No. 16-302

In the Supreme Court of the United States

THE GEO GROUP, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 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 to eliminate the unlawful employment practice and seek relief for the aggrieved employees. 42 U.S.C. 2000e-5(f)(1). The question presented is:

Whether the court of appeals correctly held that the Commission may satisfy its pre-suit obligations with respect to a class of aggrieved employees, and need not separately investigate, make a reasonable-cause determination, and conciliate with respect to each employee for whom it ultimately seeks relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulation and rule:

Miscellaneous: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-37a) is reported at 816 F.3d 1189. The order of the district court (Pet. App. 38a-76a) is not published in the *Federal Supplement* but is available at 2012 WL 8667598.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2016. A petition for rehearing was denied on June 7, 2016 (Pet. App. 1a-3a). The petition for a writ of certiorari was filed on September 6, 2016 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimina-

tion based on race, sex, and other protected characteristics. 42 U.S.C. 2000e-2(a)(1). It also bars retaliation against employees who complain about unlawful discrimination. 42 U.S.C. 2000e-3(a). The Equal Employment Opportunity Commission (EEOC or Commission) enforces those prohibitions through "a detailed, multi-step procedure" involving both administrative and judicial proceedings. *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649 (2015).

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 then 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." *Gen-*

eral Tel. Co. of the Nw., Inc. v. *EEOC*, 446 U.S. 318, 331 (1980). The Commission's investigations often uncover more widespread 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.

2. Petitioner provides corrections and detention services to federal, state, and local government agencies. The Arizona Department of Corrections has hired petitioner to operate units in two neighboring facilities in Florence, Arizona, which are known as Florence West and the Central Arizona Correctional Facility (CACF). Pet. App. 8a, 21a n.6.

Alice Hancock was a correctional officer at Florence West. In June 2009, she filed a charge of discrimination and retaliation with the Arizona Civil Rights Division (ACRD) and the EEOC. Hancock alleged that a male supervisor sexually harassed her by grabbing her crotch and that petitioner failed to remedy the harassment after she reported the incident. Instead, Hancock alleged that petitioner suspended her after other employees falsely accused her of making an inappropriate comment. Petitioner ultimately fired Hancock three months after she filed the charge. Pet. App. 8a-9a, 40a.

Pursuant to a worksharing agreement with the EEOC, the ACRD investigated Hancock's charge.

Pet. App. 9a & n.3.[1] The ACRD sought relevant evidence from petitioner, including information about "similar complaints made by others." *Id.* at 9a. Based on petitioner's responses, the ACRD identified a number of other current and former female employees who had suffered potentially actionable sexual harassment or retaliation. *Ibid.*; see *id.* at 40a-41a.

In May 2010, the ACRD completed its investigation and issued a determination finding reasonable cause to believe that petitioner had engaged in unlawful discrimination, harassment, and retaliation "against Hancock and a class of female employees" at Florence West and the CAFC. Pet. App. 11a; see *id.* at 80a-91a. In addition to substantiating the allegation in Hancock's charge, the ACRD described other "egregious" incidents of harassment, including a variety of inappropriate sexual comments, an incident in which a male officer grabbed Hancock's breast, and another incident in which a male officer "forcibly lifted [a female employee] onto a table, shoved himself between her legs[,] and tried to kiss her." *Id.* at 10a-11a. The ACRD further found reasonable cause to believe that petitioner had failed to take reasonable steps to prevent and correct this harassment. *Ibid.*

The EEOC issued a separate letter adopting the ACRD's reasonable-cause determination. Pet. App. 11a. The Commission's letter likewise found reasonable cause to believe that petitioner had violated Title VII by discriminating and retaliating against Hancock and "a class of female employees." *Id.* at 78a.

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[1] See *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 111-112 (1988) (describing the EEOC's worksharing agreements with state and local agencies); 29 C.F.R. 1601.13 (setting forth procedures for deferring investigations to state and local agencies).

The EEOC and the ACRD invited petitioner to conciliate and outlined a proposed agreement that would have provided damages for Hancock, a fund to compensate unidentified class members, and injunctive relief. Pet. App. 11a. The agencies' conciliation letter stated that they sought relief for "a class of at least nineteen other similarly situated women" at Florence West and the CACF. *Id.* at 44a (citations omitted). During conciliation, petitioner asked the agencies to identify all of the women in the class. *Id.* at 11a. The agencies declined to do so, but the ACRD provided petitioner with the non-privileged portions of its investigation file and audio recordings of its witness interviews. *Id.* at 45a. Conciliation ultimately proved unsuccessful. *Id.* at 11a-12a.

3. In September 2010, the EEOC filed this suit alleging that petitioner violated Title VII by subjecting Hancock and a class of similarly situated female employees at Florence West and the CACF to a sex-based hostile work environment, sexual harassment, and retaliation. Pet. App. 12a.[2]

During the litigation, the EEOC and the ACRD sent letters to petitioner's employees at Florence West and the CACF seeking information about other incidents of sexual harassment or retaliation. Pet. App. 12a. In response, several additional women identified themselves as victims of unlawful employment practices. *Ibid.* The EEOC and the ACRD ultimately sought relief for a class of 25 employees. *Id.* at 47a-48a; EEOC C.A. Br. 15-16.

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[2] The ACRD filed a suit in state court alleging violations of Arizona law. Petitioner removed that suit to federal court, and the cases were consolidated. Pet. App. 12a n.4, 39a & n.1.

The district court held that the EEOC and the ACRD could not seek relief for 19 women who had not been specifically identified during the ACRD's investigation. Pet. App. 38a-76a.[3] The court reasoned that the agencies had not satisfied their pre-suit obligations as to those women because "their allegations could not have been investigated, included in the reasonable cause determinations, or subject to conciliation efforts." *Id.* at 63a-64a. The court also stayed the agencies' claims on behalf of five additional women who had been identified during the ACRD's investigation, but who had not been specifically named during conciliation. *Id.* at 66a-75a. The court concluded that Title VII requires the EEOC to engage in "individualized conciliation," and that "meaningful conciliation" requires, among other things, that the Commission identify all individuals for whom it seeks relief and provide "a basis for the amount of damages claimed for each individual." *Id.* at 72a-74a.

After renewed conciliation failed, the district court rejected or limited the agencies' claims seeking relief for most of the remaining women in the class. Pet. App. 13a-14a. Petitioner then settled Hancock's claim and entered into a consent decree resolving the agencies' claims seeking relief for two other employees. *Id.* at 14a-15a. The consent decree preserved the agencies' right to seek review of the court's earlier rulings, and the agencies appealed. *Id.* at 15a.

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[3] The district court's order addressed the agencies' claims seeking relief for 15 women, but the agencies had identified four additional women while petitioner's motion for partial summary judgment was pending. EEOC C.A. Br. 15-17 & n.4. The court treated the ACRD's pre-suit obligations under Arizona law as equivalent to the EEOC's obligations under Title VII. Pet. App. 50a-52a.

4. The court of appeals vacated and remanded. Pet. App. 4a-37a. As relevant here, the court held that the district court erred in dismissing the agencies' claims for failure to satisfy their pre-suit obligations. *Id.* at 15a-24a. The court began with this Court's decision in *Mach Mining*, which was issued after the district court's decision and which defined the scope of judicial review of the EEOC's conciliation efforts. *Id.* at 17a-18a. *Mach Mining* held that a court "may review whether the EEOC satisfied its statutory obligation to attempt conciliation," but instructed 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. Specifically, *Mach Mining* held that the Commission satisfies its duty to conciliate if it (1) "describes both what the employer has done and which employees (or what class of employees) have suffered as a result," and (2) "tr[ies] to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1655-1656; see Pet. App. 17a.

In this case, the court of appeals explained that the EEOC's reasonable-cause determination identified a "class" of petitioner's female employees at Florence West and the CACF who had been subjected to sex discrimination and retaliation in violation of Title VII. Pet. App 18a. The agencies then proposed a conciliation agreement that would have remedied petitioner's allegedly unlawful employment practices on a class-wide basis through "injunctive relief" and a "class fund for unnamed class members." *Ibid.* The court held

that those steps "clearly satisfied Title VII" as interpreted in *Mach Mining*. *Ibid.*

The court of appeals also "reject[ed] the district court's premise that the EEOC * * * must identify and conciliate on behalf of each individual aggrieved employee during the investigation process prior to filing a lawsuit seeking recovery on behalf of a class." Pet. App. 20a. Instead, the court held that the Commission may meet its pre-suit obligations with respect to "an identified class of individuals." *Ibid.* The court noted that *Mach Mining* held that the Commission satisfies its duty to conciliate if it identifies a "'class of employees'" aggrieved by the employer's unlawful practices, and the court declined to "impose any additional pre-suit conciliation requirement" by mandating that the EEOC specifically identify every individual for whom it will ultimately seek relief. *Id.* at 21a (quoting *Mach Mining*, 135 S. Ct. at 1656). The court emphasized that a contrary rule would undermine the effective enforcement of Title VII's prohibition on employment discrimination. *Ibid.* It also noted that its holding was "consistent with the rulings of [its] sister circuits," citing decisions from the Third, Fourth, and Sixth Circuits. *Id.* at 23a.

5. The court of appeals denied petitioner's request for rehearing en banc with no judge requesting a vote. Pet. App. 1a-3a.

ARGUMENT

Petitioner renews its contention (Pet. 9-25) that before filing an action seeking relief for a class of employees, the EEOC must separately investigate, make a reasonable-cause determination, and conciliate with respect to each individual for whom it ultimately seeks relief. The court of appeals correctly rejected that

argument as inconsistent with Title VII and with this Court's decision in *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645 (2015), which instructed that the Commission fulfills its pre-suit conciliation obligation if it identifies the "*class* of employees" for which it seeks relief. *Id.* at 1656 (emphasis added). Numerous other courts of appeals have likewise held that the Commission may satisfy its pre-suit obligations on a class-wide basis. The only circuit to depart from that view did so in a pre-*Mach Mining* case involving different facts, and that circuit has not had the opportunity to revisit the issue with the benefit of this Court's guidance. Further review is therefore unwarranted.

1. The court of appeals correctly held that the EEOC may satisfy its pre-suit obligations on a class-wide basis even if the class includes some individuals who are not specifically identified until after the Commission's suit is filed.

a. In *Mach Mining*, this Court held that because Title VII makes conciliation "a necessary precondition to filing a lawsuit," a court hearing a Title VII action "may review whether the EEOC satisfied its statutory obligation to attempt conciliation." 135 S. Ct. at 1649, 1651. For the same reason, a court may determine whether the Commission satisfied Title VII's other administrative prerequisites to suit by conducting an investigation and making a reasonable-cause determination. See, *e.g.*, *EEOC* v. *Sterling Jewelers*, 801 F.3d 96, 100-101 (2d Cir. 2015), cert. denied, No. 15-1329 (Oct. 3, 2016).

As *Mach Mining* emphasized, however, "[t]he appropriate scope of review enforces the statute's requirements * * * but goes no further." 135 S. Ct. at 1653. With respect to conciliation, "Congress granted

the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief." *Id.* at 1654. "For a court to assess any of those choices * * * is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far." *Id.* at 1654-1655. Instead, this Court held that reviewing courts may ask only (1) whether the Commission "inform[ed] the employer about the specific allegation" by "describ[ing] both what the employer has done and which employees (or what class of employees) have suffered as a result," and (2) whether the Commission "tr[ied] to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice." *Id.* at 1655-1656.

The proper scope of judicial review of the EEOC's investigations and reasonable-cause determinations is also "relatively barebones." *Mach Mining*, 135 S. Ct. at 1656. Title VII does not "define 'investigation' or prescribe the steps that the EEOC must take in conducting an investigation." *Sterling Jewelers*, 801 F.3d at 100 (citation omitted). 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 a reviewing court 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, L.L.C.*, 826 F.3d 791, 805-806 (5th Cir. 2016) (*Bass Pro*); *Sterling Jewelers*, 801 F.3d at 101; *Serrano* v. *Cintas Corp.*, 699 F.3d 884, 904 (6th Cir. 2012), cert. denied, 134 S. Ct.

92 (2013). For similar reasons, a court may not review "the evidence underlying a reasonable cause determination." *Keco Indus.*, 748 F.2d at 1100; see, *e.g.*, *EEOC* v. *Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) ("The existence of probable cause to sue is generally and in this instance not judicially reviewable.").

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—would be to depart from the statute Congress enacted and impose the sort of "extra procedural requirements" that *Mach Mining* rejected. 135 S. Ct. at 1655. Allowing close judicial scrutiny of the sufficiency of the EEOC's investigations and reasonable-cause determinations 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." *Sterling Jewelers*, 801 F.3d at 101-102 (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 102; see *Mach Mining*, 135 S. Ct. at 1654.[4]

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[4] Petitioner errs in stating (*e.g.*, Pet. i, 9) that Title VII's administrative pre-suit requirements are "jurisdictional." Some lower-court decisions have used the "jurisdictional" label. See, *e.g.*, *EEOC* v. *Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982). But as this Court has observed, courts have been "profligate in [their] use of the term," which should instead be reserved for threshold limitations that Congress "clearly states * * * shall count as jurisdictional." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 510, 515 (2006). Congress did not frame Title VII's administrative

b. When the EEOC investigates a charge of discrimination filed by an individual, it often discovers unlawful employment practices with broader effects. An investigation into a charge that a company refused to hire an applicant because of her sex may reveal that other female applicants were turned away under the same discriminatory policy. *Mach Mining*, 135 S. Ct. at 1650. An investigation into charges by employees claiming to have been harmed by a retail chain's discriminatory pay and promotion practices may show that those practices have adversely affected other employees around the country. *Sterling Jewelers*, 801 F.3d at 99. Or, as here, an investigation into a charge that a company failed to prevent and remedy sexual harassment against one female employee may show that it likewise failed to prevent and remedy similar harassment against other women. Pet. App. 8a-11a.

In such circumstances, Title VII authorizes the EEOC to bring suit to remedy the unlawful employment practices identified during its investigation and to seek relief for all of the aggrieved individuals, not just the original charging party. As this Court has emphasized, "the EEOC need look no further than [42 U.S.C. 2000e-5] for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals." *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 324

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pre-suit requirements as limits on the subject matter jurisdiction of the district courts. 42 U.S.C. 2000e-5(b). Under *Arbaugh*, therefore, those requirements are "precondition[s] to suit but not * * * jurisdictional prerequisite[s]." *EEOC* v. *Agro Distrib., LLC*, 555 F.3d 462, 469 (5th Cir. 2009); see *id.* at 468-469 (overruling circuit precedent labeling the conciliation requirement "jurisdictional" because that precedent was "overturned by *Arbaugh*").

(1980) (*General Tel. Co.*). And because the existence and scope of an unlawful employment practice may be clear before every individual adversely affected by that practice has been identified, the EEOC has long relied on 42 U.S.C. 2000e-5 to bring suits seeking relief for groups or classes that include individuals who have not yet been identified when the suit is filed.

In *Mach Mining*, for example, the Commission sued on behalf of "a class of women who had * * * applied for mining jobs" with the defendant. 135 S. Ct. at 1650. In *General Telephone Co.*, the Commission sought relief on behalf of a class consisting of "female employees in General Telephone's facilities in the States of California, Idaho, Montana, and Oregon." 446 U.S. at 321. And in *Sterling Jewelers*, the Commission sought relief for a "class of female employees with retail sales responsibilities nationwide." 801 F.3d at 99-100 (citation omitted).

In such cases, Title VII does not require the EEOC to identify every aggrieved individual during its initial investigation, or to conciliate separately with respect to each individual for whom it will ultimately seek relief in court. The statute requires the Commission to conduct an "investigation," to determine whether there is "reasonable cause" to believe that an employer has violated Title VII, and to "endeavor to eliminate any such alleged unlawful employment practice" through conciliation. 42 U.S.C. 2000e-5(b). But as the long history of the Commission's enforcement actions makes clear, the Commission can satisfy those obligations on a class-wide basis by investigating discriminatory activities or policies that affect multiple employees, by finding reasonable cause to believe that the employer has discriminated against an identifiable

class, and by attempting to use conciliation to remedy that discrimination on a class-wide basis.

This Court's decision in *Mach Mining* confirms that the EEOC may satisfy its pre-suit obligations on a class-wide basis. In *Mach Mining*, the Commission sought relief for a class of female applicants for mining jobs. The defendant argued that the Commission's conciliation efforts were insufficient because, among other things, the Commission had failed to "identify the particular individuals for whom it seeks [monetary] relief." Pet. Br. at 40, *Mach Mining*, *supra* (No. 13-1019); see *id.* at 5. But this Court rejected the defendant's proposed "bargaining checklist," which included the requirement that the Commission must identify every individual for whom it seeks relief. 135 S. Ct. at 1654. Instead, the Court expressly recognized that the Commission may satisfy its pre-suit obligations on a class-wide basis, explaining that the Commission complies with Title VII's conciliation requirement if it explains to the employer "which employees (*or what class of employees*)" were harmed by the allegedly unlawful employment practice. *Id.* at 1656 (emphasis added); see *id.* at 1652 (stating that the Commission "must tell the employer * * * what practice has harmed which person *or class*") (emphasis added).

c. Petitioner identifies no sound reason to require the Commission to separately investigate, make a reasonable-cause determination, and conciliate with respect to each individual for whom it ultimately seeks relief in court.

First, petitioner attempts to distinguish *Mach Mining* by noting (Pet. 9, 11-12) that it focused on conciliation. Here, in contrast, petitioner asserts

(*ibid.*) that the Commission "wholly failed" to satisfy *all* of its pre-suit obligations—including not just conciliation but also investigation and a reasonable-cause determination—with respect to the 19 women that the Commission identified during litigation. But petitioner's characterization rests on the premise that the Commission was required to satisfy its pre-suit obligations as to each employee individually, and could not do so on a class-wide basis. As this Court's decision in *Mach Mining* makes clear, that premise is wrong. Just as the Commission can fulfill its obligation to conciliate with respect to a class, it can satisfy its duty to investigate and make a reasonable-cause determination by finding evidence that an employer has engaged in discrimination against an identified class. Indeed, *Mach Mining* specifically approved the Commission's practice of issuing reasonable-cause determinations that find discrimination against a specified "class of employees" rather than named individuals. 135 S. Ct. at 1655-1656.

Second, petitioner contends (Pet. 9) that the "EEOC's investigation bounds the permissible claims in a subsequent EEOC civil lawsuit." Petitioner is correct that the claims the Commission asserts in a suit brought under 42 U.S.C. 2000e-5 must arise from "a reasonable investigation of the charging party's complaint." *General Tel. Co.*, 446 U.S. at 331. The Commission thus may bring a suit to remedy discrimination that differs in kind or scope from that alleged in a charge, so long as it uncovers the additional discrimination during a reasonable investigation of the charge. *Ibid.* But the Commission could not, for example, focus its investigation, reasonable-cause de-

termination, and conciliation on sex discrimination and then file a suit alleging race discrimination.

Most of the decisions on which petitioner relies (Pet. 10-13) applied that general principle to limit or dismiss the Commission's claims because the courts concluded that the claims ultimately asserted in litigation were outside the scope of the Commission's investigation and conciliation—for example, because the investigation and conciliation focused on employees in a single city, but the Commission's suit sought relief for a "nationwide class." *EEOC* v. *Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 982 (S.D. Ind. 2003) (*Jillian's*); see, *e.g.*, *EEOC* v. *Dillard's Inc.*, No. 08-cv-1780, 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); *EEOC* v. *Target Corp.*, No. 02-C-146, 2007 WL 1461298, at *2-*3 (E.D. Wis. May 16, 2007). But it does not follow that the Commission must identify every employee for whom it will ultimately seek relief at the investigation stage. To the contrary, some of the decisions on which petitioner relies expressly recognize that the Commission "is *not* required to identify every potential class member" during its investigation. *Dillard's*, 2011 WL 2784516, at *6 (emphasis added); accord *Jillian's*, 279 F. Supp. 2d at 983.

Here, petitioner does not contend—and could not plausibly contend—that the claims the EEOC asserted in court were outside the scope of the administrative investigation and conciliation. In investigating Hancock's charge, the ACRD requested information about "similar complaints made by others," and petitioner provided documentation of harassment complaints by other employees. Pet. App. 9a. The ACRD

then issued a detailed reasonable-cause determination describing petitioner's management of the Florence West and CACF facilities, recounting extensive evidence of harassment and retaliation involving several different women at those facilities, and finding reasonable cause to believe that petitioner had engaged in harassment and retaliation against "a class of female employees." *Id.* at 90a; see *id.* at 80a-91a; see also *id.* at 77a-79a (EEOC reasonable-cause determination adopting the ACRD's findings). The agencies advised petitioner during conciliation that they sought relief for Hancock and "a class of at least nineteen other similarly situated women" employed at Florence West and the CACF. *Id.* at 44a (citations omitted). And the agencies ultimately sought relief for 25 women who worked at the same two facilities that had been the focus of the investigation and conciliation. *Id.* at 48a; see EEOC C.A. Br. 15-16.

Third, petitioner asserts (Pet. 15-16) that allowing the EEOC to satisfy its pre-suit obligations on a class-wide basis unfairly denies employers notice of the scope of the claims they face and a meaningful opportunity to conciliate. But *Mach Mining* rejected the contention that meaningful conciliation requires the Commission to identify every individual for whom it seeks relief, instructing that the Commission may identify either the "employees" *or* the "class of employees" at issue. 135 S. Ct. at 1656. And here, the investigation and conciliation process unquestionably put petitioner on notice that it faced claims of sex discrimination and retaliation involving a class of women employed at the Florence West and CACF facilities. Pet. App. 21a n.6.

Moreover, a rule requiring the EEOC to identify all individuals for whom it will ultimately seek relief during its initial investigation would undermine Title VII's enforcement scheme. Such a rule would significantly prolong the Commission's administrative investigations, imposing unnecessary costs on both the Commission and employers in the many cases in which the unlawful employment practice at issue could be resolved on a class-wide basis through conciliation.[5] Such a requirement would also encourage employers to conceal evidence, secure in the knowledge that the Commission would be unable to seek relief for any victims of discrimination who were not identified during its investigation even if those victims came to light during litigation. The court of appeals correctly held that Congress did not impose such a counterproductive regime. Pet. App. 21a-23a.

2. Petitioner contends (Pet. 17-25) that this Court should grant review to resolve the disagreement between the decision below and the Eighth Circuit's decision in *EEOC* v. *CRST Van Expedited, Inc.*, 679

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[5] 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. See EEOC, *All Statutes FY 1997 - FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Nov. 9, 2016); EEOC, *Litigation Statistics, FY 1997 Through FY 2015*, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Nov. 9, 2016).

F.3d 657 (2012) (*CRST*).[6] But as another court of appeals recently observed, *CRST* is inconsistent with this Court's subsequent decision in *Mach Mining*—indeed, it exemplifies the sort of intrusive judicial review that this Court rejected. And even if *CRST* were still good law, this case would not be an appropriate vehicle in which to consider the asserted disagreement created by the Eighth Circuit's decision.

a. The court of appeals correctly observed that its holding that the EEOC may satisfy its pre-suit obligations on a class-wide basis was "consistent with the rulings of [its] sister circuits." Pet. App. 23a. At least five other courts of appeals have concluded, in accordance with the decision below, that "the EEOC can meet its conciliation and investigation requirements without naming individual class members." *Bass Pro*, 826 F.3d at 805 (5th Cir.); see *Sterling Jewelers*, 801 F.3d at 103-104 (2d Cir.) (the Commission satisfied its pre-suit investigation requirement in a suit alleging a nationwide practice of sex discrimination by investigating the underlying charges as "class charges") (citation omitted); *Serrano*, 699 F.3d at 904-905 (6th Cir.) (the Commission may satisfy its pre-suit obligations on a class-wide basis by making the defendant aware that it "had investigated and was seeking to conciliate class-wide claims"); *EEOC* v. *Rhone-Poulenc, Inc.*, 876 F.2d 16, 17 (3d Cir. 1989) (same); *Keco Indus.*, 748 F.2d at 1100-1102 (6th Cir.) (the Commission properly investigated and conciliated a "class-based claim" even though its suit sought relief

[6] This Court recently vacated and remanded a separate decision by the Eighth Circuit addressing the EEOC's liability for attorney's fees in the *CRST* litigation. See *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642 (2016).

for employees not named during the conciliation process); *EEOC* v. *American Nat'l Bank*, 652 F.2d 1176, 1185-1186 (4th Cir. 1981) (holding that the EEOC's investigation and conciliation of claims of discriminatory practices at some bank branches were sufficient to allow the Commission to seek relief for women adversely affected by the same practices at other branches), cert. denied, 459 U.S. 923 (1982); see also *EEOC* v. *Bruno's Rest.*, 13 F.3d 285, 289 (9th Cir. 1993) (the Commission is "not required to provide documentation of individual attempts to conciliate on behalf of each potential claimant").

b. Petitioner's asserted circuit conflict (Pet. 17-22) rests on the Eighth Circuit's decision in *CRST*. In that case, a divided panel affirmed the dismissal of the EEOC's claims seeking relief for 67 female truck drivers who had suffered sexual harassment because the panel concluded that the Commission had not investigated or attempted to conciliate "the specific allegations of any of the 67 allegedly aggrieved persons prior to filing [a] complaint." 679 F.3d at 673-674. Judge Murphy, in dissent, criticized the panel majority's "new requirement that the EEOC must complete its presuit duties for each individual alleged victim of discrimination when pursuing a class claim." *Id.* at 695. She added that such a rule "place[d] unprecedented obligations on the EEOC" and "reward[ed] [the employer] for withholding information from the Commission" during its investigation. *Ibid.*

The *CRST* panel majority's requirement of individualized investigation and conciliation is inconsistent with the decision below—and with the decisions of numerous other circuits. But as the court of appeals emphasized, *CRST* "was decided prior to *Mach Min-*

ing," Pet. App. 20a n.5, and it is inconsistent with this Court's subsequent decision instructing that the Commission may satisfy its pre-suit obligations on a class-wide basis. Indeed, as the Fifth Circuit has explained, "the *CRST* court engaged in precisely the kind of 'deep dive'" into the adequacy of the Commission's pre-suit procedures that "the Court prohibited in *Mach Mining*." *Bass Pro*, 826 F.3d at 804 (quoting *Mach Mining*, 135 S. Ct. at 1653). The Eighth Circuit has not had the opportunity to revisit its decision in *CRST* with the benefit of *Mach Mining*. In light of this Court's instructions, it will presumably reach a different result when it does so. Accordingly, unless and until the Eighth Circuit adheres to *CRST* in a future case, the asserted conflict created by that single decision does not warrant this Court's review.[7]

In any event, even if the disagreement created by the pre-*Mach Mining* decision in *CRST* otherwise warranted this Court's intervention, this case would not be an appropriate vehicle in which to resolve it. The court of appeals expressly distinguished the circumstances presented here from its understanding of the facts in *CRST*. Pet. App. 21a n.6. In so doing, the court emphasized that this case involved an investiga-

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[7] Petitioner notes (Pet. 22-23) that the district court in *CRST* held that *Mach Mining* did not require it to set aside its judgment under Federal Rule of Civil Procedure 60(b). *EEOC* v. *CRST Van Expedited, Inc.*, No. 07-cv-95, 2015 WL 8773440, at *4 (N.D. Iowa Dec. 14, 2015). But a district court order in a Rule 60(b) posture provides no indication of how the Eighth Circuit would assess the implications of *Mach Mining* in a case in which that question were squarely presented. And the only other decisions petitioner cites (Pet. 22-23) to support its assertion that the disagreement created by *CRST* "[w]ill [c]ontinue to [d]eepen" are district court decisions issued in 2013—two years *before Mach Mining*.

tion that "revealed multiple potential victims of discrimination" at two neighboring facilities; that those two facilities were "identified in the Reasonable Cause Determination as part of the class"; and that the conciliation process put petitioner on notice that the Commission was seeking relief for a "class" of female employees at those facilities. *Ibid.*; see *id.* at 44a (quoting a conciliation letter advising petitioner that the Commission sought relief for Hancock and "a class of at least nineteen other similarly situated women") (citations omitted). The Commission's suit seeking relief for 25 women employed at the same two facilities falls comfortably within the scope of those investigation and conciliation efforts, and petitioner cites no decision finding that the Commission failed to satisfy its pre-suit obligations under circumstances like those present here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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