No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council and Society for Human Resource Management respectfully submit this brief *amici curiae* in support of the position of Petitioner before this Court in favor of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

Many of *amici's* members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As potential defendants

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the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

to Title VII discrimination charges and lawsuits, *amici* have a substantial interest in the question presented regarding the extent to which federal courts may review the sufficiency of the U.S. Equal Employment Opportunity Commission's (EEOC) presuit conciliation efforts. Because the EEOC is authorized to sue only after it has fulfilled its statutory duty to conciliate in good faith, judicial review of those efforts is necessary to ensure full compliance with Title VII.

As national representatives whose membership includes those primarily responsible for compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and/or SHRM has participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved Title VII questions. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

SUMMARY OF ARGUMENT

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, which prohibits discrimination in the terms, conditions or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Title VII authorizes the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public

interest, but only after meaningful efforts "to secure from the respondent a conciliation agreement acceptable to the Commission" have failed. 42 U.S.C. § 2000e-5(f)(1).

Conciliation plays a critical role in carrying out the policies underlying Title VII. Indeed, "Title VII places primary emphasis on conciliation to resolve disputes." *EEOC v. Zia Co.*, 582 F.2d 527, 529 (10th Cir. 1978). Thus, in order to effectuate the meaning and legislative intent of Title VII, the EEOC must be required to conciliate every discrimination charge it believes to have merit in good faith. As virtually every court of appeals, save for the Seventh Circuit below, has held, judicial review of the EEOC's presuit conciliation efforts is necessary to ensure that Title VII's purposes and aims are achieved.

Ignoring those principles, the Seventh Circuit held that Title VII does not authorize, and in fact categorically precludes, judicial review of EEOC conciliation efforts. The Seventh Circuit's interpretation cannot be reconciled with Title VII's goals, including the resolution of workplace discrimination claims through informal, non-coercive means, and therefore should be reversed.

Precluding meaningful judicial review of EEOC presuit conciliation activities would frustrate sound employment relations policies and proactive compliance programs by encouraging, rather than minimizing, protracted Title VII litigation. Moreover, the EEOC's administrative enforcement policies and much-maligned litigation conduct over the last several years belie the agency's assurances that judicial review is unnecessary to ensure its compliance with Title VII.

For instance, the EEOC's current Strategic Plan[2] requires field offices to progressively increase the percentage of systemic cases on their active litigation dockets. Such policies serve not to encourage informal, presuit resolution of meritorious claims, but rather to incentivize staff to bypass conciliation in favor of high-profile, systemic litigation. Recent cases in which the EEOC's conciliation efforts have been roundly criticized by the courts, as well as many charge respondents' anecdotal accounts of wildly inappropriate EEOC conciliation conduct, confirm that the agency either is ill-equipped or simply not inclined to adequately police its own compliance with its presuit obligations.

Courts thus can and should evaluate and decide whether, for instance, the EEOC's denial of a defendant's request to meet face-to-face[3], failure to identify those on whose behalf it is seeking to conciliate[4], or refusal to outline the legal basis for its settlement demand[5], amounts to a lack of good faith. Judicial review is the only reliable means of ensuring that the EEOC makes every good faith effort to resolve all meritorious discrimination charges informally through non-coercive means, litigating only as a last resort.

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[2] *See, infra* note 10.

[3] *EEOC v. Agro Distrib., LLC*, 555 F.3d 462 (5th Cir. 2009).

[4] *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).

[5] *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104 (5th Cir. 1981).

ARGUMENT

I. JUDICIAL REVIEW OF EEOC CONCILIATION IS CRITICAL TO THE PROPER ADMINISTRATION OF TITLE VII

In the four decades since the U.S. Equal Employment Opportunity Commission (EEOC) was given authority to litigate Title VII cases, no court – until the Seventh Circuit below – ever held that the sufficiency of the agency's statutory conciliation efforts was beyond the scope of judicial review. In fact, every court of appeals to have considered the issue not only has held that EEOC conciliation is reviewable, but also that the agency's efforts should be evaluated under a good faith standard. Until recently, even the EEOC itself routinely acknowledged and accepted the "judiciary's role in reviewing the conciliation process." Plaintiff EEOC's Response to Defendant United Road Towing's Motion for Partial Summary Judgment at 5, *EEOC v. United Road Towing, Inc*., No. 1:10-cv-06259 (N.D. Ill. Nov. 15, 2011).

Upending that long case tradition, the Seventh Circuit below held that Title VII does not authorize, and in fact precludes, any level of judicial review of the EEOC's presuit conciliation efforts. The dubious notion endorsed by the court below that the EEOC's conciliation efforts – no matter how questionable – cannot be second-guessed by even this Court will only encourage agency behavior seemingly designed to undermine, rather than facilitate, informal resolution of discrimination charges – a result squarely at odds with Title VII's goals and purposes. Accordingly, the decision below is erroneous and should be reversed by this Court.

A. Conciliation Is At The Core Of Title VII Enforcement

The EEOC was established by, and is authorized to enforce, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). Upon the filing of a charge, Title VII provides in relevant part:

> [T]he Commission shall serve a notice of the charge ... within ten days, and shall make an investigation thereof. ... If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge .... 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 such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination through this administrative framework of charge

investigations and informal conciliation. In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). "Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)). Thus, even in granting EEOC the authority to litigate, Congress retained the statute's requirement that the agency discharge all of its administrative duties, including conciliation, as a precondition to suit. *Id.*

"Conciliation is the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law. Each step in the process – investigation, determination, conciliation, and if necessary, suit – is intimately related to the others." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1306 (W.D. Pa. 1977).

EEOC conciliation thus plays a prominent role in effectuating Title VII's ultimate goal of voluntary compliance. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (the EEOC "whenever possible" must attempt to resolve discrimination charges "before suit is brought in a federal court ...."); *see also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be "preferred means of enforcing Title VII") (citation omitted). The legislative history of the 1972 amendments to Title VII

confirms Congress's preference for conciliation as a means of resolving discrimination claims:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as required by existing law. Only if conciliation proves to be *impossible* do we expect the Commission to bring action in federal district court to seek enforcement.

118 Cong. Rec. H1861 (Mar. 8, 1972) (quoted by *EEOC v. Zia*, 582 F.2d 527, 533 (10th Cir. 1978)) (emphasis added).

In fact, presuit conciliation is so crucial to the administration of Title VII that this Court has directed the EEOC to "refrain from commencing a civil action until it has discharged its administrative duties." *Occidental*, 432 U.S. at 368; *see also EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1042-43 (7th Cir. 1982) (conciliation is "so important to the statutory scheme that the EEOC may not commence legal action until it has attempted to negotiate voluntary compliance"); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003) (duty to conciliate is "at the heart of Title VII").

B. If Carried Out At All, The EEOC's Conciliation Efforts Often Involve Abusive And Unreasonable Tactics That Undermine, Rather Than Promote, Informal Resolution Of Discrimination Claims

Despite the critical role of conciliation in Title VII's overall enforcement scheme, the EEOC repeatedly has circumvented the process by persistently refusing to engage in meaningful efforts to conciliate prior to suit.

In particular, the agency now regularly employs heavy-handed, hide-the-ball negotiation tactics during conciliation, often to coerce employers to settle, particularly those that justifiably fear the reputational damage that would result from an EEOC-initiated public enforcement action. *See, e.g., EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (EEOC "compounded its arbitrary assessment that Agro violated the ADA with an unsupportable demand for compensatory damages as a weapon to force settlement").

Sometimes, the EEOC fails to conduct *any* manner of conciliation prior to filing suit. In *EEOC v. CRST Van Expedited, Inc*., for instance, the EEOC sued a nationwide trucking company, alleging that it subjected a class of female drivers to unlawful sexual harassment in violation of Title VII.[6] 679 F.3d 657 (8th Cir. 2012). The EEOC sought a range of remedies, including non-monetary injunctive and programmatic relief, as well as back pay, compensatory and punitive damages on behalf of a single charging party and a class of approximately 270 current and former employees. *Id.*

The EEOC's class eventually was whittled down to 67 alleged victims. In dismissing those remaining claims, the trial court observed that "the EEOC's failure to investigate the claims of the 67 allegedly aggrieved persons deprived CRST of a meaningful opportunity to engage in conciliation and foreclosed any possibility that the parties might settle all or some

[6] The EEOC's complaint, which was signed by EEOC Regional Attorney John Hendrickson, stemmed from a single sexual harassment charge of discrimination it received from former employee Monika Starke. *CRST*, 679 F.3d at 668.

of this dispute without the expense of a federal lawsuit." *EEOC v. CRST Van Expedited, Inc.*, 2009 WL 2524402, at *18 (N.D. Iowa Aug. 13, 2009); *see also EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 816 (S.D.N.Y. 2013) (sanction of dismissal necessary so as not to "sanction[] a course of action that promotes litigation in contravention of Title VII's emphasis on voluntary proceedings and informal conciliation"); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003) ("In its haste to file the instant lawsuit, with lurid, perhaps newsworthy, allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort") (footnote omitted).

The decision below serves only to encourage the agency's use of such tactics, knowing that even its most egregious conciliation conduct will never see the light of day. If for no other reason, careful judicial review of the EEOC's conciliation activities is necessary to guard against this abuse of process, which harms employers and charging parties alike, and undermines the very core of Title VII's enforcement scheme.

II. THE EEOC'S INCREASINGLY AGGRESSIVE LITIGATION PHILOSOPHY REINFORCES THE NEED FOR CAREFUL JUDICIAL OVERSIGHT OF ITS PRESUIT CONCILIATION OBLIGATIONS

In recent years, the EEOC has put a high priority on pursuing systemic litigation where alleged discrimination has a potentially broad impact on an industry, profession, company or geographic area. In fact, the agency has established goals requiring its field offices

to ensure that a specific percentage of lawsuits brought by the EEOC is systemic in nature. *See infra* note 10.

Implicit in the EEOC's aggressive enforcement strategy is the general assumption that conciliation is merely a means to an end – not to resolve suspected discrimination informally in a just and meaningful way, but rather to extort an exorbitant monetary settlement from a charge respondent under constant threat of high-profile litigation. The EEOC stands to benefit greatly from such an approach in a number of ways, including by enabling the agency to submit impressive reports to Congress touting its success in recovering millions of dollars on behalf of countless discrimination victims.[7]

A. As Systemic Enforcement Efforts Have Increased, So Too Have Documented Instances Of EEOC Conciliation Abuses

Concomitant with the increase in EEOC-initiated systemic cases has been an increase in court cases finding that the agency failed to meet its conciliation obligation as required by Title VII. *See, e.g., EEOC v. Bloomberg, LP*, 967 F. Supp. 2d 802 (S.D.N.Y. 2013); *EEOC v. Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587

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[7] *See* EEOC Press Release, *EEOC Releases Performance and Accountability Report Under New Strategic Plan* (Nov. 19, 2012) (in which the EEOC touts its "historic monetary recovery through is [sic] private sector administrative enforcement – $365.4 million – the highest level of monetary relief ever. Administrative enforcement includes mediation, settlements, withdrawals with benefits and conciliation. Approximately 10 percent of this amount – $36 million – came from investigations and conciliations of systemic charges of discrimination, four times the amount received in the previous fiscal year"), *available at* http:// www.eeoc.gov/eeoc/newsroom/release/11-19-12.cfm

(W.D. Pa. 2013); *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005 (D. Ariz. 2013). Indeed, the EEOC has developed quite a "reputation for testing the boundaries of the law" in that regard. Editorial, *Discriminating Against Partnerships: The feds try to rewrite PwC's retirement policy*, Wall St. J. (June 3, 2013).[8] The agency's conciliation tactics have been so questionable of late that they have garnered particularly unflattering media coverage.

For example, a June 3, 2013 *Wall Street Journal* editorial described the futile efforts of one company, PricewaterhouseCoopers (PwC), to obtain meaningful information from the EEOC regarding the basis for its reasonable cause determination and conciliation demand. The EEOC reportedly "declined to explain and merely read [this Court's] *Clackamas* tests [sic] out loud, hoping the company would settle." *Id*.

Lawyers for the company questioned whether the EEOC's conciliation efforts were sufficient to satisfy its statutory obligations, and explained that the agency's recalcitrance "deprived us of the ability to formulate a proposal to address your concerns." *Id*. The company nevertheless offered to formally reconsider the challenged mandatory retirement policy, but two days later, the EEOC ended negotiations. *Id*. The editorial blasted the EEOC, calling the PwC case "one more example of the ways that [the EEOC] harasses private business simply because it wants to show who's the boss." *Id.*

The EEOC's corresponding shift in philosophy – that Title VII's plain text and legislative history confirm that Congress did not intend for the agency's

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[8] *Available at* http://online.wsj.com/article/SB10001424127887323855804578511693604180764.html

conciliation efforts to be subject to judicial review – is a less-than-subtle attempt on the agency's part to avoid the predictably negative consequences for failing to comply with its statutory conciliation mandate.

B. The Certainty Of Judicial Review Will Help Curb The Many EEOC Conciliation Abuses That Go Unreported

The EEOC regularly employs many of the same abusive conciliation tactics during the administrative investigations process, outside of the purview of the courts or the news media, cautioning further in favor of judicial review of the agency's conciliation practices.

Amici have been told that EEOC investigators regularly refuse to explain the rationale for a reasonable cause determination or discuss the strengths and weaknesses of a claim or defense, contending that the merits are irrelevant during conciliation. Even when agency officials have been willing to discuss the basis for their findings and demand for relief during conciliation, they often refuse to acknowledge obvious flaws in the agency's legal theory, or provide confusing and contradictory explanations for their actions.

For example, one employer reported receiving a cause determination from a state fair employment practices agency in a matter that had been dual-filed with the EEOC. After the state's settlement efforts failed, the matter was sent to the EEOC for its review. The EEOC did not close the case or launch its own investigation. Instead, the agency held on to the case and, *six years later*, issued its own reasonable cause determination. During the conciliation that followed, it insisted that the employer was responsible for lost wages for the entire period during which the charge

was pending, claiming the agency's unexplained delay in pursing the matter was "irrelevant" to the calculation of damages.

Amici also have been told repeatedly that the EEOC regularly refuses to provide any information during conciliation to support very large monetary demands, often on behalf of purported "classes" of victims never identified in the underlying charge. Particularly in systemic or class-based cases, *amici* understand that the EEOC often refuses to describe how back pay was calculated or provide other basic information supporting the class-based conciliation demand.

Worse still, *amici's* members report that EEOC conciliation too often consists of "take it or leave it" demands and, even in the case of an acquiescing employer, the agency's outright refusal to offer any meaningful guidance or assistance on how best to comply. *Amici* are aware anecdotally that the EEOC has demanded that an employer change its hiring policies and practices, while at the same time refusing repeated requests to identify or suggest specific changes that would satisfy the demand on the ground that it is not the agency's "job" to educate employers on how to follow the law.

Employers should not be required to make a "conciliation proposal in an evidentiary vacuum." *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1032 (N.D. Ill. 1998). When the EEOC makes a conciliation demand that is tantamount to a request for a blank check, and then abruptly ends negotiations when the employer questions the legal and factual basis for its position, it cannot be said to have discharged its statutory presuit obligations. Nor should the courts simply accept the agency's word on the matter.

The EEOC frequently demands during conciliation negotiations that the employer agree to allow the agency to publically disclose the terms of any agreement, including the amount of monetary relief the employer has agreed to pay to resolve the matter. While it often seeks to bypass Title VII's conciliation confidentiality provisions when doing so would serve its own best interests, the EEOC also has been known to withhold information from respondents during conciliation on confidentiality grounds. Pointing to Title VII's confidentiality clause, 42 U.S.C. § 2000e-5(b), for instance, the EEOC in one case reportedly refused to provide the employer with copies of an expert report on which it had relied in determining reasonable cause and formulating its conciliation demand. And yet this Court long ago confirmed that "the 'public' to whom the statute forbids disclosure … cannot logically include the parties to the agency proceeding." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 598 (1981) (footnote omitted).[9]

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[9] It thus appears that the EEOC regularly invokes, or disregards, § 2000e-5(b)'s confidentiality clause specifically as a negotiation tactic. This, too, is troubling, and should be subject to review by the courts. According to the EEOC, "Congress provided that nothing said or done during the conciliation *process* may be 'used as evidence in a subsequent proceeding without the written consent of the persons concerned.'" Brief of the Respondent at 3 (emphasis added). The agency's interpretation mischaracterizes the actual scope and meaning of § 2000e-5(b), which provides, in relevant part:

> The Commission *shall endeavor to eliminate any such alleged unlawful employment practice* by informal means 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*,

Employers also have described instances in which the EEOC either has refused requests for face-to-face conciliation conferences altogether, or has placed unreasonable conditions on such meetings. In one case, the EEOC reportedly refused to meet with the employer unless it agreed not to revisit or question the merits of the underlying case. In another, the EEOC refused to meet in-person with an employer unless and until it provided a point-by-point response to the EEOC's conciliation proposal, which consisted of a large monetary demand and extensive, nonmonetary programmatic relief. The company explained that in order to fully understand and properly respond to the EEOC's conciliation demand, it needed to have a more detailed discussion with the agency regarding the basis of the investigation findings and relief sought. The EEOC persisted, and the company accordingly supplied a partial response to the demand based on the limited information it had, again requesting a face-to-face meeting.

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or used as evidence in a subsequent proceeding *without the written consent of the persons concerned*.

42 U.S.C. § 2000e-5(b) (emphasis added).

On its face, § 2000e-5(b)'s confidentiality provision restricts the Commission's ability to disclose that which is said or done as part of the agency's efforts "to eliminate any such alleged unlawful employment practice" in subsequent litigation. *Id.* In other words, it prohibits the EEOC from disclosing the content or nature of substantive discussions, and in particular those related to possible remedies for suspected discrimination, that occur during or in connection with conciliation.

Even assuming the EEOC's construction of § 2000e-5(b) is plausible, the agency still glosses over the fact that it is bound only to the extent that the "persons concerned" have not consented to the disclosure. *Id.*

Within hours, however, the company received a letter from the EEOC deeming conciliation to have failed, and three days after that, the agency filed suit. It is inconceivable that when Congress first instructed the agency to "endeavor to eliminate" discrimination through non-coercive conciliation, 42 U.S.C. § 2000e-5(b), it would have had such tactics in mind.

It goes without saying that a company has a fiduciary responsibility to act in the best interest of its shareholders and cannot simply agree to compensate an undetermined number of unidentified individuals – and for violations it knows nothing about and cannot verify. Before a company can justify entering into any settlement, it must have some way to "value" the case, which would require at a minimum a clear understanding of the agency's findings, the size and scope of the effected class, and whether the alleged victims attempted to mitigate their damages and by how much.

The EEOC's persistent refusal to provide any meaningful information with which to evaluate an employer's potential liability undermines the conciliation process, and it is clearly within the scope of a federal court's authority to so find. Accepting the EEOC's bald assertion that Title VII precludes judicial review of its presuit conciliation efforts would defeat the important public policy objectives inherent in Congress' stated preference for the informal resolution of Title VII charges and would "expand the power of the EEOC far beyond what Congress intended ...." *EEOC v. CRST Van Expedited, Inc.*, 2009 WL 2524402, at *17 (N.D. Iowa Aug. 13, 2009).

Under the EEOC's current enforcement philosophy, employers have little confidence that discrimination claims will be evaluated by the EEOC fairly and in a

consistent manner, or that the agency will pursue suit *only* in those rare instances in which informal resolution is not possible. Indeed, the agency's current policy and strategic enforcement priorities appear increasingly at odds with its presuit conciliation mandate.[10] To the extent that the decision below further emboldens the EEOC to pursue what has been characterized as a "sue first, ask questions later" strategy, it betrays the core goals and principles underlying Title VII and therefore must be reversed.

C. Employers Have No Interest In Litigating For The Sake Of Litigating

The EEOC asserts that employers have "every incentive to thwart the settlement process and to 'stockpile exhibits for the coming court battle' rather than to negotiate in good faith with the Commission …." Brief for the Respondent at 11. That notion cannot be further from the truth, especially in the case of large, public companies that answer and are accountable to boards of directors and shareholders. Businesses generally seek to avoid litigation to the maximum extent possible, not only because of the toll particularly high-profile cases can have on employee

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[10] As noted, the EEOC's current Strategic Enforcement Plan calls on the agency to progressively increase the percentage of systemic cases on its active litigation docket. EEOC, Strategic Enforcement Plan FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm. Accordingly, the EEOC last fiscal year established an 18%-21% target based on the percentage of systemic cases on its litigation docket by the end of the year. EEOC, Fiscal Year 2013 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/2013par.cfm. The agency exceeded that target in Fiscal Year 2013, with 54 of the 231 active cases on its litigation docket raising systemic issues. *Id.*

morale and consumer confidence, but also because of the significant costs and uncertainty associated with defending such matters.

The EEOC's persistent refusal to explain the basis for substantial (in some cases, multi-million dollar) monetary conciliation demands makes it all but certain that the respondent's representative will be unable to obtain the settlement authority from company executives needed to resolve the case. One employer characterizes the problem as follows:

> The company has received an eight-figure conciliation demand from the EEOC. Its in-house counsel escalates the matter to the company's CFO and President, who ask for detailed information regarding the basis for and evidence supporting the demand, as well as how it was calculated, and who and what it covers. In addition, they ask for a reasonable valuation of the case, including how much it would cost to litigate, and a recommendation on how to respond to the EEOC. The executives also want to know the scope of the problem so as to begin immediately to fix it.
>
> The EEOC has provided the company with only minimal information regarding the basis for its class-based findings and demand for class-based relief, and refuses to identify even the size of the alleged victim class. Accordingly, counsel cannot place a value on the case, or respond meaningfully to any of the executives' questions, and is denied the authority needed to settle the charge on the EEOC's terms – which the agency has made clear are non-negotiable.

In fact, it is the EEOC – the litigation efforts of which are funded by taxpayer dollars – that has the strongest interest in bypassing confidential, out-of-court settlement in favor of high-profile litigation. In written testimony submitted to the Commission in connection with the development of its Strategic Enforcement Plan, for instance, John Hendrickson, Regional Attorney of the EEOC's Chicago District Office and Counsel of Record in the underlying case, expressed his view that:

> [A]ny Strategic Enforcement Plan, in addition to recognizing bifurcation and delegated litigation authority, should state that *litigation itself is the bedrock of agency enforcement*. If there is no expectation of litigation in the wake of discrimination, then discrimination shall surely flourish. More than that, there must be an expectation of systemic litigation which is effective.

Drafting of a New Strategic Enforcement Plan by the Strategic Enforcement Plan Work Group, Public Input into the Development of EEOC's Strategic Enforcement Plan, Meeting of July 18, 2012 (written testimony of John Hendrickson, Chicago District Office) (emphasis added).[11]

Mr. Hendrickson continued:

> *Administrative investigations and EEOC litigation* under the 2012 Strategic Plan and its implementing Strategic Enforcement Plan are virtually certain to involve higher stakes, stakes of a different order of magnitude, including both dollars for distribution to class members and

[11] *Available at* http://www.eeoc.gov/eeoc/meetings/7-18-12/hendrickson.cfm

> reforms in how business is conducted and human capital is managed [sic] compelled as matters of injunctive relief. Our vision will continue to be "justice and equality in the workplace."

Id. (emphasis added).

That perspective aside, EEOC's core mission is, and always has been, to prevent and correct discriminatory employment practices by conducting proper charge investigations and by attempting to correct alleged violations through informal, non-coercive conciliation. Although the agency also is authorized to litigate strategically in the public interest, voluntary resolution of discrimination claims remains "'the preferred means for achieving' the goal of equality of employment opportunities." *Occidental*, 432 U.S. at 368 (citation omitted).

Despite the critical role that conciliation plays in the Title VII's administrative enforcement scheme, the EEOC's most experienced and powerful litigator in testimony regarding *strategic enforcement* tellingly fails to make even passing reference to it. To the contrary, he believes that litigation, not conciliation or other forms of dispute resolution, is "the bedrock of agency enforcement" – a view that undoubtedly is shared by his direct reports and other agency litigators. Hendrickson written testimony, *supra*.

Those beliefs, coupled with the agency's overall systemic enforcement strategy, confirm that the EEOC mistakenly "views [its] power of suit and its administrative process as unrelated activities, rather than as sequential steps in a unified scheme for securing compliance with Title VII." *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975).

They also confirm that the EEOC is ill-equipped to properly self-police its conciliation efforts. Among other things, the Commission's broad delegation of litigation authority to the General Counsel has resulted in little managerial oversight of field enforcement activities, including the fulfillment of presuit conciliation responsibilities. In addition, the agency has never issued any detailed rules governing the conduct of conciliations, so even if it were inclined to monitor its activities for compliance, it would have no standards to apply. Finally, the incentives established in the Strategic Plan for developing robust systemic litigation dockets serve as a potent disincentive to engaging in meaningful conciliation efforts.

III. AN APPROPRIATELY ROBUST STANDARD OF REVIEW MUST ENSURE THAT EEOC CONCILIATION EFFORTS BOTH ARE MEANINGFUL AND UNDERTAKEN IN GOOD FAITH

The EEOC does not satisfy its administrative duties merely by inviting a respondent to participate in conciliation. Indeed, the EEOC's right to sue must be premised on fulfillment of its conciliation obligation "in good faith, while encouraging voluntary compliance and reserving judicial action as a *last resort*." *EEOC v. Klingler Elec. Co.*, 636 F.2d 104, 107 (5th Cir. 1981) (emphasis added). Even the most deferential standard of review concedes as much. *See, e.g., EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).

The EEOC argued below that presuit administrative processes, including conciliation, are entirely unreviewable, even under a standard "where the [agency] simply demonstrates that it made a proposal

and the employer rejected it ...." Petition of the Equal Employment Opportunity Commission for Interlocutory Appeal at 18, *EEOC v. Mach Mining, LLC*, No. 13-8012 (7th Cir. May 30, 2013). It explains, "This kind of review risks unnecessarily formalizing the conciliation process in contravention of the statute's admonition that conciliation be 'informal' .... Any further review, on the other hand, would require adding a standard not expressly authorized by the statute." *Id.*

The EEOC insists that "the distinction between substance and procedure in [the conciliation] context is elusive at best," Brief of the Respondent at 10, as evidenced by the "inability of courts to develop workable standards" for assessing the sufficiency of its conciliation efforts. *Id*. at 11. To the contrary, the federal courts of appeals have crafted straightforward, workable standards for assessing whether the EEOC has fulfilled its statutory conciliation obligations, standards that have been applied for as long as the EEOC has been litigating Title VII cases. The courts have done so without "engag[ing] in a prohibited inquiry into the substantive reasonableness of particular offers." *Id.* (citation omitted).

Indeed, as Petitioner aptly observes, courts applying any of the current standards of review may assess whether or not the EEOC's (1) refusal to meet face-to-face; (2) refusal to disclose any information regarding the specific victims on whose behalf it seeks to obtain relief; and/or (3) failure to provide the respondent with a reasonable period of time to consider a conciliation demand amounts to a breach of the agency's duty to conciliate in good faith – without having to examine the substantive conciliation proposals and counter-proposals. Brief for Petitioner at 25. Most require

even more. Given the many documented and anecdotal instances of unreasonable conciliation tactics by the EEOC, this Court should establish a standard of review that not only incorporates a basic, good faith component, but also is sufficiently robust so as to effectively deter such conduct. *See, e.g.*, Brief for Petitioner at 37-43.

Rather than independent, mutually exclusive functions, the EEOC's investigation and merits determination "are supposed to provide a framework for conciliation." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1305-06 (W.D. Pa. 1977) (emphasis added). Conciliation, in turn, represents "the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law" without resort to litigation. *Id.* When the agency fails to discharge its conciliation duties in good faith, it deprives the employer of a meaningful opportunity to resolve the matter informally, as contemplated by Congress in Title VII. Because of the vital role that conciliation plays in the administration of Title VII, judicial review of the EEOC's compliance with its statutory conciliation mandate is crucial.

CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit below should be reversed.

Respectfully submitted,

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