No. 15-90021

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Petitioner Cross-Respondent

v.

KOCH FOODS OF MISSISSIPPI, LLC,

Defendant-Respondent Cross-Petitioner

On Petition for Permission to Appeal from the
U.S. District Court, S.D. Miss., Nos. 3:10-CV-135; 3:11-CV-391
Hon. Daniel P. Jordan III, United States District Judge

ANSWER OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO CROSS-PETITION FOR PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO 28 U.S.C. § 1292(b)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Miscellaneous

INTRODUCTION

Plaintiff-Petitioner Cross-Respondent Equal Employment Opportunity Commission ("EEOC" or "Commission") submits this answer to Defendant-Respondent Cross-Petitioner Koch Foods of Mississippi, LLC's ("Koch Foods") cross-petition requesting permission to appeal the district court's September 22, 2014 and October 29, 2014 orders ("Orders"), Nos. 10-cv-135 Docket Nos. (R.) 483 & 490, pursuant to Fed. R. App. P. 5(b)(2). *See id.* (answer to petition requesting permission to appeal may be filed within 10 days after the petition is served); Fed. R. App. P. 26.

Koch Foods' cross-petition asks this Court to exercise review of the following question: "Is the EEOC, by virtue of 8 U.S.C. § 1367, exempt from the obligation imposed on all parties under Federal Rule of Civil Procedure 26 to produce all relevant, non-privileged information requested in discovery where the district court has ruled the information is relevant and discoverable?" Koch Foods Answer & Cross Pet. 1. Koch Foods asserts that this question—but not the questions the EEOC presented in its petition for permission to appeal—is appropriate for interlocutory appeal under 28 U.S.C. § 1292(b). Koch Foods Answer & Cross Pet. 6-7. In the EEOC's view, the district court correctly decided Koch Foods' question, holding that federal law precludes discovery of U-visa applications and related materials ("U-visa discovery") from the EEOC. Moreover,

Koch Foods has never before argued that its question should be reviewed under 28 U.S.C. § 1292(b), and does not now demonstrate that its question meets Section 1292(b)'s standard for interlocutory appeal.

ARGUMENT

This Court should decline to exercise review over the question presented in Koch Foods' cross-petition. The district court correctly decided Koch Foods' question, and it is a straightforward issue that does not require further review. Furthermore, Koch Foods' cross-petition does not demonstrate that the question presented meets the standard for interlocutory appeal under Section 1292(b).

I. The district court correctly held that federal law precludes U-visa discovery from EEOC.

Koch Foods' petition presents a question that is easily answered by interpreting a statute and a related regulation. This is true even though the parties disagree on whether the factual record substantiates Koch Foods' allegation that U-visa discovery is relevant. Koch Foods asserts that "[d]iscovery [] revealed [] that the Plaintiffs and other claimants claimed to be victims of outrageous abuse and mistreatment as a means to obtain visas that confer legal status to live and work in the United States. " Koch Foods Answer & Cross-Pet. 3 (citing R.327-330). The EEOC contests Koch Foods' hypothesis that individual plaintiffs ("Individual Plaintiffs") and class members on whose behalf the EEOC brought suit

("Aggrieved Individuals") fabricated the allegations underlying this case to obtain U-visas. In fact, Koch Foods' speculation relies on testimony that does not even refer to U-visas.[1] But even setting aside this factual dispute, Koch Foods' question involves a straightforward legal issue that the district court correctly resolved in the EEOC's favor.

Koch Foods incorrectly argues that there is no basis for exempting the Commission from U-visa discovery. Koch Foods Answer & Cross-Pet. 19. However, a federal statute and regulation, 8 U.S.C. § 1367 and 8 C.F.R. § 214.14, establish a privilege that prohibits the Commission from disclosing U-visa applications—and, as explained in the EEOC's petition for interlocutory appeal, extends to the Aggrieved Individuals on whose behalf the Commission brought

[1] Koch Foods did not argue that U-visa discovery is relevant until late in this litigation, *see* EEOC Pet. 4, and the evidence Koch Foods invoked failed to validate its new theory. For example, Koch Foods emphasized that counsel objected to deposition questions relating to immigration status. R. 330 at 20-21. But counsel merely invoked the protective order in effect at the time, which barred discovery relating to immigration status. *See* R. 154 at 3-4. Also, Koch Foods made much of the fact that certain Individual Plaintiffs and Aggrieved Individuals were recently married, implying that those individuals only sought to "spread [] immigration benefits" to their new spouses. R. 330 at 6 & n.8. However, Koch Foods presented no evidence that those individuals chose to marry for illicit purposes. R. 361 at 4. Koch Foods also stressed that certain employees who testified to mistreatment in the workplace previously signed a document—at Koch Foods' behest—stating that they did not experience or know of mistreatment. R. 330 at 19. But those employees also testified, for example, that they signed the document without understanding its contents, or that they feared consequences if they refused to sign. *See* R. 361 at 20-21; R. 362 at 29-30. Moreover, boilerplate declarations prepared by the employer should be accorded little weight. R. 361 at 19-20; R. 362 at 29-30. Based on such questionable evidence—which does not even pertain to U-visas—Koch Foods leapt to the conclusion that Individual Plaintiffs and Aggrieved Individuals fabricated the allegations underlying this lawsuit to obtain U-visas.

suit. EEOC Pet. 9-11. The statute is clear: it prohibits "use by or disclosure to *anyone*" other than agency officers and employees "of *any* information which relates to a [U-visa applicant]." 8 U.S.C. § 1367(a)(2) (emphases added). This broad prohibition, precluding disclosure of "*any* information" to "*anyone*," easily encompasses civil discovery, despite Koch Foods' assertion otherwise. Koch Foods Answer & Cross-Pet. 10. And, 8 C.F.R. § 214.14(e)(2) explicitly provides that the statutory confidentiality provision applies equally to the EEOC, as a certifying agency: "Agencies receiving information under this section … are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. [§] 1367." *See also* 8 C.F.R. § 214.14(a)(2) (the EEOC is a certifying agency). Koch Foods does not contest that the regulation renders Section 1367's confidentiality protection applicable to the EEOC.

Even if Section 1367 does not constitute an evidentiary privilege, the statute and regulation together express a strong federal policy against disclosure of U-visa material, which warrants blocking discovery under Fed. R. Civ. P. 26(c). Again, Section 1367 bars disclosure of U-visa applications and related information to "*anyone*," with limited exceptions not applicable here. Courts should rightly consider this policy—and the purposes behind it—and accord it significant weight when parties seek U-visa discovery. Here, the strong policy against disclosure

outweighs the marginal relevance of U-visa discovery. Therefore, the district court reached the correct result in prohibiting U-visa discovery from the EEOC.

Koch Foods also contends that Section 1367 does not bar disclosure of U-visa applications in civil litigation because the statute does not explicitly refer to discovery, relying on *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961). Koch Foods Answer & Cross-Pet. 8-10. But although *St. Regis* indicates that a statutory confidentiality provision must plainly encompass civil discovery, it does not demand an explicit statutory reference to civil discovery. 368 U.S. at 218. And here, as explained, Section 1367 is readily understood to include civil discovery because its broad coverage is clear from the statutory text. Section 1367 prohibits "disclosure to *anyone*" of "*any* information," and is easily distinguished from more narrowly drawn confidentiality provisions, like the one at issue in *St. Regis*. *See* 368 U.S. 208, 216 & n.5, 218-220 (statute, which restricted Commerce Department from publishing, allowing examination of, or using census reports for other than statistical purposes, did not preclude private parties from disclosing reports to the Federal Trade Commission (FTC), particularly because separate statute authorized FTC to obtain the information the reports contained from private parties).

Koch Foods also invokes *Zambrano v. INS*, 972 F.2d 1122 (9th Cir. 1992), *see* Koch Foods Answer & Cross-Pet. 8-10, but that decision is inapposite.

Zambrano involved a provision that prohibited the Department of Justice (DOJ) from using information furnished by immigrants who applied for temporary status for purposes other than processing applications; that is, DOJ could not use that information "to prosecute, deport or otherwise penalize" applicants. *Id.* at 1125. In *Zambrano*, individuals sought to bring a class action against the Immigration and Naturalization Service (INS), alleging that INS denied status to applicants or discouraged applications due to regulations that had been deemed invalid. *Id.* at 1124. The court held that the provision in question—which was designed to protect applicants—did not shield INS from releasing names of affected applicants for purposes of identifying class members. *Id.* at 1124-26.

Nor does a Department of Homeland Security (DHS) instruction on Section 1367 provide support for Koch Foods' position. *See* Koch Foods Answer & Cross-Pet. at 11-12. The DHS instruction identifies an exception to Section 1367 where "disclosure of protected information is mandated by court order or constitutional requirements," such as criminal prosecutors' *Brady* or *Giglio* disclosure obligations arising under the Fourteenth Amendment's Due Process Clause. Department of Homeland Security, *Implementation of Section 1367 Information Provisions* § VI(A)(1)(e), http://www.dhs.gov/sites/default/files/publications/implementation-of-section-

%201367-%20information-provisions-instruction-002-02-001_0_0.pdf; *see also Brady v. Maryland*, 373 U.S. 83, 86 (1963) (due process requires disclosure of exculpatory evidence to accused); *Giglio v. United States*, 405 U.S. 150, 155 (1972) (due process requires disclosure of material bearing on credibility of prosecution witness). Koch Foods' contention that civil discovery is analogous to prosecutors' constitutional disclosure obligations is not persuasive.

Finally, permitting U-visa discovery—from the EEOC itself or from Individual Plaintiffs and Aggrieved Individuals—will impede the EEOC's enforcement efforts, contrary to Koch Foods' assertion otherwise. *See* Koch Foods Answer & Cross-Pet. 13-14. Koch Foods appears to argue that permitting U-visa discovery in this case would not impede the EEOC's enforcement efforts because such discovery (in Koch Foods' view) is relevant to the parties' claims and defenses. Koch Foods Answer & Cross-Pet. 13-14. But Koch Foods understates the degree to which allowing U-visa discovery would hinder the EEOC's efforts—not only in this case, but in other cases where the EEOC brings suit on behalf of vulnerable immigrant workers. The EEOC's enforcement suits depend on employees' involvement, but immigrant workers may be discouraged from participating if there is a risk of U-visa discovery. Even workers who have not sought U-visas themselves may avoid participating in civil rights suits if U-visa

applications are disclosed, perhaps because they fear their own status will be revealed, or because their status may change in the future. *See* EEOC Pet. 12-13; *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064-65 (9th Cir. 2004) (both documented and undocumented workers may fear inquiries into immigration status).

The U-visa program and its confidentiality provisions were adopted to assuage these very fears. Congress created the U-visa program to encourage immigrants without status to report certain crimes, thereby enabling government enforcement efforts. And Congress established the confidentiality provisions to protect U-visa applicants from the perpetrators of those crimes, due to the risk that perpetrators would misuse sensitive immigration information to retaliate against individuals who reported crimes. *See* EEOC Pet. 7-8 (discussing statutory purpose and legislative history of statutes establishing U-visas and the confidentiality protections).[2]

Moreover, vindicating the civil rights of immigrant workers is integral to the EEOC's enforcement efforts. One of the EEOC's enforcement priorities under the

[2] Koch Foods expounded a narrow view of the purposes of the U-visa program and its confidentiality provisions, stating that U-visas were designed only to "provide legal status to victims of certain crimes" and that Congress enacted Section 1367 "to protect undocumented immigrants who report crimes from deportation." Koch Foods Answer & Cross-Pet. 9-10, 13. Although these are certainly among the purposes of the U-visa program and its confidentiality provisions, they are by no means the only purposes. Congress specified that the U-visa program is designed to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute" crimes "while offering protection to victims of [] offenses," making clear that provisions for victim protection are closely tied to law enforcement goals. Pub. L. No. 106-386, 114 Stat. 1464 § 1513(a)(2)(A) (2000).

agency's current Strategic Enforcement Plan—which was approved by the bi-partisan Commission after public input and a public meeting—is "Protecting Immigrant, Migrant & Other Vulnerable Workers." U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan FY 2013-2016* 1, 4-5, http://www.eeoc.gov/eeoc/plan/upload/sep.pdf. The Strategic Enforcement Plan explains that the EEOC has prioritized this goal because "vulnerable workers [] may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them." *Id.* at 1. This focus of the agency's Strategic Enforcement Plan underscores that allowing U-visa discovery from the EEOC—or from Aggrieved Individuals themselves—will hinder the EEOC in carrying out its enforcement mission.

II. Koch Foods fails to demonstrate that the question presented for review meets the standard articulated in 28 U.S.C. § 1292(b).

As the EEOC argued in its petition for interlocutory appeal, this Court should exercise appellate review over the questions the Commission presented. However, this Court should decline to exercise review over the question Koch Foods presented, because it involves a straightforward legal issue—which the district court correctly decided—and because Koch Foods has not demonstrated that its question meets the standard for interlocutory appeal.

Koch Foods asserts that the question it presented—but not the EEOC's questions—is a "controlling question of law as to which there is substantial ground for difference of opinion, [where] … an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).[3] As an initial matter, it is worth noting that Koch Foods has never before identified this question as an appropriate issue for interlocutory appeal. On the contrary, in its opposition to the EEOC's motion for certification, Koch Foods strenuously argued against interlocutory appeal, asserting that "[t]he [district court's] orders do not present controlling questions of law, and there is no substantial ground for a difference of opinion regarding the Court's rulings." R. 506 at 1. Now, however, Koch Foods argues for the first time that its Section 1367 question—an issue the district court decided in those very same orders—is appropriate for interlocutory appeal under Section 1292(b).

Moreover, Koch Foods' cross-petition fails to demonstrate that the question presented meets the Section 1292(b) standard. To begin, Koch Foods does not explain how its Section 1367 question gives rise to substantial difference of opinion. Without providing any example or citation, Koch Foods simply asserts

[3] EEOC's petition presented the following questions: 1) whether federal law (specifically 8 U.S.C. § 1367) protects Individual Plaintiffs and other Aggrieved Individuals from disclosing U-visa application information; and 2) whether efforts to obtain U-visas and other immigration protections are discoverable to test credibility. EEOC Pet. 1.

that "substantial grounds for a difference of opinion exist concerning" its Section 1367 question. Koch Foods Answer & Cross-Pet 18. This unsupported statement is far from sufficient to demonstrate that Koch Foods' question meets Section 1292(b)'s standard for interlocutory appeal.

Also, it is difficult to understand why Koch Foods views its Section 1367 question as presenting a controlling question of law as to which substantial ground for difference of opinion exists, while simultaneously asserting that the EEOC's question regarding the same statute does not meet this standard. *See* Koch Foods Answer & Cross-Pet. 18-19. In contrast to Koch Foods, the EEOC adequately explained why its Section 1367 question—whether federal law (specifically 8 U.S.C. § 1367) protects Individual Plaintiffs and other Aggrieved Individuals from disclosing U-visa application information—*does* give rise to "substantial ground for difference of opinion." EEOC Pet. 17-18. And, the district court recognized that the EEOC's Section 1367 question meets this standard, invoking the principle that "novel and difficult questions of first impression" may give rise to substantial ground for difference of opinion, citing the lack of "authoritative guidance on [the EEOC's Section 1367] question," and emphasizing that "resolution [of the EEOC's question] will have an extraordinarily significant impact on this litigation and potentially others." EEOC Pet. Ex. A (R. 513) at 5-6 (citation omitted).

Koch Foods also fails to demonstrate that resolving its Section 1367 question is likely to "materially advance the ultimate termination of the litigation." Koch Foods' cross-petition asserts that resolving its Section 1367 question would materially advance this litigation by simplifying discovery. Koch Foods Answer & Cross-Pet. 19-20. And, Koch Foods states that "the district court concluded in its certifying order [that] an early resolution of the issue will materially advance the ultimate termination of the litigation." Koch Foods Answer & Cross-Pet. 19. The EEOC agrees with the general principle that avoiding unnecessary discovery may materially advance litigation, and the EEOC's petition argued that resolving the questions the EEOC presented for interlocutory appeal would advance this litigation for that very reason. EEOC Pet. 19. But the district court never stated that early resolution of *Koch Foods*' Section 1367 question will materially advance the ultimate termination of the litigation; it referred to the *EEOC's* Section 1367 question. *See* EEOC Pet. Ex. A (R. 513) at 6. Of course, the district court could not have been referring to the question Koch Foods now raises because Koch Foods never even argued that the district court should certify its Section 1367 question for interlocutory appeal.

In fact, resolving Koch Foods' question would not streamline this litigation to the degree Koch Foods claims. Koch Foods asserts that "[i]f the EEOC is

improperly exempted from producing the information, the only means to obtain the requested information is to serve and enforce third party subpoenas on over 100 claimants." Koch Foods Answer & Cross-Pet. 19. That is, Koch Foods implies that it would not need to seek U-visa discovery from Aggrieved Individuals if it could obtain discovery from the EEOC, suggesting that a resolution in its favor would prevent burdensome discovery. But given the broad U-visa discovery Koch Foods seeks, it is difficult to believe that Koch Foods would forgo U-visa discovery from Aggrieved Individuals even if it were permitted to obtain discovery from the EEOC.

The EEOC plays a limited role in the U-visa application process. Law enforcement agencies, like the EEOC, complete an initial certification. 8 C.F.R. § 214.14(c). After initial certification, the applicant submits her U-visa application forms to U.S. Citizenship and Immigration Services, which determines whether the applicant receives a visa. *Id.*; 8 U.S.C. § 1101(a)(15)(U)(i). The district court permitted discovery of three U-visa application forms (with some sections omitted) from Individual Plaintiffs and Aggrieved Individuals: Form I-918, Petition for U Nonimmigrant Status; Form I-918 Supplement A, Petition for Qualifying Family Member of U-1 Recipient; and Form I-918 Supplement B, U nonimmigrant Status Certification. EEOC Pet. Ex. C (R. 483) at 13; *see also I-918, Petition for U*

Nonimmigrant Status, http://www.uscis.gov/i-918. Only one of these forms—Supplement B—pertains to law enforcement certification.

Again, given the EEOC's limited role as an initial certifier, and given that Koch Foods sought discovery of U-visa application forms covering matters beyond certification, it is difficult to accept Koch Foods' implication that it would not seek U-visa discovery from individuals even if it could obtain discovery from the EEOC. This undermines Koch Foods' claim that resolving its Section 1367 issue would materially advance this litigation by streamlining discovery. But Koch Foods' point that streamlining discovery may materially advance litigation does support exercising judicial review over the questions the EEOC presented. If this Court resolves either of those questions in the EEOC's favor, Koch Foods would not be permitted to seek U-visa discovery from Individual Plaintiffs or Aggrieved Individuals, significantly narrowing the scope of discovery. *See* EEOC Pet. 19.

In summary, Koch Foods has not demonstrated that its Section 1367 question meets the Section 1292(b) standard. Koch Foods has never before argued that this question is appropriate for interlocutory appeal, and in fact previously asserted that the district court's Orders did not address any question that met the Section 1292(b) standard. Koch Foods fails even to explain how its Section 1367 question gives rise to a "substantial difference of opinion." And, it is difficult to

accept Koch Foods' claim that resolving the question in its favor would streamline discovery.

CONCLUSION

For the reasons stated above and in its petition for interlocutory appeal, the Commission respectfully requests that this Court deny Koch Foods' cross-petition for interlocutory appeal, grant the EEOC's petition for interlocutory appeal, and reverse the Orders and remand for further proceedings. The Commission asks this Court to hold that U-visa discovery is barred because federal law prohibits disclosure, and because such discovery is not available to assess credibility in light of the *in terrorem* effect.

Respectfully submitted,

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Dated: August 5, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the typeface requirements of Fifth Cir. R. 32.2 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font in the body and 12-point Times New Roman font in the footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 5, 2015, I filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit via the CMF/ECF system, thereby serving the attorneys of record listed below:

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