No. 15-1329

In the Supreme Court of the United States

STERLING JEWELERS INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL STATUTES AND REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

INTEREST OF THE *AMICI CURIAE*[1]

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

The Chamber is the world's largest business federation. It 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 of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

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[1] No counsel for any 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. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both Petitioner and Respondent have consented to the filing of this brief. Copies of Petitioner's and Respondent's consents are filed herewith.

The businesses represented by the Chamber have a substantial interest in meaningful judicial review of the EEOC's failure to engage in its statutorily mandated duty to conduct an investigation prior to bringing suit.

The EEOC's failure to conduct a genuine pre-charge investigation, lately criticized by plaintiffs' attorneys, management attorneys, and courts alike, directly impacts the accuracy of the claims brought by the EEOC and, in turn, the integrity of the conciliation process. The enforcement regime created by Title VII depends on the EEOC conducting a meaningful investigation before bringing the authority of the United States to bear against an employer. In particular, genuine investigations are essential to a meaningful conciliation process. Meaningful judicial review serves as an important and necessary check to ensure a genuine investigation, and this case exemplifies the need for such a review.

SUMMARY OF ARGUMENT

In *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), this Court unanimously rejected the argument that courts may not review whether the EEOC complies with its pre-suit obligation to conciliate. The Court noted, however, that Title VII gives the EEOC "discretion to de-

termine the kind and amount of communication with an employer appropriate in any given case" and therefore suggested that review of the EEOC's duty to conciliate should be "narrow." *Id.* at 1649.

Certiorari review is warranted because the decision below mistakenly read *Mach Mining* to hold that, where the EEOC brings a nationwide pattern or practice charge based solely on an investigation into an individual, isolated, and unrelated disparate treatment claim, courts are powerless to review the EEOC's failure to engage in a meaningful investigation.

Mach Mining does not require such a result.

The EEOC's position that its statutorily mandated pre-suit duty of investigation is not subject to judicial review contravenes the text of Title VII as well as the separation of powers principles that undergird the structural roles of administrative agencies and courts. The plain text of Title VII requires the EEOC 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 discretionary, 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 CRST Van Expe-*

dited, Inc. v. EEOC, No. 14-1375, 2016 U.S. LEXIS 3350, at *8-9 (May 19, 2016); *Mach Mining*, 135 S. Ct. at 1649-50; *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977). Requiring the EEOC to conduct a genuine investigation prior to bringing suit is critical to ensuring that it does not bring claims without an adequate factual basis—a goal that, assuming good faith on the part of the EEOC, advances 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 is the case 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.

Moreover, the EEOC's attempt to insulate its pre-suit duty to investigate from judicial review cannot be squared with this 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 those brought by private plaintiffs and, more broadly, cases involving conditions precedent to suits contained in a variety of federal statutes. Where compliance 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 need for *certiorari* review is underscored by the EEOC's own performance record. A well-documented problem exists with the EEOC's investigations (or lack thereof). Unfortunately, it has 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 represent that the courts need not exercise any meaningful oversight over its pre-suit investigation duties. Indeed, judicial oversight is critical to ensure the smooth functioning of the system Congress put in place.

For all these reasons, this Court's intervention is needed, and therefore, this Court should grant Sterling's petition for a writ of certiorari.

ARGUMENT

I. THE SECOND CIRCUIT'S ERRONEOUS EXTENSION OF *MACH MINING* WILL HAVE A DRAMATIC IMPACT ON AMERICAN BUSINESS.

Last Term in *Mach Mining,* this Court unanimously rejected the EEOC's argument that its total failure to conciliate was not subject to judicial review, reasoning that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." 135 S. Ct. at 1651. The Court noted, however, that Title VII gives

the EEOC "discretion to determine the kind and amount of communication with an employer appropriate in any given case" and therefore suggested that review of the EEOC's duty to conciliate should be "narrow." *Id.* at 1649.

The EEOC has seized upon *Mach Mining* to assert that courts may not review in any way the "scope" of the EEOC's distinct statutory duty to investigate. The Second Circuit agreed, relying on this Court's statement that "judicial review is 'narrow' and serves to 'enforce[] the statute's requirements . . . that the EEOC afford a chance to discuss and rectify a specified discriminatory practice—but goes no further." Pet. App. 8a.

The decision below acknowledged that "*Mach Mining* did not address the EEOC's obligation to investigate," but it nonetheless "conclude[d] that judicial review of an EEOC investigation is similarly limited. . . . courts may not review the *sufficiency* of an investigation—only whether an investigation occurred." Pet. App. 8a. The brief analysis by the court in the decision below failed to account for the distinct nature of the EEOC's duty to investigate, which should have led it to the opposite conclusion.

As a result, the court applied *Mach Mining* far beyond the conciliation context in which it

was decided. *Mach Mining* involved *only* conciliation, the final step before litigation in Title VII's "overall enforcement structure [of] a sequential series of steps beginning with the filing of a charge with the EEOC." *Occidental*, 432 U.S. at 372; *see also Mach Mining*, 135 S. Ct. at 1650 (noting charge, investigation, and reasonable cause determination and recognizing that petitioner asserted only "that the EEOC had failed to 'conciliate in good faith' prior to filing suit"). In *Mach Mining*, this Court had no reason to address other, independent, statutory pre-suit duties and, accordingly, did not.

The failure by the Second Circuit to consider the critical differences between the duty to conciliate and the duty to investigate, discussed fully in the Petition, *see* Pet. 15-20, resulted in a holding that could affect "tens of thousands of charges, thousands of conciliations, and hundreds of lawsuits every year." Pet. 20. This was not a small matter, and the gravity of its consequences warrants this Court's intervention.

II. THE DECISION BELOW CONFLICTS WITH THE STATUTORY TEXT, STRUCTURE, AND PURPOSE.

The text of Title VII's pre-suit requirements mandates that the EEOC engage in a meaning-

ful charge-investigation process. This step is foundational to the statutory scheme enacted by Congress.

The original enactment of Title VII did not empower the EEOC to sue employers to enforce the Act. Rather, "[i]n pursuing the goal of bringing employment discrimination to an end, Congress chose cooperation and voluntary compliance as its preferred means." *Mach Mining*, 135 S. Ct. at 1651 (internal quotation marks omitted).

Congress later enacted the Equal Opportunity Act of 1972 which amended Title VII to permit the EEOC to bring suit. Under these amendments, Congress authorized the EEOC to bring suit in its own name on behalf of a "person or persons aggrieved" by an employer's unlawful employment practice in Section 706 of Title VII, 42 U.S.C. § 2000e-5(f)(1). Thus, 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*, 432 U.S. at 368.

Reflecting this goal of avoiding litigation if at all possible, Title VII and the EEOC's procedural regulations both empower and require the

investigation and remediation of alleged employment discrimination, promptly and efficiently. To enable the EEOC to investigate charges, Title VII authorizes the EEOC to compel production of witnesses, documents, and other information to the extent that information "is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a); *see also id.* § 2000e-9; 29 C.F.R. §§ 1601.15-1601.17; *EEOC v. Shell Oil*, 466 U.S. 54, 63-64 (1984).

A meaningful investigation by the EEOC serves as the foundation for Title VII's statutory enforcement scheme. The Second Circuit's holding that courts may not step in to require such an investigation ignores the text, structure, and purpose of the statute.

A. The Text of Title VII Demonstrates that the EEOC's Pre-Suit Investigation Duty Is Mandatory in Nature.

Title VII "sets forth 'an integrated, multistep enforcement procedure'" intended to enable the EEOC "to detect and remedy instances of discrimination." *Shell Oil Co.*, 466 U.S. at 62 (quoting *Occidental*, 432 U.S. at 359). 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 deter-

mine whether there is "reasonable cause to believe that the charge is true." *Id.* (emphasis added); *see also CRST*, 679 F.3d at 672. If the EEOC determines 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 believe that the charge is true . . . .") (emphases added); *see also CRST*, 679 F.3d at 672. Only if those efforts are unsuccessful 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.

This 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). Congress's use of the word "shall" in § 2000e-5(f)(1) unambiguously renders the actions required by the statute mandatory. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002);

see also Martini, 178 F.3d at 1346 (describing the use of the word "shall" in the statute as "both mandatory and unqualified," as "an unambiguous command," and as an "express requirement.").

Congress intentionally designed the pre-suit steps in Section 2000e-5(b) to be taken in successive order; each step does not stand alone. *See Occidental*, 432 U.S. at 359 (emphasis added); *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974) (describing the EEOC's "power of suit and administrative process" not as "unrelated activities, [but] *sequential steps in a unified scheme* for securing compliance with Title VII.") (citation omitted) (alterations in original) (emphasis added).

A genuine investigation must be the first step in the enforcement process for at least two reasons. 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.

Second, commencing the enforcement process with a genuine investigation is also essential because any conciliation efforts are naturally dependent on the discoveries 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) ("[T]hese separate [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."); *id.* at *22-23 ("Only if those efforts are unsuc-

cessful should a case enter the final enforcement stage.").

B. Mandatory Agency Duties Are Presumptively Reviewable, and Nothing Undermines that Presumption in this Case.

This 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). Such judicial review is firmly rooted in Title VII, which provides that federal courts "shall have jurisdiction of actions brought under this subchapter," *id.* § 2000e-5(f)(3), which gives those courts the authority to adjudicate suits pursued by the EEOC, including the 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, this Court has repeatedly demonstrated

its view that absent satisfaction of these 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"); *Hallstrom v. Tillamook Cty.*, 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, 272-73 (1931) ("The filing of a claim or demand as a prerequisite to 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 true as well with respect to conditions precedent to suit in Title VII actions brought by private plaintiffs rather than the Government. *See, e.g., Baldwin Cty. 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 114-15 (same).

C. The Courts May Review the Scope of the EEOC's Investigation Without Reviewing the Adequacy of Its Investigation.

In his Report, Recommendation, and Order, Pet. App. 115a, accepted and adopted by the District Court, Pet. App. 40a, 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.'" Pet. App. 120a (citation omitted). Accordingly, he 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. Pet App. 120a-122a (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 the EEOC's efforts 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.

III. THE EEOC'S RECENT ENFORCEMENT RECORD DEMONSTRATES THE NECESSITY OF THIS COURT'S INTERVENTION.

In the circumstances of this case, the EEOC failed to show it had conducted any actual investigation into claims of nationwide company-wide pay and promotion discrimination. Pet. 2-4 & n.1. Rather, it appears that it swallowed whole the unvetted information obtained from plaintiffs' lawyers. *See id.*

Unfortunately, the EEOC's conduct in this suit is not atypical. As data collected in the recently released Alexander Report demonstrates, the EEOC's recent behavior illuminates the danger in accepting the EEOC's position that the courts have no role in ensuring that the EEOC investigated the claims it brings to courts. *See supra* at 3-4.

The Report contains 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 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, http://edworkforce.house.gov/uploadedfiles/testimony_olson.pdf.

As a result, complaints abound regarding the EEOC's conduct with respect to 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 the 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 the EEOC for continuing "to liti-

> gation 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/EEOC%20Enforcement%20Paper%20June%202014.pdf ("Chamber EEOC Review").

EEOC investigators have employed a host of tactics that demonstrate abuse of the system.[2]

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[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.

Plaintiff and management attorneys, courts, and Chamber members have uniformly criticized the EEOC for investigations that are dilatory, inconsistent, and 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). Sterling's petition further sets out a growing number of precedents arising from the EEOC's abusive litigation practices and failure to comply with its statutory pre-suit obligations. *See* Pet. 28-36 (discussing cases).

- 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.

The EEOC's conduct in this case, far from being an isolated incident, is an additional part of the story. This is 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 warrants this Court's intervention. As this Court has stated, the "fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013). This Court should grant Sterling's petition for a writ of certiorari in order to take the opportunity to do just that.

Because the decision below undermines Title VII's enforcement scheme, presents important issues of significant interest to American businesses, and is bound to recur given the EEOC's aggressive enforcement policy, the Court should grant Sterling's Petition for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth by Petitioner, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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