IN THE SUPREME COURT OF IOWA

June 19, 2013

No. 13-0412
Polk County No. 08843

RENT-A-CENTER, INC.,

Petitioner-Appellee

v.

IOWA CIVIL RIGHTS COMMISSION,

Respondent-Appellant

On Appeal from the District Court of Polk County.

The Honorable Robert B. Hanson, Judge.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
In support of Respondent/Appellant

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STATEMENT OF THE ISSUES

I. DID THE DISTRICT COURT ERR IN HOLDING THAT UNDER THE FEDERAL ARBITRATION ACT AN EMPLOYEE'S PRIVATE ARBITRATION AGREEMENT IS BINDING ON A STATE PUBLIC AGENCY EVEN THOUGH THE AGENCY IS NOT A PARTY TO THE AGREEMENT AND EVEN THOUGH IT IS CHARGED BY STATE LAW WITH THE INDEPENDENT DUTY TO ENFORCE AND PROSECUTE VIOLATIONS OF THE IOWA CIVIL RIGHTS ACT?

II. DID THE DISTRICT COURT ERR IN HOLDING THAT THE FEDERAL ARBITRATION ACT PREEMPTS THE IOWA CIVIL RIGHTS COMMISSION'S INTEGRATED PROSECUTORIAL AND ENFORCEMENT ROLE THAT IS NOT DERIVATIVE OF THE INDIVIDUAL EMPLOYEE'S COMPLAINT AND THAT IS INTEGRAL TO THE ENFORCEMENT OF BOTH STATE AND FEDERAL ANTI-DISCRIMINATION LAW?

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STATEMENT OF THE CASE

AND

STATEMENT OF THE FACTS

The NAACP adopts the Statement of the Case and Statement of Facts of the appellant, the Iowa Civil Rights Commission ("the Commission").

INTEREST OF AMICUS

The National Association for the Advancement of Colored People ("the NAACP") is the country's largest and oldest civil rights organization. Founded in 1909, it is a non-profit corporation chartered by the State of New York. The mission of the NAACP is to ensure the political, social, and economic equality of rights of all persons, to advocate and fight for social justice, and to eliminate racial hatred and racial discrimination. In addition to litigation which it has commenced or in which it has been involved, the NAACP has sought and depended upon vigorous enforcement of the Nation's and each State's Civil Rights Acts by the Equal Employment Opportunity Commission ("the EEOC") and State civil rights commissions.

In the landmark case of *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the United States Supreme Court held that neither the Federal Arbitration Act nor the legislation establishing and empowering the EEOC required the agency to be bound by a private arbitration agreement to which it was not a party in either its decision to prosecute an employer or the relief it sought. In the opinion of the NAACP the same should be and is true for state civil rights agencies

when they enforce civil rights and anti-discrimination laws. The ruling below, however, holds otherwise and if not reversed, puts in jeopardy the vigorous enforcement of not only state civil rights and anti-discrimination laws but also federal anti-discrimination laws because these state agencies play a large role in the enforcement of the federal laws.

The District Court ruled that because of an employee's private arbitration agreement with her employer, the Federal Arbitration Act preempts Iowa law and ousts the Commission of its statutory authority and responsibility under the Iowa Civil Rights Act to initiate an enforcement proceeding and prosecute the employer for sex discrimination, despite the fact that the Commission was not a party to the arbitration agreement. The Iowa Civil Rights Act is typical of the statutes in numerous states, perhaps more than half, in the mission assigned to the Commission and the powers granted to it. Unless reversed, therefore, the ruling below threatens to have a devastating effect on state enforcement of state civil rights and anti-discrimination law, in Iowa and elsewhere, and to undermine the national interest in fair and non-discriminatory practices in employment, housing, and public accommodations.

Whenever there is a private arbitration agreement, the District Court's holding denies the Commission the power to investigate reported violations of citizens' civil rights and, on its own initiative where conciliation efforts prove unsuccessful, commence a public hearing to prosecute the violation, despite the fact that Commission is not a party to the agreement. If this view were affirmed and became accepted, the impact on the NAACP's membership and on citizens generally would be enormous, as it would thwart the ability of state civil rights commissions to vindicate the public interest in enforcement of the Civil Rights Act.[1] On a national level, though precise figures are not known, it has been estimated that the Nation has 120 million non-union employees and that fifteen to twenty-five percent of employers have adopted mandatory arbitration agreements.[2] Conceivably, therefore, upwards of thirty million

[1] Indeed, if affirmed, the District Court's ruling, namely, that the Federal Arbitration Act preempts state regulatory agencies from proceeding in any case in which an Iowa citizen or resident signed an arbitration agreement, even though the agency was not a party to the arbitration agreement, would bring about sweeping change in state regulatory powers and the ability of the State of Iowa to govern and secure the safety and welfare of those living and working within its borders. *E.g.*, Iowa Code § 88.9 (2013) (Labor Commissioner's authority to file suit for remedies against employers who retaliate against persons filing OSHA complaints); Iowa Code § 91A (2013) (Labor Commissioner's authority to file suit against employer for violation of Iowa's wage payment laws); Iowa Code § 537.6113 (2013) (Iowa Attorney General's authority to seek remedies for violation of Iowa's consumer credit laws, including individual relief for injured consumers); Iowa Code § 216.8A(3)(c) (2013) (Iowa Civil Rights Commission's authority to pursue discrimination cases against landlords for inaccessible multi-family dwellings).

[2] Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. Mo. B. 174 (2008) (citing NELA, *Data Points: Prevalence of Mandatory Arbitration Systems Imposed on Employees*, 1 (Oct. 2007)); David Lewin, *Employee Voice and Mutual Gains*, in *Labor and Employment Relations Associations Series: Proceedings of the 60th Annual Meeting*, 1-2 http://lera.press.illinois.edu/proceedings2008/lewin.html (2008) (reporting that in a large sample of non-union enterprises, sixty-three percent of the business units

employees may be affected[3] if it becomes established that a private arbitration agreement can deprive a public agency like the Commission of its statutory power and responsibility independently to investigate, conciliate, and prosecute violations of state civil rights acts. In Iowa alone, according to the Commission's 2012 Annual Report, there were 1,566 non-housing cases docketed with the Commission in 2012; and of these, 1,373 or eighty-eight percent involved employment, and nearly a third involved claims of racial discrimination.[4]

For these reasons the NAACP has a very strong interest in the resolution of the issues raised in this action and appeal.

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had one or another type of ADR system in place and that arbitration was the most common single ADR method, with seventy to eighty percent of the non-union businesses utilizing it).

[3] Halvordson, 64 J. Mo. B. 174.

[4] *See* Iowa Civil Rights Commission, *Annual Report for Fiscal Year 2012*, 5-6 https://icrc.iowa.gov/sites/files/civil_rights/documents/Annual Report FY12_fv.pdf (accessed June 12, 2013).

SUMMARY OF THE ARGUMENT

Under the Federal Arbitration Act ("the FAA") general principles of contract law apply to an arbitration agreement, and arbitration agreements are assured treatment no different from that accorded any other contract. Under basic principles of contract law a contract is binding on those who are parties to it, but it is not binding on one who was *not* a party to it and did not later elect to adhere to that contract. Accordingly, while the FAA ensures enforcement of an arbitration agreement against those who are parties to the agreement, the FAA "does not require parties to arbitrate when they have not agreed to do so." *Waffle House,* 534 U.S. at 293 (quoting *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior U.*, 489 U. S. 468, 478 (1989)).

In this case the employer, the petitioner-appellee Rent-A-Center ("Rent-A-Center") secured an arbitration agreement with its employee Nicole Henry. But the Commission was not a party to that arbitration agreement. Not only is the Commission a *non-party* to the arbitration agreement, but the interest it is asserting is not derivative of Henry's and the Commission is not her proxy. The Iowa Civil Rights Commission is charged by the Iowa Legislature with

eliminating unfair and discriminatory practices in Iowa. In prosecuting an employer for violating the Iowa Civil Rights Act, it acts independently to enforce important state law and to vindicate the vital *public* interest in securing fair and non-discriminatory practices.

No decision of the United States Supreme Court holds otherwise; and two opinions of the Court—*Waffle House,* 534 U.S. 279, and *Preston v. Ferrer*, 552 U.S. 346 (2008), both discussed below—require the conclusion that the Commission *in acting as prosecutor and pursuing an enforcement action against an employer for violation of civil rights legislation* is not bound or precluded from doing so on account of the employee's agreement to arbitrate her own claim.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT UNDER THE FEDERAL ARBITRATION ACT AN EMPLOYEE'S PRIVATE ARBITRATION AGREEMENT IS BINDING ON A STATE PUBLIC AGENCY EVEN THOUGH THE AGENCY IS NOT A PARTY TO THE AGREEMENT AND EVEN THOUGH IT IS CHARGED BY STATE LAW WITH THE INDEPENDENT DUTY TO ENFORCE AND PROSECUTE VIOLATIONS OF THE IOWA CIVIL RIGHTS ACT.

The 1925 Federal Arbitration Act was passed in order to counteract judicial suspicion of arbitration and to make clear the federal policy favoring arbitration. *E.g. Dean Witter Reynolds, Inc. v. Byrd*, 470 U. S. 213, 219-20 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Thus section 2 of the FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). As this Court has recognized, "Congress intended to place arbitration agreements upon the same footing as other contracts, where they belong;" *Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816, 818-19 (Iowa 2002) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984), in other words, "as enforceable as other contracts, *but not more so*."

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 n. 12 (1967) (emphasis added).

Accordingly, cases are legion which hold that application of the Federal Arbitration Act requires the conclusion that parties who have agreed to arbitrate a dispute are bound to do so. *E.g.*, *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S.Ct. 500, 503 (2012); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). In short, *parties* to an arbitration agreement are bound by what *they* have said in *their* contract.

Conversely, because the Federal Arbitration Act only requires *parties* who have agreed to arbitrate to do so, "[i]t goes without saying that a contract cannot bind a *nonparty*," *Waffle House*, 534 U.S. at 294 (emphasis added), and that a nonparty cannot be compelled to arbitrate where the nonparty has not agreed to so. *Volt Info. Sci.*, 489 U.S. at 474-75.

These fundamental principles are clear and beyond dispute. Recent cases decided by the United States Supreme Court interpreting and applying the Federal Arbitration Act emphatically underscore these fundamental points. *Nitro-Lift Techs.* , 133 S.Ct.

500 (*Per Curiam*), *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201 (2012), *Rent-A-Center, W., Inc. v. Jackson*, 130 S.Ct. 2772 (2010), *Preston*, 552 U.S. 346, and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), *all* hold that *parties* who have agreed to arbitrate are bound to do so according to *their* agreement, and under the Supremacy Clause of the U.S. Constitution a state's policy-based preference for its courts or a particular state administrative agency to decide a matter does *not* constitute justification for holding that parties do not have to arbitrate.

Not one of these or other opinions by the United States Supreme Court, however, requires the Commission—a nonparty—to arbitrate a violation of the Iowa Civil Rights Act *when it chooses to exercise its prosecutorial enforcement authority*, just because an individual employee signed an arbitration agreement. There is no U.S. Supreme Court opinion that precludes the instant action of the Commission to enforce the Iowa Civil Rights Act or compels it to arbitrate. The Commission is not only a nonparty to the arbitration agreement but is also an agency of the State of Iowa charged with enforcing the Iowa Civil Rights Act and collaborating with its

counterpart federal agencies in the enforcement of federal anti-discrimination law.

Indeed, *Waffle House* and *Preston* make clear that the District Court erred in holding otherwise. 522 U.S. 346; 534 U.S. 279. Each of these Supreme Court opinions recognizes the right of a public agency exercising statutory authority in the public interest, acting "not as adjudicator but as prosecutor, pursuing an enforcement action in its own name or reviewing a discrimination charge to determine whether to initiate judicial proceedings." *Preston*, 552 U.S. at 359. The court below misread both *Waffle House* and *Preston* and erred in limiting *Waffle House* to *federal* agencies. *Id.* at 346; 534 U.S. 279.

EEOC v. Waffle House, Inc.

In *Waffle House*, a former employee of Waffle House Inc. who was subject to an arbitration agreement filed a charge of disability discrimination with the EEOC. 534 U.S. 279. The EEOC investigated, found reasonable cause, attempted conciliation, and after the failure of conciliation commenced suit in federal court seeking injunctive relief and specific relief designed to make the complainant whole, including compensatory and punitive damages.

Relying upon its arbitration agreement with the employee, Waffle House petitioned under the FAA for a stay of the EEOC's action and to compel arbitration; but the District Court denied relief. Adopting a "balancing" approach that balanced the policies underlying the FAA with Title VII and the powers of the EEOC, the Fourth Circuit held that as a nonparty to the arbitration agreement the EEOC could bring an enforcement action, but it was barred from seeking or obtaining victim-specific, individual relief.

The Supreme Court rejected the Fourth Circuit's balancing approach and reversed. Examining the EEOC's powers under Title VII, the Court found that the EEOC was authorized to bring suit to remedy unlawful employment practices and to pursue both the injunctive relief and the victim-specific relief it was seeking in the case. The FAA and policies underlying it ensure enforcement of private agreements to arbitrate, but "nothing in [the FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement." *Id.* at 289 (emphasis added).

Tellingly, the Supreme Court explained, "[t]he FAA does not mention enforcement by *public* agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to

place any restriction on a nonparty's choice of forum." *Id. (*emphasis added*)*. The EEOC was not a party to any arbitration agreement. *Id.* at 294. "No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty." *Id.* The EEOC was not required to obtain the employee's consent in order to prosecute its claim, and its prayer for relief could not be dictated by the employee. Consequently, the EEOC's action was not derivative. Instead the EEOC possessed independent statutory authority to initiate the enforcement action and to determine the relief, including victim-specific relief, that it would pursue in order to vindicate the public interest in non-discriminatory employment practices. "Absent textual support for a contrary view, 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." *Id.* at 291-92 (emphasis added).

Rejecting the applicability of *Waffle House* to public agencies at the state level that possess statutory authority and responsibility to enforce state laws, even ones like the Iowa Civil Rights Commission whose enforcement efforts complement Title VII and are vital to

securing the national interest in fair employment practices, the District Court below erroneously confines *Waffle House* to the EEOC, barring the Commission from proceeding because it is not a "federal agency." Of course, the EEOC is a federal agency, but the Supreme Court's analysis in *Waffle House* did not rely upon the EEOC's federal character as the basis for its decision, but instead focused on the EEOC *as a nonparty* to an arbitration agreement (1) that was in consequence not bound by it and (2) that possessed full authority *as a public agency* pursuing the public interest and empowered by applicable statutes to commit public resources to prosecute and enforce the law.

Rent-A-Center's view would eviscerate the role of state civil rights commissions and fair employment agencies in preventing and eliminating unfair and discriminatory employment practices if private arbitration agreements with employees would bar public enforcement actions by the state commissions. The Supreme Court in *Waffle House* was well aware of this fact. The Commissions of nine states, including the Iowa Civil Rights Commission, filed a Brief of Amici Curiae in *Waffle House* expressing "grave concerns if EEOC's ability to seek full relief is found to be impeded by arbitration agreements.

This concern is based not only on the ability of our enforcement ally [the EEOC] to obtain full relief, but also on the devastating effect on state enforcement if the same limitations are applied to the states."[5] The state commissions communicated to the Court that it "would be an unwarranted federal intrusion on State law to allow an agreement, to which the State is not a party, to preclude the State from pursuing the State's administrative remedies . . . [and enforcing] the State's interest in remedying unlawful employment discrimination."[6] The Court's careful reference to "public" agencies throughout its opinion in *Waffle House* surely was worded so as to include not only the EEOC's but also the state commissions' enforcement efforts. The Supreme Court did not limit its holding in *Waffle House* to "federal" agencies, and the District Court erred in ruling otherwise.

Preston v. Ferrer

This point is confirmed by the Supreme Court's more recent opinion in *Preston*. 552 U.S. 346. On one level *Preston* represents simply the enforcement of a private arbitration agreement against a party to the agreement who was trying to avoid or delay arbitration.

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[5] Br. of Amici Curiae Md. Comm'n on Human Rel., Conn. Comm'n on Human Rights and Opportunities, Iowa Civ. Rights Comm'n, Kan. Human Rights Comm'n, Ky. Comm'n on Human Rights, Mass. Comm'n Against Discrimination, Mich. Dep't of Civil Rights, N.C. Human Rel. Comm'n, R.I. Comm'n for Human Rights in Support of Petr., *EEOC v. Waffle House, Inc.*, 2001 WL 568545 at 4 (No. 99-1823, 534 U.S. 279, (2002)).
[6] *Id.* at 9.

Preston was an attorney rendering services to persons in the entertainment industry who were his clients, and he entered into a contract with Ferrer, a TV personality, which contained an arbitration clause. Ferrer refused to pay Preston the fees provided for in the contract, and Preston invoked the arbitration clause and sought arbitration. Ferrer resisted arbitration and invoked the jurisdiction of the California Labor Commissioner, who had responsibility to enforce the Talent Agency Act. Ferrer claimed that Preston was a "talent agent" under the California Talent Agency Act, that a "talent agent" has to be licensed, that Preston wasn't licensed, and that accordingly Preston's contract with Ferrer was illegal and unenforceable. Ferrer contended that he was not a "talent agent" but instead was an attorney acting as a personal manager, and that the Talent Agency Act didn't apply. The Court viewed Ferrer as attacking the legality of the contract—something which myriad Supreme Court cases in the last half century commit to the arbitrator to resolve—and said that the only issue was whether Preston was, or was not, a "talent agent." Ferrer wanted the Labor Commissioner to adjudicate that issue, but the Court found that the arbitration agreement that Ferrer had signed

committed resolution of that issue and the contract's legality to the arbitrator.

Rent-A-Center views *Preston* as preempting state laws lodging jurisdiction in state administrative agencies to enforce state law, and the court below accepted that broad view. But that view misperceives both what was involved in *Preston* and what the Court said. The facts in *Preston* are that a *party to an arbitration agreement* was trying to avoid it on grounds that the agreement, the FAA, and Supreme Court jurisprudence decisively commit to the arbitrator; and the administrative agency was not seeking on its own initiative to exercise statutory authority to enforce state law. The only question was who decided whether Preston was a "talent agent." Ferrer wanted the Labor Commissioner to adjudicate that issue, and the Supreme Court understandably rejected that effort.

A different case would have been presented had the Labor Commission been acting in its prosecutorial role in an enforcement action the Labor Commissioner herself initiated. Ferrer tried to rely on *Waffle House* to establish the Labor Commissioner's independent authority, but Justice Ginsburg—writing for the 8-Justice majority—distinguished *Waffle House* and rejected Ferrer's argument. *Id.* at

358-59. In *Waffle House,* as Justice Ginsburg explained, "the Court addressed the role of an agency, not as adjudicator but as prosecutor, pursuing an enforcement action in its own name or reviewing a discrimination charge to determine whether to initiate judicial proceedings." *Id.* at 359.

This view is confirmed and was anticipated in the Oral Argument in *Preston*. Transcr., *Preston v. Ferrer*, 2008 WL 117843 at *23-24 (Jan. 14, 2008) (552 U.S. 346 (2008)) (pinpoints correspond to the Westlaw pagination). Addressing Preston's attorney, Justice Kennedy asked, "I suppose if we write the case your way, we have to talk about what happens if this Labor Commissioner had enforcement powers, that they had the sua sponte right to invoke, and that they did?" *Id.* at *57. Preston's attorney replied, "I think the Labor Commissioner probably does. I think it has to do with the adjudicatory versus prosecutorial function of an administrative agency." *Id.* Continuing this line of inquiry, Justice Ginsburg distinguished the role of the Labor Commissioner in *Preston* from that of "[a]n agency like the EEOC [in] *Waffle House*." *Id.* Preston's attorney agreed, "[T]his is an administrative agency providing an adjudicatory forum," and following up, Justice Ginsburg said it was

"quite different from the Labor Commissioner commencing a proceeding." *Id.* at *57-58. Preston's attorney continued to agree. This was not a case of the state agency exercising prosecutorial discretion and "acting in an essentially executive branch function. Here in our case, all they did was supply a hearing room and a hearing officer, an adjudicatory function." *Id.* at *58.

Importantly, as the Oral Argument Transcript and Opinion demonstrate, the Supreme Court in *Preston* did *not* distinguish *Waffle House* because the EEOC was a "federal" agency and the Labor Commission was a "state" agency. *See Preston*, 552 U.S. 346. If that had been a basis for distinction, there would have been no point to this portion of the Oral Argument, and the adjudicatorial versus prosecutorial role of the Labor Commission would have been irrelevant.

As developed in the Commission's Brief at pages 37-42, other state appellate courts have applied the Supreme Court's holding in *Waffle House* to their state civil rights commissions and have held that a private arbitration agreement does not preclude the state agency acting independently to pursue its own action and enforce state law. *See, e.g., Joulé, Inc. v. Simmons*, 944 N.E.2d 143 (Mass.

2011); *Department of Fair Employment and Housing v. Harvest Buick Pontiac GMC, Inc.*, 2002 WL 1939172 (Cal. Dist. Ct. App. Aug. 21, 2002); *Ladenburg Thalmann & Co., v. Matty*, 36 Misc.3d 1243(A) (N.Y. Sup. Ct. 2012).[7]

In the case at hand involving Rent-A-Center, the Commission *is acting* in a prosecutorial role. Unlike *Preston,* this *is* a case being pursued and prosecuted by the Commission as a state agency within the Executive Branch of Iowa Government to enforce state law, namely, the Iowa Civil Rights Act. We turn to the role of the Commission in this case.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE FEDERAL ARBITRATION ACT PREEMPTS THE IOWA CIVIL RIGHTS COMMISSION'S INTEGRATED PROSECUTORIAL AND ENFORCEMENT ROLE THAT IS NOT DERIVATIVE OF THE INDIVIDUAL EMPLOYEE'S COMPLAINT AND THAT IS INTEGRAL TO THE ENFORCEMENT OF BOTH STATE AND FEDERAL ANTI-DISCRIMINATION LAW.

As the Supreme Court did with the EEOC in *Waffle House*, the starting place in this case is to examine the enabling legislation of the Iowa Civil Rights Commission to see if that law, even without

[7]Not only have other state courts reached the same result as in *Waffle House*, state courts have found its reasoning applicable to other state agencies with enforcement powers. *People ex rel. Cuomo v. Coventry First LLC*, 915 N.E.2d 616 (N.Y. 2009); *State ex rel. Hatch v. Cross Country Bank, Inc.*, 703 N.W.2d 562 (Minn. App. 2005).

considering the effect of the FAA, requires the Commission to arbitrate cases because the private parties have agreed to. *See* 534 U.S. 279. The Iowa statutes contain no provision that would require arbitration in the absence of an actual arbitration agreement signed by the Commission. Indeed, if *only* state law were controlling in this case, which concededly it is not, *Heaberlin Farms*, 641 N.W.2d 816, it is clear that even the employee Nicole Henry would not be required to arbitrate her personal civil rights claim. Iowa Code § 679A.1 (b) (2013); *Polk Co. Secondary Roads v. Iowa Civil Rights Comm'n*, 468 N.W.2d 811 (Iowa 1991).

The Commission was established nearly a half century ago by the Iowa Civil Rights Act (ICRA), Iowa Code Chapter 216, and it is both charged and empowered to receive or initiate complaints and process them to the end of preventing and eliminating unfair and discriminatory practices in employment. Iowa Code § 216.15(1) (2013); *Iron Workers Lo. No. 67 v. Hart*, 191 N.W.2d 758, 766 (Iowa 1971) [hereinafter *Iron Workers*]. As Justice, later Chief Justice, Reynoldson stated, "The Iowa legislation is another manifestation of a massive national drive to right wrongs prevailing in our social and economic structures for more than a century." *Iron Workers*, 191

N.W.2d at 765. *Accord* Arthur Earl Bonfield, Speech, *The Origin and Rationale of the Iowa Civil Rights Act*, in *Report to the Iowa Civil Rights Commission* (Des Moines, Iowa July 21, 1990); Arthur Earl Bonfield, *State Civil Rights Statutes: Some Proposals*, 49 Iowa L. Rev. 1067 (1964).

Whereas the EEOC initially had no prosecutorial role in employment discrimination cases, the Iowa Civil Rights Commission has always had this role. The Commission, like the EEOC later, was empowered to seek equitable relief, and this always included both a cease and desist order and a preliminary injunction. *See Iron Workers,* 191 N.W.2d at 761. This is because the ICRA was aimed at "correcting a broader pattern of behavior" rather than "affording merely a remedy in a specific dispute." *Id.* at 770; *accord Estabrook v. Iowa Civil Rights Comm'n*, 283 N.W.2d 306, 308 (Iowa 1979). This remained true even though an individual was authorized to by-pass commission procedures altogether and file directly in the district court. *Estabrook*, 283 N.W.2d at 310. Like the EEOC, its powers are of a public nature, and there is nothing in the Iowa Civil Rights Act or anywhere else in the Iowa Code "suggesting that the existence of an arbitration agreement between private parties materially changes the

[Commission]'s statutory function or the remedies that are otherwise available." *Waffle House*, 534 U.S. at 288.

Nor is the Commission merely a representative of a party to the agreement asserting a derivative complaint. Like the EEOC in *Waffle House,* the Commission need not obtain the complainant Henry's consent to prosecute its claim, nor is the relief it is seeking subject to her dictation. Instead, the Commission acts independently in the public interest in the exercise of its own judgment and the special governmental powers delegated to it to enforce state law and secure important state interests.

First, the Commission does not need the complainant to trigger an investigation; the agency can file its own complaint. Iowa Code § 216.15(1). The Commission also conducts investigations, often taking the form of testing operations, conducted before the filing of a Commission charge. Iowa Code § 216.5(3) (2013). These take place when there is no complaint at all on file. If the test warrants, a Commission charge can follow. *Id.* Thus, the Commission can study discrimination, uncover discrimination, and remedy discrimination entirely on its own without the participation of a complainant.

Second, even when a complainant does file a complaint, as is the case here, the agency is nevertheless still in control of its own proceedings, not the complainant. In the first case decided under the Iowa Civil Rights Act, the Iowa Supreme Court observed that the individual complainant plays a supporting role only. *Iron Workers*, 191 N.W.2d 758 (Iowa 1971).

> The complaint's main function is to trigger Commission investigation and, if probable cause is found, conference, conciliation and persuasion will follow. The agency decides if litigation is necessary. Complainant's importance as an adversary party is not established by the statutory provisions.

Id. at 766.

Third, no person can pursue a discrimination case without first coming through the Commission. *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 37 (Iowa 1993). If a person outside the Commission files a complaint, the Commission has exclusive jurisdiction over the matter for sixty (60) days. 42 U.S.C. § 2000e-5(c) (2012); Iowa Code § 216.16(2)(a) (2013). Even after the period of exclusive jurisdiction, the only control a complainant has on the process is whether to obtain a "right to sue" letter. Although a complainant may withdraw a complaint, "nothing [in the Iowa Civil Rights Act] shall preclude the commission from continuing the investigation and initiating a

complaint on its own behalf against the original respondent, as provided for in the Act, whenever it deems it in the public interest." Iowa Admin. Code ("IAC") r. 161-3.8(3) (2013).

Fourth, the agency controls each step of the process that leads to a public hearing. After the filing of a complaint, the Commission conducts a jurisdictional review to see if the case can be sent to screening. IAC r. 161-3.9 (2013). If the Commission closes the case at this point, the complainant's only option is to seek an administrative appeal–an appeal which the Commission's attorney will then defend. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8 (Iowa 2010). Following jurisdictional review, the Commission performs a screening so that it can determine whether to conduct a full investigation. IAC r. 161-3.12 (2013); Iowa Code § 216.16(7). The Commission seeks information from the parties and reviews the information to determine if there is, in the Commission's judgment, a reasonable possibility of finding probable cause, or if the Commission believes the legal issues in the case are important. IAC r. 161-3.12(1)(f). In this process the Commission decides what information to seek, not the complainant. The Commission decides whether to proceed to full investigation, not the complainant. If the Commission

"screens a case in," it then conducts a full investigation of the matter. Again, what questions to ask, what witnesses to interview, what documents to review, and whether to issue subpoenas and to whom, are entirely in the Commission's control. *See generally* IAC r. 161-3.13 (2013). Neither the complainant nor the respondent has a right to request a subpoena at the investigation stage. IAC r. 161-3.14(3) (2013). If a complainant is not cooperative during the investigation the Commission can close the case. IAC r. 161-3.12(2)(b).

Fifth, in its role as investigator it may also act as a mediator, and the Commission can close a case as an "involuntary satisfactory adjustment" over the complainant's objection if the respondent makes an offer that is "acceptable to the executive director or designee but not to the complainant." *Id.* at (2)(c). The complainant has the opportunity to pursue her own action independent of the Commission mechanism (*see Estabrook*, 283 N.W.2d 306; *Eilders v. Iowa Civil Rights Comm'n*, 2002 WL 535028 (Iowa App.) (No. 00-1277), and then and only then does the complainant's own agreement to arbitrate govern how she can or whether she will pursue such an independent course. If probable cause to believe that the respondent has committed an unfair or discriminatory act in violation of the Civil

Rights Act is found, the Commission is required to undertake conciliation. As stated above, the Commission may close the case over the complainant's objection if a "satisfactory adjustment" acceptable to the Commission's Executive Director is reached. The Commission, or one of its commissioners, must be a signatory to any conciliation agreement. IAC r. 161-3.13(9). Importantly, even if a complainant wants to settle but the Commission does not, the Commission is not obligated to do so and can refuse to sign. If the Commission thinks that either a mediation or conciliation agreement is not being followed, it can conduct an investigation of the issue. Iowa Code § 216.15(10)(a). The Commission, in its discretion, can seek to enforce a conciliation or mediation agreement. Iowa Code § 216.15(10)(b); Iowa Code § 216.15(14) (mediation enforcement). If conciliation fails, the case is then placed in line for further prosecution at a public hearing. Iowa Code § 216.15.

Sixth, not every case where probable cause is found, and that cannot be conciliated, must go to hearing. Instead the Commission reviews the case to determine whether the *Commission* believes the case is litigation-worthy. As this Court said in *Estabrook*, "the legislative intent was to permit the commission to be selective in the

cases singled out to process through the agency, so as to better impact unfair or discriminatory practices with highly visible and meritorious cases." 283 N.W.2d at 311; *see* IAC r. 161-3.12(2)(d) ("The complaint may be administratively closed after a probable cause determination has been made where it is determined that the record does not justify proceeding to public hearing."); IAC r. 161-3.16(7) (2013) (showing again the independence of the Commission, the complainant may not seek reopening of a decision not to litigate); IAC r. 161-4.2(1)(a) (2013); 1981 Iowa Op. Atty. Gen. 181, 1981 WL 315343.

Seventh, once the Commission staff determines that it is going to proceed to public hearing, the Commission drafts a "statement of charges" that sets out what issues will be litigated. IAC r. 161-4.2(1). In this statement of charges the Commission, in its sole discretion, can identify issues which "[t]he commission has elected not to prosecute despite a probable cause finding." *Id.* at (1)(d)(2). Such issues are not made part of the notice of hearing and are not litigated at the hearing. *Id.* at (1)(e). The complainant has no input on the determination whether to litigate or what issues to litigate.

Eighth, the parties in any contested case proceedings are the employer and the Commission, not the complainant, *Iron Workers,*

191 N.W.2d at 766, and the Commission represents its own interests. IAC r. 161-4.1(2) (2013); Iowa Code § 216.15(7) ("The case in support of such complaint shall be presented at the hearing by one of the commission's attorneys or agents."). The Commission may on its own motion review any decision of an administrative law judge, IAC r. 161-4.23(2) (2013), but Commission orders are not orders of a court and may not be levied upon or enforced through contempt powers. Instead, Commission orders must be converted to judicial orders through a petition for enforcement, and only the Commission may seek judicial enforcement of any resulting agency order. Iowa Code § 216.17(2) (2013); *Christensen v. Iowa Civil Rights Comm'n*, 292 N.W.2d 429, 431 (Iowa 1980); *Wilson & Co. v. Oxberger*, 252 N.W.2d 687, 689 (Iowa 1977). More specifically, a complainant does not have the authority to seek enforcement of a Commission order in the complainant's favor. Iowa Code § 216.17(3); *Estabrook*, 283 N.W.2d at 313(McCormick, J, concurring).

In sum, the Commission acts independently of the complainant and is, like the EEOC, "master of its own case" authorized by the governing statute "to evaluate the strength of the public interest at stake." *Waffle House*, 534 U.S. at 291; *Estabrook*, 283 N.W.2d at

310-311. This is precisely the prosecutorial and enforcement role understood and described by the U. S. Supreme Court in *Preston* to be quite different from the merely adjudicative role of the administrative agency in that case. 552 U.S. 346. In the proceedings under California law in *Preston,* the Court clarified, "the Labor Commissioner functions not as an advocate advancing a cause before a tribunal authorized to find facts and apply the law; instead, the Commissioner serves as an impartial arbiter." *Preston*, 552 U.S. at 359.

This distinction is significant and very real and is the only way to understand *Waffle House* and *Preston.* When a state agency functions merely as alternate *forum for adjudication* to which a party bound by an arbitration agreement repairs, the FAA does not permit the state to interpose the agency between parties to the agreement and the arbitrator. But when a state agency functions as an active participant in litigation prosecuting violations of state law and discharging its independent responsibility to enforce, for example, state civil rights legislation, the FAA simply does not apply and the public agency is not bound by the private parties' arbitration agreement.

The distinction just described is not one that Rent-A-Center has acknowledged in this case, and the District Court in its ruling below did not recognize it. It was, however, nicely expressed by the Administrative Law Judge who ruled on Rent-A-Center's motion to dismiss or in the alternative, to stay proceedings and compel arbitration:

> The closer question is whether the commission's role in this case is similar to a party-prosecutor like the EEOC in *Waffle House*, or is the commission's role comparable to an adjudicatory agency [as in *Preston v. Ferrer*]. . . .
>
> In my view, the commission's role in this proceeding is very comparable to the EEOC's role in *Waffle House*. Administrative enforcement actions, by their very nature, may involve one arm of a regulatory agency occupying a prosecutorial role while the members of the board or commission occupy an adjudicatory role. . . . In this case, the commission, through its assistant attorney general, is acting in a party-litigant role similar to that of the EEOC. The administrative law judge is an independent decision-maker, which is the same role as the district court in *Waffle House*. The assistant attorney general can seek similar relief that the EEOC sought in *Waffle House*. The only real difference between this action by the commission and the action by the EEOC in *Waffle House* is the choice of forum: a hearing before an administrative law judge versus a trial before the district court.

Order Granting Extension of Requests for Deadlines [Administrative Law Judge's Ruling on RAC's Motion to Dismiss, Dated April 19, 2011], Record on Appeal at 88-89.

The Commission's adjudicative power represents an intended part of its integrated prosecutorial and enforcement authority.[8] The holding and rationale in *Waffle House* apply equally to the Commission and state civil rights agencies like it. That the Commission, from the perspective of its statutorily granted authority, is actually more powerful than the EEOC and plays critical roles in both the state and federal enforcement schemes makes the applicability of *Waffle House* even more compelling.

The court below did not appreciate the role of state and local deferral agencies in the federal civil rights scheme. Rather than being peripheral, in the real world of practical experience this role is central. Indeed, the Commission's role is so central to the national policy to eliminate invidious discrimination that Congress cannot have intended that the FAA and private arbitration agreements to which state regulatory agencies are not a party would preempt them from exercising their independent authority to pursue suit in such forums as state laws may provide. "The [Iowa] legislature apparently also enacted chapter [216] to provide a legal enforcement tool for federal civil rights legislation. . . . That Congress anticipated creation

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[8] *See* Bonfield, *The Origin and Rationale of the Iowa Civil Rights Act* at 10-14; Bonfield, 49 Iowa L. Rev. at 1110-1120.

of state commissions to effect this federal [anti-discrimination] mandate is clear from examination of the legislation." *Estabrook*, 283 N.W.2d at 309. In its discussion of a preemption issue involving ERISA and state laws barring sex discrimination, the U.S. Supreme Court in *Shaw v. Delta Airlines Inc.* recognized the integral role state civil rights agencies such as the Iowa Civil Rights Commission play in the enforcement of federal anti-discrimination law and is therefore relevant to this Court's construction of the FAA:

> State laws obviously play a significant role in the enforcement of Title VII. . . .
>
> Given the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII's commands. . . . This would frustrate the goal of encouraging joint state/federal enforcement of Title VII; an employee's only remedies for discrimination prohibited by Title VII in ERISA plans would be federal ones. Such a disruption of the enforcement scheme contemplated by Title VII would, in the words of § 514(d), "modify" and "impair" federal law.
>
> Pre-emption of this sort not only would eliminate a forum for resolving disputes that, in certain situations, may be more convenient than the EEOC, but also would substantially increase the EEOC's workload. . . , [causing it either] to devote less time to each individual case or to accept longer delays in handling cases.

463 U.S. 85, 101-102, 102 n. 23 (1983).

It is because of the limitations on the EEOC's abilities that over ninety state and local agencies–including the Iowa Civil Rights Commission–have workshare agreements with the EEOC so that the leg work in federal antidiscrimination enforcement is performed at the state level. *See* Williams, Adley & Company-DC, LLP, *Evaluation of the Management of the EEOC's State and Local Programs Project Number 2010-09-AEP Final Evaluation Report*, http://www1.eeoc.gov//eeoc/oig/2010-09-aep.cfm?renderforprint=1 (March 10, 2011). The key role of the state Commissions in enforcement of longstanding *federal* civil rights law further demonstrates that Congress cannot have intended the result reached by the District Court.

CONCLUSION

This is an extremely important case, especially because the Iowa Supreme Court is known nationally for its leadership in the area of civil rights. If the Court affirms the ruling below, the precedent would adversely affect millions of non-union employees across the nation and the enforcement authority of state civil rights agencies could be gutted; and on the eve of the 50th Anniversary of the Civil Rights Act of 1964, that landmark legislation would be dramatically undercut. Indeed, not just state civil rights agencies would be affected but any agency charged with enforcement powers under state law affecting the states' citizens and residents. The District Court erred in interpreting the FAA to bar the Commission's action where the Commission had not agreed to arbitrate. This Court should reverse the District Court so that the Commission is free to act in the public interest and vigorously enforce the Iowa Civil Rights Act.

Respectfully submitted,

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I, David S. Walker, hereby certify that on the 19th day of June, 2013, I or a person acting on my behalf did serve the Brief of Amicus Curiae on Behalf of the National Association for the Advancement of Colored People on all other parties to this appeal by mailing 2 copies thereof to the respective counsel for said parties:

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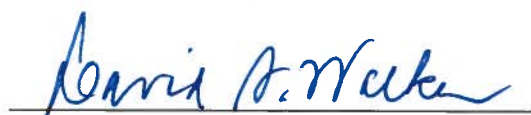

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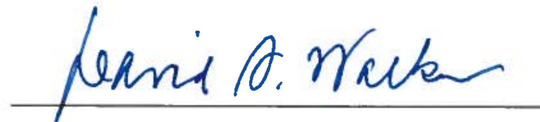
I, David S. Walker, hereby certify that I or a person acting on my behalf filed the Brief of Amicus Curiae on Behalf of the National Association for the Advancement of Colored People on the 19th day of June, 2013, by delivering 18 copies thereof to the Clerk of the Iowa Supreme Court, Iowa Judicial Building, 1111 E. Court Avenue, Des Moines, Iowa 50319.



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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of I.R.A.P. 6.903(1)(g)(1) and 6.906(3) because this brief contains 6,998 words, excluding the parts exempted by that rule.

This Brief complies with the typeface and typestyle requirements of I.R.A.P. 6.903(1e)-(f) because this brief in printed in 14-point Georgia for the body and 14-point Arial (sans serif font) for headings.

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