No. 14-1375

In the Supreme Court of the United States

CRST VAN EXPEDITED, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a district court's finding that the Equal Employment Opportunity Commission failed to satisfy the administrative preconditions for filing an enforcement suit authorizes an award of attorney's fees to the defendant under the fee-shifting provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 774 F.3d 1169. The opinion of the district court (Pet. App. 33a-85a) is unreported but is available at 2013 WL 3984478. An earlier relevant opinion of the court of appeals (Pet. App. 86a-163a) is reported at 679 F.3d 657.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2014. A petition for rehearing was denied on February 20, 2015 (Pet. App. 218a). The petition for a writ of certiorari was filed on May 19, 2015, and granted on December 4, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Equal Employment Opportunity Commission (EEOC or Commission) must satisfy certain administrative preconditions before bringing an enforcement suit in federal court. The question presented is whether a district court's finding that the EEOC did not satisfy those preconditions before filing a suit renders the defendant a "prevailing party" eligible for an award of attorney's fees under 42 U.S.C. 2000e-5(k). Here, that question arises in the context of unusually complex and protracted litigation stemming from the EEOC's effort to redress complaints of sexual harassment raised by hundreds of petitioner's female employees.

A. Title VII's Enforcement Scheme

1. Title VII prohibits employment discrimination based on race, sex, and other protected characteristics. 42 U.S.C. 2000e-2(a)(1). The EEOC enforces that prohibition through "a detailed, multi-step procedure" involving both administrative and judicial proceedings. *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649 (2015). The process ordinarily begins when an employee or applicant for employment files a charge with the Commission alleging that an employer has violated Title VII. 42 U.S.C. 2000e-5(b). The Commission then notifies the employer and conducts an investigation. *Ibid.* If the Commission does not find "reasonable cause" to believe the allegation has merit, it dismisses the charge. *Ibid.* The charging party may then file a private suit in federal court. 42 U.S.C. 2000e-5(f)(1).

If the Commission finds reasonable cause to believe the charge is true, it must "endeavor to eliminate" the

discriminatory practice "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). That process of conciliation "need not involve any specific steps or measures." *Mach Mining*, 135 S. Ct. at 1654. The Commission satisfies its statutory obligation to conciliate so long as it notifies the employer of "what the employer has done and which employees (or what class of employees) have suffered as a result" and offers the employer "an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1656.

Congress left to the Commission the ultimate decision whether to enter into a conciliation agreement or to file suit. *Mach Mining*, 135 S. Ct. at 1654. If more than 30 days have elapsed since the filing of a charge and the EEOC "has been unable to secure * * * a conciliation agreement acceptable to the Commission," it may bring a civil action in federal court to eliminate the unlawful employment practice and seek relief for the aggrieved individuals. 42 U.S.C. 2000e-5(f)(1). The remedies available in such suits include injunctions, back pay, and compensatory and punitive damages. 42 U.S.C. 1981a(a)(1), 2000e-5(g)(1).

Although the Commission's enforcement process begins with the filing of a charge, "EEOC enforcement actions are not limited to the claims presented by the charging parties." *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 331 (1980) (*General Tel.*). The Commission's investigations often uncover additional discrimination, and the Commission is authorized to bring suit to remedy "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *Ibid.* Such suits frequently seek relief for groups or classes of individ-

uals, such as all "female employees" adversely affected by specified policies, *id.* at 321, or "a class of women who * * * applied" for particular positions, *Mach Mining*, 135 S. Ct. at 1650. As this Court has explained, "the EEOC need look no further than [42 U.S.C. 2000e-5] for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals." *General Tel.*, 446 U.S. at 324.[1]

2. The ordinary rule in American litigation is that litigants are responsible for their own attorney's fees. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Like a number of other federal statutes, Title VII creates an exception to that rule by giving district courts discretion to award fees to a "prevailing party." 42 U.S.C. 2000e-5(k). Because Title VII plaintiffs are "the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority," this Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416-418 (1978) (citation and internal quotation marks omitted). A prevailing defendant, in contrast, may be awarded fees only if "a court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. The EEOC may not recover attorney's fees if it prevails as a plaintiff, but it is liable for an award of fees to a prevailing defendant "the same as a private

[1] The EEOC is also authorized to bring a suit to remedy a "pattern or practice" of discrimination under a separate provision, 42 U.S.C. 2000e-6. That separate authority is not at issue here.

person." 42 U.S.C. 2000e-5(k); see *Christiansburg Garment*, 434 U.S. at 422 n.20.

B. The EEOC's Investigation Of Sexual Harassment Against Petitioner's Female Drivers

1. Petitioner is an interstate trucking company that employs more than 2500 drivers. Petitioner uses a team-driving system in which two drivers alternate between sleeping and driving. That system allows petitioner's trucks to stay on the road for up to 22 hours a day and allows petitioner to offer faster delivery than its competitors. But the system also requires petitioner's two-person teams to live and work together for up to 21 days at a time in the close confines of a truck cab, which consists of two front seats and a small berth area with two bunk beds. Pet. App. 88a; J.A. 397a-398a.

Petitioner's driver workforce has a high turnover rate, and petitioner hires thousands of new drivers each year. Pet. App. 177a. Petitioner provides new drivers with a few days of classroom orientation and then pairs them with experienced drivers (known as lead drivers or trainers) for 28 days of over-the-road training. *Id.* at 88a-89a. At the end of that training period, the lead driver gives the trainee a "pass/fail driving evaluation" that helps determine whether the trainee will be offered a permanent job. *Id.* at 89a.

2. Between January 2005 and October 15, 2008, petitioner received at least 182 complaints that male drivers had sexually harassed their female trainees and co-drivers—a rate of nearly one complaint per week. J.A. 445a. That means that at least "6.7% of all women driving with men" complained of sexual harassment, and petitioner also received an unknown number of additional complaints that it failed to doc-

ument. J.A. 445a-446a. In many cases, the alleged harassment was extreme—for example, dozens of petitioner's female drivers have alleged that they were sexually assaulted. J.A. 451a-455a.

Petitioner had a formal policy prohibiting sexual harassment, and it encouraged drivers who suffered harassment to report it to their dispatchers or to petitioner's Human Resources (HR) Department. Pet. App. 88a-90a. But when the two-person HR Department received a complaint, it typically did not try to determine whether the complaint was true. J.A. 540a-542a. Petitioner's responses to some complaints were documented in investigative files and summarized in a chart maintained by the HR Department, which was entitled "Positive Work Environment Communication" (PWE). Supp. J.A. 2-4 (redacted chart); see J.A. 522a.

The PWE chart indicates that petitioner's most frequent response to an allegation of harassment was a "verbal warning" to the alleged harasser (shown as "vw"). Supp. J.A. 2-4. In some cases, petitioner barred the alleged harasser from driving with women for six months (shown as "nf," for "no females"). *Ibid.*; see J.A. 529a. It appears that only one or two male drivers were fired for sexual harassment, J.A. 417a, and there is no indication of any other instance in which a male driver was placed on probation, suspended, removed from the lead-driver program, or otherwise disciplined for harassment. See J.A. 529a, 536a. Petitioner also did not check the HR Department's files to determine "whether lead driver candi-

dates ha[d] a history of sexual harassment" before assigning them to train women. J.A. 399a.[2]

3. In December 2005, Monika Starke, one of petitioner's former trainees, filed a charge with the EEOC. Pet. App. 90a-91a. She alleged that in July and August 2005, two different lead drivers sexually harassed her during her over-the-road training. *Id.* at 91a. She stated that the first driver constantly made sexual remarks, and that when Starke complained to her dispatcher she was told that she "could not get off the truck until the next day." *Ibid.* Starke alleged that her second lead driver forced her to have unwanted sex in order to receive a passing evaluation. *Ibid.*; see Supp. J.A. 44 (charge).

The Commission investigated Starke's allegations, and also sought to determine whether other female drivers were being subjected to similar treatment. Pet. App. 91a-94a. In a letter accompanying the EEOC's initial notice of the charge, the Commission asked petitioner whether, between January 2005 and

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[2] As petitioner notes (Br. 8-9), the EEOC has interpreted Title VII to prohibit trucking companies from adopting same-sex driver assignment policies. Title VII prohibits policies that "segregate" or "classify" employees in a manner that "deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of sex. 42 U.S.C. 2000e-2(a)(2). Because women constitute a relatively small fraction of drivers in the trucking industry, a same-sex assignment policy would result in many fewer opportunities for female drivers and would thus create an "impediment to training and employment for female drivers that male drivers d[o] not face." *EEOC* v. *New Prime, Inc.*, 42 F. Supp. 3d 1201, 1213 (W.D. Mo. 2014). For example, one trucking company's same-sex assignment policy required women seeking training "to remain on [a] waiting list for a year or more while men faced no such delay." *Ibid.*

November 2005, "any other individual ha[d] complained to any supervisor or manager concerning the conduct described in the [charge]" and directed petitioner to identify each such complainant and provide documentation about the complaint. Supp. J.A. 45-48. As the EEOC would ultimately discover during litigation, petitioner's files showed that dozens of other women had complained of harassment during the relevant timeframe. *Id.* at 2. But petitioner's response identified just two of them. *Id.* at 49-50.[3]

Despite petitioner's incomplete response, the EEOC discovered during its investigation that a number of other female drivers had complained about sexual harassment during the relevant period. Pet. App. 173a-174a & nn. 7-9. The EEOC's investigator expressed concern to petitioner about the "number of complaints," and in particular about the number of

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[3] The district court suggested that petitioner failed to reveal the dozens of other complaints in its files because the EEOC's request for information about other individuals who had complained about "the conduct described in the [charge]" was a request for information about others who had complained about the harassment suffered *by Starke*. Pet. App. 168a-169a & nn. 4-5. But that is not how petitioner itself understood the question: The two women it identified had complained that they were victimized by separate incidents of harassment. Supp. J.A. 49-50. And petitioner's omission of the dozens of other complaints in its files cannot be explained by the particular phrasing of the EEOC's question in this case. At around the same time, a different EEOC office investigating a separate charge asked petitioner "whether any complaints of sexual harassment, excluding the charging party's, have ever been made formally or informally." J.A. 537a. Petitioner responded with the same two names, and no others. J.A. 538a. Petitioner's HR Director later admitted that this response was "inaccurate" and could not explain the failure to disclose the other complaints in petitioner's records. J.A. 539a.

female trainees who alleged that lead drivers were demanding sex in exchange for passing grades. J.A. 813a. Petitioner responded with a letter representing that the number of complaints it had received was "actually quite minimal" given the size of its workforce and assuring the Commission that petitioner "promptly investigate[d] allegations of harassment and mete[d] out appropriate discipline." J.A. 814a, 816a.

4. In July 2007, the EEOC completed its investigation and sent a letter notifying petitioner that it had found reasonable cause to believe that Starke had suffered sexual harassment in violation of Title VII. J.A. 810a-812a. The letter further stated that the Commission had found "reasonable cause to believe that [petitioner] ha[d] subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII." J.A. 811a.

The determination letter invited petitioner to conciliate, and over the next several weeks the EEOC's investigator and petitioner's attorney discussed the possible terms of a conciliation agreement. J.A. 811a; see J.A. 281a-282a. Among other things, petitioner's attorney requested "more information regarding the class" of female drivers for whom the Commission was seeking relief. J.A. 282a. The investigator explained that she could not provide the names of all class members or give an indication of the size of the class, but that the Commission would seek an agreement requiring petitioner to "send a letter to past and present employees to help identify class members so that settlements could be paid" to women who were found to have suffered harassment. *Ibid.*[4]

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[4] Communications during conciliation ordinarily must be kept confidential. 42 U.S.C. 2000e-5(b); see *Mach Mining*, 135 S. Ct. at

Petitioner's attorney did not object to that procedure or seek further information about the class. J.A. 282a. On August 24, 2007, however, he informed the EEOC that based on the monetary demand made by Starke's private counsel, petitioner "d[id] not wish to engage in conciliation efforts" because it was "confident that conciliation will not result in a resolution of this matter." J.A. 284a; see J.A. 282a.

C. The Present Litigation

In September 2007, the Commission filed a suit in federal district court alleging that petitioner violated Title VII by subjecting Starke and "a class of similarly situated female employees" to sexual harassment in violation of Title VII. J.A. 803a-804a. Petitioner's answer asserted seven affirmative defenses, but did not specifically challenge the EEOC's compliance with Title VII's pre-suit requirements. J.A. 783a-786a; cf. Fed. R. Civ. P. 9(c). The case proceeded to discovery.[5]

1. The EEOC seeks relief for 154 women who complained of sexual harassment

From the outset, petitioner and the district court understood that the EEOC was seeking in discovery to identify women who had suffered sexual harassment. J.A. 362a-363a, 648a. Among other things, the Commission obtained the addresses of petitioner's current and former female drivers and sent them letters advising them of the suit and requesting responses from those who had suffered harassment.

1655. In this case, however, the district court permitted an inquiry into the conciliation process, and the communication between petitioner and the Commission is part of the public record.

[5] The district court allowed Starke and several other female drivers to intervene in the suit as plaintiffs. Pet. App. 2a.

J.A. 694a. Petitioner did not object to the addition of claimants, but in August 2008 it expressed dissatisfaction with the pace at which the EEOC was identifying them. J.A. 649a-650a. At petitioner's request, the court directed the Commission to identify all women for whom it sought relief by October 15, 2008. J.A. 650a-651a.

Just two weeks before that deadline, petitioner produced to the Commission the HR Department's PWE chart of sexual harassment complaints and 146 internal investigation files. J.A. 695a-696a. Those documents reflected dozens of complaints that petitioner had received before and during the Commission's administrative investigation. *Ibid.*; see Supp. J.A. 2-4. Petitioner had not disclosed the documents during the investigation, in its mandatory initial disclosures under Federal Rule of Civil Procedure 26, or in the first batch of documents it produced in response to the EEOC's specific request for investigative files. J.A. 695a-696a. Primarily because of petitioner's belated disclosure, the EEOC added a large number of women to its list of claimants in the final weeks before the October 15 deadline. J.A. 695a-696a.

After the completion of discovery, the EEOC ultimately sought relief for 154 women.[6] Although those women alleged that they had been harassed by many different male drivers, their allegations reflected common patterns of harassing conduct. For example:

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[6] The EEOC identified more than 250 claimants by the October 15 deadline, but the district court barred it from seeking relief for women who were not made available for a deposition by a particular date. Pet. App. 191a-192a.

- 42 women alleged that they were sexually assaulted. J.A. 451a-455a, 475a-476a.
- 48 women alleged that they were subjected to offensive sex-based touching. J.A. 456a-460a, 476a-477a.
- 60 women alleged that they were propositioned for sex. J.A. 461a-467a, 477a-480a.
- 19 women alleged that male drivers either threw them off of their trucks or threatened to do so. J.A. 467a-470a, 481a-482a.

2. The EEOC's claims seeking relief for 67 women survive summary judgment

After the close of discovery, petitioner filed seven motions for summary judgment. J.A. 30a-34a. None of them challenged the Commission's satisfaction of Title VII's pre-suit requirements.

a. One of petitioner's motions sought to preclude the EEOC from relying on the pattern-or-practice framework set forth in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) (*Teamsters*). Under the *Teamsters* framework, the Commission must first establish that an employer engaged in a "pattern or practice" of employment discrimination. *Id.* at 360. That showing can be made on a class-wide basis, and it establishes a rebuttable presumption that individual employment actions were attributable to the unlawful pattern or practice. *Id.* at 361-362. Here, the district court precluded the EEOC from relying on the *Teamsters* framework because it held that the Commission had not established that

petitioner had a pattern or practice of tolerating sexual harassment. J.A. 350a-443a.[7]

b. Petitioner's other motions sought summary judgment on the EEOC's claims for specific women.[8] The district court granted the motions in part and denied them in part. Pet. App. 41a-43a.

Sexual harassment is actionable under Title VII if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citation omitted); see Pet. App. 128a-129a. An employer's liability for such harassment depends on the position held by the harasser. An employer is vicariously liable for harassment by a supervisor unless it can establish an affirmative defense. *Vance* v. *Ball State Univ.*, 133 S. Ct. 2434, 2442 (2013). But if the harasser is a co-worker, the plaintiff must prove that "the employer was negligent"—that is, that the employer "knew or reasonably should have

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[7] Although a separate statutory provision authorizes the EEOC to sue to remedy a "pattern or practice" of resistance to Title VII rights, 42 U.S.C. 2000e-6, the use of the *Teamsters* framework is not limited to cases brought under Section 2000e-6. Cf. Pet. Br. 13. The *Teamsters* framework is simply a method of proving discrimination affecting a group of individuals, and every court of appeals to consider the issue has held that the Commission may "pursue a claim under the *Teamsters* pattern-or-practice framework" in a suit brought under 42 U.S.C. 2000e-5. *Serrano* v. *Cintas Corp.*, 699 F.3d 884, 896 (6th Cir. 2012), cert. denied, 134 S. Ct. 92 (2013); accord *Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 899 (7th Cir. 1999); *EEOC* v. *American Nat'l Bank*, 652 F.2d 1176, 1184, 1187-1188 (4th Cir. 1981), cert. denied, 459 U.S. 923 (1982).

[8] The EEOC filed a one-count complaint seeking relief for a class. J.A. 803a-808a. The lower courts treated the Commission's request for relief for each woman as a separate "claim." Pet. App. 15a-18a, 54a-56a. This brief follows the same convention.

known about the harassment but failed to take remedial action." *Vance*, 133 S. Ct. at 2440-2441.

In this case, the district court held that petitioner's lead drivers did not qualify as "supervisors" because they lacked ultimate authority to hire or fire trainees. J.A. 208a n.2, 434a. Accordingly, the EEOC's claim seeking relief for a particular woman survived summary judgment only if the court concluded that a reasonable jury could have found, among other things, (1) that the woman suffered severe or pervasive harassment, and (2) that petitioner knew or should have known about the harassment but failed to take remedial action. Pet. App. 134a-135a; J.A. 208a-209a.

c. After the district court's summary judgment rulings, the EEOC had trial-ready claims seeking relief for 67 women. Pet. App. 192a-193a. The deposition testimony from a sampling of those women illustrates the type of conduct at issue:

- Deborah Carey testified that "ten of her fourteen co-drivers sexually harassed her," including by "fondl[ing] her while she was sleeping" and by abandoning her at a truck stop after she rebuffed a sexual advance. Carey "complained about some of this conduct early on to no avail." J.A. 196a.
- Kelli Carney testified that she was harassed by three drivers, including one who "forced sex upon [her]" multiple times and told her "that he would kill [her]" if she reported him. J.A. 683a-684a. Carney testified that she reported the rapes to the HR Department, J.A. 686a, but her complaint does not appear in petitioner's files.

- Tequila Jackson testified that, among other things, her trainer told her that "he was going to rape [her]." J.A. 504a. Jackson called a dispatcher to report the threatening behavior as it was occurring on a Friday evening, but the dispatcher told her that she would have to stay on the truck "until Monday morning." J.A. 507a. The trainer received a verbal warning. Supp. J.A. 2.
- Shalitha Ross testified that she woke up with her co-driver on top of her, fondling her breast. J.A. 608a-610a, 621a-622a. She complained to a dispatcher, but he did not believe her and initially failed to arrange for her to get off of the truck. J.A. 624a-626a, 641a. The co-driver received a verbal warning. Supp. J.A. 2.
- Gloria South testified that her trainer raped her repeatedly and prevented her from reporting him. J.A. 710a-725a. She was eventually able to get off the truck and report the rapes to petitioner's HR Director, who assured her that the trainer would be fired. J.A. 731a-734a. In fact, he received a verbal warning and a temporary "no females" designation. Supp. J.A. 3.
- Tameisha Wilson testified that a male driver "constantly propositioned [her] for sexual intercourse," "tried to grab her breasts every night," "tried to jump on top of her," "punched her in the jaw," and "tried to choke her." Wilson complained to her dispatcher, who "refused to help" and told her to "try to stick it out." J.A. 196a-197a.

3. The district court finds that the EEOC failed to satisfy Title VII's pre-suit requirements and dismisses the Commission's claims seeking relief for the remaining 67 women

The district court dismissed the EEOC's claims seeking relief for the remaining 67 women because it held that the Commission failed to satisfy Title VII's pre-suit requirements. Pet. App. 164a-217a.

a. The EEOC's compliance with its pre-suit obligations was raised for the first time in one of the district court's summary judgment orders. The court noted that petitioner had not objected, but suggested that the EEOC's identification of additional claimants during litigation was improper. J.A. 355a n.2. Instead, the court suggested that the EEOC must identify all potential claimants during its administrative investigation. J.A. 361a n.5.

Shortly thereafter, petitioner filed a motion for an order to show cause why the EEOC's complaint should not be dismissed for failure to satisfy Title VII's pre-suit requirements. J.A. 276a. The district court granted the motion and reopened discovery to allow an inquiry into the investigation and conciliation process. J.A. 278a-279a.

b. The district court then dismissed the EEOC's claims seeking relief for the remaining 67 women. Pet. App. 164a-217a. The court acknowledged that the Commission had broadened its investigation of Starke's charge to a "class" investigation and that the Commission had found reasonable cause to believe that petitioner subjected "a class of employees and prospective employees" to sexual harassment. *Id.* at 179a-180a (citation omitted). The court recognized that it could not "second-guess" that reasonable-cause

finding. *Id.* at 203a. But the court rejected the Commission's contention that it could satisfy Title VII's pre-suit requirements on a class-wide basis. The court held that the EEOC was required to investigate, make a reasonable-cause determination, and conciliate each individual woman's claim separately, and that the Commission had not done so with respect to the 67 women whose claims had survived summary judgment. *Id.* at 212a-213a.

The Commission argued that the proper remedy for any failure to satisfy Title VII's pre-suit requirements was a stay of proceedings. Cf. 42 U.S.C. 2000e-5(f)(1) (authorizing a stay to allow for conciliation). The district court disagreed, reasoning that dismissal was "a severe but appropriate remedy" given what it viewed as the EEOC's total failure to satisfy Title VII's pre-suit requirements as to the 67 remaining women. Pet. App. 214a; see *id.* at 213a n.24. The court recognized that its ruling meant that "dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom." *Id.* at 214a.

c. The district court awarded petitioner $4.5 million in attorney's fees and costs. J.A. 123a-174a. The court acknowledged that the EEOC could not be held liable for a fee award unless its claims were "frivolous, unreasonable, or without foundation." J.A. 138a (quoting *Christiansburg Garment*, 434 U.S. at 421). But the court held that "[t]he EEOC's failure to investigate and attempt to conciliate the individual claims constituted an unreasonable failure to satisfy Title VII's prerequisites to suit." J.A. 140a. The court did not find that the EEOC's suit was unreasonable in any other respect.

4. A divided panel of the court of appeals affirms in part, reverses in part, and remands

A divided panel of the court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 86a-163a.

a. As relevant here, the court of appeals first affirmed the dismissal of the EEOC's claims based on the Commission's failure to satisfy Title VII's pre-suit requirements. Pet. App. 103a-116a. The court agreed with the district court that the EEOC was required to identify *all* claimants during its investigation and to attempt conciliation with respect to each of their claims individually. *Id.* at 106a-114a. The court further held that the district court "did not abuse its discretion in opting to dismiss, rather than stay, the EEOC's complaint." *Id.* at 115a.

The court of appeals also affirmed the district court's grant of summary judgment to petitioner on all but two of the remaining claims. Pet. App. 128a-152a. The court reversed the district court's grant of summary judgment on the EEOC's claims seeking relief for Starke and one other woman, Tillie Jones. *Id.* at 155a-156a. Because it had reversed in part, the court also vacated the award of attorney's fees. *Id.* at 155a.

b. Judge Murphy dissented in part. Pet. App. 156a-163a. She criticized the majority for "impos[ing] a new requirement that the EEOC must complete its presuit duties for each individual alleged victim of discrimination when pursuing a class claim," explaining that the majority's novel rule "places unprecedented obligations on the EEOC" and "in effect rewards [petitioner] for withholding information" during the Commission's investigation. *Id.* at 156a. Judge Murphy also dissented from the court's holding that

petitioner's lead drivers did not qualify as supervisors. *Id.* at 156a-157a.

c. The court of appeals denied the Commission's petition for rehearing en banc. J.A. 14a. Judges Murphy, Bye, and Melloy voted to grant the petition. J.A. 14a-15a.

5. On remand, the parties settle the EEOC's claim seeking relief for Starke and the district court again awards attorney's fees

When the case returned to the district court, the EEOC withdrew the claim seeking relief for Jones, acknowledging that the claim was barred by the district court's order precluding the Commission from seeking relief for women who had not been identified during its pre-suit investigation. J.A. 118a. The parties then settled the Commission's sole remaining claim, which sought relief for Starke. J.A. 120a-122a. Petitioner agreed to pay $50,000, and the parties agreed to file a joint motion "to dismiss EEOC's claim on behalf of Ms. Starke with prejudice." J.A. 121a. The parties filed the required motion, and the district court entered an order dismissing the case with prejudice and incorporating the settlement agreement. J.A. 117a-122a.

The district court then granted petitioner's renewed motion for attorney's fees, awarding approximately $4.7 million in fees and costs. Pet. App. 33a-85a. Although Judge Murphy had agreed with the EEOC's position on appeal, the district court reaffirmed its finding that the EEOC's contention that it had satisfied Title VII's pre-suit requirements was "unreasonable." *Id.* at 64a-65a. Without discussing the facts of the individual claims, the court further held that "the EEOC's pattern-or-practice claim and

153 of its individual claims were unreasonable or groundless." *Id.* at 67a.

6. The court of appeals reverses and remands the fee award

The court of appeals reversed and remanded the fee award. Pet. App. 1a-32a. As relevant here, the court held that a finding that the EEOC failed to satisfy Title VII's pre-suit requirements does not authorize an award of attorney's fees to the defendant. *Id.* at 18a-24a. The court relied on circuit precedent holding that a defendant does not qualify as a "prevailing party" under 42 U.S.C. 2000e-5(k) unless it secures a "judicial determination on the merits" of the plaintiff's claim. *Marquart* v. *Lodge 837*, 26 F.3d 842, 852 (8th Cir. 1994); see Pet. App. 18a-19a. The court held that a dismissal based on the EEOC's failure to satisfy Title VII's pre-suit requirements is not a ruling "on the merits" because those requirements are nonjurisdictional prerequisites to filing a suit rather than elements of a Title VII claim. Pet. App. 20a-24a.

The court of appeals also vacated the remainder of the fee award. Pet. App. 24a-28a. The court held that the district court erred in making "a universal finding that all of the EEOC's claims were without foundation." *Id.* at 28a. The court explained that a district court must "make findings as to why a particular 'claim was frivolous, unreasonable, or groundless'" before awarding fees to a Title VII defendant. *Ibid.* (quoting *Christiansburg Garment*, 434 U.S. at 422).

SUMMARY OF ARGUMENT

I. A district court's finding that the EEOC failed to satisfy Title VII's administrative preconditions to filing a lawsuit does not authorize an award of attorney's fees under 42 U.S.C. 2000e-5(k) because it does not make the defendant a "prevailing party."

A. Under Title VII, as under many other fee-shifting statutes, only a "prevailing party" is eligible for an award of attorney's fees. 42 U.S.C. 2000e-5(k). This Court has held that a prevailing party is one that secures a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (*Buckhannon*). A defendant does not satisfy that test unless, at a minimum, it obtains a judgment barring further litigation on the plaintiff's claim. Absent such a judgment, the legal relationship between the parties remains materially unchanged because the plaintiff is free to refile.

B. A district court's finding that the EEOC failed to satisfy Title VII's administrative preconditions to a suit does not make the defendant a prevailing party because it does not bar further litigation on the Commission's claim. As this Court has now clarified, the proper remedy for such a failure is a stay—not a dismissal. *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1656 (2015). But even where, as in this pre-*Mach Mining* case, a court dismisses an action based on a plaintiff's failure to satisfy a precondition to filing suit, it has long been settled that such a dismissal does not preclude the plaintiff from returning to court after the precondition has been met. See, *e.g.*, *Costello* v. *United States*, 365 U.S. 265, 284-288 (1961). And because such a dismissal does not protect the defend-

ant from further litigation on the same claim, it does not constitute the sort of material alteration of the parties' legal relationship required to confer prevailing-party status.

C. Petitioner appears to agree that a defendant cannot qualify as a prevailing party unless it secures a judgment foreclosing further litigation on the plaintiff's claim. But petitioner asserts (Br. 23, 29, 41) that the dismissal of the relevant claims in this case had the requisite effect because it was a dismissal "with prejudice." That characterization did not appear in the petition for a writ of certiorari, and it is incorrect. The district court's original dismissal of the relevant claims was not denominated a dismissal with prejudice, and this Court's decisions make clear that it did not have that legal effect. After the court of appeals remanded two other claims for further proceedings and the Commission withdrew one of them, the parties settled the Commission's final claim and agreed to dismiss the case "with prejudice." But that agreed-upon dismissal did not and could not modify the court's earlier dismissal of the claims at issue here, which had already been affirmed by the court of appeals.

D. Petitioner's policy arguments about the need for fee awards could not justify a departure from the clear and settled meaning of "prevailing party," and those arguments are in any event misplaced. The EEOC already has powerful incentives to conciliate and to avoid having its enforcement actions dismissed, and the marginal deterrent effect of a fee award adds little. Nor are fee awards needed to compensate defendants. Awards for failure to satisfy Title VII's pre-suit requirements are already rare, and would become

even rarer in light of this Court's guidance in *Mach Mining*. Defendants should ordinarily have little difficulty identifying and raising early in the litigation any perceived failure by the Commission to satisfy its pre-suit obligations, thus securing relief before incurring substantial attorney's fees. In this case, petitioner incurred millions of dollars in fees only because it failed to raise the issue until more than 18 months into the litigation.

II. Even if a finding that the EEOC failed to satisfy Title VII's pre-suit requirements could authorize an award of attorney's fees, this Court should affirm on the alternative ground that the award here was improper because the Commission's suit was not "frivolous, unreasonable, or groundless." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978). The courts below held that the EEOC failed to satisfy its pre-suit obligations because it did not separately investigate, make a reasonable-cause determination, and conciliate with respect to each individual woman for whom it ultimately sought relief. That novel understanding of the pre-suit requirements imposed by 42 U.S.C. 2000e-5 is contrary to longstanding practice and the decisions of other courts of appeals. It was emphatically rejected by Judge Murphy in this very case. And it has now been disapproved by this Court, which instructed that the EEOC may satisfy its conciliation obligations by identifying the "*class* of employees" for which it seeks relief. *Mach Mining*, 135 S. Ct. at 1656 (emphasis added). At a minimum, therefore, the EEOC's position that it could satisfy its pre-suit obligations on a class-wide basis was not "frivolous, unreasonable, or groundless."

ARGUMENT

I. A DISTRICT COURT'S FINDING THAT THE EEOC FAILED TO SATISFY TITLE VII'S PRE-SUIT REQUIREMENTS DOES NOT AUTHORIZE AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. 2000e-5(k)

A defendant cannot qualify as a prevailing party eligible for an award of attorney's fees unless it has secured a "judicially sanctioned change in the legal relationship of the parties" in the form of a judgment foreclosing the plaintiff's claim. *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). A finding that the EEOC failed to satisfy Title VII's pre-suit requirements does not authorize such a judgment. Instead, like other dismissals for failures to satisfy preconditions to filing a lawsuit, a dismissal based on the EEOC's failure to satisfy Title VII's pre-suit requirements allows the Commission to satisfy those requirements and then return to court. And contrary to petitioner's assertion, nothing about the procedural history of this case altered the usual consequences of a dismissal for failure to satisfy a precondition to suit or rendered the dismissal here one "with prejudice."

A. A Defendant Is Not A "Prevailing Party" Eligible For An Award Of Attorney's Fees Unless It Secures A Judgment Precluding Further Litigation On The Plaintiff's Claim

1. Like many statutes containing fee-shifting provisions, Title VII allows district courts to award attorney's fees to a "prevailing party." 42 U.S.C. 2000e-5(k); see *Buckhannon*, 532 U.S. at 602-603 (collecting examples). Under such statutes, "no fee award is permissible until [a party] has crossed the 'statutory

threshold' of prevailing party status." *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989) (*Garland*) (citation omitted). A district court then has discretion to determine whether an award of fees is warranted under the particular circumstances of the case. See, *e.g.*, *Farrar* v. *Hobby*, 506 U.S. 103, 114-115 (1992). This Court has developed different principles to guide courts' discretion in awarding fees under different fee-shifting statutes, relying on "the large objectives of the relevant Act." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139-140 (2005) (citation and internal quotation marks omitted).[9] But the threshold term "prevailing party" is "a legal term of art," and this Court has held that it should be interpreted "consistently" across the various provisions in which it appears. *Buckhannon*, 532 U.S. at 603 & n.4.

In *Buckhannon*, this Court "distilled from [its] prior cases" a two-part test for prevailing-party status. 532 U.S. at 603. To qualify as a prevailing party, a party must establish that it has achieved (1) a "material alteration of the legal relationship of the parties," *id.* at 604 (quoting *Garland*, 489 U.S. at 792-793), and (2) "judicial *imprimatur* on the change," *id.* at 605. Both elements are required. A court decision contain-

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[9] Compare *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (holding that under the fee-shifting provision of the Copyright Act, 17 U.S.C. 505, "[p]revailing plaintiffs and prevailing defendants are to be treated alike"), with *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416-417, 421 (1978) (holding that under 42 U.S.C. 2000e-5(k) and other civil rights statutes, prevailing plaintiffs should ordinarily receive fee awards, but prevailing defendants may be awarded fees only if the plaintiff's claim "was frivolous, unreasonable, or groundless").

ing a favorable statement of the law "unaccompanied by 'judicial relief'" is insufficient because it does not alter the parties' legal relationship. *Id.* at 606 (emphasis omitted) (quoting *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987)). And a defendant's voluntary change in conduct or a private settlement agreement may alter the parties' legal relationship, but such a change "lacks the necessary judicial *imprimatur*" to confer prevailing-party status. *Id.* at 605.

2. Although *Buckhannon* involved a plaintiff seeking prevailing-party status, "the term 'prevailing party' * * * does not distinguish between plaintiffs and defendants." *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 759 (1989). The same principles thus govern the application of that "legal term of art," *Buckhannon*, 532 U.S. at 603, to defendants. The courts of appeals to consider the question have uniformly agreed, holding across a range of statutes that *Buckhannon* governs prevailing-party determinations "whether the party seeking fees is a plaintiff or a defendant." *Mr. L.* v. *Sloan*, 449 F.3d 405, 407 (2d Cir. 2006) (Sotomayor, J.) (Individuals with Disabilities Education Act, 20 U.S.C. 1415(i)(3)(B)); see also, *e.g.*, *District of Columbia* v. *Straus*, 590 F.3d 898, 901-902 (D.C. Cir. 2010) (same); *Newport News Holdings Corp.* v. *Virtual City Vision, Inc.*, 650 F.3d 423, 444 (4th Cir.) (*Newport News*) (Copyright Act, 17 U.S.C. 505), cert. denied, 132 S. Ct. 575 (2011); *Cadkin* v. *Loose*, 569 F.3d 1142, 1147-1149 (9th Cir. 2009) (same), cert. denied, 559 U.S. 1007 (2010); *Riviera Distribs., Inc.* v. *Jones*, 517 F.3d 926, 928 (7th Cir. 2008) (same); *RFR Indus., Inc.* v. *Century Steps, Inc.*, 477 F.3d 1348, 1353 (Fed. Cir. 2007) (Patent Act, 35 U.S.C. 285). Accordingly, as petitioner

appears to acknowledge (Br. 28-30), a defendant "prevail[s]" under a fee-shifting provision like 42 U.S.C. 2000e-5(k) only if it achieves a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605.

3. As the courts of appeals have explained, not every court-ordered dismissal renders the defendant a prevailing party. Most obviously, a defendant who secures a dismissal without prejudice does not qualify. Such a dismissal "does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing" of the same claim at a later date. *Oscar* v. *Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008); accord, *e.g.*, *RFR Indus.*, 477 F.3d at 1353. The same logic applies when a plaintiff withdraws a claim by omitting it from an amended complaint; that step "d[oes] not alter the legal relationship between the parties because [the plaintiff] remain[s] at liberty to bring the claim again." *Newport News*, 650 F.3d at 444.

The same is true when a court dismisses for *forum non conveniens* or on another procedural ground that does not "immunize a defendant from the risk of further litigation on the merits of a plaintiff's claims." *Dattner* v. *Conagra Foods, Inc.*, 458 F.3d 98, 103 (2d Cir. 2006). In such cases, the defendant has not "achieved a judicially sanctioned change in the legal relationship of the parties" because the plaintiff "is free to pursue his claims" in another forum or at a later time. *Ibid.* see, *e.g.*, *Elwood* v. *Drescher*, 456 F.3d 943, 948 (9th Cir. 2006).

The unifying principle of those decisions is that a defendant cannot qualify as a prevailing party if it obtains a dismissal on the ground "that the plaintiff

has sued too soon, or in the wrong court, or failed to jump through a procedural hoop." *Citizens for a Better Env't* v. *Steel Co.*, 230 F.3d 923, 929-930 (7th Cir. 2000) (Easterbrook, J.), cert. denied, 532 U.S. 994 (2001). Such dismissals leave open the possibility that "the dispute will continue later, or elsewhere." *Id.* at 930. And because they do not definitively "end the litigation in the defendant's favor," such dismissals "do[] not make [the defendant] a prevailing party." *Ibid.*

4. Under *Buckhannon*, therefore, a defendant cannot qualify as a prevailing party unless it secures a court order that bars further litigation on the plaintiff's claim—ordinarily, a judgment with "claim preclusion or *res judicata*" effect. *Claiborne* v. *Wisdom*, 414 F.3d 715, 719 (7th Cir. 2005), cert. dismissed, 546 U.S. 1162 (2006); see, *e.g.*, *United States ex rel. Grynberg* v. *Praxair, Inc.*, 389 F.3d 1038, 1057 (10th Cir. 2004) (holding that a defendant qualifies as a prevailing party where the plaintiff is "prohibited from bringing further claims on these facts"), cert. denied, 545 U.S. 1139 (2005). Petitioner's examples (Br. 33-34) of decisions awarding fees based on non-merits grounds are all consistent with that rule: Each of the underlying orders appears to have barred further litigation on the plaintiff's claim.[10]

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[10] An order precluding further litigation on the plaintiff's claim is a necessary condition for prevailing-party status, but it may not be sufficient. *Buckhannon* requires not only a change in the parties' legal relationship, but also "judicial *imprimatur* on the change." 532 U.S. at 605. Some courts have suggested that the necessary imprimatur is lacking if a dismissal with prejudice is accomplished under Federal Rule of Civil Procedure 41(a)(1), which in some circumstances permits a plaintiff or the parties jointly to dismiss a

The courts of appeals, including in the decision below, have sometimes said that a defendant must secure a judgment "on the merits" in order to qualify as a prevailing party. Pet. App. 23a; see, *e.g.*, *Latin Am. Music Co.* v. *American Soc'y of Composers, Authors & Publishers*, 642 F.3d 87, 91 (1st Cir. 2011); *Claiborne*, 414 F.3d at 719. That terminology is understandable because "[i]t is frequently said" that a judgment for the defendant has claim-preclusive effect "only if the judgment is rendered 'on the merits.'" 1 Restatement (Second) of Judgments § 19 cmt. a, at 161 (1982) (Restatement). But some judgments "not passing directly on the substance of the claim" also have claim-preclusive effect, and the Restatement therefore avoids the "on the merits" terminology "because of its possibly misleading connotations." *Ibid.*; see *Semtek Int'l, Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001).[11]

In this context, too, asking whether a judgment is "on the merits" in some abstract sense risks confusion. Instead, a court conducting a prevailing-party inquiry should ask the legally determinative question directly: Has the defendant secured a "judicially sanctioned

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case "without a court order." See, *e.g.*, *RFR Indus.*, 477 F.3d at 1353. The Court need not decide that issue here.

[11] The Eighth Circuit first articulated its "on the merits" requirement in a pre-*Buckhannon* case. See *Marquart* v. *Lodge 837*, 26 F.3d 842, 850-852 (1994). There, the Eighth Circuit predicted that this Court would not apply a "material alteration of the legal relationship" test to determine whether a defendant qualified as a prevailing party. *Id.* at 851. That aspect of *Marquart*'s reasoning is inconsistent with *Buckhannon*, which made clear that "prevailing party" is "a legal term of art" that refers to a party that has obtained a "judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 603, 605.

change in the legal relationship of the parties," *Buckhannon*, 532 U.S. at 605, in the form of an order that bars further litigation on the plaintiff's claim?

B. A District Court's Finding That The EEOC Did Not Satisfy Title VII's Pre-Suit Requirements Does Not Support An Award Of Attorney's Fees Because It Does Not Preclude Further Litigation Once Those Requirements Are Met

Before bringing a suit under 42 U.S.C. 2000e-5, the EEOC must receive a charge, conduct an investigation, make a reasonable-cause determination, and "endeavor to eliminate" the alleged discrimination through conciliation. 42 U.S.C. 2000e-5(b). The statute makes the last step of that process "a necessary precondition to filing a lawsuit," *Mach Mining*, 135 S. Ct. at 1651, by specifying that the EEOC may bring an action only if it "has been unable to secure * * * a conciliation agreement acceptable to the Commission." 42 U.S.C. 2000e-5(f)(1).

In *Mach Mining*, this Court held that courts must review "the EEOC's compliance with the law's conciliation provision" in the same way that "[c]ourts routinely enforce [other] compulsory prerequisites to suit." 135 S. Ct. at 1651-1652. This Court has long held that a failure to satisfy such a prerequisite—including some of the specific prerequisites on which *Mach Mining* relied—does not bar further litigation once the prerequisite has been satisfied. A dismissal for failure to satisfy Title VII's pre-suit requirements therefore does not make the defendant a prevailing party because it does not foreclose further litigation on the Commission's claim.

1. A district court's finding that the EEOC failed to satisfy Title VII's pre-suit requirements does not bar further litigation on the Commission's claim

a. This Court's decision in *Mach Mining* makes clear that the Commission's failure to satisfy Title VII's pre-suit requirements does not foreclose further litigation on the Commission's claim. Indeed, this Court instructed that if a district court finds that the Commission failed to satisfy its obligation to conciliate before bringing a suit, the "appropriate remedy" is not to dismiss at all, but rather to stay the litigation and "order the EEOC to undertake the mandated efforts to obtain voluntary compliance." 135 S. Ct. at 1656; see 42 U.S.C. 2000e-5(f)(1) (authorizing such a stay). Such a stay obviously does not make the defendant a prevailing party within the meaning of 42 U.S.C. 2000e-5(k), and the question presented in this case thus should not arise in the future.

Petitioner asserts (Br. 54-55) that *Mach Mining*'s instruction on the proper remedy does not apply where, as here, a district court finds that the Commission failed to investigate and find reasonable cause in addition to failing to conciliate. That is incorrect, as this case illustrates. The EEOC's claims seeking relief for the 67 women at issue here have already survived summary judgment; there is unquestionably "reasonable cause" to believe that those allegations have merit. Courts have long held that employers may not challenge "the sufficiency of the EEOC's investigation" or "the evidence underlying a reasonable cause determination." *EEOC* v. *Keco Indus.*, 748 F.2d 1097, 1100 (6th Cir. 1984); see, *e.g.*, *EEOC* v. *Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005). Instead, the primary purpose of those steps is "to

provide a basis for later conciliation proceedings." *Keco Indus.*, 748 F.2d at 1100. Accordingly, as the court of appeals recognized, the fact that the Commission did not individually investigate and conciliate the claims at issue here deprived petitioner—at most—of a "meaningful opportunity to conciliate" those claims on an individual basis. Pet. App. 114a. In such circumstances, the stay procedure specified in *Mach Mining* is all that is required to remedy any defect and afford petitioner the process to which it is entitled under Title VII.

b. Here, of course, the lower courts acted without *Mach Mining*'s guidance and dismissed the EEOC's claims rather than staying them. Pet. App. 115a-116a, 213a-214a & n.24. But such a dismissal does not preclude further litigation on the relevant claims. It has long been settled that a "judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied." Restatement § 20(2), at 170. Ordinarily, "[n]o more need be done" to bring a second action than "satisfy the precondition." 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4437, at 180 (2d ed. 2002); see 18 James W. Moore, *Moore's Federal Practice* § 131.30[3][b], at 131-104 to 131-105 & n.77 (3d ed. 2015) (collecting cases).

This Court and others have applied that principle in a variety of contexts. For example, in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989), this Court held that an environmental suit had to be dismissed because the plaintiffs failed to comply with a statutory requirement to give notice at least 60 days before

bringing suit. *Id.* at 25-26, 33. The Court emphasized, however, that the dismissal would not have "the inequitable result of depriving [the plaintiffs] of their right to a day in court" because the plaintiffs "remain[ed] free to give notice and file [a new] suit in compliance with the statute." *Id.* at 32 (citation and internal quotation marks omitted).

Similarly, in *United States* v. *Zucca*, 351 U.S. 91 (1956), this Court held that a statute requiring the filing of an affidavit of good cause prior to the initiation of a denaturalization proceeding mandated dismissal of a proceeding that had been instituted without the requisite affidavit. *Id.* at 99-100. But the Court later held that such a dismissal did not bar the government from instituting a new denaturalization proceeding after complying with the affidavit requirement. See *Costello*, 365 U.S. at 285.

Courts of appeals have applied the same principle to Title VII's requirement that a private plaintiff obtain a right-to-sue letter from the Commission before bringing a suit. There, too, a judgment rejecting a plaintiff's claim for failure to satisfy the required pre-suit procedures "will not bar the filing of a new * * * action after [the plaintiff] exhausts his EEOC remedies." *Murthy* v. *Vilsack*, 609 F.3d 460, 466 (D.C. Cir. 2010); see, *e.g.*, *Lebron-Rios* v. *U.S. Marshal Serv.*, 341 F.3d 7, 14-15 (1st Cir. 2003); *Criales* v. *American Airlines, Inc.*, 105 F.3d 93, 96-97 (2d Cir.), cert. denied, 522 U.S. 906 (1997).

The same logic applies to the Title VII pre-suit requirements applicable to the Commission. Indeed, this Court's decision in *Mach Mining* expressly analogized those requirements to the requirement that private litigants obtain a right-to-sue letter and to the

statutory prerequisites at issue in *Hallstrom* and *Zucca*, citing each of those requirements as evidence that Title VII's conciliation requirement is judicially enforceable. See 135 S. Ct. at 1651-1652. *Hallstrom* and *Costello* thus confirm that a dismissal for failure to satisfy Title VII's pre-suit requirements does not bar the EEOC from initiating a new lawsuit on the same underlying claims so long as it satisfies its pre-suit obligations before it does so. And those decisions also confirm that refiling is permitted even where, as here, there was substantial litigation on the merits of the original suit before it was dismissed. See *Hallstrom*, 493 U.S. at 32 (original suit involved "years of litigation and a determination on the merits"); *Costello*, 365 U.S. at 267-268 (original denaturalization proceeding was litigated all the way to this Court).[12]

c. Consistent with those principles, the lower courts that have considered the issue have generally

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[12] *Mach Mining* also analogized the EEOC's conciliation obligation to the requirement that an employee file "a timely charge with the EEOC" before bringing suit. 135 S. Ct. at 1651. A holding that a plaintiff failed to file a timely charge generally forecloses further litigation on the claim. See *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 120 (2002). But that is because the requirement to file a timely charge operates as a "statute of limitations." *Id.* at 117. A plaintiff that has not filed a timely charge, like any plaintiff who files too late, cannot cure that defect after her original suit is dismissed. The dismissal therefore bars further litigation. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) ("The rules of finality * * * treat a dismissal on statute-of-limitations grounds * * * as a judgment on the merits."). But where, as here, a complaint is dismissed not because the plaintiff filed too late, but only because it failed to take a required step before filing, the plaintiff remains free to satisfy the requirement and bring a new action.

concluded that a dismissal based on the EEOC's failure to satisfy Title VII's pre-suit requirements does not preclude a subsequent action once those requirements have been satisfied. Such a dismissal "does not bar a second suit" because the Commission may "start over, conduct a proper investigation, issue a prompt notice to the [employer] if conciliation should fail, * * * and sue again." *Truvillion* v. *King's Daughters Hosp.*, 614 F.2d 520, 525 (5th Cir. 1980); see, *e.g.*, *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981); *EEOC* v. *International Bhd. of Elec. Workers*, 506 F. Supp. 480, 482 (D. Mass. 1981); *EEOC* v. *Sears, Roebuck & Co.*, 490 F. Supp. 1245, 1258 (M.D. Ala. 1980).

A contrary rule would have severely "inequitable result[s]." *Hallstrom*, 493 U.S. at 32. Even a dismissal without prejudice is hardly "a toothless sanction"; being forced to start the litigation over imposes significant burdens on the Commission, and in some cases the obstacles to initiating a new suit may make refiling "unlikely." *United States* v. *Taylor*, 487 U.S. 326, 342 (1988) (discussing dismissals without prejudice under the Speedy Trial Act, 18 U.S.C. 3162). As this Court recognized in *Mach Mining*, such burdens are not warranted, and the proper remedy for a finding that the EEOC failed to satisfy Title VII's pre-suit requirements is a stay, not a dismissal of any sort. But allowing such a dismissal to preclude the EEOC from returning to court after satisfying the relevant requirements would be far worse. Such a result would thwart the central purpose of Title VII by allowing unlawful employment discrimination to go unremedied and depriving meritorious claims of their "day in court." *Hallstrom*, 493 U.S. at 32 (citation omitted).

2. Petitioner's contention that Title VII's pre-suit requirements are elements of the EEOC's claim is irrelevant and mistaken

Petitioner contends (Br. 41-56) that it prevailed "on the merits" in this case because the EEOC's pre-suit obligations are "elements" of a Title VII claim or otherwise properly considered to be "merits" issues. That contention is both irrelevant and mistaken.

a. Under *Buckhannon*, the relevant question in determining whether a defendant qualifies as a "prevailing party" is not whether the ground on which it prevailed can be described as a "merits" issue or an "element" in some sense of those words. The question is whether the defendant obtained a "judicially sanctioned change in the legal relationship of the parties" in the form of an order barring further litigation on the plaintiff's claim. 532 U.S. at 605. A dismissal for failure to satisfy pre-suit requirements like those at issue here does not have that effect, regardless of how the requirements might be characterized for other purposes. For example, in contending that Title VII's pre-suit requirements should be regarded as "merits" issues, petitioner analogizes them to the mandatory pre-suit requirements at issue in *Hallstrom* and *Zucca*. Pet. Br. 48-49 & n.10. But this Court has held that those same mandatory requirements do not support a dismissal precluding further litigation. *Hallstrom*, 493 U.S. at 32; *Costello*, 365 U.S. at 285.

b. In any event, petitioner errs in asserting that Title VII's pre-suit requirements are "elements" of the EEOC's claim. Petitioner relies primarily on *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), which addressed the provision of Title VII specifying that an employer is subject to the statute only if it has 15 or

more employees. *Id.* at 504-505; see 42 U.S.C. 2000e(b). The Court held that "the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." *Arbaugh*, 546 U.S. at 516. The 15-employee rule is an element of the plaintiff's claim because a plaintiff cannot prove that an employer has violated Title VII unless it establishes that the employer is subject to Title VII in the first place.

Title VII's pre-suit requirements serve a very different function. They do not define the entities subject to Title VII, the scope of the statutory prohibition, or the parties entitled to assert a claim for relief, cf. *Lexmark Int'l, Inc.* v. *Static Controls Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014). Instead, they establish *procedural* requirements that the EEOC must satisfy before filing a suit. This Court drew precisely that distinction in *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154 (2010). There, the Court distinguished between the 15-employee requirement at issue in *Arbaugh*, which "could be considered an element of a Title VII claim," and procedural "prerequisite[s] to initiating a lawsuit." *Id.* at 165-166. The Court explained that Title VII's requirement that a private litigant file an EEOC charge before bringing suit is not an element of a Title VII claim, but is instead "[a] statutory condition that requires a party to take some action before filing a lawsuit." *Id.* at 166. The Court then concluded that the Copyright Act's registration requirement is likewise a "threshold requirement[] that claimants must complete, or exhaust, before filing a lawsuit," not an element of the claim. *Ibid.*

The same logic applies to Title VII's pre-suit requirements. To confirm that conclusion, one need look no further than the allocation of issues between judges and juries. "If satisfaction of an essential element of a claim for relief is at issue * * * the jury is the proper trier of contested facts." *Arbaugh*, 546 U.S. at 514; see 42 U.S.C. 1981a(c) (providing a right to a jury trial in Title VII suits seeking money damages). But the EEOC's compliance with Title VII's pre-suit requirements has never been regarded as an issue for the jury; to the contrary, if a defendant challenges the EEOC's satisfaction of those requirements, "*a court* must conduct the factfinding necessary to decide that limited dispute." *Mach Mining*, 135 S. Ct. at 1656 (emphasis added).

C. The Unusual Procedural History Of This Case Does Not Require A Different Result

Petitioner and its amici do not appear to deny that a defendant qualifies as a prevailing party only if it secures a court order that precludes further litigation on the plaintiff's claim. And they do not attempt to explain why, as a general matter, the EEOC's failure to satisfy Title VII's pre-suit requirements would—unlike the failure to satisfy other similar preconditions to suit—preclude further litigation once those requirements have been met. Instead, petitioner's contention that it is a prevailing party is predicated on the assertion that the dismissal of the relevant claims in this case was "with prejudice."[13] That characterization did

[13] See Pet. Br. 41 ("Because [petitioner] 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

not appear in the petition for a writ of certiorari, and it is mistaken. The district court dismissed the relevant claims in 2009. The Eighth Circuit affirmed that dismissal, reversed the district court's judgment in other respects, and remanded for further proceedings on the EEOC's claims seeking relief for two women. After the EEOC withdrew one of the remanded claims and the parties settled the other, the parties agreed to a dismissal with prejudice. But that dismissal could not and did not alter the original dismissal of the claims at issue here, which had already been affirmed by the Eighth Circuit.

1. The district court's 2009 dismissal did not bar further litigation of the EEOC's claims

After holding that the EEOC failed to satisfy Title VII's pre-suit requirements, the district court concluded that those claims should be dismissed. Pet. App. 213a-214a & n.24. Although the court had dismissed other claims asserted by the EEOC and by the intervenors in this case "with prejudice," J.A. 273a, 311a, 442a, it did not do so here. Both the dismissal order and the subsequent judgment specify that the EEOC's complaint is "dismissed" but do not indicate that the dismissal is "with prejudice." Pet. App. 216a; 07-cv-95 Docket entry No. (Docket entry No.) 279 (Oct. 1, 2009). There is no indication that the court believed its order would preclude the EEOC from filing a new suit if it thereafter satisfied its pre-suit obligations. To the contrary, the court stated that its

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relationship."); see also *id.* at 23 ("[A] defendant who secures a dismissal with prejudice, as [petitioner] did here, is a 'prevailing party.'"); *id.* at 29 (contending that "defendants who prevail by obtaining a dismissal with prejudice" qualify as prevailing parties).

order meant that "dozens of potentially meritorious sexual harassment claims *may* now never see the inside of a courtroom," Pet. App. 214a (emphasis added), and the decision it cited as precedent for dismissing rather than staying the litigation was a dismissal "without prejudice." *Sears, Roebuck*, 490 F. Supp. at 1258, 1262; see Pet. App. 213a-214a n.24.

Petitioner does not appear to contend that the district court's 2009 dismissal was "with prejudice" or that it otherwise precluded the EEOC from returning to court if it satisfied Title VII's pre-suit requirements as to the 67 women at issue. Instead, petitioner's assertion that the relevant claims were dismissed "with prejudice" appears to rely on the district court's 2013 dismissal following remand. See Pet. Br. 17, 19. But Amicus Americans for Forfeiture Reform (AFR) asserts (Br. 16-25) that the original 2009 dismissal operated as a dismissal with prejudice under Federal Rule of Civil Procedure 41(b). That is incorrect.

Rule 41(b) allows a court to dismiss an action if a plaintiff fails to prosecute its suit or to comply with a court order. The rule specifies that "[u]nless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." Fed. R. Civ. P. 41(b). Amicus contends that because the district court's 2009 dismissal was a "dismissal not under [Rule 41]," and because it was not specifically denominated "without prejudice," it operates as an adjudication on the merits barring further litigation. AFR Amicus Br. 4, 18-21.

Amicus' argument is foreclosed by this Court's decision in *Costello*. In that case, the district court dismissed the original denaturalization proceeding because the government failed to file the required affidavit of good cause. 365 U.S. at 268. The district court specifically "declined to enter an order of dismissal 'without prejudice'" and instead "entered an order which did not specify whether the dismissal was with or without prejudice." *Ibid.* When the government brought a new denaturalization proceeding after complying with the affidavit requirement, the defendant argued that the second proceeding was barred because the earlier dismissal "must be construed to be with prejudice" under Rule 41(b). *Id.* at 284.

This Court rejected that argument, holding that "a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b)." *Costello*, 365 U.S. at 285. The Court explained that "the concept of jurisdiction embodied" in Rule 41(b) is not limited to "the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter." *Ibid.* Instead, the Court relied on long-established common law principles to hold that the "lack of jurisdiction" exception in Rule 41(b) encompasses "those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim," and it held that "[f]ailure to file the affidavit of good cause in a denaturalization proceeding falls within this category." *Ibid.*

Like the affidavit requirement at issue in *Costello*, the EEOC's pre-suit obligations are "precondition[s] requisite" to a lawsuit. 365 U.S. at 285. Under *Costello*, therefore, the dismissal of the EEOC's claims for failure to satisfy those pre-suit requirements did not qualify as a dismissal "on the merits" under Rule 41(b). See 9 Charles Alan Wright et al., *Federal Practice & Procedure* § 2373, 756-758 & nn. 36-42 (3d ed. 2008) (collecting cases applying *Costello* to hold that "Rule 41(b) does not apply in situations in which a case is dismissed because of some initial bar" such as a precondition to bringing suit); see also, *e.g.*, *Lebron-Rios*, 341 F.3d at 14-15; *Criales*, 105 F.3d at 96-97; *Truvillion*, 614 F.2d at 524.

2. The district court's 2013 orders did not alter the effect of the 2009 dismissal

On appeal, the Eighth Circuit affirmed the district court's dismissal of the EEOC's complaint to the extent it rested on a finding that the Commission had not satisfied Title VII's pre-suit requirements. Pet. App. 115a-116a, 155a-156a. The court of appeals reversed the district court's grant of summary judgment on the EEOC's claims seeking relief for two women, Starke and Jones, and remanded "for further proceedings consistent with [its] opinion." *Id.* at 156a.

On remand, the EEOC voluntarily withdrew its claim seeking relief for Jones because that claim was barred by the district court's holding that the EEOC could not seek relief for any women who had not been specifically identified in the investigation and conciliation process. Docket entry No. 360 (Oct. 11, 2012). That withdrawal left the EEOC's claim seeking relief for Starke as the only live claim in the case. The parties then entered into a settlement agreement under

which petitioner agreed to pay $50,000 to settle that claim. J.A. 121a. The agreement provides that the parties "shall file a joint motion, in the form attached [to the agreement], to dismiss EEOC's claim on behalf of Ms. Starke with prejudice." *Ibid.*

Consistent with their agreement, the parties filed a joint motion "to dismiss th[e] action with prejudice." Docket entry No. 379, at 1 (Feb. 8, 2013). The same day, the district court signed an order, in the form submitted by the parties, granting the motion:

> Based on EEOC's withdrawal of its claim on behalf of Tillie Jones, the parties' settlement of EEOC's claim on behalf of Monika Starke, and the mandate issued by the Court of Appeals on September 14, 2012, with respect to all other claims asserted by EEOC, this case is DISMISSED WITH PREJUDICE.

J.A. 118a; see Docket entry No. 379-2, at 2 (Feb. 8, 2013) (proposed order). Although the order's statement that the "case" is dismissed with prejudice might be ambiguous if considered in isolation, it cannot be regarded as altering the character of the court's 2009 dismissal of the claims at issue here for at least two reasons.

First, those claims were no longer before the district court. They had been dismissed in 2009 and the court of appeals had affirmed their dismissal. The court of appeals remanded for further proceedings on other claims, but the district court had no authority to "revisit its already final determinations" that had been upheld by the court of appeals. *United States* v. *Cote*, 51 F.3d 178, 181 (9th Cir. 1995); see, *e.g.*, *Retractable Techs., Inc.* v. *Becton Dickinson & Co.*, 757 F.3d 1366, 1371 (Fed. Cir. 2014) ("Unless remanded

by [the court of appeals], all issues within the scope of the appealed judgment are deemed incorporated within the mandate and thus are precluded from further adjudication.") (citation omitted), cert. denied, 135 S. Ct. 1843 (2015); see also *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) ("When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled."). When the district court entered the dismissal with prejudice, the only portion of the case before it was the EEOC's claim seeking relief for Starke.

Second, that understanding is confirmed by the parties' settlement agreement, which the court's dismissal order incorporated. J.A. 117a-122a. The parties agreed to file a motion "to dismiss EEOC's claim *on behalf of Ms. Starke* with prejudice." J.A. 121a (emphasis added). Nothing in the agreement reflects any intent to alter the character of the district court's dismissal of other claims more than three years earlier. And it would be particularly anomalous to hold that the agreed-upon dismissal had that effect because the parties' agreement acknowledged that they had a live dispute about whether petitioner qualified as a "prevailing party" and specified that the agreement was not intended to prejudice either party's position on that issue. J.A. 121a-122a ("[T]his agreement does not preclude either EEOC or [petitioner] from making any arguments relating to [petitioner's] pursuit of attorney's fees and costs, including arguments relating to whether EEOC or [petitioner] is the prevailing party.").

Accordingly, the 2013 dismissal of the Commission's claim seeking relief for Starke did not trans-

form the district court's 2009 dismissal of the claims at issue here into a dismissal "with prejudice."[14]

D. Petitioner's Policy Arguments Lack Merit

Petitioner contends (Br. 37-41) that awards of attorney's fees are needed to compensate defendants and deter the Commission from neglecting its pre-suit obligations. Here, as in *Buckhannon*, the Court need not consider those "policy arguments" because the case is controlled by the "clear meaning of 'prevailing party' in the fee-shifting statutes." 532 U.S. at 610. In Title VII, as in many other statutes, Congress made attorney's fees available only to a "prevailing party." 42 U.S.C. 2000e-5(k). Under Title VII, as under those other statutes, a defendant that secures a dismissal based on the plaintiff's failure to satisfy a precondition to suit is not a "prevailing party" because it has not obtained a "judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 605. Petitioner's Title VII-specific policy arguments could not justify a departure from the settled meaning of "prevailing party." And in any event, those policy

[14] After this Court's decision in *Mach Mining*, the EEOC filed a motion under Federal Rule of Civil Procedure 60(b) seeking relief from the district court's 2009 dismissal on the ground that *Mach Mining* had established that the Commission satisfied Title VII's pre-suit requirements in this case. Docket entry No. 414 (July 10, 2015). The district court denied the motion. Docket entry No. 441 (Dec. 14, 2015). The Commission filed a notice of appeal, which it has now withdrawn. Docket entry Nos. 445, 446 (Feb. 12 and 17, 2016). The Commission's request for Rule 60(b) relief is not inconsistent with its view that it could reassert its claims on behalf of the women at issue here by filing a new action after individually conciliating those claims. Unlike that course, Rule 60(b) relief would have reinstated the Commission's prior suit, which was ready for trial, without delay or further proceedings.

arguments are misplaced—both as a general matter and as applied to the highly unusual circumstances of this case.

1. The EEOC has powerful incentives to resolve charges through investigation and conciliation rather than litigation. Voluntary compliance requires fewer resources and ensures that unlawful employment practices are remedied faster. The Commission therefore relies on conciliation and other voluntary measures as its principal means of eliminating employment discrimination and securing relief for aggrieved individuals.

In Fiscal Year 2015, the Commission received more than 89,000 charges alleging violations of Title VII and other antidiscrimination statutes. EEOC, *All Statutes FY 1997 - FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Feb. 17, 2016). The Commission found reasonable cause in 3239 cases and successfully conciliated 1432 cases. *Ibid.* The EEOC resorts to litigation in only a "small fraction" of its cases. *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002). In Fiscal Year 2015, the Commission filed just 142 merits suits—a number equal to about 4% of the cases in which it found reasonable cause. EEOC, *Litigation Statistics, FY 1997 Through FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Feb. 17, 2016).

Nor is it accurate to suggest that the Commission files suit prematurely simply to gain access to discovery under the Federal Rules of Civil Procedure. Cf. Pet. Br. 51. Unlike private parties, the Commission has broad investigative authority, including the authority to issue administrative subpoenas. 42 U.S.C. 2000e-8 to 2000e-9; see *EEOC* v. *Shell Oil Co.*, 466

U.S. 54, 63-64 (1984). The Commission thus need not resort to civil litigation just to obtain relevant records from an employer.

Finally, petitioner is quite wrong to suggest (Br. 39) that "[t]he Eighth Circuit's holding gives the EEOC license" to disregard Title VII's pre-suit requirements in future cases. The Commission invested years of time and effort in this litigation, only to be sent back to square one by the district court's dismissal order. That is not a result that the Commission has any interest in repeating, quite apart from any additional burden imposed by a fee award.

2. Petitioner also errs in suggesting that awards of attorney's fees are needed to compensate defendants who successfully persuade courts that the EEOC has failed to satisfy Title VII's pre-suit requirements. Even if this Court adopted petitioner's position, such awards would be rare. As this Court's decision in *Mach Mining* emphasized, judicial review of conciliation is extremely limited. 135 S. Ct. at 1656 (prescribing "relatively barebones review"). And even before *Mach Mining*, courts had long held Title VII defendants may not examine the sufficiency of the EEOC's investigations or ask district courts to second-guess the Commission's reasonable-cause determinations. See *Caterpillar*, 409 F.3d at 833; *Keco Indus.*, 748 F.2d at 1100.

Even if a court concluded that the EEOC had not satisfied its pre-suit obligations and further concluded (contrary to *Mach Mining*) that dismissal was the appropriate remedy, a fee award would be available only if the court also found that the Commission's belief that it had satisfied its pre-suit obligations "was frivolous, unreasonable, or groundless." *Christians-*

burg Garment, 434 U.S. at 422. Such cases would be rare: Petitioner has identified only a handful of decisions awarding attorney's fees based on the Commission's failure to satisfy its pre-suit obligations, and those decisions typically applied a degree of scrutiny that has now been rejected by this Court in *Mach Mining*. See, e.g., *EEOC* v. *Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003) (*Asplundh*); see also *Mach Mining*, 135 S. Ct. at 1651 n.1, 1655-1656 (disapproving *Asplundh*'s approach). Denying the defendants in those unusual cases "the extraordinary boon of attorney's fees," *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring), works no injustice.

Moreover, in the rare cases in which the EEOC unreasonably fails to satisfy its pre-suit obligations, that failure should—by definition—be readily apparent to the defendant and easily resolved without extended litigation. Petitioner emphasizes (Br. 38) that in this case it incurred "millions of dollars in fees." But it did so only because it neglected to challenge the EEOC's compliance with its pre-suit obligations until more than 18 months into this litigation, even though it was obvious from the start that the EEOC was seeking relief for women it had not identified during its pre-suit investigation. The overwhelming majority of the fee award at issue here is attributable to petitioner's litigation on the merits—efforts that left petitioner facing trial on claims seeking relief for nearly 70 women. Of the more than $4 million in fees that petitioner was awarded, it has stated that just $128,415—about 3% of the total—was incurred for litigation over the EEOC's compliance with its pre-suit obligations. Docket entry No. 416-2, at 3 (July 31, 2015). The highly unusual circumstances of this case, which are

attributable in substantial part to petitioner's own litigation decisions, make it a poor proxy for typical disputes over the Commission's compliance with Title VII's pre-suit requirements.

II. EVEN IF A COURT'S FINDING THAT THE EEOC FAILED TO SATISFY TITLE VII'S PRE-SUIT REQUIREMENTS COULD AUTHORIZE A FEE AWARD, AN AWARD IS INAPPROPRIATE HERE BECAUSE THE EEOC'S SUIT WAS REASONABLE

Even if this Court concludes that a finding that the EEOC failed to satisfy Title VII's pre-suit requirements could justify an award of attorney's fees in some circumstances, it should affirm the denial of an award in this case because the EEOC's position plainly was not "frivolous, unreasonable, or groundless." *Christiansburg Garment*, 434 U.S. at 422. The court of appeals has not yet passed on that question, but this Court may affirm "on any ground properly raised below." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); see EEOC C.A. Br. 62-78 (raising this issue). In *Farrar*, for example, this Court rejected the court of appeals' holding that a plaintiff was not a "prevailing party," but affirmed on the alternative ground that a fee award was clearly inappropriate in the circumstances of that case. 506 U.S. at 115-117.

The same is true here. The district court and the court of appeals held that the EEOC failed to satisfy its pre-suit obligations because it did not separately investigate, make a reasonable-cause determination, and conciliate on behalf of each individual woman for whom it ultimately sought relief. Pet. App. 113a-116a, 211a-213a. Those courts' statements that the EEOC "wholly failed" to satisfy its pre-suit obligations, *e.g.*,

id. at 115a-116a, rest on the premise that the Commission was required to satisfy those obligations as to each claimant individually, and could not do so on a class-wide basis. But that understanding of 42 U.S.C. 2000e-5 is contrary to a long history of the Commission's enforcement actions and the decisions of other courts. It was specifically rejected by Judge Murphy in this very case. And it has now been disapproved by this Court, which instructed that the EEOC fulfills its conciliation obligation if it identifies the "*class* of employees" for which it seeks relief. *Mach Mining*, 135 S. Ct. at 1656 (emphasis added). The Commission's conclusion that it had satisfied its pre-suit obligations on a class-wide basis was thus correct. For present purposes, however, the relevant point is that there is no sound basis for concluding that Commission's position was "frivolous, unreasonable, or groundless."

A. For decades, the EEOC has relied on 42 U.S.C. 2000e-5 to bring suits seeking relief for groups or classes that include individuals who have not yet been identified when the suit is brought. In *Mach Mining*, for example, the Commission sued on behalf of "a class of women who had * * * applied for mining jobs" with the defendant. 135 S. Ct. at 1650. Similarly, in *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318 (1980), the Commission sought relief on behalf of a class consisting of "female employees in General Telephone's facilities in the States of California, Idaho, Montana, and Oregon." *Id.* at 321.

Until the Eighth Circuit's merits decision in this case, no court of appeals had held that the EEOC is required to identify all claimants during its investigation and individually conciliate their claims, and several courts of appeals had expressly recognized that

the EEOC is "not required to provide documentation of individual attempts to conciliate on behalf of each potential claimant." *EEOC* v. *Bruno's Rest.*, 13 F.3d 285, 289 (9th Cir. 1993) (quoting *EEOC* v. *Rhone-Poulenc, Inc.*, 876 F.2d 16, 17 (3d Cir. 1989)).[15] And since the court of appeals' decision, the Sixth Circuit has reaffirmed that the EEOC may satisfy Title VII's pre-suit requirements on a class-wide basis by making the defendant aware that it "had investigated and was seeking to conciliate class-wide claims." *Serrano* v. *Cintas Corp.*, 699 F.3d 884, 904-905 (2012), cert. denied, 134 S. Ct. 92 (2013).

B. The history of this case reinforces the reasonableness of the EEOC's belief that it had satisfied its pre-suit obligations. It was clear to petitioner from the outset that the Commission had not identified all claimants during its investigation—indeed, the Commission's investigator had told petitioner as much during conciliation. J.A. 282a. But petitioner did not raise the issue in its answer, at any time during the next year and a half of litigation, or in any of its seven motions for summary judgment. The failure of peti-

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[15] See also, *e.g.*, *Keco Indus.*, 748 F.2d at 1100 (reversing district court's holding that the EEOC could not conciliate on a class-wide basis); *EEOC* v. *American Nat'l Bank*, 652 F.2d 1176, 1185-1186 (4th Cir. 1981) (allowing the EEOC to seek relief for claimants who applied to bank branches other than the branches that were the subject of conciliation). Many district courts have applied the same rule, including in cases like this one, where the EEOC sought relief on behalf of multiple women affected by a hostile work environment. See, *e.g.*, *EEOC* v. *Braun Elec. Co.*, No. 1:12-cv-01592, 2014 WL 1330566, at *4 (E.D. Cal. Apr. 2, 2014); *EEOC* v. *California Psychiatric Transitions*, 644 F. Supp. 2d 1249, 1272-1273 (E.D. Cal. 2009); *EEOC* v. *David Lerner Assocs.*, No. 3:05-cv-292, 2005 WL 2850080, at *3 (D. Conn. Oct. 27, 2005).

tioner's sophisticated counsel to challenge the EEOC's compliance with Title VII's pre-suit requirements until prompted to do so by the district court confirms that the EEOC did not act unreasonably.

So does the fact that Judge Murphy agreed with the EEOC, concluding that the Commission's understanding of its pre-suit obligations was not merely reasonable, but correct. Pet. App. 156a-160a. Judge Murphy sharply criticized the panel majority's "new requirement that the EEOC must complete its presuit duties for each individual alleged victim of discrimination when pursuing a class claim," explaining that such a rule "place[d] unprecedented obligations on the EEOC" and "reward[ed] [petitioner] for withholding information from the Commission" during the investigation. *Id.* at 156a. And when the EEOC sought rehearing en banc, two of Judge Murphy's colleagues joined her in voting to rehear the case. J.A. 14a-15a. A view that attracts such support from appellate jurists should not be deemed "frivolous, unreasonable, or groundless" for purposes of a fee award.

C. This Court's subsequent decision in *Mach Mining* confirms the reasonableness of the EEOC's position. Consistent with the view adopted by the courts below in this case, the petitioner in *Mach Mining* argued that the EEOC must, among other things, "identify the particular individuals for whom it seeks [monetary] relief" in order to satisfy its conciliation obligation. Pet. Br. at 40, *Mach Mining*, *supra* (No. 13-1019). But this Court rejected "Mach Mining's bargaining checklist" and reaffirmed that the Commission can satisfy its pre-suit obligations on a class-wide basis. 135 S. Ct. at 1654. The Court explained that the Commission satisfies those obligations when

it explains to the employer "both what the employer has done and which employees (*or what class of employees*) have suffered as a result" and offers the employer "an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1656 (emphasis added); see *id.* at 1652 (stating that the Commission "must tell the employer * * * what practice has harmed which person *or class*") (emphasis added). The view of the EEOC's conciliation requirements adopted by the courts below cannot be reconciled with that express approval of a class-wide approach to conciliation. At the very least, the Commission's understanding in this case—which comports with the understanding later expressed by the Court—was not unreasonable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2016

APPENDIX

1. 42 U.S.C. 2000e-2(a) provides:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. 42 U.S.C. 2000e-5 provides:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, 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, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. 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. In determining wheth-

er reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. 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. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. 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.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with re-

spect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days

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[1] So in original. Probably should be subsection "(b)".

(provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of

the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(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. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or "the Attorney General in a case involving a government, governmental agency, or political subdivision. 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 Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, 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. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or

the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that

no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or per-

sons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

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 costs the same as a private person.

3. 42 U.S.C. 2000e-6 provides:

Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is

intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and **(3)** requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the

proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection

with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

4. Fed. R. Civ. P. 41 provides:

Dismissal of Actions

(a) Voluntary Dismissal.

(1) ***By the Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as adjudication on the merits.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudica-

tion. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) Dismissing A Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Cost of A Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.