No. 14-1375

IN THE
Supreme Court of the United States

CRST VAN EXPEDITED, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a dismissal of a Title VII case, based on the Equal Employment Opportunity Commission's total failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, can form the basis of an attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k)?

PARTIES TO THIS PROCEEDING

The only two parties to this proceeding are identified in the case caption on the cover.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner CRST Van Expedited, Inc. is the wholly owned subsidiary of its parent corporation, CRST International, Inc., which is a privately held corporation. No publicly held corporation owns any of CRST Van Expedited's or CRST International's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a) is reported at 774 F.3d 1169 (8th Cir. 2014). The opinion of the United States District Court for the Northern District of Iowa (Pet. App. 33a) is unreported but is available at 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013). The Eighth Circuit's earlier opinion (Pet. App. 86a) is reported at 679 F.3d 657 (8th Cir. 2012). The district court's earlier opinion (Pet. App. 164a) is unreported but is available at 2009 U.S. Dist. LEXIS 71396 (N.D. Iowa Aug. 13, 2009).

JURISDICTION

The Eighth Circuit entered its judgment on December 22, 2014, and denied petitioner's timely petition for rehearing en banc on February 20, 2015. Petitioner filed a timely petition for certiorari on May 19, 2015, which this Court granted on December 4, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for the costs the same as a private person.

Section 706 of Title VII, 42 U.S.C. § 2000e-5, provides in pertinent part that:

> (b) . . . Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer . . . (hereinafter referred to as the "respondent") 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 and promptly notify the person claiming to be aggrieved and the respondent of its action. . . . 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 any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . . The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(f)(1) 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) of this section, 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. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT

In the underlying litigation before the district court, the Equal Employment Opportunity Commission (EEOC) admitted that it had asserted 67 individual claims of sexual harassment against CRST under Title VII without first investigating the claims, determining whether there was reasonable cause to believe them, or attempting to conciliate them, as Title VII requires. The district court therefore dismissed those claims, and the Eighth Circuit affirmed. Based on those rulings, which are no longer at issue, Petitioner sought, and the district court awarded, attorney's fees and costs pursuant to Title VII and this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The Eighth Circuit, however, reversed the fee award based on that circuit's rule that fee awards to defendants require a resolution of the case "on the merits." As shown *infra*, there is no such limitation in the statute or in this Court's precedents. Nor would it make sense to create one. And even if there were a requirement that defendants prevail "on the merits" in order to qualify for fees, such a rule would not bar the award in this case.

A. Statutory Background

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. Title VII also created the EEOC. *Id.* § 2000e-4(a).

Title VII's enforcement procedure begins when a "person claiming to be aggrieved" by an "unlawful employment practice" files a charge with the EEOC.

Id. § 2000e-5(b). The statute provides that the EEOC "shall serve a notice of the charge" on the employer (including "the date, place and circumstances of the alleged unlawful employment practice") and that the EEOC "shall make an investigation." *Id.* If the EEOC "determines after such investigation that there is not reasonable cause to believe that the charge is true," it dismisses the charge and notifies the parties. *Id.* The individual claiming to be aggrieved may then sue the employer in district court. *Id.* § 2000e-5(f)(1). If, however, the EEOC determines "that there is reasonable cause to believe that the charge is true," it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(b).

Under the 1964 Act, the EEOC had no authority to bring suit if conciliation was unsuccessful. Rather, "[t]he failure of conciliation efforts terminated the involvement of the EEOC." *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 358-59 (1977). When conciliation failed, the EEOC notified the individual claiming to be aggrieved, and he or she could then bring a civil action in district court. *Id.*; *see* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260. The 1964 Act did, however, empower the Attorney General to bring a civil action on behalf of the United States if he or she had "reasonable cause to believe" that an employer was intentionally "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title." *Id.* § 707(a), 78 Stat. at 261 (codified at 42 U.S.C. § 2000e-6(a)); *see*,

e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 328-30 (1977).

In 1972, Congress modified the statute in two significant respects. First, it authorized the EEOC to bring a civil action against the employer named in a charge if, after completing the above procedures, the EEOC was "unable to secure from the respondent a conciliation agreement acceptable to" it. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104 (codified at 42 U.S.C. § 2000e-5(f)(1)). The amended Act thus established "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life*, 432 U.S. at 359. The EEOC must first investigate the charge; next determine if there is reasonable cause to believe that it is true; and then attempt to conciliate any credible claims it identifies. *See id.* Only if the EEOC completes these procedures and its conciliation efforts are unsuccessful can it file suit based on those identified claims. *See id.*[1]

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[1] As this Court has noted, the courts of appeals have held that the EEOC may litigate claims that it identifies in a reasonable investigation of the original charge, even if those claims were not raised in the charge itself. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 331 (1980). This "reasonable investigation" rule still requires that all claims be subject to an investigation, a reasonable-cause determination, and a conciliation effort by the EEOC before it brings suit. *See, e.g.*, *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 366 (4th Cir. 1976), *cited in Gen. Tel. Co. of the Nw., Inc.*, 446 U.S. at 331.

Second, while preserving the separate statutory provision for "pattern or practice" actions, Congress transferred that enforcement authority from the Attorney General to the EEOC. Pub. L. No. 92-261, § 5, 86 Stat. at 107 (codified at 42 U.S.C. § 2000e-6(c), (e)); *see Int'l Bhd. of Teamsters*, 431 U.S. at 328 n.1. When it brings a pattern-or-practice suit pursuant to the separate statutory authorization in Section 707, the EEOC "is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *Int'l Bhd. of Teamsters*, 431 U.S. at 360. Rather, the EEOC's "burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant." *Id.*

The statute has always provided, as it does now, that in any Title VII action, "the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k). In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), this Court held that a district court may award an attorney's fee to a prevailing defendant under this provision only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation."

B. Proceedings Below

1. Background

CRST is a family-owned long-distance trucking company headquartered in Cedar Rapids, Iowa. JA 397a. CRST employs two-driver teams to transport shipments throughout the nation on large tractor-trailer trucks. *Id.*

Working conditions for CRST's long-haul drivers are unlike those for many jobs. The two-driver teams spend up to twenty-two hours a day together operating a large truck. The truck's cab, with two front seats and a two-bunk berth area, has both driving and living functions. Trips may last up to twenty-one days, and drivers usually spend no time with their families during such trips. Access to restrooms and showers is limited. Because drivers are continuously on the road, their supervisors seldom see them working together. *Id.* at 397a-398a.

CRST employs three categories of team drivers: (i) trainees; (ii) lead drivers who provide the training; and (iii) fully qualified co-drivers. All three categories of drivers report to dispatchers. *Id.* at 398a.

The EEOC interprets Title VII to require that trucking companies compose their driver teams without regard to sex. In 1997 and 2004, the EEOC sued two trucking firms for implementing same-sex assignment policies, seeking punitive damages. Both cases were settled with consent decrees that "prohibit[] the Company from preferring same-sex assignments of drivers during training." Consent Decree 5, *EEOC v. Gordon Trucking, Inc.*, Case No. 3:04-cv-5646 (W.D.

Wash. Oct. 4, 2004) (reprinted in ECF No. 150-5 at 124, 128); Consent Decree 5, *EEOC v. Swift Transportation Co., Inc.*, Case No. 3:97-cv-965 (D. Or. Oct. 28, 1998) (reprinted in ECF No. 150-5 at 85, 89). The EEOC recently prevailed in another challenge to a trucking company's same-sex driver team policy. *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201 (W.D. Mo. 2014). In that case, the court agreed with the EEOC that such policies are "facially discriminatory" and cannot be justified by a concern to protect drivers from sexual harassment. *Id.* at 1213-14.

Based on the EEOC's requirements, CRST has adopted a gender-neutral policy in composing its driver teams. Consequently, women and men often drive together. JA 401a. At the time of the events at issue, 14% of CRST's drivers were women, which was "more than three times as many women as an expert would predict" based on "the availability of women in the relevant labor market." *Id.* at 400a-401a.

2. EEOC Investigation and Preliminary Proceedings

On December 1, 2005, Monika Starke, a CRST driver, filed a Charge of Discrimination with the EEOC, alleging two different incidents of sexual harassment by two different male lead drivers. Pet. App. 165a-166a. The EEOC undertook an investigation of Ms. Starke's allegations, and CRST voluntarily provided a variety of requested information. *Id.* at 167a-173a & n.6. Over the next several months, the EEOC made additional requests for information about, *inter alia*, other women who had driven with the alleged harassers; other charges of harassment that

CRST had received from any government agency within the past five years; and the driving histories of all female drivers employed since 2005. *Id.* at 171a-180a. CRST voluntarily provided all of this information as well. *Id.* at 179a-180a.

On July 12, 2007, the EEOC issued a Letter of Determination finding "reasonable cause to believe" that CRST "subjected [Starke] to sexual harassment," and also that CRST "has subjected a class of employees and prospective employees to sexual harassment." JA 811a. The parties tried and failed to conciliate Ms. Starke's claim. Pet. App. 183a. No other individual claims were raised or discussed during the conciliation process.[2] When CRST inquired as to the purported "class" identified in the EEOC's Letter of Determination, the EEOC responded that it "was not able to provide names of all class members" or even "an indication of the size of the class." *Id.* at 182a (quoting JA 282a (Decl. of EEOC Investigator Bloomer)).

3. District Court Litigation and Discovery Proceedings

On September 27, 2007, the EEOC filed a single-count complaint under Section 706(f) of Title VII on behalf of Ms. Starke and a class of "similarly situated" but unidentified female employees of CRST. JA 783a-809a. The EEOC sought injunctive relief and compensatory and punitive damages for Ms. Starke and

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[2] The EEOC subsequently made a reasonable-cause determination with respect to one other individual charge of sexual harassment filed by another CRST driver, Remcey Peeples. The EEOC attempted to conciliate that claim in October 2007. JA 283a.

other women who had allegedly been sexually harassed while they were employed by CRST. The complaint did not make any allegations that CRST had engaged in a "pattern or practice" of discrimination, and it did not invoke Section 707 of Title VII. *See id.* at 792a-799a.

As the district court explained, neither the EEOC's Letter of Determination nor its complaint identified any individual claimants other than Ms. Starke or provided any "indication of how many 'similarly situated female employees' the EEOC alleged to exist." Pet. App. 186a-187a. The court adopted a discovery plan based on its impression that "the number of allegedly aggrieved persons was relatively small." *Id.* at 187a. In the course of discovery, however, "it became clear that the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief," and that "the EEOC was using discovery to find them." *Id.* at 188a. For example, between May and September of 2008, the EEOC sent 2,730 letters to former female employees of CRST soliciting them to participate in the lawsuit. *Id.*

Fearing that "this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons," the court set a deadline of October 15, 2008, for the EEOC to identify all of the individuals whose claims it would pursue in this case. *Id.* at 188a-189a. Roughly one week before the deadline, the EEOC had identified 79 claims. *Id.* at 189a. In the final days, however, the EEOC began identifying large numbers of claims very quickly. *Id.* at 190a. The EEOC ultimately named 270

individuals who had allegedly been sexually harassed by male CRST drivers. *Id.* at 189a.

Because the EEOC identified so many claims in such a short period of time, CRST moved for an order to show cause why the hastily identified claims should not be dismissed on the ground that the EEOC could not possibly have investigated them or adequately determined their validity. In response, the EEOC asserted that "[e]ach class member named by the EEOC . . . has provided credible evidence of sexual harassment." JA 689a.[3] The EEOC also asserted that it intended to litigate this matter as "a pattern or practice case." *Id.*

The district court accepted the EEOC's "represent[ation] to the court that . . . it had a good-faith belief that each and every one of the approximately 270 women disclosed to CRST has an actionable claim for sex discrimination." *Id.* at 655a. But the court warned the EEOC that if it later turned out that its claims were not reasonably grounded, CRST could file "an appropriate motion." *Id.* at 656a. The district court also advised CRST that, "[c]onsistent with the EEOC's representations to the court, CRST may assume with some certainty that this is approximately a 270-person pattern-or-practice case." *Id.* at 657a.

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[3] The EEOC noted one exception: it had named 56 women with whom it had not yet had "personal contact," but as to whom it nonetheless "ha[d] a good faith belief that they were likely victims of sexual harassment." JA 696a.

The number of claimants was reduced, however, when the district court dismissed 99 of the EEOC's original 270 individual claims as a discovery sanction—which the EEOC did not appeal—because the claimants did not appear for their depositions. Pet. App. 192a. The EEOC unilaterally dropped 18 other claims. That left 154 claimants, each of whom CRST deposed.

After discovery closed, CRST moved for summary judgment with respect to the EEOC's contention that CRST had engaged in a "pattern or practice" of discrimination, as well as with respect to a majority of the EEOC's individual claims. JA 30a-34a.

In ruling on CRST's pattern-or-practice motion, the court emphasized that "[t]he EEOC did not plead a violation of § 707, and the phrase 'pattern or practice'—a phrase with which the EEOC is familiar—appears nowhere in the EEOC's Complaint." *Id.* at 382a. "[M]uch confusion ha[d] ... crept into this case," however, through the EEOC's repeated use of "pattern or practice" terminology in its briefing, which raised the concern that it was "pursuing matters in this case that it did not plead or allege in [its] Complaint." *Id.* The district court noted that it appeared "the EEOC is attempting to have its cake and eat it too," by "attempting to avail itself of the *Teamsters* burden-shifting framework yet still seek compensatory and punitive damages under § 706." *Id.* at 383a.

The court explained that it would bypass the "cloud of confusion" by simply assuming that the EEOC was entitled to argue a "pattern or practice" theory of liability. *Id.* The court then rejected that theory on the merits. In particular, the court found that CRST's

written anti-harassment policy and its enforcement of that policy satisfied Title VII's requirements, *id.* at 429a-431a, and that the incidence of allegations of sexual harassment at CRST was too low to suggest any wrongful pattern or practice, *id.* at 431a-433a. The court therefore concluded that the EEOC had not established even a *prima facie* case of a pattern or practice of tolerating sexual harassment. *Id.* at 429a; *see id.* at 433a (explaining that "the EEOC's argument boils down to little more than its bald assertions"). The court therefore held that "[t]o the extent that the EEOC asserts a 'pattern or practice claim' in this litigation against CRST, such claim is dismissed with prejudice." *Id.* at 442a.

The district court also granted summary judgment to CRST with respect to 87 of the EEOC's remaining 154 individual claims. Because CRST does not operate a large common workplace, such as a factory or office, each of the claims was based on unique facts, including different female drivers, alleged harassers, trucks, locations, times, and types of alleged harassment. The grounds for the court's summary judgment rulings varied from claim to claim and included that the alleged harassment was not severe or pervasive; that the female drivers had not complained of harassment when CRST could have acted to remedy it; that CRST had adequately responded when it did receive timely complaints; and that some claims were time-barred.[4]

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[4] The district court's summary judgment rulings on the EEOC's individual claims are included in the Joint Appendix. *See* JA 312a-346a (statute of limitations); JA 292a-311a (judicial estoppel); JA 223a-274a (interveners' claims); JA 205a-222a (failure to report or

4. Dismissal For Failure To Satisfy Pre-Suit Obligations

After the summary judgment rulings, 67 individual claims remained. Although the EEOC's class-wide "pattern or practice" theory had been rejected, the EEOC persisted in pressing these claimants' allegations, seeking to "present separate claims for each" at trial based on their particular facts. JA 348a (EEOC's Resistance to Mots. In Limine). CRST moved to dismiss these claims on the ground that the EEOC had not fulfilled its statutory obligations to investigate the facts, determine whether there was reasonable cause to believe that the complainants' allegations were true, and then, if so, attempt to conciliate their claims before bringing suit on their behalf.

In response to CRST's motion, the district court required the EEOC to specify whether and when it had investigated, found reasonable cause, and attempted to conciliate each of the claims. *Id.* at 278a-279a. In its submission, the EEOC conceded that, with respect to the "individual claim[s] of sex harassment" brought by each of the remaining 67 women, it had made "no separate investigation . . . prior to litigation," reached "no separate Reasonable Cause Determination," and attempted "no separate conciliation."[5] Supp. App. 5-42.

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effective CRST response to reported harassment); JA 186a-204a (alleged harassment not severe or pervasive); JA 175a-185a (two or more grounds).

[5] The EEOC also conceded that it did not investigate, find reasonable cause, or attempt to conciliate any of the other claims resolved on summary judgment, with the exception of its two claims on behalf of Ms. Starke and Ms. Peeples. *See* JA 101a

However, the EEOC argued that, because it investigated Ms. Starke's charge of sexual harassment against CRST and included an undefined "class of employees" in its Letter of Determination for Ms. Starke's charge (as well as in another Letter for one other individual charge), the EEOC was not required to satisfy the pre-suit requirements for the hundreds of other individual claims that it added in the course of litigation.[6]

The district court rejected the EEOC's argument. As the court explained, the EEOC may pursue related claims that emerge in its pre-suit investigation, even if they are not raised in the original charge, as long as these claims are "included in the reasonable cause determination and subject to a conciliation proceeding." Pet. App. 199a (quoting *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992)). But, the court held, the EEOC may not avoid those requirements by including a "vague reference to a 'class' in the Letter of Determination" and then projecting back into that "class" hundreds of individual Section 706 claimants whom it discovers later. *Id.* at 211a-212a; *see id.* at 206a n.21. In effect, the court concluded, the EEOC was seeking to "bootstrap the investigation, determination

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(EEOC Reply Br. in No. 13-3159 (8th Cir.)). CRST has not sought to recover its fees with respect to the EEOC's claims on behalf of Ms. Peeples or Ms. Starke.

[6] The EEOC did not argue that it investigated a pattern-or-practice claim against CRST, and the administrative record does not reveal any investigation of such a claim. *See* ECF No. 244-2. As noted below, the EEOC has disavowed any pattern-or-practice claim in this case. *See infra* at 20.

and conciliation of the allegations of Starke and a handful of other allegedly aggrieved persons into a § 706 lawsuit with hundreds of allegedly aggrieved persons." *Id.* at 206a.

Based on the record, including the EEOC's administrative record of its investigation of Ms. Starke's charge, the district court found that the "EEOC did not conduct any investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint—let alone issue a reasonable cause determination as to those allegations or conciliate them." *Id.* at 204a. Rather, "[t]he record shows that the EEOC wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons in this case." *Id.* The court noted, for example, that the EEOC did not "interview any witnesses or subpoena any documents to determine whether any of the[] allegations were true." *Id.* at 205a. None of the alleged harassers was ever interviewed.

Accordingly, the court barred the EEOC from pursuing its remaining 67 claims, dismissed the EEOC's complaint, and entered judgment for CRST. *Id.* at 215a-216a.[7] The district court also awarded CRST $4,004,371 in attorney's fees and $463,071 in expenses, in addition to taxable costs. JA 174a. The court

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[7] Although the EEOC's claims were dismissed, Title VII provided all 67 individuals the right to pursue their own claims in their own names. *See* 42 U.S.C. § 2000e-5(f)(1). Three of the 67 individuals filed sexual harassment charges against CRST and intervened in the EEOC's action to assert their own claims through their own counsel. Those three claims survived the dismissal of the EEOC's claims on their behalf. *See* Pet. App. 194a n.18.

determined that such an award of attorney's fees was appropriate under *Christiansburg* "because the EEOC's actions in pursuing this lawsuit were unreasonable, contrary to the procedure outlined by Title VII and imposed an unnecessary burden upon CRST and the court." *Id.* at 143a. The court further found that "[a]n award of fees is necessary to guarantee that Title VII's procedures are observed in a manner that maximizes the potential for ending discriminatory practices without litigation in federal court." *Id.* Although the court "ma[de] no finding as to whether the trial attorneys for the EEOC acted in bad faith," it noted that "higher-level attorneys" at the EEOC had made sensational public statements accusing CRST of "rampant sexual harassment" even though the EEOC had not investigated its own claims. *Id.* at 143a n.4; *see* Pet. App. 214a n.25 (same).

5. First Appeal And Remand

The EEOC did not appeal the district court's pattern-or-practice ruling, including the court's finding that the EEOC did not establish even a *prima facie* case that CRST engaged in a pattern or practice of tolerating sexual harassment. The EEOC likewise did not appeal the dismissal of 99 of its claims as a discovery sanction for failing to make those claimants available for deposition. And the EEOC did not appeal the court's grants of summary judgment with respect to 47 of its other individual claims.

The EEOC did, however, appeal 40 of the 87 individual grants of summary judgment, as well as the award of fees and costs. The Eighth Circuit affirmed 38 of the 40 grants of summary judgment, but reversed as

to the other two, which concerned the individual claims that the EEOC brought on behalf of Monika Starke and Tillie Jones. Pet. App. 155a-156a. Because those two claims were remanded to the district court, there was no final judgment in place, and the Eighth Circuit accordingly vacated the district court's award of fees and costs without prejudice. *Id.* at 156a.

The EEOC also appealed the dismissal of the 67 claims for failure to satisfy Title VII's pre-suit requirements. The Eighth Circuit affirmed the dismissal, agreeing both that the EEOC had "wholly failed" to satisfy Title VII's pre-suit requirements and that dismissal was a permissible remedy under the circumstances. *Id.* at 115a-116a. The EEOC did not seek review from this Court of the Eighth Circuit's holding on either point.

On remand, the EEOC withdrew its claim on behalf of Ms. Jones because, under the law of the case, its failure to investigate, find reasonable cause, and attempt to conciliate her claim barred further litigation. The parties then settled the EEOC's claim on behalf of Ms. Starke and jointly moved to dismiss the case. The court entered a new final judgment dismissing the case with prejudice. JA 115a-119a.

CRST then renewed its petition for an award of attorney's fees and costs. Drawing on nearly six years of experience with the case and the parties, and evaluating that experience in light of this Court's guidance in *Christiansburg*, the district court again found that the EEOC's pursuit of its claims was unreasonable. Pet. App. 64a. The court awarded CRST $4,189,296 in attorney's fees, $413,387 in out-of-pocket

expenses, and $91,758 in taxable costs. Pet. App. 84a-85a.

6. Decision Under Review

The EEOC appealed the fee award to the Eighth Circuit. The EEOC contended that, because it had obtained a settlement regarding Ms. Starke, it was the prevailing party. The EEOC argued alternatively that, even if the EEOC had not prevailed, CRST was not entitled to a fee award because CRST was not a prevailing party either and the *Christiansburg* test was not satisfied. The EEOC also contended that the district court should not have awarded fees to CRST for successfully litigating the "pattern-or-practice issue," in part because "EEOC's one-count complaint does not include a 'pattern-or-practice claim.'" JA 113a & n.18. The EEOC expressly disavowed that it had brought any pattern-or-practice claim and explained that it had merely sought to "use a pattern-or-practice method of proof" to support its *individual* claims on behalf of the various claimants under Section 706. *Id.* at 114a.

The Eighth Circuit rejected the EEOC's contention that it was the prevailing party. Pet. App. 17a-18a. The court vacated the district court's fee award with respect to 84 of the individual claims resolved on summary judgment, however, because the district court "did not make particularized findings of frivolousness, unreasonableness, or groundlessness as to each individual claim." *Id.* at 28a. The Eighth Circuit remanded these claims to the district court to make such individualized determinations. It also held that, "to the extent that the district court's order awarded

attorneys' fees to CRST based on a purported pattern-or-practice claim," the court had erred because "the EEOC did not allege that CRST was engaged in 'a pattern or practice' of illegal sex-based discrimination or otherwise plead a violation of Section 707 of Title VII." *Id.* at 17a-18a (quotation marks omitted).

Finally, in the ruling under review here, the Eighth Circuit reversed the fee award with respect to the 67 claims dismissed because of the EEOC's failure to satisfy Title VII's pre-suit requirements. The EEOC had argued that the district court's dismissal of these claims did not "constitute a ruling on the merits," and that consequently CRST "cannot be a prevailing party with respect to those claims." *Id.* at 18a. The Eighth Circuit agreed, holding that the dismissal of those claims "does not constitute a ruling on the merits," and that "[t]herefore, CRST is not a prevailing party as to these claims." *Id.* at 23a-24a. The court also held that CRST could not satisfy the *Christiansburg* standard for the same reason: "'[P]roof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits.'" *Id.* at 18a (quoting *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994)).

CRST petitioned for rehearing en banc, which was denied on February 20, 2015. *Id.* at 218a. On December 4, 2015, this Court granted CRST's petition for certiorari.

SUMMARY OF ARGUMENT

Section 706(k) authorizes district courts to award attorney's fees to the "prevailing party" in a Title VII case and "entrust[s] the effectuation of the statutory policy to the discretion of the district courts." *Christiansburg*, 434 U.S. at 416; *see* 42 U.S.C. § 2000e-5(k). That discretion is limited by this Court's decision in *Christiansburg*, which permits a fee award to a prevailing defendant only if the plaintiff's lawsuit was "frivolous, unreasonable, or without foundation." 434 U.S. at 421.

The district court concluded that the *Christiansburg* standard was satisfied in this case because the EEOC "wholly abandoned" its statutory obligation to investigate the allegations at issue here, determine whether they were supported by "reasonable cause," and attempt conciliation before bringing suit. Pet. App. 204a. As the district court recognized, that failure rendered the EEOC's claims unreasonable because the EEOC had not followed the pre-suit administrative procedure required by Title VII and had instead placed "an unnecessary burden upon CRST and the court." JA 143a. The district court also concluded that a fee award to CRST was "necessary to guarantee that Title VII's procedures are observed in a manner that maximizes the potential for ending discriminatory practices without litigation in federal court." *Id.*

The Eighth Circuit agreed that the EEOC "wholly failed to satisfy its statutory pre-suit obligations" in this case. Pet. App. 115a-116a. But the court reversed the award of fees on the ground that fee awards are

available only when a defendant prevails "on the merits," and CRST had not prevailed "on the merits" here. That holding is doubly erroneous. Fee awards to prevailing defendants are not limited to cases that are decided "on the merits," and in any event, a dismissal based on the EEOC's failure to satisfy Title VII's pre-suit requirements is properly viewed as a ruling "on the merits" of the EEOC's case.

1. The Eighth Circuit's rule that a prevailing defendant may recover fees only when a case is decided "on the merits" has no basis in the statute, conflicts with this Court's decision in *Christiansburg*, and severely undermines the policy of Section 706(k). As an initial matter, there can be no doubt that a defendant who secures a dismissal with prejudice, as CRST did here, is a "prevailing party." As this Court has explained, the prototypical "prevailing party" is a "party in whose favor a judgment is rendered." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (quotation marks omitted). While a plaintiff must obtain "relief on the merits of his claim" to prevail, *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), such a requirement cannot logically apply to defendants, who, by definition, have no claims and seek no relief.

There is no basis for excluding all defendants who prevail on purportedly "non-merits" grounds from the statutory authorization for fee awards. The *Christiansburg* standard aims to protect defendants from the costs of unreasonable lawsuits without unduly deterring plaintiffs from seeking their day in court. In essence, *Christiansburg* promises plaintiffs that they

will not have to pay the defendant's fees, even if they lose, so long as their decision to bring suit was "reasonable" in the first place. 434 U.S. at 422. As lower courts applying *Christiansburg* have repeatedly recognized, that decision to litigate can be unreasonable for many reasons that do not bear on the ultimate merits of the claims—including, for example, when the suit is obviously time-barred or moot. Awarding fees in such cases is entirely consistent with *Christiansburg*'s letter and logic.

By contrast, categorically denying fees in such cases would frustrate the congressional policy choice embodied in Section 706(k): to ensure that plaintiffs who impose unnecessary and unreasonable litigation costs on defendants will bear the costs of their own choices. If, as the EEOC contends, CRST prevailed on "non-merits" grounds in this case, that only confirms that Congress's concerns are fully engaged in "non-merits" cases. CRST thoroughly litigated all 67 claims at issue here, including taking the deposition of each claimant, even though the EEOC ultimately admitted that it had not investigated or found "reasonable cause" to believe that the claimants' allegations of sexual harassment were "true" before bringing suit. 42 U.S.C. § 2000e-5(b). Congress conditioned the EEOC's power to sue upon satisfaction of its pre-suit responsibilities—thereby making federal courts a last, rather than first, resort—in order to avoid burdening defendants and courts with avoidable litigation costs of this kind. Congress could not plausibly have intended to preclude a fee award, which is itself a backstop protection for defendants shouldered with unreasonable litigation

costs, when the EEOC violates these statutory safeguards. Such a rule would leave the EEOC free to disregard its pre-suit responsibilities with impunity and to attempt to coerce settlement of uninvestigated, unevaluated, and unconciliated claims through the threatened or actual imposition of massive litigation expense in federal courts.

2. Even if Congress intended Section 706(k) to limit defendants' fee awards to cases decided "on the merits," which it did not, this case would still qualify. The pre-suit requirements that the EEOC failed to satisfy here are elements of its statutory cause of action, comparable in form and function to other conditions in Title VII that the Court has already recognized as such. *See Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (limitation of private right of action to plaintiffs who are "aggrieved"); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (numerosity requirement for a covered "employer"). Moreover, unlike claim-processing rules that "seek to promote the orderly progress of litigation," *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), Title VII's pre-suit requirements are substantive, mandatory conditions that determine whether a court may hold an employer liable in a case brought by the EEOC at all. Indeed, a central purpose of the pre-suit requirements is to prevent the EEOC from litigating cases that it has not first screened for merit and determined there is "reasonable cause" to pursue. The EEOC's claims were dismissed in this case because the EEOC failed, *inter alia*, to first determine whether the allegations that it intended to litigate had sufficient

merit to warrant requiring CRST to defend itself in court. In all of these senses, the district court decision goes directly to "the merits" of the EEOC's case.

ARGUMENT

I. Neither Section 706(k) Nor This Court's Decision In *Christiansburg* Requires That A Defendant Prevail "On The Merits" In Order To Be Awarded Fees.

In order to obtain an award of attorney's fees in a Title VII case, a litigant must clear two hurdles. First, it must qualify as a "prevailing party" within the meaning of the statute. 42 U.S.C. § 2000e-5(k). Second, because the statute provides only that the court "may" award fees to the prevailing party, a prevailing party must also establish that a fee award is warranted in its case. This Court has held that, under Section 706(k), "a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances." *Christiansburg*, 434 U.S. at 417; *see Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). A district court may award fees to a prevailing defendant, however, only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg*, 434 U.S. at 421.

In this case, the Eighth Circuit imposed a new *third* hurdle for a defendant to clear, holding that no attorney's fees could be awarded with respect to the claims at issue because they were not resolved "on the merits." Specifically, it held both that CRST was "not a *prevailing party* as to these claims" because there was

no "ruling on the merits," Pet. App. 23a (emphasis added), and, additionally, that the *Christiansburg* standard could not be satisfied "'without a judicial determination of the plaintiff's case on the merits,'" *id.* at 18a (quoting *Marquart*, 26 F.3d at 852). The Eighth Circuit erred in imposing this third hurdle, which has no basis in the statute or this Court's cases and subverts the congressional policy providing for fee awards to defendants in appropriate cases.

A. Section 706(k) Authorizes An Award Of Fees To Any "Prevailing Party."

Section 706(k), like many other fee-shifting statutes, authorizes an award of attorney's fees to "the prevailing party." 42 U.S.C. § 2000e-5(k). The Eighth Circuit's conclusion that only *some* defendants who win judgments in their favor have "prevailed" is contrary to the ordinary meaning of the word and its traditional legal significance.

Indeed, it is not clear that the EEOC itself defends the Eighth Circuit's singular definition of a "prevailing party" in this Court. In the court below, the EEOC urged that CRST could not be a "prevailing party" under circuit precedent without securing a judgment "on the merits." *See* JA 105a-112a. The Eighth Circuit agreed. Pet. App. 23a. In its Brief in Opposition to Certiorari, however, the EEOC casts its victory below as an application of *Christiansburg*—with no mention of the threshold "prevailing party" inquiry—and defends the decision solely on that ground. *See* Brief in Opposition 8, 10.

In any event, the Eighth Circuit's limitation of the definition of a "prevailing" defendant to one that prevails "on the merits" is untenable. The paradigm of a "prevailing party" is "'[a] party in whose favor a judgment is rendered.'" *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603 (quoting *Black's Law Dictionary* 1145 (7th ed. 1999)). There is no question that the district court rendered judgment in favor of CRST with respect to the claims at issue here. *See* Pet. App. 215a-216a. Accordingly, CRST is the "prevailing party" with respect to those claims.

To be sure, this Court has often held that a *plaintiff* is not a "prevailing party" unless it obtains "at least some relief on the merits of [its] claim." *Hewitt*, 482 U.S. at 760. The most familiar form of "relief on the merits" is a favorable judgment, *see Farrar v. Hobby*, 506 U.S. 103, 112-13 (1992), although other forms of victory can also suffice, *see Maher v. Gagne*, 448 U.S. 122, 129 (1980) (upholding fee award where plaintiffs settled and obtained a consent decree); *cf. Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 605 (explaining that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit," does not suffice for prevailing party status). Some relief "on the merits" is necessary for a plaintiff to prevail because the "touchstone of the prevailing party inquiry" is whether there has been a "material alteration of the legal relationship of the parties." *Sole v. Wyner*, 551 U.S. 74, 82 (2007) (quotation marks omitted). In other words, a plaintiff cannot "prevail" without prevailing "on the merits" because there is no other way for a plaintiff to secure "a

court-ordered 'chang[e] [in] the legal relationship'" with the defendant. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 604 (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (brackets in original)).

Things look different from the other side of the courtroom. The defendant is not *seeking* "relief on the merits of [any] claim," *Hewitt*, 482 U.S. at 760, and the only change in the legal relationship that a defendant wants is a dismissal, with prejudice, of the plaintiff's case. Such a dismissal is "the stuff of which legal victories are made" for the defense bar. *Id.* Accordingly, there is no logical basis for excluding defendants who prevail by obtaining a dismissal with prejudice, albeit on purportedly "non-merits" grounds, from the category of "prevailing defendants."

The Eighth Circuit itself has recognized that if it used the "material alteration" standard that applies to plaintiffs, a defendant who wins a dismissal with prejudice on non-merits grounds "would technically be a prevailing party." *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 851 (8th Cir. 1994). However, the court nonetheless adopted a "very narrow" definition of a "prevailing defendant" based on its sense of "the public policy conception of the role of the judiciary." *Id.* at 851-52. In so doing, the court purported to follow "lessons learned from" this Court's decision in *Christiansburg*. *Id.* at 850.

Christiansburg, however, adopted a rule of "*treating* prevailing plaintiffs and defendants differently," not *defining* those categories differently at

the threshold. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994) (emphasis added); *see Christiansburg*, 434 U.S. at 421; *see also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 759 (1989) (explaining that "in *Christiansburg Garment* we held that even though the term 'prevailing party' in § 706(k) *does not distinguish between plaintiffs and defendants*, the principle [that a prevailing plaintiff should ordinarily recover fees] would not be applied to a *prevailing defendant*" (emphasis added; citation omitted)). Accordingly, there was no basis for the Eighth Circuit to impose an additional requirement for a defendant to qualify as a "prevailing party."

B. District Courts May Award Fees To Prevailing Defendants Whether Or Not They Prevail "On The Merits."

Because a defendant who obtains a judgment in its favor is plainly a "prevailing party," the central issue in this case is whether a district court has discretion to award fees to such a prevailing defendant when the decision rests on "non-merits" grounds. Nothing in the statute or in *Christiansburg* favors stripping judges of that discretion, which would serve only to undermine the important policy objectives of Section 706(k).

1. The Eighth Circuit's Rule Has No Basis In Section 706(k) And Conflicts With Christiansburg.

By its terms, Section 706(k) imposes no categorical restrictions on which prevailing parties may be awarded fees. Congress "entrust[ed] the effectuation of the statutory policy to the discretion of the district

courts." *Christiansburg*, 434 U.S. at 416. In *Christiansburg*, this Court explained that equitable considerations nonetheless counsel different standards with respect to plaintiffs and defendants. Because the private plaintiff is "the chosen instrument of Congress" to vindicate the critical policies of Title VII—and because the defendant against whom fees are awarded is, by definition, "a violator of federal law"—attorneys' fees are awarded to prevailing private plaintiffs "in all but special circumstances." *Id.* at 417-18. Fee awards to prevailing defendants, by contrast, are warranted only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation," although the court need not find "subjective bad faith." *Id.* at 421.

As the Court explained in *Christiansburg*, this standard effectuates Congress's commitments to "protect[ing] defendants from burdensome litigation having no legal or factual basis" and "'deter[ring] the bringing of lawsuits without foundation,'" *id.* at 420 (quoting 110 Cong. Rec. 13,668 (1964) (statement of Sen. Lausche)), while also ensuring that the prospect of an adverse fee award will not undercut "vigorous enforcement of the provisions of Title VII," *id.* at 422. Although the Court considered standards that would make fee awards available to defendants in even fewer cases, it squarely rejected them. Shifting the balance further in favor of plaintiffs, the Court concluded, would "distort" the adversarial process, giving plaintiffs "substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action." *Id.* at 419. As the Court noted, "many

defendants in Title VII claims are small- and moderate-size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights." *Id.* at 422 n.20.

The *Christiansburg* standard thus reflects this Court's considered accommodation of the competing interests that Congress sought to protect in Section 706(k). *See Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 762 (1980) ("[*Christiansburg*'s] distinction advances the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation."). Under the terms of that compromise, a defendant may recover the costs of defending itself only when it was unreasonable for the plaintiff to require the defendant to do so. *See Christiansburg*, 434 U.S. at 421-22. Put the other way, plaintiffs deciding whether to bring suit can rest assured that they will not have to pay the defendant's fees if they lose, so long as they have "reasonable ground[s] for bringing suit" in the first place. *Id.* at 422; *see id.* at 422 n.20 (directing district courts to determine "the reasonableness of the [plaintiff's] litigation efforts"); *id.* at 421, 422 (directing district courts to consider whether the "action" that the plaintiff brought was frivolous, unreasonable, or groundless).

The logic of *Christiansburg* dictates its scope. As the Court's opinion made clear, *Christiansburg* raised the bar for fee awards to defendants in order to ensure that plaintiffs with viable claims would not be deterred from seeking their day in court. *See id.* at 422; *see also Fogerty*, 510 U.S. at 524. When a lawsuit has no reasonable chance of success, however, this principle

has no application. And that is true regardless of why the lawsuit is legally untenable. What matters, in short, is the reasonableness of the *decision to litigate*, because that is the decision Congress and the Court sought to insulate from undue deterrence.

As courts have repeatedly recognized, that decision can be unreasonable for many reasons unrelated to the ultimate merits of the plaintiff's claims. *See, e.g.*, *C.W. v. Capistrano Unified Sch. Dist.*, 784 F.3d 1237, 1247-48 (9th Cir. 2015) (upholding attorney's fee award under *Christiansburg* because the "outcome [was] predetermined" by the defendant's "Eleventh Amendment immunity"); *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 152 (4th Cir. 2014) (upholding attorney's fee award under *Christiansburg* because "the EEOC's lawsuit effectively was moot at its inception"); *Hamer v. Lake Cty.*, 819 F.2d 1362, 1370 (7th Cir. 1987) (upholding attorney's fee award under *Christiansburg* because the plaintiffs' suit was clearly barred by the Tax Injunction Act); *Hutcherson v. Bd. of Sup'rs of Franklin Cty.*, 742 F.2d 142, 146 (4th Cir. 1984) (same); *Cote v. James River Corp.*, 761 F.2d 60, 61 (1st Cir. 1985) (holding that attorney's fee award was warranted under *Christiansburg* because "it became unreasonable to continue litigation" when the plaintiff learned her claim was certainly "time-barred"); *see also Davidson v. Culver City*, 159 F. App'x 756, 759 (9th Cir. 2005) (upholding attorney's fee award under *Christiansburg* because "the result should have been obvious from the inception of this litigation . . . . [g]iven the applicability of res judicata"); *DeLeon v. Haltom City*, 113 F. App'x 577, 578 (5th Cir. 2004) (upholding

attorney's fee award under *Christiansburg* because the defendant was "unequivocally protected from liability by absolute judicial immunity").[8]

In fact, *Christiansburg* itself involved a barrier to suit far afield from the merits of any allegation of discrimination or sexual harassment—and the Court's treatment of that barrier is irreconcilable with the Eighth Circuit's interpretation of the Court's decision. In *Christiansburg*, the EEOC notified the charging party that its conciliation efforts had failed and that she had a right to sue the employer in federal court, but she did not do so. In 1972, almost two years after the EEOC sent that right-to-sue letter, Congress amended Title VII to authorize the EEOC to enforce the statute through litigation, and also permitted such suits with respect to any "'charges pending with the Commission'" on the effective date of the amendment. *Christiansburg*, 434 U.S. at 414 (citation omitted). The EEOC brought suit on behalf of the charging party, but the district court dismissed the action because the charge had not been pending on the relevant date. *Id.*

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[8] Courts similarly do not observe a "merits-only" restriction in other areas where the reasonableness of the decision to litigate is at issue. *See, e.g.*, *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987) (explaining that Rule 38 of the Federal Rules of Appellate Procedure "affords a court of appeals plenary discretion to assess 'just damages' in order to penalize an appellant who takes a frivolous appeal"); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1385 (4th Cir. 1991) (approving Rule 11 sanctions for knowingly pursuing a claim that is time-barred); *Fermin v. Nat'l Home Life Assurance Co.*, 15 F.3d 180, 1994 WL 24922, at *2 (5th Cir. 1994) (unpublished table decision) (approving Rule 11 sanctions for knowingly pursuing a claim that is barred by res judicata).

The defendant then requested an award of fees. The district court held that such an award was not justified because "'the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless,'" and the court of appeals affirmed. *Id.* at 415 (citation omitted).

After clarifying the standard for fee awards to prevailing defendants, this Court affirmed the denial of fees as well. The Court explained that by asking whether "'the Commission's action in bringing the suit could . . . be characterized as unreasonable or meritless,'" the district court had correctly "focused on the standards we have discussed." *Id.* at 423 (citation omitted). In particular, the Court noted the district court's holding that the "'Commission's statutory interpretation of § 14 of the 1972 amendments was not frivolous.'" *Id.* at 423-24 (citation omitted). Of course, if the *Christiansburg* inquiry were limited to the merits of the discrimination or harassment claim, the plausibility of the EEOC's statutory analysis regarding the timeliness question would have been irrelevant. The fact that the Court approved the district court's approach is thus a powerful indication that *Christiansburg* does not require a showing that the EEOC's case was unreasonable "on the merits" in order for a prevailing defendant to win a fee award.

Christiansburg also precludes any suggestion that defendants are eligible for fee awards only when they actually have been cleared of charges of discrimination. As the Court explained, one of the two court of appeals decisions from which it drew the operative standard involved "a defendant that had successfully resisted a

Commission demand for documents." *Christiansburg*, 434 U.S. at 421 (citing *U.S. Steel Corp. v. United States*, 519 F.2d 359 (3d Cir. 1975)). Such disputes involving EEOC investigations are plainly "proceeding[s] under this subchapter [i.e., Title VII]," for which fee awards are available. 42 U.S.C. § 2000e-5(k); *see id.* §§ 2000e-8, 2000e-9. But the defendant who prevails against a demand for documents has not been exonerated of the underlying charge of discrimination.

The underlying merits of a discrimination or harassment charge are not even relevant in proceedings regarding the EEOC's use of its investigatory powers. *See* 42 U.S.C. § 2000e-8(a) (granting the EEOC "access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation"); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 (1984) (explaining the conditions for enforcement of an EEOC administrative subpoena). The fact that both Section 706(k) and *Christiansburg* encompass such proceedings confirms that neither Congress nor the Court intended to limit defendant fee awards to cases where allegations of discrimination are resolved "on the merits." To the contrary, such a restriction would effectively nullify Congress's choice to apply Section 706(k) to "*any* action or proceeding under" Title VII, 42 U.S.C. § 2000e-5(k) (emphasis added). *See, e.g.*, *EEOC v. Bellemar Parts Indus., Inc.*, 868 F.2d 199, 200 (6th Cir. 1989) (holding that the defendant was entitled to fees under *Christiansburg*

because "the action filed by the EEOC to enforce its subpoena in district court was groundless").

2. Imposing A "Merits-Only" Restriction On Attorney's Fee Awards Would Undermine The Policy Of Section 706(k).

"When applying fee-shifting statutes," this Court "discern[s] the limits on a district court's discretion" by looking to "the large objectives of the relevant Act." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139-40 (2005) (quotation marks omitted). The objective of Title VII's allowance for fee awards to defendants is "to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420. Accordingly, grafting a merits-only restriction onto the *Christiansburg* test would be appropriate only if defending litigation that is unreasonable on non-merits grounds could not be burdensome or costly to the defendant. But that is not the case.

This case illustrates the point as well as any could. The EEOC contends that CRST did not prevail "on the merits" when it secured a dismissal of the 67 claims at issue here. As explained below, that is incorrect. *See infra* Part II. But if this case is indeed an example of "non-merits" adjudication, that only confirms that the policy rationale animating Section 706(k) applies just as forcefully to "non-merits" cases as to "merits" cases.

When in 1972 Congress authorized the EEOC to enforce Title VII through litigation, Congress retained the pre-suit requirements as a compensating limitation on the exercise of the EEOC's enforcement power. *See Shell Oil Co.*, 466 U.S. at 78. Specifically, the pre-suit

requirements—investigation, reasonable cause determination, and conciliation—serve to prevent the EEOC from imposing unjustified costs and disruption on an employer, either by litigating uninvestigated or unevaluated claims or by litigating without first attempting settlement. By establishing these threshold duties as a necessary foundation for any subsequent lawsuit, Congress sought to ensure that the EEOC's litigation authority would be limited to "legitimate, unreconcilable disputes," and would only "take over at the level where conciliations fail." 118 Cong. Rec. 588-89 (1972) (statement of Sen. Dominick); *see id.* at 7563 (statement of Rep. Perkins) (explaining that, despite its litigating authority, the EEOC would "continue to make every effort to conciliate as is required by existing law").

Here, CRST incurred millions of dollars in fees and expenses to defend against—and ultimately defeat—claims that were "without" the "foundation" that the statute requires. *Christiansburg*, 434 U.S. at 421. The EEOC put CRST to the expense of litigating these 67 claims, including depositions of the 67 claimants, even though it had not first investigated them, found "reasonable cause to believe" that they were "true," or attempted to conciliate them with CRST. 42 U.S.C. § 2000e-5(b). That is precisely what Congress sought to avoid. In fact, *both* the pre-suit requirements and the fee-shifting provision have the common purpose of avoiding this result, for each serves to shield employers from the costs of unnecessary litigation. It would be anomalous if the fee-shifting remedy—a mechanism to protect defendants from the costs of unreasonable

litigation—were categorically unavailable when the EEOC disregards the very statutory provisions that seek to protect defendants from unreasonable litigation. Two circuits have rejected that result, and a third has endorsed their position. *See EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003); *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982); *see also EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 469 (5th Cir. 2009).

Prohibiting fee awards to defendants under the circumstances presented here would invite the EEOC to shift the administrative costs of fulfilling its own statutory obligations to defendants and federal courts, using discovery and motion practice as substitutes for the pre-suit process required by Congress. Indeed, that is precisely what happened in this case. *See* Pet. App 188a (explaining that the EEOC did not know "on whose behalf it was seeking relief" and "was using discovery to find them"); JA 143a (finding fee award warranted because, *inter alia*, the EEOC's strategy of pursuing this litigation "contrary to the procedure outlined by Title VII" had "imposed an unnecessary burden upon CRST and the court"). The Eighth Circuit's holding gives the EEOC license to bring uninvestigated, unexamined, and unconciliated claims directly to court—leaving it to the defendant and the district judge to sort plausible from baseless claims—secure in the knowledge that the EEOC will not foot the bill because there is no fee-shifting for such "non-merits" dispositions. Likewise, the holding below endorses an EEOC strategy of attempting to coerce settlements from employers by filing an

unsubstantiated allegation that a "class" of claimants exists without ever investigating if that is in fact true. Indeed, under the Eighth Circuit's rule, there is no disincentive to such conduct by the EEOC other than expense of its own time and effort. The docket entries in this case demonstrate the extraordinary investment of time and judicial resources required of a district court when the EEOC bypasses the statutory pre-suit requirements. JA 1a-98a.

Although these dynamics are particularly acute when the EEOC does not satisfy its pre-suit obligations, they also arise in other contexts that may not go to the ultimate merits of the underlying claim. District courts should be free to determine that a plaintiff should pay the defendant's costs of litigating claims that were, for example, clearly barred by res judicata, a statute of limitations, or an ironclad immunity. *See supra* at 33-34 (collecting cases). When these dispositive flaws in the plaintiff's case are not apparent to the defendant at the outset of litigation, the defendant may incur substantial expenses defending a futile lawsuit, as CRST did here. A district court may appropriately conclude that the plaintiff's decision to litigate such claims was unreasonable—particularly if the plaintiff is a sophisticated litigant, such as the EEOC, that is well-acquainted with its obligations both before and after filing suit. *See Christiansburg*, 434 U.S. at 422 n.20 (explaining that "a district court may consider distinctions between the Commission and private plaintiffs in determining the reasonableness of the Commission's litigation efforts").

It would be better for everyone, not least the courts, if avoidable and unreasonable litigation expenses were never generated at all. But when they are, the legislative plan directs that they should be paid by the party responsible for them. That plan is grounded in considerations of both fairness and deterrence. *See Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011) (explaining that fee-shifting is appropriate because "[t]he plaintiff acted wrongly" and "the court may shift to him the reasonable costs that [his] claims imposed on his adversary" (citing *Christiansburg*, 434 U.S. at 420-21)); *Christiansburg*, 434 U.S. 420 (explaining that fee-shifting "serve[s] . . . 'to diminish the likelihood of unjustified suits being brought'" (quoting 110 Cong. Rec. 6534 (statement of Sen. Humphrey))). Those statutory objectives of achieving both fairness and deterrence are fully implicated in cases like this one, whether or not the district court's dismissal constitutes a ruling on "the merits."

II. Even If Section 706(k) Could Be Read To Require That A Defendant Prevail "On The Merits," CRST Prevailed On The Merits Here.

Because CRST won a dismissal with prejudice of the 67 claims involved here, it prevailed in the only sense this Court has ever required as a condition of a fee award: it secured a material court-ordered change in the parties' legal relationship. For the reasons set out above, any further requirement that the dismissal be "merits-based" would be misguided. If such a requirement did exist, however, CRST's victory in this case would readily satisfy it. The pre-suit requirements

that the EEOC failed to satisfy in this case are elements of its statutory cause of action; they are substantive, mandatory conditions on liability; and they serve to ensure that the EEOC does not litigate cases without first investigating claims "on the merits" and determining that there is a reasonable legal and factual basis for pursuing them.

A. The Pre-Suit Requirements Are Elements Of The EEOC's Cause Of Action.

Neither the Eighth Circuit nor the EEOC has questioned the premise that, if satisfaction of the pre-suit requirements is an "element" of the EEOC's cause of action, a dismissal on that ground qualifies as a ruling on the merits. *See* Pet. App. 20a; JA 106a-107a. Because the pre-suit requirements do form elements of the EEOC's case, CRST prevailed on the merits here when it defeated these 67 claims by demonstrating that the EEOC did not investigate, find reasonable cause for, or attempt to conciliate any of these claims as required by the statute.

That conclusion follows directly from this Court's cases. First, the Court has already recognized that the "element[s] of a plaintiff's claim for relief" under Title VII extend beyond the ultimate question whether the alleged discrimination has occurred. *Arbaugh*, 546 U.S. at 509. In *Arbaugh*, the Court held that Title VII's numerosity requirement—the definition of an "employer" as an entity with 15 or more employees—does not circumscribe a court's jurisdiction, but rather forms "a substantive ingredient of a Title VII claim." *Id.* at 503.

Just like the numerosity requirement, the conditions set out in Section 706(b) should also be treated as a "substantive ingredient of a Title VII claim." *Id.* There is no basis for drawing any distinction: neither provision limits the court's jurisdiction; neither goes to the "merits" in the narrow sense of whether the complainant's allegations of discrimination are true; and the EEOC must establish both to prove its case. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1656 (2015) (explaining that a "sworn affidavit from the EEOC stating that it has performed the obligations" will usually suffice with respect to the conciliation requirement).

This Court's cases concerning private-plaintiff suits also strongly indicate that satisfaction of the three pre-suit requirements forms an "element" of the EEOC's case. As the Court has recognized, Title VII confers distinct rights of action on the EEOC and on private plaintiffs. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 325-26 (1980); 42 U.S.C. § 2000e-5(f)(1) (providing that under certain circumstances, "the Commission may bring a civil action," and under other circumstances, "a civil action may be brought . . . by the person claiming to be aggrieved"). The Court has specifically held that Title VII's cause of action for a "person claiming to be aggrieved" incorporates the zone-of-interests test into the definition of "aggrieved." *Thompson*, 562 U.S. at 177-78 (quotation marks omitted). And, as the Court recently clarified, when a right to sue is circumscribed by the zone-of-interests test, "the zone-of-interests test . . . is an element of the cause of action under the statute." *Lexmark Int'l, Inc.*

v. Static Control Components, Inc., 134 S. Ct. 1377, 1391 n.6 (2014); *see id.* at 1387-88.

Suppose, then, that a private plaintiff brings suit under Title VII, but the court determines that he or she is not "aggrieved" within the meaning of the statute. To use the example set forth in this Court's decision in *Thompson v. North American Stainless, LP*, suppose that a shareholder "sue[s] a company for firing a valuable employee for racially discriminatory reasons," alleging "that the value of his stock decreased as a consequence." 562 U.S. at 177. Under *Thompson*, that lawsuit would be dismissed because the shareholder is not "aggrieved" within the meaning of Section 706(f). *Id.* And, under *Lexmark*, that dismissal would necessarily qualify as merits-based: the plaintiff failed to satisfy an element of the applicable cause of action. 134 S. Ct. at 1391 n.6. That result makes perfect sense. Since a viable private-plaintiff case requires both an "aggrieved" employee and a covered "employer," it is not surprising that both would equally be elements of the relevant cause of action under Title VII.

The question here is no different. Just as Congress permitted a private plaintiff to sue only if he or she is "aggrieved," it permitted the EEOC to sue only if it has investigated, found reasonable cause, and "has been unable to secure from the respondent a conciliation agreement acceptable to" it. 42 U.S.C. § 2000e-5(f)(1). There is no reason why the former "aggrieved" requirement should qualify as an "element"—as it necessarily does under this Court's cases—but the latter pre-suit requirement, which appears in parallel form in the same statutory subsection, should not. In a

private-plaintiff case, the zone-of-interests test measures whether "Congress intended to permit the suit" brought by the plaintiff. *Thompson*, 562 U.S. at 178 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). In the case of an action brought by the EEOC, that same question is answered by the pre-suit requirements. The two limitations on the statutory causes of action are thus analogous in both form and function. Each requires some initial filtering depending upon the private or governmental nature of the plaintiff. Accordingly, satisfaction of the pre-suit requirements is a necessary element of the EEOC's case.

The Eighth Circuit explained its contrary holding on three grounds. First, it noted that the pre-suit requirements "do not distinguish which employers are subject to Title VII or whether an employer has violated Title VII." Pet. App. 23a. As this Court's analysis of the zone-of-interests test indicates, however, that definition of an "element" is incompatible with settled law. Indeed, it is common for the elements of a cause of action to include not only facts establishing that the defendant has violated a statute, but also others that determine whether the plaintiff's suit against the defendant will lie. *See, e.g.*, *Lexmark*, 134 S. Ct. at 1390 (observing that "federal causes of action in a variety of contexts . . . incorporate a requirement of proximate causation"). In a securities fraud case, for example, the plaintiff must prove not only that the defendant violated the Securities Exchange Act, but also that "the act or omission of the defendant alleged to violate [the Act] caused the loss for which the

plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4); *see Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). A private RICO plaintiff likewise must prove not only that the defendant violated the statute, but also that the plaintiff was "injured in [its] business or property by reason of [the] violation." 18 U.S.C. § 1964(c). This Court has always characterized such conditions as "elements," even though, by their own terms, they are not necessary to establish a violation of the statute. *See, e.g.*, *Dura*, 544 U.S. at 341-42; *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 285 (1992) (O'Connor, J., concurring) (describing RICO's "business or property" requirement as among "the elements of a private cause of action under RICO"); *see also United States v. Hayes*, 555 U.S. 415, 422 (2009) (defining "element" as "'[a] constituent part of a claim that must be proved for the claim to succeed'" (quoting *Black's Law Dictionary* 558 (8th ed. 2004)).

Second, the Eighth Circuit drew an analogy to *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). Its decision finds no support in *Reed*, however. In *Reed*, this Court determined that the Copyright Act's registration requirement "does not restrict a federal court's subject-matter jurisdiction." *Id.* at 157. The Court based its analysis on *Arbaugh*, which similarly concluded that Title VII's numerosity requirement does not "affect[] federal-court subject-matter jurisdiction." 546 U.S. at 503. After explaining why the Copyright Act's registration requirement satisfied the criteria set out in *Arbaugh*, *Reed* entertained the counterargument "[t]hat the numerosity requirement in *Arbaugh could be considered* an element of a Title

VII claim, rather than a prerequisite to initiating a lawsuit," and rejected the proffered distinction as immaterial to the jurisdictional question. 559 U.S. at 165-66 (emphasis added). *Reed* thus did not even affirm the accuracy of this hypothetical distinction between an element of a cause of action and a "prerequisite" to a lawsuit, let alone establish its relevance for purposes of a fee award.[9]

Finally, the Eighth Circuit declined to treat satisfaction of the pre-suit requirements as an element because these conditions apply when the EEOC brings "*any* lawsuit, not just a sexual-harassment lawsuit." Pet. App. 22a. But that point is refuted by *Arbaugh*. The numerosity requirement—the Eighth Circuit's paradigm of a Title VII element, *see id.* 20a-23a—also applies to all Title VII litigation, not only to sexual harassment suits. Yet, as all agree, numerosity is "a substantive ingredient of a Title VII claim for relief." *Arbaugh*, 546 U.S. at 503. Nothing in this Court's cases suggests that satisfaction of the pre-suit requirements should be treated any differently.

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[9] Moreover, the First Circuit has held that, under *Reed*, registration is an element of the plaintiff's cause of action under the Copyright Act. *Latin Am. Music Co. v. Media Power Grp., Inc.*, 705 F.3d 34, 42-43 (1st Cir. 2013); *Airframe Sys., Inc. v. L-3 Commc'ns Corp.*, 658 F.3d 100, 105 (1st Cir. 2011).

B. The Pre-Suit Requirements Are Not Claim-Processing Rules, But Are Mandatory, Substantive Limitations on Liability In Cases Brought By The EEOC.

Even if it were not considered an "element" of the EEOC's cause of action, satisfaction of Title VII's pre-suit requirements would remain a mandatory and substantive condition of a defendant's liability, and accordingly should be deemed a "merits" issue in any sense relevant to a fee award.

Unlike ordinary claim-processing rules that "seek to promote the orderly progress of litigation," *Henderson*, 562 U.S. at 435, Title VII's pre-suit requirements circumscribe the range of cases in which the EEOC may pursue litigation at all. Specifically, the statute mandates that the EEOC "*shall* make an investigation," and, if it finds reasonable cause, "*shall* endeavor" to conciliate with the employer. 42 U.S.C. § 2000e-5(b) (emphasis added). As the Court observed in *Mach Mining*, "[t]hat language is mandatory, not precatory." 135 S. Ct. at 1651. Only if conciliation fails "may" the EEOC bring a civil action. 42 U.S.C. § 2000e-5(f)(1); *see Occidental Life*, 432 U.S. at 368 ("[T]he EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties."). Accordingly, a court is barred from holding a defendant liable to the EEOC unless these "necessary precondition[s]" are satisfied. *Mach Mining*, 135 S. Ct. at 1651.

In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), this Court considered an analogous restriction on a statutory cause of action in the Resource

Conservation and Recovery Act (RCRA). RCRA provides for citizen suits, but only if they are brought at least sixty days after giving notice of the violation to the government and the alleged violator. 42 U.S.C. § 6972(a)(1)(A), (b)(1). Applying the statutory language according to its terms, this Court held that the provision is "a mandatory, not optional, condition precedent for suit," and that it binds plaintiffs and courts alike. *Hallstrom*, 493 U.S. at 26. As the Court explained, the notice-and-delay requirements create an opportunity for a prospective defendant to "bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit"—a policy that would be "frustrated" if the Court did not give "full effect to the words of the statute" and "preserve[] the compromise struck by Congress." *Id.* at 29 (internal quotation marks omitted). The Court therefore concluded that the notice-and-delay requirements "are mandatory conditions" that "a district court may not disregard . . . at its discretion." *Id.* at 31.[10]

Pre-suit conditions of this kind are not procedural formalities that determine *how* litigation unfolds, but categorical restrictions Congress has imposed on *whether* litigation (and hence liability) are permitted in the first place. In RCRA, Congress confined defendants' legal exposure to cases in which, despite notice, they persisted in violation of the statute. In

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[10] *See also United States v. Zucca*, 351 U.S. 91, 100 (1956) (holding that filing an affidavit of good cause is a mandatory prerequisite in denaturalization proceedings); *Mach Mining*, 135 S. Ct. at 1651-52 (comparing Title VII's pre-suit requirements to the conditions precedent at issue in *Hallstrom* and *Zucca*).

Title VII, it limited EEOC enforcement action to cases in which an investigation has been conducted, reasonable cause has been found, and conciliation has been tried and failed. The point of these administrative requirements is not to "promote the orderly progress" of an inevitable lawsuit, *Henderson*, 562 U.S. at 435—such as by forcing plaintiffs to bring their claims within a certain period—but to preclude some unwarranted or unnecessary lawsuits from ever being brought at all. It is in this sense that the pre-suit requirements "serve[] a substantive mission." *Mach Mining*, 135 S. Ct. at 1654. By circumscribing the universe of cases in which an employer may be held liable to the EEOC in court, they aim to "to 'eliminate' unlawful discrimination from the workplace" in the most efficient manner possible. *Id.* (quoting 42 U.S.C. § 2000e-5(b)).

This Court's cases concerning time bars also offer an instructive comparison. The apt analogy for the pre-suit requirements is a statute of repose. As the Court recently explained, such statutes differ from procedural rules like statutes of limitations that are amenable to tolling. They are inflexible and substantive restrictions that "can be said to define the scope of the cause of action, and therefore the liability of the defendant." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2187 (2014). Such non-negotiable prerequisites, whether time bars or conditions precedent, are surely "procedural" in one sense of the word. But they ultimately determine whether the defendant can be held liable to the plaintiff under the terms of the statute, *see id.*, and therefore go to the merits of the claim.

C. The Pre-Suit Requirements Serve To Limit The EEOC's Enforcement Authority To Potentially Meritorious Claims, And Here The EEOC Admitted That It Did Not First Determine Whether Its Claims Were Potentially Meritorious.

The pre-suit requirements go to the merits in yet another sense. Taken together, they form "an integrated, multistep enforcement procedure" that limits the EEOC's litigation authority to investigated claims with potential merit, and then further to those that cannot readily be settled on terms acceptable to the EEOC. *Occidental Life*, 432 U.S. at 359. Compliance with this scheme is a "merits" issue because a core function of the scheme is to investigate and test cases for merit before authorizing the EEOC to sue.

In this way the pre-suit requirements resemble other threshold determinations that require an early assessment of the merits of a case. Such rules rest on the recognition that litigation is costly and that these costs should not be imposed without good cause. For example, defendants can move to dismiss for failure to state a claim, which helps to ensure that "a plaintiff with a largely groundless claim" may not undertake expansive discovery "with the right to do so representing an *in terrorem* increment of the settlement value." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (internal quotation marks omitted). In criminal cases, a "judicial determination of probable cause" serves an analogous function as "a prerequisite to extended restraint of liberty following arrest."

Gerstein v. Pugh, 420 U.S. 103, 114 (1975). In denaturalization proceedings, the Court has likewise insisted on "a preliminary showing of good cause" before imposing the "serious consequences" that attend the proceeding itself. *United States v. Zucca*, 351 U.S. 91, 99-100 (1956). A failure to satisfy any of these sufficient-cause thresholds is a failure to show that the case has sufficient *merit* to proceed.

In the case of a lawsuit brought by the EEOC under Title VII, Congress added another such threshold: the EEOC must ensure through an administrative investigation that there is reasonable cause for the complainant's charges before filing suit on his or her behalf. That requirement is readily explained by the legislative history of the 1972 Act, which reflects pronounced concern about "pit[ting] the overwhelming financial strength and manpower of the Federal Government" against employers who would "bear the full economic brunt of defending themselves." 118 Cong. Rec. 671 (1972) (statement of Sen. Gambrell). Although Congress rejected the most radical measures to address this concern, such as subsidizing defendants' attorney's fees in routine cases, *see id.*, it did decide to limit EEOC enforcement—unlike private enforcement, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973)—to cases where the EEOC has first investigated and found reasonable cause. *See Gen. Tel. Co. of the Nw.*, 446 U.S. at 325 ("The 1972 amendments . . . expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers *reasonably suspected* of violating Title VII." (emphasis added)).

In this case, the district court's determination, affirmed by the Eighth Circuit, that the EEOC "wholly abandoned" its pre-suit obligations amounts to a ruling that, rather than investigating and determining whether the claims were potentially meritorious, the EEOC shifted the burden to CRST to show that they were not. The EEOC "did not interview any witnesses or subpoena any documents to determine whether any of [the claimants'] allegations were true." Pet. App. 107a. None of the alleged harassers was interviewed with respect to any claim. Nor did the EEOC make reasonable-cause determinations as to the 67 claims at issue here. *Id.* In fact, in 27 of the 67 cases, the alleged harassment had not yet *occurred* when the EEOC issued its Letter of Determination. *Id.* In 38 of the remaining 40 cases, "the EEOC admits that it was not even aware of the[] allegations until after the filing of the Complaint"; the EEOC had instead "used discovery in the instant lawsuit to find them." *Id.* at 108a. Because the prescribed statutory pre-suit process—including a threshold determination of reasonable cause—defines the claims that the EEOC is entitled to litigate, the EEOC did not have a "reasonable ground for bringing suit" with respect to these 67 claims. *Christiansburg*, 434 U.S. at 422.

Faced with the rare case in which the EEOC "wholly abdicated its role in the administrative process," Pet. App. 213a n.24, the district court reasonably concluded that dismissal with prejudice and an award of attorney's fees were warranted. The court noted that, in a less egregious case, it "might have stayed" the case rather than dismissing the defective

claims. *Id.* Here, however, "dismissal [was] a severe but appropriate remedy" to avoid "ratify[ing] a 'sue first, ask questions later' litigation strategy on the part of the EEOC.'" *Id.* at 214a.

The Eighth Circuit affirmed the dismissal. It explained that Title VII vests the district court with "'discretion'" to decide whether to stay proceedings, Pet. App. 115a (quoting 42 U.S.C. § 2000e-5(f)(1)), and concluded that the district court had properly deemed dismissal a "severe but appropriate remedy" in this case, *id.* (quotation marks omitted). That holding—which is not before the Court (and as to which the EEOC chose not to seek review by this Court)—is fully consistent with the Court's recent decision in *Mach Mining*. In *Mach Mining*, the Court explained that, when a district court resolves a "limited dispute" over the adequacy of conciliation in favor of the employer, "the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance." 135 S. Ct. at 1656. The Court in *Mach Mining* addressed only the conciliation requirement, however; it did not consider a sweeping failure by the EEOC, as here, to investigate, find reasonable cause, and attempt conciliation. *Mach Mining* did not purport to divest district courts of their remedial discretion in that or any other circumstance. Indeed, the Court explained its holding about the "appropriate remedy" in a failure-to-conciliate case by pointing to the provision of Title VII that "authoriz[es] a stay of a Title VII action for that purpose," *i.e.*, for the purpose of renewed conciliation. *Id.*; *see* 42 U.S.C. § 2000e-5(f)(1) (authorizing district courts to stay proceedings for up

to sixty days "pending ... further efforts of the Commission to obtain voluntary compliance"). In this case, by contrast, the EEOC did not just sue without attempting to "obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1). It failed to undertake any investigation or assessment of the 67 claims at issue here, suing before it had any basis to conclude even that they were claims worth conciliating. *See* 42 U.S.C. § 2000e-5(b) (directing the EEOC to attempt conciliation "[i]f the Commission determines after ... investigation that there is reasonable cause to believe that the charge is true").

In any event, as the district court explained, the effect of a stay under the circumstances presented here would simply be to "ratify" the EEOC's statutory violation. Pet. App. 214a. It would mean that, if the EEOC fails to investigate and find reasonable cause before bringing suit, it can always do so at some later point in the litigation (perhaps, as here, after the defendant has done that work through extensive discovery and numerous summary judgment motions). It would substantially increase the EEOC's leverage to coerce settlement of uninvestigated, unevaluated, and unconciliated claims if the defendant has to bear the additional costs of a "do over." This result would effectively undo Congress's decision to impose threshold requirements *before* the EEOC may bring suit, and would instead require the defendant to bear the costs of the EEOC's statutory violation.

* * *

The Eighth Circuit and the EEOC would have courts distinguish among the many ways in which a

defendant may prevail, selecting out those that go to "the merits" of the EEOC's case in order to determine whether a fee award is permissible. This approach will require courts to craft new rules to determine and explain the proper treatment of various types of claim-processing rules, conditions precedent, pleading standards, immunity defenses, and limitations on statutory coverage. The near certainty of inconsistent results counsels against starting down this path at all.

If the Court does develop a new jurisprudence of "merits-related" victories for fee-shifting purposes, however, CRST's victory here would qualify under any reasonable standard. Establishing that the EEOC has statutory authorization to sue is a necessary "element" of its claim; the restrictions represent mandatory and substantive limitations on the range of cases in which employers may be liable to the EEOC; a central purpose of the pre-suit conditions is to set a merits-based threshold for initiating litigation; and the district court concluded that the EEOC had not satisfied that threshold requirement (or the others) before litigating these claims.

In the end, this case presents a simple dilemma. If the dismissal in this case goes to "the merits," the Eighth Circuit erred in applying its own "merits-only" rule to deny CRST a fee award. And if the dismissal in this case does not go to "the merits," then it demonstrates that the Eighth Circuit's "merits-only" rule cannot be squared with the core policy of Title VII's fee-shifting provision. In either event, the decision below should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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