No. 15-20078

United States Court of Appeals

for the

Fifth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

BASS PRO OUTDOOR WORLD, LLC,
and TRACKER MARINE RETAIL, LLC,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

BRIEF OF APPELLANTS

Michael W. Johnston
Samuel M. Matchett
Rebecca Cole Moore
Jona J. McCormick
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5138

James P. Sullivan
KING & SPALDING LLP
401 Congress Avenue, Suite 3200
Austin, Texas 78701
Telephone: 512-457-2000
Facsimile: 512-457-2100

ATTORNEYS FOR DEFENDANTS-APPELLANTS

No. 15-20078

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee v. BASS PRO OUTDOOR WORLD, LLC and TRACKER MARINE RETAIL, LLC, Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. District Court Judge:

   The Honorable Keith P. Ellison

2. Parties:

   Plaintiff-Appellee – Equal Employment Opportunity Commission ("EEOC")

   Defendants-Appellants – Bass Pro Outdoor World, LLC and Tracker Marine Retail, LLC

3. Attorneys:

   Counsel for Plaintiff-Appellee:

   Adewale-Mendes, Rose, Supervisory Trial Attorney, EEOC
   Batog, Konrad, Trial Attorney, EEOC
   Bowne, Timothy M., EEOC
   Juge, Gregory T., Acting Supervisory Trial Attorney, EEOC
   Lee, James, Deputy General Counsel, EEOC
   Lopez, P. David, General Counsel, EEOC

Reams, Gwendolyn Young, Associate General Counsel, EEOC
Rose, Robert, Regional Attorney, EEOC
Sacher, James, Regional Attorney, EEOC
Sustaita, Rodolfo Lucio, Senior Trial Attorney, EEOC
Tucker, James Mark, Attorney, EEOC
Wilhite, Connie Kay, EEOC

Counsel for Defendants-Appellants:

Burns, William Robert, King & Spalding LLP
Johnston, Michael W., King & Spalding LLP
Matchett, Samuel M., King & Spalding LLP
McCormick, Jona J., King & Spalding LLP
Moore, Rebecca C., King & Spalding LLP
Sullivan, James P., King & Spalding LLP
Tandy, Lovita T, King & Spalding LLP

4. Entities with a financial interest:

No other entities have a known financial interest in this case.

5. Federal Rule of Appellate Procedure 26.1:

Defendant-Appellant Bass Pro Outdoor World, LLC is a wholly owned subsidiary of Bass Pro, LLC. Defendant-Appellant Tracker Marine Retail, LLC is a wholly owned subsidiary of Bass Pro Group, LLC.

STATEMENT REGARDING ORAL ARGUMENT

Appellants submit that this matter is appropriate for oral argument. As the district court observed, this case involves complicated issues of law "reflect[ing] a fundamental disagreement as to the role that the [EEOC] is to play in the vindication of rights guaranteed by Title VII and the scope of its authority to represent those who may have been aggrieved by unlawful employment practices." ROA.9375. The stakes are high because "[t]his clash appears to present itself in a great number of Title VII suits in which the EEOC is involved." *Id.* Despite the importance of these issues to this and many other cases, they rarely present the opportunity for appellate review. ROA.9419-20; ROA.9703-04. "These are important questions that will not only shape, if not resolve, the case at hand, but also help determine the Commission's actions in future cases." ROA.9420.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Case Authorities

Constitutional Law

Statutes

Federal Rules

Other Authorities

United States Court of Appeals

for the

Fifth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

BASS PRO OUTDOOR WORLD, LLC, and TRACKER MARINE RETAIL, LLC,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

BRIEF OF APPELLANTS

JURISDICTION

The district court had subject matter jurisdiction over this Title VII action pursuant to 28 U.S.C. § 1331. Pursuant to 28 U.S.C. § 1292(b), Appellants (collectively, "Bass Pro") timely filed a petition for leave to appeal from the July 30, 2014 order (the "Order"), ROA.9374-420, issued by Judge Ellison, as amended and certified on November 17, 2014. ROA.9700-09. This Court granted Bass Pro's petition on February 10, 2015.

ISSUES PRESENTED

1. May the EEOC bring a pattern or practice cause of action under § 706 of Title VII, or is that claim cognizable only under § 707?

2. May the EEOC use the *Teamsters* pattern or practice method of proof where it seeks compensatory and punitive damages for tens of thousands of allegedly aggrieved individuals challenging thousands of hiring decisions made by hundreds of different decision-makers spread throughout 69 stores in 31 states over a period of ten years (the "*Teamsters* Question")?

3. May the EEOC bring a § 706 lawsuit alleging intentional discrimination and seeking compensatory and punitive damages for tens of thousands of allegedly aggrieved individuals without investigating, issuing a cause determination, or conciliating the claim of a single aggrieved person (the "Prerequisites Question")?

INTRODUCTION

The EEOC investigated Bass Pro's employment practices, including its hiring processes, for over three years. During that investigation, Bass Pro voluntarily produced over 200,000 pages of documents, facilitated the EEOC's on-site visits to five of its stores and its corporate headquarters, and made available numerous witnesses for interview. The EEOC selected the documents, stores, and witnesses it targeted, and had broad authority to subpoena any additional information or witnesses it desired. Yet it is undisputed that the EEOC did not identify a single individual it believed to be a victim of actual

hiring discrimination during the investigation. The EEOC nevertheless filed this lawsuit alleging that discrimination against Black and Hispanic applicants is, and was during the investigation, so widespread and pervasive that it constitutes a nationwide pattern or practice – that is, the company's standard operating procedure – irrespective of decision-maker, job type, or store.

The agency seeks compensatory and punitive damages and a jury trial on behalf of every unsuccessful Black or Hispanic applicant who applied to any of Bass Pro's 69 stores since at least 2005 – a group numbering 50,000 or more people by the EEOC's own estimation, far exceeding the EEOC's estimate of alleged discriminatory hiring decisions (approximately 4,000). The EEOC asks to prove these claims using the *Teamsters* bifurcated framework, which shifts the burden to Bass Pro to disprove discrimination in each case. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Thus, the EEOC seeks to hold Bass Pro presumptively liable for back pay, compensatory damages, and punitive damages to potentially 46,000 people who could

not have been victims of discrimination under the EEOC's own theory of the case.

The district court's rulings create a pattern or practice cause of action that this Court has held does not exist under § 706 of Title VII, and disregard Title VII's carefully crafted, multi-step enforcement scheme. Beyond this, the district court has opened the door to a litigation process that the EEOC unabashedly argues will create such insurmountable settlement pressure that Bass Pro is "virtual[ly] certain[]" to settle before having an opportunity to present its defenses with respect to any of the individual claims. ROA.10308. Even if Title VII did not prohibit the EEOC from proceeding in this manner, basic principles of due process, the Seventh Amendment, and manageability would.

STATEMENT OF THE CASE

I. Title VII's Statutory Framework

A. The Distinction Between § 706 and § 707

Title VII of the Civil Rights Act of 1964 renders it unlawful for an employer intentionally "to fail or refuse to hire . . . any *individual* . . . because of such *individual's* race . . . or national origin." 42 U.S.C.

§ 2000e-2(a)(1) (emphases added). Two distinct provisions govern judicial enforcement of this prohibition against private employers: (1) § 706, which permits a "person or persons aggrieved" or the EEOC to file suit to recover for an alleged violation, *see* 42 U.S.C. § 2000e-5; and (2) § 707, which specifically authorizes the government to bring suit to redress an employer's "pattern or practice of resistance" to the Title VII rights, *see* 42 U.S.C. § 2000e-6.[1] *See also EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 812 (S.D.N.Y. 2013) ("Congress . . . created two principal avenues through which the EEOC could remedy discrimination: (1) individual claims under Section 706 and (2) pattern-or-practice claims under Section 707.").

From its inception, Title VII established a clear distinction between § 706 and § 707. Originally, private individuals (but not the government) could sue under § 706, and the Attorney General (but not private individuals) could bring pattern or practice suits under § 707. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 842-44 (5th Cir. 1975).

[1] For clarity, further references to § 706 and § 707 will not include the corresponding U.S.C. citation.

Congress amended Title VII in 1972 to give the EEOC (in addition to private individuals) enforcement authority under § 706. *See* § 706(f). At the same time, Congress transferred to the EEOC the Attorney General's prior authority under § 707 to bring pattern or practice claims. *See* § 707(c). Sections 706 and 707 remained separate and distinct provisions, with the 1972 Amendments "retain[ing] the dichotomy between individual and pattern or practice enforcement." Brief of Appellant United States, *United States v. N.C.*, No. 77-164, 1977 WL 203655, at *25 (4th Cir. 1977). As the Attorney General explained, "[b]oth before and after the 1972 amendments, Title VII differentiated between the enforcement of individual rights and enforcement through pattern or practice suits." *Id.* *See also EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984).

This distinction became critical with the passage of the Civil Rights Act of 1991 ("CRA 1991"), 42 U.S.C. § 1981a. CRA 1991 authorized compensatory and punitive damages and a jury trial for

disparate treatment claims[2] "brought . . . under Section 706," but not for § 707 pattern or practice claims. 42 U.S.C. § 1981a(a)(1). For § 707 pattern or practice claims, equitable relief remains the only remedy, and there is no right to a jury trial. ROA.2826; ROA.9399.

B. The *Teamsters* Method of Proof

Section 707 pattern or practice actions are typically tried to courts under the bifurcated framework established by *Teamsters,* 431 U.S. at 360-61, in which proceedings are divided into two stages. A Stage I finding that "racial discrimination was the company's standard operating procedure[—]the regular rather than the unusual practice" entitles the EEOC to an award of *prospective* injunctive relief designed to end the discriminatory practice. *Id.* at 336. Such a finding does not establish liability or damages as to any individual. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409, 417 (5th Cir. 1998). The EEOC may seek individual equitable remedies, including back pay, in Stage II bench proceedings, which are "essentially a series of individual lawsuits." *Id.* at 421. "At this phase, the burden of proof will shift to

[2] The EEOC's lawsuit alleges intentional discrimination and does not allege a disparate impact violation. ROA.7826-8094. This brief discusses the statutory requirements for a disparate treatment claim.

the company, but it will have the right to raise any individual affirmative defenses it may have, and to 'demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting *Teamsters*, 431 U.S. at 362). Such determinations cannot be made through formulas or representative proof, because the employer "is entitled to individualized determinations of each employee's eligibility for backpay." *Id.* at 2560.[3]

Before CRA 1991, the Fifth Circuit recognized two circumstances where use of *Teamsters* may be appropriate: § 707 actions by the government, and private class actions under § 706. *Scarlett v. Seaboard Coast Line R.R. Co.*, 676 F.2d 1043, 1053 (5th Cir. Unit B 1982). With respect to the latter, however, private lawsuits must be certified under Rule 23 before they may use *Teamsters*. *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355-56 (5th Cir. 2001). Since this Court's seminal decision in *Allison*, 151 F.3d 402, no Title VII disparate

[3] This Court previously permitted formulaic distributions of back pay when individualized determinations of liability and relief would be impractical. *See, e.g.*, *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 280-81 (5th Cir. 2008), *aff'd in part and vacated in part*, 649 F.3d 374 (5th Cir. 2011). The Supreme Court's decision in *Wal-Mart* forecloses this practice. *Wal-Mart*, 131 S. Ct. at 2561.

treatment class action seeking CRA 1991 damages has been certified in the Fifth Circuit, and this Court has never extended the *Teamsters* approach to § 706 claims involving legal damages and jury trials.

C. Administrative Prerequisites to Suit

Title VII requires the EEOC to satisfy significant conditions precedent to filing suit. "Unlike the typical litigant . . . , the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

Whether the EEOC proceeds under § 706 or § 707, Title VII's "integrated, multistep enforcement" process "begins with the filing of a charge with the EEOC." *Shell Oil*, 466 U.S. at 62.[4] The charge must be filed by or on behalf of an aggrieved person or by a Commissioner. *See* § 706(b).

> A Commissioner may file a charge in either of two situations. First, when a victim of discrimination is reluctant to file a charge himself because of fear of retaliation, a Commissioner may file a charge on behalf of the victim. [citing § 706]. Second, when a Commissioner has reason to think that an

[4] In transferring authority to bring pattern or practice suits from the Attorney General to the EEOC, Congress incorporated § 706(b)'s pre-suit requirements into § 707 actions. *See* § 707(e).

> employer has engaged in a 'pattern or practice' of discriminatory conduct, he may file a charge on his own initiative. [citing § 707].

Shell Oil, 466 U.S. at 62 (internal citation omitted).

Regardless of who files the charge, the statute requires that the EEOC notify the employer and conduct an investigation of the allegations in the charge. *See* § 706(b). The purpose of the investigation is "to enable the EEOC to reach a determination of reasonable cause or no reasonable cause." *EEOC v. Hearst Corp.,* 103 F.3d 462, 468 (5th Cir. 1997). If the EEOC finds reasonable cause, it must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 706(b). Only then may it file suit. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651-54 (2015). The EEOC's lawsuit may not exceed the scope of its investigation and resulting cause determination. *EEOC v. Wal-Mart Stores, Inc.*, No. 97-40652, 1998 WL 526800, at *11 (5th Cir. July 29, 1998) (*per curiam*); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 675-77 (8th Cir. 2012).

II. Procedural History

A. The Administrative Process[5]

The administrative process in this lawsuit stemmed from two Commissioner's charges alleging a pattern or practice of hiring discrimination. ROA.6086; ROA.6088-90. The charges did not identify any specific persons aggrieved, but alleged that the "persons aggrieved include all applicants, deterred applicants, employees, and former employees who have been, continue to be, or will in the future be adversely affected by any of the unlawful employment practices set forth in the foregoing charge." ROA.6089.

During the ensuing three year investigation, Bass Pro voluntarily produced over 200,000 pages of documents, permitted the EEOC to visit five of its stores and its corporate headquarters, and arranged for multiple witness interviews. ROA.1865-75 ¶¶ 8-40. The agency selected the documents it wished to examine, the stores it chose to visit,

[5] The procedural history of this case involves numerous facts, allegations, and rulings not relevant to this appeal. For brevity's sake, this brief only recounts relevant facts and allegations without qualifying language indicating the existence of such extraneous matters, such as "in relevant part" or "among others." In addition, this brief does not distinguish between the two Appellants, even though they participated differently in stages of this dispute, because such distinctions are irrelevant to the issues on appeal.

and the witnesses it chose to interview. *Id.* It enjoyed broad powers to subpoena any additional documents or witnesses it felt necessary. *Shell Oil*, 466 U.S. at 68-69 (EEOC may subpoena "virtually any material that might cast light on the allegations against the employer."). The EEOC was under no time constraints; Congress gave it authority to conduct as extensive an investigation as it wanted into any violations relating to a charge. *Occidental*, 432 U.S. at 355-73.

Despite the breadth of the charge allegations and the length of its investigation, it is undisputed that the EEOC failed to identify a single person it believed to be an actual victim of discrimination during its investigation. ROA.9706-07. As the EEOC admits and the district court found, at no time did the EEOC charge, investigate, find cause as to, or conciliate the claim of a single allegedly aggrieved person. ROA.6086; ROA.6088-90; ROA.9706-07; ROA.10135-40, 10151-52; ROA.6096 ¶ 16; ROA.6123-27; ROA.7064 ¶ 63.

B. The Lawsuit and District Court Rulings

1. The District Court's Original Rulings

This lawsuit challenges every hiring decision in the last decade by any decision-maker, in any store, for any position (whether salaried or

unsalaried, part time or full time), for which there was an unsuccessful Black or Hispanic applicant. In its Original and First Amended Complaints, the EEOC: (1) invoked its authority to sue under both § 706 and § 707; (2) alleged a "pattern or practice" of discrimination against Black and Hispanic applicants; and (3) did not identify or purport to proceed on behalf of any particular aggrieved person. ROA.26-34; ROA.425-36. Bass Pro moved to dismiss the First Amended Complaint, arguing that the EEOC had asserted a claim that did not exist under Title VII: a pattern or practice claim seeking compensatory and punitive damages under § 706. ROA.1256-306. The EEOC has since confirmed that this is exactly the claim it is pursuing. ROA.1153 ¶ 7; ROA.9907; ROA.2369.

On May 31, 2012, the district court dismissed the § 706 claim, holding: (1) "the EEOC may not bring a pattern or practice claim pursuant to § 706," ROA.2806; (2) the EEOC may not use the *Teamsters* bifurcated analytical framework to prove a § 706 claim, ROA.2823-26; and (3) "[w]hile 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." ROA.2826. The district court reaffirmed these critical rulings on multiple occasions. ROA.9946 ("I rather think that is correct" that the EEOC may not use *Teamsters* to prove § 706 claims.); ROA.9940 ("If you're going to proceed under 706, there need to be named claimants, and their claim for relief has to be individual discrimination."). *See also* ROA.5095; ROA.7599-601.

In response to the dismissal of its § 706 claim, the EEOC obtained a lengthy extension of time to file a Second Amended Complaint, ROA.2931, during which it solicited potential claimants to participate in this lawsuit, ROA.7686-93. It then amended its complaint to include over 200 Black and Hispanic "Identified Aggrieved Individuals." ROA.3107 ¶¶ 35-36, 3205-43 ¶¶ 177-361, 3319-3324 ¶¶ 410-30. None of these individuals was identified or had his or her claim investigated during the administrative process. ROA.9706-07. The EEOC admitted it did not intend to plead the "individual, separate claims of the named 201 unhired minorities," ROA.4700, but described them as "exemplars of a pattern or practice of discrimination." ROA.10224.

Bass Pro moved for summary judgment on the § 706 claims based on the EEOC's failure to have satisfied any of the administrative prerequisites to a § 706 suit. ROA.6024-610. The district court granted the motion in part, holding that that "the EEOC can bring an enforcement action only with regard to unlawful conduct that was discovered and disclosed in the pre-litigation process." ROA.7627 (citations and internal quotation marks omitted). The district court felt "compelled" to dismiss the claims of all applicants who applied after the letter of determination "because the Commission could not possibly have learned about these individuals during its investigation and could not possibly have conciliated their claims." ROA.7627-28. "To conclude to the contrary would defeat the purpose of the pre-litigation notice and conciliation requirements and sanction the use of pre-trial discovery as a substitute for pre-litigation investigation, notice, and conciliation." *Id.* (citations and internal quotation marks omitted).

The district court stayed the case for additional conciliation of the § 706 claims on behalf of applicants who applied *prior* to the letter of

determination.[6] ROA.7618-19. In the meantime, however, the EEOC admitted that its investigation had not uncovered the identity of *any* allegedly aggrieved individual. ROA.10135-40, 10151-52; ROA.9706-07.[7] Bass Pro renewed its motion for summary judgment as to the § 706 claims. ROA.7675-81.

2. The District Court Reverses Course

In its renewed motion for summary judgment, Bass Pro argued that the district court's earlier ruling that the EEOC cannot bring a § 706 action seeking relief for individuals it had not learned about during its investigation required dismissal of the § 706 claims because the EEOC admitted that it had not identified any allegedly aggrieved individual during its investigation. ROA.7675-81.

The EEOC again asked the district court to reconsider its ruling on the *Teamsters* Question, arguing that the only way it could proceed with its § 706 claims would be if the district court reversed that ruling

[6] The district court later acknowledged that this ruling was based on the erroneous belief that the EEOC had identified individual victims during its investigation, but had not disclosed their identities to Bass Pro. ROA.9418 n.24.

[7] It was not until over two years after the EEOC filed this lawsuit, at the November 19, 2013 hearing, that Bass Pro learned the EEOC had not identified or investigated the claim of any person it believed to be an actual victim of discrimination. ROA.10135-40, 10151-52; ROA.9706-07.

and accepted its investigation of the § 707 claim as an investigation of its § 706 claim. ROA.8095-126. Specifically, the EEOC argued that if the *Teamsters* ruling were reversed, "then that will establish by definition that the EEOC did investigate the Section 706 claim . . . because it is undisputed that the EEOC investigated the Section 707 claim by virtue of the statistical analysis establishing a pattern or practice of discrimination." ROA.8106 n.13. The EEOC explained its logic, stating that "an investigation of a pattern or practice is an investigation of both the 707 claim and a 706 claim, from a systemic standpoint." ROA.10205. Thus, the EEOC argued, reversal of the *Teamsters* ruling "would require the denial . . . of Defendants' planned, renewed motion for summary judgment on the issue that the EEOC did not investigate at all the Section 706 claim." ROA.8106 n.13.

The district court accepted the EEOC's arguments and completely reversed course, holding that: (1) "subject to constraints imposed by the Seventh Amendment and basic manageability factors, the Commission can employ the *Teamsters* framework to prove its § 706 claims," ROA.9374-75; and (2) even though the record evidence showed "that no

individuals were identified or investigated [by the EEOC] in the investigation period," ROA.9706-07, the EEOC satisfied the conditions precedent to its § 706 claim, ROA.9411-19. However, the district court acknowledged that "there is ample support for Defendants' positions," *id.* ROA.9419, and that "both motions presented close questions of law," ROA.9700. This Court granted Bass Pro's petition for interlocutory appeal. See Order, *EEOC v. Bass Pro*, No. 15-20078 (5th Cir. Feb. 10, 2015).

SUMMARY OF ARGUMENT

The Order re-writes Title VII. The combined effect of the district court's ruling on the *Teamsters* Question and the Prerequisites Question is to create a pattern or practice cause of action that does not exist under § 706. This result contradicts Congress's intent not to provide compensatory and punitive damages for EEOC pattern or practice claims, and impermissibly renders § 707 superfluous.

The ruling on the *Teamsters* Question is independently erroneous. This portion of the Order should be reversed because this Court has held that the *Teamsters* framework is not an appropriate

method of proving thousands of individual claims for compensatory and punitive damages in a private class action, and the same considerations apply here. Moreover, Bass Pro is entitled to present its defenses to each claim for individual relief. There is no way to try tens of thousands of individual claims in a manageable way, and allowing the EEOC to use *Teamsters* in this case would violate Bass Pro's due process right to a meaningful opportunity to defend itself. The *Teamsters* framework would also violate the Seventh Amendment because multiple juries would be required to pass on overlapping factual issues.

The Order should be reversed on the Prerequisites Question. Under established precedent, the EEOC's lawsuit must be limited to the claims it investigated, found reasonable cause to be true, and attempted to conciliate. It is undisputed that the EEOC did not identify or investigate a single allegedly aggrieved individual during its administrative process. Because the EEOC did not complete any of these required steps with respect to a § 706 claim, its lawsuit must be limited to a § 707 pattern or practice claim. In addition, compensatory

and punitive damages may not be presumed from a pattern or practice, but require individualized assessment. If left intact, the district court's ruling would undermine the important purposes of Title VII's conditions precedent to suit, as Bass Pro had no notice of the individual claims for compensatory and punitive damages with which it was charged, and no meaningful way to attempt to resolve them short of litigation.

ARGUMENT

The issues on appeal involve questions of law that this Court reviews *de novo*. *See, e.g.*, *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006).

I. The Order Rewrites Title VII.

The combined effect of the district court's rulings in the Order is to rewrite Title VII by (1) creating a pattern or practice cause of action under § 706 that does not exist, (2) changing the allocation of damages authorized by Congress, and (3) rendering part of the statute functionally meaningless.

A. The Order Creates a Nonexistent Pattern or Practice Cause of Action under § 706.

This Court has held that no pattern or practice cause of action exists under § 706. *Celestine,* 266 F.3d at 355 (holding in private § 706 case that a "pattern or practice case is not a separate and free-standing cause of action"); *cf. Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1219 (5th Cir. 1995), *overruled on other grounds* by *Desert Palace, Inc. v. Costa*, 549 U.S. 90, 90-91 (2003) (holding same for the ADEA). The EEOC recognizes, as it must, that these are "binding and dispositive" decisions on this very point. Indeed, in urging the district court to reconsider its original dismissal of the § 706 claim, the EEOC argued:

> This Court ruled that, "The Court agrees with Defendants that the EEOC may not bring a pattern or practice **claim** pursuant to § 706." Doc. No. 53 at 9. In doing so, the Court treated the issue of "pattern or practice" as a claim, which is a clear error of law. The Decision does not mention either *Celestine* or *Mooney*, which are binding and dispositive decisions from the Fifth Circuit.

ROA.2962. Thus, the EEOC acknowledges that it "may not bring a pattern or practice **claim** pursuant to § 706." *Id.*

Nevertheless, the EEOC is in this case actually attempting to "bring a pattern or practice claim pursuant to § 706." In a discovery

plan submitted to the district court on January 27, 2012, the EEOC said that it "has asserted a pattern or practice claim under Sections 706(f)(1) and (3) and 707 of Title VII." ROA.1153 ¶ 7. At an October 22, 2012 hearing, it argued that it is entitled to bring such a claim:

> THE COURT: So you think a pattern and practice claim can be brought under 706 or 707?
>
> MR. JUGE: Yes, Your Honor. Both.

ROA.9907. And in its April 3, 2012 response to Bass Pro's Motion to Dismiss, the EEOC argued: "The EEOC can bring its pattern or practice claim pursuant to Section 706 of Title VII." ROA.2369.

Even if the EEOC had not conceded that it is trying to "bring a pattern or practice claim pursuant to § 706," this Court's precedent would lead inexorably to that conclusion. In *Allegheny-Ludlum,* 517 F.2d at 842-43, this Court looked to the substance of the case to determine whether it was a § 706 or a § 707 action. There, an organization sought to intervene in a lawsuit brought jointly by the Attorney General and the EEOC during the transition period following the transfer of § 707 authority to the EEOC. In holding that § 706(f)'s mandatory intervention rights for aggrieved persons did not apply in

that case, this Court held: "this was not in substance a § 706 action, but rather a 'pattern or practice' action authorized by § 707, which the EEOC was empowered to institute by virtue of the transfer of functions outlined in § 707(c)." *Id.* (internal citation omitted). A pattern or practice action by the EEOC is brought pursuant to § 707 and not pursuant to § 706, and rights available under § 706 do not simply transfer to § 707 actions. *Id.*

Similarly, this case is, *in substance*, a § 707 case. The EEOC charged, investigated, determined, conciliated, and ultimately pleaded a pattern or practice claim. ROA.6086; ROA.6088-90; ROA.9706; ROA.8106 n.13; ROA.10135-40, 10151-52; ROA.6096 ¶ 16; ROA.6123-27; ROA.7064 ¶ 63; ROA.26-34. It did not charge, investigate, determine, conciliate, and plead discrimination against any particular aggrieved individual. *Id.*[8] Indeed, the EEOC admits that in this case

[8] The Supreme Court has held that the EEOC derives its authority to bring suit on behalf of "a group of aggrieved individuals" from § 706, not Rule 23. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 324 (1980). The Court did not dispense with the need for an aggrieved individual under § 706, nor create an independent "class" cause of action. *See id.* at 334 n.16 ("We hold only that the nature of the EEOC's enforcement action is such that it is not properly characterized as a 'class action' subject to the procedural requirements of Rule 23"). Although when faced with dismissal of its already filed lawsuit, the EEOC found some claimants to name in the Second

there are no "persons aggrieved" with a right to intervene in this case. ROA.1153 ¶ 6; ROA.10202, 10253; ROA.10676 ¶ 6. That concession alone mandates the same conclusion as in *Allegheny-Ludlum*: that the EEOC has not brought a § 706 action at all. Otherwise, aggrieved individuals would have a right to intervene. *See* § 706(f).[9] This is *in substance* a pattern or practice claim governed by § 707, and only the remedies applicable to § 707 claims are available. *See Allegheny-Ludlum*, 517 F.2d at 842-43.

B. The Order Rewrites Title VII's Damages Provisions.

The Order fundamentally changes the allocation of remedies authorized by Congress, by allowing the EEOC to seek compensatory and punitive damages and a jury trial in a pattern or practice case. Before CRA 1991, neither compensatory and punitive damages nor a jury trial were available under either § 706 or § 707. CRA 1991 made an important change:

Amended Complaint, these individuals' claims were not part of the administrative process. Moreover, the EEOC did not intend to plead their individual claims. ROA.4700.

[9] Even if there were a right for tens of thousands of people to intervene, as the district court recognized, the aggrieved individual's right to intervene would be significantly curtailed if the alleged victim is not identified and notified that the lawsuit exists until significant portions of the litigation have passed. ROA.9416.

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act, . . . , the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C. § 1981a(a)(1) (internal citation omitted). This section references numerous provisions of Title VII (but not § 707) and specifically extends compensatory and punitive damages and a jury trial to § 706 and § 717 (but not § 707). Notwithstanding this fact, the district court concluded that "Congress *did* intend to make compensatory and punitive damages available to victims of a discriminatory pattern or practice, it just required that they – or the EEOC – seek them in a § 706 suit." ROA.9399.

This reasoning raises the question of how the EEOC could pursue such a claim. This Court has held, and the EEOC has admitted, that there is no independent pattern or practice cause of action under § 706. The EEOC's only authority to file a pattern or practice cause of action emanates from § 707, and the language of § 1981a does not extend the

right to compensatory and punitive damages and a jury trial to § 707 pattern or practice cases. "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). It is difficult to believe, given the detailed procedures Congress included in Title VII, that Congress's omission of § 707 from CRA 1991 was accidental[10] or based on an unspoken belief that § 706 somehow made inclusion unnecessary, or that its intent to extend such relief to pattern or practice cases was better left unstated. *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013) (holding Title VII's text must be faithfully observed "[i]n light of Congress' special care in drawing so precise a statutory scheme").

[10] Section 707 played an active and important role in the EEOC's enforcement of Title VII. In the year after the transfer of pattern or practice authority to the EEOC, "the Commission created the first systemic program in the field when it established '707 units' in Regional Litigation Centers. These units were responsible for addressing 'pattern or practice' discrimination under Section 707 of Title VII through the development of Commissioner's Charges, the expansion of individual charges to address systemic issues, the investigation of class charges, and litigation." Sys. Task Force Rpt. (Mar. 2006), at 57 http://www.eeoc.gov/eeoc/task_reports/systemic.cfm, at App'x C (last visited June 19, 2015).

Finally, the district court concluded that Congress must have intended for the EEOC to be able to continue to use *Teamsters* to prove § 706 violations because

> by 1991 – it was established that the framework set forth in *Franks* and *Teamsters* could be used in cases brought pursuant to § 706. Congress was presumptively aware of the *Franks*, *Teamsters*, and *General Telephone* decisions, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (quoting *Lorillard v. Pons,* 434 U.S. 575, 580 (1978)), and nevertheless chose not to clarify that § 706 suits had to be proven using *McDonnell Douglas* when it passed the 1991 amendments, *see United States v. O'Brien*, 560 U.S. 218, 231 (2010) ("Congress does not enact substantive changes *sub silentio*.") . . . .

ROA.9401.

The problem with this reasoning is that it requires this Court to believe that Congress intended to do by inference under § 706 what at the same time it explicitly chose not to do under § 707 – allow the EEOC to seek compensatory and punitive damages in a pattern or practice case.

C. The Order Renders § 707 Functionally Superfluous.

The Order also violates the "longstanding canon of statutory construction that terms in a statute should not be considered so as to render any provision of that statute meaningless or superfluous." *Beck v. Prupis*, 529 U.S. 494, 506 (2000); *see also Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015) (statute must be construed so "no clause is rendered superfluous, void, or insignificant.") (internal quotation marks omitted).

Congress crafted a specific provision – § 707 – to govern pattern or practice claims brought by the EEOC. Section 707, the only section in Title VII to even mention a "pattern or practice" claim, is the operative provision granting the EEOC authority to bring pattern or practice lawsuits. *See* § 707(c), (e); *Teamsters*, 431 U.S. at 328 n.1; *Shell Oil*, 466 U.S. at 69-70. Yet the district court's rulings leave § 707 with no substantive purpose. The EEOC concedes as much by admitting that its claims under §§ 706 and 707 are investigated and tried exactly the same. ROA.10205 ("[A]n investigation of a pattern or practice is an investigation of both the 707 claim and a 706 claim from a systemic

standpoint."); ROA.10225-26 ("[A] circumstance where there is a pattern or practice of discrimination, then whether [it is] a 707 claim or a 706 claim – the proof that we need to establish liability in the first place is the same . . . .").

The district court originally dismissed the § 706 claims, "find[ing] no support in the case law, or in the statutes themselves, for the EEOC's proposition that § 707's pattern or practice language is merely a redundancy." ROA.2826. Upon reversing course, the district court identified three *procedural* distinctions it believed made § 707 non-superfluous. However, the first distinction is based on an erroneous reading of § 707, the second supports Bass Pro, and the third is a procedure the EEOC has never used in the 43 years it has had enforcement authority. None creates any meaningful role for § 707.

1. Required compliance with § 706(b) conditions precedent to suit

The first distinction, upon which the district court relied most heavily, is based upon a faulty reading of § 707. The district court now interprets § 707 to allow the EEOC to file suit without first having received a charge or completed the other administrative prerequisites to

suit. ROA.9397-98. Respectfully, this is incorrect and contradicts the district court's prior ruling on this very issue. ROA.2830-31. While the *Attorney General* had the option to proceed without a charge prior to the 1972 Amendments, the district court previously and correctly recognized that "[t]he plain language of section 707 incorporates [the § 706(b)] procedure into pattern or practice actions." *Id.* (citations omitted); *see also* § 707(c) ("[t]he Commission shall carry out such functions in accordance with [§ 707(e)]"); § 707(e) ("[a]ll such actions shall be conducted in accordance with the procedures set forth in [§ 706(b)]"); *Shell Oil*, 466 U.S. at 62.

In reversing itself on this point, the district court relied upon dicta in *Allegheny-Ludlum*. ROA.9397 (citing *Allegheny-Ludlum,* 517 F.2d at 843 ("Section 707 does not make it mandatory that anyone file a charge against the employer or follow administrative timetables before the suit may be brought.")). *Allegheny-Ludlum*, however, acknowledged that the recently enacted 1972 Amendments might have changed the pre-suit requirements and explicitly declined to rule on that issue:

> One court has even indicated that the Commission may have similar responsibilities [to engage in administrative

> procedures] in connection with 'pattern or practice' suits brought under § 707 subsequent to the effective date of the 1972 amendments. This is such a lawsuit. We have determined, however, that this case does not require us to attempt to settle these intricate questions in terms of congressional intent with respect to jurisdiction.

Id. at 869 (internal citation omitted) (citing *United States v. Masonry Contractors Ass'n*, 497 F.2d 871, 875-76 (6th Cir. 1974)). The Order fails to acknowledge this crucial language.

Moreover, at the time of the transfer of authority from the Attorney General to the EEOC, neither agency had any doubt about the EEOC's obligation to comply with § 706(b)'s pre-suit requirements. During arguments over which agency should have authority to bring pattern or practice suits against public employers following the 1972 Amendments (an ambiguity that existed in the law),[11] both agreed that the EEOC, but not the Attorney General, would be required to comply with § 706(b)'s conditions precedent to suit. *See United States v. Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1091 n.1 (9th Cir. 1979) ("Because § 707(e) provides that all pattern or practice actions *must be* conducted

[11] The agencies' dispute over who had this authority also reinforces their understanding that § 707, not § 706, governs pattern or practice actions; otherwise, the Attorney General could have simply used its authority under § 706 instead. *See* § 706(f).

in accordance with the procedural requirements of § 706, the EEOC [argues that it, not the Attorney General,] should initiate such actions against public employers in order to attempt conciliation efforts.") (emphasis added); Brief of Appellant, *United States v. N.C.*, No. 77-1614, 1977 WL 203655, at *34 (4th Cir. 1977) ("The United States does not take issue with the argument that, before EEOC brings a pattern or practice suit under section 707(e), it must follow the procedures of section 706(f)(1). But on its face, section 707(e) applies only to EEOC."). *See also* Brief for EEOC, *EEOC v. Shell Oil Co.*, No. 82-825, 1983 U.S. S. Ct. Briefs LEXIS 66, at *54 (May 10, 1983) (arguing, in a § 707 Commissioner's charge case, that "Section 706(b) charges are a condition precedent to agency action under Title VII").[12]

Moreover, the EEOC's own course of conduct confirms its understanding of this statutory requirement. From 1972, when the

[12] *See also Masonry Contractors*, 497 F.2d at 875-76 ("Because this action was brought under Section 707. . . before said section was amended in 1972, it is not necessary for a charge to have been filed with the EEOC as required under § 2000e-5 . . . ."); *EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619, 621-22 (N.D. Ohio 2011) ("The EEOC's ability to act under § 707, however, is subject to the procedures of § 706, as set forth in § 707(e). . . ."); *EEOC v. Freeman*, No. 09-cv-2573, 2010 U.S. Dist. LEXIS 41336, at *13 (D. Md. Apr. 26, 2010) ("[T]he EEOC's authority, unlike that possessed by the DOJ, is restricted by the procedures set forth in Section 706.").

EEOC received § 707 enforcement authority, until 2014 – a period of 42 years – the EEOC never filed a § 707 lawsuit without receiving an initiating charge and at least attempting to engage in the administrative process. The EEOC filed its first such suit last year, only to have it dismissed for failure to comply with the conditions precedent to suit. *See EEOC v. CVS Pharmacy, Inc.*, No. 14-cv-863, 2014 WL 5034657, at *4 (N.D. Ill. Oct. 7, 2014).

2. Individuals' right of intervention

The second distinction the district court relied upon – the right of aggrieved persons to intervene in § 706 suits but not in § 707 suits – *supports*, not undermines, Bass Pro's position in this case. In § 706 suits, "[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission." § 706(f)(1). The *reason* there is no intervention right under § 707 is because pattern or practice suits address broad-based policies that do not necessarily concern the rights of any particular individual, while § 706 exists to protect those individual interests. *See Allegheny-Ludlum*, 517 F.2d at 843; *see also Gen. Tel.*, 446 U.S. at 331. The EEOC's concession that

there is no "person aggrieved" with a right to intervene in this case compels the conclusion it has not brought a § 706 claim at all. *See* ROA.1153 ¶ 6; ROA.10202, 10253; ROA.10676 ¶ 6.

3. Right to request a three-judge panel

The final distinction cited by the district court was the availability of trial before a three-judge panel under § 707(b), which is not available under § 706. ROA.9398. This was a procedure available "to the Attorney General" prior to the transfer of powers, and it is far from clear that it was one of the "functions" transferred to the EEOC in 1972. *See* § 707(c) (providing that "the functions of the Attorney General under this section shall be transferred to the Commission" and "[t]he Commission shall carry out such functions in accordance with [§ 707(d) and § 707(e)]"). In any event, to Bass Pro's knowledge, it is a procedure the EEOC has never invoked.

D. The District Court's Interpretation of the Statute Does Not Withstand Scrutiny.

The district court concluded that "Congress *did* intend to make compensatory and punitive damages available to victims of a discriminatory pattern or practice, it just required that they — or the

EEOC — seek them in a § 706 suit." ROA.9399. The district court reasoned that "the effect of the 1991 amendments is to require that, even where an individual was discriminated against as a part of a pattern or practice, and even where the EEOC intends to bring suit pursuant to § 707 to address that pattern or practice, a suit that asks for compensatory and/or punitive damages . . . must still be brought pursuant to § 706 and thus adhere to its pre-suit prerequisites." ROA.9400.

At the same time, however, the district court accepted the EEOC's argument that those pre-suit requirements are satisfied for § 706 by the exact same statistics-based investigation the EEOC would conduct under § 707. ROA.10205 ("[A]n investigation of a pattern or practice is an investigation of both the § 707 claim and a § 706 claim from a systemic standpoint."). Moreover, the district court concluded that the EEOC need not identify any alleged victims during the investigation (even when it seeks compensatory and punitive damages), let alone investigate what happened to them and whether they were harmed. The result of the district court's logic is that the EEOC's demand for

compensatory and punitive damages triggers the EEOC's obligation to engage in the § 706 administrative process but does not require that process to address the issues raised by the demand. That is a counter-intuitive result.

It is also counter-intuitive to believe that a procedure that had theretofore never been invoked by the EEOC was the driving force behind Congress's decision not to provide enhanced remedies for § 707 suits in CRA 1991. Congress could not have intended § 707 to be reduced to such an insignificant and largely meaningless role. *See Duncan v. Walker*, 533 U.S. 167, 174-75 (2001) (noting that where a "term occupies so pivotal a place in the statutory scheme," it may not be construed so as to relegate it to "to quite an insignificant role").

The district court relied heavily upon *Serrano v. Cintas Corp.,* 699 F.3d 884 (6th Cir. 2012), the only circuit-level opinion to have directly addressed the *Teamsters* Question. ROA.9384-91.[13] Although the

[13] Other district courts have struggled with the *Teamsters* Question as well. *Compare EEOC v. JBS USA, LLC*, No. 10-cv-2103, 2011 U.S. Dist. LEXIS 87127, at *12-14 (D. Colo. Aug. 8, 2011) (holding no *Teamsters* under § 706); *EEOC v. JBS USA, LLC*, No. 8:10-cv-318, Order, Doc. 296 (D. Neb. Sept. 28, 2012) (same), *with EEOC v. Performance Food Grp., Inc.*, 16 F. Supp. 3d 576, 579 (D. Md. 2014) (following *Cintas* but stating that, "[s]hould there be a change in the precedential

district court concluded that the Sixth Circuit "had a healthy understanding of § 706 and the Title VII remedial scheme," ROA.9414, the *Cintas* opinion does not withstand scrutiny.

Cintas admitted that "Congress could not have intended" a result that rendered § 707 superfluous. 699 F.3d at 895. However, it relied on a misreading of the statute to circumvent that outcome, reasoning that the "important distinction [that] prevents § 707 from becoming superfluous . . . [is that] § 707 permits the EEOC to initiate suit without first receiving a charge filed by an aggrieved individual, as it must when initiating suit under § 706." *Id.* at 896. This "important distinction," though helpful to Bass Pro (it would require dismissal here because there was no charge filed by an aggrieved person), was rejected by the district court and is flatly contradicted by the statutory language. *See* § 706(b) ("Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, *or by a member of the Commission* . . . .") (emphasis added). Nevertheless, *Cintas* at least

climate prior to the commencement of Phase Two, the Court may reconsider this decision"); *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1144 n.4 (D. Nev. 2007) (permitting *Teamsters* under § 706 even though result "creates an apparent redundancy in the law that troubles the Court").

recognized § 706 requires a "specific victim," 699 F.3d at 896, something entirely absent here.

Cintas also acknowledged that § 707 gives "explicit authorization" for EEOC pattern or practice claims, whereas § 706 does not. *Id.* at 894. Yet *Cintas* concluded that this glaring distinction "simply means that the scope of the EEOC's authority to bring suit is more limited when it acts pursuant to § 707." *Id.* This reasoning makes little sense: Why would Congress provide a separate § 707 cause of action knowing such claims are subsumed within another provision?

Finally, *Cintas* failed to appreciate or address the significant practical implications of its ruling, which are now becoming obvious on remand in that case. The EEOC has recently argued that the Sixth Circuit's ruling relieves it of the obligation to ever identify the actual victims of discrimination. EEOC's Supp'l Brief, *EEOC v. Cintas Corp.*, No. 2:04-cv-40132-SFC-RSW, Doc. 1116 ("*Cintas* Doc. 1116") at 4-5 (E.D. Mich. Mar. 17, 2014); *id.* at EEOC Not., Doc 1131 ("*Cintas* Doc. 1131"), at 2 (E.D. Mich. April 20, 2015). Because the EEOC believes it would be "impossib[le]" to identify who would have actually been

selected for a given position, it has argued that the district court should allocate damages on a formulaic basis: First, a damages pool would be calculated based on a statistically determined hiring shortfall (125 females according to the EEOC). Then that pool would be distributed on a *pro rata* basis to every rejected female applicant (between 5,000 and 6,000 individuals). *Cintas* Doc. 1116 at 2-3 & n.3; *Cintas* Doc. 1131 at 2-3. In this way, the EEOC urges, "it should not be necessary to conduct individual proceedings" for every applicant in Stage II. *Cintas* Doc. 1131 at 2-3.

The EEOC's *Cintas* proposal is foreclosed by *Wal-Mart*, 131 S. Ct. at 2560-61. The district court there faces three unmanageable or unconstitutional choices in light of the Sixth Circuit's ruling: (1) conduct thousands of individual jury trials to determine who the actual victims are, which is wholly unmanageable and the EEOC believes to be impossible; (2) adopt a formulaic approach to individual liability and damages that violates the defendant's due process right to present its defenses to every claim; or (3) hope that the defendant will be forced to settle and give up its right to due process. This Court should not follow

the Sixth Circuit's lead, given that the number of potential claimants in this case is even more daunting.[14]

II. The District Court's Ruling on the *Teamsters* Question Ignores Fifth Circuit Precedent and Violates Bass Pro's Constitutional Rights.

Following *Cintas*'s lead, the district court held that because *Teamsters* is a method of proof available to private class action plaintiffs under § 706, it should be available to the EEOC as well. ROA.9414 ("Congress wanted the Commission to have all the same rights as private litigants when it brings suit pursuant to § 706."). Bass Pro respectfully disagrees. Private plaintiffs and the EEOC are treated differently in many ways under the statute, and this Court and others have comfortably distinguished between *Teamsters'* availability under § 706 for private class action plaintiffs and under § 707 for government actions. *See, e.g.*, *Scarlett v. Seaboard Coast Line R.R. Co.*, 676 F.2d 1043, 1053 (5th Cir. Unit B 1982) ("This is not a 'pattern and practice'

[14] The district court in this case is currently grappling with the manageability and constitutional problems posed by the EEOC's use of *Teamsters* in a case of this size and nature. ROA.10640-71; Bass Pro's Resp. to Mot. for Entry of Case Mgmt. Order, *EEOC v. Bass Pro*, No. 4:11-cv-03425, Doc. 214 (S.D. Tex. May 21, 2015); *id.*, EEOC's Reply to Mot. for Entry of Case Mgmt. Order, Doc. 218 (June 1, 2015). The question whether it has jurisdiction to resolve these issues pending this appeal is currently before the district court. Resp. by Bass Pro, *EEOC v. Bass Pro*, No. 4:11-cv-03425, Doc. 214 at 5-7 (S.D. Tex. May 21, 2015).

suit by the government under section 707, in which the government may postpone until the 'remedial' stage of trial proof that each individual for whom it seeks relief was discriminatorily denied an employment opportunity. Nor is this a private [§ 706] class action, in which a similar manner of proceeding with the production of evidence is appropriate.") (internal citations omitted).[15] The district court brushed *Scarlett* aside, holding that it did not "catalogu[e] the entire universe of cases in which the *Teamsters* framework can be used." ROA.9391. While this may be true enough in general terms, there would have been no reason for *Scarlett* to have drawn the distinction it did if there were no distinction to draw.

Moreover, even if the district court's premise were correct, the EEOC would not be entitled to use the *Teamsters* method of proof in this case for at least two reasons: (1) private plaintiffs would not be entitled to use the *Teamsters* method of proof in this case; and (2) the

[15] *See also Chin v. Port Auth.*, 685 F.3d 135, 147 (2d Cir. 2012) ("The phrase 'pattern or practice' . . . is often used in a technical sense to refer either to this unique form of liability available in government actions under [§ 707], *see, e.g.*, [*Shell Oil*], or to the burden-shifting framework set out in *Teamsters* and available both to the government in [§ 707] litigation and to class-action plaintiffs in private actions alleging discrimination, *see, e.g.,* [*Wal-Mart*].").

EEOC cannot use a method of proof that violates Bass Pro's constitutional rights and common-sense principles of manageability and judicial efficiency.[16]

A. Private Plaintiffs Would not be Entitled to Use *Teamsters* to Prove this Case.

This Court's decision in *Allison* held that the changes brought by CRA 1991 make class certification – and the *Teamsters* method of proof – inappropriate in private Title VII actions alleging thousands of individualized claims for compensatory and punitive damages. *See Allison v. Citgo Petroleum Corp.,* 151 F.3d 402 (5th Cir. 1998). In reaching this conclusion, *Allison* explained that a Stage I pattern or practice finding would not resolve any of these highly individual claims, nor would it narrow the issues that would have to be discovered and tried in subsequent stages. "Such a finding establishes only that there has been general harm to the group and that injunctive relief is

[16] Prior to the Order, Bass Pro repeatedly argued the constitutional and manageability problems inherent in a *Teamsters* approach. ROA.85-86; ROA.1125-32; ROA.1762-69; ROA.2557-58; ROA.3370-76; ROA.4122-24; ROA.5591-601; ROA.8411-15; ROA.10044; ROA.9966; ROA.10281-87; ROA.10300-01. Although the district court declined to rule on those issues until it considers the EEOC's proposed case management order, ROA.9403, they are subject to appeal. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996); *See Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 398-99 (5th Cir. 2010) (en banc).

appropriate." *Id.* at 417 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring in the judgment)). "Actual liability to individual class members, and their entitlement to monetary relief, are not determined until the second stage of the trial." *Id.*

> Before passage of the Civil Rights Act of 1991, liability and the appropriate remedies in all Title VII cases were determined in bench trials. Monetary relief was limited to back pay and other equitable remedies. By bringing additional monetary claims within the scope of intentional discrimination cases, the Civil Rights Act of 1991 added to the complexity and diversity of the issues to be tried and decided. By injecting jury trials into the Title VII mix, *the 1991 Act introduced, in the context of class actions, potential manageability problems with both practical and legal, indeed constitutional, implications*.

Id. at 410 (emphasis added).

Because of the constitutional and manageability problems presented by the *Teamsters* approach after CRA 1991, *Allison* concluded the case was "unsuitable for class certification under Rule 23." *Id.* at 407. The plaintiffs were left to prove their individual claims in unbifurcated proceedings using the traditional method of proof, where they at all times retain the burden to prove their claims. *See Celestine*, 266 F.3d at 355-56 & n.4. *Allison*'s reasoning applies equally in this

case, where a *Teamsters* approach would require a far greater number of individualized adjudications before a jury than in *Allison*.

Contrary to the EEOC's repeated arguments below, *General Telephone* does not compel a different result. *General Telephone* was decided before passage of CRA 1991, and the Supreme Court had no occasion to consider the issues presented here. 446 U.S. at 318. Moreover, the Supreme Court held that the EEOC derived its authority to bring suit on behalf of "a group of aggrieved individuals" from § 706, not Rule 23. *Id.* at 324. Nothing in § 706 authorizes the EEOC to aggregate claims or to use representative proof to establish an individual's *prima facie* case, nor does it excuse the EEOC from compliance with constitutional and case-management requirements.[17]

B. Using the *Teamsters* Method of Proof in this Case Would Trample Bass Pro's Due Process Right to a Meaningful Time and Manner to Assert its Defenses.

The manageability problems inherent in the *Teamsters* approach in a case of this size are not simply a matter of convenience or

[17] Indeed, many of Rule 23's requirements are based on "the important due process concerns of both plaintiffs and defendants inherent in the certification decision." *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 554 (5th Cir. 2011) (quoting *Unger v. Amedisys, Inc.*, 401 F.3d 316, 320-21 (5th Cir. 2005)).

efficiency, but significantly impact Bass Pro's due process right to defend itself against these most serious and damaging charges. Due process "requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Bass Pro vigorously *denies* the charges against it and is entitled to assert its individual defenses to liability and damages with respect to every allegedly aggrieved person on whose behalf the EEOC seeks to recover. *Wal-Mart,* 131 S. Ct. at 2560-61. The EEOC's proposed method for proving its claims, however, renders this right illusory. *See In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (granting mandamus to correct consolidation of 3,031 claimants' claims who were only before the court in "a fictional sense," violating "defendants' right to due process").

The EEOC has not and cannot present a plan for how tens of thousands of individual claims for back pay, compensatory damages, and punitive damages could be tried in Stage II. It seems to concede there is no manageable way to do so and has argued that the *Teamsters* approach will avoid that result because either the EEOC's claims lack merit and it will lose at Stage I, or else Bass Pro will settle before Stage II. ROA.10651-52. The EEOC admits "[t]here has never been, as far as we know, the need for stage two proceedings in a jury case after the 1991 act." ROA.10308. Why? Because, "typically, the case is settled. As [defense counsel] says, we haven't tried these kind of cases before and that's the reason." ROA.10040.

The EEOC used this fact to argue against an interlocutory appeal, reasoning that appellate review would only delay the settlement it believes is a "virtual certainty" under *Teamsters* framework. ROA.10308. It is now arguing in the district court that a virtue of its proposed case management plan, which follows a *Teamsters* approach, is that it will likely force Bass Pro to forgo, through settlement, its due process right to present individual defenses. ROA.10647, 10653-54

nn.18, 22; Reply by EEOC, *EEOC v. Bass Pro*, No. 4:11-cv-03425, Doc. 218 at 4-5 (S.D. Tex. May 21, 2015) (arguing "Bass Pro would have [the] choice" to "try to disprove the individual liability or damages with respect to myriad presumed victims," "but this eventuality is exceedingly unlikely").[18]

This Court rejected this very argument in *Allison*:

> The plaintiffs have emphasized that class certification will "facilitate" settlement. We are not sure of such a result. In any event, we should not condone a certification-at-all-costs approach to this case for the simple purpose of forcing a settlement. *Settlements should reflect the relative merits of the parties' claims, not a surrender to the vageries of an utterly unpredictable and burdensome litigation procedure.*

Allison, 151 F.3d at 422 n.17 (emphasis added). "[C]lass counsel cannot be permitted to force settlement by refusing to agree to a reasonable method of trial should settlement negotiations fail." *Espenscheid v. DirectSAT USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) (Posner, J.).

---

[18] This is not the only case where the EEOC has touted the settlement pressures created by *Teamsters*. *See, e.g.,* EEOC's Mot. to Bifurcate, *EEOC v. FAPS, Inc.*, No. 2:10-cv-03095, Doc. 156-1 at 4 (D.N.J. Mar. 23, 2015). ("Given that when a plaintiff succeeds in Stage I by proving a pattern or practice of discrimination, there often is a settlement instead of a Stage II trial, the potential efficiencies of having a bifurcated trial whereby EEOC would not be required to present every class member before the Stage I jury are obvious."); EEOC's Opposed Mot. to Bifurcate, *EEOC v. Lawler Foods, Inc.*, No. 4:14-cv-03588, Doc. 14 at 8 (S.D. Tex. May 4, 2015) (similar).

Indeed, this Court has described as "judicial blackmail" the "insurmountable pressure on defendants to settle" such cases. *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.'").

The due process violation inherent in these phantom Stage II proceedings is exacerbated by the fact that Bass Pro would have the burden to disprove discrimination, often a decade or more after the fact, against tens of thousands of people, *the vast majority of whom could not have been harmed based upon the EEOC's own allegations*. If the EEOC is correct that there were approximately 4,000 hiring shortfalls, ROA.7128 ¶ 11, but that there may be more than 50,000 people who "would be the subject of Stage II proceedings," ROA.10648 n.9, then Bass Pro would be presumptively liable to *46,000 people* against whom it could not have discriminated, but to whom it would be liable for back

pay, compensatory damages, and punitive damages if it could not disprove discrimination.[19]

Worse, the EEOC admits it would be "extremely difficult" to disprove discrimination given the inherent "uncertainties" in "who would have been hired." ROA.9003. This would be especially true if the EEOC gets its way and does not identify the alleged victims until Stage II, more than a decade after many of the hiring decisions at issue. ROA. 10689-91 ¶¶ 42-44. Until then, Bass Pro would have no means to prepare its defense.[20] Relevant decision-makers would be asked to recall and justify hiring decisions – many made following job fairs attended by thousands of applicants – years earlier. If evidence is unavailable due to faded memories or absence of witnesses, Bass Pro would be liable.

---

[19] Under Title VII, "only those individuals who have suffered a loss of pay because of the illegal discrimination are entitled to compensation." *Shipes v. Trinity Indus.*, 987 F.2d 311, 318 (5th Cir. 1993).

[20] Bass Pro does not know which of its rejected applicants are Black or Hispanic, ROA.9003, let alone which applicants intend to participate as claimants in this case. Until the EEOC identifies the individuals it believes were actually victims of discrimination and the positions for which they applied (which the EEOC proposes to do for the first time in Stage II proceedings it believes will never occur), Bass Pro has no way of knowing which hiring decisions it must defend.

The fundamental unfairness in this result would be bad enough even if Bass Pro did not bear the burden of proof. Shifting the burden to Bass Pro on top of this would be arbitrary, and combined with the lack of a meaningful time and place for Bass Pro to prepare and present its defenses, would violate Bass Pro's most basic due process rights. *W. & Atl. R.R. v. Henderson*, 279 U.S. 639, 641-44 (1929) ("[A] presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment.").

Teamsters involved a few hundred claimants, equitable relief, and a bench trial, and the district court was directed "to identify which of the minority members were actual victims of discrimination" on remand. 431 U.S. at 327. The EEOC is badly misusing the proof method *Teamsters* announced as a way not to adjudicate who is a victim, but to forgo such adjudication, coerce a settlement, and collect compensatory and punitive damages for individuals it has not even identified, let alone concluded suffered such harm. It is little wonder the EEOC would like to maintain this regime.

Notably, these manageability and due process concerns would not disappear even if the EEOC were to limit its monetary claims under § 706 to back-pay relief. All of the claimants would still have to be deposed and their individual liability and eligibility for back pay adjudicated. *Wal-Mart*, 131 S. Ct. at 2560-61 (holding that an employer "is entitled to individualized determinations of each employee's eligibility for backpay"). While the absence of a jury would provide greater flexibility and avoid Seventh Amendment problems, Bass Pro would still not be afforded a meaningful opportunity to adjudicate its defenses to these claims. "Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury . . . gives no cause to believe that all their claims can productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551.

C. The *Teamsters* Bifurcated Approach Would Violate the Seventh Amendment.

Using the *Teamsters* bifurcated approach in a case of this size and complexity would also violate Bass Pro's Seventh Amendment right not to have a second jury reexamine factual issues decided by the first jury. U.S. Const. amend. VII. "The Seventh Amendment entitles parties to

have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues." *Castano*, 84 F.3d at 750. For bifurcation to be constitutionally permissible, therefore, the "issue to be tried must be so distinct and separate from the others that a trial of it alone may be had without injustice." *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 305 (5th Cir. 1993) (citation omitted).

It is self-evident that one jury would not be able to adjudicate tens of thousands of individual claims. However, this is what the Seventh Amendment would require. In *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001), this Court specifically held that the same jury would have to consider both Title VII pattern or practice liability (Stage I) and compensatory and punitive damages (Stage II):

> To meet the requirements of the Seventh Amendment, one jury may have to hear all the issues regarding the pattern and practice claim. This same jury would have to determine the quantum of compensatory and punitive damages.

Id. at 415. Although the opinion is not controlling because it was withdrawn in light of a settlement that occurred while the plaintiff's petition for rehearing en banc was pending, *see Smith v. Texaco, Inc.*, 281 F.3d 477 (5th Cir. 2002), its reasoning is nonetheless persuasive.

Significantly, the EEOC *admits* that there would be overlapping factual issues between the pattern or practice determination in Stage I and individual punitive damages determinations in Stage II, leading to "potentially inconsistent results" if separate juries were to make those findings. ROA.2216-17. It relied on this fact to argue that a Stage I jury should determine punitive damages for all claimants. *Id.* However, *Allison* squarely held that punitive damages *must* be resolved on an individualized basis and would have to occur in Stage II of a *Teamsters* trial:

> [P]unitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage.

Allison, 151 F.3d at 417-18. Others have recognized the Seventh Amendment implications of this fact as well.[21]

[21] *See, e.g.*, *David v. Signal Int'l, LLC*, No. 08-cv-1220, 2012 WL 10759668, at *35 (E.D. La. Jan. 4, 2012) ("[A]t the very least the claim for punitive damages would carry the risk of Seventh Amendment problems in a bifurcated scenario."); *Ramirez v. DeCoster*, 194 F.R.D. 348, 354 n.4 (D. Me. 2000) (holding "[t]here is no avoiding the single jury requirement" under the *Teamsters* approach); *Adler v. Wallace Computer Servs., Inc.*, 202 F.R.D. 666, 673 (N.D. Ga. 2001) ("The Seventh Amendment provides the most compelling justification for denying the request for hybrid certification" of a Title VII class.).

There would also be overlap between determinations of various managers' motives at both phases of trial. A Stage I jury determining whether it is Bass Pro's nationwide standard operating procedure to discriminate must decide whether discrimination was so pervasive that it was "the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. In making this determination, it will have to resolve whether different Bass Pro managers have discriminatory mindsets, whether Bass Pro took remedial measures when it learned of instances of discrimination, and whether various anecdotal instances of discrimination occurred. If it finds in favor of the EEOC, subsequent juries would have to consider whether the anecdotal witnesses were discriminated against, whether the decision-makers involved had discriminatory mindsets or acted with malice warranting punitive damages, and whether Bass Pro took good faith measures to comply with the law so as to avoid imputing punitive damages liability. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). The first jury could find Bass Pro was a mass discriminator, while the second could find it was a model of Title VII compliance. This is not just a case of

overlapping evidence, but of factual issues involving motivations and actions that are central to both stages.

Although the EEOC has previously made much of *Allison*'s statement that "there are no common issues between the first stage of a pattern or practice claim and an individual discrimination lawsuit," the Court made this statement to explain why the issues decided in Stage I would not narrow the issues to be decided in Stage II. *Allison*, 151 F.3d at 421. Its citation to *Cooper v. Federal Reserve Bank,* 467 U.S. 867 (1984), which held that a verdict that no pattern or practice exists is not "dispositive of the individual claims" of anecdotal witnesses where no individual finding occurred, *id.* at 880, makes this clear. Because the Stage I jury would not issue a verdict as to which anecdotal witnesses were discriminated against, there is no issue preclusion and no narrowing of issues for Stage II. This is an entirely different question from whether the Stage I jury would have resolved factual *issues* embedded within the pattern or practice determination that would also be determined in Stage II.

III. The District Court's Ruling on the Prerequisites Question was Erroneous.

The district court permitted the EEOC to pursue its § 706 claim for highly individualized compensatory and punitive damages without having identified a single alleged victim of discrimination prior to suit, let alone having investigated, found cause as to, or conciliated any allegedly aggrieved person's claim. This ignores Title VII's "integrated, multistep enforcement procedure," *Occidental*, 432 U.S. at 359, impermissibly permits the EEOC to use discovery to uncover alleged violations, and ill serves Title VII's "primary purpose" of attempting to achieve voluntary compliance without litigation. *McClain*, 519 F.3d at 273 (quoting *Pacheco v. Mineta*, 448 F.3d 783, 788-89 (5th Cir. 2006)).

A. The EEOC's Lawsuit Impermissibly Exceeds the Scope of its Investigation.

It is well established that an EEOC lawsuit is limited to the claims it investigated, found cause to be true, and conciliated. The EEOC does not dispute this legal principle. Reply Brief for EEOC, *EEOC v. Geo Grp.*, No. 13-16292, 2014 WL 2958056, at *20 (9th Cir. June 18, 2014) ("Geo contends that the scope of EEOC's suit is limited by the scope of EEOC's investigation, determination, and conciliation.

EEOC agrees.") (internal citation omitted). *See also* ROA.7627-28 (citing cases). While courts may not review the *adequacy* of an investigation, they can and must review what claims the EEOC investigated and found reasonable cause to be true to assess the agency's compliance with its conditions precedent to suit. *Id.*

There is no pattern or practice cause of action under § 706, and compensatory and punitive damages are not available for a § 707 pattern or practice violation. Rather, § 706 permits the EEOC to investigate and, if reasonable cause is found and conciliation efforts fail, to litigate an alleged "unlawful employment practice." § 706(b), (f). As relevant here, it is an unlawful employment practice for an employer intentionally "to fail or refuse to hire . . . any *individual* . . . because of such *individual's* race . . . or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphases added). The district court's finding "that no individuals were identified or investigated [by the EEOC] in the investigation period", ROA.9706-07, ends the inquiry – the EEOC did not investigate a § 706 claim. *See also* ROA.2826. ("[T]he Court cannot locate a case in which

the EEOC brought a § 706 claim without identifying a single plaintiff.") Nor did the EEOC find reasonable cause as to any § 706 claim.[22]

Many courts have dismissed § 706 claims on behalf of allegedly aggrieved individuals not discovered until after the lawsuit, even when the EEOC identified some individuals during the administrative process and thus had a § 706 claim to bring. *See, e.g.*, *CRST*, 679 F.3d at 671 (affirming dismissal of claims of 67 individuals not identified during investigation and conciliation of "class" claims); *EEOC v. Bloomberg, L.P.*, 967 F. Supp. 2d 802, 812-13 (S.D.N.Y. 2013) (dismissing claims of individuals discovered post-lawsuit, and holding EEOC may not "use class-wide claims brought under Section 707 to conduct an end run around the pre-litigation requirements that must be satisfied before bringing suit on behalf of individual claimants under Section 706").[23] Indeed, the district court did exactly that in its original

---

[22] The EEOC's letter of determination found reasonable cause to believe that Bass Pro "has engaged in a nationwide pattern and practice of discriminating against African American and/or Black and Hispanic individuals with respect to store hiring for hourly and salaried positions on the basis of race and national origin." ROA.6096 ¶ 16; ROA.6123-27.

[23] *See also, EEOC v. Swissport Fueling, Inc.,* 916 F. Supp. 2d 1005 (D. Ariz. 2013); *Ariz. v. Geo Grp., Inc.*, No. 10-cv-1995, 2012 U.S. Dist. LEXIS 102950, at *33-35, *38 (D. Ariz. Apr. 17, 2012); *EEOC v. Target Corp.*, No. 02-C-146, 2007 WL 1461298, at

rulings, when it mistakenly believed the EEOC had identified allegedly aggrieved persons during its investigation. ROA.7627; ROA.9418 n.24. After learning that the EEOC had not identified any individual claims during its investigation, the district court reversed course and held that it was not necessary for the EEOC to have done so. ROA.9418-19.

To be sure, there are cases that hold otherwise and permit the EEOC to use discovery to uncover additional victims beyond those identified during the administrative process, such as the Sixth Circuit's opinion in *Cintas*, 699 F.3d at 904. The other cases upon which the district court relied were cases that did not involve compensatory or punitive damages, or cases where the alleged victims were part of a discrete group whose identities the employer knew or could easily ascertain. ROA.9415.[24] *See also* ROA.9674-98 (distinguishing cases cited by EEOC).

---

*3 (E.D. Wis. May 16, 2007); *EEOC v. Dillard's Inc.*, No. 08-cv-1780, 2011 WL 2784516, at *7-8 (S.D. Cal. July 14, 2011); *EEOC v. Original Honeybaked Ham Co. of Ga., Inc.*, 918 F. Supp. 2d 1171, 1177-78 (D. Colo. 2013).

[24] *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996) (citing *EEOC v. United Parcel Serv.*, 860 F.2d 372, 374 (10th Cir. 1988)) (cited language dicta in *Harvey* and taken from *UPS,* case with no compensatory or punitive damages); *EEOC v. Bruno's Rest.*, 13 F.3d 285, 289 (9th Cir. 1993) (no compensatory or punitive damages and identifiable group of terminated pregnant employees);

However, this Court need not decide whether the EEOC must identify *all* alleged victims in all cases, nor need it decide what, beyond identifying an allegedly aggrieved person, constitutes an investigation of his or her claim. Because the EEOC admits it did not identify *any* aggrieved persons during its investigation, this Court's task is an easy one. Bass Pro is unaware of a single case where the EEOC has been allowed to maintain a § 706 action without having investigated or conciliated the claim of a single aggrieved individual.

B. The District Court's Order Undermines the Purpose of Title VII's Pre-Suit Requirements.

Recognizing the importance Title VII places on opportunities for voluntary compliance, this Court strictly enforces Title VII's pre-suit requirements even against individual plaintiffs, who are generally unschooled in the law and have far fewer conditions precedent to suit

---

EEOC v. Rhone-Poulenc, Inc., 876 F.2d 16 (3d Cir. 1989) (no compensatory or punitive damages and identifiable group of terminated employees over 40 years old); *EEOC v. U.S. Steel Corp.*, No. 10-cv-1284, 2012 WL 3017869, at *10 (W.D. Pa. July 23, 2012) (identifiable group of employees given random alcohol test and court declines to decide Prerequisites Question); *EEOC v. PBM Graphics Inc.*, 877 F. Supp. 2d 334, 361 (M.D.N.C. 2012) (identifiable group of employees at single facility).

than the EEOC.[25] "Failure to exhaust is not a procedural 'gotcha' issue. It is a mainstay of proper enforcement of Title VII remedies. Courts should not condone lawsuits that exceed the scope of EEOC exhaustion, because doing so would thwart the administrative process and peremptorily substitute litigation for conciliation." *McClain*, 519 F.3d at 272-73. A "'*less* exacting rule would [ ] circumvent the statutory scheme, since Title VII clearly contemplates that no issue will be the subject of a civil action until the EEOC has first had the opportunity to attempt to obtain voluntary compliance.'" *Pacheco*, 448 F.3d at 789 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 467 (5th Cir. 1970)).

This primary purpose of Title VII cannot be fulfilled when neither the EEOC nor the employer knows who was allegedly harmed or how, or which hiring decisions are at issue. *See Marshall v. Sun Oil Co. (Del.),* 605 F.2d 1331, 1335 (5th Cir. 1979) ("The [government] must of

[25] Unlike the EEOC, private plaintiffs need not await the conclusion of the EEOC investigation or participate in conciliation, but may cut short the investigation and file suit within 180 or 300 days of the charge (depending on the State). *See* § 706(f)(1); *Occidental*, 432 U.S. at 368. Nevertheless, they are precluded from pursuing any claims that exceed "the scope of the EEOC investigation which can reasonably be expected to grow out of the [initial] charge of discrimination." *McClain*, 519 F.3d at 274 (emphasis removed) (internal quotation marks omitted).

course investigate the allegations of terminated employees; otherwise conciliation would not be meaningful."). The generalized, kitchen-sink allegations that Bass Pro discriminated against Black and Hispanic applicants – without reference to decision-maker, store, or position, and with no way of identifying which applicants were Black or Hispanic – provides no notice at all. This is especially true in a case involving compensatory and punitive damages, which "are uniquely dependent on the subjective and intangible differences of each [claimant's] individual circumstances." *Allison*, 151 F.3d at 418. They cannot be presumed even where individual violations are established, *see Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996) (reversing compensatory damages despite liability finding of egregious racial harassment), let alone upon a statistical showing, *see Allison*, 151 F.3d at 416-18. Excusing the EEOC from investigating individual claims and allowing it to pursue compensatory and punitive damages based on alleged statistical shortfalls would undermine these principles, provide

no notice to the employer of the charges against it, and render conciliation meaningless.[26]

There is no mistaking why the EEOC seeks this result. It is not that the EEOC needs or wants discovery to uncover alleged victims. Rather, the agency believes it will *never* have to identify the vast majority of alleged victims until it has a settlement in hand. The EEOC seeks to skip not only the conditions precedent to suit, but the adjudication of its claims as well.

C. Dismissal is the Proper Remedy.

The district court has already ruled that if it is wrong on the Prerequisites Question, the § 706 claims will be dismissed. ROA.9707. The appropriateness of dismissal – of limiting the EEOC's lawsuit to the scope of the administrative proceedings – is unaltered by the Supreme Court's recent holding that the EEOC's failure to *conciliate* a claim it has investigated and found cause to be true warrants a stay of proceedings for additional conciliation. *Mach Mining*, 135 S. Ct. at

[26] *Occidental*, 432 U.S. at 371 n.30 (Title VII's time limitations were "for the purpose of 'giving notice to the party charged (so) that he would have the opportunity to gather and preserve the evidence with which to sustain himself when formal charges are filed and subsequent enforcement proceedings are instituted.'") (quoting 117 Cong. Rec. 31972 (1971)).

1656. A stay for further conciliation is a remedy specifically provided in § 706(f). There is no such "stay" for failure to comply with the charge, investigation, and reasonable cause preconditions to suit. *Mach Mining* did nothing to disturb the limitation of EEOC lawsuits to claims it investigated, nor did it prohibit dismissal for failure to comply with conditions precedent to suit that precede conciliation. To the contrary, the Court cited with approval opinions dismissing cases where such preconditions were not met. *Id.* at 1651-52.

There is no disputing the importance of Title VII or the EEOC's role in its enforcement. However, "experience teaches 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, 825-26 (1980). "'Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002) (quoting *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984)). The Supreme Court has applied this principle to *pro se*

plaintiffs who fail to satisfy Title VII's tight deadlines and filing requirements. *See Baldwin Cnty*, 466 U.S. at 152 (reversing excusal of *pro se* Plaintiff's failure to file within 90 days right to sue); *see also McClain*, 519 F.3d at 274 (dismissing disparate-impact claim where individual did not allege a neutral policy in his charge). The EEOC is not – and should not be – held to a lesser standard.

* * *

If affirmed, the district court's rulings could provide a government agency with an incentive to exercise its authority to enforce our nation's anti-discrimination laws in a manner that not only strays far afield from Congress's intent, but tramples employers' rights to their day in court to defend themselves. The EEOC's mission is important and noble, but this undisputed fact does not excuse the agency from trying its cases in a lawful manner. As Judge Wilkinson observed:

> The reference to statutory goals and missions, however, 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.

EEOC v. Propak Logistics, Inc., 746 F.3d 145, 156-57 (4th Cir. 2014) (Wilkinson, J., concurring).

CONCLUSION

The district court's Order should be reversed and the § 706 claim dismissed.

This 19th day of June, 2015.

s/ Michael W. Johnston
Michael W. Johnston
Samuel M. Matchett
Rebecca Cole Moore
Jona J. McCormick
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5138

James P. Sullivan
KING & SPALDING LLP
401 Congress Avenue, Suite 3200
Austin, Texas 78701
Telephone: 512-457-2000
Facsimile: 512-457-2100

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on June 19, 2015, the foregoing brief was served, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/, upon the following registered CM/ECF users:

James Mark Tucker

Via e-mail to the following attorneys:

Gregory Thomas Juge and Connie Kay Wilhite

Counsel also certifies that on June 19, 2015 the foregoing brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5TH CIR. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5TH CIR. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

s/ Michael W. Johnston
Michael W. Johnston
Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

   [X] this brief contains 13,638 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) or 5TH CIR. R. 32.2, *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using *Microsoft Word 2007* in *Century Schoolbook 14-point typeface*, or

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

s/ Michael W. Johnston
Michael W. Johnston

Dated: June 19, 2015

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 20, 2015

Mr. Michael Wayne Johnston
King & Spalding, L.L.P.
1180 Peachtree Street, N.E.
Atlanta, GA 30309

No. 15-20078 EEOC v. Bass Pro Outdoor World, L.L.C., et al
USDC No. 4:11-CV-3425

Dear Mr. Johnston,

You must submit the seven (7) paper copies of your brief required by 5TH CIR. R. 31.1 within five (5) days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5TH CIR. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk

Renee McDonough

By: _____
Renee S. McDonough, Deputy Clerk
504-310-7673

cc:
Mr. Gregory Thomas Juge
Mr. Samuel M. Matchett
Mrs. Jona Jene McCormick
Mrs. Rebecca Cole Moore
Mr. James Patrick Sullivan
Mr. James Mark Tucker
Ms. Connie Kay Wilhite