No. 15-20078

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

BASS PRO OUTDOOR WORLD, L.L.C.; and TRACKER MARINE RETAIL, L.L.C.,

Defendants-Appellants.

Appeal from the United State District Court
for the Southern District of Texas

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REVERSAL

Deborah White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209
(703) 600-2067

Of counsel for Retail Litigation Center

Kathryn Comerford Todd
Warren Postman
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

Of counsel for Chamber of Commerce of the United States of America

Eric S. Dreiband
Yaakov M. Roth
Haley A. Wojdowski
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Tel: (202) 379-3939
Fax: (202) 626-1700
esdreiband@jonesday.com

Counsel for Amici Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 15-20078

EEOC v. Bass Pro Outdoor World, L.L.C. et al.

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Appellants' Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 of the Rules of this Court have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

Amici Curiae

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

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

Counsel for Amici Curiae

1. Eric S. Dreiband
   Yaakov M. Roth
   Haley A. Wojdowski
   JONES DAY
   51 Louisiana Ave., N.W.
   Washington, D.C. 20001

2. Deborah White
   RETAIL LITIGATION CENTER, INC.
   1700 N. Moore Street, Suite 2250
   Arlington, VA 22209

3. Kathryn Comerford Todd
Warren Postman
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

/s/ Eric S. Dreiband
Eric S. Dreiband

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

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 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.

---

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

SUMMARY OF ARGUMENT

This is a case about the efforts of the Equal Employment Opportunity Commission ("EEOC") to have its cake and eat it too. Title VII is a detailed statutory scheme that carefully conditions and limits EEOC's powers, consistent with Congress's longstanding wariness about overempowering that agency. But EEOC wants to mix-and-match Title VII's provisions, to maximize its leverage over employers. Specifically, it seeks to utilize a special proof framework developed for *equitable* "pattern or practice" actions under § *707* of the Civil Rights Act of 1964 to seek *monetary relief* for individual violations under § *706* of the Act. And, to further expand its coercive powers, EEOC wants to bring these actions without ever investigating or even identifying the supposedly aggrieved particular individuals on whose behalf it purports to act.

The dangerous end result of this unauthorized restructuring of Title VII is well exemplified by this case: An alleged nationwide class action alleging tens of thousands of potential but unidentified victims, with EEOC seeking up to $300,000 in money damages for each—and, not surprisingly, assuring the District Court that the case will *surely* settle before it comes time for the unmanageable task of identifying and trying to a jury the claims of each individual victim. That is precisely the sort of coercive, threatening power that Congress never intended to grant EEOC—and, to the contrary, repeatedly sought to prevent.

I. Title VII authorizes EEOC to pursue two distinct claims against employers. Under § 706 of the Civil Rights Act, EEOC may sue on behalf of one or more "aggrieved" persons for violation of the statute. 42 U.S.C. § 2000e-5(f). And, under § 707 of the Act, EEOC may sue to enjoin a "pattern or practice" of discrimination. *Id.* § 2000e-6. For those pattern-or-practice claims, the Supreme Court developed a unique proof framework: Once EEOC demonstrates existence of a "regular procedure or policy" of discrimination, then an employer seeking to limit the scope of the injunctive remedy must bear the burden of *disproving* that any individual employment action was the product of that discriminatory policy. *Int'l B'hood of Teamsters v. United States*, 431 U.S. 324, 360-62 (1977).

Here, however, EEOC wants to invoke that *Teamsters* burden-shifting rule not in a pattern-or-practice suit under § 707 of the Act, but in an action that it filed under § 706 of the Act. This would help EEOC, because Congress authorized monetary relief and jury trials exclusively for § 706 cases, whereas § 707 suits trigger only equitable remedies in bench trials. But importing the § 707 proof structure into the § 706 cause of action would completely upend the congressional determination to distinguish the two claims. It would render § 707 effectively redundant. And it would empower EEOC to extort employers with the threat of a multi-million dollar judgment based on a single, abstract jury finding—a power that Congress long tried to keep *out* of EEOC's hands.

EEOC's principal argument is that if private plaintiffs in class actions are entitled to use the *Teamsters* framework, then so should government enforcement agencies. But that contention glosses over the fundamental distinction between EEOC and class-action plaintiffs: The latter must comply with Federal Rule of Civil Procedure 23 to certify a class. That means private plaintiffs must show "commonality," among other things, and limit themselves to *equitable* relief, making the *Teamsters* rule at once less burdensome and less threatening. It is one thing to offer a presumption in systemic discrimination cases seeking injunctive remedies, but quite another to allow crippling monetary awards whenever a single jury finds an ill-defined "policy" of unlawful behavior. Neither Congress nor the Supreme Court has ever opened that door.

II. Compounding the unfairness of its countertextual attempt to mix § 707's proof structure with § 706's remedies, EEOC also wants to pursue this claim without ever investigating or identifying the actual "aggrieved" persons on whose behalf it is suing—relying instead on general statistics, with any actual, unlawful employment practices or policies to be identified (or not) in discovery. That aggressive gambit renders EEOC's pursuit of this case not just substantively deficient but also procedurally flawed. Allowing EEOC to sue first and investigate later is contrary to Title VII's plain text and Congress's clear intent.

As a check on EEOC's authority and to protect both employers and victims, Congress insisted EEOC follow an "integrated, multistep enforcement procedure" before filing suit. *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977). That process begins with a charge, requires notice to employers, a mandatory investigation, and an effort to resolve claims through "conciliation." 42 U.S.C. § 2000e-5(b). Without identifying particular unlawful employment actions, however, it is impossible to meaningfully investigate or conciliate the claims. How can anyone be expected to settle claims without knowing the number of alleged victims, who they are, or what happened to them? After all, statistics alone do not prove intentional discrimination; nor could they possibly demonstrate any individualized damages. EEOC must still necessarily identify and investigate acts of individual discrimination as a *prelude* to any lawsuit—not *after the fact*, when it is too late to achieve Title VII's preferred goal of voluntary compliance.

* * *

Affirming the District Court's order below would distort the carefully calibrated statutory scheme that Congress set up, making it even easier for EEOC to coerce large settlements by threatening massive monetary liability based on alleged statistical imbalances yet without specifying any of the predicate facts. That is not the scheme Congress enacted. This Court should not approve it.

ARGUMENT

I. EEOC CANNOT INVOKE THE *TEAMSTERS* FRAMEWORK TO OBTAIN MONEY DAMAGES IN A § 706 ACTION.

EEOC seeks this Court's imprimatur on its invocation, in an action seeking compensatory and punitive damages under § 706 of the Civil Rights Act, of the unique proof structure that the Supreme Court developed for equitable pattern-or practice claims under § 707 of the Act. It should not be given. Combining the remedies that Congress provided under § 706 with the proof framework that the Supreme Court recognized under § 707 would grant EEOC a dangerous power at odds with the text, structure, history, and purpose of Title VII. In fact, no plaintiff (private or government) may use the *Teamsters* burden-shifting framework outside the purely *equitable* contexts where it developed—and for good reason.

A. Allowing EEOC To Recover Money Damages Using the *Teamsters* Framework Would Upend the Congressional Compromise.

From its enactment, the Civil Rights Act has been a balancing act. On one hand, Congress wanted to eliminate, deter, and remedy employment discrimination. But on the other, Congress was wary of giving federal government agencies too much power to bully employers, the heart of the American economy. In the 1991 amendments to Title VII, that balance manifested itself in the decision to authorize money damages for individual suits under § 706 of the Act, but not for EEOC pattern-or-practice suits under § 707. EEOC convinced the District Court below, as a practical matter, to reject that compromise. That was error.

1. From its inception, Title VII gave private individuals subjected to unlawful discrimination a cause of action to remedy that violation. *Occidental Life*, 432 U.S. at 359. Initial drafts of the 1964 Civil Rights Act also authorized public enforcement by granting EEOC so-called "cease-and-desist" authority to hold hearings and issue its own orders, like the NLRB. *See* H.R. Rep. No. 570, at 9-10 (1963). When that approach drew significant criticism from Members of Congress concerned that such a scheme would force employers to "bear the burden of proving [their] freedom from guilt," *id.* at 15, the Act's proponents suggested allowing EEOC to file lawsuits, giving employers "a fairer forum," H.R. Rep. No. 914, Pt. 2, at 29 (1963). But even that proposal was criticized as allowing EEOC to engage in "fishing expeditions," 110 Cong. Rec. 6449 (1964) (Sen. Dirksen), and otherwise to harass and threaten employers, *id.* at 7255 (1964) (Sen. Ervin).

Ultimately, Congress "limited [EEOC's] function to investigation of employment discrimination charges and informal methods of conciliation and persuasion"; only the charging party or the Attorney General could sue, not EEOC. *Occidental Life*, 432 U.S. at 358-59. As Senator Humphrey explained in an effort to win over skeptical colleagues, "[t]he Commission can only investigate. The Commission can only persuade, conciliate, mediate." 110 Cong. Rec. 14,187. Congress enacted the statute only after assurances that EEOC would not "carry a club," but only "the art of persuasion." *Id.* at 14,188.

Moreover, EEOC could not (and still cannot) investigate employers on a whim; "unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only to evidence 'relevant to the charge under investigation,'" thus tying the agency's investigative authority to the specific charge filed with the agency. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984) (quoting 42 U.S.C. § 2000e-8(a)). That was "not accidental," but rather consistent with Congress's desire to prevent EEOC from "exercising unconstrained … authority." *Id.* at 64-65.

Section 707 of the 1964 Act did authorize the *Attorney General* to sue to remedy a "pattern or practice" of discrimination. That is, if employers "repeatedly and regularly engaged in acts prohibited by the statute," the Attorney General could ask a court could enjoin them. 110 Cong. Rec. 14,270 (Sen. Humphrey). In *Teamsters*, the Supreme Court construed § 707 as requiring the government to prove "that unlawful discrimination has been a regular procedure or policy followed by an employer." 431 U.S. at 360. Upon such a finding, the court may issue "an injunctive order against continuation of the discriminatory practice." *Id.* at 361. If the government also seeks "individual" equitable relief for victims, the burden is on the *employer* to prove that each person was "denied an employment opportunity for lawful reasons." *Id.* at 361-62. That pattern-or-practice framework is known as the *Teamsters* model.

2. When Congress amended Title VII in 1972, it again rejected a campaign to grant cease-and-desist authority to EEOC, but did authorize it to sue under § 706 for violations of the Act as well as to bring pattern-or-practice lawsuits under § 707, in lieu of the Attorney General. *See Occidental Life*, 432 U.S. at 359-65; 42 U.S.C. § 2000e-6(c). Those powers, however, were subject to numerous constraints. Among other things, Congress required that EEOC abide by § 706's "integrated, multistep enforcement procedure" before filing suit. 432 U.S. at 359; *see also infra*, Part II.

Congress also provided only for *equitable* relief. 42 U.S.C. § 2000e-5(g)(1). That includes backpay, *id.*, but Congress imposed a two-year statute of limitations on that form of relief because it recognized the dangers of allowing EEOC to seek "enormous monetary penalties," particularly in "pattern or practice suits" that "can extend back to 1965." H.R. Rep. No. 92-238, at 66 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2175; *see also* Sen. Comm. on Labor & Pub. Welfare, 92d Cong., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 189 (1972) (Rep. Dent) (unlimited backpay "appear[s] onerous to a majority"). As one Member explained, sounding a common theme, that limit was necessary "to preclude the threat of enormous backpay liability which could be utilized to coerce employers … into surrendering their fundamental rights to a fair hearing and due process." *Id.* at 249 (Rep. Erlenborn).

These amendments and others were motivated by a fear of giving EEOC—known to be a "very zealous" agency, *id.* at 779 (Sen. Saxbe)—vast powers to use the "full judicial and police enforcement powers of the Government," *id.* at 513 (Sen. Allen), to "compel … and bully" employers, *id.* at 1013 (Sen. Gambrell). In short, Congress struck a considered balance.

3. That balancing act continued in 1991, when Congress again amended Title VII. In the Civil Rights Act of 1991, Congress for the first time authorized compensatory and punitive damages (and hence jury trials) under Title VII, including for § 706 suits brought by EEOC. *See* 42 U.S.C. § 1981a(a) (allowing damages for complaining party under § 706); *id.* § 2000e(l) ("complaining party" includes EEOC). But, again, this power came with checks and constraints. For example, while initial drafts allowed for *unlimited* damages, Congress ultimately imposed caps on total recoverable damages. *Id.* § 1981a(b)(3). That change came after heavy criticism that unlimited damages would be "a device for intimidating employers" into submission, 136 Cong. Rec. S9345 (July 10, 1990) (Sen. Helms), coercing them "to settle these cases whether they have merit or not," 136 Cong. Rec. H6773 (Aug. 2, 1990) (Rep. Sensenbrenner). The potential for massive punitive damages is "a Damocles sword" that "is hanging over your head when a jury sitting there is deliberating and debating your very existence." 136 Cong. Rec. S9909 (July 18, 1990) (Sen. Bumpers).

Congress also restricted the *types* of claims that would trigger the right to money damages. In particular, the 1991 Act provided for those rights only "[i]n an action brought by a complaining party *under section 706 or 717* of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(a)(1) (emphasis added). The pattern-or-practice provision—§ 707—was notably omitted. As such, "EEOC is not authorized to seek compensatory or punitive damages under § 707; the relevant portion of [§ 1981a] only authorizes recovery of compensatory and punitive damages in an action … under § 706." *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 930 (N.D. Iowa 2009); *see also Kramer v. Bank of Am. Secs., LLC*, 355 F.3d 961, 965 (7th Cir. 2004) ("Section 1981a(a)(2) permits recovery of compensatory and punitive damages … only for those claims listed therein.").

That omission is consistent with Congress's concern that huge liability would coerce employers to settle meritless claims or face potential bankruptcy. Even with capped damages, if EEOC could use the § 707 *Teamsters* framework to shift the burden to employers—effectively forcing the employer to convince the jury that each allegedly aggrieved individual was *not* the victim of discrimination, with hundreds of thousands of dollars on the table for each—its leverage would be enormous, creating precisely the Due Process concerns and settlement pressure that Congress sought to eliminate by imposing the damages caps. *See* 136 Cong. Rec. S15331 (Oct. 16, 1990) (Sen. Hatch) ("I might point out, in pattern or practice

intentional discrimination cases there may be dozens and even hundreds of claimants …. Punitive damages could well amount to millions and millions of dollars in those cases."); 136 Cong. Rec. S10322 (July 23, 1990) (editorial submitted by Sen. Dole) (warning that in "broadly based class actions that allege that the employer engages in a 'pattern or practice' of discrimination," there could be "millions in compensatory and punitive damages hanging in the balance").

In short, a Congress worried about crippling, coercive monetary liability and that had always been wary of giving too much unconstrained power to EEOC had good reason to provide that "the damages section applies to *individual* cases of intentional discrimination," 137 Cong. Rec. S15446 (Oct. 30, 1991) (Sen. Robb) (emphasis added), but not broad-based EEOC suits under § 707.

4. EEOC does not claim it can obtain jury trials or monetary damages in § 707 suits. Rather, its theory—which the District Court accepted—is that the *Teamsters* pattern-or-practice framework may be used in so-called *§ 706* "pattern or practice" actions, even though only § 707, and *not* § 706, contains the reference to pattern-or-practice suits. That theory would overturn the careful congressional compromise embodied in the 1991 Act. It would eliminate the distinction between § 706 and § 707, turning the latter into a practically redundant and useless vestige. And it would grant EEOC the dangerous power to threaten effectively unlimited monetary liability, a power that Congress for decades deliberately withheld.

If EEOC's theory is correct—*i.e.*, if it can bring a "pattern or practice" suit under § 706, invoking *Teamsters* and obtaining a jury trial and compensatory and punitive damages—then Congress's decision to extend jury trials and money damages to § 706 claims but not to § 707 claims would have no consequence at all. *Cf. Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."). That is, if EEOC can do under § 706 everything that it historically did under the pattern-or-practice provision, and—in light of the 1991 amendments—obtain compensatory and punitive damages to boot, then why would Congress have excluded § 707 from § 1981a? And, furthermore, what is the continued significance of § 707 altogether, if EEOC can evade its remedial limits by pleading the same claim and invoking the same proof framework under § 706? In short, EEOC's construction would effectively nullify § 707 and upend "the result of a compromise" in Congress. *Mohasco Corp. v. Silver*, 447 U.S. 807, 819 (1980). That cannot be right. *See TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001) (rejecting construction that would "in practical effect render that exception entirely superfluous"); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (rejecting construction giving Congress's action "no operative effect").

The District Court reasoned that allowing EEOC to invoke the *Teamsters* framework under § 706 does not render § 707 redundant, because only under § 707 may EEOC sue without following the administrative pre-suit process. ROA.9398. That is wrong. The provision that transferred § 707 authority to EEOC requires it to "carry out such functions in accordance with" § 707(e), which requires that when EEOC acts on a "charge of a pattern or practice of discrimination," "[a]ll such actions shall be conducted in accordance with the procedures set forth in [§ 706]." 42 U.S.C. § 2000e-6(c), 6(e). Thus, as EEOC has itself advised courts elsewhere, "whether filed under 42 U.S.C. § 2000e-5 (§ 706) or § 2000e-6 (§ 707), all EEOC litigation shares the same administrative prerequisites." Br. for EEOC at 62, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), http://www.eeoc.gov/eeoc/litigation/briefs/crst.txt.[2]

[2] The notion that § 707(e) just "dictates what must happen when a pattern-or-practice charge is filed, but does not mandate that such a charge be filed in the first instance" (ROA.9398 n.9), cannot be squared with the statutory text or purpose, or with EEOC's own regulations. *First*, § 707(e)'s first sentence is the affirmative *grant of power* to EEOC; it fully spells out EEOC's § 707 authority—and then the second sentence requires EEOC to follow § 706 procedures in all such cases. The District Court's view renders the first sentence superfluous. *Second*, there is no reason why Congress would have required EEOC to abide by § 706's procedures for § 707 claims originating with a charge but left it free to ignore them if it simply throws out the charge and proceeds without one, especially given Congress's desire to deny EEOC "unconstrained" power. *Shell Oil*, 466 U.S. at 65. *Third*, EEOC's own regulations require it to follow the pre-suit process in *all* cases. 29 C.F.R. §§ 1601.1, 1601.24. In truth, EEOC may *never* act without a charge—and never needs to, since its *Commissioners* may file them. 42 U.S.C. § 2000e-6(e).

The District Court also claimed that, under § 707 alone, EEOC may request a three-judge court in cases of public importance. ROA.9398. Again, that ignores both statutory language and congressional intent. Section 707(c) requires EEOC to carry out § 707 functions "in accordance with subsections (d) and (e)," neither of which permits EEOC (unlike the Attorney General) to request a three-judge court. 42 U.S.C. § 2000e-6(c). Indeed, EEOC has *never*—to *amici*'s knowledge—tried to invoke that power. Moreover, even if EEOC could seek a three-judge court only in § 707 cases, why would Congress have excluded compensatory and punitive damages *only* for those cases—the ones of the greatest public importance? It is far more sensible to understand the 1991 amendments as having excluded that relief for *all* pattern-or-practice cases, given the abuses that Congress feared could arise if EEOC could seek huge damages in those wide-ranging class-action-like suits.

In sum, allowing EEOC to invoke the *Teamsters* framework in a § 706 suit that seeks compensatory and punitive damages (and hence would be tried to a jury) would give the agency precisely the type of overwhelming leverage that Congress repeatedly sought to avoid—by refusing cease-and-desist authority in 1964, limiting backpay in 1972, and capping monetary damages and restricting them to § 706 cases in 1991. This leverage, in turn, would allow EEOC to "coerce employers … into surrendering their fundamental rights to a fair hearing and due process." *Legislative History*, *supra*, at 249 (Rep. Erlenborn).

Indeed, this case is a poster child for the unfair and coercive settlement pressures that would result from undoing these congressional compromises. EEOC repeatedly reassured the District Court below that it need not worry about how it would structure the "remedial" phase of the *Teamsters* trial, because Defendants were "virtually certain[]" to settle the case in advance of that point. ROA.10308; *see also* ROA.10653 n.18 ("Stage II proceedings [in *Teamsters* cases] rarely occur, as the parties typically settle before then."). Congress never intended to tilt the litigation playing field so unevenly against employers that they have no genuine choice but to submit to EEOC's demands. Yet EEOC admits that its position here would inevitably do just that. This Court should reject it.

B. EEOC's Analogy to Private Class Actions Fails, Because Those Suits Are Restricted by Rule 23 and Limited to Equitable Relief.

EEOC's principal counterargument, echoed by the District Court below, is that the *Teamsters* framework was drawn from, and continues to apply in, private class actions under § 706. *Teamsters*, 431 U.S. at 359 (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976)). If private class-action plaintiffs may invoke the *Teamsters* burden-shifting approach to prove discrimination under § 706, the agency contends, it should equally be entitled to do so when it sues under § 706. *See Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 324 (1980) ("EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose … of securing relief for a group of aggrieved individuals.").

That argument ignores the fundamental distinctions between EEOC and private class-action plaintiffs. The latter are governed by Rule 23 of the Federal Rules of Civil Procedure. Under that Rule, private class-action plaintiffs *cannot* use *Teamsters* to obtain compensatory or punitive damages, which are inherently individualized, not susceptible to class treatment. Thus, both EEOC and private parties may invoke *Teamsters* in class contexts to obtain *equitable* relief from a *judge*, but when either seeks *money* from a *jury*, they must prove *individualized* injuries without a presumption. Any other course would contradict this Court's decisions and make adjudication of pattern-or-practice claims unmanageable.

1. Private class-action plaintiffs "must affirmatively demonstrate … compliance with [Rule 23]," *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), including its "commonality" requirement. Rule 23 requires plaintiffs to "show," through "rigorous analysis," *id.* at 2550, that class members "suffered the same injury," *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982), through a single discriminatory procedure or concrete policy, *id.* at 159 n.15. *Franks* was such a class action, and the Court held that if a discriminatory "pattern and practice" were established, "the burden will be upon [defendants] to prove that individuals who reapply [for positions they were denied] were not in fact victims of previous hiring discrimination." 424 U.S. at 772. Given Rule 23's premise of commonality, drawing that inference of individual discrimination makes sense.

But while *Franks* authorized use of the burden-shifting framework in private class actions under § 706, it did so in 1976, when Title VII offered only equitable relief and no right to a jury trial. The 1991 Civil Rights Act substantially changed the landscape. As this Court explained in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), private plaintiffs seeking money damages under § 706 *cannot be certified as a class* consistent with Rule 23(b). This Court held that "compensatory and punitive damages required particularly individualized proof of injury, including how each class member was personally affected," and therefore are not suitable for Rule 23(b)(2) certification, which is available only if equitable relief predominates. *Id.* at 416. "The very nature of these damages … necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not class-wide, remedy." *Id.* at 417. (Indeed, the 1991 Act provides punitive damages only for discrimination against an "aggrieved individual," 42 U.S.C. § 1981a(b)(1), suggesting that punitive damages may never be available on a "class-wide" basis, *Allison*, 151 F.3d at 417.) Nor is certification in such a case proper under Rule 23(b)(3), because the "claims for compensatory and punitive damages must … focus almost entirely on facts and issues specific to individuals rather than the class as a whole," such that issues common to the class would necessarily not predominate over individualized issues. *Id.* at 419.

The Supreme Court's subsequent decision in *Wal-Mart*, 131 S. Ct. 2541, went even further than *Allison*, holding that even claims for backpay are not susceptible to certification under Rule 23(b)(2). Claims for "*individualized* relief (like the backpay at issue here)," said the Court, "do not satisfy the Rule." *Id.* at 2557. "Similarly," the Rule "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* The Court was unanimous on this point. *Id.* at 2561 (Ginsburg, J., dissenting) (agreeing that class "should not have been certified under [Rule] 23(b)(2)").

In sum, under *Allison* and *Wal-Mart*, private class-action plaintiffs may be able to use the burden-shifting framework authorized in *Franks*, but cannot do so to obtain compensatory or punitive damages from a jury. Rule 23 forbids it.

2. As EEOC likes to emphasize, it is not subject to Rule 23 when it sues under § 706 on behalf of a group of aggrieved persons. That was the holding of *General Telephone*, 446 U.S. at 324. But that is also why EEOC's analogy to private class-action plaintiffs is fundamentally flawed. In the private class-action context, Rule 23 ensures that the *Teamsters* burden-shifting framework is used responsibly and consistently with due process. Specifically, its commonality and predominance requirements make use of the *Teamsters* framework both less burdensome (because commonality and other Rule 23 elements allow for class-wide proof) and less threatening (because only equitable relief is on the table).

EEOC, however, is improperly trying to invoke *Teamsters* without proving that the aggrieved persons on whose behalf it acts present truly common questions, as *Falcon* required private plaintiffs to do. *See* 457 U.S. at 157-59 & n.15; *see also Wal-Mart*, 131 S. Ct. at 2553-57 (finding no commonality in Title VII putative class suit where plaintiffs identified no "uniform employment practice" causing their injuries). And it would do so in a bid to obtain not just equitable relief, and not even just backpay, but also compensatory and punitive damages—from a jury, not a judge. That is forbidden even in the context of private class actions.

Again, the point is not that EEOC is bound by Rule 23. It is not. Rather, the point is that restricting EEOC's use of *Teamsters* to § 707 suits is consistent with allowing private plaintiffs to invoke that framework under § 706 in the narrow class context. Whoever the plaintiff, the *Teamsters* framework can be invoked only to seek *equitable* remedies, not money damages.

3. That principle makes sense, is consistent with the doctrine, and has the added benefit of avoiding the extremely challenging manageability and due-process issues that would arise if juries were asked to adjudicate *Teamsters* cases for compensatory and punitive damages. EEOC's proposed case management order, filed in the District Court during this appeal, illustrates the insurmountable problems with its effort to invoke *Teamsters* in a § 706 jury case seeking monetary damages. ROA.10640.

First, EEOC proposes to have *one* jury determine whether EEOC has established that discrimination was Bass Pro's regular policy or procedure—and then have *other* juries determine, with a presumption in EEOC's favor pursuant to the first finding, whether particular persons deserve compensatory damages or backpay. ROA.10649-50. But the overlap between those inquiries raises serious Seventh Amendment concerns. *See Smith v. Texaco, Inc.*, 263 F.3d 394, 415 (5th Cir. 2001) ("To meet the requirements of the Seventh Amendment, one jury may have to hear all the issues regarding the pattern and practice claim. This same jury would have to determine the quantum of compensatory and punitive damages."), *withdrawn in light of settlement*, 281 F.3d 477 (5th Cir. 2002).

Second, EEOC wants the first jury to determine punitive damages for the entire class, despite not having heard any evidence about the particular individuals who would receive these awards, or their circumstances. ROA.10649. That is a gross due-process violation and flies in the face of this Court's holding in *Allison* that "punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage." 151 F.3d at 418. Of course, asking the *second* jury to assess punitive damages would require EEOC to repeat its presentation of Stage One pattern-or-practice evidence. This quandary, again, shows the basic incongruity between *Teamsters* and damages.

Third, because of the sheer number of alleged potential victims here—some 50,000 out of over a million applicants—EEOC proposes a "series" of Stage Two juries to assess individualized remedies for each presumptive victim. ROA.10648 n.9, ROA.10650. Assuming that four such individuals could be examined and cross-examined on each day of this jury trial (or "series" of jury trials), it would take over 34 years to hear their testimony, even if the juries sat 7 days per week, 52 weeks per year. Adding in defense witnesses and jury deliberations, this "series" of trials would take over a *century*. Obviously this is not a manageable plan. (And it should go without saying that EEOC cannot evade these logistical impossibilities by denying Bass Pro the meaningful opportunity to dispute liability based on the specific circumstances of each individual. "Due process *requires* that there be an opportunity to present every available defense." *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932) (emphasis added).)

These illustrative defects in EEOC's plan for adjudication of this case show why the *Teamsters* approach was designed for, and must remain limited to, claims that seek equitable relief only. For a suit seeking only equitable remedies, no jury right attaches. *See* 42 U.S.C. § 1981a(c). There is thus no Seventh Amendment barrier to bifurcation, no difficulty posed by having multiple fact-finders, and no obstacle to using special masters or other more efficient adjudicative techniques to accommodate a large number of claimants. *See Allison*, 151 F.3d at 409.

Rule 23, *Allison*, and *Wal-Mart* already ensure that private plaintiffs cannot use *Teamsters* to seek money damages. Congress's decision to exclude § 707 from § 1981a properly has the same effect for EEOC lawsuits. This Court should reject EEOC's attempt to import the § 707 *Teamsters* framework into the § 706 cause of action, and reverse the District Court's contrary order.

II. ALLOWING EEOC TO FILE SUIT WITHOUT INVESTIGATING, IDENTIFYING, OR CONCILIATING CLAIMS OF AGGRIEVED PERSONS WOULD EVISCERATE THE STATUTORY SCHEME AND UNFAIRLY PRESSURE EMPLOYERS.

Further exacerbating both the coercive effect and the manageability defects of combining the *Teamsters* framework with a § 706 claim for damages, EEOC filed this suit without ever investigating or identifying the concrete "pattern or practice" at issue or the individuals allegedly aggrieved by it. Instead, it examined some statistical data about Bass Pro's hiring, inferred an ill-defined "policy" of discrimination, and then demanded Bass Pro pay it tens of millions of dollars to settle. EEOC apparently intends to use *discovery* to identify the alleged victims of the abstract discriminatory policy that its complaint alleges.

Congress, however, *mandated* that EEOC meaningfully investigate and seek to conciliate claims before filing suit, both as a procedural protection for employers and to maximize chances of quick resolution that would provide relief to victims. Both of those goals will be severely undermined if EEOC may rush to court before investigating and providing to the employer the most basic information about its

claim—as this case, now eight years since the first charge and with discovery not yet even begun, so well illustrates. To be sure, private plaintiffs are expected to develop their claims through civil discovery, but Congress gave EEOC subpoena authority precisely so that it could investigate and resolve claims voluntarily and confidentially—without the costs and delays attendant upon in-court litigation.

A. Congress Required EEOC To Investigate and Conciliate Claims Before Filing Lawsuits, To Facilitate Early Resolution of Disputes.

"[C]ooperation and voluntary compliance" are Title VII's "'preferred means for achieving' the goal of equality of employment opportunities." *Occidental Life*, 432 U.S. at 367-68. After all, quick and efficient resolution of employment discrimination complaints are advantageous for employers (who can thereby avoid lengthy, costly litigation) and also for victims (who can obtain relief without waiting many years or facing the hassles and uncertainty of discovery and trial).

Accordingly, Congress structured the Act to facilitate early resolution of disputes. In particular, Title VII requires EEOC to follow an "integrated, multistep enforcement procedure." *Occidental Life*, 432 U.S. at 359. Prior to filing suit, EEOC must: (1) receive a charge of discrimination from an aggrieved person or an EEOC Commissioner; (2) provide notice of the charge to the employer within ten days; (3) investigate the charge; (4) notify the employer if that investigation gives rise to reasonable cause to suspect a violation; and (5) attempt to conciliate the dispute confidentially. 42 U.S.C. § 2000e-5(b). By requiring EEOC to investigate

and provide notice of all claims, employers can understand the nature and scope of the allegations, and thus engage in meaningful conciliation talks that help "prevent interminable litigation which would be a burden on both the EEOC and the district courts, not to mention the entities which are sued," *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1307 (W.D. Pa. 1977), as well as the alleged victims.

B. Allowing EEOC To Sue Without Investigating and Identifying the Alleged Unlawful Policy or Its Victims Would Defeat the Purposes of the Pre-Suit Process, and Courts Do Not Allow It.

Here, EEOC purported to comply with Title VII's pre-suit process by merely inferring a policy of discrimination based on statistical data—and then demanding a huge settlement sum. But such flimsy analysis, which did not identify any names or even the number of alleged victims, neither suffices as an "investigation" under § 706's multistep process nor sets the stage for adequate conciliation.

1. EEOC's action in this case originated with a Commissioner's charge against Bass Pro that vaguely alleged "unlawful discriminatory practices" such as "[f]ailing to recruit and/or hire" and "[f]ailing to promote" blacks, Hispanics, women, and Asians at all of its stores. ROA.6089. It did not identify a particular, concrete employment policy, procedure, or rule as the cause of the intentional discrimination. Nor did EEOC identify particular victims or provide any details to help Bass Pro do so. Instead, the charge stated that the persons aggrieved "include all applicants, deterred applicants, employees and former employees who have

been, continue[] to be, or will in the future be adversely affected by any of the unlawful employment practices set forth in the foregoing charge." ROA.6089.

In its investigation into this charge, EEOC did not delve any deeper. Rather, it viewed this as a "statistical" case, not one about "individual circumstances," and relied largely if not exclusively on its statistical finding of a "shortfall" of racial-minority employees in Bass Pro's stores, as compared to geographic "census" data. ROA.10136-38. Such a "shortfall" could be caused by any number of legitimate factors, or by a number of discriminatory factors. But EEOC did not identify a specific, discriminatory policy as the supposed cause. Rather, based on a statistical inference—and without investigating any specific individual circumstances—EEOC found reasonable cause and demanded $35 million to settle. ROA.6141-42.

This kind of approach does not satisfy the purposes behind Title VII's multistep enforcement procedure. "Absent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate," as Congress prescribed. *CRST Van Expedited*, 679 F.3d at 676. And it is precisely the identification of the potential claimants that allows defendant employers to "evaluate [their] exposure and meaningfully participate in conciliation." *EEOC v. Swissport Fueling, Inc.*, No. CV-10-02101, 2014 U.S. Dist. LEXIS 17926, at *3 (D. Ariz. Jan. 9, 2014). *Accord Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1648 (2015) (describing

notice to employer regarding "which employees (or class of employees) have suffered" as irreducible component of conciliation).

In practical terms, an investigation that neglects to identify any aggrieved individuals or meaningfully define the scope of the aggrieved class fails "to provide a framework for conciliation," *Allegheny Airlines*, 436 F. Supp. at 1306, particularly where the alleged unlawful employment "policy" is also characterized in vague, broad terms. The predictable result is that the dispute is not resolved voluntarily: Neither the accused party nor EEOC has sufficient information about the alleged wrongdoing to make the settlement process fruitful. And that means high costs for the defendant employer and no relief for any true victims. This case is exemplary: More than *eight years* after the issuance of the first Commissioner's charge (*see* ROA.6086), Bass Pro has presumably spent considerable sums on attorneys' fees and nobody has received any relief for alleged injuries. That is a powerful sign that the process did not function here as it should.

2. EEOC has argued that, not to worry, it will "obtain more information" from Bass Pro in "discovery" and use that to supplement its statistical analysis and to identify individual aggrieved persons. ROA.10141. That may be an acceptable course for private plaintiffs, but Congress *required* EEOC to investigate claims *before* bringing suit, and provided it with subpoena power so that it could do so. *See* 42 U.S.C. § 2000e-5(b); *id.* § 2000e-8(a). As with the *Teamsters* issue, EEOC

glosses over important differences between it and private plaintiffs—differences that Congress understood and accounted for in Title VII.

Waiting until after litigation commences to investigate claims is contrary to the purposes of the statute, since it makes voluntary resolution less likely. Courts therefore do not allow it. Rather, EEOC may only bring claims that were investigated and identified *prior* to a lawsuit. The Eighth Circuit's *CRST* decision is illustrative: EEOC found reasonable cause regarding one named employee and an unidentified "class." In conciliation, EEOC insisted that the *employer* identify the class members; it did not do any investigation of its own to determine the size of the class or the identity of its members. 679 F.3d at 667-68. By suing first and identifying the liability's scope later, EEOC deprived the employer of a "meaningful opportunity to conciliate." *Id*. at 676. The court affirmed dismissal of the class claims, explaining that instead of "reasonably investigat[ing] the class allegations of sexual harassment," EEOC impermissibly "engaged in fact-gathering as to the 'class' 'during the discovery phase of an already-filed lawsuit." *Id*. at 676-77. *Accord EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 971 (7th Cir. 1996); *EEOC v. Sears*, 650 F.2d 14, 18-19 (2d Cir. 1981); *Patterson v. Am. Tobacco*, 535 F.2d 257, 271-72 (4th Cir. 1976); *EEOC v. Bloomberg*, 967 F. Supp. 2d 802, 811-16 (S.D.N.Y. 2013); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 980 (S.D. Ind. 2003); *Allegheny Airlines*, 436 F. Supp. at 1304.

* * *

Title VII represents a compromise: It balances EEOC's power to enforce the employment discrimination laws, on one hand, against the protection of employers and victims from the burdens of lengthy litigation, on the other. EEOC, however, wants to rewrite that compromise and disrupt that balance. By allowing it to do so, the District Court's order contradicts the text of Title VII and elevates EEOC's policy judgments over Congress's. This Court should reverse.

CONCLUSION

For these reasons, *amici curiae* respectfully submit that the District Court's order should be reversed on both issues presented.

Respectfully submitted,

/s/ Eric S. Dreiband
Eric S. Dreiband
Yaakov M. Roth
Haley A. Wojdowski
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Tel: (202) 379-3939
Fax: (202) 626-1700
esdreiband@jonesday.com

Counsel for Amici Curiae

Deborah White
RETAIL LITIGATION CENTER
1700 N. Moore Street, Suite 2250
Arlington, VA 22209
(703) 600-2067

Of counsel for Retail Litigation Center

Kathryn Comerford Todd
Warren Postman
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062

Of counsel for Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that this 26th day of June 2015, I caused a true and correct copy of the foregoing BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REVERSAL to be filed electronically with the Clerk of the Court using the CM/ECF system, which will sent electronic copies thereof to attorneys Michael W. Johnston, Samuel M. Matchett, Jona J. McCormick, Rebecca C. Moore, James P. Sullivan, James M. Tucker. I also caused a copy of the foregoing Brief to be sent by U.S. mail to attorneys Gregory T. Juge and Connie K. Wilhite.

/s/ Eric S. Dreiband
Eric S. Dreiband

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2007, in Times New Roman style, 14 point font, with footnotes in 12 point font.

June 26, 2015

/s/ Eric S. Dreiband
Eric S. Dreiband