No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. ELIMINATING JUDICIAL REVIEW OF EEOC CONCILIATION WILL HINDER VOLUNTARY RESOLUTION OF TITLE VII DISPUTES 5

A. Experience Illustrates That the EEOC Too Often Bypasses Its Duty To Engage in Meaningful Pre-Suit Conciliation 7

B. Employers Would Have No Reason To Refuse Reasonable Conciliation Offers in Favor of Holding Out for Judicial Review 16

II. THE DECISION BELOW IS ALSO LEGALLY INDEFENSIBLE 21

A. The Seventh Circuit's Refusal To Enforce a Statutory Command Has No Legal Basis and Lacks a Limiting Principle 22

B. As Four Decades of Jurisprudence Show, Courts Have No Trouble Applying Title VII's Conciliation Requirement 25

TABLE OF CONTENTS
(continued)

Page

C. The Contemporaneous Legislative Record Refutes the Seventh Circuit's Decision..................28

CONCLUSION..30

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001) 23

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 5

Chandler v. Roudebush,
425 U.S. 840 (1976) 28, 29

EEOC v. Agro Distribution LLC,
555 F.3d 462 (5th Cir. 2009) 9

EEOC v. Allegheny Airlines,
436 F. Supp. 1300 (W.D. Pa. 1977) 14

EEOC v. Asplundh Tree Expert Co.,
340 F.3d 1256 (11th Cir. 2003) 5, 8, 9, 26

EEOC v. Bass Pro Outdoor World, LLC,
No. 4:11-CV-3425, 2014 U.S. Dist.
LEXIS 27019 (S.D. Tex. Mar. 4, 2014) 18

EEOC v. Bloomberg L.P.,
751 F. Supp. 2d 628 (S.D.N.Y. 2011) 18

EEOC v. Bloomberg L.P.,
967 F. Supp. 2d 802 (S.D.N.Y. 2013) 11, 12

EEOC v. Container Corp. of Am.,
352 F. Supp. 262 (M.D. Fla. 1972) 25

EEOC v. CRST Van Expedited, Inc.,
679 F.3d 657 (8th Cir. 2012) 12, 13, 26, 27

EEOC v. Dillard's, Inc.,
No. 08–CV–1780,
2011 U.S. Dist. LEXIS 76206
(S.D. Cal. July 14, 2011)..................................14, 15

TABLE OF AUTHORITIES
(continued)

Page(s)

EEOC v. *Evans Fruit Co.*,
872 F. Supp. 2d 1107
(E.D. Wash. 2012) 10, 11

EEOC v. *HomeNurse, Inc.,*
No. 1:13-CV-2927, 2013 U.S. Dist.
LEXIS 147686 (N.D. Ga. 2013) 9

EEOC v. *Pet, Inc., Funsten Nut Div.*,
612 F.2d 1001 (5th Cir. 1980) 13, 14, 25

EEOC v. *Propak Logistics, Inc.,*
746 F.3d 145 (4th Cir. 2014) 16

EEOC v. *Ruby Tuesday, Inc.,*
919 F. Supp. 2d 587 (W.D. Pa. 2013) 10

EEOC v. *Sears, Roebuck & Co.*,
504 F. Supp. 241 (N.D. Ill. 1980) 28

EEOC v. *Sears, Roebuck & Co.*,
650 F.2d 14 (2d Cir. 1981) 13, 18

EEOC v. *Shell Oil Co.*,
466 U.S. 54 (1984) 22, 23

EEOC v. *Sherwood Med. Inust., Inc.*,
452 F. Supp. 678 (M.D. Fla. 1978) 29

EEOC v. *Swissport Fueling, Inc.*,
916 F. Supp. 2d 1005 (D. Ariz. 2013) 11, 13

Gen. Tel. Co. of the Nw., Inc. v. EEOC,
446 U.S. 318 (1980) 26

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 23

Hudson v. McMillian,
503 U.S. 1 (1992) 27

TABLE OF AUTHORITIES
(continued)

Page(s)

INS v. St. Cyr,
533 U.S. 289 (2001) 21

McComb v. Jacksonville Paper Co.,
336 U.S. 187 (1949) 18

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) 6, 28, 29

Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship,
507 U.S. 380 (1993) 27

St. Paul Mercury Indem. Co. v. Red Cab Co.,
303 U.S. 283 (1938) 27

United States v. Leon,
468 U.S. 897 (1984) 27

United States v. Nixon,
418 U.S. 683 (1974) 24

Vaca v. Sipes,
386 U.S. 171 (1967) 27

Watson v. United States,
552 U.S. 74 (2007) 26

W.R. Grace & Co. v. Local Union 759,
461 U.S. 757 (1983) 5

STATUTES

5 U.S.C. § 7114(a) 27

25 U.S.C. § 2710(d) 27

28 U.S.C. § 1915(a) 27

29 U.S.C. § 158(d) 27

42 U.S.C. §12117(a) 26

TABLE OF AUTHORITIES
(continued)

Page(s)

42 U.S.C. § 1981a(b) 12

42 U.S.C. § 2000e-5(b) 17, 22

42 U.S.C. § 2000e-5(f) 19, 23, 28, 29

42 U.S.C. § 2000e-8 11

42 U.S.C. §2000e-9 11

OTHER AUTHORITIES

117 Cong. Rec. 38402 (Nov. 1, 1971) 30

117 Cong. Rec. 40290 (Nov. 10, 1971) 29

118 Cong. Rec. 1976 (Feb. 1, 1972) 30

118 Cong. Rec. 3804 (Feb. 14, 1972) 29

EEOC, Regional Attorneys' Manual, Part 3, § IV.A.2.a (Apr. 2005) 17

EEOC Strategic Enforcement Plan (Dec. 2012) 15

Scott Flaherty, *EEOC Attorney Says Presuit Attacks Excuse To Up Billables*, LAW360, Aug. 21, 2014 19

S. 2515, 92d Cong., § 4(f) (1971) 28

S. Rep. No. 92-415 (1971) 29

U.S. Const. art. I, § 7 24

U.S. Const. art. I, § 8 24

U.S. Const. art. II, § 2 24

INTERESTS OF THE *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 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 Congress, the Executive Branch, and the courts. 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] All parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts. NFIB is the nation's leading small-business association; its mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 businesses nationwide.

American Trucking Associations, Inc. (ATA) is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and was created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including before this Court.

SUMMARY OF ARGUMENT

I. The Seventh Circuit held that courts may not review the EEOC's compliance with its statutory obligation to "conciliate" prior to suing employers. In so holding, the court rested on the following policy argument: If conciliation is reviewable, employers could sandbag the negotiations and instead just "stockpile exhibits" for future litigation over the sufficiency of the EEOC's efforts, in the hopes of avoiding liability for their unlawful discrimination. That, said the court, would undermine conciliation.

On the other hand, the Court of Appeals was confident that the EEOC would have every reason to conciliate in good faith even if the EEOC's actions are not reviewable after-the-fact by any court. Based on those incorrect assumptions about the incentives of employers and the EEOC, the Seventh Circuit reached the counterintuitive conclusion that eliminating judicial review of the conciliation duty would *promote* conciliation and thereby further Congress's acknowledged intent that "voluntary compliance be the preferred means of achieving the objectives of Title VII." Pet. App. 16a (quoting *Ricci v. DeStefano*, 557 U.S. 557, 581 (2009)). Precisely the opposite is true.

Amici—as representatives of employers that face EEOC investigations and attempt to conciliate with the agency in an effort to both avoid litigation and redress any actual wrongdoing—are ideally situated to identify flaws in the Seventh Circuit's premises, both as to how the EEOC acts in the real world and as to employers' own practical incentives.

First, there are many reasons—institutional, personal, ideological, practical, strategic—why some EEOC officials, in some cases, might prefer to short-circuit or even wholly bypass conciliation in favor of bringing suit in court immediately. Four decades of enforcement history bears this out and illustrates that the EEOC too often prefers to sue first and negotiate later. There is thus good reason to conclude that, contrary to the empty assurances offered by the court below, the result of eliminating all judicial review of conciliation will be less conciliation, less voluntary resolution of disputes, and more costly and drawn-out litigation.

Second, as Congress understood, the best chance to settle a dispute is *before* litigation, because that timing allows employers to avoid the high costs of litigation and the stigma of being labeled publicly by the Commission as violators of civil rights. For that reason, also contrary to the decision below, no rational employer would invite the costs and public stigma of an EEOC lawsuit by trying to sandbag conciliation in the unlikely hope that a federal judge applying deferential review will later grant relief (which may well be only dismissal without prejudice, to allow further negotiations with the EEOC).

In short, the court below misunderstood the real incentives facing the EEOC and employers. Refusal to enforce the conciliation obligation will surely mean *less* conciliation and *more* litigation—exactly the opposite of what even the court below conceded that Congress intended.

II. Beyond its unsupportable policy rationale, the decision below is also legally indefensible, for the reasons ably articulated by Petitioner. *Amici* expand and elaborate on three of those reasons here.

First, the decision lacks any limiting principle, offering blind trust in an executive agency and relying on the faint hope of congressional oversight to cure any executive departures from its statutory obligations. Our legal system is not so sanguine. To the contrary, judicial review of executive compliance with the law is a foundational and critical component of American constitutional separation of powers.

Second, the Seventh Circuit's insistence that no judicially manageable standard is possible in this area ignores the forty-year body of jurisprudence that courts have developed to address the sufficiency

of EEOC conciliation. It also ignores the many other contexts in which courts apply similar inquiries without apparent difficulty. The inquiry into EEOC conciliation efforts may be somewhat fact-intensive, but that is no excuse for judicial abdication.

Third, the Court of Appeals' conclusion is further refuted by contemporaneous legislative materials for the 1972 amendments to Title VII. Congress *rejected* a version of the law that expressly made conciliation nonreviewable. That rejection reflected a politically necessary compromise with skeptics of the EEOC who demanded more judicial oversight. This Court should not rewrite that bargain now, yielding the EEOC the unchecked discretion Congress rejected.

In short, there is nothing unusual about judicial review of agency action; there is no reason courts cannot play their traditional role here; and such judicial review is exactly what Congress wanted.

ARGUMENT

I. ELIMINATING JUDICIAL REVIEW OF EEOC CONCILIATION WILL HINDER VOLUNTARY RESOLUTION OF TITLE VII DISPUTES.

As even the court below admitted (Pet. App. 16a), "Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (acknowledging "Congress's intention to promote conciliation rather than litigation in the Title VII context" (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984))). Indeed, it is no overstatement to say that "[t]he duty to conciliate is at the heart of Title VII." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003).

By stripping federal courts of the power to oversee and enforce that conciliation obligation, the decision below strikes at the heart of Title VII. Yet, somehow, the Seventh Circuit reasoned that by eliminating all judicial review, it would *promote* conciliation. The court's conclusion is premised on its assumptions about the EEOC's and employers' motivations. The court was wrong as to both.

First, the Seventh Circuit expressed confidence that the EEOC would still engage in meaningful conciliation, even without judicial review, given its own "powerful incentives" to do so. (Pet. App. 20a-21a.) But history demonstrates that even *with* the check of judicial review, a zealous investigator—perhaps anxious to make new law, set an example, or garner a favorable headline—sometimes cuts corners from Title VII's "integrated, multistep enforcement procedure." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359, 368 (1977). The EEOC's incentives to do so will only intensify if this Court affirms the decision below, and removes the check of a neutral arbiter to encourage agency compliance with its statutory obligations.

Second, the Seventh Circuit worried that judicial review was encouraging employers to manipulate the conciliation process to manufacture a defense for subsequent litigation. (Pet. App. 16a-18a.) That is not only unsupported by the facts of this case or any other empirical evidence, but also implausible. Employers want to *avoid* costly, prolonged litigation and *avoid* public allegations of civil rights violations. It is fanciful to think that employers would incur with certainty the financial and reputational costs of an EEOC lawsuit and manipulate the conciliation

process, in the hopes of later convincing a judge to toss the lawsuit on procedural grounds. Moreover, the standards applied by courts to enforce the conciliation obligation are deferential to the EEOC; an employer's odds of obtaining relief through such manipulation are a long shot at best.

Affirming the decision below will therefore have a profoundly negative effect on voluntary resolution of employment disputes—harming employers *and* employees alike, and undermining congressional intent. As Congress well understood, the best time to settle disputes is *before* they reach court, *before* they attract public scrutiny, and *before* the parties become litigation adversaries. All those advantages are lost if the EEOC sues first and negotiates later. Yet that is the unfortunate but natural effect of the decision below. This Court should therefore reverse that decision.

A. Experience Illustrates That the EEOC Too Often Bypasses Its Duty To Engage in Meaningful Pre-Suit Conciliation.

The Seventh Circuit was not bothered by the prospect of eliminating judicial enforcement of the EEOC's conceded obligation to attempt conciliation before filing suit, in part because it believed that the EEOC had sufficient motivation—even absent the check of judicial review—to ensure that it would do its best to conciliate. (*See* Pet. App. 20a-21a.)

The business community is far less confident, based on many years of experience. Forty years of jurisprudence illustrates how, despite its "limits of budget and personnel" and the far-fetched prospect of congressional oversight (*see id.*), the EEOC has in many cases bypassed its statutory duty to conciliate.

This history undermines the court's counterintuitive, counter-factual assumption that eliminating review would promote conciliation, and also illustrates the wide range of EEOC conduct that the decision below insulates from review if allowed to stand. The Seventh Circuit overlooked this trail of numerous instances of the EEOC's actual failures to engage in meaningful conciliation and instead speculated about strategic behavior of employers. It is therefore worth a closer look at some illustrative cases.

Sometimes, the allure of filing a high-profile case overcomes a desire to settle privately. For example, in *Asplundh Tree*, the EEOC in a "flurry of activity" gave the employer a "grossly arbitrary" deadline of "12 business days" to consider a conciliation offer requiring "both reinstatement and front pay" as well as "nationwide notice to its employees of [the] allegations" and the duty to conduct "nationwide anti-discrimination training of all its … employees." 340 F.3d at 1258-59. This was after a *32-month* investigation in which the employer fully cooperated, and before the agency had cited any theory of liability. *See id.* The employer's counsel attempted to contact the EEOC, but the agency "the next day" declared a failure of conciliation. *Id.* The Eleventh Circuit found that "[i]n its haste to file the instant lawsuit, with lurid, perhaps newsworthy, allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort." *Id.* at 1261. "The chronology of events," the court pointedly observed, "lend themselves to the interpretation that the Commission's haste may have been motivated, at least in part, by the fact that conciliation, *unlike litigation*, is not in the public

domain." *Id.* at 1261 n.3. *Cf.* EEOC Newsroom, http://www.eeoc.gov/eeoc/newsroom/index.cfm (listing EEOC press releases about litigation filings).

In other cases, particular investigators may allow their own biases to interfere with their statutory duties. For example, in *EEOC v. Agro Distribution LLC*, 555 F.3d 462 (5th Cir. 2009), "the Commission dealt in an arbitrary manner based on preconceived notions of its investigator and ignored the attempts of Agro's counsel to engage the Commission in settlement discussions." *Id.* at 468. Although the aggrieved employee "denied suffering any emotional problems from the [termination]," the EEOC made "an insupportable demand" for $120,000 in emotional-suffering damages, "as a weapon to force settlement." *Id.* at 467-68 & n.5. While the employer called the EEOC "requesting a meeting," the EEOC declared a failure of conciliation "[t]he next day." *Id.* at 467. The employer then offered to pay a smaller sum, but the EEOC failed to respond for "[n]early ten months" and then flatly rejected the offer. *Id.* In the end, *after* filing suit, the EEOC offered to settle for less than 20% of the demand in its complaint, but the employer proceeded and prevailed on the merits at summary judgment. *See id.*; *see also EEOC v. HomeNurse, Inc.*, No. 1:13-CV-2927, 2013 U.S. Dist. LEXIS 147686, at *44 (N.D. Ga. Sept. 30, 2013) ("For whatever reason, the responsible EEOC investigators and attorneys have repeatedly refused this small employer's entreaties to resolve this case quickly and in a cost-effective manner. The by-product of all of this obstinance is a small employer with a large attorney's fee bill and an unnecessary squabble in federal court.").

Internal administrative pressures may also cause EEOC investigators to neglect conciliation. In one recent case, for example, the defendant employer suggested that premature truncation of conciliation was motivated by "an administrative desire to bring this lawsuit before the expiration of the EEOC's fiscal year on September 30, 2009." *EEOC v. Ruby Tuesday, Inc.*, 919 F. Supp. 2d 587, 595 n.11 (W.D. Pa. 2013). In that case, the EEOC issued a "demand for the payment of more than $6 million dollars, coupled with nine (9) days to either say 'yes' or to make a 'best and final' response"—an approach that the court condemned as "so devoid of reasonableness" that it was "not a meaningful, good faith conciliation effort." *Id.* at 595. While the court was reluctant to endorse the employer's suggestion about the EEOC's motives, it made clear that such a purpose would be an obviously "ill-founded basis" for "obviating a direct statutory command." *Id.* at 595 n.11. *See also* Dep. Tr. at 69, *EEOC v. RPH Mgmt., Inc.*, Civ. No. 03-0502, Dkt. No. 93-6 (N.D. Ala. Nov. 23, 2005) (testimony by EEOC supervisor agreeing that he "pressure[s]" his investigators to "close the older cases prior to the end of the fiscal year"; court later dismissed suit for failure adequately to conciliate).

The EEOC sometimes is reluctant to provide the employer with the information necessary to evaluate the potential claims against it—even if such information is necessary to any reasoned decision on settlement—perhaps because the agency is expecting future litigation and does not want to give the employer any conceivable head start. Thus, for example, in *EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107 (E.D. Wash. 2012), the EEOC demanded $1 million for an unspecified class of female employees

who had allegedly been sexually harassed. *See id.* at 1113-14. The employer asked the EEOC for the names of the employees who had supposedly conducted the harassment, and promised to "look further into the allegations of harassment and … provide a status report … within two weeks." *Id.* "A mere six days later," however, the EEOC ended conciliation. *Id.* at 1114. The court faulted the EEOC for its failure "to be more forthcoming regarding the type of damages sought …, some justification for the amount of damages sought, potential size of the class, general temporal scope of the allegations, and the potential number of individuals … alleged to be involved in the harassment." *Id.* at 1115; *see also EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1043 (D. Ariz. 2013) (faulting EEOC for "at no point" providing employer with "basis for its calculations of back pay, compensatory damages, and punitive damages," thus leaving employer "unable to make a meaningful offer of settlement" and making EEOC's conciliation "neither bona fide nor reasonable").

Other times, the EEOC's refusal to provide such critical information might stem from a preference for using civil discovery to identify and investigate allegations of discrimination and assemble a class of claimants, even though the EEOC is able to obtain information from the employer throughout the investigatory process, *see, e.g.*, 42 U.S.C. §§ 2000e-8, 2000e-9. For example, in *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802 (S.D.N.Y. 2013), the EEOC found that Bloomberg had discriminated against a "class" of pregnant women and demanded $7.5 million to compensate those class members. *Id.* at 807. But the EEOC did not *identify* any of these

class members. Bloomberg requested information about these claimants (such as how many there were). *Id.* at 808. "The next day, the EEOC sent Bloomberg a letter declaring that conciliation has been unsuccessful … ." *Id.* Only after filing a federal suit and engaging in discovery did the EEOC identify the particular employees on whose behalf it sought relief. *Id.* at 813-15. By proceeding in that fashion, the EEOC created a moving target for liability, and thus denied Bloomberg "an opportunity to tailor any class-wide conciliatory efforts to the breadth of legitimate claims it might face." *Id.* at 813.[2] The court found that the EEOC had thereby "blatantly contravene[d] Title VII's emphasis on resolving disputes without resort to litigation." *Id.* at 814.

Similarly, in *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), the EEOC issued a reasonable cause determination regarding a single named employee and an unidentified "class" of other employees allegedly subjected to sexual harassment. During conciliation, the EEOC insisted that the *employer* identify the class members; it did not do any investigation of its own to determine the size of the supposed "class" or the identity of its members. *See id.* at 667-68. Only after two years of discovery in litigation did the EEOC identify the employees whom it alleged had been sexually harassed; and the "number of purported class members continuously changed throughout the discovery process." *Id.* at 676. As the district court and Eighth Circuit

[2] The number of class members is a critical piece of information in evaluating any settlement, because damages are capped "for each complaining party." 42 U.S.C. § 1981a(b)(3).

recognized, by suing first and identifying the scope of the liability later, the EEOC unfairly deprived the employer of a "meaningful opportunity to conciliate." *Id.*; *see also Swissport Fueling*, 916 F. Supp. 2d at 1043 (noting that employer "was faced with a moving target of liability throughout the conciliation process, making it practically impossible for [employer] to accurately confront the issues before it").

Another difficulty faced by employers has been the tendency of some EEOC investigators to demand an "all-or-nothing" settlement. Thus, in *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981), the EEOC brought suit alleging that the employer had engaged in race discrimination at two stores in New York. *Id.* at 16. Prior to filing the suit, however, the EEOC had offered to conciliate "only on a *nationwide* basis, rather than with respect to the two facilities that were the subject of the suit." *Id.* (emphasis added). That was inadequate, the Second Circuit held, because the "framework chosen" for conciliation "must afford a fair opportunity to discuss the practices at those installations" that are "the subject of suit." *Id.* at 19. "Sears was given no opportunity to reform its practices in Brooklyn and White Plains," which were the allegedly affected facilities, "prior to instigation of the suit." *Id.*

The EEOC's "all-or-nothing" approach was again seen in *EEOC v. Pet, Inc., Funsten Nut Division*, 612 F.2d 1001 (5th Cir. 1980) (per curiam), but in that case, the employer wanted to conciliate the claims for the alleged "class" with the exception of one particular terminated employee. *See id.* at 1002. The EEOC, however, refused to settle *any* of the claims unless that individual was granted relief. *See*

id. Thus, even though the vast majority of claims could have been voluntarily resolved, the EEOC insisted on litigating them all. "Such an all-or-nothing approach on the part of a commission, one of whose most essential functions is to attempt conciliation, will not do." *Id.*

Finally, in some cases the EEOC conciliates on claims relating to a particular *type* of discrimination or a particular *geography* or a particular *employee* but, if that fails, substantially modifies the nature of the claims before filing suit and without notice to the employer. Perhaps because the EEOC erroneously assumes that conciliation of new claims would have the same result as conciliating the old ones, it does not attempt to reopen conciliation to address the new issues. But, of course, settlement dynamics depend considerably on the suit's allegations and scope.

Thus, in *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300 (W.D. Pa. 1977), the EEOC tried to conciliate a claim that the airline was discriminating against men in hiring flight attendants. *See id.* at 1305. When the parties were unable to agree on the claim of sex discrimination, the EEOC brought a suit that also asserted unrelated *race* discrimination claims that were far more inflammatory and that the employer may well have been interested in settling if given a chance, such as a claim of "excluding blacks from certain jobs because of their race." *Id.* at 1303.

Further, in *EEOC v. Dillard's, Inc.*, No. 08–CV–1780, 2011 U.S. Dist. LEXIS 76206 (S.D. Cal. July 14, 2011), the EEOC proposed to conciliate claims of two employees from a single store who were terminated for failure to provide sufficiently specific doctor notes after missing work. *See id.* at *2-5. The

EEOC proposed that the employer pay damages of $325,000 to these employees, and did not mention damages for anyone else. *Id.* at *4-5. After the employer declined the offer, the EEOC filed suit on behalf of a class of "similarly-situated individuals" and then sought *nationwide* discovery to identify the class. *See id.* at *5-6. Thus, the EEOC's "conciliation efforts focused on two individuals … both of whom worked at the El Centro store," and gave no notice to the employer that it "potentially faced claims on behalf of a nationwide class." *Id.* at *26.

None of this is to deny that many EEOC officials genuinely prefer settlement in many cases, particularly garden-variety cases. But the above examples show that the EEOC's incentives to discuss or reach settlement can be overcome by a variety of other interests that can lead the agency to circumvent its statutory obligation to conciliate in favor of an aggressive pursuit of the EEOC's strategic agenda. *See* EEOC Strategic Enforcement Plan (Dec. 2012) ("targeted enforcement necessitates a paradigm shift to focus on specific priorities, recognizing that focused effort should have a broad and lasting impact to more effectively advance the agency's mission"). Ultimately, though, whatever the motivation, that is not the scheme that Congress designed. And if all of these incidents took place *notwithstanding* the prospect of judicial review, it is easy to see how, when the EEOC wants to litigate a case, it may allow its other interests to outweigh its interest in voluntary settlement *absent* that check.

As Judge Wilkinson recently warned, courts setting legal rules must take care not to encourage "sub-optimal agency behavior," particularly given the "danger that those inside a public bureaucracy,

armed with significant resources, authority, and discretion, may become gradually numb as to how their actions affect those outside parties they investigate or sue." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J., concurring). That warning is especially apt here, in light of Congress's intent to protect employers from the substantial burdens of EEOC litigation by allowing them the chance to voluntarily resolve Title VII complaints outside of court. Eliminating judicial review would greatly undermine that protection.

B. Employers Would Have No Reason To Refuse Reasonable Conciliation Offers in Favor of Holding Out for Judicial Review.

The second premise for the Seventh Circuit's conclusion that "review undermines conciliation" (Pet. App. 16a) was that judicial enforcement would supposedly "invit[e] employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." (*Id.*) In that view, allowing courts to enforce the conciliation obligation "tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes" so that it can "stockpile exhibits for the coming court battle." (*Id.* at 16a-17a.) This reasoning is unsupported by both precedent and practice. It is also blind to the true incentives faced by employers when they are accused by the EEOC of violating civil rights laws.

First, the Seventh Circuit cited no decisional authority or empirical evidence that, over the forty years during which the federal courts uniformly reviewed EEOC conciliation, employers engaged in

such bad-faith tactics. Nor are *amici* aware of any judicial decisions describing such behavior. There is certainly no evidence here that Petitioner did anything but negotiate in good faith.

Second, the Seventh Circuit's ahistorical narrative presumes that employers do not seriously want to settle the claims against them. Nothing could be further from the truth. Most businesses much prefer to resolve disputes quickly, quietly, and out of the public eye. Although the Seventh Circuit speculated that employers lose nothing by turning conciliation into a litigation prelude—because "the employer remains free to settle after the EEOC files suit" (Pet. App. 18a)—that ignores the substantial benefits to employers of settling before suit is filed.

For one, most employers prefer to settle *confidentially*. 42 U.S.C. § 2000e-5(b) (conciliation must be confidential unless parties agree otherwise). A publicly filed EEOC complaint and corresponding press release and publicity can draw considerable attention from employees, investors, shareholders, and others. It harms the company's reputation, hurts morale, and may impair the employer's overall business. A principal benefit of conciliation, for employers, is that it allows them an opportunity to resolve the case *privately*, without being labeled civil rights violators by a government agency. Moreover, the Seventh Circuit's speculation ignores that, after a suit is filed, a settlement with the EEOC generally can only be obtained by agreeing to a consent decree. *See* EEOC, Regional Attorneys' Manual, Part 3, § IV.A.2.a (Apr. 2005) ("To ensure effective enforcement of Commission resolutions, the agency's practice is that settlements be in the form of a

consent decree."). Such decrees, of course, expose employers to the risk of contempt sanctions, while pre-suit settlements do not. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) ("The force and vitality of judicial decrees derive from more robust sanctions."). Both reasons give employers sufficient motivation to settle during conciliation rather than throw away that opportunity in the hopes of a settlement down the road after suit has been filed.

For another, the notion that an employer would reject any *reasonable* offer in the hopes of later convincing a federal judge that the offer was *unreasonable* simply ignores the deferential posture adopted by all courts with respect to conciliation. Although the Circuits have nominally articulated different standards by which to judge adequacy of conciliation efforts, most Circuits agree that the court's "role in reviewing efforts to conciliate, while not inert, is modest." *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 637 (S.D.N.Y. 2010); *see also id.* at 639 (refusing to make any "judgment about the wisdom of the parties' respective conciliation strategies"); *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2014 U.S. Dist. LEXIS 27019, at *12, *18 (S.D. Tex. Mar. 4, 2014) (conciliation "does *not* require a minitrial" and EEOC is not governed by any "rigid rules and regulations"); *Sears*, 650 F.2d at 18 (agreeing that "Commission should be given wide latitude in shaping both the general framework of conciliation and the specific offers made"). In the vast majority of cases, the EEOC's conciliation efforts satisfy *any* Circuit's test, making it highly irrational for an employer to forfeit the opportunity to resolve a claim during the pre-suit process and instead hold out for judicial review of conciliation.

Third, if a district court does find a conciliation violation, it might (depending on the circumstances) do no more than stay proceedings to allow the parties another chance to conciliate. Indeed, Title VII expressly contemplates that courts may take such action, further belying the notion that Title VII envisioned no judicial involvement at all in the conciliation process. *See* 42 U.S.C. § 2000e-5(f)(1) ("[T]he court may, in its discretion, stay further proceedings … for … further efforts of the Commission to obtain voluntary compliance."). Given the district court's discretion to fashion an appropriate remedy for any violation, the Seventh Circuit's speculation that employers will assert frivolous defenses in order to later try to convince a judge to force the EEOC to resume conciliation is far-fetched. Employers want to resolve disputes quickly, not pay hefty lawyers' fees indefinitely.

Contrary to recent public speculation of a senior EEOC official, eliminating judicial review is not justified by a need to save employers from lawyers who allegedly try to "rack up billable hours" by fighting over conciliation and drawing out litigation. Scott Flaherty, *EEOC Attorney Says Presuit Attacks Excuse To Up Billables*, LAW360, Aug. 21, 2014. That paternalistic suggestion is offensive to both employers (who are more than capable of monitoring their attorneys) and lawyers (who are fiduciary-bound to act in their clients' best interests), and should not be countenanced by this Court.

Fourth, the knowledge that a conciliation record may end up before a federal judge would give any employer the added incentive to behave reasonably and make a genuine, good-faith attempt to settle. No

employer wants to get off on the wrong foot with the judge presiding over its case by asserting that the EEOC failed to conciliate when in fact the employer had rejected reasonable settlement offers. For the same reason that judicial review encourages the EEOC to act more reasonably, fairly, and openly in conducting conciliation, it encourages employers to do the same—not tempt them to do the opposite, as the court below speculated without any factual basis.

* * *

In short, if the EEOC satisfies its obligation to engage in meaningful negotiation, there is little opportunity for employers to sandbag and little incentive to waste resources. To be sure, there could be some employers who may raise frivolous objections to conciliation, just as there are some employees who raise frivolous discrimination complaints. But the former concern is no reason to eliminate judicial power to address meritorious objections, just as the latter is no reason to refuse to enforce Title VII's substantive rights. Conversely, to immunize the EEOC from judicial review would only encourage it to rush to court, refuse to share critical information, and expand its claims without notice to employers—as it has proven willing to do. The predictable result will be less conciliation and more litigation, which not only hurts employers, but also employees. In the absence of quick and effective relief as part of a negotiated settlement, employees must wait years and submit to intrusive discovery before obtaining any meaningful relief. That is the very opposite of what everyone recognizes that Congress intended.

II. THE DECISION BELOW IS ALSO LEGALLY INDEFENSIBLE.

The decision below is not just inconsistent with the policy of conciliation embodied in Title VII, but is also wrong on the law. Far from being an unusual departure from the ordinary judicial role, review of EEOC compliance with its statutory pre-suit duties is quintessentially within the judicial ken—and is exactly what Congress intended.

First, the Seventh Circuit's reasoning misstates the relevant inquiry and ultimately lacks a limiting principle. If applied to other statutory schemes, the court's broad reasoning would forbid judicial review of executive compliance with other pre-suit duties—contradicting this Court's "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

Second, the notion that there is no "meaningful standard" by which courts can judge the EEOC's compliance with the statutory obligation is a far too ready concession. Courts have been policing the agency's conciliation efforts for more than four *decades*, and a developed body of law sets forth the standards that meaningful conciliation requires. The need for multifactor, case-by-case adjudication is not a legal basis to abdicate the task of judicial review altogether—any more than in the numerous other contexts in which such adjudication is routine.

Third, the contemporaneous legislative record refutes the court's conclusion that Congress intended no judicial review of conciliation. In fact, review was part of a careful, intentional compromise to cut back on the EEOC's unchecked discretion. This Court should not rewrite that political bargain.

A. The Seventh Circuit's Refusal To Enforce a Statutory Command Has No Legal Basis and Lacks a Limiting Principle.

In refusing to enforce Title VII's requirement that the EEOC attempt conciliation before suit, the Seventh Circuit emphasized that Title VII does not expressly authorize judicial review and that this case thus presents the question whether to recognize an "implied" affirmative defense under the statute. This approach to the issue is entirely backwards. Courts are presumptively empowered to enforce the law, and to ensure that executive agencies do not exceed their boundaries. Ultimately, the reasoning adopted by the Seventh Circuit lacks a clear limiting principle and stands in substantial tension with the basic framework of the administrative state.

The court observed that Title VII "contains no express provision for an affirmative defense based on an alleged defect in the EEOC's conciliation efforts." (Pet. App. 5a-6a.) True enough: Title VII does not *specifically* direct courts to review whether the EEOC satisfied its conciliation duty, just as it does not *specifically* direct courts to review whether the EEOC received "a charge … filed by or on behalf of a person claiming to be aggrieved," for example, or whether the EEOC "serve[d] a notice of the charge … on such employer … within ten days"—both of which are prerequisites to suit found in the same statutory provision. 42 U.S.C. § 2000e-5(b). However, Title VII's lack of specific direction has not stopped courts—including this Court—from ensuring EEOC compliance with those procedural requirements. *See, e.g.*, *Shell Oil*, 466 U.S. at 67-81 (reviewing sufficiency of Commissioner's charge and notice to

employer). The reason is that Title VII, in the very same section, *does* say that federal courts "shall have jurisdiction of actions brought under this subchapter," 42 U.S.C. § 2000e-5(f)(3); and that suffices to give them the authority to adjudicate suits pursued by the EEOC—including to resolve contentions that the EEOC did not satisfy the express prerequisites to such suits.

By analogy, the Seventh Circuit drew upon the Supreme Court's jurisprudence disfavoring "implied rights of action." (Pet. App. 19a.) The crucial point, however, is that in an implied right of action case, the *plaintiff* is invoking the court's jurisdiction and seeking its intervention in a matter that would otherwise lie outside the court's power. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (plaintiff sued to enforce federal regulation against state executive agency); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (plaintiff sought to sue university for damages for violating federal statute governing release of educational records). By contrast, in the Title VII context it is the *EEOC* who is suing the *employer*, 42 U.S.C. § 2000e-5(f), and the employer defendant is simply asking the court to enforce the statutory prerequisites to such an action. In other words, Title VII plainly contemplates federal suits by the EEOC to enforce the law and judicial enforcement of the statute. The only question is whether the court should enforce the *entire* statutory scheme, including those parts that require the EEOC to undertake an administrative process before bringing suit—or will enforce it only selectively. Neither this Court's implied right-of-action jurisprudence nor any other legal principle offers any support for the latter approach.

In the end, the Seventh Circuit's reasoning has no limiting principle. As Petitioner has shown, Congress often imposes statutory preconditions to suit. (Pet. Br. 19-21 (citing *Hallstron v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-58 (2010); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007); *United States v. Zucca*, 351 U.S. 91, 94 (1956); *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931)).) In these situations, the particular statute in question does not *expressly* say that failure to comply with the precondition provides an "affirmative defense," but the courts nonetheless understand that without satisfaction of the legal prerequisite, the case cannot proceed.

The Seventh Circuit's assurance that EEOC officials are subject, in theory, to the oversight of Congress, and "are appointed by the President with the advice and consent of the Senate" (Pet. App. 20a-21a), only underscores the breadth of its position. *All* agencies are potentially subject to congressional influence, and *all* agency heads are appointed by the President or senior officers. *See* U.S. Const. art. I, §§ 7-8; art. II, § 2. Of course, that has never been viewed as a reason to free agencies from judicial review of statutory constraints. To the contrary, ensuring that executive actors comply with the law—at least where their noncompliance would impose concrete injury on third parties, as here—is the classic role of courts within our scheme of separated powers. *See United States v. Nixon*, 418 U.S. 683, 692-97, 708 (1974) (asserting judicial power to review president's assertion of executive privilege, "in light of our historic commitment to the rule of law").

B. As Four Decades of Jurisprudence Show, Courts Have No Trouble Applying Title VII's Conciliation Requirement.

Even if the courts *generally* enforce requirements applicable to the executive branch—even "pre-suit" requirements—the Seventh Circuit reasoned that courts cannot play that usual role here, due to the absence of any "meaningful standard" by which it could enforce the EEOC's obligation to attempt conciliation. (*See* Pet. App. 9a-10a.) In effect, the court ruled that because the task that Congress directed is difficult, courts are free to disregard it.

As the 40-year history of judicial review of conciliation shows, however, that concern is greatly overstated. Challenges to EEOC conciliation may be *fact-intensive*, but that hardly makes them unreviewable. And while the Seventh Circuit may prefer to avoid fact-intensive inquiries, Congress is free to impose them, and courts cannot abdicate just because they dislike the statutory regime.

Ever since the 1972 amendments were enacted, federal courts have uniformly enforced the EEOC's conciliation duty. *See EEOC v. Container Corp. of Am.*, 352 F. Supp. 262, 263-66 (M.D. Fla. 1972) (in "first" suit pursued by EEOC, holding that "to foreclose judicial inquiry into the satisfaction of the conditions [such as conciliation] would eliminate them from the Act"). A well-developed body of law has since emerged, recognizing certain basic principles by which courts can test the adequacy of the EEOC's efforts. For example: The EEOC cannot conciliate in an "all-or-nothing" fashion. *Pet*, 612 F.2d at 1002. In class action cases, where the EEOC is unconstrained by Rule 23 of the Federal Rules of

Civil Procedure, *see Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 320 (1980), the EEOC must give the employer sufficient information about the number of affected individuals to evaluate its potential exposure. *CRST*, 679 F.3d at 678. The EEOC must provide enough time for the employer to consider its offers. *Asplundh Tree*, 340 F.3d at 1260. *See also* Pet. Br. 36-39 (setting forth principles).

Of course there are divergences among the lower courts on some questions (*see* Pet. App. 10a n.2), just as the lower courts diverge on many other issues. Because the inquiry is necessarily fact-intensive and case-specific—what is required for a "meaningful" conciliation will differ from case to case—some questions simply may not have categorical answers. (Pet. App. 10a.) But that does not make the inquiry unmanageable. Courts have been managing it for decades. And, of course, if Congress believed that judicial review of the EEOC's conciliation obligation was unmanageable, it could have eliminated that review at any time. Congress has not done so.[3]

The Seventh Circuit critiqued the "good faith" test adopted by some courts as too "difficult … to

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[3] Indeed, that acquiescence is particularly compelling here, because Congress has amended Title VII in other ways, *see, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1079, and has incorporated its remedial scheme (including the conciliation prerequisite) wholesale into other statutes, *see, e.g.*, 42 U.S.C. § 12117(a) (ADA). Contrary to the Seventh Circuit's implication (Pet. App. 26a n.4), this Court continues to note and take guidance from congressional acquiescence in appropriate cases. *See, e.g.*, *Watson v. United States*, 552 U.S. 74, 82-83 (2007) (invoking "long congressional acquiescence" to judicial construction of statute).

enforce." (Pet. App. 11a (quoting *Doe v. Oberweis Dairy*, 456 F.3d 704, 711 (7th Cir. 2006)).) And, to be sure, some courts may prefer to phrase the inquiry in more objective terms (such as the requirement of a "meaningful" chance to conciliate, *CRST*, 679 F.3d at 676). But the fact is that courts apply "good faith" inquiries *all the time*. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 920 (1984) (exclusionary rule inapplicable if officer acted in "good faith"); *Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (creditor's "good faith" relevant to whether its late filing is "excusable" under Bankruptcy Rules); *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (excessive force inquiry turns on whether force was applied in "good-faith"); *Vaca v. Sipes*, 386 U.S. 171, 194 (1967) (union has duty to represent employees "in good faith"); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (in diversity cases, sum claimed by plaintiff controls if "made in good faith"); 28 U.S.C. § 1915(a)(3) (court must certify whether *in forma pauperis* appeal is "taken in good faith").

Moreover, in many other contexts, Congress has written a good-faith *negotiation* duty into the law. *See, e.g.*, 29 U.S.C. § 158(d) (duty to negotiate with unions in good faith); 5 U.S.C. § 7114(a)(4) (same duty for federal agencies and civil-service unions); 25 U.S.C. § 2710(d)(3), (7) (requiring states to negotiate "in good faith" with Indian tribes and authorizing enforcement suits). Analyzing a negotiating party's good faith is thus hardly an unprecedented or impossible task. While some courts may prefer a more bright-line, objective test, the choice belongs to Congress. The alleged lack of a manageable standard is therefore illusory and irrelevant here.

C. The Contemporaneous Legislative Record Refutes the Seventh Circuit's Decision.

The Seventh Circuit's holding that Congress did not intend for courts to enforce the statutory duty to conciliate is also refuted by the 1972 amendments to Title VII, which first authorized the EEOC to bring enforcement actions in court after compliance with its pre-suit obligations. Specifically, early drafts of those amendments expressly specified that no judicial review of conciliation would be had—but the final, enacted amendments dropped that language, as part of a broader set of revisions that were designed to limit the EEOC's power and give federal courts greater oversight. If affirmed, the opinion below would undo that congressional choice to establish firm limits on EEOC litigation authority.

Early versions of the 1972 amendments to Title VII expressly stated that the EEOC may proceed with a lawsuit against an employer if it cannot secure "a conciliation agreement acceptable to the Commission, *which determination shall not be reviewable in any court*." S. 2515, 92d Cong., § 4(f) (1971) (emphasis added). Skeptics of EEOC authority initially sought to amend the bill to delete that phrase, and their efforts—initially—failed. *See EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 262 (N.D. Ill. 1980). But, following that skirmish, the bill *was unable to pass*. Instead, the entire bill was replaced by a substitute amendment proposed by Senator Dominick, *see Chandler v. Roudebush*, 425 U.S. 840, 855-57 (1976); *Occidental Life*, 432 U.S. at 361-66; and that version, which Congress ultimately enacted, does not include the italicized language precluding judicial review. 42 U.S.C.

§ 2000e-5(f)(1). Removing that language was a compromise measure necessary to secure the bill's passage, acceding to the views of those skeptical Senators who believed that EEOC conciliation needed "some oversight." 118 Cong. Rec. 3804 (Feb. 14, 1972); *see also EEOC v. Sherwood Med. Indus., Inc.*, 452 F. Supp. 678, 683 (M.D. Fla. 1978) ("The legislative history of the 1972 amendments confirms that Congress viewed judicial relief as a recourse of last resort, sought only after a settlement has been attempted and failed.").

Indeed, the bill ultimately enacted by Congress differed dramatically from the amendments initially proposed. The initial draft would have given the EEOC the power to adjudicate complaints and issue cease-and-desist orders without going to court at all. *See Occidental Life*, 432 U.S. at 361-64. But that proposal provoked an outcry from Members of Congress who sought to guarantee employers the procedural protections and oversight of an Article III court. *See id.*; *Chandler*, 425 U.S. at 850 (describing how "grant of cease-and-desist power to the EEOC provoked strong dissenting statements"). Senator Dominick, whose substitute bill was ultimately adopted, criticized the initial bill as allowing the EEOC to act, in "Star Chamber" fashion, as "investigator, prosecutor, trial judge and judicial review board," without independent judicial checks. 117 Cong. Rec. 40290 (Nov. 10, 1971); *see also, e.g.*, S. Rep. No. 92-415 at 85 (1971) (recording views of initial Committee dissent, including Sen. Dominick, that civil rights litigation ought to be supervised by "[f]ederal court judges who, shielded from political influence by life tenure, are more likely to withstand

political pressures and render their decisions in a climate tempered by judicial reflection”).

Fears of a runaway, politicized agency beyond the reach of the federal courts motivated Congress to scrap cease-and-desist authority for the EEOC and simultaneously *eliminate* the barrier to judicial review of conciliation. Rewriting that conscious congressional choice is therefore plainly improper. Put another way, a Congress worried about giving a “blank legislative check,” 117 Cong. Rec. 38402 (Nov. 1, 1971) (Sen. Allen), to the “crusaders” at the EEOC, 118 Cong. Rec. 1976 (Feb. 1, 1972) (Sen. Ervin), would hardly have intended for the judicial branch to turn a blind eye when that agency ignores the statutory constraints that Congress imposed.

CONCLUSION

For the reasons stated above and by Petitioner, the decision below should be reversed.

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