No. 12-1347

In the Supreme Court of the United States

CINTAS CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 allows individuals to file charges alleging employment discrimination against their private-sector employers. 42 U.S.C. 2000e-5(b). Title VII provides that, if the Equal Employment Opportunity Commission (EEOC) "has been unable to secure from [the employer named in the charge] a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against" the employer. 42 U.S.C. 2000e-5(f)(1).

The questions presented are as follows:

1. Whether the EEOC, when it brings such a civil action, must prove its allegations of discrimination under the *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), burden-shifting framework, or may instead invoke the pattern-or-practice framework articulated in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).

2. Whether the EEOC's administrative efforts in this case satisfied Title VII's pre-suit requirements when the employer admitted, and the court of appeals found, that the EEOC had provided notice that it was investigating and seeking to conciliate for a class of women in Michigan, and when the court found that the agency's three-year effort to achieve a consensual resolution of the case ended because of the employer's indifference.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 699 F.3d 884. Three of the district court's opinions (Pet. App. 70-99, 425-451, 452-482) are reported at 711 F. Supp. 2d 782, 737 F. Supp. 2d 764 and 777. The remaining district court opinions (Pet. App. 47-69, 131-169, 170-187, 188-215, 216-248, 249-276, 277-304, 305-339, 340-370, 371-395, 396-424, 483-510, 511-542, 543-554, 555-563, 564-576, 577-607) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2012. A petition for rehearing was denied on January 15, 2013 (Pet. App. 104-105). The petition for a writ of certiorari was filed on April 15, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner supplies uniforms and other products to commercial customers. Pet. App. 3. It employs service sales representatives (SSRs) as entry-level employees who pick up and deliver the products and who "[s]ell and service customers by taking care of all customer needs." Gov't C.A. App. A439; see Pet. App. 4. The general requirements for the SSR job include communications and sales skills, the physical ability to make deliveries, and possession of a driver's license. *Ibid.* Petitioner views SSRs as the "face of Cintas." *Ibid.*

From 1999 to the first quarter of 2005 (the time period relevant to this action), almost all of the SSRs that petitioner hired in Michigan were men. From 1999 to 2002, for example, petitioner hired 268 SSRs in the State, all but six of whom were male. Gov't C.A. App. A637, A639. The hiring at each of petitioner's 14 Michigan locations mirrored petitioner's overall statewide hiring patterns. For example, at petitioner's largest location (Westland), petitioner hired 53 men and no women from 1999 to 2002. *Id.* at A639. At Madison Heights, petitioner hired 47 men and no women. *Ibid.*

A government statistical expert analyzed petitioner's SSR hiring data and concluded that its "fraction of hires who were women was considerably lower than the fraction of women in the applicant pool." Gov't C.A. App. A640. "In 1999-2002," the expert found, "only 2% of the hires were women, even though 27% of the appropriate external local labor market on average was female, and even though 16% of the applications in these years came from women." *Ibid.* "In the 2003-2004 period," the expert determined, "only 11% of the hires were women even though 27% of the external labor market on average was female, and even though 25% of the applications

in these years came from women." *Ibid.* The expert concluded that "[o]ver the entire period, the probability that these discrepancies would have occurred by chance alone is much less than one in a trillion." *Id.* at A642.

The data were consistent with views expressed by petitioner's hiring officials that SSR positions were most appropriately filled by males. One manager who performed initial application screenings stated that petitioner's workplace reminded him of the "old Marine Corps" where "the general overall impression was this is man's work kind of thing." Gov't C.A. App. A469. Another manager stated that he had "[p]robably" heard employees of petitioner "say that the SSR position is a man's job, or something along those lines," and that "to be truthful * * * [he] probably thought that way" as well. *Id.* at A461. A female applicant stated that her male interviewer told her that "they hire men to do the driving and that there are no women drivers * * * [and] that I would be better off sewing in the plant." *Id.* at A849. Another female applicant said her interviewer questioned whether she was physically able to do the work, despite her insistence that she was, and told her "he was trying to find a man to fill the position." *Id.* at A458.

Hiring officials' perception that SSR jobs were only for men was recognized as a problem at the company's highest levels. In a 2003 speech at an annual management meeting, petitioner's president and chief executive officer admonished managers to "put the myth that females cannot be SSRs out of your mind and hire more women SSRs." Gov't C.A. App. A32.

2. In 1999, Mirna Serrano applied for an SSR position at one of petitioner's locations but was not hired. After unsuccessfully applying for an SSR position at

another of petitioner's Michigan locations, Serrano filed an Equal Employment Opportunity Commission (EEOC) charge in April 2000, alleging that petitioner had not hired her because she was a woman and that "[t]here are no female Drivers at * * * their locations." 04-cv-40132 Docket entry No. (Docket entry No.) 48-2, at 2 (E.D. Mich. June 27, 2005); Pet. App. 4.

The EEOC began an investigation, requesting information from petitioner about its hiring practices. Pet. App. 4. Petitioner responded with hiring data from only one location. The data indicated that all 18 individuals petitioner had hired for SSR positions since July 1999 were men. Docket entry No. 48-5, at 7; Docket entry No. 47, at 7. Upon seeing this information, the EEOC investigator requested more comprehensive data about the SSR workforce. Petitioner again responded with data on only one hiring location. Docket entry No. 48-6. The EEOC therefore made explicit that it was expanding its investigation by requesting information about petitioner's SSR hiring at *all* its Michigan facilities. Docket entry No. 48-8, at 3.

When petitioner refused to produce the data, the EEOC issued a subpoena, specifically requesting data from "all of [petitioner's] facilities in the State of Michigan." Docket entry No. 48-7, at 3. Petitioner sought to have the EEOC revoke or modify the subpoena, arguing that it should not be required to supply information beyond one facility. Docket entry No. 48-8. The EEOC largely denied the petition on the ground that the available information indicated a lack of female hires at one facility, thus leading to questions about petitioner's hiring practices at other facilities. Docket entry No. 48-9, at 4. The EEOC clarified that the information sought would not extend beyond Michigan facilities. *Id.*

at 5-6. Petitioner then began to produce the documents the EEOC sought.

In July 2002, after more than two years of investigation, the EEOC issued a determination letter. That letter stated the agency's finding that there was reasonable cause to believe Serrano's "allegations are true." Pet. App. 5. The letter stated in addition that petitioner had "discriminated against females as a class" by failing to hire them as SSRs in Michigan. *Ibid.* The EEOC's determination letter included an invitation to conciliate, and the EEOC attached a draft conciliation agreement that included proposed relief for Serrano and a class of similarly situated individuals, many of whom the EEOC identified by name. *Ibid.*

The EEOC's conciliation efforts continued for almost three years. Pet. App. 5; Docket entry No. 49-2, at 2; Docket entry No. 48-14; Docket entry No. 836-5, at 18; Docket entry No. 876-10, at 6. At no time during the conciliation period did petitioner "respond" to the EEOC's conciliation proposal "or present a counteroffer for settlement." Pet. App. 5. On April 14, 2005, in light of petitioner's "three-year silence" in response to the EEOC's conciliation efforts, *id.* at 37, the agency issued a letter stating that "efforts to conciliate this charge * * * have been unsuccessful," and that "further conciliation efforts would be futile or non-productive." Docket entry No. 876-8.

3. In May 2004, Serrano filed a complaint on behalf of herself and a proposed class of women who had applied for employment as SSRs in Michigan. Pet. App. 5. In December 2005 (after the end of the conciliation efforts discussed above), the EEOC filed a complaint-in-intervention pursuant to 42 U.S.C. 2000e-5(f)(1) and (3).

Pet. App. 5.[1] Petitioner moved for judgment on the pleadings, arguing that the EEOC should not be allowed to prove its case in bifurcated proceedings pursuant to *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) (*Teamsters*), because it had brought suit under Section 706 of Title VII. Pet. App. 6.

The district court granted petitioner's motion, holding that "the EEOC is precluded from advancing its claims against [petitioner] under the *Teamsters* 'pattern or practice' framework." Pet. App. 72; see *id.* at 70-99. Instead, the court concluded, the EEOC "must proceed under the framework in *McDonnell-Douglas Corp. v. Green*, [411] U.S. 792 (1973)." *Id.* at 98-99.

The district court subsequently dismissed the EEOC's complaint in its entirety "for failure to exhaust administrative remedies." Pet. App. 52. The court stated that "this case is not now, nor has it ever been, a class-based lawsuit." *Id.* at 60. In the court's view, the suit therefore was simply an action involving specific named employees for whom, the district court concluded, the EEOC had "pursued no individual investigation

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[1] The Serrano/EEOC action was consolidated for pretrial purposes with another pending suit against petitioner alleging gender discrimination in hiring, *Avalos* v. *Cintas Corp.*, No. 06-cv-12311 (E.D. Mich. May 22, 2006). See Pet. App. 5 n.1. The Sixth Circuit recently affirmed the district court's denial of class certification in *Avalos* but reversed in part the district court's grant of summary judgment to petitioner on one of the case's individual claims of discrimination. See *Davis* v. *Cintas Corp.*, No. 10-1662, 2013 WL 2343302, at *8, *15 (6th Cir. May 30, 2013).

Serrano is no longer a party to this case. The district court denied class certification on March 31, 2009, Docket entry No. 627, and Serrano did not appeal that decision. On September 20, 2010, the court granted Serrano's motion to dismiss her claims with prejudice. Docket entry No. 937.

on conciliation proceedings * * * before it filed suit as an intervenor." *Id.* at 67. The court acknowledged that dismissal of the case was a "severe penalty" but thought it was justified because the EEOC had not "follow[ed] the clearly delineated paths to justice that Congress has created." *Id.* at 67-68 (citation omitted).

4. The court of appeals reversed. Pet. App. 1-44.

a. The court of appeals identified as the "most salient[] issue in this case" the question whether, when the EEOC brings suit under Section 706, it "is limited to proving its allegations of discrimination pursuant to the *McDonnell Douglas* * * * burden-shifting framework, or whether it may employ the pattern-or-practice framework announced by the Supreme Court in [*Teamsters*]." Pet. App. 9. The court noted that Title VII plaintiffs alleging disparate treatment must prove discriminatory intent, a burden they may satisfy through either direct or circumstantial evidence. *Id.* at 10. The court explained that "[b]oth *McDonnell Douglas* and *Teamsters* provide frameworks through which a plaintiff can prove intentional discrimination through circumstantial evidence." *Id.* at 11.

Under the *McDonnell Douglas* approach, the court of appeals explained, if a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to "offer evidence of a legitimate, nondiscriminatory reason for" its actions. Pet. App. 11-12 (citation omitted). Under the *Teamsters* framework, by contrast, the plaintiff bears "the higher initial burden of establishing 'that unlawful discrimination has been a regular procedure or policy followed by an employer or a group of employers.'" *Id.* at 12 (quoting *Teamsters*, 431 U.S. at 360). "Upon that showing," the court of appeals noted, there is a rebuttable presumption that "any particular

employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Ibid.* (quoting *Teamsters*, 431 U.S. at 362). The employer may rebut that presumption, however, by showing that an "individual applicant was denied an employment opportunity for lawful reasons." *Ibid.* (quoting *Teamsters*, 431 U.S. at 362).

Petitioner contended in the court of appeals that "the EEOC may employ the *Teamsters* framework only when it acts pursuant to [Section] 707" of Title VII, and not when, as in this case, it proceeds under Section 706. Pet. App. 14; compare 42 U.S.C. 2000e-6(a) and (e) (Section 707) (authorizing the EEOC to "bring a civil action" if it "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII) with 42 U.S.C. 2000e-5(b) and (f)(1) (Section 706) ("Whenever a charge is filed by or on behalf of a person claiming to be aggrieved" by an "unlawful employment practice," and the EEOC "determines after [an] investigation that there is reasonable cause to believe that the charge is true," the EEOC may "bring a civil action" if it "has been unable to secure from the [employer] a conciliation agreement acceptable to the Commission."). The court of appeals rejected petitioner's contention. Pet. App. 14. The court recognized that Section 706 "does not contain the same explicit authorization as does [Section] 707 for suits under a pattern-or-practice theory." *Ibid.* The court concluded, however, that "the inclusion of the language in [Section] 707 simply means that the scope of the EEOC's authority to bring suit is more limited when it acts pursuant to [Section] 707." *Id.* at 15.

The court of appeals explained that *McDonnell Douglas* "did not create 'an inflexible formulation' for burden shifting, but rather embodied the 'general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.'" Pet. App. 15 (quoting *Teamsters*, 431 U.S. at 358). The court noted that "a plaintiff has flexibility in how she meets that initial burden, and variance based on the facts of the case is expected." *Ibid.*

The court of appeals further observed that the *Teamsters* Court, in addressing a pattern-or-practice suit brought under Section 707, had analogized the suit to *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), a case involving Section 706. Pet. App. 16. The court viewed that analogy as indicating that this Court did not regard "the pattern-or-practice framework" as limited to "the EEOC's enforcement authority under [Section] 707." *Ibid.* The court also stated that "[s]ubsequent Supreme Court decisions affirming the viability of EEOC class claims under [Section] 706 and Congress's 'general intent to accord parallel or overlapping remedies against discrimination' further support" its conclusion. *Ibid.* (quoting *General Tel. Co. of the Nw.* v. *EEOC*, 446 U.S. 318, 333 (1980)).

The court of appeals rejected petitioner's argument that Section 707 would be "superfluous" if the pattern-or-practice method of proof were available under Section 706. Pet. App. 17-18. The court noted that Section 707 would still serve a distinct function because that provision "permits the EEOC to initiate suit without first receiving a charge filed by an aggrieved individual, as it must when initiating suit under [Section] 706." *Id.*

at 18. The court also explained that petitioner relied on a faulty premise when it argued that "allowing the EEOC to pursue the pattern-or-practice method for [Section] 706 claims will allow the EEOC to 'have its cake and eat it too' because the *Teamsters* framework provides a more generous standard of proof and [Section] 706 affords greater remedies." *Id.* at 18-19. That argument, the court observed, overlooked the fact that "under *Teamsters*, the plaintiff's initial burden to make out a prima facie case is heightened." *Id.* at 19.

b. The court of appeals reversed the district court's holding that "the EEOC failed to comply with the administrative prerequisites to suit under [Section] 706." Pet. App. 35; see *id.* at 35-37. Petitioner argued both that "the EEOC never investigated or sought to conciliate claims on a class-wide basis" and that "even if it had, class-wide conciliation was not an adequate substitute for conciliation on behalf of the thirteen claimants the EEOC ultimately named in its enforcement action." *Id.* at 36. Given the court of appeals' holding that "the EEOC may properly proceed with class-based claims under the *Teamsters* framework," the court found it necessary to address only the first argument. *Ibid.*

The court of appeals found it "clear" that the EEOC had "provided notice to [petitioner] that it was investigating class-wide instances of discrimination." Pet. App. 36. The EEOC's reasonable-cause determination "explicitly stated" that the agency was investigating discrimination against women "as a class," and the agency's draft conciliation agreement "indicated that the EEOC sought class-based remedies." *Id.* at 36-37 (quoting Docket entry Nos. 836-40 & 836-41). Accordingly, the court of appeals found "no basis for concluding that [petitioner] was unaware that the EEOC had investi-

gated and was seeking to conciliate class-wide claims." *Id.* at 37.

In addition, the court of appeals noted that petitioner "does not appear to refute the EEOC's assertion that [petitioner] expressed no interest to the EEOC in reaching a settlement on these claims." Pet. App. 37. The court concluded that petitioner's "three-year silence in response to the EEOC's offer of conciliation can reasonably be interpreted as rejection and, accordingly, the EEOC acted appropriately in terminating conciliation and seeking to vindicate the claims through suit." *Ibid.*

c. Judge Gibbons concurred in part and dissented in part. Pet. App. 40-44. Although she "join[ed] the majority * * * in concluding that the EEOC satisfied its administrative prerequisites to suit," she would have held that the EEOC's complaint did not adequately allege the pattern-or-practice method of proof. *Id.* at 44.

ARGUMENT

Petitioner contends that the EEOC was not permitted to use the pattern-or-practice framework under Section 706 of Title VII, and that the agency's administrative actions were inadequate. The court of appeals correctly rejected both arguments, and its holdings do not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. Petitioner contends that "neither this Court nor any other circuit besides the court below has ever held that the EEOC can assert [a pattern-or-practice] claim under [Section] 706." Pet. 5-6. That is incorrect.

For example, *General Telephone Co. of the Nw.* v. *EEOC*, 446 U.S. 318 (1980), involved a Section 706 claim by the EEOC using the pattern-or-practice framework. See *id.* at 322, 333; *EEOC* v. *General Tel. Co.*, 599 F.2d 322, 332 (9th Cir. 1979), aff'd, 446 U.S. 318 (1980) (citing

International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977)). This Court did not question the EEOC's ability to use this framework under Section 706, and it held that the EEOC need not seek Federal Rule of Civil Procedure 23 certification when it does so. The Court explained that "the EEOC need look no further than [Section] 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals." 446 U.S. at 324; see *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 288 (2002) (same). On remand after this Court's decision in *General Telephone*, the EEOC, still proceeding under Section 706, went on to try the case using the *Teamsters* method of proof. See *EEOC* v. *General Tel. Co. of the Nw.*, 885 F.2d 575, 577, 584 (9th Cir. 1989) (reversing district court's finding that the "EEOC had failed to prove that GenTel engaged in a company-wide pattern or practice of intentional discrimination"), cert. denied, 498 U.S. 950 (1990).

After *General Telephone*, several other courts of appeals also recognized that the EEOC may invoke the *Teamsters* framework in a Section 706 action. See *Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) (*General Telephone* "holds that, as the plaintiff in a pattern-or-practice suit under [Section] 706(f)(1) * * * , the EEOC may seek classwide relief."); *EEOC* v. *American Nat'l Bank*, 652 F.2d 1176, 1184, 1187-1188 (4th Cir. 1981) (noting the EEOC's "broad enforcement powers" under Section 706, and holding that the EEOC had proved a "pattern or practice of discrimination" under *Teamsters*), cert. denied, 459 U.S. 923 (1982); *EEOC* v. *Monarch Mach. Tool Co.*, 737 F.2d 1444, 1446-1449 (6th Cir. 1980). No court of appeals has held to the contrary.

Petitioner suggests (Pet. 27 n.3) that *General Telephone* is not relevant because it was decided before the Civil Rights Act of 1991, which authorized damage awards in actions brought under Section 706. See 42 U.S.C. 1981a(a)(1). Although petitioner views the 1991 Civil Rights Act as a key interpretive aid when construing Section 706 (*e.g.*, Pet. 26), Congress last modified Section 706(f)(1) in 1972 and left it unchanged in the 1991 statute. That suggests that Congress intended to leave intact this Court's interpretation of that provision. See *United States* v. *O'Brien*, 130 S. Ct. 2169, 2178 (2010) ("Congress does not enact substantive changes *sub silentio*."); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of [a] * * * judicial interpretation" of a statutory provision and "to adopt that interpretation" when it re-enacts the statute without changing the relevant provision.).

This Court and several courts of appeals have recognized that the 1991 Act did not alter the interpretation of Title VII adopted in *General Telephone*. See *Waffle House*, 534 U.S. at 288 ("Against the backdrop of our decision[] in * * * *General Telephone*, Congress expanded the remedies available in EEOC enforcement actions in 1991 to include compensatory and punitive damages."); *In re Bemis Co.*, 279 F.3d 419, 421-422 (7th Cir. 2002) (availability of damages after 1991 Act in no way alters "the validity or scope of *General Telephone*"); *EEOC* v. *Dinuba Med. Clinic*, 222 F.3d 580, 588 (9th Cir. 2000) (same).

Petitioner argues that the 1991 Act is significant because it references "an aggrieved individual." Pet. 30. There is no logical inconsistency, however, between Congress's focus on aggrieved individuals and the EEOC's use of the *Teamsters* framework. Every pri-

vate class action using the *Teamsters* mode of proof is brought under Section 706. See, *e.g.*, *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 773 n.32 (1976). And in this case, as in any EEOC hiring-discrimination case, any potential damages are tied to the number of women the EEOC can prove would have been hired in the absence of discrimination, *i.e.*, aggrieved individuals. Petitioner's characterization of the 1991 Act as limiting methods of proof previously available in a Section 706 case is also contrary to that statute's stated purpose to provide "*additional* remedies * * * needed to deter * * * intentional discrimination in the workplace." Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), 105 Stat. 1071 (emphasis added).

b. Petitioner's argument is also unsupported by the text of Section 706 itself.

Section 706(f)(1) broadly provides that the EEOC "may bring a civil action against any respondent * * * named in the charge." 42 U.S.C. 2000e-5(f)(1); see 42 U.S.C. 2000e-5(a) (The EEOC "is empowered * * * to prevent any person from engaging in any unlawful employment practice."). Nothing in this language limits the EEOC to any particular method of proof when suing to remedy a violation of Title VII. Cf. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 366 (1977) (Section 706(f)(1) "imposes no limitation upon the power of the EEOC to file suit in a federal court.").

"The 'factual inquiry' in a Title VII case is 'whether the defendant intentionally discriminated against the plaintiff.'" *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983) (alteration and citation omitted). "In other words, is 'the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'"

Ibid. (internal citation omitted). That is what the EEOC must establish when it brings suit under Section 706.

"The prima facie case method established in *McDonnell Douglas*" is one way to support an inference of intentional discrimination when the EEOC is seeking to establish a violation of Title VII, but that method of proof "was 'never intended to be rigid, mechanized, or ritualistic." *Aikens*, 460 U.S. at 715 (citation omitted). Likewise, "[i]n Title VII jurisprudence 'pattern-or-practice' simply refers to a method of proof and does not constitute a 'freestanding cause of action.'" *Parisi* v. *Goldman, Sachs & Co.*, 710 F.3d 483, 487 (2d Cir. 2013) (citation omitted); see *Celestine* v. *Petroleos de Venezuella SA*, 266 F.3d 343, 355 (5th Cir. 2001) ("A pattern or practice case is not a separate and free-standing cause of action * * * but is really merely another method by which disparate treatment can be shown.") (internal quotation marks and citation omitted). This Court in *Teamsters* squarely rejected the contention that the *McConnell Douglas* framework is "the *only* means" of establishing a prima facie case of discrimination, 431 U.S. at 358; Pet. App. 15, and there is no reason to believe that Congress intended it to be the only means of proceeding under Section 706.

Petitioner also fails to explain how Congress, when it enacted Section 706 in 1972, could have intended that acceptable methods of proof would be limited to those subsequently articulated in *McDonnell Douglas* in 1973, and would exclude those articulated in *Teamsters* in 1977. To the contrary, the broad language of Section 706 is consistent with Congress's intent in enacting the 1972 Amendment to remedy what it deemed "a major flaw in the operation of Title VII," namely the lack of litigation authority for the EEOC. S. Rep. No. 415, 92d

Cong., 1st Sess. 4 (1971). Congress therefore amended Title VII to provide the EEOC "with effective power to enforce [T]itle VII." *Id.* at 28.

Petitioner's suggestion that Section 706's language *is* limiting reflects a misperception of the statutory text. Petitioner states that Section 706 "permits the EEOC to sue an employer only on behalf of a particular 'person or persons aggrieved' by the employer's unlawful employment practice." Pet. 25. Section 706 contains *no* language, however, stating that an EEOC suit is "on behalf" of individuals. Section 706(f)(1) uses the term "person or persons aggrieved," moreover, to authorize such individuals to intervene in EEOC actions, not to limit the EEOC's authority to sue. 42 U.S.C. 2000e-5(f)(1). The right of intervention reflects Congress's understanding that the EEOC does not simply act on individuals' behalf when it brings suit under Section 706, but "acts also to vindicate the public interest in preventing employment discrimination." *General Tel.*, 446 U.S. at 326. Accordingly, an EEOC action under Section 706 can go forward whether or not any individual victim intervenes.

The history of the 1972 Amendments confirms Congress's intent that the EEOC be allowed to use the pattern-or-practice framework in a Section 706 action. The bill's floor managers stated that Section 706 would allow the EEOC to bring "exactly the same actions that the Department of Justice does under pattern and practice." 118 Cong. Rec. 4081 (1972); see *id.* at 4082 (stating that, if the EEOC "proceeds by suit [under Section 706], then it can proceed by class suit. If it proceeds by class suit, it is * * * doing exactly what the Department of Justice does in pattern and practice suits.") (quoted in *General Tel.*, 446 U.S. at 329).

c. Petitioner contends that interpreting Section 706 to permit use of the pattern-or-practice framework "renders [Section] 707 superfluous and meaningless." Pet. 27. Petitioner is incorrect because there are important differences between Sections 706 and 707. In particular, Section 707 includes features that allow the Government to act expeditiously to halt a pattern or practice of discrimination.

First, unlike Section 706, Section 707 "permits the EEOC to initiate suit without first receiving a charge." Pet. App. 18; see *General Tel.*, 446 U.S. at 327-328; *United States* v. *Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1096 n.5 (9th Cir.), cert. denied, 444 U.S. 832 (1979); *United States* v. *Allegheny-Ludlum Indus.*, 517 F.2d 826, 843 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Petitioner argues that Section 706 offers a parallel mechanism for expedited action in the form of a Commissioner's charge, but a Commissioner's charge entails a multi-step process that precedes its signing, see 1 *EEOC Compliance Manual* § 8 (1992), and then investigation, issuance of the determination, and conciliation before the EEOC may file suit. *Id.* §§ 33-34. Under Section 707, by contrast, the EEOC may file suit immediately once it learns of "a pattern or practice of resistance to the full enjoyment of * * * rights secured by * * * [Title VII]." 42 U.S.C. 2000e-6(a); see 13-cv-03729 Docket entry No. 1 (N.D. Ill. May 20, 2013) (Section 707 case filed without a charge once the EEOC learned of an employer's practice of using a severance agreement that interfered with employees' rights to file EEOC charges).

Second, while Congress conferred upon private parties the "right to intervene" in an EEOC action filed under Section 706(f)(1), no such right of intervention

exists under Section 707. That aspect of the statute furthers the government's ability to act quickly to resolve discrimination through a Section 707 suit. *Allegheny*, 517 F.2d at 842-844. Third, unlike Section 706, Section 707 allows the government to request that the case be heard initially by a three-judge district court, whose decision is appealable directly to this Court. 42 U.S.C. 2000e-6(b). Fourth, whether suit is brought before a single district judge or before a three-judge panel, Section 707 requires that the case be heard "at the earliest practicable date" and otherwise must be "in every way expedited." *Ibid.*

Finally, there is no sound basis for petitioner's apparent belief that the EEOC will be unfairly advantaged if it can use the pattern-or-practice method of proof when proceeding under Section 706. The "*Teamsters* framework is *not* an inherently easier standard of proof; it is simply a different standard of proof." Pet. App. 19 (emphasis added). "Indeed, under *Teamsters*, the plaintiff's initial burden to make out a prima facie case is heightened." *Ibid.*

2. Petitioner contends that the EEOC violated "the investigation and conciliation requirements of Title VII." Pet. 24. That argument likewise does not warrant review.

a. Since 1964, Title VII has set out the EEOC's administrative duties regarding charges of discrimination. The EEOC must serve notice of all discrimination charges on the employer, and it must "make an investigation of such charge." Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 259; see 42 U.S.C. 2000e-5(b). Also since 1964, Title VII has stated that, if the EEOC determines "there is reasonable cause to believe that the charge is true," it shall endeavor to eliminate the unlaw-

ful practice through "informal" methods of conciliation. *Ibid.* The 1964 Act required that the EEOC maintain the confidentiality of such efforts and stated that they could not be "used as evidence in a subsequent proceeding" absent consent of "the persons concerned." *Ibid.* These requirements preceded Congress's conferral of litigation authority on the EEOC, and they remain virtually unchanged in the current version of the statute.

When Congress granted the EEOC litigation authority in 1972, it authorized the agency to file suit "[i]f * * * the Commission has been unable to secure from the respondent a conciliation agreement *acceptable to the Commission*." 42 U.S.C. 2000e-5(f) (emphasis added). The statute contains no additional pre-suit requirements and, once filed, the EEOC's suit is tried de novo. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (The EEOC "cannot adjudicate claims or impose administrative sanctions. * * * [R]esponsibility for enforcement of Title VII is vested with federal courts."). For this reason, courts generally do not review EEOC determinations to evaluate whether they are supported by substantial evidence or otherwise probe into the EEOC's administrative investigation. See *EEOC* v. *Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (Courts "have no business limiting the [EEOC's] suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation. The existence of probable cause to sue is generally and in this instance not judicially reviewable."); *EEOC* v. *Keco Indus.*, 748 F.2d 1097, 1100 (6th Cir. 1984) (rejecting two-stage adjudication model because it would "deflect the efforts of both the court and the parties from the main purpose of this litigation: to determine whether [the employer] has actually violated

Title VII") (citation omitted); see *Ward* v. *EEOC*, 719 F.2d 311, 313-314 (9th Cir. 1983) (rejecting charging party's challenge under Title VII or the Administrative Procedure Act (APA) to the EEOC's handling of charge), cert. denied, 466 U.S. 953 (1984); *Georator Corp.* v. *EEOC*, 592 F.2d 765, 767-69 (4th Cir. 1979) (rejecting employer's request to review cause determination under either Title VII or APA because determination is non-binding and statute calls for trial *de novo*).

Petitioner contends that, in investigating sex discrimination against a class of women who applied for SSR jobs at its locations in Michigan from 1999 until 2005, the EEOC did not satisfy the administrative prerequisites to the filing of suit. Petitioner fails, however, to quote any specific statutory requirement that the EEOC did not fulfill. Rather, petitioner asserts in more general terms that the EEOC should have "identif[ied]" (Pet. 4, 11), specified the number of (Pet. 11, 14), or "meaningfully describe[d]" (Pet. 20) the alleged victims of petitioner's discriminatory hiring practices.

Those arguments lack merit. Undisputed record evidence in this case establishes that the EEOC made clear to petitioner that it was investigating hiring-based sex discrimination against a class of women who had applied to be SSRs at petitioner's Michigan locations beginning in 1999, the year Serrano unsuccessfully applied for a position, until 2005, when the EEOC determined that petitioner was uninterested in conciliation. Pet. App. 4-5. Petitioner acknowledged as much in various district court filings. *See, e.g.* Docket entry No. 338, at 37 ("While Cintas vehemently denies that it discriminated in SSR hiring in Michigan * * *, it does admit that the EEOC gave notice, through its investigation, of a potential Michigan class."); *id.* at 32 ("[T]he Determination

and the corresponding Conciliation Agreement applied—most broadly—to Michigan facilities and contemplated—at most—a Michigan class."); Docket entry No. 47, at 6 (stating that from February 2003 onward, "the parties' conciliation efforts were solely focused on Cintas' facilities in the State of Michigan"); Docket entry No. 836, at 3 ("[T]he investigation eventually expanded beyond Ms. Serrano's individual allegations and broadened into a class-wide investigation regarding Cintas' hiring of females as SSRs throughout the State of Michigan.").

Moreover, the draft conciliation agreement the EEOC presented to petitioner listed the names of 112 women who had applied at several of the Michigan locations. Pet. App. 5. Petitioner's references to a "vague" or "indeterminate" class, Pet. 3, 12, and to an "undefined group," Pet. 12, are therefore inconsistent with the record. In any event, any case-specific challenge to the adequacy of the notice that petitioner received would not present any issue of widespread importance warranting this Court's review.

b. Petitioner contends that the Eighth Circuit has adopted a different approach to review of the administrative process than has the Sixth Circuit. Contrary to petitioner's contention, this case does not present an issue on which the circuits have disagreed.

According to petitioner, the Eighth Circuit, unlike the court of appeals below, requires the EEOC to investigate the harm to every individual victim in every case. Pet. 3-4 (citing *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012) (*CRST*)). That contention reflects a failure to appreciate the difference between the methods of proof invoked here and in *CRST*.

The court of appeals in this case noted, but found it unnecessary to address, petitioner's contention that the EEOC should have pursued "conciliation on behalf of the thirteen claimants the EEOC ultimately named in its enforcement action." Pet. App. 36. Because this case involves a class-based claim "under the *Teamsters* framework," the court focused instead on the factual question whether the EEOC had investigated and conciliated on a class-wide basis. *Ibid.* The court answered that question in the affirmative, finding it "clear that the EEOC provided notice to [petitioner] that it was investigating class-wide instances of discrimination." *Ibid.* The court's holding is amply supported by the district court record. See *id.* at 36-37.

Unlike this case, *CRST* did not involve the pattern-or-practice method of proof. Indeed, the Eighth Circuit there found it "[n]otabl[e] the EEOC did not allege * * * 'a pattern or practice' of * * * discrimination," and the court stated that its holding on the need for individual conciliation did not extend to pattern-or-practice cases. *CRST*, 679 F.3d at 676 n.13; see *ibid.* ("We, like the district court, 'express[] no view as to whether the EEOC's investigation, determination and conciliation * * * would be sufficient to support a *pattern[-]or-practice* lawsuit.'") (quoting *EEOC* v. *CRST Van Expedited, Inc.*, No. 07-cv-95, 2009 WL 2524402, at *16 n.21 (N.D. Iowa Aug. 13, 2009)) (brackets in original). Accordingly, there is no conflict between the court of appeals' holding in this case and the Eighth Circuit's holding in *CRST*.

CRST is further distinguishable because the Eighth Circuit in that case favorably quoted the Sixth Circuit for the settled proposition that "as a general rule, 'the nature and extent of an EEOC investigation into a dis-

crimination claim is a matter within the discretion of that agency.'" *CRST*, 679 F.3d at 674 (quoting *KECO Indus.*, 748 F.2d at 1100). The court in *CRST* departed from that general rule only because of the unusual facts before it. The case involved alleged sexual harassment of hundreds of women by different men in the distinct location of their long-haul trucks, and it grew exponentially from the handful of women the EEOC had known about at the administrative stage. See *id.* at 666-667.

Those distinctive facts set *CRST* apart from this case, and from the other cases in which appellate courts have recognized that the EEOC need not name specific class members at the administrative stage as long as the parameters of the class are identified. See *EEOC* v. *Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996) (noting the "EEOC's ability to challenge discrimination affecting unidentified members of a known class") (citing *EEOC* v. *United Parcel Serv.*, 860 F.2d 372, 374 (10th Cir. 1988) (holding that the EEOC may challenge no-beard policy that may affect unidentified members of known class)); *EEOC* v. *Bruno's Rest.*, 13 F.3d 285, 287, 289 (9th Cir. 1993) (in class suit alleging discrimination against several pregnant waitresses, the "EEOC is not required to provide documentation of individual attempts to conciliate on behalf of each potential claimant") (quoting *EEOC* v. *Rhone-Poulenc, Inc.*, 876 F.2d 16, 17 (3d Cir. 1989) (ADEA discharge case)); *American Nat'l Bank*, 652 F.2d at 1184-1186 (holding that the EEOC may pursue hiring claims involving locations not specifically identified in investigation or conciliation when the employer knows that the hiring practices being investigated affected those locations).

c. Petitioner contends that there is a "broader disagreement" concerning judicial review of "the adequacy

or reasonableness of the EEOC's conciliation efforts." Pet. 4; see also Pet. 18-20. Any such disagreement is not implicated by this case.

The cases petitioner cites involve the EEOC's conduct in responding to the employer during conciliation. See, *e.g.*, *EEOC* v. *Agro Distribution, LLC*, 555 F.3d 462, 467-468 (5th Cir. 2009); *EEOC* v. *Asplundh Tree Expert Co.*, 340 F.3d 1256, 1258-1260 (11th Cir. 2003). This case presents no issue concerning the reasonableness of the EEOC's conduct during the conciliation process because petitioner "did not respond" to the EEOC's conciliation proposal "or present a counteroffer for settlement." Pet. App. 5; see *id.* at 37 (explaining that petitioner "expressed no interest to the EEOC in reaching a settlement"); *ibid.* (citing petitioner's "three-year silence" in response to the EEOC's offer). This case therefore presents no question concerning the scrutiny that courts should give to the EEOC's conduct during conciliation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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