No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

The American Insurance Association ("AIA") is a leading national trade association representing over 300 major property and casualty insurance companies that collectively underwrite more than $100 billion in property and casualty insurance nationwide. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance, including employment practices liability insurance.

Employers facing discrimination lawsuits and insurance carriers writing employment practices liability insurance often face threatened litigation by the United States Equal Employment Opportunity Commission ("EEOC"). Insurers and employers facing this situation require detailed information in order to accurately set reserves and ensure that any settlement not only promptly and fairly compensates meritorious claims, but also satisfies the interests of insurance regulators. The AIA submits the Seventh Circuit's ruling is wrong as a matter of policy, since it is fundamental to the litigation process for a party to have fulsome information relative to the claims at issue. The Congressionally-mandated conciliation process was intended to provide that core knowledge. This is particularly important in EEOC-initiated litigation, where one of the government's fundamental

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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. Pursuant to S. Ct. Rule 37.6, the AIA states that no counsel for a party wrote 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 or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

mandates is to achieve voluntary and informal compliance with anti-discrimination laws.

SUMMARY OF ARGUMENT

I. The Seventh Circuit's ruling forbids judicial review of the EEOC's satisfaction of its statutory obligation to conciliate discrimination claims in good faith, which undermines the ability of employers and insurers to reasonably assess settlement issues. When Congress enacted Title VII of the Civil Rights Act of 1964 ("Act"), it mandated that the EEOC engage in conciliation proceedings with employers prior to bringing lawsuits. 42 U.S.C. § 2000e-5(b), (f)(1). While the language of the Act does not specify how conciliation proceedings must be conducted or the quantum of information that must be disclosed or exchanged, it clearly requires that the EEOC engage in good faith proceedings *before* bringing lawsuits. *Id*. Congress enacted this requirement in the interests of judicial economy, providing both the EEOC and employers with an avenue to resolve disputes confidentially, voluntarily, informally and without burdening the dockets of federal courts.

First, contrary to this clear Congressional intent that courts have followed over the last several decades, in *EEOC v. Mach Mining, LLC*, the Seventh Circuit held that this obligation is not judicially reviewable, and that, in essence, the EEOC may skip the statutory requirement of conciliation without any consequence. 738 F.3d 171, 184 (7th Cir. 2013). The Seventh Circuit opined that "failures by the EEOC in the conciliation process simply do not support an affirmative defense for employers charged with employment discrimination." *Id*. In support of its conclusion that employers may not use failure-to-conciliate as an affirmative

defense, the Seventh Circuit noted "as a practical matter, there is little reason to expect the potential for dismissal to promote conciliation. The employer in a dismissed case has little incentive to resume talks, of course. The next employer the EEOC investigates will have seen the benefit of using the conciliation process as a strategic defense rather than a chance to settle." *Id*. at 184-85. Contrary to Congress's view that conciliation proceedings must be conducted as a vehicle to foster judicial economy, the Seventh Circuit decided that the requirement of conciliation proceedings was merely a formality that mostly benefitted employers who sought the dismissal of claims when the EEOC neglected to follow mandatory procedure.

Second, while the Seventh Circuit focused on critiquing certain employers' potential defense strategies, it failed to account for the practical realities of its holding. The Seventh Circuit's ruling encourages the EEOC to abstain from the procedural requirement of meaningful conciliation established by Congress and ignores the fact that employers and their insurance carriers—along with alleged victims of discrimination—have both financial and business-reputation reasons to resolve litigation as quickly and cost-efficiently as possible. In reality, an insurer needs the EEOC's help before it can authorize payment, due to insurers' fiduciary obligations to their stockholders and legal obligations to regulators not to pay claims unless there are sufficient indicia that they have merit. In this way, the Seventh Circuit failed to consider how the ruling impacts multiple constituents, including already over-burdened federal courts, which will now face more EEOC litigation; employers who face such claims; and the insurance industry, which bears the cost of defending the time-consuming and

expensive litigation through employment practices liability insurance. In short, when the EEOC cooperates, alleged victims receive compensation more quickly, whether because insurers gain some leverage over employers who are otherwise resistant to settle, or because they are better equipped to assess the EEOC's demands and litigation costs and risks.

II. A construction of the Act that places the EEOC above judicial review of whether it fulfilled conditions precedent to institution of a lawsuit—based on the Seventh Circuit's view that employers simply use the failure-to-conciliate defense for delay and non-meritorious purposes—ignores the realities of modern workplace litigation. It also flies in the face of the principal foundation of our system of government that judicial review of executive and agency compliance with the law is a bedrock principle of American constitutional separation of powers.

First, EEOC litigation imposes significant costs upon employers and their insurance carriers. Such litigation inevitably causes disruptions to businesses and distractions to management. Further, media attention to EEOC litigation[2] often harms an employer's reputation in the marketplace—not only with investors, shareholders, customers, and the public, but also with their own employees and potential applicants. An employer charged with actionable discrimination in publicly-filed court

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[2] The EEOC has been very clear that media exposure is one of its enforcement tools. The EEOC has represented that it intends to "[p]rioritize spending for the systemic initiative . . . [since systemic cases generate substantial media and other public notice, [and] they help deter other employers from engaging in similar prohibited conduct." EEOC FY 2012 Congressional Budget Justification at 3, www.eeoc.gov/eeoc/plan/2012budget.cfm.

documents suffers from competitive disadvantages as compared to other businesses who are able to portray themselves as progressive employers-of-choice.

Second, employers and their carriers are often forced to defend lawsuits where the EEOC posits a take-it-or-leave-it settlement demand at the end of an administrative investigation and provides little to no information or documentation about its claims. Such tactics are perfectly consistent with (and, indeed, encouraged by) the Seventh Circuit's ruling below, for the EEOC's position before this Court—and as the Seventh Circuit held below—is that its conciliation efforts are beyond judicial review and federal courts are stripped of the power to enforce that obligation. However, to encourage meaningful settlement negotiations prior to the EEOC's institution of a lawsuit, both sides should have pertinent information and documentation about the claims. Employers need to know the identity of individuals whom the EEOC asserts are allegedly injured and have documentation of the specific damages the EEOC uses as the basis of its settlement demands. Conciliation efforts will be predictably futile when the EEOC does not even provide an employer with these basic metrics, including identities of the parties on whose behalf the government is suing, and a substantiation of the damages sought. Absent this information, it becomes nearly impossible for an employer to evaluate exposure and damages or make a practical, meaningful decision to resolve a claim in conciliation.

For a variety of reasons, this concern is equally applicable to carriers writing employment practices liability insurance. They require detailed information in order to accurately set reserves and ensure that any settlement not only promptly and fairly compensates

meritorious claims but also satisfies the interests of insurance market conduct regulators, who scrutinize claim files to confirm that settlements are sufficient, yet not so high that a carrier's rate filings or solvency may be called into question.

In short, the Seventh Circuit's ruling is wrong as a matter of policy, since it is fundamental to the litigation process for a party to have fulsome information relative to the claims at issue. The Congressionally-mandated conciliation process was intended to provide that core knowledge.

ARGUMENT

I. The Seventh Circuit Improperly Construed The Act To Forbid Judicial Review Of The EEOC's Satisfaction Of The Conciliation Obligation

The Seventh Circuit improperly assessed the implications of the failure-to-conciliate defense. Reducing delays, minimizing costs, and unburdening the federal court system should be the goals of our judicial system. For civil cases tried in federal court, the median time to verdict in civil cases is almost two years; it is even higher in complex matters, such as the EEOC pattern or practice lawsuit at issue here.[3] Applied to employers and insurance companies, two years of complex, case-specific discovery and the resulting legal fees engender considerable costs. EEOC pattern or practice lawsuits with discovery

[3] *See* Admin. Office U.S. Courts, Federal Judicial Caseload Statistics 2013, Tbl C-5, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C05Mar13.pdf.

about employee data, resulting in multi-year proceedings with multiple court interactions, place a heavy and unnecessary burden on the judiciary. Yet, the EEOC appears more interested in hitting its benchmarks than it is in successfully conciliating cases. Under the EEOC's Strategic Enforcement Plan, it has set annual quotas for key performance measures for its enforcement and litigation activity. *See* Gerald L. Maatman, Jr. and Christopher J. DeGroff, EEOC-Initiated Litigation: Case Law Developments In 2013 And Trends To Watch For In 2014 at 6, *available at* http://www.workplaceclassaction.com/files/2013/12/EEOC-Initiated-Litigation-Case-Law-Developments-2013-3.pdf. The agency's stated goal is to ensure that systemic cases make up 22% to 24% of its litigation docket by fiscal year 2016, with at least 20% of its annual litigation docket made up of systemic cases. *Id*. In fiscal year 2013, the EEOC continued to take strides toward that goal. According to the EEOC's final tally of litigation activity, it filed 131 merits lawsuits during fiscal year 2013. *Id*. Litigating such cases are complex and difficult while, in contrast, conciliation proceedings are relatively inexpensive, informal, and can lead to quicker resolutions. *See*, *e.g*. *Burnett v. Grattan*, 468 U.S. 42, 54 (1984); *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 104 (1979). Applied to Title VII claims, this notion holds true, as intended by Congress when the legislation was drafted.

Recent decisions involving Title VII discrimination cases illuminate the Congressional intent behind the statute, even though appellate courts have recognized the importance of it for years. Conciliation is not optional and must be conducted in good faith, and the goal of conciliation is to make litigation the last resort. *See*, *e.g*., *EEOC v. Asplundh Tree Expert Co*., 340 F.3d 1256, 1260-61 (11th Cir. 2003) (the

EEOC failed to conciliate in good faith where it gave employer only 12 business days to respond to proposed conciliation agreement and did not acknowledge defense counsel's response that arrived shortly thereafter because "[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."). More recently, in *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802 (S.D.N.Y. 2013), the EEOC filed an action against the defendant after several current and former employees alleged sex and pregnancy discrimination. Initially, the EEOC investigated the defendant after the charging parties filed their discrimination claims. *Id*. at 806. The defendant cooperated with the investigation by providing the names of women who had taken maternity leave in the period when the discrimination was alleged. *Id*. Days later, the EEOC sent the defendant a Letter of Determination that mentioned the names of the charging parties, but no other individual claimants. *Id*. at 806, 812. The record confirmed that several non-intervening plaintiffs were not contacted by the EEOC until after the litigation was commenced. *Id*. at 813. As the litigation proceeded and more claimants were identified, the defendant offered to discuss cases of the identified individuals to determine the breadth of the grievance. *Id*. In response, the EEOC refused to conciliate any claims other than those of the charging parties. *Id*. One day after the defendant proposed to discuss individual claims, the EEOC declared the conciliation was unsuccessful, and later filed suit. *Id*.

Rejecting this approach, the court noted that "allowing the EEOC to subvert its pre-litigation

obligations with respect to individual claims by yelling far and wide about class claims would undermine the statutory policy goal of encouraging conciliation." *Id*. at 813. In other words, the court viewed conciliation requirement as a policy goal of the Act, not the mere formality functioning as a defense tactic that the Seventh Circuit uniquely believed it to be. Further, the court emphasized that the EEOC is not entitled to abandon its requirement to conciliate individual claims just because it is bringing a class-based claim. *Id*. at 814. Every individual claim must be part of a good faith conciliation process. Finally, the court held "[t]he EEOC's conduct here blatantly contravenes Title VII's emphasis on resolving disputes without resort to litigation[.]" *Id*. Thus, the court in *EEOC v. Bloomberg* determined that conciliation is a Congressionally-intended obligation designed to resolve disputes, not a superfluous part of the Act giving rise to a defense tactic to secure dismissals. This approach to resolving Title VII disputes is a correct construction of the Act, as opposed to the Seventh Circuit's opinion that the EEOC may sue without regard to how it meets its conciliation obligation because the obligation is not judicially reviewable.

In support of its holding, the court in *EEOC v. Bloomberg* cited a similar case where the EEOC did not disclose the identities of class members during its investigation and conciliation proceedings: the district court opinion in *EEOC v. CRST*, which was later affirmed by the Eighth Circuit. There, the court held that the EEOC conducted an improper investigation and,

> To rule to the contrary would severely undermine if not completely eviscerate Title VII's integrated, multistep enforcement

> procedure, expand the power of the EEOC far beyond what Congress intended[,] and greatly increase litigation costs. . . . To accept the EEOC's view of its own authority would also impose an untenable burden upon the federal district courts, as the EEOC might avoid administrative proceedings for the vast majority of allegedly aggrieved persons. [Further,] Congress surely did not intend that employers, even ones whose workplaces might be rife with [sex discrimination], face the moving target of allegedly aggrieved persons that [defendant] faced in both the administrative and legal phases of this dispute.

Bloomberg, at 815 (citing *EEOC v. CRST Van Expedited*, No. 07-CV-95-LRR, 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009). Thus, following *EEOC v. CRST*, the court in *EEOC v. Bloomberg* held that Congress's intent in enacting Title VII was for parties to resolve disputes in conciliation proceedings that follow proper investigations by the EEOC, as opposed to costly post-suit litigation that unfairly burdens defendants when the EEOC refuses to identify the allegedly injured persons on whose behalf it is bringing suit, and instead seeks to modify such a class throughout the discovery process. In sum, conciliation proceedings lead to the least burdensome and most efficient means of resolving disputes, especially if they are conducted following proper EEOC investigations.

II. In Suggesting That A Contrary Construct Of The Act Leads Defendants To Litigate Side Issues And Delay Justice, The Seventh Circuit Ignored The Interests Of Employers And Their Carriers To Settle Meritorious Claims And Reduce Their Litigation Costs

Litigation in modern American courts is expensive and time-consuming. The time and money businesses expend on litigation detracts from their core mission of delivering goods and services to their customers. Corporate reputations also are impacted by the extent to which businesses remedy any injury they allegedly have caused, including to applicants or employees in Title VII litigation; confidential settlement of such claims is often far preferable to massive jury verdicts pinning liability on an employer for violation of the Act. The same is true for the insurance industry, for reducing the duration and costs of litigation and otherwise making the defense of claims as cost-efficient as possible are at the heart of sound insurance practices.

With these standards in mind, conciliation proceedings work best when all relevant information is shared in good faith and when the parties are making decisions on the same set of facts. The Seventh Circuit did not delineate the type or quantum of information that the EEOC should provide to employers to facilitate good faith conciliation proceedings. It simply construed the Act to hold that such activity is not judicially reviewable, and that the EEOC can be trusted to fulfill its statutory duty to conciliate—at all time, in all circumstances, and in all cases. Experience shows, however, that agency conduct not

subject to review can be influenced negatively by the lack of meaningful judicial oversight.

Decisions from other courts do provide guidance as to how this mandatory process can be productive in order to reduce litigation costs. In *EEOC v. Bloomberg*, the court noted that the EEOC has the autonomy to bring additional claims if they are reasonably related to the claim it had investigated, but:

> The Court is not aware of any binding legal authority, and the EEOC has provided none, that allows the EEOC to . . . level broad accusations of class-wide discrimination to present [defendant] with a moving target of prospective plaintiffs and, after unsuccessfully pursuing pattern-or-practice claims, substitute its own investigation with the fruits of discovery to identify which members of the class, none of whom were discussed specifically during conciliation, might have legitimate individual claims[.]

967 F. Supp. 2d at 814. Thus, the court in *EEOC v. Bloomberg* held that the EEOC's conduct violated Congressional intent. *Id*. The court determined that it was improper to use a lawsuit to identify potential plaintiffs through discovery at the defendant's expense. *Id*. The court ruled that a thorough pre-suit investigation would likely have resulted in the identification of potential injured persons. Hence, a detailed pre-suit investigation is completely consistent with Congress's intent when it enacted Title VII. The undeniable goal of Title VII is to resolve disputes short of litigation. This stands in stark contrast to the Seventh Circuit's ruling that the EEOC's conciliation efforts are not subject to judicial review.

In addition, the court in *EEOC v. Bloomberg* held that the EEOC's pre-litigation conduct failed to meet the Act's requirements because it did not make the requisite reasonable cause determinations regarding the non-intervening plaintiffs. *Id*. at 814. The EEOC failed to afford the defendant a reasonable opportunity to conciliate by "[refusing] to disclose to the defendant the identity of any potential class members during the course of its investigation or conciliation efforts or even engage in a discussion of any individual claims it might late bring on behalf of class members[.]" *Id*. at 815. Finally, citing *EEOC v. CRST*, the court held "the EEOC's actions—or more appropriately, inaction—'foreclosed any possibility that the parties might settle all or some of this dispute without the expense of a federal lawsuit,' as Title VII prefers." *Id*. at 815-16 (citations omitted). Thus, the court found that Title VII's statutory framework demonstrated that Congress preferred that parties settle disputes and avoid expensive litigation, and this ideal could not be reasonably attained when the EEOC conciliates in bad faith by refusing to identify class members to the party who is supposed to defend themselves against them.

EEOC v. CRST, 679 F.3d 657 (8th Cir. 2012), illustrates the perverse results that follow from the Seventh Circuit's decision. In *EEOC v. CRST*, the EEOC sued an employer trucking company for violating Title VII, alleging the defendant was responsible for the severe and pervasive sexual harassment of female long-haul drivers in its New-Driver Training program. The district court granted the defendant summary judgment as to three claimants as well as the EEOC; granted the employer summary judgment as to certain claims; barred the EEOC from seeking relief for the remaining claimants based on its failure to reasonably investigate or good

faith conciliate; and granted the employer's motion for attorneys' fees. *Id*. The EEOC appealed these holdings. *Id*.

In relevant part, the Eighth Circuit noted that "from . . . the date that the EEOC filed suit, until nearly two years thereafter, the EEOC did not identify the women comprising the putative class despite the district court's and CRST's repeated requests to do so." *Id*. at 669. The Eighth Circuit thus held that the EEOC was barred from bringing claims for 67 of the female claimants as it did not investigate their claims, but rather used discovery to identify claimants, and thus did not attempt to conciliate their claims prior to filing a complaint. *Id*. at 673-74. The Eighth Circuit ruled that although the EEOC is permitted to seek relief for individuals beyond the charging parties, it must investigate—and conciliate—the claims of such persons during the course of its investigation, as opposed to in discovery after filing a lawsuit. *Id*. at 674. Thus, the EEOC "may not use discovery in the resulting lawsuit 'as a fishing expedition' to uncover more violations." *Id*. at 675 (citing *EEOC v. Target Corp.*, No. 02-C-146, 2007 WL 1461298 (E.D. Wis. May 16, 2007)).

In reaching its conclusion that the EEOC conducted a "fishing expedition" to uncover potential wrong-doings, the Eighth Circuit analyzed several factors: the EEOC's letter of determination did not provide the defendant with any notice as to the size of the class of allegedly injured employees; it did not provide the names of all class members or the number of "similarly-situated" employees; and the EEOC's sending of thousands of solicitation letters to former employees over the course of several months, which created "a clear and present danger that this case

would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons . . . [a] strategy [that] was untenable . . . [and defendant] faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery, and indefinite continuance of trial." *Id*. at 676 (citing *EEOC v. CRST Van Expedited*, No. 07-CV-95-LRR, 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009)). The Eighth Circuit held that "absent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate." *Id*.

As *EEOC v. CRST* aptly demonstrates, fulsome conciliation is the most cost-effective and expeditious means to resolve disputes for all interested parties. The process works best when the EEOC gives employers a meaningful opportunity to conciliate by providing them with the critical facts when it is asked to do so. Employers must be provided the identities of the claimants as well as a substantiation of their damages in order for the process to work. If the EEOC may demand substantial dollars and not explain the basis for its demand, conciliation will be fruitless, as parties and insurers will be unable to make meaningful risk calculations. *See EEOC v. Associated Dry Goods Corp*., 449 U.S. 590, 601 (1981) ("A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own."). If the EEOC is allowed to render the conciliation process ineffectual, it is essentially being given the freedom to dispense with Congress's mandate to try and avoid litigation.

Beyond the identity of claimants, employers and their carriers also have an interest knowing what their alleged damages are in order to conciliate in a meaningful manner. A defendant in any litigation needs to know the extent of the plaintiff's damages before an intelligent settlement assessment can be made. In *EEOC v. Bloomberg*, the EEOC requested roughly $41 million in damages from the defendant. *See* 751 F. Supp. 2d 628, 641 (S.D.N.Y. 2010). When the defendant offered to discuss with the EEOC how it determined the amount of damages it requested, the EEOC refused to engage in discussions and merely asserted "that it had interviewed a 'fair number' of women and then extrapolated from those interviews an amount it determined was acceptable for the class claim pool." *Id*. The court held that this non-substantive conciliation effort did not afford the defendant a reasonable opportunity to make a counter-offer. *Id*. at 641-42.

In granting the defendant's motion for summary judgment, the court concluded "that the EEOC's position, in these circumstances, does not embody a 'reasonable and flexible' response to the 'reasonable attitudes' of the employer." *Id*. at 642. In other words, the court noted, it was reasonable for the defendant to inquire into how the EEOC arrived at its monetary demand figure, and the EEOC's refusal to engage in such discussions was problematic. *Id*. The court concluded "in a complex case like this one, the EEOC cannot, when the employer reasonably asks for information to formulate a monetary counteroffer, make substantial monetary demands and require employers simply to pony up or face a lawsuit." *Id*. In essence, the EEOC's strategy of a take-it-or-leave it demand—with the threat of a lawsuit systemically attacking an employer's policies and practices—is

entirely inconsistent with the purpose and goal of the Act. *See EEOC v. Agro Distr., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (finding that the EEOC made an "unsupportable demand for compensatory damages as a weapon to force settlement"). Thus, in order for conciliation to serve its purpose, the EEOC must comply with an employer's requests regarding the substantiation of the monetary figures the EEOC demands. *See EEOC v. Evans Fruit Co*., 872 F. Supp. 2d 1107, 1114 (E.D. Wash. 2012) (the EEOC demanded $1 million for an unspecified class of female employees who allegedly had been harassed, and after the employer asked for information about the claims and the damages, the EEOC abruptly ended conciliation and filed its lawsuit); *EEOC v. Swissport Fueling, Inc*., 916 F. Supp. 2d 1005, 1043 (D. Ariz. 2013) (criticizing the EEOC for its failure to provide the employer with the basis for the Commission's calculations of damages in its pre-lawsuit conciliation demand, thereby making its proposal neither reasonable nor bona fide). The Seventh Circuit's decision subverts the requirements of the Act and should be reversed.

CONCLUSION

The Seventh Circuit's unprecedented ruling that the EEOC may essentially conciliate in bad faith and subsequently litigate as it pleases is contrary to the Congressional intent of Title VII. By specifically mandating that parties engage in conciliation before proceeding to litigation, Congress recognized that post-investigation litigation is burdensome to the courts and costly to litigants and their constituents, such as insurance companies who insure and defend employers. Conciliation is effective when the EEOC provides employers with fundamental information regarding the identities of allegedly injured persons

and the injuries they claim. If the Act is construed to the contrary, the EEOC is allowed to implement the mandatory conciliation process without judicial review, and meaningful settlement talks will quickly evaporate into what will soon become a storm of discovery and expensive litigation. The adverse effects of the Seventh Circuit's holding, if left uncorrected, will be felt by the EEOC, injured victims of job bias, employers, and insurance carriers.

The disparity of views as to how to assess conciliation demonstrates there may not be one correct answer. However, allowing for judicial review of conciliation is the best approach, since it encourages the EEOC to conduct thorough, good faith investigations that will lead to more fruitful conciliation proceedings. Thus, the two arguments presented here offer a pragmatic formula for resolving disputes in a manner that is conscious of both judicial economy and the needs of the insurance industry, which manages and underwrites much of the employment practices litigation against businesses in America.

Respectfully submitted,

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