No. 13-2456

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Equal Employment Opportunity Commission,
Plaintiff-Appellant,

v.

Mach Mining, LLC,
Defendant-Appellee.

On Interlocutory Appeal from an Order of the
United States District Court for the Southern District of Illinois, Benton Division
Case No. 3:11-cv-879-JPG-PMF
Honorable J. Phil Gilbert, District Judge

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, its members or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

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The Equal Employment Advisory Council and Society for Human Resource Management respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges this Court to affirm the decision below and thus supports the position of Defendant-Appellee.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 of the nation's largest private sector companies, collectively providing employment to roughly 20 million people throughout the United States. They all are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*., as amended, and other antidiscrimination laws.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 225,000 individual members, SHRM's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, SHRM's mission also is to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in over 100 countries.

As employers or representatives of employers who are potential defendants to Title VII discrimination charges and lawsuits, *amici's* members have a substantial interest in the issue presented in this case regarding the extent to which federal courts may review the sufficiency of the EEOC's pre-suit conciliation efforts. Because the EEOC is authorized to sue employers in federal court only after it has fulfilled its statutory duty to conciliate in good faith, judicial review of those efforts is necessary to ensure full compliance with Title VII.

As national representatives of large employers, and in particular those primarily responsible for compliance with equal employment opportunity laws and regulations, *amici* have perspective and experience that can help the Court assess issues of law and public policy raised in this case beyond the help that the lawyers for the parties can provide. *Cf. Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997).

Accordingly, *amici* seek to bring these countervailing policy considerations to the Court's attention and assist the Court in putting the arguments of the Plaintiff-Appellant into proper perspective. Mindful of this Court's admonitions in *Ryan*, *amici's* brief does not rehash legal arguments addressed in the parties' briefs. Rather, it offers observations and perspectives on the issues, based on the collective experience of *amici's* members.

Since 1976, EEAC and/or SHRM have participated as *amicus curiae* in hundreds of cases before the United States Supreme Court, this Court[1], and other

[1] *See, e.g., McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873 (7th Cir. 2012); *Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005); *Kyles v. J.K. Guardian Sec. Servs.*, 222 F.3d 289 (7th Cir. 2000); *Ameritech Benefit Plan Comm. v. Commun. Workers of Am.*, 220 F.3d 814 (7th Cir. 2000).

federal courts of appeals, many of which have involved Title VII questions. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

The EEOC sued Defendant-Appellant Mach Mining in federal court, alleging class-based violations of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000-e *et seq*. *EEOC v. Mach Mining, LLC*, 2013 BL 132595, at *1 (S.D. Ill. May 20, 2013). The company asserted a number of affirmative defenses, including that the EEOC failed to satisfy its statutory duty to conciliate prior to filing suit. *Id.* Specifically, it claimed that the EEOC (1) failed to identify the individuals on whose behalf it was seeking relief; (2) failed to provide any information regarding the alleged victims' specific claims and entitlement to relief; (3) refused the company's request for an in-person meeting; and (4) deemed conciliation a failure even though the company agreed to all non-economic terms, made a monetary counteroffer, and requested additional information in order to evaluate the agency's position. *Id.*

Thereafter, the EEOC moved for partial summary judgment, contending that the sufficiency of its pre-suit conciliation efforts was beyond the scope of judicial review. *Id.* The trial court disagreed, concluding that whether and to what extent the EEOC satisfied its duty to conciliate is subject to some level of review, so as to ensure the agency made "a sincere and reasonable effort to negotiate." *EEOC v.*

Mach Mining, LLC, 2013 BL 21378, at *3 (S.D. Ill. Jan. 28, 2013). After its request for reconsideration was denied, the EEOC petitioned this Court for interlocutory appeal. *EEOC v. Mach Mining, LLC*, No. 13-8012 (7th Cir. May 30, 2013).

SUMMARY OF ARGUMENT

The district court was correct. The EEOC's compliance with Title VII's requirement that it attempt to eliminate suspected workplace discrimination through "informal methods of conference, conciliation and persuasion" is, and always has been, subject to judicial review. 42 U.S.C. § 2000e-5(b). To the extent this Court has not said so explicitly, it should do so now.

No federal court of appeals has ever held that compliance with Title VII's presuit conciliation requirement is beyond the scope of judicial review. In fact, until very recently, the EEOC itself routinely accepted the "judiciary's role in reviewing the conciliation process …." Plaintiff EEOC's Response to Defendant's Motion for Partial Summary Judgment at 5, *EEOC v. United Road Towing, Inc.*, No. 1:10-cv-06259 (N.D. Ill. Nov. 15, 2011), ECF No. 83.

Regrettably, the EEOC "views [its] power of suit and its administrative process as unrelated activities, rather than as sequential steps in a unified scheme for securing compliance with Title VII." *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975). It is incorrect. In fact, the EEOC's investigation and determination "are supposed to provide a framework for conciliation," *EEOC v. Allegheny Airlines, Inc.*, 436 F. Supp. 1300, 1305-06 (W.D. Pa. 1977) (emphasis added), which, in turn, represents

"the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law" without resort to litigation. *Id.* When the agency fails to discharge its conciliation duties in good faith, it deprives the employer a meaningful opportunity to resolve the matter informally.

The EEOC now regularly employs heavy-handed, hide-the-ball negotiation tactics during conciliation, which further cautions in favor of careful judicial review of the agency's presuit activities. It is inconceivable that when Congress first instructed the agency to "endeavor to eliminate" discrimination through conciliation, it would have had such tactics in mind. 42 U.S.C. § 2000e-5(b). When the EEOC makes a conciliation demand that is tantamount to a request for a blank check, and then abruptly ends negotiations when the employer questions the legal and factual basis for its position, it cannot be said to have discharged its statutory presuit obligations. Nor should the federal courts simply accept the agency's word on the matter.

Conferring upon the EEOC unchecked authority to circumvent its obligation to conciliate in good faith as a precondition to suit therefore would result in "undue violence to the legal process that Congress established to achieve equal employment opportunities in this country." *EEOC v. Bailey Co.*, 563 F.2d 439, 448 (6th Cir. 1977). It also would arm the agency with a powerful weapon for forcing employers to settle even cases of questionable merit so as to avoid even a threat of having to defend against an EEOC-initiated lawsuit. One need only look to recent decisions to appreciate the crushing financial impact such conduct has had on employers.

See, e.g., EEOC v. CRST Van Expedited, Inc., 2013 BL 205224 (N.D. Iowa Aug. 1, 2013).

Employers should not be required to make a "conciliation proposal in an evidentiary vacuum." *EEOC v. First Midwest Bank*, 14 F. Supp.2d 1028, 1032 (N.D. Ill. 1998). A company has a fiduciary responsibility to act in the best interest of its shareholders and cannot simply agree to compensate an undetermined number of unidentified individuals – and for violations it knows nothing about and cannot verify. Before a company can justify entering into any settlement, it must have some way to "value" the case, which would require among other things a clear understanding of the agency's findings, the size and scope of the effected class, and whether they took steps to mitigate any damages.

The EEOC's persistent refusal to provide any meaningful information with which to evaluate an employer's potential liability undermines the conciliation process, and it is clearly within the scope of a federal court's authority to so find. Accepting the EEOC's bald assertion that Title VII precludes judicial review of its presuit conciliation efforts would defeat the important public policy objectives inherent in Congress' stated preference for the informal resolution of Title VII charges and "expand the power of the EEOC far beyond what Congress intended ...." *EEOC v. CRST Van Expedited*, *Inc.*, 2009 BL 174086, at *18 (N.D. Iowa Aug. 13, 2009).

ARGUMENT

I. THE EEOC'S COMPLIANCE WITH TITLE VII'S REQUIREMENT THAT IT ENDEAVOR TO CONCILIATE SUCCESSFULLY EVERY DISCRIMINATION CHARGE PRIOR TO SUIT UNQUESTIONABLY IS SUBJECT TO JUDICIAL REVIEW

A. Title VII Mandates That The EEOC Attempt Conciliation Before Filing Suit

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). Upon the filing of a charge, Title VII provides in relevant part:

> [T]he Commission shall serve a notice of the charge ... within ten days, and shall make an investigation thereof .... If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge .... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination only through this administrative framework of charge investigations and, where appropriate, informal conciliation. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(b), 78 Stat. 259. In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

While the EEOC is authorized by Title VII to sue employers in federal court, it may do so only after its efforts "to secure from the respondent a conciliation agreement acceptable to the Commission" have failed. 42 U.S.C. § 2000e-5(f)(1); *see also EEOC v. Shell Oil Co.*, 466 U.S. at 64 (EEOC may sue only where conciliation attempts are "ineffectual"). In its procedural Title VII regulations, the EEOC provides further:

> In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief. Where such conciliation attempts are successful, the terms of the conciliation agreement shall be reduced to writing and shall be signed by the Commission's designated representative and the parties.

29 C.F.R. § 1601.24(a). Only after the agency is "unable to obtain voluntary compliance" *and* has determined "that further efforts to do so would be futile or nonproductive" may it deem conciliation a failure and so notify the parties. 29 C.F.R. § 1601.25.

In fact, pre-suit conciliation is "so important to the statutory scheme that the EEOC may not commence legal action until it has attempted to negotiate voluntary compliance." *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1042 (7th Cir. 1982) (citations omitted). As the Supreme Court in *Occidental Life Insurance* observed:

> [T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. Unlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC *is required by law to refrain from commencing a civil action until it has discharged its administrative duties.*

Occidental Life Ins. Co. of Calif. v. EEOC, 432 U.S. 355, 368 (1977) (quoting *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 44 (1974)) (emphasis added).

The EEOC's authority to litigate is conditioned upon fulfillment of pre-suit conciliation; indeed, it is a precondition to suit. Thus, there is no legal basis for the claim, nor has any court agreed, that EEOC pre-suit conciliation is outside the scope of judicial review. To the contrary, federal courts must be free to assess the sufficiency of those efforts in order to determine whether the agency's action may proceed. The EEOC's contention that Title VII precludes judicial review therefore should be rejected.

B. No Court of Appeals Has Held That EEOC Conciliation Efforts Are Beyond The Scope Of Judicial Review

Conciliation plays a key role in effectuating the policies underlying Title VII. Indeed, "Title VII places *primary* emphasis on conciliation to resolve disputes." *EEOC v. Zia Co.*, 582 F.2d 527, 529 (10th Cir. 1978) (emphasis added). It thus

should come as no surprise that every federal appeals court to consider the question has concluded that the EEOC's pre-suit conciliation efforts are subject to judicial review. *See id.; see also EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097 (6th Cir. 1984)*; EEOC v. Klingler Elec. Corp.*, 636 F.2d 104 (5th Cir. 1981); *EEOC v. Radiator Specialty Co.,* 610 F.2d 178 (4th Cir. 1979).

As the Tenth Circuit has observed, "Since the Act states that the Commission 'shall' endeavor to eliminate alleged unlawful employment practices by conciliation, and sue only if it is unable to secure a conciliation agreement, it has generally been held that a showing of some effort is a precondition of bringing suit." *Zia Co.*, 582 F.2d at 532*; see also EEOC v. Global Horizons, Inc.,* 2013 BL 100091, at *10 (E.D. Wash. Apr. 12, 2013) ("it is clear that Congress intended the EEOC to satisfy these requirements before filing suit, and therefore failure to satisfy these requirements will result in the EEOC's lawsuit being dismissed …").

Indeed, the U.S. Supreme Court has strongly suggested that federal courts have a special responsibility to ensure full compliance with both the letter and the spirit of Title VII – including the EEOC's statutory obligation to conciliate prior to commencing suit in federal court:

> Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices.

> Courts retain these broad remedial powers despite a Commission finding of no reasonable cause to believe that the Act has been violated. *Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.*

Alexander v. Gardner-Denver Co., 415 U.S. at 44-45 (citations omitted) (emphasis added).

While this Court "has not specifically addressed the standard to be used by district courts facing allegations of deficient conciliation," *EEOC v. United Rd. Towing, Inc.*, 2012 BL 125811, at *5 (N.D. Ill. May 11, 2012) (citation omitted), it has evaluated the sufficiency of the EEOC's "statutorily mandated presuit conciliation" efforts generally. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 358 (7th Cir. 1988) (finding that the EEOC "badly abused the investigation, predetermination settlement, and conciliation statutory prerequisites to suit, all of which are 'intimately related' in Title VII's enforcement structure") (footnote and citations omitted).

The EEOC contends that this Court's decision in *EEOC v. Caterpillar* compels the conclusion that "its conciliation process is not subject to any level of judicial review because conciliation, like a probable cause determination, is a prerequisite to filing suit." *EEOC v. Mach Mining, LLC,* 2013 BL 21378, at *4 (S.D. Ill. Jan. 28, 2013) (footnote omitted). The Court in *Caterpillar* held that when the EEOC is the plaintiff, it is not required to exhaust administrative remedies prior to filing suit, observing that "[n]o case actually *holds* that the scope of the EEOC's investigation is a justiciable issue in a suit by the EEOC …." *EEOC v. Caterpillar,*

Inc., 409 F.3d 831, 832 (7th Cir. 2005). To the extent that *Caterpillar* did not address, much less resolve, the question whether EEOC's statutory conciliation efforts are subject to judicial review, it is inapposite. *See EEOC v. St. Alexius Med. Ctr.,* 2012 BL 330480 (N.D. Ill. Dec. 18, 2012).

In light of the importance of pre-suit conciliation to the proper administration of Title VII, this Court should reject the EEOC's baseless assertion that the statute should be construed as precluding judicial review of its conciliation efforts.

C. Judicial Review Of The EEOC's Pre-Suit Activities Promotes The Goals Underlying Title VII, Including The Well-Established Federal Public Policy Favoring Informal Resolution Of Claims Of Employment Discrimination

In enacting Title VII, Congress "selected cooperation and voluntary compliance … as the preferred means for achieving the goal of equality of employment opportunities." *Occidental Life,* 432 U.S. at 368 (citation and internal quotation omitted). Indeed:

> When Congress first enacted Title VII in 1964 it selected cooperation and voluntary compliance as the preferred means for achieving the goal of equality of employment opportunities. To this end, Congress created the EEOC and established an administrative procedure whereby the EEOC would have the opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act.

Id. (citation and internal quotation omitted).[2] Thus, in order to effectuate the meaning and legislative intent of Title VII, the EEOC must be required to conciliate every discrimination charge it believes to have merit in good faith.

The EEOC by no means is statutorily required to *successfully* conciliate each case, as long as it engages in good faith efforts towards achieving settlement. Nevertheless, while "[o]nly an 'attempt' to conciliate is a prerequisite to suit brought by the EEOC, … [t]he requirement is, however, an essential one in the statutory jurisdictional scheme." *EEOC v. Anderson's Rest. of Charlotte, Inc.*, 1986 BL 464, at *4, *6-*7 (W.D.N.C. Apr. 20, 1986) (concluding that agency's conciliation efforts were "less than reasonable and flexible" and noting that "[b]efore a small corporation such as Defendant should be expected to pay such a substantial amount of damages, it ought to be afforded the opportunity to analyze the basis for the demand") (citations omitted).

Courts may evaluate and decide, for instance, whether the EEOC's denial of a defendant's request to meet face-to-face[3], failure to identify the individuals on whose behalf it is seeking to conciliate[4], or refusal to outline the legal basis for its

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[2] The legislative history of the 1972 amendments confirms Congress's preference for conciliation as a means of enforcing Title VII:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as required by existing law. Only if conciliation proves to be *impossible* do we expect the Commission to bring action in federal district court to seek enforcement.

118 Cong. Rec. H1861 (Mar. 8, 1972) (quoted by *EEOC v. Zia Corp.*, 582 F.2d 527, 533 (10th Cir. 1978)) (emphasis added).

[3] *EEOC v. Agro Distrib., LLC*, 555 F.3d 462 (5th Cir. 2009).

[4] *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).

settlement demand[5], amounts to a lack of good faith, without examining the parties' specific offers and counteroffers. *See, e.g., EEOC v. Lifecare Mgmt. Servs., LLC,* 2009 BL 53873 (W.D. Pa. Mar. 17, 2009) (defendant's discovery request not designed to "delv[e] into the substantive aspect of any conciliation negotiations, but rather simply requests information which pertains to the efforts and actions of the EEOC to conciliate the Charge") (citing *EEOC v. Mobil Oil Corp.*, 362 F. Supp. 786 (W.D. Mo. 1973). Judicial review is the only reliable means of ensuring that the EEOC made an effort to resolve the charge informally, and that its attempt crossed the threshold of good faith as a matter of law.

D. The EEOC's Own Litigation Conduct Over The Years Belies Its Categorical Declaration That Title VII Pre-Suit Administrative Activities Are Beyond The Scope Of Judicial Review

Until very recently, the EEOC has acknowledged and accepted the federal courts' authority to review the sufficiency of its Title VII pre-suit conciliation efforts, actively defending against claims of bad (or insufficiently good) faith and even weighing in regarding the appropriate standard of review. The agency's newfound assertion that its pre-suit conciliation efforts are not, and have never been, subject to any measure of judicial review whatsoever is of very recent origin and should be squarely rejected by this Court.

Even recently, the EEOC's views on the subject of judicial review have varied considerably. In July 2009, for instance, it conceded in response to a challenge to its pre-suit conciliation efforts that Title VII "authorizes the EEOC to file suit if it has

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[5] *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104 (5th Cir. 1981).

been able to secure 'a conciliation agreement acceptable to [it].' … Given these requirements, *a showing of some good faith effort to conciliate is a precondition to the EEOC bringing suit*." Plaintiff's Response in Opposition to Defendant's Motion to Dismiss the EEOC's Class-Based Allegations at 14, *EEOC v. Fisher Sand & Gravel Co.*, No. 1:09-cv-00309-WFD-WFL (D.N.M. July 1, 2009), ECF No. 11 (citations omitted) (emphasis added); *see also EEOC v. Fisher Sand & Gravel Co.*, 2010 BL 64909, at *7-*8 (D.N.M. Mar. 25, 2010) ("Plaintiff [EEOC] readily agrees, and case law supports, that the EEOC is required to make a 'good faith' effort at conciliation"). Similarly, in November 2011, the EEOC said:

> To fulfill its conciliation obligation, EEOC is merely required to make a good faith attempt to conciliate. … *The judiciary's role in reviewing the conciliation process* is limited to determining whether EEOC attempted conciliation; 'the form and substance of the EEOC's conciliation proposals are within the agency's discretion, and, therefore, immune from judicial second-guessing.

Plaintiff EEOC's Response to Defendant's Motion for Partial Summary Judgment at 4-5, *EEOC v. United Road Towing, Inc.*, No. 1:10-cv-06259 (N.D. Ill. Nov. 15, 2011), ECF No. 83 (citations omitted) (emphasis added).

The EEOC tried its new tack in September 2012, however, when it spent "eight pages of its brief arguing that its pre-litigation actions were not subject to judicial review" at all. *EEOC v. Swissport Fueling, Inc.*, 2013 BL 4628, at *13 (D. Ariz. Jan. 7, 2013). Yet in November 2012, it retreated to a more moderate view on the subject:

> *Courts evaluate* EEOC's efforts in accord with Congress's deference to EEOC. … Conciliation requires only that EEOC notify a respondent of

> the nature of the violation and how it could be remedied, as the EEOC did in the present case.

EEOC's Memorandum in Opposition to Defendant Multilink's Motion for Summary Judgment at 17-18, *EEOC v. Multilink, Inc.*, No. 1:11-cv-2071-CAB (N.D. Oh. Nov. 2, 2012), ECF No. 34 (citation omitted) (emphasis added). Inasmuch as even the EEOC has recognized and accepted the federal judiciary's role in assessing its compliance with Title VII conciliation requirements, this Court should confirm that the agency's statutory pre-suit conciliation activities are subject to judicial review.

In addition, the Court should hold that the EEOC does not discharge its administrative duties merely by inviting a respondent to participate in conciliation. In order to fulfill its statutory mandate, the agency's conciliation efforts must be, in the judgment of the reviewing court, both meaningful *and* undertaken in good faith. "The law declares that the Commission 'shall' seek conciliation; it is inconceivable to us that good faith efforts are not required." *Zia Co.*, 582 F.2d at 533.

In *EEOC v. Klingler Electric Corp.*, the Fifth Circuit held that the EEOC satisfies its statutory duty to conciliate only if, at a minimum, "it outlines to the employer the reasonable cause for its belief that Title VII has been violated, offers an opportunity for voluntary compliance, and responds in a reasonable and flexible manner to the reasonable attitudes of the employer." 636 F.2d 104, 107 (5th Cir. 1981) (citation omitted). *See also EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (the EEOC failed to properly investigate and "compounded its arbitrary assessment that Agro violated the ADA with an insupportable demand for compensatory damages as a weapon to force settlement); *EEOC v. Asplundh Tree*

Expert Co., 340 F.3d 1256, 1261 (11th Cir. 2003) (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"); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981) ("patently inadequate" conciliation by EEOC warrants dismissal of action); *EEOC v. Die Fliedermaus, LLC*, 77 F. Supp.2d 460, 467 (S.D.N.Y. 1999) (by ignoring employer's letter seeking more information regarding certain aspects of the conciliation proposal, and instead filing suit six days later, the EEOC failed to respond in a "reasonable and flexible manner").

Even those courts that accord greater deference to the EEOC regarding the sufficiency of its conciliation efforts nevertheless agree that, at bottom, the agency must exercise good faith in discharging its statutory obligations. *See EEOC v. Keco Indus., Inc.*, 748 F.2d 1097 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.,* 610 F.2d 178 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978). The EEOC cannot be expected to step outside of itself and objectively evaluate whether or not it has satisfied its good faith obligations. That is, and always has been, the responsibility of the federal courts.

II. LIMITING JUDICIAL REVIEW OF EEOC PRE-SUIT CONCILIATION EFFORTS WOULD FRUSTRATE SOUND EMPLOYMENT RELATIONS POLICIES BY ENCOURAGING, RATHER THAN MINIMIZING, COSTLY AND TIME-CONSUMING TITLE VII LITIGATION

A. The EEOC's Current "Sue First, Ask Questions Later" Enforcement Strategy Highlights The Need For Careful Judicial Oversight Of Pre-Suit Conciliation Activities

The EEOC implores the federal courts simply to "trust us," even in the face of repeated instances of overreach and abuse. This Court should reject the idea that the same agency that receives, investigates, and litigates Title VII discrimination claims is better suited than the federal judiciary to objectively evaluate the sufficiency of its efforts.

As the EEOC concedes, defendants regularly have raised questions regarding the sufficiency of the agency's pre-suit conciliation efforts in the four decades since it obtained litigation authority under Title VII. *See Zia*, 582 F.2d at 532 ("Only after the 1972 law changes, when the EEOC commenced suing, did the need for conciliation efforts as a prerequisite to suit, and questions of their sufficiency, arise"). According to the EEOC, however, "challenges to the EEOC's conciliation process … are becoming more routine." Brief of Plaintiff-Appellant at 23.

If employers find themselves increasingly having to challenge the EEOC's compliance with pre-suit requirements, it is not because they wish to expend resources and incur substantial costs simply for the sake of doing so. Rather, this asserted spike in conciliation challenges, assuming it is real, likely is directly correlated to the EEOC's own increasingly aggressive and extreme tactics – which

often include shoddy investigations, leading to questionable findings that form the basis of unreasonable, "take-it-or-leave-it" conciliation demands.

In *EEOC v. GAP, Inc.*, for instance, the EEOC sued, claiming that the defendant unlawfully discharged one of its employees "because [he] had glomerulonephritis, a kidney disease which causes frequent bathroom trips." 2011 BL 326770, at *1 (E.D. Mich. Dec. 27, 2011). More than a year later, the EEOC sought to amend its complaint to change the claimed disability from glomerulonephritis to HIV. The defendant opposed the motion, arguing among other things that to permit the EEOC to amend its complaint after over a year of litigation would be unduly prejudicial.

Denying the EEOC's motion, the Magistrate Judge agreed, observing:

> The litigation prejudice to the Defendant, along with the unnecessary delay and the fact that the EEOC had knowledge of but chose to conceal the HIV nature of this case are sufficient reasons in and of themselves to deny the Plaintiff's motion to amend. In addition, by concealing the fact that its investigation centered on an HIV-related condition, the EEOC denied the Defendant a reasonable opportunity to conciliate before litigation. ... By concealing the critical fact that this was an HIV case, thereby depriving the Defendant of notice of the true nature of the claim, the EEOC's attempt at conciliation was not made in good faith, and was the equivalent of no conciliation at all. Had the EEOC been more forthcoming about Mr. Cook's claim, conciliation may well have taken a different direction.

Id. at *3.[6]

[6] The EEOC later moved to dismiss the case with prejudice, noting that "[a]lthough the Commission disputes the Magistrate Judge's characterizations of the Commission's actions, it has decided to dismiss its claims with prejudice. However, it wishes to protect the interests of the Charging Party, and seeks a thirty (30) day period in which to allow the Charging Party time to determine whether to move to intervene." Plaintiff's Motion for Voluntary Dismissal with Prejudice at 4, *EEOC v. GAP, Inc.*, No. 2:10-cv-14559-AJT-RSW (E.D. Mich. Jan. 6, 2012), ECF No. 38.

Similarly, in *EEOC v. Ruby Tuesday, Inc.*, the EEOC was found to have failed to comply with its pre-suit conciliation obligations. 2013 BL 16149 (W.D. Pa. Jan. 22, 2013). There, the agency issued a reasonable cause determination, along with an invitation to conciliate and a proposed conciliation agreement. The employer requested, but was denied, a 30-day extension of time within which to respond to the proposed conciliation agreement – which at that point did not include a demand for monetary relief.

Instead, the EEOC made a monetary demand of $6.4 million in damages on behalf of an unidentified class, and instructed the respondent to respond with its "best offer" within a week's time. *Id.* at *2. Although the company made a counter-offer as to the charging party's claims, in which it "expressed willingness to engage in further conciliation discussions as to the broader claims pressed by the EEOC," the agency did not respond and, eight days later, deemed conciliation efforts unsuccessful. *Id.* (footnote omitted). It filed suit nine days thereafter asserting, among other things, a pattern-or-practice age discrimination claim.

The employer moved for summary judgment on the ground that the EEOC failed to satisfy its statutory duty to conciliate in good faith. The EEOC took the position that it was not obligated to do anything more by way of conciliation than outline its case against the employer and the remedy necessary to address the suspected violation, and questioned whether the court was authorized to "determine whether the EEOC has fulfilled its statutory conciliation obligations" in any event. *Id.* at *8.

Even though it viewed its authority to review the EEOC's conciliation efforts as "sharply curtailed" (though "not non-existent"), the district court nevertheless found that the EEOC's conciliation efforts "did not meet even the low standard proffered by the EEOC." *Id.* It noted in particular that "'conciliation by letter' in such a substantial pattern and practice case would rarely constitute 'conciliation.'" *Id.*

These examples of the EEOC's unreasonable conciliation and subsequent litigation tactics represent only a small sampling of cases that have actually reached the federal courts. Many more abusive tactics already occur during the administrative investigations process, outside of the judiciary's purview, which *amici* believe are designed to force employers to give up the fight and simply settle – thus enabling the EEOC to take full credit for the "win," both in its public press releases, as well as in reporting to Congress on its performance.[7]

B. Recent Enforcement Debacles Confirm That The EEOC Cannot Be Trusted To Adequately Police Its Own Compliance With Title VII Pre-Suit Requirements

More and more, employers are being required to face the Hobson's choice of either spending hundreds of thousands of dollars in counsel fees pushing back against unreasonable EEOC conciliation conduct, or blindly acceding to conciliation

[7] *See* EEOC Press Release, *EEOC Releases Performance and Accountability Report Under New Strategic Plan* (Nov. 19, 2012) (in which the EEOC touts its "historic monetary recovery through … private sector administrative enforcement--$365.4 million-the highest level of monetary relief ever. Administrative enforcement includes mediation, settlements, withdrawals with benefits and conciliation. Approximately 10 percent of this amount--$36 million-- came from investigations and conciliations of systemic charges of discrimination, four times the amount received in the previous fiscal year"), *available at* http://www.eeoc.gov/eeoc/newsroom/release/11-19-12.cfm.

demands on behalf of entire classes of unidentified victims whose individual damages have never been disclosed. Accepting the EEOC's contention that its pre-suit statutory conciliation responsibilities are not subject to judicial review would only exacerbate the problem.

In *Christiansburg Garment Co. v. EEOC*, the Supreme Court ruled that a prevailing defendant will be entitled to recover attorney's fees only where the plaintiff's suit is deemed to be "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U.S. 412, 422 (1978). It reasoned that while a heightened burden is necessary so as not to discourage plaintiffs from suing for fear of being responsible for a successful employer's attorney's fees, Congress made fees available to defendants so as to protect them "from burdensome litigation having no legal or factual basis." *Id.* at 420.

Federal courts continue, with increasing frequency, to sanction the EEOC for failing to fulfill its pre-suit statutory investigation and conciliation obligations. In a number of recent cases, the agency's actions were found to be so improper that it has been ordered to reimburse millions of dollars in attorney's fees and costs to the prevailing defendant. As one district court observed recently:

> [A] failure by the EEOC to satisfy its statutory notice, investigation, reasonable-cause determination, and conciliation requirements exposes the EEOC to an award of reasonable attorney's fees and costs against it. Under 2000e-5(k), "the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee (including expert fees) as part of the costs, and the [EEOC] and the United States shall be liable for costs the same as a private person."
>
> * * *
>
> As the Ninth Circuit determined in *Pierce Packing,* the premature filing of a Title VII case by the EEOC can be deemed an unreasonable

> action, thereby justifying an award of attorney's fees to the prevailing defendant. … Given the potential risk of paying a defendant's attorney's fees and costs, the EEOC must carefully ensure that it has satisfied its statutory pre-lawsuit requirements before filing a lawsuit in federal court.

EEOC v. Global Horizons, Inc., 2013 BL 100091, at *10 (E.D. Wash. Apr. 12, 2013) (citations and footnote omitted).

EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012), remains perhaps one of the most shocking examples of EEOC pre-suit abuses. There, the agency sued on behalf of a group of current and former female drivers of the defendant, a nationwide trucking company, alleging unlawful sexual harassment in violation of Title VII. *Id.* at 664. Among the victims on whose behalf the EEOC sought relief was Monika Starke, the original charging party. After issuing a series of rulings disposing of the EEOC's class-based and individual claims, the trial court declared the defendant to be the prevailing party. *Id.* at 671.

In its subsequent motion for attorney's fees and costs, the defendant argued among other things that the EEOC failed to conduct any investigation or conciliate the claims of nearly all the class members. The trial court agreed, concluding that the EEOC's pursuit of the case was unreasonable, at odds with the discrimination complaint procedures set forth in the statute, and imposed an unnecessary burden on both the company and the court. It thus ordered the EEOC to reimburse the defendant $4.46 million in attorney's fees and costs. *EEOC. v. CRST Van Expedited, Inc.*, 2010 BL 320742 (N.D. Iowa Feb. 9, 2010), *vacated without prejudice*, 679 F.3d 657 (8th Cir. 2012).

The EEOC appealed both the dismissal of its case on the merits and the fees award to the Eighth Circuit, which affirmed the district court's findings with respect to all but one of the class members (Jones), as well as Starke, the original charging party. *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012). Because the EEOC still had "live claims" against the employer, the appeals court vacated the attorney's fees award pending further proceedings. *Id.* On remand, the EEOC sought to voluntarily dismiss its claims on behalf of Jones, conceding that because it failed to investigate or conciliate, the "law of the case" precluded the agency from recovering damages on her behalf. *EEOC v. CRST Van Expedited, Inc.*, 2013 BL 38172 (N.D. Iowa Feb. 11, 2013). It eventually settled Starke's claims for $50,000, agreeing that the settlement would not preclude the defendant from seeking attorney's fees. *Id.* On the defendant's renewed motion for fees, the trial court again found the EEOC's conduct and actions – including its failure to satisfy pre-suit investigation and conciliation obligations – to be so improper as to justify an award of $4,694,442.14 in attorney's fees, costs and expenses to the defendant. *EEOC v. CRST Van Expedited, Inc.*, 2013 BL 205224 (N.D. Iowa Aug. 1, 2013).

Contrary to the EEOC's position *du jour*, the federal courts have both the right and the responsibility to ensure that such abuses are properly addressed. As the Supreme Court observed in *Occidental Life*:

> [W]hen a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief. The same discretionary power to locate a just result in light of the circumstances peculiar to the case can also be exercised when the EEOC is the plaintiff.

432 U.S. at 373 (citation and internal quotation omitted).

"Agencies are creatures of Congress; 'an agency literally has no power to act ... unless and until Congress confers power upon it.'" *City of Arlington, Texas v. FCC*, ___U.S. ___, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (citation omitted). The EEOC has never issued a substantive regulation, or any sub-regulatory guidance, expressing its current view that judicial review of its conciliation procedures is "precluded by Title VII." Brief of Plaintiff-Appellant at 5. Nor could it do so, since Congress intentionally chose not to confer upon the EEOC substantive rulemaking authority under Title VII. Instead, it gave the agency limited authority "to issue, amend, or rescind suitable *procedural* regulations" as required to administer the Act. 42 U.S.C. § 2000e-12(a). The fact that the EEOC cannot promulgate substantive regulations interpreting Title VII further suggests that Congress did not intend to preclude judicial review of the agency's statutory conciliation activities.

The EEOC seeks to persuade this Court that it is fully capable of regulating its own conduct so as to ensure it complies in every respect with Title VII. Recent history tells a different story. Permitting the EEOC's pre-suit conciliation activities to go unchecked by the judicial branch would arm the agency with a most powerful weapon for forcing employers to settle even questionable claims so as to avoid the risk of having to defend a costly and lengthy lawsuit against the federal government. As Chief Justice Roberts observed in his dissenting opinion in *City of Arlington v. FCC*:

> The administrative state 'wields vast power and touches almost every aspect of daily life.' The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities. '[T]he administrative state with its reams of regulations would leave them rubbing their eyes.'

133 S. Ct. at 1878 (Roberts, C.J., dissenting).

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council and Society for Human Resources Management respectfully urge the Court to affirm the district court's decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Rae T. Vann, hereby certify that this Brief Of The Equal Employment Advisory Council and Society for Human Resource Management As *Amici Curiae* In Support Of Defendant-Appellee And In Support Of Affirmance complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). This brief is written in Century Schoolbook twelve-point typeface using MS Word 2003 word processing software and contains 6,863 words.

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