No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner's opening brief demonstrated that as a mandatory condition precedent to the Commission's litigation authority, Title VII's conciliation requirement is presumptively subject to judicial enforcement. *See* Petr. Br. 17-22. The United States seemingly agrees, making no effort to contest petitioner's showing that this Court's precedents make such preconditions presumptively enforceable. Indeed, the Government seems to acknowledge that courts may enforce the conciliation obligation at least to *some* degree. *See* U.S. Br. 53 n.22 (agreeing that a court may "check that the Commission has attempted defendant- and claim-specific conciliation"). But the standard of review the Solicitor General proposes is so empty that it effectively amounts to no judicial review at all. Accordingly, the decision below can be affirmed only if the Court concludes that something special about the conciliation precondition overcomes the ordinary presumption that litigation preconditions are subject to meaningful judicial review. The Government's attempts to make that showing fall short.

I. The Government's Proposed Standard Amounts To No Judicial Review At All.

The Government now seemingly agrees that compliance with the conciliation precondition *is* subject to judicial review – at least to some extent. The Solicitor General acknowledges that the statute requires the EEOC to "attempt conciliation" before filing suit, and apparently recognizes that a court can

enforce compliance with that requirement. U.S. Br. 20; *see also id.* 53 n.22.[1] But the Government then asserts that compliance is conclusively established by submitting the EEOC's "letter inviting [the employer] to conciliate" and another letter "noting that conciliation had failed to yield an acceptable agreement." U.S. Br. 21-22.

This perfunctory and self-serving standard is tantamount to denying judicial enforcement of the conciliation precondition altogether. At best, the EEOC's letters would show that *the Commission* is satisfied that it has met it conciliation obligation. *But see, e.g.*, *Dent v. St. Louis-San Francisco Ry. Co.*, 406 F.2d 399, 401 (1969) (EEOC sent similar letters even though, in fact, "there was no conciliation" due to an agency backlog). But accepting an agency's representation that it believes it has complied with the law amounts to no *judicial* review at all.

Nothing in the statute justifies such toothless review. In construing a similar statutory precondition to litigation in *Woodford v. Ngo*, 548 U.S. 81 (2006), this Court held that a requirement that prisoners exhaust available administrative remedies was not satisfied by the prisoner's mere

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[1] The Government asserts in a footnote that the Commission need not conciliate "a case involving a pattern or practice of employment discrimination under 42 U.S.C. § 2000e-6(a)." U.S. Br. 20 n.4. But it does not explain why or urge affirmance on that novel and baseless theory. *See, e.g.*, *EEOC v. CVS Pharmacy*, No. 14-cv-863, 2014 WL 5034657, at *3-*4 (N.D. Ill. Oct. 7, 2014.) (rejecting argument). Nor did the Government make that argument below or in its response to the petition for certiorari.

filing of a grievance that was rejected. Instead, "*proper* exhaustion of administrative remedies is necessary." *Id.* at 84 (emphasis added). This Court applied the same insight to Title VII's preconditions in *EEOC v. Shell Oil*, 466 U.S. 54 (1984), when it held that the EEOC is empowered to issue investigative subpoenas only upon filing of a "*valid* charge" of discrimination. *Id.* at 65 (emphasis added). Likewise, when Congress made conciliation a precondition to the EEOC's authority to file a lawsuit, Congress plainly meant *proper* conciliation, *i.e.*, a good faith, genuine conciliation effort. Otherwise, what is the point of the provision? And while there may be some disagreement over what proper conciliation entails, *see infra* § V, there should be no dispute that the Government's proposed rule is woefully inadequate to enforce *any* reasonable conception of that requirement.

II. The Text And History Of Title VII Do Not Demonstrate Congress's Intent To Preclude Judicial Enforcement Of The Conciliation Precondition.

Perhaps recognizing as much, the Government quickly moves on to its principal, categorical argument that "Congress did not intend judicial review of the Commission's conciliation efforts." U.S. Br. 32 (capitalization altered). But nothing the Government points to in the text or history of Title VII's conciliation precondition overcomes the ordinary presumption that conditions precedent to suit are subject to judicial enforcement.

A. The Statutory Language Does Not Give The Commission Unreviewable Discretion Over The Process For Conducting Mandatory Conciliation.

1. The Government claims that Title VII's "text commits the process" of conciliation "to the agency's discretion" because it provides "no standards by which to judge the Commission's conciliation process." U.S. Br. 17; *see also id.* 36-39 (arguing that review of conciliation would be barred under the Administrative Procedure Act (APA) by the exception for matters "committed to agency discretion by law"). This argument fails for two fundamental reasons.

First, the implication that Congress intended to give an agency unreviewable discretion arises only in "those rare circumstances," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993), in which a statute is "drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citation omitted); *see also id.* at 405 (holding exception inapplicable to provision permitting agency to fund roads that cut through public parks if no "feasible and prudent" alternative route exists) (quoting 23 U.S.C. § 138).

The Government cannot seriously claim that the conciliation process was committed to agency discretion under this test, having acknowledged that courts have long enforced a comparable provision of the National Labor Relations Act (NLRA) that requires good-faith bargaining between employers and unions. *See* U.S. Br. 38; *see also Ford Motor Co.*

v. EEOC, 458 U.S. 219, 226 n.8 (1982) (noting that Congress modeled parts of Title VII on NLRA).[2] They also regularly enforce local rules requiring parties to participate in court mediation programs in good faith. *See* Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 383 (2011); *see also id.* at 385 nn. 94-95 (noting that dozens of state and federal laws require good faith mediation participation). Likewise, four decades of judicial experience have demonstrated that Title VII's conciliation provision is susceptible of judicial elaboration. And petitioner has proposed a number of specific rules grounded in those cases, the text and purposes of the statute, and common understanding of what meaningful conciliation requires in this context. *See* Petr. Br. 37-40.

Second, the lack of detail regarding conciliation procedures in the text of Title VII reflects nothing more than Congress's expectation that the Commission would issue implementing regulations, as it has with respect to other preconditions to suit indisputably subject to judicial review. *See* 29 C.F.R. Part 601. The courts have been required to develop conciliation standards only because the Commission

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[2] The Government notes that the NLRA imposes other more specific obligations as well, U.S. Br. 38, but does not deny that courts (and the NLRB, through regulations) have given the good-faith bargaining obligation independent meaning. *See Littleton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 200 (1991) (explaining that the "unilateral change doctrine," which prohibits employers from changing employment terms during labor negotiations, "represents the Board's interpretation of the NLRA requirement that parties bargain in good faith").

itself has steadfastly declined to do so, as part of its concerted effort to ensure that its compliance with the conciliation precondition is never reviewed by the judiciary. *See* U.S. Br. 38 n.12.

It makes perfect sense that Congress would prefer that the details be established by regulation. The Commission is well positioned to set basic requirements that ensure a process recognizable as conciliation and likely to achieve the statutory goal of informal settlement, while maintaining appropriate flexibility. Congress also would have expected the Commission to develop rules that do not infringe upon the agency's statutory authority to decide for itself what constitutes an acceptable conciliation agreement.

At the same time, however, Congress would have understood that courts would hold the Commission to the standards it set in any regulations reasonably interpreting the statute. *See Shell Oil*, 466 U.S. at 67 (noting that the Commission's regulations governing the content of discrimination charges are "binding on the Commission as well as claimants"). After all, it is one thing to trust an agency to develop appropriate standards for its own conduct *ex ante* through notice-and-comment rulemaking (which is itself subject to judicial review) and quite another to trust that absent judicial review each of the EEOC's thousands of employees will engage in genuine conciliation efforts in tens of thousands of cases across the country.

Thus, in *Shell Oil*, this Court enforced the requirement that an administrative subpoena be predicated on a valid charge of discrimination, even while acknowledging that the "statute itself

prescribes only minimal requirements." 466 U.S. at 67. Instead of concluding that the lack of statutory detail precluded judicial enforcement, the Court recognized that Congress had charged the Commission with responsibility for establishing more detailed requirements through regulations, which this Court then interpreted in light of considerations "drawn from the structure of Title VII" and its purposes. *Id*. at 68.[3]

Of course, the Commission has refused to issue binding regulations construing the conciliation provision. But an agency cannot avoid judicial enforcement of one statutory obligation by failing to undertake another.

2. Nor does judicial review of the conciliation process "almost inevitably" result "in a prohibited inquiry into the substantive reasonableness of particular offers." U.S. Br. 17. The Government does not dispute that courts affording judicial review to

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[3] The Government notes that in *Shell Oil*, the Court declined to "look behind the charge to determine whether it was supported by a sufficient factual basis." U.S. Br. 23. But the Court refused to look behind the charging document because the statute conditioned the Commission's subpoena power on the "existence of a charge that meets the requirements set forth" in the statute, and those requirements specify that the charge contain particular information, not that it be supported by any quantum of proof. *Shell Oil*, 466 U.S. at 65 (citing 42 U.S.C. § 2000e-5(b)). Enforcing the statutory conciliation requirement would obviously require a different inquiry because the requirement is different. In any event, petitioner does not ask for review of the evidentiary support for the EEOC's charges, or even the substance of its settlement demands.

conciliation have made clear they will not second-guess the Commission's decisions on the substance of an acceptable conciliation agreement. *See id.* 50. Other than citing a handful of decisions allegedly violating this established principle, *see id.* 50 & n.21, the Government offers no explanation why it is impossible to develop rules that police the outer boundaries of a process of genuine conciliation without invading the Commission's substantive discretion.

Indeed, in a concession that seriously undermines its categorical assertion that its compliance with its duty to conciliate is unreviewable, the Government agrees that a court can inquire whether the Commission has attempted conciliation with one employer then sued another, or seeks to litigate claims it did not attempt to conciliate, without invading the EEOC's substantive discretion. *See* U.S. Br. 53 n.23. Moreover, the Commission itself has begun to develop internal (unenforceable) guidelines to elaborate its conciliation obligation in purely procedural terms. *See* Petr. Br. 42 & n.33. A court likewise can inquire whether the Commission gave defendants reasonable time to consider a settlement demand, or the basic information they need to make an informed settlement decision, without knowing *anything* about the substance of the offer. *See* Petr. Br. 37-40.

3. The Government nonetheless attempts to argue that the Congress would not have intended judicial enforcement of the conciliation requirement because, unlike other Title VII preconditions, the conciliation provision cannot be enforced without what it ominously describes as "extensive collateral

proceedings," but what is in fact a straightforward assessment of the basic process employed by the Commission. U.S. Br. 24-25. This argument fails for multiple reasons as well.

First, the conciliation precondition is not unique in requiring a "collateral" inquiry. For example, courts frequently must decide whether to toll Title VII's time limits in light of the facts of the case and the litigation conduct of the parties. *See Zipes v. TWA, Inc.*, 455 U.S. 385, 392-97 (1982); *see also Occidental Life Insurance Company of California v. EEOC*, 432 U.S. 355, 373 (1977) (courts may grant relief if a defendant is "significantly handicapped in making his defense because of an inordinate EEOC delay" in filing suit).

Second, enforcing the conciliation obligation does not involve a "searching inquiry" under "an amorphous standard." U.S. Br. 25. It would take little effort, for example, to determine whether the Commission has explained the basis of its monetary demands or identified the claimants for whom it seeks relief. *See* Petr. Br. 39-40. While concerns about unduly complicated collateral proceedings might inform how courts (or EEOC regulations) construe the content of the conciliation obligation, they provide no basis to conclude that Congress intended no court to enforce *any* conciliation requirement, no matter how straight-forward.

Finally, even if the Government can hypothesize reasons why Congress *could* have treated conciliation differently from the other preconditions, the fact remains that the text of Title VII draws no such distinction. That uniform textual treatment strongly suggests that Congress did not view the conciliation

requirement as uniquely incompatible with judicial enforcement.

B. The Confidentiality Provisions Do Not Demonstrate That Congress Intended To Preclude Judicial Enforcement Of The Conciliation Precondition.

The Government is also wrong in arguing that Title VII's confidentiality provisions are incompatible with judicial enforcement of the conciliation precondition. Rather than read the confidentiality provisions as rendering the conciliation obligation essentially precatory, the Court should adopt an interpretation that gives meaningful effect to all of the statute's provisions. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

1. The Government does not dispute that placing conciliation information under seal would permit effective enforcement of the precondition while also complying with the statute's prohibition against the Commission making conciliation information public. The most it can say is that filing information under seal is unusual. U.S. Br. 26. But it is no more unusual than the confidentiality provision itself. And reading a confidentiality provision to require that information be placed under seal is far less surprising than reading it to preclude, *sub silentio*, enforcement of a condition precedent to suit and any meaningful review of agency action.

Nor does the provision's prohibition against using anything "said or done during" conciliation "as evidence in a subsequent proceeding," 42 U.S.C. § 2000e-5(b), indicate that Congress intended to preclude judicial review. The Government accepts

that the confidentiality provision was part of the original statute under which suits could only be brought by private parties, who had no duty to conciliate. U.S. Br. 29-30; Petr. Br. 28-29. Consequently, when Congress made conciliation a precondition to EEOC suit in 1972, the confidentiality provision's only function was to prohibit using conciliation information to prove or disprove discrimination. Petr. Br. 28-29.

The Government suggests to the contrary that even prior to 1972, the confidentiality provision served a broader purpose by precluding employers' attempts to assert conciliation defenses to private suits. *See* U.S. Br. 27 n.7, 30. But the Solicitor General's citations do not remotely support that assertion. The Government relies on a handful of cases arising at a time when the EEOC was so understaffed and overburdened that it routinely issued right-to-sue letters before attempting any conciliation. In a number of those cases, employers attempted to defend against the subsequent private suits by claiming that the Commission had failed to engage in any conciliation effort at all. Because the defense was a complete lack of conciliation, and because the lack of conciliation was generally undisputed, so far as can be determined, none of the employers in those cases attempted to introduce anything "said or done" during conciliation as part of their defense. *See, e.g.*, *Miller v. Int'l Paper Co.*, 408 F.2d 283, 288-89 & n. 24 (5th Cir. 1969) (collecting cases); *Dent v. St. Louis-San Francisco Ry. Co.*, 406 F.2d 399, 401 (5th Cir. 1969); *Johnson v. Seaboard Air Line R. Co.*, 405 F.2d 645, 647 (4th Cir. 1968);

Choate v. Caterpillar Tractor Co., 402 F.2d 357, 358 (7th Cir. 1968).

Moreover, the courts of appeals uniformly rejected conciliation defenses against private plaintiffs, not on the ground that the confidentiality provision precluded them, but rather because the statute unambiguously failed to condition the private right to sue on the Commission's fulfillment of its conciliation obligation and because it made no sense to make the complainant "the innocent victim of a dereliction of statutory duty on the part of the Commission." *Dent*, 406 F.2d at 403 (quoting *Choate*, 402 F.2d at 361); *see also Miller*, 408 F.2d at 290; *Johnson*, 405 F.2d at 648-53. There is no reason to believe that Congress enacted the confidentiality provisions to preclude a near-frivolous defense foreclosed by other language in the statute and simple common sense.[4]

The Government must, then, show that Congress nonetheless intended the confidentiality provisions to take on an expanded role after 1972, performing one additional, peculiar function: precluding enforcement of the just-enacted conciliation precondition. But the Government can make no such showing. At best, the Government's brief suggests that Congress gave little thought to the interplay between the confidentiality

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[4] The Government's interpretation would also make it difficult to implement this Court's decision in *Ford Motor Company v. EEOC*, 458 U.S. 219, 228 (1982) – which adopted a rule that "toll[s] the further accrual of backpay liability if the defendant offers the claimant the job originally sought" – when the offer was made during conciliation.

provision and enforcement of the conciliation precondition. But that hardly suffices to overcome the presumption of enforceability or justifies rejecting a reading that allows both sets of provisions to play a meaningful role in the statute.

2. In any event, because confidentiality is waivable, it does not preclude judicial review of the EEOC's compliance with the conciliation precondition. *See* Petr. Br. 30-33.

The Government quibbles with petitioner's statement that confidentiality can be "deemed waived" by a defendant when it asserts a conciliation defense, noting that the statute requires the waiver to be "in writing." U.S. Br. 28. However, as to the defendant, the filing of a written motion to dismiss or for summary judgment is sufficient. Even if not, the Court can make clear that the motion must be accompanied by an express waiver statement.

The Government also says that a defendant's willingness to waive confidentiality "does not mean that the Commission or the charging party consents." *Id.* 28. But petitioner never suggested otherwise. Instead, because proving satisfaction of the conciliation precondition is the EEOC's burden, it must either file sufficient waivers of confidentiality or have its case dismissed for lack of proof. *See* Petr. Br. 30-31.[5] The Government makes no attempt to explain why that reasoning is wrong.

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[5] To the extent private claimants are involved in the conciliation, it is entirely appropriate to require them to cooperate with the EEOC's prosecution of the case by waiving confidentiality if they wish the case to proceed.

3. Nothing in petitioner's interpretation conflicts with the purpose of the confidentiality provisions. The Government says that "judicial review of the Commission's conciliation efforts subverts" Congress's "goal . . . to protect the confidentiality of conciliation talks so the parties could communicate openly without fear that doing so would prejudice them in litigation." U.S. Br. 29. But that goal is met by prohibiting use of what was said or done in conciliation to prove or disprove the merits of a discrimination claim, consistent with the federal rule of evidence designed to promote the same end. *See* Fed. R. Evid. 408(a). On the other hand, allowing courts to review some limited conciliation information to decide whether the EEOC has undertaken the minimal steps necessary to permit genuine conciliation directly *advances* the fundamental purposes of the statute.[6]

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[6] In addition, there is scant evidence Congress was concerned about protecting the EEOC from public scrutiny of its conciliation conduct. *See generally EEOC v. Associated Dry Goods*, 449 U.S. 590, 596, 599-600 (1981). By its terms, the statute only prohibits the Commission and its employees, not employers, from publicly disclosing what is said or done in conciliation. 42 U.S.C. § 2000e-5(b); *see also* 42 U.S.C. § 2000e-8(e) (prohibiting Commission employees from publicly disclosing results of investigation prior to suit). The statute likewise permits using conciliation information as evidence with the written consent of the "persons concerned," 42 U.S.C. § 2000e-5(b), a term that is used pervasively in the statute to refer to claimants and potential defendants, not the Commission, which is referred to by name, *see id.* § 2000e-5.

C. The Statutory History Does Not Support The Government's Interpretation.

The Government argues that the 1972 amendments were enacted against the backdrop of "existing law" under which "conciliation had not been subject to judicial review." U.S. Br. 30. But that mixes apples and oranges. Existing law had simply held that failure to conciliate was no defense against *private* litigation, because Congress had failed to make conciliation a precondition to private suits. *See supra* pp. 11-12. To the extent Congress was aware of these decisions, it would have understood that their necessary implication was that if Congress *had* made conciliation a precondition to litigation, the courts *would have* reviewed the EEOC's compliance with the conciliation mandate.

III. The Government's APA Argument Is Irrelevant And Meritless.

The Government asserts that under "basic principles of administrative law, the Commission's conciliation process is not reviewable because it is not final agency action" under the Administrative Procedure Act. U.S. Br. 32. That argument gets the Government nowhere, for two reasons.

First, the Government's APA musings are entirely beside the point. The Solicitor General's claim that "petitioner does not contend that Title VII itself provides for judicial review of the Commission's conciliation process," U.S. Br. 32-33 n.11, is inexplicable. That is *exactly* what petitioner has argued: Title VII expressly makes conciliation a condition precedent to suit and it is well established that courts may enforce such conditions in the

normal course of adjudicating a statutory claim. Enforcement of these preconditions arises not from any principle of administrative law but rather from the unremarkable presumption that when Congress requires that certain acts be taken prior to commencement of litigation, failure to satisfy the precondition bars the suit. *See* Petr. Br. 18-22; *United States v. Zucca*, 351 U.S. 91 (1956) (enforcing condition precedent to Government denaturalization suit without any reference to administrative law).

Second, even if the APA shed light on the question presented, it would not help the Government, which focuses on the wrong agency action. The question would not be, as the Solicitor General contends, whether "the Commission's conciliation process" standing in isolation constitutes final agency action or failure to act. U.S. Br. 32. Rather, the question would be whether filing suit without having satisfied the conciliation precondition is reviewable as final agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). It would be. Filing a complaint is an "agency action." *See FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 238 n.7 (1980) ("We agree with [respondent] and the Court of Appeals that issuance of the complaint is 'agency action.'"); *AT&T v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001) (same). And when filing a complaint constitutes the culmination of the agency's investigative or adjudicative process, it is *final* agency action. *See, e.g.*, *AT&T v. EEOC*, 270 F.3d at 977 ("[T]here clearly would be final agency action if the Commission filed a lawsuit against AT&T."); *cf. Standard Oil Co. of Calif.*, 449 U.S. at 239-45 (holding that filing of an *administrative*

complaint was not final agency action because it would be followed by further administrative proceedings, but noting that upon completion of the proceedings, the administrative decision may be subject to judicial challenge for failure to satisfy a precondition to filing the administrative complaint).[7]

Of course, such an APA question would never actually arise because anyone sued by an agency "will simply defend itself against the suit" rather than bringing a separate APA claim. *AT&T v. EEOC*, 270 F.3d at 975. But that simply shows that the Government's APA argument is pointless as well as wrong.

IV. Judicial Enforcement Of The Conciliation Precondition Does Not Harm Title VII Enforcement.

The parties agree that Congress strongly preferred that Title VII claims be resolved through conciliation and voluntary compliance rather than litigation. Conciliation agreements "bring[] defendants into 'voluntary compliance' and end[] discrimination far more quickly than could [EEOC] litigation proceeding at its often ponderous pace." *Ford Motor Co.*, 458 U.S. at 228. They conserve Commission resources and allow employers to resolve claims quickly and confidentially, when the publicity of litigation might otherwise compel them to fight to

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[7] As previously explained, the conciliation requirement is not so vague as to constitute a matter committed to agency discretion by law. *See supra* pp. 4-7.

clear the company's name. *See Associated Dry Goods*, 449 U.S. at 600 n.16.

None of these benefits can accrue unless the Commission engages in good faith, genuine conciliation efforts. The Government does not dispute, for example, that the fiduciary duty an employer (or its insurer) owes its shareholders precludes simply acceding to EEOC demands, particularly for large sums of money, absent basic information about the Commission's claims. *See* Am. Insurance Ass'n Br. 3, 5-6 (explaining that "an insurer needs the EEOC's help before it can authorize payment, due to insurers' fiduciary obligations to their stockholders and legal obligations to regulators not to pay claims unless there are sufficient indicia that they have merit").

The United States nonetheless insists that judicial enforcement of the conciliation requirement is entirely unnecessary and, in fact, would impede Title VII enforcement. U.S. Br. 39-48. Both claims are wrong, belied by the experience in the great majority of the country under federal appellate decisions that have long deemed the conciliation duty enforceable.

1. There is reason to doubt the Government's assertion that the EEOC can be trusted to engage consistently in good faith conciliation without any judicial supervision. *See* Petr. Br. 46-49; Retail Lit. Ctr. Br. § I.A; EEAC Br. § II; Am. Insurance Ass'n Br. 7-10. But more importantly, the very fact that Congress made conciliation a statutory requirement demonstrates that *Congress* did not believe that the Commission's employees should be left to their own devices. As the Government notes (Br. 30-31),

settlement negotiations are almost always a matter left to agency discretion – agency officials are allowed to decide for themselves whether to attempt informal settlement and can choose to file suit and negotiate later on a case-by-case basis. But the highly divided Congress that enacted the 1972 amendments treated the EEOC very differently, subjecting that traditional discretion to statutory control. *See* Retail Lit. Ctr. Br. 29-30. Having taken that extraordinary step, it is difficult to believe that Congress nonetheless intended to leave compliance with that limitation on agency discretion to the agency's discretion.

Indeed, everything the Government points to – available scrutiny from Congress, presidential appointment and Senate confirmation of EEOC commissioners, and the Commission's incentives to settle cases to preserve resources, U.S. Br. 46-48 – are reasons why Congress might have declined to make conciliation a mandatory precondition to suit in the first place. But Congress made a different choice. The Government may believe that Congress's distrust was unwarranted or has outlived its justification. Petitioner disagrees. But the parties' views don't matter: until the EEOC persuades Congress to revise the statute, it must operate under the restrictions Congress enacted as part of the 1972 compromise.

2. The Government is also wrong in claiming that even modest judicial involvement in policing the Commission's conciliation obligation would undermine Title VII enforcement.

The Government argues that enforcing the conciliation obligation will give employers "every incentive" to forego meaningful negotiations in favor

of stockpiling exhibits for a conciliation defense. U.S. Br. 40. After all, the Government says, employers can always settle after the suit is filed and the defense fails. *Id.* But as petitioner and its amici have explained, and the Government simply ignores because it has no answer, that strategy is fraught with risks that few employers are willing to take. One of the reasons the EEOC successfully conciliates so many of its claims – even though circuits have been enforcing the conciliation precondition for decades – is that the filing of a government lawsuit publicly accusing a company of engaging in reprehensible discrimination imposes public relations costs (in addition to significant litigation expenses) that cannot be undone by a post-suit settlement. *See* Retail Lit. Ctr. Br. 17-18.

The Government's argument also assumes that prevailing on a conciliation defense "allows employers to 'avoid liability for unlawful discrimination' because the agency should have conciliated differently." U.S. Br. 42-43 (quoting Pet. App. 2a). But in reality, a successful defense ordinarily leads to more conciliation, not evading trial altogether. *See, e.g.*, *EEOC v. Klingler*, 636 F.2d 104, 107 (5th Cir. 1981) (conciliation failure results in stay pending further conciliation); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (1981) (affirming dismissal without prejudice to refiling once conciliation obligation fulfilled).[8] Accordingly, the defense offers little to

[8] Failure to satisfy a condition precedent to suit usually calls for dismissal without prejudice to refiling if the condition is later met. *See, e.g.*, *Costello v. United States*, 365 U.S. 265, 284-

employers who have no "desire to see their adversary across the negotiating table again." Pet. App. 17a.

The United States nonetheless argues that a conciliation defense is a "potent weapon" for delay, and says that this case "illustrates the point." U.S. Br. 43-46. The latter claim is based on a mischaracterization of the proceedings below. *See* Cert. Reply 3-4. More than three years after suit was filed, this case is no closer to resolution largely because of the EEOC's relentless motion practice and interlocutory appeal asserting its novel theory that the conciliation precondition is unenforceable.[9] Petitioner's discovery requests were limited and

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88 (1999) (dismissal of denaturalization proceeding due to Government's failure to satisfy precondition should be without prejudice); *Hallstrom v. Tillamook Co.*, 493 U.S. 20, 31-32 (1989) (same for private environmental suit filed in violation of notice precondition); *Criales v. American Airlines, Inc.*, 105 F.3d 93, 95 (2d Cir. 1997) (same for private Title VII suit filed before EEOC issued right-to-sue letter); *Sears, Roebuck & Co.*, 650 F.2d at 19 (same for failure to conciliate). In some instances, a court may instead issue a stay pending satisfaction of the condition. *See, e.g.*, *Rhines v. Weber*, 544 U.S. 269, 276-77 (2005) (stay to permit exhaustion of habeas remedies); *Sears, Roebuck & Co.*, 650 F.2d at 19 (noting district court's discretion to stay rather than dismiss for conciliation failure); *see also* 42 U.S.C. § 2000e-5(f)(1). On the other hand, when the Commission's conciliation failure is particularly egregious and prejudicial, dismissal with prejudice may be appropriate. *See* Fed. R. Civ. P. 11; *cf. Occidental Life Ins. Co.* , 432 U.S. at 373 (holding that "federal courts do not lack the power to provide relief" when undue EEOC delay prejudices defendant); *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 277 (7th Cir. 1980) (holding that conciliation violation is relevant to laches defense).

[9] *See* R. 20, 32, 45, 59, 60, 80.

entirely reasonable, including its sixteen inter-related requests for admission for each claimant, which EEOC was able to answer in a four-page chart that considerably narrowed the factual issues in dispute. *See* J.A. 55-59 (requests for admission); *id.* 79-81 (answers admitting, among other things, that the EEOC never informed petitioner of the basis for any of its monetary demands).[10]

In any event, enforcing *any* of Title VII's preconditions creates the possibility of meritless defenses and delay. *See, e.g.*, *Shell Oil*, 466 U.S. at 67-74 (addressing ultimately meritless objection to charge of discrimination). Congress could reasonably conclude that enforcing the conciliation mandate would avoid more delay than it caused, by ensuring a genuine opportunity for informal settlement before the EEOC resorts to what is often painfully prolonged litigation.

V. In The Absence Of EEOC Regulations, This Court Should Identify Several Principles That Elaborate The Conciliation Precondition.

As discussed, many of the Government's objections to any enforcement of the conciliation obligation arise from its complaints regarding the particular rules courts have adopted. That is, to a significant extent, a problem of the agency's own making. At any time, the Commission may issue

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[10] While petitioner initially objected to some discovery prior to resolution of the conciliation defense, it quickly dropped those objections and responded. *See* R. 42, p. 15 n.6.

regulations that, if reasonable, will displace those judicial constructions. *See Nat'l Cable & Telecom. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 982-83 (2005). In the meantime, petitioner has suggested a non-exhaustive list of reasonable requirements this Court could adopt based on existing case law, the statutory text, and common sense. *See* Petr. Br. 37-39. The Government's resistance to judicial enforcement of even these modest boundaries to the EEOC's discretion is unjustified.

The Government complains that "[c]ourts do not generally require civil litigants to" provide the other side in a conciliation information about their claims, "tell the other party on what terms they will settle," or abstain from "take-it-or-leave it offers." U.S. Br. 53. But that is because most civil litigants are not subject to a *statutory duty of conciliation* as a *precondition* to suit. Where Congress *has* imposed such a duty, courts have long enforced similar requirements. *See, e.g.*, *NLRB v. Acme Indust. Co.*, 385 U.S. 432, 435-36 (1967) (NLRA duty to bargain in good faith requires sharing information); *NLRB v. General Electric Co.*, 418 F.2d 736, 756-757 (2d Cir. 1969) (NLRB may find that offering "proposal on a take-it-or-leave-it basis" constitutes failure to bargain in good faith).

Other than insisting on being treated like a party free from any conciliation obligation, the Commission offers no particularized objection to most of petitioner's specific proposals. That is hardly surprising. How on earth, for example, can the EEOC object to having to tell an employer what it views as a "conciliation agreement acceptable to the Commission?" 42 U.S.C. § 2000e-5(b). Does it really

insist on the right to make the employer submit proposal after proposal until it rightly guesses what the Commission is after? Or does the EEOC want the right to declare conciliation a failure after an employer's first unsuccessful guess? And how can the Commission object to having to explain how it calculated its damages demand? After all, it will have to provide that explanation in court if the case goes to trial. The only reason to insist on the right *not* to disclose the calculation is to preserve the Commission's ability to make unsupported demands for money in the hopes that an employer will simply acquiesce, knowing that if the employer does not, the Commission can determine later what amount the law and the facts actually support.[11]

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[11] The Government does object to having to "identify every possible claimant at the conciliation stage," insisting that it should be allowed to wait to obtain that information "during conciliation or litigation." U.S. Br. 53-54 n.23. Why that information cannot be obtained during the initial investigation – during which the Commission may exercise its subpoena power to obtain "information . . . within the employer's control," *id*., the Government does not say. In any event, at the very least, the Government has no basis for objecting to the requirement that it identify all the claimants for whom it is demanding monetary or other individualized relief. *See* Petr. Br. 39-40. The Government cannot legitimately demand money or a job for a person it does not know to exist, and no responsible company official could agree to such a demand.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 26, 2014