No. 12-1347

IN THE

# Supreme Court of the United States

CINTAS CORPORATION,
*Petitioner,*
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent.*

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

# BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER


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## BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council, Chamber of Commerce of the United States of America, National Federation of Independent Business Small Business Legal Center, Society for Human Resource Management and Retail Litigation Center, Inc. respectfully submit this brief *amici curiae*[1] with the

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

consent of the parties. The brief supports the petition for a writ of certiorari.

## INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and 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 Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

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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 the preparation or submission of the brief.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts 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 350,000 member businesses nationwide. The NFIB Small Business Legal 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 Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 225,000 individual members, SHRM's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, SHRM's mission also is to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in over 100 countries.

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings which 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 employers, and as potential defendants to claims asserted under these laws, *amici*'s members have a substantial interest in the issue presented in this case regarding the scope of the Equal Employment Opportunity Commission's (EEOC) authority under Title VII.

Disregarding Title VII's plain and unambiguous text, the Sixth Circuit below held that the EEOC may pursue a pattern-or-practice Title VII discrimination claim under either Section 706 or Section 707 of the statute (or ostensibly some combination of the two) (1) whether or not the agency's complaint specifies its intent to do so; and (2) despite its failure to investigate and conciliate the claims of any class members other than the single charging party. In doing so, it deepened an already-pronounced conflict in the courts regarding the scope of the EEOC's statutory authority under Title VII, as well as the extent to which the agency's actions in carrying out its administrative duties are subject to judicial review.

Because of their interest in the application of the nation's fair employment laws, *amici* have filed

numerous briefs in cases before this Court and the courts of appeals involving the proper construction and interpretation of Title VII and other federal laws. Thus, they have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

*Amici* seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of their 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.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

There is a persistent conflict in the courts regarding the scope of the U.S. Equal Employment Opportunity Commission's (EEOC) litigation authority under Title VII of the Civil Rights Act of 1964 (Title VII). If left unresolved, this conflict will continue to spur inconsistent and inefficient Title VII enforcement, thus undermining the statute's aim of prompt and effective informal resolution of discrimination claims.

Title VII establishes "'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)). The EEOC is charged with enforcing Title VII, and is authorized

to sue an offending employer in federal court, but only after it has discharged its pre-suit investigative responsibilities.

Hand in hand with the investigation is the EEOC's duty to conciliate. As one court observed, "Conciliation is the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law. Each step in the process – investigation, determination, conciliation, and if necessary suit – is intimately related to the others." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1305 (W.D. Pa. 1977).

Despite the importance of Title VII's administrative scheme, the EEOC repeatedly has circumvented the process by failing to fully investigate the claims of all those on whose behalf it seeks relief, and by persistently refusing to engage in meaningful efforts to resolve such claims informally, without resort to protracted litigation.

Regrettably, the Fourth, Sixth, Seventh and Tenth Circuits are of the view that whether and to what extent the EEOC has fulfilled its pre-suit obligations – including the statutory duty to conciliate discrimination charges – is largely within the agency's own discretion and is, for all intents and purposes, judicially unreviewable. In contrast, the Second, Fifth, and Eleventh Circuits all hold the EEOC to a higher standard, one which requires the agency to conduct a meaningful investigation, make factual determinations, and endeavor to eliminate suspected violations through informal means.

Title VII authorizes the EEOC to recover damages for intentional discrimination either (1) by proving that each victim was harmed individually, in which

case the agency may obtain victim-specific relief, including compensatory or punitive damages; or (2) by establishing that unlawful discrimination was the employer's "standard operating procedure" and thus securing class-wide injunctive relief – but not compensatory or punitive damages. The federal courts also are divided as to whether the EEOC may pursue compensatory and punitive damages for pattern-or-practice discrimination under Section 706 instead of Section 707, which expressly authorizes pattern-or-practice claims, but limits the remedy to injunctive relief.

The Sixth Circuit below joined those courts that draw no meaningful distinction between the two. Such a view is inconsistent with the plain text of Title VII. It also threatens the right of every Title VII defendant to mount a defense to individual claims, exposes them to liability for substantial damages that are not authorized in pattern-or-practice claims, and diverts time and resources away from meaningful Title VII enforcement.

## REASONS FOR GRANTING THE WRIT

### REVIEW OF THE DECISION BELOW IS NECESSARY IN ORDER TO PROVIDE MUCH NEEDED CLARITY ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE BUSINESS COMMUNITY

This case presents the Court with an opportunity to resolve two issues that go to the very core of Title VII enforcement, and which are of great concern to the more than half a million American businesses, large and small, that are subject to the Act: (1) whether the U.S. Equal Employment Opportunity

Commission's (EEOC) persistent failure and refusal to thoroughly investigate and conciliate class-based claims of Title VII discrimination prior to suit satisfies its statutory obligations and is consistent with this Court's Title VII jurisprudence; and (2) whether Title VII permits the EEOC to bring a class-based, pattern-or-practice discrimination claim under Section 706, rather than Section 707 – which explicitly authorizes such actions – thereby positioning itself to collect substantial compensatory and punitive damages on behalf of individual class members without first having to prove individual harm.

The decision below intensifies a clear conflict in the courts regarding these two very important, interrelated issues, which if left unresolved will profoundly undercut fair and efficient Title VII enforcement. Accordingly, review by this Court is warranted.

### A. The Decision Below Exacerbates A Longstanding Disagreement In The Courts Regarding The Breadth Of The EEOC's Litigation Authority Under Title VII

The U.S. Equal Employment Opportunity Commission (EEOC) is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC

alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). Upon the filing of a charge, Title VII provides in relevant part:

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

42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination through this administrative framework of charge investigations and, where appropriate, informal conciliation. 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 § 706 of the amended Act." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (quoting *Alexander v. Gardner-*

*Denver Co.*, 415 U.S. 36, 44 (1974)). Thus, even in granting EEOC the authority to litigate, Congress retained the statute's administrative enforcement scheme as a prerequisite to suit. *Id.*

### 1. Lower courts cannot agree on whether the EEOC's Title VII pre-suit administrative activities are subject to judicial review and if so, what standard applies

Implicit in the EEOC's overall systemic litigation strategy is the general assumption that it is not required to investigate the individual claims of purported victims of an alleged pattern or practice of discrimination – or to make specific findings or attempt conciliation on their behalf – prior to filing a public enforcement action against an employer in federal court, in which it seeks full statutory relief. The EEOC's flawed view of its administrative charge resolution responsibilities is inconsistent with Title VII's plain text, as well as this Court's longstanding Title VII jurisprudence.

Even more troubling, however, the EEOC believes that each and every aspect of its pre-suit administrative procedure is judicially unreviewable. The EEOC argued recently that "Title VII's text and other indicia of legislative intent compel the conclusion that Congress left presuit [sic] conciliation efforts to the EEOC's discretion and did not intend judicial review of this informal and confidential process." Petition of the Equal Employment Opportunity Commission for Interlocutory Appeal at 16, *EEOC v. Mach Mining, LLC*, No. 13-8012 (7th Cir. May 30, 2013). In the agency's view, pre-suit administrative processes, including conciliation, are entirely un-

reviewable, even under "a very deferential standard of review where the EEOC simply demonstrates that it made a proposal and the employer rejected it ...." *Id.* at 18. It explains, "This kind of review risks unnecessarily formalizing the conciliation process in contravention of the statute's admonition that conciliation be 'informal' .... Any further review, on the other hand, would require adding a standard not expressly authorized by the statute." *Id.* At the same time, the EEOC concedes that "there are substantial grounds for a difference of opinion about this." *Id.* at 16.

Indeed, federal courts have long disagreed about the extent to which they are authorized to assess the sufficiency of the EEOC's administrative charge resolution efforts and, if judicial review is permitted, what standard should apply. *See, e.g., EEOC v. Mach Mining, LLC*, 2013 U.S. Dist. LEXIS 71172, at *15 (S.D. Ill. May 20, 2013) ("[W]hile all circuits to have considered the issue have found conciliation subject to review, those circuits are not in agreement on the level of review").

As one court observed earlier this year:

> Even where the EEOC has fulfilled its statutory enforcement obligations on paper, some courts have still undertaken an analysis into the quality and sufficiency of the agency's pre-suit activities. For example, if the agency's obligatory pre-suit activities failed to put the employer on notice about the national scope of the contemplated litigation the scope of the EEOC's claims may be limited.

*EEOC v. U.S. Steel Corp.*, 2013 U.S. Dist. LEXIS 22748, at *27 (W.D. Pa. Feb. 20, 2013). Some cases

"establish that the EEOC must make genuine and diligent efforts to resolve possible violations prior to filing a formal legal complaint in federal court," *id.*, whereas others "suggest substantive scrutiny of the agency's Title VII compliance is beyond a federal court's purview." *Id.* More specifically, the federal courts to have decided the question generally follow one of two approaches. One imposes a bona fide, "good faith" conciliation requirement that is designed to ensure the EEOC's pre-suit efforts are meaningful, and the other affords the agency wide latitude to determine for itself whether or not it fulfilled its statutory obligations.

In *EEOC v. Klingler Electric Corp.*, the Fifth Circuit held that the EEOC satisfies its statutory duty to conciliate only if, at a minimum, "it outlines to the employer the reasonable cause for its belief that Title VII has been violated, offers an opportunity for voluntary compliance, and responds in a reasonable and flexible manner to the reasonable attitudes of the employer." 636 F.2d 104, 107 (5th Cir. 1981) (citation omitted). The *Klingler* good faith conciliation standard is followed by the Second and Eleventh Circuits, as well as a number of district courts. *See, e.g., EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir. 2009) (the EEOC failed to properly investigate and "compounded its arbitrary assessment that Agro violated the ADA with an insupportable demand for compensatory damages as a weapon to force settlement"); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003) (EEOC "failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort"); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981) ("patently inadequate" conciliation by EEOC war-

rants dismissal of action); *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 642 (S.D.N.Y. 2010) ("the EEOC's position, in these circumstances, does not embody a 'reasonable and flexible' response to the 'reasonable attitudes' of the employer"); *EEOC v. Die Fliedermaus, LLC*, 77 F. Supp. 2d 460, 467 (S.D.N.Y. 1999) (By ignoring employer's letter seeking more information regarding certain aspects of the conciliation proposal, and instead filing suit six days later, the EEOC failed to respond in a "reasonable and flexible manner").

Along those lines, the Eighth Circuit held in *EEOC v. CRST Van Expedited* that the EEOC's failure to investigate (or attempt to conciliate) individual instances of alleged discrimination warranted dismissal of its class claims. 679 F.3d 657 (8th Cir. 2012). In doing so, it agreed with the district court, which excoriated the EEOC for "wholly abandon[ing]" its role in the *entire* administrative process. *EEOC v. CRST Van Expedited, Inc*., 2009 U.S. Dist. LEXIS 71396, at *51 (N.D. Iowa Aug. 13, 2009) ("the EEOC did not conduct *any* investigation of the specific allegations ... let alone issue a reasonable cause determination as to those allegations or conciliate them"), *aff'd*, 679 F.3d 657 (8th Cir. 2012).

In contrast, the court below held that the nature and scope of the EEOC's pre-suit, administrative activities is within the agency's own discretion, and is not subject to second-guessing by the courts, reaffirming its longstanding position on the subject. Indeed, the Sixth Circuit long has held that a district court's role is only to "determine whether the EEOC made an attempt at conciliation." *EEOC v. Keco Indus., Inc.,* 748 F.2d 1097, 1102 (6th Cir. 1984). In *Keco Industries,* the Sixth Circuit acknowledged that

there is a good faith component to Title VII conciliation, but went on to suggest that whether the "form and substance" of conciliation represents a good faith effort on the EEOC's part is for the agency, and it alone, to decide:

> The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review.

*Id*. This highly deferential conciliation standard is followed by a number of courts, including the Fourth and Tenth Circuits. *See EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978); *see also EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 53354, at *42 (D. Neb. Apr. 12, 2013) (courts "cannot review the sufficiency of the EEOC's investigation as a means of limiting the EEOC's claims"); *Ariz. ex rel Goddard v. GEO Group*, 2012 U.S. Dist. LEXIS 102950, at *30 (D. Ariz. Apr. 17, 2012) (noting that "district courts in [the Ninth Circuit] have generally tilted toward the approach taken by the Sixth and Tenth Circuits, affording the EEOC wide deference in discharging its duty to conciliate") (citation omitted).

The Seventh Circuit also appears to ascribe to that view, and has cited *Keco* for the proposition that the EEOC's compliance with Title VII's pre-suit requirements is not subject to any meaningful level of judicial review *at all*. *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 294 (7th Cir. 1994) ("Whether litigating to back up its demand was prudent … is a matter for the conscience of the person who authorized the

suit, rather than for the judiciary") (citing *Keco Industries*); *see also EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005) (observing that "no case actually *holds* that the scope of the EEOC's investigation is a justiciable issue in a suit by the EEOC").

The EEOC has argued that the Seventh Circuit's decision in *EEOC v. Caterpillar* compels the conclusion that "its conciliation process is not subject to any level of judicial review because conciliation, like a probable cause determination, is a prerequisite to filing suit." *EEOC v. Mach Mining*, 2013 U.S. Dist. LEXIS 10859, at *9 (S.D. Ill. Jan. 28, 2013) (footnote omitted). As one district court pointed out, however, "[c]onsidering the same argument from the EEOC, a court in the Northern District of Illinois concluded that *Caterpillar* compels no such conclusion." *Id.* (citing *EEOC v. St. Alexius Med. Ctr.,* 2012 U.S. Dist. LEXIS 178866 (N.D. Ill. Dec. 18, 2012)) (footnote omitted).

Indeed, when Congress granted the EEOC litigation authority in 1972, it rejected efforts to insulate agency pre-suit conduct from judicial review. An earlier version of what eventually would become the Equal Employment Opportunity Act of 1972 specified:

> If the Commission determines after attempting to secure voluntary compliance under subsection (b) that it is unable to secure from the respondent a conciliation agreement acceptable to Commission and the person aggrieved, *which determination shall not be reviewable by any court*, the Commission shall issue and cause to be served upon the respondent a complaint stating the facts upon which the allegation of the unlawful employment practice is based ....

H.R. 1746, 92d Cong. § 4(f) (1971) (emphasis added). That version of the legislation, which clearly sought to limit the scope of judicial review of EEOC conciliation efforts, was rejected. The enacted version instead provides:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

42 U.S.C. § 2000e-5(f)(1). Despite Congress's clear intent to empower courts to review and assess the sufficiency of its pre-suit activities, the EEOC continues to press the courts – with some success – to relinquish that authority. This case presents the Court with an opportunity to correct that misperception, and in doing so bring much-needed clarity and predictability to the administration and enforcement of Title VII.

**2. Courts are sharply divided as to whether the EEOC may pursue compensatory and punitive damages for pattern-or-practice discrimination under Section 706 instead of Section 707, which expressly authorizes pattern-or-practice claims, but limits the remedy to injunctive relief**

The EEOC may file a Title VII lawsuit for intentional, disparate treatment discrimination in one of

two ways. Section 706 empowers the agency to sue an employer in its own name on behalf of a "person or [a class of] persons aggrieved" by an unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1). Alternatively, the agency may bring a "pattern or practice" lawsuit under Section 707. 42 U.S.C. § 2000e-6. To make out the latter claim, this Court has said that the EEOC must show that alleged discrimination was the defendant's *modus operandi* – *e.g.*, a "standard operating procedure" followed by the employer, as opposed to isolated violations. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

Liability in a Section 707 case does not hinge on the particularized experience of the individual claimant, as it does in a Section 706 claim. In particular, while Section 706 actions "are – and have always been – adjudicated under the burden-shifting framework announced in *McDonnell-Douglas* [*Corp. v. Green*, 411 U.S. 792 (1973)]," Pet. App. 97, Section 707 pattern-or-practice cases are resolved using the two-step approach set forth in *Teamsters*. 431 U.S. at 360.

Under the *Teamsters* framework, the EEOC must establish in an initial "liability" phase the existence of a general policy of discrimination, as opposed to isolated discriminatory acts. *Id.* If the agency meets this burden, the employer is then given an opportunity to defeat the agency's *prima facie* case by "demonstrating that the Government's proof is either inaccurate or insignificant." *Id.* If the employer fails to make this showing, liability attaches, warranting a broad injunction benefiting the entire class as a whole. *Id.* The case then moves to a second "remedial" phase to determine what, if any, relief

should be granted to individual class members. *Id.* at 361.

"[N]owhere within the text of § 706 can the EEOC find authority to bring a so-called 'pattern or practice' action. That authority is instead couched within § 707, to which Congress chose not to extend compensatory or punitive damages when amending 42 U.S.C. § 1981a ...." Pet. App. 97. While acknowledging that Section 706 "does not contain the same explicit authorization as does Section 707 for suits under a pattern-or-practice theory," Pet. App. 14, the Sixth Circuit below nevertheless concluded that such an omission in no way limits the EEOC's use of the *Teamsters* framework for establishing liability in Section 706 cases. Pet. App. 19.

Some "courts have blurred the line between class-wide claims brought pursuant to § 706 and pattern-or-practice claims brought pursuant to § 707," while others "have reached the contrary conclusion." *EEOC v. Bass Pro Outdoor World, LLC,* 884 F. Supp. 2d 499, 519-20 (S.D. Tex. 2012) (citations omitted). In *EEOC v. International Profit Associates*, 2007 U.S. Dist. LEXIS 19070 (N.D. Ill. Mar. 16, 2007), for instance, a federal trial court permitted the EEOC to maintain a "hybrid" pattern-or-practice action for full statutory damages under Section 706, reasoning, not unlike the Sixth Circuit below, that because Sections 706 and 707 share similar procedures, Congress must have intended to allow pattern-or-practice claims to be brought under either provision. *See also EEOC v. Scolari Warehouse Markets, Inc.,* 488 F. Supp. 2d 1117, 1145 (D. Nev. 2007) ("Given the similar nature of such claims and the remedial purpose of Title VII," there is "little legal or prudential reason to foreclose the EEOC from bringing a pattern-or-practice claim

pursuant to §§ 706 and 707 for the purpose of seeking punitive and compensatory damages").

Likewise, in *EEOC v. Pitre, Inc.*, the district court rejected as "far from accurate" the employer's contention that the EEOC's authority to bring a pattern-or-practice suit is defined by, and limited to, the plain text of Section 707. 2012 U.S. Dist. LEXIS 179146, at *16 (D.N.M. Nov. 30, 2012). Relying on the Sixth Circuit's decision below, it concluded that "Sections 706 and 707 clearly overlap, providing the EEOC with multiple routes to bring employers who engage in unlawful discrimination to justice." *Id.* at *17, *20-*21 n.1 (also noting "it is possible that the EEOC will rely on § 707 in an effort to skirt the 300-day statutory limitations period. At this time, though, the Court need not determine the EEOC's authority to bring suit under §§ 706 and 707 simultaneously").

In contrast, a number of federal courts have rejected the notion that Sections 706 and 707 are functionally indistinguishable, thereby enabling the government to pursue class-based, expanded damages as it sees fit. In *EEOC v. CRST Van Expedited,* for instance, the trial court harshly criticized the EEOC for pursuing a *Teamsters*-type pattern-or-practice case in which it sought class-based compensatory and punitive damages under Section 706, not under Section 707. 611 F. Supp. 2d 918 (N.D. Iowa 2009), *aff'd*, 679 F.3d 657 (8th Cir. 2012). Rejecting the EEOC's questionable contention that its failure to investigate and attempt to informally resolve the claims of all the class members on whose behalf it sought monetary relief "does not preclude it from proving that the discriminatory environment existed and that identified victims are entitled to compensation," *EEOC v. CRST Van Expedited, Inc.*, 615 F.

Supp. 2d 867, 875 (N.D. Iowa 2009) (citation omitted), *aff'd*, 679 F.3d 657 (8th Cir. 2012), the trial court observed:

> [I]t would appear the EEOC is attempting to have its cake and eat it too. That is, the EEOC is attempting to avail itself of the *Teamsters* burden-shifting framework yet still seek compensatory and punitive damages under § 706. Complicating matters further, it is important to remember that the Supreme Court designed the *Teamsters* burden-shifting framework with only equitable relief in mind.

611 F. Supp. 2d at 934 (citations omitted). Thus, "[d]espite not directly ruling on the propriety of the EEOC's attempt to bring a pattern or practice suit under § 706, the *CRST* Court was not receptive to the EEOC's arguments on the subject ...." Pet. App. 94-95.

The district court in *EEOC v. Bass Pro Outdoor World, LLC* similarly held that the EEOC "cannot bring a hybrid pattern or practice claim that melds the respective frameworks of § 706 and § 707. Rather, the Court interprets § 706 to not provide a vehicle for pattern or practice claims. Likewise, the Court believes § 707 only permits equitable relief." 884 F. Supp. 2d 499, 520 (S.D. Tex. 2012). The court there found no "support in the case law, or in the statutes themselves, for the EEOC's proposition that § 707's pattern or practice language is merely a redundancy." *Id.*

### B. The Decision Below Threatens To Undermine Effective Title VII Enforcement By Facilitating, Indeed Encouraging, Abusive EEOC Litigation Tactics That Significantly Disadvantage All Employers, But Especially Those With Nationwide Operations

The EEOC has embarked on an aggressive enforcement strategy that continues to focus on large cases with potential systemic implications.[2] Because the EEOC can bring a Title VII pattern-or-practice lawsuit against any covered business with a nationwide employee presence essentially wherever it chooses, the inconsistency in the courts regarding the scope of the EEOC's authority under Title VII, a conflict that is exacerbated by the decision below, gives the agency a significant tactical advantage over employers defending such claims.[3]

In addition, because the federal courts do not agree on whether and to what extent EEOC pre-suit

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[2] A post that appeared last year in the *Boston Herald* criticized a particularly aggressive EEOC investigation of a local business, characterizing the EEOC's efforts to "fish" for potential violations "and even solicit[] victims – rather than just waiting for people to report they've been wronged" as a "growing part of the agency's mission." *See* John Zaremba, *EEOC defends Marylou's hiring probe*, Boston Herald, June 8, 2012, *available at* http://www.bostonherald.com/news/regional/view.bg?articleid=1061137490.

[3] Title VII applies to every employer with 15 or more employees; thus, the number of employers potentially at risk is substantial. For example, in 2008, 56% of all U.S. business establishments, which collectively employ millions of workers, were subject to Title VII. United States Census Bureau, Employment Size of Firms, Table 2a. Employment Size of Employer and Nonemployer Firms, 2008, *available at* http://www.census.gov/econ/smallbus.html

administrative obligations are subject to review, employers have little confidence that discrimination claims will be evaluated by the EEOC fairly and in a consistent manner, or that the agency will pursue suit *only* in those rare instances in which informal resolution is not possible. The decision below further emboldens the EEOC to pursue what the district court characterized as a "sue first, ask questions later" strategy,[4] and it is likely to result in an increase in agency-initiated, pattern-or-practice class litigation, which in turn will require employers to devote considerable time and financial resources to defend themselves.

These unchecked EEOC enforcement tactics continue to receive decidedly unflattering, national attention, both by the courts and the media. For example, a recent *Wall Street Journal* editorial questioned the EEOC's decision, consistent with its "reputation for testing the boundaries of the law," to target PricewaterhouseCooper's (PwC) mandatory retirement policy for firm partners. Editorial, *Discriminating Against Partnerships*, Wall St. J., June 3, 2013.[5] Of particular relevance here, the editorial points out that during conciliation, the firm asked the EEOC to "clarify its concerns" – presumably the basis for its reasonable cause determination and settlement demand – in response to which the agency reportedly "declined to explain and merely read [this Court's] *Clackamas* tests out loud, hoping the company would settle." *Id*. It continued:

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[4] *EEOC v. CRST Van Expedited, Inc*., 2009 U.S. Dist. LEXIS 71396 (N.D. Iowa 2009), *aff'd*, 679 F.3d 657 (8th Cir. 2012).

[5] *Available at* http://online.wsj.com/article/SB10001424127887323855804578511693604180764.html

> PwC's lawyers replied in a January 2013 letter that this tactic "does not, in our view, satisfy the agency's obligations to conciliate" and "deprived us of the ability to formulate a proposal to address your concerns." PwC also offered to put the mandatory retirement age up for another partner vote. Two days later, [the EEOC] terminated the negotiation.

*Id*. The editorial concludes by observing:

> Perhaps they think that dealing with the EEOC behind closed doors is best. But trying to negotiate quietly hasn't helped PwC. This is one more example of the ways that [the EEOC] harasses private business simply because it wants to show who's the boss.

*Id.*

The persistent conflict regarding whether and to what degree courts may review the sufficiency of the EEOC's pre-suit administrative efforts further enables the agency to utilize harassing and unjustified tactics to coerce employers to settle, particularly those that justifiably fear the reputational damage that would result from an EEOC-initiated public enforcement action.

Because of these inconsistencies, employers with operations in multiple jurisdictions thus face vastly different standards, requirements and expectations regarding administrative charge resolution procedures, which create an unacceptable level of unpredictability that makes it much more difficult to resolve discrimination claims informally and as expeditiously as possible. More importantly, the EEOC's notion that its conciliation efforts – however questionable – cannot be second-guessed by this or

any other Court will continue to encourage agency behavior seemingly designed to undermine, rather than facilitate, informal discrimination charge investigation, which is squarely at odds with Title VII's aims and purposes.

The legislative history of the 1972 amendments to Title VII confirms Congress's preference for conciliation as a means of resolving discrimination claims:

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

118 Cong. Rec. H1861 (Mar. 8, 1972) (quoted by *EEOC v. Zia*, 582 F.2d 527, 533 (10th Cir. 1978)) (emphasis added). This Court acknowledged the strong federal public policy favoring informal resolution of discrimination charges through conciliation in *Occidental Life Insurance Co. of California v. EEOC*, ruling that the EEOC "whenever possible" must attempt to resolve discrimination charges "before suit is brought in a federal court ...." 432 U.S. 355, 368 (1977). *See also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be "preferred means of enforcing Title VII") (citation omitted).

The EEOC does not satisfy its administrative duties merely by inviting a respondent to participate in conciliation. In order to fulfill its statutory mandate, the agency's conciliation efforts both must be meaningful *and* undertaken in good faith. Indeed, as the Fifth Circuit in *Klingler* observed, the EEOC's

right to sue is premised on fulfillment of its conciliation obligation "in good faith, while encouraging voluntary compliance and reserving judicial action as a *last resort*." 636 F.2d at 107 (emphasis added).

## CONCLUSION

Accordingly, the *amici curiae* respectfully request the Court grant the petition for a writ of certiorari.

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