an individual's decision to arbitrate his claim does not preclude the EEOC from seeking monetary relief on his behalf because the EEOC's enforcement authority "is not derivative of the legal rights of individuals even when it is seeking to make them whole." *Ibid.* Applying that analysis, the court of appeals concluded that "the Commission is not bound by the failure of [petitioner's] ex-partners to exhaust their remedies; the *Commission* had no duty to exhaust." *Ibid.*

The court of appeals also rejected petitioner's reliance on the statement in *Waffle House* that an individual's conduct "may have the effect of limiting the relief that the EEOC may obtain in court." Pet. App. 2a (quoting *Waffle House*, 534 U.S. at 296). The court explained

that this Court was not referring to a "procedural forfeiture," but to an individual's failure to mitigate and his acceptance of a settlement. *Ibid.* The court also stated that when an individual sues and loses, the employer might be able "to interpose the judgment as a bar to the EEOC's obtaining money for [that individual], by virtue of the doctrine of collateral estoppel." *Id.* at 2a-3a. Because petitioner sought summary judgment based entirely on a ground that was inconsistent with *Waffle House*, however, the court of appeals held that the EEOC was free to seek monetary relief for petitioner's ex-partners. *Id.* at 3a.

ARGUMENT

The court of appeals held, on interlocutory appeal, that the EEOC may seek victim-specific relief for individuals who did not file age discrimination charges with the EEOC. Pet. App. 2a. The interlocutory nature of the ruling provides a sufficient basis to deny review. In any event, the court of appeals' holding is supported by the plain language of the ADEA and this Court's decisions, and it does not conflict with the decision of any other court of appeals. For that reason as well, further review is not warranted.

1. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). The interlocutory nature of the order "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per

curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893) (Court generally should not review interlocutory order absent "extraordinary" circumstances); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some * * * unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

This case does not present any reason to depart from the general rule against review of interlocutory orders. To the contrary, this case is particularly ill-suited for immediate review by this Court. Discovery is proceeding in the district court, and resolution of the question presented by petitioner on the permissibility of make-whole relief will not affect the EEOC's ability to seek a determination of liability and appropriate injunctive relief. Should petitioner ultimately prevail on liability, the issue of the propriety of make-whole relief would become moot. Should the EEOC prevail on liability, petitioner will be able to raise any challenge to that determination in the court of appeals. And, if the court of appeals affirms, petitioner may then seek this Court's review on the propriety of make-whole relief, as well as on any other issue that petitioner chooses to raise at that time. See Pet. 8 n.2 (noting that petitioner has argued that its partners are not employees covered by the ADEA, and that the downgrading of 32 partners was performance-based). In those circumstances, there is no reason for the Court to deviate from its normal practice of denying review of interlocutory orders.

2. In any event, the court of appeals correctly held that an individual's failure to file a charge does not affect the EEOC's authority to seek relief for that individual, and that holding does not conflict with the decision of any other court of appeals. For that reason as well, review is not warranted.

a. Under the ADEA, the EEOC is explicitly empowered "to make investigations," whether or not it has received a charge of discrimination from an individual. 29 U.S.C. 626(a). As this Court has observed, "the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA 'from any source,' and it has independent authority to investigate age discrimination." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (citing 29 C.F.R. 1626.4, 1626.13); see 29 C.F.R. 1626.4 ("The Commission may, on its own initiative, conduct investigations of employers * * * pursuant to sections 6 and 7 of the Act."); 29 C.F.R. 1626.13 (Commission may continue investigation even after withdrawal of a charge "[b]ecause the Commission has independent investigative authority").

The ADEA also explicitly authorizes the EEOC to bring an action to recover monetary and injunctive relief for victims of discrimination. See 29 U.S.C 626(b) (incorporating 29 U.S.C. 216(b) and (c), 217), and separately providing that a court may award the EEOC victim-specific relief). The ADEA imposes only one precondition to an EEOC enforcement action—that the EEOC "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(b).

In a separate provision, the ADEA gives individuals a right to file their own suit, but only if they first file an administrative charge within a specified number of days. 29 U.S.C. 626(d). By its terms, however, that administrative charge requirement affects only an individual's right to file his own ADEA action. It does not qualify the EEOC's separate authority to file its own suit and to seek relief for individual victims of discrimination. Thus, the text of the ADEA unambiguously gives the EEOC authority to seek relief for victims of discrimination regardless of whether those individuals have filed their own charges of discrimination.

That allocation of authority furthers the ADEA's purposes. Persons who are discrimination victims may be reluctant to file charges because of concerns about the consequences for their careers or for other legitimate reasons. In such situations, the Act allows the EEOC to determine whether it is in the public interest to seek relief for those persons.

b. This Court's decision in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), firmly supports the conclusion that the EEOC's authority to seek victim-specific relief is not dependent on an individual filing his own charge of discrimination. In that case, the Secretary of Labor sought minimum wages and overtime pay for workers who opposed application of the FLSA requirements to them. The Court upheld the Secretary's authority to seek such relief, explaining that "the purposes of the Act require that it be applied even to those who would decline its protections." *Id.* at 302. Because the ADEA incorporates the enforcement provision of the FLSA, 29 U.S.C. 626(b), that same principle governs the EEOC's authority to seek relief. And if the EEOC may seek relief for persons who ac-

tively oppose the EEOC's position, it may surely seek relief for persons who have simply chosen not to file charges.[1]

This Court's decision in *Waffle House* reinforces that conclusion. In that case, the Court held that the EEOC may seek victim-specific relief for individuals who have signed arbitration agreements. The Court explained that the text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, "clearly makes the EEOC the master of its own case," and "it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief." 534 U.S. at 291-292. The Court added that even when the EEOC seeks entirely victim-specific relief, it "may be seeking to vindicate a public interest," *id.* at 296, and the EEOC's claim for that relief is therefore not "merely derivative." *Id.* at 297.

The situation here is analogous. The text of the ADEA unambiguously gives the EEOC authority to seek victim-specific relief regardless of whether an individual files a charge, and the EEOC's request for such relief is designed to vindicate the public interest. The court of appeals therefore correctly held that an individual's failure to file a charge does not preclude the EEOC's request for victim-specific relief.

c. Three other circuits, while not addressing the precise question presented here, have recognized that the failure of an individual to file a charge does not preclude the EEOC from filing suit. In *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1537 (1996), the Second Circuit held that "the EEOC may file suit where a charge was

[1] Should any discrimination victim refuse a monetary award, that money would be paid into the treasury. *Donovan* v. *University of Tex.*, 643 F.2d 1201, 1208 n.16 (5th Cir. 1981).

not filed by the affected employee." In *EEOC* v. *American & Efird Mills, Inc.*, 964 F.2d 300, 303 (1992), the Fourth Circuit held that "[n]othing in the language of this title, or in the incorporated language of the other statutes, hinges EEOC authority on the filing of a valid employee charge." And in *EEOC* v. *Tire Kingdom, Inc.*, 80 F.3d 449, 451 (1996), the Eleventh Circuit held that "29 U.S.C. § 626(b) * * * grants the EEOC an independent right to bring suit to enforce the provisions of the ADEA, and that, "by its plain reading," the timely charge requirement, "does not apply to the EEOC." There is only one circuit decision that has ever applied the time limits for private individual actions to an EEOC action, and the court of appeals in this case overruled that decision. Pet. App. 2a (overruling *EEOC* v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001)).

Petitioner contends (Pet. 13-15) that the decision below conflicts with the Fifth Circuit's decision in *Vines* v. *University of Louisiana*, 398 F.3d 700 (2005), cert. denied, 126 S. Ct. 1019 (2006), and the Third Circuit's decision in *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (1990). There is, however, no conflict.

In *Vines*, the Fifth Circuit held that when the EEOC seeks relief on behalf of individuals and loses, collateral estoppel bars those individuals from seeking relief on the same charges. 398 F.3d at 706-707. In *U.S. Steel*, the Third Circuit held that individuals who fully litigated their own claims are barred by res judicata from recovering relief in a subsequent EEOC action based on the same claims. 921 F.2d at 496-497. There is no conflict between those collateral estoppel and res judicata decisions and the decision below. Because there has been no prior action involving the claims raised by the EEOC in this case, the doctrines of collateral estoppel

and res judicata are inapplicable. Moreover, the court below expressly left open the possibility that collateral estoppel would bar an individual who sues and loses from obtaining relief in an EEOC action. Pet. App. 3a. At the same time, neither *Vines* nor *U.S. Steel* involved the distinct question whether an individual's failure to file a charge bars the EEOC from obtaining relief for that individual, and neither of those circuits has resolved that distinct issue. Petitioner's asserted conflict therefore does not exist.[2]

3. Rather than focusing on the question presented in this case, petitioner seeks to present the more general question "[w]hether conduct by individuals that bars them from obtaining individual relief under the federal antidiscrimination laws similarly bars the Equal Employment Opportunity Commission (EEOC) from obtaining individual relief on their behalf." Pet. (i). The sole question certified and resolved by the court of appeals, however, is the much narrower question whether "the EEOC may obtain monetary relief on behalf of individuals who, having failed to file timely administrative charges under the ADEA, are barred from bringing their own suits." Pet. App. 1a.

Furthermore, in holding that the EEOC may obtain relief for individuals who have not filed timely administrative charges, the court of appeals did not suggest that

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[2] In *Vines*, the Court invited the views of the United States on whether certiorari should be granted. In its brief responding to that invitation, the United States argued that a judgment against the EEOC does not bar an individual from litigating his own ADEA claim. See Brief for the United States as Amicus Curiae at 6-12, *Vines*, *supra* (No. 04-1615). The United States nonetheless opposed review of that issue. *Id.* at 12-17. The Court denied a writ of certiorari. 126 S. Ct. 1019 (2006).

an individual's conduct could never affect the EEOC's ability to obtain relief for that individual, as petitioner's more general question implies. To the contrary, the court of appeals expressly recognized that under *Waffle House* and other cases, an individual's failure to mitigate and an individual's settlement of a claim *would* affect the EEOC's effort to obtain relief for that individual. Pet. App. 2a. And as discussed above, the court of appeals also left open the possibility that when an individual sues and loses, the EEOC may be foreclosed from obtaining relief for that individual. *Id.* at 3a.

At the same time, as *Waffle House* makes clear, "it simply does not follow from the cases holding that the employee's conduct may affect the EEOC's recovery that the EEOC's claim is merely derivative." 534 U.S. 297. The Court has recognized "several situations in which the EEOC does not stand in the employee's shoes," *ibid.*, including when the employees actively oppose relief, as in *Tony & Susan Alamo Foundation*, and when an employee agrees to arbitration, as in *Waffle House*. The court of appeals correctly concluded that an employee's failure to file a charge is another situation in which an employee's conduct does not affect the EEOC's authority to seek victim-specific relief.

Because the court of appeals resolved only the narrow question whether an individual's failure to file a timely charge affects the EEOC's authority to seek relief for that individual, because it correctly resolved that question, and because the court's interlocutory decision on that issue does not conflict with the decision of any other court of appeals, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2006