NO. 14-1375

In the
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

PETITIONER,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

RESPONDENT.

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

BRIEF FOR BASS PRO SHOPS OUTDOOR WORLD, LLC AND TRACKER MARINE RETAIL, LLC AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

For years, amici curiae Bass Pro Shops Outdoor World, LLC and Tracker Marine Retail, LLC (collectively, "Bass Pro") have been embroiled in onerous litigation brought by the Equal Employment Opportunity Commission ("EEOC"). *See EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425 (S.D. Tex.), No. 15-20078 (5th Cir.). The EEOC has sued Bass Pro for compensatory and punitive damages on behalf of tens of thousands of unidentified people. Although it did not investigate or identify a single individual the EEOC believes to have been the victim of actual discrimination, the EEOC nevertheless asserted that intentional discrimination in hiring was so pervasive at Bass Pro as to constitute a nationwide standard operating procedure, and demanded $30 million to settle the case. As it did with petitioner, the EEOC "wholly abandoned its statutory duties" to investigate, determine cause, and conciliate before bringing highly individualized § 706 claims against Bass Pro. Pet. App. 204a. Thus, the question presented in this case is of particular interest to Bass Pro, which respectfully submits this amicus brief in support of petitioner.

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[1] Petitioner's letter giving blanket consent to amicus briefs, and respondent's written consent to this brief, are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Dismissal based on the pre-suit obligations of Title VII should not *insulate* the EEOC from liability for attorneys' fees; instead, it strongly suggests that such an award is appropriate. Even without Congress's express direction, it is only a matter of common sense that the EEOC should investigate claims, determine whether there is at least reasonable cause to bring them, and attempt to conciliate them before bringing expensive, time-consuming litigation. Shooting first and asking questions later is, quite simply, not an acceptable approach to enforcing the law.

As exemplified by Bass Pro's ongoing case, however, the EEOC has a troubling record of noncompliance with the statutorily mandated prerequisites to filing a lawsuit. *See* Part I, *infra*. The EEOC also has an established track record of pursuing abusive litigation, without first assessing reasonable cause, in hopes of extorting settlements. *See* Part II, *infra*. As petitioner's brief explains, the statutory standard for fees, and the policy concerns animating that statute, are fully satisfied in such circumstances. When the EEOC's claims are dismissed for failure to investigate, determine reasonable cause, or otherwise satisfy the statutory prerequisites to bringing suit, the defendant has unquestionably "prevail[ed]," 42 U.S.C. § 2000e-5(k), and has done so precisely because the EEOC's claims are "frivolous, unreasonable, or groundless," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). District courts' authority to award fees in this regrettably common circumstance is necessary to

deter abuse by holding the agency accountable for ignoring "the federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

ARGUMENT

I. The EEOC Did Not Meet Title VII's Pre-Suit Obligations Before Bringing § 706 Claims Against Bass Pro.

The Court once observed, in another case involving the EEOC, that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). As petitioner's case shows, however, the EEOC does not always follow the "integrated, multistep enforcement procedure" that Congress decreed in Title VII. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). According to the district court, "the EEOC did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint—let alone issue a reasonable cause determination as to those allegations or conciliate them." Pet. App. 204a.

Bass Pro can report, based on its own experience, that petitioner is not alone in having been forced to defend claims that the EEOC never investigated, let alone conciliated, prior to suit. Bass Pro's encounter began with the issuance of two charges by an EEOC Commissioner. *See* 42 U.S.C. § 2000e-5(b) (providing

for "a charge . . . filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission"). Neither charge identified any aggrieved individuals, broadly defined in those documents as "all employees who have been, continue to be, or will in the future be adversely affected by the unlawful employment practices set forth in the foregoing charge." Instead, they vaguely alleged that Bass Pro engaged in a nationwide pattern or practice of discrimination against Black, Hispanic, Asian, and female applicants and employees.

During the "investigation" that followed, the EEOC did not identify a single individual it believed to be a victim of hiring discrimination. As the district court would later find, "no individuals were identified or investigated in the investigation period." *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, 2014 WL 6453606, at *4–*5 (S.D. Tex. Nov. 17, 2014). According to its attorney, the EEOC confined itself to a "statistical analysis" and did not investigate "specific people" or their "individual circumstances." *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, Hr'g Tr. at 40:13–41:1 (S.D. Tex. Nov. 19, 2013); *see also id.* at 55:8–56:2 (complaining that finding aggrieved individuals is "a very lengthy and expensive process, which is why we don't do it beforehand"). Rather, the EEOC simply compared Bass Pro's hiring data with census availability data and hiring data for alleged competitors' stores (which the EEOC refused to identify). *Id.* at 42:15–43:12.

A District Director of the EEOC eventually issued a determination of reasonable cause, which is

supposed to "inform the employer about the specific allegation" against it. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1655 (2015). The determination did not disclose the statistical methodology upon which the finding of reasonable cause was based, name a single aggrieved individual, or describe any allegedly discriminatory employment decision.

During the ensuing conciliation, the EEOC made a settlement demand of $30 million in compensatory and punitive damages (which are not available for pattern-or-practice claims according to 42 U.S.C. § 1981a(a)(1)) for 1000 unidentified individuals. In an effort to assess this eight-figure demand, Bass Pro repeatedly requested specific information about the EEOC's statistics and the underlying Title VII claims, only to be rebuffed each time. The EEOC declined to give information about any aggrieved individuals, such as their names or putative stories of discrimination.[2] In hindsight, such stonewalling is hardly surprising: The EEOC simply had no individualized information to share. As the EEOC's attorney declared, in an effort to justify to the district court why the agency had not shared any names with Bass Pro, "it's not that we were trying to hide

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[2] At one point, the EEOC did provide the names of two managers at a single store in Louisiana who were accused of making racist remarks. Bass Pro promptly investigated and terminated both of them. Thereafter, the EEOC refused to name any managers accused of discrimination. *Cf. EEOC v. Shell Oil Co.*, 466 U.S. 54, 92 (1984) (O'Connor, J., dissenting) (noting that EEOC "stonewalling" does not promote "voluntary remedial action").

information from the defendants. We don't have that information either." *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, Hr'g Tr. at 56:16–18 (S.D. Tex. Nov. 19, 2013).

Bereft of the information needed to assess the Title VII claims, Bass Pro was unable to engage in meaningful conciliation and the EEOC declared conciliation a failure. Ten months later, the EEOC sued Bass Pro. *See EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425 (S.D. Tex.).

The EEOC sought compensatory and punitive damages, pursuant to § 706 of Title VII, 42 U.S.C. § 2000e-5, potentially on behalf of every Black or Hispanic applicant who unsuccessfully applied to any of Bass Pro's 69 stores since 2005, without regard to whether they were eligible to be hired. By the EEOC's own estimation, there are 50,000 or more people who fit those criteria among over 1,000,000 unsuccessful applicants. The EEOC further sought an injunction against Bass Pro's alleged "pattern or practice" of discrimination under § 707 of Title VII, 42 U.S.C. § 2000e-6.[3]

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[3] Because compensatory and punitive damages are not available for a § 707 claim, as they are for a § 706 claim, *see* 42 U.S.C. § 1981a(a)(1), the EEOC has tried to bring a nonexistent pattern-or-practice claim pursuant to § 706. Bass Pro is challenging that move in an interlocutory appeal to the Fifth Circuit. *Cf.* JA 383a (noting district court's finding that "the EEOC is attempting to have its cake and eat it too" by "avail[ing] itself of the *Teamsters* burden-shifting framework yet still seek[ing] compensatory damages under § 706" (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977))).

The district court granted Bass Pro's motion to dismiss, albeit with leave to amend the complaint. *See EEOC v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499, 509 (S.D. Tex. 2012). The EEOC was held not to have plausibly alleged a nationwide pattern or practice of discrimination in support of its § 707 claim. *See id.* at 513–18. In addition, the district court concluded that the EEOC must name aggrieved individuals in support of the § 706 claims for compensatory and punitive damages: "While the EEOC is not obligated to provide the identities of all § 706 class members, the Court cannot locate a case in which the EEOC brought a § 706 claim without identifying a single plaintiff." *Id.* at 520–21.

The EEOC subsequently amended its complaint to provide, for the first time in half a decade of dealing with Bass Pro, the names of roughly 200 individuals with potential § 706 claims. The list included individuals who could not have been victims of discrimination and whose claims clearly were not investigated by the EEOC because they were actually hired, failed to appear for a required drug test, were not old enough to work, or were not eligible to work in a store selling firearms under ATF regulations. The failure to name these individuals during conciliation foreclosed informal resolution of their flawed claims—and confirmed glaring deficiencies in the EEOC's pre-suit efforts. *See EEOC v. Bass Pro Outdoor World, LLC*, 1 F. Supp. 3d 647, 666 (S.D. Tex. 2014) ("[T]he EEOC ought to have provided more information. For instance, had Bass Pro had a better sense of how the class was comprised, it could have helped to weed out claimants who had in fact been hired . . . .").

Because the EEOC stonewalled Bass Pro prior to filing suit, the district court stayed the case in 2014 to allow for renewed conciliation. *See Bass Pro*, 1 F. Supp. 3d at 667–71. "Without information on the individual claims for which [the EEOC] sought compensatory damages—or at least *some* of those claims—Bass Pro was not afforded enough notice to meaningfully participate in the conciliation process." *Id.* at 666 (internal quotation marks omitted). The renewed conciliation failed, with the EEOC refusing to provide information regarding thousands of supposedly aggrieved individuals who were said to be entitled to compensatory and punitive damages under § 706, but who were not named in the amended complaint.

Litigation has continued in the wake of the failure of renewed conciliation, with the Fifth Circuit recently hearing Bass Pro's interlocutory appeal under 28 U.S.C. § 1292(b). *See EEOC v. Bass Pro Outdoor World, LLC*, No. 15-20078 (5th Cir.). The EEOC attempted to avoid that discretionary appeal based on "the overwhelming likelihood, the virtual certainty" that Bass Pro would settle. *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, Hr'g Tr. at 36:19–37:21 (S.D. Tex. Oct. 27, 2014). The district court rejected the EEOC's "deeply unfair" argument, comparing it to the " 'judicial blackmail' " that courts have condemned. *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425, 2014 WL 6453606, at *4 (S.D. Tex. Nov. 17, 2014) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996)); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (Posner, J.) ("Judge Friendly, who was not given to hyperbole, called settlements induced by

a small probability of an immense judgment in a class action 'blackmail settlements.' ").[4]

In sum, the EEOC has forced Bass Pro to spend millions of dollars in attorneys' fees to defend itself against the § 706 claims of individuals who remain unknown to this day. Contrary to Title VII, the EEOC sued Bass Pro for compensatory and punitive damages without investigating the claims of even a single individual, without making a determination of reasonable cause as to any of their individualized claims, and without providing the information needed for meaningful conciliation. When the district court eventually forced the EEOC to identify individuals, it identified many who clearly lacked claims. The agency thus ignored Congress's attempt to "prevent the EEOC from imposing unjustified costs and disruption on an employer" by statutorily "limit[ing] the EEOC's litigation authority to investigated claims with potential merit, and then further to those that cannot readily be settled on terms acceptable to the EEOC." Pet'r Br. 38, 51.

II. EEOC Misconduct Is Alarmingly Common.

Bass Pro is not the only employer for whom petitioner's case will inspire déjà vu. The EEOC has a bad habit of flouting its pre-suit obligations under

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[4] Before the Fifth Circuit, Bass Pro is challenging the district court's refusal to "dismiss the § 706 claims for failure to investigate[ ] because the Court is not fully persuaded that the Commission is barred from bringing § 706 claims on behalf of unidentified victims." *EEOC v. Bass Pro Outdoor World, LLC*, 35 F. Supp. 3d 836, 865 (S.D. Tex. 2014).

Title VII. If the EEOC is not susceptible to payment of attorneys' fees under 42 U.S.C. § 2000e-5(k) in cases like petitioner's and Bass Pro's, then it will have little incentive to do better.

Even when the EEOC does purport to have investigated actual victims of discrimination, its list of allegedly aggrieved persons has a tendency to fluctuate wildly. *See, e.g.*, *EEOC v. Global Horizons, Inc.*, 100 F. Supp. 3d 1077, 1090 (E.D. Wash. 2015) ("[The EEOC's] unpreparedness is highlighted by the ever-changing number of Thai claimants throughout this lawsuit."). In one case, the EEOC told a district court that it had 2000 people in its class, only to drop that number to 332 upon being ordered to provide information regarding 250 of those people. *See EEOC v. J&R Baker Farms, LLC*, No. 7:14-cv-136, 2015 WL 7185534, at *1–*2 (M.D. Ga. Nov. 13, 2015). The EEOC then came forward with just 113 individuals, while disavowing any responsibility for "the accuracy of the information" it was providing to a federal court. *See* Resp. in Opp. to Sanctions, *EEOC v. J&R Baker Farms, LLC*, No. 7:14-cv-136, at 2, 8 (M.D. Ga. Jan. 7, 2016).

In another case, the number of aggrieved women claimed by the EEOC jumped from "approximately fifty" to a figure "exceed[ing] 1,300 by several thousand." *See EEOC v. Cintas Corp.*, No. 2:04-cv-40132, slip op. at 3–4 (E.D. Mich. Apr. 15, 2015). Some of the listed women turned out to be men. *See* Joint Mot. for Consent Decree, *EEOC v. Cintas Corp.*, No. 2:04-cv-40132, at 10 (E.D. Mich. Nov. 11, 2015) ("The individuals who will receive monetary relief are

those listed [by the EEOC], except for those individuals who are male.").

In other cases, the EEOC has frustrated any meaningful conciliation, as it did in Bass Pro's case, by seeking money damages on behalf of a class while refusing to disclose its members or its size. *See, e.g.*, *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1037–40 (D. Ariz. 2013) ("Swissport was . . . faced with an amorphous number of potential claimants, making it impossible for it to evaluate its exposure and meaningfully participate in conciliation."); *EEOC v. La Rana Haw., LLC*, 888 F. Supp. 2d 1019, 1045 (D. Haw. 2012) (noting the EEOC's "obstinate refusal" to "furnish information regarding the class of unnamed 'aggrieved individuals,' the allegedly unlawful acts, or any other fact that would put Defendants on notice of the class or its claims"); *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1031–33 (N.D. Ill. 1998).

The EEOC may even ignore such information during the investigation, hoping to retrieve it in discovery if the employer cannot be bullied into settling. *See* Pet'r Br. 39–40 (identifying "an EEOC strategy of attempting to coerce settlements from employers by filing an unsubstantiated allegation that a 'class' of claimants exists without ever investigating if that is in fact true"). Thus, in *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 814 (S.D.N.Y. 2013), the agency "blatantly contravene[d] Title VII's emphasis on resolving disputes without resort to litigation" by "level[ing] broad accusations of class-wide discrimination to present [the employer] with a moving target of prospective plaintiffs and, after

unsuccessfully pursuing pattern-or-practice claims, substitut[ing] its own investigation with the fruits of discovery to identify which members of the class, none of whom were discussed specifically during conciliation, might have legitimate individual claims under Section 706."

Failure to meet Title VII's pre-suit obligations is of a piece with "the EEOC's disappointing litigation conduct" in later stages. *EEOC v. Freeman*, 778 F.3d 463, 468 (4th Cir. 2015) (Agee, J., concurring). Federal courts have repeatedly condemned the agency for committing "extortion," *EEOC v. Gen. Dynamics Corp.*, 849 F. Supp. 1158, 1165 (N.D. Tex. 1994); *EEOC v. Anchor Cont'l, Inc.*, 74 F.R.D. 523, 526 (D.S.C. 1977); for "run[ning] roughshod over [citizens'] rights," *EEOC v. HomeNurse, Inc.*, No. 1:13-cv-2927, 2013 WL 5779046, at *14 (N.D. Ga. Sept. 30, 2013); for engaging in "deliberate obfuscation," *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 780 (7th Cir. 2007); and for taking positions that are "appalling," *EEOC v. Shoney's, Inc.*, 542 F. Supp. 332, 338 (N.D. Ala. 1982), "ridiculous," *EEOC v. OhioHealth Corp.*, __ F. Supp. 3d __, 2015 WL 3952339, at *5 (S.D. Ohio June 29, 2015), or "inexcusable," *EEOC v. E.J. Sacco, Inc.*, 102 F. Supp. 2d 413, 420 (E.D. Mich. 2000).

Indeed, Judge Wilkinson recently warned the EEOC that "what happened here was inexcusable. . . . Even if the agency will not acknowledge the damage that such lengthy investigation and groundless litigation can inflict on companies and their employees, we can." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J.,

concurring). The EEOC's "statutory goals and missions . . . cannot be divorced from the manner in which those purposes are implemented. . . . It is not far-fetched to believe that the nation's deep commitment to combatting discrimination will be affected for good or ill by the esteem in which this important agency is held." *Id.* at 157.

Such conduct has resulted in fee awards and sanctions against the EEOC. *See, e.g.*, *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 591–92 (6th Cir. 2013); *EEOC v. TriCore Reference Labs.*, 493 F. App'x 955, 960–61 (10th Cir. 2012); *EEOC v. W. Customer Mgmt. Grp., LLC*, No. 3:10-cv-378, 2014 WL 4435980, at *1 (N.D. Fla. Sept. 8, 2014); *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, No. 1:13-cv-46, 2014 WL 1689727, at *1 (M.D.N.C. Apr. 29, 2014); *EEOC v. Original Honeybaked Ham Co. of Ga., Inc.*, No. 11-cv-2560, 2013 WL 752912, at *4 (D. Colo. Feb. 27, 2013). According to one report, "[t]oday's EEOC . . . is pursuing many questionable cases through sometimes overly aggressive means—and, as a result, has suffered significant court losses that are embarrassing to the agency and costly to taxpayers. Courts have found EEOC's litigation tactics to be so egregious they have ordered EEOC to pay defendants' attorney's fees in ten cases since 2011." MINORITY STAFF. OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 113TH CONG., EEOC: AN AGENCY ON THE WRONG TRACK? 3 (Comm. Print 2014), *available at* http://www.help.senate.gov/imo/media/FINAL_EEOC_Report_with_Appendix.pdf.

As one Commissioner recently confessed to her colleagues, the EEOC's "reputation and credibility

[have] suffered from several recent lawsuits where we were not only sanctioned, but openly chastised by the courts." Memorandum from Constance S. Barker, Commissioner, EEOC, to EEOC Chairman & Commissioners 4 (May 23, 2014). Given the EEOC's track record, in pre-suit administrative proceedings and beyond, the Court should not limit the power to award attorneys' fees under 42 U.S.C. § 2000e-5(k). The defendants were clearly the prevailing parties in such cases. Fee awards will serve their intended purpose: "[T]o protect defendants from burdensome litigation having no legal or factual basis," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978), by shepherding the EEOC's efforts in accordance with "the nation's deep commitment to combatting discrimination," *Propak*, 746 F.3d at 157 (Wilkinson, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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