No. 18-11776

In The United States Court of Appeals For The Eleventh Circuit

Equal Employment Opportunity Commission,
Plaintiff-Appellant,

v.

The Doherty Group, Inc., d/b/a Doherty Enterprises, Inc.,
Defendant-Appellee.

On Appeal from
the United States District Court
for the Southern District of Florida (No. 14-cv-81184)

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rule 26.1-1, counsel for the Chamber of Commerce of the United States of America states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Counsel further certifies that, in addition to the persons listed in the certificates of interested persons filed by the parties, the following persons have an interest in the outcome of this case (solely as a result of their role in connection with this brief):

1. Chamber of Commerce of the United States of America
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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") 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.

This case raises such issues. The legal theories advanced here by the Equal Employment Opportunity Commission ("EEOC") would confer on the agency a novel, broad, ill-defined authority to challenge otherwise-lawful and legitimate employment practices (including arbitration and severance agreements), and also strip employers of important procedural protections that Congress imposed to constrain EEOC's power. The Chamber participated as *amicus* in *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015), in which the Seventh Circuit roundly rejected the same EEOC theories.

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[1] Counsel for both parties have consented to the filing of this brief. No counsel for any party authored any part of this brief. No party or counsel for any party contributed money that was intended to fund its preparation or submission. No person other than *amicus*, its members, and its counsel contributed money intended to fund its preparation or submission.

STATEMENT OF THE ISSUES

1. May EEOC pursue a Title VII "pattern or practice" lawsuit against an employer even if the employer is not alleged to have ever engaged in any prohibited discrimination or retaliation?

2. May EEOC pursue a Title VII "pattern or practice" lawsuit against an employer without following the pre-suit procedures (including an effort to conciliate the claim) that Title VII and EEOC's own regulations impose?

SUMMARY OF ARGUMENT

EEOC claims that Appellee ("Doherty") engaged in a "pattern or practice" of intentional "resistance" to Title VII rights by requiring employees to sign an arbitration agreement that supposedly precluded them from filing charges with EEOC. The district court granted summary judgment by rejecting EEOC's *factual premise* about the challenged agreement, and this Court can and should affirm on that case-specific basis. This brief explains why EEOC's *legal theory*—which the district court accepted at the motion-to-dismiss phase—also fails. Both substantively and procedurally, EEOC's claim is defective. The only other Court of Appeals to have confronted the agency's theory (the Seventh Circuit) decisively rejected it, just three years ago, in *EEOC v. CVS Pharmacy*. This Court should follow suit—and, at minimum, should not create a circuit split by endorsing the agency's novel view of its own powers. Doing otherwise would create a new, unbounded set of Title VII violations and, adding insult to injury, deprive employers of crucial procedural protections against agency abuse.

As to substance, Title VII's pattern-or-practice provision authorizes EEOC to use a class action-style proof framework against those who *repeatedly* engage in the unlawful employment practices forbidden by Title VII—discrimination and retaliation. Every court to consider this power has so described it; Title VII's text and legislative history are in accord; and even EEOC and the Department of Justice have long taken the same view. Yet EEOC does not allege that Doherty ever discriminated or retaliated. Its theory thus turns pattern-or-practice liability on its head—instead of being directed at the *worst, repeat* violators, EEOC would invoke it against otherwise *lawful* conduct. As the Seventh Circuit correctly held in *CVS*, however, Title VII "does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes." 809 F.3d at 341.

As to procedure, Congress made clear that litigation by EEOC must always be a last resort—*after* failure of attempts to resolve the matter privately. That conciliation obligation, a key component of an integrated, multi-step enforcement scheme designed to resolve disputes efficiently and to protect employers from abuse of power, applies just as much to pattern-or-practice claims as to any other Title VII claims. Yet EEOC refused to even *consider* a voluntary, out-of-court resolution of its dispute with Doherty. EEOC's position perverts the statutory scheme; finds no support in legislative history or caselaw; and ignores the agency's own comprehensive regulations. As the Seventh Circuit correctly observed, EEOC's approach "would undermine both the spirit and letter of Title VII." *Id.* at 343.

Indeed, EEOC's construction of § 707 would have dire policy consequences. If a pattern-or-practice suit may be premised on any allegation that the employer's acts somehow "interfere" with EEOC's processes or "chill" employees from exercising their rights, then Title VII hands EEOC a stunningly unbounded authority to challenge any employer policy it believes to be "bad." And to make matters worse, EEOC's approach would also deny employers basic procedural safeguards, such as confidential pre-suit conciliation, in the very class of cases—involving amorphous, unpredictable theories of liability—where they are arguably needed most.

ARGUMENT

By way of statutory background (and all of the relevant provisions are included in an appendix to this brief), Title VII prohibits two classes of "unlawful employment practices." Section 703 forbids discrimination based on race and certain other traits. 42 U.S.C. § 2000e-2. Section 704 forbids discrimination (often referred to as "retaliation") against a person who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Id.* § 2000e-3(a). Section 706, Title VII's principal enforcement provision, allows EEOC to sue an employer for prohibited discrimination or retaliation. *Id.* § 2000e-5(f)(1). But it may do so only after following a multi-step procedure that begins with the filing of a "charge" and concludes with a confidential, out-of-court effort to "eliminate" the unlawful employment practice "by informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(b).

This case concerns § 707, the Act's pattern-or-practice provision. Section 707(a) says that the Attorney General may sue any person who "is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII. *Id.* § 2000e-6(a). In 1972, Congress transferred this authority to EEOC, requiring it to "carry out such functions in accordance with subsections (d) and (e)." *Id.* § 2000e-6(c). Section 707(d) calls for EEOC to replace the Attorney General in pending suits. *Id.* § 2000e-6(d). And § 707(e) authorizes EEOC "to investigate and act on a charge of a pattern or practice of discrimination"—but "[a]ll such actions shall be conducted in accordance with the procedures set forth in" § 706. *Id.* § 2000e-6(e).

EEOC contends that § 707(a)'s reference to a "pattern or practice" of intentional "resistance" to Title VII "rights" extends in unspecified ways beyond *discriminatory* practices, to include practices such as the use of arbitration agreements that supposedly might chill or deter employees from invoking Title VII's machinery. And because no discrimination is alleged in such cases, EEOC further asserts that it need not follow § 707(e)'s mandate to follow the ordinary pre-suit procedures. EEOC Br. 52-62.

As the Seventh Circuit has held, EEOC's reading is wrong—at odds with the statutory text, congressional intent, caselaw, and even EEOC's own regulations. And, as a policy matter, EEOC's approach would create great uncertainty and unfairness for employers trying in good faith to comply with the law.

I. ADOPTING EEOC'S POSITION WOULD CREATE A CIRCUIT SPLIT WITH THE SEVENTH CIRCUIT.

As EEOC implicitly acknowledges—albeit in a fleeting sentence on page 57 of its brief—validating its claim here would create a direct conflict with the only other Court of Appeals to have directly confronted these legal issues: the Seventh Circuit, which rejected EEOC's view in its *CVS* decision.

CVS was like this case, except it concerned severance agreements rather than arbitration agreements. 809 F.3d at 336. In those agreements, departing employees waived certain claims against CVS, including Title VII claims, and agreed not to sue CVS in any court or agency. *Id.* at 336-37. EEOC sued under § 707, claiming that the severance agreements *might* deter former employees from filing EEOC charges and therefore amounted to "a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII." *Id.* at 336-37. As in this case, EEOC did not allege any discrimination or retaliation, and it did not give the employer any opportunity to resolve the matter confidentially in an out-of-court conciliation agreement. *Id.* at 338. CVS successfully moved for summary judgment on those grounds. *Id.*

On appeal, EEOC argued that an employer could violate § 707(a) even if the employer did not engage in any discrimination or retaliation. *Id.* at 339. It also argued that it could sue under § 707 "without following any of the pre-suit procedures contained in Section 706, including conciliation." *Id.* The Seventh Circuit rejected both arguments and affirmed summary judgment in CVS's favor.

Turning first to EEOC's substantive view that pattern-or-practice "resistance" claims under § 707(a) may be broader than pattern-or-practice "discrimination" claims under § 707(e), the Seventh Circuit disagreed. The court flatly "reject[ed] the EEOC's expansive interpretation of its powers under Section 707(a)." *Id.* at 341. As the court explained, that provision refers to "resistance to the full enjoyment of any of the rights secured by" Title VII. *Id.* And that phrase refers to "practices that threaten the employee's right to be free from workplace discrimination and retaliation for opposing discriminatory employment practices." *Id.* Thus, § 707(a) "does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII … in one consolidated proceeding." *Id.* Because EEOC did not allege that CVS had engaged in discrimination or retaliation, it failed to state a claim. *Id.*

The Seventh Circuit's holding on the substantive scope of § 707(a) flowed into its procedural holding on the prerequisites to suit under that provision. "[B]ecause there is no difference between a suit challenging a 'pattern or practice of resistance' under Section 707(a) and a 'pattern or practice of discrimination' under Section 707(e)," the latter provision's mandate that EEOC follow "the procedures set forth in" § 706 applies to all such actions. *Id.* at 342. EEOC's contrary reading, the court noted, "reads the conciliation requirement out of the statute." *Id.*

Finally, the court observed that its reading of the statute—but not EEOC's—comports with the agency's own regulations. *Id.* Those regulations require EEOC to

pursue conciliation whenever it "determines that there is reasonable cause to believe that an unlawful employment practice has occurred," and preclude it from suing unless it cannot secure an acceptable "conciliation agreement." *Id.*. "Nowhere in the EEOC's comprehensive regulations is there any statement suggesting that suits may be brought under Section 707(a) without conciliation or an allegation of discrimination." *Id.*

EEOC is relying here on the same interpretation of § 707 that the Seventh Circuit rejected. As in *CVS*, EEOC "advances a novel interpretation of its powers under Section 707(a) that extends beyond the pursuit of unlawful unemployment practices involving discrimination and retaliation, and that frees the EEOC from engaging in informal methods of dispute resolution as a prerequisite to litigation." *Id.* at 341. As in *CVS*, this Court should firmly reject that interpretation.

II. As the Seventh Circuit Correctly Held, Repeat Discrimination Is a *Sine Qua Non* of a Title VII Pattern-or-Practice Claim.

On the merits, the Seventh Circuit correctly answered the substantive issue when it held that § 707(a) provides EEOC a vehicle for challenging discriminatory practices—not a broad authority to sue in the *absence* of discrimination.

A. EEOC does not allege that Doherty ever engaged in any forbidden discrimination (or retaliation). Instead, it argues that Doherty's use of the arbitration agreement itself constitutes a "pattern or practice" of resisting the "rights secured by" Title VII. That is *backwards*. Pattern-or-practice claims target *repeat* discriminators and give EEOC a vehicle for class-wide relief. Every source of authority so confirms.

The Courts. The leading case, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), explained that a pattern-or-practice suit under § 707(a) is akin to a class action. *Id.* at 360. Because the Government alleged "a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights," it "had to establish" that "*discrimination* was the company's standard operating procedure," and "§ 707(a)" requires the government to "prove[]" that the employer engaged in "a pattern or practice of *discriminatory conduct*." *Id.* at 336, 343 n.24 (emphasis added). Congress intended § 707 to apply where an employer "repeatedly and regularly" engaged in employment practices "prohibited by the statute." *Id.* at 336 n.16 (quoting legislative history). *Teamsters* thus makes clear that § 707 does not prohibit *distinct* misconduct; rather, it creates an enforcement tool against *sustained* misconduct.

Since *Teamsters*, the Supreme Court has consistently described § 707 as a tool for fighting systemic *discrimination*. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 n.4 (2006) ("Title VII … authoriz[es] suits by the Government to enjoin 'pattern or practice' *discrimination*"); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002) ("[Title VII] authorized … actions by the Attorney General in cases involving a 'pattern or practice' of *discrimination*."); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 454 n.29 (1986) ("[T]he Attorney General [had] the power to institute suit in cases where there existed a pattern or practice of *discrimination*."); *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 327 (1980) ("Prior to 1972, the only civil actions authorized" involved a suspected "'pattern or practice' of *discrimination*.") (all emphases added).

Lower courts, too, have always recognized that claims "under § 707 … are limited to allegations of a pattern or practice of discrimination." *Serrano v. Cintas Corp.*, 699 F.3d 884, 894 (6th Cir. 2012). That is, "in Title VII jurisprudence 'pattern-or-practice' simply refers to a method of proof and does not constitute a 'freestanding cause of action.'" *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487 (2d Cir. 2013); *see also Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355 (5th Cir. 2001) ("A pattern or practice ... is really 'merely another method by which disparate treatment can be shown.'").

In sum, "there is technically no such thing as a 'pattern or practice violation' or a § 707 violation; there are just patterns or practices of violating § 703." *EEOC v. Bass Pro Outdoor World, LLC*, 35 F. Supp. 3d 836, 853 n.10 (S.D. Tex. 2014).

Congress. The legislative history is in accord. Section 707(a) was incorporated into the original Act because Senators wanted to ensure that authorities could act "where [they] feel that there is a *pattern of discrimination*." 110 Cong. Rec. 14,189 (1964) (Sen. Pastore) (emphasis added). Under § 707, the Attorney General may "institute suit whenever he has reasonable cause to believe that there is a pattern or practice of *discrimination*." *Id.* at 12,722 (Sen. Humphrey); *see also id.* at 12,596 (Sen. Clark) (Attorney General must "find in each instance a pattern of *discrimination*"); *id.* at 14,191 (Sen. Javits) ("Attorney General can bring a suit to establish a pattern or practice of *discrimination*.") (all emphases added). In short, "[t]he words 'resistance to enjoyment of the rights' under the act means no more than refusal to comply with titles II or VII of the act: that is, engaging in any prohibited discrimination." *Id.* at 15,895 (Rep. Celler).

When Congress in 1972 transferred pattern-or-practice authority to EEOC, it reiterated this understanding. A House Committee described § 707 as authorizing "*discrimination* suits" that attack "deeply imbedded … *discrimination*." H.R. Rep. 92-238, at 13-14 (1971) (emphases added). A Senate Committee likewise recounted how § 707 allows "broad-scale actions against any 'pattern or practice' of *discrimination*." S. Rep. 92-415, at 28 (1971) (emphasis added). One prominent senator described a pattern-or-practice as "nothing but a broader version involving more parties in greater depth in terms of length of time and the prevalence of a given practice than an individual suit." 118 Cong. Rec. 4081 (1972) (Sen. Javits).

Executive Branch. Even EEOC and the U.S. Department of Justice have long advanced the same view. In *Teamsters*, the Government contended that, in a pattern-or-practice case, the question is "whether a company has regularly engaged in *discriminatory* acts." Br. for U.S. and EEOC at *26 & n.30, *Teamsters*, 431 U.S. 324, 1976 WL 181355 (emphasis added). In later cases, it similarly took the view that § 707 requires a pattern of discrimination. *See* Br. for EEOC at *33, *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), 1983 U.S. S. Ct. Briefs LEXIS 66 (describing § 707 as authorizing "'pattern or practice' actions only where" there is a "'pattern or practice' of discrimination"); Br. for EEOC at *27, *Gen. Tel.*, 446 U.S. 318, 1980 WL 339554 ("Attorney General … was empowered under Section 707 … to bring suit if he was satisfied that a 'pattern or practice' of discrimination existed."). And EEOC has told other courts that "'pattern or practice' is an evidentiary framework, not a 'claim.'" Br. of EEOC at 40, *EEOC v. Geo Grp.*, No.

13-16292 (9th Cir. 2014), http://www1.eeoc.gov/eeoc/litigation/briefs/geogroup.html. For its part, the U.S. Justice Department articulates the same understanding: Under "[s]ection 707 of Title VII, the Attorney General has authority to bring suit [in public-sector cases] … where there is reason to believe that a 'pattern or practice' of discrimination exists." *Employment Section Overview*, http://www.justice.gov/crt/about/emp/overview.php.

B. In denying Doherty's motion to dismiss, the district court nevertheless (and without considering the authorities discussed above) adopted EEOC's reading of § 707's substantive scope. JA.59-62. EEOC repeats the court's reasoning on appeal. EEOC Br. 58-62. But that reasoning is flawed and unpersuasive.

The district court rested principally on § 707's text, emphasizing that § 707(a) refers to a pattern of "resistance" rather than a pattern of "unlawful employment practices." JA.59. The differing language, however, stems from the fact that Congress used the same pattern-or-practice concept throughout the civil rights laws, beyond the employment context. EEOC Br. 59 n.7. Each of these laws refers in generic terms to a "pattern or practice of resistance" to "rights secured by" that particular statute. The critical point—which EEOC ignores—is that *no* court has endorsed EEOC's nebulous definition of "resistance" under *any* of these laws. *E.g.*, *United States v. Lansdowne Swim Club*, 894 F.2d 83, 88 (3d Cir. 1990) (requiring, in Title II case, "pattern or practice of discrimination"). And when Congress amended the statute to grant litigation authority to EEOC, it authorized the agency to act on allegations of "a pattern or practice of

discrimination," 42 U.S.C. § 2000e-6(e) (emphasis added), confirming that Congress in the Title VII context understood these concepts to be interchangeable.

Nor, in any event, does the "resistance" language support EEOC's theory. For one thing, § 707(a) speaks of resistance to the "rights secured by" Title VII—which are the *substantive* rights to be free of discrimination, set forth in §§ 703 and 704—not the *procedures* that one follows to *vindicate* those rights, like filing a charge. Of course, Title VII protects invocation of its procedural machinery—but it does so through § 704, its anti-retaliation provision.[2] For another thing, a voluntary agreement not to exercise a right does not "resist" or "defeat" (EEOC Br. 59) it. Agreeing to arbitrate a Title VII claim simply means committing to sue in an arbitral forum rather than a court or other tribunal; nobody would call that "resisting" the exercise of Title VII rights.

Beyond its textual analysis, the district court (JA.60) cited one district court case from the 1960s, *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965). But that case involved blatant discrimination: The Klan "beat and threatened Negro pickets to prevent them from enjoying the right of equal employment opportunity." *Id.* at 356. At most, it stands for the proposition that *non-employers* may be held liable under § 707, if they contribute to unlawful discrimination. *See id.* at 349 ("these provisions reach any person ... that interferes with the enjoyment of civil rights

[2] Note that, as EEOC does not dispute, offering a contract that purports to ban charge-filing is not itself "retaliation," as it involves no adverse employment action. *See EEOC v. SunDance Rehabilitation Corp.*, 466 F.3d 490, 501 (6th Cir. 2006).

secured by the Act"); *see also* EEOC Br. 60 (noting that § 707(a) refers to resistance by "any person"); *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 892 (3d Cir. 1990) (recognizing § 707 claim against Pennsylvania based on "discriminatory" state law that affected teachers, even though State was "not … the employer"). But that proposition is irrelevant here: Doherty *is* an employer. The problem for EEOC is that Doherty has not discriminated.

* * *

Transforming § 707 from a class-action device to an open-ended, independent category of undefined wrongdoing would conflict with the statute's text, structure, and history, and with uniform caselaw. It would also "bring about an enormous and transformative expansion in [EEOC's] regulatory authority," improperly construing a "long-extant statute" to vest EEOC with a previously "unheralded" power to concoct new violations of Title VII. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). This Court should, like the Seventh Circuit, decline to take that path.

III. As the Seventh Circuit Correctly Held, EEOC Must Engage In Conciliation Prior To Filing a Pattern-or-Practice Lawsuit.

The Seventh Circuit was also correct in resolving the related procedural question. Congress required conciliation before *any* EEOC suit, to ensure that litigation is a last resort. And EEOC's own regulations demand the same. EEOC's position here—that § 707 cases need not be conciliated if they are not preceded by a "charge" and/or do not allege "discrimination"—is irreconcilable with the law.

A. When Congress enacted Title VII in 1964, "[c]ooperation and voluntary compliance" were its "preferred means" to end discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Congress thus "established a procedure whereby" EEOC would try "to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Id.*

In 1972, Congress amended the Act "to empower the [EEOC] to bring suit." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 357 (1977). But EEOC must "refrain from commencing a civil action until it has discharged its administrative duties," *id.* at 359, including receipt of a charge, notice to the employer, investigation of the charge's allegations, determination of reasonable cause, and efforts to resolve the matter by "conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). Only if EEOC is "unable to secure" a conciliation agreement may it sue. *Id.* § 2000e-5(f)(1).

Congress in 1972 also transferred to EEOC the Attorney General's authority to file pattern-or-practice suits. *Id.* § 2000e-6(c). But, in doing so, Congress required EEOC to "carry out such functions in accordance with subsections (d) and (e) of this section." *Id.* And § 707(e) requires "[a]ll such actions" to "be conducted in accordance with the procedures set forth in [§ 706]." *Id.* § 2000e-6(e).

By cross-referencing § 706 as dictating the "procedures" EEOC must follow in § 707 actions, Congress made clear that EEOC must *in all cases* comply with § 706's prerequisites—including conciliation. That is, because EEOC's authority to sue under § 707(a) comes from § 707(c), and § 707(c) requires it to act in accordance with § 707(e),

and § 707(e) incorporates § 706 procedures, EEOC's pre-suit obligations extend equally to all § 707 pattern-or-practice claims. *Accord* H.R. Rep. 92-238, at 29 (1971) (provision "[a]ssimilates procedures for new proceedings brought under [§] 707 to those now provided for under [§] 706"). Not long after the 1972 amendments, the Government itself thus told the Fourth Circuit that "[s]ections 707(c), (d) and (e), when read together, indicate that in all cases in which EEOC has pattern or practice authority, EEOC must adhere to the procedural requirements of [§] 706." Br. for U.S. at *21, *United States v. North Carolina*, 587 F.2d 625 (4th Cir. 1978) (No. 77-1614), 1977 WL 203655. Just so.

Courts have consistently recognized this procedural equivalence. For example, the Ninth Circuit explained recently that "the conciliation requirements do not change depending on whether the EEOC brings a claim under § 2000e–5 (a § 706 claim) or § 2000e–6 (a § 707 pattern-or-practice claim). Title VII indicates that the pre-suit conciliation procedures for both sections are the same." *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1201 (9th Cir. 2016). Other courts have uniformly held likewise. *See, e.g.*, *EEOC v. United Air Lines*, No. 73-C-972, 1975 U.S. Dist. LEXIS 11689, at *4-5 (N.D. Ill. June 26, 1975); *EEOC v. Whirlpool Corp.*, 80 F.R.D. 10, 17 (N.D. Ind. 1978); *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628, 644 (S.D.N.Y. 2010); *EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619, 622 (N.D. Ohio 2011).

Indeed, even EEOC itself has previously admitted that "whether filed under 42 U.S.C. § 2000e-5 (§ 706) or § 2000e-6 (§ 707), all EEOC litigation shares the same administrative prerequisites." Br. for EEOC at 62, *EEOC v. CRST Van Expedited, Inc.*,

679 F.3d 657 (8th Cir. 2012), http://www.eeoc.gov/eeoc/litigation/briefs/crst.txt. Likewise, EEOC recently advised the Ninth Circuit that "§ 706 and § 707 impose the *same* pre-suit requirements" and it would "def[y] the reality of EEOC's administrative process to hold that § 706 and § 707 impose different pre-suit requirements." Br. for EEOC at 45-46, *Geo Grp., Inc.*, No. 13-16292.

Finally, EEOC enacted regulations that describe the exclusive process by which it enforces Title VII; the regulations "contain *the* procedures" for "administration and enforcement of title VII," 29 C.F.R. § 1601.1 (emphasis added), and further codify EEOC's conciliation duty. They provide that *whenever* EEOC has "reasonable cause to believe that an unlawful employment practice has occurred or is occurring, [it] shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion." 29 C.F.R. § 1601.24(a). EEOC may "bring a civil action" only if it is unable to secure an acceptable conciliation agreement, *id.* § 1601.27; it otherwise has no authority to sue. These regulations bind EEOC. *See Shell Oil*, 466 U.S. at 67.

Nor can the comprehensive regulations be limited to § 706 cases, or to a subset of § 707 cases. Originally, EEOC promulgated separate rules for "the processing of cases under section 707." 40 Fed. Reg. 16193, 16193 (Apr. 10, 1975). They explained how a § 707 proceeding would begin with a charge; proceed to investigate whether the employer "engaged in a pattern or practice of unlawful discrimination"; and then move to conciliation, only on failure of which would a lawsuit be filed. *See id.* at 16193-94 (adding 29 C.F.R. §§ 1601.50-1601.59). EEOC later rescinded those rules, explaining

that, "[i]n the future, 707 charges will be processed under the procedures set forth in Subpart B [29 C.F.R. §§ 1601.6-1601.29]." 44 Fed. Reg. 4667, 4668 (Jan. 23, 1979). It is thus apparent that EEOC intended its regulations to apply to *all* Title VII cases. It has never so much as hinted that any § 707 suits could commence *absent* a charge or *absent* conciliation.

B. EEOC contends that it did not have to conciliate in this case. EEOC Br. 52-58. In its view, § 707(c) transferred to it *all* of the Attorney General's powers, and § 707(e) added only a limited caveat—that when EEOC "act[s] on a *charge* of a pattern or practice of *discrimination*," it must follow § 706 procedures. If EEOC acts *without* a discrimination charge, however, EEOC considers itself unencumbered by § 706. EEOC Br. 54-59 (emphasis added). At the 12(b)(6) stage, the district court accepted this interpretation of the statutory scheme. JA.55-59.

In addition to ignoring the caselaw and the independently binding regulations, EEOC's reading of § 707 is untenable. Section 707(a), by its terms, grants power only to the Attorney General. And the transfer provision, § 707(c), mandates that EEOC "carry out" the transferred functions "in accordance with" § 707(e), which requires compliance with the § 706 procedures. There is thus no such thing as an EEOC pattern-or-practice suit pursuant to § 707(a) alone. There is only an EEOC pattern-or-practice suit in accordance with § 707(c) and § 707(e)—meaning one that flows from a charge of discrimination and is processed pursuant to the § 706 procedures. Reading § 707 *as a whole* refutes EEOC's interpretation.

EEOC's construction would also result in a nonsensical scheme. Why would Congress require EEOC to abide by the pre-suit procedures for § 707 claims originating with a *charge*, but leave it free to ignore those procedures (including notice to the employer, an investigation, and conciliation) if it simply throws out the charge and proceeds without one? Such a reading renders § 707(e) superfluous and eviscerates Congress's desire to deny to EEOC "unconstrained" power. *Shell Oil*, 466 U.S. at 65. Indeed, as the Seventh Circuit recognized, on that theory, "the EEOC would never be required to engage in conciliation before filing a suit because it could always contend that it was acting pursuant to its broader power under Section 707(a)." *CVS*, 809 F.3d at 342. In a similar vein, why would Congress detail the "requirements" of a valid § 707 charge if EEOC could sue without one? *Shell Oil*, 466 U.S. at 67. And why would Congress permit EEOC to bring a § 707 suit absent a charge but deny it the more limited authority to *investigate* in that scenario? *Id.* at 64 ("EEOC's investigative authority is tied to charges filed with the Commission."); 42 U.S.C. § 2000e-8(a) (investigative power limited to matters "relevant to the charge").

In agreeing with EEOC's position, the district court placed dispositive weight on *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975). *See* JA.55-56 & n.4; *see also* EEOC Br. 55-56. But that decision is inapposite: The Fifth Circuit ruled only on *intervention*, not *conciliation*. In fact, it expressly stated that it was not deciding whether EEOC is obliged to conciliate before suing under § 707.

Allegheny-Ludlum rejected a private entity's request to intervene in a § 707 case. The would-be intervenor relied on § 706(f)(1), which says that "persons aggrieved shall have the right to intervene in a civil action brought by" EEOC. 42 U.S.C. § 2000e-5(f)(1). But, while the Fifth Circuit recognized that § 707 actions must be conducted in accordance with the § 706 procedures, it concluded that intervention was not among § 707(e)'s referenced "procedures." 517 F.2d at 842-44. Rather, it believed the intent behind § 707(e) was for EEOC to "provide an *administrative procedure*" for § 707 actions. *Id.* at 844 (quoting legislative history with emphasis added). "[W]hile Congress apparently intended that the EEOC have investigative and conciliatory authority in 'pattern or practice' situations comparable to its existing powers in § 706 cases, there is no indication that Congress intended the duplication of procedures to extend beyond the administrative level," to encompass intervention in judicial litigation. *Id.*

Unlike *Allegheny-Ludlum*, this case concerns the "administrative procedure" that EEOC must follow before it sues. The Fifth Circuit expressed no doubt that § 707(e) *does* extend § 706's "procedures" at "the administrative level" to the § 707 context. *Id.* And, lest there be doubt, *Allegheny-Ludlum* expressly announced that it was *not* deciding whether EEOC must conciliate in § 707 cases. The Fifth Circuit noted that "[o]ne court has even indicated that the Commission may have similar responsibilities [to conciliate] in connection with 'pattern or practice' suits brought under § 707." *Id.* at 869. It concluded that "this case does not require us to attempt to settle these intricate questions," because "any duty to conciliate ... was fully satisfied." *Id.*

Thus, the procedural question at issue was an open one after *Allegheny-Ludlum*, and the district court erred by treating it as controlled by "binding precedent." JA.59.[3]

* * *

Allowing EEOC to bypass its pre-suit obligations in a heretofore-unknown set of § 707 cases would make nonsense of the statutory scheme and ignore the absence of authority for such a course in the agency's own comprehensive regulations. Again, this Court should follow the Seventh Circuit in rejecting EEOC's argument.

IV. SUSTAINING EEOC'S THEORY WOULD CREATE SUBSTANTIVE UNCERTAINTY AND PROCEDURAL UNFAIRNESS FOR EMPLOYERS.

EEOC's revisionist reading of § 707 is not only plainly wrong as a precedential and doctrinal matter. It is also deeply troubling as a policy matter. On the substantive scope of § 707(a), EEOC's theory has no clear limiting principle, and would thus create uncertainty and liability exposure for employers attempting in good faith to comply with Title VII. And, procedurally, EEOC's approach would thrust employers into protracted, costly litigation, even though Congress recognized that confidential, inexpensive resolutions are best for employers and employees alike.

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[3] Even if *Allegheny-Ludlum* had resolved the issue, that 1975 decision's interpretation would not bind this Court; any such interpretation has been supplanted by EEOC's more recent regulations, which (as discussed above) *do* require conciliation in § 707 cases. *See Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). *Allegheny-Ludlum* did not hold that its reading of Title VII "follow[ed] from the unambiguous terms of the statute," which would preclude variant agency regulation. *Id.* To the contrary, the court acknowledged that § 707(e) "[a]rguably" incorporates even § 706(f)(1)'s intervention provision, and decided otherwise because of *legislative history*. 517 F.2d at 844.

A. From the perspective of employers, a central difficulty with EEOC's view of Title VII's pattern-or-practice provision is its subjective and unrestricted nature. While an extensive body of law, developed over more than five decades, defines and objectively circumscribes the "unlawful employment practices" that Title VII forbids, nothing delimits the concept of supposedly prohibited "resistance." Nor do any clear parameters emerge from EEOC's theory. To the contrary, if a pattern-or-practice suit may be pursued even absent discrimination, so long as EEOC alleges that the employer's acts vaguely "interfere" with EEOC's processes or "chill" employees from filing charges, then § 707 hands EEOC a stunningly unbounded authority to challenge any employer policy it believes to be "bad."

Following that logic, EEOC could seek to enjoin any release of Title VII claims, because employees are less likely to file charges if they will not obtain personal relief from EEOC's enforcement efforts. Yet Title VII releases are entirely ubiquitous and consistent with congressional intent. *See, e.g.*, *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 792-93 (7th Cir. 2005). Similarly, EEOC could argue that employers violate § 707 by failing to *affirmatively advise* employees of their right to file a charge, since that would reduce the likelihood that charges are filed. Yet neither Congress nor EEOC has ever imposed such a duty on employers. *See Ribble v. Kimberly-Clark Corp.*, No. 09-C-643, 2012 U.S. Dist. LEXIS 21822, at *8 (E.D. Wis. Feb. 22, 2012). As just another example, EEOC could try to block employers' pursuit of civil discovery, on the theory that discovery may deter other employees from exercising their rights. *See* Erica Teichert, *EEOC Says*

Social Media Discovery Scares Plaintiffs Away, Law360 (Mar. 12, 2014) (reporting concern by senior EEOC attorney that discovery into plaintiffs' social media makes employees "far less willing to participate in our cases" and has a "chilling effect").

The point is that if vague concepts like "resistance" and "chilling effect" mark the bounds of Title VII liability, the possibilities for an overzealous agency are endless. Allowing EEOC to invent this new, ill-defined category of Title VII liability will thus deprive employers of certainty as to their legal obligations and expose them to unpredictable litigation on ever-shifting imaginative theories. In Title VII, Congress created a "precise, complex, and exhaustive" statutory scheme, *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013), because workers and businesses alike need certainty. EEOC's open-ended conception of § 707(a) runs in the opposite direction.

Conversely, there are already ample tools that EEOC may use to ensure that its work is not disrupted. As EEOC itself notes, courts have held that a contract provision that bans charge-filing or agency cooperation is *unenforceable*. EEOC Br. 24. Title VII also separately authorizes EEOC to seek "temporary or preliminary relief" during an investigation, "to carry out the purposes of this Act," 42 U.S.C. § 2000e-5(f)(2); courts have permitted EEOC to use that power to enjoin anti-cooperation provisions that are causing harm to particular investigations. *See, e.g.*, *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 745-46 (1st Cir. 1996). And obstruction-of-justice statutes protect against corrupt attempts at interfering with agency proceedings. *E.g.*, 18 U.S.C. § 1505. All of these remedies undermine the argument for imposing expansive § 707 liability.

B. Making matters worse, EEOC's theory would excuse it from giving the employer an opportunity—before it is publicly accused of the most serious civil-rights violations—to resolve the matter privately and voluntarily.

Congress imposed a conciliation obligation because it recognized that lengthy, expensive litigation does not best advance the interests of businesses or employees; a quick, cheap resolution is often preferable for both sides. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998). And Congress further recognized that such a resolution is most likely to be achieved out of the public eye, before positions harden through the adversarial judicial process. Accordingly, Congress guaranteed employers a chance for *private* resolution, *see* 42 U.S.C. § 2000e-5(b) ("Nothing said or done during and as a part of such informal endeavors may be made public ...."), and forbade EEOC from filing suit unless and until conciliation fails, *see id.* § 2000e-5(f)(1). Litigation must be EEOC's "last resort." *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003).

EEOC's theory would undo these important procedural protections. Once a federal agency accuses an employer of a pattern-or-practice of Title VII violations—usually accompanied, as in this case, by a forceful press release asserting that the employer has "violate[d] the law," https://www.eeoc.gov/eeoc/newsroom/release/9-19-14b.cfm—many employers will feel they have no choice but to defend themselves. That is so even if the employer would have been perfectly willing to address EEOC's concerns privately and confidentially, such as (in this case) by amending the arbitration agreement to clarify that Doherty's employees retain the right to file EEOC charges.

See EEOC Br. 45; *see also, e.g.*, *CVS*, 809 F.3d at 338 (noting that CVS had offered to amend its severance agreement, but EEOC sued anyway). The result: great expense for all parties, serious reputational harm to the employer, and any relief for employees delayed for years. That is exactly why Congress made conciliation "a key component of the statutory scheme." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015).

CONCLUSION

This Court should join the Seventh Circuit in rejecting EEOC's interpretation of Title VII's pattern-or-practice provision.

Dated: October 17, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the portions exempted by Rule 32(f), the brief contains 6,479 words, as determined by the Microsoft Word 2016 program used to prepare it.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Garamond.

Dated: October 17, 2018

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CERTIFICATE OF SERVICE

I certify that on October 17, 2018, I electronically filed the foregoing brief with the United States Court of Appeals for the Eleventh Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

Dated: October 17, 2018

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STATUTORY AND REGULATORY APPENDIX

42 U.S.C. § 2000e-2(a). Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--

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

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

42 U.S.C. § 2000e-3(a). Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $ 1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c)

or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

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

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to

grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

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

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

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

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the

Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of

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

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

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

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

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

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or

expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

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

(h) Provisions of 29 USCS §§ 101 et seq. not applicable to civil actions for prevention of unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101-115), shall not apply with respect to civil actions brought under this section.

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

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

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

42 U.S.C. § 2000e-6. Civil actions by the Attorney General

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

(b) Jurisdiction; hearing and determination. The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

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

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

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission. Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer. Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure. Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

29 C.F.R. § 1601.1. Purpose

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Genetic Information Nondiscrimination Act of 2008. Section 107 of the Americans with Disabilities Act and section 207 of the Genetic Information Nondiscrimination Act incorporate the powers, remedies and procedures set forth in sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964. Based on its experience in the enforcement of title VII, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act, and upon its evaluation of suggestions and petitions for amendments submitted by interested persons, the Commission may from time to time amend and revise these procedures.

29 C.F.R. § 1601.24 Conciliation: Procedure and authority.

(a) Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion. In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief. Where such conciliation attempts are successful, the terms of the conciliation agreement shall be reduced to writing and shall be signed by the Commission's designated representative and the parties. A copy of the signed agreement shall be sent to the respondent and the person claiming to be aggrieved. Where a charge has been filed on behalf of a person claiming to be aggrieved, the conciliation agreement may be signed by the person filing the charge or by the person on whose behalf the charge was filed.

(b) District Directors; the Director of the Office of Field Programs or the Director of Field Management Programs; or their designees are hereby delegated authority to enter into informal conciliation efforts. District Directors or upon delegation, Field Directors, Area Directors, or Local Directors; the Director of the Office of Field Programs; or the Director of Field Management Programs are hereby delegated the authority to negotiate and sign conciliation agreements. When a suit brought by the Commission is in litigation, the General Counsel is hereby delegated the authority to negotiate and sign conciliation agreements where, pursuant to section 706(f)(1) of title VII, a court has stayed processings in the case pending further efforts of the Commission to obtain voluntary compliance.

(c) Proof of compliance with title VII, the ADA, or GINA in accordance with the terms of the agreement shall be obtained by the Commission before the case is closed. In those instances in which a person claiming to be aggrieved or a member of the class claimed to be aggrieved by the practices alleged in the charge is not a party to such an agreement, the agreement shall not extinguish or in any way prejudice the rights of such person to proceed in court under section 706(f)(1) of title VII, the ADA, or GINA.

29 C.F.R. § 1601.27 Civil actions by the Commission.

The Commission may bring a civil action against any respondent named in a charge not a government, governmental agency or political subdivision, after thirty (30) days from the date of the filing of a charge with the Commission unless a conciliation agreement acceptable to the Commission has been secured: Provided, however, That the Commission may seek preliminary or temporary relief pursuant to section 706(f)(2) of title VII, according to the procedures set forth in § 1601.23 of this part, at any time.