No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

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.

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[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

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

SUMMARY OF ARGUMENT

Petitioner has amply demonstrated the split among the Circuits over the question presented, and illustrated its recurring nature. *Amici* focus on why the decision below is troubling as a policy matter, and why it is wrong as a legal matter.

I. The Seventh Circuit found that eliminating judicial review of the conciliation duty would actually *promote* conciliation. The opposite is true, however. Title VII's enforcement history illustrates that the EEOC too often bypasses meaningful conciliation, preferring to sue first and negotiate later. But Congress understood that the best chance to settle a dispute is *before* litigation, and therefore directed the EEOC to conciliate *before* filing a suit. That is when employers are most eager to settle, to avoid the stigma of being labeled publicly as violators of civil rights. For that reason, also contrary to the decision below, no rational employer would invite that stigma by sandbagging conciliation in the marginal hope that a deferential judge will later grant relief. The court below thus misunderstood the real incentives facing the EEOC and employers. As a practical matter, refusal to enforce the conciliation obligation will mean *less* conciliation and more litigation.

II. The Seventh Circuit's decision is also legally unsupportable. *First*, it lacks any limiting principle, offering blind trust in an executive agency and relying on the faint hope of congressional oversight. Our legal system is not so sanguine. *Second*, the decision's conclusion is refuted by legislative history, as Congress *rejected* a bill that expressly made conciliation nonreviewable, in a compromise to skeptics of the EEOC who demanded more judicial oversight. To rewrite that bargain is plainly improper. *Third*, the court's insistence that no judicially manageable standard is possible ignores the forty-year body of jurisprudence that courts have developed in this area, and the numerous other contexts in which courts apply "good faith" inquiries. These tests may be fact-intensive, but that is no excuse for judicial abdication.

ARGUMENT

I. THE DECISION BELOW WILL HINDER THE VOLUNTARY RESOLUTION OF TITLE VII DISPUTES.

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

By stripping from federal courts the power to *enforce* that conciliation obligation, the decision below strikes at the heart of Title VII. Yet, somehow, the Seventh Circuit reasoned that eliminating judicial review would *promote* conciliation. That conclusion followed from two premises—one about the EEOC's incentives, the other about employers'—but the court below was wrong as to both.

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

Second, the Seventh Circuit worried that judicial review was encouraging employers to manipulate the conciliation process to manufacture a defense for the subsequent litigation. (Pet. App. 16a-18a.) That is implausible for a host of reasons. Employers want to *avoid* costly, drawn-out litigation and to *avoid* being accused of civil rights violations in publicly filed lawsuits. It is fanciful to think that they would incur with certainty the financial and reputational costs of an EEOC lawsuit in the hopes of subsequently manipulating the conciliation review process. Moreover, the standards applied by courts to enforce

the conciliation obligation are deferential to the EEOC, which means that an employer's odds of obtaining real relief through such manipulation are, at best, marginal.

Employers with operations within the Seventh Circuit are therefore concerned about the profoundly negative effect that the decision below will have on the voluntary resolution of employment disputes (harming employers *and* employees). As Congress well understood, the best time to settle such disputes is *before* they reach court, *before* they attract public scrutiny, *before* the parties become adversaries in federal litigation. All of that is lost if the EEOC can sue first and negotiate later—yet, unfortunately, that is the natural effect of the decision below. This case therefore deserves this Court's attention.

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

The Seventh Circuit was not bothered by the prospect of eliminating judicial enforcement of the EEOC's conceded obligation to attempt conciliation before filing suit, in part because it believed that the EEOC had sufficient incentives—even absent the threat of judicial review—to ensure its compliance. (Pet. App. 20a-21a.) The business community is far less confident based on years of experience. Forty years of jurisprudence illustrates how, despite its "limits of budget and personnel" and the prospect of congressional oversight (*see id.*), the EEOC has in many cases bypassed its statutory duty to engage in conciliation. This history undermines the court's counterintuitive, counter-factual assumption that eliminating review would promote conciliation, and

also illustrates the wide range of EEOC conduct that the decision below insulates from review. The Seventh Circuit overlooked this trail of numerous instances of the EEOC's actual failures to engage in meaningful conciliation and instead speculated about strategic behavior of employers. It is therefore worth a closer look at some illustrative cases.

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

In other cases, particular investigators may allow their own biases to interfere with their statutory duties. In *EEOC v. Agro Distribution LLC*, 555 F.3d 462 (5th Cir. 2009), "the Commission dealt in an arbitrary manner based on preconceived notions of its investigator and ignored the attempts of Agro's counsel to engage the Commission in settlement discussions." *Id.* at 468. Although the aggrieved employee "denied suffering any emotional problems from the [termination]," the EEOC demanded $120,000 for emotional suffering. *Id.* at 467 & n.5. The employer called the EEOC "requesting a meeting," but, "[t]he next day," the EEOC declared a failure of conciliation. *Id.* at 467. The employer then offered to pay a smaller sum, but the EEOC failed to respond for "[n]early ten months" and then flatly rejected the offer. *Id.* In the end, *after* filing suit, the EEOC offered to settle for less than 20% of the demand in its complaint, but the employer proceeded and prevailed on the merits at summary judgment. *See id.*

The EEOC sometimes is reluctant to provide the employer with the information necessary to evaluate the potential claims against it, perhaps because the agency is contemplating future litigation and does not want to give the employer any conceivable head start. Thus, for example, in *EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107 (E.D. Wash. 2012), the EEOC demanded $1 million for an unspecified class of female employees who had allegedly been sexually harassed. *See id.* at 1113-14. The employer asked the EEOC for the names of the employees who had supposedly conducted the harassment, and promised to "look further into the allegations of harassment and … provide a status report … within two weeks."

Id. "A mere six days later," however, the EEOC ended conciliation. *Id.* at 1114. The court faulted the EEOC for its failure "to be more forthcoming regarding the type of damages sought …, some justification for the amount of damages sought, potential size of the class, general temporal scope of the allegations, and the potential number of individuals … alleged to be involved in the harassment." *Id.* at 1115.

Other times, the EEOC's refusal to provide such information might stem from a preference for using the civil discovery process to identify and investigate allegations of discrimination and assemble a class of claimants, even though the EEOC is able to obtain information from the employer throughout the investigatory process, *see, e.g.*, 42 U.S.C. §§ 2000e-8, 2000e-9. For example, in *EEOC v. Bloomberg L.P.*, No. 07-Civ.-8383, 2013 U.S. Dist. LEXIS 128385 (S.D.N.Y. Sept. 9, 2013), the EEOC found that Bloomberg had discriminated against a "class" of pregnant women and demanded $7.5 million to compensate those class members. *Id.* at *9. But the EEOC did not *identify* any of these class members. Bloomberg requested information about these claimants (such as how many there were). *Id.* at *12. "The next day, the EEOC sent Bloomberg a letter declaring that conciliation has been unsuccessful … ." *Id.* Only after filing a federal suit and engaging in discovery did the EEOC identify particular employees on whose behalf it sought relief. *Id.* at *26-32. By proceeding in that fashion, the EEOC denied Bloomberg "an opportunity to tailor any class-wide conciliatory efforts to the breadth of legitimate

claims it might face." *Id.* at *27.[2] The court found that the EEOC had "blatantly contravene[d] Title VII's emphasis on resolving disputes without resort to litigation." *Id.* at *28-29.

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

Another difficulty faced by employers has been the tendency of some EEOC investigators to demand an "all-or-nothing" settlement. Thus, in *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981), the EEOC brought suit alleging that the employer had engaged in race discrimination at two stores in New York. *Id.* at 16. Prior to filing the suit, however, the EEOC had offered to conciliate "only on a *nationwide*

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

basis, rather than with respect to the two facilities that were the subject of the suit." *Id.* (emphasis added). That was inadequate, the Second Circuit held, because the "framework chosen" for conciliation "must afford a fair opportunity to discuss the practices at those installations" that are "the subject of suit." *Id.* at 19. "Sears was given no opportunity to reform its practices in Brooklyn and White Plains … prior to instigation of the suit." *Id.*

Conversely, in *EEOC v. Pet, Inc., Funsten Nut Division*, 612 F.2d 1001 (5th Cir. 1980) (per curiam), the employer expressed its willingness to conciliate the claims with respect to the alleged "class" but simply refused to reinstate or compensate one particular employee who had been terminated. *See id.* at 1002. The EEOC refused to settle *any* of the claims unless that individual was granted relief. *See id.* "Such an all-or-nothing approach on the part of a commission, one of whose most essential functions is to attempt conciliation, will not do." *Id.*

Finally, in some cases the EEOC conciliates on claims relating to a particular *type* of discrimination or a particular *geography* or a particular *employee* but, if that fails, substantially modifies the nature of the claims before filing suit and without notice to the employer. Perhaps because the EEOC erroneously assumes that it would have no more luck conciliating the new claims than the old ones, it does not attempt to reopen conciliation to address the new issues.

Thus, in *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300 (W.D. Pa. 1977), the EEOC tried to conciliate a claim that the airline was discriminating against men in hiring flight attendants. *See id.* at 1305. But when the parties were unable to reach

agreement on that claim of sex discrimination, the EEOC brought a suit that also asserted unrelated claims of *race* discrimination that the employer may well have been interested in settling, such as a claim of "excluding blacks from certain jobs because of their race" and "using pre-employment criteria (arrest record inquiries) which caused a disproportionate rejection of blacks." *Id.* at 1303.

And in *EEOC v. Dillard's, Inc.*, No. 08–CV–1780, 2011 U.S. Dist. LEXIS 76206 (S.D. Cal. July 14, 2011), the EEOC proposed to conciliate claims of two employees from a single store who were terminated for failure to provide sufficiently specific doctor notes after missing work. *See id.* at *2-5. The EEOC proposed that the employer pay damages of $325,000 to these employees, and did not mention damages for anyone else. *Id.* at *4-5. After the employer declined the offer, the EEOC filed suit on behalf of a class of "similarly-situated individuals" and then sought *nationwide* discovery to identify that class. *See id.* at *5-6. Thus, the EEOC's "conciliation efforts focused on two individuals … both of whom worked at the El Centro store," and provided no notice to the employer that it "potentially faced claims on behalf of a nationwide class." *Id.* at *26.

These illustrative examples reflect that, for a variety of reasons, the EEOC's internal incentives to discuss settlement can be overcome by other interests in some cases, with the statutory obligation to conciliate bypassed in favor of an aggressive pursuit of the EEOC's agenda. *See, e.g.*, EEOC Strategic Enforcement Plan (Dec. 2012) ("targeted enforcement necessitates a paradigm shift to focus on specific priorities, recognizing that a focused effort

should have a broad and lasting impact to more effectively advance the agency's mission"); EEOC Newsroom, http://www.eeoc.gov/eeoc/newsroom/index.cfm (listing press releases issued by EEOC upon significant litigation filings or victories). Ultimately, whatever the motivation, that is not the scheme that Congress designed. If these incidents took place *notwithstanding* the prospect of judicial review, it is easy to see how, when the EEOC wants to litigate a case, it may allow its other interests to outweigh its interest in voluntary settlement *absent* that check.

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

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

First, the Seventh Circuit's ahistorical narrative presumes that employers do not seriously want to settle the claims against them. Nothing could be

further from the truth. Most businesses would much prefer to resolve these disputes quickly, quietly, and out of the public eye. Although the Seventh Circuit speculated that employers lose nothing by turning conciliation into a litigation prelude—as "the employer remains free to settle after the EEOC files suit" (Pet. App. 18a)—that ignores the substantial preference of most employers to settle *confidentially*. *See* 42 U.S.C. § 2000e-5(b) (conciliation must be confidential unless parties agree otherwise). A publicly filed EEOC complaint and corresponding press release and publicity can draw considerable attention from employees, investors, shareholders, and others. It harms the company's reputation. It hurts morale. And it may hurt the employer's business. The principal benefit of conciliation, for employers, is that it allows them an opportunity to resolve the case *privately*, without being labeled civil rights violators by a government agency. Employers thus have *every* reason to settle during conciliation—and good reason *not* to throw away that opportunity in the hopes of a settlement down the road, after a suit (with all of its attendant costs) has been filed.

Second, the notion that an employer would reject any *reasonable* offer to avoid a lawsuit in the hopes of later convincing a federal judge that the offer was *unreasonable* simply ignores the deferential posture adopted by all courts with respect to conciliation. Although the Circuits have articulated different standards by which to judge adequacy of conciliation efforts, even courts in Circuits adopting the more rigorous standards agree that the court's "role in reviewing efforts to conciliate, while not inert, is modest." *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 637 (S.D.N.Y. 2011); *see also id.* at 639 (refusing

to make any "judgment about the wisdom of the parties' respective conciliation strategies"); *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2014 U.S. Dist. LEXIS 27019, at *12, *18 (S.D. Tex. Mar. 4, 2014) (conciliation "does *not* require a minitrial" and EEOC is not governed by any "rigid rules and regulations"); *Sears*, 650 F.2d at 18 (agreeing that "Commission should be given wide latitude in shaping both the general framework of conciliation and the specific offers made"). In the vast majority of cases, the EEOC's conciliation efforts satisfy *any* Circuit's test, making it highly irrational for an employer to forfeit the opportunity to resolve a claim during the pre-suit process and instead hold out for judicial review of conciliation.

Third, if a court does find a conciliation violation, it may (depending on the circumstances) dismiss the action in whole or part or stay the case to allow the parties another chance to conciliate. *See* 42 U.S.C. § 2000e-5(f)(1) ("[T]he court may, in its discretion, stay further proceedings … for … further efforts of the Commission to obtain voluntary compliance."). Given this statutory authority to review conciliation and fashion an appropriate remedy, it is hard to believe, as the Seventh Circuit asserted, that employers may want to "delay" by asserting frivolous defenses, only to then try to convince a judge to force the EEOC to resume conciliation. (Pet. App. 17a). Employers want to resolve disputes quickly, not pay hefty lawyers' fees indefinitely.

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

employer wants to get off on the wrong foot with the presiding judge in its case by rejecting reasonable efforts to resolve the dispute amicably. For the very same reason that judicial review would plainly encourage the EEOC to act more reasonably and openly in conducting the conciliation that Congress contemplated, judicial review would encourage employers to do the same—not, as the court below assumed, tempt them to do the opposite.

* * *

In short, if the EEOC satisfies its own basic duty to engage in meaningful negotiation, there is little opportunity for employers to sandbag and little incentive to waste resources on a losing issue. To be sure, there could be some employers who may raise frivolous objections to conciliation, just as there are some employees who raise frivolous discrimination complaints. But the former concern is no reason to eliminate judicial power to address meritorious objections, just as the latter is no reason to refuse to enforce Title VII altogether. Conversely, immunizing the EEOC from judicial review would only encourage it to rush to court, to refuse to share critical information, and to expand its claims without notice to employers. The predictable result will be less conciliation and more litigation. That does not only hurt employers; it also harms employees, who instead of receiving quick and effective relief could be forced to wait years and to submit to intrusive discovery and the hassles of federal litigation before obtaining any relief. This is the very opposite of what Congress wanted when it enacted Title VII.

II. THE DECISION BELOW IS WRONG.

The decision below is not just inconsistent with the policy of conciliation embodied in Title VII, but is also wrong on the law. *First*, the Seventh Circuit's reasoning misstates the relevant inquiry and ultimately lacks a limiting principle. If applied to other statutory schemes, the court's broad reasoning would forbid judicial review of executive compliance with other pre-suit requirements—contradicting this Court's "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). *Second*, the contemporaneous legislative record refutes the court's conclusion that Congress intended no judicial review of conciliation; the opinion below improperly revises a careful and intentional congressional compromise. *Third*, the notion that there is no "meaningful standard" by which courts can judge the EEOC's compliance with the statutory obligation is a far too ready concession. Courts have been policing the agency's conciliation efforts for more than four *decades*, and a developed body of law sets forth the minimal standards that meaningful conciliation requires. That multifactor, case-by-case adjudication may be necessary is not a legal basis to abdicate the task altogether.

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

In refusing to enforce Title VII's requirement that the EEOC attempt conciliation before suit, the Seventh Circuit emphasized that Title VII does not expressly authorize judicial review and that this case thus presents the question whether to recognize an "implied" affirmative defense under the statute.

This approach is entirely wrong. Courts are presumptively empowered to enforce the law, and to ensure that executive agencies do not exceed their boundaries. Ultimately, the reasoning adopted by the Seventh Circuit lacks a clear limiting principle and stands in substantial tension with the basic framework of the administrative state.

The court observed that Title VII "contains no express provision for an affirmative defense based on an alleged defect in the EEOC's conciliation efforts." (Pet. App. 5a-6a.) True enough: Title VII does not *specifically* direct courts to review whether the EEOC satisfied its conciliation duty, just as it does not *specifically* direct courts to review whether the EEOC received "a charge … filed by or on behalf of a person claiming to be aggrieved" 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 statutory provision. 42 U.S.C. § 2000e-5(b). Yet that has not stopped courts—including this Court—from reviewing EEOC compliance with those procedural requirements. *See, e.g.*, *Shell Oil*, 466 U.S. 54 (reviewing sufficiency of Commissioner's charge and notice to employer). The reason is that Title VII *does* say that federal courts "shall have jurisdiction of actions brought under this subchapter," 42 U.S.C. § 2000e-5(f)(3); and that suffices to give them the authority to adjudicate suits pursued by the EEOC—including to resolve contentions that the EEOC did not satisfy the prerequisites to such suits.

By analogy, the court drew upon the Supreme Court's jurisprudence disfavoring "implied rights of

action." (Pet. App. 19a.) The crucial point, however, is that in an implied right of action case, the *plaintiff* is invoking the court's jurisdiction and seeking judicial intervention. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (plaintiff sued to enforce federal regulation against state executive agency); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (plaintiff sought to sue university for damages for violating federal statute governing release of educational records). By contrast, in the Title VII context it is the *EEOC* who is suing the *employer*, 42 U.S.C. § 2000e-5(f), and the employer defendant is simply asking the court to enforce the statutory prerequisites to such an action. In other words, Title VII plainly contemplates federal suits by the EEOC to enforce the law, and judicial enforcement of the statute. The only question is whether the court should enforce the *entire* statutory scheme, including the parts requiring the EEOC to undertake an administrative process before bringing suit—or, rather, enforce it only selectively. This Court's implied right-of-action jurisprudence offers no support for the latter approach.

In the end, the Seventh Circuit's reasoning has no limiting principle. As Petitioner has shown, Congress often imposes statutory preconditions to suit. (*See* Pet. 23 (citing *Hallstron v. Tillamook Cnty.*, 493 U.S. 20, 31 (1989); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157-58 (2010); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007); *United States v. Zucca*, 351 U.S. 91, 94 (1956); *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931).) In these situations, the statute does not *expressly* say that failure to comply provides an "affirmative defense,"

but the courts nonetheless understand that without satisfaction of the condition, the case cannot proceed.

The Seventh Circuit's assurance that EEOC officials are subject, in theory, to the oversight of Congress, and "are appointed by the President with the advice and consent of the Senate" (Pet. App. 20a-21a), only underscores the breadth of its position. *All* agencies are potentially subject to congressional influence, and *all* agencies have their heads appointed by the President or senior-level officers. *See* U.S. Const. art. I, §§ 7-8; art. II, § 2. But, of course, that has never been viewed as a reason to free agencies from judicial review of their statutory constraints. The Seventh Circuit's contrary logic has no legal basis and should be rejected.

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

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

Early versions of the 1972 amendments to Title VII expressly stated that the EEOC may proceed with a lawsuit against an employer if it cannot

secure "a conciliation agreement acceptable to the Commission, *which determination shall not be reviewable in any court*." S. 2515, 92d Cong., § 4(f) (1971) (emphasis added). Skeptics of EEOC authority initially sought to amend the bill to delete that phrase, and their efforts—initially—failed. *See EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 262 (N.D. Ill. 1980) But, following that skirmish, the bill *was unable to pass*. Instead, the entire bill was replaced by a substitute amendment proposed by Senator Dominick, *see Chandler v. Roudebush*, 425 U.S. 840, 855-57 (1976); *Occidental Life*, 432 U.S. at 361-66; and that version, which Congress ultimately enacted, *does not include the italicized language precluding judicial review*. *See* 42 U.S.C. § 2000e-5(f)(1). Removing that language was a compromise measure necessary to secure the bill's passage, acceding to the views of those skeptical Senators who believed that EEOC conciliation needed "some oversight." 118 Cong. Rec. 3804 (Feb. 14, 1972).

Indeed, the bill ultimately enacted by Congress differed dramatically from the amendments initially proposed. The initial draft would have given the EEOC the power to adjudicate complaints and issue cease-and-desist orders. *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 initial Committee dissent, including Senator Dominick, that civil rights litigation ought to be supervised by "[f]ederal court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render their decisions in a climate tempered by judicial reflection").

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 Seventh Circuit's rewriting of that conscious congressional choice was therefore plainly inappropriate. Put another way, a Congress worried about giving a "blank legislative check," 117 Cong. Rec. 38402 (Nov. 1, 1971) (Sen. Allen), to the "crusaders" at the EEOC, 118 Cong. Rec. 1976 (Feb. 1, 1972) (Sen. Ervin), would hardly have intended for the judicial branch to blindly trust that agency, as the Seventh Circuit now will.

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

The Seventh Circuit also put considerable emphasis on the supposed absence of a "meaningful standard" by which it could enforce the obligation to attempt conciliation. (*See* Pet. App. 9a-10a.) As the 40-year history of judicial review of conciliation shows, however, that concern is greatly overstated. Challenges to EEOC conciliation may be *fact-intensive*, but that hardly makes them unreviewable.

Ever since the 1972 amendments were enacted, courts have been enforcing the EEOC's conciliation duty. *See EEOC v. Container Corp. of Am.*, 352 F. Supp. 262, 263-66 (M.D. Fla. 1972) (in "first" suit pursued by EEOC, holding that "to foreclose judicial inquiry into the satisfaction of the conditions [such as conciliation] would eliminate them from the Act"). A well-developed body of law has since emerged, recognizing certain basic principles. For example: The EEOC cannot conciliate in an "all-or-nothing" fashion. *Pet*, 612 F.2d at 1002. In class action cases, the EEOC must give the employer sufficient information about the number of affected individuals to evaluate its potential exposure. *CRST*, 679 F.3d at 678. The EEOC must provide enough time for the employer to consider its offers. *Asplundh Tree*, 340 F.3d at 1260. Of course there are divergences among the lower courts on some questions (*see* Pet. App. 10a n.2), just as the lower courts diverge on many other issues. And because the inquiry is necessarily fact-intensive and case-specific—what is required to ensure a "meaningful" conciliation will be different in one case from another—certain questions may not have categorical yes-or-no answers. (Pet. App. 10a.) But that does not make the inquiry unmanageable. Courts have been managing it for decades.

The Seventh Circuit critiqued the "good faith" test adopted by some courts as too "difficult … to enforce." (Pet. App. 11a (quoting *Doe v. Oberweis Dairy*, 456 F.3d 704, 711 (7th Cir. 2006)).) And, to be sure, some courts may prefer to phrase the inquiry in more objective terms (such as the requirement of a "meaningful" chance to conciliate, *CRST*, 679 F.3d at 676). But courts apply "good faith" inquiries *all the time*. *See, e.g.*, *United States v. Leon*, 468 U.S. 897,

920 (1984) (exclusionary rule inapplicable if officer acted in "good faith"); *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (excessive force inquiry turns on whether force was applied in "good-faith"); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (in diversity cases, sum claimed by plaintiff controls "if the claim is apparently made in good faith"). And, in the labor context, Congress wrote a good-faith *negotiation* duty into the law, 29 U.S.C. § 158(d), as the court below conceded. (Pet. App. 11a.) With so many practical manifestations, the good-faith test simply cannot be condemned as unworkable.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

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