No. 13-1019

In the Supreme Court of the United States

MACH MINING, LLC, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
GAIL S. COLEMAN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
IAN HEATH GERSHENGORN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under federal law, once the Equal Employment Opportunity Commission (Commission) investigates a charge of unlawful employment discrimination and determines that there is reasonable cause to support the charge, 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). "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 be "used as evidence in a subsequent proceeding" unless all "persons concerned" consent. *Ibid.* If the Commission is "unable to secure from the respondent a conciliation agreement acceptable to the Commission," and at least 30 days have elapsed from the filing of the charge, the Commission may bring suit against the respondent in federal district court. 42 U.S.C. 2000e-5(f)(1).

The question presented is whether the Commission's alleged failure to engage in sufficient conciliation efforts is subject to judicial review and provides a basis for dismissal of the Commission's suit on the merits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 738 F.3d 171. The opinions of the district court denying the Equal Employment Opportunity Commission's motion for summary judgment (Pet. App. 31a-41a) and denying reconsideration and certifying the case for interlocutory review (Pet. App. 42a-55a) are not published in the *Federal Supplement* but are available at 2013 WL 319337 and 2013 WL 2177770.

JURISDICTION

The court of appeals entered its judgment on December 20, 2013. A petition for a writ of certiorari was filed on February 25, 2014, and was granted on June 30, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

1. In the Equal Employment Opportunity Act of 1972 (EEO Act), Pub. L. No. 92-261, 86 Stat. 103, which amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Congress set out a detailed, multi-step process for the Equal Employment Opportunity Commission (Commission or EEOC) to enforce the statute's prohibition on unlawful employment practices. See *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). The process begins when either a person claiming to be aggrieved or a Commission member files a charge of unlawful employment discrimination with the Commission. See 42 U.S.C. 2000e-5(b). The Commission then notifies the respondent of the charge and begins an investigation. *Ibid.* If the Commission determines that there is not reasonable cause to support the charge, it dismisses the charge and promptly notifies the parties. *Ibid.* At that point, the complainant may file his or her own lawsuit. 42 U.S.C. 2000e-5(f)(1).

If the Commission finds reasonable cause to believe 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). The statute leaves to the Commission the ultimate decision whether to enter into a conciliation agreement or to sue. If more than 30 days have elapsed from the filing of the charge of employment discrimination and "the Com-

mission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission," the Commission may sue the respondent in federal court. 42 U.S.C. 2000e-5(f)(1).[1]

Congress mandated that all aspects of the conciliation process be kept confidential: "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees." 42 U.S.C. 2000e-5(b). Further, 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." *Ibid.* Congress provided criminal penalties for violation of these confidentiality provisions. *Ibid.* (authorizing fine of up to $1000 and imprisonment of up to one year).

2. In 2008, a woman who had unsuccessfully applied for a mining position with petitioner filed a charge of unlawful employment discrimination with the Commission. Pet. App. 3a. She contended that petitioner, which had never hired a woman for a mining position, refused to hire her based on her gender. *Id.* at 3a, 31a-32a. The Commission investigated the charge and found reasonable cause to believe petitioner had discriminated against a class of women who applied for mining-related jobs. *Id.* at 3a.

In its letter notifying petitioner of the reasonable-cause finding, the Commission invited petitioner to conciliate. Pet. App. 3a; see J.A. 14-17. The letter stated that a Commission representative would contact petitioner to begin the conciliation process and

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[1] Different procedures apply for suits against government respondents, see 42 U.S.C. 2000e-5(c), (d) and (f); those procedures are not at issue here.

encouraged petitioner to raise any questions it had about the process. J.A. 16-17.

From September 2010 to September 2011, the Commission attempted conciliation with petitioner, but no agreement was reached. Pet. App. 3a. Accordingly, the Commission sent petitioner a letter stating that, with respect to the specific charge at issue, "conciliation efforts as are required by law have occurred and have been unsuccessful." J.A. 18-19.

The Commission then filed this lawsuit, contending that petitioner engaged in a pattern or practice of unlawful employment discrimination and used employment practices that had a disparate impact on female applicants. Pet. App. 31a-32a; J.A. 20-25. The complaint alleged that "[a]ll conditions precedent to the institution of this lawsuit have been fulfilled." J.A. 22. In its answer, petitioner asserted as an affirmative defense that the complaint should be dismissed because the Commission had failed to expend sufficient efforts on conciliation. Pet. App. 3a, 32a; J.A. 30.

The Commission sought partial summary judgment on the ground that Title VII precludes judicial review of the sufficiency of the Commission's conciliation efforts. Pet. App. 2a, 32a; Summ. J. Mot. 1 (July 30, 2012) (Docket entry No. 32). To confirm that conciliation occurred, the Commission provided both its letter inviting petitioner to conciliate and its letter stating that conciliation had failed. Summ. J. Mot. Exs. 6 (notice of reasonable-cause determination) (J.A. 14-17), C (notice of conciliation failure) (J.A. 18-19).

Petitioner responded that the court must review the *sufficiency* of the Commission's conciliation efforts. Petitioner listed numerous questions the court should ask about the Commission's motives, process,

and offers, and it urged the court to order discovery so the court could build a "full record" of what happened during conciliation and decide if the Commission "respond[ed] in a reasonable and flexible manner to the reasonable attitudes of [petitioner]." Def.'s Mem. in Opp. to Summ. J. Mot. 5-20 (Oct. 18, 2012) (Docket entry No. 42) (Def.'s Summ. J. Br.). Petitioner then submitted "extensive discovery requests"—including more than 600 requests for admissions of fact (15 requests to each of 43 different people)—that "s[ought] information about the EEOC's investigation and conciliation efforts." Pet. App. 3a-4a, 54a n.1; see J.A. 44, 47-59. Petitioner also "slowed discovery on the merits" by objecting to the Commission's merits-related discovery requests on "failure to conciliate" grounds. Pet. App. 4a.

3. The district court denied the Commission's summary-judgment motion. Pet. App. 31a-41a. Relying on precedent from other circuits, the court concluded that it may review the Commission's conciliation efforts to determine whether the Commission "made a sincere and reasonable effort to negotiate." *Id.* at 34a-36a, 40a (citation and internal quotation marks omitted).

The court also denied the Commission's request to keep the details of conciliation confidential. Pet. App. 40a. The Commission had moved to strike portions of petitioner's summary-judgment brief that made representations about what happened during the conciliation process on the ground that Title VII mandates confidentiality. *Ibid.* (citing 42 U.S.C. 2000e-5(b)). The court rejected that request, concluding that it was required to review what happened during conciliation

to judge the sufficiency of the Commission's efforts. *Ibid.*

The district court denied the Commission's motion for reconsideration but certified to the court of appeals the question whether and under what standard courts may review the EEOC's "informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit." Pet. App. 42a-55a; see 28 U.S.C. 1292(b).

4. The court of appeals reversed. Pet. App. 1a-30a. The court concluded that "an alleged failure to conciliate" cannot support dismissal of a discrimination suit on the merits. *Id.* at 2a. Because the Commission "ple[aded] on the face of its complaint that it has complied with all procedures required under Title VII" and the documents the Commission sent to petitioner (notice of reasonable-cause determination and notice of conciliation failure) are "facially sufficient" to show that conciliation occurred, no further review is warranted. *Id.* at 3a, 30a.

The court of appeals first observed that Title VII's "express statutory language mak[es] clear that conciliation is an informal process" that is "entrusted solely to the EEOC's expert judgment" and must "remain confidential." Pet. App. 5a-6a. The court explained that the words Congress chose are "significant": by stating that the Commission should "*endeavor to eliminate*" discrimination using "*informal methods* of conference, conciliation, and persuasion," and that any conciliation agreement must be "*acceptable to the Commission,*" Congress committed the conciliation process to the Commission's discretion. *Id.* at 7a (quoting 42 U.S.C. 2000e-5(b) and (f)(1)).

The court further explained that Title VII's requirement that "all details of the conciliation" be kept "strictly confidential," along with its prohibition on the use of informal conciliation efforts "as evidence" in a subsequent proceeding, cannot be reconciled with judicial review of the conciliation process. Pet. App. 7a (citing 42 U.S.C. 2000e-5(b)). Courts either would have to "evaluate conciliation without evidence to weigh" or "construct an implied set of exceptions to the sweeping statutory requirement of confidentiality." *Id.* at 9a.

The court of appeals also concluded that Title VII contains no "meaningful standard" for courts to use to evaluate the sufficiency of the Commission's conciliation efforts. Pet. App. 9a-16a. The court explained that the statute provides "open-ended" language about the Commission's duty to informally attempt conciliation and gives the Commission "complete discretion to accept or reject an employer's offer." *Id.* at 9a. The court observed that experience in the courts of appeals that have allowed sufficiency review has confirmed that there is no "workable legal standard" for courts to apply. *Id.* at 10a n.2, 16a. And the court explained that the lack of any meaningful standard to review the Commission's process shows it is "committed to agency discretion by law." *Id.* at 13a-16a.

The court of appeals recognized that permitting judicial review of conciliation efforts would "invite[] 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. Inquiring into the conciliation process, the court explained, would "protract and complicate Title VII litigation," with "little or no off-

setting benefit" in terms of obtaining voluntary compliance with the law. *Id.* at 17a (citation omitted). And "the stronger the EEOC's case on the merits, the stronger the incentive to use a failure-to-conciliate defense." *Id.* at 18a.

Finally, the court of appeals concluded that an alleged failure to engage in sufficient conciliation efforts is not a "sound basis for dismissing a case on the merits," because "[t]he wrong claimed * * * is purely one of insufficient process," and "the remedy for a deficiency in a process is more process, not letting one party off the hook entirely." Pet. App. 28a-29a. Dismissal of a Title VII claim with prejudice would impose the "significant social costs of allowing employment discrimination to go unaddressed." *Id.* at 28a.

SUMMARY OF ARGUMENT

In a Title VII lawsuit, a court may not review the sufficiency of the EEOC's pre-suit conciliation efforts.

A. The statutory text establishes that Congress did not intend to permit review of the EEOC's conciliation efforts. Title VII directs the Commission, prior to filing suit, to "endeavor to eliminate" employment discrimination through various "informal methods," 42 U.S.C. 2000e-5(b), and states that the Commission may bring suit if it is unable to secure an agreement "acceptable to the Commission" through conciliation, 42 U.S.C. 2000e-5(f)(1).

The EEOC's duty is to "endeavor" to persuade an employer to voluntarily comply with the law, and Congress did not specify any particular process the agency must use to accomplish that goal. Instead, Congress left it to the Commission to decide which "informal methods" of "conference, conciliation, and persuasion" would be appropriate. Congress also en-

trusted the ultimate decision whether to enter into a conciliation agreement exclusively to the Commission, which strongly suggests that the process leading up to that decision also is committed to the agency's discretion. And Congress provided that "nothing said or done" during conciliation may be "made public" by the Commission or "used as evidence in a subsequent proceeding" absent written consent. That broad confidentiality mandate is incompatible with judicial review of the conciliation process.

B. The Commission agrees that it has a duty to attempt conciliation before bringing an employment-discrimination suit under 42 U.S.C. 2000e-5. The Commission's practice is to invite an employer to conciliate when it issues a reasonable-cause determination and to send a notice to the employer when conciliation fails to yield an acceptable agreement. If challenged in court, the EEOC will provide those two documents (which preserve the confidentiality of the conciliation process) to show that it fulfilled its statutory duty. The court of appeals correctly recognized that nothing more is required.

Petitioner is wrong to assert that the Commission must undergo a searching review of its conciliation efforts before it may seek to prove discrimination in court. In *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984), this Court refused to look behind a facially valid charge of discrimination to assess the sufficiency of the information supporting the charge and to second-guess the EEOC's notice process. The Court should do the same here: facially valid documents establish that the EEOC attempted conciliation as required by statute. Petitioner's attempt to convert a simple condition precedent into a searching judicial inquiry is

not only incompatible with this Court's guidance about conditions precedent to suit, but also is at odds with the statute's confidentiality provisions and the statute's history.

C. Background principles governing judicial review of agency action reinforce that Congress intended no review here. Although this is not a case brought under the Administrative Procedure Act (APA), 5U.S.C. 551 *et seq.*, the APA is instructive because it embodies longstanding principles of judicial review. The Commission's informal conciliation process would not qualify as final agency action under the APA because it is not a discrete decision or action that marks the culmination of the agency's decisionmaking process. Indeed, even the agency's determination that conciliation has failed is not a final agency action—it is a step in the process leading to the court's determination of whether unlawful discrimination has occurred.

Petitioner could not obtain judicial review under the APA to force the EEOC to take certain actions during conciliation, because a failure to act is only remediable when the agency failed to undertake a specific act the law requires, *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004), and Title VII does not require the EEOC to take any particular actions other than to "endeavor" to conciliate. Moreover, by deciding not to prescribe standards for judging the sufficiency of the Commission's conciliation efforts, by requiring conciliation to be kept confidential, and by entrusting the ultimate decision whether conciliation has succeeded to the Commission, Congress made clear that the conciliation process is committed to agency discretion by law.

D. Judicial review of the adequacy of the Commission's conciliation efforts undermines the effective enforcement of Title VII. Employers that believe litigation is likely will have an incentive to treat every communication during conciliation as a potential exhibit supporting their eventual inadequate-conciliation argument, rather than as a genuine opportunity for dialogue. Further, both employers and the EEOC will be less open and willing to negotiate if they know that their communications will not remain confidential and can be used to their detriment at trial. And once the EEOC has filed suit, employers have every incentive to raise inadequate-conciliation arguments. The result is to burden the courts with mini-trials on a collateral issue and delay (and sometimes entirely avoid) adjudication of the merits. Experience has demonstrated that employers view the inadequate-conciliation argument as a "potent weapon" in Title VII suits, *Shell Oil*, 466 U.S. at 81, and will use that weapon to obtain discovery, delay, and dismissal.

Judicial review is not necessary to ensure the Commission conciliates in good faith. The Commission has "powerful incentives to conciliate," and it has a long history of doing so successfully in many cases. Pet. App. 20a.

E. The judicial review petitioner proposes is unworkable and unwise. Although several courts of appeals have authorized judicial review of conciliation efforts, they have been unable to formulate any workable standard, and the result is that individual judges decide the sufficiency of conciliation on an ad hoc basis. This creates substantial uncertainty for the EEOC, which never knows if its informal conciliation efforts will someday be found insufficient.

Petitioner proposes a variety of factors to judge the sufficiency of the EEOC's conciliation efforts, but those factors are no more help than the indeterminate standards articulated by the courts of appeals. Moreover, petitioner's proposed judicial review is intrusive, imposing burdens on the EEOC to provide certain information, conciliate for a certain time, and negotiate in a certain way—even though there is no basis in the statutory text for any such rules.

As unworkable and unwise as petitioner's proposed review is on its own, petitioner's remedy makes it worse. Dismissal of a Title VII lawsuit on the merits is far too drastic a remedy for a deficiency in the conciliation process. The remedy for lack of process is more process. For all of these reasons, the judgment of the court of appeals should be affirmed.

ARGUMENT

IN A TITLE VII LAWSUIT, THE COURT MAY NOT REVIEW THE SUFFICIENCY OF THE EEOC'S PRE-SUIT CONCILIATION EFFORTS

A. The Plain Language Of Title VII Demonstrates That Congress Did Not Intend Review Of The EEOC's Conciliation Efforts

1. Title VII sets out an "integrated, multistep enforcement procedure" for the Commission to bring an employment-discrimination lawsuit. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). When a charge of unlawful employment discrimination is filed with the Commission, the Commission provides the employer with notice of the charge and investigates the charge. 42 U.S.C. 2000e-5(b). If the Commission determines that there is reasonable cause to believe the charge is true, then Title VII directs it to attempt

to informally conciliate the charge before filing suit against the employer. *Ibid.*

Three key provisions of Title VII address the conciliation process. First, the statute directs the Commission to seek voluntary compliance before bringing a lawsuit: When the Commission finds reasonable cause to believe the charge of employment discrimination, "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). Second, Title VII requires that all aspects of the conciliation process be kept confidential: "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." *Ibid.* The statute includes criminal penalties for violation of that prohibition, stating that "[a]ny 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." *Ibid.* Third, Title VII entrusts to the Commission's discretion the ultimate decision whether to informally resolve a charge of employment discrimination and on what terms: the Commission may sue an employer for unlawful discrimination if 30 days have elapsed since the filing of the charge and "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." 42 U.S.C. 2000e-5(f)(1).

Taken together, these provisions make clear that although the Commission must attempt conciliation, courts may not review the sufficiency of the agency's informal conciliation process.

2. The obligation Congress placed on the Commission is to "endeavor" to eliminate unlawful employment discrimination through "informal" methods. 42 U.S.C. 2000e-5(b). "Endeavor" means to "attempt" or "try." See, *e.g.*, *American Heritage College Dictionary* 462 (4th ed. 2010) (*American Heritage Dictionary*) ("[t]o attempt (fulfillment of a responsibility, for example) by employment or expenditure of effort"); *Black's Law Dictionary* 607 (9th ed. 2009) ("[t]o exert physical or intellectual strength toward the attainment of an object or goal"); *Webster's Third New International Dictionary of the English Language* 748 (1993) (*Webster's*) (to "try" or "to work with set purpose" or "make an effort"). By directing the Commission to "endeavor" to eliminate unlawful discrimination, Congress simply told the agency to try to resolve claims of employment discrimination informally prior to filing suit.

The Commission's duty is to try to "eliminate [the employer's] unlawful employment practice." 42 U.S.C. 2000e-5(b). Congress did not direct the Commission to resolve the charge of discrimination and avoid litigation at any cost; rather, it directed the Commission to seek a resolution that *eliminates* the employer's unlawful discrimination. "Congress was focused on effective enforcement of the anti-discrimination standards of Title VII, not creating new rights for employers." Pet. App. 19a. And the statute gives the Commission the authority to decide what resolution would be sufficient to "eliminate" the unlawful discrimination. See 42 U.S.C. 2000e-5(f)(1) (conciliation agreement must be "acceptable to the Commission").

Congress did not specify any particular processes the Commission must use in conciliation, instead leaving it to the Commission to use "informal" methods such as "conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). Congress's repeated use of the word "informal" to describe the Commission's conciliation "endeavors" shows that Congress did not intend to prescribe rules the Commission must follow in the conciliation process. See, *e.g.*, *American Heritage Dictionary* 712 ("informal" means "[n]ot being in accord with prescribed regulations or forms"); *Webster's* 1160 ("informal" means "conducted or carried out without formal, regularly prescribed, or ceremonious procedure").

Further, the three "informal methods" Congress identified—"conference, conciliation, and persuasion"—provide the Commission with substantial discretion about how to urge an employer to stop its illegal practices. See, *e.g.*, *American Heritage Dictionary* 299 ("conference" is ("[a] meeting for consultation or discussion" or "[a]n exchange of views"); *id.* at 297 ("conciliate" is "[t]o make or try to make compatible; reconcile"); *id.* at 1039 ("persuade" is "[t]o induce to undertake a course of action or embrace a point of view by means of argument, reasoning, or entreaty"). Congress did not specify that the Commission must "negotiate" or "bargain" with an employer, nor did Congress specify any discrete steps the Commission must take in attempting to informally resolve the charge. See pp. 38-39, *infra* (contrasting Title VII with collective-bargaining statute). Rather, by using the subjective, open-ended terms "conference," "conciliation," and "persuasion," Congress left

it to the Commission to make its own judgment about how best to obtain voluntary compliance.

3. It is undisputed that the Commission's ultimate decision whether to enter into a conciliation agreement or sue is unreviewable. See Pet. Br. 10, 24; Pet. App. 9a, 12a-13a. Congress's statement that the Commission may sue if it is "unable to secure * * * a conciliation agreement *acceptable to the Commission*," 42 U.S.C. 2000e-5(f)(1) (emphasis added), entrusts to the Commission the decision whether to resolve a charge of employment discrimination through conciliation and on what terms. Title VII provides "no description of what a negotiated settlement should look like," Pet. App. 9a, and the EEOC "is free to refuse an offer that might appear fair or even generous to a neutral observer," *id.* at 12a. Because the decision whether to enter into a conciliation agreement is entrusted to the Commission's sole discretion, it is not judicially reviewable. And the unreviewability of the Commission's ultimate decision strongly suggests that Congress did not expect courts to inquire into the adequacy of the agency's process leading up to that decision. See, *e.g.*, *Fort Sumter Tours, Inc.* v. *Babbitt*, 202 F.3d 349, 356-357 (D.C. Cir. 2000) (when National Park Service's letter denying reconsideration was nonreviewable, court did not look behind the letter to judge the adequacy of the agency's process).

Petitioner argues (Br. 25-26) that a court foreclosed by statute from reviewing the "substance" of the Commission's conciliation efforts can nevertheless review the Commission's "procedure." But that distinction is illusory. As the court of appeals explained, "[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." Pet. App. 12a; see pp. 51-53, *infra* (addressing the intrusiveness of petitioner's proposed review).

Moreover, the text commits the process as well as the ultimate decision to the agency's discretion. Congress provided in the text no standards by which to judge the Commission's conciliation process. See *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 72 n.26 (1984) (rejecting assumption that a court should review whether EEOC charge of discrimination was well-founded because "[n]othing in the statute" provides a basis for that assumption). And the ordinary meaning of the words Congress chose to describe that process—"endeavor" to eliminate discrimination, using "informal" methods such as "conference, conciliation, and persuasion," and seek an agreement "acceptable to the Commission"—are infused with informality and discretion. The statutory language addressing the conciliation process 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." Pet. App. 7a. As the court of appeals correctly noted, "[i]t would be difficult for Congress to have packed more deference to agency decisionmaking into so few lines of text." *Ibid.*[2]

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[2] Petitioner also suggests (Br. 30) that the provision authorizing a court to grant a stay in a Title VII suit indicates an intention to permit judicial review of the pre-suit conciliation process. But the provision that "[u]pon request," a court, in its discretion, may stay proceedings for up to 60 days to permit "efforts of the Commission to obtain voluntary compliance," 42 U.S.C. 2000e-5(f)(1), does not

4. Title VII's confidentiality provisions reinforce that Congress did not authorize judicial review of the sufficiency of the Commission's informal conciliation efforts. Immediately after directing the Commission to "endeavor to eliminate" discrimination through informal conciliation methods, Congress mandated a broad protection for the confidentiality of the conciliation process. This provision prohibits the Commission from making public anything "said or done during and as a part of" the conciliation process, 42 U.S.C. 2000e-5(b), and it precludes anyone from using anything "said or done" during conciliation "as evidence" in court unless all "persons concerned" provide "written consent." *Ibid.* Congress used comprehensive language to describe the information that must be kept confidential—anything "said or done during and as a part of" the Commission's "informal endeavors." Further, by coupling the prohibition on public disclosure with a prohibition on use of the information in a proceeding (such as a Title VII case), Congress prescribed restrictions that cover any circumstances in which the information might be disclosed. Congress's statement that the information could be used as evidence only when all "persons concerned"—the EEOC, the employer, and the complainant—provide "*written* consent," *ibid.*, demonstrates that Congress expected such disclosures to be rare.[3] And Congress under-

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require the court to judge the sufficiency of the Commission's prior conciliation efforts. Courts routinely grant stays to permit settlement talks without delving into the details of the parties' prior settlement efforts.

[3] "Persons concerned" includes not only the employer and the Commission, but also the victims of discrimination. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 599-600 (1981).

scored the importance of confidentiality by including criminal penalties for making information about conciliation public. *Ibid.*

The broad non-disclosure requirement is fundamentally incompatible with judicial review of the sufficiency of the EEOC's conciliation process. As the court of appeals explained, inquiring into the sufficiency of conciliation would require courts either to respect the statute's confidentiality provisions and "evaluate conciliation without evidence to weigh," or to "construct an implied set of exceptions to the sweeping statutory requirement of confidentiality." Pet. App. 9a. The court of appeals appropriately chose to "stick to the text." *Ibid.*

If Congress had intended to authorize searching review of the Commission's conciliation efforts, it would have said so. Pet. App. 5a-6a. But Congress gave no hint that it expected such review; to the contrary, it defined the agency's obligation using discretion-granting terms and committed the ultimate decision to the agency's discretion. In the context of "a statute as precise, complex, and exhaustive as Title VII," which includes detailed and comprehensive enforcement procedures, the court of appeals appropriately declined to erect new procedural hurdles to suit that appear nowhere in the statute's text. *Id.* at 6a (citation omitted).

B. The Commission's Duty To Attempt Conciliation Does Not Make The Conciliation Process Judicially Reviewable

1. Petitioner's principal contention (Br. 18-22) is that courts may review the sufficiency of the Commission's conciliation efforts because conciliation is a condition precedent to the Commission's filing suit. The

Commission does not dispute that it has a duty to attempt conciliation of a charge of discrimination before filing a Title VII lawsuit under 42 U.S.C. 2000e-5. But all that is required is for the Commission to establish that it has attempted conciliation in an effort to obtain a resolution acceptable to the Commission.

Title VII provides that the Commission "shall endeavor to eliminate" unlawful employment discrimination informally before bringing suit. 42 U.S.C. 2000e-5(b). That mandatory language places a duty on the Commission to seek informal resolution of a charge before bringing a lawsuit. See, *e.g.*, *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 718-719 (1990) (the word "shall" generally implies a mandatory duty).[4]

When the Commission finds reasonable cause to support a charge of unlawful employment discrimination, the Commission invites the employer to conciliate. The Commission's practice is to include an invitation to conciliate in its letter advising an employer that it has reasonable cause to believe that the employer engaged in unlawful employment practices. See EEOC, *EEOC Compliance Manual*, § 40.4(e) (June 2006), available at 2006 WL 4673170; see also 29 C.F.R. 1601.21(b) (reasonable-cause notification). When the Commission determines that conciliation will not lead to an acceptable resolution of the charge, the Commission's practice, embodied in a regulation, is to send another letter to the employer notifying it of the failure of conciliation. 29 C.F.R. 1601.25 (stating that if the EEOC "is unable to obtain voluntary compliance" through conciliation and "determines that

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[4] The duty to attempt conciliation does not apply in a case involving a pattern or practice of employment discrimination under 42 U.S.C. 2000e-6. See 42 U.S.C. 2000e-6(a).

further efforts to do so would be futile or counterproductive," it shall "notify the respondent in writing"). Those two documents are the "bookends" of the conciliation process; they show that the Commission has attempted conciliation, but they do not reveal any details of what happened during conciliation.

When the Commission brings a Title VII lawsuit and an employer contends that the Commission failed to fulfill its duty to seek to resolve the matter by conciliation, the court may check to ensure that the Commission attempted conciliation by reviewing those two letters. In this case, for example, the Commission pleaded in the complaint that it had satisfied all preconditions to suit, J.A. 22, and petitioner sought dismissal on failure-to-conciliate grounds, J.A. 30. The Commission then sought summary judgment on the issue and provided to the court its letter inviting petitioner to conciliate (J.A. 14-17) and the letter it sent approximately one year later noting that conciliation had failed to yield an acceptable agreement (J.A. 18-19).[5] There is "no challenge here to the facial sufficiency of these documents" that show conciliation occurred. Pet. App. 3a; see Pet. Br. 5-6 (no dispute that conciliation failed). Those documents establish that the Commission "endeavor[ed] to eliminate" petitioner's unlawful employment discrimination, 42 U.S.C. 2000e-5(b), but that the Commission was "unable to secure from the respondent a conciliation

[5] The Commission can file those two letters while respecting the statute's confidentiality mandate because the letters do not disclose things "said or done during and as a part of" the EEOC's conciliation efforts, 42 U.S.C. 2000e-5(b); they simply disclose that conciliation was attempted and failed to yield an agreement acceptable to the EEOC.

agreement acceptable to the Commission," 42 U.S.C. 2000e-5(f)(1).

Once the EEOC establishes that it has attempted conciliation, nothing more is required. That makes sense, because all the Commission seeks is a chance to get into court to prove its case on the merits. The court of appeals therefore correctly held that, "[i]f the EEOC has ple[aded] on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient," no further review is warranted. Pet. App. 30a (citing *Shell Oil*, 466 U.S. at 81).

2. Petitioner asks the Court to require a searching review of the Commission's conciliation efforts, where courts would scrutinize the Commission's communications, offers, and negotiations. See Pet. Br. 36-41, 45, 51; see also pp. 51-53, *infra*. But this Court's decisions addressing the preconditions for a Title VII lawsuit refute the notion that the EEOC must satisfy such a heavy burden simply to have a chance to prove discrimination in court.[6]

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[6] Petitioner contends (Br. 17, 21-22) that the court of appeals erred by referring to its inadequate-conciliation argument as an "affirmative defense," rather than a "condition precedent" to suit. This argument is beside the point. The district court and the court of appeals called petitioner's argument an "affirmative defense" (Pet. App. 2a, 3a, 7a, 9a, 19a, 31a, 32a, 43a) because petitioner designated it as one in its answer (J.A. 30), and because if the argument is successful, it would allow an employer to avoid liability even if the EEOC made out a case of discrimination on the merits (see Pet. App. 29a; *Black's Law Dictionary* 482 (definition of "affirmative defense")). Regardless of how it is characterized, petitioner's argument is simply not one supported by Title VII's text.

EEOC v. *Shell Oil Co.*, *supra*, is particularly instructive. *Shell Oil* addressed the question whether a charge filed by a member of the EEOC was sufficient to trigger a Title VII investigation. 466 U.S. at 56. If the charge was valid, then a subpoena issued by the EEOC during its investigation was enforceable. *Id.* at 65. The Court held that a charge is valid if it complies with the "minimal requirements" expressly set out in the statute and regulations—that the charge be "in writing under oath or affirmation," and "contain such information and be in such form as the Commission requires" by regulation, 42 U.S.C. 2000e-5(b), including a statement of "the facts * * * constituting the alleged unlawful employment practices," 29 C.F.R. 1601.12(a)(3). *Shell Oil*, 466 U.S. at 67. The Court then reviewed the charge at issue and concluded, from the face of the charge, that the charge included all of the necessary information. *Id.* at 67-74.

Significantly, the Court declined the employer's invitation to go further and look behind the charge to determine whether it was supported by a sufficient factual basis. The employer argued that the charge was "not supportable by the facts" and the EEOC must "answer[] a series of questions regarding the basis of the charge" and "furnish[] information substantiating its answers." *Shell Oil*, 466 U.S. at 57-58. The Court disagreed, stating that courts should not "determine whether the charge of discrimination is 'well founded' or 'verifiable'" because nothing in the statute supports such a requirement. *Id.* at 72 n.26 ("[A]ny effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error."). The Court also rejected the employer's related argument

that the EEOC must provide the evidence underlying the charge when it sends the employer notice of the charge. *Id.* at 81. The Court explained that an insufficient-notice argument would be a "potent weapon in the hands of employers" who wish to delay adjudication of the merits and would require district courts to adjudicate collateral questions about whether the EEOC's notice was sufficient before the EEOC could even investigate. *Ibid.*

The reasoning of *Shell Oil* applies here. Title VII requires the Commission to attempt conciliation, and the letters the Commission sends to begin and end conciliation show, on their face, that the Commission has fulfilled its duty. Nothing in Title VII requires the EEOC's conciliation efforts to meet a sufficiency standard, just as nothing in the statute requires the EEOC to prove the validity of a charge or establish the sufficiency of its notice before it can investigate. In both cases, a sufficiency argument would be a "potent weapon" for employers to use to "delay as long as possible" the investigation and adjudication of the charge of employment discrimination. *Shell Oil*, 466 U.S. at 81. And in both cases, inquiring into sufficiency would require significant collateral litigation that would burden the district courts and be unjustified at such a preliminary stage of the case. *Ibid.* Thus here, as in *Shell Oil*, the agency's burden is met when it provides facially adequate documentation to establish that it fulfilled its statutory duty.

3. None of the other pre-suit requirements petitioner cites (Br. 18-21) involve the type of searching judicial review petitioner proposes for pre-suit conciliation. These requirements generally are specific, discrete requirements that courts can check have been

satisfied at the outset of a suit. For example, a private party must file a charge with the EEOC within 180 or 300 days of the alleged unlawful employment practice to bring suit to remedy that practice. See, *e.g.*, *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 104-105, 114-115 (2002); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 555 n.4 (1977). Similarly, a person who has received a right-to-sue letter and wishes to bring a Title VII suit must do so within 90 days. *Baldwin Cnty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 149-150 (1984) (per curiam); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). The stated deadlines are clear, and courts routinely enforce these provisions without extensive collateral proceedings.

Yet in petitioner's view, before the EEOC even is allowed a chance to prove a charge of discrimination in court, the court must conduct a mini-trial to determine whether the Commission's conciliation efforts were sufficient. Petitioner has identified no other pre-suit requirement that either places such a burden on EEOC before it may proceed in court or involves such a searching inquiry and uses such an amorphous standard. See pp. 51-53, *infra* (describing petitioner's proposed standard). The fact that petitioner's approach imposes a precondition to a Title VII suit unlike any other is good reason to reject it.

4. Petitioner's effort (Br. 26-21) to reconcile its proposal for searching review of the conciliation process with the statute's confidentiality provisions is unavailing.

Petitioner asserts (Br. 26-28), for example, that when Congress mandated that "[n]othing said or

done" during conciliation be "made public" or "used as evidence in a subsequent proceeding" without consent, it meant to allow judicial review of the Commission's informal conciliation efforts under seal. But in our justice system, openness—not sealing—is the norm. It is thus difficult to believe that Congress, without any indication in the text, intended a regime that would require the parties in every Title VII action brought by the Commission to litigate the adequacy of the Commission's conciliation efforts under seal, complete with protective orders and decisions sealed from public view. Moreover, petitioner's "under seal" solution is not an easy one; as the court of appeals noted, the case law on how to litigate such matters while maintaining confidentiality is "scattered and inconsistent." Pet. App. 8a n.1. The uncertainty has acute consequences, because Title VII's confidentiality mandate is backed up by criminal penalties. See 42 U.S.C. 2000e-5(b).

Moreover, the sealed proceedings petitioner envisions are incompatible with the command that "[n]othing said or done during and as a part of [the EEOC's] informal endeavors" may be used "as evidence in a subsequent proceeding" without written consent of all persons concerned. Petitioner's only response (Br. 27-28) is that the word "evidence" means "information used to prove a claim on the merits." But that is not its ordinary meaning; "evidence" is anything "that tends to prove or disprove the existence of an alleged fact" in court. *Black's Law Dictionary* 635; Bryan A. Garner, *Garner's Modern American Usage* 322 (2d ed. 2003) ("evidence" "includes all means by which a fact in issue is established or disproved"). A court uses "evidence" to decide

preliminary questions in a case just as it uses evidence to decide the ultimate merits of a plaintiff's claim.[7] Petitioner relies (Br. 27-28) on statutes that prohibit the use of information "as evidence" or "for any purpose" in a judicial, legislative, or administrative proceeding. 42 U.S.C. 3789g(a); see 7 U.S.C. 2276(b)(2)(B); 10 U.S.C. 613a(b)(2)-(3); 13 U.S.C. 9(a); 15 U.S.C. 281a; 42 U.S.C. 10708(b). But the broader formulation makes sense in those statutes because the prohibition applies to legislative and administrative proceedings in addition to litigation.[8]

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[7] Petitioner's narrow interpretation of "evidence" also is incompatible with its assertion (Br. 9, 22) that the Commission must prove adequate conciliation as an "element" of its claim of unlawful discrimination. If conciliation were an element of a Title VII claim (which it is not, see, *e.g.*, *Green*, 411 U.S. at 802), then surely the information used to establish it would be "evidence."

Petitioner also suggests (Br. 28-29) that, because only private parties (not the EEOC) could sue before 1972, and the confidentiality provisions were in place then, the only possible use of conciliation information as "evidence" then was to prove the merits in a private suit. But before 1972, employers did attempt to use conciliation information for other purposes in private suits, see p. 30, *supra*; Pet Br. 28-29, and nothing in the 1964 or 1972 legislative records suggests that "evidence" meant anything other than its broad, ordinary meaning.

[8] In *EEOC* v. *Phillip Services Corp.*, 635 F.3d 164 (5th Cir. 2011), the EEOC sought to introduce evidence from conciliation to establish that an employer breached an oral conciliation agreement. *Id.* at 165. The EEOC argued that such evidence could be admitted because the evidence was not being used to prove or disprove the merits of a Title VII charge. *Id.* at 165-166. The court of appeals disagreed and affirmed dismissal of the breach-of-contract suit. *Id.* at 166. The Commission now agrees the prohibition on use of conciliation matters as "evidence" is not limited to their use to prove or disprove the merits of a charge.

If Congress had wanted to permit use of conciliation materials in some court proceedings, it would have said so. For example, although Title VII bars disclosure of information obtained during Commission investigations, that bar lasts only until "the institution of any proceeding * * * involving such information." 42 U.S.C. 2000e-8(e). Similarly, Federal Rule of Evidence 408, which generally precludes admission of settlement offers and negotiations, includes exceptions allowing that evidence to be used for purposes such as "proving a witness's bias or prejudice" or "proving an effort to obstruct a criminal investigation or prosecution." Fed. R. Evid. 408; see Pet. App. 8a. Title VII's confidentiality provisions include no similar exceptions or limitations.

Petitioner is thus left to suggest (Br. 29-30) that the confidentiality of conciliation should be "deemed waived" whenever an employer challenges the adequacy of conciliation. An employer's decision to make such an argument may mean that it is willing to consent to disclosure of conciliation matters, but that does not mean the Commission or the charging party consents. The statute provides no exception for a "deemed waiver," and its requirement that all concerned persons consent in writing refute the notion that a waiver may be implied. 42 U.S.C. 2000e-5(b). In any event, the Court should not presume that a defendant challenging the Commission's conciliation efforts is willing to waive the confidentiality protections; petitioner refused to do so in this very case.[9]

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[9] In district court, the Commission argued that petitioner had waived confidentiality by raising an inadequate-conciliation defense, J.A. 36, but petitioner resisted that argument, J.A. 37-38, and attempted to limit the materials the Commission could use to

Here, Congress's goal was to protect the confidentiality of conciliation talks so the parties could communicate openly without fear that doing so would prejudice them in litigation. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 599 n.16 (1981). As the court of appeals recognized, judicial review of the Commission's conciliation efforts subverts that goal.

5. The statutory history further supports the view that Congress never intended review of the sufficiency of the Commission's conciliation efforts to be a key part of a Title VII suit. As originally enacted, Title VII authorized the Commission to investigate a charge of discrimination and to attempt to resolve the charge by conciliation but it did not authorize the Commission to enforce the statute. See *Shell Oil*, 466 U.S. at 77-78; see H.R. Rep. No. 238, 92d Cong., 1st Sess. 2 (1971) (under the 1964 Act, "the Commission is * * * limited essentially to the function of conciliation") (1971 House Report). In 1964, the statute stated that if the Commission finds reasonable cause to support the charge, "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 259. The statute contained confidentiality provisions similar to those in

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respond to the defense, see Def.'s Opp. to Mot. to Deem Confidentiality Waived 4 (June 11, 2012) (Docket entry No. 23). Petitioner then recounted some selected details of conciliation to argue that conciliation was inadequate. See Def.'s Summ. J. Br. 17-20. When the Commission moved to strike these statements, petitioner asserted that it "is not prohibited from submitting information from conciliation," but also that it "ha[d] not waived confidentiality" by doing so. Def.'s Mem. in Opp. to Mot. to Strike 1, 4 (Nov. 13, 2012) (Docket entry No. 49).

place today, *ibid.*, and provided that, if "the Commission has been unable to obtain voluntary compliance with this title" and at least 30 days have passed since the filing of the charge, the Commission shall notify the charging party and the charging party may sue, § 706(e), 78 Stat. 260.

Congress amended Title VII in 1972 to give the Commission the authority to enforce Title VII through litigation. *Shell Oil*, 466 U.S. at 77; see, *e.g.*, 1971 House Report 4, 9 (result of EEOC's "limited authority" in the 1964 Act was that it could not obtain conciliation in most of the cases in which it had found reasonable cause). These amendments provided the EEOC with litigation authority while maintaining the core conciliation and confidentiality provisions. EEO Act sec. 4(a), § 706(b) and (f)(1), 86 Stat. 104, 105.

Nothing in the 1972 amendments suggests an intention to make conciliation a key issue in Title VII suits or provide employers with new rights to a certain conciliation process. The 1972 House Conference Report stated that, after finding reasonable cause to support a charge, the Commission shall "attempt conciliation in conformity with the requirements of existing law." H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 17 (1972) (1972 Conf. Report). But under existing law, conciliation had not been subject to judicial review. See 118 Cong. Rec. 3805-3806 (1972) (statement of Sen. Ervin); see also *Miller* v. *International Paper Co.*, 408 F.2d 283, 289 & n.24 (5th Cir. 1969) (holding that conciliation was not a precondition to a private suit and noting that "a deluge of cases has already considered and rejected the company's argument"). And if Congress had intended to authorize review of informal conciliation efforts, it should be

expected to have spoken clearly in light of the long legal tradition that courts do *not* review behavior during settlement negotiations. See, *e.g.*, 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:56, at 122-124 (3d ed. 2007).

The changes that Congress made to Title VII in 1972 are all consistent with continuing the existing regime of non-reviewability. Congress reiterated the informality of the conciliation process by amending the statute to provide that "[n]othing said or done as a part of such *informal* endeavors may be made public." EEO Act sec. 4(a), § 706(b), 86 Stat. 104 (emphasis added), and it added language permitting the Commission to sue when it "has been unable to secure from the respondent a conciliation agreement acceptable to" it, sec. 4(a), § 706(f)(1), 86 Stat. 105. Accordingly, nothing in the 1972 legislative record indicates that Congress expected searching review of the Commission's conciliation efforts at the behest of an employer, rather than simply a check to ensure there was an opportunity for the Commission to resolve the matter by conciliation.[10]

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[10] A debated issue in 1972 was whether the EEOC should have cease-and-desist authority or litigation authority. See *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 361-362 (1977). The original House and Senate bills provided that the Commission could bring an administrative enforcement action if it was unable to secure "a conciliation agreement acceptable to the Commission and to the person aggrieved, which determination shall not be reviewable in any court." H.R. 1746, 92d Cong., 1st Sess. sec. 4, § 706(f) (as introduced in the House, Jan. 22, 1971); see S. 2515, 92d Cong., 1st Sess. sec. 4(a), § 706(f) (as introduced in the Senate, Sept. 14, 1971) (similar language). As part of the amendments in both the House and Senate that removed administrative enforcement authority and added litigating authority, the "shall not be reviewable in any

C. Foundational Principles Of Administrative Law Reinforce The Conclusion That Congress Did Not Intend Judicial Review Of The Commission's Conciliation Efforts

1. Petitioner invokes (Br. 17) the presumption of judicial review of agency action to support its contention that courts should review the Commission's conciliation process. But an agency's conciliation process is not the type of agency action presumptively subject to judicial review.

Under basic principles of administrative law, the Commission's conciliation process is not reviewable because it is not final agency action. The APA is instructive in this regard, because although this is not an APA suit, the APA is generally understood to have codified existing principles of judicial review. See, *e.g.*, *Heckler* v. *Chaney,* 470 U.S. 821, 832 (1985). The APA generally authorizes review only of "final agency action." 5 U.S.C. 704.[11] An "agency action" "includes

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court" language was removed. H.R. 9247, 92d Cong., 1st Sess. § 3(a) and (c) (as introduced in the House, June 17, 1971); S. Amend. No. 884, 92d Cong., 2d Sess. (1972); see 1972 Conf. Report 17. Amicus National Retail Litigation Center asserts (Br. 28-29) that the removal of that language shows that Congress intended judicial oversight of EEOC conciliations. That is incorrect. First, the change was made because of competing proposals about what type of enforcement authority to give the EEOC, not competing proposals about judicial review. Second, the language about reviewability referred to the ultimate determination that conciliation has failed, not the sufficiency of the EEOC's process. Third, the final bill retained the language providing that the conciliation agreement just be "acceptable to the Commission," and all agree that the language makes the Commission's ultimate decision unreviewable.

[11] The APA also authorizes judicial review of an "[a]gency action made reviewable by statute," 5 U.S.C. 704, but petitioner does not

the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13). An agency action is "final" if it "mark[s] the consummation of the agency's decisionmaking process," and it is a decision "by which rights or obligations have been determined or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks and citations omitted). The "core question" is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992).

Under these principles, it is clear that the Commission's conciliation process is not a final agency action. As an initial matter, the Commission's informal communications, negotiations, and other efforts are not the type of "circumscribed, discrete" actions, made on an administrative record, that typically qualify as "agency action." *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004); see also, *e.g.*, *Franklin*, 505 U.S. at 796 (census report is an "unusual candidate" to be considered "agency action" because it was not "promulgated to the public in the Federal Register" and "no official administrative record is generated").

Moreover, the Commission's conciliation efforts are not "final" agency actions because they do not reflect the culmination of the agency's decisionmaking—they are part of the process leading up to a decision. Even the result of these informal endeavors—the agency's decision that conciliation has not produced an ac-

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contend that Title VII itself provides for judicial review of the Commission's conciliation process.

ceptable agreement—is not a "final" agency action because it does not finally determine an employer's rights. The EEOC has no authority to adjudicate claims or impose administrative sanctions, see *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), and the Commission's conclusion that further conciliation efforts are unwarranted does not have "the status of law" so that "immediate compliance with [its] terms [i]s expected," *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-240 (1980) (internal quotation marks and citation omitted). Rather, the agency's decision that conciliation has not yielded an acceptable agreement is a step in the process by which a *court* determines the parties' rights. The decision to sue is a "determination only that adjudicatory proceedings will commence," and the potential that the employer will have to defend itself in court does not make it aggrieved within the meaning of the APA. *Standard Oil*, 449 U.S. at 241-242; see 5 U.S.C. 702 (cause of action for person "adversely affected or aggrieved by agency action within the meaning of the relevant statute"). Just as an agency's filing of an administrative complaint is not a final agency action, *Standard Oil*, 449 U.S. at 244, the EEOC's decision to sue in court also is not a final agency action. And here, petitioner challenges not the EEOC's conclusion that conciliation has failed to yield an acceptable agreement but the process leading up to that conclusion.

2. Nor would the Commission's conciliation efforts be reviewable as a challenge to the agency's failure to act. Cf. Pet. Br. 36-41 (suggesting that the EEOC should have taken additional steps during conciliation). A failure to act is remediable under the APA only if the plaintiff "asserts that an agency failed to

take a *discrete* agency action that it is *required to take*." *Southern Utah Wilderness Alliance*, 542 U.S. at 64. This rule reflects the "traditional practice" prior to the APA that judicial review to compel agency action was limited to situations where a statute contained "a specific, unequivocal command." *Id.* at 63 (citation omitted). Accordingly, when a plaintiff seeks judicial review to address an agency's failure to act, "the presumption is that judicial review is *not* available." *Chaney*, 470 U.S. at 831 (emphasis added).

This Court has previously rejected attempts to require agency action to comply with a general statutory directive. In *Norton* v. *Southern Utah Wilderness Alliance*, *supra*, the plaintiffs sought to compel the Bureau of Land Management to take action to protect public lands from damage caused by off-road vehicles. 542 U.S. at 60. The relevant statute directed the Bureau to "continue to manage" the public lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness." *Id.* at 65 (quoting 43 U.S.C. 1782(c)). Because that statute is "mandatory as to the object to be achieved," but "leaves [the Bureau] with a great deal of discretion in deciding how to achieve it," this Court held that courts may not oversee the process by which the Bureau complies with the statutory directive. *Id.* at 66-67. "If courts were empowered to enter general orders compelling compliance with broad statutory mandates," the Court explained, it would impermissibly require the "supervising court, rather than the agency, to work out compliance with the broad statutory mandate" on a case-by-case basis. *Id.* at 66.

So too here. Title VII provides a "broad statutory mandate[]" (*Southern Utah Wilderness Alliance*, 542

U.S. at 66) to the EEOC to "endeavor to eliminate" the employer's unlawful practices through "informal methods," 42 U.S.C. 2000e-5(b), but otherwise leaves it to the agency to decide how to best carry out that duty. Requiring a court to review the agency's process to judge compliance with that mandate case-by-case would usurp the agency's role and burden the courts with "day-to-day * * * management" (*Southern Utah Wilderness Alliance*, 542 U.S. at 67) of the EEOC's conciliation efforts. Nothing in Title VII "legally *require[s]*" the Commission to take specific steps during conciliation, *id.* at 63, and so the Court should not command the agency to take such steps.

3. The absence from Title VII of any meaningful standard for courts to use in evaluating the Commission's conciliation efforts confirms that Congress intended no such review. Agency action is not judicially reviewable if "no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Chaney*, 470 U.S. at 830. When there are no such standards for reviewing agency action, the agency's decision is "committed to agency discretion by law" and judicial review is foreclosed. *Id.* at 829-830 (citing 5 U.S.C. 701(a)(2); emphasis omitted).

That is the case here: Title VII includes no standard for judging the sufficiency of the EEOC's conciliation efforts. The statute directs the Commission to "endeavor" to eliminate discrimination through "informal methods" of "conference, conciliation, and persuasion," 42 U.S.C. 2000e-5(b), but it says nothing about what steps the Commission must take and how vigorously the Commission must pursue conciliation—

other than that any conciliation agreement must be "acceptable to the Commission," 42 U.S.C. 2000e-5(f)(1). By labeling conciliation "informal," by giving the Commission the choice of how to attempt to achieve voluntary compliance (conference, conciliation, or persuasion), by requiring the process to remain confidential, and by entrusting to the agency the ultimate decision about whether conciliation has produced an acceptable outcome, Congress has committed the conciliation process to the agency rather than providing a "judicially reviewable prerequisite to suit." Pet. App. 9a; see *id.* at 14a.

The question of how to persuade an employer to comply with Title VII is the kind of question traditionally left to agency discretion, because it depends on many variables, including the agency's judgment about where its "resources are best spent." *Lincoln* v. *Vigil*, 508 U.S. 182, 193 (1993) (citation omitted). And Congress's decision to permit the EEOC to sue when it determines that no agreement acceptable to it has been reached strongly suggests that the process leading up to that decision is unreviewable. See, *e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 594, 601 (1988) (CIA director's authority to terminate an employee in his or her sole discretion made termination unreviewable).

Petitioner seeks to address the absence of meaningful standards for judicial review by noting that some courts have made up rules (Br. 25-26); by proposing its own set of rules (Br. 36-41); and by suggesting (Br. 35) that the EEOC could promulgate regulations to provide standards. But the point is that *Congress* has not supplied a standard for judicial review. Any effort by judges or petitioner to fill that gap and formalize the "informal" process that Congress in-

tended is an appropriation of the lawmaking function, as there is no congressional guidance to light the way.[12]

Petitioner also suggests (Br. 36) that courts can develop standards for judicial review of conciliation efforts because they review collective bargaining under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq*. But unlike Title VII, the NLRA places numerous specific duties on employers and unions, including the duty to "bargain collectively," which requires "meet[ing] at reasonable times and confer[ring] in good faith with respect to wages, hours, and other terms and conditions of employment," "negotiat[ing] * * * an agreement," and "execut[ing] * * * a written contract incorporating any agreement reached." 29 U.S.C. 158(d). Further, the collective bargaining process is not required

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[12] Petitioner's suggestion (Br. 35) that the EEOC "provide more detailed content to the conciliation obligation" so that courts may review it presumes that the EEOC's conciliation efforts are judicially reviewable, which they are not. The EEOC has appropriately decided not to promulgate regulations requiring a specific process for its own internal, confidential, and informal efforts. The EEOC has promulgated procedural regulations under Title VII to provide guidance to charging parties about how to contact the EEOC and initiate charges and to explain to charging parties and respondents what steps the Commission will then take. See 29 C.F.R. 1601.6-1601.24. The EEOC has not issued detailed regulations addressing conciliation, however, because the manner in which the Commission seeks to bring about voluntary compliance depends on the facts of each case and on the relief the Commission believes is necessary to eliminate the unlawful practice. The Commission has delegated decisionmaking authority over conciliation to the District Directors, 29 C.F.R. 1601.24(b), so that the individuals most familiar with each case can determine how best to persuade an employer to stop its unlawful practices.

to be kept confidential, see, *e.g.*, *Carey Salt Co.* v. *NLRB*, 736 F.3d 405, 411-412 (5th Cir. 2013), unlike conciliation under Title VII, see 42 U.S.C. 2000e-5(b). And as the court of appeals recognized (Pet. App. 11a), the task of reviewing labor negotiations has not been an easy one for the federal courts. See *Carey Salt Co.*, 736 F.3d at 411-430.

Not only does the statute fail to contain any standards for judging conciliation, but it includes language that indicates that Congress did not intend such review. The language committing the ultimate conciliation decision to the agency, combined with the statute's confidentiality provisions, make this a situation where the statute itself "preclude[s] judicial review." 5 U.S.C. 701(a)(1); see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345-346, 349 (1984) (whether a statute precludes review depends on the statutory text, statutory scheme as a whole, legislative history, and tradition).

Accordingly, even if the Commission's conciliation efforts are considered "final agency action" to which a presumption of judicial review applies, that presumption is overcome by Congress's failure to provide any standards for judging the sufficiency of the efforts and the statutory language that demonstrates an intention to preclude judicial review.

D. Judicial Review Of The Commission's Conciliation Efforts Would Undermine Effective Enforcement Of Title VII

1. "[V]oluntary compliance" is "the preferred means of achieving the objectives of Title VII" of preventing and remedying unlawful employment discrimination. *Ricci* v. *DeStefano*, 557 U.S. 557, 581 (2009) (citation omitted). Judicial review of conciliа-

tion reduces employers' incentives to conciliate in good faith and increases their incentives to raise inadequate-conciliation arguments to delay (and perhaps entirely avoid) adjudication of a charge of unlawful employment discrimination.

Judicial review of conciliation undermines the purposes of Title VII in several ways. First, in cases where litigation is likely, the employer's "incentive to reach an agreement" through conciliation will be outweighed by "the incentive to stockpile exhibits for the coming court battle." Pet. App. 17a. If an employer knows that it may "avoid liability down the road * * * by arguing that the EEOC did not negotiate properly," it will view every communication with the agency as a potential exhibit in the later litigation, rather than as an opportunity for open communication to reach an agreement. *Ibid.* And the employer has every incentive to do so, because the employer remains "free to settle after the EEOC files suit." *Id.* at 18a. Unsurprisingly, in the circuits that permit judicial review, the effort to "stockpile exhibits" is already happening.[13]

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[13] See, *e.g.*, Seyfarth Shaw LLP, *Pro-Actively Addressing and Preparing for EEOC Investigations & Lawsuits* 7 (2012) ("[E]very communication [with the EEOC] should be viewed as an exhibit to a future motion to a federal district court judge."), http://www.seyfarth.com/dir_docs/publications/EEOCCountdownWebinar72512.pdf; see also Strafford Publications, Inc., *Defending Title VII Litigation: Rethinking Strategies After Recent Employee-Friendly Federal Court Rulings* 19 (June 18, 2014) (advising employers on how to "[s]et up [a] failure to conciliate defense" during conciliation), http://media.straffordpub.com/products/defending-title-vii-litigation-rethinking-strategies-after-recent-employee-friendly-federal-court-rulings-2014-06-18/presentation.pdf.

Second, both the employer's and the EEOC's willingness to engage in frank conversations and negotiations decreases when they know those communications may be used in court. The "prospect of disclosure or possible admission into evidence" of conciliation proposals "tend[s] to inhibit the kind of free and open communication necessary to achieve" voluntary compliance. *Branch* v. *Phillips Petroleum Co.*, 638 F.2d 873, 881 (5th Cir. 1981). The EEOC's "investigation and conciliation" must be "carried on in privacy" for conciliation to succeed. *Associated Dry Goods Corp.*, 449 U.S. at 599 n.16 (quoting statement of Sen. Dirksen). Even if the inadequate-conciliation issue were litigated under seal, material from conciliation could prejudice a party's rights, contrary to Congress's intention to encourage candid discussion. Further, the prospect of later judicial review makes it very unlikely that conciliation will be "cheap, informal, and relatively quick" (Pet. Br. 16), as Congress intended.

Third, employers will have every incentive to raise an inadequate-conciliation argument once litigation commences. The cost to the employer is minimal—worst case, the argument is rejected and the employer must defend the suit on the merits—and the potential upside is significant. Some courts have dismissed Title VII lawsuits on the merits as the remedy for the agency's allegedly inadequate conciliation efforts. See, *e.g.*, *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 677 (8th Cir. 2012); *EEOC* v. *Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003). Even without a dismissal remedy, the employer may seek to use the dispute over the adequacy of conciliation to obtain discovery about the Commission's investigation

or the strength of the Commission's evidence, or to forestall consideration of the merits of the case. And "the stronger the EEOC's case on the merits, the stronger the incentive to use a failure-to-conciliate defense." Pet. App. 18a.

The proliferation of inadequate-conciliation arguments places substantial burdens on the EEOC and the courts. The EEOC must divert resources from investigating and litigating employment discrimination cases to create records of its conciliation efforts. Cf. *EEOC* v. *Sterling Jewelers, Inc.*, 3 F. Supp. 3d 57, 64-65 (W.D.N.Y. 2014) (permitting deposition of EEOC investigator to judge sufficiency of EEOC's investigation); see also *Southern Utah Wilderness Alliance*, 542 U.S. at 66 (noting need to "protect agencies from undue judicial interference with their lawful discretion"). As time passes, evidence may be lost and witnesses' memories may fade, making it more difficult to litigate charges of unlawful employment discrimination. See, *e.g.*, *Hardin* v. *Straub*, 490 U.S. 536, 543 n.12 (1989). And the longer the delay, the longer victims of the unlawful discrimination must wait to obtain relief. Judicial review of conciliation efforts also burdens the courts by requiring them to conduct mini-trials on this collateral issue before ever reaching the merits of a discrimination case. See Pet. App. 2a. As the court of appeals explained, this effort may be "ultimately pointless" because the decision whether conciliation has reached an acceptable conclusion is entrusted to the Commission. *Ibid.*

The "dominant purpose" of Title VII is "to root out discrimination." *Shell Oil*, 466 U.S. at 77. But an inadequate-conciliation argument allows employers to "avoid liability for unlawful discrimination" because

the agency should have conciliated differently. Pet. App. 2a. That turns the purpose of conciliation on its head by placing the burden on the EEOC to prove it tried hard enough to eliminate the alleged discrimination, even though the *employer* is the one discriminating. See *Miller*, 408 F.2d at 290-291 ("There is no provision in Title VII permitting discrimination until cajolery is duly and fully performed. The real burden of the statute is not upon the EEOC but upon the discriminator.").

2. Experience has demonstrated that the inadequate-conciliation argument is "a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible." *Shell Oil*, 466 U.S. at 66-67, 81 (discussing notice-of-charge requirement). This case illustrates the point. Petitioner spent two years seeking extensive discovery about the Commission's investigation and conciliation efforts. Pet. App. 4a. Petitioner submitted "extensive discovery requests"—including more than 600 requests for admissions of fact—that "s[ought] information about the EEOC's investigation and conciliation efforts." *Id.* at 3a-4a, 54a n.1; see J.A. 44, 47-59; see also Summ. J. Mot. Ex. D, at 5-7 (petitioner's notice of deposition included nine topics related to the EEOC's investigation and conciliation efforts). Petitioner also "slowed discovery on the merits" by objecting to the Commission's merits-related discovery requests on "failure to conciliate" grounds. Pet. App. 4a; see Summ. J. Mot. Exs. E 3-12 (petitioner objected to nine interrogatories on inadequate-conciliation grounds), F 1-17, 18-20, 22 (petitioner objected to 24 document-production requests on inadequate-conciliation grounds).

Petitioner's inadequate-conciliation argument has shifted the focus of this lawsuit from whether petitioner engaged in systemic hiring discrimination against women to whether the EEOC had done enough during its pre-suit conciliation process. After three years of litigation, this case is no closer to a determination of the merits of the employment-discrimination claim. Cf. *Shell Oil*, 466 U.S. at 81 n.38 (dispute over sufficiency of charge stymied the EEOC's investigation "for over three years").

Numerous other cases have demonstrated that employers will use judicial review of conciliation efforts as a tactic for diversion and delay. Title VII defendants have routinely argued that the EEOC's conciliation efforts were insufficient.[14] Even though most of

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[14] Cases from just the past five years prove the point. See, *e.g.*, *EEOC* v. *New Prime, Inc.*, No. 11-CV-03367, 2014 WL 4060305, at *6-*7 (W.D. Mo. Aug. 14, 2014); *EEOC* v. *Unit Drilling Co.*, No. 13-CV-147, 2014 WL 2211011, at *2 (N.D. Okla. May 28, 2014); *EEOC* v. *Braun Elec. Co.*, No. 12-CV-01592, 2014 WL 1330566, at *4-*5 (E.D. Cal. Apr. 2, 2014); *EEOC* v. *Global Horizons, Inc.*, No. 11-CV-00257, 2014 WL 819129, at *3 (D. Haw. Feb. 28, 2014); *EEOC* v. *Spoa, LLC*, No. 13-CV-1615, 2014 WL 47337, at *4 (D. Md. Jan. 3, 2014); *EEOC* v. *Bloomberg L.P.*, 967 F. Supp. 2d 802, 813-814 (S.D.N.Y. 2013); *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 966 F. Supp. 2d 949, 958-960 (N.D. Cal. 2013); *EEOC* v. *JBS USA, LLC*, 940 F. Supp. 2d 949, 965-966 (D. Neb. 2013); *EEOC* v. *Wedco, Inc.*, No. 3:12-CV-00523, 2013 WL 1104754, at *2-*3 (D. Nev. Mar. 12, 2013); *EEOC* v. *United States Steel Corp.*, No. 10-12, 2013 WL 625315, at *10-*11 (W.D. Pa. Feb. 20, 2013); *EEOC* v. *Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587, 594-595 (W.D. Pa. 2013); *EEOC* v. *Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1036-1037 (D. Ariz. 2013); *EEOC* v. *Finish Line, Inc.*, 915 F. Supp. 2d 904, 924 (M.D. Tenn. 2013); *EEOC* v. *Rock-Tenn Servs. Co.*, 901 F. Supp. 2d 810, 819-821 (N.D. Tex. 2012); *EEOC* v. *IPS Indus., Inc.*, 899 F. Supp. 2d 507, 524 (N.D. Miss. 2012); *EEOC* v. *La Rana*

those challenges ultimately have been rejected, employers continue to raise them because of the opportunity for discovery, delay, and possible dismissal. And since the Eighth Circuit upheld the dismissal of a Title VII lawsuit on inadequate-conciliation grounds

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Haw., LLC, 888 F. Supp. 2d 1019, 1045-1046 (D. Haw. 2012); *EEOC* v. *PBM Graphics Inc.*, 877 F. Supp. 2d 334, 363 (M.D.N.C. 2012); *EEOC* v. *Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1114-1115 (E.D. Wash. 2012); *EEOC* v. *United Rd. Towing, Inc.*, No. 10-CV-6259, 2012 WL 1830099, at *5 (N.D. Ill. May 11, 2012); *EEOC* v. *Pioneer Hotel, Inc.*, No. 11-CV-1588, 2012 WL 1601658, at *3 (D. Nev. May 4, 2012); *EEOC* v. *River View Coal, LLC*, No. 4:11-CV-00117, 2012 WL 1593138, at *2-*3 (W.D. Ky. May 4, 2012); *EEOC* v. *Luihn Food Sys., Inc.*, No. 09-CV-387, 2011 WL 4747896, at *5 (E.D.N.C. Sept. 20, 2011); *EEOC* v. *AMX Commc'ns, Ltd.*, No. 09-CV-2483, 2011 WL 3555831, at *5 (D. Md. Aug. 8, 2011); *EEOC* v. *Crye-Leike, Inc.*, 800 F. Supp. 2d 1009, 1017-1018 (E.D. Ark. 2011); *EEOC* v. *McGee Bros.*, No. 10-CV-142, 2011 WL 1542148, at *4 (W.D.N.C. Apr. 21, 2011); *EEOC* v. *Riverview Animal Clinic, P.C.*, 761 F. Supp. 2d 1296, 1302 (N.D. Ala. 2010); *EEOC* v. *O'Reilly Auto. Inc.*, No. 08-CV-2429, 2010 WL 5391183, at *7 (S.D. Tex. Dec. 14, 2010), report & recomm. adopted, 2010 WL 5387634, at *1 (S.D. Tex. Dec. 16, 2010); *EEOC* v. *High Speed Enter., Inc.*, No. CV-08-01789, 2010 WL 8367452, at *5 (D. Ariz. Sept. 30, 2010); *EEOC* v. *California Psychiatric Transitions, Inc.*, 725 F. Supp. 2d 1100, 1117 (E.D. Cal. 2010); *EEOC* v. *Bimbo Bakeries USA, Inc.*, No. 09-CV-1872, 2010 WL 598641, at *6-*7 (M.D. Pa. Feb. 17, 2010); *EEOC* v. *Wal-Mart Stores, Inc.*, No. 07-0300, 2009 WL 3028981, at *3 (D.N.M. Sept. 8, 2009); *EEOC* v. *Champion Chevrolet*, No. 3:07-CV-444, 2009 WL 2835101, at *7-*8 (D. Nev. Aug. 26, 2009); *EEOC* v. *Preston Hood Chevrolet, LLC*, No. 08-CV-1265, 2009 WL 2489184, at *2 (S.D. Miss. Aug. 13, 2009); *EEOC* v. *Healthcare & Ret. Corp. of Am.*, No. 07-CV-13670, 2009 WL 2488110, at *1 (E.D. Mich. Aug. 11, 2009); *EEOC* v. *Columbia Sussex Corp.*, 632 F. Supp. 2d 576, 585-586 (M.D. La. 2009); *EEOC* v. *Paramount Staffing, Inc.*, 601 F. Supp. 2d 986, 990-991 (W.D. Tenn. 2009); *EEOC* v. *Gonnella Baking Co.*, No. 08C5240, 2009 WL 307509, at *4 (N.D. Ill. Feb. 5, 2009).

in *EEOC* v. *CRST Van Expedited, Inc.*, *supra*, the frequency with which employers raise the argument has increased. The court of appeals therefore was correct to be concerned that employers would use judicial review of conciliation to thwart the purposes of Title VII.

3. Petitioner mistakenly contends (Br. 46-49) that judicial review of the conciliation process is necessary to ensure that the EEOC conciliates in good faith. The Commission's activities are entitled to a presumption of regularity. See, *e.g.*, *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004). The Commission takes its obligation to conciliate seriously, and it has adopted standard practices to ensure that it invites an employer to conciliate in every case where it makes a reasonable-cause finding and to ensure that employers have written notice when the EEOC has determined that conciliation has not yielded an acceptable agreement. See pp. 20-21, *supra*. The result is that the Commission is complying with its statutory directive to attempt conciliation in every case before filing suit.[15] Courts may check

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[15] Petitioner is wrong to assert (Br. 32) that there are numerous cases in which "the Commission refused to engage in any relevant conciliation at all." The Commission is aware of only one substantive enforcement action under 42 U.S.C. 2000e-5 where the EEOC did not offer to conciliate, and that case involved a question of whether the conciliation obligation applied on the unique facts of the case. See *EEOC* v. *Pierce Packing Co.*, 669 F.2d 605, 607-608 (9th Cir. 1982) (uncertainty about whether EEOC had to make its own reasonable-cause finding or conciliate when an employee filed sex-discrimination charges with both the Department of Labor (DOL) and the EEOC and the DOL investigated and found cause to support the charge). In one other case, a court issued a stay after stating that it was unclear whether the Commission had

that compliance by reviewing the documents the EEOC sends employers to start and end conciliation. See *Shell Oil*, 466 U.S. at 65, 81 (review of charges for facial sufficiency provides a sufficient constraint on the EEOC's investigative authority). The EEOC's efforts also are subject to "meaningful scrutiny" from the political Branches, because Congress may conduct oversight hearings and amend Title VII, and the President appoints the commissioners with the advice and consent of the Senate. Pet. App. 20a-21a.

The EEOC has "powerful incentives to conciliate." Pet. App. 20a. Voluntary compliance requires fewer agency resources than litigation and ensures that unlawful employment practices are remedied more quickly. *Ibid.* The EEOC relies on conciliation as a primary method of obtaining monetary relief for victims of discrimination.[16] In 2013, for example, the Commission received over 90,000 charges of discrimination (under all anti-discrimination statutes it enforces), found reasonable cause in 3515 cases, and successfully conciliated in 1437 cases. The Commission filed suit on the merits in only 131 of the remain-

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attempted conciliation. See *EEOC* v. *Chesapeake & Ohio Ry. Co.*, No. 39-73-NN, 1973 WL 307, at *1 (E.D. Va. Oct. 10, 1973). All of the other cases petitioner cites raise arguments not that the Commission failed to conciliate at all, but that its efforts at conciliation fell short.

[16] See EEOC, *EEOC Litigation Statistics FY 1997 through FY 2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Oct. 26, 2014) (*EEOC Litigation Statistics*); EEOC, *All Statutes, FY 1997-2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Oct. 26, 2014) (*All Statutes*) (together reporting that in 2013, the Commission obtained $372.1 million through non-litigation resolutions, but recovered just $38.6 million through litigation).

ing 2078 cases.[17] These data confirm the importance of conciliation to the EEOC. They also underscore that the EEOC, like any federal agency, has budget and personnel constraints that ensure that conciliation remains a principal focus of the Commission's efforts. See *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 291, 297 (2002) (recognizing that the Title VII "confers on the agency the authority to evaluate the strength of the public interest" and make judgments about "which of the remedies authorized by law that it shall seek in any given case").

Out of over 10,000 cases the Commission has filed since 1980, petitioner and its amici point to a small number of cases as examples of the Commission's purportedly inadequate conciliation. But as petitioner's amici recognize, these cases do not reflect the Commission's general practice. Retail Litig. Ctr. Amicus Br. 18 ("[I]n the vast majority of cases, the EEOC's conciliation efforts satisfy *any* Circuit's test."). In any event, a few courts' judgment that the EEOC did not try hard enough to conciliate does not resolve whether courts should be asking that question in the first place.

E. Petitioner's Proposed Judicial Review Is Unworkable And Unwise

1. Petitioner contends (Br. 35-36) that the experience in the circuits has proven that judicial oversight of the conciliation process is workable. Petitioner is wrong. Lacking any express guidance from Title VII's text, the courts that have sought to evaluate the Commission's conciliation efforts "have struggled to provide meaningful guidance on how to judge the

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[17] See *EEOC Litigation Statistics; All Statutes.*

process." Pet. App. 27a. The courts of appeals have articulated different standards for reviewing the Commission's conciliation efforts. Some courts ask the open-ended (and inevitably intrusive) question whether the Commission "ma[de] a good faith effort to conciliate the claim." *EEOC* v. *Keco Indus., Inc.,* 748 F.2d 1097, 1102 (6th Cir. 1984); see *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC* v. *Zia Co.*, 582 F.2d 527, 533-534 (10th Cir. 1978).[18]

Other courts have used a more focused three-part test for evaluating the Commission's conciliation efforts, asking whether the Commission (1) has sufficiently explained its reasonable cause determination to the employer, (2) has provided the employer with a sufficient opportunity to comply voluntarily, and (3) has responded "in a reasonable and flexible manner to the reasonable attitudes of the employer." *Asplundh Tree Expert Co.*, 340 F.3d at 1259; *EEOC* v. *Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) (per curiam). Courts performing that inquiry often review the details of conciliation to make their own judgment as to whether the agency was sufficiently "reasonable" and "flexible" in negotiations.[19]

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[18] See, *e.g.*, *Keco*, 748 F.2d at 1101-1102 (reviewing the terms of a proposed conciliation agreement and deciding whether conciliation efforts had sufficiently "broke[n] down"); *Radiator Specialty Co.*, 610 F.2d at 183 (examining all communications between the parties before concluding that the failure to reach agreement "cannot be attributed to the Commission"); *Zia Co.*, 582 F.2d at 531-534 (reviewing the parties' interactions in detail and concluding that the Commission should have "given" the defendant "more time").

[19] See, *e.g.*, *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17-19 (2d Cir. 1981) (although the Commission attempted conciliation for 14 months, with 28 meetings between the parties and "extensive correspondence," court affirmed dismissal of the lawsuit because

The indeterminacy of these standards is reflected in the fact that courts purporting to apply the same test often have disagreed on which factors are relevant.[20] And the "distinction between process and substance" has proven to be illusory, because courts inevitably have reviewed the content of communications and offers during conciliation to judge the sufficiency of the Commission's efforts. Pet. App. 12a.[21]

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the Commission sought a conciliation agreement that was nationwide in scope, but sued regarding discrimination at only two stores); *Klingler Elec. Corp.*, 636 F.2d at 107 (calling for a "thorough inquiry" into the terms of the proposed conciliation agreement; the "materiality of the information" the employer proposed to add to the agreement; "the history of negotiations"; and "the nature of the EEOC's counter-proposal and [the employer's] response" in order to judge "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances").

[20] Some courts claiming to simply check for "good faith conciliation" have required EEOC to identify all claimants during conciliation, see *Swissport Fueling, Inc.*, 916 F. Supp. 2d at 1036-1040, while others have not, see *EEOC* v. *Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1129 & n.14 (D. Nev. 2007). Some courts applying the "good faith" standard have required the EEOC to provide the basis for a monetary demand, see *EEOC* v. *Pacific Mar. Ass'n*, 188 F.R.D. 379, 380-381 (D. Or. 1999), while others have not, see *Serrano* v. *Cintas Corp.*, 699 F.3d 884, 904-905 (6th Cir. 2012), cert. denied, 134 S. Ct. 92 (2013). Some courts purporting to apply a deferential standard have scrutinized the reasonableness of the EEOC's conciliation demand, see *EEOC* v. *First Midwest Bank N.A.*, 14 F. Supp. 2d 1028, 1032 (N.D. Ill. 1998), while others claiming to apply a heightened standard have not, see *PBM Graphics*, 877 F. Supp. 2d at 363.

[21] Several courts reviewing the Commission's conciliation efforts have criticized the Commission's substantive decisions during conciliation. See *EEOC* v. *Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (criticizing EEOC for size of compensatory damages demand); *Ruby Tuesday*, 919 F. Supp. 2d at 595 (same); *EEOC*

The result is that evaluating the Commission's conciliation process has been left largely to the ad hoc judgments of individual judges, leaving the Commission entirely uncertain about whether a court will later decide that its conciliation efforts are in some way inadequate.

Courts also have struggled to perform this judicial review while respecting Title VII's confidentiality provisions. See Pet. App. 8a-9a & n.1. The EEOC has been placed between a proverbial "rock and a hard place" because some courts have recognized an insufficient-conciliation defense to which the EEOC must respond but also have forbidden the EEOC from divulging information about conciliation proceedings. See *EEOC* v. *United States Steel Corp.*, No. 10-1284, 2012 WL 1150799 (W.D. Pa. Apr. 5, 2012) (after employer sought dismissal based on EEOC's purported failure to satisfy its pre-suit requirements, EEOC provided documents showing it conciliated; employer then argued that the EEOC improperly disclosed confidential documents, asked that they be struck, and later moved for attorney's fees and costs against the EEOC); see also note 9, *supra* (describing confidentiality disputes in this case).

2. From the beginning of this litigation, petitioner has sought wide-ranging judicial review of the Commission's conciliation process. Petitioner describes

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v. *Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002 (5th Cir. 1980) (per curiam) (criticizing EEOC for refusing to dispose of some but not all claims); *EEOC* v. *Sears, Roebuck & Co.*, No. 79CV5708, 1980 WL 180, at *1 (S.D.N.Y. June 16, 1980) (same), aff'd, 650 F.2d 14 (2d Cir. 1981); *EEOC* v. *HomeNurse, Inc.*, No. 1:13–CV–02927, 2013 WL 5779046, at *14 (N.D. Ga. Sept. 30, 2013) (criticizing EEOC for failure to reach agreement to resolve the charge during investigation).

this review as evaluating whether the Commission acted in "good faith" and whether its efforts were "genuine" and "meaningful." Pet. Br. 8, 38, 41, 45; Pet. C.A. Br. 21, 42. Petitioner also has described the inquiry as an ad hoc review of "whether the EEOC has, under the circumstances of the particular case, acted reasonably, sincerely, and responsively." Pet. C.A. Br. 8; see *id.* at 12, 42, 43 & n.14; Def.'s Summ. J. Br. 7.

Petitioner contends that the EEOC must provide an employer with particular information in every conciliation, including "an outline of the factual and legal basis for the claims," a detailed explanation for its remedial requests, and details about its investigation. See Pet. Br. 39-40; see also *id.* at 10, 25-26, 37-38. Petitioner also contends (Br. 40) that the Commission is required to propose some number of offers and consider some number of counteroffers, and that the EEOC cannot make a "take-it-or-leave-it offer." In petitioner's view (Br. 38), the EEOC also must tell the employer on what terms it would agree to resolve the charge. And petitioner proposes (Br. 40) that conciliation must last some set amount of time for it to be fair to the employer. Petitioner's proposed penalty for failing to meet these requirements is severe—dismissal of the Title VII case on the merits. See Pet. Br. 18 n.10, 31; Pet. C.A. Br. 46 n.16; J.A. 30.[22]

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[22] Before the district court and court of appeals, petitioner advocated an even heavier burden, arguing that the EEOC must "function" in the role "of a neutral," Def.'s Summ. J. Br. 6; see *id.* at 20; that the Commission must hold in-person meetings at the employer's request, see Def.'s Summ. J. Br. 19, 20; see Pet. C.A. Br. 6, 45; that the Commission must continue conciliation as long as the employer expresses a "willingness to conciliate," Def.'s Summ. J.

This proposed set of rules places a heavy burden on the EEOC, one unknown in civil settlement negotiations. Courts do not generally require civil litigants to provide all the information they have compiled about the case to the other party, or immediately tell the other party on what terms they will settle. Nor do courts forbid parties from making "take-it-or-leave-it" offers. And still less do courts impose these constraints in service of a standard that is entirely indeterminate, leaving each individual judge to decide "just how many offers, counteroffers, conferences, or phone calls should be necessary to satisfy judicial review" in a given case. Pet. App. 9a. Yet petitioner would place all of these burdens on the Commission—inviting manipulation by defendants, intrusion into the agency's decisionmaking process, and uncertainty for all concerned—and petitioner would do so even though the statute envisions an "informal" process.[23]

Br. 20; see Pet. C.A. Br. 6 (same); and that the Commission may file suit "only if [conciliation] is *impossible*." Def.'s Summ. J. Br. 5, 13. The fact that petitioner's proposed standard has changed throughout the course of the litigation shows how malleable it is. Indeed, that is why the court of appeals remarked that petitioner had provided no "workable standard" to the court, "despite repeated invitations." Pet. App. 9a-10a.

[23] The Commission agrees that it may not attempt conciliation with one employer and then sue a union or an unrelated employer, or attempt conciliation on a charge of sex discrimination and then sue for race discrimination. Although there are cases from the 1970s where that occurred, see *EEOC* v. *Allegheny Airlines*, 436 F. Supp. 1300 (W.D. Pa. 1977); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976), it is not the EEOC's practice now. A court can readily check that the Commission has attempted defendant- and claim-specific conciliation, because the reasonable-cause letter identifies the respondent and the particular type of claim at issue. See, *e.g.*, J.A. 14-15.

3. Even if this Court were to conclude that judicial review of conciliation is appropriate, it should hold that dismissal of a Title VII suit on the merits is too "final and drastic" a remedy for a deficiency in conciliation. Pet. App. 30a. Petitioner's contention (Br. 40-41) is that Title VII guarantees an employer a certain procedure. But the remedy for any lack of appropriate process is to provide appropriate process. See Pet. App. 17a ("All the employer should legitimately hope to gain is some unspecified quantum of additional efforts."); see also, *e.g.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (agency remand rule). A failure of the conciliation process does not disprove or cutoff the claim of employment discrimination, and thus merits dismissal is an inappropriate remedy. Pet. App. 29a (court should not "let[] one party off the hook entirely" because of a process deficiency). A merits dismissal would inappropriately "excuse the employer's (assumed) unlawful discrimination" and impose the "significant social costs of allowing employment discrimination to go unaddressed." *Id.* at 28a, 30a.

This does not mean the Commission must identify every possible claimant at the conciliation stage, because the EEOC may bring a representative action in cases of class-wide discrimination. See *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 323-324 (1980). Often, in such cases, the information necessary to identify each member of the class is within the employer's control and is provided during conciliation or litigation. The statutory text provides no basis for requiring all possible victims to be identified during conciliation; the Commission's charge is to determine whether there is reasonable cause to believe that an unlawful employment practice has occurred, 42 U.S.C. 2000e-5(b), not to establish all facts it will later need to prove in court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
IAN HEATH GERSHENGORN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
GAIL S. COLEMAN
Attorney
Equal Employment Opportunity Commission

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APPENDIX

1. 42 U.S.C. 2000e-5 provides:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

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, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, 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 em-

ployer, employment agency, labor organization, or joint labor-management committee (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 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. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. 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. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable

under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

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[1] So in original. Probably should be subsection "(b)".

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authori-

ty to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) 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. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the

Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involv-

ing a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district

in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a

respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

2. 29 C.F.R. 1601.24 provides:

Conciliation: Procedure and authority.

(a) Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion. In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief. Where such conciliation attempts are successful, the terms of the conciliation agreement shall be reduced to writing and shall be signed by the Commission's designated representative and the parties. A copy of the signed agreement shall be sent to the respondent and the person claiming to be aggrieved. Where a charge has been filed on behalf of a person claiming to be aggrieved, the conciliation agreement may be

signed by the person filing the charge or by the person on whose behalf the charge was filed.

(b) District Directors; the Director of the Office of Field Programs or the Director of Field Management Programs; or their designees are hereby delegated authority to enter into informal conciliation efforts. District Directors or upon delegation, Field Directors, Area Directors, or Local Directors; the Director of the Office of Field Programs; or the Director of Field Management Programs are hereby delegated the authority to negotiate and sign conciliation agreements. When a suit brought by the Commission is in litigation, the General Counsel is hereby delegated the authority to negotiate and sign conciliation agreements where, pursuant to section 706(f)(1) of title VII, a court has stayed processings in the case pending further efforts of the Commission to obtain voluntary compliance.

(c) Proof of compliance with title VII, the ADA, or GINA in accordance with the terms of the agreement shall be obtained by the Commission before the case is closed. In those instances in which a person claiming to be aggrieved or a member of the class claimed to be aggrieved by the practices alleged in the charge is not a party to such an agreement, the agreement shall not extinguish or in any way prejudice the rights of such person to proceed in court under section 706(f)(1) of title VII, the ADA, or GINA.

3. 29 C.F.R. 1601.25 provides:

Failure of conciliation; notice.

Where the Commission is unable to obtain voluntary compliance as provided by title VII, the ADA, or GINA and it determines that further efforts to do so would be futile or nonproductive, it shall, through the appropriate District Director, the Director of the Office of Field Programs, or Director of Field Management Programs, or their designees, so notify the respondent in writing.

4. 29 C.F.R. 1601.26 provides:

Confidentiality of endeavors.

(a) Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. This provision does not apply to such disclosures to the representatives of Federal, State or local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under title VII, the ADA, or GINA: *Provided, however*, That the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosures will not serve the purposes of the effective enforcement of title VII, the ADA, or GINA.

(b) Factual information obtained by the Commission during such informal endeavors, if such information is otherwise obtainable by the Commission under section 709 of title VII, for disclosure purposes will be considered by the Commission as obtained during the investigatory process.