No. 13-2456

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

MACH MINING, LLC,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Illinois, No. 11-cv-879
Honorable J. Phil Gilbert, District Judge, Presiding

BRIEF FOR *AMICI CURIAE* RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel for *Amici Curiae* furnishes the following statement in compliance with Circuit Rule 26.1:

(1) The full name of every party that the attorney represents in the case:

Retail Litigation Center, Inc.
Chamber of Commerce of the United States of America
National Federation of Independent Business Small Business Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the District Court or before an administrative agency) or are expected to appear for the party in this court:

Jones Day

(3) If the amicus is a corporation, i) Identify all its parent corporations, if any; and ii) List any publicly held company that owns 10% or more of amicus' stock:

Retail Litigation Center, Inc. has no parent corporations and no publicly held company has any ownership interest therein.

Chamber of Commerce of the United States of America has no parent corporations and no publicly held company has any ownership interest therein.

National Federation of Independent Business Small Business Center has no parent corporations and no publicly held company has any ownership interest therein.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

INTEREST 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.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public-interest law firm established to provide legal

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

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.

SUMMARY OF ARGUMENT

Congress required the EEOC to conduct conciliation proceedings as a precondition to suing an employer under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(b), (f)(1). Yet the EEOC's position is that no matter how flagrantly it refuses to comply with its statutory duty, there is nothing that any court or employer can do about it. That unprecedented position would all but eliminate a critical feature of the integrated, multistep enforcement procedure that Congress created in 1964 and amended in 1972.

I. There is simply no reason why the EEOC's compliance with a clear statutory duty should be categorically beyond the courts' power to review. Contrary to the EEOC's assertions, Title VII's text nowhere "precludes" review of the EEOC's pre-suit duties. Compliance with the statute's conciliation requirement is just as reviewable as compliance with Title VII's charge requirements, time limits, and notice rules—all of which have been routinely subject to review, including by the Supreme Court. Nor does the Administrative Procedure Act ("APA") have any bearing here: Employers do not need to invoke the APA to obtain review because the *EEOC* is suing *them*, not the other way around. In any event, nothing in the APA, if it applied, would prevent a court from inquiring into whether the EEOC satisfied its conciliation obligations. The EEOC also invokes legislative history and caselaw, but both actually refute its position. Congress rejected an early version of the 1972 amendments that expressly made EEOC conciliation unreviewable; and courts for the past four decades have consistently reviewed the EEOC's compliance with its pre-suit duties, including its conciliation obligations.

The EEOC's policy arguments similarly fail to demonstrate that courts should ignore Title VII's text. The substance of conciliation is confidential because settlement discussions cannot be used for *merits* purposes. That hardly means that courts cannot review whether conciliation took place, and the EEOC offers no explanation for why allowing them to do so would discourage open communication. If anything, the opposite is true. And fears of gamesmanship are greatly overblown. So long as the EEOC satisfies its own duty to conciliate, what employers do will not be and has not been an obstacle to merits adjudication, despite the prevailing rule allowing review. Discovery, of course, is a two-way street, and while it is not surprising that the EEOC dislikes that process as much as most private parties do, the Federal Rules of Civil Procedure expressly authorize defendants to take discovery of government plaintiffs. *See, e.g.*, Fed. R. Civ. P. 30(b)(6).

None of this means that courts should second-guess the EEOC's judgment as to whether to *accept* a particular settlement agreement. After all, the statute does provide that any conciliation agreement must be "acceptable to the *Commission*." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). But courts have long enforced the basic statutory requirement that the EEOC give employers a meaningful opportunity to resolve the agency's claims out of court—which the EEOC has in various cases violated by, among other things, refusing to offer to conciliate, sabotaging the process by refusing to disclose critical information, conciliating as to one claim or party or location but then suing as to another, or declining to identify a settlement demand or respond to an employer's counteroffers.

II. While it is clear that the order below correctly rejected the EEOC's all-or-nothing argument that its conciliation efforts are categorically unreviewable, this Court need not at this stage of the case precisely define a standard of review. The EEOC made no effort below to contend that it satisfied *any* standard—only to argue that no review is permitted. It is enough, for now, to reject that categorical position, and leave the particulars for remand and, if necessary, for this Court's further review after a final judgment.

But if this Court is inclined to announce a particular standard for review of the EEOC's compliance with its conciliation obligation, the EEOC must, at minimum, afford the employer a meaningful opportunity to settle the case without litigation. Courts have an important role to play in ensuring that the agency does not manipulate, abuse, or effectively evade its statutory duty. For example, the EEOC might sabotage the process by refusing to provide important information about the nature of the claim. Or it might refuse to answer reasonable factual questions, thereby preventing the employer from engaging in the process. Or it might give the employer insufficient time to consider an offer, or refuse to consider an employer's counteroffer. Or it may demand compensation in excess of Title VII's damages caps, 42 U.S.C. § 1981a(b), and then declare impasse when the employer points this out. An objective "meaningful opportunity" test would give courts the flexibility to respond to the full range of factual settings while respecting both the statutory purpose and the EEOC's legitimate discretion.

ARGUMENT

I. The EEOC Should Not Be Permitted To Flout Its Statutory Pre-Suit Obligations Without Any Judicial Review.

Title VII requires the EEOC to "refrain from commencing a civil action until it has discharged its administrative duties," including by following an "integrated, multistep enforcement procedure." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359, 368 (1977). One step of that procedure requires the agency to "endeavor to eliminate any … alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). Only if those efforts fail—*i.e.*, if the EEOC is "unable to secure from the respondent a conciliation agreement acceptable to the Commission"—may it then "bring a civil action" to enforce Title VII. *Id.* § 2000e-5(f)(1).

The EEOC's position in this appeal is stark and categorical: The federal courts may *never* review whether or how it complied with that statutory obligation, but rather must simply accept without question the agency's certification that it has done so. In effect, the EEOC is asking the courts to just trust it.

But courts are empowered to enforce the law, and to ensure that agencies do not exceed their boundaries. To make compliance with a statute unreviewable is to make violation of that statute irremediable. And, unless Congress specifically says so, courts do not ordinarily presume that Congress intended to give its commands no teeth. There is no reason to depart from that rule here. Nothing—not statutory text, legislative history, caselaw, or policy—even hints that Congress wanted employers to have no recourse when the EEOC ignores its statutory duties.

A. Title VII's text does not preclude review of the EEOC's compliance with its conciliation obligation.

The EEOC repeatedly claims that the text of Title VII "precludes" review of its compliance with the pre-suit duty to conciliate. *See* EEOC Br. at 4, 5, 7. But repeating it does not make it so. In fact, nothing in Title VII even *suggests* that judicial review is barred.

1. Indeed, the EEOC soon retreats to a far more modest claim: Title VII says only that the EEOC must "attempt conciliation," and "[n]o provision *authorizes* judicial review" thereof. *Id.* at 7 (emphasis added). To be sure, 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" 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"—all of which are prerequisites to suit found in the same provision. 42 U.S.C. § 2000e-5(b). Yet that has not stopped federal courts—including the Supreme Court and this Court—from routinely reviewing EEOC compliance with those procedural requirements. *See EEOC v. Shell Oil*, 466 U.S. 54 (1984) (reviewing sufficiency of Commissioner's charge and EEOC's notice to employer); *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 696 (7th Cir. 1996) (finding that EEOC's complaint was not premised on a "valid charge supported by a finding of reasonable cause"); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 356-58 (7th Cir. 1988) (considering claim that EEOC conducted its "statutorily mandated preconditions to suit" amidst "conflicts of interest").

Title VII *does* say that federal district courts "shall have jurisdiction of actions brought under this subchapter," 42 U.S.C. § 2000e-5(f)(3); and that alone suffices to give them the authority to adjudicate suits pursued by the EEOC and to resolve contentions that the EEOC did not satisfy its prerequisites. Indeed, since 1972, when Congress authorized the EEOC to sue, every court that has considered the question has held that these prerequisites are reviewable. *See infra*, Part I.D. The statutory text also belies the EEOC's claim that "[n]o provision declares what venue would hear challenges based on alleged failures to conciliate." EEOC Br. at 7. There is an entire subsection devoted to venue. 42 U.S.C. § 2000e-5(f)(3). (To be clear, to *Amici*'s knowledge, nobody is suggesting that courts ought to hear conciliation challenges outside the Title VII civil actions in which they arise.)

2. The EEOC next argues that, if Title VII does not directly preclude review, certain features of the conciliation regime still "lea[d] to the conclusion that review is precluded." EEOC Br. at 8. That inference is unwarranted.

First, while Title VII says that litigation may ensue if the EEOC is "unable to secure from the respondent a conciliation agreement acceptable to the Commission," 42 U.S.C. § 2000e-5(f)(1), that means only that the ultimate, *substantive* decision whether to accept a particular settlement is within the EEOC's discretion, *i.e.*, that a court generally cannot second-guess the agency's decision to refuse an offer. *See EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 294 (7th Cir. 1994) (holding that EEOC "must pursue conciliation" but that judiciary cannot bar EEOC from suing where EEOC "failed to get all of what it wanted in bargaining"). It does not mean that the

EEOC is free to deprive employers of the *procedural* right to a meaningful chance to settle out of court. In other words, whether a particular conciliation agreement is "acceptable" may be up to the EEOC, but whether to engage in conciliation is not.

Second, the statute says that "[n]othing said or done during and as a part of [conciliation] may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b). Conciliation would not be workable if the EEOC were free to use statements made during those settlement discussions in a subsequent press release or summary judgment brief. But there is no such risk from judicial review of the EEOC's compliance with its conciliation obligation, and the EEOC never explains why there would be. If anything, the confidentiality rule shows how seriously Congress took conciliation, highlighting the conflict between the statute that Congress enacted and the EEOC's insistence that it may disregard that process without *any* review. To the extent that the EEOC is concerned that the confidentiality provisions prevent it from responding to an employer's claim that it failed to conciliate, a court could require an employer to consent to disclosure to the extent necessary to pursue and evaluate a conciliation challenge (which has, in fact, long been the EEOC's own position). *See, e.g.*, *EEOC v. Rockwell Int'l Corp.*, 922 F. Supp. 118, 120 (N.D. Ill. 1996) (finding that employer "raised the issue of the scope of plaintiff's conciliation" and so "waived the bar in 2000e-5(b)").

Third, the EEOC notes that Title VII describes conciliation as "informal." EEOC Br. at 8. True enough. But "informal" does not mean "optional."

Fourth and finally, the EEOC says that Title VII "mentions a court's role in conciliation only in the context of cases initially brought by private plaintiffs in which the EEOC intervenes." EEOC Br. at 8. Actually, the statute provides that the court may stay *any* Title VII litigation if the EEOC wants to pursue "further efforts … to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1); *see also EEOC v. United Road Towing*, No. 10-cv-6259, 2012 WL 1830099, at *5 (N.D. Ill. May 11, 2012) (applying this provision in EEOC-initiated case). That authority was needed because there is no statutory duty to engage in "further" conciliation *after* filing suit. By contrast, Title VII directly requires the EEOC to attempt conciliation *before* suing; judicial review of that obligation needs no special mention.

3. In short, Title VII indisputably requires the EEOC to attempt conciliation before bringing suit. Nothing in Title VII suggests that compliance with that prerequisite ought to be treated any differently than compliance with the statute's other pre-suit obligations, which are routinely reviewed by federal courts.

B. The APA neither applies nor precludes review here.

The EEOC argues that the Administrative Procedure Act ("APA") forecloses review of its conciliation efforts. The district court properly rejected that meritless argument. R.55 at 6 n.1; *see also EEOC v. Swissport Fueling, Inc.*, No. CV-10-2101, 2013 BL 4628, at *25 (D. Ariz. Jan. 7, 2013). No court has accepted it. If the EEOC were correct, then the Supreme Court erred in *Shell Oil* when it reviewed the EEOC Commissioner's charges and the EEOC's notice obligations; and every court that has reviewed the EEOC's pre-suit process since 1972 is wrong as well.

Most fundamentally, an employer being sued by the EEOC under Title VII has no need to invoke the APA, which provides an independent cause of action to anyone "suffering legal wrong because of agency action." 5 U.S.C. § 702. That distinguishes cases like *Stewart v. EEOC*, 611 F.2d 679 (7th Cir. 1979), *McCottrell v. EEOC*, 726 F.2d 350 (7th Cir. 1984), *AT&T Co. v. EEOC*, 270 F.3d 973 (D.C. Cir. 2001), *Circuit City Stores, Inc. v. EEOC*, 75 F. Supp. 2d 491 (E.D. Va. 1999), and *Borg-Warner Protective Services Corp. v. EEOC*, 245 F.3d 831 (D.C. Cir. 2001), all of which were actions *against* the EEOC, where plaintiffs needed a statutory hook for affirmative claims and therefore had to invoke the APA. *See Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006) (describing APA as providing "a limited cause of action for parties adversely affected by agency action"). When the EEOC sues an employer, by contrast, it acts under 42 U.S.C. § 2000e-5(f), and the employer needs no independent statutory basis to challenge EEOC's pre-suit conduct. The alleged limits of the APA are therefore entirely irrelevant in this context.

Even if the APA were somehow relevant, the EEOC is wrong to contend that APA principles foreclose review. *First*, the EEOC argues that APA review cannot be had because Title VII directly precludes review (*see* EEOC Br. at 15), but that premise is false, as explained. *Second*, the decision whether or not to conciliate is *not* "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Unlike the law at issue in *Webster v. Doe*, 486 U.S. 592 (1988), Title VII does not give the EEOC sole discretion to decide whether to conciliate. Quite the opposite: It says that the EEOC "shall"—not "may"—conciliate. 42 U.S.C. § 2000e-5(b). And, as 41 years of

precedent have shown, that directive is hardly so broad or vague as to make meaningful judicial review impossible. *See infra*, Part I.D. *Third*, while a conciliation violation is not "final agency action" on its own, "there clearly would be final agency action if the Commission filed a lawsuit." *AT&T Co.*, 270 F.3d at 975. At that point, the employer would have no need to "challenge that decision as final agency action under the APA; it would instead simply defend itself against the suit." *Id.* That is precisely what is going on here. All of the cases cited by the EEOC involve affirmative suits against an agency, either before formal action was taken or while administrative proceedings were ongoing, and so are plainly inapt. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980); *AT&T Co.*, 270 F.3d at 975; *Stewart*, 611 F.2d at 683.

Finally, the EEOC's APA argument has no limiting principle. It would except from judicial review all executive agencies' compliance with congressional prerequisites to filing a civil or criminal action, and thus overturn decades or centuries of judicial review of executive action. The EEOC's APA argument is not just wrong but dangerously wrong, and threatens to unleash the EEOC and other agencies to engage in abusive pre-suit tactics or to evade congressionally mandated pre-suit requirements altogether. This is not the law, nor should it be.

C. Title VII's legislative history squarely refutes the EEOC's position.

The EEOC cites snippets of legislative history to create the impression that Congress deliberately rejected judicial review of the EEOC's efforts to comply with the conciliation obligation. *See* EEOC Br. at 10-11. The truth is just the opposite: Early versions of the 1972 amendments to Title VII included express *preclusions* of

judicial review of EEOC conciliation—but the final, enacted version tellingly did not. That shift was part of a broader set of revisions designed to limit the EEOC's power and give courts greater oversight. The EEOC's position here would undo that congressional choice to establish firm limits on the EEOC's litigation authority.

The EEOC quotes excerpts from a Senate debate involving Senators Williams and Javits, two proponents of broad EEOC authority, and Senator Ervin, a skeptic. The EEOC says that the proposal on the table was "to require judicial review of EEOC conciliation," and that the proposal was soundly rejected after Senator Williams pointed out that there would be no formal record of conciliation and Senator Javits described the amendment as "inconceivable." EEOC Br. at 10-11. The EEOC thus concludes from the defeat of this amendment that Congress must have intended that conciliation *not* be subject to judicial review.

What the EEOC does not say is that the bill, as it then stood, expressly stated that the EEOC may proceed 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). The proposal that the EEOC describes as intended "to require judicial review of EEOC conciliation" was an amendment that proposed to delete that italicized language. 118 Cong. Rec. 3799 (Feb. 14, 1972). Although that amendment was defeated, the legislation also ultimately failed to pass. The entire bill was instead replaced by a substitute amendment proposed by Senator Dominick, *see Chandler v. Roudebush*, 425 U.S. 840, 855-57 (1976); *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1041-43

(7th Cir. 1982); and that version, which Congress ultimately enacted, *does not include the italicized language precluding review*. *See* 42 U.S.C. § 2000e-5(f)(1). Thus, by the EEOC's own logic, Congress adopted language "to require judicial review of EEOC conciliation" (EEOC Br. at 11), acceding to the views of those, like Senator Allen, who believed that EEOC conciliation needed "some oversight," 118 Cong. Rec. 3804 (Feb. 14, 1972).

Indeed, the bill ultimately enacted by Congress differed dramatically from the legislation initially proposed and pressed by Senators Javits and Williams. Those Senators wanted to give the EEOC the power to adjudicate complaints and issue cease-and-desist orders. *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 protections and oversight of an Article III court. *See id.*; *Chandler*, 425 U.S. at 850 (describing how "[t]he 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 any independent judicial check. 117 Cong. Rec. 40290 (Nov. 10, 1971); *see also, e.g.*, S. Rep. No. 92-415 at 85 (1971) (recording the views of the Committee dissent, including Senator Dominick, that civil rights litigation ought to be supervised by "Federal 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").

These 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 to *eliminate* the barrier to judicial review of conciliation, the EEOC's "most important function," *Liberty Trucking*, 695 F.2d at 1042. To undo that conscious congressional determination would plainly be inappropriate.

D. For more than four decades, courts have consistently reviewed the EEOC's conciliation efforts.

Given Title VII's text and legislative history, since 1972 (when Congress amended Title VII to authorize the EEOC to file lawsuits) courts have routinely reviewed the EEOC's satisfaction or violation of its duty to conciliate. *No* court has adopted the EEOC's position that judicial review is wholly prohibited. The EEOC is thus brashly asking this Court to reject an unbroken line of jurisprudence dating to the very enactment of the amendments at issue.

1. In the very "first [suit] brought by the EEOC under the recently amended Act," the defendant "contend[ed] that the EEOC did not endeavor to seek conciliation and, therefore, failed to satisfy that prerequisite to bringing suit." *EEOC v. Container Corp. of Am.*, 352 F. Supp. 262, 263-64 (M.D. Fla. 1972). The EEOC, then as now, argued that "its decision to sue is not reviewable and the Court is foreclosed from inquiring into the extent of the conciliation efforts." *Id.* at 264. Judge Tjoflat, then a district judge, examined the "overall statutory scheme" and correctly concluded that "each one of the deliberate steps in this statutory scheme —charge, notice, investigation, reasonable cause, conciliation—[is] intended by Congress to be a condition precedent to the next succeeding step and ultimately

legal action." *Id.* at 264-65. Rejecting the EEOC's argument, the court held that "to foreclose judicial inquiry into the satisfaction of the conditions [such as conciliation] would eliminate them from the Act." *Id.* at 266. "The Court concludes that the question of the EEOC's satisfaction of the statutory conditions precedent to suit is a proper and indeed a necessary subject of judicial inquiry." *Id.*

The EEOC has had no better luck since. This Court cited, adopted, and relied upon *Container Corp.* in *Sears*, 839 F.2d at 358, when it thoroughly reviewed the EEOC's pre-suit conduct and found that it had "badly abused the investigation, predetermination settlement, and conciliation statutory prerequisites to suit." *See also, e.g., Harvey L. Walner & Assocs.*, 91 F.3d at 970 (finding that "the failed effort at conciliation related not to Shepard's charge but to EEOC's determination that Walner was engaged in an ongoing pattern of sexual harassment" and that EEOC therefore could not proceed to suit on the basis of Shepard's charge); *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271, 277 (7th Cir. 1980) (holding that EEOC "must conciliate the charges or practices which are at issue" and reviewing conciliation process to determine whether laches barred EEOC's suit).

Furthermore, all of the courts of appeals faced with objections to EEOC conciliation efforts have reviewed those efforts—and, on occasion, found them wanting. *See, e.g.*, *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981) (EEOC's "insistence on nationwide conciliation" failed to satisfy duty because it did not "afford a fair opportunity" to discuss particular stores that were subject of suit); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 271-72 (4th Cir. 1976) (dismissing suit

where EEOC "had not attempted to conciliate the charges"); *EEOC v. Pet, Inc.*, 612 F.2d 1001, 1002 (5th Cir. 1980) (per curiam) (EEOC violated statute by "refus[ing] [employer's] offer to attempt to conciliate the class issues" and insisting on resolving individual and class issues in "all-or-nothing" fashion); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1360-61 (6th Cir. 1975) (EEOC failed to conciliate because it "did not notify [employer] that conciliation had failed and was terminated before bringing suit"); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676 (8th Cir. 2012) (EEOC gave "no meaningful opportunity to conciliate" when it did not identify names or number of allegedly aggrieved persons); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982) ("The exchange of letters between Pierce and the EEOC was inadequate to constitute legitimate conciliation."); *EEOC v. Zia Corp.*, 582 F.2d 527, 534 (10th Cir. 1978) ("EEOC regional litigation officials acted improperly" by "escalat[ing]" demands without providing "sufficient [time] … for reasoned responses"); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003) (EEOC violated conciliation duty by giving employer only 12 business days to respond to agreement that "included no theory of liability").

District court authority to the same effect is extensive; influential decisions include, *e.g.*, *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975); *EEOC v. Westvaco Corp.*, 372 F. Supp. 985 (D. Md. 1974); *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300 (W.D. Pa. 1977); *EEOC v. Sherwood Med. Indus., Inc.* 452 F. Supp. 678 (M.D. Fla. 1978); *EEOC v. First Midwest Bank*, 14 F. Supp. 2d 1028 (N.D. Ill. 1998); *EEOC v. Dial Corp.*, 156

F. Supp. 2d 926 (N.D. Ill. 2001); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974 (S.D. Ind. 2003); and *EEOC v. Bloomberg, L.P.*, 751 F. Supp. 2d 628 (S.D.N.Y. 2010).

2. Particularly because Congress, notwithstanding this unbroken line of precedent, has not amended Title VII to preclude review of conciliation—even as it has amended it in other ways, *see* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1079—it would be wrong for this Court to depart from the longstanding view of the federal courts. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984) (citing "congressional acquiescence" to "contemporaneous judicial construction").

3. Despite this uniform authority, the EEOC continues to press the same position that it first advanced unsuccessfully in 1972: that courts have no means to enforce the statutory conciliation obligation. In support of that uncompromising position, the EEOC cites five cases from this Court. But none is on point.

Elgin Teachers held only that the court could not *force* the EEOC to accept the employer's settlement offer, where the EEOC conciliated but simply "failed to get all of what it wanted in bargaining." 27 F.3d at 294. This Court confirmed that the EEOC "*must* pursue conciliation," *id.* (emphasis added), a mandatory obligation that would be completely toothless if the courts were barred from reviewing it. And, while the courts may not force the EEOC to settle a case on particular terms, what the courts can do, should do, and have been doing is review whether the EEOC engaged in a meaningful conciliation process, and afforded the employer a fair opportunity to resolve the specific claims against it out of court.

EEOC v. Caterpillar, Inc., 409 F.3d 831 (7th Cir. 2005), was not about the conciliation requirement at all, but rather concerned whether courts should review the EEOC's finding that a particular charge was supported by reasonable cause. *See id.* at 833. It obviously makes no sense for courts to review reasonable-cause findings as opposed to just proceeding directly to the merits, which requires the EEOC to satisfy a higher burden of proof. That is why preliminary probable-cause findings are unreviewable, not just in the Title VII context, but "generally." *Id.* For example, once a grand jury indicts a criminal defendant, the defendant cannot ask the court to review whether the grand jury had probable cause to do so; rather, the court will simply determine whether or not the defendant is actually guilty. Courts may and often do, however, review the pre-indictment process for alleged procedural and other misconduct by law enforcement. Likewise, if the EEOC completely failed to issue a reasonable-cause finding, courts could enforce that statutory precondition to suit, and nothing in *Caterpillar* is to the contrary.

McCottrell and *Stewart*, as discussed, involved suits *against* the EEOC by employees seeking to force the agency to act on their charges. Both cases were dismissed because "Title VII does not provide either an express or implied cause of action against the EEOC to challenge its investigation and processing of a charge." *McCottrell*, 726 F.2d at 351; *see also Stewart*, 611 F.2d at 682 ("Had Congress intended a remedy of enforcement against the EEOC, the provisions of § 2000e would have so indicated."). Neither has any relevance when the EEOC itself

initiates suit under Title VII, and an employer simply objects to the agency's failure to satisfy the statutory prerequisites to suit.

Finally, *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006), addressed an employer's request for a "court-fashioned bar" to suits by employees who refuse to cooperate with the EEOC. *Id.* at 710. There was "no basis in the language of Title VII for that position," explained the court, because the employee had satisfied all of the "procedural requirements" that Title VII imposes "as a precondition to bringing a suit in federal court"; the court could not add to those. *Id.* Of course, the fact that judges should not *add* to Title VII's pre-suit conditions does not remotely imply that they should not enforce the requirements that Title VII does expressly include. To the contrary, *Doe* reflects the need to adhere to the text of the statute—which, as relevant here, indisputably requires the EEOC to conciliate before suing.

In short, none of these cases holds or suggests that courts may not review whether the EEOC adequately engaged in conciliation before bringing suit. As shown, every court to consider the issue has held just the opposite.

E. The courts have an important role to play in policing the EEOC's compliance with its statutory pre-suit obligations.

The EEOC further argues that review of its conciliation efforts is bad policy. Even if that were a reason to refuse to enforce a statutory mandate, the EEOC's policy arguments are more than outweighed by the substantial risk that judicial abdication would enable all sorts of agency shenanigans.

1. The EEOC asks the Court to trust that the agency is, of its own accord, "firmly committed to conciliation," so that judicial review is unnecessary. (EEOC

Br. at 23-26.) But the cases discussed above amply demonstrate the need for judicial review; indeed, considering the sorts of misconduct that the EEOC has committed in the past *notwithstanding* the check of independent judicial review, removing that check would be a dangerous development.

Absent judicial review, the EEOC could "consistently stonewall[] in the face of 'plainly reasonable' requests … to obtain more information," *Bloomberg*, 751 F. Supp. 2d at 641; act in a "grossly arbitrary manner" by imposing an unreasonable deadline for an employer's response, *Asplundh Tree*, 340 F.3d at 1259; use conciliation "as a weapon to force settlement," *EEOC v. Agro Distribution LLC*, 555 F.3d 462, 468 (5th Cir. 2009); "wholly fail[] to satisfy its statutory pre-suit obligations" and then bring a massive class action, *CRST*, 679 F.3d at 677; offer to conciliate limited local claims and then bring a nationwide suit, *EEOC v. Dillard's, Inc.*, No. 08–CV–1780, 2011 WL 2784516 (S.D. Cal. July 14, 2011); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1267-68 (D. Colo. 2007); conciliate nationwide and then pursue litigation for locations that were not the subject of conciliation, *Sears*, 650 F.2d at 19; conciliate as to particular employees' claims and then bring suit on behalf of others, *EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107, 1113-15 (E.D. Wash. 2012); fail to reach agreement on one issue and bring suit on another, *Allegheny Airlines*, 436 F. Supp. at 1306; or skip conciliation outright, *Pierce Packing*, 669 F.2d at 608. As both the volume and nature of the EEOC's failures prove, EEOC self-enforcement is wholly insufficient.

Indeed, concerns about abuses of power by the EEOC were the impetus for Congress to reject legislation giving the agency cease-and-desist authority and instead to force it to litigate under the watchful eye of the federal courts. *See supra*, Part I.C. 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 blindly trust the agency to follow the law.

2. Apart from "just trust us," the EEOC suggests that judicial review would threaten conciliation by destroying "the confidentiality necessary to have free and unfettered discussions." EEOC Br. at 27. As discussed, however, the EEOC never explains *why* that would be so. It is intuitively obvious that parties would never willingly discuss settlement if their statements could later be used against them on the merits. That is why Title VII specifically forbids the EEOC from using those statements for that purpose. *See* 42 U.S.C. § 2000e-5(b). But there is no reason why an employer, knowing that it may later ask a court to review the back-and-forth if the EEOC shuts down talks prematurely or brings suit on charges that it never previously mentioned, would be less willing to settle.

3. The EEOC also stokes fears that employers will view conciliation "not as dispute resolution but as another front in a potential litigation battle," thereby encouraging gamesmanship. EEOC Br. at 27. That does not appear to have much hampered Title VII litigation over the past 40 years, probably because, if the EEOC satisfies its own basic duty, there is little opportunity for employers to sandbag and

little incentive to waste resources on a losing issue. After all, notwithstanding the examples above, courts often find without difficulty that the EEOC satisfied its conciliation duty. In all events, that some employers may raise frivolous objections to conciliation is no reason to eliminate judicial power to address meritorious ones.

II. Although This Court Need Not Adopt a Standard in This Case, the EEOC Must at Minimum Afford the Employer a Procedurally Meaningful Opportunity To Conciliate.

The district court certified two questions for appeal: *first*, may courts "review the EEOC's informal efforts to secure a conciliation agreement acceptable to the EEOC before filing suit"; and, *second*, if so, "should the reviewing court apply a deferential or heightened standard of review?"

For the reasons above, the answer to the first certified question is plainly "yes." Courts may review the EEOC's compliance with its statutory pre-suit duty to conciliate, just as they may review the EEOC's compliance with its other pre-suit duties; the text, structure, and legislative history of Title VII prove as much, and the uniform caselaw over the past four decades confirms it.

This Court need not, however, answer the second certified question. It does not affect the order below and would be more suitably resolved on a well-developed factual record. Instead, the Court should affirm the order below and remand. The question of what legal standard applies to EEOC conciliation efforts could always be revisited, if necessary, on appeal after final judgment.

In the district court, Mach Mining included in its answer to the EEOC's complaint the assertion that the EEOC failed to conciliate in good faith. *See* R.55 at 2. The EEOC then moved for summary judgment on that issue, arguing that "its

conciliation process is not subject to judicial review." *Id.* Importantly, the EEOC "fail[ed] to argue that its conciliation efforts would satisfy either the 'deferential standard' or the 'heightened scrutiny standard'" that courts variously employ; rather, it argued only that "its conciliation process is not subject to any level of judicial review." *Id.* at 6. The district court rejected that argument, finding that "at least some level of judicial review" is permitted. *Id.* at 7. Accordingly, the court denied the motion, while making clear that the EEOC could later argue that it *did* adequately conciliate. *See id.*

Given that posture, this Court need not now articulate a standard of review to govern all conciliation challenges. Interlocutory review is authorized only for "controlling" questions, 28 U.S.C. § 1292(b), and it is impossible to say whether a particular standard would be "controlling" where there is no developed factual record, no decision below, and no argument by *either* party that the EEOC satisfied or violated *any* standard. Moreover, § 1292(b) authorizes review of "*orders*," not abstract "legal questions." *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 246 (7th Cir. 1981). Because this Court can affirm the order below based purely on this Court's answer to the first certified question, there is no need at this time to proceed to the second.

Furthermore, while the second certified question asks whether a "deferential" or "heightened" standard of review is appropriate, the practical differences between those articulations are intertwined with the factual distinctions among the cases. Indeed, the EEOC itself says that courts that purportedly apply the same test have

reached (allegedly) conflicting results (EEOC Br. at 35-37), confirming that the outcomes depend not just on the legal test but on the factual record, which has yet to be fully developed here.

Having said that, if this Court elects to reach the second question, it should hold that the EEOC must at minimum afford employers a *meaningful opportunity* to conciliate. *CRST*, 679 F.3d at 676 (EEOC must afford "meaningful opportunity to conciliate"); *Asplundh Tree*, 340 F.3d at 1260 (EEOC must afford "meaningful conciliation opportunity"); *EEOC v. Bailey Co.*, 563 F.2d 439, 448 (6th Cir. 1977) (EEOC must afford chance "to participate in meaningful conciliation"); *see also Marshall v. Sun Oil Co. (Del.)*, 605 F.2d 1331, 1335 (5th Cir. 1979) (conciliation must be "meaningful" under parallel ADEA provision). The legal question, at bottom, is whether the EEOC did or did not meaningfully try to use "conference, conciliation, and persuasion" to resolve the claims that it later seeks to pursue in court. 42 U.S.C. § 2000e-5(b). It would be both impossible and counterproductive to try to preemptively spell out all of the ways in which the EEOC might deprive employers of that meaningful opportunity. As shown, there are numerous manipulations and contrivances that have been, and could be, used to effectively evade the conciliation process—failing to provide sufficient time for an employer to consider an offer or submit a counteroffer, *e.g.*, *Asplundh Tree*, 340 F.3d at 1261; failing to provide basic facts about the claims, *e.g.*, *Bloomberg*, 751 F. Supp. 2d at 641; or misrepresenting the *type* of claim, *e.g.*, *Allegheny Airlines*, 436 F. Supp. at 1306, or the claim's *geographic scope*, *e.g.*, *Outback Steak House*, 520 F. Supp. 2d at

1267-68, or the *identity* of the aggrieved parties, *e.g.*, *CRST*, 679 F.3d at 676. Such deficiencies deprive employers of the meaningful opportunity to resolve the claims against them outside of court, and *that* is why they do not satisfy the statute.

Elucidating whether particular EEOC actions on particular facts satisfy its obligations in particular suits must inevitably fall to case-by-case adjudication, given the nature of the inquiry. But a "meaningful opportunity" test provides an objective standard that is flexible enough to encompass the full range of factual scenarios, without forcing the EEOC to approve particular settlements against its will. If this Court chooses to adopt a specific standard, it should be this one.

CONCLUSION

For the foregoing reasons, this Court should rule that the EEOC's compliance with its pre-suit duty to conciliate is not immune from judicial review. If the Court reaches the second question, it should hold that the EEOC must at minimum afford employers a meaningful opportunity to resolve the claims against them out of court.

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Respectfully submitted,

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CERTIFICATE OF WORD-COUNT COMPLIANCE

The undersigned attorney hereby certifies, pursuant to Fed. R. App. P. 32(a)(7)(c), that the foregoing Brief for *Amici Curiae* contains 6,893 words, excluding those sections excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on August 28, 2013, I caused copies of the foregoing Brief of *Amici Curiae* to be served via the Electronic Case Filing (ECF) service on the following:

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