No. 13-1019

In The Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

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

BRIEF OF *AMICI CURIAE* IMPACT FUND, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AARP, ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS, DISABILITY RIGHTS CALIFORNIA, AND PUBLIC COUNSEL IN SUPPORT OF RESPONDENT

MICHAEL L. FOREMAN
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Boulevard,
Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu

JOCELYN D. LARKIN
ROBERT L. SCHUG
MEREDITH JOHNSON
IMPACT FUND
125 University Avenue
Suite 102
Berkeley, CA 94710
(510) 845-3473
jlarkin@impactfund.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*

Amici curiae are public interest organizations representing the interests of workers, consumers, persons with disabilities, and civil rights plaintiffs, particularly those of modest means. *Amici* advocate for those who often cannot safeguard their own rights. *Amici* present here the perspective of the victims of workplace discrimination who often must depend on the Equal Employment Opportunity Commission (EEOC) to vindicate their rights.[1]

The **Impact Fund** is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund has been counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

The **National Employment Lawyers Association (NELA)** advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no counsel for any Party authored this brief, in whole or in part. In addition, no person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this brief. All Parties have consented to the filing of this brief.

civil rights disputes. NELA and its 69 state and local affiliates have more than 4,000 members nationwide committed to working for those who have been illegally mistreated in the workplace.

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities, and fights for issues that matter most to families, such as employment and income security, healthcare, retirement planning, affordable utilities, and protection from financial abuse. AARP is dedicated to addressing the needs and interests of people aged fifty and older, including older workers, and strives through legal and legislative advocacy to preserve the means to enforce their rights. AARP has a long history of advocating for vigorous enforcement of employment discrimination laws at the federal and state level, including the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634, the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101, *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Asian Americans Advancing Justice – Asian Law Caucus (ALC) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. Advancing Justice – ALC is part of a national affiliation of Asian American civil rights groups, with offices in Los Angeles, Chicago, and Washington, DC. Advancing Justice – ALC has a long

history of protecting low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. Advancing Justice – ALC regularly assists workers with their discrimination claims in the EEOC complaint and conciliation process.

Disability Rights California, a statewide nonprofit corporation, is the State of California's designated federal protection and advocacy agency for people with disabilities, and provides abuse and neglect investigation, information and training, facility monitoring, and may pursue administrative, legal, and other appropriate remedies or approaches to ensure the protection of the rights of people with disabilities.

Public Counsel is the largest not-for-profit law firm of its kind in the nation. It is the public interest arm of the Los Angeles County and Beverly Hills Bar Associations and is also the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults, and families throughout Los Angeles County. In 2013, Public Counsel assisted more than 30,000 people with direct legal services and assisted hundreds of thousands more through filing impact lawsuits, influencing policy, and sponsoring legislation.

SUMMARY OF ARGUMENT

Amici support the Solicitor General's position that a court may not review the sufficiency of the EEOC's pre-suit conciliation efforts. *Amici* write separately to provide the perspective of the victims of workplace discrimination whom Title VII is intended to protect. *Amici* raise arguments not addressed, or fully addressed, by the parties.

1. Any substantive review of conciliation efforts harms the victims of discrimination by violating Title VII's mandate that conciliation remain confidential. The statute's guarantee of confidentiality ensures that the EEOC, charging parties, and employers can engage in full and frank settlement negotiations with the goal of achieving voluntary compliance. Judicial review of conciliation efforts has a chilling effect on settlement because it exposes the substance of sensitive discussions to the district court and, potentially, to the public. Charging parties are doubly harmed: they are less able to resolve their claims in conciliation and, when forced to litigate, their claims are heard by judges potentially influenced by irrelevant settlement communications.

2. If this Court decides to allow some level of review of the EEOC's pre-suit conciliation efforts, dismissal should not be the remedy where those efforts are found to be inadequate. This overly-harsh consequence unfairly punishes the victims of discrimination, and is contrary to the purpose of Title VII. Instead, if an employer is genuinely interested in

further conciliation, the district court should—without delving into the substance of the negotiations—allow an additional period for settlement discussions.

ARGUMENT

I. Judicial Review of Conciliation Undermines Title VII's Mandate of Confidentiality and Harms Victims of Discrimination.

A. An Implied Affirmative Defense Is Inconsistent with Statutorily-Mandated Confidentiality.

Title VII provides that conciliation efforts are to remain confidential, and criminalizes disclosure of such efforts without consent. 42 U.S.C. § 2000e-5(b). Allowing courts to review the sufficiency of the EEOC's conciliation efforts directly undermines this express mandate.

If judicial review is allowed, the parties will necessarily have to disclose confidential settlement communications. The district court must then parse the give-and-take between the EEOC and the employer, as well as the details of offers and counter-offers. As the Seventh Circuit appropriately observed, "[a] court reviewing whether the agency negotiated in good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers—not to mention using confidential and inadmissible materials as evidence—unless its review were so cursory as to be

meaningless." *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 177 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014).

Despite paying homage to the "modest" role of the court in reviewing the EEOC's conciliation efforts, some district courts have delved deeply into the particulars. In *EEOC v. Bloomberg L.P.*, the court reviewed the details of correspondence between the EEOC and the employer, the offers and counter-offers made by each side, and what took place during certain conciliation meetings. 751 F. Supp. 2d 628, 637-42 (S.D.N.Y. 2010), *decision clarified on reconsideration* (Dec. 2, 2010). Likewise, in *EEOC v. CRST Van Expedited, Inc.*, the district court referenced specific emails, voicemails, and conversations between the EEOC and defense counsel. No. 07-CV-95-LRR, 2009 WL 2524402, at *6-7 (N.D. Iowa Aug. 13, 2009).

This is not what Congress intended. Under Title VII, conciliation efforts are confidential and are to remain confidential. The severe penalties for breach demonstrate that this admonition is not merely a suggestion: violation is punishable by a fine of up to $1,000, imprisonment for up to a year, or both. 42 U.S.C. § 2000e-5(b).

Filing conciliation evidence under seal (or redacted) will not solve the problem. Even if the parties agree that certain evidence should be sealed, the district court might not acquiesce. Nor is there any guarantee that dockets will remain sealed, particularly if the media seeks access. *See*, *e.g.*, *Lugosch v.*

Pyramid Co. of Onondaga, 435 F.3d 110, 126-27 (2d Cir. 2006) (holding that a presumption of immediate public access attached to certain sealed documents and ordering the district court to quickly ensure immediate access to the documents if appropriate). As one circuit court explained, "we embrace the judge's decision to carefully review every document in light of . . . the somewhat tepid and general justifications offered for sealing the documents," noting that the district court had reserved the right to unseal the materials if it "'determine[d] that they should be available to the public or otherwise do not merit sealed status.'" *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1186-87 (9th Cir. 2006) (quoting district court decision); *see also*, *e.g.*, *In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1120 (9th Cir. 2012) ("Because there are no compelling reasons to keep the judicial records sealed, we order the district court on remand to grant the . . . motion to unseal."). Collateral litigation about sealing and unsealing conciliation records will cause delay and divert the court's attention from the merits.

This Court should also reject Mach Mining's claim that the employer or the EEOC can waive the charging party's right to confidentiality by "put[ting] conciliation at issue." *See* Pet. Br. 11. Employers who have carefully orchestrated their conciliation positions will readily waive confidentiality to press their insufficient-conciliation defense. Likewise, when challenged, the EEOC has an understandable interest in proffering information to demonstrate that it has

fulfilled its statutory duty to conciliate. Lost in this back and forth is the aggrieved party's right to confidentiality, which should not be forfeited by the employer's unilateral decision to challenge the EEOC's conciliation efforts. The statute expressly requires "the written consent of the *persons concerned*" for any disclosure or use of conciliation communications in a subsequent proceeding. 42 U.S.C. § 2000e-5(b) (emphasis added). This broad language reflects an intent to ensure that charging parties retain control of their right to confidentiality.

B. Review of EEOC Conciliation Efforts Inappropriately Exposes Judges to Settlement Discussions.

An implied conciliation defense also inappropriately entangles the district court in the parties' settlement discussions, harming the charging parties.

Pre-trial conciliation negotiations are meant to remain outside of the court's review. Judges who become enmeshed in reviewing settlement negotiations are privy to confidential or privileged information about the merits of the claims, compromising their ability to remain neutral. *See*, *e.g.*, *EEOC v. LifeCare Mgmt. Servs., LLC*, No. 02:08-CV-1358, 2009 WL 772834, at *5 (W.D. Pa. Mar. 17, 2009) ("[T]he Court is concerned that its intimate knowledge of the details contained in the conciliation documents might reasonably result in one [of] the parties questioning the impartiality of the Court."). A judge could well

draw improper conclusions about the charging party's motivation and credibility based on the size and scope of the demand, or perceived willingness to compromise.

Moreover, if the judge routinely reviews conciliation discussions, the parties will be disinclined to candidly discuss the strengths and weaknesses of their respective positions. As one employer argued, "even under seal, these documents inappropriately disclose[ ] to the [c]ourt and its staff the confidential discussion related to resolution of this matter, which [is] information [to which] it would normally not have had access." *Id.* at *3.

Review of conciliation efforts prevents the EEOC from negotiating freely, without fear that information shared will be used against it in a subsequent proceeding. This chilling effect frustrates Title VII's goal of voluntary compliance and harms the charging parties whom the statute is intended to protect.

II. Dismissal Is Never an Appropriate Remedy for Insufficient Conciliation.

The Solicitor General has persuasively explained why allowing judicial review of conciliation is at odds with the text of Title VII. *See generally* Resp. Br. 12-19. As this Court has observed,"[i]t is not for us to rewrite [Title VII] so that it covers . . . what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010); *accord Univ. of Tex. Sw. Med. Ctr. v. Nassar*,

133 S. Ct. 2517, 2528-29 (2013) (refusing to read a mixed motive analysis into Title VII retaliation claims because the plain language of Title VII did not provide such an analysis). *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173-78 (2009) (refusing to read a mixed motive burden-shifting framework into the ADEA because it does not have the same statutory language as Title VII). Where Congress has chosen not to create a defense to Title VII, the Court should not read one into the statute.

If this Court is inclined to allow *some* limited review of conciliation efforts, dismissal should not be the remedy when those efforts fall short.[2] As the Seventh Circuit correctly concluded, dismissal on the merits "would excuse the employer's (assumed) unlawful discrimination" and "would be too final and drastic a remedy for any procedural deficiency in conciliation." *Mach Mining*, 738 F.3d at 184. Instead, if the district court determines that the employer is interested in further conciliation, the court has the option—without looking into the substance of the negotiations—to allow an additional period for settlement discussions.

[2] Mach Mining sought complete dismissal of the EEOC's complaint below for alleged insufficient conciliation. J.A. 30.

A. Dismissal Unjustly Punishes the Victims of Discrimination.

Many victims of workplace discrimination are unable to retain private legal counsel, and instead rely on the EEOC to pursue their claims. Consequently, dismissing a lawsuit based on the pre-suit conciliation will often end the charging parties' only opportunity to vindicate their rights. This result unfairly punishes the victims of discrimination, who have little say about how the conciliation proceeds.[3] Conversely, the employer is given a free pass—it will never address the merits of the allegations or, if appropriate, change the practices at issue.

The outcome in *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012), provides a particularly painful illustration. The charging parties were female truck driver trainees subjected to pervasive sexual harassment by male "lead trainers" during extended training trips in long-haul trucks. *Id.* at 665-67. One woman alleged that her trainer

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[3] The harm from dismissal is not limited to charging parties who allege discrimination under Title VII. The Americans with Disabilities Act expressly incorporates Title VII's enforcement provisions. 42 U.S.C. § 12117(a). In addition, dismissal causes even greater harm where EEOC enforcement power is exclusive and precludes any subsequent private suit by a charging party. *See* 29 U.S.C. § 626(c)(1) ("[T]he right of any person to bring [a civil] action [under the Age Discrimination in Employment Act] shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.").

repeatedly forced her to have unwanted sex as a condition of receiving a passing grade. *Id.* at 666. "The EEOC eventually discovered that several hundred women employees claimed severe sexual harassment by CRST male trainers," including "claims of sexual propositioning, sexual assault, and rape." *Id.* at 695 (Murphy, J., dissenting). But because the district court concluded that the EEOC had not properly conducted its pre-suit investigation and conciliation, the claims of 67 women were dismissed without ever reaching the merits. *See id.* at 697 ("The dismissal of scores of women claimants with apparent trial worthy claims is affirmed by the majority even though it was CRST which ended the conciliation process and even though the EEOC made substantial efforts to investigate and conciliate prior to filing its lawsuit.").

Similarly, in *EEOC v. Bloomberg L.P.*, women who took maternity leave alleged that they were subsequently demoted, received less pay, had job functions and responsibilities taken away, and had their supervisory responsibilities reduced. 967 F. Supp. 2d 802, 806-07 (S.D.N.Y. 2013). In dismissing the claims of many of these women because of issues with the EEOC's pre-suit obligations, the district court observed that "certain . . . claims may be meritorious but now will never see the inside of a courtroom." *Id.* at 816.

The charging parties do not just lose the ability to recover monetary damages when the EEOC's claims are dismissed. In many instances, they also

lose the potential for injunctive relief. The EEOC is more likely than plaintiffs with individual claims to pursue and fashion remedies for systemic Title VII violations. *See Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980) (recognizing the EEOC's broad power to enforce Title VII). Without these important structural remedies that are at the heart of Title VII, victims will continue to be exposed to discriminatory working conditions.

Charging parties rightfully rely on the EEOC and the statutory scheme provided by Congress to vindicate their rights. They should not have their claims defeated on purely procedural grounds resulting from a process over which they have little control.[4]

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[4] *Amici* do not intend to suggest that the EEOC has failed to properly discharge its duty to conciliate. Although Mach Mining attempts to paint the EEOC as unwilling to conciliate unless forced by the court, the data does not support this view. The EEOC initiates lawsuits in a very small percentage of cases. *See*, *e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002). And the share of cases it has successfully conciliated has *increased* over time. *Compare* EEOC, Enforcement and Litigation Statistics, All Statutes, FY 1992-FY 1996, http://www.eeoc.gov/eeoc/statistics/enforcement/all-a.cfm (last visited Oct. 29, 2014) (from 1992 to 1996, the EEOC found reasonable cause in 9,830 cases, and successfully conciliated 2,990 of them, a rate of 30%), *with* EEOC, Enforcement and Litigation Statistics, All Statutes, FY 1997-FY 2013, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Oct. 29, 2014) (from 2009 to 2013, the EEOC found reasonable cause in 20,930 cases, and successfully conciliated 6,967, a rate of 33%).

B. District Courts Have the Authority to Allow Further Conciliation.

If the district court determines that the matter may be resolved through informal methods, it has ample authority to allow additional time for renewed conciliation. This outcome is consistent with the text and purpose of Title VII, and protects the rights of victims to have their claims resolved on the merits.

Courts have the authority under both Title VII and the Federal Rules of Civil Procedure to allow, or order, additional settlement discussions. Title VII provides that "the court may, in its discretion, stay further proceedings for . . . further efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1). Likewise, Rule 16 of the Federal Rules of Civil Procedure gives the district court the power to order pre-trial conferences for, among other purposes, "facilitating settlement." Fed. R. Civ. P. 16(a)(5).

The district court is fully empowered to order a settlement conference or a limited stay of the litigation, and can do so without reviewing the substance of the parties' settlement negotiations. This approach furthers the goal of voluntary compliance with Title VII, while at the same time respecting the EEOC's enforcement role. Employers also get what they want: a focused opportunity to resolve the claim, which they contend they did not previously receive.[5]

[5] Neither Mach Mining nor its *amici* address the harsh consequences of dismissal on the charging parties, nor do they

(Continued on following page)

Most importantly, avoiding outright dismissal preserves the rights of aggrieved employees to have their claims heard and resolved on the merits.

CONCLUSION

"The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (internal quotation marks and alteration omitted). This Court should reject Mach Mining's invitation to read into Title VII an affirmative defense that the statute does not provide.

For the foregoing reasons, *Amici Curiae* respectfully request that this Court affirm the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted on November 3, 2014,

MICHAEL L. FOREMAN
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Boulevard, Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu

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explain why a stay would not meet any legitimate interest in further conciliation.

JOCELYN D. LARKIN
ROBERT L. SCHUG
MEREDITH JOHNSON
IMPACT FUND
125 University Avenue
Suite 102
Berkeley, CA 94710
(510) 845-3473
jlarkin@impactfund.org