No. 14-3653

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff–Appellant,

v.

CVS PHARMACY, INC.,

Defendant–Appellee.

On Appeal From The United States District Court
For The Northern District Of Illinois (No. 1:14-cv-00863)

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF CVS PHARMACY, INC. AND AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel for *amici curiae* furnishes the following statement pursuant to Circuit Rule 26.1:

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.
Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation: i) Identify all its parent corporations, if any; and ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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

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

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings involving important issues that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.[1]

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1 All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici curiae*, their members, and their counsel contributed money that was intended to fund preparing or submitting this brief.

This case is of particular importance to the RLC, the Chamber, and their members because retailers and other businesses nationwide routinely enter into separation agreements with employees. These agreements play an important role not only when individual employees leave a company, but also in large-scale reductions in force. Standard-form separation agreements are an efficient, mutually agreeable mechanism to extend additional unearned compensation and benefits to involuntarily separated employees as they seek new employment in exchange for resolution of potential employment disputes through release of claims. Congress intended to promote and facilitate a private dispute-resolution system to the greatest extent possible in enacting Title VII, and the Supreme Court and lower courts have repeatedly affirmed this core purpose of the statute by enforcing voluntary employment releases. As employers and employees nationwide have relied on this fundamental legal landscape to enter into mutually agreed upon separation agreements, the courts consequently have been spared the expense of overseeing and resolving potential employment disputes.

The Equal Employment Opportunity Commission ("EEOC") now seeks to upset this established and beneficial regime by asking this Court to be the first ever to find that a standard-form separation agreement violates Title VII—despite *no* allegations of discrimination or retaliation against any employee, an *explicit* provision memorializing employees' right to participate in agency proceedings enforcing employment discrimination laws, and evidence that the agreement undisputedly did *not* dissuade the only former CVS employee the record addresses

from filing a charge with the EEOC. The EEOC's novel extension of Title VII liability would also have this Court assume the role of copy editor by making a federal case out of separation agreements' formatting, word choice, and style. Lacking statutory or regulatory standards that could ensure fair enforcement or provide employers with confidence that future agreements comply with the law, this approach cannot satisfy basic norms of due process. Moreover, the EEOC disregarded its statutory obligation to engage in informal conciliation with CVS before filing suit.

The vast majority of separation agreements contain language similar to that used by CVS. If the EEOC were to prevail, countless similar agreements could be invalidated and the threat of liability for noncompliant releases could make companies reluctant to offer them at all. This result would deprive employers of the certainty these agreements provide, and employees of the compensation and additional benefits they receive from them. The Court should decline the EEOC's unsupported and disruptive invitation to undermine Title VII's policy of private resolution reflected in the beneficial practice of offering separation agreements.

ARGUMENT

I. Businesses Nationwide Use Separation Agreements As Standard Practice.

Separation agreements are common devices used by countless employers and employees in thousands of businesses across hundreds of industries—to the mutual benefit of employees and employers, as well as the judicial system, which is spared the cost of resolving innumerable potential employment disputes.

A. Separation Agreements Are Advantageous To Employees And Employers Alike.

The basic premise of separation agreements is the mutual benefit that flows to each party. Through separation agreements, former employees may be given additional compensation or lump-sum payments, often tied to years of service. *See*, *e.g.*, EEOC, *Understanding Waivers of Discrimination Claims in Employee Severance Agreements*, *available at* http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html (valid waivers require "something of value *in addition to* any of the employee's existing entitlements," such as "a lump sum payment of a percentage of the employee's annual salary" (emphasis in original)); *see also*, *e.g.*, *Hampton v. Ford Motor Co.*, 561 F.3d 709, 717 (7th Cir. 2009) (recognizing $100,000 consideration for separation agreement). Employers may offer employees assistance in seeking new employment, including out-placement services, resume writing assistance, and career counseling services. When an employee is involuntarily separated, loss of health insurance is often a particular, acute concern. Separation agreements can provide for an employer subsidy for continued health insurance coverage during this transition.

The benefits to employers are also significant. Companies often have a corporate culture where employees are considered to be part of a corporate family. In reduction-in-force situations, separation agreements provide a mechanism for employers to provide additional assistance to former associates who have lost their employment as the result of corporate restructuring or cost cutting after a downturn in business. These separation agreements generally do not involve situations where

an employee has a potential claim against the employer. Nonetheless, a separation agreement with a release of claims provides employers with certainty and peace of mind. Where an employee has a potential claim, separation agreements provide mutually agreed upon compensation to the employee in return for a final release of claims for the employer. Given the numerous benefits to employees and employers, use of separation agreements has become standard industry practice.

B. The CVS Separation Agreement Conforms With Standard Industry Practice.

The EEOC's legally baseless position would upend employers' existing practices, as the CVS Separation Agreement ("Agreement") is indistinguishable from countless other standard-form separation agreements used by the vast majority of employers nationwide. *See* A-2 (Decision at 2 n.1) (recognizing that "similar severance agreements are used nationwide in both the private and public sector and have been widely upheld"). For example, the EEOC's sample agreement contains similar language, albeit less clearly protective of employees' rights to cooperate with the EEOC. *See infra* pp. 17-18.[2] Such agreements are both routine and routinely upheld in court absent evidence of duress or other outside factors not alleged here. *See*, *e.g.*, *Hampton*, 561 F.3d at 714-16 (upholding release of "'any and all rights or claims'" and agreement not to initiate against employer "'any

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2 *See also*, *e.g.*, ISAC Separation Agreement and General Release of Claims, *available at* http://www.chicagobusiness.com/Assets/legacy/downloads/DavisSeparationAgreement.pdf (six-page, single-spaced agreement used by the legislatively created Illinois Student Assistance Commission including language similar to every provision the EEOC challenges in this Agreement).

proceedings of any kind,'" even though agreement was generic, not subject to negotiation, and employee allegedly was not allowed to take contract home and did not obtain legal advice before signing); *Fortino v. Quasar Co.*, 950 F.2d 389, 394-95 (7th Cir. 1991) (upholding release of discrimination claims). Because it is difficult to distinguish the Agreement here from the many others like it that are signed—and enforced—every year, invalidating this Agreement would not only run contrary to a vast array of settled legal precedent, but would also have far-reaching and disruptive implications across multiple industries. If employers are precluded from obtaining a release from all legally releasable claims, they would have little incentive to offer severance payments, which may very well increase litigation brought by terminated employees against employers. Even if these claims generally would be unsuccessful, they would nonetheless impose high costs on litigants and clog the judicial system with unnecessary litigation. Employees overwhelmingly prefer to release potential claims in order to obtain a certain severance package, and the EEOC should not be permitted to preclude this desirable, rational procedure to end employment relationships.

II. The EEOC's Position Would Raise Serious Concerns for Employers' Due Process Rights.

Beyond the lack of statutory grounding for the EEOC's position, as detailed below and in CVS's brief, it also suffers from the fatal flaw of advocating a vague and open-ended standard. If the EEOC prevails, employers would have no meaningful basis to know whether their conduct going forward violates Title VII, and would be subject to the whims of arbitrary enforcement under an inchoate, and

potentially shifting, standard. Such a landscape cannot be reconciled with the Constitution's due process guarantees (*see*, *e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)), and these grave concerns therefore provide an additional reason for rejecting it. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

A. Reversal Would Leave Employers With No Notice Whether Their Conduct Violates The Law.

The EEOC identifies no false statements in the Agreement, and does not allege that the Agreement misstates the law or was applied in a discriminatory manner. Rather, its objections are atmospheric, claiming that the Agreement's provisions—taken as a whole and considered in context with the Agreement's overall form and style—somehow amount to a restraint on employees' Title VII rights notwithstanding the Agreement's explicit carve-out for agency participation. CVS certainly could not have had notice that the Agreement violated the law under such an amorphous standard, and other employers nationwide will be hard-pressed to understand what they must do to ensure that their own separation agreements are not deemed unlawful under the EECO's expansive theory.

The EEOC concedes that the Agreement expressly states that it is not "'intended to [n]or shall interfere with [an] Employee's right to participate in a proceeding with any appropriate federal, state, or local government agency

enforcing antidiscrimination laws,'" and that it does not include "'any rights that [an] Employee cannot lawfully waive.'" EEOC Br. 43-44 (quoting A-18 (Agreement ¶¶ 7-8)). Yet the EEOC's complaint faults CVS for not *repeating* these caveats (which were not required in the first instance). *See* A-13 (Compl. ¶ 8(f)) (describing "participat[ion]" provision as a "single qualifying sentence that is not repeated anywhere else in the Agreement"). In its brief in this Court, the EEOC characterizes the paragraphs containing language releasing CVS from all legally releasable claims (A-18 (Agreement ¶¶ 7-8)) as hopelessly muddled, and "readily and reasonably confus[ing] … [to] a non-attorney CVS employee." EEOC Br. 43-44. A plain reading of these paragraphs, however, reveals that they begin by listing the rights employees give up, and end with explicit language making clear that employees are *not* barred from cooperating with the EEOC. It is hard to guess what more the EEOC wants CVS to do beyond excluding general releases from its separation agreements—an approach the EEOC could not defend if it argued for it directly. *See*, *e.g.*, *EEOC v. Allstate Ins. Co.*, 778 F.3d 444, 449 (3d Cir. 2015).

More generally, the EEOC takes issue with the Agreement's length and formatting, emphasizing in its complaint that the Agreement is "*five-page[s]*" and "*single spaced*." A-11 (Compl. ¶ 8) (emphases in original). It takes the same tack here, insisting that the Agreement is suspect because it "is five pages long, single-spaced, in a small font, and drafted entirely in 'legalese.'" EEOC Br. 42. From the very outset of this case, as evidenced by its public statements, the EEOC's concerns have been editorial, focusing on form and format over substance. *See* Press Release,

EEOC, EEOC Sues CVS to Preserve Employee Access to the Legal System (Feb. 7, 2014), *available at* http://eeoc.gov/eeoc/newsroom/release/2-7-14.cfm (in press release issued same day it filed suit, EEOC accused CVS of using "an overly broad severance agreement set forth in five pages of small print").

A five-page, single-spaced separation agreement is fairly typical of standard industry practice and is not unusual or coercive. Separation agreements often cover substantial ground in order to protect both the employer *and* the employee. For instance, the Agreement sets out the amount and terms of the employee's severance payments, employer-subsidized health insurance, and employer-provided outplacement assistance, as well as delineates time periods for the employee to consult with counsel, consider the agreement, and, if the employee chooses, revoke the agreement after signing. A-17-18 (Agreement ¶¶ 2-3, 5, 10-11). These provisions and the rest of the Agreement are written in plain English and set off by numbered paragraphs with bold, underlined headings. This Agreement does not contain a single footnote, much less fine print.

There is no statutory or regulatory basis for the EEOC to object to a separation agreement on the basis of its number of pages, size of print, or formatting. In the six pages of its brief devoted to parsing the Agreement's typesetting and wording, the EEOC cites just one case, and that in a footnote addressing a tangential point. EEOC Br. 42-47 & n.12. In fact, the EEOC *concedes* that there is no precedent supporting its interpretation of Title VII, and consequently relies on courts' interpretations of the materially different National

Labor Relations Act (*id.* at 47-48), and separation agreements that explicitly purported to prohibit employees from filing charges with the EEOC or cooperating voluntarily with an EEOC investigation (*see*, *e.g.*, *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 741 (1st Cir. 1996); CVS Br. 20). The former CVS employee whose complaint to the EEOC initiated this litigation clearly had no trouble understanding that the separation agreement did not preclude her from complaining to the EEOC. *Infra* p. 12. It is the EEOC—and the EEOC alone—that finds certain statements in the Agreement "extremely troubling." EEOC Br. 47. Without any relevant legal support, the EEOC's novel legal theory must fail. The Due Process Clause guarantees that legal sanctions hinge on violation of a defined law, not on a difference of opinion regarding a document's length, formatting, or wording. *See Grayned*, 408 U.S. at 108.

The EEOC's lack of support for its theory here is especially significant because Congress has demonstrated that it knows how to dictate standards for valid employment waivers, as well as how to delegate such authority to an agency in other contexts, and yet it did not do so here. In the Older Workers Benefit Protection Act ("OWBPA"), for example, Congress included detailed requirements and specific language that must be included before an employee will be held to have "knowing[ly] and voluntar[ily]" waived rights under the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. § 626(f)(1) (waivers must, for example, advise employees "to consult with an attorney prior to executing an agreement," and provide a three-week period "within which to consider the agreement," then another

week in which "the individual may revoke the agreement"). Congress did not set such requirements for Title VII waivers, nor did it grant the EEOC authority to mandate such minutiae as an agreement's length and font size. *See Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (holding that "textual differences between the ADEA and Title VII" mandate different interpretations).

Moreover, congressional or agency rules dictating the content of employment waivers would not in and of themselves be sufficient to render these rules separately actionable by the EEOC as an affirmative Title VII violation. The OWBPA's requirements, for example, simply "govern[] the effect under federal law of waivers or releases" on age discrimination claims. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). Courts almost uniformly interpret this rule to mean that noncompliance is a "shield for plaintiffs … when an employer invokes the waiver as an affirmative defense," not "swords that provide plaintiffs with an independent cause of action for affirmative relief." *Whitehead v. Okla. Gas & Elec. Co.*, 187 F.3d 1184, 1191 (10th Cir. 1999). A ruling in favor of the EEOC would create the odd situation of judicially grafting an implicit cause of action onto Title VII regarding content and style of separation agreements where none exists to enforce explicit standards elsewhere.

The EEOC addresses these critical due process concerns regarding notice with a cursory, two-paragraph response at the end of its brief. EEOC Br. 51-52 ("[T]he appropriate standard to apply in determining liability is an objective one: whether CVS's use of the challenged provisions in the [Agreement] 'well might have

dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006))). The EEOC, however, ignores that this "reasonable worker" standard applies in the context of *retaliation* claims (*see Burlington*, 548 U.S. at 67-68), not to any freestanding conduct that the EEOC might deem to interfere with Title VII. Even within the area of statutorily enumerated retaliation claims, the Supreme Court still insists that the "reasonable worker" standard be strictly enforced to ensure that employers are held liable for *actual* violations of Title VII only, not for "minor annoyances" or violating a "general civility code for the American workplace." *Id.* at 68 (citation omitted).

In any event, the facts of this case do not provide a plausible basis to conclude that a reasonable worker would have been dissuaded from exercising his or her right to file a charge with the EEOC after signing the Agreement. The EEOC alleged no examples of employees who were scared off, and the only employee the record discusses was indisputably *not* discouraged. Tonia Ramos signed the Agreement, then "[s]oon thereafter" "filed a charge with [the] EEOC alleging that CVS terminated her due to her sex and race." A-2 (Decision at 2). Indeed, the only reason the EEOC learned about the Agreement was because Ramos filed ultimately unsuccessful claims with the agency. EEOC Br. 3. The fact that Ramos was not deterred from filing a claim with the EEOC by any language in the Agreement undermines the EEOC's premise that a reasonable worker would have been too confused or threatened by the Agreement to do just that.

Finding that a five-page separation agreement containing protections and benefits for employees and employers could render involuntary the signature of a competent adult—much less one who had three weeks to consider the Agreement's terms and consult with counsel, and an extra week to revoke the agreement (A-18 Agreement ¶ 11)—would uproot well-established principles of contract law and call into doubt a host of routine agreements made every day by countless employees, consumers, and other parties. *See*, *e.g.*, *Bess v. DirecTV, Inc.*, 381 Ill. App. 3d 229, 240 (2008) (no procedural unconscionability from contract's length or formatting where contracting party could "locate, read, [and] understand" provisions in question); 12 Ill. Law & Prac. Contracts § 59 (same). The EEOC proceeds on the assumption that Title VII includes a right for employees not to be confused by the terms of the contracts they sign. This novel protection is nowhere to be found in the statute, and would conflict with the rule that parties are presumed to have read and understood the agreements they sign. Absent allegations of duress or undue influence—which the EEOC does not make—"[c]ompetent adults are bound by such documents, read or unread." *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997); *see also*, *e.g.*, *Golden v. McDermott, Will & Emery*, 299 Ill. App. 3d 982 (1998) (enforcing severance agreement releasing "any and all claims," known or unknown, despite duress allegations); *Breckenridge v. Cambridge Homes, Inc.*, 616 N.E. 2d 615 (Ill. App. Ct. 1993). Even the heightened protections safeguarding First Amendment speech rights do not require that legislation be so carefully drafted that no individual could be confused about its scope, just that laws be "'readily

susceptible'" to an interpretation leaving open sufficient avenues for protected speech. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). Here—outside the realms of both constitutional mandate and statutory text—the Agreement's explicit caveats making clear that it does not take away employees' rights to participate in agency proceedings far surpass this requirement.

B. The EEOC's Extra-Statutory Standard Would Invite Arbitrary Enforcement.

Further compounding the significant due process notice concerns, the EEOC would replace the prevailing rule in favor of enforcing private severance agreements with undefined, subjective standards that will lead to arbitrary enforcement. Yet "[i]t is a basic principle of due process" that a law is impermissibly void "if its prohibitions are not clearly defined," lest the law "trap the innocent by not providing fair warning" or fail to provide regulated parties with a "reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Grayned*, 408 U.S. at 108. "[L]aws must provide explicit standards for those who apply them" to avoid the need for "ad hoc and subjective" decisions, "with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09; *see also*, *e.g.*, *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (due process vagueness doctrine "incorporates notions of fair notice or warning" and requires "reasonably clear guidelines" for those who enforce and interpret the law); *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012) (same).

The EEOC would have this Court circumvent these principles by invalidating the Agreement under Title VII, but without "provid[ing] meaningful standards to

guide the application" of its theory going forward. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44 (1991). A fair reading of the complaint and the EEOC's brief leaves the precise nature of the EEOC's objections unclear, forcing CVS and other employers to guess at what a permissible separation agreement might look like. For example, would the Agreement satisfy the EEOC's objections if it were reprinted in 14-point font and double-spaced or if CVS eliminated several provisions to make it fit onto three pages instead of five? Would CVS have been safe setting off the agency participation provision in a separate paragraph rather than at the end of the paragraph where it is now, or repeating it on each page? Or, does the Agreement fail EEOC scrutiny based on an unexplained combination of factors?

The need to avoid ad hoc enforcement standards is especially warranted here because the EEOC's entire theory is predicated on a novel reading of Section 707(a) that would unmoor pattern or practice liability from violations of the specific, defined rights that Title VII protects: to be free from discrimination and retaliation. The EEOC thus seeks not only to unwind the predictable application of the current regime, but also to replace it with nothing more than amorphous, extra-statutory objections to tone or style. There is no limiting principle to the EEOC's new approach, which would make it impossible for employers to ensure that future agreements conform to the law—or have any confidence that the EEOC will not change its undefined test in the future.

Due process requires more. It disserves both employers and employees to inject uncertainty into whether, and on what terms, separation agreements might

be enforced. The lack of fair notice and potential for arbitrary enforcement that the EEOC's position would create are thus further reasons to reject it. *See Edward J. DeBartolo Corp.*, 485 U.S. at 575.

III. The Agreement Does Not Violate Title VII.

The Agreement contains unremarkable provisions substantially similar to those in agreements that countless retailers and other employers use every day, to the benefit of departing employees and employers alike. The EEOC argues that merely *offering* such an agreement constitutes a pattern or practice of resistance to Title VII. Adopting this theory would work a sea change in employment law wholly unjustified by either Title VII's text or governing precedents, with detrimental consequences for industries and employees nationwide that rely on the common tool of standard-form separation agreements.

A. The Agreement Explicitly Informs Employees Of Their Right To Participate In Agency Investigations.

Even if this Court were to stretch existing precedent to find that offering a standard-form separation agreement could somehow constitute a pattern or practice of Title VII violations—which it cannot (*infra* Part III.B.)—the express terms of the Agreement make clear that *this* severance program would not approach that level.

As described above, the Agreement includes the caveat that its general-release provision does not apply to rights the employee cannot lawfully waive, and that "nothing" in it precludes the employee from "participat[ing] in" or "cooperating with" agency proceedings. A-18 (Agreement ¶¶ 7-8). This express carve-out for participation in EEOC (and other agencies') investigations applies regardless of

whether the employee or agency initiates the proceedings. As the district court explained, using the term "participate"—which means "to be involved with others in doing something and to take part in an activity … with others"—makes the breadth of this carve-out plain. A-4-5 (Decision at 4-5 n.3 (citation and internal quotation marks omitted)); *see also id.* ("It is not reasonable to construe 'the right to participate in a proceeding with any appropriate federal … agency' to exclude the right of the employee from filing an EEOC charge." (citation omitted)).

The Agreement's language thus goes out of its way to allow for cooperation with the EEOC. Courts overwhelmingly have favored mutually agreed upon separation agreements, and even have held that Title VII is not violated by an agreement that *misstates* the law. *EEOC v. Cognis Corp.*, 2012 WL 1893725, at *6-*7 (C.D. Ill. May 23, 2012) (provision "threaten[ing] termination if an employee took statutorily protected activity" was "void" as against public policy, but did not violate Title VII). It follows *a fortiori* that CVS did not violate Title VII by surpassing its minimum obligations and expressly and accurately informing employees of their non-released rights and allowing for cooperation with the EEOC. *See Ribble v. Kimberly-Clark Corp.*, 2012 WL 589252, at *8 (E.D. Wis. Feb. 22, 2012) (agreement "could have more explicitly stated" that employee "retains the right to file a charge with the EEOC, [but] such specificity is not required").

Indeed, in this respect the Agreement is at least as protective of employees' rights as the sample separation agreement on the EEOC's own website. That sample agreement suggests a provision excepting "claims that cannot be released

under applicable law"—just like paragraph 7 of the Agreement—but it does not include a provision comparable to paragraph 8's statement about the right to participate in agency proceedings. *See* EEOC, *Understanding Waivers of Discrimination Claims In Employee Severance Agreements* App. B, *available at* http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html#B. The EEOC tries to explain away its sample agreement by noting that it is two pages long and "nowhere mentions agency proceedings or cooperation." EEOC Br. 44 n.11. Yet, the Commission cannot explain how the mere addition of three pages can transform language endorsed by the agency into a pattern or practice of violating federal law. Equally puzzling is the EEOC's failure to explain why remaining silent about an employee's right to participate in agency proceedings is preferable to an express statement informing employees that signing a separation agreement cannot waive their right to do so.

Moreover, the Agreement's "participation" carve-out is materially identical to language the EEOC *approved* when resolving a similar lawsuit. *See* Consent Decree 4, *EEOC v. Eastman Kodak*, No. 06-cv-06489 (W.D.N.Y. Oct. 11, 2006) (requiring future releases to include caveat that "[n]othing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency"). Now, the EEOC highlights the Agreement's length and use of "legalese" (EEOC Br. 42), but the *Kodak* consent decree is tellingly silent about page limits for future agreements, and merely requires inclusion of an additional paragraph with

prose of equivalent formality to the Agreement's. Consent Decree at 3 ("Except as described below, you agree and covenant not to file any suit, charge or complaint against Releasees in any court or administrative agency, with regard to any claim, demand, liability or obligation arising out of your employment with Kodak or separation therefrom. …" (internal quotation marks omitted)).

Finally, undermining the EEOC's theory that employees could be misled, the Agreement contains several provisions specifically designed to ensure that employees fully understand and voluntarily accept its terms. These provisions contain explicit language about the rights employees retain. Consistent with the EEOC's more stringent regulations for knowing and voluntary releases under the OWBPA (*see* 29 C.F.R. § 1625.22), employees are advised to consult with an attorney before signing and given three weeks in which to seek outside advice and otherwise consider the Agreement. Even after signing the Agreement, employees are given another week to further consider the Agreement and, if they so choose, to revoke it. A-18 (Agreement ¶¶ 10-11). Ruling for the EEOC would make this Court the first ever to find a Title VII violation hidden within an agreement that expressly highlights an employee's right to participate in agency investigations *and* contains procedural protections beyond the minimum legal requirements to ensure that employees enter into the agreement knowingly and voluntarily.

B. Offering Employees A Severance Agreement Does Not Violate Title VII.

In any event, merely offering severance to an employee, including additional compensation and benefits, in exchange for a release is neither discrimination nor

retaliation—the only two types of "unlawful employment practices" that Title VII prohibits. *See* 42 U.S.C. §§ 2000e-2, 2000e-3; *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490, 498 (6th Cir. 2006) (no Title VII violation where employer "engaged in no further action" beyond "offer[ing] a contract"); *Davis v. Precoat Metals*, 328 F. Supp. 2d 847, 852 (N.D. Ill. 2004) ("Offering severance benefits in return for a general release of claims is neither discriminatory nor retaliatory.").

Even directly "condition[ing] severance pay on promises … not to file charges with the EEOC" or "participate in EEOC proceedings" does not, on its own, constitute retaliation. *Sundance*, 466 F.3d at 497, 499, 501; *see also*, *e.g.*, *Allstate Ins. Co.*, 778 F.3d at 452 (finding "no legal authority" for proposition that "denying an employee an unearned benefit on the basis of the employee's refusal to sign a release" is adverse action). To be sure, an overly broad or misleading contract provision may be *unenforceable*, but contract enforceability is irrelevant to Title VII. The cases the EEOC cites (EEOC Br. 39-41) do not suggest otherwise, and those cases that *have* addressed the intersection of contract enforceability with the elements of Title VII reject the EEOC's position. *See*, *e.g.*, *Sundance*, 466 F.3d at 501 (provision barring employee from filing charges with EEOC not retaliation even though it "may be unenforceable").

Instead, a Title VII violation requires allegations that a particular employee suffered discrimination or retaliation—and the EEOC's complaint contains no such allegations. *Cf. EEOC v. Bd. of Governors of State Colls. & Univs.*, 957 F.2d 424 (7th Cir. 1992) (finding retaliation under ADEA where collective bargaining

agreement authorized employer to stop union grievance procedures if employee filed EEOC charge, *and employer in fact did so*). Therefore, CVS cannot be guilty of a "pattern or practice of resistance to the full enjoyment of any of the rights *secured by this subchapter*" (42 U.S.C. § 2000e-6 (emphasis added)) if nothing in the Agreement is an "unlawful employment practice" under Title VII.

The EEOC concedes (EEOC Br. 26) that the phrase "pattern or practice" is not "a term of art, and the words reflect only their usual meaning." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977). Accordingly, Section 707(a) does not refer to a distinct type of wrong, but to repeated instances of the same misconduct Title VII outlines elsewhere. Section 707(a) is simply a means of pursuing multiple violations of Title VII in one consolidated proceeding, much like a class action. *Id.* at 360. Just as the class-action mechanism may not be construed to alter parties' substantive rights (*see* 28 U.S.C. § 2072(b); *Garber v. Randell*, 477 F.2d 711, 715 (2d Cir. 1973) (consolidation may not "change the rights of the parties")), the EEOC in a Section 707(a) action bears the burden of showing "a regular practice *of discrimination*." *Int'l Bhd. of Teamsters*, 431 U.S. at 360 (emphasis added); *see also*, *e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 n.4 (2006) (same).

In an attempt to further its argument, the EEOC resorts to citing cases of egregious instances of extreme and repeated discrimination (EEOC Br. 23 n.7, 32-33). These cases are worlds apart from the ordinary business uses of routine separation agreements. *See*, *e.g.*, *United States v. Original Knights of the Ku Klux*

Klan, 250 F. Supp. 330, 356 (E.D. La. 1965); *United States v. Sampson*, 256 F. Supp. 470, 473-74 (N.D. Miss. 1966). Nothing in these cases suggests that "pattern or practice" liability can be found without any underlying Title VII violations.

IV. A Ruling For The EEOC—On Either Substantive Or Procedural Grounds—Would Undermine The Important Goals Underlying Title VII.

Judgment for the EEOC expanding the settled definition of "pattern or practice" liability would discourage the voluntary resolution of potential post-employment disputes through separation agreements, at great cost to all involved. Ruling for the EEOC that the Commission is not required to engage in conciliation and other statutory pre-suit requirements before initiating this lawsuit would also undermine Title VII's goals of encouraging informal dispute resolution over litigation.

A. Separation Agreements Encourage Efficient, Private Dispute-Resolution.

As detailed more fully above, in exchange for signing a release and waiver of potential employment claims, separation agreements provide extra compensation and benefits for departing employees quickly and efficiently—which can be a significant aid to an unemployed person seeking new employment. Employers, in turn, gain finality instead of the ongoing threat of potential litigation in the months and years after an employee leaves. Even in the typical case where there is no reason to suspect that an employee would sue, employers often prefer an option to trade extra compensation to avoid the potential risk of litigation. *See*, *e.g.*, *Spencer v. Banco Real, S.A.*, 87 F.R.D. 739, 747 (S.D.N.Y. 1980) ("[E]ven if an employer

believes it will prevail, it must realize that it will seldom recoup the costs of litigation, however meritless."). Absent the ability to obtain a broad release, employers will have less incentive to offer severance compensation, and would be unlikely to do so.

The benefits of separation agreements also extend beyond the contracting parties. Congress recognized when enacting Title VII "that the courtroom is not always the best forum for settling workplace disputes." *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1237, 1241 (M.D. Ala. 2001); *see also Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 366 (1977) ("It is hoped that recourse to the private lawsuit will be the exception and not the rule …." (citation omitted)). Where separation agreements are used to resolve disputes that would otherwise lead to litigation, courts are saved from expending considerable time and resources that would be necessary to adjudicate those claims. Given that employment disputes already make up over one in every ten private civil appeals commenced in this Circuit,[3] those savings are no doubt substantial.

The EEOC's approach would sacrifice many of these benefits by making it far more difficult for employers and employees to resolve disputes voluntarily, or even just end employment relationships cleanly. Without a clear standard against which to measure separation agreements going forward and assurance that the EEOC will

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3 U.S. Courts, *Table B-7—U.S. Courts of Appeals Federal Judicial Caseload Statistics* 2 (Mar. 31, 2014), *available at* http://www.uscourts.gov/statistics/table/b-7/federal-judicial-caseload-statistics/2014/03/31.

not move the mark yet again once permitted to erase the textual limits on Section 707(a), employers and employees will be hard pressed to know whether the agreements they enter into will satisfy the EEOC. Indeed, the risk of gambling against an undefined standard would become significantly greater if, as the EEOC would have it, the consequences for noncompliant agreements could include the "sword" of Title VII enforcement actions. Thus, judgment for the EEOC would have wide-reaching effects as industries reevaluate the benefits and risks of separation agreements.

Judgment for the EEOC would also negatively affect employees. Most employees who sign separation agreements by definition prefer the benefits of their bargain to the remote possibility of bringing a Title VII claim. The EEOC's theory would deprive countless employees of those benefits and could even raise difficult questions of whether they would be required to pay back some or all of the consideration they received if those releases are found to violate Title VII. Such a result would impose a significant hardship on former employees who may have already spent the money they received to cover living or medical costs while seeking alternative employment. Employers would be placed in the untenable position of trying to recoup these payments even though they were mutually agreed upon in good faith. The EEOC may be content with litigating routine, ordinary separation agreements out of existence, but the employees and employers who voluntarily entered into them with full knowledge of their provisions, and who depend on their validity, would bear the perverse consequences of this tack.

Such an outcome would also undermine Congress's important goals in enacting Title VII to encourage voluntary, informal dispute resolution. As the Supreme Court has noted, Congress intended informal, out-of-court dispute resolution to be the norm under Title VII, with litigation as a last resort. *Occidental*, 432 U.S. at 366; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (Congress intended "[c]ooperation and voluntary compliance . . . as the preferred means for achieving" equal employment opportunities); *see also* 110 Cong. Rec. 14,190, 14,443 (1964) (statement of Sen. Humphrey) (Civil Rights Act of 1964 "establish[ed] a framework of law wherein men of good will and reason can seek to resolve . . . difficult and emotional issues of human rights" through "voluntary conciliation—not coercion"). In other words, the benefits that separation agreements advance—fast and inexpensive out-of-court resolution of potential employment disputes—are the same goals Congress hoped Title VII would facilitate itself. By throwing up new, undefined hurdles to employers' and employees' ability to reach mutually beneficial separation agreements, the EEOC's position would undermine these important statutory goals.

B. Title VII's Conciliation Requirement Complements The Societal Benefits Of Enforcing Separation Agreements.

The same is true of the procedural issues in this case. The EEOC has not advanced just one novel reading of Title VII, but has also insisted that it has *no* obligation to engage in conciliation or the other pre-suit requirements enshrined in Section 706 before initiating a pattern or practice lawsuit under Section 707(a). EEOC Br. 15-38. Beyond the lack of legal support for, and the illogical practical

consequences of, this contorted reading of Title VII (CVS Br. 39-51), the EEOC's theory ignores the fact that the pre-suit confidential conciliation process mandated by Title VII is a key aspect of Title VII's enforcement regime. Indeed, it is the primary means Congress intended to achieve the statute's goals of informal, non-coercive dispute resolution, as the signers of the original Civil Rights Act of 1964 emphasized. *See*, *e.g.*, 110 Cong. Rec. at 14,443 (statement of Sen. Humphrey). The courts have uniformly echoed this important purpose. *See*, *e.g.*, *Occidental*, 432 U.S. at 367-68 ("Congress, in enacting Title VII, chose cooperation and voluntary compliance … as the preferred means of achieving its goals (citation and alteration omitted)); *Alexander*, 415 U.S. at 44 (Congress created the EEOC to give parties "an opportunity to settle disputes through conference, conciliation, and persuasion" before resort to litigation); *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1042 (7th Cir. 1982) (describing conciliation as the EEOC's "most important function"). Even the EEOC purports to recognize the importance of its conciliation responsibility. *See* EEOC Oversight Hearing, Sen. Comm. on Health, Education, Labor & Pensions (May 26, 2015) (statement of Jenny Yang, Chair, EEOC) ("Litigation is truly a last resort. … We are required to conciliate. We take that responsibility seriously.").

This Term, the Supreme Court further underscored that conciliation is "a key component of the statutory scheme." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015); *see also*, *e.g.*, *id.* ("Congress chose cooperation and voluntary compliance as its preferred means" of bringing "employment discrimination to an end" (citation and alteration omitted)); *id.* at 1653 (emphasizing the "EEOC's duty

to attempt conciliation of employment discrimination claims"). In so doing, it confirmed that Title VII's prerequisites to suit serve the important roles of giving the employer notice of what it has allegedly done and the "opportunity to remedy the allegedly discriminatory practice" without resort to litigation. *Id.* at 1656.

Here, where the EEOC does not dispute that it bypassed Title VII's conciliation requirements (as well as other important pre-suit obligations (*see* CVS Br. 44-45)), it is clear that it has abandoned the spirit *and* the letter of the role Congress intended it should play in "settling disputes … in an informal, noncoercive fashion." *Occidental*, 432 U.S. at 368. The EEOC's aggressive and novel theories—procedurally *and* substantively—sacrifice the important public benefits that Title VII was designed to achieve.

CONCLUSION

For these reasons, this Court should affirm the decision below.

Dated: June 23, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 6,922 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point New Century Schoolbook font.

Dated: June 23, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2015, an electronic copy of the foregoing Brief of *Amici Curiae* In Support Of CVS Pharmacy, Inc. And Affirmance was filed with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the Court's CM/ECF system and was served electronically by Notice of Docket Activity upon all parties, who are registered CM/ECF participants.

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