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 *AMICI CURIAE* OF WOMEN'S RIGHTS ORGANIZATIONS AND INDIVIDUALS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amici Curiae are women's rights organizations and individuals* who share a longstanding commitment to workplace equality.[1] To advance that goal, *Amici* have developed expertise in Title VII and EEOC proceedings. Because of their expertise, *Amici* are uniquely equipped to inform the Court of the impact on workplace equality if Petitioner Mach Mining LLC's position prevails and employers can delay resolution of discrimination complaints by asking judges to inject themselves after the fact into Title VII's pre-litigation conciliation process and second-guess the EEOC's conduct.

Amici write to highlight the negative repercussions of Petitioner's position, specifically for women in blue-collar, non-traditional occupations.[2] Many of the female workers for whom *Amici* advocate labor in fields such as construction, mining, law enforcement, and firefighting. Women in these occupations confront some of the highest rates and most extreme examples of sexual harassment

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* Statements of interest for the organizations and a list of individual signatories may be found in Appendix A.

1. The Parties have consented to the filing of this amicus brief. Counsel for *Amici* authored this brief in its entirety. No person or entity other than *Amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief.

2. The Bureau of Labor Statistics defines non-traditional occupations as "those in which women comprise 25 percent or less of total employed." *Women in Nontraditional Occupations for Women in 2009*, Bureau of Labor Statistics (Apr. 2010), http://www.dol.gov/wb/factsheets/nontra2009.htm.

and other forms of gender discrimination. In *Amici*'s experience, each day of unwarranted delay in the handling of employment-discrimination claims undermines workplace safety by impeding expeditious resolution of employee complaints about discriminatory practices. Permitting after-the-fact judicial intervention into the EEOC's pre-adjudicatory conciliation process produces just such delay.

Accordingly, *Amici* submit this brief in support of Respondent EEOC's argument that permitting judicial micromanagement of the EEOC's pre-litigation conciliation efforts thwarts Title VII's overriding purpose: ending discrimination in employment. Notably, the post-hoc judicial intervention into pre-adjudicatory conciliation for which Petitioner advocates also undermines judicial economy, contravening one of the primary stated goals of mandatory pre-litigation conciliation.

SUMMARY OF THE ARGUMENT

Women in blue-collar, non-traditional jobs face employment barriers more perilous than the glass ceiling, most notably severe sexual harassment and the threat that gender discrimination will escalate into workplace violence. Non-traditional industries have both low numbers of female employees and some of the highest rates of gender discrimination. In some male-dominated occupations, women experience levels of discrimination more than three times greater than the national average. Worse still, many non-traditional jobs require collaboration among coworkers to prevent significant safety risks; in these workplaces, discrimination, harassment, and retaliation may have potentially lethal

consequences. Women working in these fields need the promise of confidentiality and systemic reform that Title VII specifically directs the EEOC to provide.

Petitioner Mach Mining proposes to interminably delay resolution of Title VII claims by subjecting the EEOC's pre-litigation conciliation efforts to after-the-fact judicial scrutiny. Fundamentally, conciliation is an informal process, designed to precede, and ideally to avoid, litigation. Permitting after-the-fact judicial intervention into this pre-adjudicatory process delays the resolution of existing cases and deters the pursuit and resolution of new claims. Such interference not only runs counter to a primary rationale behind the conciliation process, namely judicial economy, but also has particularly grim consequences for women in blue-collar, non-traditional jobs.

First, each day lost to unnecessary judicial revisiting of the pre-litigation conciliation process brings with it a heightened threat of actual harm to women who have risked their livelihoods and their lives by bringing their claims of discrimination to light. Promptly resolving the complaints of female employees in these already perilous jobs maintains workplace safety and advances equality for everyone. For women subjected to discrimination in these blue-collar, non-traditional occupations, justice delayed is justice denied.

Second, subjecting the EEOC's informal conciliation efforts to judicial intercession undercuts the agency's ability to fulfill its unique mandate within Title VII's enforcement scheme. The EEOC's role includes not only bringing lawsuits on behalf of individuals, but also litigating

charges of systemic discrimination through pattern and practice enforcement actions, as well as intervening in civil actions brought by others. By authorizing the EEOC to bring civil actions on behalf of employees, Congress offered victims of workplace discrimination both legal assistance and a degree of confidentiality. This protects employees from retaliation while they seek swift resolution of their claims. Authorizing post-hoc judicial intervention into informal, pre-adjudicatory conciliation will undermine confidentiality protections, hamstring the EEOC, and slow resolution of employment discrimination allegations. All of this will impede or ultimately stymie systemic reform in bias-infected industries.

Third, insisting on post-hoc judicial micromanagement of the pre-adjudicatory conciliation process fundamentally conflicts with the primary rationale for having such a process in the first place: promoting judicial economy by attempting to resolve cases *without judicial intervention*. Petitioner Mach Mining cannot have it both ways. If it truly believes that conciliation cannot function without judicial intervention, Petitioner should advocate replacing that pre-adjudicatory process with a court-managed effort at conciliation occurring at the outset of litigation. As it is, however, if conciliation fails, the proper role of the courts is to resolve the claims against an employer through a trial, not to stall or entirely circumvent adjudication of those claims by subjecting the pre-adjudicatory conciliation process to extended and unnecessary scrutiny.

ARGUMENT

I. Women in Non-Traditional Jobs Will Be Particularly Harmed by the Delays Associated with Opening Conciliation to Judicial Intervention.

In acutely gender-segregated occupations, low numbers of women face disproportionately high rates of discrimination; and harassment and retaliation pose tangible threats to workplace safety. These fields already involve dangerous work, which compounds the hazards attendant to gender discrimination. The harassment suffered by women in these professions includes not just frequent, inappropriate remarks based on their gender and race, but rape, assault, and death threats; women who expose themselves by reporting such misconduct face revictimization through employer retaliation. Workplace safety in dangerous industries like law enforcement and construction often depends on cooperation among workers; consequently, harassment and retaliation can take especially treacherous forms. The delay created by permitting after-the-fact judicial review of the EEOC's conciliation efforts will cause women in non-traditional jobs to suffer significant and substantial injury.

A. Women in the Construction and Mining Industries

In construction and mining, gender-based harassment intensifies already high risks of physical injury. Of the few women in these industries, the vast majority encounter at least one form of gender discrimination. Eighty-eight percent of women construction workers experience sexual harassment—more than three times the rate of the

general workforce. *See* Occupational Safety and Health Administration, *Women in the Construction Workplace: Providing Equitable Safety and Health Protection* (1999) [hereinafter OSHA Report], https://www.osha.gov/doc/accsh/haswicformal.html; Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC News (Nov. 16, 2011, 12:01 AM), http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/. According to OSHA, the mining industry features the highest rate of sexual harassment complaints per 100,000 employed women. OSHA Report.

Such egregious rates of harassment are unsurprising considering that most women in these industries have few or no female coworkers. Women make up just 9.1% of construction workers. *Labor Force Statistics from the Current Population Survey*, Bureau of Labor Statistics (Feb. 26, 2014) [hereinafter *Labor Force Statistics*], http://www.bls.gov/cps/cpsaat18.htm. Women in the mining industry are scarcely better represented. According to the Bureau of Labor Statistics, women comprise 13.1% of the mining workforce. *Labor Force Statistics*. Statistics also evidence the distinctly high hurdles facing women of color. For example, African American women make up 13.5% of the women in the workforce, but only 6.7% of women in construction and mining. National Women's Law Center, Women in Construction: Still Breaking Ground 2 (2014) [hereinafter Women in Construction], *available at* http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf.[3] And the harassment

3. Underrepresentation is just the first of many barriers women of color must overcome. Women of color confront more sexual harassment and earn less money than white women doing the same

goes beyond just words. One woman in a male-dominated industry, a construction worker, reported having hammers and wrenches dropped on her from the scaffolding above by her male coworkers. OSHA Report.

Beyond the sheer prevalence of harassment in such jobs, the already hazardous nature of these workplaces ratchets up the dangers harassment poses to female workers. A female miner reported that a male coworker threatened to throw her – or, as he called her, "the little bitch" – into concentrator bins, the likely result of which would have been death by suffocation or crushing. OSHA Report.

Women who do step forward to report discrimination may find themselves working in constant fear of retaliation as their cases proceed. *Amicus* Equal Rights Advocates represents a female gold miner who works in a remote geographical location. Out of the approximately 300 employees at her site, she is one of only two women who work underground. Her attempts at confronting the

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jobs (and obviously less than men, including men of color). As one study showed, "[w]omen experienced more sexual harassment than men, minorities experienced more ethnic harassment than Whites, and minority women experienced more harassment overall than majority men, minority men, and majority women." Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. of Applied Psychology 426 (2006) *available at* http://www.celiamoore.com/uploads/9/3/2/1/9321973/berdahl_moore_-_jap_-_march_2006.pdf. Census data shows that for every dollar earned by a white, non-Hispanic woman, African American women earn 82 cents and Hispanic women earn just 69 cents. *By the Numbers: A Look at the Gender Pay Gap*, American Association of University Women (Sep. 18, 2014), http://www.aauw.org/2014/09/18/gender-pay-gap/.

gender-based discrimination she faces, including the sexualized, hostile work environment in the mine, have been met with resentment and retaliation. On several occasions, men have purposefully interfered with the underground microphone system while she drills, cutting off her lifeline of communication with her coworkers and her supervisor. Concerned coworkers have advised her that if she continues to "try to change the male culture of mining" she should "watch her back" as some "not very nice" men work in the mine. She recently filed an EEOC charge alleging sex discrimination, and now fears an "accident" occurring while she works underground.

For those women in non-traditional occupations who step forward to report the gender-based harassment they face in the workplace, the specter of retaliation looms large. Women in highly-segregated industries who experience such a disproportionately hostile working environment have little incentive to risk the increased animosity and retaliation likely to await them if they go public with complaints of discrimination. The EEOC process, including conciliation, provides a measure of confidentiality to such employment-discrimination victims. *See* Part II.A. Allowing conciliation to be judicially reviewed will undermine its confidential nature, encouraging employers to use the "inadequate conciliation" defense as a wedge to obtain, and expose in public litigation, the names of all discrimination complainants and other details of the conciliation process. Indeed, Mach Mining sought exactly this information in the District Court.

B. Women in Law Enforcement and Firefighting

Women in law enforcement face similarly long odds and brutal treatment. Women "number only 11.3% of local full-time sworn officers, 12.9% of sheriffs and 16.1% of Federal officers." Diane Wetendorf, *Female Officers as Victims of Police-Perpetrated Domestic Violence* 1 (Apr. 2007) [hereinafter *Female Officers*], *available at* http://www.dwetendorf.com/Wetendorf_FemaleOfficer.pdf. In these industries too, low numbers of women face disproportionately high rates of gender-based harassment: studies show that "anywhere from 60-70% of women officers experienced sexual/gender harassment." National Center for Women & Policing, Recruiting & Retaining Women: A Self-Assessment Guide for Law Enforcement 133 (2000) [hereinafter Recruiting & Retaining Women], *available at* https://www.ncjrs.gov/pdffiles1/bja/185235.pdf.

These disturbing statistics reflect a "culture [that] does not fully welcome female officers, but requires them to assimilate into the male culture." *Female Officers* at 1. Women in law enforcement also report "being under constant surveillance and scrutiny by male officers," and having "to repeatedly prove themselves." *Id.* Male officers often view their female counterparts as inferior officers because female officers de-escalate violent situations rather than embracing violence. *Id.* at 2. At the same time, women in law enforcement are plagued by harassing comments and conduct from the men who dominate their workplaces. *Id.* Without a critical mass of women, cultural change remains unlikely; more likely, the hostile work environment experienced by female law enforcement officers will continue to deter women from integrating the profession.

Gender disparities and institutionalized hostility toward women also permeate fire departments. Mark Bendick, Jr., Denise M. Hulett, Francine Moccio, & Sheila Y. Thomas, A National Report Card on Women in Firefighting 1 (Apr. 2008) [hereinafter Women in Firefighting], *available at* http://i-women.org/wp-content/uploads/2014/07/35827WSP.pdf. Census data shows that women make up only 3.7% of firefighters. *Id.* Shockingly, more than half of the nation's fire departments have *never* employed a woman firefighter. *Id.* And, similar to women in construction and mining, 84.7% of female firefighters report experiencing gender discrimination in some form. *Id.* at 3. Female firefighters describe a grotesque gauntlet of gender-based discrimination, from harassing "pranks" such as "human feces in boots and on bathroom walls, hardcore pornography, and derogatory messages left in lockers, food contamination, shunning" to "vulgar statements, unwanted attention, and 'locker-room' pranks involving gross and juvenile sexually-related 'humor.' " *Id.* at 8.

Many more cases lurk in the shadows. Despite the high incidence of discrimination in blue-collar, non-traditional industries, women in these fields actually *complain* about workplace discrimination with startling infrequency: Studies show, for example, that only 4-6% of female law enforcement officers come forward to report harassment. Recruiting & Retaining Women at 133. Women in law enforcement who have complained of discrimination and harassment report that their departments stopped sending backup to assist them in violent situations. *Id.* at 141. Female officers who suffer such dangerous forms of retaliation often have no choice but to leave the force: Without essential backup, their lives

– already imperiled by the very nature of their work – are endangered beyond all reason. *Id.* Female firefighters who complained of discrimination and harassment reported facing comparably lethal retaliatory conduct, such as male coworkers shutting off their water supplies. Women in Firefighting at 8.

For the women in non-traditional occupations who risk their livelihoods and lives by coming forward with discrimination claims, each day of delayed relief brings a heightened risk of being thrown in a concentrator bin, losing contact during dangerous drilling operations, responding to a 911 call without backup, or attempting to fight a fire with no water. With stakes this high, there is no time to waste. But unnecessary delay is exactly what Petitioner's request for judicial intervention into pre-litigation conciliation would impose.

C. In These Non-Traditional Fields, Justice Delayed Is Justice Denied.

The stories of women in non-traditional occupations illustrate how delayed resolution of their claims harms their careers and denies them the opportunity for timely and meaningful relief. For example, *Amicus* Legal Momentum represents a New York state peace officer who began experiencing workplace discrimination in 2008, after she became pregnant. The discrimination started when the client requested a two-week leave to address temporary pregnancy-related discomfort. The employer required the client to meet with its in-house physician, who declared that upon her return to work, the client, due to her pregnancy, would be automatically ineligible to carry a firearm. The employer then transferred the

client to a much less desirable assignment, indefinitely and against her wishes. The employer refused to reconsider its decision, even after the client, upon her return from leave, presented documentation from her own physician clearing her for full duty. The client eventually filed charges with the EEOC, and, in 2011, the agency determined that the employer's policy of automatically demoting pregnant peace officers was discriminatory. Three years later, the case remains mired in conciliation. (It is notable that the case is in the Second Circuit, one of the Circuits permitting a robust failure-to-conciliate defense.) Needless to say, the sought-after accommodation will not make the client whole. The additional delay resulting from after-the-fact judicial intervention into the EEOC's pre-litigation conciliation process will only worsen this problem.

Meanwhile, the confusion caused by this conciliation quagmire prevents other women in the client's workplace from understanding and vindicating their rights. In the past 12 months, at least three coworkers have approached the client to inquire whether pregnant workers have a right to an accommodation. Judicial review of EEOC conciliation will inevitably drag out this already lengthy process. Both sides will view conciliation as the opening skirmish of a subsequent failure-to-conciliate defense by the employer. Instead of speed and informality, the parties to the "conciliation" will play it close to the vest and attempt to develop evidence on the issue of whether the EEOC adequately conciliated the employee's claims. Such a protracted conciliation process can seriously harm women by discouraging them from pursuing their rights, even when the issue at stake is as critical as an accommodation necessary to preserve a healthy pregnancy – a matter that can be of particular importance

to women in non-traditional fields due to the physical demands of their jobs.[4]

II. Judicial Second-Guessing of EEOC Confidential Conciliation Deters Claims and Stymies Systemic Reform.

Congress empowered the EEOC to identify discrimination, uproot its underlying causes, and implement systemic reform. *See* 42 U.S.C. § 2000e-5 ("The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title."). Specifically, Title VII gives the EEOC the unique ability to bring claims on behalf of employees and to pursue systemic change through pattern or practice enforcement actions.[5] *See* 42 U.S.C. § 2000e-5 (permitting the EEOC to file a civil action on behalf of a victim of discrimination); 42 U.S.C. § 2000e-4 (permitting the EEOC to intervene in a civil action); 42

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4. On the distinct risks faced by pregnant women in non-traditional occupations, *see, e.g.*, Joanna Grossman & Gillian Thomas, *Making Pregnancy Work: Overcoming the PDA's Capacity-Based Model*, 21 Yale J.L. & Feminism 15, 19-24 (2009); Deborah L. Brake & Joanna Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 68 Duke J. Gender L. & Pol'y 67 (2013).

5. *Amici* agree with Respondent EEOC that "[t]he duty to attempt conciliation does not apply in a case involving a pattern or practice of employment discrimination under 42 U.S.C. 2000e-6." Resp. Br. at 20, n. 4. To the extent that the EEOC does attempt to informally conciliate claims in situations where the statute does not so require, it should not be punished by then being subjected to post-hoc judicial scrutiny.

U.S.C. § 2000e-6 (permitting the EEOC to file pattern or practice civil actions). The EEOC's unique role in Title VII's enforcement scheme is particularly important to women working in highly segregated fields, where public exposure is especially dangerous and women often lack allies. Permitting judicial intervention into the conciliation process as Petitioner proposes will thwart the EEOC's ability to fulfill its congressional mandate, transforming it from an agent of equality into a tool of delay.

A. Congress' Empowerment of the EEOC to Pursue Claims in Its Own Name and to Effect Systemic Reform Without Exposing Victims Is Particularly Important in Non-Traditional Fields, Where Retaliation Is Especially Dangerous and Female Workers Are Often Isolated.

The unique role the EEOC plays in enforcing Title VII presents two critical benefits for women in non-traditional occupations facing gender-based discrimination. First, the agency can pursue claims under its own name, which preserves at least some confidentiality for victims of discrimination who might not otherwise be willing to come forward. Second, the EEOC can bring pattern or practice claims on behalf of entire classes, seeking systemic reform on behalf of groups of employees without named plaintiffs having to come forward as class representatives under Federal Rule of Civil Procedure 23. *See Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 330 (1980) (Rule 23 prerequisites not applicable to EEOC actions brought in the agency's name).

In 1972 Congress amended Title VII to empower the EEOC to bring its own enforcement actions. *See* 42 U.S.C.A. § 2000e-5 (allowing the Commission to "bring a civil action against any respondent not a government agency"). When an EEOC investigation finds reasonable cause to believe that a charge of discrimination is true, it may pursue relief on behalf of the victim under the agency's own banner. With the EEOC as her ally, a victim knows that she is not fighting her employer alone. Proceeding under the banner of the EEOC minimizes a victim's exposure, and with it the burdens of conventional class litigation that might otherwise deter women in high-risk occupations from moving forward with their valid claims. "[I]ndeed, we have observed that the 1972 amendments created a system in which the EEOC was intended to bear the primary burden of litigation." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002) (internal quotation marks omitted). Avoiding the burden of coming forward as a named plaintiff may well be the deciding factor that emboldens women in non-traditional occupations to vindicate their rights under Title VII.

Congress also authorized the EEOC to seek systemic reform. "Title VII of the Civil Rights Act of 1964, as amended, authorizes the [EEOC] 'to investigate and act on a charge' that an employer has engaged in 'a pattern or practice' of employment discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 56 (1984). Congress did so "because '[the EEOC] has access to the most current statistical computations and analyses regarding employment patterns' [and] was thought to be in the best position 'to determine where 'pattern or practice' litigation is warranted' and to pursue it." *Id.* at 69. Thus, Congress purposefully provided the EEOC with a tool to combat

structural discrimination. *See Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318 (1980) (EEOC may seek classwide relief under § 706(f)(1) without being certified as the class representative under Rule 23).

Because the EEOC can protect women from the exposure typically attendant to serving as a named plaintiff in traditional class litigation, the EEOC plays a unique role in effectuating the remedial goals of Title VII. It is this unique role that is endangered by the judicial intervention into the pre-litigation conciliation process proposed by Petitioner.

Women in non-traditional industries rely especially heavily on the EEOC to eliminate discrimination. It is these women who will be most harmed by the delay associated with unnecessary judicial intervention, and by the breach of confidentiality that inevitably results when courts are invited to scrutinize every detail of the pre-litigation conciliation process.

First, in non-traditional occupations where employees depend on each other for safety, harassment and retaliation threaten not only the intended target, but also the stability and safety of the entire workplace. Allowing women to pursue claims under the aegis of the EEOC minimizes their exposure and maintains workplace stability. Similarly, the confidentiality of conciliation proceedings reduces the risk of retaliation and increases the likelihood that women will come forward. For example, when women firefighters have complained internally, they report that fire departments have ignored their complaints, or, worse still, have ostracized and retaliated against them. Women in Firefighting at 9. Accordingly, to resolve such

severe problems women "trust outside agencies, such as the EEOC, more than their own department," in large part because of the assurances that their exposure will be minimized. *Id.* at 9. Subjecting the EEOC's process to searching after-the-fact judicial review will force the women who would report such harassment back into the shadows, stymying systemic solutions.[6]

Second, the nature of non-traditional occupations and their acute gender imbalance frequently leaves female employees isolated from each other on the jobsite, while jobsites themselves are often geographically dispersed. Many non-traditional jobs fit this description. In the pin-up worlds of construction locker rooms, for example, those women who do break into the profession are often the only female employees at their jobsites. Susan Eisenberg, *Isolation of Tradeswomen Melts at Rare Conference,* Women's E-News (May 27, 2011), http://womensenews.org/story/labor/110526/isolation-tradeswomen-melts-at-rare-conference#.VEvYVvnF8WZ. Similarly, "[n]ot one paid women firefighter has ever worked in more than half of

6. Indeed Counsel for *Amicus Curiae* in support of Petitioner, the American Insurance Association, proposes that defendants preserve evidence from EEOC conciliation for later use in concocting a "failure-to-conciliate defense." Gerald Maatman Jr. is recently quoted as saying, "There's a real premium, for attorneys representing employers and seeking to create their defenses, to be able to substantiate what was said, what was asked for and how the positions moved or didn't move during the conciliation process." Ben James, *Employers' EEOC Survival Guide: Conciliation*, Law360 (Oct. 21, 2014, 4:08 PM), http://www.law360.com/articles/575823/employers-eeoc-survival-guide-conciliation. Creating a paper trail with an eye towards revealing the details of the conciliation process in open court undercuts the informal and confidential nature of conciliation.

the nation's fire departments." Women in Firefighting 1. The atomization of women in these occupations requires a comprehensive attack on entrenched patterns and practices of discrimination, yet frustrates the ability of individual women to pursue such a strategy without the EEOC's assistance.

Worse still, the deliberate practices of employers in highly segregated industries may cause further dispersion and isolation of women. Women report a practice called "checkerboarding," whereby employers send them to a specific worksite to meet gender quotas only to fire them once they satisfy these goals. Women in Construction at 8. Women subject to checkerboarding often do not have personal knowledge of other women who experience such practices, much less of women never hired to begin with. When employers constantly shuttle their few female employees to new locations to meet quotas, these women are even less likely to have a support system on the jobsite to which they can turn when they experience gender-based discrimination. The same women are equally unlikely to take the risk of complaining about conditions on sites where they no longer work but which desperately need improvement.

In these atomized contexts, the EEOC's unique authority to bring pattern or practice claims complements the traditional class action mechanism of Rule 23 of the Federal Rules of Civil Procedure. Indeed, in the best-case scenario the pattern or practice mechanism, including robust informal conciliation, may end such systemic discrimination before traditional class action litigation can even get off the ground.

B. Petitioner's Proposals Directly Subvert the EEOC's Statutorily Mandated Role in Title VII's Enforcement Scheme, Exposing Women to Retaliation and Delaying Access to Justice.

Petitioner Mach Mining's proposals for judicial intervention into the EEOC's enforcement procedures flout Congress' carefully constructed remedial regime. The particular propositions put forward by Petitioner and its *Amici* will chill enforcement, clog courts, obstruct reform, and, ultimately, harm women.

Specifically, Mach Mining and its *Amici* propose that the EEOC be required to identify "every claim and claimant" during the conciliation process. Br. for Petitioner at 37; Br. of *Amici Curiae* Retail Litigation Center *et al.*, at 10–11. In such contexts, the threat of retaliation presents a menacing specter. Retaliation is illegal, but so are the underlying discriminatory practices that sparked the EEOC's investigation. Few victims will accept an employer's assurances that despite its prior bad acts, it intends to use the information to conciliate and not to retaliate.

Petitioner also proposes that courts should peer into the confidential discussions between women and the EEOC. According to Mach Mining, if a defendant asserts that the EEOC has failed to conciliate a claim, then a court should order the EEOC and the complainant to waive confidentiality. Pet'r's Br. at 30-31. Failure to conciliate (or even refusal to waive Title VII's confidentiality provisions), says Mach, should result in dismissal of the claim for failure of proof. *Id.* This suggestion demonstrates ignorance of the realities of gender discrimination, particularly sexual

and racial harassment claims. Court-mandated waiver of confidentiality, and the inevitable fear of public exposure of both their identities and the often sexualized nature of their allegations, will unquestionably deter women from coming forward.

Confidentiality is essential for complainants who work in unintegrated and already physically dangerous workplaces, where destabilizing retaliation risks harming more than just the intended target. The harms associated with exposing claimants far outweigh any purported benefits of judicial intervention. In reality, Mach Mining's proposed judicial entanglements will raise new barriers to ending employment discrimination. This outcome undermines the stated goal of the conciliation process: to expeditiously redress discrimination.

In essence, Petitioner's proposals would transform conciliation from an informal, swift, and efficient means of avoiding litigation into an all-consuming mini-trial, constrained by a judicially-mandated list of boxes to check before the EEOC may even knock on the courthouse door. If the EEOC must, at every stage of conciliation, protect itself from judicial second-guessing, the process will lose any semblance of informality or speed. Women will suffer, and so, too, will the courts. A judicially imposed checklist does not offer any solutions; it will make things worse.

III. Judicial Examination of Pre-Adjudicatory Conciliation Undermines a Crucial Stated Goal of Such Conciliation: Judicial Economy.

Pre-adjudication conciliation is intended to resolve disputes in a swift and cost-effective manner prior to, and

ideally without resort to, litigation. A crucial goal of such pre-adjudicatory process is judicial economy. Petitioner's proposal to permit judicial intervention into this pre-adjudicatory process, by contrast, subverts judicial economy. Mach Mining suggests that parties be required to conciliate without the aid of a court, only to have courts revisit this conciliation once litigation begins. This unnecessary detour wastes limited judicial resources and will further burden the courts. Had Congress intended for conciliation to be subject to judicial management, it could have mandated that conciliation take place as a phase of litigation rather than as a pre-adjudicatory process.

Worse yet, in the hands of the defense bar, the "failure to conciliate" affirmative defense turns upside down conciliation's original goal: a swift and cost-effective resolution that achieves justice where possible without burdening the courts. The result provides legitimate benefit to no one: courts must delve into the details of a process whose only real advantage lies in the non-involvement of the courts; the EEOC must litigate procedural issues instead of focusing on substantive systemic reform; and women in non-traditional, already high-risk fields face unnecessary and lengthy delays on the road to justice.

That this court-burdening, justice-delaying perversion of process has become an open and intentional strategy on the part of the defense bar is no secret. Defense-side "lawyers say employers would be well-served to leave the door open for a possible 'failure to conciliate' defense." Ben James, *Employers' EEOC Survival Guide: Conciliation*, Law360 (Oct. 21, 2014, 4:08 PM), http://www.law360.com/articles/575823/employers-eeoc-survival-guide-

conciliation. As one partner at a major defense-side law firm recently commented, "You don't want to be the one to say this is going nowhere if you can avoid it. You want to preserve, if you can, the argument that the agency has failed to meet its conciliation obligation in good faith." *Id.* The strategy is clear: In conciliation, employers seek to project the appearance of always being close to agreeing to resolve the claims against them, while never actually agreeing to do so, in order to create some basis for arguing that the EEOC acted in bad faith when it ultimately concludes the process and seeks justice in court. When employers embrace and string out an unproductive conciliation process in this way, it forms the first step of a litigation strategy designed to impose further delay.

The inherent inefficiency of inserting the judiciary into the pre-litigation conciliation process has thus been seized upon by those who seek the opposite of a swift and cost-effective resolution of discrimination claims. To these attorneys, the conciliation process has become nothing more than an "opportunity to seek dismissal of the lawsuit based on the failure of the EEOC's conciliation process." *Federal Courts Split on Conciliation Defense,* 37 Preventive Strategies 1 (First Quarter 2014), *available at* http://www.jacksonlewis.com/media/pnc/1/media.2611.pdf. As the Seventh Circuit noted, permitting judicial review of the conciliation process will open the door to calculated delays that will harm vulnerable employees. "Offering the implied defense invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 178 (7th Cir. 2013).

When courts are dragged into the pre-litigation conciliation process as post-hoc micromanagers, conciliation's advantages swiftly evaporate, and what was intended to be a *pre-adjudicatory* process is transformed into a vehicle for stalling litigation, clogging the courts, impeding EEOC action, and delaying justice for the women who can least afford it. As even Petitioner's *Amicus Curiae*, the American Insurance Association, acknowledges, "Congress enacted this requirement in the interests of judicial economy, providing both the EEOC and employers with an avenue to resolve disputes confidentially, voluntarily, informally and without burdening the dockets of federal courts." Br. for Am. Ins. Ass'n. as *Amici Curiae* at 2. The post-filing adjudicative rehashing of the conciliation process proposed by Petitioner promises to turn these congressional goals on their head. Judicial intervention threatens to vitiate the stated benefits of conciliation for all involved, including an overburdened judiciary, by requiring courts to revisit pre-litigation conciliation after the fact, in all of its granular details.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — DESCRIPTIONS OF SIGNATORIES

Descriptions of the *Amici Curiae*

Founded in 1974, **Equal Rights Advocates** (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. ERA has litigated important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), and has appeared as *amicus curiae* in a number of Supreme Court cases interpreting Title VII, including *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Over the course of its forty-year history, ERA has frequently advocated on behalf of women working in male-dominated industries who have suffered egregious discrimination, harassment, and retaliation for reporting such violations. Today, ERA continues to represent women sheriffs, shipyard workers, and gold miners confronting discrimination on the job. ERA has a strong interest in ensuring that women facing discrimination in non-traditional industries have access to swift, efficient resolution of their complaints through the EEOC's pre-litigation conciliation process or the courts.

Legal Momentum (formerly the NOW Legal Defense and Education Fund) has worked to advance women's rights for more than forty years. We advocate in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote women's access to jobs by combating gender discrimination and stereotypes in employment. We have litigated

cases to secure full enforcement of laws prohibiting sex discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and participated as *amicus curiae* on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Legal Momentum is fully aware that discrimination against women remains pervasive, and is deeply concerned that judicial review of EEOC conciliation will hamper the ability of women to continue to challenge unlawful employment practices under Title VII without fear of delay or retaliation.

Brenda Berkman was the named plaintiff in the federal sex discrimination lawsuit that resulted in the hiring of the New York City Fire Department's first women firefighters in 1982. She rose to the rank of Captain before retiring after 25 years of proud service as a firefighter and fire officer for the City. She founded and led the FDNY's United Women Firefighters and also led the International Association for Women Firefighters for more than 10 years. She joins this brief to bring to the Court's attention the importance of suits under Title VII to women's participation and success in nontraditional fields, and the importance of not allowing overly lengthy conciliation to prevent those suits from reaching courts.

Gender Justice is a non-profit law firm based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its mission, Gender Justice helps courts, employers, schools,

and the public better understand the role that cognitive bias and unconscious stereotyping plays in perpetuating discrimination, and what can be done to limit their harmful effects and ensure equality of opportunity for all. As part of its impact litigation program, Gender Justice represents individual citizens in the Midwest region and provides legal advocacy as amicus curiae in cases that have an impact in the region. Gender Justice attorneys have represented women in sex discrimination cases involving hostility toward women in blue-collar workplaces in the Midwest, such as paper mills and beet processing plants. Gender Justice has an interest in protecting and enforcing women's legal rights in the workplace, and in the proper interpretation of the Civil Rights Act of 1964 and other civil rights laws.

The **Institute for Women's Policy Research** (IWPR), founded in 1987, is an independent, non-profit research organization that conducts rigorous research and disseminates its findings to address the needs of women, promote public dialogue, and strengthen families, communities, and societies. IWPR focuses on issues of poverty and welfare, employment and earnings, work and family issues, health and safety, and women's civic and political participation. IWPR is particularly concerned with identifying the causes and consequences of the persistent gender wage gap for the welfare and economic prosperity of women and their families. Economic research suggests that non-traditional occupations for women have higher median earnings than occupations predominantly performed by women; occupational segregation accounts for a significant component of the gender wage gap.

IWPR's research finds that women face substantial barriers when seeking to work in occupations that are non-traditional for women; these barriers include sexual harassment and discrimination in hiring, assignments and promotions.

Legal Aid Society – Employment Law Center (Legal Aid) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, Legal Aid has represented low-wage clients in cases involving a broad range of employment-related issues, including discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid has appeared before this Court in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g.*, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g., Fisher v. U.T. Austin*, 133 S. Ct. 2411 (2013), *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), *U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Legal Aid's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding.

Legal Voice is a non-profit public interest organization that works to advance the legal rights of women through public impact litigation, legislation, and legal rights education. Since its founding in 1978, Legal Voice (formerly known as the Northwest Women's Law Center), has been dedicated to protecting and expanding women's rights, including the right to equality in the workplace. Toward that end, Legal Voice has advocated for legislation to advance women's workplace rights and access to equal employment opportunity. In addition, Legal Voice has participated as counsel and as amicus curiae in the Pacific Northwest and across the country in numerous cases advocating for the women's rights to equal opportunity and to work free of sex discrimination and sexual harassment in the workplace.

The **National Organization for Women (NOW) Foundation** is a 501 (c) (3) non-profit organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist activist organization in the United States, with hundreds of thousands of members and contributing supporters in hundreds of chapters in all 50 states and the District of Columbia. NOW Foundation's goals include advocating for the elimination of sex-based discrimination in employment and for the hiring and promotion of qualified women, especially in occupations that traditionally have been closed to women.

The **National Partnership for Women & Families** is a nonprofit, nonpartisan advocacy organization that uses public education and advocacy to promote fairness in the

workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of women and their families. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious discrimination and has filed numerous briefs as Amicus Curiae in the U.S. Supreme Court and in the Federal Courts of Appeals to protect constitutional and legal rights.

The **National Women's Law Center** (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and harassment, but also access to effective means of enforcing that right and remedying such conduct. NWLC has prepared or participated in several *amicus* briefs before the Supreme Court in Title VII cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53 (2006).

Susan Eisenberg is the Director of the **On Equal Terms Project** and a Resident Artist/Scholar at the Women's Studies Research Center at Brandeis University,

as well as a poet, multidisciplinary artist, policy analyst, public speaker, educator, and author of *We'll Call You If We Need You: Experiences of Women Working Construction*, a New York Times Notable Book. She entered the construction industry in 1978, becoming one of the first women in the country to achieve journey-level status as a union electrician. She is the director of the On Equal Terms Project, which uses art, witness, historic artifacts, and research to advance public conversation and action about occupational segregation in skilled trades from a grassroots perspective. She served on the Planning Team for the First National IBEW Women's Conference and on the AFL-CIO BCTD's National Team for Minority and Women Recruitment and Retention, and has addressed the International Labour Organization in Geneva, Switzerland about women in the US construction industry. The On Equal Terms Project joins this brief to call the Court's attention to the importance of government oversight in the fight against discrimination in skilled trades.

Oregon Tradeswomen, Inc., (OTI) is dedicated to promoting success for women in the trades through education, leadership and mentorship. Founded in 1989 as a small support group led by four tradeswomen (an elevator constructor, two carpenters and an operating engineer), OTI was reorganized as Oregon Tradeswomen, Inc., a 501 (c)(3) non-profit, in 1999. OTI was founded on the principles that women deserve and can attain economic self-sufficiency through pursuing careers in the building, mechanical, electrical, and utility trades while helping and encouraging the trades industry to build up

a diverse workforce. Today the organization is comprised of nearly 400 members, three programs, an annual trades career fair for women and girls, and the support of trades industry employers. OTI believes that EEOC enforcement of antidiscrimination laws is critical to the success of women in the trades.

The **Sargent Shriver National Center on Poverty Law** (Shriver Center) is a proponent of anti-poverty measures and focuses on policy and legal matters in employment, housing, health care, public benefits, criminal justice, and education. The Shriver Center's Women's Law and Policy Project concentrates on the economic security and advancement of women and girls. That is why our advocacy includes ensuring that women are able to obtain and retain employment in blue-collar, non-traditional industries such as construction, mining, law enforcement and firefighting. These industries offer a real alternative to the low wages and lack of benefits found in most other blue-collar occupations, particularly traditionally female occupations. In addition, as an organization that represents the interests of low-income people, the majority of whom are members of one or more protected class, the Shriver Center is concerned about maintaining the integrity of the EEOC process. For these reasons, the Shriver Center supports the Respondent's arguments and has a compelling interest in the outcome of this case.

The **Southwest Women's Law Center** is a non-profit policy and advocacy law center that has been focused on advancing the rights of women and girls in the workplace

for approximately 10 years. Accordingly, the Law Center is uniquely qualified to comment on, and inform the Court about, the impact of workplace equality. The Southwest Women's Law Center supports the arguments proffered by the Respondent. Permitting judicial micromanagement of the EEOC's pre-litigation conciliation efforts thwarts the remedial purpose of Title VII and undermines judicial economy. We concur with Respondent's position that litigating parties should engage in mandatory pre-adjudicatory conciliation.

The **Sugar Law Center for Economic & Social Justice** (Sugar Law) is a leading national nonprofit law center based in Detroit, Michigan in the United States of America. Sugar Law's central mission includes the promotion of economic and social rights as human rights within the legal system. Our work includes protecting the rights of all persons to work free from discrimination based on their gender. The Sugar Law Center is deeply interested in this case because its outcome will impact the right of all workers to effectively utilize EEOC procedures when they have been the victims of unlawful discrimination. The EEOC's effectiveness in cases of systemic discrimination is markedly diminished by increasingly heightened after-the-fact court review of conciliation efforts as a prerequisite to the agency's enforcement actions. Over the decades that we have served working people, we have witnessed many women systematically excluded from occupations solely based on their gender and have utilized the procedures of the EEOC to redress such unlawful discrimination. This case is critically important to preserve the agency's

effectiveness towards the shared goal of eradicating discrimination within industries traditionally closed to women. The judgment of *Amici* is based on over 15 years of experience in advocacy and representation on behalf of thousands of workers before federal and state trial and appellate courts throughout the country.

Tradeswomen, Inc. is based in Oakland, California and was founded in 1979 as a grass-roots support organization for women in blue-collar, skilled craft jobs. The organization works to recruit more women into the construction and related non-traditional trades, to promote their retention, and to develop tradeswomen's capacity for leadership and career growth. Tradeswomen, Inc. joins this brief to emphasize to the Court that judicial review of the EEOC conciliation process not only runs counter to a primary rationale behind the that process, namely judicial economy, but also has particularly grim consequences for women in blue-collar, non-traditional jobs.

Since 1964, **Wider Opportunities for Women** (WOW) has promoted women's empowerment, equity and economic security across the lifespan. Through advocacy, research, training and technical assistance WOW works to advance equal education and employment opportunities, family economic security and secure retirement. WOW has played a leadership role in defining non-traditional occupations (NTO) for women and building policy, programs and practices to advance women's opportunities in male-dominated fields. Our National Center for Women's Employment Equity has partners in 18

states, delivering direct services to prepare women for nontraditional careers funded through our Opportunities for Women in Nontraditional Employment (OWNE) Initiative. WOW provides leadership to several national coalitions, including the National Coalition on Women and Job Training, the National Task Force on Tradeswomen's Issues, the Committee on Women in the Trades of the Building and Construction Trades Department of the AFL-CIO that promote equal employment opportunity and expanded opportunities for women to enter and succeed in traditionally male-dominated occupations. WOW joins this brief to demonstrate our interest in and emphasize the importance of the EEOC's strong enforcement of Title VII to opening high-wage, high-skilled, blue-collar jobs in male-dominated fields.

The **Women's Law Project** (WLP) is a public interest legal organization dedicated to creating a more just and equitable society by advancing the rights of women through high impact litigation, public policy advocacy and community education. The Pennsylvania-based WLP has worked since its founding in 1974 to eliminate sex discrimination in our laws and institutions and to promote change in the legal system that will directly affect the status and opportunities of women. WLP assists women who have been victims of employment discrimination through its telephone counseling service and through direct legal representation. WLP has a strong interest in the proper application of civil rights laws protecting women from employment discrimination.