No. 14-1375

# In the Supreme Court of the United States

CRST VAN EXPEDITED, INC., PETITIONER

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**


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## QUESTION PRESENTED

Whether the court of appeals correctly declined to award petitioner attorney's fees under 42 U.S.C. 2000e-5(k) based on the Equal Employment Opportunity Commission's failure to sufficiently investigate and conciliate before filing suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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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. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits an employer from discriminating in employment on the basis of sex. 42 U.S.C. 2000e-2(a)(1). The Equal Employment Opportunity Commission (EEOC or Commission) enforces the statute's prohibition on unlawful employment practices through investigation and litigation. A person claiming to be aggrieved or an EEOC member may file a charge of unlawful employment discrimination with the EEOC. See 42 U.S.C. 2000e-5(b). The EEOC then investigates, and if it determines that there is not reasonable cause to support the charge, it dismisses the charge and notifies the parties. *Ibid.* At that point, the complainant may file his or her own lawsuit. 42 U.S.C. 2000e-5(f)(1).

If the EEOC finds reasonable cause to believe that the charge is true, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). If the EEOC "has been unable to secure from the respondent a conciliation agreement acceptable to [it]," the EEOC may sue to seek relief for the aggrieved individual. 42 U.S.C. 2000e-5(f)(1). As this Court recently explained, a court "may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit," but "the scope of that review is narrow" because the EEOC has "extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649 (2015).

Title VII authorizes a court, in its discretion, to award attorney's fees to a prevailing party (other than

the EEOC or the United States). 42 U.S.C. 2000e-5(k). In *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), this Court held that a prevailing Title VII defendant is entitled to fees only where the plaintiff's claim was "frivolous, unreasonable, or groundless," or "the plaintiff continued to litigate after it clearly became so." *Id.* at 422.

2. Petitioner is an interstate trucking service that employs more than 2500 drivers. Pet. App. 88a. It uses team driving for long-haul assignments, where two drivers alternate between sleeping and driving, for up to 21 days together. *Ibid.* Petitioner provides newly-hired drivers with a short classroom orientation and then pairs them with an experienced driver (the lead driver) 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" to determine if the trainee should be certified as a "full-fledged CRST driver." *Id.* at 89a.

In December 2005, a former CRST driver-trainee filed a charge of sex discrimination with the EEOC. Pet. App. 90a. She alleged that the two lead drivers petitioner assigned to train her sexually harassed and sexually assaulted her during her over-the-road training. *Id.* at 90a-91a. In particular, she alleged that one lead driver constantly made sexual remarks to her during her training, and the other lead driver forced her to have unwanted sex in order to receive a passing grade. *Id.* at 91a.

The EEOC investigated the complaint. Pet. App. 91a-94a. During its investigation, the EEOC learned that numerous other female drivers and trainees had complained to petitioner of sexual assault and sexual harassment by male trainers or co-drivers during

over-the-road training or long-haul driving assignments. *Id.* at 92a-93a, 173a-175a. The EEOC sent petitioner a letter explaining that it had found reasonable cause to believe that petitioner had discriminated on the basis of sex against the complainant and "a class of employees and prospective employees." *Id.* at 180a. In that letter, the EEOC invited petitioner to conciliate the claim. *Id.* at 180a-181a.

From July through August 2007, the EEOC attempted to obtain petitioner's voluntary compliance through conciliation. Pet. App. 94a-95a; see 42 U.S.C. 2000e-5 (providing that when the EEOC determines after investigation "that there is reasonable cause to believe" the charge of discrimination, the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion"). An EEOC representative had several phone calls with petitioner's attorney, discussing possible conditions of settlement. Pet. App. 181a-182a. But then petitioner's attorney cut off conciliation, explaining to the EEOC representative that, based on the complainant's monetary demands, "CRST does not wish to engage in conciliation efforts because we are confident that conciliation will not result in a resolution of this matter." *Id.* at 182a-183a. The EEOC sent petitioner a letter confirming that conciliation had failed. *Id.* at 183a.

3. The EEOC sued petitioner in federal district court, contending that the complainant and "a class of similarly situated female employees" had been sexually harassed and subjected to a hostile work environment by male lead drivers or co-drivers. Pet. App. 95a (quoting complaint). The complaint alleged that petitioner failed "to prevent, correct, and protect" female

trainees and drivers from sexual harassment and a hostile work environment in violation of Title VII. *Id.* at 96a (quoting complaint). The EEOC's lawsuit sought "to correct [petitioner's] unlawful employment practices on the basis of sex" and to provide relief to the class of female CRST employees "who were adversely affected by such practices." *Id.* at 95a (quoting complaint). The district court permitted the complainant and five other women to intervene in the suit. *Id.* at 2a.

The parties engaged in discovery. Pet. App. 187a-188a. After completion of discovery, the EEOC identified and produced for deposition 154 claimants for whom petitioner was liable for sexual harassment by a lead driver or co-driver. *Id.* at 10a-11a. Petitioner filed several motions for summary judgment (on statute-of-limitations, judicial estoppel, and other grounds). *Id.* at 3a-6a. As a result of its rulings on those motions, the district court reduced the number of EEOC claimants with trial-worthy allegations to 67 women. *Id.* at 6a.

Petitioner moved to dismiss the complaint with respect to all remaining claimants on the ground that the EEOC failed to investigate, make reasonable cause determinations, and attempt conciliation with respect to each individual claimant. Pet. App. 6a-7a. The district court agreed and dismissed the complaint on the ground that the EEOC failed to sufficiently investigate and conciliate each of the individual claims. 07-CV-95-LRR Order 31-39 (N.D. Iowa Aug. 13, 2009) (Docket entry No. 263).

Petitioner sought approximately $7.6 million in attorney's fees and more than $1 million in expenses and costs. 07-CV-95-LRR Order 4-5 (N.D. Iowa Feb. 9,

2010) (Docket entry No. 320). The district court awarded petitioner $4.5 million in attorney's fees based on the EEOC's "failure to investigate and attempt to conciliate" as to the 67 claimants. *Id.* at 14-15, 39.

4. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 86a-163a. The court affirmed dismissal of the EEOC's claim as to the 67 claimants for failure to sufficiently investigate and conciliate with respect to each of them. *Id.* at 103a. The court acknowledged that the EEOC's investigation had revealed that a number of female drivers had been sexually harassed, and it declined to second-guess the EEOC's finding that "reasonable cause existed to believe that [petitioner] ha[d] subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII." *Id.* at 106a (second set of brackets in original; citation and internal quotation marks omitted). But the court concluded that the EEOC should have identified all possible claimants during its investigation and attempted conciliation with respect to each one of them (even though petitioner had cut off conciliation completely after deciding it would not settle the complainant's claim). *Id.* at 106a-114a. The court also concluded that dismissal, rather than a stay, was the appropriate remedy. *Id.* at 115a-116a. Judge Murphy dissented from those rulings, explaining that the court was wrong to affirm dismissal of the EEOC's claims on the ground that the EEOC failed to identify and conciliate with respect to each alleged victim of discrimination. *Id.* at 156a-161a (Murphy, J., concurring in part and dissenting in part).

The court of appeals separately concluded that the district court had erred in granting summary judgment for petitioner with respect to two claimants. See Pet. App. 123a-128a, 138a-142a. On that basis, the court determined that petitioner was no longer a prevailing defendant and vacated the award of attorney's fees without prejudice. *Id.* at 155a-156a.

The EEOC filed a petition for rehearing en banc, which was denied. 09-3764 Order 1-3 (8th Cir. June 8, 2012).

5. On remand, the EEOC and petitioner reached a settlement agreement and jointly sought dismissal of the case. Pet. App. 47a-48a. The district court dismissed the case. *Id.* at 48a.

The district court then granted petitioner's renewed motion for attorney's fees, awarding petitioner $4.2 million in attorney's fees and approximately $500,000 in expenses and costs. Pet. App. 33a-85a. The court recognized that a defendant may obtain attorney's fees under Title VII only when there has been "a judicial determination of the plaintiff's case on the merits" and "the plaintiff's claim is frivolous, unreasonable or groundless." *Id.* at 52a (citation and internal quotation marks omitted). But the court decided that its decision to dismiss the EEOC's claims "due to the EEOC's failure to satisfy its pre-suit obligations" is "a dismissal on the merits of the EEOC's claims" because satisfying the pre-suit obligations is "an additional element of a claim to relief." *Id.* at 58a-59a. The court also concluded that the EEOC's consistent contention that it did not have to conciliate for each individual victim was "frivolous, unreasonable or groundless," *id.* at 64a, and the court so concluded even though Judge Murphy in dissent had *agreed* with

the EEOC's argument in this very case. See p. 6, *supra* (citing Pet. App. 156a-161a); Pet. App. 61a (noting the EEOC's argument).

6. The court of appeals reversed and remanded. Pet. App. 1a-32a. As relevant here, the court concluded that petitioner cannot obtain attorney's fees based on the EEOC's failure to sufficiently investigate or conciliate because there was no judicial determination of the merits of the sex discrimination claim. *Id.* at 18a-24a & n.4. The court explained that, under this Court's decision in *Christiansburg*, a defendant may not obtain attorney's fees unless the court finds that the "plaintiff's case is frivolous, unreasonable, or groundless," and such a finding "is not possible without a judicial determination of the plaintiff's case on the merits." *Id.* at 18a (citation omitted). The court explained that the EEOC's duty to investigate and conciliate are "nonjurisdictional preconditions" to suit, not "elements of the [Title VII] claims." *Id.* at 22a. These "presuit obligations" "do not distinguish which employers are subject to Title VII or whether an employer has violated Title VII"; instead, they "provide[] employers an opportunity to resolve the dispute in lieu of litigation." *Id.* at 23a. The court likened these administrative requirements to "the [Copyright Act's] registration requirement," which this Court held is a "non-jurisdictional precondition to filing suit, as opposed to an element of the claim." *Id.* at 21a-22a (citing *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 165-166 (2010)).

The court of appeals remanded for the district court to reconsider whether to award fees for the claims that had been decided on their merits on summary judgment and for the court to reconsider the

award of attorney's fees on appeal using the correct legal standards. Pet. App. 27a-32a.[1]

7. After the court of appeals' decision, this Court decided *Mach Mining*, *supra*, clarifying that the EEOC has "wide latitude over the conciliation process" under Title VII, subject only to "relatively barebones" judicial review. 135 S. Ct. at 1652, 1656. The Court also held that, if the EEOC fails to engage in sufficient conciliation, "the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance," not to dismiss the case. *Id.* at 1656.

**ARGUMENT**

Petitioner contends (Pet. 11-24) that the court of appeals erred in declining to award it attorney's fees based on the EEOC's failure to investigate and conciliate with respect to each alleged victim before filing this Title VII class-action suit. The court of appeals' conclusion is correct, and there is no disagreement in the circuits on the question presented. Indeed, this Court's recent decision in *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645 (2015), confirms the correctness of the court of appeals' ruling. Further review is therefore unwarranted.

1. The court of appeals correctly concluded that petitioner cannot obtain attorney's fees under 42 U.S.C. 2000e-5(k) based on a ruling that the EEOC failed to sufficiently investigate and conciliate because that ruling was not a determination of the merits of the sex-discrimination claim.

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[1] The court of appeals also reversed the fee award to the extent that it was based on a purported pattern-or-practice claim, Pet. App. 17a-18a; that holding is not at issue here.

a. Although the general rule in the United States is that "litigants must pay their own attorney's fees," *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 415 (1978), Title VII permits a district court, "in its discretion," to award "a reasonable attorney's fee" to "the prevailing party, other than the Commission or the United States." 42 U.S.C. 2000e-5(k). The EEOC and the United States may be liable for costs under this provision. *Ibid.*

As this Court has explained, a prevailing defendant, as well as a prevailing plaintiff, may obtain attorney's fees under Title VII. *Christiansburg*, 434 U.S. at 419-420. But, the Court clarified, such fees should not be awarded as a matter of course to a prevailing defendant. *Id.* at 421-422. Rather, a district court may award attorney's fees to a prevailing defendant only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* at 421.

As the court of appeals explained, "[p]roof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits." Pet. App. 18a (quoting *Marquart* v. *Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 852 (8th Cir. 1994)). The determination that the plaintiff's legal position was "frivolous, unreasonable, or groundless" (*Christiansburg*, 434 U.S. at 422) depends on an assessment of the merits of the plaintiff's claims for relief. As the court of appeals correctly recognized, the district court did not address the merits of the EEOC's claims of sex discrimination with respect to the claimants for whom the EEOC failed to sufficiently investigate and conciliate. Petitioner did not obtain

summary judgment based on a finding that the EEOC failed to establish one of the elements of its claims. Rather, the district court dismissed those claims without regard to their merits on the ground that the EEOC failed to fulfill the statutory preconditions to bringing suit. See Pet. App. 213a.

Petitioner contends (Pet. 12) that the district court's dismissal was a ruling on the merits because the failure to sufficiently investigate and conciliate is "a failure to satisfy an element" of the EEOC's claim. That is wrong. The EEOC's obligation to investigate and conciliate are "nonjurisdictional precondition[s] to filing suit," not "element[s] of the claim." Pet. App. 22a; see *Mach Mining*, 135 S. Ct. at 1651 (conciliation is a "prerequisite[] to suit"). These preconditions are administrative steps that the EEOC must take before it can file suit under Title VII. See 42 U.S.C. 2000e-5(b) and (f). They do not define the scope of the cause of action: they "do not distinguish which employers are subject to Title VII or whether an employer has violated Title VII." Pet. App. 23a.

b. This Court's recent decision in *Mach Mining* confirms that a district court may not award attorney's fees for failure to follow these pre-suit requirements. The Court explained that the EEOC's duty to conciliate is a "prerequisite[] to suit in Title VII litigation," just like the requirements that a private plaintiff file a timely charge with the EEOC and that an employee obtain a right-to-sue letter before going to court. 135 S. Ct. at 1651-1652. The effect of the EEOC's fulfilling its conciliation obligation is that its "claim against the employer [may] go forward" in court, not that the EEOC has established an element of the claim. *Id.* at 1651.

*Mach Mining*'s discussion of the remedy for failure to fulfill this pre-suit condition confirms that attempted conciliation is not an element of a Title VII claim. As the Court explained, if a district court "find[s] in favor of the employer" on a failure-to-conciliate defense, "the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance"—not to dismiss the case. 135 S. Ct. at 1656. If petitioner were correct that attempted conciliation is an element of the Title VII claim, dismissal rather than an order of compliance would have been the expected remedy.[2]

Petitioner contends (Pet. 22-24) that attorney's fees must be available for failure to satisfy pre-suit requirements to ensure that conciliation occurs. The premise underlying this argument is that courts may thoroughly review the EEOC's compliance with pre-suit requirements such as conciliation and dismiss a case when they decide the EEOC has not tried hard enough to settle a case. But this Court rejected that premise in *Mach Mining*, explaining that courts should conduct a "relatively barebones review" to "allow[] the EEOC to exercise all the expansive dis-

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[2] Petitioner contends (Pet. 12-14) that dismissal remains an appropriate remedy, despite the clear language in *Mach Mining*, because the EEOC failed to sufficiently investigate as well as failing to sufficiently conciliate. But the Court recognized that the appropriate remedy for the EEOC's failure to fulfill a pre-suit condition is to give the EEOC the opportunity to fulfill that condition, not to dismiss the case outright. 135 S. Ct. at 1656. That holding makes sense, because an employer that violates Title VII should not escape liability based on the EEOC's failure to fulfill pre-suit conditions. And in any event, *Mach Mining* recognizes that the EEOC's duty to investigate and conciliate are preconditions to suit, not elements of a Title VII violation. *Id.* at 1651-1652.

cretion Title VII gives it to decide how to conduct conciliation efforts and when to end them." 135 S. Ct. at 1656. *Mach Mining* also clarified that a district court should not dismiss a case based on failure to conciliate. *Ibid.* Petitioner's policy arguments fail to account for *Mach Mining*.

c. Petitioner contends (Pet. 18-20) that the EEOC's failure to sufficiently investigate and conciliate should be treated the same as the employer-numerosity requirement in Title VII's definition of employer. In *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), this Court held that the requirement that a company have 15 or more employees to be considered an "employer" under Title VII (see 42 U.S.C. 2000e(b)) should be considered "an element of a plaintiff's claim for relief, not a jurisdictional issue." 546 U.S. at 516. But as the court of appeals correctly explained, the EEOC's pre-suit obligations, unlike the employer-numerosity requirement, do not address whether the employer is subject to Title VII or whether the employer has violated the law. See Pet. App. 23a. Title VII's employee-numerosity limitation is merits-related because it determines whether an employer is subject to—and thus can violate—Title VII. Title VII's pre-suit requirements, in contrast, have nothing to do with establishing whether the statute was violated; instead, compliance with those requirements simply permits the EEOC to try to establish a violation in court. See *Mach Mining*, 135 S. Ct. at 1651.

Petitioner likewise errs (Pet. 20-22) in relying on this Court's decision in *Christiansburg*. In that case, the Court determined whether and in what circumstances a prevailing defendant—as opposed to a pre-

vailing plaintiff—can obtain attorney's fees under Title VII. The Court concluded that a prevailing defendant may obtain attorney's fees, but that such an award should be rare, appropriate only when a plaintiff's claim is frivolous, unreasonable, or groundless. 434 U.S. at 418-422.

Petitioner contends (Pet. 20-21) that *Christiansburg* supports its position here because the basis for attorney's fees in that case was not a merits determination, but a finding that no charge was pending with the EEOC when the EEOC obtained the right to sue in its own name in 1972. But this Court did not uphold an award of attorney's fees on that basis; rather, the courts below *declined* to award attorney's fees, and this Court affirmed that determination. And the Court did not opine on whether the asserted basis for fees was an appropriate one. *Christiansburg* therefore does not establish that attorney's fees are appropriate based on non-merits determinations.

2. Contrary to petitioner's contention (Pet. 14-17), there is no disagreement in the circuits on the question presented. The cases upon which petitioner relies are distinguishable or have been overruled or undermined by this Court's recent decision in *Mach Mining*. In any event, the Court's recent decision in *Mach Mining* makes certiorari particularly inappropriate at this time.

The first decision upon which petitioner relies, *EEOC* v. *Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014), did not address the question presented here. In *Propak Logistics*, the district court granted summary judgment to the employer on grounds of laches (an unreasonable delay in asserting one's rights that materially prejudiced the defendant). *Id.* at 148-150.

The district court awarded the employer attorney's fees on several grounds, including that the claim for relief was moot because the employer had closed its facilities and that the claim could not be established because the alleged victims and witnesses, as well as the relevant employment records, were unavailable. *Ibid.*

The question for the court of appeals was whether the district court abused its discretion in awarding attorney's fees under Title VII on the facts of that case; the court of appeals found no abuse of discretion. 746 F.3d at 151-152, 154. The court did not consider whether a dismissal solely based on the EEOC's failure to fulfill its pre-suit obligation to investigate or conciliate could be a basis for attorney's fees. Indeed, the employer never argued that the EEOC failed to satisfy any aspect of Title VII's pre-suit requirements, and these requirements were in fact satisfied. See *id.* at 148-149 (noting that the EEOC investigated, issued a reasonable-cause determination, and attempted conciliation).

The Eleventh Circuit's decision in *EEOC* v. *Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003), likewise does not conflict with the decision below. In *Asplundh*, the district court had dismissed the lawsuit and awarded attorney's fees based on the EEOC's failure to engage in sufficient conciliation before filing suit. *Id.* at 1259. The court of appeals agreed that the EEOC should have tried harder to settle the suit and upheld the attorney's fees award. *Id.* at 1259-1261. But the court's focus was on whether the EEOC had failed to fulfill its conciliation duty prior to filing suit, not whether such a failure was an appropriate basis for attorney's fees. See *ibid.* And

the court of appeals' decision that the EEOC had failed to fulfill its conciliation duty does not survive *Mach Mining*. In *Mach Mining*, the Court noted that some courts had gone "too far" in their review of conciliation, and it cited *Asplundh* as one example. See 135 S. Ct. at 1651 & n.1, 1654-1655. The Court described *Asplundh* as a case in which the lower courts had failed to "enforce the law Congress wrote" and improperly "impose[d] extra procedural requirements." *Id.* at 1654-1655. Accordingly, *Asplundh* is no longer good law.

Petitioner also cites (Pet. 16 n.7) *EEOC* v. *Agro Distribution, LLC*, 555 F.3d 462 (5th Cir. 2009). In that case, which concerns the Americans with Disabilities Act, the district court granted summary judgment to the employer on the ground that the complainant was not disabled and that the employer had offered a reasonable accommodation, and the court of appeals upheld that ruling. *Id.* at 469-472. In passing, the court of appeals remarked that a court could "dismiss[] the case and award[] attorneys' fees" if the EEOC had failed to sufficiently conciliate. *Id.* at 469. As petitioner recognizes (Pet. 16 n.7), that statement was dicta, because the basis for attorney's fees was the failure of the ADA claim on its merits. 555 F.3d at 472-473.

Finally, the decision in *EEOC* v. *Pierce Packing Co.*, 669 F.2d 605 (9th Cir. 1982), does not establish a circuit split warranting this Court's review. That case concerned whether the EEOC had to make its own reasonable-cause finding or conciliate when an employee filed sex-discrimination charges with both the Department of Labor (DOL) and the EEOC and the DOL investigated and found cause to support the

charge. *Id.* at 606-608. The court of appeals concluded that, in those circumstances, the EEOC was still required to investigate and conciliate itself, and so it declined to enforce a settlement agreement between the EEOC and the employer. *Id.* at 607-609. The court also affirmed the district court's award of attorney's fees under abuse-of-discretion review. *Id.* at 609. But the court did not consider the legal issue whether the EEOC's failure to follow pre-suit requirements can be the basis for an attorney's fees award. Instead, the court simply concluded that there was "adequate support in the record to uphold" the district court's award under abuse-of-discretion review. *Ibid.*

More broadly, this Court's recent decision in *Mach Mining* undermines the analysis in the decisions petitioner cites in two critical respects. First, to the extent that those cases suggest that a district court may dismiss a case (rather than stay the action) based on the EEOC's failure to conciliate, see, *e.g.*, *Pierce Packing*, 669 F.2d at 607, they are inconsistent with *Mach Mining*'s teaching that dismissal is not an appropriate remedy. See 135 S. Ct. at 1656. Second, to the extent that those cases hold that the EEOC failed to sufficiently conciliate, they apply a much more stringent standard than the Court set out in *Mach Mining*. In *Pierce Packing*, for example, an EEOC investigator conducted an on-site compliance review and sent Pierce Packing a detailed letter describing the discriminatory conduct the EEOC found and proposing supplemental settlement terms to resolve the discrimination. 669 F.2d at 606-607. The court of appeals decided that "[t]he exchange of letters between Pierce and the EEOC was inadequate to consti-

tute *legitimate* conciliation" and that the EEOC could not initiate litigation until "the possibility of voluntary compliance has been *exhausted*." *Id.* at 608 (citation omitted; emphases added). *Mach Mining*, by contrast, makes clear that the EEOC has "leeway" on "how to seek voluntary compliance and when to quit the effort" and "discretion over the pace and duration of conciliation" and that a court goes "too far" when it second-guesses those strategic decisions. 135 S. Ct. at 1654-1655.

There is, accordingly, ample reason to believe that in the wake of *Mach Mining* the Ninth Circuit would reach a different result in *Pierce Packing* and the Eleventh Circuit would reach a different result in *Asplundh*—indeed, there is no reason to think that petitioner here could obtain dismissal and an award of attorney's fees in any circuit after *Mach Mining*. At the very least, because the courts of appeals have not yet had the opportunity to consider the effect of *Mach Mining* on requests for attorney's fees based on the EEOC's failure to follow pre-suit requirements, review of the question presented would be premature at this time.[3]

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[3] Petitioner also cites (Pet. 16-17) a variety of decisions regarding private Title VII suits and suits brought under 42 U.S.C. 1983. One of those decisions is an unpublished summary order, and none of the decisions addresses the question here, which is whether the EEOC's failure to follow pre-suit investigation and conciliation requirements may serve as a basis for attorney's fees. Indeed, attorney's fees for Section 1983 lawsuits are governed by a different statute, 42 U.S.C. 1988. Of the two cited cases that involved Title VII's attorney's fees provision, both *reversed* a district court's award of attorney's fees, and neither involved a dismissal based on the EEOC's failure to fulfill pre-suit requirements. See *Marquart*, 26 F.3d at 852 (plaintiff voluntarily dismissed case);

3. This case would be a poor candidate for further review for at least two additional reasons. First, the Court's recent decision in *Mach Mining* seriously undermines the basis for the attorney's fees award in this case. The EEOC's position was that it was required to investigate and conciliate with respect to its claim for relief, and was required to give petitioner notice of the class for which it seeks relief, but it did not need to conciliate with respect to every member of the class. See Pet. App. 158a-159a (Murphy, J., concurring in part and dissenting in part). The court of appeals rejected that standard and imposed a demanding standard for pre-suit investigation and conciliation, see *id.* at 105a-114a, and it affirmed the district court's dismissal of the EEOC's claims as an appropriate remedy.

But *Mach Mining* makes clear that the Eighth Circuit and other courts had gone too far in their review of the EEOC's pre-suit efforts. The Court clarified that the EEOC has "wide latitude over the conciliation process," including "extensive discretion" to determine when and how to conciliate. 135 S. Ct. at 1649, 1652. All the EEOC must do, this Court said, is "communicate in some way" with the employer in an effort to achieve the employer's voluntary compliance; "inform the employer about the specific allegation," typically in a letter that "describes both what the employer has done and which employees (*or what class of employees*) have suffered as a result"; and "try to engage the employer in some form of discussion" to "give the employer an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1655-

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*Anthony* v. *Marion Cnty. Gen. Hosp.*, 617 F.2d 1164, 1169-1170 (5th Cir. 1980) (case dismissed based on failure to prosecute).

1656 (emphasis added). A court may review "those requirements"—"and nothing else." *Id.* at 1656. The court of appeals' review of the EEOC's investigation and conciliation in this case was much more searching than the Court envisioned in *Mach Mining*. Moreover, even if the EEOC had failed to conciliate, the court of appeals' affirmance of the dismissal of the EEOC's lawsuit on the merits is at odds with this Court's conclusion that dismissal is not appropriate for a failure to conciliate. *Ibid.* Because petitioner should never have been eligible for attorney's fees in the first place, this case would be an exceptionally poor vehicle for considering the question presented.

Second, even if the EEOC failed to conciliate and even if dismissal were an appropriate remedy for that failure, the EEOC's failure to investigate and conciliate with respect to each class member cannot be the basis for attorney's fees because the district court's decision in this case was the first to impose that requirement. See Pet. App. 158a-160a (Murphy, J., concurring in part and dissenting in part). The EEOC's failure to have anticipated that novel interpretation of Title VII does not make its claim "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421-424. And that is particularly so given that Judge Murphy's dissent embraced the EEOC's position in this very case. Further review is therefore unwarranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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