No. 13-1019

IN THE

# Supreme Court of the United States

MACH MINING, LLC,

*Petitioner*,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

*Respondent*.

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

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

Whether and to what extent may a court enforce the Equal Employment Opportunity Commission's duty under 42 U.S.C. § 2000e-5(b), (f)(1) to conciliate discrimination claims before filing suit.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner states that the parent corporation of Mach Mining, LLC is Coal Field Transports, Inc. There are no publicly held companies that own more than 10 percent of Mach Mining, LLC's stock.

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## BRIEF FOR THE PETITIONER

Petitioner Mach Mining, LLC, respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a) is published at 738 F.3d 171. The district court's decisions dated January 28, 2013 (Pet. App. 31a-41a) and May 20, 2013 (Pet. App. 42a-55a) are unpublished.

## JURISDICTION

The court of appeals entered its judgment on December 20, 2013. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on February 25, 2014, which this Court granted on June 30, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Section 2000e-5(b) of Title 42 provides in relevant part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . (hereinafter referred to as the

> "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. 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. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. . . .

Section 2000e-5(f)(1) of Title 42 provides in relevant part:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government,

> governmental agency, or political subdivision named in the charge. . . .

## STATEMENT OF THE CASE

Title VII of the Civil Rights Act of 1964 prohibits the Equal Employment Opportunity Commission (EEOC) from suing an employer unless the Commission first has been unable to secure a conciliation agreement with the employer. 42 U.S.C. § 2000e-5(f)(1). Breaking with thirty years of uniform circuit precedent, the Seventh Circuit held that this precondition to suit is unenforceable.

### I. Statutory Background

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. While Congress has authorized individuals and the Equal Employment Opportunity Commission to bring suits to enforce the statute when certain conditions are met, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving th[e] goal" of equal employment opportunity. *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 44 (1974). Toward that end, "Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977).

First, a charge of discrimination must be "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission" alleging an "unlawful employment practice." 42 U.S.C. § 2000e-5(b).

Second, upon receipt of the charge, the Commission "shall serve a notice of the charge . . . on such employer" and "shall make an investigation thereof." *Id*.

Third, "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission *shall* endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id*. (emphasis added).[1] "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." *Id*. During the conciliation process, the Commission has "the responsibility of . . . settling disputes, if possible, in an informal, noncoercive fashion." *Occidental*, 432 U.S. at 367-68.

Fourth, only if "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission" may the Commission file suit. 42 U.S.C. § 2000e-5(f)(1).[2]

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[1] By contrast, "[i]f the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action." 42 U.S.C. § 2000e-5(b). An individual complainant may then file her own civil action. *Id*. § 2000e-5(f)(1).

[2] If the respondent is a governmental entity, the Commission is required to refer the case to the Attorney General for litigation. 42 U.S.C. § 2000e-5(f)(1).

## II. Procedural History

1. In early 2008, a single complainant filed a charge of discrimination with the EEOC, alleging that petitioner, a coal mining company, had denied the complainant employment as a coal miner because of her sex. Pet. App. 3a. The Commission issued a determination that there was reasonable cause to believe petitioner had "discriminated against [the] Charging Party and a class of female applicants, because of their sex, in that [petitioner] failed to recruit and hire them, in violation of Title VII." J.A. 15. Other than stating that the finding was based on "the evidence obtained during the course of the investigation," the determination contained no information regarding the basis of the finding. *Id.* Nor did it identify the individuals other than the charging party against whom petitioner allegedly discriminated, or otherwise define the size or scope of the class of alleged victims. *Id*.

The Commission then presented petitioner with a verbal conciliation demand. What further conciliation efforts the Commission made are not disclosed in the record, as the EEOC has insisted that Title VII prohibits petitioners from trying to prove, or the district court from considering, what the Commission did or did not do in an attempt to reach an informal resolution.[3] The record does show, however, that the EEOC eventually notified

[3] The Commission threatened to seek sanctions against petitioner's counsel *personally* if they made any submission to the court attempting to show that the EEOC had breached its conciliation obligation. *See* J.A. 88.

petitioner that it had determined that the conciliation process had failed and that further discussions would be futile. J.A. 18-19.

2. A few days later, the Commission sued petitioner in the United States District Court for the Southern District of Illinois. *See* J.A. 20-26 (Complaint). The complaint alleged that petitioner had either engaged in "a policy or practice of not hiring women for mining and related positions" or "in the alternative, had a neutral hiring policy which had a disparate impact on women applicants for mining and related positions." *Id.* 21. The Commission sought backpay, compensatory damages, and punitive damages for an undefined "class of female applicants," in "amounts to be determined at trial." *Id.* 24-25. With respect to the process required by Title VII, the Commission alleged that "[a]ll conditions precedent to the institution of this lawsuit have been fulfilled." *Id.* 22.

The same day, the Commission issued a press release, featuring inflammatory quotes from EEOC attorneys, including the assertion that "Mach Mining needs to realize that this is 2011, not 1911."[4] The Commission's attorneys further stated that they hoped that the litigation would send a signal to other employers to reconsider policies having a disparate impact.[5]

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[4] *See* Press Release, ACH Mining Sued by EEOC for Sex Discrimination: Federal Agency Asserts That Coal Mine's Failure to Hire Qualified Female Applicants Violated Civil Rights Law (Sept. 27, 2011), http://goo.gl/Lk5mO5.

[5] *Id.*

Petitioner filed an answer arguing, among other things, that the Commission had failed to fulfill its statutory obligation to conciliate in good faith. J.A. 27-34.[6] The Commission subsequently moved for partial summary judgment, arguing that the "conciliation process is not subject to judicial review." Pet. App. 32a.

The district court denied the motion. *Id.* 31a. The court observed that all of the circuits "that have weighed in on the matter agree that conciliation is subject to at least *some* level of review." *Id.* 35a. The court found it unnecessary to decide whether the EEOC's conciliation efforts were sufficient in this case, because the Commission had elected not "to argue that its conciliation efforts would satisfy either the 'deferential standard' or the 'heightened scrutiny' standard" applied in the various circuits. *Id*. 37a. At the Commission's request, however, the court certified the case for interlocutory appellate review under 28 U.S.C. § 1292(b). Pet. App. 52a.

3. The Seventh Circuit accepted the certified appeal and reversed. The court recognized that every circuit to have addressed the question had held that the EEOC's compliance with the conciliation precondition to litigation is judicially enforceable. But it "disagree[d] with our colleagues in other circuits," *id.* 3a, making itself "the first circuit to reject" the principle that the duty to conciliate is

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[6] In an effort to identify the nature of the claims to be conciliated, petitioner sought limited discovery, including requests for admission with respect to each complainant identified by the Commission. *See* J.A. 47-59; Cert. Reply 3-4.

enforceable, *id.* 24a. The panel held instead that courts are forbidden from conducting any inquiry into whether the Commission has fulfilled its conciliation obligation: "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, our review of those procedures is satisfied." *Id.* 30a (citation omitted). Because the EEOC made such a cursory allegation in this case, the Seventh Circuit held that the courts had no further role to play. *Id.*

4. This Court subsequently granted petitioner's petition for a writ of certiorari. 134 S. Ct. 2872 (2014).

## SUMMARY OF ARGUMENT

The Seventh Circuit wrongly held that the courts are powerless to inquire into Title VII's requirement that the EEOC attempt conciliation before resorting to litigation.

I. Congress intended conciliation to be the preferred means of resolving Title VII complaints, recognizing that conciliation provides a quicker and more certain means of ensuring compliance with the statute and securing relief for victims of discrimination. To that end, Congress expressly conditioned the EEOC's authority to commence Title VII lawsuits on its first attempting to conciliate the dispute.

The Seventh Circuit believed Congress would not have intended for this requirement to be judicially enforceable because Title VII does not expressly provide that noncompliance with the requirement is an affirmative defense. But Title VII does not expressly provide that noncompliance with *any* of Title VII's preconditions to litigation are affirmative defenses. Nonetheless, this Court has repeatedly held that other preconditions, such as the requirement of a timely charge of discrimination, are judicially enforceable. That is in keeping with the Court's construction of other mandatory preconditions to suit and the law's general treatment of conditions precedent to litigation: compliance with such requirements is an element of the plaintiff's claim, which the plaintiff must plead and prove, not an affirmative defense one might expect to be set forth as such in the text of the statute.

II. Courts should hesitate before concluding that Congress has departed from the traditional treatment of conditions precedent to litigation. This is particularly so when Congress has imposed limitations on agency authority, given the longstanding assumption that Congress intends judicial review of administrative action. The reasons the Seventh Circuit gave for its decision do not overcome that presumption.

The court noted that the statute gives the agency broad discretion to decide whether a particular conciliation agreement is acceptable. But that does not preclude judicial review of whether the agency has engaged in a *process* that is recognizable as conciliation. For example, a court need not second-guess the EEOC's substantive determinations about an acceptable conciliation agreement to hold that the Commission must give an employer adequate time and information to consider a settlement proposal and may not conciliate race discrimination with respect to an individual and then file suit claiming sex discrimination against a class.

The Seventh Circuit also pointed to Title VII's confidentiality provision, which states that nothing "said or done" during conciliation "may be made public by the Commission" or "used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b). But Congress did not enact that provision as a backhanded way of precluding judicial review of the EEOC's conciliation obligation. Public dissemination of conciliation information can be precluded by filing such evidence under seal. And the proscription against using conciliation information as "evidence"

in a "subsequent proceeding," is best understood to preclude only its use to prove or disprove *the merits* of a discrimination claim, as the EEOC itself has argued in other cases. That understanding is confirmed by the history of the provision, which was added to the statute before the EEOC was given litigation authority, at a time when the only possible use of conciliation evidence was to prove or contest the merits of a discrimination claim.

In any event, confidentiality may be waived and should be deemed waived to the extent the parties put conciliation at issue in the case. And even if confidentiality were not waived, that would not preclude judicial enforcement of the conciliation precondition in the material number of cases in which such evidence is not needed.

The Seventh Circuit also was wrong to think that Congress would not have intended the conciliation precondition to be enforceable without providing detailed standards for compliance. Congress left a variety of provisions of Title VII, including this one, for further elaboration by the Commission. Congress authorized the Commission to issue regulations to provide exactly that kind of detail necessary for the implementation of the statute's procedural requirements. The EEOC's decision not to issue meaningful conciliation regulations does not empower it to evade judicial review of its compliance with the statute's most important requirements.

Moreover, four decades of experience have shown that even in the face of the Commission's own self-imposed silence the courts are perfectly capable of establishing reasonable rules that both give content to the conciliation requirement and respect the

Commission's discretion to decide what constitutes an acceptable conciliation agreement.

Finally, the court of appeals had no basis for its cynical view that judicial enforcement of the conciliation requirement would undermine conciliation because employers would forgo meaningful conciliation in favor of accumulating evidence to use in a conciliation defense in litigation. The very fact that Congress made conciliation mandatory shows that it did not share that view. In fact, employers have substantial financial and public relations interests in resolving even arguably non-meritorious discrimination claims in the confidential context of conciliation before a lawsuit or press release is issued. At the same time, the court of appeals' belief that the agency could be counted on to obey the law without judicial superintendence runs counter to the premise of the presumption of judicial review of agency action, while ignoring the real world incentives the agency often faces and the documented history of Commission non-compliance with its conciliation obligations.

## ARGUMENT

"The 'primary objective' of Title VII is to bring employment discrimination to an end." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) (citation omitted). The "preferred means for achieving this goal is through cooperation and voluntary compliance." *Id*. (internal punctuation and citation omitted). Congress thus required that before the EEOC may institute litigation, it must first attempt to resolve discrimination claims through conciliation, "thereby bringing defendants into 'voluntary

compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace." *Id*.

Notwithstanding that Congress refused to leave it up to the EEOC to decide whether conciliation was worth pursuing before filing suit, the Seventh Circuit concluded that Congress nonetheless intended to make the mandatory conciliation obligation unenforceable. That conclusion was wrong.

## I. The EEOC's Compliance With The Conciliation Precondition Is Subject To Judicial Review.

Consistent with Congress's desire to make litigation a last resort, Title VII establishes "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). By its terms, the statute permits suit by the Commission only at the end of that process, expressly making conciliation a precondition to litigation. This Court has repeatedly held that Title VII's other preconditions are subject to judicial enforcement, consistent with the law's general treatment of conditions precedent to litigation. The same principles support judicial enforcement of the conciliation precondition as well.

### A. The Plain Text Of Title VII Makes Conciliation A Mandatory Condition Precedent To The Commission's Power To Bring Suit.

Title VII provides that upon finding of reasonable cause, "the Commission *shall* endeavor to

eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (emphasis added). And it permits suits by the Commission only "*[i]f* . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission" within a specified period of time. *Id*. § 2000e-5(f)(1) (emphasis added).

The statutory text thus unambiguously establishes that the EEOC is "required by law to refrain from commencing a civil action until it has discharged its administrative duties," including its "responsibility" for "settling disputes, if possible, in an informal, noncoercive fashion." *Occidental*, 432 U.S. at 368. When Title VII provides that a certain action shall be taken as a precondition to litigation, the word "'shall' makes the act" required by the statute "mandatory." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (interpreting provision making filing of timely charge mandatory precondition to private suit).[7]

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[7] The Court has left open whether other "steps in the integrated procedure" of Title VII's enforcement provisions constitute mandatory preconditions to the EEOC's investigative or litigation authority. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984). For example, the statute requires the EEOC to provide employers prompt notice of a charge of discrimination, 42 U.S.C. § 2000e-5(b), after which the Commission must investigate the claim and may issue judicially enforceable subpoenas, *see id*. § 2000e-9. Because the statute does not directly link the notice requirement to the EEOC's subpoena power, the Court has doubted whether the Commission's failure to issue adequate

Making conciliation a precondition to litigation was not inadvertent. As originally enacted, the Commission's only enforcement authority was the ability to engage in conciliation. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Congress expanded the Commission's enforcement options in 1972 by authorizing it to bring suit. But in providing the EEOC that additional authority, Congress "did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation." *Shell Oil*, 466 U.S. at 78. Instead, "[c]ooperation and voluntary compliance" remained the "preferred means for achieving th[e] goal" of equal employment opportunity. *Alexander*, 415 U.S. at 44; *see also, e.g., EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) (noting "the statutory goal of maximum possible reliance upon voluntary conciliation and administrative resolution of claims"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-81 (1989) (explaining that Title VII's "elaborate administrative procedure" is designed to "work towards the resolution of these claims through conciliation rather than litigation.").

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notice deprives it of the power to issue a subpoena. *See Shell Oil*, 466 U.S. at 65-66. But neither the EEOC nor the Seventh Circuit has doubted that conciliation is a mandatory precondition to litigation. Nor could they. Exhausting conciliation is expressly made a precondition to suit in the very sentence authorizing EEOC suit. *See* 42 U.S.C. § 2000e-5(f)(1).

The conciliation precondition was driven by Congress's recognition that informal resolution of discrimination claims is superior to litigation in a number of respects. For one thing, it is generally much more expeditious at getting relief to injured workers and finality to employers. By design, the conciliation process is intended to be cheap, informal, and relatively quick. *See* 42 U.S.C. § 2000e-5(b); *Burnett v. Grattan*, 468 U.S. 42, 54 (1984); *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 104 (1979) (discussing conciliation procedures of the Fair Housing Act). By contrast, the median time to verdict in a civil case tried in federal court is nearly two years.[8] Litigating complex class or pattern-and-practices cases like this one can take even longer.[9]

Often conciliation is more likely to be effective than post-suit settlement efforts. Employers may be more willing to reach agreement through private conciliation than after suit has been filed, when they may feel compelled to clear their name. That, no doubt, is one of the reasons Congress forbade the Commission from making what is said or done in conciliation public without the consent of the people and companies involved. *See* 42 U.S.C. § 2000e-5(b); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590,

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[8] *See* Admin. Office U.S. Courts, Federal Judicial Caseload Statistics 2013, tbl C-5, http://goo.gl/mpw2SK.

[9] *See, e.g.,* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements & Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 820 (2010) (among cases ending in settlement, average time between filing civil rights class action suit and settlement was 3.7 years in 2005-06).

599 n.16 (1981) ("The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy.") (quoting 110 Cong. Rec. 8193 (1964) (Sen. Dirksen)).

### B. Failure To Comply With A Condition Precedent To Suit Is Subject To Judicial Review And Remedy.

The Seventh Circuit did not question that conciliation is a mandatory precondition to suit. Instead, it held that the precondition was not enforceable in court, reasoning that the "text of Title VII contains no express provision for an affirmative defense based on an alleged defect in the EEOC's conciliation efforts." Pet. App. 5a-6a. The court found that silence "compelling," *id*. 6a, given Congress's "special care in drawing so precise a statutory scheme," *id*. 5a (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013)). But that reasoning gets the analytical framework exactly backwards: preconditions to suit are presumptively enforceable absent clear indication that Congress intended otherwise. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 672 n.4 (1986) ("judicial review is the rule" and "the intention to exclude it must be made specifically manifest.") (citation and internal quotation marks omitted); *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (there is a "strong presumption that Congress intends judicial review of administrative action" and "[t]he presumption in favor of judicial review may be overcome only upon a showing of clear and convincing evidence of a contrary legislative intent.") (citation and internal quotation marks omitted).

1. Title VII's "integrated, multistep enforcement procedure," *Occidental*, 432 U.S. at 359, contains a number of conditions precedent to litigation without expressly stating that noncompliance with *any* of them is subject to judicial review or grounds for a defense. *See* 42 U.S.C. §§ 2000e-5(b), (f)(1). Yet, this Court has repeatedly recognized that other Title VII preconditions are judicially enforceable, treating that conclusion as necessarily following from the fact that the requirement is a condition precedent to litigation.

For example, the Court has held that an employee's failure to file a timely charge requires dismissal of the worker's suit. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977) ("Timely filing [of a charge] is a prerequisite to maintenance of a Title VII action."); *see also Morgan*, 536 U.S. at 101, 114-15 (same); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (same).

The Court likewise has held that the ninety-day time limit for filing a private suit after receiving a right to sue letter is a judicially enforceable condition precedent to suit. *See Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 149-50 (1984) (per curiam); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (calling timely filing of charge and receipt of right-to-sue letter "jurisdictional prerequisites to a federal action").[10]

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[10] In more recent cases, the Court has clarified that the preconditions are not necessarily "jurisdictional" in the sense of going to the courts' subject matter jurisdiction. *See Zipes*, 455 U.S. at 393 (explaining that, as a consequence, time limits may be subject to equitable tolling). But the Court has not

It makes no difference that the precondition here applies to suits by the Government. In *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), for example, the Commission brought suit to enforce an administrative subpoena. The subject of the investigation, Shell Oil, defended on the ground that Title VII permits the Commission to issue subpoenas only as part of an investigation triggered by a proper charge of discrimination. Shell Oil further argued that the charge against it failed to include the information required by the statute and the EEOC's regulations. *Id*. at 59. Although the statute does not expressly state that non-compliance with the charge requirements is a defense to an EEOC suit to enforce a subpoena, this Court nonetheless enforced the precondition. *Id*. at 67-81. The "existence of a charge that meets the requirements set forth in" the statute, the Court held, "is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." *Id.* at 65. The Court explained that this conclusion flows from Title VII's "integrated, multistep enforcement procedure," *id*. at 62 (citation omitted), under which filing of a valid charge is made a precondition to the EEOC's authority to issue a subpoena, *id*. at 64-65. The Court did not even pause to consider whether such a requirement was judicially enforceable. That much literally went without saying.

It also goes without saying by Congress that noncompliance with a condition precedent to suit is

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questioned that failure to comply with the time limits is a basis for dismissal.

subject to judicial review and remedy. For example, in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), this Court construed a provision of the Resource Conservation and Recovery Act of 1976 (RCRA), that provided that "[n]o action may be commenced . . . prior to sixty days after the plaintiff has given notice of the violation" to the Environmental Protection Agency, the state, and the alleged violator. 42 U.S.C. § 6972(b)(1). Like Title VII, the statute did not expressly provide that the condition was subject to judicial enforcement, or that non-compliance constituted a ground for dismissal. *Id*. The plaintiff in *Hallstrom* had failed to comply with the notice requirement, but the district court refused to dismiss the suit. The Ninth Circuit reversed, and this Court affirmed the court of appeals. The Court explained that under "a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit." 493 U.S. at 26. The Court took it as a given, therefore, that the courts were empowered to enforce the condition by dismissing a suit filed in violation of the notice requirement. "As a general rule," the Court explained, "if an action is barred by the terms of a statute, it must be dismissed." *Id*. at 31. Tellingly, for this proposition the Court cited *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), one of this Court's decisions enforcing Title VII's litigation preconditions. *See Hallstrom*, 493 U.S. at 31.

This Court has applied the same principles to other statutes that impose mandatory preconditions to suit but that do not expressly provide for judicial review or establish noncompliance as a defense. *See,*

*e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-58 (2010) (under 17 U.S.C. §§ 501(a), 411(a), copyright registration is a precondition "plaintiffs ordinarily must satisfy before filing an infringement claim"); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007) (failure to comply with administrative exhaustion requirement of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), is a basis for dismissal); *United States v. Zucca*, 351 U.S. 91, 94 (1956) (upholding dismissal of denaturalization suit when government failed to comply with precondition); *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931) ("The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant . . . .").

2. The Seventh Circuit reached the opposite conclusion in part because it wrongly assumed that non-compliance with a condition precedent to suit should be viewed as an affirmative defense, which one might expect Congress to expressly establish, just as it would expressly create a private right of action. Pet. App. 19a-20a.

The problem is that prerequisites to suit like Title VII's conciliation precondition are properly considered conditions precedent to suit, not affirmative defenses. *See, e.g.*, *Hallstrom*, 493 U.S. at 26 (notice of claim requirement a "condition precedent for suit"); *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1167 (10th Cir. 2007) ("[W]e and every circuit court to address the question directly therefore have deemed compliance with Title VII's filing deadline as a condition precedent rather than

an affirmative defense.") (collecting citations). And conditions precedent are treated as elements of the plaintiff's claim, which the plaintiff must plead and prove. *See* Fed. R. Civ. P. 9(c) (plaintiff bears burden of pleading conditions precedent); *Myers v. Cent. Fla. Invs., Inc.*, 592 F.3d 1201, 1223-25 (11th Cir. 2010) (plaintiff must plead satisfaction of conditions precedent to Title VII suit, including filing of EEOC charge). For that very reason, the EEOC's complaint in this case alleges that it had satisfied the preconditions to suit. J.A. 22, at ¶ 6 (EEOC Complaint).

Congress does not ordinarily state expressly that failure to plead or prove an element of one's claim is an affirmative defense. *See* Pet. App. 29a. One would no more anticipate Congress to provide that failure to conciliate is a basis for defense than one would expect it to create an express affirmative defense for failure to prove discrimination.[11]

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[11] The panel was wrong in any event to conclude that Congress must expressly identify an affirmative defense in the way it must expressly establish a private right of action. This Court has held, for example, that failure to comply with the PLRA's exhaustion requirement, although an affirmative defense, is a mandatory basis for dismissal, even though the statute does not expressly provide for judicial review of exhaustion or say that failure to exhaust is a defense. *See Jones*, 549 U.S. at 211-12.

## II. The Seventh Circuit Identified No Valid Basis For Exempting The Conciliation Precondition From Judicial Enforcement.

The court of appeals nonetheless thought that judicial enforcement of this particular precondition to suit was undesirable for various reasons. None of the court's objections provides an adequate basis for declining to enforce the statute's requirements.

### A. Courts Should Not Conclude That Preconditions To Litigation Are Precatory Unless Congress Unambiguously So Provides.

This Court should not lightly assume that Congress intended the conciliation precondition to be mandatory, but unenforceable. Leaving compliance with an important statutory requirement up to the good faith of a government agency runs contrary to the basic understanding 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).

This is no less true when Congress imposes procedural requirements on a government agency. The "statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (citation omitted). To the contrary, the Court has long applied a "strong presumption that Congress intends judicial review of administrative action." *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (citations and internal punctuation omitted). Accordingly, "judicial

review is the rule" and "the intention to exclude it must be made specifically manifest." *Bowen*, 476 U.S. at 672 n.4 (citation and internal quotation marks omitted); *see also Traynor*, 485 U.S. at 542 ("The presumption in favor of judicial review may be overcome 'only upon a showing of 'clear and convincing evidence' of a contrary legislative intent.'") (citation omitted).

In light of the combined traditions of judicial enforcement of conditions precedent to litigation, and the equally strong presumption of judicial review of agency action, Congress's failure to expressly distinguish the conciliation precondition from the other enforceable Title VII conditions precedent ought to be fatal to the EEOC's attempt to avoid judicial scrutiny. But even if intent to exclude judicial review of an agency's satisfaction of an express condition precedent to suit could ever be found absent express statutory text, there is no sufficient basis for inferring it here.

### B. Giving The EEOC Discretion To Decide The Substance Of An Acceptable Conciliation Agreement Does Not Indicate That Congress Intended To Preclude Judicial Enforcement Of The Non-Discretionary Duty To Conciliate Before Resorting To Litigation.

The court of appeals thought it significant that the statute requires only that the EEOC "endeavor" to reach an agreement through "informal" means, and that the Commission may sue if it is unable to obtain a "conciliation agreement acceptable to the Commission." Pet. App. 7a (quoting 42 U.S.C.

§§ 2000e-5(b), (f)(1) (emphasis omitted)). From this, it wrongly concluded that Congress would not have intended such a discretionary process to be subject to judicial review.

The fact that the Commission's decision whether to *accept* a conciliation offer is discretionary only highlights that its obligation to *engage* in conciliation prior to litigation is not. As discussed, Congress could not have been clearer that conciliation is mandatory. Nor is there any basis to doubt that the EEOC's fulfillment of its conciliation obligation prior to commencing litigation is essential to the proper operation of the statutory scheme.

The court of appeals believed that this mandatory requirement cannot be judicially enforced without trenching on the EEOC's discretion to decide whether a particular conciliation agreement is acceptable, Pet. App. 12a, but that assumption is baseless. The Seventh Circuit grudgingly acknowledged that other circuits have long recognized a distinction between enforcing the EEOC's procedural obligation to conciliate and its discretionary authority to decide the substance of an acceptable conciliation agreement. *Id.* 24a-27a. For example, a court need not inquire into the substantive adequacy of the parties' proposals to determine that the EEOC may not conciliate claims of race discrimination with respect to an individual, then file suit claiming sex discrimination against a class. *See, e.g.*, *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 271-72 (4th Cir. 1976). Likewise, a court does not impair the Commission's discretionary authority over the content of a conciliation agreement by requiring the EEOC to provide defendants basic

information about its claims and demands, or adequate time to evaluate them. *See infra* Parts II.C., and II.D.2. Such requirements simply compel the EEOC to engage in a procedure that is recognizable as conciliation.

### C. The Statute's Confidentiality Provision Does Not Preclude Enforcement Of The Conciliation Mandate.

The court of appeals also was wrong in believing that judicial enforcement of the conciliation provision "conflicts directly with the confidentiality provision" in Title VII. Pet. App. 7a. That provision declares that:

> Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, used as evidence in a subsequent proceeding without the written consent of the persons concerned.

42 U.S.C. § 2000e-5(b).

Given the strong presumption that preconditions to litigation are judicially enforceable, and that agency action is judicially reviewable, one would expect that if Congress intended to preclude judicial enforcement of the conciliation precondition, it would have said so directly, not through the winks and nods of an evidentiary limitation. It would be particularly strange for Congress to do so through an evidentiary limitation that can be waived by the parties, such that compliance with the precondition could be enforced in some cases, but not others, depending on whether the Commission (or other parties) chose to waive confidentiality.

In any event, the provision is perfectly compatible with judicial enforcement of the conciliation obligation. *See* Pet. App. 48a-51a. The first part of the provision – prohibiting the Commission from making conciliation details public – is easily satisfied by placing the relevant evidence under seal. *See Associated Dry Goods Corp.*, 449 U.S. at 598-600 (explaining that statutes' confidentiality provisions do not preclude all disclosures of confidential information, only disclosures to the general public). The court of appeals did not contend otherwise. *See* Pet. App. 8a-9a & n.1.

The proscription against using conciliation matters "as evidence in a subsequent proceeding" is also no barrier to judicial enforcement, for several reasons.

*First*, as the EEOC itself has previously argued, the provision is most sensibly read to prohibit using what was said or done in a conciliation as evidence going to the merits of the claims. *See EEOC v. Philip Servs. Corp.*, 635 F.3d 164, 165 (5th Cir. 2011) ("The Commission argues that this court should read the statute as prohibiting disclosure only in subsequent proceedings on the merits of the charge . . . ."); Pet. App. 50a-51a. The word "evidence" most commonly and immediately refers to information used to prove a claim on the merits, not everything a court might consider in the course of administering the litigation. Thus, in other statutes, Congress has expressly distinguished between using information as "evidence" and using it for other purposes in litigation. *See, e.g.*, 42 U.S.C. § 3789g(a) (providing that certain information gathered by government "shall not, without the consent of the person

furnishing such information, be admitted *as evidence* ***or*** *used for any purpose* in any action, suit, or other judicial, legislative, or administrative proceedings") (emphasis added); 42 U.S.C. § 10708(b) (same language); 7 U.S.C. § 2276(b)(2) (same); 13 U.S.C. § 9(a) (same); 10 U.S.C. § 613a (same); 15 U.S.C. § 281a (materially same language).

That interpretation is in line with the principal legal provision protecting the confidentiality of settlement negotiations in general, Federal Rule of Evidence 408. That rule prohibits use of settlement negotiation as evidence "either to prove or disprove the validity or amount of a disputed claim or to impeach by prior inconsistent statement or a contradiction." Fed. R. Evid. 408(a).

To be sure, the Title VII confidentiality provision says that conciliation matters may not be used "as evidence in a subsequent proceeding," without expressly stating that the prohibited use is with respect to the merits of the discrimination claim. But any inference that Congress intended also to preclude using conciliation evidence to enforce compliance with the conciliation mandate is dispelled by the statute's history. The confidentiality provision was part of the original statute, under which the EEOC could only conciliate claims and only individuals could sue. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259. Because private plaintiffs could hardly be held accountable for the EEOC's failure to conduct adequate conciliation, inadequate conciliation was not a defense to private suit. *See Canavan v. Beneficial Fin. Corp.*, 553 F.2d 860, 863 (3rd Cir. 1977); *Dent v. St. Louis-San Francisco Ry. Co.*, 406 F.2d 399, 402-03 (5th Cir.

1969), *cert. denied*, 403 U.S. 912 (1969); *Johnson v. Seaboard Air Line R.R. Co*., 405 F.2d 645, 648 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969). Accordingly, courts would never have occasion to consider what was said or done in conciliation as evidence going to anything other than the merits of the discrimination claim. Banning such use was the only function of the confidentiality provision. *See, e.g.*, *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 880-81 & n.6 (5th Cir. 1981).[12]

When Congress gave the EEOC litigating authority in 1972, and conditioned its right to sue on compliance with the conciliation mandate, it made no material alteration to the confidentiality provision. *See* Equal Employment Opportunity Act of 1972, *supra*, § 4(a). There is nothing in the legislative history or background that gives reason to think that Congress intended the confidentiality provision to operate any differently after 1972 (*i.e.*, to prohibit anything other than use of conciliation evidence to prove or dispute the merits of a lawsuit). There is certainly no reason to think Congress intended the provision to preclude enforcement of the conciliation precondition it had just enacted.

Other parts of the statute confirm this understanding. As originally enacted, and to this

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[12] It was also a necessary function because Federal Rule of Evidence 408 was not enacted for another ten years. *See* Fed. R. Evid. 408, advisory committee notes to 1974 enactment (noting that prior to rule, under "existing federal law evidence of conduct and statements made in compromise negotiations [was] admissible in subsequent litigation between the parties").

day, Title VII permits courts to stay proceedings for up to sixty days to allow further conciliation. *See* 42 U.S.C. § 2000e-5(f)(1). Congress would not have thought that the confidentiality provision required the district court to exercise its discretion blindly. Instead, Congress would have understood that the court would need to know something about the prior conciliation efforts. The confidentiality provision can be reconciled with that expectation by construing it to preclude submission of conciliation evidence only to support or disprove a discrimination claim on the merits.

*Second*, even if applicable, the confidentiality limitation should be deemed waived when parties put compliance with the precondition at issue in court. *See* 42 U.S.C. § 2000e-5(b) (use of conciliation evidence prohibited only in the absence of "written consent of the persons concerned"). As noted above, compliance with the conciliation condition precedent to suit is part of what the EEOC must prove to establish its case. However, the Commission need not disclose confidential information to satisfy that obligation in every case. Compliance with conditions precedent to litigation can be alleged generally. *See* Fed. R. Civ. P. 9(c). If that allegation is not controverted, there should be no need to introduce any conciliation evidence. On the other hand, if the employer controverts the allegation by moving to dismiss or for summary judgment, the employer should be deemed to waive confidentiality to the extent necessary to adjudicate the specific failures the defendant alleges. And to the extent that the EEOC is a "person[] concerned" within the meaning of the statute, the Commission may also waive

confidentiality to the same extent in order to meet its burden of proving compliance with the precondition, in which case the evidence may be submitted based on the consent of the parties. If the Commission for some reason refuses to waive confidentiality, its claim may be dismissed for failure of proof while still preserving confidentiality.[13]

This regime is consistent with the treatment afforded other waivable privileges by courts and the federal rules. *See, e.g.*, *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (privilege against self-incrimination); Fed. R. Evid. 502(a) (attorney client privilege); *Willy v. Admin. Review Bd.*, 423 F.3d 483, 497 & n.63 (5th Cir. 2005) (same, collecting cases).[14]

*Third*, in a material number of cases, no evidence regarding what was "said or done" in conciliation is needed to decide whether the EEOC has complied with the conciliation mandate. As discussed below,

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[13] The same result appropriately would follow if a complainant participated in the conciliation but refused to waive confidentiality. If multiple complainants participated, but only some refused to waive confidentiality, the claims regarding the non-waiving complainants could be dismissed and anything "said or done" by those complainants excluded from evidence. 42 U.S.C. § 2000e-5(b).

[14] In fact, in this case, the Commission initially insisted that by raising a conciliation defense, petitioner had waived its right to maintain the confidentiality of the conciliation proceedings. *See* J.A. 36. Petitioner informed the Commission that its assertion was premature, as petitioner had not yet moved for dismissal or summary judgment on the basis of inadequate conciliation, but that when the time came, petitioner would agree to waive confidentiality to the extent necessary to adjudicate the defense. *See* J.A. 38.

in many cases, the conciliation objection is that the Commission refused to engage in any relevant conciliation at all, by failing, for example, to conciliate with a particular defendant, over particular claims, or with respect to certain alleged victims. *See infra* Part II.D.2. In other cases, the complaint is that the EEOC failed to respond to reasonable requests for information regarding its claims. *See id*. In such cases, the relevant facts may be undisputed, obviating the need to admit what was said or done in conciliation "as evidence." 42 U.S.C. § 2000e-5(b).[15] In any case, examining the *subject matter* of the conciliation, or the Commission's failure to respond to requests for information, does not require a court to consider any confidential conciliation details. *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc*., 332 F.3d 976, 981 (6th Cir. 2003) (recognizing privilege for settlement negotiation communications but distinguishing the "existence of . . . settlement talks" from the details of "settlement communications"); *Kelley v. Sec., U.S. Dep't Hous. & Urban Dev.*, 3 F.3d 951, 956-57 (6th Cir. 1993) (noting that even if the statute were read to prevent "disclosure of offers, submissions, concessions and similar negotiating efforts during conciliation," that would not "preclude an examination of the conciliation *process* itself")

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[15] *See, e.g.*, *EEOC v. Pet, Inc*., 612 F.2d 1001, 1002 (5th Cir. 1980); *EEOC v. Sears, Roebuck & Co.*, No. 79 Civ. 5708 (KTD), 1980 WL 180, at *1 (S.D.N.Y. June 16, 1980) (same), *aff'd*, 650 F.2d 14 (2nd Cir. 1981).

(emphasis added) (discussing parallel provision of the Fair Housing Act, 42 U.S.C. § 3610(d)(1)).

### D. The Conciliation Requirement Is Susceptible To Neutral Judicial Enforcement.

The court of appeals also believed that Congress would not have intended judicial enforcement of the conciliation precondition given the purported "lack of any meaningful standard to apply." Pet. App. 9a. But the court ignored that Congress simultaneously gave the EEOC authority to elaborate the procedural requirements of the statute. And it disregarded the various contexts in which courts and other adjudicative bodies have managed to enforce conciliation obligations, including the four decades of experience other circuits have accumulated enforcing the Title VII conciliation mandate.

#### *1. The EEOC Is Empowered To Issue Regulations Defining The Conciliation Obligation.*

Congress did not define in detail what counts as "conciliation" within the meaning of the statute, just as it did not define what constitutes a "charge" or how a charge is "filed." *See EEOC v. Shell Oil*, 466 U.S. 54, 67-74 (1984) (considering required content of a charge); *Love v. Pullman Co.*, 404 U.S. 522, 524-26 (1972) (considering whether charge was properly filed). That is no basis, however, to conclude that Congress intended to forbid the courts from considering whether a lawsuit was preceded by the timely filing of a proper charge or adequate conciliation.

Instead, recognizing that the statute did not contain all the detail required for its administration, Congress gave Commission authority to issue "suitable procedural regulations to carry out" Title VII. 42 U.S.C. § 2000e-12(a). Using that authority, the Commission has previously defined in greater detail standards for complying with the statute's various procedural requirements, including filing the initial charge,[16] serving the charge on the employer,[17] investigating the charge,[18] issuing of no-cause or reasonable-cause determinations,[19] and issuing right-to-sue letters.[20]

Thus, in *Shell Oil*, this Court held that the timely filing of a proper charge was a judicially enforceable precondition to EEOC litigation, even while recognizing that the "statute itself prescribes only minimal requirements pertaining to the form and content of charges of discrimination." 466 U.S. at 67. The Court did not conclude that the lack of greater statutory guidance indicated that Congress intended to preclude judicial enforcement of the requirement. Instead, the Court deferred to the Commission's regulations defining what information a valid charge required. *Id*.; *see also Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) (deferring to EEOC's regulations defining "charge").

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[16] 29 C.F.R. §§ 1601.9, 1601.12.

[17] *Id*. § 1601.14.

[18] *Id*. §§ 1601.15-.17.

[19] *Id*. §§ 1601.18-.21.

[20] *Id*. § 1601.28.

There is no reason why the Commission could not do the same thing here and issue regulations that provide more detailed content to the conciliation obligation, even while protecting the Commission's discretion to decide what constitutes an acceptable agreement.[21] In fact, the EEOC has already begun to develop internal standards for "evaluating the quality of EEOC investigations and conciliations," through a Draft Quality Control Plan.[22] Of course, that plan is, by design, non-binding. But the fact that the EEOC has chosen to elaborate the meaning of the conciliation requirement in non-binding quality control principles rather than enforceable regulations is no reason to allow it to thereby avoid judicial review of its compliance with the statute.

*2. Experience Demonstrates That Conciliation Requirements, Including Title VII's, Are Susceptible To Judicial Enforcement.*

The Seventh Circuit was wrong as well to think that there is something special about a conciliation requirement that makes it incapable of judicial enforcement. Courts and other tribunals have enforced this and other similar obligations for many years.

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[21] The Commission has a regulation on conciliation, but it does little more than parrot the statute. *See* 29 C.F.R. § 1601.24.

[22] *See* EEOC, U.S. Equal Employment Opportunity Commission Quality Control Plan 2013 Draft Principles, http://goo.gl/H8QyS0.

For example, in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), this Court explained that provisions of the National Labor Relations Act "require an employer to bargain 'in good faith with respect to wages, hours, and other terms and conditions of employment.'" *Id.* at 198 (quoting 29 U.S.C. § 158(a)(5), (d)). Rather than throw up its hands and declare the provision unenforceable, the Court enforced the obligation, giving due deference to the National Labor Relation Board's "interpretation of the NLRA requirement that parties bargain in good faith." *Id*. at 200.

The Seventh Circuit treated the NLRA as an unwise anomaly, incapable of neutral judicial enforcement. Pet. App. 11a-12a. But the duty to negotiate or mediate in good faith prior to litigation or arbitration is also a precondition in many collective bargaining and other agreements, and that duty is commonly enforced by courts or arbitrators. *See, e.g*., *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207-08 (2014); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-57 (1964); *JPD, Inc. v. Chronimed Holdings, Inc*., 539 F.3d 388, 390 (6th Cir. 2008); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc*., 623 F.3d 476, 478 (7th Cir. 2010); *see also, e.g*., INT'L BAR ASS'N, IBA GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES 30 (2010) ("It is common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration.").

But the best evidence that the Title VII conciliation requirement can be judicially enforced is that it *has been* judicially enforced in other circuits

for decades. *See* Pet. App. 25a (collecting cases). Although courts have differed somewhat in the details, all have construed Title VII to require the EEOC to negotiate in good faith and have given greater content to that obligation in the context of case-by-case adjudication. *Id*.

From these decisions, it is possible to identify a number of reasonable principles that give concrete content to the conciliation obligation without entangling courts in the substance of the parties' negotiating positions. Specifically, the EEOC must at least:

**a. Attempt conciliation with each defendant regarding every claim and claimant.** Conciliation cannot achieve its intended purpose of providing an expeditious alternative to litigation unless the EEOC attempts conciliation with each defendant regarding each claim. It cannot, for example, pursue sex discrimination claims against a union, when it only attempted conciliation of those claims with the employer.[23] Likewise, it cannot conciliate race discrimination in hiring claims, then litigate sex discrimination in promotion claims.[24] Nor

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[23] *See Patterson v. Am. Tobacco Co*., 535 F.2d 257, 271-72 (4th Cir. 1976). In this case, for example, the EEOC sought discovery regarding other companies it suspects were involved in petitioner's operations, telling the district court that the evidence could lead it to join the other companies as defendants and insisting that it may do so without first attempting conciliation with them. *See* R. 115-10.

[24] *See Patterson*, 535 F.2d. at 271-72; *EEOC v. Am. Nat. Bank*, 652 F.2d 1176, 1186 (4th Cir. 1981) (dicta).

can conciliation perform its intended function unless the EEOC negotiates regarding all the alleged victims for whom it seeks remedial relief.[25]

**b. Inform the defendant what steps it believes are necessary to "eliminate the alleged unlawful employment practice." § 2000e-5(b)**.[26] In other words, the EEOC must inform the defendant what would constitute "a conciliation agreement acceptable to the Commission." § 2000e-5(f)(1). This includes what actions EEOC expects the defendant to take to change its employment practices, as well as what monetary or other relief it expects the employer to provide alleged victims.

**c. Provide the defendant with the basic information about the Commission's claims and demands that a defendant needs in order to evaluate any settlement proposal**. Genuine conciliation cannot take place unless the EEOC explains the basis for its demands. *See EEOC v. Associated Dry Goods Corp*., 449 U.S. 590, 601 (1981) ("A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own."). While one might hope that the EEOC's

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[25] *See Hill v. W. Elec. Co., Inc.*, 672 F.2d 381, 390 n.6 (4th Cir. 1982) (cannot conciliate individual claims, then litigate class claims); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2nd Cir. 1981) (cannot conciliate class claims, then bring individual claims never discussed in conciliation).

[26] *See EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981); *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1334 (5th Cir. 1979).

reasonable cause determination would provide that information, the Commission regularly limits its investigative findings to utterly conclusory allegations of unlawful conduct. *Compare* J.A. 14-17 (reasonable cause determination in this case)[27] *with Associated Dry Goods*, 449 U.S. at 601 n.18 (noting that in 1981, it was the Commission's practice to "explain the factual basis for its conclusion" when it issued its probable cause determination, and observing the "important benefits of the reasonable-cause determination would be lost" if the Commission "announce[d] no more than its bare conclusion on reasonable cause.").

Accordingly, to engage in genuine conciliation, the Commission must provide an outline of the factual and legal basis for the claims.[28] In addition, at least when asked, it must explain the basis of its remedial demands. For example, when the EEOC asks for monetary relief, it must explain how it arrived at the amount of any monetary relief demanded; it cannot simply pick an arbitrary number and state its intention to sue if the defendant does

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[27] The reasonable cause letter in this case stated only that EEOC had "determined that the evidence obtained during the course of the investigation establishes reasonable cause to believe that Respondent discriminated against Charging Party and a class of female applicants, because of their sex, in that Respondent failed to recruit and hire them, in violation of Title VII." J.A. 15.

[28] *See Klingler Elec. Corp.*, 636 F.2d at 107; *Marshall*, 605 F.2d at 1335.

not pay it.[29] And because an employer cannot be expected to agree to hire, promote, or reinstate an employee unless it knows who that person is and can evaluate her qualifications, the Commission must identify the particular individuals for whom it seeks such relief.

**d. Provide the employer a reasonable amount of time to review and respond to a conciliation offer**. While it should go without saying that an employer needs time to evaluate a conciliation demand, the Commission has sometimes failed even that basic standard of good faith negotiation.[30]

**e. Accept and consider counter-offers**. Although the EEOC retains discretion to decide what constitutes an acceptable conciliation agreement, conciliation necessarily implies a process of communication and negotiation. It cannot simply make an initial "take-it-or-leave it" offer and declare conciliation a failure if the defendant does not simply acquiesce.[31]

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These modest and reasonable procedural requirements are readily derived from the text of the

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[29] *Cf. EEOC v. Agro Distr., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (finding EEOC made an "insupportable demand for compensatory damages as a weapon to force settlement").

[30] *See, e.g.*, *EEOC v. Trans States Airlines*, 462 F.3d 987, 996 (8th Cir. 2006); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1258-59 (11th Cir. 2003).

[31] *See Agro Distr.*, 555 F.3d at 468.

statute and ordinary understandings of what it means to attempt real conciliation of a dispute. Unless the agency undertakes these basic prerequisites of genuine conciliation, it cannot reasonably claim that it was "*unable* to secure from the respondent a conciliation agreement acceptable to the Commission," 42 U.S.C. § 2000e-5(f)(1) (emphasis added). For example, when the Commission offers an employer a take-it-or-leave-it demand for millions of dollars without identifying how it arrived at that number, the number of alleged victims, or any factual basis to believe that the claims have merit, it is more accurate to say that the Commission has *chosen* not to secure an acceptable conciliation agreement and has failed to engage in anything recognizable as an attempt to "eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id*.[32] Such an illusory "conciliation" fails to fulfil Title VII's mandate that EEOC settle "disputes, if possible, in an informal, *noncoercive* fashion." *Occidental*, 432 U.S. at 367-68 (emphasis added).

At the same time, the principles described above do not "invite[] ad hoc assessments of whether the

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[32] For that reason, and because the EEOC is charged with elaborating the procedural requirements of the statute through regulations, there is no basis to claim that *all* aspects of the conciliation process, including non-substantive issues of procedure, are effectively committed to agency discretion by the statute's failure to provide any "meaningful standard against which to judge the agency's" conduct. Pet. App. 13a (quoting *Wester v. Doe*, 486 U.S. 592, 600 (1988) (interpreting Section 701(a) of the Administrative Procedures Act)).

EEOC played fairly or took reasonable substantive positions." Pet. App. 27a. Instead, they simply impose reasonable *procedural* requirements that ensure that the Commission will give employers the basic information any responsible litigant would need before acquiescing to the agency's demands. Indeed, the Commission has implicitly recognized the reasonableness of at least some of these requirements by including them in the agency's Draft Quality Control Plan, including, for example, the requirement that the Commission "inform[] the parties of the proposed categories of relief and how monetary terms were reached" and also "respond[] appropriately to reasonable offers made by the parties."[33]

If the agency believes that other aspects of the courts' conciliation case law place an unfair burden on the Commission, or constitute an unwarranted intrusion on its discretion, the EEOC remains free to alter the standards by issuing reasonable regulations. *See, e.g.*, *Nat'l Cable & Telecom. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

Of course, no one would accept as reasonable a regulation that stated that the Commission may decline to conciliate at all with particular defendants or regarding particular claims or claimants, or that the EEOC may issue large monetary demands with

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[33] *See* U.S. Equal Employment Opportunity Commission Quality Control Plan 2013 Draft Principles, *supra*; *see also* EEOC, Resolving a Charge, http://www.eeoc.gov/employers/resolving.cfm (in describing conciliation process, stating that "Conciliation discussions are negotiations and **counter-offers may be presented**") (emphasis in original).

no explanation of how they were calculated and then require a response within twenty-four hours. Yet that is the practical effect of the Commission's failure to issue any meaningful regulations at all and the Seventh Circuit's ruling that courts may not develop and enforce rules to fill that void.

### E. Judicial Review Does Not Undermine Conciliation.

Finally, the court of appeals hypothesized that judicial enforcement of compliance of the conciliation precondition "invites employers to use the conciliation process to undermine enforcement of Title VII" rather than as an "opportunity resolve a dispute." Pet. App. 16a. At the same time, it assumed that even without the prospect of judicial enforcement, the EEOC would faithfully comply with its conciliation duty. Pet. App. 20a-21a.

While these might be perfectly fine arguments to make to Congress, they are not grounds for refusing to enforce the statute as written. *See Hallstrom*, 493 U.S. at 31 (explaining that such arguments "disregard the plain language" of a statute establishing a precondition to litigation). In any event, Seventh Circuit's speculation has no foundation.

1. The panel justified its conclusion that employers would attempt to game the system through an extended law-and-economics style thought experiment. *See* Pet. App. 16a-18a. The lack of citation to any empirical support is telling – the condition has been enforced in other circuit for four decades, yet the court of appeals cited to no

substantial evidence in reality bearing out its hypothesis.[34]

In any event, the court of appeals' musings are premised on a fundamental misunderstanding of the incentives employers face. The court assumed that often an "employer's incentive to reach an agreement" will be "outweighed by the incentive to stockpile exhibits" in support of a conciliation defense at trial. Pet. App. 17a. But the court greatly underestimated employers' incentives to settle discrimination claims through conciliation. Successful conciliation avoids what can be enormous litigation costs, as well as substantial distraction and disruption to the employer's business. Often even more importantly, because it is a confidential process, a successful conciliation can avoid harmful public allegations of wrongdoing. The panel thus betrayed its ignorance of business realities when it brushed aside as trivial the impact of the Government filing a complaint and issuing press releases accusing a company of particularly odious illegal conduct. Pet. App. 18a.

The court also disregarded that many companies, when faced with allegations that their employees have engaged in illegal discrimination, are genuinely interested in finding out the truth, stopping any unlawful discrimination, and making amends to

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[34] In its cert-stage brief, the Government insinuated that this case is an example of what the Seventh Circuit feared. *See* BIO 18-19. But as the cert. reply demonstrated, its assertions were unfounded, premised on a misleading description of the record. *See* Cert. Reply 3-4.

victims. But they cannot do so when the EEOC issues its investigative findings, as in this case, in utterly conclusory terms and then refuses during conciliation to provide the employer the basic information anyone wanting to find out the truth would need to know. That is particularly true when the employer's own investigation uncovers no substantial evidence of discrimination – although an employer may be perfectly willing to acknowledge it may have missed something, it cannot be expected to simply take the EEOC's word for it, as the EEOC is not infallible either.[35]

The panel thus acted with surprising and unjustified cynicism in scoffing at the proposition that an employer might raise a conciliation defense "out of a desire to see their adversary across the negotiating table again." Pet. App. 17a. Congress plainly did not share the panel's apparent view that *genuine* conciliation serves no purpose and is unlikely to lead to any different result than grossly inadequate efforts.

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[35] *See, e.g.*, *Agro Distr.,* 555 F.3d at 473 (affirming award of attorney's fees against Commission for pursuing obviously meritless discrimination claims); *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 154 (4th Cir. 2014) (same); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 591-92 (6th Cir. 2013) (same); *EEOC v. Tricore Reference Labs.*, 493 Fed. App'x. 955, 960-61 (10th Cir. 2012) (same); *see generally* Press Release, EEOC Issues Comprehensive Litigation Report (Aug. 13, 2002), http://goo.gl/XHlhXr (stating that although EEOC settles approximately 91% of suits filed, it wins only about 60% of those it litigates to judgment).

This is not to deny that some employers will have no interest in conciliation or may seek to use a conciliation defense to avoid liability for unlawful conduct. This is a big country, with many employers, and they are not all the same. The point instead is that Congress indisputably believed that requiring the EEOC to conciliate prior to litigating would, on balance, be better than leaving it up to the agency to decide for itself when to litigate first and seek settlement later. If it had shared the Seventh Circuit's skepticism of the value of good faith conciliation, it never would have enacted the conciliation provision in the first place.

2. Without any sense of irony, the panel traded its cynic's goggles for rose-colored glasses when it switched focus to the EEOC itself. The panel assumed that Congress would not have intended judicial enforcement of the conciliation precondition but instead would have trusted the agency to comply with the law on its own. Pet. App. 20a-21a. One need not assume the worst of the agency to recognize the implausibility of that assumption.

To start, the long-standing strong presumption in favor of judicial review of agency action is premised on the opposite understanding. "Without judicial review," this Court has said, "statutory limits would be naught but empty words." *Bowen*, 476 U.S. at 672 n.3 (citation omitted). The court of appeals did not cite to anything in the language or history of the statute to show that Congress entertained the contrary presumption in this case. *See* Pet. App. 18a-21a.

Nor are the reasons the court gave for its special confidence in the agency compelling. The court noted

that the EEOC is subject to presidential and congressional oversight. Pet. App. 20a-21a. But that, of course, is true of virtually every agency.[36] Nonetheless, as noted, this Court does not generally presume that Congress left enforcement of statutory requirements on agency conduct to the political branches.

The court of appeals also noted that the EEOC receives many complaints, but litigates few cases even among those it finds to have merit. Pet. App. 20a. It assumed that this means that the Commission has an incentive to conciliate cases successfully. That may be fair general assumption, but it ignores that the agency (or particular agency employees) may face countervailing incentives as well.

For example, EEOC officials may also have incentives to file cases in order to demonstrate – to superiors within the agency, others within the executive branch, members of Congress, interest groups, or the public at large – that they are zealously enforcing the statute. That is, some agency officials may believe, rightly or wrongly, that they get more credit for filing cases than for conciliating claims with some of their constituencies, including, perhaps, those responsible for agency budgets. *Cf.* Barry A. Hartstein, ed., ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2013: AN ANNUAL REPORT ON EEOC CHARGES, LITIGATION, REGULATORY

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[36] In fact as an independent agency, *see* Pet. App. 20a, the EEOC is less susceptible to direct presidential control than most agencies.

DEVELOPMENTS AND NOTEWORTHY CASE DEVELOPMENTS 13 (Jan. 2014) (noting that "a vast majority of EEOC lawsuits are filed during the last two months of the EEOC's fiscal year").[37] At the very least, given their confidential status, it may be more difficult for the Commission to publicize the details of its conciliation successes. *See* EEOC, Significant EEOC Race/Color Cases, http://goo.gl/OSiWOx (identifying Commissions' achievements in combatting race discrimination by listing over 150 litigated cases and three settled by pre-litigation conciliation).

Relatedly, as some courts have noted, filing a lawsuit may also result in greater publicity than a conciliation agreement. *See, e.g.*, *Asplundh*, 340 F.3d at 1261; EEOC, E-RACE Goals and Objectives, ¶ 4, http://goo.gl/82GRO4 (identifying as agency priority, "Increase Media Publicity" by "broaden[ing] its press efforts on race and color discrimination cases"). This is not to accuse the agency of self-aggrandizement. An agency may believe that such publicity has legitimate uses. In this case, for example, the EEOC apparently hoped that by publicizing its suit against petitioner, it would alert other firms to the need to avoid practices with potential for disparate impact.[38]

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[37] *Available at* http://goo.gl/7aPvh1.

[38] Press Release, ACH Mining Sued by EEOC for Sex Discrimination: Federal Agency Asserts That Coal Mine's Failure to Hire Qualified Female Applicants Violated Civil Rights Law (Sept. 27, 2011), http://goo.gl/Lk5mO5 (quoting EEOC attorney as saying "We hope that this case will encourage employers to look at their policies. A policy which results in a

The point is simply that confidential conciliation cannot serve this purpose.

Litigation also holds out the prospect of establishing legal principles that may be helpful to the Commission in other cases or advance the agency's view of best reading of the statute it enforces and sound public policy. *See, e.g.*, EEOC, E-RACE Goals and Objectives, ¶ 3, http://goo.gl/82GRO4 (identifying as agency priority developing "litigation strategies to address" practices causing disparate impact, such as "credit and background checks, arrest and conviction records, employment tests, [and] subjective decision making").

This is not idle speculation. At the end of the day, experience simply has not borne out the Seventh Circuit's optimistic predictions. As amici have shown, even in circuits enforcing the conciliation condition, there are ample examples of the Commission engaging in grossly deficient conciliation efforts. *See* Retail Lit. Ctr. Cert-Stage Br. § I.A.

Those failures do not simply harm employers. They demonstrate that in some instances, the Commission's interests may not be squarely aligned with the individuals on whose behalf it is suing, almost all of whom are most interested in obtaining fair relief for their injuries in the most expeditious way possible. As this Court put it, "the victims of job discrimination want jobs, not lawsuits." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982). "Delays in

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work force that looks dramatically different than the applicant pool is a policy worth reconsidering.").

litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them." *Id*. at 228.

This is not, of course, to say that giving short shrift to conciliation is the agency's modus operandi. Just as it is dangerous to generalize about employers' attitude toward conciliation, it would be unfair to assume that all EEOC cases are conducted in the same manner. Conciliation is largely conducted by the agency's more than fifty field offices spread among fifteen regional districts, and the details may be left to the discretion of one or two particular employees.[39] So one would expect variation in particular employees' and offices' approach to conciliation.

But that is precisely why Congress did not leave conciliation up to the agency and its employees. It decided that in the special context of Title VII, it would establish a statutory conciliation obligation and make it a precondition to Commission litigation. There is every reason to expect that Congress would have understood that for that constraint to work as intended, it must be subject to judicial enforcement.

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The EEOC rested its motion for summary judgment solely on its claim to be immune from any judicial scrutiny at all. *See* Pet. App. 37a (district

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[39] *See* EEOC Office List and Jurisdictional Map, http://www.eeoc.gov/field/.

court noting that Commission disavowed any attempt to show that its conciliation efforts could survive any applicable standard of review). Because that categorical claim has no merit, this Court should reverse the Seventh Circuit and affirm the district court's denial of the Commission's motion for partial summary judgment.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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