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No Longer a Paper Tiger: The EEOC and Its Statutory Duty to Conciliate

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NO LONGER A PAPER TIGER: THE EEOC AND ITS STATUTORY DUTY TO CONCILIATE[1]

ABSTRACT

Congress created the Equal Employment Opportunity Commission to effectuate the ends of Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. To effectuate those ends, Congress vested the EEOC with authority to not only receive, investigate, and conciliate charges of employment discrimination, but also to enforce Title VII against private employers who discriminate by initiating suit against them.

After the EEOC receives a charge of employment discrimination, it must, after completing an investigation, attempt to conciliate the charge with a private employer accused of discrimination before initiating suit. The EEOC's "duty to conciliate is at the heart of Title VII," so a critical question arises when the EEOC appears to violate its duty by, for instance, making egregious demands of an employer: what is the proper standard for reviewing whether the agency has satisfied its statutory duty to conciliate? The federal circuit courts of appeals are split between two standards of review—the deferential and the stringent standards of review.

This Comment argues that the deferential standard of review is inadequate to protect private employers from the EEOC's potential abuse of its statutory duty. Rather, the stringent standard is the proper standard, and it is consistent with the text, purpose, legislative history, and jurisprudence of Title VII.

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[1] The phrase "paper tiger" appears in a speech Senator James Browning Allen of Alabama delivered during the senatorial debates before the Equal Employment Opportunity Act of 1972, which amended the Civil Rights Act of 1964, passed. *See* 118 CONG. REC. 3803 (1972) (statement of Sen. James Allen).

INTRODUCTION

Robert Lewis filed a charge of discrimination against his employer, the Asplundh Tree Expert Company, with the Equal Employment Opportunity Commission, alleging that he suffered racial discrimination when Pete Evans crafted a noose from a piece of rope and placed it around Lewis's neck.[2] After investigating the charge for thirty-two months, the EEOC determined that there was "reasonable cause to believe the charge [was] true."[3] It then sent Asplundh a proposed conciliation agreement, requiring a response within twelve business days[4]—a very short period of time relative to the lengthy period of investigation.

Notably, the proposed conciliation agreement demanded three remedies that were not merely impracticable but *impossible* for Asplundh to perform.[5] First, the EEOC demanded that Asplundh reinstate Lewis as a laborer even though the project on which he had worked ended three years earlier and the office for which he worked had closed.[6] Second, the EEOC demanded that Asplundh provide Lewis with front pay even though, again, the project on which he had worked ended three years earlier and the office for which he worked had closed.[7] Third, the EEOC demanded that Asplundh conduct nationwide antidiscrimination training for all its management and hourly employees within ninety days even though the alleged discrimination occurred only in the city of Gainesville, Florida.[8]

Moreover, the agency refused to reopen negotiations even though Asplundh made clear that it had retained counsel and wished to settle the case.[9] Perhaps most objectionable of all, however, was the fact that Asplundh did not even

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[2] EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1257 (11th Cir. 2003). The charge also alleged disparate pay and retaliation. *Id.* at 1257–58.

[3] *Id.* at 1258 (internal quotation marks omitted).

[4] *Id.* After receipt of the proposed conciliation agreement, Asplundh retained counsel. *Id.* Asplundh's counsel faxed a request to the EEOC investigator assigned to Lewis's case, requesting both a telephone call and an extension to respond to the proposed agreement until he and the EEOC investigator had an opportunity to discuss the case. *Id.* The next day, without acknowledging the faxed request, the EEOC asserted that conciliation had failed. *Id.* at 1258–59.

[5] *Id.* at 1260.

[6] *See id.* at 1258.

[7] *See id.*

[8] *Id.*

[9] *See id.* at 1260–61.

employ Evans.[10] The EEOC provided no theory explaining how Asplundh could possibly be liable.[11]

These facts from *EEOC v. Asplundh Tree Expert Co.* prompt a crucial question: given that after the EEOC receives a charge of discrimination, Title VII of the Civil Rights Act of 1964 requires the agency to attempt to conciliate the charge with the private employer accused of discrimination before initiating suit against it,[12] what is the proper standard for reviewing whether the agency has satisfied its statutory duty to conciliate?

The answer to this question is more relevant than ever. The EEOC recently released its *Strategic Plan for Fiscal Years 2012–2016*, which presents the agency's strategy for enforcing Title VII over the next few years.[13] The EEOC intends to focus its enforcement responsibilities on employers who allegedly engage in systemic discrimination, defined as alleged discrimination with "a broad impact on an industry, profession, company, or geographic area."[14] By 2016, the agency aims to maintain a certain number of systemic discrimination cases on its litigation docket, increasing the number of such cases each year until that number is met.[15] Importantly, as the agency increases the number of systemic discrimination cases it chooses to litigate, the potential for the agency to abuse its statutory duty to conciliate increases. That is, the agency has greater incentive to engage in unreasonable conciliatory efforts similar to those in *Asplundh*, effectively rendering its statutory duty to conciliate an empty formality. Whether the plan warrants fear of such abuse depends, at least in part, on what standard governs for reviewing whether the EEOC has satisfied its statutory duty to conciliate.

In addressing the proper standard for reviewing whether the EEOC has satisfied its statutory duty to conciliate, this Comment has five parts. Part I provides background, contextualizing the EEOC's statutory duty to conciliate within the framework imposed by Title VII of the Civil Rights Act of 1964,

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[10] *See id.* at 1260. Evans was an employee of the Gainesville Regional Utilities. *Id.* at 1257. Asplundh had contracted with the GRU to dig ditches and lay cable. *Id.*

[11] *Id.* at 1260.

[12] *See* 42 U.S.C. § 2000e-5(b), (f)(1) (2006).

[13] EEOC, STRATEGIC PLAN FOR FISCAL YEARS 2012–2016, at 1 (2012), *available at* http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf.

[14] *Id.* at 14. In 2006, the EEOC adopted its Systemic Initiative, which first "[made] the identification, investigation, and litigation of systemic discrimination cases . . . a top priority." *Id.*

[15] *See id.* at 12, 18–19. The agency has not yet determined how many systemic discrimination cases it must maintain on its litigation docket. *Id.* at 12, 18.

which created the EEOC and its concomitant duty to conciliate.[16] Part II discusses the current split in the federal circuit courts of appeals on the proper standard for reviewing whether the agency has satisfied its duty to conciliate—two circuits, the Sixth and the Tenth, argue for a deferential standard of review[17] while three others, the Second, Fifth, and Eleventh, argue for a stringent standard.[18] Part III critiques the deferential standard of review, arguing that it cannot adequately protect private employers from the agency's potential abuse of its statutory duty to conciliate.[19] Part IV argues that the stringent standard of review is the proper standard not only because it lacks the shortcomings of the deferential standard, but also because it is consistent with the text, purpose, legislative history, and jurisprudence of Title VII. Finally, Part V addresses resistance to adopting the stringent standard of review.

I. BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin.[20] Toward that end, Title VII created the EEOC,[21] the federal agency with congressionally granted authority to not only receive, investigate, and conciliate allegations of employment discrimination,[22] but to enforce Title VII against private employers who engage in discriminatory practices, whether systemic or individualized, by initiating suit against them.[23]

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[16] *See* §§ 2000e-4(a)–(g), -5(b).

[17] *See* EEOC v. Keco Indus., 748 F.2d 1097, 1102 (6th Cir. 1984); EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978).

[18] *See* EEOC v. Agro Distribution LLC, 555 F.3d 462, 468 (5th Cir. 2009); EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1259 (11th Cir. 2003); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1534 (2d Cir. 1996); EEOC v. Sears, Roebuck & Co., 650 F.2d 14, 18–19 (2d Cir. 1981); EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. Unit A Feb. 1981); Nicholas J. Wagoner, *More Percolation over Good Faith Conciliation*, CIRCUIT SPLITS (May 30, 2012, 6:19 AM), http://www.circuitsplits.com/2012/05/eliminating-discrimination-with-good-faith-conciliation.html.

[19] This Comment discusses the effects the agency's potential abuse of its statutory duty has on private employers. Although others, including employees of those employers, would certainly feel the effects of any agency abuse, those effects are beyond the scope of this Comment.

[20] § 2000e-2. See DONALD R. LIVINGSTON, EEOC LITIGATION AND CHARGE RESOLUTION 3–9 (Charles A. Shanor & Paul E. Mirengoff eds., 2005), for a brief history of the political compromises that preceded passage of the Civil Rights Act of 1964.

[21] § 2000e-4(a). See LIVINGSTON, *supra* note 20, at 9–24, for a brief history of the EEOC, a brief overview of the statutes it enforces, and a brief overview of its functions in both the federal and private sectors.

[22] *See* § 2000e-5(b).

[23] *See id.* § 2000e-5(f)(1). Congress granted the EEOC authority to enforce Title VII by passing the Equal Employment Opportunity Act of 1972, which amended the Civil Rights Act of 1964 to that effect. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 286 (2002). The EEOC, however, has authority to initiate

The EEOC's administrative duties—the receipt, investigation, and conciliation of allegations of employment discrimination—begin once an aggrieved person, a party on behalf of an aggrieved person, or an EEOC commissioner files a charge of employment discrimination with the agency.[24] Upon receipt of a charge, the EEOC must serve the employer with notice of it.[25] This notice includes "the date, place and circumstances of the alleged" employment discrimination.[26] Then, the EEOC must investigate the charge.[27] If the agency finds no reasonable cause to believe that the charge is true, it will dismiss it.[28] If, on the other hand, it does find reasonable cause to believe the charge is true, it must attempt to eliminate the unlawful discriminatory practice through conciliation,[29] a term not statutorily defined.[30] The EEOC generally begins the process of conciliation by inviting the employer to participate in conciliation.[31] In its invitation, the EEOC generally requests that the employer contact the agency within a specified period of time to indicate whether it would like to participate.[32] Simultaneously with, or soon after the invitation, the EEOC generally sends a proposed conciliation agreement to the employer.[33]

The EEOC's enforcement duties—the initiation of suit—may begin in one of two circumstances. The EEOC may initiate suit against a private employer

litigation only against private employers and not against state or local governments, which the Attorney General retains authority to sue. *See* § 2000e-5(f)(1).

[24] *See* § 2000e-5(b). As the statute indicates in its enforcement provisions, state or local governments may affect the process explained here, but the potential impact of state and local laws are beyond the scope of this Comment. *See id.* § 2000e-5(c).

[25] *Id.* § 2000e-5(b).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* The statute provides that "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* Although, according to the statute, the agency must attempt to eliminate any alleged employment discrimination through the use of three informal methods, these three methods have collapsed into the single term of "conciliation." *See* LIVINGSTON, *supra* note 20, at 428.

[30] *See* § 2000e.

[31] LIVINGSTON, *supra* note 20, at 431.

[32] *Id.* at 432.

[33] *Id.*

if, first, the employer refuses to participate in conciliation[34] or if, second, the employer does agree to participate but conciliation fails.[35]

Within Title VII's framework for the EEOC's administrative and enforcement duties, this Comment focuses on the agency's statutory duty to conciliate and argues that the proper standard for reviewing whether the agency has satisfied this duty is the stringent standard of review.

II. THE CIRCUIT SPLIT ON THE PROPER STANDARD OF REVIEW

Although the EEOC's "duty to conciliate is at the heart of Title VII,"[36] the federal circuit courts of appeals are split on the proper standard for reviewing whether the agency has satisfied its duty to conciliate prior to initiating suit against a private employer.[37] Two circuits—the Sixth and Tenth—have adopted a deferential standard of review that requires the EEOC to "make a good faith effort to conciliate the claim" at issue.[38] In contrast, three other circuits—the Second, Fifth, and Eleventh—have adopted a stringent standard of review that requires the agency to satisfy a three-pronged test that focuses on "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances."[39]

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[34] EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1535 (2d Cir. 1996) ("If the defendant refuses the invitation to conciliate . . . , the EEOC need not pursue conciliation and may proceed to litigate the question of the employer's liability for the alleged violations."); LIVINGSTON, *supra* note 20, at 432.

[35] *See* § 2000e-5(f)(1). The charging party may file suit in federal court against his employer if the EEOC dismisses the charge or if the EEOC, within 180 days of the filing of the charge, has not conciliated the charge or filed suit itself. *See id.*

[36] EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1260 (11th Cir. 2003).

[37] EEOC v. Alia Corp., 842 F. Supp. 2d 1243, 1255 (E.D. Cal. 2012) (quoting EEOC v. Timeless Invs., Inc., 734 F. Supp. 2d 1035, 1052 (E.D. Cal. 2010)). This circuit split may grow even more divisive if the Ninth Circuit, given the recent attention its district courts have given to the matter, issues its opinion on which standard should govern. *See id.* at 1255–56; EEOC v. Evans Fruit Co., 872 F. Supp. 2d 1107, 1114 (E.D. Wash. 2012). If, of course, the Ninth Circuit adopts the deferential standard of review, which many of its district courts have done, then there would be an even division among six circuits between the two standards of review. *But see* EEOC v. Cal. Psychiatric Transitions, Inc., 725 F. Supp. 2d 1100, 1114–15 (E.D. Cal. 2010) (integrating both standards of review, suggesting that although the EEOC need only make a good faith effort at conciliation as required by the deferential standard, the content of that good faith effort conforms to the three-pronged test required by the stringent standard).

[38] EEOC v. Keco Indus., 748 F.2d 1097, 1102 (6th Cir. 1984); *accord* EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978).

[39] *Asplundh*, 340 F.3d at 1259 (quoting EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. Unit A Feb. 1981)) (internal quotation mark omitted); *accord* EEOC v. Agro Distribution LLC, 555 F.3d 462, 468 (5th Cir. 2009); *Johnson & Higgins*, 91 F.3d at 1534; EEOC v. Sears, Roebuck & Co., 650 F.2d 14, 18–19 (2d Cir. 1981).

A. The Deferential Standard of Review

Two circuits—the Sixth and Tenth—have adopted a deferential standard of review that requires the EEOC to "make a good faith effort to conciliate the claim" at issue.[40]

The Sixth Circuit, in *EEOC v. Keco Industries, Inc.*, explained that the deferential standard turns not on whether the reviewing court is satisfied with the EEOC's attempt to conciliate, but, rather, on whether the EEOC made a good faith effort to conciliate.[41] In that case, a female employee filed a charge of discrimination with the EEOC, alleging that her employer, Keco Industries, Inc., discriminated against her because of her sex.[42] The EEOC investigated the charge and determined that there was reasonable cause to believe the charge was true, finding wage differentials and job segregation between female and male employees.[43] For that reason, the EEOC prepared a proposed conciliation agreement that addressed these findings, requiring Keco to make all jobs available to both female and male employees unless gender proved a legitimate qualification for a particular position.[44] Keco rejected the agreement.[45] The court held that the agency had made a good faith effort to conciliate, reasoning that, first, the reviewing court should not inquire into the content of the agency's efforts and, second, the agency need not make any further efforts once an employer rejects its initial efforts.[46] On the former point, the court elaborated that "[t]he form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review."[47] According to the court, a reviewing court "should only determine whether the EEOC made an *attempt* at conciliation."[48]

The Tenth Circuit has further explained the deferential standard.[49] In *EEOC v. Zia Co.*, the court emphasized that "a [reviewing] court should not examine the details of the offers and counteroffers between the parties, nor impose its

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40 *Keco*, 748 F.2d at 1102; *accord Zia Co.*, 582 F.2d at 533.
41 748 F.2d at 1102.
42 *Id.* at 1098.
43 *See id.* at 1101.
44 *Id.*
45 *Id.*
46 *See id.* at 1102.
47 *Id.*
48 *Id.* (emphasis added).
49 *See* EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978).

notions of what the [conciliation] agreement should provide."[50] In *Zia*, the EEOC investigated charges that Zia discriminated against its employees on the basis of national origin.[51] Once the agency substantiated the charges, it invited Zia to participate in conciliation discussions.[52] Conciliation, however, proved difficult due to Zia's contractual relationship with the Energy Research Development Agency (ERDA), which required Zia to obtain the ERDA's approval of any conciliation agreement.[53] The parties disagreed over boilerplate language in the proposed conciliation agreement about the consequences of failure to comply with the agreement's terms.[54] Eventually, counsel for the ERDA asked its Office of General Counsel in Washington, D.C., for aid in convincing the EEOC in Washington, D.C., to omit the contested language.[55] The Office of General Counsel failed to reach agreement with the EEOC in D.C. and recommended signing the conciliation agreement notwithstanding the contested language.[56] By the time the ERDA gave Zia permission to sign the agreement, the EEOC's Denver Regional Litigation Center was already considering whether to bring suit and though it later authorized the litigation,[57] it did offer to continue pursuing conciliatory efforts.[58] Conciliation failed when the EEOC's trial attorney expanded the scope of the negotiation and the litigation.[59] The court held that the EEOC, at the regional level, failed to make a good faith effort to conciliate the claims at issue because the agency's regional litigation officials acted inappropriately for three reasons.[60] First, at the time referral of the case was sent to the Denver Regional Litigation Center, the officials knew, or should have known, that the ERDA's Office of General Counsel and the EEOC in D.C. were engaged in negotiations.[61] Second, the officials should have reasonably expected that, given more time, conflict over the contested boilerplate language would have

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50 *Id.*

51 *Id.* at 529.

52 *Id.*

53 *Id.* at 530. The contract provided that the ERDA would pay Zia any back pay settlement. *Id.*

54 *See id.*

55 *See id.* at 531. The ERDA had previously communicated with the EEOC's district office in Albuquerque. *See id.*

56 *See id.*

57 *Id.*

58 *Id.*

59 *Id.* at 532.

60 *See id.* at 534.

61 *Id.*

been resolved.[62] Finally, the officials should not have escalated their demands without new meetings and sufficient time to allow the ERDA to respond.[63]

The *Zia* case illustrates two relevant points. First, it illustrates that "deference is not abdication."[64] Even though the Tenth Circuit applied the deferential standard of review to the EEOC's conciliatory efforts, it nonetheless could—and did—find that the EEOC had not satisfied its statutory duty to conciliate.[65] Second, and more importantly, the case illustrates that even if a reviewing court does not defer to the agency, the justification for not deferring rests upon concerns with the *process* of conciliation and not the *substance* of conciliation.[66] Part III will discuss this distinction between the process and substance of conciliation in more detail.

B. The Stringent Standard of Review

In contrast to the deferential standard of review, the stringent standard requires the EEOC to satisfy a three-pronged test, which focuses on "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances" to assess whether it has complied with its statutory duty to conciliate.[67] More specifically, the EEOC must "(1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer."[68] Three circuits—the Second, Fifth, and Eleventh—have adopted the stringent standard of review.[69]

The Second Circuit applied the stringent standard of review in *EEOC v. Johnson & Higgins, Inc.*[70] In that case, the EEOC found reasonable cause to

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62 *Id.*

63 *Id.*

64 EEOC v. Arabian Am. Oil Co. 499 U.S. 244, 260 (1991) (Scalia, J., concurring).

65 *See Zia*, 582 F.2d at 534.

66 *See id.* at 533.

67 EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. Unit A Feb. 1981).

68 EEOC v. Agro Distribution LLC, 555 F.3d 462, 468 (5th Cir. 2009).

69 *See id.* at 468; EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1259 (11th Cir. 2003); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1534 (2d Cir. 1996); EEOC v. Sears, Roebuck & Co., 650 F.2d 14, 18–19 (2d Cir. 1981); *Klingler*, 636 F.2d at 107.

70 *See* 91 F.3d at 1534–35. Although the EEOC brought suit against the corporation to enforce not Title VII of the Civil Rights Act of 1964, but the Age Discrimination in Employment Act of 1967 (ADEA), *see id.*, Congress has authorized the EEOC to exercise the same enforcement power the agency has under Title VII when enforcing the ADEA's prohibitions against employment discrimination on the basis of age, *see* 29 U.S.C. § 626(b) (2012) (providing that the EEOC must "attempt to eliminate the discriminatory practice or

believe that Johnson & Higgins, Inc., which implemented a mandatory retirement policy that forced its directors to retire by age sixty-two, discriminated on the basis of age.[71] The agency invited the company to participate in conciliation, but the company instead insisted that the agency reconsider its position.[72] In response, the agency outlined its procedures for conciliation and requested that the company produce records of its former directors' salaries.[73] The company again insisted that the agency reconsider and, consequently, the EEOC brought suit.[74] On appeal, the company argued that the EEOC failed to comply with its statutory duty to conciliate.[75] The Second Circuit disagreed, finding that the agency satisfied the three-pronged test: (1) the EEOC found reasonable cause for its determination that the charge against the company was true, and it informed the company of its grounds for cause; (2) it invited the company to participate in conciliation; and (3) it reasonably responded to the company's unreasonable persistence in arguing that it did not violate the law.[76] The court stated that, in this case, the EEOC need not have done more than it did and held that the agency had satisfied its statutory duty to conciliate.[77]

Johnson & Higgins, then, is to the stringent standard of review what *Zia* is to the deferential standard. Although the Second Circuit applied the stringent standard of review to the EEOC's conciliatory efforts, it nonetheless could—and did—find that the agency satisfied its statutory duty to conciliate.[78] However, the employer's unreasonable persistence in arguing that it did not violate the law heavily influenced the court's decision, suggesting perhaps that the Second Circuit did not want to punish the agency for the employer's recalcitrance.[79]

The Fifth Circuit, in *EEOC v. Klingler Electric Corp.*, highlighted the differences between application of the stringent standard of review and the

practices alleged, and to effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion" before it may proceed to litigation). The analysis of the EEOC's duty to conciliate is the same, then, under both statutes.

71 *See Johnson & Higgins*, 91 F.3d at 1532–33.

72 *Id.* at 1533.

73 *Id.*

74 *See id.*

75 *Id.* at 1534.

76 *See id.* at 1535.

77 *Id.*

78 *See id.*

79 *See id.*

deferential.[80] In that case, after investigating a charge of employment discrimination filed against Klingler and determining that there was reasonable cause to believe the charge was true, the EEOC initiated the conciliation process.[81] During conciliation, the agency sent Klingler an unsigned, proposed conciliation agreement, which left an item blank because the agency needed Klingler to fill it with the appropriate information.[82] Klingler filled in the blank, signed the agreement, and returned it to the EEOC.[83] However, the agency did not approve of Klingler's response to the item left blank.[84] The EEOC made a counterproposal and, after Klingler "did not act upon the proposal,"[85] the EEOC announced that conciliation had failed.[86] The Fifth Circuit, on the issue of whether the agency satisfied its statutory duty to conciliate, criticized the lower court's analysis of the EEOC's conciliation efforts because that court essentially applied the deferential standard of review.[87] The lower court never ascertained what Klingler wrote in the item left blank, it never ascertained what the EEOC demanded in its counterproposal, and it never ascertained how Klingler responded to the counterproposal.[88] The Fifth Circuit reasoned that the lower court could not "make a proper evaluation without a more thorough inquiry into such relevant facts of the conciliation negotiations."[89] According to the Fifth Circuit, then, the stringent standard of review, unlike the deferential standard, essentially requires the reviewing court to inquire about the "form and substance" of conciliation and to "examine the details of the offers and counteroffers between the parties."[90]

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80 *See* 636 F.2d 104, 107 (5th Cir. Unit A Feb. 1981).

81 *Id.* at 106.

82 *Id.*

83 *Id.*

84 *See id.*

85 *Id.* (internal quotation marks omitted). The court emphasized that the record merely reflected that "Klingler 'did not act upon the proposal.'" *See id.*

86 *Id.*

87 *See id.* at 107 ("The district court apparently evaluated the EEOC's conciliation effort without looking beyond the face of the proposed conciliation agreement signed by Klingler.").

88 *Id.*

89 *Id.*

90 *Compare id.* ("It was impossible . . . to make a proper evaluation without a more thorough inquiry into [the] relevant facts . . . ."), *with* EEOC v. Keco Indus., 748 F.2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC . . . ."), *and* EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978) ("[A] court should not examine the details of the offers and counteroffers between the parties . . . .").

Finally, returning to the case with which this Comment began, the Eleventh Circuit applied the stringent standard of review in *Asplundh* and held that the agency had not satisfied its statutory duty to conciliate.[91] Recall the dramatic facts of that case—Lewis alleged that he suffered racial discrimination when another man crafted a noose from a piece of rope and placed it around Lewis's neck.[92] Although the EEOC investigated Lewis's claim for a lengthy period of thirty-two months, once it finally decided that it wished to proceed to the conciliatory phase, the agency sprinted forward, trampling upon Asplundh with arbitrarily abrupt deadlines, unreasonably extensive demands, and prematurely ceased negotiations.[93] Specifically, the agency required Asplundh to respond to its proposed conciliation agreement within twelve business days, the conciliation agreement itself contained impracticable demands, and the agency refused to reopen negotiations even though Asplundh made clear that it had retained counsel and wished to settle the case.[94] Reviewing these facts, the Eleventh Circuit flatly declared that "it cannot be said that the EEOC acted in good faith. In fact, its conduct 'smacks more of coercion than of conciliation.'"[95]

III. A CRITIQUE OF THE DEFERENTIAL STANDARD OF REVIEW

The deferential standard of review is not the proper standard for reviewing whether the EEOC has satisfied its statutory duty to conciliate. Because the standard allows a reviewing court to examine only the process and not the content of conciliation, the standard suffers from three shortcomings that allow the agency to abuse its statutory duty to conciliate by circumventing meaningful conciliatory efforts altogether. This Part discusses these three shortcomings in turn.

First, because the deferential standard allows a reviewing court to examine only the process and not the content of conciliation, the court's analysis of the EEOC's conciliatory efforts is necessarily incomplete.[96] That is, if the "form

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91 *See* EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1261 (11th Cir. 2003).

92 *Id.* at 1257.

93 *See id.* at 1258, 1260. The court imputed a self-interested motive to the EEOC's haste in filing—the case, after all, involved "lurid" allegations of racial discrimination that would draw media attention to the agency, and anything said or done during conciliation, unlike litigation, cannot be made public. *See id.* at 1261 & n.3; *see also* 42 U.S.C. § 2000e-5(b) (2006).

94 *See Asplundh*, 340 F.3d at 1258–61.

95 *Id.* at 1260 (quoting EEOC v. Pet, Inc., Funsten Nut Div., 612 F.2d 1001, 1002 (5th Cir. 1980)).

96 The deferential standard of review implicitly requires the reviewing court to bifurcate the process and content of conciliation before it may examine only the former and not the latter. This Part sets aside the

and substance"[97] of conciliation and the "details of the offers and counteroffers between the parties"[98] are beyond judicial review, any analysis of whether the EEOC has made a good faith effort to conciliate with an employer cannot be a complete one.

Consider, for instance, how a reviewing court would have applied the deferential standard of review in *Keco* with a minor factual difference in that case. Recall that in *Keco*, the Sixth Circuit mentioned an excerpt from the proposed conciliation agreement between Keco and the EEOC,[99] but it did not meaningfully examine the excerpt when it decided in favor of the agency.[100] Suppose that the excerpt contained impracticable and unreasonable demands similar to those the EEOC made in *Asplundh*.[101] Under the deferential standard, they would amount to the substance and details of conciliation and, as a consequence, they would remain beyond judicial review.[102] The court would still have found for the EEOC, and the decision, given the change in facts, would be—or should be—troubling. To put the point another way, even if the EEOC were to speak with an employer often, even if it were to meet with an employer often, and even if it were to amend proposed conciliation agreements often, none of these outward contributions to the process of conciliation matter if the discussions, meetings, and agreements contained content that did not evidence the agency's genuine willingness to further conciliation with the employer. If the agency may give the appearance of an adequate process of conciliation while simultaneously impeding that process with unreasonable substance and details, then the agency has the means to evade fulfilling its statutory duty to conciliate.

Second, because the deferential standard allows a reviewing court to examine only the process and not the content of conciliation, the standard creates unintended incentives for the EEOC that run contrary to the heart of Title VII.[103] Consider again the hypothetical factual difference in *Keco*. Even if the proposed conciliation agreement contained impracticable and unreasonable demands, the court could rule in favor of the EEOC not only because the

difficulties inherent in bifurcation, another problem with the deferential standard, and assumes instead that the court has determined how and where to draw the line between process and content.

97 EEOC v. Keco Indus., 748 F.2d 1097, 1102 (6th Cir. 1984).

98 EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978).

99 *See* 748 F.2d at 1101.

100 *See id.* at 1101–02.

101 *See* EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1260 (11th Cir. 2003).

102 *See Keco*, 748 F.2d at 1102.

103 *See Asplundh*, 340 F.3d at 1260.

demands amount to the substance and details of conciliation, but also because Keco would reject the proposed agreement and, notably, rejection is a matter of process, not content.[104] Once an employer rejects a proposed agreement, the EEOC need not attempt further conciliation efforts and may proceed immediately to litigation.[105] To rely on the deferential standard, then, is to give the EEOC an incentive not only to draft proposed conciliation agreements with objectionable demands insulated from judicial review, a point related to the first shortcoming of the deferential standard, but also to give the agency an incentive to draft such agreements in an effort to encourage their rejection and thereby circumvent meaningful conciliatory efforts. To argue that these unintended incentives are problematic assumes, of course, that the EEOC prefers to litigate rather than conciliate. That assumption is grounded in the EEOC's *Strategic Plan for Fiscal Years 2012–2016*, which, as discussed in the Introduction, describes the agency's intent to maintain a certain number of systemic discrimination cases on its litigation docket.[106]

Third, even if examination of the process of conciliation provided sufficient protection from abuse, the depth of examination under the deferential standard is too shallow to prove significant. In explaining the deferential standard, the Sixth Circuit in *Keco* asserted that the reviewing court "should only determine whether the EEOC made an *attempt* at conciliation."[107] Reading the words of that opinion strictly, the standard arguably appears to turn not on whether the EEOC made a good faith effort to conciliate, but on whether it made any effort at all.[108] Consider once more the hypothetical factual difference in *Keco* and, this time, suppose further that the written proposed conciliation agreement with objectionable demands was the only communication between the EEOC and Keco during conciliation. If the EEOC need only make an attempt at conciliation, then sending such a proposed agreement, without more, would arguably satisfy its statutory duty to conciliate.

To the extent the deferential standard of review has been explained and applied by the Sixth and the Tenth Circuits, it cannot be the proper standard for

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104 *See Keco*, 748 F.2d at 1101–02. If Keco rejected the proposed conciliation agreement in the actual case, it would likely reject a proposed agreement like the one in *Asplundh*. *See id.* at 1101; *Asplundh*, 340 F.3d at 1258.

105 *Keco*, 748 F.2d at 1101–02.

106 EEOC, *supra* note 13, at 12, 18–19.

107 748 F.2d at 1102 (emphasis added).

108 *See id.*; *see also* EEOC v. Swissport Fueling, Inc., 916 F. Supp. 2d 1005, 1037 (D. Ariz. 2013) ("[T]he Sixth and Tenth Circuits have taken a more deferential approach that looks only at the EEOC's attempt to conciliate without delving deeply into the substance of that attempt.").

reviewing whether the EEOC has satisfied its statutory duty to conciliate. Because the standard allows a reviewing court to examine only the process and not the content of conciliation, it suffers from the three shortcomings discussed, which allow the agency to abuse its statutory duty to conciliate by circumventing meaningful conciliatory efforts altogether.

IV. THE STRINGENT STANDARD OF REVIEW IS THE PROPER STANDARD

The stringent standard of review is the proper standard for reviewing whether the EEOC has satisfied its statutory duty to conciliate. As discussed in Part II, it requires the EEOC to satisfy a three-pronged test that focuses on "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances."[109] The three-pronged test requires the EEOC to "(1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer."[110]

The stringent standard of review is the proper standard for two reasons: (1) it has a strength the deferential standard lacks—it requires the reviewing court to examine both the process and content of conciliation, and (2) it is consistent with the text, purpose, legislative history, and jurisprudence of Title VII. As Part II discussed how the stringent standard of review requires the reviewing court to examine both the process and content of conciliation, this Part argues that adopting the standard is consistent with the text, purpose, legislative history, and jurisprudence of Title VII.

A. The Text of Title VII of the Civil Rights Act of 1964 Is Consistent with Adopting the Stringent Standard of Review

Although the plain language of Title VII does not identify any standard for reviewing whether the EEOC has satisfied its statutory duty to conciliate,[111] the statutory text is nonetheless consistent with adopting the stringent standard

[109] EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. Unit A Feb. 1981).
[110] EEOC v. Agro Distribution LLC, 555 F.3d 462, 468 (5th Cir. 2009).
[111] EEOC v. Hometown Buffet, Inc., 481 F. Supp. 2d 1110, 1113 (S.D. Cal. 2007).

of review already adopted by the Second, Fifth, and Eleventh Circuit courts of appeals.[112]

The statutory text is consistent with adopting the stringent standard of review because it noticeably fails to state that any part of the EEOC's congressionally granted authority is beyond judicial review.[113] First, in addressing a charge of discrimination, the statute provides that the EEOC must serve notice of the charge on the employer, and it permits the agency to determine the substance and form of the notice—the charge "shall contain such information and be in such form as the Commission requires."[114] Second, in addressing the investigation of a charge, the statute allows the agency to determine whether to dismiss or pursue a charge of discrimination—"[i]f the Commission determines . . . that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge,"[115] but if, on the other hand, "the Commission determines . . . that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[116] Finally, in addressing the conciliation agreement that may follow a charge, the statute provides the EEOC with the authority to deny or approve a conciliation agreement—if the agency cannot secure "a conciliation agreement acceptable to the Commission," the agency may then initiate suit against the employer.[117]

Now, one may argue that analysis of the statutory treatment of the EEOC's administrative obligations—its duty to notify employers of the charges against them, its duty to investigate charges, and its duty to conciliate charges—appears to support adopting the deferential standard of review rather than the stringent standard. Analysis suggests that, upon reading the relevant provisions collectively, Congress vested the agency with substantial authority to act in its discretion such that a reviewing court should not interfere with that discretion

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112 *See Agro*, 555 F.3d at 468; EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1259 (11th Cir. 2003); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1534 (2d Cir. 1996); EEOC v. Sears, Roebuck & Co., 650 F.2d 14, 18–19 (2d Cir. 1981); *Klingler*, 636 F.2d at 107.

113 *See* 42 U.S.C. § 2000e-5 (2006).

114 *Id.* § 2000e-5(b).

115 *Id.*

116 *Id.*

117 *Id.* § 2000e-5(f)(1). The conciliation agreement must be "acceptable to the Commission" whether the employer is "a government, governmental agency, or political subdivision." *Id.* The only difference in the case of an employer that is "a government, governmental agency, or political subdivision" is the agency's duty to refer the case to the Attorney General, who may choose whether to file a case against the respondent in the appropriate district court. *Id.*

unless the agency fails to act in good faith.[118] The statutory text, after all, seems to focus on what the EEOC—and not what any other entity—requires, determines, and accepts.[119] It grants the agency the power to decide when to proceed to each step in the administrative process and when, moreover, to move from the administrative process into a courtroom.[120]

However, arguing that the EEOC retains congressionally granted authority to perform the administrative tasks necessary to prevent unlawful employment practices, and arguing that, in particular, the EEOC retains authority to accept or deny a conciliation agreement, does not significantly contribute to the discussion about whether the EEOC has satisfied its statutory duty to conciliate. First, although the statute permits the agency to determine the substance and form of notice, it simultaneously requires the agency to include the date, place, and circumstances of the alleged discrimination within the notice.[121] Second, although the statute allows the agency to determine whether there is reasonable cause to believe the charge of discrimination is true, the agency's authority remains cabined by the mandates of reasonableness.[122] As discussed in Part III, the deferential standard of review theoretically allows the EEOC to behave unreasonably and, thus, that standard is inconsistent with the statutory text.[123] Finally, although the statute allows the agency to determine whether a conciliation agreement is acceptable,[124] that certainly cannot mean that the agency may include whatever it pleases within the agreement without the check of judicial review.[125]

In the absence of plain language that suggests that the EEOC's congressionally granted authority is beyond judicial review, and in a statutory scheme that suggests that the EEOC cannot rationally retain authority to impose unreasonable demands upon employers, the text of Title VII is consistent with adopting the stringent standard of review.

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118 *See id.* § 2000e-5(b). In addressing the EEOC's authority to issue regulations, the statute also allows the agency "to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." *Id.* § 2000e-12(a).

119 *See id.* § 2000e-5(b), (f)(1).

120 *See id.* § 2000e-5(f)(1).

121 *See id.* § 2000e-5(b).

122 *See id.*

123 *See supra* Part III.

124 *See* § 2000e-5(f)(1).

125 *See supra* Part III.

B. The Purpose of Title VII of the Civil Rights Act of 1964 Is Consistent with Adopting the Stringent Standard of Review

The purpose of Title VII is to prohibit employers from discriminating on the basis of race, color, religion, sex, or national origin.[126] To effect this purpose, Title VII imposes a framework that encourages conciliation in lieu of litigation.[127] Similarly, to effect the purpose of Title VII, the stringent standard of review imposes a framework—its three-pronged test—that encourages conciliation.[128] For that reason, the purpose of Title VII is consistent with adopting the stringent standard of review.

Title VII's framework encourages conciliation through its many provisions on conciliation including, for example, the statute's confidentiality provisions.[129] Congress foresaw that confidentiality would prove a critical issue for both the EEOC and employers during the conciliatory process.[130] Each may have valid reasons for avoiding conciliation for fear that anything revealed would then become available for public disclosure.[131] Therefore, to encourage conciliation, Title VII provides that "[n]othing said or done during and as a part of [the conciliatory process] may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned."[132]

The stringent standard of review similarly imposes a framework that encourages conciliation in the form of its three-pronged test. The first prong, which requires the EEOC to explain to the employer the reasonable cause for its belief that the employer violated Title VII,[133] encourages conciliation by

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126 *See* § 2000e-2(a)–(d).

127 *See id.* § 2000e-5(b), (f)(1); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [the purpose of Title VII]."). Title VII, however, does not contemplate that the agency should never pursue litigation. *See* § 2000e-5(f)(1). Indeed, as a matter of institutional organization, the agency's General Counsel independently directs the Office of the General Counsel, which implements the agency's litigation program. *See* 2 BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW ch. 26.I.A (5th ed. 2012). If all cases were to conciliate, there would be no need for the litigation program at all. And although, arguably, EEOC litigators have perverse incentives to ensure conciliation fails, that issue is beyond the scope of this Comment.

128 *See* EEOC v. Agro Distribution LLC, 555 F.3d 462, 468 (5th Cir. 2009).

129 *See* § 2000e-5(b).

130 *See* LIVINGSTON, *supra* note 20, at 441.

131 *See id.*

132 § 2000e-5(b). Moreover, the statute provides consequences for violating the confidentiality provisions—"[a]ny person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both." *Id.*

133 *Agro*, 555 F.3d at 468.

providing a foundation of shared information from which the parties may begin negotiations. The second prong, which requires the EEOC to offer the employer "an opportunity for voluntary compliance,"[134] encourages conciliation by allowing the employer to avoid potentially costly litigation and public exposure.[135] The third prong, which requires the EEOC to respond reasonably and flexibly "to the reasonable attitudes of the employer,"[136] encourages conciliation by serving as a reminder that a judicial check exists for both the EEOC and the employer.[137]

Now if Title VII truly aims to impose a framework that encourages conciliation in lieu of litigation, one might wonder why Congress vested the EEOC with the authority to bring suit at all. In originally enacting Title VII, Congress hoped that employers would comply with the statute voluntarily.[138] That hope, however, proved far too optimistic.[139] In the EEOC's fifth annual report, for fiscal year 1970, the agency determined that it successfully conciliated only 342 cases, which amounted to less than fifteen percent of the cases it designated for conciliation.[140] Whatever the reason for the EEOC's failure to conciliate a significant number of cases,[141] Congress ultimately chose to strengthen the agency's administrative and enforcement authority by enacting the Equal Employment Opportunity Act of 1972 to amend Title VII.[142] In enacting the amendment, however, Congress did not abandon its hope that the EEOC and employers would engage in successful conciliation, evidenced by Congress's retention of the EEOC's statutory duty to conciliate.[143] Thus, the agency's duty to conciliate is not harmed but helped by its authority to bring suit—Congress realized that the inability of the EEOC to

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134 *Id.*

135 *See* LIVINGSTON, *supra* note 20, at 441. To be sure, the second prong encourages settlement to the extent that the employer believes the charge against it has merit. *See id.*

136 *Agro*, 555 F.3d at 468.

137 *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44–45 (1974). Title VII provides the EEOC with only indirect enforcement authority. *See id.* In other words, the agency may bring suit, but it cannot adjudicate claims or impose administrative sanctions. *Id.* Rather, the federal courts have direct enforcement authority for ensuring compliance with Title VII. *See id.*

138 EEOC v. Shell Oil Co., 466 U.S. 54, 77 (1984).

139 *Id.*

140 118 CONG. REC. 3804 (1972) (statement of Sen. James Allen).

141 Senator James Browning Allen of Alabama, one of the Senators most outspoken in his criticism of the EEOC, argued that the agency's dismal conciliation record was due to its own inadequacies. *See id.* During the debates on the Equal Employment Opportunity Act of 1972, he insisted "that only a very low percentage of conciliation failures with Alabama employers is due to the latter's recalcitrance. . . . [C]onciliation will work, given a fair opportunity, if, and when, the EEOC seriously and sincerely 'gets with it.'" *Id.* at 3804–05.

142 *See Shell Oil*, 466 U.S. at 61–63.

143 *See* 42 U.S.C. § 2000e-5(b)(2006).

enforce Title VII was a "serious defect," making the agency nothing more than a "toothless tiger."[144] To wield potential litigation before an employer is to remind it that successful conciliation is in its interest.

The purpose of Title VII is consistent with adopting the stringent standard of review, which encourages the EEOC and employers to reach successful conciliation.

C. The Legislative History of Title VII of the Civil Rights Act of 1964 Is Consistent with Adopting the Stringent Standard of Review

The legislative history of Title VII demonstrates congressional distrust of the EEOC and the consequent need for meaningful judicial review of the agency's actions. This section discusses two prominent debates in the legislative history of Title VII: (1) the debate on whether to grant the EEOC cease-and-desist authority and (2) the debate on whether to retain statutory language that would preclude a court from reviewing the agency's determination that a conciliation agreement is unacceptable. The outcome of both debates is consistent with adopting the stringent standard of review.

The debate on whether to grant the EEOC cease-and-desist authority dates back to the agency's beginnings.[145] Prior to passage of the Civil Rights Act of 1964, Congress initially modeled the agency after the National Labor Relations Board, which did have cease-and-desist authority.[146] However, Republicans in Congress vehemently resisted granting the EEOC that authority and, ultimately, they prevailed.[147] Then, prior to passage of the Equal Employment Opportunity Act of 1972, the debate resurfaced and, again, Republicans in Congress resisted granting the EEOC cease-and-desist authority and, again, they prevailed.[148] Because the agency had "attained an image as an advocate for civil rights," Congress was wary of allowing a mission-based agency,

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144 *See* Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 677 (2005) (internal quotation marks omitted).

145 *See* Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 64–68 (1964) (discussing the legislative history of the Civil Rights Act of 1964); Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 59.

146 *See* Berg, *supra* note 145, at 64–65 (discussing the legislative history of the Civil Rights Act of 1964); White, *supra* note 145, at 59.

147 *See* Berg, *supra* note 145, at 65–67.

148 *See* LIVINGSTON, *supra* note 20, at 10.

which could become overzealous in the pursuit of its goals, the power to act as "investigator, prosecutor, and judge."[149]

The debate on whether to retain statutory language that would preclude a court from reviewing the agency's determination that a conciliation agreement is unacceptable began prior to passage of the Equal Employment Opportunity Act of 1972.[150] The contentious statutory language provided that "[i]f the Commission determines after attempting to secure voluntary compliance under subsection (b) that it is unable to secure from the respondent a conciliation agreement acceptable to the Commission, [that] determination shall not be reviewable in any court."[151]

Perhaps the provision's harshest critic was Senator Samuel James Ervin, Jr., of North Carolina, who particularly opposed the clause that would insulate the agency's determination on whether a conciliation agreement was acceptable from judicial review.[152] He argued that the clause would give "five bureaucrats, who are elected by nobody to do anything and who are responsible to nobody on the face of the earth, powers greater than those that the courts and the laws of the United States impose on the office of President."[153] In his opinion, the clause would give the EEOC "absolute power, with no review except the sort of kangaroo proceeding imposed on the courts, which are denied the right to find according to what the evidence states is probably true."[154] Elaborating on Senator Ervin's distrust of the EEOC and the need for meaningful judicial review, Senator James Browning Allen of Alabama argued that the clause was "typical of the arrogance of the Commission,"[155] and that, instead of conferring additional authority to the EEOC, Congress should "sharply remind the Commission of its statutory obligation to attempt to conciliate every appropriate case."[156]

Senator Ervin and Senator Allen's objections highlighted the danger of granting the EEOC the authority to determine whether a conciliation agreement is acceptable in the absence of judicial review. As passed, their

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149 White, *supra* note 145, at 65 (internal quotation marks omitted).

150 *See* 118 CONG. REC. 3799–800 (1972) (statement of Sen. Samuel Ervin).

151 *Id.* at 3799.

152 *See id.* at 3799–800.

153 *Id.* at 3799. The EEOC is composed of five members, who are appointed by the President with the advice and consent of the Senate for a term of five years each. 42 U.S.C. § 2000e-4(a) (2006).

154 118 CONG. REC. 3800 (1972) (statement of Sen. Samuel Ervin).

155 *Id.* at 3803 (statement of Sen. James Allen).

156 *Id*. at 3805.

objections prevailed—the Equal Employment Opportunity Act of 1972 did not incorporate the clause on immunity from judicial review.[157] The senatorial debates, then, support the stringent standard of review, which imposes requirements upon the agency that address congressional distrust of the agency's judgment and the need for meaningful judicial review.

One may argue that, on the contrary, the legislative history supports the deferential standard of review. In the same debate, the Senate attempted to craft the language of the amending statute to create a standard of conciliation that depended not on approval by the EEOC, but instead on existing law.[158] As mentioned, a prior draft of Title VII included the following provision: "If the Commission determines after attempting to secure voluntary compliance under subsection (b) that it is unable to secure from the respondent a conciliation agreement *acceptable to the Commission* . . . ."[159] Senator Ervin argued that the provision should instead read as follows: "If the Commission determines that it is unable to secure from the respondent a conciliation agreement *complying with the law* . . . ."[160] He adamantly emphasized that if the provision did not change, the statute would promote the capricious policies of the EEOC rather than justice—assuming, of course, that the two are not one and the same.[161] Yet, as passed, the provision reads almost identical to the one Senator Ervin declared subject to the "whims and caprices of the Commission."[162] That is, as passed, the provision reflects congressional support of deference to the EEOC notwithstanding the senatorial arguments that stressed the possibility of agency abuse.

This argument would have been convincing had the clause "shall not be reviewable in any court" remained. Even if the agency engages in abusive conciliatory efforts like those in *Asplundh*,[163] the agency cannot act merely according to its "whims and caprices" without facing sanctions by the courts.

The legislative history of Title VII is consistent with adopting the stringent standard of review. The outcomes of two prominent debates in the legislative history of the statute demonstrate congressional distrust of the EEOC and the consequent need for meaningful judicial review of the agency's actions, which

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157 *See* § 2000e.
158 *See* 118 CONG. REC. 3799 (1972) (statement of Sen. Samuel Ervin).
159 *Id.* (emphasis added).
160 *Id.* (emphasis added).
161 *See id.*
162 *Id.*; *see* § 2000e-5(f)(1).
163 *See* EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1260 (11th Cir. 2003).

the stringent standard provides by requiring a reviewing court to examine both the process and content of conciliation.

D. The Supreme Court's Jurisprudence on Deference to the EEOC Is Consistent with Adopting the Stringent Standard of Review

Just as the text, purpose, and legislative history of Title VII are consistent with adopting the stringent standard of review, so, too, is the Supreme Court's jurisprudence on deference to the EEOC.

Although perhaps counterintuitive to argue that adopting the stringent standard of review, rather than the deferential, is consistent with the Court's jurisprudence on deference to the EEOC, critical is the fact that the Court issues opinions along a deference "continuum."[164] This continuum ranges from the antideference regime, which begins with a presumption against deferring to an agency's interpretation of a statute as, for example, in cases involving penal statutes, to the strongest deference regime, which, in contrast, begins with a presumption for deferring as in cases involving military and foreign policy.[165] In the modern administrative state, where Congress delegates legislative power to agencies,[166] the bulk of federal law derives from agency rules, guidelines, opinions, and manuals.[167] Consequently, courts frequently confront the deference continuum, asking whether to defer to agencies at all and, if so, how much deference to confer.[168]

Now there is an important distinction to bear in mind before turning to this section's argument—for courts to apply a deference regime to an agency's interpretation of a statute is not necessarily to defer to the agency.[169] A deference regime is merely a framework that courts use to evaluate an

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[164] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098 (2008).

[165] *See id.* at 1098–100; *see also* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1737 (2010). Eskridge and Baer identify seven deference regimes, but this section will focus on the regimes crafted in *Chevron* and *Skidmore* because those are the regimes most relevant for the EEOC. *See* Eskridge & Baer, *supra* note 164, at 1098–100. Most of the other deference regimes Eskridge and Baer identify apply only in narrow circumstances. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1246 n.61 (2007).

[166] See Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1537–39 (1999), for a discussion on the problem of whether Congress may delegate legislative power.

[167] Raso & Eskridge, *supra* note 165, at 1730.

[168] *Id.*

[169] *See id.* at 1736.

agency's interpretation.[170] Theoretically, then, when a court applies a highly deferential regime such as that the Court crafted in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[171] it will uphold a larger number of agency interpretations than it would if it were to apply a less deferential regime such as that in *Skidmore v. Swift & Co.*[172]

This section argues that although the Court's jurisprudence on deference to agencies is unpredictable,[173] the Court nonetheless exhibits a pattern of conferring considerably less deference to the EEOC than it does to other agencies and, therefore, its jurisprudence on deference to the EEOC is consistent with adopting the stringent standard of review.[174]

1. The Court's Jurisprudence on Deference to Administrative Agencies

The Court's jurisprudence on deference to agencies is unpredictable—the Court treats the deference regimes along the deference continuum as canons of statutory construction and not as binding precedents.[175] Treating the deference regimes as canons allows the Court to apply the regimes periodically rather than systematically such that the regimes themselves effectively become mere factors the Court evaluates alongside many other factors.[176] These other factors may include the ideologies of each Justice, the Court's expressed policies underlying deference, and the preferences of Congress and the President.[177]

Yet even if the Court applies the deference regimes along the continuum unpredictably, a brief review of a couple of those regimes is necessary to appreciate the anomalous pattern of lesser deference that emerges for the EEOC. Specifically, this subsection will focus on two positions on the continuum, namely, those occupied by *Chevron* and *Skidmore*.[178]

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170 *Id.*

171 *See* 467 U.S. 837, 843 (1984).

172 *See* 323 U.S. 134, 139–40 (1944); Raso & Eskridge, *supra* note 165, at 1736.

173 *See* Raso & Eskridge, *supra* note 165, at 1766.

174 *See* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006); Wern, *supra* note 166, at 1550.

175 Raso & Eskridge, *supra* note 165, at 1734.

176 *Id.* at 1734–35.

177 *Id.* at 1734. Scholars have offered many theories to explain what motivates judicial behavior. *See, e.g.*, LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 122–24 (1997) (arguing that there is considerable room for debate on why judges choose the positions they ultimately adopt because of the inherent difficulty in understanding human behavior).

178 See *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006), for a summary of the "familiar principles" that guide the Court's deference doctrine.

The more deferential regime of the two, *Chevron*, requires a reviewing court to engage in a two-step analysis when evaluating an agency's interpretation of law.[179] First, the court must determine whether the meaning of the statutory language at issue is unambiguous.[180] If so, the analysis need not proceed further—the court and the agency must effectuate Congress's unambiguous intent.[181] But if the statutory language is ambiguous or silent, the court must proceed to the second step and determine whether the agency's interpretation is a permissible one.[182] If so, the court must defer to the agency notwithstanding the fact that, if given the opportunity, the court would have chosen a different interpretation.[183]

More significant than *Chevron*'s two-step analysis, however, is how the case expanded the boundaries of judicial deference through its distinction between explicit and implicit delegations of authority.[184] "If Congress has explicitly left a gap for the agency to fill," then "there is an express delegation of authority to the agency," and any regulations the agency promulgates are afforded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[185] Moreover, if Congress implicitly left a gap, then a reviewing court cannot substitute its own construction of the relevant statutory provision in place of an agency's reasonable interpretation.[186] In short, whether Congress explicitly or implicitly left a gap for the agency to fill, a reviewing court must defer to the agency's reasonable interpretation of the statute.[187]

Now on to the *Skidmore* deference regime. The Court has emphasized that the *Chevron* deference regime applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[188] Otherwise, the *Skidmore* regime applies—the agency's interpretation is "entitled to respect" to the extent that it has the "power to persuade."[189] In evaluating whether the agency's interpretation has

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179 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
180 *See id.* at 842.
181 *Id.* at 842–43.
182 *Id.* at 843.
183 *See id.* at 844.
184 *See* Hickman & Krueger, *supra* note 165, at 1242.
185 *Chevron*, 467 U.S. at 843–44.
186 *Id.* at 844.
187 *See id.* at 843–44.
188 United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).
189 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

the power to persuade, a reviewing court must consider the thoroughness of the agency's consideration, the validity of the agency's reasoning, the interpretation's consistency with earlier and later pronouncements, and any other relevant factors.[190] The *Skidmore* regime applies to a variety of agency interpretations, including enforcement guidelines and agency manuals.[191] Because agencies make rules carrying the force of law through notice-and-comment rulemaking and adjudication less often than they issue guidelines and manuals, the *Skidmore* regime applies more often than the *Chevron* regime.[192]

This subsection focused on the *Chevron* and *Skidmore* deference regimes, two positions on the deference continuum, to lay the foundation for the following subsection. As explained, the Court's jurisprudence on deference to administrative agencies is unpredictable because the Court treats deference regimes like canons of statutory construction rather than binding precedents.[193] For instance, a study by Professor Thomas Merrill that analyzed Supreme Court cases involving agency interpretation of a statute found that the Court did not apply *Chevron* consistently: though *Chevron* "purports to describe a universal standard by which to determine whether to follow an administrative interpretation of a statute, the two-step framework has been used in only about one-third of the total post-*Chevron* cases in which one or more Justices recognized that a deference question was presented."[194]

2. The Court's Jurisprudence on Deference to the EEOC

Although, overall, the Court's jurisprudence on deference to administrative agencies is unpredictable, the Court has exhibited an anomalous pattern of applying the less deferential *Skidmore* regime to the EEOC's interpretations of Title VII.[195] This pattern is consistent with adopting the stringent standard for reviewing whether the agency has satisfied its statutory duty to conciliate.

As discussed in the previous subsection, whether the more deferential *Chevron* regime or the less deferential *Skidmore* regime applies to the EEOC's interpretation of Title VII turns on whether Congress delegated to the EEOC the authority to make rules carrying the force of law with respect to Title

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190 *Id.*

191 Hart, *supra* note 174, at 1941.

192 *Id.*; *see also* Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1109–10 (2001).

193 Raso & Eskridge, *supra* note 165, at 1734.

194 Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992).

195 *See* Hart, *supra* note 174, at 1937; Wern, *supra* note 166, at 1550.

VII.[196] It did not.[197] In Title VII, Congress expressly delegated to the EEOC only the authority to issue *procedural* rules,[198] and the Court has since interpreted Title VII as thereby denying the agency the power to engage in rulemaking.[199] Pursuant to its limited authority, the agency has indeed interpreted its statutory duty to conciliate, issuing a regulation that provides that "[i]n conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief."[200] Presumably, the less deferential *Skidmore* regime would apply to this interpretation given not only the analysis in the previous subsection, but also the Court's general treatment of the EEOC and its other interpretations.

As a general matter, the Court confers less deference to the EEOC than it does to other administrative agencies.[201] In the same study by Professor Merrill mentioned in the previous subsection, empirical data on the Court's deference to *all* administrative agencies pre- and post-*Chevron* indicated that the average deference rate was approximately seventy-two percent.[202] In a later study that built upon Professor Merrill's statistics, empirical data on the Court's deference to *only* the EEOC indicated an average deference rate of approximately fifty-four percent.[203]

When the Court considers cases involving the EEOC's statutory interpretations, it applies the *Skidmore* regime more often than *Chevron*, which

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196 *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

197 *See* 42 U.S.C. § 2000e-12(a) (2006).

198 *See id.*; *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976).

199 *See* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 682 (1991).

200 29 C.F.R. § 1601.24(a) (2009).

201 *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991) (Scalia, J., concurring); *see also* Wern, *supra* note 166, at 1549.

202 *See* Merrill, *supra* note 194, at 981–82 (noting that, pre-*Chevron*, the agency view was accepted 34 out of 45 times, while post-*Chevron*, the agency view was accepted 63 out of 90 times, resulting in a total from both pre- and post-*Chevron* of 97 out of 135 times for a total average deference rate of approximately 72%); Wern, *supra* note 166, at 1547, 1549. Merrill conducted the study on Supreme Court deference to all agencies. *See* Merrill, *supra* note 194, at 981 n.51. Wern then used Merrill's statistics as a baseline against which he could compare the Court's deference to all agencies to its deference to the EEOC. *See* Wern, *supra* note 166, at 1547, 1549.

203 Wern, *supra* note 166, at 1549–50. Notably, Wern addressed the limitations of his statistical analysis, particularly the small sample size he used to calculate the Court's deference rate to the agency. *See id.* at 1550. But even if his analysis is not wholly accurate, it does suggest disproportionately less deference to the EEOC. *See id.*

may explain the disproportionality.[204] In *General Electric Co. v. Gilbert*, for example, the Court considered EEOC guidelines.[205] At issue was whether a corporation's refusal to pay disability benefits for time lost due to pregnancy and childbirth discriminated against female employees in violation of Title VII.[206] The EEOC guidelines provided that disabilities related to pregnancy, miscarriage, abortion, and childbirth were temporary disabilities that required the same benefits as other temporary disabilities.[207] Applying *Skidmore*, the Court reasoned that because the EEOC issued the guidelines in conflict with its previous interpretations of Title VII, the guidelines lacked the "power to persuade."[208] Then, in *EEOC v. Arabian American Oil Co.*, the Court again applied *Skidmore* and again rejected the agency's interpretation.[209] At issue was whether Title VII applied "extraterritorially to regulate the employment practices of [American] employers who employ [U.S.] citizens abroad."[210] According to the EEOC, Title VII did in fact apply as it stated in a letter from its General Counsel, testimony by its Chairman, and a decision it issued.[211] Like in *Gilbert*, the Court reasoned that the EEOC's latest position was inconsistent with its previous interpretation of the statute and, thus, unpersuasive.[212]

The Court has exhibited a pattern of applying the less deferential *Skidmore* regime to the EEOC's interpretations of Title VII.[213] It has demonstrated a "lack of respect" for the EEOC[214] and has thereby relegated the EEOC to the fringes of administrative law as a "second class agency."[215] Because the Court has indicated that the EEOC is not entitled to the deference normally conferred

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204 *See* Hart, *supra* note 174, at 1945.

205 *See* 429 U.S. 125, 141 (1976).

206 *Id.* at 129.

207 *Id.* at 140–41 (quoting 29 C.F.R. § 1604.10(b) (1975)).

208 *See id.* at 141–43.

209 *See* 499 U.S. 244, 257–58 (1991).

210 *Id.* at 246.

211 *Id.* at 257.

212 *See id.* at 257–58. The presumption against the extraterritorial application of laws also influenced the Court's analysis, and it concluded that "the EEOC's interpretation is insufficiently weighty to overcome the presumption against extraterritorial application." *Id.* at 258.

213 *See* Hart, *supra* note 174, at 1937. Oddly, in a case decided between *Gilbert* and *Arabian American Oil*, the Court said that "the EEOC's interpretation of ambiguous language *need only be reasonable to be entitled to deference*." EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) (emphasis added). However, the Court in *Arabian American Oil* did not even mention that case in its decision. *Arabian Am. Oil*, 499 U.S. at 260 (Scalia, J., concurring).

214 Hart, *supra* note 174, at 1937.

215 Wern, *supra* note 166, at 1550 (internal quotation marks omitted).

upon other administrative agencies,[216] the Court's jurisprudence on deference to the EEOC is consistent with adopting the stringent standard for reviewing whether the agency has satisfied its statutory duty to conciliate.

V. RESISTANCE TO ADOPTING THE STRINGENT STANDARD OF REVIEW

While recognizing that the deferential standard of review has its shortcomings, some may resist adopting the stringent standard of review in its stead. Rather, they argue that there are other avenues for remedying the deferential standard's shortcomings. This Part addresses two of these avenues, both of which begin with the premise that the EEOC has abused its statutory duty to conciliate. The first avenue focuses on legislative oversight, arguing that the current split among the federal circuit courts of appeals highlights an oddly narrow judicial vision of how to ensure that the EEOC satisfies its statutory duty to conciliate. The second avenue focuses on an employer's ability to argue its case on the merits. This Part then argues that both avenues fail to appreciate the paramount nature of the agency's statutory duty to conciliate.

A. Legislative Oversight

The first avenue for remedying the deferential standard of review's shortcomings focuses on the legislative oversight of agencies, which, according to Richard Posner, "is too little emphasized."[217] The EEOC, after all, exists within a tripartite governmental system and, consequently, it is susceptible to significant legislative oversight that materializes through appropriations subcommittees, among other formal and informal methods of influence.

Congress, through its appropriations subcommittees, has means to influence the EEOC in a way unavailable to the courts—only Congress retains the "power of the purse."[218] The EEOC, like any other agency, needs money to

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[216] *See Arabian Am. Oil*, 499 U.S. at 259 (Scalia, J., concurring).

[217] Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 338 (1974); *cf.* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 70 (2006) ("[T]he level of [congressional] oversight is high enough that it is incorrect to assert that Congress abdicates its responsibility when it delegates discretion to those administering the law.").

[218] *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION 474 (2010) (internal quotation marks omitted); *see also* Beermann, *supra* note 217, at 85 ("As a practical matter, in a disagreement between Congress and the President over the priorities or the value of a particular program, Congress will win if it uses its power over the allocation of funds.").

operate, and it certainly cares about whether Congress will decrease, preserve, or increase its annual budget.[219] That is, "government agencies must go to *their* capital markets—the legislative appropriations committees—every year. There is competition among agencies for the largest possible slice of the appropriations pie, and the agency that has a reputation for economy and hard work enjoys an advantage in the competition."[220] In its congressional budget justification for fiscal year 2013, the EEOC requested a budget of $373,711,000, which is an increase of $13,711,000 from its fiscal year 2012 appropriation.[221] With its "power of the purse," Congress may exert influence over the EEOC in at least four distinct ways.[222]

First, in allocating to the EEOC its annual appropriation, Congress may use appropriations riders, which it regularly uses to supervise, if not control, the activities of federal agencies.[223] These appropriations riders usually specify a regulatory action that Congress does not want executed and will then "prohibit the expenditure of funds for carrying out" that specified action.[224] Second, rather than using appropriations riders, Congress may earmark funds, which is a tactic that amounts to "the converse of riders."[225] When Congress earmarks funds, it specifies a regulatory action that it wants executed and will then mark the expenditure of funds for carrying out that specified action.[226] For the protection of employers, powerful members of Congress often secure funds for the pursuit of business objectives in their districts.[227] Here, Congress may specify that although it would like the EEOC to pursue litigation when necessary, it will expend a smaller budget for that purpose, forcing the EEOC

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219 *See* MANNING & STEPHENSON, *supra* note 218, at 474.

220 Posner, *supra* note 217, at 338.

221 EEOC, FY 2013 CONGRESSIONAL BUDGET JUSTIFICATION 1 (2012). In the report, the chair of the EEOC, Jacqueline A. Berrien, writes in support of the increased budgetary request:

> [The EEOC's] . . . progress is fragile. Given the agency's varied enforcement responsibilities [it is] constantly challenged to meet the growing public demand for the services [it] provide[s]. EEOC staff has worked to improve operations, provide better service to the public, and more effectively and efficiently enforce the federal laws prohibiting employment discrimination, and [it] will continue to do so.

Id. at 2.

222 *See* MANNING & STEPHENSON, *supra* note 218, at 474 (internal quotation marks omitted); *see also* Beermann, *supra* note 217, at 84 ("The power of the purse is among Congress's most potent weapons in its effort to control the execution of the laws.").

223 *See* Beermann, *supra* note 217, at 85.

224 *Id.*

225 *Id.* at 89.

226 *See id.*

227 *See id.* at 90.

to engage in conciliation efforts that respect business goals. Third, particular members of Congress who have exceptional influence over the agency's budget may exert their individual influence on the appropriations subcommittees.[228] This manner of exerting influence over the EEOC focuses on the political clout of individual members of Congress, who will retaliate or reward the agency as they deem appropriate.[229] Fourth and finally, Congress may increase or decrease the overall budget it awards to the EEOC.[230] If Congress wants the EEOC to enforce Title VII more aggressively, it may increase the agency's budget.[231] If, on the other hand, Congress wants the EEOC to enforce its statutory obligations less aggressively, it will decrease the agency's budget.[232]

Admittedly, the EEOC is susceptible to significant legislative oversight, and employers dissatisfied with the agency's conciliatory efforts may seek recourse by lobbying for congressional action in their favor. Yet this avenue assumes that the EEOC has already failed to comply with its statutory duty to conciliate, thereby brushing aside the agency's failure to respect the heart of Title VII to the detriment of private employers.[233] If conciliation is to be elevated above litigation, then the means to ensure its elevation, to the furthest extent possible, should be both efficient and fair. To require employers dissatisfied with the agency's conciliatory efforts to seek recourse through the cumbersome legislative process instead of the less time-consuming judicial process is to stray too far from efficiency. Moreover, to require them to do so without imposing more rigorous requirements on the agency to comply with its statutory duty in the first instance strays too far from fairness.

B. Employers Retain the Right to Argue Their Cases on the Merits

The second avenue for remedying the deferential standard's shortcomings relies on the fact that the conciliatory process is voluntary for employers, who always retain the right to argue their cases on the merits.[234] Thus, according to this avenue, even if the EEOC has failed to satisfy its statutory duty to

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228 *See* MANNING & STEPHENSON, *supra* note 218, at 474.
229 *See id.*
230 *See id.*
231 *See id.*
232 *See id.*
233 *See* EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1260 (11th Cir. 2003).
234 *See* LIVINGSTON, *supra* note 20, at 431.

conciliate, employers have not been harmed because they may nonetheless contest the charges filed against them in court.

This avenue, like the previous one, begins from the assumption that the agency has failed to satisfy its statutory duty to conciliate and thereby neglects the underlying purpose of Title VII.[235] If the EEOC has not provided an employer with a meaningful opportunity to conciliate, which is an especially damaging deprivation if the charge against the employer is untrue, the EEOC has effectively elevated litigation above conciliation. The stringent standard of review imposes requirements upon the agency, which the deferential standard does not, in an effort to ensure that the agency does not "accord[] only perfunctory significance to its conciliation role."[236]

Moreover, this avenue ignores practical concerns. If whether the EEOC has failed to satisfy its statutory duty to conciliate is a nonissue, then the agency would have fewer incentives to ensure that it satisfied that duty and, consequently, more cases would proceed to litigation. If that were to occur, then there would be increased costs borne both by the agency and, particularly, employers.[237] Additionally, if more money were expended on an expanding docket of unnecessary litigation, less attention would be given to claims that actually require litigation to clarify and extend the law. Money would be better spent litigating these claims instead of those that could have been settled through conciliation.

CONCLUSION

The EEOC is, unquestionably, no longer a paper tiger. After attempting to conciliate charges of discrimination with private employers accused of discrimination, the agency may enforce Title VII by initiating suit against them.[238]

Yet it cannot roam uncaged. Concern about the proper standard for reviewing whether the agency has satisfied its statutory duty to conciliate is more relevant than ever given that the EEOC has released its *Strategic Plan for Fiscal Years 2012–2016*, which requires the agency to maintain a certain

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235 *See* 42 U.S.C. §§ 2000e-2(a)–(d), -5(b) (2006).

236 *See* 118 CONG. REC. 3805 (1972) (statement of Sen. James Allen).

237 *See* LIVINGSTON, *supra* note 20, at 441 (discussing the advantages of conciliation, including the avoidance of "creeping back-pay damages, litigation costs, and potential public exposure").

238 § 2000e-5(f)(1).

number of systemic discrimination cases on its litigation docket.[239] In an effort to meet its quota of systemic discrimination cases, the agency has greater incentive to engage in unreasonable conciliatory efforts similar to those in *Asplundh*.[240]

As this Comment has argued, the proper standard for reviewing whether the EEOC has satisfied its statutory duty to conciliate prior to initiating suit is not the deferential standard of review, which allows the agency to circumvent meaningful conciliatory efforts, but, rather, the stringent standard of review. The stringent standard lacks the shortcomings of the deferential standard and, perhaps more importantly, it is consistent with the text, purpose, legislative history, and jurisprudence of Title VII.

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239 *See* EEOC, *supra* note 13, at 12, 18.

240 *See id.*; *see also* EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1260 (11th Cir. 2003).

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