No. 15-20078

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

BASS PRO OUTDOOR WORLD, LLC,
and TRACKER MARINE RETAIL, LLC,

Defendants-Appellants.

On Appeal from the U.S. District Court
for the Southern District of Texas
Case No. 4:11-cv-3425

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

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June 26, 2015

EEOC v. Bass Pro Outdoor World, LLC, *et al.*
No. 15-20078

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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s/ Rae T. Vann
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FEDERAL RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amicus curiae*, its members or counsel, contributed money that was intended to fund the preparation or submission of this brief.

Respectfully submitted,

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STATUTES

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* contingent upon granting of the accompanying motion for leave. The brief urges the court to reverse the decision below, and thus supports the position of Defendants-Appellants Bass Pro Outdoor World, LLC and Tracker Marine Retail, LLC before this Court.

INTEREST OF THE *AMICUS 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 membership includes over 250 major U.S. corporations, providing employment to millions of workers. 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.

All of EEAC'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 amended, as well as other labor and employment statutes and regulations. As potential defendants to Title VII discrimination claims, EEAC has a direct and ongoing interest in the question before this Court regarding the scope of the U.S. Equal Employment

Opportunity Commission's (EEOC) authority to sue and recover full statutory damages for unlawful Title VII pattern-or-practice discrimination without first having to prove that each member of the victim class actually was harmed by the alleged discriminatory employment practices. The district court below incorrectly held that the EEOC need not establish individual harm in order to obtain compensatory and punitive damages on behalf of the class as a whole.

Since 1976, EEAC has participated in hundreds of cases before this Court, the U.S. Supreme Court and other federal appeals courts involving the proper interpretation of Title VII and other federal discrimination statutes. Because of its experience in these matters, EEAC is 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

On February 20, 2007, the EEOC issued a Commissioner charge accusing Bass Pro of nationwide discrimination against African-American applicants and employees. *EEOC v. Bass Pro Outdoor World,* LLC, 35 F. Supp. 3d 836, 839 (S.D. Tex. 2014). After a three-year investigation, the agency issued a reasonable cause determination and initiated conciliation discussions, during which Bass Pro repeatedly (but unsuccessfully) requested specific information regarding the nature of the EEOC's claims and basis for relief. *Id.*

After deeming conciliation a failure, the EEOC filed suit, asserting among other things that Bass Pro was engaged in a nationwide pattern or practice of hiring discrimination against African-Americans, as well as Hispanics. *Id.* The agency invoked Section 706 of Title VII, but sought to prove its case using the framework established by the Supreme Court in *International Brotherhood of Teamsters v. United States* for evaluating pattern-or-practice claims brought under Section 707 of the Act. *Id.* at 840.

Bass Pro challenged the EEOC's attempt to bring a Section 706 case for monetary damages using the Section 707 standard for injunctive relief. *Id.* The trial court initially refused to allow the EEOC to bring its case under a hybrid methodology but, after the EEOC asked for reconsideration, reversed itself. *Id.* at 865. Relying primarily on the Sixth Circuit's decision in *Serrano v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012), *cert. denied*, 134 S. Ct. 92 (2013), the trial court concluded that the Supreme Court "has sanctioned a flexible approach to proving Title VII violations that can be adapted to the case at hand," 35 F. Supp. 3d. at 847, one which does not preclude the application of the *Teamsters* framework to Section 706 claims. *Id.* at 865.

SUMMARY OF ARGUMENT

The district court below incorrectly held that the U.S. Equal Employment Opportunity Commission (EEOC) may sue for and recover class-wide prospective

relief and victim-specific compensatory and punitive damages for intentional discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., as amended, even in the absence of proof of individual harm. Because the decision impermissibly conflicts with the plain text of Title VII and diverts time and resources away from meaningful Title VII enforcement, it should be reversed by this Court.

Among other things, Title VII makes it unlawful to discriminate in the "terms, conditions, or privileges of employment" because of an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). In addition to providing a private right of action for intentional discrimination, Section 706 of Title VII permits the EEOC, after satisfying its administrative charge investigation and conciliation responsibilities, to bring an action in federal court to redress the employer's alleged discriminatory employment actions against the aggrieved employee or employees. *Id.* Section 707 authorizes the EEOC to file suit whenever it "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter …." 42 U.S.C. § 2000e-6(a).

A Section 707 case differs functionally from a class-based claim brought under Section 706. While Section 706 actions are adjudicated under the burden-shifting framework of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973),

pattern or practice cases are decided under a phased approach set forth by the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Under that framework, the EEOC must establish in an initial "liability" phase the existence of an objectively verifiable policy or practice of discrimination. If the EEOC makes this showing (and if the employer fails to rebut it), liability attaches and the case moves to a "remedial" phase to identify and determine prospective relief for individual class members.

In 1991, Congress amended Title VII to make compensatory and punitive damages available in actions brought under Section 706, but not in Section 707 pattern-or-practice claims. Proof of individual harm is essential to establishing liability for intentional discrimination under Section 706. And since the *Teamsters* pattern-or-practice framework does not require proof that every member of the class was harmed by the challenged employment practice, it cannot, in keeping with the plain text and intent of Title VII, be applied to Section 706 cases.

Moreover, allowing the EEOC to bring Section 707 claims for damages only available under Section 706 would make it extremely difficult for employers to successfully manage and defend EEOC class-based lawsuits. In particular, the EEOC's hybrid strategy provides the agency with an easier path to establishing liability, while preserving its ability to obtain maximum relief. Such an approach threatens to undermine Title VII's goal of prompt resolution of individual claims

by encouraging the EEOC to construct massive class-based suits that are very difficult to defend, with the ultimate result being that companies feel compelled to settle for strategic reasons rather than to engage in a costly and time-consuming public fight with the government.

ARGUMENT

I. THE DISTRICT COURT'S CONCLUSION THAT THE EEOC MAY PURSUE COMPENSATORY AND PUNITIVE DAMAGES FOR PATTERN-OR-PRACTICE DISCRIMINATION IS INCONSISTENT WITH TITLE VII'S PLAIN TEXT AND SETTLED CASE LAW

Reversing its own, earlier ruling, the district court in this case held that the U.S. Equal Employment Opportunity Commission (EEOC) may invoke the *Teamsters* pattern-or-practice framework to recover compensatory and punitive damages for intentional discrimination under Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., as amended, without first having to establish liability as to each individual victim. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Because the decision impermissibly conflicts with the plain text of Title VII, frustrates its policy aims, and purports to enlarge the EEOC's enforcement authority well beyond the bounds of the law as crafted by Congress, it should be reversed.

A. Sections 706 And 707 Serve Important, But Distinct, Purposes

Title VII prohibits discrimination against a covered individual "with respect to his 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). The statute authorizes the EEOC to recover damages for intentional discrimination either (1) by proving that each victim was harmed individually, in which case the agency may obtain victim-specific relief pursuant to Section 706 of the Act; or (2) by establishing that unlawful discrimination was the employer's "standard operating procedure," thus securing class-wide prospective relief under Section 707.

Specifically, Section 706 empowers the EEOC to sue an employer in its own name on behalf of a "person or [a class of] persons aggrieved" by an unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1). In contrast, Section 707 authorizes the agency to bring pattern-or-practice discrimination lawsuits whenever it has reasonable cause to believe that "any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment" of any right under Title VII, 42 U.S.C. § 2000e-6(a), and that the alleged pattern or practice "is of such a nature and is intended to deny the full exercise" of such rights. *Id.*

Prior to 1991, the only statutory remedy available to Title VII litigants was back pay and injunctive and declaratory relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). With the passage of the Civil Rights Act of 1991 (CRA), however, Congress significantly changed the character of Title VII actions by creating a right of both parties to a jury trial and expanding statutory remedies

for violations to include compensatory and punitive damages, in addition to injunctive and equitable relief. 42 U.S.C. § 1981a. The Amendments provide, in relevant part:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination prohibited under section 703, 704, or 717 of the Act … the complaining party may recover compensatory and punitive damages … in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C. § 1981a(a)(1).

Thus as amended, Title VII permits the award of compensatory and punitive damages in intentional discrimination claims brought under Section 706, but not with respect to Section 707 pattern or practice claims. As to the latter, the EEOC only may obtain class-wide injunctive relief, such as "an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as [the EEOC] deems necessary to insure the full enjoyment" of Title VII rights.[1] 42 U.S.C. § 2000e-6(a). In that regard, "there is a significant distinction between §§ 706 and 707 claims." *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 932 (N.D. Iowa 2009) (citation and internal quotations omitted), *aff'd*, 679 F.3d 657 (8th Cir.

[1] In 1972, Congress transferred the authority to bring pattern or practice suits from the Department of Justice to the EEOC. *See* 42 U.S.C. § 2000e-6(c).

2012); *see also United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 843-44 (5th Cir. 1975).

The 1991 Amendments to Title VII emphasized the need for individual remedies, particularly in the case of punitive damages awards, which require individualized proof "that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). As the Supreme Court observed in *Kolstad v. American Dental Ass'n*:

> The very structure of § 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. Section 1981a(a)(1) limits compensatory and punitive awards to instances of intentional discrimination, while § 1981a(b)(1) requires plaintiffs to make an additional "demonstrat[ion]" of their eligibility for punitive damages. Congress plainly sought to impose two standards of liability -- one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.

527 U.S. 526, 534 (1999). With that in mind, it is no surprise that Congress expressly limited the availability of compensatory and punitive damages to claims brought under Section 706. Indeed, the individualized inquiry required to establish threshold liability for such damages under Section 706 is fundamentally inconsistent with the proof scheme outlined by the Supreme Court that applies to Section 707 claims.

B. The *Teamsters* Framework Was Not Designed With Class-Wide Compensatory And Punitive Damages In Mind

Courts typically use the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *superseded by statute on other* grounds, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), to evaluate disparate treatment discrimination claims brought under Section 706. Under *McDonnell Douglas*, once the plaintiff makes out a threshold discrimination claim, the defendant has the opportunity to offer a legitimate, nondiscriminatory justification for the challenged employment action. The plaintiff loses if he or she is then unable to show that the reason offered by the employer is false or a pretext for unlawful discrimination.

In contrast, EEOC pattern-or-practice claims brought pursuant to Section 707 are resolved using the two-step approach set forth by the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Under the *Teamsters* framework, the EEOC must establish in an initial "liability" phase the existence of a general policy of discrimination, *id.* at 360-61, as opposed to isolated discriminatory acts. If the agency meets that burden, the employer then is given an opportunity to defeat the agency's *prima facie* case by "demonstrating that the Government's proof is either inaccurate or insignificant." *Id.* at 360. If the employer fails to make this showing, class-wide liability attaches. *Id.* at 361. The case then moves to a second "remedial" phase to assess damages.

Id. Thus, liability in a Section 707 case does not hinge on the particularized experience of the individual claimant, as it does in a Section 706 claim.

As noted, Congress in enacting the CRA greatly expanded the remedies available under Title VII by permitting the award of compensatory and punitive damages in cases of intentional discrimination, in addition to statutory attorney's fees and costs. 42 U.S.C. § 1981a(a)(1). Although the CRA places a per-claim statutory cap of $300,000 on the amount of compensatory and punitive damages that may be recovered against any employer with 500 or more employees, that limitation is of little comfort if the EEOC is permitted to aggregate hundreds of claims under the guise of a *Teamsters* pattern-or-practice claim, thus avoiding any obligation to actually demonstrate each victim's threshold entitlement to such damages.

In this case, the EEOC "seeks compensatory and punitive damages and a jury trial on behalf of every unsuccessful Black or Hispanic applicant who applied to any of Bass Pro's 69 stores since at least 2005 – a group numbering 50,000 or more people by the EEOC's own estimation." Br. of Appellants, 3. The maximum potential recovery for compensatory damages alone thus is fifteen *billion* dollars ($300,000 x 50,000 class members).

That figure is apart from any punitive damages the agency seeks, which under *Teamsters* similarly would not be subject to individual proof until *after* the

liability phase. Yet the CRA made punitive damages available to Title VII plaintiffs only if they could prove that the defendant intentionally discriminated against them "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1); *see also Kolstad*, 527 U.S. at 530. In other words, Title VII restricts the award of punitive damages to instances in which the "aggrieved individual" is proven to have been subjected to intentional discrimination by a defendant that acted with "malice or reckless indifference" to his or her statutory rights. Individualized findings are required not only to determine which victims were harmed, but also to assess who ultimately is entitled to relief – which itself will depend on a number of factors unique to each individual's particular circumstances. Application of the *Teamsters* framework to a pattern-or-practice claim seeking full monetary relief would relieve the EEOC of that statutory requirement, and thus is impermissible as a matter of law.

Even though the EEOC recently has stepped up efforts to bring Section 706 lawsuits for compensatory and punitive damages applying the *Teamsters* pattern-or-practice framework, lower courts – including, at least initially, the district court below – generally have rejected the notion that Sections 706 and 707 are functionally indistinguishable, thereby enabling the government to pursue class-based, expanded damages as it sees fit. For instance, the trial court in *EEOC v. CRST Van Expedited* harshly criticized the EEOC for pursuing a *Teamsters*-type

pattern-or-practice case in which it sought class-based compensatory and punitive damages under Section 706, not under Section 707. 611 F. Supp. 2d 918 (N.D. Iowa 2009), *aff'd*, 679 F.3d 657 (8th Cir. 2012).

Rejecting the EEOC's questionable contention that its failure to investigate and attempt to informally resolve the claims of all the class members on whose behalf it sought monetary relief "does not preclude it from proving that the discriminatory environment existed and that identified victims are entitled to compensation," *EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867, 875 (N.D. Iowa 2009), the court observed:

> [I]t would appear the EEOC is attempting to have its cake and eat it too. That is, the EEOC is attempting to avail itself of the *Teamsters* burden-shifting framework yet still seek compensatory and punitive damages under § 706. Complicating matters further, it is important to remember that the Supreme Court designed the *Teamsters* burden-shifting framework with only equitable relief in mind.

611 F. Supp. 2d at 934 (citations omitted).

The Sixth Circuit is the only appeals court that has permitted the EEOC to utilize the *Teamsters* pattern-or-practice proof scheme to recover compensatory and punitive damages in a Section 706 case. *Serrano v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012), *cert. denied*, 134 S. Ct. 92 (2013). Acknowledging the fact that Section 706 "does not contain the same explicit authorization as does § 707 for suits under a pattern-or-practice theory," 699 F.3d at 894, the court nevertheless

went on to surmise that "exclusion of pattern-or-practice language from § 706" does not limit the agency's use of that theory of liability to Section 707 cases. *Id.*

To the contrary, the Sixth Circuit reasoned, *Teamsters* seems to suggest that the EEOC has flexibility to raise such claims under either Section 706 or Section 707, since the Supreme Court in deciding *Teamsters* – a Section 707 case – relied on *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), an earlier case involving a private class action lawsuit brought under Section 706. In doing so, the Sixth Circuit failed to account for the direct impact of the 1991 Amendments to Title VII on the availability of damages in Section 707 claims, as well as the fact that the *Teamsters* framework was devised without those particular damages in mind. Because it is inconsistent with Title VII's text and would expand the EEOC's enforcement authority well beyond that contemplated by Congress, the district court was wrong to adopt and apply the Sixth Circuit's reasoning here.

II. THE DECISION BELOW THREATENS TO UNDERMINE EFFECTIVE TITLE VII ENFORCEMENT BY FACILITATING, INDEED ENCOURAGING, ABUSIVE EEOC LITIGATION TACTICS

In this case, as in *CRST*, the EEOC wants to "have its cake and eat it too," 611 F. Supp. 2d at 934, by prosecuting a large, pattern-or-practice discrimination lawsuit for full statutory relief, while at the same time invoking *Teamsters* to relieve it of having to prove that the individual class members were, in fact, aggrieved and thus entitled to those remedies. As noted, such an approach – fully

endorsed by the district court below – is squarely at odds with the text and structure of Title VII, as well as the policy principles underlying it.

The benefits to the EEOC of being able to file a discrimination lawsuit under Section 706 while *prosecuting* the case under Section 707 are obvious. As noted, claims brought under Section 706 require individualized proof of discrimination, whereas Section 707 claims – brought typically on behalf of large groups of applicants or employees – do not. For employers, such an approach not only makes it much more difficult to successfully defend class-based discrimination claims brought by the EEOC, but it also exposes them to far more significant damages than contemplated by the statute itself.

The threat is compounded by the fact that the EEOC has embarked on an aggressive enforcement strategy that continues to focus on large cases with potential systemic implications. Because the EEOC can bring a Title VII pattern-or-practice lawsuit against any covered business with a nationwide employee presence essentially wherever it chooses, expanding the scope of the EEOC's Title VII litigation authority would give the agency a significant tactical advantage over employers defending such claims. Title VII applies to every employer with 15 or more employees; thus, the number of employers potentially at risk is substantial.

The significantly higher costs and exposure posed by class actions generally, and enforcement actions brought by the federal government in particular, place

enormous pressure on defendants to settle rather than run even a small risk of catastrophic loss. It is what the Supreme Court has described as "the risk of 'in terrorem' settlements …." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2013), and this court has referred to as "judicial blackmail." *Fener v. Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund (LOCAL 66*), 579 F.3d 401, 406 (5th Cir. 2009) (citation and footnote omitted); *see also Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000) (emphasis added). The district court's flawed reasoning further emboldens the agency to pursue class-based claims for substantial monetary damages without the burden of having to identify actual, individualized proof of injury.

If this Court endorses the district court's decision below, employers likely will see a significant increase in EEOC "hybrid" 706/707 claims, which in turn will require them to devote much more time and substantially greater resources to defend themselves. Indeed, the EEOC has "the ability to exact, albeit unintentionally, high costs on a private employer throughout the investigative process and potential subsequent litigation." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J., concurring). Title VII was designed to root out discriminatory employment practices, not to facilitate EEOC litigation for the sake of litigating. Because the decision below would permit the EEOC to sue for significant monetary damages without first identifying specific harm to

individual members of the alleged victim class, it is contrary to Title VII and therefore should be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* Equal Employment Advisory Council respectfully urges the Court to reverse the decision below.

Respectfully submitted,

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June 26, 2015

CERTIFICATE OF SERVICE

I certify that on June 26, 2015, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system, save for the following counsel with U.S. Mail service preference who will be served via first-class U.S. Mail, postage prepaid:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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