No. 14-3653

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff/Appellant,

v.

CVS PHARMACY, INCORPORATED,
Defendant/Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 1:14-cv-00863
The Honorable John W. Darrah

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS & RULES

OTHER AUTHORITIES

INTRODUCTION

The EEOC alleges that CVS has engaged in a pattern or practice of resistance to the full enjoyment of rights secured by Title VII, in violation of Section 707 of the statute, 42 U.S.C. § 2000e-6. In its opening brief ("EEOC-Br."), EEOC explained that Section 707 authorizes it to challenge a pattern or practice of resistance to statutory rights, including the right of unfettered agency access. EEOC-Br.22-23, 26-33. Because Section 707(a) authorizes such challenges even where no charge has been filed, the pre-suit requirements are different and there is no free-standing obligation to conciliate. EEOC-Br.35-37. EEOC argued that a reasonable trier of fact could find that CVS's use of its Separation Agreement ("SA") constitutes a pattern or practice of resistance to its employees' protected rights to cooperate and communicate with EEOC. EEOC-Br.39-41.

In response, CVS ignores the statutory text while selectively excerpting positions EEOC has taken before the courts and Congress, quoting them out of context, and attempting to brand as "revisionist" the distinct legal arguments EEOC advances here. CVS's approach to the case law is much the same. This Court should not credit CVS's fruitless efforts.

ARGUMENT

1. CVS complains, at least seven times, that various aspects of EEOC's argument are "unprecedented," "novel," or "heretofore-unknown." CVS Brief ("CVS-Br.") 1, 9,

23, 35-36, 37, 46, 50. The implication, apparently, is that this Court should dismiss such arguments out of hand.

The infirmity of CVS's reasoning is plain. The novelty of a statutory argument has no bearing on its validity. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (recognizing that sexual harassment theory originated in EEOC Guidelines promulgated in 1980, sixteen years after 1964 Civil Rights Act); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (adopting sex-stereotyping theory of intentional discrimination twenty-three years after 1964 Act); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (recognizing same-sex harassment as valid theory of sex discrimination thirty-four years after 1964 Act). EEOC's arguments should stand or fall based on their merit, not vintage.

2. As explained, Congress used different language in its respective grants of authority in Sections 706 and 707. EEOC-Br.22. Whereas Section 706(a) empowers EEOC "to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title," Section 707(a), as amended in 1972, authorizes it to bring suit against "any person or group of persons [] engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." This linguistic variation was mirrored in other contemporaneous and later civil rights statutes, and was not accidental: it reflected Congress's intent to give the government an independent cause of action to protect the rights at stake, one that was

simultaneously broader in the conduct it could reach and narrower in applicable remedies. EEOC-Br.26-30. *See Gen. Tel. Co. of the NW, Inc. v. EEOC*, 446 U.S. 318, 333 (1980) (noting Congress's "general intent to accord parallel or overlapping remedies against discrimination") (internal citation and quotation marks omitted).

CVS responds, without authority or reason, that "Congress used the two phrases [i.e., "unlawful employment practices" and "resistance"] interchangeably." CVS-Br.31. CVS acknowledges the other parallel causes of action, CVS-Br.32-33, but offers another explanation: Congress chose to save itself some work by adopting the "pattern or practice of resistance" shorthand rather than rewriting the words specific to each statute. CVS-Br.32-33. This interpretation is devoid of legal or logical support. *See* EEOC-Br.27; *Russello v. United States*, 464 U.S. 16, 23 (1983) (declining to read different statutory terms as meaning the same because "Congress did not write the statute that way. We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."). Likewise, it makes no sense to ascribe the difference between the dual litigation authority provisions in Title VII and its analogues to Congress's (nowhere articulated) desire to cut corners in drafting.

Moreover, CVS's interpretation of Section 707(a)'s "pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter" as merely coextensive with Section 706's grant of authority over "unlawful employment

practices" would render Section 707 redundant. *See Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015) ("We have long held that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause is rendered superfluous, void, or insignificant.") (internal citations and quotation marks omitted). This was not Congress's view of the statute in 1972, and it has not been the Supreme Court's understanding since. *See* EEOC-Br.31.

Rather, both Congress and the Court have understood Sections 706 and 707 to serve different purposes. At least since the 1972 amendments, EEOC has had full authority under Section 706 to bring suit against private employers based on charges of "unlawful employment practices" under Sections 703 and 704—including "patterns or practices" of discrimination. *See, e.g.*, *Gen. Tel.*, 446 U.S. at 324 ("EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals."); *Serrano v. Cintas Corp.*, 699 F.3d 884, 895-96 (6th Cir. 2012) (holding that the *Teamsters* pattern-or-practice framework may apply in Section 706 cases).[1] Section 707, on the other hand, accomplishes something else:

> The 1972 amendments, in addition to providing for a § 706 suit by the EEOC pursuant to a charge filed by a private party, transferred to the EEOC the Attorney General's authority to bring pattern-or-practice suits on his own motion.… Senator Williams then noted that, upon the transfer,

[1] The term "pattern or practice" in Title VII parlance has two distinct uses: it may refer either to a method of proof or to a type of legal claim, depending on context. *See infra* at 6-8.

> "[t]here will be no difference between the cases that the Attorney General can bring under section 707 as a 'pattern or practice' charge and those which the [EEOC] will be able to bring." [118 Cong. Rec. 4081 (1972).]

Gen. Tel., 446 U.S. at 328.

Section 706 and its analogous provisions, with their focus on compensating specific victims (as individuals or classes), restrict the cause of action to specified unlawful practices, but allow for greater and more personalized remedies. The Section 707-type "pattern-or-practice of resistance" provisions, on the other hand, allow the government a freer hand to safeguard the statutes' operation, but offer only such relief as is necessary to further that purpose. EEOC-Br.29-30.

CVS calls this reasoning "nebulous" and claims no court has endorsed it. CVS-Br.33. While no court has addressed this argument in full, courts *have* endorsed aspects of it. *See* EEOC-Br.30, 31-33. CVS merely ignores *Serrano* and dismisses the other line of precedent because it involves non-employer defendants. CVS-Br.33-34. But these cases establish that, like the other statutory analogues, Section 707 actions may reach conduct beyond Section 703/704 "unlawful employment practices."

In any case, neither citation CVS proffers suggests otherwise. *See United States v. Lansdowne Swim Club*, 894 F.2d 83, 84 (3d Cir. 1990) (defendant was found to have "discriminated against blacks on the basis of race or color"; does not address general standard for "pattern or practice of resistance"); *Voting Rights: Hearings Before the H. Comm. on the Judiciary*, 86th Cong. 10-11, 13 (1960) (discussing meaning of phrase in bill

referring to "deprivation [of voting rights] … pursuant to a pattern or practice"; not a "resistance" statute).

CVS also insists, without support, that Section 707 actions should be reserved for the "worst of the worst" repeat Title VII violators. CVS-Br.10, 23, 26, 27, 31. Although Section 707 addresses repeated conduct, the "magnitude" of the violation is irrelevant to which enforcement provision EEOC uses. Indeed, EEOC has used Section 706, with its greater remedies (including punitive damages), to prosecute very serious, repeated violations. *See, e.g.*, Press Release, EEOC, Jury Awards $240 Million for Long-Term Abuse of Workers with Intellectual Disabilities (May 1, 2013) (EEOC v. Henry's Turkey Serv., No. 3:11cv00041 (S.D. Iowa); *see* 42 U.S.C. § 12117(a) (incorporating Section 706 enforcement authority))[2]; *see also Serrano*, 699 F.3d at 889 (challenging state-wide pattern or practice of sex-based discrimination); *Gen. Tel.*, 446 U.S. at 321 (alleging sex-based discrimination across four states).

3. CVS argues that the term "pattern-or-practice" refers only to a method of proving discrimination, and never to a type of legal claim. CVS-Br.28-30. It inventories case law, legislative history, and prior EEOC statements allegedly supporting this characterization. But CVS is wrong; its position is incompatible with the statutory language, and none of its purported "support" addresses the question here: whether, in addition to the "pattern-or-practice" framework of proof, there is also a Section 707(a)

[2] *Available at* http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm.

cause of action for a "pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." The plain language of the statute says "yes."

The *Teamsters* Court observed that Title VII's use of "'pattern or practice' … was not intended as a term of art, and the words reflect only their usual meaning." *Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977); *see* EEOC-Br.26-27. Accordingly, the Court noted Senator Humphrey's observation: "'(A) pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature.…'" 431 U.S. at 336 n.16 (quoting 110 Cong. Rec. 14270 (1964)). This language in *Teamsters* gave rise to the now-familiar "pattern-or-practice" framework of proof available under both Sections 706 and 707. *See, e.g.*, *Griffin v. Bd. of Regents of Regency Univs.*, 795 F.2d 1281, 1287 (7th Cir. 1986) ("The plaintiff must prove … that a pattern or practice exists and that it was the defendant's regular operating procedure.") (citing *Teamsters*, 431 U.S. at 336).

EEOC has never disputed that one meaning of "pattern-or-practice" is a method of proving discrimination. EEOC has consistently advocated this position in court, as CVS points out—often over the objection of defendants who sought to limit the applicability of the pattern-or-practice method of proof to Section 707 actions. *See, e.g.*, *Serrano*, 699 F.3d at 891-92; Br. for Appellant at 40, EEOC v. The Geo Group, Nos. 10-2088 & 10-1995 (9th Cir. 2014) (hereinafter "Geo Brief").[3]

[3] *Available at* http://www.eeoc.gov/eeoc/litigation/briefs/geogroup.html.

But EEOC's position that "pattern-or-practice" describes a method of proof is not inconsistent with its view that the phrase may also characterize certain Title VII *claims*. Both positions are consistent with the plain language of the statute and with *Teamsters*. In Section 707, Congress incorporated an explicit reference to a "pattern or practice of resistance" to the full enjoyment of rights secured by the statute; thus, every Section 707 claim *must* be a pattern-or-practice claim. EEOC-Br.22. *See Teamsters*, 431 U.S. at 360 (describing proof framework in a "pattern-or-practice *suit*" under Section 707) (emphasis added).

CVS then argues that Section 707 claims cannot challenge anything other than discrimination, but its cited cases do not support its argument. CVS-Br.27-29. For example, CVS argues that *Teamsters* stands for the proposition that Section 707 "does not prohibit *distinct* misconduct; it creates an enforcement tool against *repeat* misconduct." CVS-Br.27. But *Teamsters* says nothing of the sort. The *Teamsters* Court addressed itself, unsurprisingly, to what was before it: discrimination by covered entities. 431 U.S. at 329. It had no reason to address potential Section 707 "resistance" claims, nor did it do so.[4] *But see id.* at 336 n.16 (stating that systemic racial discrimination or "repeatedly and regularly engag[ing] in acts prohibited by the statute" are *examples* of a "pattern or practice" of denial of rights, not the entire universe).

[4] The same holds true for the parties in *Teamsters*, including EEOC and the Justice Department. *See* CVS-Br.30.

Other Supreme Court excerpts CVS cites are mere passing references, many in footnotes, where the Court's focus was plainly on a different point. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 n.4 (2006) (passing reference in dicta noting generally that governmental Title VII suits have a separate jurisdictional grant); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002) (after passing reference in dicta to Attorney General's authority pre-1972 Amendments, explaining that "[t]hose amendments authorize the courts to enjoin employers from engaging in unlawful employment practices," citing Section 706(g)(1)); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 455 n.29 (1986) (in dicta, summarizing legislative history, noting that the Senate originally deleted EEOC's litigation power from the 1964 Act but eventually restored it with the 1972 Amendments); *Gen. Tel.*, 446 U.S. at 327 (in Section 706 suit, passing reference in summarizing legislative history of 1964 Act); *but see id.* at 328 ("The 1972 amendments … *transferred to the EEOC the Attorney General's authority to bring pattern-or-practice suits on his own motion*.") (emphasis added).

CVS finds no more support in this Court's decisions that, like *Teamsters*, involve Section 707 challenges to a pattern or practice of discrimination and provided no reason to opine on any broader issue. *See Council 31, AFSCME, AFL-CIO v. Ward*, 978 F.2d 373, 375-76, 379 (7th Cir. 1992); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 308 (7th Cir.

1988); *United States v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 1*, 438 F.2d 679, 680 (7th Cir. 1971).[5]

Other cases CVS relies on are Section 706 cases, brought by private parties. Any incidental remarks in these opinions about Section 707 are, at best, dicta. In at least one instance, CVS simply misrepresents the court's opinion. *Compare Serrano*, 699 F.3d at 894 ("The Court in *Teamsters* then analogized the facts surrounding *discrimination claims* brought by the EEOC under § 707, *which are limited to allegations of a pattern or practice of discrimination*, to the facts in *Franks v. Bowman Transportation Co.*, … a class-action lawsuit.") (internal citation omitted) (emphases added), *with* CVS-Br.28-29. *See also Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487-88 (2d Cir. 2013) (finding arbitration agreement did not preclude private party from vindicating right to bring Section 706 "pattern or practice" claim); *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 716-17 (7th Cir. 2012) (under Section 706, explicating difference between intentional nature of "pattern-or-practice claims" and disparate impact claim at issue); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866 n.6 (7th Cir. 1985) (explaining difference between "pattern-or-practice" scenario and disparate impact, on the one hand, and individual claims, on the other); *Celestine v.*

[5] CVS also cites *EEOC v. Bass Pro Outdoor World, LLC*, 35 F. Supp. 3d 836, 853 n.10 (S.D. Tex. 2014). CVS-Br.29. In most respects, the *Bass Pro* court disagreed with CVS's position in this case. 35 F. Supp. 3d at 852 ("fully agree[ing]" EEOC may bring a Section 707 "pattern or practice suit anytime that it has reasonable cause to believe such a suit necessary," and "in amending § 707, Congress apparently intended that the EEOC have investigative and conciliatory authority[,] not that the EEOC be forced to engage in investigation and conciliation") (internal citations and quotation marks omitted).

Petroleos de Venezuella SA, 266 F.3d 343, 355 (5th Cir. 2001) (discussing availability of "pattern and practice" method of proof in a "private, non-class suit").

CVS's selective quotations from EEOC's appellate briefs are similarly unavailing. CVS-Br.30-31. Once again, CVS cites either briefs from cases involving actual discrimination claims (and thus, unremarkably, addressing themselves to discrimination), or one brief from a Section 706 case (Geo Group) arguing, as explained above, that the *Teamsters* evidentiary framework should not be limited to Section 707 actions. In any case, CVS's discussion of past EEOC arguments in unrelated cases presenting different questions is simply irrelevant to the question before this Court: whether Section 707's reference to "resistance" encompasses more than "unlawful employment practices."

Next, CVS presents a list of hypothetical Section 707 actions it alleges EEOC could bring if this Court should agree that "resistance" extends beyond the "unlawful employment actions" of Sections 703 and 704. CVS-Br.36. CVS undermines its own attempt at *reductio ad absurdum* by choosing examples that are (almost all) non-starters because they have been expressly precluded by the courts or by the Federal Rules of Civil Procedure.[6] CVS's examples are also, for the most part, inconsistent with EEOC's long-standing published guidance. *See Understanding Waivers of Discrimination Claims in*

[6] *See generally* Fed. R. Civ. P. 26(b)(1), 26(b)(2)(C); *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002) (describing permissible limitations on scope of discovery under federal rules).

Employee Severance Agreements, § III http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html (Jul. 15, 2009) ("A waiver in a severance agreement generally is valid when an employee **knowingly and voluntarily** consents to the waiver.") (emphasis in original); Enforcement Guidance on Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes, No. 915.002, 1997 WL 33159165, at *4 (Apr. 10, 1997) ("Nothing in this enforcement guidance diminishes Commission support for post-dispute agreements entered into knowingly and voluntarily to settle claims of discrimination or utilize alternative dispute resolution mechanisms.").[7] This court should not entertain CVS's exaggerations.

4. Next, CVS argues, again without support, that individuals' rights to file charges and participate in EEOC investigations are not among the "rights secured by" Title VII. CVS-Br.31-32. As explained, and as CVS admits, Title VII explicitly protects these rights. EEOC-Br.39 (citing 42 U.S.C. §§ 2000e-3(a), 2000e-5(b),(e)); CVS-Br.32. But CVS offers two reasons these "rights secured by" Title VII cannot be what they are: because they are ostensibly already protected by Title VII's anti-retaliation provision[8] and because paying someone not to exercise a right "is not, in ordinary parlance, 'resistance' thereto." CVS-Br.32. Neither argument fares any better.

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[7] *Available at* http://www.eeoc.gov/policy/docs/waiver.html.

[8] CVS's assurance here rings somewhat hollow in light of its agreement with the Sixth Circuit that a separation agreement expressly conditioning severance pay on promises not to file EEOC charges is *not* retaliatory under Title VII. CVS-Br.25 (citing *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490, 497-98, 500-01 (6th Cir. 2006)).

As to CVS's first response, EEOC has never suggested that Sections 706 and 707 are mutually exclusive. If this Court should find that CVS's use of the SA were to constitute retaliation under Title VII, anticipatory or otherwise, EEOC would treat it as such. The point here, however, is that EEOC's authority to protect individuals' charge-filing and cooperation rights does not depend on such a finding, so long as the agency acts to enjoin a pattern or practice of resistance to those rights under Section 707.

As to the second point, CVS conflates knowing and voluntary settlement of a legal claim with charge-filing and cooperation bans, which consistently have been held void as against public policy. *See* EEOC-Br.39-41. As described above, EEOC agrees that there is nothing wrong with the knowing and voluntary exchange of consideration for an individual's rights to sue in court. This is especially true because the individual's choice about his or her suit rights does not impair EEOC's ability to act in the public interest. *See Waffle House*, 534 U.S. at 287-88.

But charge-filing and cooperation rights are another matter. As noted, EEOC depends critically on the charge-filing and cooperation of individual employees as part of Title VII's enforcement scheme. EEOC-Br.39 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006)). *See also, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (emphasizing importance of "[m]aintaining unfettered access to statutory remedial mechanisms"); *EEOC v. Bd. of Governors of State Colls. & Univs.*, 957 F.2d 424, 431 (7th Cir. 1992) (observing that the "work of the EEOC [] depends upon employee

cooperation"); *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744 (1st Cir. 1996) ("[A]ny agreement that materially interferes with communication between an employee and the [EEOC] sows the seeds of harm to the public interest.").

CVS rejoins that EEOC need not use Section 707 to protect these rights because any infringing contractual terms are unenforceable anyway. CVS-Br.10, 23, 25, 34-35. Yet, as at least one commentator has observed, the laissez-faire approach CVS advocates—and that the courts have followed—has resulted in the persistent inclusion of unenforceable provisions in modern contracts, an "especially acute" problem in the employment context. Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 Ohio St. L.J. 1127, 1127 (2009). As Sullivan argues, by prioritizing maximal enforcement over deterring this practice, "the courts are unwittingly permitting, indeed encouraging, injustice to individuals who are not parties." *Id.* at 1132.

As to why a party would knowingly incorporate an unenforceable contract provision, Sullivan explains:

> [T]he obvious reason why one party would seek a clause it knew to be unenforceable is that it believed the other party to be unaware of the fact and likely to remain unaware of it. This might be because the second party lacks sophistication and legal counsel. Further, at least in some contexts the insisting party might reinforce the clause's implicit message that it is enforceable as written.… Empirical evidence that employees are unaware of even their most basic rights—whether their employer needs a good reason to discharge them—suggests that it would not be hard to convince employees that an overbroad noncompetition clause is valid (or that a slanted arbitration regime is all they are entitled to). There is also some

> limited empirical evidence that employers in fact often draft clauses that are not enforceable as written.

Id. at 1136-37 (footnotes omitted).

As Sullivan explains, the fact that the anti-cooperation language may be unenforceable does little to address the harm perpetuated by its persistence in employment contracts. This Court has repeatedly recognized that the imposition of overbroad and ambiguous rules has a marked tendency to deter employees, and lay people in general, from engaging in otherwise permissible and even protected conduct. EEOC-Br.47-49.[9] To the extent that, as CVS notes (CVS-Br.25), some courts have declined to remedy this obstacle to EEOC's law enforcement efforts via Section 704's anti-retaliation provision, Section 707 affords EEOC an invaluable tool to address it in another way.

Lastly, CVS offers that the EEOC need not concern itself with anti-cooperation provisions or Section 707 "resistance" because the agency may simply assume the "minor burden of issuing a subpoena." CVS-Br.19. This suggestion is disingenuous. While the EEOC could issue subpoenas to employees who sign such agreements, that hardly addresses the issue here—that the SA interferes with employees' statutory rights. As the First Circuit observed:

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[9] CVS maintains that EEOC may not rely on any NLRA cases because "[t]hat statute does not require 'proof of coercive intent' to establish a violation." CVS-Br.38 n.4. CVS is wrong. EEOC uses these cases only for their recognition of the chilling and deterrent effect of overly broad rules.

> [Astra contends that] because the EEOC could obtain the information it seeks through the use of its subpoena power, there is no evidence of irreparable harm.… This boils down to a contention that employees who have signed settlement agreements should speak only when spoken to. We reject such a repressive construct. It would be most peculiar to insist that the EEOC resort to its subpoena power when public policy so clearly favors the free flow of information between victims of harassment and the agency entrusted with righting the wrongs inflicted upon them. Such a protocol would not only stultify investigations but also significantly increase the time and expense of a probe.

Astra, 94 F.3d at 745.

5. The plain text of Section 707(a) says that the government may bring suit "*whenever*" it "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." (Emphasis added.) Section 707(a) makes no reference to a charge of discrimination. EEOC-Br.23-24. Accordingly, this Court and others have recognized that EEOC may bring an enforcement action pursuant to Section 707 "on its own initiative"—i.e., without a charge of discrimination. EEOC-Br.23, 25-26.[10]

CVS terms EEOC's position "untenable," CVS-Br.46, but proffers an alternative nonsensical reading of Section 707. CVS argues that EEOC's reading of Section 707(e) renders its first sentence "superfluous," but CVS misunderstands the textual argument: § 707(a) established litigation authority for "pattern-or-practice of resistance" cases, § 707(c) transferred the Attorney General's functions (which did not include charge-

[10] As explained, legal authority supports this position notwithstanding CVS's creative efforts to construe these cases as saying something other than what they actually say. *Compare* EEOC-Br.25-26 *with* CVS-Br.48 n.6.

processing) to EEOC as of 1974, and the first sentence of § 707(e) gave EEOC "authority to investigate and act on a charge of a pattern or practice of discrimination." This sentence is not superfluous because it addresses something not covered in § 707(a) or (c). It is CVS who misreads the text in thinking that the second sentence in § 707(e)—"[a]ll *such actions* shall be conducted in accordance with the procedures set forth in [section 706]" (emphasis added)—refers to the civil action in § 707(a). Rather, the antecedent of "such actions" is plainly the word "charge" in the previous sentence.

Indeed, the two-year gap between the transfer provision and EEOC's § 707(e) authority is consistent with *EEOC's* interpretation of the statute, not CVS's. CVS-Br.47-48. If CVS were correct that EEOC could only ever act pursuant to a charge, and that § 707(e) described the full universe of EEOC's authority, there would have been little authority to transfer in 1974 apart from the pending litigation described separately in § 707(d). Rather, what *does* make sense is exactly what CVS dismisses out of hand: that EEOC was first given authority to act on charges, and then assumed authority over "pattern or practice of resistance" cases two years later.

Next, CVS claims that EEOC's reading of Section 707 results in a "nonsensical" scheme. CVS-Br.47. But as explained (EEOC-Br.29-30 and *supra* at 2-3, 5), there is nothing nonsensical about Sections 706 and 707 being tailored differently to serve different purposes. The charge-filing, investigation, and conciliation procedures of Section 706, which also apply to Section 707 cases based on a charge (*see infra* at 20 n.15),

make sense in the context of cases alleging narrower violations focused on individuals or defined classes, where greater remedies may be warranted. Such procedures serve no purpose in a "pattern-or-practice of resistance" case brought by the government to secure access to statutory rights.

What is also clear from the statutory language is that EEOC's obligation to conciliate is part of the charge-filing process in Section 706(b) and flows from the existence of a charge. EEOC-Br.36. The sole source of the EEOC's conciliation obligation is in Section 706, and the statute expressly ties the conciliation requirement to charge-filing.[11] *See id.*; *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("Title VII … imposes a duty on the EEOC to attempt conciliation *of a discrimination charge* prior to filing a lawsuit.") (emphasis added).[12]

Unable to change Title VII, CVS attempts to change the subject by suggesting that EEOC officials told the Senate HELP Committee the agency must conciliate in all cases. CVS-Br.41, 43. The EEOC officials were invited to testify generally about the state of EEOC's enforcement programs and policies, and that is what they both did. *See Oversight of the Equal Employment Opportunity Commission: Examining EEOC's*

[11] Title VII only contains one reference to conciliation outside of Section 706: Section 705(g)(4) empowers EEOC to conciliate, at an employer's (or union's) invitation, when its members threaten to refuse or refuse to cooperate in effectuating Title VII. That situation does not apply here.

[12] To the extent CVS suggests (CVS-Br.41) that *Mach Mining* holds otherwise, CVS is simply wrong. That said, if this Court should find that conciliation is required in this case, *Mach Mining* holds that the appropriate remedy is to send the case back to EEOC to seek voluntary compliance. 135 S. Ct. at 1656.

Enforcement and Litigation Programs, 114th Cong. (May 19, 2015) (statements of P. David Lopez, Jenny R. Yang).[13] The subject of Section 707 "pattern-or-practice of resistance" actions, which constitute a tiny fraction of EEOC's case load, did not arise. That the EEOC officials did not raise it affirmatively is of no consequence.

CVS then attempts to play "gotcha" with briefs EEOC has filed in other cases (CVS-Br.43)—again, to no avail. EEOC has never told any court that it categorically must conciliate in all cases, including those brought without a charge, and the CRST and Geo appeals are no exceptions. CRST was a section 706 case brought pursuant to two charges of discrimination; in the cited passage of the brief, EEOC explained that the adequacy of its conciliation efforts did not turn on whether the case was denominated "pattern-or-practice" or whether it had been brought under Section 706 or 707. Br. for Appellant at 62-63, EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (Nos. 09-3674, 09-3675, 10-1682) (8th Cir. 2012).[14] Likewise, the cited passage in the Geo brief simply argued that EEOC does not process *charges* any differently based on which statutory provision may be involved. Geo Brief, *supra*, at 46-47. EEOC's stated position in both briefs is consistent with its position here: where there is a charge, the full panoply of Section 706 procedures applies, including conciliation, and it makes no

[13] *Available at* http://www.help.senate.gov/imo/media/doc/Lopez3.pdf *and* http://www.help.senate.gov/imo/media/doc/Yang.pdf.
[14] *Available at* http://www.eeoc.gov/eeoc/litigation/briefs/crst.txt.

difference whether the claim is "pattern-or-practice" or under which statutory provision it arises. *See* EEOC-Br.36.

Next, CVS attempts to extract from Title VII's implementing regulations what it cannot get from the statute. But 29 C.F.R. § 1601.24(a) does not create a freestanding obligation to conciliate in EEOC cases that do not originate with a charge. EEOC-Br.36-37. The plain language of the regulation is tied to remediation of "unlawful employment practices," and as CVS itself acknowledges, there is no "unlawful employment practice" within the meaning of Title VII or its implementing regulations at issue in this case. CVS-Br.24. Thus, simply put, the regulation does not apply.

In addition to misunderstanding EEOC's position,[15] CVS contends this argument was waived because EEOC did not cite § 1601.24(a) in its opposition papers below. CVS-Br.49. First, as this Court has observed, "it is well settled that the waiver rule does not prevent a party from attacking on appeal the legal theory upon which the district court based its decision[.]" *Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., Inc.*, 782 F.3d 922, 927 (7th Cir. 2015) (internal citations and quotation marks omitted). Because the district court expressly relied on § 1601.24(a) in holding that conciliation

[15] CVS characterizes EEOC's position as being that the conciliation requirement applies to Section 706 cases only, CVS-Br.49-50, but CVS is incorrect. EEOC's position in this case, as before, is that the procedural requirements of Section 706(b) are implicated "when a charge is filed alleging an unlawful employment practice." EEOC-Br.37. Conciliation is required in those Section 707 cases filed pursuant to a charge. EEOC-Br.22. It is not required, however, in Section 707 "pattern or practice of resistance" cases that do not rely on a charge for their jurisdictional basis.

was required in this case, Op., R.33 at 8; A-8, waiver does not bar EEOC from challenging that ruling.

Regardless, EEOC did not "waive" this argument. EEOC has consistently argued that this case was not based on a charge and did not involve an "unlawful employment practice" within the statutory meaning of Title VII and, therefore, that conciliation was not required.[16] *See, e.g.*, R.27 at 6, 19-20. EEOC made this argument based on Title VII itself; a fortiori, the same rationale applies to the implementing regulation, which cannot create legal obligations not in Title VII. *See* 42 U.S.C. § 2000e-12(a) (delegation of rulemaking authority); 5 U.S.C. § 706(2)(C) (APA) ("The reviewing court shall … hold unlawful and set aside agency action … found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]").

Because EEOC squarely addressed this issue below, it was not waived. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *Fox v. Hayes*, 600 F.3d 819, 832 (7th Cir. 2010) ("Waiver is not meant as an overly technical appellate hurdle, … and because the defendants' [] argument was fairly presented throughout the dispositive pre- and post-trial motions, we will review it here.").

[16] CVS now argues that "this case *did* originate with a 'charge' of 'discrimination'—one filed by Ramos." CVS-Br.46. Although EEOC learned about the SA because it was attached to Ramos' charge, this case is unrelated to the investigation of that charge and did not use that charge as its jurisdictional basis. *See* EEOC-Br.at 3 & n.2, 35.

6. A reasonable trier of fact could find that CVS's regular use of the SA over a period of several years constituted a pattern or practice of resistance to the signatories' full enjoyment of their Title VII rights. EEOC-Br.38. Such a finding would rest on CVS's intentional inclusion of misleading language suggesting that signatories could not file EEOC charges and threatening them with liability for CVS's attorney's fees if they cooperated with EEOC without proper authorization from CVS. EEOC-Br.42-47.

CVS offers several unavailing responses. First, CVS (with its amici) emphasizes that severance agreements like the SA here are "standard," "typical," and "ubiquitous." CVS-Br.1, 2, 17. Even if so, that fact has no bearing on their merit. *See, e.g.*, *Fallacy: Appeal to Common Practice*, The Nizkor Project, http://www.nizkor.org/features/fallacies/appeal-to-common-practice.html (last visited July 8, 2015) ("[T]he mere fact that most people do something does not make it correct, moral, justified, or reasonable[.]"). *See also* CVS-Br.22-23 (conceding that portions of the SA are written in "legalese," but offering the excuse that "[s]uch is the nature of modern legal drafting.")[17] In fact, to the extent that impenetrable language like that in paragraphs 7, 8, 13, and 14 of the SA is commonplace, it demonstrates exactly why it presents a serious impediment to the rights of American workers and to EEOC's law enforcement responsibilities.

[17] CVS cites *Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996), as if that opinion endorses "legalese." CVS-Br.23. It does not. 73 F.3d at 153 ("Drafting is not the strong suit of § 5(c)'s authors.").

Next, CVS argues that EEOC cannot state a claim for intentional discrimination because it alleges that the charge-filing and cooperation provisions of the SA are so convoluted as to confuse employees about their Title VII rights. CVS-Br.11, 37-38. According to CVS, this is "a claim about the Agreement's *effects*—not CVS's *intent*." CVS-Br.37-38. As a matter of simple logic, CVS is wrong. A party may act with intent where it acts to confuse or mislead someone else, a concept well-recognized in the law. *See, e.g.*, 29 U.S.C. § 626(f)(1)(A) (ADEA, as amended by OWBPA, providing that a "knowing and voluntary" waiver must be "part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate"); *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997) (in debt collection action, observing that "the courts, our own included, have held … [that] the debt collector may not defeat the statute's purpose by making the required disclosures in a form or within a context in which they are unlikely to be understood by the unsophisticated debtors who are the particular objects of the statute's solicitude"); *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 462 (7th Cir. 2000) (in trademark infringement action, observing that "the defendant's intent (or lack thereof) to palm off its product as that of another" is one of the most important elements in the "likelihood of consumer confusion" test).

Thus, there is nothing "inherent[ly] absurd[]" (CVS-Br.37) about the idea that CVS drafted the SA with the intent of confusing its signatories—as Sullivan observes,

this is exactly why companies include language they know to be unenforceable in employment contracts. *See supra* at 14; *see also* Sullivan, *supra* at 1137 ("Even if the other party obtains appropriate advice …, the mere existence of the clause is itself a deterrent to violating it. After all, … the individual putatively bound by the clause may not be prepared to expend the resources necessary to defend an action brought by the first party."). This is what EEOC alleges here.

What *is* absurd, on the other hand, is CVS's argument that, because EEOC alleges that the SA's language will likely chill or deter the exercise of signatories' Title VII rights, EEOC somehow cannot demonstrate that CVS acted intentionally. CVS-Br.37-38. In effect, CVS argues, for EEOC to allege an intentional pattern or practice of resistance by CVS, EEOC needs direct evidence of CVS's intent, in the form of a separation agreement that "directly barred charge-filing." CVS-Br.38. CVS's position flies in the face of decades of law in the Supreme Court and this Court holding that a Title VII plaintiff need not adduce direct evidence to support a claim.

As the Supreme Court explained, "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citation omitted). Thus, as this Court has observed repeatedly, an employer's intent to violate Title VII may be inferred from circumstantial evidence, even under the "direct method" of proof. *See,*

e.g., *Coleman v. Donahoe*, 667 F.3d 835, 845 (7th Cir. 2012) ("Under the 'direct method,' the plaintiff may avoid summary judgment by presenting sufficient evidence, either direct or circumstantial, that the employer's discriminatory animus motivated an adverse employment action. Of course, 'smoking gun' evidence of discriminatory intent is hard to come by."); *Benders v. Bellows & Bellows*, 515 F.3d 757, 764 (7th Cir. 2008) (in Title VII retaliation case, observing that "[b]ecause direct evidence—which essentially requires an admission by the employer—is rare, we also consider circumstantial evidence from which the fact finder could infer intentional discrimination.")

EEOC's argument here is simple: a trier of fact could infer, from the language in the SA, that CVS intended to deter its former employees' exercise of their Title VII rights to file charges and cooperate with EEOC by leaving them uncertain what might happen to them if they disobeyed CVS. EEOC-Br.42-47. That inquiry is properly framed via an objective standard asking whether the SA's language "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (internal citation and quotation marks omitted); EEOC-Br.51. The language of the SA is circumstantial evidence from which the trier of fact could make the ultimate inference of resistance to Title VII rights.

While not responding directly to this argument, CVS offers two principal but meritless rejoinders. First, CVS complains that EEOC did not adduce evidence that any

signatory, including Ramos, was actually deterred from charge-filing or cooperation. CVS-Br.10, 21. But the objective standard does not require such evidence; indeed, if retaliation cases required the charging party to show she was deterred from filing a charge, there could be no such cases. Nor does this render the chilling effect of the SA's language "purely hypothetical" or "mere speculation" (CVS-Br.21); rather, it means that the proper way to assess the effect of that language is by the objective reasonableness standard, which applies to retaliation claims involving threats. *See, e.g.*, *Heuer v. Weil-McLain*, 203 F.3d 1021, 1023 (7th Cir. 2000) (expressing "no doubt" that retaliation includes "efforts to induce a claimant to drop her claim" as well as "efforts to deter or prevent the filing of a claim").

Finally, CVS argues, based on contract law rather than the reasonable person standard, the SA would not confuse any reasonable person about his rights vis-à-vis EEOC. CVS-Br.18-19. As this Court has explained, though, contract law principles alone are not adequate to the task of assessing compliance with federal antidiscrimination law. *See Pierce v. Atchison Topeka & Santa Fe Ry. Co.*, 110 F.3d 431, 437 (7th Cir. 1997) (in pre-OWBPA ADEA case, relying on Title VII precedent in assessing "knowing and voluntary" nature of waiver; "The contract approach [] does not give sufficient weight to the federal interest in ensuring that the goals of the ADEA are not undermined by private agreements born of circumstances in which employees confront extreme economic pressures or lack information regarding their legal alternatives.").

Even if contract law alone were the standard by which to measure the SA, though, established doctrines of contract interpretation suggest that it limits employee communications with EEOC. For example, while CVS faults EEOC for looking at the provisions of the SA as a whole, CVS-Br.15, this approach is exactly what *CVS says* contract law requires. CVS-Br.18 (citing and quoting *Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 764 (7th Cir. 2010)). Moreover, CVS misleads this Court in stating, based on *one* case, that "courts recognize" that the term "charge" in a release is "'easily understood'" to mean lawsuits, not EEOC charges. CVS-Br.15 (citing *Romero v. Allstate Ins. Co.*, 1 F. Supp. 3d 319, 396 (E.D. Pa. 2014)). The *Romero* court observed that, because the word "charge" in Allstate's release appeared with synonyms for legal actions, it was "easily understood, particularly by businesspeople in Plaintiffs' positions," to refer to lawsuits. *Id.* But in CVS's SA, the release applies to "causes of action, lawsuits, proceedings, complaints, charges, debts, contracts, judgments, damages, claims, and attorneys fees," and Paragraph 8 involves proceedings in any court "or agency." EEOC-Br.3-4. *Romero*'s observations about the word "charge" are inapposite here.

CONCLUSION

For the foregoing reasons and those in EEOC's opening brief, the judgment of the district court should be reversed and the case remanded for further proceedings.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I, Elizabeth E. Theran, hereby certify that I electronically filed the foregoing brief with the Court via the appellate CM/ECF system this 16th day of July, 2015. I also certify that the following counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system:

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