14-1782

United States Court of Appeals
for the
Second Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

STERLING JEWELERS, INC.,
Defendant-Appellee,

ARBITRATION CLAIMANTS,
Intervenor.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK (NO. 08-CV-00706(A)(M)
(HONORABLE RICHARD J. ARCARA, DISTRICT JUDGE)

BRIEF ON BEHALF OF *AMICUS CURIAE*
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF DEFENDANT-APPELLEE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent company, and no publicly held company has ten percent or greater ownership in the Chamber.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief as *amicus curiae* in support of Defendant-Appellee Sterling Jewelers, Inc. ("Sterling") in this appeal.

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region in the country. A principal function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases which raise issues of concern to the nation's business community.

The businesses represented by the Chamber have a substantial interest in the proper interpretation of 42 U.S.C. § 2000e-5(b) with respect to the statutorily mandated duty of Plaintiff-Appellant Equal Employment Opportunity Commission ("EEOC") to conduct an investigation prior to bringing suit. In particular, the Chamber has serious concerns as to how the EEOC is currently administering and

[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to the filing of this brief. As required by Fed. R. App. P. 29(c)(5) and 2d Cir. Local Rule 29.1(b), *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

enforcing this provision. EEOC's failure to conduct a genuine pre-charge investigation, lately criticized by plaintiff and management attorneys and courts alike, directly impacts the accuracy of the claims brought by the EEOC and the quality of the conciliation process. Title VII expressly assumes that the EEOC will conduct a meaningful investigation before bringing the enforcement authority of the United States to bear against an employer. And genuine investigations can lead to conciliations that instruct employers as to their legal obligations regarding individual employment decisions and most efficiently eradicate and remedy an unlawful practice. Judicial review serves as an important and necessary check to ensure a genuine investigation, and this case exemplifies the need for such review.

SUMMARY OF ARGUMENT

The EEOC's position that its statutorily mandated pre-suit duty of investigation is not subject to judicial review contravenes the statutory text of Title VII and its relevant legislative history, and also the separation of powers principles undergirding the structural roles of administrative agencies and courts. Under the plain text of Title VII, the EEOC is required to refrain from bringing suit until it has discharged its statutory duties. 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(1). The language is mandatory rather than precatory, and the pre-suit duties are part of an integrated, multistep enforcement procedure, such that each step is sequential and builds on the prior step. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372

(1977). Conducting a genuine investigation before bringing suit helps ensure that the EEOC does not bring claims without an adequate factual basis—a goal that, absent bad faith on the part of EEOC, serves the interests of all parties by avoiding the inefficiency and unfairness of unjustified litigation. A genuine investigation is also necessary to define the charge at issue so that there can be a *meaningful* opportunity to conciliate. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676 (8th Cir. 2012). As with other parts of Title VII, Congress enacted a "careful blend of administrative and judicial enforcement powers," *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976), and the mandatory, unqualified nature of the EEOC's pre-suit investigation duty, *see Martini v. Fed. Nat'l Mort. Ass'n*, 178 F.3d 1336, 1346 (D.C. Cir. 1999), is an essential component of a process designed to ensure that conciliation takes place only after a meaningful investigation.

The EEOC's attempt to insulate its pre-suit duty to investigate from judicial review cannot be squared with the Supreme Court's "strong presumption in favor of judicial review of administrative action," *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), *superseded on other grounds by* REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302 (2005) (codified as 8 U.S.C. § 1252(a)(5)), which has been repeatedly upheld in the context of Title VII cases brought by the EEOC as well as Title VII suits brought by private plaintiffs and, more broadly, cases involving conditions precedent to suits contained in a variety of federal statutes. Where compli-

ance with a statute is unreviewable, violation of the statute is irremediable. Courts do not ordinarily presume that Congress intended to give its commands no teeth, and this Court should not do so here.

The EEOC's position also conflicts with relevant legislative history surrounding Title VII's enactment. Congress considered language that would have precluded judicial review, but intentionally removed that language prior to enacting the current language. This choice was motivated by concern about the absence of a check on the EEOC's power. In this appeal, the EEOC is attempting to eliminate, by judicial fiat, the accountability Congress imposed.

Finally, the EEOC's own performance record only underscores the need for judicial oversight. The EEOC has unfortunately become an agency that sues first and asks questions later. A report issued by Senator Lamar Alexander, the current Ranking Member and incoming Chairman of the Senate's Committee on Health, Education, Labor and Pensions, vividly illustrates this trend. *See* Sen. Lamar Alexander, *EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns About Important Anti-Discrimination Agency*, Appendix 1 (Summary of EEOC Sanctions First Awarded Since 2011) at 1-3 (Nov. 24, 2014), http://www.help.senate.gov/imo/media/FINAL_EEOC_Report_with_Appendix.pdf (hereinafter the "Alexander Report"). In light of its recent track record in the

courts, the EEOC is in a poor position to tell this Court it need not exercise any meaningful oversight over its pre-suit investigation and conciliation duties.

Indeed, the circumstances of this particular case highlight the necessity of judicial review as an essential check on agency action. Because the EEOC conducted no nationwide investigation into the pattern-and-practice violations it alleged in this case, the District Court's order granting summary judgment and dismissing the EEOC's nationwide pattern or practice lawsuit should be affirmed.

ARGUMENT

As the Court is aware, this appeal takes place against the backdrop of a case currently before the United States Supreme Court, *Mach Mining, LLC v. EEOC*, No. 13-1019. The question presented in that case concerns whether the EEOC's duty to conciliate discrimination claims prior to filing suit is subject to judicial review. In that case, the Seventh Circuit, standing alone, broke with over thirty years of settled circuit precedent to hold that the conciliation precondition to suit is unenforceable. *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 172-73 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014). This Court, however, has sided with those circuits that have held that the EEOC's mandatory pre-suit duty to conciliate *is* subject to judicial review. *See, e.g.*, *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1980); *see also EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1535 (2d Cir. 1996) (reviewing Commission's compliance with conciliation re-

quirement of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b)); *accord Serrano v. Cintas Corp.*, 699 F.3d 884, 904-05 (6th Cir. 2012); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676-77 (8th Cir. 2012); *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 467-69 (5th Cir. 2009); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259-61 (11th Cir. 2003); *EEOC v. Bruno's Rest.*, 13 F.3d 285, 288-89 (9th Cir. 1993); *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185-86 (4th Cir. 1981); *EEOC v. Zia Co.*, 582 F.2d 527, 532-34 (10th Cir. 1978).

This appeal concerns another precondition to suit—the EEOC's duty to *investigate* discrimination claims prior to filing suit. Consistent with its position on the conciliation precondition to suit, this Court should hold that whether the EEOC has conducted a pre-suit investigation of the claims at issue is subject to judicial review.

I. This Court May Review Whether The EEOC Satisfied Its Statutory Duty To Conduct An Investigation Of The Claims At Issue Prior To Bringing Suit.

In Section 706 of Title VII, Congress authorized the EEOC to bring suit in its own name on behalf of a "person or persons aggrieved" by the employer's unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1). However, the original enactment did not empower the EEOC to sue employers to enforce the Act; rather, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving equality of employment opportunities." *EEOC v. Hickey-Mitchell Co.*,

507 F.2d 944, 947 (8th Cir. 1974) (citing Act of July 2, 1964, Pub. L. 88-352, tit. VII, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1970)).

When that was not successful, Congress enacted the Equal Opportunity Act of 1972 which amended Title VII to permit the EEOC to bring suit. Under these amendments, the EEOC conducts litigation on behalf of private parties but also is the "federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (emphasis added).

A. The Plain Text Of Title VII Expressly Provides That The EEOC's Pre-Suit Investigation Duty Is Mandatory In Nature, Not Precatory.

Under 42 U.S.C. § 2000e-5(b), once a charge is filed by an employee "alleging that an employer . . . has engaged in an unlawful employment practice," the EEOC "*shall* make an investigation" to determine whether there is "reasonable cause to believe that the charge is true." *Id.* (emphasis added)*; see also EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 672 (8th Cir. 2012). If the EEOC determines that such reasonable cause exists, it takes the next step of "endeavor[ing] to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) ("*If* the Commission determines *after such investigation* that there is reasonable cause to be-

lieve that the charge is true . . . .") (emphases added); *see also CRST*, 679 F.3d at 672. If those efforts are unsuccessful, *only then* may the EEOC proceed to the final step of bringing a civil action to redress the charge. 42 U.S.C. § 2000e-5(f)(1) ("*If* . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission . . . .") (emphasis added); *accord Occidental*, 432 U.S. at 368; *CRST*, 679 F.3d at 672.

The plain language of the statutory text therefore provides that the EEOC may not commence a civil action until it has discharged these administrative duties. The Supreme Court has stated that "the EEOC is required *by law to refrain from commencing a civil action until it has discharged its administrative duties*." *Occidental*, 432 U.S. at 368 (emphasis added); *see also* 42 U.S.C. § 2000e-5(f)(1). Indeed, the Congress's use of the word "shall" unambiguously renders the act required by the statute mandatory. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002). The D.C. Circuit has explained that the statute says that "the Commission '*shall*' investigate the charge," which it described as "both mandatory and unqualified," as an "unambiguous command," as an "express requirement," and as trumping a regulation authorizing early termination of the process. *Martini v. Fed. Nat'l Mort. Ass'n*, 178 F.3d 1336, 1346 (D.C. Cir. 1999).

Moreover, Congress designed the pre-suit steps in Section 2000e-5(b) to be taken in successive order; each step does not stand alone. "In the Equal Employ-

ment Opportunity Act of 1972, Congress established an *integrated, multistep enforcement procedure* culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental*, 432 U.S. at 359 (emphasis added); *see Hickey-Mitchell Co.*, 507 F.2d at 948 (holding that the EEOC's "power of suit and administrative process [are not] unrelated activities, [but] *sequential steps in a unified scheme* for securing compliance with Title VII.") (citation omitted) (alterations in original) (emphasis added).

For at least two reasons, a genuine investigation must be the first step in the enforcement process. First, a decision by the EEOC to bring claims against an employer without first investigating the validity of those claims creates a needless risk that the Commission, employers, and the courts will go through great expense and disruption based on claims that are in fact unwarranted. There is no plausible reason why Congress would have wanted the EEOC to bring claims against employers that it had not first investigated, and then to find out whether those claims were warranted only during enforcement proceedings. That is no doubt why Congress, when vesting the sovereign enforcement authority of the United States in the EEOC, expressly required that enforcement be preceded by an investigation of the claims to be brought.

Second, commencing the enforcement process with a genuine investigation is also essential because any conciliation efforts are naturally dependent on the dis-

coveries made during the course of the EEOC's investigation. Indeed, "[a]bsent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate." *CRST*, 679 F.3d at 676; *see also EEOC v. Jillian's of Indianapolis, Inc.*, 279 F. Supp. 2d 974, 979 (S.D. Ind. 2003) ("Each step along the administrative path—from charge to investigation and from investigation to lawsuit—must grow out of the one before it."). This framework is another part of Title VII's "careful blend of administrative and judicial enforcement powers." *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976); *see also EEOC v. Hearst Corp.*, No. 96-20042, 1997 U.S. App. LEXIS 12785, at *23 (5th Cir. Jan. 22, 1997) ("[The investigation and conciliation] stages are important to [Title VII's] enforcement scheme because of the different roles that the EEOC plays in the management of discrimination charges: administrator, investigator, mediator, and finally, enforcer. . . . Only if those efforts are unsuccessful should a case enter the final enforcement stage.").

B. Mandatory Agency Duties Are Presumptively Reviewable, And Nothing Undermines That Presumption In This Case.

The Supreme Court has long recognized a "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), *superseded on other grounds by* REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302 (2005) (codified at 8 U.S.C. § 1252(a)(5)); *see also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 672 n.3 (1986) ("judicial review . . . is the rule"

and "the intention to exclude it must be made specifically manifest") (citations and internal quotation marks omitted), *superseded on other grounds by* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874, 2037-38 (1986) (codified at 42 U.S.C. § 1395ff). The presumption in favor of judicial review may be overcome "only upon a showing of clear and convincing evidence of a contrary legislative intent." *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (citation and internal quotation marks omitted), *superseded on other grounds by* 38 U.S.C. § 105(c). This presumption is designed to ensure that the actions of executive agencies do not exceed their purview. The EEOC's position that its pre-suit duty to investigate is not subject to judicial review contravenes these basic principles of administrative law.

Although Title VII does not explicitly direct courts to review whether the EEOC properly performed its pre-suit duty to investigate, it also does not explicitly direct courts to review the other prerequisites to suit found in section 2000e-5(b): whether the EEOC received "a charge . . . filed by or on behalf of a person claiming to be aggrieved," or whether the EEOC "serve[d] a notice of the charge . . . on such employer . . . within ten days," or whether the EEOC "determine[d] whether reasonable cause exists." 42 U.S.C. § 2000e-5(b). But this Court has not hesitated to review the EEOC's compliance with those and other threshold requirements. *See, e.g.*, *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1980) (re-

viewing EEOC's conciliation); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 82 (1984) (reviewing Commissioner's charge and notice to employer); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1535 (2d Cir. 1996) (reviewing EEOC's conciliation under ADEA); *accord CRST*, 679 F.3d at 672-77 (reviewing EEOC's investigation and conciliation); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003) (reviewing EEOC's conciliation). Such judicial review is firmly rooted in Title VII, which provides that federal courts "shall have jurisdiction of actions brought under this subchapter," 42 U.S.C. § 2000e-5(f)(3), which gives those courts the authority to adjudicate suits pursued by the EEOC, including defenses that the EEOC failed to satisfy its statutorily mandated pre-suit duties.

Congress frequently enacts statutory preconditions to suit, and although the statute does not expressly provide that failure to satisfy those preconditions provides an affirmative defense, the Supreme Court has repeatedly demonstrated its view that absent satisfaction of those preconditions, the case cannot proceed. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-58 (2010) (under 17 U.S.C. §§ 411(a), 501(a), "plaintiffs ordinarily must satisfy [the precondition of copyright registration] before filing an infringement claim"); *Hallstron v. Tillamook Cnty.*, 493 U.S. 20, 26, 31 (1989) (under "a literal reading of the [Resource Conservation and Recovery Act of 1976], compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit"); *United States v.*

Zucca, 351 U.S. 91, 99 (1956) (affirming dismissal of denaturalization proceeding because government failed to file good cause affidavit as required by statute); *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931) ("The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant . . . . [I]t is not within the judicial province to read out of the statute the requirement of its words.").

This is also the case with respect to conditions precedent to suit in Title VII actions brought by private plaintiffs rather than the Government. *See, e.g., Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants."); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977) ("Timely filing [of a charge] is a prerequisite to the maintenance of a Title VII action"); *see also Morgan*, 536 U.S. at 101, 114-15 (same); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (same). The EEOC would have this Court ignore these precedents but can point to no statutory language that would justify such an action.

C. This Court Can Review The *Scope* Of The EEOC's Investigation Without Reviewing The *Adequacy* Of Its Investigation.

In his Report, Recommendation, and Order, accepted and adopted by the District Court, APP-94-95, the Magistrate Judge noted that the EEOC's argument that "'a district court should not examine the adequacy of an EEOC[] investigation' does not mean that it 'should not examine whether the investigation occurred at all.'" APP-78 (citation omitted). He accordingly held that courts may review whether the EEOC investigated the same claims that it eventually brought, *i.e.*, whether the EEOC conducted an investigation with the same *scope* as the claims. APP-79 (citing cases).

The *adequacy or sufficiency* of an EEOC investigation is analytically different from the *scope* of an EEOC investigation: the latter merely involves an analysis of the nexus or "fit" between the claims brought and the persons and wrongdoing discovered during the course of the investigation. Once a court determines that the EEOC has brought claims with no nexus or "fit" to any investigation, it necessarily follows that, although the EEOC may have investigated *something* else, it has not investigated *the claims at issue in the case.*

This Court should not succumb to attempts by the EEOC to "divert the Court's attention from the absence of any . . . investigation by stringing together citations from cases standing for the proposition that courts should refrain from reviewing the sufficiency of the underlying investigation." *EEOC v. Bloomberg*

L.P., 967 F. Supp. 2d 802, 814 (S.D.N.Y. 2013). Such efforts would "patently conflate[] the principle of granting deference to the discretionary actions of federal agencies with the Court's duty to ensure that a required action was performed at all." *Id.*

Surely the EEOC would concede that an investigation by the EEOC into Company A could not justify charges against Company B, and that an investigation solely into religious discrimination by an employer could not justify charges of sex discrimination. By the same token, however, an investigation—such as the one conducted here by the EEOC—into individual, isolated, and unrelated disparate treatment claims cannot justify the analytically distinct charges of a nationwide pattern or practice violation.

II. The Legislative History Underscores Congress Had No Intent To Oust Judicial Review of the EEOC's Pre-Suit Obligations.

A review of the relevant legislative history confirms that Congress did not intend to preclude judicial review of the EEOC's pre-suit duties. Congress struck a careful and intentional compromise which the EEOC's position would destroy. As noted, the 1972 amendments to Title VII (the "Amendments") authorized the EEOC to bring enforcement actions in court after it had complied with its pre-suit duties. Early drafts of the Amendments expressly specified that judicial review of conciliation would *not* be available. Specifically, the early versions stated that the EEOC may proceed with a suit against an employer if it cannot obtain "a concilia-

tion agreement acceptable to the Commission, *which determination shall not be reviewable in any court*." S. 2515, 92d Cong. § 4(f) (1971) (emphasis added).

However, the bill containing the language precluding judicial review did not pass, so it was then replaced by a substitute amendment proposed by Senator Dominick. *See Chandler v. Roudebush*, 425 U.S. 840, 855-57 (1976); *see also Occidental*, 432 U.S. at 361-66. The version that Congress ultimately enacted *removed the italicized language precluding judicial review*. *See* 42 U.S.C. § 2000e-5(f)(1). The deletion of that language was the compromise that was necessary in order to secure the bill's passage. *See* 118 CONG. REC. 3803-04 (Feb. 14, 1972).

This was just one of the compromise measures that Congress put in place to provide judicial checks on the EEOC. For example, the initial draft would have empowered the EEOC with the ability to adjudicate complaints and issue cease-and-desist orders. *See Occidental*, 432 U.S. at 361-64. However, that provoked a strong dissent from Members of Congress who believed the protections and oversight of an Article III court were essential. *See id.; Chandler*, 425 U.S. at 850. Indeed, Senator Dominick, whose substitute bill was eventually adopted, was concerned that the initial bill allowed the EEOC to act as "investigator, prosecutor, trial judge and judicial review board" without any independent check. 117 CONG. REC. 40290 (Nov. 10, 1971) (statement of Sen. Dominick); *see also, e.g.*, S. Rep. No. 92-415, at 86 (1971).

Such concerns were behind Congress's decision to eliminate the EEOC's cease-and-desist authority as well as the proposed barrier to judicial review. Put simply, Congress was worried about giving a "blank legislative check" to the EEOC. 117 CONG. REC. 38402 (Nov. 1, 1971) (statement of Sen. Allen).

Although the legislative history focused largely on the power to issue cease-and-desist orders and the duty of conciliation, it also underscores the absence of any intent by the same Congress to *oust* courts of traditional judicial review, including review of the EEOC's statutorily mandated pre-suit duty of investigation. As Senator Dominick wrote in an article, reprinted in the Congressional record: "The principal objection to the administrative approach is that it harkens back to the 'Star Chamber' proceedings outlawed in England more than 300 years ago. That is, the EEOC would, in effect, become investigator, prosecutor, trial judge and judicial review board—all before you ever got to the Court of Appeals! I do not believe this is appropriate for any Executive agency of government." 117 CONG. REC. 40290 (Nov. 10, 1971) (statement of Sen. Dominick); *see also* 118 CONG. REC. 3803 (Feb. 14, 1972) (statement of Sen. Allen) ("To vest in a single Federal agency the prerogative of bringing a charge, then investigating it, then trying the case, while at the same time sitting in judgment on it, and then enforcing its own findings is alien to guaranteed and fundamental principles of due process. It is in absolute contradiction with all that our constitutional system defends."); 117

CONG. REC. 38402 (Nov. 1, 1971) (statement of Sen. Allen) ("The broad powers sought under the measure represent a radical departure from the concept of American jurisprudence and our cherished legal system of checks and balances. The legislation seeks to make the Commissioner accuser, prosecutor, judge, and jury all in one."). It is implausible that legislators with these concerns would leave statutory pre-suit requirements to the grace of the Commission, Instead, Senator Dominick's amendments envisioned that his approach "would bring together and preserve both the expertise of the EEOC in investigating, processing and conciliating unfair employment cases and the expertise and freedom from shifting political winds of the federal courts." 117 CONG. REC. 40290 (Nov. 10, 1971) (statement of Sen. Dominick). And so the balance was struck, a balance the EEOC's position places in critical jeopardy.

Senator Dominick's amendments were grounded in the desire to balance the utility of having an agency dedicated to the task against the need to provide a judicial check. As he put it, "The EEOC cannot do its job unless there are some enforcement powers behind it. Because of this immediate need, and because of my belief in the separation of powers among the three branches of this government, I maintain that use of the courts is the proper way." 117 CONG. REC. 40291 (Nov. 10, 1971) (statement of Sen. Dominick). The EEOC's position in this appeal constitutes another attempt to evade judicial review of its mandatory statutory obliga-

tions, undoing the careful compromise struck by Congress.

III. The EEOC's Recent Enforcement Record Demonstrates The Necessity Of Judicial Oversight.

In this case, the EEOC failed to show it had conducted any actual investigation into claims of nationwide company-wide pay and promotion discrimination, Appellee's Br. 9-11; rather, it appears that it simply swallowed whole the unvetted information obtained from plaintiffs' lawyers, *id.* at 19. Unfortunately, the EEOC's conduct in this suit is not so unique that this Court can ignore the important role judicial review would play in ensuring the EEOC performs its essential functions. As data collected in the recently released Alexander Report demonstrates, there is danger to accepting the EEOC's position that there is no role for the courts to ensure that the EEOC actually has investigated the claims it brings to courts. *See supra* at 4. Contained within the Report's pages is a Table summarizing the sanctions imposed by courts against the EEOC, which shows that the EEOC has been required to pay attorneys' fees ten times since 2011 in cases that were deemed frivolous or mismanaged by the EEOC's attorneys. Alexander Report, Appendix 1, at 1-3. Thus the Report finds that the EEOC "is pursuing many questionable cases through sometimes overly aggressive means—and, as a result, has suffered significant court losses . . . ." Alexander Report at 3; *see also* Mary Kissel, *Chronicling EEOC's Abuses*, THE WALL STREET JOURNAL (Nov. 24, 2014), http://online.wsj.com/articles/political-diary-chronicling-eeoc-abuses-1416867954.

The EEOC's efforts to avoid judicial review of its statutorily mandated pre-suit duty to investigate is simply another example of its rush to litigate first, and investigate and conciliate later (or never). As noted in testimony by Camille A. Olson on behalf of the Chamber to the United States House of Representatives Committee on Education and the Workforce Subcommittee on Workforce Protections (the "Chamber Testimony"), "[l]oosely-defined and overly broad grants of authority to agency officers have created an administrative climate at the EEOC which prioritizes expansive enforcement, aggressive litigation and punishment over education, cooperation and conciliation." Chamber Testimony at 2, https://www.uschamber.com/sites/default/files/documents/files/OlsonTestimonyReEEOCEnforcementJune102014w-EEOCPaper.pdf.

As a result, complaints abound regarding the EEOC's conduct regarding its pre-suit obligation to investigate. For example:

- Cases in which the EEOC will pursue investigations despite clear evidence that any alleged adverse action was not discriminatory – such as terminating an employee caught on videotape leaving pornography around the workplace.

- Cases in which EEOC investigators propose large settlement figures, only to dismiss the case entirely upon rejection of the offer, thereby demonstrating that the original settlement was an act of gamesmanship.

- A federal case in which the judge criticized the EEOC for using a "sue first, prove later" approach.

- A federal case brought by EEOC which the judge described as "one of

those cases where the complaint turned out to be without foundation from the beginning."

- A federal case in which the judge criticized EEOC for continuing "to litigate the . . . claims after it became clear there were no grounds upon which to proceed," describing the EEOC's claims as "frivolous, unreasonable and without foundation."

U.S. Chamber of Commerce, *A Review of Enforcement and Litigation Strategy during the Obama Administration – A Misuse of Authority* 2 (June 2014), https://www.uschamber.com/sites/default/files/documents/files/021449_LABR%20EEOC%20Enforcement%20Paper_FIN_%20rev.pdf ("Chamber EEOC Review"). EEOC investigators have employed a host of tactics that demonstrate abuse of the system.[2] Plaintiff and management attorneys, courts, and Chamber members, have uniformly criticized the EEOC for investigations that are dilatory, inconsistent, and

[2] The following anecdotes were personally described to Chamber staff by concerned Chamber members:

- Investigators refusing to close cases that are several years old by continually making additional requests for information.
- Continually attempting to communicate directly with supervisory employees rather than employers' counsel.
- Making overly burdensome requests for information and issuing subpoenas which are sweeping in scope and not sufficiently related to the underlying investigation.
- Serving subpoenas for information or documents that were not previously included in EEOC Information Requests.
- Demanding that the employer turn over workplace policies that are completely irrelevant to the underlying charge.

Chamber EEOC Review at 6-7; *see also* Chamber Testimony at 3-4.

of questionable quality. *See* Chamber Testimony at 3 & n.8 (citing Meeting Transcript of EEOC's July 18, 2012 Public Input into the Development of EEOC's Strategic Enforcement Plan Meeting, http://www.eeoc.gov/eeoc/meetings/7-18-12/transcript.cfm; Meeting Transcript of EEOC's March 20, 2013 Development of a Quality Control Plan for Private Sector Investigations and Conciliations Meeting, http://www.eeoc.gov/eeoc/meetings/3-20-13/transcript.cfm). The EEOC's conduct in this case, far from being an isolated incident, is an additional part of the story. This is obviously not what Congress had in mind when it vested the enforcement authority of the United States in the EEOC.

Against this record, this most recent attempt by the EEOC to unilaterally expand its authority must fail. As the Supreme Court has instructed, the "fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014) (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013)). This Court should not hesitate to do just that.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order granting summary judgment and dismissing the EEOC's nationwide pattern or practice lawsuit.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 5,230 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 hereby certify that on December 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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