No. 13-___

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

R. Lance Witcher
David L. Schenberg
OGLETREE, DEAKINS,
NASH, SMOAK &
STEWART, P.C.
7700 Bonhomme Ave.
Suite 650
St. Louis, MO 63105

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

QUESTION PRESENTED

In Title VII of the Civil Rights Act of 1964, "Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). At the outset of that process, if the EEOC finds that there is reasonable cause to believe a charge of discrimination against a private party it "shall endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The Commission is forbidden from filing suit unless within a specified period it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." *Id.* § 2000e-5(f)(1). Congress imposed similar requirements in the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), the Fair Housing Act, 42 U.S.C. § 3610(b)(1), and federal election law, 2 U.S.C. §§ 437g(a)(4), (a)(6)(A).

The Question Presented, on which the Seventh Circuit in this case avowedly rejected the precedent of numerous other courts of appeals, is:

Whether and to what extent may a court enforce the EEOC's mandatory duty 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mach Mining, LLC, respectfully petitions for a writ of certiorari to review 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. The panel pre-circulated its opinion to the en banc court, which did not call for further review. *Id.* 25a n.3. 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 permits the Equal Employment Opportunity Commission (EEOC) to sue an employer only if the Commission has been unable to secure a conciliation agreement with the employer. 42 U.S.C. § 2000e-5(f)(1). This case presents the question whether that statutory litigation precondition is immune from judicial enforcement. The Seventh Circuit held that it is, acknowledging it was exacerbating an already-significant circuit conflict over whether and how Title VII's conciliation obligation may be enforced in court.

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 suits by individuals and the Equal Employment Opportunity Commission (EEOC) to enforce the statute, "[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*.

Fourth, the Commission may not file suit unless within a specified period "the Commission has been unable to secure from the respondent a conciliation

---

[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) (emphasis added). An individual complainant may then file her own civil action. *Id*. § 2000e-5(f)(1).

agreement acceptable to the Commission." *Id*. § 2000e-5(f)(1).[2]

The EEOC's power to sue an employer – added to the statute in 1972 – was a departure from the statute as originally enacted, which limited the Commission to informal conciliation efforts. *See Occidental Life*, 432 U.S. at 367-68. But in authorizing the EEOC to bring suit, 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." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 78 (1984). The EEOC is thus "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 Life*, 432 U.S. at 368.

II. Procedural History

1. In early 2008, the EEOC received a single charge of discrimination against petitioner, a coal mining company, alleging the complainant had been denied 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,

---

[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).

because of their sex, in that [petitioner] failed to recruit and hire them, in violation of Title VII." Mot. for Sum. Judg., R. 32-1, Ex. B.[3] But 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, but later notified petitioner that it had determined that the conciliation process had failed and that further discussions would be futile. Mot. for Sum. Judg., R. 32-1, Ex. C.[4]

---

[3] "R. XX-Y" refers to the docket entry for the relevant document in the district court record.

[4] In the district court, the Commission's position was that evidence regarding the substance of the conciliation process was *per se* irrelevant as a matter of law because the conciliation precondition was not judicially enforceable. Moreover, although the EEOC has itself regularly introduced conciliation evidence to prove compliance with the conciliation precondition, *see* Pet. App. 8a n.1, it opposed any attempt by petitioner to introduce that evidence, arguing that Title VII precluded disclosure of what was said or done during conciliation even for the limited purposes of reviewing the EEOC's compliance with the conciliation precondition to litigation. *See* Pet. App. 48a (citing 42 U.S.C. § 2000e-5(b)). Commission lawyers thus threatened to move for sanctions against petitioner's counsel *personally* if they made any such submission. *See* Def. Opp. to Mot. for Sum. Judg., R. 42-1, Ex. A. Accordingly, although petitioner's brief in

2. A few days later, the Commission sued petitioner in the United States District Court for the Southern District of Illinois. *See* Compl., R.2. The complaint alleges 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.* 1. The Commission sought backpay, compensatory damages, and punitive damages for an undefined "class of female applicants," in "amounts to be determined at trial." *Id.* 4. 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."[5] 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.[6]

---

opposition to the Commission's motion for summary judgment included a proffer of what the evidence would show, no evidence regarding any conciliation process was included in the summary judgment record. *See* Def. Opp. to Mot. for Sum. Judg., R. 42-1 at 17-20; Pet. App. 40a. Instead, the lower courts decided the case on the purely legal question of whether the conciliation requirement is judicially enforceable.

[5] *See* EEOC, 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), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-27-11c.cfm.

[6] *Id*.

Petitioner filed an answer raising, among other things, the affirmative defense that the Commission had failed to fulfill its statutory obligation to conciliate in good faith the allegations raised in the complaint before filing suit. Answer, R.10 at 3.

The Commission subsequently moved for partial summary judgment on petitioner's conciliation defense, arguing that "its conciliation process is not subject to judicial review." Pet. App. 32a. The Commission notably did not assert that if the conciliation obligation was enforceable, it was satisfied in this case.

The district court denied the motion. Pet. App. 31a. The court observed that while "there is a circuit split as to the scope of an inquiry a court may make into the EEOC's statutory conciliation obligations," *id*. 34a, all of the courts "that have weighed in on the matter agree that conciliation is subject to at least *some* level of review," *id.* 35a. The court declined to go further to decide whether the EEOC's conciliation efforts were sufficient in this case, explaining that the Commission "fails 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 two questions for interlocutory appellate review under 28 U.S.C. § 1292(b):

> (1) Is the EEOC's conciliation process subject to judicial review?; and
>
> (2) If so, is that level of review a deferential or heightened scrutiny level of review?

Pet. App. 52a.

3. The Seventh Circuit reversed. The court recognized that *every* circuit to have addressed the question has held that the EEOC's compliance with the conciliation precondition to litigation is judicially enforceable, although those courts "stand divided over the level of scrutiny to apply in reviewing conciliation." Pet. App. 24a. The court explained that "the Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry" while the "Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith." *Id*. 25a.

The Seventh Circuit, however, "disagree[d] with our colleagues in other circuits," Pet. App. 3a, avowedly making itself "the first circuit to reject explicitly the implied affirmative defense of failure to conciliate." *Id.* 24a.[7] Specifically, the Seventh Circuit held that courts are forbidden from even asking 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).

In striking out on its own, the Seventh Circuit found it significant that the text of Title VII contains no "express provision for an affirmative defense based on an alleged defect in the EEOC's conciliation

---

[7] The court thus "proceeded as if we are creating a circuit split" by circulating the opinion among the other active judges in the circuit, none of whom favored addressing the question en banc. Pet. App. 25a & n.3.

efforts," Pet. App. 5a-6a, and makes conciliation discussions confidential, *id*. 7a. In the court's view, the confidentiality provision would require courts "to evaluate conciliation without evidence to weigh, at least without the consent of both parties." *Id.* 9a. The court acknowledged the possibility that conciliation evidence could be filed under seal and that the provision might be read to prohibit only use of conciliation evidence in proceedings on the *merits* of a discrimination claim. *Id*. 8a-9a & n.1. But it concluded that the better reading of the statute was that judicial inquiry is forbidden. *Id*. 9a.

To buttress that interpretation, the court relied on a variety of policy considerations. The court believed, for example, that although other courts had been enforcing the conciliation obligation for decades, there was no "meaningful standard to apply." Pet. App. 9a. The court acknowledged that many courts apply a "good faith" standard similar to the requirement in the National Labor Relations Act that unions and employers bargain in good faith, which obligation is judicially enforceable. *Id*. 11a; 29 U.S.C. § 158(d). And it recognized that other circuits – in decisions dating to 1978 – uniformly have been able to draw a distinction "between review of the conciliation process, which they permit, and review of the substance of the EEOC's position, which is supposedly prohibited." Pet. App. 12a. However, the Seventh Circuit believed that this distinction "is unlikely to survive the adversarial crucible of litigation," although the court did not point to any examples from the decades-long experience of other circuits. *Id*.

The court also speculated that "[o]ffering the implied defense invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." Pet. App. 16a. But, again, the court pointed to nothing in the experience of other circuits to support that claim.

At the same time, the court was "not persuaded" by petitioner's argument that EEOC field offices sometimes have incentives to short-circuit the conciliation process in favor of litigation to advance the Commission's policy agenda. Pet. App. 19a. Although other courts in numerous decisions had identified woefully inadequate conciliation efforts by the Commission, the Seventh Circuit perceived that the "agency has its own powerful incentives to conciliate," given that it litigates only a portion of the claims it fails to settle through conciliation. *Id.* 20a. Judicial review of the process was further unnecessary, the court thought, because "Congress can exert its influence on the EEOC through oversight hearings, adjustments to appropriations, and statutory amendments," and because the Commissioners are "appointed by the President with the advice and consent of the Senate." *Id*. 20a-21a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to resolve an intractable circuit conflict over the meaning of a central provision of the nation's most important and frequently litigated employment discrimination statute. Because Congress has long deemed voluntary conciliation more effective at obtaining equal employment opportunities for all, it expressly conditioned the EEOC's litigation authority on the agency first exhausting conciliation efforts. In this case, the Seventh Circuit acknowledged that it was further exacerbating a long-standing circuit conflict over the extent to which that requirement is judicially enforceable, taking the most extreme position yet by holding that the conciliation precondition is not judicially enforceable at all. The resulting circuit conflict and the court of appeals' reading of the statute are untenable and require this Court's review.

I. The Circuits Are Irreconcilably Divided Over Whether, And How, The EEOC's Compliance With Its Conciliation Mandate Is Subject To Judicial Review.

The decision in this case exacerbates a circuit conflict over whether, and how, courts may review the EEOC's compliance with Title VII's conciliation precondition to suit. The circuits are now spread along a continuum: (1) the Seventh Circuit stands alone in holding that the conciliation precondition is judicially unenforceable; (2) three circuits hold that the precondition is subject to judicial review, but under a quite deferential standard (along with two other circuits that enforce the precondition but have

not articulated a specific standard of review); and (3) three circuits apply a more searching review using a three-factor test that focuses on the Commission's provision of basic information to the employer and the EEOC's willingness to engage in a reasonable back and forth with the defendant.

A. The Seventh Circuit Stands Alone In Holding That The Conciliation Precondition Is Unenforceable.

The Seventh Circuit explained that its decision in this case "makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate." Pet. App. 24a. In fact, the decision created an eight-to-one circuit conflict on the basic question whether the conciliation precondition is judicially enforceable at all.

1. In a line of decisions stretching back more than thirty-five years, eight circuits have held that the EEOC's compliance with the conciliation precondition is subject to judicial review in any subsequent enforcement action the Commission might bring.

Second Circuit: *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981); *see also EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534-35 (2d Cir. 1996) (reviewing Commission compliance with conciliation requirement of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b)).

Fourth Circuit: *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185-86 (4th Cir. 1981); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976).

Fifth Circuit: *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 467-69 (5th Cir. 2009); *EEOC v. Klingler Elec. Corp*., 636 F.2d 104, 106-07 (5th Cir. Unit A Feb. 1981); *EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002-03 (5th Cir. 1980); *see also Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1334-39 (5th Cir. 1979) (same under ADEA).

Sixth Circuit: *Serrano v. Cintas Corp.*, 699 F.3d 884, 904-05 (6th Cir. 2012); *EEOC v. Keco Indus., Inc*., 748 F.2d 1097, 1101-02 (6th Cir. 1984); *see also Kelly v. Sec'y, U.S. Dep't Hous. & Urban Dev.*, 3 F.3d 951, 954-57 (6th Cir. 1993) (same under the Fair Housing Act (FHA), 42 U.S.C. § 3610(b)(1)); *Baumgardner v. Sec'y, U.S. Dep't Hous. & Urban Dev.*, 960 F.2d 572, 578-79 (6th Cir. 1992) (same).

Eighth Circuit: *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676-77 (8th Cir. 2012); *see also EEOC v. Trans States Airlines*, 462 F.3d 987, 996 (8th Cir. 2006) (permitting judicial review into "EEOC's failure to satisfy its obligation to conciliate" to decide whether to award attorney's fees against Commission).

Ninth Circuit: *EEOC v. Bruno's Rest*., 13 F.3d 285, 288-89 (9th Cir. 1993) (reviewing adequacy of conciliation efforts in context of request for attorney's fee award against the agency); *cf. also EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982) (holding that settlement reached prior to EEOC investigation into charges not enforceable in federal court, in part because "[g]enuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit by the EEOC which are conspicuously absent here").

Tenth Circuit: *EEOC v. Zia Co.*, 582 F.2d 527, 532-34 (10th Cir. 1978); *cf. also Mountain Side Mobile Estates P'ship v. Sec'y Hous. & Urban Dev.*, 56 F.3d 1243, 1249-50 (10th Cir. 1995) (same under Fair Housing Act); *Morgan v. Sec'y, U.S. Dep't Hous. & Urban Dev.*, 985 F.2d 1451, 1456-57 (10th Cir. 1993) (same); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir. 1985) (same under ADEA).

Eleventh Circuit: *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259-61 (11th Cir. 2003).

2. The Seventh Circuit was aware of this consensus, *see* Pet. App. 25a, but chose to "disagree with our colleagues in other circuits and hold that the statutory directive to the EEOC to negotiate first and sue later does not implicitly create a defense." *Id*. 3a.

There is no prospect that this division will heal itself without this Court's intervention. Certainly, the Seventh Circuit is not about to change its mind. Invoking circuit practice for decisions "creating a circuit split," the panel circulated its opinion to the rest of the active members of the court prior to publication, but "[n]o judge favored a rehearing en banc on the question of rejecting the implied affirmative defense for failure to conciliate." Pet. App. 25a n.3.

Likewise, the Seventh Circuit did not question that the law in other circuits was firmly settled in favor of judicial review. In numerous opinions, those courts have carefully explained the basis of their conclusion that the conciliation precondition is enforceable and gone on to decide how that obligation is to be enforced. *See, e.g.*, *Am. Nat'l Bank*, 652 F.2d

at 1185-86; *Zia Co.*, 582 F.2d at 532-34; *Agro Distribution*, 555 F.3d at 467-69; *see also Baumgardner*, 960 F.2d at 578-79 (considering same issue under FHA); *Marshall*, 605 F.2d at 1334-37 (same under ADEA). There is no reasonable likelihood that eight other circuits will take up the issue en banc and reverse course.

B. Three Circuits Review The EEOC's Conciliation Efforts For "Good Faith."

As the Seventh Circuit explained, the circuits that enforce the conciliation precondition "stand divided over the level of scrutiny to apply in reviewing conciliation." Pet. App. 24a. Of the eight circuits that enforce the precondition, six have articulated specific standards of review, falling into two camps.[8]

The Fourth, Sixth, and Tenth Circuits enforce the conciliation precondition by asking generally whether the Commission acted in "good faith" or "reasonably." *See, e.g.*, *Radiator Specialty Co.*, 610 F.2d at 183 (4th Cir.); *Serrano*, 699 F.3d at 904 (6th Cir.); *Keco*, 748 F.2d at 1102 (6th Cir.); *Zia Co.*, 582 F.2d at 533 (10th Cir.); *see also Mountain Side*, 56 F.3d at 1249 (same under FHA); *Prudential Fed. Sav.*

---

[8] The Eighth and Ninth Circuits have not clearly articulated a standard of review. The Eighth Circuit has suggested that the EEOC must provide an employer with a "meaningful opportunity to conciliate," without further elaboration. *CRST Van Expedited*, 679 F.2d at 676. The Ninth Circuit similarly has held only that "*[g]enuine* . . . conciliation" is a "jurisdictional condition[] precedent to suit by the EEOC." *Pierce Packing Co.*, 669 F.2d at 608 (emphasis added).

& Loan Ass'n, 763 F.2d at 1168-69 (same under ADEA).

In these circuits, courts require that the Commission make a genuine effort to conciliate claims before proceeding to court. They have held, for example, that the Commission cannot seek to conciliate claims regarding "race discrimination in hiring" but then bring a "subsequent suit including charges of race discrimination in layoffs . . . , or sex discrimination." *Am. Nat'l Bank*, 652 F.2d at 1186; *see also Patterson*, 535 F.2d at 271-72 (dismissing sex discrimination claims against union when Commission attempted conciliation of those claims only with employer). And they have required that the Commission provide employers a reasonable time to respond to conciliation offers. *See, e.g.*, *Zia Co.*, 582 F.2d at 534 (five days to respond found unreasonable under circumstances of the case).

At the same time, these circuits have emphasized the modest demands of their good faith standard. *See Radiator Specialty Co.*, 610 F.2d at 183 ("The law requires, however, no more than a good faith attempt at conciliation."); *Keco*, 748 F.2d at 1102 ("The district court should only determine whether the EEOC made an attempt at conciliation."). The Sixth Circuit, for example, has held that the "EEOC is under no duty to attempt further conciliation after an employer rejects its offer." *Serrano*, 699 F.3d at 905 (quoting *Keco*, 748 F.2d at 1101)) (internal quotation marks omitted).

C. Three Circuits Apply A More Demanding Three-Factor Test.

While agreeing that the Commission must act in good faith,[9] the Second, Fifth, and Eleventh Circuits have gone further, holding that to act in good faith, the Commission must:

1) outline to the employer the reasonable cause for its belief that Title VII has been violated;
2) offer an opportunity for voluntary compliance; and
3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.

Agro Distribution, 555 F.3d at 468 (5th Cir.); *see also Asplundh Tree Expert*, 340 F.3d at 1259 (11th Cir.) (same); *Klingler Elec.*, 636 F.2d at 107 (5th Cir.) (same); *Johnson & Higgins, Inc.*, 91 F.3d at 1534-35 (2d. Cir.) (same under ADEA, relying on Title VII cases).

Under this standard, courts have required the Commission to provide employers with basic information about the agency's claims and demands, including "the basis for the EEOC's charges against it." *Asplundh Tree Expert Co.*, 340 F.3d at 1260. In addition, in these circuits it is not enough – as the Sixth Circuit has held under its unadorned "good faith" test, *see supra* at 17 – for the EEOC to simply

---

[9] *See, e.g.*, *Agro Distr.*, 555 F.3d at 467; *Asplundh Tree Expert Co*., 340 F.3d at 1260; *Sears, Roebuck & Co.*, 650 F.2d at 17.

present a conciliation demand, and then sue if the offer is rejected. Instead, the Commission must engage in a reasonable give and take with the employer. *See, e.g.*, *Agro Distribution*, 555 F.3d at 468 & n.6 (contrasting Fifth Circuit's rule with Sixth Circuit's standard and holding that EEOC violates duty to conciliate when it makes a "take-it-or-leave-it offer"); *Asplundh Tree Expert Co.*, 340 F.3d at 1260 (conciliation requirement not satisfied by "all-or-nothing" approach). Thus, for example, the Fifth Circuit has held that the Commission failed its conciliation obligation by refusing an employer's offer to conciliate class issues unless the employer first agreed to provide a remedy to the charging individual. *Pet, Inc.*, 612 F.2d at 1002.

II. The Question Presented Is Important And Recurring.

Certiorari to resolve this multifaceted conflict is further warranted because the proper administration of Title VII's conciliation precondition goes to the heart of the statute's intended enforcement mechanism and affects thousands of discrimination cases every year. Further, the Question Presented also governs the enforceability of conciliation under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), the Fair Housing Act, 42 U.S.C. § 3610(b)(1); and federal election law, 2 U.S.C. §§ 437g(a)(4), (a)(6)(A).

This Court has repeatedly acknowledged "Congress' intent that voluntary compliance be the preferred means of achieving the objectives of Title VII." *Ricci v. DeStefano*, 557 U.S. 557, 581 (2009) (quoting *Firefighters v. Cleveland*, 478 U.S. 501, 515

(1986)) (internal quotation marks omitted); *see also Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) ("[T]he legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace."). The requirement that the EEOC attempt to conciliate claims before resorting to litigation is the principal means by which that policy is implemented. And the process cannot function as intended unless the Commission performs its statutory duty reasonably and in good faith.

The vast majority of circuits have concluded that in light of these considerations the EEOC cannot evade judicial enforcement of the express conciliation obligation, while the Seventh Circuit drew the opposite conclusion, believing that judicial "review undermines conciliation." Pet. App. 16a (capitalization altered). Either way, however, everyone agrees that the answer to the question presented by this petition is of critical importance to the intended functioning of one of the most important aspects of the statute.

The proper functioning of the statute, in turn, is critical to the appropriate resolution of thousands of discrimination claims processed by the EEOC every year. As the court of appeals explained, the Commission "currently processes and investigates nearly 100,000 charges of discrimination a year." Pet. App. 20a. Historically, the Commission has found reasonable cause (thereby triggering its

conciliation duty) in approximately 3,500 – 9,000 cases per year.[10] The Commission has filed suit in approximately 125 – 425 cases per year.[11] And as the numerous decisions cited above demonstrate, a recurring question in those cases is how (and whether) a court should enforce the conciliation mandate.[12]

---

[10] *See* EEOC, All Statutes: FY 1997 - FY 2013, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm.

[11] *See* EEOC, EEOC Litigation Statistics: FY 1997 – FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

[12] In many circuits, the question has been so well settled for so long that there are few recent appeals raising the question presented by this petition. But litigation in the trial courts over whether the EEOC has satisfied the conciliation precondition remains common. *See, e.g.*, *EEOC v. Swissport Fueling, Inc*., 916 F. Supp. 2d 1005, 1036 (D. Ariz. 2013) (ADEA case); *EEOC v. Ruby Tuesday, Inc*., 919 F. Supp. 2d 587, 595-98 (W.D. Pa. 2013); *EEOC v. Original Honeybaked Ham Co. of Georgia, Inc*., 918 F. Supp. 2d 1171 (D. Col. 2013); *EEOC v. La Rana Hawaii, LLC*, 888 F. Supp. 2d 1019, 1045 (D. Haw. 2012); *EEOC v. Dillard's Inc.*, No., 08-CV-1780-IEG(PCL), 2011 WL 2784516, at *5 (S.D. Cal. July 14, 2011); *EEOC v. Bloomberg, L.P.*, 751 F. Supp. 2d 628, 642 (S.D.N.Y. 2010); *EEOC v. High Speed Enter., Inc*., No. CV-08-01789-PHX-ROS, 2010 WL 8367452, at *3 (D. Ariz. Sept. 30, 2010); *EEOC v. Bimbo Bakeries USA, Inc*., No. 1:09-CV-1872, 2010 WL 598641, at *7 (M.D. Pa. Feb. 17, 2010); *EEOC v. UMB Bank, N.A.*, 432 F. Supp. 2d 948, 954-55 (W.D. Mo. 2006); *EEOC v. Reeves*, No. CV0010515DT(RZX), 2002 WL 1151459, at *6 (C.D. Cal. 2002), *rev'd on other grounds*, 68 Fed. Appx. 830 (9th Cir. 2003); *EEOC v. Golden Lender Fin. Grp*., No. 99 Civ. 8591(JGK), 2000 WL 381426, at *5 (S.D.N.Y. Apr. 13, 2000); *EEOC v. Pacific Mar. Ass'n,* 188 F.R.D. 379, 380-81 (D. Or. 1999); *EEOC v. Die Fliedermaus, LLC*, 77 F. Supp. 2d

III. The Decision Below Is Wrong.

Certiorari is also warranted because the Seventh Circuit's ruling is wrong.

1. The court of appeals did not contest that Title VII's plain text makes conciliation efforts by the Commission *mandatory* and an express precondition to suit. Pet. App. 6a. It could hardly conclude otherwise. The statute 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).

Making conciliation a precondition to litigation was hardly inadvertent. As originally enacted, the Commission's only enforcement authority was the ability to engage in conciliation. *See Alexander v. Gardner-Davis Co.*, 415 U.S. 36, 44 (1974). As this Court has noted, although Congress subsequently expanded that authority to include enforcement litigation, Congress remained committed to having voluntary compliance be the principal form of Title VII enforcement. *See, e.g.*, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, at 367-68 (1977). Congress

---

460, 467 (S.D.N.Y. 1999); *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1031-33 (N.D. Ill. 1998).

could reasonably fear that unless it made conciliation a precondition to litigation, the Commission's lawyers would litigate first and negotiate later.

The Seventh Circuit noted that the statute does not expressly state that non-compliance with the conciliation precondition is an affirmative defense to a premature EEOC lawsuit. Pet. App. 5a-6a. But that observation asks the wrong question – this Court has long treated compliance with statutory preconditions to suit as subject to judicial review and non-compliance as a defense. The "general rule," this Court has explained, is that "if an action is barred by the terms of a statute, it must be dismissed." *Hallstron v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989) (holding that non-compliance with pre-suit notice requirement in the Resource Conservation and Recovery Act requires dismissal); *see also, 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, 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 . . . .").

Application of that general rule is particularly appropriate with respect to preconditions on an administrative agency's right to sue, given the "strong presumption that Congress intends judicial review of administrative action." *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (citations and internal punctuation omitted); *see also, e.g.*, *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 672 n.3 (1986) (explaining that "judicial review is the rule" and "the intention to exclude it must be made specifically manifest") (citation and internal quotation marks omitted).

This Court has applied that same general rule to Title VII's preconditions to suit. For example, this Court has repeatedly interpreted the statute to require dismissal of private suits based on untimely charges. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002) (ordering claims based on untimely charge to be dismissed); *United Air Lines v. Evans*, 431 U.S. 553, 557 (1977) (same); *id.* at 555 n.4 ("Timely filing [of a charge] is a prerequisite to maintenance of a Title VII action."); *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (explaining that while timely filing of a charge "is not a *jurisdictional* prerequisite to suit" – and therefore is subject to the equitable doctrine of tolling – an untimely charge is still a basis for dismissal) (emphasis added). Likewise, Title VII provides that a complainant may file a civil action "within ninety days after" receiving a right-to-sue letter, but does not make non-compliance with that deadline an express defense. 42 U.S.C. § 2000e-5(f)(1). But this Court has long understood that such a defense exists. *See Baldwin Cnty. Welcome Ctr. v.*

Brown, 466 U.S. 147 (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").

Nor has the Court limited such defenses to cases brought by private plaintiffs. In *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), 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 recognized the defense. The Court held that "the existence of a charge that meets the requirements set forth in . . . 42 U.S.C. § 2000e-5(b) is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." 466 U.S. at 65. The Court explained that this conclusion flowed from Title VII's "integrated, multistep enforcement procedure," *id*. at 62 (citation omitted), under which filing of a valid charge was made a precondition to the EEOC's authority to issue a subpoena, *id*. at 64-65. And the Court had no difficulty in concluding that the Commission's compliance with that statutory precondition was subject to judicial review. *See id*. at 67-81.

2. Accordingly, the question in this case is whether there is some convincing basis to believe that Congress intended Title VII's conciliation precondition to be treated anomalously, requiring courts to accept the Commission's word for it that the prerequisite has been satisfied.[13] There is not.

The court of appeals noted 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), 2000e-5(f)(1) (emphasis omitted)). But that simply shows, as all the circuits recognize, that the statute leaves it up to the Commission to decide whether the *substance* of a settlement proposal is satisfactory; it does not show that Congress intended to preclude judicial review of the *procedural* adequacy of the Commission's conciliation efforts. 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).

The Seventh Circuit also placed great weight on the fact that the statute provides that "[n]othing said or done during and as a part of such informal

---

[13] The Seventh Circuit's reference to the Court's reluctance to imply private rights of action, Pet. App. 19a-20a, is thus entirely inapt.

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." Pet. App. 7a-8a (quoting 42 U.S.C. § 2000e-5(b)). It makes little sense to believe that Congress prohibited judicial review not directly, but instead through the indirection of prohibiting the disclosure of certain evidence. Further, as the district court rightly concluded, this provision does not erect an insurmountable bar to judicial review. *Id*. 48a-51a. A court can prevent conciliation evidence from being "made public" by keeping it under seal. And, as the EEOC itself has argued in the past, the proscription against using conciliation evidence "in a subsequent proceeding" is most sensibly read to preclude using that evidence as proof of discrimination in proceedings on the merits, consistent with the practice under Federal Rule of Evidence 408(b). *See EEOC v. Philip Svcs. 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 history of the statute confirms this interpretation. The confidentiality requirement was enacted as part of the original statute, when the Act permitted suit only by aggrieved parties, not the Commission. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259. At that time, the only conceivable use for conciliation evidence in a subsequent judicial proceeding would have been to prove (or disprove) the merits of the discrimination

claim.[14] It was only later that Congress gave the EEOC authorization to sue, subject to the conciliation precondition. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 105. While that amendment left in place the original confidentiality language, that is no reason to believe that Congress intended that pre-existing provision to render unreviewable (and therefore largely precatory) the condition it had just attached to the Commission's litigation authority.

3. The Seventh Circuit also concluded that Congress could not have intended the conciliation obligation to be judicially reviewed because there is no "meaningful standard to apply." Pet. App. 9a. The court further doubted that judicial review could be cabined to examination of the conciliation *process* as distinct from the *substance* of the Commission's settlement offers and decisions. *Id.* 12a. But those conclusions are belied by more than three decades of experience in the circuits providing such review. Moreover, to the extent greater guidance might be desirable, the EEOC itself is empowered to provide it through regulations. The Commission cannot evade judicial oversight through the maneuver of refusing to interpret a statutory provision within its authority.

---

[14] Sensibly, the Commission's compliance with its conciliation obligation has never been considered a precondition for a *private* suit. *See McDonnell Douglas*, 411 U.S. at 798-99. Accordingly, prior to the authorization of suits by the Commission itself, defendants would not have had any reason to present conciliation evidence to prove the inadequacy of the conciliation process.

a. The Seventh Circuit acknowledged that other courts have generally reviewed the Commission's conciliation efforts under a "good faith" standard that specifically rejects any authority to decide the reasonableness of the EEOC's settlement offers or its decision to reject an employer's counter-proposal. Pet. App. 11a. And the court of appeals recognized that in the National Labor Relations Act (NLRA), Congress imposed a similar obligation on employers and unions to bargain in good faith, a requirement that has been subject to administrative and judicial review for decades. *Id.* (citing 29 U.S.C. § 158); *see, e.g.*, *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198-99 (1991) (duty to bargain in good faith judicially enforceable); *cf. also Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) (en banc) (rejecting agency claim that enforcement provisions of Title VI, which also require that agency attempt to secure voluntary compliance before taking further enforcement steps, are not subject to judicial review).

Aside from noting that the NLRA expressly requires good faith bargaining (which is beside the point at issue here – *viz.*, whether such a requirement can be judicially administered) the Seventh Circuit worried that it may be impossible to administer a good faith standard without second-guessing the Commission's decisions about what kinds of relief are appropriate in a particular case. Pet. App. 12a. But that worry simply ignores the established record in other circuits, where courts have enforced reasonable standards of conduct without invading that administrative prerogative. For example, courts have held that good faith

requires the following modest steps by the Commission:

- Engaging in conciliation on the actual claims later brought in litigation.[15]
  - The Commission may not, for example, conciliate race discrimination claims, but litigate sex discrimination claims.[16]
  - Nor may the EEOC conciliate only individual claims, then attempt to litigate class claims.[17]
  - Conversely, the Commission cannot limit conciliation to discussion of class-wide claims, then litigate only individual claims that were never discussed.[18]
- Providing the defendant notice of what the EEOC believes is necessary to achieve compliance.[19]

---

[15] *See EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981) ("[I]t was not the intention of Congress that the Commission could attempt conciliation on one set of issues and having failed, litigate a different set.") (citation and internal quotation marks omitted).

[16] *See Patterson*, 535 F.2d at 271-72; *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1186 (4th Cir. 1981) (dicta); *EEOC v. Sherwood Med. Indus., Inc.*, 452 F. Supp. 678, 682 (M.D. Fla. 1978).

[17] *See Hill v. Western Elec. Co., Inc.*, 672 F.2d 381, 390 n.6 (4th Cir. 1982).

[18] *See Sears, Roebuck & Co.*, 650 F.2d at 18-19.

[19] *See EEOC v. Klingler Elec. Corp.*, 636 F.2d 104-07 (5th Cir. Unit A Feb. 1981); *Marshall*, 605 F.2d at 1334.

- Providing the defendant with a reasonable amount of time to review and respond to a conciliation offer.[20]
- Providing an explanation for how the Commission arrived at the amount of monetary relief it has demanded.[21]
- Providing information needed to evaluate the Commission's demands, including identifying the individuals for whom it seeks equitable relief, such as reinstatement, so that the employer can evaluate their qualifications.[22]

b. To the extent the Seventh Circuit was dissatisfied with the case-by-case approach undertaken by the other circuits, that is in large part the EEOC's own doing.

The Commission has 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 other preconditions to litigation, including filing the initial charge,[23] serving the charge on the employer,[24]

---

[20] *See EEOC v. Zia Co.*, 582 F.2d 527, 534 (10th Cir. 1978).

[21] *EEOC v. High Speed Enter., Inc*., 2010 WL 8367452, at *5 (D. Ariz. Sept. 30, 2010); *see also EEOC v. Ruby Tuesday, Inc*., 919 F. Supp. 2d 587 (W.D. Pa. Jan. 22, 2013) (ADEA case).

[22] *EEOC v. First Midwest Bank, N.A*., 14 F. Supp. 2d 1028, 1031-32 (N.D. Ill. 1998).

[23] 29 C.F.R. §§ 1601.9, 1601.12

[24] *Id*. § 1601.14.

investigating the charge,[25] issuing of no-cause or reasonable-cause determinations,[26] and issuing right-to-sue letters.[27] If it is unhappy with how the courts have construed the Commission's conciliation obligations, there is no reason why the agency could not likewise issue regulations addressing that question. *See, e.g.*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) (deferring to EEOC's regulations defining "charge"); *Litton Fin. Printing Div.*, 501 U.S. at 200 (deferring to National Labor Relations Board's interpretation of National Labor Relations Act's requirement that unions and employers bargain in good faith).

Indeed, that is the path this Court took in *Shell Oil*. As noted earlier, in that case, this Court held that filing of a proper charge was a judicially enforceable prerequisite to the Commission's authority to issue administrative subpoenas or seek their enforcement in federal court. 466 U.S. at 65. There was no question in that case that a charge had been filed; the employer argued, instead, that the charge was inadequate because it did not include sufficient factual detail. *Id*. at 67. Rather than conclude that compliance with the statute was judicially unreviewable, this Court deferred to the EEOC's regulations defining the required contents of a charge. *Id*.

---

[25] *Id*. §§ 1601.15-.17.

[26] *Id*. §§ 1601.18-.21.

[27] *Id*. § 1601.28.

Of course, in this case, the Commission has decided that its interests lie in declining to identify any standard of conduct that would bind *it* in conciliation proceedings.[28] That is not because the task is impossible – the Commission has itself solicited comments on a Draft Quality Control Plan intended to be used internally for "evaluating the quality of EEOC investigations and conciliations."[29] While it may be understandable that the Commission would prefer to issue non-binding quality control principles rather than enforceable regulations, that is no reason to allow the agency to thereby avoid judicial review of its compliance with statutory preconditions to litigation.

4. Finally, the court of appeals considered it unwise to allow defendants to seek judicial enforcement of the Commission's conciliation obligation because, it hypothesized, employers would act in bad faith, seeking to "use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." Pet. App. 16a. But the court cited no basis for that claim in the experience of the circuits that have subjected

---

[28] The EEOC has issued brief regulations addressing the conciliation process, but in describing the Commission's obligations, the regulations do little more than repeat the relevant statutory language. *See* 29 C.F.R. § 1601.24.

[29] *See* EEOC, Press Release, *U.S. Equal Employment Opportunity Commission Quality Control Plan 2013 Draft Principles*, *available at* http://www.eeoc.gov/eeoc/newsroom/release/quality_controlplan_2013.cfm.

conciliation to judicial review for the past three-and-a-half decades. And, in fact, that experience shows that judicial review is essential to ensuring that the conciliation process provides a real opportunity for resolving claims quickly and fairly, without resort to litigation. Absent a minimal level of good-faith cooperation from the EEOC, the conciliation process has no real prospect for success.

For example, few employers will be willing to simply accede to the Commission's monetary demands – sometimes for millions of dollars – without being given some idea of how the EEOC arrived at the number, some indication of the number of individuals for whom that relief is sought, and reason to think that the Commission has a legal basis for seeking that relief. Although the Commission will have issued a reasonable cause determination prior to conciliation efforts, that determination generally does not provide that information. In this case, for example, the initial charge made no class allegations and the reasonable cause determination stated only that the Commission found grounds to believe that "a class of female applicants" had also been subject to discrimination. *See* Mot. for Sum. Judg., R. 32-1, Ex. B. The determination said nothing about how many women were included in the class, or even how the Commission had defined the class for which it would be seeking a remedy. Were the EEOC then to demand a large sum of money during conciliation talks, without providing that withheld information, the employer would have no means of assessing the reasonableness of the offer, and therefore no responsible basis to accept it. Yet, the Commission previously has employed just that tactic – presenting

defendants with "take-it-or-leave-it" demands for sometimes millions of dollars without providing any meaningful explanation as to how that number was derived. *See, e.g.*, *EEOC v. Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587, 595-98 (W.D. Pa. 2013) (EEOC made demand for more than $6 million in ADEA case without providing employer the "basis for that monetary demand" and giving it only nine days to respond with its best offer or face-to-face meeting); *EEOC v. Reeves*, No. CV0010515DT(RZX), 2002 WL 1151459, at *7 (C.D. Cal. May 6, 2002) (awarding attorney's fees against EEOC, when the Commission ended negotiations after the employer failed to accept agency's initial demand of "payment of $1 million in compensatory and punitive damages and reinstatement of individuals whose identities were unknown to Defendant" even "while refusing to provide even the most essential facts underlying its claims against Defendant"), *rev'd on other grounds*, 68 Fed. Appx. 830 (9th Cir. 2003).

While the court of appeals was skeptical of employers' interest in good faith conciliation, it was willing to assume that the Commission could be trusted to comply with the law, even without any judicial oversight. Pet. App. 20a-21a. But the long-standing presumption in favor of judicial review of agency action is premised on the opposite understanding: "Without judicial review, statutory limits would be naught but empty words." *Bowen*, 476 U.S. at 672 n.3 (citation omitted); *see also, e.g.*, *Barlow v. Collins*, 397 U.S. 159, 167 (1970) ("[U]nless members of the protected class may have judicial review the statutory objectives might not be realized."). And in this case, the historical record

bears out that presumption. While the EEOC may litigate relatively few claims, even among those it failed to conciliate successfully, *see* Pet. App. 20a, that relatively small body of litigation has given rise to a distressing number of cases in which courts have found a lack of good-faith attempts to conciliate by the agency.[30]

Moreover, the need for judicial review of conciliation efforts is particularly acute in cases, like this one, raising pattern or practice claims and seeking class-wide relief (a type of litigation the EEOC has identified as one of its "top priorities").[31] The successful conciliation of such claims can bring important relief to large numbers of individuals while avoiding the especially long delays that too often accompany such complicated and high-stakes litigation. But precisely because the stakes are so high, employers are predictably unwilling to resolve the cases without the kind of basic information and process that judicial enforcement of the Commission's conciliation obligations has until now secured. At the same time, the risk that agency lawyers will

---

[30] *See, e.g.*, *EEOC v. CRST Van Expedited*, 679 F.3d 657, 671-72 (8th Cir. 2012); *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1258-61 (11th Cir. 2003); *Sears, Roebuck & Co.*, 650 F.2d at 18-19; *Zia Co.*, 582 F.2d at 530-34; *Patterson*, 535 F.2d at 271-72; *EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002 (5th Cir. 1980); *supra* 21 n.12 (collecting district court cases).

[31] *See* EEOC, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013 - 2016 § IV.A.3, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

sometimes give conciliation short shrift can be very real – because bringing such cases is an agency priority, some officials may be more interested in filing a lawsuit than in achieving a less high-profile resolution of the case. *See, e.g.*, *Asplundh*, 340 F.3d at 1261 (noting that the "chronology of events in this case lend themselves to the interpretation that the Commission's haste may have been motivated, at least in part, by the fact that conciliation, *unlike litigation*, is not in the public domain. . . . We note that the record reveals that the EEOC office in Miami, which is prosecuting this case, has apparently already made public by way of comments to the *New York Times* that this case involves the allegations of a noose incident.").

Ultimately, however, the Court need not impugn the general motives or good faith of the Commission to decide that nothing in the statute overcomes the ordinary presumption that statutory preconditions to suit are subject to judicial enforcement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

R. Lance Witcher
David L. Schenberg
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
7700 Bonhomme Ave.
Suite 650
St. Louis, MO 63105

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

February 21, 2014

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13-2456

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

MACH MINING, LLC,

Defendant-Appellant,

Appeal from the United States District Court for the Southern District of Illinois.
No. 3:11-cv-879 – **J. Phil Gilbert**, *Judge*.

ARGUED OCTOBER 29, 2013 – DECIDED DECEMBER 20, 2013

Before: WOOD, *Chief Judge*, and KANNE and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge.* Title VII of the Civil Rights Act of 1964 directs the Equal Employment Opportunity Commission to try to negotiate an end to

an employer's unlawful employment practices before suing for a judicial remedy. 42 U.S.C. § 2000e–5(b).Mach Mining, LLC, the target of an EEOC lawsuit for sex discrimination in hiring, sees in this statutory instruction an implied affirmative defense in its discrimination case. Mach Mining seeks dismissal of the EEOC's suit on the ground that the agency failed to engage in good-faith conciliation before filing suit. The EEOC moved for summary judgment on this "failure-to-conciliate" defense, arguing that courts should look no further than the face of the complaint to review the sufficiency of the conciliation process itself. The district court denied that motion but certified for interlocutory appeal the question whether an alleged failure to conciliate is subject to judicial review in the form of an implied affirmative defense to the EEOC's suit.

We reverse the district court's denial of summary judgment on the affirmative defense. The language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit. Finding in Title VII an implied failure-to-conciliate defense adds to that statute an unwarranted mechanism by which employers can avoid liability for unlawful discrimination. They can do so through protracted and ultimately pointless litigation over whether the EEOC tried hard enough to settle. An implied failure-to-conciliate defense also runs flatly contrary to the broad statutory prohibition on using what was said and done during the conciliation process "as evidence in a subsequent proceeding." 42 U.S.C. § 2000e–5(b). We therefore

disagree with our colleagues in other circuits and hold that the statutory directive to the EEOC to negotiate first and sue later does not implicitly create a defense for employers who have allegedly violated Title VII.

Factual and Procedural Background

The EEOC received a charge of discrimination in early 2008 from a woman who claimed Mach Mining had denied a number of her applications for coal mining jobs because of her gender. After investigating the charge, the agency determined there was reasonable cause to believe Mach Mining had discriminated against a class of female job applicants at its mine near Johnston City, Illinois. In late 2010, the EEOC notified the company of its intention to begin informal conciliation. The parties discussed possible resolution but did not reach an agreement. In September 2011, the EEOC told Mach Mining that it had determined the conciliation process had been unsuccessful and that further efforts would be futile. The EEOC filed its complaint in the district court two weeks later. There is no challenge here to the facial sufficiency of these documents. See *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984).

Mach Mining's answer denied unlawful discrimination and asserted several affirmative defenses. The only defense relevant to this appeal is the allegation that the suit should be dismissed because the EEOC failed to conciliate in good faith. The parties have spent nearly two years sparring over whether this is a sufficient ground for dismissing the discrimination case. The defense has been the subject of extensive discovery requests by

Mach Mining seeking information about the EEOC's investigation and conciliation efforts. The defense has also slowed discovery on the merits of the underlying discriminatory hiring claim. Mach Mining has asserted failure to conciliate as a basis for objecting to a number of the EEOC's discovery requests. The EEOC moved for summary judgment solely on the issue of whether, as a matter of law, an alleged failure to conciliate is an affirmative defense to its suit for unlawful discrimination.

In denying the EEOC's motion, the district court held that courts should evaluate conciliation to the extent needed to "determine whether the EEOC made a sincere and reasonable effort to negotiate." *EEOC v. Mach Mining, LLC*, 2013 WL 319337, at *5 (S.D.Ill. Jan. 28, 2013) (internal quotations omitted). Because the EEOC had not argued that its efforts were either sincere or reasonable, only that they were not reviewable as a defense to unlawful discrimination, the district court had no occasion to demonstrate what its proposed standard might mean in practice. The district court followed decisions of other circuits holding (and sometimes simply assuming) that judicial review of conciliation is appropriate in the form of an affirmative defense. See *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097 (6th Cir. 1984); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104 (5th Cir. 1981); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978).

The district court recognized at the same time that the EEOC's position had merit and raised arguments not considered by other circuits. It thus certified for interlocutory appeal under 28 U.S.C. § 1292(b) whether and to what extent conciliation is judicially reviewable through an implied affirmative defense. We accepted the appeal because it presents a controlling question of law as to which there is substantial ground for difference of opinion, because the resolution may advance the ultimate termination of the case, and because of the importance of the issue.

Analysis

In evaluating whether Mach Mining has a legally viable affirmative defense for failure to conciliate, we consider (1) the statutory language, (2) whether there is a workable standard for such a defense, (3) whether the defense might fit into the broader statutory scheme, and (4) our relevant case law. We then review (5) the decisions of other courts recognizing the affirmative defense that we reject here.

I. *Statutory Language*

We begin our analysis, of course, with the text of the statute, mindful of the Supreme Court's recent admonition that "Congress' special care in drawing so precise a statutory scheme" as Title VII "makes it incorrect to infer that Congress meant anything other than what the text does say." *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2530, 186 L.Ed.2d 503 (2013). The text of Title VII contains no express provision for an affirmative defense based on an alleged defect in the EEOC's

conciliation efforts. In "the context of a statute as precise, complex, and exhaustive as Title VII," *id.*, this silence itself is compelling. We do not rely only on that silence, however. We are also persuaded by the express statutory language making clear that conciliation is an informal process entrusted solely to the EEOC's expert judgment and that the process is to remain confidential.

The EEOC's enforcement procedures under Title VII are spelled out in section 706 of the Civil Rights Act of 1964 as amended. 42 U.S.C. § 2000e–5. The process begins when the agency receives a charge of discrimination from an aggrieved employee or a Commission member. It then must notify the employer and investigate whether reasonable cause exists to support the allegations.

A finding of cause triggers the conciliation process: "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." § 2000e–5(b). The EEOC may sue only after it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." § 2000e–5(f)(1). Title VII allows the entire process to move fairly quickly, at least in some cases. The only time limit on the EEOC's ability to sue is that it not do so within the first 30 days after receiving the original charge. See § 2000e–5(f)(1); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 360, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977).

The words are significant: "*endeavor to eliminate*" discriminatory practices "by *informal methods* of conference, conciliation, and persuasion." § 2000e–5(b). If it is "unable to secure from the respondent a conciliation agreement *acceptable to the Commission*," the agency may then sue. § 2000e–5(f)(1). What we have then is an instruction to the EEOC to try, by whatever methods of persuasion it chooses short of litigation, to secure an agreement that the agency in its sole discretion finds acceptable. It would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text.

The only other statutory terms in Title VII addressing the conciliation process make all details of the conciliation process strictly confidential. Violators are even subject to criminal prosecution: "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." § 2000e–5(b).

An implied affirmative defense for failure to conciliate conflicts directly with the confidentiality provision. See generally *United States v. Misc. Firearms*, 376 F.3d 709, 712 (7th Cir. 2004) (courts should avoid interpretations that "render other

provisions of the statute inconsistent, meaningless, or superfluous").[1]

The statute's explicit prohibition against using the contents of conciliation as evidence in a later proceeding is broad. Unlike Federal Rule of Evidence 408(b) regarding evidence of settlement negotiations, Title VII contains no exception allowing such information to be admitted for a collateral purpose,

---

[1] The parties dispute whether the criminal provision applies equally to the EEOC and to employers, as well as whether it would penalize using information as evidence if it is filed under seal (and thus arguably not "made public"). Case law on these questions is scattered and inconsistent. Compare *EEOC v. LifeCare Mgmt. Servs., LLC*, No. 02:08–CV–1358, 2009 WL 772834 (W.D.Pa. Mar. 17, 2009) (district judge recused after viewing conciliation documents that were filed under seal and became subject of dispute; court relied on confidentiality provision but did not consider how it might apply to the entire failure-to-conciliate defense), with *EEOC v. First Midwest Bank, NA*, 14 F.Supp.2d 1028 (N.D.Ill.1998) (recounting at length the procedural and substantive details of parties' conciliation efforts, without any mention of confidentiality). But we need not explore all subtleties of the criminal provision here. Also, the EEOC has produced evidence related to conciliation efforts before courts that have recognized the failure-to-conciliate defense. These actions appear to have been efforts to comply with conflicting and, we believe, mistaken interpretations of the law. The EEOC has not waived its right to argue that the failure-to-conciliate defense is mistaken at its foundation.

such as to satisfy a court that the EEOC's efforts to conciliate were sufficient. Implying a failure-to-conciliate defense in Title VII would thus require courts to evaluate conciliation without evidence to weigh, at least without the consent of both parties. An alternative but no more persuasive solution to the problem would be first to imply this affirmative defense and then to construct an implied set of exceptions to the sweeping statutory requirement of confidentiality. The better reading is to avoid the conflict, stick to the text, and reject both the non-statutory affirmative defense and the nonstatutory exceptions to confidentiality.

II. *No Standard for Review*

The second major problem with an implied failure-to-conciliate defense is the lack of a meaningful standard to apply. Title VII says nothing about the informal methods the EEOC is required to use—must it involve all three of conference, conciliation, and persuasion?—or how hard the agency should "endeavor" to pursue them. The statute gives no description of what a negotiated settlement should look like beyond eliminating the discriminatory conduct. And the statute gives the agency complete discretion to accept or reject an employer's offer for any reason. Such an open-ended provision looks nothing like a judicially reviewable prerequisite to suit.

Nor can Mach Mining explain just how many offers, counteroffers, conferences, or phone calls should be necessary to satisfy judicial review, despite repeated invitations to provide the court with a workable standard. In its brief, the company says review would sometimes require the EEOC to

respond to employers' requests for more information, but sometimes not. Sometimes the agency would have to show how it calculated monetary damages, but sometimes not. Sometimes it would have to identify all individual complainants, identify potential new hires, or agree to face-to-face meetings, but sometimes not. The defendant's uncertainty is consistent with the cases that have recognized this affirmative defense, but we are not tempted to send district courts down such a dimly lighted path.[2]

---

[2] Courts applying a failure-to-conciliate defense have varied widely in what evidence they consider and what actions they require of the EEOC. Must the EEOC identify all claimants during conciliation? Compare *EEOC v. Swissport Fueling, Inc.*, 916 F.Supp.2d 1005, 1037–38 (D.Ariz.2013) (yes), with *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F.Supp.2d 1117, 1129 n. 14 (D.Nev.2007) (no). Must the EEOC provide during conciliation the basis for its damages demand? Compare *EEOC v. Bloomberg LP*, 751 F.Supp.2d 628, 641–42 (S.D.N.Y.2010) (yes, agency must provide more than "basic information"), with *EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 274 (D.Minn.2009) (no), and *EEOC v. Riverview Animal Clinic, PC*, 761 F.Supp.2d 1296, 1302 (N.D.Ala.2010) (agency can "negotiate in good faith even if it does not have an accurate final computation of actual damages"). Is the substantive reasonableness of the EEOC's settlement position relevant? Compare *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (finding failure to conciliate based in part on substance of agency's "insupportable" settlement demand), with *EEOC v. High Speed Enter., Inc.*, No. CV–08–01789, 2010 WL 8367452, at *5 (D.Ariz. Sept. 30, 2010) (disclaiming any reliance on value of agency's settlement offer). May the EEOC raise

In the absence of any statutory guide, some courts that have approved the implied affirmative defense for failure to conciliate have imposed a requirement of good faith. *E.g., Keco Indus.*, 748 F.2d at 1102; *Zia Co.*, 582 F.2d at 533. Mach Mining argues that the National Labor Relations Act offers a template for how courts should analyze good faith in this context, and some courts have indeed relied on the NLRA for guidance in evaluating Title VII conciliation. *E.g., Zia Co.*, 582 F.2d at 533.

Unlike Title VII, however, the NLRA contains an explicit statutory command to employers and unions to negotiate in good faith, 29 U.S.C. § 158(d), so courts have done their best to enforce that explicit command. We have warned about the problems of applying such a standard to a process like conciliation under Title VII: "We know from cases under the National Labor Relations Act, which requires unions and employers to bargain in good faith, how difficult it is to enforce such a duty, because it jostles uneasily with the right of each party to a labor negotiation to refuse an offer by the other even if a neutral observer would think it a fair, even a generous, offer." *Doe v. Oberweis Dairy*, 456

---

its damages demand significantly? Compare *EEOC v. PBM Graphics Inc.*, 877 F.Supp.2d 334, 363 (M.D.N.C.2012) (agency's sudden quintupling of monetary demands was not failure to conciliate), with *EEOC v. First Midwest Bank, NA*, 14 F.Supp.2d 1028, 1032 (N.D.Ill.1998) (agency's sudden quadrupling of monetary demands showed failure to conciliate).

F.3d 704, 711 (7th Cir. 2006) (internal citations omitted); see also *Nassar*, 133 S.Ct. at 2530 (Title VII's "detailed statutory scheme" should not be read in light of "capacious language" of other statutes).

The parties here agree that, like a party to a labor negotiation, the EEOC is free to refuse an offer that might appear fair or even generous to a neutral observer. Courts that have recognized an implied affirmative defense for failure to conciliate draw a distinction between review of the conciliation process, which they permit, and review of the substance of the EEOC's position, which is supposedly prohibited. See, *e.g., EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 273 (D.Minn.2009) ("While the substance and details of any settlement offers, or discussions, are not discoverable, the actions and efforts, that are undertaken by the EEOC to conciliate the matter ... are subject to the Court's review.").

But the distinction between process and substance in this context is unlikely to survive the adversarial crucible of litigation. A court reviewing whether the agency negotiated in good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers—not to mention using confidential and inadmissible materials as evidence—unless its review were so cursory as to be meaningless. Was it unreasonable for the EEOC to refuse one more meeting, one more request for information, or one more extension of time to respond, or to raise its settlement demand? So unreasonable as to permit an inference of bad faith? These questions cannot be answered without a close look at the substance of the parties' positions, yet all agree that Title VII leaves

the choice to settle or not entirely to the EEOC's unreviewable discretion.

While Mach Mining did not plead its conciliation defense under the Administrative Procedure Act, its argument relies heavily on the statute's "basic presumption of judicial review" that is so central to American law in general and the APA in particular. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), abrogated in part on other grounds, *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The APA thus casts a helpful light because the lack of a workable standard for courts to apply makes conciliation look very much like an action "committed to agency discretion by law," which the APA excepts from its general presumption of judicial review. See 5 U.S.C § 701(a); cf. § 704 (only actions "made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"). Under this exception, court involvement "is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Webster v. Doe*, 486 U.S. 592, 600, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988), quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).

3 Under the APA, this exception is generally narrow. It applies only "if a careful analysis of the statutory language, statutory structure, legislative history, and the nature of the agency action requires it." *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 615 (7th Cir. 2003). Nevertheless, the exception is not so narrow as

to disappear entirely into the rule, and we have applied it where the statutory text and structure as well as the nature of the agency decision so demand. See *Anaya–Aguilar v. Holder*, 683 F.3d 369, 373 (7th Cir. 2012); *Singh v. Moyer*, 867 F.2d 1035, 1038–39 (7th Cir. 1989); *Board of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, 605 F.2d 1016, 1025 (7th Cir. 1979). We need not do so directly here because, again, Mach Mining has not explicitly grounded its defense in the APA. But our reasoning is consistent with the APA exception because the statutory directive to attempt conciliation is so similar to those open-ended grants of authority that courts have found committed to agency discretion by law and thus not subject to judicial review under the APA.

To be sure, the presumption favoring judicial review is not limited to the APA. It extends to cases such as this one, in which the agency action is not being challenged under the APA. In *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986), the Supreme Court considered a non-APA challenge to regulations setting out how to calculate Medicare Part B benefits. Noting the "strong presumption" in favor of review, *id.* at 670, 106 S.Ct. 2133, the Court held the regulations were judicially reviewable. It distinguished an earlier case that said individual benefit computations were unreviewable because the challenge in *Bowen* was to a general agency rulemaking and thus presented less danger of flooding courts with burdensome litigation in contravention of the statutory scheme. *Id.* at 675–76.

Similarly, in *Traynor v. Turnage*, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988), the Court applied the presumption of judicial review to petitioners' challenge to a Veterans' Administration regulation that allegedly violated the Rehabilitation Act of 1973. *Traynor* explained that the challenge to the particular regulation's lawfulness would not drag courts into complex, fact-specific determinations or open the door to "expensive and time-consuming litigation" over individual claims. *Id.* at 544–45, 108 S.Ct. 1372. The broader challenge to the regulation was thus not barred by an earlier case finding that Congress had expressly precluded review of individual veteran benefits awards.

While upholding judicial review in each case, both *Bowen* and *Traynor* acknowledged that the general "presumption favoring judicial review of administrative action is just that—a presumption." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984), cited in *Bowen*, 476 U.S. at 673, 106 S.Ct. 2133, and *Traynor*, 485 U.S. at 542, 108 S.Ct. 1372. It may be overcome "whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Block*, 467 U.S. at 351, 104 S.Ct. 2450 (internal quotations omitted); see also *Morris v. Gressette*, 432 U.S. 491, 504–05, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977).

Unlike the pure questions of law the Supreme Court found reviewable in *Traynor* and *Bowen*, case-by-case adjudication of the sufficiency of the EEOC's conciliation efforts would require that courts be given some metric by which to analyze the parties' conduct. Congress's failure to provide even the outlines of such

a standard tends to show that it did not intend for judicial review of conciliation through an implied affirmative defense. This conclusion becomes compelling when considered alongside the language of the statute, including the prohibition on evidence from the conciliation process. Judicial review under the implied affirmative defense would have to proceed without a workable legal standard and even without evidence.

III. *Review Undermines Conciliation*

An implied affirmative defense for failure to conciliate also does not fit well with the broader statutory scheme of Title VII. Offering the implied defense invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute. The Supreme Court has recognized "Congress's intent that voluntary compliance be the preferred means of achieving the objectives of Title VII." *Ricci v. DeStefano*, 557 U.S. 557, 581, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (internal quotations omitted). In 1972 Congress gave the EEOC the new power to bring suit in order to spur more voluntary compliance. *EEOC v. Kimberly–Clark Corp.*, 511 F.2d 1352, 1357 (6th Cir. 1975). Congress's purpose is not served well by litigating the parties' informal endeavors at "conference, conciliation, and persuasion." Simply put, the conciliation defense tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court. Such disputes impose significant costs on both sides, as well as on the court, and to what end?

All the employer should legitimately hope to gain is some unspecified quantum of additional efforts at conciliation by the EEOC. The result of such a defense, as we have said in a closely related context, is to "protract and complicate Title VII litigation, and with little or no offsetting benefit." *Oberweis Dairy*, 456 F.3d at 710 (reversing summary judgment for employer; complaining party's failure to cooperate did not provide employer with affirmative defense); see also *EEOC v. Chicago Miniature Lamp Works*, 526 F.Supp. 974, 975–76 (N.D.Ill.1981) (discussing at length "undesirability of turning every properly-filed EEOC action into a two-fold action" by litigating first the EEOC's probable cause finding and then the actual merits).

Of course, we doubt that many employers will go to the trouble of putting on a failure-to-conciliate defense purely out of a desire to see their adversary across the negotiating table again. What most hope to win is dismissal of the case, or at least its delay. See, *e.g., Asplundh Tree*, 340 F.3d at 1261; *EEOC v. Bloomberg LP*, —— F.Supp.2d ——, ——, 2013 WL 4799150, at *10–11 (S.D.N.Y. Sept. 9, 2013) (dismissing case while acknowledging that meritorious discrimination claims "now will never see the inside of a courtroom").

If an employer engaged in conciliation knows it can avoid liability down the road, even if it has engaged in unlawful discrimination, by arguing that the EEOC did not negotiate properly—whatever that might mean—the employer's incentive to reach an agreement can be outweighed by the incentive to stockpile exhibits for the coming court battle. Similar reasoning explains why Title VII makes negotiations

confidential in the first place. See *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 881 (5th Cir. 1981) ("the prospect of disclosure or possible admission into evidence of proposals made during conciliation efforts would tend to inhibit the kind of free and open communication necessary to achieve unlitigated compliance with the requirements of Title VII").

An employer cannot be sure in advance that its defense will carry the day, of course. But the cost to the employer of pursuing that defense rather than settling before suit is filed is likely to be relatively low—a civil complaint from the EEOC, perhaps accompanied by a negative press release—because the employer remains free to settle after the EEOC files suit. The potential gains of escaping liability altogether will, in some cases, more than make up for the risks of not engaging in serious attempts at conciliation. And the stronger the EEOC's case on the merits, the stronger the incentive to use a failure-to-conciliate defense. We see no persuasive reason to find that a statute meant to encourage voluntary compliance on the part of employers implied a defense that would create such contrary incentives for them. See generally *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984) (rejecting employer's effort to litigate adequacy of EEOC's disclosure of facts supporting subpoena where such disputes would slow and undermine EEOC's enforcement efforts).

Mach Mining and the amici supporting it argue strenuously that judges must police the EEOC, lest it either abandon conciliation altogether or misuse it by advancing unrealistic and even extortionate settlement demands. Neither scenario is plausible.

We are not persuaded by Mach Mining's argument that EEOC field offices are so eager to win publicity or to curry favor with Washington by filing more lawsuits that they will needlessly rush to court.

First, in the context of deciding whether to imply private rights of action, the Supreme Court has repeatedly made clear that not every statutory directive is the subject of a private right of action. See generally *Sosa v. Alvarez–Machain*, 542 U.S. 692, 727, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) ("this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"); *Alexander v. Sandoval*, 532 U.S. 275, 286–87, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (without congressional "intent to create not just a private right but also a private remedy ... a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute").

The Court's reluctance to imply private rights of action would seem to apply with similar force to implied affirmative defenses, especially as defenses for violations of federal law where Congress provided expressly for the enforcement action itself. Using the standards for implied rights of action, there is no indication that Title VII's directive to conciliate was for the special benefit of employers or that they have a right to conciliation. Congress was focused on effective enforcement of the anti-discrimination standards of Title VII, not creating new rights for employers. See *Alexander*, 532 U.S. at 289, 121 S.Ct. 1511 ("Statutes that focus on the person regulated rather than the individuals protected create 'no

implication of an intent to confer rights on a particular class of persons.' "), quoting *California v. Sierra Club*, 451 U.S. 287, 294, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981).

Second, the agency has its own powerful incentives to conciliate, and the available data show that it does so. The EEOC currently processes and investigates nearly 100,000 charges of discrimination a year, but it ultimately files suit in only a few hundred cases. In fiscal year 2012, the agency attempted conciliation in 4207 cases, was unsuccessful in 2616, yet filed suit on the merits in just 122. All Statutes: FY 1997 Through FY 2012, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm; EEOC Litigation Statistics, FY 1997 Through FY 2012, http://www.eeoc. gov/eeoc/statistics/enforcement/litigation.cfm (both sites last visited Dec. 20, 2013). That so few unsuccessful efforts at conciliation end up in court shows how constrained the agency is by practical limits of budget and personnel.

The agency's practices and priorities are also checked in this regard by the two other branches of government, making it less urgent for the judiciary to add its supervision, at least without a statutory command to do so. Although structured as an independent agency, the EEOC shares its enforcement authority with the Attorney General, see 42 U.S.C. § 2000e–5(f), and it is attuned to the policy priorities of the executive. See Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 Cardozo L.Rev. 273, 297–98 (1993). As it can with other agencies, Congress can exert its influence on the EEOC

through oversight hearings, adjustments to appropriations, and statutory amendments. In addition, the commissioners who head the agency are appointed by the President with the advice and consent of the Senate. In short, even without the judiciary trying to monitor the EEOC's efforts at conciliation, those efforts are subject to meaningful scrutiny.

IV. *Applicable Seventh Circuit Case Law*

We turn next to our own decisions that provide some guidance on this question of an implied defense. We have not had occasion before this case to examine this particular question about an implied defense for failure to conciliate. But our rejection of the defense is consistent with our earlier cases rejecting similar attempts by employers to change the focus from their employment practices to the agency's pre-suit processes.

For example, in *EEOC v. Elgin Teachers Association*, 27 F.3d 292 (7th Cir. 1994), the EEOC sued a local teachers union for damages related to a collective bargaining agreement that the agency believed was discriminatory. Rejecting the union's claim that the EEOC "lacked the right" to sue, we noted that although "the EEOC must pursue conciliation, it failed to get all of what it wanted in bargaining." *Id.* at 294 (internal citations omitted). While we doubted whether the teachers union was the best target for suit, we made clear that the decision to go to court was "a matter for the conscience of the person who authorized the suit, rather than for the judiciary." *Id*. The same reasoning applies to judicial review of conciliation efforts.

More recently, in *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006), we held that the defendant employer was not entitled to summary judgment on the ground that the complainant, a former employee, had failed to cooperate with the EEOC before suit was filed. Although the EEOC requires complainants to cooperate with its investigations, we refused to read into Title VII a rule that good-faith cooperation was a prerequisite to individual suit or that failure to cooperate would be an affirmative defense. Nothing in the statutory text expressed any such requirement, and imposing it would needlessly complicate Title VII cases: "To allow employers to inject such an issue by way of defense in every Title VII case would cast a pall over litigation under that statute." *Id.* at 711. The same reasoning applies to a failure-to-conciliate defense.

EEOC v. Caterpillar, Inc., 409 F.3d 831 (7th Cir. 2005), is even more closely on point. In *Caterpillar*, the defendant employer had moved for partial summary judgment on the theory that the EEOC's complaint went beyond the scope of the investigation required by 42 U.S.C. § 2000e–5(b). We affirmed denial of summary judgment. Distinguishing cases with contrary dicta, we held that the "existence of probable cause to sue is generally and in this instance not judicially reviewable." 409 F.3d at 833. Nothing in the language of Title VII or our past case law invites courts to review the agency's finding of probable or reasonable cause, and the same is true of its approach to conciliation.

Mach Mining offers two grounds for distinguishing *Caterpillar*. It first argues that any error as to whether probable cause exists will be

corrected at trial while, absent court review, insufficient conciliation will remain forever unremedied. We are not persuaded. A trial will check defects in the conciliation process to the same extent it will a lack of probable cause. All an employer loses from deficient conciliation effort is the chance to comply with the discrimination laws without need for a trial, and we must keep in mind that the EEOC has complete discretion to decide whether to settle.

If the EEOC's demands are so high that they offer no real chance at bargaining, a trial on the merits should bring them back to earth. If the employer feels it lacked the time or information necessary to settle before suit is filed, litigation will provide both. The employer can still settle, and district courts have many tools available to encourage reasonable settlements. We see no reason the EEOC would be likely to prefer spending its limited litigation budget rather than accept success in the form of a reasonable settlement. Moreover, the parties can settle quickly and without court approval because EEOC suits are not considered representative actions subject to the requirements of Rule 23. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002); cf. Fed.R.Civ.P. 23(e). It is true that the employer may have to bear the burden of trial, but that is equally true in the probable cause context. Mach Mining asserts also that the existence of probable cause is particularly the subject of agency expertise in a way that a failure to conciliate is not. This claim, offered without further support or explanation, is no more persuasive.

Perhaps the closest our cases come to supporting a failure-to-conciliate defense is *EEOC v. Massey–Ferguson, Inc.*, 622 F.2d 271, 277 (7th Cir. 1980), where our discussion of a laches defense shows that some evidence from the conciliation process was offered and considered. We rejected the employer's attempt to require the EEOC to raise back-pay claims in conciliation as a condition of seeking back-pay in the lawsuit. Nevertheless, our discussion seems to have assumed some degree of judicial review might be available, and the evidence from the conciliation process was deemed relevant to a defense of laches. The parties did not make an issue of the conciliation process in *Massey–Ferguson*, however. Nor did they raise the issue of confidentiality or confront the issues of statutory text we address here. The opinion therefore adds little to Mach Mining's case here, while *Caterpillar*, *Oberweis Dairy*, and *Elgin Teachers Association* show our consistent skepticism toward employers' efforts to change the focus from their own conduct to the agency's pre-suit actions.

V. *Other Circuits*

Our decision makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate. Because the courts of appeals already stand divided over the level of scrutiny to apply in reviewing conciliation, our holding may complicate an

existing circuit split more than it creates one, but we have proceeded as if we are creating a circuit split.[3]

As explained in more detail below, the Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981). The Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). While we respect the views of our colleagues in these circuits, we also recognize our duty to decide our cases independently and to disagree when we must. See, *e.g., Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 443 (7th Cir. 1994), *aff'd sub nom. Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R. Co.*, 516 U.S. 152, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996); *Grandberry v. Keever*, 735 F.3d 616, 618 (7th Cir. 2013).

To the extent other courts have explained why judicial review of conciliation is appropriate in the

---

[3] We have circulated this opinion among all judges of this court in regular active service pursuant to Circuit Rule 40(e). No judge favored a rehearing en banc on the question of rejecting the implied affirmative defense for failure to conciliate.

form of an implied affirmative defense to claims of unlawful discrimination, we are not persuaded to join them.[4] Few courts recognizing this implied defense have addressed the issue directly; those that have recognized it have pointed generally to a need to give effect to Congress's intention that the EEOC address discrimination through voluntary settlement. See, *e.g., EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11–CV–3425, 2013 WL 5515345, at *4 (S.D.Tex. Oct. 2, 2013); *Bloomberg LP*, ——F.Supp.2d at ——, 2013 WL 4799150, at *7. As we have explained, though, apart from the problems this poses under the statutory text, including the confidentiality requirement, we are also skeptical that court oversight is necessary or that it encourages

---

[4] Nor are we persuaded by the arguments of Mach Mining's amici that Congress has implicitly "acquiesced" to these courts' long-standing interpretations. Amicus Br. of Retail Litig. Ctr., Inc., U.S. Chamber of Commerce, and Nat'l Fed. of Indep. Bus. at 18, citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). *Block* discussed congressional inaction on the way to holding that courts could *not* review the challenged agency action, and in any event, the Supreme Court has since expressed considerable skepticism about this argument by acquiescence, regardless of which direction it runs. See *Alexander v. Sandoval*, 532 U.S. 275, 292–93, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); *Central Bank of Denver, NA v. First Interstate Bank of Denver, NA*, 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994).

compliance rather than strategic evasion on the part of employers.

Given Title VII's deliberate silence concerning the details of conciliation, it is not surprising that other courts have struggled to provide meaningful guidance on how to judge the process. The approach adopted in the Fourth, Sixth, and Tenth Circuits proposes to inquire into the good faith of the EEOC's efforts. As we have explained, we see no reason to import a judicially reviewable requirement of good faith into the informal and confidential process of conciliation when the statute does not require it.

The Second, Fifth, and Eleventh Circuits employ an even more searching three-part test first announced in *Marshall v. Sun Oil Co. (Delaware)*, 605 F.2d 1331, 1335 (5th Cir. 1979). This test asks whether the EEOC: (1) outlined to the employer its cause for believing Title VII has been violated, (2) gave the employer a chance to comply voluntarily, and (3) responded "in a reasonable and flexible manner to the reasonable attitudes of the employer." *Asplundh Tree*, 340 F.3d at 1259.

This inquiry—especially the open-ended third step—appears to be no clearer in practice than on paper. It invites ad hoc assessments of whether the EEOC played fairly and took reasonable substantive positions. See note 2, above, collecting cases. Under either test, court review will conflict directly with the statute's confidentiality provision, as well as with its grant of discretion to the agency to accept or reject any particular offer to compromise.

Finally, a word on remedies. Even if there were a sound basis for disregarding the confidentiality

provision in Title VII and subjecting the EEOC's conciliation efforts to any form of judicial review, and even where the EEOC's conciliation effort has fallen short of judicial expectations, we see no sound basis for dismissing a case on the merits. Dismissal certainly is not required by the language of the statute, which says nothing to authorize judicial review in the first place and effectively prohibits it by making the relevant evidence inadmissible. See 42 U.S.C. § 2000e–5(b).

As a practical matter, there is little reason to expect the potential for dismissal to promote conciliation. The employer in a dismissed case has little incentive to resume talks, of course. The next employer the EEOC investigates will have seen the benefit of using the conciliation process as a strategic defense rather than a chance to settle. Dismissal also provides little additional deterrence against EEOC misconduct beyond what a stay or a referral to mediation could provide, and the significant social costs of allowing employment discrimination to go unaddressed in these situations are likely to outweigh any marginal gain in deterrence. Cf. *Hudson v. Michigan*, 547 U.S. 586, 594–96, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (holding that violation of "knock-and-announce" rule under Fourth Amendment did not require suppression of evidence where deterrence benefits would be outweighed by substantial social costs).

Because all parties acknowledge that the statute grants the EEOC discretion to reject any particular settlement offer, Mach Mining must argue that its failure to conciliate defense is a claim solely about process and not substance. This distinction seems too

fine a thread on which to hang judicial review. Cases applying both the tests for failure to conciliate slide easily from review of the form of conciliation toward more substantive scrutiny. Even setting aside this problem, the Supreme Court has made clear that, as a general rule, the remedy for a deficiency in a process is more process, not letting one party off the hook entirely. See, *e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (citizens classified as "enemy combatants" were entitled to notice and hearing before neutral arbiter, but not to release from detention); *Vitek v. Jones*, 445 U.S. 480, 495–97, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (prisoner was entitled to procedural safeguards before transfer to mental hospital, but not to immunity from transfer); *Fuentes v. Shevin*, 407 U.S. 67, 96–97, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (alleged debtors were entitled to hearing before prejudgment seizure of their property, but not to forgiveness of their debts).

The essence of an affirmative defense is that it assumes the plaintiff can prove its factual allegations. An affirmative defense raises additional facts or legal arguments that defeat liability nonetheless. See 2 Moore's Federal Practice 8.08[1] (3d ed.2013); see also 5 Wright & Miller, Federal Practice and Procedure § 1271, at 585 (3d ed.2004); *Sloan Valve Co. v. Zurn Industries, Inc.*, 712 F.Supp.2d 743, 756 (N.D.Ill.2010); *Menchaca v. American Medical Response of Illinois, Inc.*, 6 F.Supp.2d 971, 972 (N.D.Ill.1998). The wrong claimed by defendant here is purely one of insufficient process. A procedural remedy, such as a short stay to allow the parties to pursue conciliation further,

would be tailored to the alleged wrong. Dismissal on the merits, however, would excuse the employer's (assumed) unlawful discrimination. That would be too final and drastic a remedy for any procedural deficiency in conciliation.

We need not say more about remedies because we hold that alleged failures by the EEOC in the conciliation process simply do not support an affirmative defense for employers charged with employment discrimination. 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, see *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984), our review of those procedures is satisfied. The EEOC is entitled to summary judgment on defendant Mach Mining's affirmative defense. The decision of the district court is REVERSED and the case is REMANDED for further proceedings on the merits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
vs.	)	Case No. 11-cv-879-JPG-PMF
MACH MINING, LLC,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff Equal Employment Opportunity Commission's ("EEOC") (1) motion for summary judgment on defendant Mach Mining, LLC's ("Mach Mining") failure to conciliate affirmative defense (Doc. 32); and (2) motion to strike "Section F" of Mach Mining's memorandum in opposition to the EEOC's motion for partial summary judgment (Doc. 45). For the following reasons, the Court denies the EEOC's motions.

1. Facts

The EEOC filed the instant suit on behalf of Brooke Petkas and a class of female applicants who had applied for non-office jobs at Mach Mining. According to the EEOC, Mach Mining "has never hired a single female for a mining-related position,"

and "did not even have a women's bathroom on its mining premises." Doc. 32, p. 1–2. The complaint alleges that Mach Mining's Johnston City, Illinois, facility engaged in a pattern or practice of unlawful employment practices since at least January 1, 2006. Specifically, those unlawful "practices included, but are not limited to failing or refusing to hire females into mining and related (non-office) positions because of their sex." Doc. 2, p. 2. The EEOC further alleges that Mach Mining "has utilized hiring practices that cause a disparate impact on the basis of sex" through its practice of "hiring only applicants who are referred by current employees." Doc. 2, p. 3. In its answer, Mach Mining asserted the affirmative defense that the EEOC failed to conciliate in good faith. The EEOC, in its instant motion for summary judgment, argues that *EEOC v. Caterpillar, Inc.*, 409 F.3d 831 (7th Cir. 2005) compels this Court to conclude that its conciliation process is not subject to judicial review.

2. Analysis

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Spath v. Hayes Wheels Int'l–Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). With this standard in mind, the Court will consider the EEOC's argument that it is entitled to judgment as matter of law.

Upon the EEOC's receipt of a charge of discrimination, the EEOC must notice the employer of the charge, investigate the allegations, and make a

determination as to whether there is "reasonable cause" to believe the allegations took place. 42 U.S.C. § 2000e–5(b). Thereafter,

> [i]f the [EEOC] determines [ ] 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.

42 U.S.C. § 2000e-f(b). As a prerequisite to filing suit, EEOC must give the employer a chance to conciliate. *Id*.; 42 U.S.C. § 2000e–5(f)(1) ("If ... the [EEOC] has been unable to secure from the respondent a conciliation agreement acceptable to the [EEOC], the [EEOC] may bring a civil action ....").

"The [EEOC]'s duty to attempt conciliation is one of its most essential functions." *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979). Its conciliation attempt must be made in "good faith." *EEOC v. First Midwest Bank, N.A.*, 14 F.Supp.2d 1028, 1031 (N.D.Ill.1998) (citing *EEOC v. Keco Indus., Inc.*, 748 F.2d 1087, 1102 (6th Cir. 1984); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978)); *see also EEOC v. Dial Corp.*, 156 F.Supp.2d 926, 939 (N.D.Ill.2001). However, "[t]he judiciary's role in reviewing the conciliation process is limited, as the 'form and substance of the EEOC's conciliation proposals are within the agency's discretion and, therefore, immune from judicial second-guessing." *See First Midwest Bank, N.A.*, 14 F.Supp.2d at 1031. (citing *Keco Indus., Inc.*, 748 F.2d at 1102; *EEOC v. Acorn Niles Corp.*, No. 93–cv–5981, 1995 WL 519976, at *6 (N.D.Ill. Aug.30, 1995)).

Currently, there is a circuit split as to the scope of inquiry a court may make into the EEOC's statutory conciliation obligation. *See, e.g., EEOC v. St. Alexius Med. Ctr.*, 12–C–7646, 2012 WL 6590625, at *1 (N.D.Ill.Dec.18, 2012); *EEOC v. United Rd. Towing, Inc.*, No. 10–C–6259, 2012 WL 1830099, at *4 (N.D.Ill. May 11, 2012); *EEOC v. McGee Bros.*, No. 10–cv–142, 2011 WL 1542148, at *4 (W.D.N.C. Apr.21, 2011). Some circuits employee a "deferential standard" and others use a "heightened scrutiny standard." *United Rd. Towing, Inc.*, 2012 WL 1830099, at *4 (citing *EEOC v. McGee Bros.*, No. 10–cv–142, 2011 WL 1542148, at *4 (W.D.N.C. Apr.21, 2011)). The Sixth Circuit, for example, employs a deferential standard, holding that

> the district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review.

EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1102 (6th Cir. 1984); *accord EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (finding "the law ... requires no more than a good faith attempt at conciliation" and determining that the EEOC had provided such a good faith attempt after examining the various conciliation attempts); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide").

Other circuits, however, demand courts engage in a more strenuous review of the conciliation process. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003). For instance, in order to satisfy the conciliation requirement in the Fifth and Eleventh Circuits

> [t]he EEOC must (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.... "[T]he fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances ."

Id. (quoting *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981)). Accordingly, even though the circuits are split on the proper scope of a conciliation review, the courts that have weighed in on the matter agree that conciliation is subject to at least *some* level of review.

The Seventh Circuit has yet to weigh in on this circuit split. *See EEOC v. St. Alexius Med. Ctr.*, No. 12–cv–7646, 2012 WL 6590625, at *1 (N.D.Ill.Dec.18, 2012). However, district courts within the Seventh Circuit, like all other courts to have considered the issue, have concluded that the EEOC's conciliation process is subject to at least *some* level of review. *See, e.g., EEOC v. Menard, Inc.*, 08–cv–0655–DRH, 2009 WL 1708628, at *1 (S.D.Ill. June 17, 2009) (EEOC need only "make[ ] a sincere and reasonable effort to negotiate"); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F.Supp.2d 974, 984–85 (S.D.Ind.2003); *EEOC v. Dial Corp.*, 156 F.Supp.2d 926, 941–42

(N.D.Ill.2001) (after considering the events of the conciliation process the court held it was "persuaded that the EEOC did, indeed, attempt to conciliate" because "[b]oth parties had the opportunity to put their respective proposals on the table before the EEOC determined that conciliation would be futile."); *EEOC v. First Midwest Bank, N.A.*, 14 F.Supp.2d 1028, 1031 (N.D.Ill.1998) (noting that "[i]f a district court finds improper conciliation efforts were made, the appropriate remedy is not dismissal, but a stay of the proceedings so that conciliation between the parties may take place" and going on to examine the conciliation process). Specifically, this Court expressed its opinion that the EEOC's conciliation process is subject to review. *EEOC v. Crownline Boats, Inc.*, 04–cv–4244–JPG, 2005 WL 1618809, at *2–4 (S.D.Ill. July 5, 2005) ("Even though conciliation is not a jurisdictional prerequisite, the defendant may still attack the sufficiency of the EEOC's conciliation as an affirmative defense to the EEOC's claim.").

In *Caterpillar*, the Seventh Circuit held that the existence of probable cause is not a justiciable issue in a suit brought by the EEOC. *EEOC v. Caterpillar*, 409 F.3d 831, 833 (7th Cir. 2005). Specifically, the EEOC's notice to Caterpillar stated it had "reasonable cause to believe that Caterpillar discriminated against [the claimant] and a class of female employees." *Id*. at 831–32. The EEOC's suit alleged that Caterpillar had engaged in plant-wide discrimination. Caterpillar argued that the plant-wide allegation was unrelated to the original charge and moved for summary judgment. *Id*. at 832. The

court denied the motion but certified the following question for interlocutory appeal:

> In determining whether the claims in an EEOC complaint are within the scope of the discrimination allegedly discovered during the EEOC's investigation, must the court accept the EEOC's Administrative Determination concerning the alleged discrimination discovered during its investigation, or instead, may the court itself review the scope of the investigation?

Id. The Seventh Circuit answered that question in the negative, specifically stating as follows:

> If courts may not limit a suit by the EEOC to claims made in the administrative charge, they likewise have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation. The existence of probable cause to sue is generally and in this instance not judicially reviewable.

Id. at 833.

Here, the EEOC fails to argue that its conciliation efforts would satisfy either the "deferential standard" or the "heightened scrutiny standard." Rather, the EEOC argues that the *Caterpillar* decision compels this Court to conclude that its conciliation process is not subject to any level of judicial review because conciliation, like a probable

cause determination, is a prerequisite to filing suit.[1] *See* 42 U.S.C. § 2000e-f(b). Considering the same argument from the EEOC, a court in the Northern District of Illinois concluded that *Caterpillar* compels no such conclusion.[2] *EEOC v. St. Alexius Med. Ctr.*, No. 12–cv–7646, 2012 WL 6590625, at *2 (N.D.Ill.Dec.18, 2012). The *St. Alexius* court reasoned that *Caterpillar* only found the probable cause determination not subject to judicial review and did not address the conciliation process. *Id*. That court further reasoned it

> would not read *Caterpillar* as having implicitly disagreed with the consensus, adopted by all circuits to have addressed the

---

[1] The Court also notes that the EEOC makes an argument that the Administrative Procedures Act ("APA") is relevant to the Court's decision. The EEOC cites no authority that directly supports this proposition. Further, this is an action brought directly by the EEOC, not a person aggrieved by an agency action. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entited to judicial review thereof .").

[2] While *St. Alexius* considered an American with Disabilities Act ("ADA") case, as that Court noted, the ADA incorporated the provisions of Title VII "regarding the procedures the EEOC must follow in handling administrative charges and in filing suits against employers on behalf of claimants." *St. Alexius*, 2012 WL 6590625, at *1 (citing 42 U.S.C. § 2177(a)).

> issue, that the EEOC's presuit conciliation efforts are subject to at least *some* level of judicial review; when the Seventh Circuit departs from such a consensus, it does so explicitly. *See Turley v. Gaetz*, 625 F.3d 1005, 1012 (7th Cir. 2010). Reading *Caterpillar* in the manner urged by the EEOC would be particularly unwise given that the Seventh Circuit has cited with approval *Keco Industries* and *Zia*, two of the decisions recognizing a court's authority to evaluate the EEOC's conciliation efforts when those efforts (or lack thereof) are challenged by a defendant in an EEOC-initiated employment discrimination suit. *See [EEOC v.] Elgin Teachers Ass'n*, 27 F.3d [292,] 294 [(7th Cir. 1994)].

Id. at *2. The Court finds the *St. Alexius* reasoning persuasive and adopts its reasoning herein.

The Court also notes that at least one other circuit rejects the EEOC's reasoning that *Caterpillar*'s holding, that the pre-suit reasonable cause determination is non justiciable, is inconsistent with a holding that the conciliation process is justiciable. The Fourth Circuit, like *Caterpillar*, has held that Title VII does not provide for review of the EEOC's reasonable cause determination. *Caterpillar*, 409 F.3d at 832 (citing *Georator Corp. v. EEOC*, 592 F.2d 765, 767 (4th Cir. 1979)). That same circuit also employs a deferential standard in reviewing the EEOC's conciliation process. *See EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (finding "the law ... requires no more than a good faith attempt at conciliation" and determining that

the EEOC had provided such a good faith attempt after examining the attempts at conciliation).

For these reasons, the Court concludes that *Caterpillar* does not preclude at least some level of judicial review of the EEOC's conciliation process. Thus, the Court denies the EEOC's motion for summary judgment. Of course, this ruling does not preclude the EEOC from filing a motion for summary judgment arguing that it did conciliate in good faith.

Finally, the EEOC filed a motion to strike a section of Mach Mining's response to the EEOC's motion for summary judgment that contained references to the conciliation process. The EEOC argues Mach Mining's reference to the conciliation process violates the portion of 42 U.S.C. § 2000e–5(b) that states "[n]othing 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." However, because the Court has found that the EEOC's conciliation process is subject to at least some level of review and that review would involve at least a cursory review of the parties' conciliation, the Court denies the EEOC's motion.

The Court notes, however, that the inquiry into the conciliation process does not require every detail of the conciliation process, as the Court need only determine whether the EEOC made "a sincere and reasonable effort to negotiate." *EEOC v. Menard, Inc.*, 08–cv–0655–DRH, 2009 WL 1708628, at *1 (S.D.Ill. June 17, 2009); *see EEOC v. Zia Co.,* 582 F.2d 527, 533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers

between the parties, nor impose its notions of what the agreement should provide"); *see also EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 273 (D.Minn.2009) ("While the substance and details of any settlement offers, or discussions, are not discoverable, the actions and efforts, that are undertaken by the EEOC to conciliate the matter are discoverable information, and are subject to the Court's review.)

3. Conclusion

Thus, the Court finds that the EEOC is not entitled to judgment as a matter of law on Mach Mining's affirmative defense that the EEOC failed to conciliate in good faith and **DENIES** the EEOC's motion for summary judgment (Doc. 32). The Court further **DENIES** the EEOC's motion to strike Section F of Mach Mining's response (Doc. 45).

IT IS SO ORDERED.

DATED: January 28, 2013

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
Plaintiff,	)
vs.	) Case No. 11-cv-879-JPG-PMF
MACH MINING, LLC,	)
Defendant.	)

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff Equal Employment Opportunity Commission's ("the EEOC") motion (Doc. 59) to reconsider or to certify for appeal pursuant to 28 U.S.C. § 1292(b) this Court's order (Doc. 55) denying the EEOC's motion for partial summary judgment. Defendant Mach Mining, LLC ("Mach Mining") filed a response (Doc. 66) to which the EEOC replied (Doc. 72). The Court heard oral argument on this matter on May 16, 2013. For the following reasons, the Court denies the motion to reconsider and grants the motion to certify this Court's January 28, 2013, order (Doc. 55) for appeal.

1. Facts

The EEOC filed the instant suit on behalf of Brooke Petkas and a class of female applicants who

had applied for non-office jobs at Mach Mining. According to the EEOC, Mach Mining "has never hired a single female for a mining-related position," and "did not even have a women's bathroom on its mining premises." Doc. 32, p. 1–2. The complaint alleges that Mach Mining's Johnston City, Illinois, facility engaged in a pattern or practice of unlawful employment practices since at least January 1, 2006. Specifically, those unlawful "practices included, but are not limited to failing or refusing to hire females into mining and related (nonoffice) positions because of their sex." Doc. 2, p. 2. The EEOC further alleges that Mach Mining "has utilized hiring practices that cause a disparate impact on the basis of sex" through its practice of "hiring only applicants who are referred by current employees." Doc. 2, p. 3.

In its answer, Mach Mining asserted the affirmative defense that the EEOC failed to conciliate in good faith. The EEOC then filed a motion for partial summary judgment arguing that conciliation is beyond the scope of judicial review. This Court denied the EEOC's motion finding that the EEOC's conciliation efforts were subject to at least *some* level of review (Doc. 55). The EEOC now asks the Court to reconsider its order denying the EEOC's motion for partial summary judgment. In the alternative, the EEOC asks this Court to certify the following question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): "whether, under Title VII or the [Administrative Procedure Act] ("APA"), courts may review EEOC's informal efforts to secure a conciliation agreement acceptable to the Commission before filing suit."

2. Motion to Reconsider

The EEOC argues reconsideration is appropriate because the Court committed manifest errors of law when it failed to (1) construe the APA to preclude judicial review of conciliation; and (2) strike Mach Mining's brief that referred to conciliation. "A court has the power to revisit prior decisions of its own ... in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)); Fed.R.Civ.P. 54(b) (providing a non-final order "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). The decision whether to reconsider a previous ruling in the same case is governed by the law of the case doctrine. *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571–72 (7th Cir. 2006). The law of the case is a discretionary doctrine that creates a presumption against reopening matters already decided in the same litigation and authorizes reconsideration only for a compelling reason such as a manifest error or a change in the law that reveals the prior ruling was erroneous. *United States v. Harris*, 531 F.3d 507, 513 (7th Cir. 2008); *Minch v. City of Chicago*, 486 F.3d 294, 301 (7th Cir. 2007). The Court will now consider whether it committed a manifest error of law requiring the reversal of its order denying the EEOC's motion for partial summary judgment.

a. APA Applicability

In a footnote in its order denying the EEOC's motion for partial summary judgment, the Court noted the EEOC did not provide caselaw supporting its argument that the APA precludes judicial review of its statutory conciliation requirement. The EEOC, in its motion to reconsider, now backs up its argument with caselaw referencing the APA. Specifically, the EEOC cites to *Standard Oil*, *AT & T*, *Caterpillar*, and *Elgin*. In *Standard Oil*, the Supreme Court found that the Federal Trade Commission's issuance of a complaint, including its reasons to believe the defendant was in violation of the Federal Trade Commission Act, was not judicially reviewable. *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 243 (1980). In *AT & T*, the D.C. Circuit held that the EEOC's letters of determination did not constitute final agency action that was reviewable by the court. *AT & T Co. v. EEOC*, 270 F.3d 973, 976–77 (D.C.Cir. 2001). In *Caterpillar*, a case on which the EEOC heavily relies, the Seventh Circuit held that "[t]he existence of probable cause to sue is generally and in this instance not judicially reviewable." *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005). In sum, *Standard Oil*, *AT & T*, and *Caterpillar* do not take a position on conciliation, and do not persuade the Court that conciliation is beyond judicial review.

In *Elgin Teachers Association*, the only case cited by the EEOC that considers conciliation, the EEOC found the Elgin school district's collective bargaining agreement objectionable. *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 293 (7th Cir. 1994). Even though the school district changed the objectionable portions of the agreement, the EEOC filed suit seeking

damages. *Id*. The Seventh Circuit rejected the defendant's argument that the EEOC lacked the right to bring suit. *Id*. at 294. Specifically, "[a]lthough the EEOC must pursue conciliation, 42 U.S.C. § 2000e–5(b); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978), it failed to get all of what it wanted in bargaining." *Id*. Accordingly, rather than find conciliation was unreviewable, the Seventh Circuit merely found that the EEOC could pursue its suit because it did not receive all of what it bargained for in conciliation. *Id*.

Interestingly, *Elgin Teachers Association* provides support for a court's authority to inquire into the EEOC's conciliation process. First, the opinion specifically says the EEOC *must* pursue conciliation. *Id*. at 294. Without court review this statutory command is meaningless. Further, the Seventh Circuit cites to *Zia* with approval. *Id*. In *Zia*, the Tenth Circuit specifically recognized a court's authority to review conciliation when it held that "the EEOC is required to act in good faith in its conciliation efforts." *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). However, "a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide...." *Id*. Accordingly, the Seventh Circuit's cite of approval to *Zia* in the context of conciliation leads this Court to believe the Seventh Circuit may find the EEOC's conciliation efforts are subject to at least a minimal level of review.

The EEOC has failed to provide any caselaw that supports its extension of the APA to preclude judicial review of conciliation. To the contrary, the Court's

ruling was consistent with every Circuit to have considered the issue. *See, e.g., EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003) ("the EEOC must (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer"); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984) (the district court should only determine whether the EEOC made an attempt at conciliation); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (finding "the law ... requires no more than a good faith attempt at conciliation" and determining that the EEOC had provided such a good faith attempt after examining the various conciliation attempts); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) ("a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide").

Further, the Court's order was consistent with Seventh Circuit caselaw that suggests courts may make at least some level of inquiry into conciliation. In *EEOC v. Massey–Ferguson*, the Seventh Circuit found that the EEOC was not required to raise class backpay claims during conciliation. 622 F.2d 271, 277 (7th Cir. 1980). However, the court stated that "failure to conciliate on class backpay is relevant to the question of unreasonable delay and, therefore, ultimately to laches." *Id*. Accordingly, the Seventh Circuit acknowledged that courts may inquire into the conciliation process. Similarly, in *Schnellbaecher v. Baskin Clothing*, the Seventh Circuit found

dismissal of a suit was appropriate where a party did not have notice of the charges or a chance to conciliate. 887 F.2d 124, 127 (7th Cir. 1989). Again, the Seventh Circuit seems to acknowledge that at least some level of inquiry into the conciliation process is appropriate. Thus, for the foregoing reasons, the Court cannot conclude it committed a manifest error of law in finding the EEOC's conciliation process is subject to at least some level of review.

b. Section F of Mach Mining's Response

Similarly, the Court cannot conclude it committed a manifest error of law in failing to strike Section F of Mach Mining's response to the EEOC's motion for partial summary judgment in which Mach Mining discusses the conciliation between the parties. The statute which the EEOC contends prohibits disclosure of this conciliation material provides as follows:

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

42 U.S.C. § 2000e–5(b). The EEOC argues that the Court erred because its ruling was in contradiction to the portion of the statute prohibiting conciliation matters to be "used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Id*.

This statutory command to refrain from introducing conciliation matters into evidence in

subsequent proceedings appears to be in contradiction to the EEOC's statutory duty to conciliate. The statute requiring conciliation provides that

> [i]f the [EEOC] determines [ ] 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.

42 U.S.C. § 2000e-f(b). As previously discussed, this statute has been read by every court to have considered the issue as requiring the EEOC to conciliate and subjecting that conciliation to at least some level of judicial review. However, to review whether the EEOC engaged in conciliation, at least some level of evidence regarding conciliation efforts must be introduced into evidence in a proceeding before the court.

"Statutory terms or words will be construed according to their ordinary, common meaning." *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 544 (7th Cir. 2003). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Id*. (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). The Court must also be mindful that statutes dealing with the same subject matter must "be read *in pari materia* and harmonized when possible." *Matter of Johnson*, 787 F.2d 1179, 1181 (7th Cir. 1986). Courts have an obligation to construe statutes "in such a way as to avoid conflicts between them, if such a construction is possible and reasonable." *Precision Indus., Inc.*, 327 F.3d at 544.

The Court believes a reasonable interpretation of 42 U.S.C. § 2000e–5(b) is achieved by construing that statute as prohibiting the introduction of conciliation matters into evidence to prove or disprove a claim on the merits. That statute, however, does not prohibit the introduction of conciliation matters in collateral proceedings such as contesting the EEOC's conciliation efforts. The Court can harmonize 42 U.S.C. § 2000e-f(b) with 42 U.S.C. § 2000e–5(b) in this manner by comparing 42 U.S.C. § 2000e–5(b) to Federal Rule of Evidence 408.

Rule 408 prohibits any party from introducing evidence of settlement negotiations into evidence. Fed.R.Evid. 408(a). However, "[t]he court may admit this evidence" in a collateral proceeding. Fed.R.Evid. 408(b). The prohibition on the introduction of the EEOC's conciliation efforts is similar to the reasoning behind Rule 408. Evidence of compromise is excluded on the ground of "the public policy favoring the compromise and settlement of disputes." Fed.R.Evid. 408 advisory committee's note. Similarly, "[w]hen Congress first enacted Title VII in 1964 it selected '[c]ooperation and voluntary compliance as the preferred means for achieving' the goal of equality of employment opportunities." *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 367–68 (1977). Congress intended the EEOC not "simply as a vehicle for conducting litigation on behalf of private parties," but as an "agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." *Id*. at 368.

Because both Rule 408 and the EEOC's duty to conciliate arise from a strong policy favoring

settlement, it is reasonable for the Court to read 42 U.S.C. § 2000e-f(b) as prohibiting the introduction of conciliation with respect to a ruling on the merits of the case. However, such evidence may be permitted in a collateral matter, such as assessing whether the EEOC has engaged in conciliation. Such a construction would further the policy encouraging settlement, but at the same time allow courts to review conciliation in a collateral proceeding. This reading is reasonable and avoids a contradiction of the statutes requiring conciliation and prohibiting the introduction of conciliation matters into evidence. It further avoids an absurd result which would be present if a party contesting conciliation could not introduce evidence of that conciliation. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").

In this instance, Mach Mining did not introduce conciliation matters for the purpose of proving or disproving this case on its merits. Rather, Mach Mining attached this information for the purpose of proving the EEOC failed to fulfill its statutory obligation to conciliate. For that reason, the Court did not commit a manifest error of law in failing to strike Section F of Mach Mining's response to the EEOC's motion for partial summary judgment.

For the foregoing reasons, the Court did not commit a manifest error of law in failing to read the APA as prohibiting judicial review of conciliation or in declining to strike Section F of Mach Mining's response to the EEOC's motion for partial summary

judgment. Thus, the Court denies the EEOC's motion to reconsider.

3. Motion to Certify

In the alternative, the EEOC asks this Court to certify its order denying the EEOC's motion for partial summary judgment to the Seventh Circuit Court of Appeals pursuant to section 1292(b). The court of appeals, in its discretion, may hear an interlocutory appeal after certification from the district court that the appeal presents "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Accordingly, "[t]here are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000). The party seeking an interlocutory appeal bears the burden of demonstrating "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

There are two questions at issue as follows: (1) Is the EEOC's conciliation process subject to judicial review?; and (2) If so, is that level of review a deferential or heightened scrutiny level of review? There is no doubt that these questions are questions of law. Further, the EEOC's position has merit. EEOC has pointed out that no circuit has considered

its APA arguments. Also, while all circuits to have considered the issue have found conciliation subject to review, those circuits are not in agreement on the level of review. *See United Rd. Towing, Inc.*, 2012 WL 1830099, at *4 (citing *EEOC v. McGee Bros.*, No. 10–cv–142, 2011 WL 1542148, at *4 (W.D.N.C. Apr. 21, 2011)) (noting some circuits employee a "deferential standard" and others use a "heightened scrutiny standard" of conciliation review). The Seventh Circuit has not specifically ruled on the justiciability of conciliation or the extent of that inquiry. The EEOC also advances significant arguments that *Caterpillar* should be extended to prohibit judicial review of conciliation.

The questions raised are controlling in this case. "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie–Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). Here, if conciliation is justiciable, the inquiry into the EEOC's conciliation could dramatically impact the size of the class. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 689–90 (8th Cir. 2012) (dismissing EEOC's claims on behalf of claimants whose alleged harassment occurred after the filing of suit because EEOC could not have conciliated on those claimants' behalf).

Finally, an interlocutory appeal on this matter may also advance the ultimate termination of litigation. If this appeal is not allowed, and Mach

Mining is allowed to discover conciliation material to support its affirmative defense, the numerous discovery requests[1] from Mach Mining will undoubtedly delay the termination of this litigation. On the other hand, if the Seventh Circuit concludes that the EEOC's conciliation process is not justiciable, this case will proceed exponentially faster absent numerous conciliation-related discovery requests.

Because the EEOC has established the four statutory criteria for certification pursuant to § 1292(b), the Court grants the EEOC's motion to

---

[1] The EEOC summarized the relevant pending discovery as follows:

> Mach [Mining]'s motion to compel discovery on this topic is currently pending and the discovery sought is extensive, including over 100 requests to admit facts, interrogatories, and a 30(b)(6) deposition of an EEOC official. Invariably there is overlap between material that concerns conciliation and material that is covered by the deliberative process privilege. Depositions on these topics almost always produce further discovery disputes regarding EEOC's invocation of this privilege. Mach [Mining] has also indicated that it seeks to depose all of the female applicants for whom EEOC seeks relief, and given the nature of its inquiries to date, it is reasonable to assume that it will attempt to question each woman about her participation in conciliation.

Doc. 72, p. 2.

certify and certifies the following questions for appeal: Whether courts may review the EEOC's informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit? If courts may review the EEOC's conciliation efforts, should the reviewing court apply a deferential or heightened scrutiny standard of review?

4. Conclusion

In conclusion the Court **GRANTS in part and DENIES in part** the EEOC's motion (Doc. 59). Specifically, the Court **DENIES** the EEOC's motion to reconsider and **GRANTS** its motion to certify this Court's January 28, 2013, order for interlocutory appeal. The Court **CERTIFIES** its January 28, 2013, order (Doc. 55) for interlocutory appeal because the following questions meet the 28 U.S .C. § 1292(b) requirements:

> May courts review the EEOC's informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit? If courts may review the EEOC's conciliation efforts, should the reviewing court apply a deferential or heightened scrutiny standard of review?

IT IS SO ORDERED.
DATED: May 20, 2013

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE