No. 15-1329

In the Supreme Court of the United States

STERLING JEWELERS INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

When the Equal Employment Opportunity Commission (EEOC or Commission) receives a charge of employment discrimination, it must "make an investigation" to determine whether "there is reasonable cause to believe that the charge is true." 42 U.S.C. 2000e-5(b). If the Commission determines that reasonable cause exists, it must "endeavor to eliminate" the discriminatory practice "by informal methods of conference, conciliation, and persuasion." *Ibid.* If the EEOC is "unable to secure * * * a conciliation agreement acceptable to the Commission," it may then bring suit in federal court. 42 U.S.C. 2000e-5(f)(1). The question presented is:

Whether the court of appeals correctly held that a court hearing an EEOC enforcement action may determine whether the Commission satisfied its statutory duty to conduct an investigation, but may not review the sufficiency of the Commission's investigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 801 F.3d 96. The order of the district court (Pet. App. 16a-40a) is reported at 3 F. Supp. 3d 57.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2015. A petition for rehearing was denied on December 1, 2015 (Pet. App. 41a). On February 9, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 29, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination based on race, sex, and other protected characteristics. 42 U.S.C. 2000e-2(a)(1). The Equal Employment Opportunity Commission (EEOC or Commission) enforces that prohibition through "a detailed, multi-step procedure" involving both administrative and judicial proceedings. *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649 (2015).

a. The enforcement process ordinarily begins when an employee or applicant for employment files a charge with the EEOC alleging that an employer has violated Title VII. 42 U.S.C. 2000e-5(b). When the Commission receives a charge, it must notify the employer and "make an investigation." *Ibid.* "If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true," it must dismiss the charge. *Ibid.* The charging party may then file a private suit in federal court. 42 U.S.C. 2000e-5(f)(1). If the Commission determines that "there is reasonable cause to believe that the charge is true," it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). If the EEOC is "unable to secure * * * a conciliation agreement acceptable to the Commission," it may bring a civil action in federal court to eliminate the unlawful employment practice and seek relief for the aggrieved individuals. 42 U.S.C. 2000e-5(f)(1); see *Mach Mining*, 135 S. Ct. at 1649-1650.

Although the process begins with the filing of a charge, "EEOC enforcement actions are not limited to

the claims presented by the charging parties." *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 331 (1980). The Commission's investigations often uncover additional discrimination, and the Commission may bring suit to remedy "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *Ibid.* The Commission's suits frequently seek relief for groups or classes, such as all "female employees" adversely affected by specified policies, *id.* at 321, or "a class of women who * * * applied" for particular positions, *Mach Mining*, 135 S. Ct. at 1650.

b. The EEOC relies on conciliation as its primary means of securing compliance with Title VII and resorts to litigation in only a "small fraction" of its cases. *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002). In Fiscal Year 2015, for example, the Commission received more than 89,000 charges alleging violations of Title VII and other statutes enforced through similar procedures. The Commission found reasonable cause in 3239 cases, successfully conciliated 1432 cases, and filed just 142 merits suits—a number equal to about 4% of the cases in which it found reasonable cause.[1]

2. Petitioner operates jewelry stores throughout the United States. Between 2005 and 2007, the EEOC received 19 charges of sex discrimination filed by women employed at petitioner's stores in nine different States. The charges alleged that petitioner dis-

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[1] See EEOC, *All Statutes FY 1997 - FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited July 29, 2016); EEOC, *Litigation Statistics, FY 1997 Through FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited July 29, 2016).

criminated against the charging parties and similarly situated women in pay and promotion, and most of them alleged that petitioner engaged in a "policy" or "pattern and practice" of discrimination. Pet. App. 3a (citation omitted); see *id.* at 3a-4a, 17a.

The EEOC transferred all 19 charges to a single investigator. As part of its investigation, the Commission requested petitioner's "company-wide protocols, including policies governing pay, promotion, and anti-discrimination; job descriptions for sales associates and management positions; and computerized personnel files listing employees' hiring dates, responsibilities, and pay and promotion histories." Pet. App. 4a.

In 2006, while the EEOC's investigation was still ongoing, petitioner and the charging parties agreed to attempt to resolve the charging parties' claims through mediation. The parties invited the Commission to participate, and the Commission agreed to suspend its investigation during the mediation process. In conjunction with the mediation, petitioner and the charging parties hired experts who analyzed petitioner's nationwide pay and promotion data. The charging parties' expert concluded that petitioner paid its female employees less and promoted them more slowly than similarly situated male employees. The parties shared the experts' analyses and the underlying data with each other, with the mediator, and with the EEOC. Pet. App. 4a.

In 2007, the mediation failed. The EEOC then sent the parties a letter confirming that—consistent with the parties' agreement—the expert analyses and other evidence exchanged during the mediation would be incorporated into the Commission's investigation. The letter also invited the parties to provide any other

information they wanted the Commission to consider in making its reasonable-cause determination. Petitioner declined to provide additional information, but the charging parties submitted a letter and supporting documents "summarizing the evidence of 'company-wide' discrimination." Pet. App. 5a; see *id.* at 4a-5a.

In January 2008, the EEOC issued a letter of determination finding reasonable cause to believe that petitioner had subjected the charging parties "and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination." Pet. App. 5a (citation omitted). The letter explained that "[s]tatistical analysis of pay and promotion data provided by [petitioner] reveals that [petitioner] promoted male employees at a statistically significant, higher rate than similarly situated female employees and that [petitioner] compensated male employees at a statistically significant, higher rate than similarly situated female employees." *Id.* at 6a (citation omitted).

3. In September 2008, the EEOC filed this suit alleging that petitioner engaged in a nationwide pattern or practice of sex discrimination in violation of Title VII.[2] A magistrate judge allowed petitioner to conduct extensive discovery into the Commission's investigation, and petitioner deposed two EEOC investigators. Both investigators invoked the deliberative-process privilege in response to questions about the Commission's decisionmaking process and the evidence it had relied upon in finding reasonable cause. Pet. App. 6a.

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[2] Petitioner had agreed that the EEOC's participation in the mediation would satisfy its obligation to attempt to conciliate before bringing suit. Pet. App. 10a n.1.

Petitioner moved for summary judgment, asserting that the EEOC failed to satisfy its obligation to investigate before bringing suit. The district court agreed and dismissed the Commission's complaint with prejudice. Pet. App. 39a-40a.[3] The court concluded that it could not "review the sufficiency of the EEOC's pre-suit investigation," but that it could determine "whether an investigation occurred." *Id.* at 22a (citation omitted). The court further held that it could "examine the scope of th[e] investigation" to determine whether it matched the scope of the claims the Commission asserted in court. *Id.* at 22a-23a. Because the Commission's complaint alleged that petitioner engaged in nationwide discrimination, the court held that it had to determine "whether the EEOC conducted a nationwide investigation." *Id.* at 24a.

The Commission argued that the record established that it conducted a nationwide investigation because, among other things, its reasonable-cause determination expressly referred to the nationwide analysis of petitioner's pay and promotion data prepared by the charging parties' expert. Pet. App. 33a-34a; see *id.* at 5a-6a. But the district court held that the Commission could not rely on that analysis because its investigators had invoked the deliberative-process privilege and declined to answer questions about whether and to what extent the Commission considered the analysis in finding reasonable cause. *Id.* at 34a. And the court believed that aside from the expert's analysis, "there is no evidence that [the Commission's] investigation was nationwide." *Ibid.*

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[3] The district court adopted the magistrate judge's report and recommendation in full. Pet. App. 40a; see *id.* at 16a-38a.

4. The court of appeals reversed. Pet. App. 1a-15a. The court began with this Court's recent decision in *Mach Mining*, which defined the scope of judicial review of the EEOC's conciliation efforts. *Id.* at 8a. *Mach Mining* held that a court "may review whether the EEOC satisfied its statutory obligation to attempt conciliation," but it also held that "the scope of that review is narrow" because the Commission has "extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case." 135 S. Ct. at 1649.

The court of appeals concluded that "judicial review of an EEOC investigation is similarly limited." Pet. App. 8a. Specifically, it agreed with the district court that "courts may not review the *sufficiency* of an investigation—only whether an investigation occurred." *Ibid.* The court of appeals also agreed with the district court that courts may evaluate the *scope* of the investigation to ensure that it matched the scope of the claims asserted in the Commission's complaint. *Ibid.* In this case, the court held that because the Commission's complaint "alleged nationwide discrimination," the Commission had to "show that it undertook to investigate whether there was a basis for alleging such widespread discrimination." *Id.* at 9a.

Applying that standard, the court of appeals held that the record established that the EEOC conducted a nationwide investigation. Pet. App. 10a-14a. The court observed that the Commission had received 19 charges from nine different States across the country and that 16 of those charges alleged company-wide discrimination. *Id.* at 12a. The court noted that "the 2,600-page investigative file shows that the EEOC requested and obtained numerous documents related

to the charges," including "company-wide policies governing pay, promotion, and anti-discrimination," "company-wide job descriptions," and "witness statements." *Id.* at 10a-11a. The court also emphasized that the Commission obtained and expressly referred to the analysis prepared by the charging parties' expert, "which found that [petitioner] paid and promoted women at statistically significant lower rates than men" and which was "based on company-wide computerized data." *Id.* at 10a-13a. The court rejected the district court's conclusion that the Commission's invocation of the deliberative-process privilege precluded it from relying on the expert's analysis. *Id.* at 13a n.3. The court explained that "nothing in Title VII" suggests that the Commission must identify the basis for its reasonable-cause determinations or "independently validate expert analysis" submitted by a party. *Ibid.*

ARGUMENT

The court of appeals correctly held that courts may determine whether the EEOC fulfilled its duty to conduct an investigation before filing suit, but may not review the thoroughness or sufficiency of that investigation. That holding is consistent with the decisions of every other court of appeals to consider the issue.

It is also consistent with petitioner's own view of the law. Petitioner previously endorsed "[t]he unbroken line of authority establishing that courts may review whether an investigation occurred but not its sufficiency." Pet. C.A. Br. 36. And even now, petitioner does not appear to contend that the court of appeals applied the wrong legal standard. Instead, petitioner principally asserts (Pet. 9-36) that the court erred in relying on this Court's decision in *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645 (2015), to support

its holding that a court may review whether the EEOC has conducted an investigation, but not the sufficiency of the investigation. But because this Court reviews judgments, not statements in opinions, an assertion that the decision below adopted the right legal standard for the wrong reason does not warrant review. In any event, the court of appeals correctly relied on *Mach Mining* to support its holding. Petitioner also briefly contends (Pet. 2) that the court of appeals erred in its application of the correct legal standard to the facts of this case. That factbound contention does not warrant review.

Finally, the unusual nature of the investigation at issue here would make this case a poor vehicle in which to consider the question presented even if that question otherwise warranted this Court's review. The petition for a writ of certiorari should be denied.

1. Title VII provides that when the EEOC receives a charge, it "shall make an investigation thereof" in order to determine whether "there is reasonable cause to believe that the charge is true." 42 U.S.C. 2000e-5(b). That investigation is one stage of the "detailed, multi-step procedure" that must be completed before the Commission brings an enforcement action. *Mach Mining*, 135 S. Ct. at 1649. Accordingly, just as *Mach Mining* held that a court hearing a Title VII action "may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit," *ibid.*, the court of appeals correctly held that a reviewing court may determine whether the Commission satisfied its statutory obligation to conduct a pre-suit investigation. Pet. App. 7a-8a.

As *Mach Mining* emphasized, however, "[t]he appropriate scope of review enforces the statute's re-

quirements * * * but goes no further." 135 S. Ct. at 1653. Title VII does not "define 'investigation' or prescribe the steps that the EEOC must take in conducting an investigation." Pet. App. 7a. Courts have thus uniformly held that "the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency" and that courts may not "inquire into the sufficiency of the Commission's investigation." *EEOC* v. *Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984); see, *e.g.*, *EEOC* v. *Bass Pro Outdoor World, LLC*, No. 15-20078, 2016 WL 3397696, at *10 (5th Cir. June 17, 2016) (same); *Serrano* v. *Cintas Corp.*, 699 F.3d 884, 904 (6th Cir. 2012) (same), cert. denied, 134 S. Ct. 92 (2013); *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012) (*CRST*) (same); *EEOC* v. *Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) ("[C]ourts * * * have no business limiting [an EEOC] suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation."). The court of appeals correctly adhered to that settled rule, holding that "courts may not review the *sufficiency* of an investigation—only whether an investigation occurred." Pet. App. 8a.

For a court to conduct a more searching inquiry—by, for example, requiring the Commission to take specified investigative steps or to secure particular types of information in every case—"is not to enforce the law Congress wrote, but to impose extra procedural requirements." *Mach Mining*, 135 S. Ct. at 1655. "Such judicial review extends too far." *Ibid.* Allowing judicial scrutiny of the sufficiency of the EEOC's investigations would also undermine the enforcement of Title VII by "effectively mak[ing]

every Title VII suit a two-step action" in which the parties would first litigate the thoroughness of the Commission's investigation and only then "proceed to litigate the merits." Pet. App. 9a (quoting *Keco Indus.*, 748 F.2d at 1100). Such burdensome preliminary litigation would "delay and divert EEOC enforcement actions from furthering the purpose behind Title VII—eliminating discrimination in the workplace." *Id.* at 10a; see *Mach Mining*, 135 S. Ct. at 1654.

2. Petitioner does not challenge the lower courts' uniform conclusion that a court may not review the sufficiency of an EEOC investigation, and petitioner also does not appear to contend that the court of appeals applied the wrong legal standard in asking whether the record established that the Commission conducted a nationwide investigation in this case. Instead, petitioner asserts (Pet. 9-27) that the court erred in relying on *Mach Mining* in a case involving the duty to investigate rather than the duty to conciliate, and that the court was wrong to conclude that the Commission actually conducted a nationwide investigation. Those contentions lack merit, and would not warrant this Court's review in any event.

a. Petitioner has not argued that courts may review the sufficiency or thoroughness of an EEOC investigation. To the contrary, petitioner previously endorsed "[t]he unbroken line of authority establishing that courts may review whether an investigation occurred but not its sufficiency." Pet. C.A. Br. 36. And before this Court, petitioner continues to acknowledge (Pet. 18) that "courts are not permitted to review the sufficiency of the EEOC's investigation."

Petitioner also does not appear to contend that the court of appeals applied the wrong legal standard in

determining that the EEOC fulfilled its obligation to conduct an investigation in this case. According to petitioner (Pet. 19), the dispositive question is whether the Commission "actually conducted a *nationwide* pre-suit investigation." The court framed the question in precisely the same terms. It held that because the Commission's complaint "alleged nationwide discrimination," the Commission had to "show that it undertook to investigate whether there was a basis for alleging such widespread discrimination." Pet. App. 9a. And the court's ultimate decision rested on its holding that the record "establish[ed] that the [Commission's] investigation was nationwide." *Id.* at 13a.

Petitioner asserts in passing (Pet. 17) that the term "investigation" "connotes a thorough or searching inquiry." But petitioner does not contend that a court may therefore review whether the EEOC has conducted a sufficiently "thorough" or "searching" inquiry in a particular case. And any such contention would be inconsistent with petitioner's concession that a court may not review the sufficiency of the EEOC's investigation.

b. Rather than challenging the legal standard applied below, petitioner principally contends that the court of appeals' discussion of *Mach Mining* "improperly extends *Mach Mining* to the EEOC's duty to investigate." Pet. 11; see Pet. 11-22. The court of appeals did discuss *Mach Mining*, explaining that although this Court "did not address the EEOC's obligation to investigate," its analysis of the proper scope of judicial review of conciliation provides guidance in this context as well. Pet. App. 8a. But the court of appeals then adopted the same rule that the lower courts have uniformly applied since long before

Mach Mining—and the rule that petitioner itself advocated below. Citing the leading pre-*Mach Mining* decision on judicial review of investigations, the court held that "courts may not review the *sufficiency* of an investigation—only whether an investigation occurred." *Ibid.* (citing *Keco Indus.*, 748 F.2d at 1100). Even if petitioner were correct that the court erred in stating that *Mach Mining* supports that rule, such an error in the court's reasoning would not warrant further review. "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956).

c. In any event, the court of appeals was right to conclude that *Mach Mining* reinforces the lower courts' uniform view of the proper scope of review of the EEOC's investigations. Petitioner's two attempts to distinguish *Mach Mining* are unpersuasive.

First, petitioner notes (Pet. 13-14) that *Mach Mining* emphasized the EEOC's broad discretion over the conciliation process. But Congress granted the Commission comparably broad authority over the scope of its administrative investigations. As with conciliation, Congress did not require the Commission to "devote a set amount of time or resources" to an investigation. *Mach Mining*, 135 S. Ct. at 1654. As with conciliation, an investigation "need not involve any specific steps or measures." *Ibid.* And just as "the EEOC alone decides whether in the end to make [a conciliation] agreement," *ibid.*, Congress assigned to "the Commission" the responsibility to "determine[]" whether "there is reasonable cause to believe that the charge is true," 42 U.S.C. 2000e-5(b). As petitioner does not dispute, the Commission's reasonable-cause determinations are not subject to judicial review. See, *e.g.*,

Caterpillar, 409 F.3d at 833 ("The existence of probable cause to sue is generally and in this instance not judicially reviewable."). And the Commission's sole authority to determine whether reasonable cause exists confirms that the Commission also has discretion to decide the nature and extent of the investigation required to make that determination.

Second, petitioner observes (Pet. 14-15) that *Mach Mining* concluded that extensive judicial review of conciliation would "flout Title VII's protection of the confidentiality of conciliation efforts." 135 S. Ct. at 1655; see 42 U.S.C. 2000e-5(b). But searching review of the Commission's investigations would also raise significant confidentiality concerns. The deliberative-process privilege protects documents and other materials that reveal "recommendations and deliberations comprising part of a process by which governmental decisions" are made. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citation omitted). That privilege exists "to prevent injury to the quality of agency decisions," which would "clearly be affected" by the disclosure of pre-decisional communications. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). A searching inquiry into the sufficiency or thoroughness of the Commission's investigations would inevitably intrude on that privilege and impair the Commission's decisionmaking. See, *e.g.*, *EEOC* v. *Continental Airlines, Inc.*, 395 F. Supp. 2d 738, 741 (N.D. Ill. 2005) (holding that the deliberative-process privilege protects an EEOC investigative report). This case illustrates that danger: The magistrate judge authorized extensive discovery into the Commission's investigation, and the Commission was forced to invoke the privilege in response to numerous questions about the

basis for its reasonable-cause determination and other aspects of its investigative process. Pet. App. 28a-30a.

Petitioner's attempts to draw a sharp distinction between conciliation and investigation are thus unavailing. And, more fundamentally, this Court's decision in *Mach Mining* rested not merely on the particular features of the conciliation process, but on the broader principle that "[t]he appropriate scope of review enforces the statute's requirements * * * but goes no further." 135 S. Ct. at 1653. That principle applies equally to investigations, and it reinforces the settled rule that reviewing courts have no warrant to second-guess the thoroughness or sufficiency of the Commission's investigations.

d. Petitioner briefly asserts (Pet. 2) that "[t]he record evidence * * * demonstrates that the EEOC failed to conduct any nationwide investigation" in this case. That factbound, record-intensive contention does not warrant this Court's review. See Sup. Ct. R. 10. It also lacks merit. As the court of appeals explained, the Commission obtained extensive company-wide evidence, including a statistical analysis prepared by the charging parties' expert. That analysis was "based on company-wide computerized data" and it "found that [petitioner] paid and promoted male employees at statistically significant higher rates than similarly-situated female employees nationwide." Pet. App. 12a-13a. The district court declined to consider the expert's analysis because the Commission invoked the deliberative-process privilege in response to questions about it during discovery. *Id.* at 13a n.3. But the court of appeals reversed that holding, and petitioner has not sought review of that aspect of the decision below. *Ibid.* Particularly in combination with

the other company-wide information that the Commission requested and received, the expert's nationwide statistical analysis is more than sufficient to show that "the [Commission's] investigation was nationwide." *Id.* at 13a; see *id.* at 10a-11a.

3. Petitioner's final argument in favor of certiorari is that a "body of case law" purportedly demonstrates the EEOC's "habitual commencement of high-profile systemic litigation without complying with its pre-suit obligations." Pet. 28; see Pet. 22-36. But to support that sweeping assertion, petitioner cites (Pet. 28-34) just eight decisions, issued over the span of more than a decade—a tiny fraction of the more than 3000 enforcement suits the Commission filed during that period, and an even smaller fraction of the more than 16,000 cases the Commission investigated and successfully conciliated.[4]

Most of the decisions on which petitioner relies limited or dismissed the EEOC's claims because the courts concluded that the scope of the Commission's investigation and conciliation did not encompass the claims ultimately asserted in litigation—for example, because the Commission's investigation and conciliation focused on employees in a single state, but its suit sought nationwide relief. See *EEOC* v. *Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 982 (S.D. Ind. 2003) (*Jillian's*); see also *CRST*, 679 F.3d at 676; *EEOC* v. *Bloomberg, L.P.*, 967 F. Supp. 2d 802, 811 (S.D.N.Y. 2013); *EEOC* v. *Dillard's Inc.*, No. 08-1780,

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[4] See EEOC, *All Statutes FY 1997 - FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited July 29, 2016); EEOC, *Litigation Statistics, FY 1997 Through FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited July 29, 2016).

2011 WL 2784516, at *8 (S.D. Cal. July 14, 2011); *EEOC* v. *Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1262-1264 (D. Colo. 2007) (*Outback*).[5] The decision below is entirely consistent with those decisions because the court of appeals allowed the Commission to pursue a nationwide claim only after verifying that it conducted a "nationwide" investigation. Pet. App. 13a. Indeed, the court expressly distinguished many of the decisions on which petitioner now relies. *Id.* at 11a, 13a-14a (citing *CRST*, 679 F.3d at 676; *Outback*, 520 F. Supp. 2d at 1267; *Jillian's*, 279 F. Supp. 2d at 980). There is thus no merit to petitioner's suggestion that the decision below unduly limits judicial scrutiny of the Commission's compliance with its pre-suit obligations.

4. Even if the scope of judicial review of the EEOC's investigations otherwise warranted this Court's consideration, this case would be a poor vehicle in which to take up the issue because the underlying investigation was atypical. The parties asked the Commission to stay its investigation relatively early in the process so they could attempt mediation. Pet. App. 4a. As a result, petitioner declined to respond to some of the Commission's outstanding requests for company-wide information, representing that "the relevant data" would be available to the Commission through the mediation. *Id.* at 69a (citation omitted). The Commission's investigation thus relied in substantial part on

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[5] Some of the other decisions on which petitioner relies did not involve review of the EEOC's pre-suit obligations at all, but instead awarded attorney's fees based on positions the Commission advanced in litigation. See *EEOC* v. *Propak Logistics, Inc.*, 746 F.3d 145, 147 (4th Cir. 2014); *EEOC* v. *Peoplemark, Inc.*, 732 F.3d 584, 591-592 (6th Cir. 2013).

data and analyses developed during the mediation process, and any evaluation of the sufficiency of the investigation would necessarily turn on the extent to which the Commission properly relied on such evidence.[6] That unusual feature of this case would make it a poor vehicle in which to consider the proper scope of judicial review of the Commission's investigations as a general matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Indeed, the court of appeals' disagreement with the district court on the question whether the Commission conducted a nationwide investigation is largely attributable to their differing views on that question. Compare Pet. App. 13a-15a & n.3 (concluding that the Commission properly relied on the nationwide analysis prepared by the charging parties' expert), with *id.* at 34a (refusing to consider the expert's analysis).