No. 15-1329

IN THE

Supreme Court of the United States

STERLING JEWELERS INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center, and Retail Litigation Center, Inc. respectfully submit this brief *amici curiae* in support of the Petition for a Writ of Certiorari and of reversal.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. Both parties have consented to the filing of this brief.

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 discriminatory employment practices. Its membership includes over 250 of the nation's largest private sector companies. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

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 through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal

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Counsel for *amici curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings that affect 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.

Many of *amici's* members 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 federal employment-related laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici* have a substantial interest in the proper investigation and resolution of discrimination charges filed with the Equal Employment Opportunity Commission (EEOC).

As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the par-

ties. Since 1976, EEAC, NFIB and the RLC collectively have participated as *amicus curiae* in hundreds of cases before this Court and the federal circuit courts of appeals, many of which have involved important 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

Between May 2005 and November 2006, 19 female employees filed discrimination charges with Respondent Equal Employment Opportunity Commission (EEOC) accusing Petitioner Sterling Jewelers Inc. (Sterling) of discriminating against them and similarly situated women in pay and promotions at Sterling retail stores. Pet. App. 3a-4a. These stores were located in nine states—California, Colorado, Florida, Indiana, Massachusetts, Missouri, Nevada, New York and Texas. *Id.* All 19 charges eventually were assigned to EEOC Lead Investigator David Ging. Pet. App. 4a.

In 2006, Sterling and counsel representing the charging parties engaged in private settlement negotiations, which the EEOC was permitted to attend. *Id.* After those settlement efforts broke down, Ging invited Sterling and the charging parties to submit any information they wished to be considered. Pet. App. 5a. Sterling did not provide any additional information beyond what already had been submitted as part of its initial response to the charges. *Id.* However, by letter dated November 30, 2007, counsel for the charging parties submitted additional information raising new allegations that the charging

parties "and other women similarly situated to them" had been subjected to a pattern or practice of unlawful sex discrimination in pay and promotions at Sterling stores, Pet. App. 19a, 117a, and that charging parties' submission and exhibits "set forth the factual, legal and statistical support" for their claims. Pet. App. 19a, 118a.

Shortly thereafter, on January 3, 2008, the EEOC issued a Letter of Determination finding that Sterling subjected the charging parties and "a class of female employees with retail responsibilities *nationwide*" to unlawful pattern-or-practice sex discrimination. Pet. App. 5a (emphasis added). The EEOC filed suit on September 23, 2008, accusing Sterling of nationwide pattern-or-practice sex discrimination in pay and promotions in violation of Title VII. Pet. App. 6a.

During discovery, Sterling sought to determine the basis for the EEOC's nationwide claim. Pet. App. 6a. Ging eventually testified that he could not recall what, if anything, he did to investigate the 19 charges or whether there was any evidence of a nationwide pattern or practice of sex discrimination in pay and promotions. *Id.*

Sterling moved for partial summary judgment on the ground that the EEOC did not investigate the claim that the company was engaged in a nationwide pattern or practice of unlawful sex discrimination, and thus the agency had failed to satisfy a mandatory precondition to suit under Title VII. *Id.* In opposing the motion, the EEOC conceded that "there is little investigative material in the files beyond the charges, Sterling's responses, and other correspondence." Pet. App. 24a. Nevertheless, the EEOC contended that Ging's testimony that he investigated the charges collectively as "class-based" claims, coupled with the

language of the charges asserting claims on behalf of all women "similarly situated," was sufficient to show that the agency satisfied its pre-suit investigation obligation. Pet. App. 4a-6a. The EEOC also argued in the alternative that even assuming it failed to satisfy its pre-suit obligations, federal courts are not authorized to review the sufficiency of its pre-suit investigative efforts. Pet. App. 3a.

The magistrate judge rejected the EEOC's arguments and recommended that the district court dismiss the agency's lawsuit with prejudice. Pet. App. 35a. Pointing out that the EEOC's obligation to investigate prior to suit "is both mandatory and unqualified," the magistrate judge concluded that the agency conducted no independent investigation at all. Pet. App. 33a (citation and internal quotation omitted).

Among other things, the magistrate judge found that the only evidence offered by the EEOC of an investigation of a nationwide pattern-or-practice claim was a statistical analysis prepared by an expert retained by the charging parties' lawyers in connection with the earlier, unsuccessful, private settlement negotiations. That analysis purported to calculate the charging parties' damages for purposes of settlement negotiations. The EEOC, however, relied on the analysis as proof of company-wide disparities in pay and promotions on the basis of sex. Pet. App. 27a.

Noting that the EEOC repeatedly refused to identify the basis for its Letter of Determination in response to Sterling's numerous discovery requests, the magistrate judge concluded that:

> having invoked privilege in response to Sterling's inquiries in discovery, the EEOC cannot now be

> allowed to argue that this was the analysis referred to in its Letter of Determination, or that it took any steps to verify the reliability of that analysis. Absent such proof, there is no evidence that its investigation was nationwide.

Pet. App. 34a (footnote omitted). The district court adopted the magistrate judge's Report and Recommendation, and by Order dated March 10, 2014, dismissed the EEOC's action with prejudice. Pet. App. 40a. The Second Circuit vacated "the district court's order granting summary judgment and [remanded] the case for further proceedings …." Pet. App. 15a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Second Circuit below effectively held that courts may not review the scope or sufficiency of an Equal Employment Opportunity Commission (EEOC) discrimination charge investigation, even where necessary to confirm the agency's compliance with its statutory pre-suit obligations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended. In doing so, it badly misconstrued this Court's holding and rationale in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), and also misapprehended the EEOC's administrative responsibilities under the Act. Accordingly, this Court should grant the writ and reverse the decision below.

The EEOC is authorized by Congress to enforce Title VII, which "sets out a detailed, multi-step procedure through which the Commission enforces the statute's prohibition on employment discrimination." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649 (2015); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984). Title VII provides that the EEOC "shall" serve notice

of, investigate, make findings as to, and conciliate every administrative charge of discrimination before commencing suit in federal court. 42 U.S.C. § 2000e-5(b). Although it also is authorized to initiate civil actions against employers it believes to have violated the Act, the EEOC may not do so unless and until it has discharged its statutory pre-suit administrative requirements, including completing an investigation of the charge. *Id*.

In *Mach Mining LLC v. EEOC*, this Court recognized that as to conciliation, Title VII confers "extensive discretion [upon the EEOC] to determine the kind and amount of communication with an employer appropriate in any given case." 135 S. Ct. at 1649. Accordingly, the Court held that the scope of review of the agency's conciliation efforts is "narrow." *Id.*

This Court explained that a sworn statement from the EEOC typically will be sufficient to establish compliance with its pre-suit conciliation obligations. *Id.* at 1656. At the same time, the Court confirmed that an employer is permitted to present its own "credible evidence" of EEOC non-compliance, *id.*, thus obligating the trial court to "conduct the factfinding necessary to decide that limited dispute." *Id.* The Court was not asked to and did not decide whether pre-suit investigation is subject to the same standard of review.

Blindly extending *Mach Mining's* holding to the charge investigation context, the Second Circuit below found that Title VII authorizes only modest judicial review of the EEOC's compliance with its statutory duty to investigate. According to the court, such a review is limited to determining whether or not an investigation occurred, not whether it was proper,

reasonable, or in any way related to the agency's civil action.

In so holding, the Second Circuit failed to reconcile its interpretation with *Mach Mining's* emphasis of (and reliance on) aspects of the administrative process that are unique to conciliation and inapplicable to the EEOC's duty to investigate. For instance, this Court in *Mach Mining* observed that Title VII directs the EEOC to "endeavor" to eliminate suspected discriminatory employment practices through "informal" means of "conference, conciliation, and persuasion" to the point at which it is able to secure an agreement "acceptable to the Commission." 135 S. Ct. at 1654 (citations and internal quotations omitted). In the Court's view, that language confers upon the EEOC considerable discretion in how it carries out its conciliation responsibilities.

The same is not true of the EEOC's duty to investigate, however, which is "both mandatory and unqualified." Pet. App. 33a (citation and internal quotation omitted). Accordingly, the Second Circuit incorrectly held that the agency was permitted to bring a nationwide Title VII pattern-or-practice suit where that claim was not first subject to a nationwide pattern-or-practice charge investigation. The EEOC's failure to investigate prior to suit not only is inconsistent with Title VII, but also deprives charging parties and respondents of a meaningful opportunity to resolve meritorious claims informally, contrary to Title VII's policy favoring prompt, informal resolution of discrimination charges over federal court litigation.

In its zeal to litigate large, high profile class-based suits, the EEOC's enforcement priorities seemingly have focused less on informal resolution of discrimination charges, as contemplated by Title VII, and more

on developing and maintaining a broad, class-based litigation docket. To the extent that the decision below encourages the EEOC to neglect its administrative charge responsibilities by "suing first and asking questions later," it serves as a barrier to effective and efficient resolution of workplace discrimination claims and thus should be reversed.

Review and reversal of the decision below is important to ensure the proper functioning and integrity of the administrative discrimination charge resolution process. Indeed, guidance from this Court regarding the authority of courts to evaluate the reasonableness of EEOC investigation efforts is sorely needed to disabuse any notion that the agency's "legal lapses and violations … have no consequence." *Mach Mining*, 135 S. Ct. at 1652-53.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW MISAPPLIED, AND IS IRRECONCILABLE WITH, THIS COURT'S DECISION IN *MACH MINING v. EEOC*

The Second Circuit held that the Equal Employment Opportunity Commission (EEOC) may sue for nation-wide pattern-or-practice sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, even where questions exist as to whether it actually investigated such claims at the administrative level. The court found that because only modest judicial review of the EEOC's compliance with its *conciliation* obligation is permitted under this Court's holding in *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645 (2015), the only question that may be considered by a reviewing court in the context of the agency's *investigation* obligation

is whether or not the EEOC conducted an investigation – not whether it was a good or poor one, or formed a proper basis for the subsequent civil suit. According to the Second Circuit, the EEOC need only demonstrate that "it took steps to determine whether there was reasonable cause to believe that the allegations in the charge are true." Pet. App. 8a-9a.

In doing so, the Second Circuit disregarded important limitations on *Mach Mining's* scope and, instead, recast that ruling in a manner that effectively precludes *any* judicial review of the EEOC's pre-suit charge investigation efforts. Because of the significance of this question to all employers subject to Title VII, review by this Court is warranted.

A. *Mach Mining* Does Not Address, Much Less Resolve, The Standard For Evaluating The EEOC's Fulfillment Of Its Pre-Suit Charge Investigation Responsibilities

The EEOC was created by Congress to enforce Title VII, which prohibits discrimination in the terms, conditions or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). The statute authorizes 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, but only after it has fulfilled its pre-suit administrative responsibilities, including its obligation to investigate the contested claims. 42 U.S.C. § 2000e-5(b).

This Court repeatedly has explained that the EEOC's administrative discrimination charge process is "'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)); *see also Mach Mining*, 135 S. Ct. at 1649 (charge process is a "detailed, multi-step procedure through which the Commission enforces the statute's prohibition on employment discrimination"); *CRST Van Expedited, Inc. v. EEOC*, 2016 WL 2903425 (U.S. 2016) (same). The statute provides, in relevant part:

> Whenever a charge is filed … alleging that an employer … has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge … on such employer … within ten days, and shall make an investigation thereof. … 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 such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b); *see also CRST*, 2016 WL 2903425, at *4.

When it first was enacted in 1964, Title VII gave the EEOC limited authority to prevent and correct alleged employment discrimination through investigations and "informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b). In 1972, Title VII was amended, authorizing the agency to sue employers believed to have engaged in unlawful discrimination 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 (1972). Although Title VII authorizes the EEOC to pursue a civil action against an employer

believed to have engaged in unlawful discrimination, the agency may exercise that authority only after it has made an investigation, reached a reasonable cause determination based on that investigation, and 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 Mach Mining*, 135 S. Ct. at 1649-50.

In *Mach Mining*, this Court outlined a deferential standard for judging the EEOC's compliance with its duty to conciliate under Title VII. *Id.* at 1656. Although the Court made general reference to the detailed, multi-step administrative process triggered by the filing of a discrimination charge, the question before the Court pertained only to the scope and standard of judicial review applicable to the EEOC's conciliation obligation. The Court held that as to conciliation, Title VII confers "extensive discretion [upon the EEOC] to determine the kind and amount of communication with an employer appropriate in any given case." *Id.* at 1649. However, it had no occasion to, and did not, examine the parameters of the EEOC's statutory duty to *investigate*.

In the *Mach Mining* case, the EEOC sued the defendant for engaging in an alleged pattern or practice of sex discrimination in hiring for non-office positions. The defendant averred that the EEOC failed to satisfy its pre-suit obligation to attempt conciliation, noting that the agency did not identify the victims on whose behalf it was seeking to conciliate, did not provide any information regarding victim-specific damages, refused the company's request for an in-person meeting, and deemed conciliation a failure even after the company made a counteroffer and expressed a willingness to continue negotiations.

For its part, the EEOC asked the trial court to find, based on the agency's representations alone, that it met its duty to conciliate, arguing further that the substance of its conciliation efforts were unreviewable. 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 to ensure it made "a sincere and reasonable effort to negotiate." *EEOC v. Mach Mining, LLC*, 2013 WL 319337, at *5 (S.D. Ill. Jan. 28, 2013) (citations and internal quotations omitted), *rev'd*, 738 F.3d 171 (7th Cir. 2013), *vacated*, 135 S. Ct. 1645 (2015). On appeal, the Seventh Circuit reversed, finding that Title VII does not authorize courts to second-guess the EEOC's conciliation activities. *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013), *vacated*, 135 S. Ct. 1645 (2015).

This Court disagreed, concluding that nothing in Title VII overcomes the "strong presumption favoring judicial review of administrative action," 135 S. Ct. at 1653, or otherwise suggests that Congress intended for the EEOC to "police its own conduct." *Id.* at 1651. As to the standard that should be applied in reviewing the EEOC's compliance with its Title VII conciliation responsibilities, the Court pointed out that the statute itself gives the EEOC broad discretion regarding what matters to conciliate and for how long. At the same time, courts may not simply "accept the EEOC's say-so that it complied with the law," *id.* at 1653, but rather must verify that the agency "actually, and not just purportedly," made an effort to conciliate. *Id.* For instance, if the EEOC made no effort whatsoever to conciliate prior to filing suit, "Title VII would offer a perfectly serviceable standard for judicial review: Without any 'endeavor' at all, the EEOC would have

failed to satisfy a necessary condition of litigation." *Id.* at 1652.

This Court observed that Title VII's "conference, conciliation and persuasion" language supplies a concrete roadmap as to what constitutes an adequate conciliation effort on the EEOC's part: those terms "necessarily involve communication between parties, including the exchange of information and views." *Id*. Accordingly, the EEOC is expected to "try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1656. In other words, the agency "must tell the employer about the claim—essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." *Id.* at 1652 (emphasis added).

Under *Mach Mining*, a sworn statement from the EEOC will "usually suffice." *Id.* However, if the employer offers its own "credible evidence" that the EEOC did not provide the respondent with necessary information about the charge or attempt to conciliate the claims, *id.*, the court "must conduct the factfinding necessary to decide that limited dispute." *Id*. Thus, even under the relatively modest standard of review articulated by the Court, employers still may challenge the sufficiency of the EEOC's conciliation efforts.

Purporting to apply the reasoning of *Mach Mining*, the Second Circuit found that like conciliation, judicial review of EEOC *investigation* efforts is narrow, and is limited to determining whether an investigation occurred. Thus, in the Second Circuit's view, to establish compliance with its statutory duties, the EEOC need only show that "it took steps to determine

whether there was reasonable cause to believe that the allegations in the charge are true." Pet. App. 8a-9a. The Second Circuit found further that the EEOC typically will satisfy that showing by filing a sworn affidavit with the court attesting that it "performed its investigative obligations and outlining the steps taken to investigate the charges …." Pet. App. 9a. The court reasoned that a more searching review would invite courts to second-guess the EEOC's investigation strategy or methods, which in turn "would expend scarce resources and would delay and divert EEOC enforcement actions from furthering the purpose behind Title VII—eliminating discrimination in the workplace." Pet. App. 10a.

Notably, while this Court in *Mach Mining* specified that employers may refute the EEOC's affidavit evidence of conciliation by offering its own evidence, the Second Circuit below conveniently declined to provide such an opportunity to employers challenging the sufficiency of pre-suit investigation. In effect, the Second Circuit's interpretation would have courts simply accept the EEOC's word that a proper investigation occurred, without any possibility for a challenge from the employer.

The decision below thus rests on an illogical and extreme extrapolation of the Title VII conciliation principles outlined in *Mach Mining*, which if allowed to stand would relieve the EEOC of any meaningful obligation to ensure that every Title VII lawsuit it files is preceded by a proper investigation. Accordingly, this Court should grant the petition and reverse the decision below.

B. The Court in *Mach Mining* Focused On Features Of Conciliation That Do Not Exist In The Investigation Context

In resolving the narrow question whether courts may review the sufficiency of EEOC conciliation efforts and, if so, under what standard, this Court in *Mach Mining* pointed to a number of unique features of conciliation that are inapplicable to other stages of the multi-step charge resolution process. For instance, the Court observed that Title VII requires the EEOC to "endeavor" to eliminate suspected discriminatory employment practices through "informal" means of "conference, conciliation, and persuasion," but does not dictate whether and how the agency should resolve the matter. 135 S. Ct. at 1649. It noted:

> Congress left to the EEOC such strategic decisions as whether to make a bare-minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief.

Id. at 1654. That built-in discretion and flexibility in the conduct of conciliation does not extend to the EEOC's notice, investigation or determination obligations. To the contrary, Title VII directs that the EEOC "shall make an investigation" of discrimination charges, 42 U.S.C. § 2000e-5(b); unlike the bargaining flexibility it affords in conciliations, Title VII does not give the EEOC a choice as to which claims to investigate, or whether to investigate at all, prior to filing suit. *Id.*

The EEOC's procedural regulations confirm and reinforce that under Title VII, Congress intended the EEOC to investigate charges of discrimination, providing that "[t]he investigation of a charge *shall* be made by the Commission …." 29 C.F.R. § 1601.15(a) (emphasis added). Whenever the agency "completes its investigation" . . . and finds "no[] reasonable cause to believe that an unlawful employment practice has occurred ... the Commission shall issue a letter of determination" to that effect. 29 C.F.R. § 1601.19(a). Where the EEOC does find reason to believe discrimination occurred, the EEOC may issue a determination *only* "based on, and limited to, evidence obtained by the Commission" during the investigation. 29 C.F.R. § 1601.21(a).

Further, although in litigation the EEOC generally is permitted to pursue any statutory violation growing out of facts uncovered during a "reasonable investigation" of an underlying charge, the agency must actually investigate prior to suit in order to invoke that rule. *See* 42 U.S.C. § 2000e-5(b); *see also e.g., EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012) (quoting *EEOC v. Delight Wholesale Co.*, 973 F.2d at 668 (8th Cir. 1992)); *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1263 (D. Colo. 2007); *EEOC v. Jillian's of Indianapolis, Inc.*, 279 F. Supp. 2d 974, 979-81 (S.D. Ind. 2003); *EEOC v. E. Hills Ford Sales, Inc*., 445 F. Supp. 985, 987-89 (W.D. Pa. 1978); *EEOC v. Nat'l Cash Register Co.*, 405 F. Supp. 562, 567 (N.D. Ga. 1975); *EEOC v. Target Corp*., 2007 WL 1461298, at *3 (E.D. Wis. May 16, 2007) (unpublished) (citation omitted). As the Eighth Circuit in *EEOC v. CRST* observed:

> [W]hile "[t]he EEOC may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged," it "must discover such individuals and wrongdoing *during the course of its investigation*."
>
> * * *
>
> "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation."

679 F.3d at 674-75 (citations omitted).

Accordingly, the EEOC may not sue an employer in federal court on claims that go beyond the scope of those uncovered and actually investigated at the administrative stage. Said differently, if an EEOC lawsuit contains allegations that were not evaluated during the underlying administrative charge investigation, then the EEOC has not fulfilled its pre-suit administrative obligations, and the action must be dismissed.

The Second Circuit below improperly extended to the investigations context this Court's ruling in *Mach Mining*, which addressed only the standard of review applicable to the EEOC's duty to conciliate. In doing so, it effectively insulated the EEOC's investigation efforts from any kind of meaningful judicial review, absolving the EEOC from having to demonstrate that it actually undertook a proper investigation of a claim prior to commencing suit on that claim, and denying employers the opportunity to adduce evidence showing that the EEOC did not, in fact, meet its investigation

obligation. For that reason, review by this Court is warranted.

II. REVIEW OF THE DECISION BELOW IS NECESSARY TO RESOLVE AN ISSUE OF SUBSTANTIAL IMPORTANCE TO EMPLOYERS REGARDING THE PROPER AND EFFICIENT RESOLUTION OF DISCRIMINATION CHARGES

A. Conferring Upon the EEOC Unconstrained Latitude In The Conduct Of Discrimination Charge Investigations Is Inconsistent With Title VII's Purposes And Policy Aims

As noted, when first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination through this administrative framework of charge investigations and, where appropriate, informal conciliation. Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). 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 (1972). "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 the amended Act. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

Not coincidentally, Congress also intended voluntary compliance to be the "preferred means of achieving the objectives of Title VII." *See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-*

Denver Co., 415 U.S. 36, 44 (1974) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)). The EEOC's regulations provide that in enacting Title VII, Congress "strongly encouraged employers … to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action." 29 C.F.R. § 1608.1(b).

Pre-suit investigation by the EEOC is vital to ensuring compliance with the policies underlying Title VII. Among other things, it promotes sound employment relations and compliance programs by encouraging early detection and correction of potential violations, without resorting to protracted federal court litigation. In particular, the EEOC charge investigation sets the stage for meaningful conciliation, which benefits respondents seeking to avoid the cost and reputational damage associated with employment discrimination litigation against the federal government. It also benefits charging parties seeking speedy resolution to their workplace disputes. *See CRST Van Expedited*, 679 F.3d at 675 ("The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation") (citations and internal quotations omitted).

The EEOC's failure to investigate a claim prior to suit deprives charging parties and respondents of a meaningful opportunity to resolve the claims informally, and represents a dereliction of the EEOC's statutory responsibilities under Title VII. It also undermines the statute's policy aims and purposes,

which favor prompt, informal resolution of discrimination charges over federal court litigation. This Court should make clear that meaningful judicial review of EEOC investigations is crucial to ensure the proper functioning of the entire administrative process.

B. The EEOC's Recent History Of Prosecutorial Abuses Confirms The Need For Clear Standards Governing It Compliance With Pre-Suit Investigative And Other Administrative Requirements

Amici remain profoundly concerned about the EEOC's current, extremely aggressive enforcement strategy, which places a premium on high-profile, mainly class-based litigation often at the expense of proper investigation and meaningful conciliation. If allowed to stand, the decision below will only encourage the EEOC to pursue litigation of claims that were *never* examined at the charge investigation stage.

Since at least 2012, the EEOC has directed significant investigative resources towards the development of claims having a potentially broad impact on large classes of applicants and employees. The agency's current Strategic Enforcement Plan (SEP), for instance, requires field offices to progressively increase the percentage of systemic cases on their active litigation dockets, but says nothing to suggest that meaningful investigation and pre-suit charge resolution are agency priorities. Such policies serve not to encourage careful administrative charge investigations, but rather to incentivize staff to bypass investigation and pre-suit conciliation in favor of high-profile, class-based lawsuits – particularly those, as here, alleging "pattern-or-practice" discrimination.

Indeed, proper pre-suit investigation is especially important to establish a strong factual basis for such claims. To make out a threshold pattern-or-practice case, the EEOC must show that alleged discrimination was the defendant's *modus operandi* – *e.g.*, a "standard operating procedure." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (footnote omitted). This may be done, in part, through the use of statistics showing a statistically significant workforce imbalance disfavoring a protected group.

For instance, a charging party could claim that the employer has engaged in a pattern or practice of unlawful discrimination through the application of hiring practices that discriminate on the basis of race. In support, he or she could offer statistics showing that since the implementation of a particular policy, the employer has hired only one African-American to fill 1,000 available positions companywide. The employer could respond with a direct attack on the charging party's statistics, arguing for example that they are rife with mathematical errors or other significant mistakes. During its investigation of the charge, the EEOC would be expected to, at a minimum, examine the data and the parties' respective views, and perform its own statistical analyses to identify strengths and weaknesses in each side's position. The agency freely admits that it did nothing of the sort here.

As noted, "Congress requires that the EEOC engage in specific pre-litigation activities, including investigating the claim and attempting to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 810 (S.D.N.Y. 2013) (internal quotation omitted) (citing *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d

1529, 1534-35 (2d Cir.1996)). Here, the EEOC brought an action against Sterling accusing it of engaging in a pattern or practice of unlawful discrimination in pay and promotions against women in retail sales positions nationwide. Despite the sweeping and very serious nature of that accusation, there is nothing in the EEOC's investigative record to suggest that the agency actually conducted an investigation of nationwide pattern-or-practice discrimination. In fact, the failure by the EEOC investigator to recall any of the details of the alleged nationwide investigation strongly implies that no such investigation occurred.

The EEOC's actions, or rather lack of action, in this case, coupled with its widely publicized systemic litigation enforcement strategy, strongly suggest that the "investigation" it claimed to have conducted here amounted to nothing more than a check-the-box exercise aimed to expedite the docketing of another systemic court case. Such conduct flies directly in the face of Title VII's pre-suit administrative requirements, as well as Congress's stated preference for informal resolution of discrimination claims.

Permitting the EEOC to bypass its obligation to investigate the claims upon which it brings suit would only serve to further encourage it to employ questionable tactics seemingly designed primarily to force employers into untenable settlement positions. The EEOC's failure to comply in every instance with its statutory duty to investigate prior to suit is particularly problematic where, as here, a handful of individual charges are transformed by the EEOC into a nationwide pattern-or-practice lawsuit without any nationwide discrimination investigation.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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