No. 14-1375

IN THE

Supreme Court of the United States

CRST VAN EXPEDITED, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TRUCKING ASSOCIATIONS, INC., AND BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

American Trucking Associations, Inc. (ATA) is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and was created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including before this Court.

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies that together have $7.2 trillion in annual revenues and nearly 16 million employees. BRT member companies comprise more than a quarter of the total value of the U.S. stock market and pay more than $230 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and participate in litigation as *amici curiae* where, as here, significant business interests are at stake.

SUMMARY OF ARGUMENT

This case presents the question of which party should pay for undisputedly illegal conduct by the government that injured a private organization.

The U.S. Equal Employment Opportunity Commission ("EEOC") is a federal law enforcement agency that violated Title VII of the Civil Rights Act of 1964 ("Title VII") when it sued Petitioner CRST Van Expedited, Inc. ("CRST"). It violated Title VII because it filed a class action-like lawsuit against CRST and sought relief for 67 individuals it first identified *after* it filed suit. Title VII, however, requires the EEOC to comply with a multi-step *pre-suit* process *before* it can file suit, 42 U.S.C. § 2000e–5(b) & (f)(1), and EEOC did *nothing* pre-suit with regard to these 67 individuals.

Title VII's pre-suit requirements mandate that the EEOC investigate, evaluate, and conciliate employment discrimination charges in an effort to resolve Title VII disputes quickly, informally, and privately to the fullest extent possible. § 2000e–5(b). Only if the EEOC engages in the full process without

success may it initiate suit. *See* § 2000e–5(f)(1). This framework, which is central to the entire enforcement scheme created for Title VII, reflects congressional goals of providing employers and employees alike the opportunity to resolve employment discrimination claims rapidly and without expensive litigation.

The EEOC's failure to follow its pre-suit statutory obligations eliminated any chance of pre-suit resolution, resulted in years of unnecessary litigation, and illegally forced the defendant-petitioner, CRST Van Expedited, Inc. ("CRST") to incur millions of dollars in attorney's fees and to suffer reputational injury as well. Faced with the EEOC's statutorily improper "sue first, ask questions later" approach, the district court properly exercised its discretion in applying Title VII's fee-shifting provision, 42 U.S.C. § 2000e–5(k), to order the EEOC to pay CRST's fees.

Amici, as representatives of employers that face EEOC investigations and attempt to conciliate with the agency in an effort both to avoid litigation and to redress any actual wrongdoing, are ideally situated to speak to the impact of the EEOC's shortcomings and the propriety of the district court's discretionary award of fees in response to EEOC illegality.

First, Title VII grants broad discretion to district courts to award a reasonable attorney's fee to a prevailing party. Under this Court's precedents, a prevailing party is one who wins a final judgment that has *res judicata* effect.

Under that standard, CRST is a prevailing party because the district court entered judgment in its favor after concluding that the EEOC wholly failed to

engage in its statutorily-required pre-suit obligations. The Eighth Circuit affirmed that determination in relevant part back in 2012, and the EEOC chose not to seek certiorari. As a result, CRST has prevailed and is eligible for attorney's fees.

Second, this Court has explained that a district court has discretion to award attorney's fees to prevailing defendants if the court determines that the plaintiff's action was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The district court in this case acted well within its discretion when it concluded that the EEOC's actions violated this standard; indeed, the court found that the EEOC wholly ignored its statutory obligations and skipped its pre-suit requirements with respect to the 67 claimants.

Third, the structure and history of Title VII demonstrate that the statutory provisions the EEOC violated here are central to the enforcement scheme Congress enacted in hopes of resolving alleged Title VII violations promptly and without litigation if possible. That statutory framework envisions the EEOC as an investigator and facilitator of employment discrimination claims first, with litigation following only as a last resort. By wholly ignoring that framework, the EEOC both disobeyed express congressional direction and deprived CRST and the 67 claimants of the due-process-like protections Congress implemented to resolve Title VII claims more quickly and efficiently than the years of costly litigation imposed here by the EEOC's failures.

Finally, the EEOC cannot avoid responsibility for its illegal conduct by incorrectly asserting that a single sentence in last term's decision in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), mandated that a stay is the only proper remedy for EEOC failures to comply with all pre-suit obligations. *Mach Mining* dealt only with the final of several steps in the pre-suit process that the EEOC violated here, and the Court merely noted that a district court may exercise its discretion to stay a case for sixty days "to obtain voluntary compliance" with Title VII. § 2000e–5(f)(1). That reference is nothing more than an indication that a court possesses discretionary authority to stay a case for conciliation proceedings and does not mandate a "do-over" for the EEOC when it fails to engage in *any* of its pre-suit obligations. The EEOC significantly over-reads *Mach Mining* and the statutory text that *Mach Mining* cited.

ARGUMENT

I. CRST IS ENTITLED TO ATTORNEY'S FEES UNDER 42 U.S.C. § 2000e–5(k).

Under a straightforward application of statutory text and this Court's precedents, the district court properly applied its broad discretion to award CRST attorney's fees in light of the EEOC's indisputable violation of Title VII. Title VII authorizes a court "in its discretion" to award "a reasonable attorney's fee" to a "prevailing party." § 2000e–5(k). A prevailing party includes any party that has obtained a final judgment with *res judicata* effect; in other words the ultimate winner of a suit. And this Court has explained that when a Title VII defendant prevails, a district court may award fees against a plaintiff so

long as it concludes "in its discretion" that the plaintiff's suit was "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421. CRST satisfied both requirements in this case.

A. A party who obtains a favorable judgment is a "prevailing party" under § 2000e–5(k).

As to the first requirement under § 2000e–5(k), a party that obtains a final judgment with *res judicata* effect is a "prevailing party." This Court on numerous occasions has interpreted the term "prevailing party" in the context of federal fee-shifting provisions, which are "interpreted . . . consistently" with one another. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 & 603 n.4 (2001) (citing § 2000e–5(k) and other examples). In interpreting such statutes, this Court has defined prevailing party as one "'in whose favor a judgment is rendered, regardless of the amount of damages awarded.'" *Id.* (quoting Black's Law Dictionary 1145 (7th ed. 1999)). At other times it has elaborated on the prevailing party inquiry as requiring a "legal victor[y]," *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), and explained that a party prevails if it can point to "a resolution of the dispute which changes the legal relationship between" or causes a "material alteration of the legal relationship of the parties." *Tex. St. Teachers Ass'n v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792-93 (1989).

In applying these principles, it is the fact of judgment—that a party won—that matters, not the basis on which judgment was entered, and this Court has never suggested otherwise. In the context of a prevailing defendant, it matters not whether

judgment is entered because a plaintiff falls short on an element of his substantive claim, lacks standing, fails to satisfy a statute of limitations or repose, disregards statutory pre-suit requirements, or violates some other required provision. In any of these scenarios the defendant is the "party in whose favor a judgment is rendered," *Buckhannon*, 532 U.S. at 603 (citation omitted), because the case has ended in defendant's favor with *res judicata* effect against the plaintiff. Said another way, the defendant is the "ultimate winner" of the case. *See id.* at 642 n.14 (Ginsburg, J., dissenting). A final judgment victory is far from the kind of "transient victory at the threshold of an action" that this Court has cautioned fails to establish prevailing party status. *Sole v. Wyner*, 551 U.S. 74, 78 (2007); *see also, e.g.*, *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam) (reversing attorney's fee award because reversal of directed verdict established only that respondents were entitled to a new trial, not that they were prevailing parties). Instead, a defendant is a prevailing party under § 2000e–5(k) and similar fee provisions when the plaintiff "leaves the courthouse emptyhanded," *Sole*, 551 U.S. at 78, and can no longer pursue the same claims due to a judicial determination.

B. CRST is a prevailing party under § 2000e–5(k).

CRST is just such a prevailing party. There is no dispute that it is the "ultimate winner" who obtained a judgment in its favor. In 2009 the district court dismissed EEOC's suit against CRST in full, noting "THAT Plaintiff Equal Employment Opportunity Commission takes nothing and this action is

dismissed." Docket 279, *EEOC v. CRST Van Expedited, Inc.*, No. 07-cv-95-LRR (N.D. Iowa Oct. 1, 2009); *see also EEOC v. CRST Van Expedited, Inc.*, No. 07-cv-95-LRR, 2009 WL 2524402, at *16 (N.D. Iowa Aug. 13, 2009) (order explaining judgment). In 2012 the Eighth Circuit affirmed that dismissal in relevant part, agreeing with the district court that "the EEOC wholly failed to satisfy its statutory pre-suit obligations." *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 677 (8th Cir. 2012).

After the Eighth Circuit denied rehearing and rehearing en banc, *id.* at 658, the EEOC chose not to petition for certiorari. The district court then entered judgment in favor of CRST on the claims of the 67 individuals at issue in this case. *See* Dockets 381 & 381-1, *CRST Van Expedited, Inc.*, No. 07-cv-95-LRR (Feb. 11, 2013). That judgment dismissed EEOC's claims with prejudice and thus had *res judicata* effect. Under those facts, CRST is a prevailing party in this litigation for purposes of § 2000e–5(k).

C. A prevailing defendant is entitled to attorney's fees if the plaintiff's suit was "frivolous, unreasonable, or without foundation."

Once a party prevails in litigation, § 2000e–5(k) authorizes the district to award attorney's fees "in its discretion." A prevailing defendant is entitled to fees if the district court concludes "that the plaintiff's action was frivolous, unreasonable, or without

foundation, even though not brought in subjective bad faith." *Christiansburg*, 434 U.S. at 421.[2]

In adopting this standard, the Court balanced a need for effective Title VII enforcement with congressional goals "to deter the bringing of lawsuits without foundation," "to discourage frivolous suits," and "to diminish the likelihood of unjustified suits being brought." *Id.* at 420 (citations and footnotes omitted). It ultimately concluded that Congress in enacting § 2000e–5(k) "wanted to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420.

One obvious way for a lawsuit to be "unreasonable" or "without foundation" occurs when the government itself violates the law and correspondingly injures a private person or organization. This kind of case presents the same type of situation addressed in *Christiansburg*, where this Court explained that a district court should ordinarily award a reasonable attorney's fee to a prevailing plaintiff because the prevailing plaintiff has established that the defendant is "a violator of federal law." *Id.* at 418; *see also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) ("In every lawsuit in which there is a prevailing Title VII plaintiff there will also be a losing defendant who

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[2] Prevailing plaintiffs, by contrast, are presumed to be entitled to attorney's fees in all but special circumstances. *See, e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975); *but see Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535-39 (1994) (Thomas, J., concurring in the judgment) (*Christiansburg* incorrectly applied a more stringent standard to prevailing defendants by "*mistakenly cast[ing] aside the statutory language to give effect to equitable considerations*").

has committed a legal wrong."). In effect, a plaintiff who prevails in a Title VII case typically demonstrates unreasonable behavior by proving that the defendant violated the law.

In fact, the government has taken this very position. In *Zipes*, the government argued that "those who violate federal law should redress those whose rights have been violated." Br. for the United States and the EEOC as Amici Curiae, *Zipes*, 491 U.S. 754 (No. 88-780), 1989 WL 1127747, at *12. It further told this Court that "[a]n award of fees . . . serves the equitable purpose of redressing a wrong, and of deterring similar wrongs in the future." *Id.* at *6.

In the same way, a defendant who prevails against the government when the government violates the law in a Title VII case prevailed because the government committed a "legal wrong" and is a "violator of federal law." *Christiansburg*, 434 U.S. at 418. A district court may exercise its broad discretion in such cases and award a reasonable attorney's fee to the defendant.

D. The district court correctly concluded that the EEOC's illegal conduct justified an attorney's fee award.

The EEOC is the *only* proven lawbreaker in this case. The district court properly awarded a reasonable attorney's fee to CRST.

Title VII requires the EEOC to undertake detailed, specific steps before it may initiate litigation, including receiving a charge of discrimination; providing notice of the charge to the respondent within ten days of its filing; investigating the charge; making a determination about whether

there is reasonable cause to believe the charge is true; and attempting to resolve any violation through informal methods of conference, conciliation, and persuasion. *See* § 2000e–5(b) & (f)(1). In this case, the EEOC indisputably and utterly failed to comply with the mandatory pre-suit investigation, reasonable cause, and conciliation requirements with respect to the 67 individuals at issue. As a result, the EEOC comes to this Court as a judicially-determined law-breaker. And its violations were egregious. The EEOC violated multiple steps of Title VII's pre-suit process, filed a massive class action lawsuit against CRST without even identifying or investigating *any* of the 67 individuals, blasted CRST with an inflammatory press release about serious civil rights violations, dragged CRST through years of unnecessary litigation, wasted the scarce resources of the federal courts, and forced CRST to spend millions of dollars to defend itself. CRST should not have to foot the bill for the government's misconduct.

The Eighth Circuit's 2012 decision upholding in relevant part the district court's dismissal recognized that "the EEOC wholly failed to satisfy its statutory pre-suit obligations." *CRST Van Expedited*, 679 F.3d at 677. It "did not investigate the specific allegations of *any* of the 67 allegedly aggrieved persons . . . until after the Complaint was filed," and made no reasonable cause determination. *Id.* at 676-77. As a result, the court concluded that "[a]bsent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate." *Id.* That is as clear a finding that the EEOC violated Title VII as anyone could ask.

The Eighth Circuit's decision further illustrated the EEOC's overreach. It explained that its "review of the undisputed facts demonstrates that the EEOC was 'using discovery in the resulting lawsuit as a fishing expedition to uncover more violations.'" *Id.* (quoting *EEOC v. Dillards, Inc.*, No. 08-cv-1780-IEG (PCL), 2011 WL 2784516, at *7 (S.D. Cal. July 14, 2011)). This conclusion was clearly correct, for the court elsewhere noted that the EEOC "did not identify any of the 67 allegedly aggrieved persons as members of the Letter of Determination's 'class' until after it filed the Complaint" and even told CRST prior to filing its complaint "that it did not know" the size of the class. *Id.* at 673. As a result, the court explained that there is "a clear and important distinction between facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit." *Id.* at 675.

The district court opinion underlying the Eighth Circuit's decision was even more pointed in explaining the illegality of EEOC's conduct under Title VII. It held that "[t]he record shows that the EEOC wholly abandoned its statutory duties as to the remaining 67 allegedly aggrieved persons in this case." *CRST Van Expedited*, 2009 WL 2524402, at *16; *see also id.* at *19 ("EEOC did not investigate, issue a reasonable cause determination[,] or conciliate the claims of the 67 allegedly aggrieved persons"). The district court observed that long after EEOC filed its suit, it "sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit" and subsequently "sent another 730 solicitation letters to former CRST female employees." *Id.* at *9. The EEOC did "not make a

reasonable cause determination as to the specific allegations of any of the 67 allegedly aggrieved persons prior to filing the Complaint," and the dates of alleged violations about 27 of the 67 individuals at issue postdate the EEOC's reasonable cause determination that formed the basis for its suit. *Id.* at *16. In other words, the alleged actions underlying those 27 individuals' assertions had not even occurred before the EEOC concluded that reasonable cause existed as to a handful of other, unrelated individuals. And as to 38 of the remaining 40 individuals, "the EEOC admits that it was not even aware of their allegations until after the filing of the Complaint. The EEOC used discovery in the instant lawsuit to find them." *Id.*; *see also CRST Van Expedited*, 679 F.3d at 673-74 (these specific findings "undisputed").

The district court thus concluded that the EEOC was attempting to "bootstrap the investigation, determination[,] and conciliation of the allegations of [Charging Party Monica] Starke and a handful of other allegedly aggrieved persons into a [§ 2000e–5] lawsuit with hundreds of allegedly aggrieved persons." *CRST Van Expedited*, 2009 WL 2524402, at *16. It termed EEOC's actions an attempt "to perfect an end-run around Title VII's statutory prerequisites to suit" and worried that the EEOC's actions, if allowed, "might avoid administrative proceedings for the vast majority of allegedly aggrieved persons." *Id.* at *16, *18. Such a result would "ratify a 'sue first, ask questions later' litigation strategy on the part of the EEOC, *which would be anathema to Congressional intent*." *Id.* at *19 (emphasis added).

These conclusions are not in dispute before this Court; they are the facts of this case that must be accepted as true. The district court properly exercised its discretion when it awarded a reasonable attorney's fee to CRST.

II. THE EEOC SHOULD NOT BE ALLOWED TO SIDESTEP ITS UTTER FAILURE TO FOLLOW ITS STATUTORY OBLIGATIONS.

The EEOC should not be allowed to dodge the district court's decision to award a reasonable attorney's fee by suggesting that its indisputably illegal behavior amounted to little more than an inadvertent "fail[ure] to sufficiently investigate and conciliate." Br. in Opp. 9. The failure here was not one of "sufficiency." Rather, the EEOC wholly abandoned Title VII's mandatory, multi-step pre-suit enforcement scheme when it did *nothing* about the 67 claimants until it filed suit and used discovery to identify them. If the EEOC had investigated the 67 claimants pre-suit—as Congress required it to do—the EEOC and CRST may well have settled these matters privately and quickly to the satisfaction of the claimants, CRST, and the public interest. Instead, the claimants received nothing; EEOC's Title VII violation forced CRST to expend several million dollars to defend itself; and the EEOC's multi-year litigation about the 67 claimants wasted its own taxpayer-funded resources and the scarce resources of the federal courts.

A. Title VII's text demands that the EEOC complete an extensive series of steps before it can sue.

The text and history of Title VII's pre-suit requirements indicate that the EEOC's obligations to

engage in the charge, investigation, reasonable cause, and conciliation process are central to the statutory scheme enacted by Congress. "In pursuing the goal of bringing employment discrimination to an end, Congress chose cooperation and voluntary compliance as its preferred means." *Mach Mining*, 135 S. Ct. at 1651 (citations and quotations omitted). To that end, Congress intended that litigation would be a last resort, not EEOC's first step. EEOC cannot jump over its statutory obligations and then seek to characterize its violations as technicalities to avoid paying for them.

Title VII "sets forth 'an integrated, multistep enforcement procedure'" intended to enable the EEOC "to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 359 (1977)). That process does not begin with the filing of a complaint in federal court. Rather, "the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Occidental Life*, 432 U.S. at 368.

Those duties are extensive and begin with the filing of a charge by or on behalf of an allegedly aggrieved party, *see* § 2000e–5(b), or by an EEOC Commissioner acting on the party's behalf. *See* 29 C.F.R. §§ 1601.7, 1601.11. Once a charge is filed, the EEOC must issue a notice to the accused entity (or "respondent") within ten days. § 2000e–5(b); *see also* 29 C.F.R. §§ 1601.7-1601.14; *Occidental Life*, 432 U.S. at 359. At that point, EEOC is statutorily required to conduct an investigation into the charge. § 2000e–5(b). If it "determines after such

investigation that there is not reasonable cause to believe that the charge is true," it must dismiss the charge and notify the parties. § 2000e–5(b); 29 C.F.R. § 1601.19(a).

If the EEOC does find reasonable cause, it must issue a reasonable cause notice to the parties. § 2000e–5(b); 29 C.F.R. § 1601.21(b). It must then "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 2000e–5(b); 29 C.F.R. § 1601.24. As this Court noted last term, the EEOC's conciliation obligation "is mandatory, not precatory" and "serves as a necessary precondition to filing a lawsuit." *Mach Mining*, 135 S. Ct. at 1651. Additionally, conference, conciliation, and persuasion "necessarily involve communication between parties, including the exchange of information and views." *Id.* at 1652.

Only if the EEOC engages in each of these preceding steps and is "unable to secure from the respondent a conciliation agreement acceptable to the Commission" may it issue a failure of conciliation notice and finally bring suit. § 2000e–5(f)(1); 29 C.F.R. §§ 1601.25 & 1601.27; *see also Occidental Life*, 432 U.S. at 359 (pre-suit process "culminat[es] in the EEOC's authority to bring a civil action"). In fact, unless EEOC's "attempt to conciliate has failed," the EEOC may not file a claim against the employer. *Mach Mining*, 135 S. Ct. at 1651.

Congress designed these pre-suit obligations to provide procedural protections to employers and to ensure that "the victim of job discrimination" does not suffer due to "lengthy delays that too often attend Title VII litigation." *Ford Motor Co. v. EEOC*,

458 U.S. 219, 221 (1982). Such a victim "needs work that will feed a family and restore self-respect. A job is needed—now." *Id.* Each step in Title VII's statutory scheme up to the point of suit thus functions as an opportunity to resolve Title VII allegations without litigation, reflecting Title VII's "statutory goal" of "maximum possible reliance upon voluntary conciliation and administrative resolution of claims." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981). The "overriding goal is not to promote the employment of lawyers but to correct discriminatory practices quickly and effectively." *Shell Oil*, 466 U.S. at 90 (O'Connor, J., concurring in part and dissenting in part).

Reflecting this goal of avoiding litigation if at all possible, Title VII and the EEOC's procedural regulations both empower and require the investigation and remediation of alleged employment discrimination, promptly and efficiently. To enable the EEOC to investigate charges, Title VII authorizes the EEOC to compel production of witnesses, documents, and other information to the extent that information "is relevant to the charge under investigation." § 2000e–8(a); *see also* § 2000e–9; 29 C.F.R. §§ 1601.15-1601.17; *Shell Oil*, 466 U.S. at 63-64. And at any time during the pre-suit process, the EEOC "may encourage the parties to settle the charge on terms that are mutually agreeable." 29 C.F.R. § 1601.20. *Accord* EEOC Compl. Manual § 15 (explaining negotiated settlement process prior to reasonable cause determination).

In addition, Congress codified additional protections to foster pre-suit resolution of Title VII

charges. Title VII requires the EEOC to treat charges, investigations, reasonable cause determinations, and conciliation proceedings as strictly confidential. *See* § 2000e–5(b) (charge "shall not be made public by the Commission"); § 2000e–8(e) (same, investigation); 29 C.F.R. § 1601.22 (same, charge and investigation); § 2000e–5(b) (in conciliation, "[n]othing said or done during and as a part of such informal endeavors may be made public" by EEOC or used in evidence in subsequent proceedings.); *see also* 29 C.F.R. § 1601.26(a) (same); *Associated Dry Goods*, 449 U.S. at 598-604 (prohibition on disclosure prevents employees filing discrimination charge from seeing employer information unrelated to their own employment). These confidentiality protections "ensure candor" and "thereby enhance[] the prospects for agreement" without litigation. *Mach Mining*, 135 S. Ct. at 1649, 1655. Congress took these confidentiality requirements so seriously that any violation by an EEOC officer or employee is punishable by up to a year in prison and a fine of up to $1,000. §§ 2000e–5(b) & 2000e–8(e).

B. Title VII's history and this Court's precedents further emphasize the importance of EEOC's statutory obligations prior to suit.

This extensive set of EEOC statutory obligations prior to suit is no accident. Rather, Title VII's multi-step enforcement scheme is central to the EEOC structure created by Congress in 1964 and reconfirmed in 1972 when Congress authorized the EEOC to sue in its own name. *See generally Occidental Life*, 432 U.S. at 358-72; *Shell Oil*, 466 U.S. at 62-82. As enacted in 1964, "Title VII limited

the EEOC's function to investigation of employment discrimination charges and informal methods of conciliation and persuasion. The failure of conciliation efforts terminated the involvement of the EEOC." *Occidental Life*, 432 U.S. at 358-59.

Under the 1964 version of Title VII, the EEOC had no litigation authority at all, for "when it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the act." *Shell Oil*, 466 U.S. at 77. Congress vested litigation authority in "the charging party, or other person aggrieved by the allegedly unlawful practice," *Occidental Life*, 432 U.S. at 359, and limited the Attorney General to intervening in cases of "general public importance" and to filing alleged "pattern or practice" cases. §§ 2000e–5(e); 2000e–6 (1964). *Accord Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 327 (1980).

Congress moved away from the voluntary compliance model in 1972 when it granted the EEOC litigation authority as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107 (1972). In doing so, however, Congress "did not abandon its wish that violations of the statute could be remedied without resort to the courts, as is evidenced by its retention in 1972 of the requirement that the Commission, before filing suit, attempt to resolve disputes through conciliation." *Shell Oil*, 466 U.S. at 78. As Representative Perkins explained in introducing the Conference Report that accompanied the House of Representatives' version of the 1972 amendments:

> The conferees contemplate that the Commission will continue to make every

> effort to conciliate as is required by existing law. Only if conciliation proves impossible do we expect the Commission to bring action in Federal district court.

118 Cong. Rec. 7563 (1972). In other words, Congress retained the charge, investigation, reasonable cause, and conciliation requirements that were previously the sole actions the EEOC could take. Congress added a final step in that process—litigation—that the EEOC could only pursue *after* it satisfied the pre-suit requirements of § 2000e–5.

Congress' decision to grant the EEOC litigation authority and to retain Title VII's multi-step pre-suit process was a compromise that came after several members of the House and Senate expressed concern about granting the EEOC too much prosecutorial power. *See Occidental Life*, 432 U.S. at 361 ("The dominant Title VII battle in [1972] was over what kind of additional enforcement powers should be granted to the EEOC."). Initial drafts of the 1972 bill contemplated that EEOC employees would serve as investigators, prosecutors, and administrative law judges ("ALJs"). *See* S.2515, 92d Cong. § 4(a) (as introduced to the Senate Sept. 14, 1971). EEOC ALJs would have been granted authority to issue cease-and-desist orders. Such orders would have been reviewed on a deferential basis by courts. *Id.* § 4(a) (proposed subsection (k) noting "substantial evidence" standard in federal courts).

Members of both Houses of Congress decried giving the EEOC cease-and-desist power. They warned that such power was dangerous, contrary to

constitutional due process protections, and downright un-American.

For example, Senator Dominick cautioned that the proposed cease-and-desist process would "harken[] back to the 'Star Chamber' proceedings outlawed in England more than 300 years ago. That is, the EEOC would, in effect, become investigator, prosecutor, trial judge and judicial review board—all before you ever got to the Court of Appeals!" 117 Cong. Rec. 40290 (1971). Representative Martin objected that "[t]he committee bill . . . would set up this five-man EEOC board to be the investigator, the prosecutor, the judge, and the jury of these cases. An employer would be considered guilty until he proves himself innocent. . . . This is a very, very dangerous piece of legislation." 117 Cong. Rec. 31959 (1971). Representative Broomfield agreed, warning that cease-and-desist authority "would be similar to letting policemen arrest, try, and punish citizens on the street at the point of a gun." 117 Cong. Rec. 32106 (1971). And Representative Ashbrook observed that the "real purpose of granting additional powers for the EEOC is to give it more authority than it deserves or should properly have," while expressing concern that the agency would use its "blackjack authority" to force employers to comply with its whims. 117 Cong. Rec. 32101 (1971).

Adding to these concerns about allowing the EEOC to act with "czar-like powers of policeman, prosecutor, judge and jury," 118 Cong. Rec. 732 (1972) (statement of Sen. Brock), was a perception by some that the EEOC was far from a neutral decisionmaker that could be trusted to render fair judgments. Senator Saxbe worried that EEOC

officials "tend to have an ax to grind. They are people who are very zealous." 118 Cong. Rec. 731 (1972). Senator Allen explained that "[t]he Commission . . . has not been and is not now the impartial agency it was supposed to be and as charged to be by law" and stated that the EEOC "has been a rabid advocate of its own preconceived ideas." 118 Cong. Rec. 932 (1972); *see also* 118 Cong. Rec. 1657 (1972) (statement of Sen. Ervin) ("virtually all" of the EEOC commissioners to date "were men who were psychologically incapable of holding the scales of justice evenly, because they were so biased in favor of the policy of the bill that they could not appraise impartially the truth involved in the proceedings"); *see also* 118 Cong. Rec. 1976 (1972) (statement of Sen. Ervin) (EEOC should not be given "autocratic power" because it "has ordinarily been staffed in the past . . . by crusaders for a cause").

These concerns and others like them led to the introduction and eventual passage of substitute bills in both the House and the Senate. The revised bill authorized the EEOC "to file federal-court actions rather than conduct its own hearings and issue cease-and desist orders" following conciliation. *Occidental Life*, 432 U.S. at 363 (House bill); *id.* at 363-64 (same; Senate bill). As Senator Dominick explained at an early stage in the proceedings, this approach properly balanced "the need to give EEOC enforcement powers and the rights of those charged with violations of the law" by "provid[ing] a combination of the expertise of the EEOC in investigating, processing, and conciliating unfair employment cases with the expertise and independence of the Federal courts." 117 Cong. Rec. 34116 (1971).

In establishing this framework, Congress sought to avoid creating an EEOC that would function as investigator, prosecutor, judge, fact-finder, and appellate tribunal. It therefore retained the original pre-suit obligations and required that litigation would ensue only after the EEOC satisfied each step of the process and only after a resolution proved impossible.

C. Section 2000e–5(k) authorizes district courts to award a reasonable attorney's fee in appropriate cases to prevent the EEOC from abusing its authority.

Allowing the EEOC to violate its charge, investigation, reasonable cause, and conciliation requirements with impunity would have the practical effect of leaving "compliance with the law" "in the Commission's hands alone." *Mach Mining*, 135 S. Ct. at 1652. This Court last term recognized that a lack of judicial review over the EEOC's conciliation obligations would render the conciliation requirement a nullity. *Id.* at 1652-53. That same concern applies with equal force to Title VII's fee provision. Unless defendants subject to the EEOC's illegal behavior have recourse to § 2000e–5(k), the EEOC will continue to impose substantial costs on defendants who never should have been sued in the first place. As *Mach Mining* recognized, "legal lapses and violations occur, and especially so when they have no consequence." 135 S. Ct. at 1652-53; *cf. also Shell Oil*, 466 U.S. at 90 (O'Connor, J., concurring in part and dissenting in part) ("Experience teaches that Government administrative agency investigations can be prone to abuse").

That recognition is particularly relevant here. The EEOC asserts that it can violate its Title VII obligations with impunity, impose millions of dollars in costs and attorney's fees as well as significant reputational harm on a defendant yet avoid *any* consequences for its illegal behavior. Despite the EEOC's insistence that Title VII gives it a free pass to violate the law, § 2000e–5(k) recognizes that defendants should not bear the financial burden of the EEOC's illegal misconduct. *See Christiansburg*, 434 U.S. at 422 n.20 ("expense of defending even a frivolous claim may become a strong disincentive to the exercise of [defendants'] legal rights").

The EEOC's violation of § 2000e–5(b)'s requirements in this case is even worse because Congress vested the EEOC with authority to enforce Tile VII and express authority to issue "suitable procedural regulations." § 2000e–12(a). EEOC exercised that authority, *see* 29 C.F.R. § 1601.1, *et seq.*, and its regulations implementing § 2000e-5's procedural requirements both bind the EEOC and demonstrate its awareness of Title VII's mandatory pre-suit requirements. *See Shell Oil*, 466 U.S. at 67 (EEOC's procedural regulations "binding on the Commission"). Accordingly, when, as in this case, the EEOC violates Title VII and imposes millions of dollars in legal fees on defendants, it should not and cannot escape responsibility for its actions.

If anything, the EEOC should be held to a higher standard based on its role as enforcer of Title VII. Indeed, *Christiansburg* explained that when considering whether to award attorney's fees against the EEOC, "a district court may consider distinctions between the Commission and private plaintiffs in

determining the reasonableness of the Commission's litigation efforts." 434 U.S. at 422 n.20. Unlike a private plaintiff, who in most situations presumably lacks legal training of any kind, the EEOC is statutorily charged with responsibility for enforcing Title VII. And, EEOC routinely touts its experience and asks this Court and other courts to defer to its interpretations of Title VII. *See, e.g.*, Br. for the United States as Amicus Curiae, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 4536939, at *26-*29 (arguing for *Skidmore* deference to the EEOC's interpretation of Title VII); *Young*, 135 S. Ct. at 1351-52 (declining to give deference because the EEOC promulgated interpretation only recently and because interpretation was inconsistent with prior government litigating positions). It is entirely reasonable to expect EEOC to remain aware of its legal obligations and to accept the consequences when it ignores them. In fact, the EEOC just last year told a Senate committee that its "statutory authority does not contemplate or permit" a strategy of "suing first, and asking questions later." Statement of EEOC General Counsel P. David Lopez to Sen. Comm. on Health, Educ., Labor & Pensions at 6, May 19, 2015, http://www.help.senate.gov/imo/media/doc/Lopez3.pdf; *see also* Statement of EEOC Chair Jenny R. Yang to Sen. Comm. on Health, Educ., Labor & Pensions at 2, May 19, 2015, http://www.help.senate.gov/imo/media/doc/Yang.pdf (litigation is "last resort").

Instead of owning up to its shortcomings, the EEOC claims that a determination of the unreasonableness of its behavior "depends on an assessment of the merits of the plaintiff's claims for

relief." Br. in Opp. 10. That statement is wrong. Of course, there is no doubt that the EEOC *could* behave unreasonably if it brought a suit that lacked any basis in fact. But *Christiansburg* did not hold, nor is it reasonable to posit, that the government should pay attorney fees only if it unreasonably asserts misconduct that never occurred. If anything, it is even more unreasonable for the EEOC to bring claims it has no statutory right to bring due to its decision to skip multiple statutory preconditions to suit. As this Court explained years ago in rejecting another EEOC attempt to avoid a Title VII requirement it did not like, "the Commission's argument is merely one of administrative convenience, and such convenience cannot override the prohibitions in the statute." *Associated Dry Goods*, 449 U.S. at 604. The EEOC's misplaced "merits" argument assumes that it can ignore its statutory obligations, file a suit illegally, impose the costs of years of litigation on defendants, and then escape responsibility by suggesting that it *might* have had a case if it had bothered to act as the law requires. Stripped of its rhetoric, that argument does not exonerate the EEOC; it illustrates the EEOC's unreasonableness.

Similarly, the EEOC elsewhere asserts that its disregard of the law was reasonable "because the district court's decision in this case was the first to impose" a requirement that the EEOC investigate, issue reasonable cause findings, and conciliate with each individual claimant. Br. in Opp. 20. That assertion is false. Prior to the EEOC's filing of this lawsuit, courts in at least nine circuits, including the Eighth Circuit, had dismissed all or significant parts of EEOC cases when the EEOC violated its pre-suit

obligations.[3] It is not surprising that so many courts have held the EEOC to its pre-suit obligations because those obligations have remained the same since 1972. And, even if the EEOC dubiously claims that it could not understand the clear import of its statutory obligations under § 2000e–5(b), courts had repeatedly informed it of its obligations. It just chose to ignore them. Given this, the district court properly exercised its discretion to determine that the EEOC was a "violator of federal law,"

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[3] *See, e.g.*, **First Circuit**—*EEOC v. IBEW*, 476 F. Supp. 341, 346-48 (D. Mass. 1979); **Second Circuit**—*EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981); **Third Circuit**—*EEOC v. E. Hills Ford Sales, Inc.,* 445 F. Supp. 985, 987-88 (W.D. Pa. 1978); *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1303, 1307 (W.D. Pa. 1977); *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1332, 1334 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975); **Fourth Circuit**—*Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 271-72 (4th Cir. 1976); *EEOC v. W. Elec. Co.*, 382 F. Supp. 787, 793-95 (D. Md. 1974); *EEOC v. Westvaco Corp.*, 372 F. Supp. 985, 992-94 (D. Md. 1974); *EEOC v. Firestone Tire & Rubber Co.*, 366 F. Supp. 273, 278 (D. Md. 1973); **Fifth Circuit**—*EEOC v. Argo Distrib., LLC*, No. 04-cv-322-KS-MTP, 2007 WL 1031649, at *3 (S.D. Miss. Mar. 30, 2007, *aff'd*, 555 F.3d 462 (5th Cir. 2009); *EEOC v. Pet, Inc.*, 612 F.2d 1001, 1002 (5th Cir. 1980) (per curiam); **Seventh Circuit**—*EEOC v. Target Corp.*, No. 02-cv-146, 2007 WL 1461298, at *3-*4 (E.D. Wis. May 16, 2007); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 978-85 (S.D. Ind. 2003); **Eighth Circuit**—*EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 947-49 (8th Cir. 1974); **Ninth Circuit**—*EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982); **Eleventh Circuit**—*EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259-61 (11th Cir. 2003); *EEOC v. Nat'l Cash Register Co.*, 405 F. Supp. 562, 564-67 (N.D. Ga. 1975); *EEOC v. King's Daughter's Hosp.*, 1976 BL 450, at *6-*7 (S.D. Miss. Jan. 12, 1976); *EEOC v. U.S. Pipe & Foundry Co.*, 375 F. Supp. 237, 241-48 (N.D. Ala. 1974); *EEOC v. Container Corp.*, 352 F. Supp. 262, 266 (M.D. Fla. 1972).

Christiansburg. 434 U.S. at 418, and that CRST was entitled to reasonable attorney's fee.

III. *MACH MINING* PROVIDES NO SUPPORT FOR THE EEOC HERE

Last term, *Mach Mining* resoundingly reaffirmed the importance of conciliation proceedings under § 2000e–5(b). There, the Court rejected the EEOC's argument that its total failure to conciliate could not be reviewed, explaining that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining*, 135 S. Ct. at 1651. In spite of this rebuke, EEOC has subsequently seized upon a single sentence at the end of *Mach Mining* to assert that this Court somehow limited the relief courts can provide, even in cases like the present involving undisputed EEOC violations of Title VII. The EEOC's assertion misconstrues the statutory text of § 2000e–5(f)(1), misinterprets *Mach Mining*, and relies on an inaccurate sleight-of-hand regarding the different roles EEOC has at different points in its pre-suit obligations under § 2000e–5(b).

A. The EEOC incorrectly interprets *Mach Mining* as mandating a stay for any EEOC violation of Title VII.

The sentence on which the EEOC places such weight states:

> Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance. *See* § 2000e–5(f)(1) (authorizing a stay of a Title VII action for that purpose).

Mach Mining, 135 S. Ct. at 1656.

The EEOC has since over-read this single sentence as applying far beyond the conciliation context in which it was made. It has asserted, including in this case, that *Mach Mining* limits judicial power for violation of *any* of EEOC's statutory pre-suit obligations to ordering a "do-over" and that neither dismissal nor a fee award can ever be appropriate, regardless of the EEOC's misconduct. *See* Br. in Opp. 12 n.2 (asserting that "the Court recognized [in *Mach Mining*] 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"); *see also, e.g.*, Rule 28(j) Letter at *1-*2, *EEOC v. Sterling Jewelers, Inc.*, No. 14-1782 (2d Cir. Apr. 30, 2015), (EEOC arguing that *Mach Mining*'s stay reference applied to failure to investigate). Thus, the EEOC asserts that a stay is the only remedy a court can impose in its discretion for *any* violation of § 2000e–5(b)'s charge, investigation, reasonable cause, or conciliation requirements. The EEOC is wrong.

B. The statutory text and *Mach Mining* itself demonstrate that the Court was speaking only of conciliation.

Each phrase of the statutory text of the stay provision undercuts the EEOC's position. The statute states:

> Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending . . . further efforts of the Commission to obtain voluntary compliance.

§ 2000e–5(f)(1).

By its terms, § 2000e–5(f)(1) requires a "request" by one of the parties. A court then "may, in its discretion, stay further proceedings," but the statute limits any stay to "not more than sixty days." *Id.* And the sole purpose of such a requested, time-limited stay is for "further efforts of the Commission to obtain voluntary compliance." *Id.* Section 2000e-5(f)(1) does not authorize a court to "stay further proceedings" for any purpose other than an attempt "to obtain voluntary compliance"—i.e., for conciliation purposes. The EEOC's interpretation of *Mach Mining* is in conflict with several requirements that flow from this statutory text.

First, without any request, the stay provision does not even apply. The EEOC is therefore wrong when it asserts that a stay is the mandatory remedy for a violation of its pre-suit obligations.

Second, the statute indicates that "the court may, in its discretion" grant a stay. *Id.* Contrary to the EEOC's assertions, that language indicates that a stay is subject to a court's wide discretion to fashion appropriate remedies and implicitly leaves open other avenues of relief.

Third, § 2000e–5(f)(1) limits any stay to "not more than sixty days." However, pre-suit investigations almost always take far longer than sixty days, rendering application of the stay provision to such requirements illogical. *Occidental Life* recognized that there is no statute of limitations for filing suit under Title VII, either in the statute or by reference to comparable state limitations periods. 432 U.S. at 360-72. The EEOC's investigative process can take years. *See, e.g.*, *id.* at 358 (charge

formally filed with the EEOC on March 9, 1971 but suit not filed until February 22, 1974); *Ford Motor*, 458 U.S. at 221-23 (charges filed in June and July 1971 but suit not filed until July 1975). In this case, the charge was filed December 1, 2005, and EEOC filed suit on September 27, 2007. *See CRST Van Expedited*, 679 F.3d at 666, 668. These already lengthy timelines do not even include the possibility of a dispute during investigation, which could add additional litigation over EEOC's right to compel production of information. *Shell Oil* is instructive in this regard. There, the EEOC's chair issued a charge on September 27, 1979. The parties disputed EEOC's authority; EEOC issued a subpoena; and this Court issued its decision about the subpoena dispute on April 2, 1984, before the EEOC decided whether to issue a reasonable cause determination. *Shell Oil*, 466 U.S. at 54, 57.

In other words, it makes no sense to interpret § 2000e–5(f)(1)'s sixty-day time limit as applying to investigations because that time period provides inadequate time for an investigation.

Fourth and most critically, § 2000e–5(f)(1)'s stay provision applies only for "further efforts of the Commission *to obtain voluntary compliance.*" (emphasis added). That language is an express reference to conciliation, not to EEOC's independent charge, investigation, and reasonable cause duties.

As a result of this statutory structure and text, it is no surprise that *Mach Mining* itself does not make the sweeping statement EEOC claims it made. As noted, *Mach Mining* involved only conciliation, the last step before litigation in Title VII's "overall enforcement structure [of] a sequential series of

steps beginning with the filing of a charge with the EEOC." *Occidental Life*, 432 U.S. at 372. *See Mach Mining*, 135 S. Ct. at 1650 (noting charge, investigation, and reasonable cause determination and recognizing that petitioner asserted only "that the EEOC had failed to 'conciliate in good faith' prior to filing suit"). Regardless whether a stay is proper following the EEOC's failure to comply with its statutory duty to conciliate, *Mach Mining* simply had no reason to reach more broadly to other, independent statutory pre-suit duties and does not address them. Instead, *Mach Mining* hews closely to the statutory text of § 2000e–5(f)(1). Even the sentence the EEOC over-reads references only "efforts to obtain voluntary compliance," 135 S. Ct. at 1656, a carefully-cabined statement clearly limited to conciliation.

For all of these reasons, EEOC is wrong when it claims that a stay under § 2000e–5(f)(1) is always "the appropriate remedy for the EEOC's failure to fulfill a pre-suit condition." Br. in Opp. 12 n.2.

C. The EEOC's interpretation is also wrong because it is impossible for the EEOC to act as the neutral investigator once it has filed suit.

Beyond the EEOC's atextual reading of § 2000e–5(f)(1) and *Mach Mining*, a stay cannot be the exclusive remedy for EEOC pre-suit statutory violations because there is no way for the EEOC to act as a neutral investigator once it has prematurely concluded that a Title VII respondent is a lawbreaker and filed suit. Critical differences in the relationship between the EEOC and Title VII respondents at different stages in the pre-suit

process raise due process concerns with pretending that EEOC can go back in time once it has moved from neutral investigator to adversary.

As already noted, § 2000e–5(b) sets out several different phases in an EEOC action. At the charge, investigation, and reasonable cause stages, the Title VII respondent stands accused of Title VII violations, and the EEOC functions as a neutral investigator of the allegations and facts. If the EEOC concludes after its investigation that there is no reasonable cause to believe a violation occurred, it simply dismisses the charge and notifies the parties. § 2000e–5(b); 29 C.F.R. § 1601.19(a).

However, the EEOC's role changes dramatically if it "determines after such investigation that there is reasonable cause to believe that the charge is true," § 2000e–5(b), and issues a reasonable cause notice. 29 C.F.R. § 1601.21(a)-(b). At that point, the EEOC is no longer neutral; instead, "the matter assume[s] the form of an adversary proceeding." *Shell Oil*, 466 U.S. at 68. The EEOC assumes a prosecutorial function and seeks to remedy what it regards as a violation of the law. Said another way, a reasonable cause determination triggers the EEOC's obligation to engage in "informal methods of conference, conciliation, and persuasion" with a goal of "endeavor[ing] to eliminate" the violation it believes occurred. § 2000e–5(b); 29 C.F.R. § 1601.24. And if the EEOC is "unable to secure from the respondent a conciliation agreement acceptable" to it, it may so declare and bring suit. § 2000e–5(f)(1); 29 C.F.R. § 1601.25.

Once the EEOC has proceeded past the reasonable cause determination, it is working "to

eliminate any such alleged unlawful employment practice." § 2000e–5(b). There is a substantial due process and fundamental fairness problem with pretending that the EEOC could reopen (or initiate in the first instance) a new, unbiased investigation. That problem only grows once the EEOC files suit and begins actively litigating against a defendant.

The district court in its merits review of this case recognized these challenges. It was aware of its authority, whether inherent or under § 2000e–5(f)(1), to stay the proceeding in response to EEOC's legal violations, for it noted that "might have stayed the instant action for further conciliation in lieu of dismissal." *CRST Van Expedited*, 2009 WL 2524402, at *19 n.24. But it recognized that a stay was improper when the EEOC had "wholly abdicated its role in the administrative process." *Id.* And the Eighth Circuit affirmed that decision in 2012, explaining that "contrary to the EEOC's contention, the district court did not abuse its discretion in opting to dismiss, rather than stay, the EEOC's complaint." *CRST Van Expedited*, 679 F.3d at 677. EEOC again chose to let the Eight Circuit's mandate issue on that ruling. It cannot rely on any argument to the contrary in its attempt to avoid paying fees now.

CONCLUSION

For the reasons stated above and by Petitioner, the decision below should be reversed.

Respectfully submitted,

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