No. 13-1019

In the Supreme Court of the United States

MACH MINING, LLC,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATES OF ARIZONA, HAWAII, ILLINOIS, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

THOMAS C. HORNE
Attorney General of Arizona
ROBERT L. ELLMAN
Solicitor General
ROSE A. DALY-ROONEY*
CHRIS CARLSEN
Assistant Attorneys General
400 W. Congress, Bldg. S-315
Tucson, AZ 85701
Phone (520) 628-6756
Rose.Daly-Rooney@azag.gov
* *Counsel of Record*

Counsel for Amici Curiae States

[additional counsel listed on signature page]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI CURIAE*

Amici Curiae, the States of Arizona, Hawaii, Illinois, and Washington (the "*Amici* States") have a strong interest in effective enforcement of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, and of state anti-discrimination laws that parallel Title VII. To avoid unnecessary duplication of efforts and provide for the prompt resolution of charges, the EEOC enters into worksharing agreements with state and local agencies. 42 U.S.C. § 2000e-8(b); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 122 (1988) (noting that Title VII supports worksharing agreements to avoid "unnecessary duplication of effort or waste of time"). State and local agencies must meet standards of capability, performance, and compatibility with EEOC's charge processing systems and methods to be designated as Fair Employment Practice Agencies ("FEPAs"). 29 C.F.R. § 1601.70; *see also New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63–64 (1980) ("Congress envisioned that Title VII's procedures and remedies would 'mesh nicely, logically, and coherently with the State and city legislation,' and that remedying employment discrimination would be an area in which '[t]he Federal Government and the State governments could cooperate effectively.'") (quoting 110 Cong. Rec. 7205 (1964) (remarks of Sen. Clark)). The EEOC and FEPAs work together to investigate charges of discrimination and, when possible, conciliate charges of discrimination.[1] For example, the Arizona Civil Rights Division ("ACRD"), Hawaii Department of Labor

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[1] *See, e.g., Harassment Charges, EEOC and FEPA Combined: FY 1997 - FY 2011*, http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm (last visited Oct. 27, 2014).

and Industrial Relations, Illinois Department of Human Rights, and Washington Human Rights Commission, having met these standards, are designated FEPAs. 29 C.F.R. § 1601.74 (listing designated FEPAs that include forty-six state agencies as well as many city agencies).

The ACRD enforces the Arizona Civil Rights Act ("ACRA") that has numerous provisions that parallel Title VII provisions. *See* Ariz. Rev. Stat. §§ 41-1461–65. Other *Amici* States have laws that parallel Title VII provisions. *See, e.g.*, Haw. Rev. Stat. § 378-2. Similar to the enforcement procedures under Title VII, once the ACRD determines that reasonable cause exists, it shall "endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." Ariz. Rev. Stat. § 41-1481(B); *see also* Haw. Rev. Stat. § 368-13(d) (same).[2] "Nothing said or done during and as a part of these informal endeavors may be made public by the [ACRD]."[3] Ariz. Rev. Stat. § 41-1481(B). If the ACRD "has not accepted a conciliation agreement to which the

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[2] Numerous state employment discrimination laws include provisions that the FEPA will "endeavor to eliminate" the discriminatory or unfair practice by "conference, conciliation, and persuasion" after a reasonable, substantial, or probable cause determination. *See, e.g.,* Colo. Rev. Stat. Ann. § 24-34-306(2)(b)(II); Cal. Gov. Code § 12963.7; Idaho Code § 67-5907; Kan. Stat. Ann. § 44-1005(e); 5 Me. Rev. Stat. § 4612(3); Mo. Ann. Stat. § 213.075(3); Neb. Rev. Stat. § 48-1118(1).

[3] Other state employment discrimination laws also parallel the requirement for the FEPA to keep confidential the information shared during conciliation. *See, e.g.*, Cal. Gov. Code § 12963.7; 5 Me. Rev. Stat. § 4612(3); Neb. Rev. Stat. § 48-1118(1).

respondent and the charging party are parties" within thirty days of issuing the cause determination, the ARCD may bring suit to eradicate unlawful employment practices. Ariz. Rev. Stat. § 41-1481(D). Although several differences exist, the ACRA is "generally identical" to Title VII, and therefore Title VII case law can be persuasive in interpreting portions of the ACRA. *Bodett v. Cox Commc'n Inc.*, 366 F.3d 736, 742 (9th Cir. 2004) (quoting *Higdon v. Evergreen Int'l Airlines, Inc.*, 673 P.2d 907, 909-10 n. 3 (Ariz. 1983)).

Because the *Amici* States work with EEOC to eliminate discrimination in the workplace and have state provisions that parallel Title VII's conciliation requirement, they have a compelling interest in having this Court affirm the Seventh Circuit's bright-line rule and hold that EEOC's conciliation efforts are not subject to judicial review.

SUMMARY OF ARGUMENT

The Seventh Circuit applied the unambiguous language of 42 U.S.C. § 2000e–5(b) and correctly adopted a bright-line test for judicial review of conciliation. *EEOC v. Mach Min., LLC*, 738 F.3d 171, 184 (7th Cir. 2013). Under this bright-line rule, if the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, no additional judicial review is required. *Id*.

The Seventh Circuit's statutory interpretation is consistent with Title VII's purpose because judicial review of conciliation efforts does not promote the elimination of unlawful employment practices through

informal processes prior to suit. Rather, the "failure to conciliate" defense: (1) leads to divergent views on the sufficiency of agency conciliation as a matter of law and ad hoc notions of reasonableness that are difficult to apply more broadly, (2) holds the EEOC and FEPAs accountable retroactively for new requirements, and (3) encourages employers to test the legal boundaries of the defense without risk

Under these conditions, judicial review of conciliation creates an incentive for employers to allow the suit to go forward no matter how diligently the EEOC, or state agencies similarly charged with ending employment discrimination, engage in the conciliation process. This incentive becomes more powerful the greater the potential liability and the amount sought in settlement. Whether employers tactically undermine the conciliation process, simply refuse to allow it to succeed, or find fault in the EEOC not accepting their proposal, the potential to find flaws in the conciliation process gives employers an opportunity to absolve their alleged unlawful actions before the merits of the case can be presented. This result clashes with Title VII's purpose to eradicate discrimination.

Affirming the Seventh Circuit's bright-line rule and rejecting the implied affirmative defense will bring predictability without sacrificing the opportunity for employers to conciliate. Voluntary compliance through conciliation ends discriminatory practices and provides victim-specific relief more expediently and without the risks involved in litigation. Moreover, the implied, affirmative failure-to-conciliate defense obstructs—rather than promotes—meaningful conciliation because it creates an environment that is not conducive to

settlement. Judicial review of conciliation strips the proceedings of those elements that make settlement work: the confidential treatment of offers, counteroffers, and communications; the exchange of information guided by ethical obligations, practical considerations, and strategy; and an understanding that neither party risks dismissal of the merits of their claim if they do not accept a proposal. Judicial review is thus contrary to Congress's express determination that conciliation communications must be confidential and the EEOC has the discretion to determine whether a conciliation agreement is acceptable.

The EEOC and FEPAs have powerful incentives to conciliate that will not be undermined if the Court adopts the Seventh Circuits' bright-line rule. When the EEOC and FEPAs achieve voluntary compliance, they are able to conserve scarce resources and end discriminatory practices and provide victim-specific relief more expeditiously and expediently, without the risks involved with litigation.

ARGUMENT

I. *Mach Mining's* Bright-Line Rule Brings Predictability Where Widely Divergent Decisions Distract the EEOC, FEPAs, District Courts, and Employers from Addressing the Merits of Agency Discrimination Claims.

The Seventh Circuit adopted a bright-line test for judicial review of conciliation in this case: "if the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, [a court's] review of those procedures is satisfied." *Mach*

Min., 738 F.3d at 184 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81 (1984)). Application of this test is supported by the language of 42 U.S.C. § 2000e–5(b) and (f)(1), which grants the EEOC exclusive authority to determine whether the conciliation process produced results "acceptable to the Commission" and includes a "broad statutory prohibition on using what was said and done during the conciliation process 'as evidence in a subsequent proceeding.'" *Mach Min.*, 738 F.3d at 172-74 (quoting 42 U.S.C. § 2000e–5(b)). By deferring the success or failure of conciliation to the EEOC's judgment, and intentionally concealing even the process underpinning that judgment, the Civil Rights Act unambiguously and purposefully obscured the conciliation process from judicial examination. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).[4]

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[4] To escape this inevitable conclusion, Petitioner and *Amici* Retail Litigation Center, Inc. conflate the plain language of the statute with the morass of years of congressional argument. Petition for Writ of Certiorari by Petitioner-Defendant ("Petitioner's Br.") at 27-28; Brief for Petitioner as *Amicus* Curiae Retailers Association ("Retailers *Amicus* Br.") at 19-21. However, even Title VII's legislative history demonstrates that Congress wished to shield conciliation from judicial review. In passing the Equal Employment Opportunity Act of 1972, Congress rejected a house bill that only allowed the EEOC to sue if conciliation efforts failed to obtain "voluntary compliance" with the Act, which potentially allowed judicial review of employers' offers to gauge whether they were sufficient to bring them into compliance. H.R. Rep. No 92-

District courts that have nevertheless reviewed the sufficiency of EEOC conciliation efforts generally apply either the good faith standard[5] or the more searching three-part inquiry.[6] *Mach Min.*, 738 F.3d at 176. The Seventh Circuit ruled as it did, in part, because it refused to send district courts stumbling down this "dimly lighted path," to wander without a workable standard. *Id.* at 176 n.2. Judicial review under both the good faith standard and three-part inquiry has produced such unpredictable results that Fair Employment Practices Agencies ("FEPAs") and the EEOC (collectively, "Agencies") have been forced to attempt to conform to the judiciary's conciliation requirements without any clear guidance on what those

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899, at 1837 (1972). Instead, Congress granted the EEOC authority to bring suit if it did not obtain an agreement "acceptable to the Commission" itself. 42 U.S.C. § 2000e–5(f)(1).

[5] The Fourth, Sixth, and Tenth Circuits require that the EEOC's efforts meet a good faith standard. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). Under this standard, the "form and substance of the EEOC's conciliation proposals are within the discretion of the EEOC and are not subject to judicial second-guessing." *Keco Indus.,* 748 F.2d at 1102.

[6] The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry into whether the EEOC: (1) outlined to the employer its cause for believing Title VII has been violated; (2) gave the employer a chance to comply voluntarily; and (3) responded "in a reasonable and flexible manner to the reasonable attitudes of the employer." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *see also EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

requirements entail.[7] The "failure to conciliate" defense: (1) leads to divergent views on the sufficiency of agency conciliation as a matter of law and ad hoc notions of reasonableness that are difficult to apply more broadly; (2) holds Agencies accountable retroactively for new requirements; and (3) encourages employers to test the legal boundaries of the defense without risk.

As the Seventh Circuit observed, courts have varied widely in what actions they require of the EEOC during conciliation. *Mach Min.*, 738 F.3d at 183 n.2. For example, courts do not agree on whether the EEOC and FEPAs must identify every aggrieved person in a class before or during conciliation,[8] or whether they

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[7] Numerous district courts examining conciliation efforts without the benefit of mandatory authority on the permissible scope of judicial review conclude that there is no practical difference between the two standards. *See*, *e.g.*, *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1037 (D. Ariz. 2013) ("This Court declines to expressly adopt one approach over another because it finds that the EEOC failed to meet its pre-suit obligations under either standard."); *EEOC v. Supervalu, Inc.*, 674 F. Supp. 2d 1007, 1008 (N.D. Ill. 2009) ("My conclusion [that the EEOC satisfied conciliation attempts] would be the same under either standard.").

[8] Numerous courts have held that the EEOC can conduct presuit conciliation efforts on behalf of unidentified similarly aggrieved discrimination victims. *See, e.g., EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996) (indicating that the EEOC may allege in its Complaint "unlawful conduct it has uncovered during the course of its investigation" even where that means "challeng[ing] discrimination affecting unidentified members of a known class") (citing *EEOC v. United Parcel Serv.*, 860 F.2d 372, 374 (10th Cir. 1988)); *EEOC v. PBM Graphics Inc.*, 877 F. Supp. 2d 334, 361 (M.D. N.C. 2012) ("To the extent PBM complains that

must provide a precise calculation of the amount sought in settlement.[9] Adopting either the good-faith or three-part inquiry does not improve predictability because courts have concluded, after considering both judicial review standards, that the result would be the same.[10] Resolving the split on a legal issue within a jurisdiction requires an appeal that adds years to the agency's litigation and delays resolution on the merits. While the issue remains unsettled, Agencies must continue to engage in conciliation without critical information about which standard to satisfy. Agencies cannot simply conform conciliation to the strictest of

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particular class members were not identified during the conciliation process, the EEOC is under no obligation to make such a disclosure."); *cf. EEOC v. Bass Pro Outdoor World, LLC*, 4:11-CV-3425, 2014 WL 3795579 *24 (S.D. Tex. July 30, 2014) (declining to dismiss EEOC case for not investigating on behalf of unidentified discrimination victims). Other courts have held that the EEOC must identify every claimant prior to suit. *See*, *e.g.*, *Swissport Fueling*, 916 F. Supp. 2d at 1038 (concluding that the EEOC failed to provide the employer with enough notice to meaningfully participate in conciliation because it sought to conciliate on a generalized basis for unnamed class members).

[9] *Compare EEOC v. Bloomberg LP*, 751 F.Supp.2d 628, 641-42 (S.D.N.Y. 2010) (an agency must provide more than "basic information"), *with EEOC v. Riverview Animal Clinic, PC,* 761 F.Supp.2d 1296, 1302 (N.D. Ala. 2010) (agency can "negotiate in good faith even if it does not have an accurate final computation of actual damages").

[10] *See, e.g., Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005 at 1037-38 (ruling that the EEOC failed to meet its pre-suit obligations under [good faith or three-part inquiry] standard where it did not provide individualized conciliation on behalf of each class member including the basis for its calculations).

the non-binding legal requirements because even pursuing that course would not necessarily save the Agencies from a failure-to-conciliate challenge, unless it resulted in a conciliation agreement. In chasing a vague conciliation ideal, the Agencies certainly will not satisfy defendants unless they forfeit their own discretion to determine the relief necessary to eliminate unlawful employment practices—accepting less recovery, considering fewer settlement options, providing relief for fewer discrimination victims—and, instead, simply accept an agreement that is acceptable to the defendants.

Having abandoned the plain language of the Act, district courts now consider the totality of the circumstances when reviewing conciliation under both the good-faith and three-part inquiry and review lengthy records. *See, e.g., EEOC v. Crye-Leike, Inc.*, 800 F. Supp. 2d 1009, 1018 (E.D. Ark. 2011) ("The Court has considered the extensive summary judgment record [of] 111 pages of briefing and 70 exhibits totaling 598 pages and finds that [Crye-Leike is] not entitled to summary judgment based on the failure of the EEOC to conciliate in good faith."). They frequently consider one or more of the following details: the amounts (or details) and timing of offers and counteroffers;[11] the contents of written conciliation

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[11] *See, e.g., Crye-Leike*, 800 F. Supp. 2d at 1014 (listing EEOC's offers and employer's counteroffers for each of the seven charging parties, including charging parties demands for attorney's fee reimbursement); *see also Riverview Animal Clinic*, 761 F. Supp. 2d at 1301-02 (considering the fact of multiple offers rather than the amounts).

communications and discussions;[12] whether the EEOC offered a face-to-face meeting;[13] the nature, type, and amount of information provided to the employer by the EEOC;[14] the calculations of back wages;[15] the basis or calculation for compensatory damages and punitive damages awards;[16] the amount of time to consider an EEOC conciliation demand;[17] what information the EEOC provided in response to an employer's request, and, if applicable, how much information was provided

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[12] *See, e.g., EEOC v. New Prime, Inc.*, 6:11-CV-03367-MDH, 2014 WL 4060305 *7, ---F. Supp. 2d --- (W.D. Mo. Aug. 14, 2014) (citing portions of written conciliation communications in decision); *EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243, 1256-57 (E.D. Cal. 2012) (referring to oral communications between EEOC investigator and defendant's counsel when examining conciliation conduct).

[13] *See, e.g., EEOC v. One Bratenahl Place Condo. Ass'n,* 644 F.Supp. 218, 221 (N.D. Ohio 1986) (finding the EEOC did not conciliate in good faith where the defendant "indicated its willingness to meet and negotiate a conciliation [and] [s]uch a meeting would have provided a forum for the free exchange of ideas and proposals to hopefully reach mutually accepted remedies").

[14] *See, e.g., EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1115 (E.D. Wash. 2012) (concluding that EEOC did not provide sufficient information).

[15] *See, e.g., Swissport Fueling, Inc.*, 916 F. Supp. 2d at 1038-39 (requiring calculations on an individual basis for every aggrieved person).

[16] *See, e.g., id.*

[17] *See, e.g., Evans Fruit Co.*, 872 F. Supp. 2d at 1115.

about the class.[18] Moreover, courts have not ranked the relative importance of the myriad of factors in their decisions, leaving the Agencies in the dark about their obligations.

Given that conciliations are informal endeavors that require consideration of a multitude of factors and competing interests to eliminate unlawful employment practices, each conciliation process is unique. It is impossible for the Agencies to predict how these factors will be applied in any specific conciliation, and their imposition denies Agencies the flexibility they need to eliminate unlawful practices. This result is contrary to Congress's express determination that EEOC has the discretion to determine whether a conciliation agreement is acceptable.

The divergent views and ad hoc reasoning of the courts that have addressed the failure-to-conciliate defense provides incentives for employers to test every conciliation process for "sub-optimal agency behavior" through judicial review. Retailers *Amicus* Br. at 15 (citing *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 155 (4th Cir. 2014) (Wilkinson, J., concurring).[19] Without fail, employers will view the agency behavior

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[18] *See, e.g., id.* at 1114-15.

[19] Although Petitioner's *Amici* use the term, "sub-optimal" to warn against agency conduct during conciliation, the concurring opinion actually addressed a different standard. The cited opinion examined whether the EEOC should be ordered to pay an attorney's fee award to a prevailing defendant in a Title VII case based on the frivolous, unreasonable, and meritless standard that generally applies to plaintiffs. *Propak Logistics*, 746 F.3d at 155-56 (internal citations omitted).

during conciliation as "sub-optimal" if the conciliation effort proves unsuccessful, because employers invariably and necessarily believe that their settlement offers in conciliation will end unlawful employment practices and, from their perspective, only agency intransigence or overreach could justify rejection of their offers. So long as conciliation does not result in an agreement that is acceptable to the employer, therefore, employers will perceive agency behavior during conciliation as "sub-optimal." The current unsettled state of the law, in which courts have crafted divergent and often contradictory requirements for Agencies, invites disgruntled employers to put the Agencies' conciliation conduct on trial before the merits of employers' own conduct can be addressed.

Whenever a court creates a new minimum requirement for conciliation, such as that every aggrieved individual must be identified during conciliation, it retroactively holds the Agencies accountable for the new requirement and prevents legitimate discrimination claims from ever seeing the light of day. For example, in 2012, the Eighth Circuit became the first—and only—circuit to reach the conclusion that the EEOC had to conduct conciliation on behalf of each claimant. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 696 (8th Cir. 2012) (Murphy, J., dissenting) ("Neither Title VII nor [the Eighth Circuit's] prior cases require that the EEOC conduct its presuit obligations . . . individually . . . ."). Consequently, even absent pre-existing authority requiring individualized conciliation, the EEOC's case was subjected to partial summary judgment on behalf of the claimants who had not been identified during conciliation. Technical bars like these create an

environment where conciliation is a minefield lying before the Agencies, and employers have no reason to be persuaded by any agency's endeavor to eliminate unlawful employment practices until they get to the other side.

An employer's decision to test the limits of judicial review of conciliation carries little risk and, potentially, the greatest possible reward—dismissal of the discrimination claims. As the Seventh Circuit correctly recognized, judicial review undermines conciliation, and the "potential gains of escaping liability altogether will, in some cases, more than make up for the risks of not engaging in serious attempts at conciliation." *Mach Mining*, 738 F.3d at 179.

Amici for Petitioners contest the Seventh Circuit's rationale, stating that the negative publicity from suit gives employers "every reason to settle during conciliation—and good reason not to throw away that opportunity in the hopes of a settlement down the road, after a suit (with all of its attendant costs) has been filed." Retailers *Amicus* Br. at 13. This argument incorrectly assumes that employers universally prefer confidential settlement above other settlement considerations. On the contrary, an employer's settlement interest may also include sending a message to the employees and discouraging other claimants, possibly vindicating the employer's policies, practices, and supervisors by trial, and avoiding reinstatement or forced promotions of employees involved in the claims. 2 *Def. of Equal Emp. Claims* § 13:17 (2014), *available at* www.westlaw.com.

Amici's point that the threat of a negative EEOC press release motivates employers to settle before a

complaint also ignores the economics of settlement negotiations. Retailers *Amicus* Br. at 13.[20] Generally, "absent strategic behavior, settlement will occur whenever the minimum amount the plaintiff is willing to accept for settling the case is less than the maximum amount the defendant is willing to offer . . . (and) the defendant's maximum 'bid' will be equal to his expectation of what he will have to pay if litigation occurs." Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. Leg. Stud. 427, 437-38 (1995).

Certainly, the existence of an affirmative defense for failure to conciliate would lower the maximum amount that defendants would be willing to bid, which decreases the likelihood of settlement because the Agencies' minimum offers cannot fall below the threshold necessary to eliminate unlawful employment practices. By itself, this change in the equation governing settlements during conciliation would

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[20] This point also incorrectly assumes that all press releases issued by the EEOC paint employers in a negative light. The EEOC regularly acknowledges employer's notable compliance efforts, even after a lawsuit has been filed. For example, the EEOC wrote in a recent press release announcing a consent decree that: "We are pleased with the scope of the commitment that the company has made given the breadth of the multi-state regional areas that it covers. This settlement represents a mutual recognition that well-rounded recruitment is the key to any employer's efforts to find the best candidates for the job." Press Release, EEOC, *HiLine Electric to Pay $210,000 to Settle EEOC Age Discrimination Suit* (Oct. 6, 2014), *available at* www.eeoc.gov/eeoc/newsroom/release/10-6-14c.cfm.

necessarily result in less successful conciliation, protracting and complicating Title VII litigation with "little or no offsetting benefit" in obtaining an agreement acceptable to the Commission. *See Mach Min*., 738 F.3d at 179 (citing *Doe v. Oberweis Dairy*, 456 F.3d 704, 710 (7th Cir. 2006)).

Further, because settlement can and often does occur throughout the course of litigation, the failure to conciliate sets up a motion for summary judgment that is essentially free, allowing employers to thwart conciliation and gamble on the potential success of their defense without affecting their likelihood of success on the merits of their case. [21] Petitioner's *amici* is correct that the gamble is not entirely free. Thwarting conciliation may carry the potential for a negative press release. However, that arguable damage to reputation would only stop an employer from thwarting conciliation if it exceeded the employer's potential gain in avoiding liability altogether. This potential to gamble at the outcome creates a perverse incentive, where employers that would otherwise have the highest expectation of liability (and, presumably, the greatest chance at actually settling through conciliation) will be the most likely to tactically thwart conciliation.

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[21] Even where motion practice is constrained by consideration of attorney's fees, there is no risk of an attorney's fee award from a prevailing plaintiff when it is the government. *See, e.g*., Ariz. Rev. Stat. § 41-1481(J) ("In any action or proceeding under this section the court may allow the prevailing party, other than the division, a reasonable attorney's fee as part of the costs.").

II. Affirming the Seventh Circuit's Bright-Line Rule and Rejecting the Implied Affirmative Defense Will Bring Predictability Without Sacrificing the Opportunity for Conciliation.

The loss of conciliation as a mechanism to end unlawful employment practices is disastrous for the Agencies, because achieving voluntary compliance through conciliation is essential to enforcement for economic and policy reasons. This is especially true for FEPAs, which have fewer attorneys, investigators, and resources than the EEOC field offices. In addition to employment, FEPAs often also enforce state and local discrimination laws in voting, housing, and public accommodations, and may be obligated to file suit in housing and public accommodations cases if conciliation fails. *See, e.g.*, Ariz. Rev. Stat. § 41-1491.34 (charging the attorney general to file a civil action when there is reasonable cause to believe a fair housing violation occurred and no conciliation agreement was obtained). Some FEPAs enforce civil rights statutes extending rights to other protected groups or covering more entities than Title VII. *See, e.g.*, Haw. Rev. Stat. § 378-2(a)(1) (extending protections based on gender identity or expression, sexual orientation, domestic or sexual violence victim status, and marital status). Voluntary compliance, when successful, frees the FEPA's personnel and resources to pursue its full range of enforcement duties. More importantly, voluntary compliance ends discriminatory practices and provides victim-specific relief more expediently and without the risks involved in litigation.

For example, the Arizona Civil Rights Division ("ACRD"), Arizona's FEPA, has its own strong

incentives to gain voluntary compliance through informal attempts to conciliate discrimination charges before and after issuing cause determinations. *See Mach Min.*, 738 F.3d at 180 (concluding that judicial review of the EEOC's conciliation undermines conciliation and is unwarranted because of the EEOC's own "powerful incentives" to conciliate). The ACRD devotes significant resources to resolving charges of discrimination through informal mediation and conciliation.

In Fiscal Year 2012, the ACRD's Compliance Section investigated 1,348 discrimination charges and resolved 901 cases, including 160 housing charges, 646 employment charges, and 95 public accommodations charges.[22] The ACRD issued 26 determinations in cases where it found reasonable cause to believe that unlawful discrimination had occurred.[23] The ACRD mediated 127 civil rights matters and facilitated 71 agreements, at a 56% settlement rate.[24] As a result of these efforts, charging parties received a total of $362,688 in monetary relief and injunctive relief. The ACRD also resolved 29 charges through pre-finding and post-finding conciliation agreements, obtaining $236,261 in monetary relief for the charging parties

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[22] See Office of Attorney General Tom Horne, Annual Report, Fiscal Year 2012 ("AGO FY 2012 Annual Report"), *available at* https://www.azag.gov/sites/default/files/sites/all/docs/annual-reports/2012AnnualReport.pdf (last visited 10/20/14) at App. B, at 16.

[23] *Id.*

[24] *Id.*

and for future monitoring and enforcement activities.[25] The conciliation agreements resulted in affirmative relief for charging parties, such as installation of accessible parking spaces, refitting for accessible restrooms, provision of American Sign Language interpretation, changes in rules, policies, or practices that interfered with the use of service animals, policy revisions, and training to prevent future civil rights violations in employment and housing.[26]

In Fiscal Year 2013, the ACRD's Compliance Section investigated 1,267 discrimination charges and resolved 827 cases, including 163 housing charges, 552 employment charges, and 112 public accommodations charges.[27] The ACRD issued 17 reasonable cause determinations.[28] The ACRD successfully conciliated 8 of these reasonable cause determinations without litigation. The ACRD mediated 113 civil rights matters and facilitated 62 agreements, at a 55% settlement rate, totaling $431,038 in monetary relief and providing injunctive relief.[29] The ACRD also resolved 19 charges through pre-finding and post-finding conciliation

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[25] *Id*. at 16-17.

[26] *Id*.

[27] See Office of Attorney General Tom Horne, Annual Report, Fiscal Year 2013 ("AGO FY 2013 Annual Report"), *available at* https://www.azag.gov/sites/default/files/sites/all/docs/annual-reports/2013AnnualReport.pdf (last visited 10/20/14) at App. C-2, at 20.

[28] *Id*.

[29] *Id*. at 21.

agreements obtaining $212,680 in monetary relief for the charging parties and for future monitoring and enforcement activities and non-monetary relief.[30] The affirmative relief included but was not limited to employment transfers, extended medical leave, provision of Video Remote Interpreting at mental health centers state-wide, employer training, changes to personnel files, and training and policy revisions to prevent future civil rights violations in employment and housing.[31]

When the ACRD is able to obtain voluntary compliance and conciliate past violations informally, it can more effectively accomplish its statutory responsibilities with fewer resources.

Searching judicial review and an implied, affirmative failure-to-conciliate defense inject an artifice into negotiations that obstruct meaningful conciliation. Typically, parties in settlement negotiations treat communications and offers as confidential; exchange information guided by ethical obligations, practical considerations, and strategy; and understand that they do not risk a dismissal of their claim(s) if they refuse an offer. Indeed, Congress expressed the same intent for conciliation: "nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e–5(b).

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[30] *Id*. at 22-22.

[31] *Id*.

In contrast, under a case-by-case judicial review, everything said or done during conciliation may be cited in a dispositive motion or, if the dispositive motion is denied, presented to the jury. *Amici* Equal Employment Advisory Council ("EEAC") allege that the EEOC's conciliation abuses include "refusing to acknowledge obvious flaws," or discuss the "strengths and weaknesses of a claim or defense." (at 14.) But conciliation is an opportunity for voluntary compliance, not an invitation for employers to demand reconsideration of an Agency's merits findings. The EEAC's position is unrealistic because candid conciliation discussions will be curtailed if the judiciary is permitted to second-guess the EEOC's (and FEPAs') conciliation efforts.

Searching judicial review coupled with the remedy of dismissal incentivizes employers to ask the Agencies for more information, regardless of how much information has been provided, and to not undertake (or share) their own investigation into the reasonable cause determination's findings and conclusion. Indeed, employers possess significant information about wages, frequency and types of raises awarded, amounts of overtime available, availability of benefits, monetary value of its benefits, and employment trends in the industry. Yet the incentive to demonstrate sub-optimal agency behavior in conciliation allows the employer to subsequently argue that it did not receive sufficient information from the Agencies to respond to the conciliation proposal, then seek dismissal of the agency's claims for failure to meet pre-suit obligations.

CONCLUSION

This Court should affirm the Seventh Circuit's decision in *EEOC v. Mach Min., LLC*, 738 F.3d 171, 184 (7th Cir. 2013).

Respectfully submitted,

THOMAS C. HORNE
Attorney General of Arizona
Robert L. Ellman
Solicitor General
Rose A. Daly-Rooney*
Chris Carlsen
Assistant Attorneys General
400 W. Congress, Bldg. S-315
Tucson, AZ 85701
Phone (520) 628-6756
Rose.Daly-Rooney@azag.gov
* *Counsel of Record*

Counsel for Amici Curiae States

DAVID M. LOUIE
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii, 96813
(808) 586-1500

ROBERT W. FERGUSON
Attorney General of Washington
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street, 12th Floor
Chicago, IL 60601
(312) 814-5376

Counsel for Amici Curiae

November 3, 2014