No. 13-2456

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Equal Employment Opportunity Commission,

Plaintiff-Appellant,

v.

Mach Mining, LLC,

Defendant-Appellee.

On Interlocutory Appeal from an Order of the
United States District Court for the Southern District of Illinois, Benton Division
Case No. 3:11-cv-879-JPG-PMF
Honorable J. Phil Gilbert, District Judge

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PLAINTIFF-APPELLANT

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INTRODUCTION

The so-called failure to conciliate defense has become a routine tactic for employers. If an employer can persuade a court that the EEOC failed to conciliate in "good faith," it may obtain a complete dismissal of the EEOC's suit and not have to pay anything to victims of discrimination. It is no wonder that employers now routinely use the conciliation process to set up that defense and burden the district courts with conciliation-based litigation.

Mach Mining has never hired a woman for a mining position. The EEOC tried conciliation, but was unable to get Mach to agree to remedy and correct the discrimination, and was forced to sue Mach to obtain compliance. Rather than defending against the discrimination claim, Mach hoped it could persuade the district court that the EEOC failed to conciliate in "good faith" in order to obtain a dismissal and leave the women it discriminated against without remedy. Mach and its amici now ask this Court to adopt a standardless review that authorizes an open-ended inquiry into the EEOC's conciliation process.

But Title VII places conciliation in the EEOC's discretion. Mach's proposed review, on the other hand, is untethered from Title VII's text or EEOC regulations and would require this Court to rewrite Title VII's conciliation confidentiality provision. Nor is review necessary to give Mach an opportunity to settle—it can settle at any time. Mach, however, does not want to settle—it wants the case dismissed.

Mach's proposed review also violates core administrative law principles. Mach proposes review even though no statute or regulation authorizes it. Mach demands

review of *only* the interlocutory process, whereas only final agency decisions are normally reviewable. And Mach's proposed standard, as Mach and its amici admit, is not capable of being described *ex ante*.

All this, they assert, is required to ensure that the EEOC engages in conciliation before filing suit. The EEOC, however, mediates and conciliates thousands of charges every year and will continue to do so regardless of what this Court decides. Conciliation is an efficient, effective, and inexpensive way to remedy discrimination. If, on the other hand, this Court agrees with Mach and its amici, the result will not be more discrimination remedied and resolved without suit. The result will be more litigation about conciliation and more victims of discrimination without remedies.

ARGUMENT

I. Title VII places the conciliation process outside judicial review.

Mach and its amici concede that the outcome of conciliation is unreviewable, but contend that the process is reviewable. Mach Br. 8; *see also* Mach Br. 18–19. Mach's proposal to separate the outcome from the process has no basis in the statute, and its proposed standards confirm that Title VII itself lacks any legal standard to judge conciliation, precisely because conciliation falls outside judicial review.

A. Title VII makes no distinction between the EEOC's conciliation process, which Mach and its amici contend is reviewable, and the EEOC's decision that conciliation has failed, which all agree is unreviewable.

1. Title VII's text commits conciliation to the EEOC's discretion.

Mach and its amici concede that the text of Title VII does not expressly authorize review of the conciliation process. *See e.g.*, Chamber of Commerce et al.

(Chamber) Br. 7. Title VII, however, not only fails to authorize review of the conciliation process; it expressly describes the purpose of conciliation and the means by which that purpose is to be achieved.

Title VII states: "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." 42 U.S.C. § 2000e-5(b). That process ends when the EEOC concludes that it was unable to reach "an agreement acceptable to the Commission." *Id.*

Title VII's text demonstrates that conciliation's purpose is not to give the employer a "meaningful opportunity" to settle; it is to enable the agency to "endeavor to eliminate" discrimination. *See* 42 U.S.C. § 2000e-5(b). And the Commission has discretion in how to achieve that objective—using "informal methods of conference, conciliation, and persuasion." *Id.*

Here the EEOC determined that there was reasonable cause to believe that Mach "discriminated against Charging Party and a class of female applicants, because of their sex, in that Respondent failed to recruit and hire them, in violation of Title VII." R.32-1, at 6–7. The EEOC also "endeavor[ed] to eliminate" the discrimination through informal, confidential conciliation, but ultimately concluded that it was unable to reach "an agreement acceptable to the Commission." R.32-1, at 9 (notification to Mach of conciliation failure). That is all the statute requires and that is all this Court should require. Courts that have reviewed conciliation, on the other hand, have never grounded their review in the text of Title VII, as the EEOC

noted in its opening brief, EEOC Br. 30, and Mach and its amici do not contend otherwise.

This Court has already recognized that these decisions are left to the EEOC's discretion. In *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 294 (7th Cir. 1994), this Court said that when the EEOC "fail[s] to get all of what it wanted in bargaining" and subsequently files suit to "back up its [conciliation] demand," that is "a matter for the conscience of the person who authorized suit, rather than for the judiciary."[1]

But when a court concludes that the EEOC failed to sufficiently conciliate, the court is essentially quarreling with the EEOC's conclusion that it was unable to reach an agreement acceptable to the Commission. Such a court is saying that the EEOC might have been able to reach an acceptable agreement—if it had done the things that the court thinks it should have done. The court may not be "imposing" an agreement, but it is saying, at the very least, that the EEOC's decision was hasty, and it imposes consequences for the EEOC's exercising its discretion.

The EEOC's approach to resolving a particular case in conciliation will depend on whether the EEOC believes a particular type of effort could be fruitful, and the EEOC, using its experienced judgment, is empowered to make that call. This is the "kind of [administrative] issue where a month of experience will be worth a year of hearings." *Am. Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624, 632–33 (D.C.

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[1] Mach's contrary suggestion that this Court has already concluded that conciliation is reviewable is meritless. *See* Mach Br. 12–13. In its opposition to the petition for interlocutory appeal, Mach conceded that "this Court has not itself directly addressed the question" of whether conciliation is judicially reviewable. Mach Opp. Pet. 25.

Cir. 1966). On the other hand, Mach's proposed "judicial examination of perceived procedural shortcomings . . . can do nothing but seriously interfere with that process prescribed by Congress." *Cf. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 547–48 (1978).

2. Title VII's conciliation confidentiality provisions confirm the conclusion that conciliation is committed to the EEOC's discretion.

Mach offers three arguments in an effort to rebut the EEOC's argument that Title VII's conciliation confidentiality provisions confirm that conciliation is not judicially reviewable. All are unavailing.

First, Mach argues that the non-disclosure provision applies only to the EEOC and that the obligation is merely to keep conciliation information from becoming public. Mach Br. 26. Mach quotes the statute as saying, "Nothing . . . may be made public by the Commission, its officers or employees . . . ."42 U.S.C. § 2000e-5(b). Mach Br. 26. But Mach omits the relevant clause that follows the prohibition on publication. The confidentiality provision goes on to say that nothing said or done during conciliation may be "used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b). Mach's effort to read away the "subsequent proceeding" prohibition should be rejected outright.

Second, Mach argues that the "[confidentiality] provision must be read *in pari materia* with the overall statute" but then reads an exception into the confidentiality provision that does not exist in Title VII's text. Mach Br. 27. The Commission agrees that the conciliation provision and the confidentiality provision must be harmonized. Indeed, harmonizing those provisions leads to the

straightforward conclusion that conciliation is unreviewable. The confidentiality provision makes clear that "nothing said or done" during conciliation can be used "in a subsequent proceeding" without the written consent of each concerned person. This means that judicial review of conciliation is not possible because those involved in conciliation are forbidden from using conciliation information in a subsequent proceeding.

Mach, on the other hand, argues that this Court can harmonize Title VII by authorizing review of conciliation (even though the statute does not expressly authorize review) and by adding an unauthorized exception to the confidentiality provision. Thus, to conclude that conciliation is reviewable, the Court can harmonize the conciliation and confidentiality provisions only by reading implied provisions into two separate statutory provisions. But to conclude that conciliation is unreviewable, the Court has nothing to harmonize because the statute's text does not provide for review and the confidentiality provision reinforces this plain reading of the text.

A focus on the text of Title VII also demonstrates that Mach's suggestion that this Court read the confidentiality provisions as if they were Federal Rule of Evidence 408 does not work. Rule 408 contains both a narrow prohibition on settlement materials (they are inadmissible "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction") and a broad exception to the narrow prohibition (such materials may be used for "another purpose," including, but not limited to the specific list of exceptions).

Title VII's conciliation confidentiality provision differs significantly. It contains a broad, categorical prohibition ("[n]othing said or done during and as a part of such informal endeavors may be . . . used as evidence in a subsequent proceeding") and a single, narrow exception to this broad prohibition (when the "persons concerned" provide "written consent"). 42 U.S.C. § 2000e-5(b). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW, Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

Moreover, Title VII's conciliation confidentiality provision, 42 U.S.C. § 2000e-5(b), differs from its investigatory confidentiality provision, *id.* § 2000e-8(e). For investigation materials, Title VII authorizes an exception to the confidentiality obligation, explicitly allowing those materials to be made public after the EEOC initiates suit. *Id.* But the conciliation confidentiality provision has no expiration clause—in fact, it specifically prohibits use of conciliation materials in a "subsequent proceeding." *Id.* § 2000e-5(b). Congress's decision to create only one exception to the conciliation confidentiality rule therefore reflects a deliberate decision, which cautions against adopting additional implicit exceptions.

And the decision to keep conciliation materials inadmissible in a "subsequent proceeding" reflects a conscious choice to promote conciliation. *See EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.16 (1981) ("maximum results from the voluntary approach will be achieved if the investigation and conciliation are [private]"); *Branch v. Phillips Petrol. Co.*, 638 F.2d 873, 881 (5th Cir. 1981) (same). That the drafters of Rule 408 thought they could promote settlement and retain a

broader exception does not mean that Rule 408's broader exception applies to Title VII.

Third, Mach argues that the conciliation confidentiality provisions must be read to include an implied exception in order to allow the EEOC to show that it had engaged in conciliation because the EEOC has submitted conciliation documents in other cases to demonstrate just that. Mach Br. 27. It is true that the EEOC has submitted this type of material to courts that review conciliation. The Commission agrees that it is difficult to square the confidentiality mandate with a review of conciliation, but when a court requires review of conciliation something must yield. This Court, however, has the opportunity to avoid this dilemma. Having never decided that conciliation is reviewable, this Court can give effect to the text of the statute.

One case cited by Mach, *EEOC v. U.S. Steel Corp.*, No. 10-1284 (W.D. Pa.), demonstrates well the EEOC's points that harmonizing review with the confidentiality provisions is difficult and that reviewing conciliation encourages gamesmanship on the part of employer-defendants, which the Chamber specifically disputes. *See* Chamber Br. 22. In that case, U.S. Steel, then-represented by counsel who represents the Chamber here, argued that the EEOC had to show that it had engaged in conciliation, but sought to prevent the EEOC from making that showing by arguing that the conciliation confidentiality provisions barred the EEOC from submitting anything "said or done" during conciliation without U.S. Steel's consent. Brief of U.S. Steel at 2–3, 7–9, *EEOC v. U.S. Steel Corp.*, No. 10-1284 (W.D. Pa. March 4, 2011) (No. 54). Counsel even sought sanctions against the EEOC (and the

individual EEOC attorneys) for submitting conciliation material to the court on the ground that the submission violated Title VII's conciliation confidentiality provisions. *Id.* at 3, 9–11.

In the brief to this Court, counsel specifically acknowledged this catch-22 tactic and offered a potential fix, one counsel argued against in *U.S. Steel*:

> To the extent that the EEOC is concerned that the confidentiality provisions prevent it from responding to an employer's claim that it failed to conciliate, a court could require an employer to consent to disclosure to the extent necessary to pursue and evaluate a conciliation challenge (which has, in fact, long been the EEOC's own position).

Chamber Br. 9. But this potential catch-22 need not be countenanced at all. Title VII's categorical admonition that what is "said or done" cannot be used in a "subsequent proceeding" can only be squared with non-review of conciliation.

B. Mach and its amici's proposed standards demonstrate that the conciliation process is committed to the EEOC's discretion.

Mach and its amici think that the question of reviewability is distinct from the standard they propose for review. *See* Mach Br. 41; Chamber Br. 23 (proposing that this Court decide reviewability but leave the standard for another day). Grappling with what standard applies, however, demonstrates that the conciliation process is committed to agency discretion. As Mach and its amici acknowledge, no consistent standard has been or can be articulated, *see* Mach Br. 42– 47, and this absence of any law to apply confirms that the process is committed to agency discretion. The Chamber puts it succinctly, "It would be both impossible and counterproductive to try to preemptively spell out all of the ways in which the EEOC might deprive employers of that meaningful opportunity." Chamber Br. 25.

This reality exposes the defect at the heart of the core prudential reason Mach and its amici offer for review. They argue that review is required to ensure that the EEOC complies with its statutory obligation to engage in conciliation before bringing suit. But if the EEOC's obligation cannot be articulated *ex ante*, an *ex post* review will not encourage the EEOC to do anything. This failure of articulation is deliberate. Mach and its amici's standards are not designed to promote conciliation; they are designed to provide maximum flexibility for a future litigation defense.

The particulars of what the EEOC must do to meet these obligations will vary greatly, Mach says. Sometimes, the EEOC will have "to respond to an employer's request to explain why the employer may be held liable (i.e., the results of its investigation)"; other times it may not. Mach Br. 43. Sometimes, the EEOC will have "to explain how it reached its demand and sufficient information to evaluate and respond to that demand"; other times it may not. *Id.* at 44. "The EEOC may, in some cases, be required to identify and conciliate the individuals on whose behalf it makes significant monetary and non-monetary demands," but presumably not in others. *Id.* "Where the employer has requested a meeting with the EEOC to discuss issues and negotiate a possible settlement, good faith may require the EEOC to engage in the 'conference' required by Title VII," but other times it may not. *Id.*

All this demonstrates that the committed to agency discretion exception applies here. If an agency action is committed to agency discretion, it is unreviewable regardless of whether Mach disavows the Administrative Procedure Act (APA). This core administrative law principle applies to all statutes:

> The basic exception [of judicial review] of matters committed to agency discretion would apply even if not stated at the outset [of the judicial review Chapter of the APA]. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review.

S. Rep. No. 79-752, at 26 (1945).

In assessing whether there is "no law to apply," the Supreme Court has focused on whether a given decision can be evaluated under a "judicially administrable standard of review." *Franklin v. Massachusetts,* 505 U.S. 788, 820 (1992) (Stevens, J., concurring). The fact that Mach and its amici cannot articulate a consistent and workable *ex ante* standard even though courts have been reviewing conciliation for years demonstrates that conciliation is committed to the EEOC's discretion and that no workable, predictable standard can be developed. "The absence of any statutory factors to guide the agency's decision-making process, in combination with the open-ended nature of the inquiry, generally supports the conclusion that the 'agency action is committed to agency discretion by law.'" *See Tamenut v. Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008).

C. Title VII's legislative history supports nonreview.

Mach and its amici attempt to make much of the complicated procedural history of the 1972 Amendments to argue that the EEOC's contention that the legislative history supports nonreview is "false." Their counter-history recalls the adage that using legislative history is often "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff,* 507

U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (quoting Judge Harold Leventhal). Mach and its amici want this Court to focus only on their friends.

Yet the history reveals five indisputable facts. One, there was a proposal to make judicial review of conciliation explicit, and that proposal failed. *See EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 262 (N.D. Ill. 1980).

Two, opponents of judicial review understood why review of the process would impede discretion over the outcome. Senator Javits noted that if judicial review were authorized, the phrase "acceptable to the Commission might just as well be stricken" as that phrase would be meaningless, and he specifically criticized the notion of a "good faith" review: "I do not know what the court would decide or how a court could probe into the minds of members of the Commission, whether they did or did not, in good faith, decide that they would or would not work out a conciliation agreement which the respondent might have wished." 118 Cong. Rec. 3805, 3806 (Feb. 14, 1972).

Three, opponents of judicial review understood why the informal nature of conciliation would preclude review. Senator Williams believed review of conciliation would be problematic because no record would be made of informal conferences, phone calls, and meetings, and the formalized record would not accurately represent what happened. 118 Cong. Rec. 3806.

Four, Senator Javits specifically discussed how the EEOC would demonstrate that it had engaged in conciliation and reached no acceptable resolution—by certifying that fact "for the record." 118 Cong. Rec. 3807.

Five, Congress highlighted the informal nature of conciliation by amending the statute in 1972 to provide that "Nothing said or done as part of such *informal* endeavors shall be made public." It previously did not include the word "informal" before "endeavors." *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, 259 (1964). This emphasis on informality suggests that conciliation is not a process Congress intended courts to review.

II. Mach and its amici's argument that judicial review is necessary to enforce a procedural right to conciliation is unavailing.

Mach and its amici argue that while an employer has no right to a particular conciliation agreement, it does have a right to a certain kind of conciliation process and that process is reviewable, even though the ultimate outcome is not. As the Chamber puts it: "[That the outcome of conciliation is unreviewable] does not mean that the EEOC is free to deprive employers of the procedural right to a meaningful chance to settle out of court." Chamber Br. 8–9; *see also* Mach Br. 8. This argument is unavailing for several reasons.

A. Mach does not seek a cure for a procedural defect; it seeks dismissal.

Even assuming that there is a judicially enforceable right to a specific pre-suit process, Mach and its amici do not seek a cure of any procedural defect. They are not seeking a meaningful chance to settle out of court. They are seeking dismissal. This exposes the animating purpose behind Mach and its amici's arguments for a searching review of conciliation. When suits like this one are dismissed for any alleged failure to conciliate, the discrimination is not eliminated and victims of discrimination go without a remedy. Employers who engage in discrimination are

never held to account. Even courts that review conciliation and dismiss EEOC suits acknowledge this harsh result. "The Court . . . recognizes that certain . . . claims may be meritorious but now will never see the inside of a courtroom." *EEOC v. Bloomberg LP*, No. 07-8383, __ F. Supp. 2d __, 2013 WL 4799150, at *11 (S.D.N.Y. 2013).

This windfall encourages employers to use conciliation to set up a potential defense and the litigation process to press that defense. No matter how egregious the discrimination, a complete defense unrelated to the merits potentially awaits. As noted in the EEOC's opening brief, "The conciliation process itself is turning into a form of quasi-litigation where many respondents focus more on setting up a 'failure to conciliate' defense rather than attempting to correct the employment practices . . . found unlawful in its reasonable cause determination." EEOC Br. 28 (noting that a leading employment firm now encourages its clients to view "every communication [with the] EEOC . . . as an exhibit to a future motion to a federal district court judge").

Mach and its amici do not challenge that central point. The EEAC essentially concedes that this is now a routine defense tactic, stating that "employers find themselves increasingly having to challenge the EEOC's compliance with pre-suit requirements . . . ." EEAC Br. 18. The most the Chamber offers to rebut this point is that there have been a lot of EEOC lawsuits in the past 40 years, so, it asserts, this Court need not worry because the conciliation defense does not always work. Chamber Br. 22. They do not deny that employers attempt to use conciliation not as a means to resolve the dispute but as a potential future defense to an otherwise

meritorious suit. Nor do they deny that this is the general advice that employers now receive from the employment bar.

The EEOC will, regardless of what this Court decides, continue to vigorously pursue mediation and conciliation in cases where the Commission finds cause to believe that a charge of discrimination is true. Conciliation is efficient, effective, and inexpensive and results in exponentially more relief for victims of discrimination than suits do. *See* EEOC Br. 24. Review of conciliation, on the other hand, does not promote conciliation; it promotes litigation about conciliation.

B. Mach has no right to conciliation and it still has a "meaningful opportunity" to settle.

As this Court has said, "[W]e are mindful that while conciliation is encouraged, it is not an inalienable *right* of a defendant." *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 907 (7th Cir. 1981) (emphasis added). Even assuming that there is some right to a "meaningful opportunity" to settle, employers are never deprived of that. Cases routinely settle at all stages of litigation without any particular process. *See* Donald R. Livingston, EEOC Litigation and Charge Resolution 808–09 (2005). Any procedural right to settle out of court never goes away. The district court can order mediation. This Court can order mediation. Mach could attempt to settle this case at any time by eliminating and remedying the discrimination that the EEOC alleges occured. Therefore, because an employer who wants an opportunity to resolve the matter on terms acceptable to the EEOC can do so even after the Commission files suit, there is no

need to expend judicial resources on review of a settlement process, much less dismiss otherwise meritorious suits.

Even if the EEOC made substantive errors during conciliation—such as by overestimating the strength of its case—Mach is not prejudiced. A trial de novo cleanses these errors. After a trial, the case will be valued lower or become valueless. And as this Court has made clear, interim procedural agency shortcomings need not be independently reviewed if those complaining of the procedural violation have an alternative "adequate remedy." *See Stewart v. EEOC*, 611 F.2d 679, 681 (7th Cir. 1979) (no review of complaint that was not investigated within 120 days because the charging party could bring a merits suit and that provided an adequate remedy); *see also McCottrell v. EEOC*, 726 F.2d 350, 351–52 (7th Cir. 1983) (denying review to a charging party complaining of the EEOC's alleged inadequacies in the investigation and conciliation because they could be remedied in a trial de novo against the employer).

C. Mach has no judicially enforceable right to a "meaningful opportunity" for pre-suit settlement.

To the extent that Mach and its amici are arguing that employers have a judicially enforceable right to a particular type of conciliation *before* being sued, the argument proves too much because it would apply with equal force to the EEOC's other pre-suit obligations, such as the pre-suit investigation and cause finding. But this Court has explicitly rejected the argument that an employer has a right to judicial review of the EEOC's pre-suit cause finding. *See EEOC v. Caterpillar*, 409 F.3d 831, 833 (7th Cir. 2005) ("The existence of probable cause [for the EEOC] to

sue is generally . . . not judicially reviewable."). An employer has no right to judicial review to challenge the EEOC's investigation and cause finding—even when a qualitatively different investigation and cause finding might have revealed that the employer had not engaged in discrimination at all. Given that Mach has no judicially reviewable right to a meaningful opportunity to prove its "innocence" before the EEOC initiates suit, it follows that Mach has no judicially reviewable right to a meaningful opportunity to "plea bargain" before suit.

D. Nonreview does not require the Court to accept the EEOC's view of the case.

Mach and its amici argue that this Court should conclude that conciliation is reviewable, otherwise the court is left with taking the EEOC's "word" that it attempted conciliation. EEAC Br. 5; Mach Br. 37. But at the conciliation stage, the statute makes clear that the EEOC's "word" does govern. At the conciliation stage, the EEOC's job is to "[e]ndeavor to eliminate [the] alleged unlawful employment practice [as the EEOC understands it] by informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b).

That changes once the EEOC files suit. Then, the EEOC's view (or word) no longer matters; what matters then is what the EEOC can prove. If the EEOC was wrong about its view during the conciliation process—if the EEOC turned out be unreasonable given the reality of the case—a trial de novo rectifies that deficiency, just as it rectifies any deficiency in the investigation or cause finding.

III. Mach and its amici's notion—that the EEOC's conduct during conciliation is reviewable even though the EEOC's ultimate decision is not—turns administrative law principles on their head.

The APA not only reflects Congress's considered decisions about how and when to review agency actions, but also underlying administrative law principles that pre-date the APA and that apply broadly to agency actions. *See, e.g.*, *Caterpillar*, 409 F.3d 834 (relying on APA caselaw to support nonreview of EEOC investigation and cause finding). Mach and its amici, however, attempt to take what they like from those administrative law principles, the general presumption in favor judicial review of agency action for example, but not any of the fundamental limitations of such review. This effort to create an EEOC-conciliation version of administrative law that runs counter to general administrative law principles should be rejected.

A. There is no presumption of judicial review in this case and Mach and its amici have failed to make the threshold showing that any statute authorizes judicial review of the conciliation process.

As a general matter, the APA embodies a "basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). But since Mach and its amici disavow the APA's judicial review provisions, which create this presumption, they have the burden of demonstrating that some statute specifically authorizes judicial review. The threshold question therefore is whether the EEOC's conciliation process is "made reviewable by a specific statute." *See Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 614 (7th Cir. 2003).

Title VII does not authorize review of conciliation. Mach and its amici acknowledge that Title VII does not explicitly authorize judicial review of the EEOC's actions during conciliation. As the Chamber states: "To be sure, Title VII

does not specifically direct courts to review whether the EEOC satisfied its conciliation duty . . . ." Chamber Br. 7.

An implied authorization to review the process should be rejected for all the reasons already discussed, but that there is no express provision authorizing review alone is enough to conclude that conciliation is unreviewable. *Cf. Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984) ("Nowhere in the Act, however, is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose [it]."); *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) ("Courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA . . . .").

B. Mach claims to seek review of only interlocutory agency decisions, which are not generally reviewable.

Mach and its amici's attempt to have the process reviewed when the ultimate outcome is unreviewable is also contrary to administrative law principles because even under the broad review available under the APA, only actions that "mark the consummation of the agency's decisionmaking process" are reviewable. *Home Builders*, 335 F.3d at 614. "[They] must not be of a merely tentative or interlocutory nature." *Id.* Yet Mach and its amici claim they want review of *only* the interlocutory process and not any final agency outcome.

C. Review of the underlying agency process leading to an unreviewable agency decision is warranted only when the statute or relevant regulations delineate some specific procedure that the agency must follow.

To be sure, courts will, under certain circumstances, entertain challenges to the agency process leading up to an otherwise unreviewable agency decision, but only when those challenging the process point to some procedural violation of law—either in the statute or the relevant regulations. *See, e.g.*, 5 U.S.C. § 706(2)(D) (court is to "hold unlawful . . . agency action . . . without observance of procedure required by law"); *Lincoln v. Vigil*, 508 U.S. 182, 194 196–98 (1993) (considering whether the agency's process leading up to the exercise of a discretionary decision was invalid because it failed to conform to the notice and comment rulemaking procedures articulated in the APA, ultimately concluding that those procedural rules were inapplicable); *Steenholdt v. Fed. Aviation Admin.*, 314 F.3d 633, 640 (D.C. Cir. 2003) (considering a procedural challenge to a decision committed to the agency's discretion—the FAA Administrator's authority to rescind an authorization to perform FAA compliance inspections—only to determine whether the FAA had violated its own procedures).

Indeed, the *Steenholdt* court specifically rejected what Mach seeks here—review for alleged violations of procedural rights that have no grounding in the statute or the regulation. *See id.* ("Petitioner identifies no FAA rule that gives him a right to question FAA personnel at review meetings, nor does he explain how he is prejudiced by the Directorate Manager's absence from the meeting or by the alleged *ex parte* communications.").

1. Mach's proposed procedural requirements have no basis in Title VII.

Under Mach's proposed review, the Court must review the record to ensure that the EEOC "(1) outline[d] to the employer the reasonable cause for its belief that

Title VII has been violated; (2) offer[ed] an opportunity for voluntary compliance; and (3) respond[ed] in a reasonable and flexible manner to the reasonable attitudes of the employer." Mach Br. 43. These specific requirements do not exist in the statute, thus they should not be used to review conciliation.

Moreover, Mach's first requirement—that the EEOC outline the reasons why it believed Title VII was violated and that a court can review whether the EEOC did this—conflicts with this Court's reading of Title VII in *EEOC v. Caterpillar*. There, this Court held that the EEOC's investigation and reasonable cause determination are not subject to judicial review. *Caterpillar*, 409 F.3d at 833. Judicial review of conciliation, as advocated by Mach, invites courts to consider whether the agency has sufficiently described the basis for its cause finding and identified affected class members. This type of review effectively involves the court in determining whether the agency's investigation and cause finding was sufficient, a review foreclosed by this Court's decision in *Caterpillar*.

2. Mach's procedural requirements have no basis in the relevant regulations.

The relevant regulations echo the text of Title VII and commit the conciliation process to the agency's discretion. 29 C.F.R. § 1601.24(a). Under the current regulations, conciliation ends when "the Commission is unable to obtain voluntary compliance . . . and . . . determines that further efforts to do so would be futile or nonproductive." *Id.* The only procedural obligation in the regulations is for the EEOC to notify Mach that conciliation had failed, which the EEOC did here. *See*

R.32-1, at 9. So amicus EEAC's notion that the regulations create a basis for judicial review of the conciliation process is also incorrect. EEAC Br. 8.

To be sure, if the relevant regulations created specific procedures that the EEOC must follow in exercising its conciliation discretion, then courts can hold the EEOC to those procedures. Indeed, courts have concluded that the EEOC's conciliation process was deficient when that process failed to conform to the EEOC's specific regulations about the conciliation process. In *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 946 (8th Cir. 1974), for example, the court reviewed an EEOC conciliation for compliance with a regulation, which no longer exists, that required the EEOC to give an employer one last chance at conciliation before commencing suit. But no such procedural requirement exists in the current iteration of the relevant regulations.

3. Statutory and regulatory compliance is confirmed by reviewing the face of the documents.

The Chamber next argues that the fact that Title VII does not specifically direct courts to review conciliation does not mean that it is not reviewable. Other pre-suit requirements—for example, the requirement that there be a charge of discrimination or the requirement to find cause—do not specifically authorize review, the Chamber argues, yet courts will ensure that those requirements have been met. *See* Chamber Br. 7. This argument misses the mark.

The EEOC agrees that the agency must attempt conciliation and conclude that conciliation has failed. Courts should not, however, look behind the conclusion that conciliation has failed and review the underlying process. *Cf. United States v. Int'l*

Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 1, 438 F.2d 679, 681 (7th Cir. 1971) (holding Attorney General's signature on complaint alleging "reasonable cause to believe" that employer engaged in a "pattern or practice of resistance" in violation of Title VII was "sufficient" and "clearly demonstrate[d] the basis of the Attorney General's 'reasonable cause to believe'"). This Court does not do so in other contexts and should not do so here.

This Court's decision in *EEOC v. Caterpillar*, 409 F.3d 831, is squarely on point. There, this Court held that the EEOC had to investigate a charge and make a reasonable cause determination before filing suit, and the Court concluded that the EEOC had done so based upon the EEOC's documented cause finding and that it would be inappropriate to look behind the EEOC's cause finding to review the investigatory process itself. *Id.* at 833–34.

The EEOC does not ask for an anomalous judicial approach to conciliation as compared to other pre-suit requirements, as the Chamber argues. *See* Chamber Br. 7. Rather, it is only in the conciliation context where courts have created extra-statutory and extra-regulatory standards of review. In the Chamber's cited cases, for example, courts reviewed an aspect of the EEOC's administrative process only insofar as Title VII or the regulations spelled out particular requirements and, as this Court did in *Caterpillar*, they decided the question of procedural compliance by looking only at the face of the documents at issue—the charges, subpoenas, or the cause findings. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 67 (1984) (reviewing sufficiency of Commissioner's charge and EEOC's notice to employer by looking at the charge and comparing it against the statutory and regulatory requirements);

EEOC v. Harvey L. Walner & Assocs., 91 F.3d 963, 966 (7th Cir. 1996) (dismissing EEOC case where complaint was not premised on a valid charge and the agency admitted that there was no charge); *see also EEOC v. K-Mart*, 694 F.2d 1055, 1064 (6th Cir. 1982) ("[S]ufficiency of a charge . . . should be determined from the face of that charge.").

4. The Quality Control Plan (QCP) creates no procedural obligations.

The agency's draft Quality Control Plan (QCP), contrary to Mach's assertion, *see* Mach Br. 35, likewise provides no basis for review of the conciliation process. As an initial matter, the agency has not adopted a final plan. The plan discussed by Mach contains only draft principles. So even if the QCP *could* create procedural obligations, a draft plan does not. Even if the QCP were not merely a draft, it would create no enforceable procedural rights because it is an internal agency policy document. *See, e.g.*, *Gaballah v. Johnson*, 629 F.2d 1191, 1203 (7th Cir. 1980).

5. There is no basis in Title VII to adopt the National Labor Relations Act's "good faith" standard.

Mach further asserts that courts should evaluate the EEOC's conduct in conciliation just as courts evaluate bargaining under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 et seq. Mach Br. 43 n.13. Mach's invocation of the NLRA, however, demonstrates well the point that even in non-agency contexts courts will review process when the ultimate outcome is unreviewable only when the statutes or regulations call for it. The NLRA, as Mach recognizes, specifically requires good-faith bargaining. *See* Mach Br. 21. It says what the parties are to discuss—"wages, hours, and other terms and conditions of employment"—when

they are to discuss them—"at reasonable times"—and how they should go about the discussions—"confer in good faith." 29 U.S.C. §§ 158(a)(5), 158(d).

Title VII articulates no such standards to review the EEOC's conduct during conciliation. And this Court, in *Doe v. Oberweis*, 456 F.3d 704, 710 (7th Cir. 2006), has already rejected an attempt to graft the NLRA standards onto Title VII, noting that adding extratextual requirements would "distress originalists" and that:

> 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.

Id. "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.*

To be sure, other federal courts have reviewed the EEOC conciliation process, but those decisions are at odds with firmly established administrative law principles. Outside of the EEOC conciliation context, one is hard-pressed to find instances where courts recognize that the substantive agency decision is committed to the agency's discretion yet the agency's underlying process in reaching that decision is substantively reviewed.

CONCLUSION

The EEOC respectfully requests that this Court conclude that the conciliation process is unreviewable because it is committed to the EEOC's discretion.

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,841 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 27, 2013

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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