No. 13-1019

In the Supreme Court of the United States

MACH MINING, LLC, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
GAIL S. COLEMAN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under federal law, once the Equal Employment Opportunity Commission (Commission) determines that there is reasonable cause to support a charge of an unlawful employment practice, the Commission "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). Conciliation efforts may not be "made public by the Commission, its officers or employees" and may not be "used as evidence in a subsequent proceeding" unless all "persons concerned" consent. *Ibid.* If the Commission is "unable to secure from the respondent a conciliation agreement acceptable to the Commission," and at least 30 days have elapsed from the filing of the charge, the Commission may bring suit against the respondent in federal district court. 42 U.S.C. 2000e-5(f)(1).

The question presented is whether the Commission's alleged failure to engage in sufficient conciliation efforts is subject to judicial review as an implied affirmative defense to the merits of the Commission's suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 738 F.3d 171. The opinions of the district court denying the Equal Employment Opportunity Commission's motion for summary judgment (Pet. App. 31a-41a) and denying reconsideration and certifying the case for interlocutory review (Pet. App. 42a-55a) are not published in the *Federal Reporter* but are available at 2013 WL 319337 and 2013 WL 2177770.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2013. A petition for a writ of certiorari was filed on February 25, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, which amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Congress set out a detailed, multi-step process for the Equal Employment Opportunity Commission (Commission or EEOC) to enforce the statute's prohibition on unlawful employment practices. See *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977). The process begins when either a person claiming to be aggrieved or a Commission member files a charge of unlawful employment discrimination with the Commission. See 42 U.S.C. 2000e-5(b). The Commission then notifies the respondent of the charge and begins an investigation. *Ibid.* If the Commission determines that there is not reasonable cause to support the charge, it dismisses the charge and promptly notifies the parties. *Ibid.* At that point, the complainant may file his or her own lawsuit. 42 U.S.C. 2000e-5(f)(1).

If the Commission finds reasonable cause to believe that the charge is true, the Commission "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). If more than 30 days have elapsed from the filing of the charge of employment discrimination and "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission," the Commission may sue the respondent in federal court. 42 U.S.C. 2000e-5(f)(1). By stating that any conciliation agreement must be "acceptable to the Commission," *ibid.*, Congress gave the Commission

sole discretion to decide whether to settle a charge of unlawful employment discrimination or to bring suit.

Congress mandated that all aspects of the conciliation process be kept confidential: "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees." 42 U.S.C. 2000e-5(b). And Congress provided criminal penalties for violation of this confidentiality mandate. *Ibid.* (authorizing fine of up to $1000 and imprisonment of up to one year). Further, Congress provided that nothing said or done during the conciliation process may be "used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.*

2. In 2008, a woman who had unsuccessfully applied for a mining position with petitioner filed a charge of unlawful employment discrimination with the Commission. Pet. App. 3a. She contended that petitioner, which had never hired a woman for a mining position, refused to hire her based on her gender. *Ibid.* The Commission investigated the charge, found reasonable cause to believe petitioner had discriminated against a class of women who applied for mining-related jobs, and invited petitioner to conciliate. *Ibid.* From late 2010 to late 2011, the Commission attempted conciliation with petitioner, but no agreement was reached. *Ibid.*

The Commission then filed this lawsuit, contending that petitioner engaged in a pattern or practice of unlawful employment discrimination and used employment practices that had a disparate impact on female applicants. Pet. App. 31a-32a; Compl. 1-3. In its answer, petitioner asserted a failure-to-conciliate affirmative defense, contending that the complaint

should be dismissed because the Commission had failed to expend sufficient efforts on conciliation. Pet. App. 3a; Answer 3.

The Commission responded that Title VII includes no such failure-to-conciliate affirmative defense, and it moved for partial summary judgment on that basis. Pet. App. 4a. In the meantime, petitioner submitted "extensive discovery requests"—including more than 600 requests for admissions of fact—that "s[ought] information about the EEOC's investigation and conciliation efforts." *Id.* at 3a-4a; see p. 18, *infra*. Petitioner also "slowed discovery on the merits" by objecting to the Commission's merits-related discovery requests on "failure to conciliate" grounds. Pet. App. 4a.

3. The district court denied the Commission's summary-judgment motion. Pet. App. 31a-41a. Relying on precedent from other circuits, the court concluded that it may review the Commission's informal settlement efforts to determine whether the Commission "made a sincere and reasonable effort to negotiate." *Id.* at 34a-36a, 40a (citation and internal quotation marks omitted).

The district court denied the Commission's motion for reconsideration but certified to the court of appeals the questions whether and to what extent the Commission's efforts to informally resolve a charge of discrimination prior to suit are judicially reviewable. Pet. App. 42a-55a; see 28 U.S.C. 1292(b).

4. The court of appeals reversed. Pet. App. 1a-30a. The court concluded, based on the statute's text, the lack of any meaningful standard of review, and the statute's overall scheme and purposes, that "an alleged failure to conciliate is not an affirmative defense

to the merits of a discrimination suit." *Id.* at 2a. In the court's view, if the Commission has "ple[aded] on the face of its complaint that it has complied with all procedures required under Title VII" and the relevant documents (letter of determination and notice of conciliation failure) are "facially sufficient," then no further judicial review is warranted. *Id.* at 30a.

The court of appeals observed that the statute "contains no express provision for an affirmative defense," and it concluded that provisions addressing conciliation "mak[e] clear" that "conciliation is an informal process" that is entrusted to "the EEOC's expert judgment." Pet. App. 5a-6a. The court noted that Congress's directive that the Commission "*endeavor to eliminat*e" discrimination using "*informal methods* of conference, conciliation, and persuasion," as well as its statement that any settlement must be "*acceptable to the Commission*," show that Congress intended there to be "deference to agency decision-making." *Id.* at 7a (quoting 42 U.S.C. 2000e-5(b) and (f)(1)). The court further explained that the statute's requirement that "all details of the conciliation" be kept "strictly confidential," along with its prohibition on the use of informal conciliation efforts "as evidence" in a subsequent proceeding, cannot be reconciled with petitioner's proposed affirmative defense, because those provisions expressly preclude consideration of the materials that would be used to establish or disprove that defense. *Ibid.* (citing 42 U.S.C. 2000e-5(b)).

The court of appeals also concluded that Title VII contains "no meaningful standard" for courts to use to evaluate a failure-to-conciliate affirmative defense. Pet. App. 9a-16a (citation omitted). That is so, the

court explained, because the statute provides "open-ended" language about the Commission's duty to informally attempt settlement and gives the Commission "complete discretion to accept or reject an employer's offer." *Id.* at 9a. The court further observed that courts have "varied widely in what evidence they consider and what actions they require of the EEOC," showing that there is no "workable legal standard" for courts to apply to evaluate a failure-to-conciliate affirmative defense. *Id.* at 10a n.2, 16a.

The court of appeals explained that a failure-to-conciliate affirmative defense makes no sense in the broader statutory scheme, because such a defense would "invite[] employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." Pet. App. 16a. And the result of permitting petitioner's proposed defense would be to "protract and complicate Title VII litigation," with "little or no offsetting benefit" in terms of obtaining voluntary compliance with the law. *Id.* at 17a (citation omitted).

Finally, the court of appeals concluded that an alleged failure to engage in sufficient conciliation efforts is not a "sound basis for dismissing a case on the merits," because "[t]he wrong claimed by [petitioner] here is purely one of insufficient process," and "the remedy for a deficiency in process is more process, not letting one party off the hook entirely." Pet. App. 28a-29a. Dismissal of a Title VII claim on the merits would "excuse the employer's (assumed) unlawful discrimination" and impose the "significant social costs of allowing employment discrimination to go unaddressed." *Id.* at 28a, 30a.

DISCUSSION

Petitioner contends (Pet. 12-21) that this Court should grant certiorari to resolve disagreement in the courts of appeals about whether the Commission's failure to conciliate sufficiently provides an implied affirmative defense in a Title VII lawsuit. The court of appeals correctly held that the informal conciliation process is entrusted to the Commission and that an alleged failure to expend sufficient conciliation efforts is not an affirmative defense to a claim of discrimination under Title VII. The Commission agrees with petitioner, however, that this case presents a recurring question of substantial importance on which the courts of appeals have disagreed. Although the question presented arises here in an interlocutory posture, the question is a purely legal one, and this Court's review is necessary to provide guidance to the Commission and to employers. This Court's review of the question presented therefore is warranted.

1. The court of appeals correctly concluded that the Commission's alleged failure to expend sufficient efforts to resolve informally the charge of discrimination does not provide an implied affirmative defense in a Title VII lawsuit.

a. Petitioner seeks an affirmative defense to liability that appears nowhere in the text of Title VII. That Title VII contains no such defense is itself reason enough not to recognize it. And in the particular context of "a statute as precise, complex, and exhaustive as Title VII," which includes detailed and comprehensive enforcement procedures, this congressional silence is "compelling." Pet. App. 6a (citation omitted).

Moreover, the Title VII provisions that do address informal dispute resolution make clear that Congress

did not intend courts to review the Commission's conciliation efforts. The statute directs the Commission to "endeavor to eliminate" unlawful discrimination through "informal methods of conference, conciliation, and persuasion" before filing suit. 42 U.S.C. 2000e-5(b). The statute does not set out any particular procedures the Commission must follow, leaving it up to the agency to decide which combination of "informal methods" to utilize and how long to pursue conciliation. Congress also entrusted to the agency the decision whether to settle the dispute at all by providing that the Commission may sue if it is "unable to secure * * * a conciliation agreement *acceptable to the Commission*." 42 U.S.C. 2000e-5(f)(1) (emphasis added). These provisions demonstrate that "conciliation is an informal process entrusted solely to the EEOC's expert judgment." Pet. App. 6a. As the court of appeals noted, "[i]t would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text." *Id.* at 7a.

The statute's confidentiality provisions reinforce that Congress did not intend to provide an affirmative defense that would enable courts to review the Commission's informal conciliation efforts. Immediately following the provision directing the Commission to "endeavor to eliminate" discrimination through informal conciliation methods, Congress provided that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. 2000e-5(b). Congress included no exceptions to the confidentiality mandate, and it barred use of informal conciliation

proceedings as evidence unless all "persons concerned" consent. And Congress underscored the importance of confidentiality by including criminal penalties for "[a]ny person who makes public information in violation of this subsection." *Ibid.*[1]

These provisions refute petitioner's contention that Congress envisioned courts second-guessing the agency's conciliation efforts. As the court of appeals explained, recognizing a failure-to-conciliate affirmative defense would require courts either to respect the statute's confidentiality provisions and "evaluate conciliation without evidence to weigh," or to "construct an implied set of exceptions to the sweeping statutory requirement of confidentiality." Pet. App. 9a. Neither approach is appealing. The court of appeals thus chose appropriately to "stick to the text" and "reject [petitioner's] nonstatutory affirmative defense." *Ibid.*

b. The absence from the statute of any meaningful standard for courts to use to evaluate the Commission's informal dispute-resolution efforts confirms that Congress intended no implied affirmative defense here. As the court of appeals explained, the statute "says nothing about" what steps the Commission must take or how vigorously the Commission must pursue conciliation, and all it says about the substance of settlements is that a conciliation agreement must be "acceptable to the Commission." Pet. App. 9a; 42 U.S.C. 2000e-5(f)(1). By labeling conciliation "informal," by giving the Commission the choice of how to

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[1] The absolute protection for the confidentiality of conciliation matters contrasts with the bar on disclosure of information obtained during Commission investigations, because that bar lasts only until "the institution of any proceeding * * * involving such information," 42 U.S.C. 2000e-8(e).

attempt settlement (conference, conciliation, or persuasion), by ensuring the process remains confidential, and by entrusting the ultimate decision to settle to the agency, Congress has committed the conciliation process to the agency, rather than providing a "judicially reviewable prerequisite to suit." Pet. App. 9a.

Lacking any express guidance from Title VII's text, the courts that have sought nevertheless to evaluate the Commission's settlement efforts understandably "have struggled to provide meaningful guidance on how to judge the process." Pet. App. 27a. The courts of appeals have articulated different standards for reviewing the Commission's conciliation efforts, see pp. 13-16, *infra*, and even courts applying the same formulations have disagreed on the application of those standards. See Pet. App. 25a-27a; see also *id.* at 10a n.2 (providing numerous examples of disagreement in the courts' approaches). The result is that evaluation of the Commission's conciliation process has been left largely to the ad hoc judgments of individual judges. That is no surprise. Crafting a workable standard for reviewing the Commission's efforts is difficult, in large part because "Title VII leaves the choice to settle or not entirely to the EEOC's unreviewable discretion." *Id.* at 12a-13a.

Petitioner concedes (Pet. 26) that Title VII precludes a court from reviewing the Commission's efforts to decide whether "the *substance* of a settlement proposal is satisfactory," but nevertheless contends that courts may evaluate "the *procedural* adequacy of the Commission's conciliation efforts." But the distinction between substance and procedure in this context is elusive at best, and thus, as the court of

appeals noted, reviewing "the conciliation process" "almost inevitably" results in courts' "engag[ing] in a prohibited inquiry into the substantive reasonableness of particular offers." Pet. App. 12a. The inability of courts to develop workable standards, like the absence of any such standards in the text, makes plain that Congress "did not intend for judicial review of conciliation through an implied affirmative defense." *Id.* at 16a.[2]

c. Recognition of an implied failure-to-conciliate affirmative defense also would undermine conciliation. As petitioner acknowledges (Pet. 3, 22-23), Congress preferred that charges of discrimination be resolved informally where possible. Yet petitioner's proposed affirmative defense would have precisely the opposite effect. If the employer knows it may "avoid liability down the road * * * by arguing that the EEOC did not negotiate properly," it has every incentive to thwart the settlement process and to "stockpile exhibits for the coming court battle" rather than to negotiate in good faith with the Commission, especially because "the employer remains free to settle after the EEOC files suit." Pet. App. 17a-18a. As the court of appeals noted, this incentive is greatest in clear cases of employment discrimination: "the stronger the EEOC's case on the merits, the stronger the incentive

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[2] Petitioner does not contend that the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, independently authorizes judicial review of the Commission's conciliation efforts. See Pet. App. 14a. Such an argument would fail in any event because, *inter alia*, the Commission's decision that conciliation has failed is not a "final agency action" within the meaning of 5 U.S.C. 704, and because the decision whether to reach a conciliation agreement is one "committed to agency discretion by law," 5 U.S.C. 701(a)(2).

to use a failure-to-conciliate defense." *Id.* at 18a. The effect would be to "protract and complicate Title VII litigation," shifting the focus from the charge of unlawful discrimination to the collateral question whether the agency did enough to settle the charge before filing suit. *Id.* at 17a (citation omitted).

Petitioner contends (Pet. 35-37) that judicial review is nevertheless necessary to ensure that the Commission undertakes good-faith conciliation efforts. But that is wrong. The Commission takes seriously its obligation to endeavor to informally resolve charges of discrimination, see, *e.g., United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001) (noting that "a presumption of regularity attaches to the actions of Government agencies"), and the reality of budget and resource constraints reinforces the Commission's commitment in that regard, providing "powerful incentives to conciliate." Pet. App. 20a. And the Commission's enforcement record establishes that it has been successful in seeking to resolve charges informally. For example, in 2013, the Commission received over 90,000 charges of unlawful discrimination (under all anti-discrimination statutes it enforces), found reasonable cause in 3515 cases, and successfully conciliated in 1437 cases, filing suit on the merits in only 131 cases.[3] Consistent with those figures, the Commission has obtained far greater monetary recovery

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[3] See EEOC, *EEOC Litigation Statistics, FY 1997 through FY 2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (*EEOC Litigation Statistics*) (last visited May 22, 2014); EEOC, *All Statutes, FY 1997 - FY 2013*, http://www.eeoc.gov/eeoc/ statistics/enforcement/all.cfm (*All Statutes*) (last visited May 22, 2014).

through non-litigation resolutions than through litigation.[4]

Moreover, a failure-to-conciliate affirmative defense would result in legitimate claims of employment discrimination being dismissed—a remedy that is far too "final and drastic" for the deficiency in process alleged. Pet. App. 28a-30a. As the court of appeals observed, any purported defect in the conciliation process provides no "sound basis for dismissing a case on the merits," because "the remedy for a deficiency in process is more process, not letting one party off the hook entirely." *Id.* at 28a, 29a. Dismissal of a Title VII claim on the merits would "excuse the employer's (assumed) unlawful discrimination" and impose the "significant social costs of allowing employment discrimination to go unaddressed." *Id.* at 28a, 30a. There is, in short, no warrant to develop an extra-statutory failure-to-conciliate affirmative defense to allow employers to avoid liability for employment discrimination.

2. The courts of appeals have disagreed about whether and to what extent courts may review the Commission's alleged failure to engage in sufficient conciliation efforts before filing a Title VII lawsuit. The court of appeals in this case held that courts may not review the Commission's conciliation efforts and that there is no implied failure-to-conciliate affirmative defense for Title VII defendants. Pet. App. 30a. In contrast, the Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have held that courts

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[4] See *EEOC Litigation Statistics* and *All Statutes* (together reporting that in 2013, the Commission obtained $ 372.1 million through non-litigation resolutions, but recovered just $ 38.6 million through litigation).

may inquire into the sufficiency of the Commission's informal conciliation efforts. Those courts' approaches differ on what standard the Commission must meet and whether failure to meet that standard justifies dismissal of a Title VII lawsuit on the merits.

The Fourth, Sixth, and Tenth Circuits, for example, have held that courts may review the sufficiency of the Commission's conciliation efforts to decide if the Commission "ma[de] a good faith effort to conciliate the claim." *EEOC* v. *Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); see *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC* v. *Zia Co.*, 582 F.2d 527, 533-534 (10th Cir. 1978). These courts have varied in describing what effect a finding of insufficient conciliation efforts would have on a Title VII lawsuit. Compare *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 272 (4th Cir.) (sex-discrimination allegations in the complaint should be dismissed based on a failure to conciliate), cert. denied, 429 U.S. 920 (1976), with *Zia Co.*, 582 F.2d at 533-534 (remedy for insufficient conciliation efforts is additional process). Although these courts have not given much content to their good-faith standard, it is clear that the standard in practice is far from "modest" (Pet. 17).[5]

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[5] See, *e.g.*, *Keco*, 748 F.2d at 1101-1102 (reviewing the terms of a proposed settlement agreement and deciding whether conciliation efforts had sufficiently "broke[n] down"); *Radiator Specialty Co.*, 610 F.2d at 183 (examining all communications between the parties before concluding that the failure to reach agreement "cannot be attributed to the Commission"); *Zia Co.*, 582 F.2d at 531-534 (reviewing the parties' interactions in detail and concluding that the Commission should have "given" the respondent "more time").

The Fifth and Eleventh Circuits have utilized a more searching three-part test for evaluating the sufficiency of the Commission's conciliation efforts. Under that test, the courts ask whether the Commission (1) has sufficiently explained its reasonable cause determination to the employer, (2) has provided the employer with a sufficient opportunity to comply voluntarily, and (3) has responded "in a reasonable and flexible manner to the reasonable attitudes of the employer." *EEOC* v. *Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC* v. *Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) (per curiam). The Second Circuit has adopted that test in the context of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, which also includes a conciliation provision. See *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996), cert. denied, 522 U.S. 808 (1997).[6] The courts that apply this test have authorized dismissal of discrimination lawsuits on the merits when the courts deem the Commission's conciliation efforts unsatisfactory.[7]

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[6] See also *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981) (in the Title VII context, stating the Commission "must make a genuine effort to conciliate with respect to each and every employment practice complained of" and "must afford a fair opportunity to discuss" the challenged practices (citation and internal quotation marks omitted)).

[7] See, *e.g.*, *Asplundh Tree Expert Co.*, 340 F.3d at 1261; *Sears, Roebuck & Co.*, 650 F.2d at 19; see also *EEOC* v. *Agro Distribution, LLC*, 555 F.3d 462, 469 (5th Cir. 2009) (stating that "dismissal" would be an "appropriate sanction" in the context of a lawsuit under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*); but see also *EEOC* v. *Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002-1003 (5th Cir. 1980) (per curiam) (stating that

And the three-part test has proven to be quite probing.[8]

Petitioner also cites (Pet. 14) cases from the Eighth and Ninth Circuits. The Eighth Circuit has affirmed the dismissal of a complaint based on the conclusion that the Commission's investigation and conciliation efforts were insufficient, but it did not clearly articulate the standard for scrutinizing the Commission's actions. See *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 676-677 (8th Cir. 2012). The Ninth Circuit has not addressed whether Title VII includes an implied failure-to-conciliate affirmative defense; the cited cases (Pet. 14) say only that "failure to conciliate can be a basis for awarding attorney's fees to a defendant in a Title VII case." *EEOC* v. *Bruno's Rest.*, 13 F.3d 285, 288-289 (9th Cir. 1993); see *EEOC* v. *Pierce Packing Co.*, 669 F.2d 605, 608-609 (9th Cir. 1982) (similar).[9]

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appropriate response to insufficient conciliation efforts in a Title VII case is to stay the litigation to permit additional negotiations).

[8] See, *e.g.*, *Sears, Roebuck & Co.*, 650 F.2d at 17-19 (although the Commission attempted conciliation for 14 months, with 28 meetings between the parties and "extensive correspondence," court affirmed dismissal of the lawsuit because the Commission sought a conciliation agreement that was nationwide in scope, but sued regarding discrimination at only two stores); *Klingler Elec. Corp.*, 636 F.2d at 107 (calling for a "thorough inquiry" into the terms of the proposed settlement agreement; the "materiality of the information" the employer proposed to add to the agreement; "the history of negotiations"; and "the nature of the EEOC's counterproposal and [the employer's] response" in order to judge "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances").

[9] The question whether courts may review the Commission's conciliation efforts in a Title VII case is presented in a pending case in the Ninth Circuit. See *EEOC* v. *The Geo Grp., Inc.*, No. 13-

The disagreement in the circuits on this issue is unlikely to be resolved without this Court's intervention. The court below circulated its opinion to all active Seventh Circuit judges, and no judge called for en banc review of the decision. Pet. App. 25a n.3. The approaches in the other circuits are longstanding. Accordingly, there is disagreement in the circuits warranting this Court's review.

3. Resolution of the question whether Title VII includes an implied failure-to-conciliate affirmative defense will have significant consequences for the enforcement of Title VII and other laws. Congress has directed the Commission to attempt conciliation before filing suit not only under Title VII, but also under the ADEA, see 29 U.S.C. 626(b), the Americans with Disabilities Act of 1990, see 42 U.S.C. 12117 (incorporating Title VII procedures), and the Genetic Information Nondiscrimination Act of 2008, see 42 U.S.C. 2000ff-6(a)(1) (Supp. V 2011) (incorporating Title VII procedures). Other statutes containing conciliation requirements also may be affected by resolution of the question presented. See 2 U.S.C. 437g(a)(4)(A)(i) (federal election law); 42 U.S.C. 3610(b)(1) (Fair Housing Act).

The disagreement in the circuits has placed the Commission in an untenable position. The Commission is statutorily required to endeavor to resolve disputes through informal conference, conciliation, and persuasion. Yet the wide variety in the courts' approaches makes it increasingly difficult for the agency to ensure that its informal efforts are sufficiently robust to avoid dismissal of meritorious law-

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16292 (9th Cir.) (opening brief and answering brief have been filed; reply brief is due on June 18, 2014).

suits on failure-to-conciliate grounds, and conciliation itself has become more protracted, resource-intensive, and time consuming. Further, in many circuits the agency is forced to choose between following Congress's mandate that everything "said or done" during the conciliation process be kept confidential and may not be used as evidence "in any subsequent proceeding" (42 U.S.C. 2000e-5(b)) and responding to an employer's failure-to-conciliate defense by disclosing its efforts to conciliate.

Moreover, the recognition of an implied failure-to-conciliate affirmative defense has created incentives for employers to treat conciliation not as a means to resolve disputes voluntarily, but as an opportunity to develop an affirmative defense for litigation. Numerous employers have challenged the adequacy of the Commission's conciliation efforts, and these challenges have led to substantial collateral litigation that is wholly unrelated to the merits of the underlying employment-discrimination lawsuits. In this case, for example, petitioner spent two years seeking extensive discovery about the Commission's investigation and conciliation efforts. Pet. App. 3a. It submitted 696 requests for admissions of fact, 645 of which related to the Commission's investigation or conciliation, Pet. First Reqs. for Admis. 1-5 & Attachs. 1-44 (June 27, 2012) (Docket entry No. 25), and it objected to merits-based discovery based on the Commission's "asserted failure to conciliate." Pet. App. 3a-4a; see Mot. for Partial Summ. J. Ex. E, at 3, 5-12 & Ex. F, at 2-20 (July 30, 2012) (Docket entry No. 32). The implied failure-to-conciliate affirmative defense has become "a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who

wish instead to delay [litigation] as long as possible." *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 66-67, 81 (1984) (discussing notice requirement). This Court should grant certiorari and hold that there is no implied failure-to-conciliate affirmative defense under Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
GAIL S. COLEMAN
Attorney
Equal Employment Opportunity Commission

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