No. 13-1019

IN THE

Supreme Court of the United States

MACH MINING, LLC,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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The parties agree that the petition in this case should be granted. The Solicitor General acknowledges that the petition "presents a recurring question of substantial importance on which the courts of appeals have disagreed." U.S. Br. 7. He rightly concludes that this "Court's review of the question presented therefore is warranted." *Id.* 7. And the Government emphasizes the need to resolve the circuit conflict now, stating that the division "has placed the Commission in an untenable position." *Id.* 17.[1]

1. The Government does argue that the court of appeals' decision is correct, but that is no basis for denying certiorari. As the Government emphasizes, the current disarray in the circuits is intolerable in itself. *Id.* This Court will resolve that conflict and

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[1] For that reason, the Government does not suggest the Court await the results of the pending litigation in the Ninth Circuit. *See* U.S. Br. 16 n.9 (citing *EEOC v. The Geo Grp., Inc.*, No. 13-16292 (9th Cir.)). There is little prospect the Ninth Circuit's decision will add appreciably to the debate – the Government has simply reiterated in that forum the same arguments it made below in this case and in its brief to this Court. *See* Brief of Plaintiff-Appellant Equal Employment Opportunity Commission § I, at 23-50, *EEOC v. Geo Grp., Inc.*, No. 13-16292 (9th Cir. Mar. 7, 2014). Moreover, the Ninth Circuit may not even reach the question, as the defendants have disavowed any argument that the case should be dismissed for failure to conciliate. *See* Appellee's Brief § VI.F.1, at 38-43, *EEOC v. Geo Grp., Inc.*, No. 13-16292 (9th Cir. May 2, 2014) (entitled "The Separate 'Failure To Conciliate In Good Faith' Issue Is Irrelevant And Moot").

restore the uniformity Congress intended whether it reverses or affirms.

Moreover, even if doubt about the correctness of the decision below were a relevant consideration, petitioner has provided ample reason to believe the decision below is wrong. The Government largely ignores those arguments, content to simply recite the court of appeals' rationale, which is not made any more convincing through repetition. For example, the Government repeats the Seventh Circuit's observation that Title VII does not expressly make non-compliance with the conciliation mandate a defense. U.S. Br. 7. But it does not deny (or even acknowledge) petitioner's showing that this Court has repeatedly held that noncompliance with other preconditions to suit, including other Title VII preconditions, is a basis for dismissal, even when Congress did not expressly provide for such a defense. *See* Pet. 23-25.

The Government also ignores the petition's showing that the statute's confidentiality provisions, read in historical context and in light of their purposes, preclude only use of conciliation evidence to prove or disprove the merits of a discrimination claim, as the EEOC itself has previously argued. *See* Pet. 26-28.

Likewise, the Solicitor General reiterates the Seventh Circuit's assertion that courts have failed to develop a "workable standard for reviewing" the EEOC's conciliation efforts. U.S. Br. 10. That claim is unsupported. *See* Pet. 29-31. And in any event, the Solicitor General offers no response to petitioner's point that even if the courts' standards were unsatisfactory, the Commission itself has authority

to issue regulations to give greater clarity and content to the conciliation obligation, as it has done with respect to other procedural prerequisites to litigation under Title VII. Pet. 31-33.

2. Instead of engaging with petitioner's legal arguments, the Government tries to portray petitioner as uninterested in conciliation and bent instead on using the conciliation process "to develop an affirmative defense for litigation" and to delay adjudication of the merits of the Commission's allegations. U.S. Br. 18; *see also id.* 4. The Government states, for example, that "petitioner spent two years seeking extensive discovery about the Commission's investigation and conciliation efforts," submitting more than 600 requests for admission on the topic. *Id*. 18. The Solicitor General further alleges that petitioner "objected to merits-based discovery based on the Commission's 'asserted failure to conciliate.'" *Id*. (citations omitted). These claims are seriously misleading.

In fact, petitioner submitted only *sixteen* entirely reasonable requests for admission relating to the Commission's failure to conduct any investigation, or provide petitioner any information, regarding the damages sought on behalf of individual claimants;[2] the Commission apparently arrives at its 600-plus number by multiplying each request for admission by 44 claimants. At the same time, the Commission fails to acknowledge that it could answer many of the

[2] The text of the requests is set forth in the appendix to this brief.

questions with a simple "yes" or "no" that would apply to all the claimants. *See* R. 26 (EEOC's four-page chart collecting responses for all claimants).[3]

Likewise, discovery took two years not because of its volume or petitioner's belligerence,[4] but rather because the Commission's insistence that its conciliation obligations were unenforceable led it to file repeated motions resisting discovery and challenging petitioner's conciliation defense. *See, e.g.*, R. 32, 34; R. 59, 72; R. 60; R. 62; R. 73, R. 80. And although the Solicitor General says that petitioner "objected to merits-based discovery" on the ground that the Commission failed to conciliate, U.S. Br. 18, he fails to disclose that petitioner dropped that objection and responded to the Commission's discovery requests.

3. The Government's misleading characterization of the discovery process in this case is consistent with its misunderstanding of the incentives faced by employers charged with engaging in unlawful discrimination. As amici have explained, employers have substantial incentives to settle even arguably meritorious discrimination claims informally. *See* Brief of *Amici Curiae* Retail Litigation Center, Inc., et al. § I.B. The Government's claim that "the stronger the EEOC's

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[3] "R. xx" refers to the docket entry in the district court record.

[4] The requests for admission, for example, were designed to *streamline* discovery by eliminating the need for interrogatories or depositions concerning matters that petitioners suspected would be uncontested.

case on the merits, the stronger the incentive to use a failure-to-conciliate defense," U.S. Br. 11-12 (internal quotation marks and citation omitted), has it exactly backwards – the stronger the EEOC's case, the *greater* incentive the employer has to reach an agreement to avoid the prospect of embarrassing litigation and a reputation-damaging verdict. But given their fiduciary duties to their stockholders, company managers cannot responsibly settle claims (sometimes for millions of dollars) in the absence of *some* reasonable basis for believing that there is a legal and factual basis for the suit and the amount of damages demanded by the Government. And experience has shown that the Commission attorneys are sometimes inclined to make demands first, then develop the legal and factual basis for those demands later, after having filed suit. *See* Retail Litigation Center Br., *supra*, § I.A. Other times, the EEOC may be tempted to short-change conciliation in the hopes of establishing particular legal principles through litigation. Whatever the reason, failure to engaging in meaningful conciliation predictably delays relief to injured employees with meritorious claims and imposes litigation costs on employers that often could be avoided through the good faith conciliation Congress has commanded.

Accordingly, the fact that employers have sometimes been forced to "challenge[] the adequacy of the Commission's conciliation efforts," U.S. Br. 18, and that courts have regularly found those efforts grossly inadequate, *see* Retail Litigation Center Br., *supra*, § I.A., only illustrates the need for judicial enforcement of the conciliation precondition and

reinforces the need for this Court to overturn the Seventh Circuit's erroneous decision in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Petitioner submitted materially identical requests for admissions for each claimant, as follows:

1. Admit that at no time after June 1, 2007, [Claimant] applied for a job with Mach.
2. Admit that as of September 17, 2010, EEOC had not determined that the "class of female applicants" (as referenced in the Letter of Determination) specifically included [Claimant].
3. Admit that as of September 17, 2010, EEOC had not verbally communicated with [Claimant].
4. Admit that as of September 17, 2010, EEOC had not exchanged written correspondence, including emails, faxes and/or any letters, with [Claimant].
5. Admit that as of September 17, 2010, EEOC had not requested any documents from a third party identified by [Claimant].
6. Admit that as of September 17, 2010, EEOC had not subpoenaed any documents from a third party identified by [Claimant].
7. Admit that as of September 17, 2010, EEOC had not interviewed any witnesses identified by [Claimant].
8. Admit that as of September 17, 2010, EEOC had not investigated whether Mach had specifically discriminated against [Claimant] based on her gender.

9. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of back wages for [Claimant].
10. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant]'s estimated back wages to Mach.
11. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of front wages for [Claimant].
12. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant]'s estimated front wages to Mach.
13. Admit that as of September 27, 2011, EEOC had not estimated damages in the form of lost benefits for [Claimant].
14. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant]'s estimated lost benefits to Mach.
15. Admit that as of September 27, 2011, EEOC had not performed any damages calculation on behalf of [Claimant].
16. Admit that as of September 27, 2011, EEOC had not disclosed [Claimant]'s damages calculation to Mach.

See EEOC's Responses To Defendant Mach Mining, LLC's First Request For Admission Directed to Plaintiff, R. 26.