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IN THE SUPREME COURT OF THE UNITED STATES

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MACH MINING, LLC, :

Petitioner : No. 13-1019

v. :

EQUAL EMPLOYMENT :

OPPORTUNITY COMMISSION. :

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Washington, D.C.

Tuesday, January 13, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 13-1019, Mach Mining, LLC v.
5 the Equal Employment Opportunity Commission.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GOLDSTEIN: Mr. Chief Justice, may it
10 please the Court:

11 Title VII prohibits the EEOC from suing a
12 private employer unless it first attempts to resolve the
13 claim of discrimination through conciliation. We ask
14 the Court to hold that a court may conduct a modest
15 inquiry into whether the EEOC violated that statute. If
16 it did, then the remedy generally is to require
17 conciliation, not to dismiss the suit with prejudice.

18 JUSTICE KENNEDY: At -- at first, I thought
19 this was an Overton Park case committed by law to agency
20 discretion. But then I couldn't find many cases in the
21 government's brief to support that, so they have a
22 different theory, and that's more their problem than
23 yours.

24 On the other hand, it seems to me that Judge
25 Hamilton in the Seventh Circuit said it's hard to

1 imagine more discretionary language than Congress used
2 here, "Shall endeavor to eliminate the unemployment
3 practice by informal methods of conference conciliation
4 and persuasion." That seems to me that those are very
5 difficult words for your position.

6 MR. GOLDSTEIN: Sure. So let me,
7 Mr. Justice Kennedy, divide that question into two
8 parts. What's the analytical framework? Is it Overton
9 Park? Is it an APA case? Is it an implied private
10 right of action case, which is what Judge Hamilton
11 thought, and then turn to the words of the statute and
12 what it means, if we were even to concede, that these
13 are kind of unusual words for a court to administer.

14 So the first is the doctrinal question. The
15 government agrees that Judge Hamilton got it wrong in
16 putting the burden on us to prove that there was an
17 implied private right of action. As a precondition to
18 suit under Title VII, everyone agrees that there doesn't
19 have to be a special statutory provision. We say that
20 this is a case, like St. Cyr, that it's a case in which
21 the government has to prove, because there is compelled
22 agency action here, the conciliation by the EEOC, that
23 there is clear and convincing evidence that Congress
24 intended to withdraw the ordinary presumption that there
25 is judicial review.

1 So then the government's view, just to put
2 out the third doctrinal framework, the government says,
3 look, we think this is kind of an ordinary statutory
4 construction case, and you should see whether it is that
5 the three provisions of the statute on which they're
6 relying are more consistent or less consistent with
7 judicial review.

8 We think that this is clearly a case -- we
9 cite *Bowen*, for example, in our brief. We cite a series
10 of cases about Congress having to give very clear
11 evidence of intent to pull the courts out of the job of
12 reviewing the agency action.

13 Now, to take your point that this -- and
14 Judge Hamilton's point, that is, this kind of language
15 is both deferential in that it's informal, you just have
16 to endeavor. And this is arguably something that's a
17 little bit unusual for courts to undertake. So first,
18 doctrinally, the fact that Congress has given the courts
19 an unusual job is not an excuse or reason for the
20 Executive Branch to tell you that you cannot do the job.
21 That would turn *Chevron* on its head. Remember, the
22 principle of *Chevron* --

23 JUSTICE GINSBURG: Well, it's kind of an odd
24 conciliation, isn't it? This is -- EEOC is supposed to
25 try to settle the matter. But there is no mutual

1 obligation on the other side. There's no obligation at
2 all on the part of the employer to cooperate to do
3 anything.

4 MR. GOLDSTEIN: Yes, Justice Ginsburg. And
5 I think this has to be a point in our favor, the fact
6 that it is unusual. Let me tell you how unusual it is;
7 and that is, the EEOC is required to do this with
8 respect to four different statutes. The Housing and
9 Urban Development Department has to do it and the
10 Federal -- the Federal Election Commission has to do it.
11 So Congress has laid this out in a series of statutes
12 where it wanted to impose on the agency this special
13 obligation. Even with respect to Title VII, the private
14 employee doesn't have to conciliate, the attorney
15 general doesn't have to conciliate, the EEOC doesn't
16 have to conciliate if it's an urgent problem under the
17 statute.

18 But Congress thought, and this Court has
19 said many times, that it was especially important that
20 the EEOC try and resolve these cases through
21 conciliation. And it would be passing strange to say
22 that the entire design of the statute is that the EEOC
23 will work this out through conciliation, if possible,
24 but that's the one provision of the statute that is not
25 enforceable.

1 JUSTICE KAGAN: Well, but at the same time,
2 Mr. Goldstein, and this really follows up on
3 Justice Kennedy's question, the statute makes entirely
4 clear that the EEOC has the prerogative to decide what
5 kind of offer by the employer is acceptable or not. And
6 there's nothing to suggest that the EEOC even has to be
7 reasonable in determining what sort of offer by the
8 employer is acceptable.

9 MR. GOLDSTEIN: Could I agree with the first
10 part, but not the second? Let me just take you to the
11 statute, if I might. It's in the blue brief at page 2.
12 And it's the block quote at the bottom. And it has a
13 timing provision that's kind of irrelevant. And then it
14 says the following: "The Commission has been" -- this
15 is, "If the Commission has been unable to secure from
16 the respondent a conciliation agreement acceptable to
17 the Commission," which is the point you just made, Your
18 Honor, "the Commission may bring a civil action against
19 any respondent, not a government."

20 Now, I think it's a helpful point to us that
21 Congress --

22 JUSTICE GINSBURG: Let's not skip over the
23 time provision as irrelevant so quickly. Because it's
24 the 30 days -- 30 days -- EEOC can sue within 30 days of
25 the charge; isn't that right?

1 MR. GOLDSTEIN: It can if it cannot reach a
2 conciliation agreement. This Court has --

3 JUSTICE GINSBURG: So Congress couldn't
4 think that this was any kind of an onerous requirement
5 if all they have is 30 -- within 30 days they can say,
6 okay, we told them that -- that what -- what the
7 complaint is, they didn't come up with anything and so
8 end of conciliation.

9 MR. GOLDSTEIN: Well, Justice Ginsburg, we
10 just, I suppose, disagree about the substance of the
11 conciliation requirement is in that point. The EEOC
12 concedes that it cannot file the suit within 30 days or
13 after 30 days unless the -- it determines that there has
14 been a conciliation process that has failed.

15 Now, what I think the helpful point for us
16 is that this language acceptable to the Commission is
17 there with respect to the substance, but not the
18 process. If you'd look at the procedural obligation,
19 which is the one we're trying to enforce here, which it
20 appears earlier in the page, "If the Commission
21 determines after such investigation that there is
22 reasonable cause to believe that the charge is true, the
23 Commission shall endeavor to eliminate" -- which is
24 expansive language, Justice Kennedy, to be sure -- "any
25 such alleged unlawful employment practice by informal

1 methods of conference, conciliation and persuasion."

2 And our point is that Congress knew how to
3 write into the statute something like a method of
4 conciliation that is acceptable to the Commission.

5 Also, to the extent this provision remains
6 vague, and it has been enforceable --

7 JUSTICE SCALIA: Mr. Goldstein, if I
8 understand your argument, you're saying that there is an
9 obligation to conciliate, but that obligation does not
10 have to be pursued in good faith.

11 MR. GOLDSTEIN: No, Justice Scalia. We
12 think --

13 JUSTICE SCALIA: So that the -- even if the
14 Commission enters upon a conciliation process, you think
15 that the outcome of that is reviewable?

16 MR. GOLDSTEIN: No, Justice Scalia. This is
17 the difference between substance and process. It is not
18 too fine a point. Let me just explain our provision --
19 our position. That is, as Justice Kagan indicates, the
20 EEOC can declare what the finish line is, but Congress
21 said they're going to have to go through a process.
22 They're going to have to run the race --

23 JUSTICE SCALIA: That was my question.

24 MR. GOLDSTEIN: Yes.

25 JUSTICE SCALIA: It can declare when the

1 finish line is, but it can do that in bad faith.

2 MR. GOLDSTEIN: No. I apologize.

3 JUSTICE SCALIA: Yes. You're saying yes, it
4 can do that in bad faith.

5 MR. GOLDSTEIN: It can -- it can say we
6 didn't get to the finish line if it went through the
7 motions, yes.

8 JUSTICE SCALIA: And it can say that in bad
9 faith.

10 MR. GOLDSTEIN: I don't believe that's
11 correct, Justice Scalia. I'll give you an example of
12 what I mean. Can I -- can I illustrate the point?

13 JUSTICE SCALIA: Well, is it correct or not
14 correct?

15 MR. GOLDSTEIN: It is not correct.

16 JUSTICE SCALIA: Because I don't understand
17 your argument.

18 MR. GOLDSTEIN: Let me give you an
19 illustration of my point. And that is, let's assume
20 that the EEOC brings a charge with respect to an
21 individual's claim. It says to the employer: We'll
22 conciliate this if you give us \$5 million. Now, \$5
23 million is not an amount of money that they legally
24 could even get in the case if they litigated it to the
25 teeth. Now, we think that that would be an -- not a

1 fair application of the statute, for them to say we
2 declare conciliation failed. So that's an illustration
3 --

4 JUSTICE SCALIA: So fair application of the
5 statute is reviewable, so that the proper -- I mean,
6 we're just quibbling over, you know, how bad it is,
7 that's right.

8 MR. GOLDSTEIN: Well, Justice Scalia, here's
9 their -- their view of judicial review is that it is
10 available, but it is limited to one thing, which is to
11 say, did we send the employer a letter that said give us
12 a call? Now, our point is that that's got to be an
13 argument in our favor, because they're conceding that
14 Congress did contemplate some form of judicial review.

15 JUSTICE KENNEDY: But it is true that you --
16 you do not -- I think I'm correct in this -- reach out
17 and try to incorporate the existing law on good faith
18 bargaining in the labor context or there are many
19 contracts which have good faith clauses and that the
20 courts have tremendous difficulty with that. And if you
21 had argued that, we would have said, oh, well, this is a
22 morass.

23 MR. GOLDSTEIN: Right. So --

24 JUSTICE KENNEDY: But it seems to me that
25 that's you're safest harbor.

1 MR. GOLDSTEIN: Well, Justice --

2 JUSTICE GINSBURG: But you've already -- you
3 recognized in -- in the prior exchange that there --
4 this is nothing like bargaining. Bargaining is
5 reciprocal. Both sides have a duty to bargain in good
6 faith.

7 MR. GOLDSTEIN: Yes.

8 JUSTICE GINSBURG: Here there is no duty at
9 all on the part of the employer. It just says EEOC
10 tried to conciliate.

11 MR. GOLDSTEIN: That's right. Justice
12 Ginsburg, Justice Kennedy, we are not asking you to
13 import the good faith bargaining case law and
14 regulations from the NLRA. Our point is different; and
15 that is, it is commonplace for the courts to review this
16 sort of thing. There are five statutes. This statute
17 has been enforced by 40 -- for 40 years and courts have
18 looked into notions like bargaining or whether parties
19 complied with the court's order to mediate. So this
20 isn't notionally something that is so unusual that
21 Congress --

22 JUSTICE SOTOMAYOR: Well, it's unusual
23 enough that there's a huge split among the circuits as
24 to how to define what they're reviewing. I can't find
25 any consistency among more than about two of them. And

1 so I go back to -- I know you say you've cited cases
2 about the imperative of judicial review, but on the
3 administrative level, it's after a final action. This
4 is not a final action.

5 MR. GOLDSTEIN: Justice Sotomayor, this is
6 not an ADA case. This is --

7 JUSTICE SOTOMAYOR: Oh, well, I agree with
8 you. But I'm trying to find something analogous and
9 there isn't. But I don't know how you make something
10 that's designated by Congress as informal into a formal
11 proceeding.

12 MR. GOLDSTEIN: Justice Sotomayor, I think
13 when Congress said informal methods of conference,
14 conciliation, and persuasion, it was contrasting
15 bringing a lawsuit. There's no indication in the
16 statutory structure or in the legislative history that
17 what Congress was trying to do is say to the EEOC, do
18 whatever you like. To the contrary, the EEOC uniquely
19 was constrained. Take the Department of Labor, take
20 any -- almost any other enforce --

21 JUSTICE GINSBURG: Well, can we take -- take
22 this case?

23 MR. GOLDSTEIN: Yes.

24 JUSTICE GINSBURG: The EEOC did send a
25 letter saying --

1 MR. GOLDSTEIN: Give us a call.

2 JUSTICE GINSBURG: -- give us a call. And
3 the charge here is the employer violated Title VII
4 because he outright refused to hire women. And there is
5 lots of evidence of that. There are no women working
6 there. They build a new facility; they don't have a
7 women's bathroom in it. They hire people that are
8 recommended to them by the current employees and the
9 current employees are all male and recommend all men.

10 Now, what -- what was the EEOC to conciliate
11 about?

12 MR. GOLDSTEIN: Well, this --

13 JUSTICE GINSBURG: Wouldn't the employer
14 have to come up and say something like, okay, we'll --
15 we'll agree that we'll hire women?

16 MR. GOLDSTEIN: Okay. Justice Ginsburg, a
17 couple preliminary points. Just factually, we are
18 talking about the difference between -- the company does
19 have female employees. We're talking about in the mine,
20 which is a serious concern under Title VII, but just to
21 be clear.

22 Now, in terms of the conciliation process,
23 here are the basic things that seem -- they ought to be
24 uncontroversial and that the EEOC over the course of the
25 past 40 years should have and could have used its

1 rulemaking authority to make clear. So the statute
2 requires that you're going to conference. Now, the
3 EEOC's position is we can say, give us a call. But what
4 ought -- there ought to be a rule that says if the
5 employer contacts you back, you are willing to
6 conference with them. You are willing to meet and have
7 a discussion.

8 The statute says that you have to attempt to
9 persuade the employer. And so that -- what that should
10 mean is simply that you're going to give the basics of
11 your demand in conciliation to the employer so it can
12 evaluate it.

13 Justice Ginsburg, the problem is that --

14 JUSTICE SCALIA: Can I ask something about
15 this?

16 MR. GOLDSTEIN: Yes.

17 JUSTICE SCALIA: Conciliation I thought
18 would be conciliation between the complaining parties
19 and the employer.

20 MR. GOLDSTEIN: It's between -- sorry.

21 JUSTICE SCALIA: But -- and that's wrong?

22 MR. GOLDSTEIN: It is the EEOC and the
23 employer.

24 JUSTICE SCALIA: Between the EEOC and the
25 employer?

1 MR. GOLDSTEIN: Right. It is an important
2 point --

3 JUSTICE SCALIA: So even if the complaining
4 party is willing to accept \$500,000 rather than a
5 million, if the EEOC says a million, the EEOC is
6 conciliated.

7 MR. GOLDSTEIN: The EEOC says it's
8 conciliated.

9 JUSTICE SCALIA: Well, no. Under the law,
10 you tell me it is conciliated.

11 MR. GOLDSTEIN: Right. The EEOC's
12 position -- that is correct, yes, full stop. And this
13 is a problem. The EEOC has an enormous incentive,
14 because it does bring about 130 cases a year, to pick
15 out the cases that it wants to be very high profile. It
16 wants to send a message to employers. Justice Ginsburg,
17 you articulated they are concerned with this employer.
18 The difficulty for them is if they conciliate, Congress
19 required that that remain entirely confidential. And so
20 the problem is that we have an agency that has an
21 enormous incentive in the cases that it picks out to
22 bypass the mandatory process that Congress imposed.

23 JUSTICE KAGAN: Mr. Goldstein, could we talk
24 about that confidentiality provision? Because in
25 addition to just the enormous discretion that this

1 statute gives to the EEOC, the other thing that tends to
2 work against you is this thing: Nothing said or done as
3 part of these informal endeavors can be used as evidence
4 in a subsequent proceeding.

5 MR. GOLDSTEIN: Yes.

6 JUSTICE KAGAN: And your entire position
7 would have all the stuff about this conciliation come in
8 as evidence in a subsequent proceeding, which is to say,
9 come in as evidence in the litigation of the lawsuit.

10 MR. GOLDSTEIN: Okay. Just to pause briefly
11 on the premise that there is enormous discretion, that
12 is the premise of Chevron deference, not courts not
13 enforcing a statute.

14 But to turn to the confidentiality
15 provision, remember that the EEOC --

16 JUSTICE KAGAN: I'm just saying as a matter
17 of fact --

18 MR. GOLDSTEIN: Okay.

19 JUSTICE KAGAN: -- there is discretion in
20 the sense that the statute clearly gives it to the EEOC
21 to decide what's acceptable in the end.

22 MR. GOLDSTEIN: Absolutely, Justice Kagan.
23 But that is true across a range of statutes that impose
24 a procedural obligation.

25 Now, confidentiality. Let's start from the

1 point that the EEOC didn't read the statute this way
2 until four decades after it was enacted. And there's a
3 good reason for that. It read it our way. The reason
4 is that when Congress enacted the statute, the reference
5 to a "subsequent proceeding" in the text unquestionably
6 was the merits of the case, because the EEOC -- there
7 was never this fight because the EEOC didn't have that
8 enforcement power.

9 JUSTICE KAGAN: Yes. But you yourself are
10 making this part of the case. You're essentially saying
11 that the EEOC has to come in and prove that it
12 conciliated in good faith or whatever term you want. So
13 it's become now, by virtue of your own argument, part of
14 the case. And how is that to be part of the case and
15 how is all this to happen unless the informal -- what's
16 said and done in the informal endeavors come in.

17 MR. GOLDSTEIN: Okay. So "subsequent
18 proceeding" can be read their way or it can be read as a
19 reference to the merits. I concede it can be read their
20 way. The question we think is that clear and convincing
21 evidence --

22 JUSTICE KAGAN: I don't even understand that
23 distinction. You're making it a part of the merits.

24 MR. GOLDSTEIN: Because the subsequent
25 proceeding is not -- is about the merits of the

1 subsequent -- the substantive claim. Let me give you
2 three examples where we have to be right that a
3 collateral inquiry into the EEOC's burden or our burden
4 is not a subsequent proceeding. That's referred to in
5 the statute, that would be subject to the
6 confidentiality proceeding.

7 This Court held in Ford Motor Company that
8 if an employer makes an offer of back pay to the
9 employee, and that would include in the conciliation
10 process, then that cuts off their right to damages. You
11 can't do that unless you can say what happened in the
12 conciliation process.

13 Number two, the statute says that you can
14 ask the judge for 60 days more of conciliation. It is
15 implausible that a court would make that judgment
16 without knowing whether conciliation has been going
17 completely worthlessly.

18 Number three, what if the employer lies to
19 the court and says, look, we never got this conciliation
20 letter. And the EEOC knows that it was discussed in the
21 conciliation meeting. Could we really say that this
22 statute bars the court from enforcing a contempt
23 proceeding against the lawyer?

24 The point of the statute is to make sure
25 that what happens in the conciliation process doesn't

1 prejudice the merits of the case. This isn't a secrecy
2 provision. Under this provision, the employer can
3 publish what happened in conciliation in the New York
4 Times.

5 JUSTICE KAGAN: I would have thought that
6 the point of the provision is very clear. It's the same
7 point as anything which says when you're involved in
8 settlement negotiations those stay in settlement
9 negotiations, and it's to protect the settle -- the
10 integrity of the negotiations.

11 MR. GOLDSTEIN: Well, I just gave you three
12 examples where I think plainly it can't be read that
13 broadly. We think it serves --

14 JUSTICE GINSBURG: You left out one person.

15 MR. GOLDSTEIN: Yes.

16 JUSTICE GINSBURG: The complainant. As I
17 understand it, to break the confidentiality all the
18 participants have to agree. And the employer might
19 agree, but the employee hasn't been heard from.

20 MR. GOLDSTEIN: This -- this, again, I think
21 has to be a point in our favor. Let me just take you to
22 the statutory text involved. And that says that you
23 have to have permission of the persons concerned. Now,
24 the commission is not a person. Justice Ginsburg, you
25 are right that the persons concerned under this statute

1 are the individual complainant and the employer.

2 Now, the complainant is not involved in this
3 inquiry at all. It's about whether the EEOC responded
4 to our request to meet, whether it gave us an
5 explanation of what it is that they were demanding.

6 How does it make any sense that Congress
7 would have said that the choice whether the evidence
8 comes in is to the complainant, who wasn't even involved
9 in this part of the process. We think that our reading
10 of the statute, which is their reading of the statute
11 for the first four decades is --

12 JUSTICE GINSBURG: But if it is
13 confidential, that is plain in the statute.

14 MR. GOLDSTEIN: But it's not confidential in
15 that sense, Justice Ginsburg. Remember, the employer,
16 as I said, is free to tell CNN, the New York Times, and
17 the Washington Post everything that happened here.

18 JUSTICE KENNEDY: So it's your position that
19 the courts that have held that the proceedings are under
20 seal or they're secret proceedings are just irrelevant;
21 we don't need to be concerned with that?

22 MR. GOLDSTEIN: Justice Kennedy, there
23 aren't such courts. Every court --

24 JUSTICE KENNEDY: There are or there aren't?

25 MR. GOLDSTEIN: Are not. Every court -- on

1 the question of administrability, it's very frequent for
2 an agency to come to you and say, look, this would work
3 so much better if the courts weren't involved; we would
4 do a great job. And for 40 years, courts have enforced
5 this provision and have never understood, before a
6 decision in 2011, the confidentiality provision to apply
7 this way. And the EEOC argued that we were right.
8 There's no indication that the statute was
9 malfunctioning in some way.

10 We think, respectfully, that you cannot have
11 agencies come in front of you and say, look, Congress
12 gave us a lot of discretion; that doesn't mean we should
13 issue regulations. They have the authority to issue
14 procedural regulations that would elaborate on what
15 conciliation means, what -- what persuasion means. But
16 they've refused to do it. And then they come to you and
17 say, well, look, you know, it's entirely vague.

18 JUSTICE GINSBURG: Because they consider it
19 -- and I think you can't quarrel with it; this is what
20 Congress intended -- as a highly informal proceeding.
21 They don't want a -- a bunch of procedural regulations.

22 MR. GOLDSTEIN: That's not quite right.
23 Remember, that they admit that there are firm
24 requirements. They have to send a letter. They can
25 only conciliate with respect to the claim that's in the

1 reasonable cause determination. We think there are
2 other very simple, modest things that the courts have
3 had no trouble enforcing --

4 JUSTICE BREYER: Well, what about that?
5 That's what I -- I mean, in my mind, of course, there
6 should be judicial review. There is of everything just
7 about. But the issue is how much.

8 MR. GOLDSTEIN: Yes.

9 JUSTICE BREYER: All right. Now, what's
10 your view on that? Because as I -- we just had a case
11 where when an IRS official wants to subpoena some
12 material, all he has to do is say it's in good faith.
13 Ah. But there could be an unusual case where we want to
14 get more than that affidavit.

15 MR. GOLDSTEIN: Yes.

16 JUSTICE BREYER: So we wrote an opinion, and
17 probably you've read it, and we said, well, judge, yeah,
18 if it's unusual and you really have some thought here
19 that the IRS is in bad faith, you can go a little
20 further. Well, that seems to me to be the kind of thing
21 that would apply here.

22 MR. GOLDSTEIN: Sure.

23 JUSTICE BREYER: And then -- okay. So
24 you're perfect satisfied. I take it the closest to this
25 is the Fourth, Sixth, and Tenth Circuit, a minimal

1 showing of good faith, that's the end of it, but you're
2 never going to say never.

3 MR. GOLDSTEIN: Yes. Now, those courts --

4 JUSTICE BREYER: That's what your -- well,
5 maybe there will be agreement on this.

6 MR. GOLDSTEIN: I doubt it.

7 The -- Justice -- Justice Breyer, that is
8 exactly right. We think that the agency here, if it
9 claims the expertise and the flexibility and to know
10 what's going on, ought to issue further elaborating
11 regulations. But we think that minimum good faith does
12 have some very easy, simple things to know. If I'm
13 going to --

14 JUSTICE BREYER: Aha. You're going a bit
15 further.

16 MR. GOLDSTEIN: I'm doing so to try and be
17 helpful. Here's what I had in my mind, Justice Breyer.
18 Look, if I'm going to conciliate something with you, if
19 we're going to work it out and I get to decide, I've got
20 to tell you the minimum of what I'll take. How is it
21 that we're supposed to work it out --

22 JUSTICE BREYER: Maybe that's confidential.
23 I don't know. Minimal good faith? Hey, I have an
24 affidavit, I'm in the agency, I sign it. We called him,
25 he came in, we discussed the matter, I tried to persuade

1 him --

2 MR. GOLDSTEIN: That is --

3 JUSTICE BREYER: -- and he's not persuaded.

4 Thank you very much. In the absence of some -- in the
5 absence of some showing that there is something like we
6 tried to get a bribe or something, good-bye.

7 MR. GOLDSTEIN: No. Justice Breyer, that is
8 not -- I believe that is not what those courts have in
9 mind. So there's nothing confidential --

10 JUSTICE BREYER: That's at the moment what I
11 have in mind. So what -- what is it --

12 MR. GOLDSTEIN: All right.

13 (Laughter.)

14 JUSTICE SCALIA: I -- I think your response
15 is persuade him about what?

16 MR. GOLDSTEIN: Persuade --

17 JUSTICE SCALIA: He tried to persuade him
18 about what? If you didn't even make an offer, there was
19 nothing to -- what, persuade him not to commit suicide?

20 MR. GOLDSTEIN: Right. Persuade --

21 JUSTICE BREYER: No, we didn't persuade him
22 about not to commit suicide. What we did is we tried to
23 persuade him that our suggestion that you reinstate the
24 individual, whatever it was, is a sensible way to go.

25 MR. GOLDSTEIN: Fine.

1 JUSTICE BREYER: And it'll be good for him
2 and good for the company. You understand.

3 MR. GOLDSTEIN: All right. Now you're
4 voting for me again.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: Mr. Goldstein, can I --
7 can I stop a moment?

8 MR. GOLDSTEIN: Please.

9 JUSTICE SOTOMAYOR: If the inquiry is about
10 what happened --

11 MR. GOLDSTEIN: Yes.

12 JUSTICE SOTOMAYOR: -- at -- at the
13 hearing --

14 MR. GOLDSTEIN: Yes. At the hearing or the
15 conciliation?

16 JUSTICE SOTOMAYOR: At the conciliation. I
17 misspoke.

18 MR. GOLDSTEIN: Thank you.

19 JUSTICE SOTOMAYOR: Okay. It seems to me,
20 though, that that may be what you're arguing now, but if
21 we look at the record below, first you didn't want to
22 waive confidentiality. You then put in a set of
23 interrogatories that demands to know what the EEOC --
24 who the EEOC contacted, how they measured their damages,
25 and a bunch of other stuff, still not waiving

1 confidentiality.

2 This new thing of yours that says if you
3 challenge it when I make a motion, then I can disclose
4 it. I think what Justice Breyer's getting to is, you
5 know whether someone conciliated or not. You can say
6 exactly what the EEOC did or didn't do or failed to do.
7 But instead, you want a whole discovery process attached
8 to this. And that's my problem here --

9 MR. GOLDSTEIN: Okay.

10 JUSTICE SOTOMAYOR: -- which is it's very
11 simple for you to come in and say, we called, we asked
12 to meet, they wouldn't meet with us.

13 MR. GOLDSTEIN: Here are the things that we
14 want and I do want to talk about what's in the record
15 and why --

16 JUSTICE SOTOMAYOR: No, no, no, no. I don't
17 want to know what you want. I want to know what happens
18 because that's the only way I can judge whether there
19 was good faith.

20 MR. GOLDSTEIN: Justice --

21 JUSTICE SOTOMAYOR: So if you walked in and
22 said, I'm not going to listen to you until you give me
23 A, B, and C, I might say you weren't acting in good
24 faith.

25 MR. GOLDSTEIN: Okay. Well, Justice

1 Sotomayor, they -- they say a court doesn't have that
2 power. Now, with respect to what happened in this case,
3 we -- the government has put us in an unbelievable bind
4 here, and that is, we issued these interrogatories and
5 then we attempted to explain to the court why we thought
6 the interrogatories were necessary in light of the
7 conciliation process, and they threatened to sanction
8 our counsel personally. So the record is empty for a
9 reason that owes entirely to them.

10 I will tell you that there are cases in
11 which the EEOC attempts to conciliate and says we are
12 suing -- we're going to sue on behalf of a class of
13 people, and we want some X amount of money, and it may
14 be an awful lot of money. And the employer will say
15 back, look, how many people are we talking about over
16 what period of time? And the EEOC's interpretation of
17 this provision is it could say we're not going to tell
18 you; we've just got a class of people and we want this
19 amount of money. And interrogatories like this would be
20 out there conceivably to illustrate to the court that we
21 had no way of conciliating this case. If we're -- if
22 it's going to say we're in an endeavor to work it out,
23 you've got to tell me what you want and the basics --
24 JUSTICE SOTOMAYOR: So you'd have all of the
25 discovery and the conciliation process in 30 days.

1 MR. GOLDSTEIN: Your Honor --

2 JUSTICE SOTOMAYOR: That -- that's basically
3 what you want to -- to have.

4 MR. GOLDSTEIN: No. Congress contemplated
5 that conciliation could conclude within 30 days. It
6 doesn't -- remember, this case is very old because they
7 got this charge in 2008 and it was years later, even
8 before they brought the case, and the case has dragged
9 on this long because they have steadfastly infused --
10 refused, in the face of eight courts of appeals'
11 rulings, no court ever indicating that the standard was
12 inadministrable, no court ever finding that an employer
13 acted in good faith -- in bad faith in raising this
14 objection.

15 And it has dragged on unnecessarily. We
16 want a modest inquiry that should be administrable, and
17 that the EEOC can elaborate on in its own regulations.

18 If I could reserve the remainder of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Ms. Saharsky.

21 ORAL ARGUMENT OF NICOLE A. SAHARSKY

22 ON BEHALF OF THE RESPONDENT

23 MS. SAHARSKY: Mr. Chief Justice, and may it
24 please the Court:

25 I think the Seventh Circuit was correct when

1 it reviewed what has been happening in the courts of
2 appeals and concluded that, in fact, what is happening
3 is not a modest inquiry and it's just not one that has a
4 basis in the text of the statute. And I think it's
5 useful to go back to the text of the statute and look --

6 JUSTICE SOTOMAYOR: Ms. Saharsky, let me
7 just ask you a simple question. You send a letter, they
8 call you, and you say, don't want to talk to you, hang
9 up. 30 days later, you send the letter that you send
10 routinely that says conciliation failed. How do they
11 get a court to review that under your theory of the
12 case? Because you say the only thing the court can
13 review is whether conciliation was offered and whether
14 it ended. So here it was offered, but we're not even
15 talking about good faith. You just say I'm not going
16 to.

17 MS. SAHARSKY: Yes.

18 JUSTICE SOTOMAYOR: "You" meaning the
19 government. So how do you review that if you're a
20 court?

21 MS. SAHARSKY: You don't review it. We
22 think that this is a matter that is entrusted to the
23 agency, that is not for court review. And I --

24 CHIEF JUSTICE ROBERTS: And what -- I'm
25 sorry. Continue. No, I'm sorry.

1 MS. SAHARSKY: That's okay.

2 I think that it helps to look at the
3 obligations that the Congress put on the commission in
4 the statute in two parts. There's the -- and I'll make
5 this brief. There's the obligation in part B, which is
6 the commission should endeavor to eliminate the
7 employment discrimination, everything is supposed to be
8 kept confidential. We understand that to put a good
9 faith obligation on the commission to try to get this
10 resolved. We don't think that it is judicially
11 reviewable because of the language that Congress used
12 and because by analogy, it is the type of agency action
13 that's committed to the agency's discretion. There's no
14 standards. But --

15 CHIEF JUSTICE ROBERTS: But what if you
16 have -- you sent a letter that says a representative of
17 this office will be in contact with you to begin the
18 conciliation process. What if the employer says, nobody
19 contacted me; it never happened. Can you get judicial
20 review of that claim?

21 MS. SAHARSKY: Well, the obligation of the
22 agency is to say that it has been unable to secure a
23 conciliation agreement acceptable to the commission. So
24 that --

25 CHIEF JUSTICE ROBERTS: No. Is it their

1 obligation to say that or is it their obligation to do
2 that?

3 MS. SAHARSKY: Well, if it is challenged, it
4 has to put the document into court that is the notice
5 that it was unable to do that.

6 CHIEF JUSTICE ROBERTS: And they say here
7 your document is signed by, you know, John Rowe. What
8 if they say, I'm sorry, it's just not true, he's lying?
9 We got nothing, nobody ever called us.

10 MS. SAHARSKY: Well, if the -- if the
11 document which says that the commission was unable to --
12 to secure an agreement acceptable to it --

13 CHIEF JUSTICE ROBERTS: No, no, no. You're
14 making it too easy on yourself, I'm talking about the
15 document that says, we will be in contact with you.
16 Right?

17 MS. SAHARSKY: Yes.

18 CHIEF JUSTICE ROBERTS: They said nobody
19 contacted me.

20 MS. SAHARSKY: I think the answer is that it
21 is the process by which the -- there was an attempt at
22 conciliation is not reviewable. We do not -- we think
23 that the agency --

24 CHIEF JUSTICE ROBERTS: Is, in my case,
25 judicial review of that question?

1 MS. SAHARSKY: No.

2 CHIEF JUSTICE ROBERTS: Nobody contacted me;
3 they've got a letter saying they'll contact me, nobody
4 ever contacted me.

5 MS. SAHARSKY: No, but we do not think that
6 there are any situations in which that will arise.
7 There are not situations in which that has arisen and
8 that is not the argument that --

9 CHIEF JUSTICE ROBERTS: That's just assuming
10 you're always right.

11 MS. SAHARSKY: That's --

12 CHIEF JUSTICE ROBERTS: I mean, I don't
13 understand why you can't have a court at least say,
14 okay, there's a direct conflict. You say you're
15 supposed to --

16 MS. SAHARSKY: Right, okay.

17 CHIEF JUSTICE ROBERTS: -- consume -- and he
18 says it never got off the ground, and you can have --

19 MS. SAHARSKY: Right.

20 CHIEF JUSTICE ROBERTS: -- Mr. Rowe file an
21 affidavit and he can file an affidavit and --

22 JUSTICE BREYER: You know, this is a -- this
23 is Hornbook law, I thought, use it till this point. But
24 everything is reviewable. Now, that isn't quite true,
25 but if you want to apply for a visa at a foreign embassy

1 abroad, at our embassy is not reviewable. Okay, and
2 maybe there's a military thing, but even the -- even
3 the -- even the things like the Panama Canal toll, where
4 they said it wasn't reviewable, Davis says it should
5 have been.

6 And the answer to your problem is it's not
7 -- it's not reviewable, the three cases or so where we
8 said it wasn't. The answer is the agency has broad
9 discretion, and because they have such broad discretion,
10 the court can review it, but unless it's very unusual,
11 they have to decide for the agency.

12 Now, eight circuits have roughly followed
13 that; three, more detailed than others. And I haven't
14 found anything in your brief that says in the last 40
15 years, the EEOC has, as a result, found its functioning
16 seriously hampered. And -- and so why -- what's --
17 that's why I'm -- I'm wondering.

18 MS. SAHARSKY: Well, a couple points. First
19 of all, I'm afraid that I may have misunderstood the
20 Chief Justice's question. If there was no attempt at
21 conciliation at all, then, you know, these letters would
22 not exist and we think that that potentially would be a
23 problem, but that --

24 CHIEF JUSTICE ROBERTS: You're saying if the
25 agency -- the agency couldn't possibly have violated the

1 law? They wouldn't say we have attempted to -- we will
2 contact you, and then not contacted you?

3 MS. SAHARSKY: I agree that that would be a
4 problem, but that is not what Petitioner is arguing for.
5 He has not identified case --

6 CHIEF JUSTICE ROBERTS: No, it's not a
7 question of what he's arguing for, it's a question of
8 what you are arguing for. You are arguing that there is
9 no judicial review, full stop. And I'm trying to pose a
10 question where it seems to me that it would be utterly
11 unreasonable for you to say you don't get judicial
12 review of that basic question.

13 I am very troubled by the idea that the
14 government can do something and we can't even look at
15 whether they've complied with the law. I'm not terribly
16 troubled by the idea that the scope of our judicial
17 review is limited. And I just wanted you to tell me
18 which it is, is it that there's no authority for a court
19 to review government action alleged to be in violation
20 of law, or is it that the scope of judicial review for
21 various reasons is sharply circumscribed?

22 MS. SAHARSKY: It's the second one, and I'm
23 sorry if I misunderstood your question earlier. The
24 scope of judicial review depends on the condition that
25 the court -- that Congress put in for the commission to

1 meet, and that is in subsection (f)(1) of this -- this
2 provision, which is that there has to be -- the
3 commission unable to obtain an agreement acceptable to
4 it.

5 What Petitioner seeks judicial review of is
6 the process behind it and puts in place these factors
7 for reviewing the process behind it. And Justice
8 Breyer --

9 JUSTICE KENNEDY: What -- what -- what can
10 you tell us about what the proper function of the court
11 is in a case like the Chief Justice put? They said
12 there was no attempt to conciliate and when we attempted
13 to conciliate, they -- they wouldn't answer our calls.

14 Now, it -- it seems to me as I read your
15 brief that you did indicate that there was some very
16 bare bones requirements that the agency had -- had to
17 meet and it could be reviewed. I can't find any -- any
18 other context where the court has essentially declined
19 to review a statutory precondition to -- to suit at all.

20 MS. SAHARSKY: Well, what we're saying,
21 Justice Kennedy, is that if it were controverted, if the
22 other side said that there was not conciliation at
23 all -- which is not what this side is saying, they are
24 just saying it wasn't enough effort -- but if there was
25 none at all, that we would put in place the letters that

1 showed that we conciliated. Those would -- the agency's
2 activities, its day-to-day workings, would be entitled
3 to a presumption of regularity and it would take really
4 something extraordinary to look behind that.

5 JUSTICE KENNEDY: But that's the
6 difference --

7 CHIEF JUSTICE ROBERTS: What's
8 extraordinary -- what's extraordinary is that counsel
9 for the other side files an affidavit saying it never
10 happened, I know you've got this letter, but we normally
11 don't take the government's say-so when it comes to a
12 dispute about whether -- whether something happened.

13 MS. SAHARSKY: Right.

14 CHIEF JUSTICE ROBERTS: So he can say --
15 say, okay, here's the affidavit, we never got it. We
16 checked our mailroom --

17 MS. SAHARSKY: Right.

18 CHIEF JUSTICE ROBERTS: Nothing ever came
19 in. We checked our phone logs, nobody ever called.

20 MS. SAHARSKY: Right. And I'm telling you
21 that if it were a situation of it nothing never
22 happened, that that could be a situation in which the
23 court would put in place a stay to permit conciliation
24 efforts. But that's not the argument that --

25 JUSTICE SCALIA: Well, let's go back to the

1 language you quoted. The commission is unable to obtain
2 an agreement acceptable to it. To obtain an -- do you
3 acknowledge that it is obliged to try to obtain an
4 agreement acceptable to it --

5 MS. SAHARSKY: Acceptable to it, yes.

6 JUSTICE SCALIA: Yes. Now, is it possible
7 that you are trying to obtain an agreement acceptable to
8 you when you do not tell the other side what that might
9 be?

10 MS. SAHARSKY: Well, I think that --

11 JUSTICE SCALIA: You just say, you know --

12 MS. SAHARSKY: I think that there's a real
13 difference between what the EEOC is doing in its
14 day-to-day activities and court review of the EEOC
15 activities. The EEOC has in place procedures and it has
16 training in order to go through all of these steps in
17 conciliation, but what we're talking about is the
18 problems that have been caused by this after-the-fact
19 second-guessing by courts, is that --

20 JUSTICE SCALIA: You have to make me an
21 offer. That's not -- that's not difficult to find out.
22 Did you make an offer or not.

23 MS. SAHARSKY: Right. But that just leads
24 the courts into questions about how much detail was in
25 the offer and is it sufficient and if the --

1 JUSTICE SCALIA: No, not necessarily. I
2 mean, you could --

3 MS. SAHARSKY: Well, that's what has
4 happened in the --

5 JUSTICE SCALIA: -- draw a line somewhere,
6 but -- but if the other side says the EEOC never made me
7 an offer, I had no idea -- no notion of what I had to
8 agree to.

9 MS. SAHARSKY: But that is not what's
10 happening and that is not the argument that they're
11 making, is that --

12 JUSTICE BREYER: So that's what -- that's
13 where we are. I'm trying to -- what I'd like you to do,
14 I'm going to get you to focus on just what you want to
15 say, that the framework in which I'm putting it is of
16 course there is review, but of course at the same time,
17 there is very broad discretion given to the EEOC. So
18 courts do not intervene; be careful, it's an unusual
19 case.

20 Now, that's what you want.

21 Now, I want to know how to say that. And
22 the case that comes to me the closest was the case that
23 we had with the IRS where, in fact, of course the IRS
24 says, we're in good faith. And the court says, that's
25 just fine, unless of course there is an unusual

1 situation.

2 Now, one can write those words. In that
3 kind of opinion, I've noticed it works best if you also
4 give an example through the use of the case.

5 Now, that's where I am. And since I think
6 that's what you want -- something like that is what you
7 want to argue, I'm asking you for help how to write
8 that.

9 MS. SAHARSKY: Right. And what I'm saying
10 is that there is -- the way not to write that is by
11 relying on a good-faith standard, because I think you
12 have a misimpression about the courts of appeals, and
13 how it has been working in the courts of appeals, which
14 is some of the courts have adopted a good-faith
15 standard, but they are putting very onerous requirements
16 on the EEOC in terms of looking at --

17 JUSTICE SCALIA: We don't have adopt a
18 good -- we don't have to adopt a good-faith standard.
19 We -- we could simply say that if you are really trying
20 to conciliate, there are a few things that you got to
21 do. And one of them is to make an offer. Is that
22 difficult to figure out?

23 MS. SAHARSKY: There are several problems
24 with that. The first of all is that the statute says
25 that the process is supposed to be informal and this is

1 adding a level of formality to it. The second thing is
2 that --

3 JUSTICE KENNEDY: We're looking -- we're
4 looking for a safety net, that we said, please, tell us
5 what the minimum rule is. You don't -- you have not
6 articulated a minimum rule. All you say is I can't
7 think of one.

8 MS. SAHARSKY: No, I'm saying that --

9 JUSTICE KENNEDY: And that doesn't answer
10 Justice Breyer's question, and our general question, how
11 do you want us to write what you want to hold in this
12 case?

13 MS. SAHARSKY: What I'd like the Court --

14 JUSTICE KENNEDY: All I hear is no review,
15 period, good-bye.

16 JUSTICE SOTOMAYOR: Now, I don't want to
17 hear we sent letters. I -- I'm positing the
18 hypothetical: You sent letters, but when they called
19 you said, we're going to trial. You didn't make -- no
20 discussion whatsoever. You sent the letter, they called
21 and said, let's sit down, and you -- and the government
22 says, no. Okay?

23 Tell me how we -- how we write a decision
24 that avoid -- that addresses that kind of case.

25 MS. SAHARSKY: Well, we do think that the

1 decision that the Court should write should focus on
2 what the obligation is that's on the EEOC, the
3 particular text that Congress enacted. And the
4 obligation that's on the EEOC is that before it can sue,
5 it has to have been unable to secure from the respondent
6 a conciliation agreement acceptable to the commission.
7 So if that's --

8 JUSTICE KENNEDY: Fine, then what is the
9 Court supposed to do to determine whether that
10 obligation is met? So far, I think your answer is
11 nothing.

12 MS. SAHARSKY: I think what the Court is
13 supposed to do is if it's controverted, look at the
14 letters indicating that there was an effort that was
15 made by the EEOC and, as a general matter, not look
16 behind those. I mean, there was --

17 CHIEF JUSTICE ROBERTS: So trust you?

18 MS. SAHARSKY: -- a year-long process --

19 CHIEF JUSTICE ROBERTS: Just trust you?

20 MS. SAHARSKY: Well --

21 CHIEF JUSTICE ROBERTS: The other side is
22 challenging with whatever evidence it has. Maybe it's
23 voluminous -- affidavits, records -- and you say, trust
24 us. Here's a letter saying we did it. That's the end
25 of the case.

1 MS. SAHARSKY: There's significant
2 incentives that operate on agencies even when there's
3 not judicial review. In this case, for example, the
4 EEOC has substantial resource that don't allow it to
5 sue --

6 CHIEF JUSTICE ROBERTS: But there are
7 incentives on most people to tell the truth most of the
8 time, but that doesn't mean that's the end of it.

9 MS. SAHARSKY: There is also review by the
10 President and by Congress, Congressional committees.
11 There are actually reports that are required every year
12 to Congress in the statute itself.

13 JUSTICE SCALIA: Ms. Saharsky, I don't even
14 agree with you about the incentives. I think, as the
15 other side points out, there is considerable incentive
16 on the EEOC to fail in conciliation so that it can bring
17 a big-deal lawsuit and get a lot of press and put a lot
18 of pressure on this employer and on other employers.
19 There are real incentives to have conciliation fail.

20 MS. SAHARSKY: I don't think that that's
21 true in most cases; and even in high-profile cases where
22 the EEOC may believe that there's a very serious,
23 substantial claim of employment discrimination, it is
24 always easier to come to an agreement than to have to go
25 through the burdens of litigation.

1 The EEOC finds reasonable cause in
2 approximately 3500 charges every year. It only has the
3 resources to litigate in about 130 of them. That's as
4 of 2013. So there are --

5 JUSTICE SOTOMAYOR: I know what your
6 position is, but assume ours is just the hypothetical.
7 It doesn't mean you've lost, but ours is that we have to
8 give some teeth to judicial review greater than what
9 you're suggesting.

10 Justice Kennedy asked you once. I'm asking
11 you -- or I asked you once before, he's asked again, and
12 I'm asking again.

13 MS. SAHARSKY: Right. And that's --

14 JUSTICE SOTOMAYOR: Give us -- give us what
15 you don't want.

16 MS. SAHARSKY: Right. And the reason --

17 JUSTICE SOTOMAYOR: Give us a way to write
18 it that gives you the least -- the less intrusion -- the
19 least intrusion but more than what you want to do.

20 MS. SAHARSKY: Yes. And to be frank, the
21 reason that this is a struggle is because the courts of
22 appeals, even those that have tried to put a minimum
23 good faith standard in place, have seen these standards
24 spiral out of control and lead to significant collateral
25 litigation.

1 So I don't mean -- I understand the effort
2 that you're looking for, Justice Sotomayor, and I will
3 do my best to provide that guidance; but I'm telling you
4 that even in the three circuits that have tried to use a
5 minimal good-faith standard, they have been scrutinizing
6 everything that the EEOC has been doing, all of the
7 letters back and forth.

8 You've gotten into situations where you're
9 even deposing EEOC investigators in district courts, and
10 that's one thing that -- if I could just back up,
11 because I think this is a really important point, is
12 that there are four various, serious problems that this
13 has led to in the district courts and in the courts of
14 appeals.

15 We're talking about mini trials on a
16 collateral issue that's not the merits of the
17 discrimination but on this question of whether the EEOC
18 tried hard enough, and it is not the case that the EEOC
19 is failing to conciliate. The EEOC is attempting
20 conciliation in these cases. Petitioner can't identify
21 cases in which it has not conciliated at all. What
22 they're saying is that we didn't try hard enough, and
23 that requires these mini trials.

24 The second very serious problem with all the
25 standards the courts of appeals have adopted is that

1 they have to make up standards that appear nowhere in
2 the statute, and they have struggled. These five
3 guidelines that Petitioner now proposes appeared for the
4 first time in their Supreme Court brief. These are not
5 the standards they were urging to the district court.

6 JUSTICE BREYER: What about that analogy
7 with that IRS case?

8 MS. SAHARSKY: I think that that is a good
9 analogy because the Court recognized that it would not
10 be appropriate to second-guess --

11 JUSTICE BREYER: So could we copy that, you
12 know, just copy that, making appropriate changes, and
13 say, look, Judge, you have to see -- you have their
14 affidavit. As long as you think that affidavit really
15 was the bottom line, we could conciliate it unless you
16 have good reason to think that isn't so. That's the end
17 of it, unless there is evidence of an abuse of process
18 that we'll allow you to go further because conciliation,
19 mediation is really a matter that Congress intended to
20 leave up to the agency.

21 And even what sounds minimal, minimal, at
22 least the agency has to make an offer. Maybe they
23 don't. Maybe the best way to conciliate it is you sit
24 there and say, well, you know, that can be in some
25 circumstance.

1 So you -- you -- what about some? Is that
2 not possible?

3 MS. SAHARSKY: Yes. I take your point,
4 Justice Breyer. I think there are some modifications
5 that I would make to it, but I think --

6 JUSTICE BREYER: What?

7 MS. SAHARSKY: -- towards the end of your
8 question, you actually raise a really important
9 ancillary point, which is that the process of trying to
10 come to a negotiation and conclusion with someone often
11 requires an element of strategy, that you might wait for
12 them to make the first offer or you might find someone
13 who says, we're never going to come to an agreement on
14 this. And that's happened in some cases; and, yet,
15 those folks still come into court and say, The EEOC
16 didn't try hard enough. Well, you told us you were
17 never going to come to an agreement.

18 JUSTICE GINSBURG: Well, what has been going
19 on, in fact, in these cases now with some courts having
20 just general good faith, others having a three factor
21 test?

22 You raised a problem here that the EEOC was
23 hit with a bunch of interrogatories.

24 Has that been going on?

25 MS. SAHARSKY: Yes. The EEOC is really

1 faced with -- you know, is really between a rock and a
2 hard place. It does its best to conciliate and it never
3 knows whether some court is going to find it to be
4 insufficient later. The EEOC is attempting to maintain
5 the confidentiality of these proceedings. When
6 employers are in conciliation, of course they want it to
7 be confidential, but then when this gets to court, they
8 say, oh, we don't care about confidentiality anymore.
9 Let's all put it before the court, but the problem is
10 that has effects for later cases. Once employers know
11 and the commission knows that this is all going to come
12 out and what Petitioner proposes, it really destroys the
13 -- the conciliation process. It's really a bedrock --

14 JUSTICE SCALIA: Do you disagree that they
15 can publish it in the New York Times if they want?

16 MS. SAHARSKY: Well, partially, the -- the
17 confidentiality provision has two portions to it. The
18 first says that the EEOC can't make public what
19 happened.

20 JUSTICE SCALIA: Right.

21 MS. SAHARSKY: So that does not apply to
22 employers.

23 JUSTICE SCALIA: Right.

24 MS. SAHARSKY: But the second part says that
25 it can't be used as evidence in a court proceeding --

1 JUSTICE SCALIA: Because that isn't
2 credible.

3 MS. SAHARSKY: -- and that does apply.

4 JUSTICE SCALIA: That's not publishing it in
5 the New York Times, is it?

6 MS. SAHARSKY: Right, but I think in most of
7 these cases, the employers have not wanted this
8 information while they've been in conciliation to become
9 public because they would --

10 JUSTICE SCALIA: That only cuts your own
11 argument. I mean, you're -- you're worrying about
12 their -- their publishing it, and then you say they have
13 no incentive to publish it. But if they want it
14 published, they can publish it in the New York Times.
15 They don't have to bring a lawsuit to do it.

16 MS. SAHARSKY: Right, but what they can't do
17 is use the evidence in court. And we think that when
18 you look at the statute and the text that Congress
19 enacted, it reflects a recognition that what Congress
20 was defining, an informal endeavor to settle a case, is
21 the kind of thing that shouldn't be public and that
22 shouldn't be the subject of court proceedings.

23 JUSTICE SCALIA: You say that, but it didn't
24 say that it shouldn't be public. They said it shouldn't
25 be use in court proceedings. That's quite different

1 from saying it shouldn't be public.

2 MS. SAHARSKY: Fine, and I'll focus on the
3 fact --

4 JUSTICE SCALIA: So why do you say the
5 opposite?

6 MS. SAHARSKY: I'm sorry. I spoke with a
7 shorthand, that it can't be made public by the
8 commission; but you're right, it also can't be used in
9 court proceedings. And that's really a bar on the type
10 of far-reaching judicial review that is sought in this
11 case.

12 I mean, Petitioner's view essentially
13 destroys the benefits of informal settlement processes
14 because the benefits of them are that they can be
15 informal, that they can be cheap, that they can be
16 quick, and that they stay confidential.

17 Now, nothing's going to stay confidential.
18 Employers don't have an incentive to conciliate, and
19 courts have to expend this massive effort on
20 something -- and I think this is an important point --
21 that's really ancillary to the main event.

22 What this statute is about, Title VII, is
23 eliminating employment discrimination; and it has a
24 number of steps that the agency goes through in order to
25 get that to happen.

1 CHIEF JUSTICE ROBERTS: You said a moment
2 ago that employees have no incentive to conciliate.

3 Why is that?

4 MS. SAHARSKY: I think that when employers
5 know that they have a potential defense that would get
6 the lawsuit dismissed on the merits, they start to treat
7 the conciliation as an opportunity --

8 CHIEF JUSTICE ROBERTS: You're kind of
9 assuming bad faith on their part.

10 MS. SAHARSKY: I'm not assuming --

11 CHIEF JUSTICE ROBERTS: We're supposed to
12 assume complete good faith on the Government's part and
13 bad faith on this employer's part.

14 MS. SAHARSKY: That's not true. I direct
15 the Court to Footnote 13 in our brief, which is where
16 lawyers for these employers are directing them to treat
17 the conciliation effort as one to set up a defense for
18 trial.

19 So I'm not suggesting that there is just
20 necessarily bad faith. What I'm saying to the Court is
21 that this is happening, the results of what has happened
22 in the courts of appeals, trying to come up with these
23 standards is that there's been a real problem with folks
24 not using conciliation to try to come to an agreement,
25 the manipulation by employers. That was footnote 13 of

1 our brief.

2 There is also a large number of cases that
3 show how often this is being raised and the kind of --
4 that's in another footnote, the kind of real
5 resources --

6 CHIEF JUSTICE ROBERTS: All this stuff is in
7 footnotes.

8 MS. SAHARSKY: What?

9 CHIEF JUSTICE ROBERTS: All this stuff is in
10 footnotes, that's where all the important stuff is.

11 JUSTICE KAGAN: It's a rule of brief
12 writing, right?

13 MS. SAHARSKY: Well, you would know.

14 JUSTICE KAGAN: Exactly. It does -- I mean,
15 here are two preconditions to endeavoring to conciliate
16 a claim, right? One is we actually told them what we
17 were objecting to, and the second is we talked.

18 So could we just have the EEOC come in with
19 an affidavit saying, we told them what we were objecting
20 to and we talked and it didn't work?

21 MS. SAHARSKY: Yes. Although, for your
22 second point, just to -- not to be too picky about it,
23 but sometimes these communications happen over letter
24 and email, so it might not be talking.

25 JUSTICE KAGAN: Okay. Talked or --

1 MS. SAHARSKY: Communicated.

2 JUSTICE KAGAN: -- communicated.

3 MS. SAHARSKY: Right. I also would want to
4 point out to the Court, though, in terms of the
5 notice of what --

6 JUSTICE KAGAN: But you would not object to
7 that; is that right?

8 MS. SAHARSKY: Well, not that the EEOC would
9 have to -- couldn't produce that kind of information.
10 The problem is really the looking behind it and the
11 Court second-guessing --

12 JUSTICE KAGAN: No, no, no. But then, yes,
13 to the extent --

14 MS. SAHARSKY: There wasn't enough
15 information.

16 JUSTICE KAGAN: -- that -- so this goes back
17 to the Chief Justice's first question.

18 To the extent that somebody comes in and
19 says either they never told me what this case was
20 about -- that is, they never told me what the claim
21 was -- or they never communicated with me, that that
22 would be a fair thing to review that doesn't get into
23 your sort of spiraling out of control, what -- you know,
24 how hard did you try, and what positions did you take --

25 MS. SAHARSKY: Right, I mean --

1 JUSTICE KAGAN: But just we told them what
2 the claim is, and we talked about the claim.

3 MS. SAHARSKY: Right. And two points to
4 make about that. The first is, I think there is a
5 concern about the spiralling out of control. You didn't
6 tell us enough; that's essentially what Petitioner is
7 saying in this case. We want more information, we want
8 more information, et cetera. So I put that on the
9 table.

10 But the second point, and this goes to the
11 first thing you suggested, is that the commission is
12 required to make a reasonable cause determination, and
13 that does provide notice to the employer about what has
14 been found through the investigation. So in this case
15 it said: We have determined that -- that there is
16 reasonable cause to support that in your -- in your
17 mining facilities, you have failed to hire a class of
18 women for mining -- for mining jobs, and that's what the
19 problem was. So I think to some extent what you're
20 saying in terms of identifying the problem already
21 happens through the reasonable cause determination.

22 And one point, if I could, I would just like
23 to make sure that the Court gets is in terms of the --
24 the real problems with trying to come up with a standard
25 and the problems that the courts of appeals have seen.

1 I mentioned the mini-trials that are collateral to the
2 main event, the fact that the Court has to make up
3 standards. You know, I can see the difficulties with
4 making up standards just from our discussion today. But
5 then there's also needing to jury rig the
6 confidentiality provisions. They do say not to use in
7 court and that's what Petitioner is talking about, is
8 really a full court review of everything said and done
9 during conciliation. And if the Court has any doubt
10 about what that is, I would point the Court to the
11 footnotes again and the discussion in our brief that
12 talks about, even when a court said it's just good faith
13 review, those courts disagreed about what does that mean
14 and what do we have to do, et cetera, et cetera.

15 And if the Court today announced five
16 factors or something like that, the Court would no doubt
17 be faced with future cases about, what does this factor
18 mean and what does this factor mean, and whatever else.
19 That's -- I mean, aside from the fact that the standard
20 is completely made up.

21 JUSTICE SCALIA: That's the world. That's
22 the world. There's always litigation over -- over
23 stuff. I mean, you -- you want to be exempt from any
24 litigation over whether a particular standard has been
25 met or not?

1 MS. SAHARSKY: I think the problem --

2 JUSTICE SCALIA: That's extraordinary. That
3 does not exist in this world.

4 MS. SAHARSKY: What I think is
5 extraordinary, Justice Scalia, is reading something into
6 a statute that doesn't exist, which is -- there are no
7 standards in the statute.

8 JUSTICE SCALIA: That is fine. And if you
9 don't like that, if you're worried -- number one, this
10 Court could set forth standards one, two, three, four,
11 five; you have to do this, this, this, and this. I
12 would prefer not to do that. And if you leave it to the
13 lower courts to do it, each lower court is going to have
14 a different -- a different set of things.

15 But the remedy for that is -- is at your
16 hands. As the other side said, you could issue rules
17 which say, this is an informal process, but what it
18 consists of is, number one, we give you notice of what
19 the -- what the offense is; we sit down with you to
20 discuss settlement of that; number three, we make
21 apparent to you what our offer is for settling the
22 matter, and whatever other rudiments of conciliation the
23 agency believes in.

24 What's wrong with that?

25 MS. SAHARSKY: Well, the -- the agency has

1 not done that because it needs flexibility in these
2 processes and because it doesn't believe that this is
3 judicially reviewable. I think the idea about putting
4 regulations in place assumes that there is going to be
5 --

6 JUSTICE SCALIA: So if we tell you it's --
7 it's judicially reviewable -- suppose we just decide
8 it's judicially reviewable and remand for the agency to
9 issue rules?

10 MS. SAHARSKY: Yes, then the agency would do
11 that. But the agency hasn't done it up to this point
12 because what it does instead of setting out regulations,
13 because it doesn't believe that this gives a private
14 right to -- to employers to enforce, is it has its own
15 training procedures about good ways to do conciliation
16 and the steps to be taken.

17 JUSTICE BREYER: I -- I'm not a conciliator
18 or a mediator, but those I know who are might be able to
19 create such rules. On the other hand, they might not.
20 It might be that conciliation is a process that in part
21 is intuitive. So to require the agency to set forth
22 rules of consideration is to invite judicial review of
23 compliance with those rules.

24 MS. SAHARSKY: I think that's --

25 JUSTICE BREYER: And that is, I think, your

1 point. And I don't think it's a minor point. I think
2 it's rather important. If the conciliation process is
3 actually to work, let it go.

4 MS. SAHARSKY: I think you're right, that to
5 a significant extent the conciliation is more an art
6 than a science. It depends on the facts of the case and
7 it depends on the relationship with an employer. If the
8 employer said, we're never going to come to an
9 agreement, that would change how much information the
10 conciliation, the -- how far along the conciliation
11 might go or how many offers the commission might make.

12 JUSTICE SCALIA: But I thought Justice
13 Breyer said you have to make the phone call if your
14 letter says it's going to make the phone call. I
15 thought Justice Breyer believed that there are some
16 rudiments.

17 MS. SAHARSKY: I think that --

18 JUSTICE SCALIA: We're just talking about
19 what the rudiments are.

20 JUSTICE BREYER: They're called
21 conciliation -- what are the three words?

22 MS. SAHARSKY: Conference, conciliation, and
23 persuasion.

24 JUSTICE BREYER: And persuasion.

25 MS. SAHARSKY: I think -- I think it's

1 helpful to focus back on that language that Congress put
2 in place, because we think that it did not intend and
3 did not show any intention to put any kind of specific
4 requirements like that on the commission. It said
5 endeavor to eliminate the employment discrimination. I
6 think --

7 CHIEF JUSTICE ROBERTS: Why does it -- in
8 terms of additionally saying, yes, we called them, how
9 can you conciliate -- this question has been asked; I
10 don't know that we've gotten an answer -- without
11 telling them what you want? I want -- we think there's
12 a class; we think it's this many; we think their damages
13 claims are, you know, 15 million. What do you think
14 about that?

15 You don't have to -- then that's the end of
16 it. You don't have to say, we'll take ten, or anything
17 else. They need to know at least what you want.

18 MS. SAHARSKY: Well, two thoughts about
19 that. Three thoughts.

20 First, the reasonable cause determination
21 gives them notice about what the discrimination --
22 alleged discrimination is.

23 Two, the commission does as a general rule
24 provide this information about what it is interested in
25 getting.

1 Third, though, there are tactics in
2 conciliations where one side might wait for the other
3 side to make an offer, et cetera, et cetera. And it's
4 really that kind of second-guessing that we think is a
5 serious problem.

6 One thing that I think is useful is to step
7 back and look at what would happen under our view of the
8 world as opposed to Petitioner's view of the world.
9 Under our view of the world, we believe that the EEOC is
10 conciliating and has significant incentives to
11 conciliate. But if we're wrong about that, the worst
12 case is a trial about the employment discrimination on
13 the merits, that we actually move on to the main event
14 and answer the question, which is -- that the EEOC has
15 been investigating: Was there discrimination here? And
16 we typically see that as a good thing in our American
17 society.

18 But what is the downside of Petitioner's
19 position is really this long -- mini-trials that are
20 collateral to the merits that happen to have -- that
21 have to happen and are happening in a majority of cases.
22 They take up significant court resources, and they're
23 not supposed to happen because of the confidentiality
24 requirements.

25 CHIEF JUSTICE ROBERTS: You want to go --

1 you want to go to -- Congress wanted you to try to
2 conciliate.

3 MS. SAHARSKY: Yes.

4 CHIEF JUSTICE ROBERTS: So to say that it's
5 a good thing to get to the merits it seems to me is not
6 -- doesn't take account of what Congress said, which is,
7 before you go to the merits, try to conciliate.

8 MS. SAHARSKY: What I'm trying to say, Mr.
9 Chief Justice, is that the point of Title VII is to stop
10 employment discrimination, and that's what we're trying
11 to do.

12 And so getting to the main event, which is,
13 has there been employment discrimination, as opposed to
14 giving employers this private right that Congress never
15 intended, we do think is a good thing. We think that
16 this has gone too far in the courts of appeals, it's not
17 what Congress intended, it's led to significant
18 consequences for the courts and for the agency, and it's
19 hurting conciliation.

20 JUSTICE KENNEDY: Well, we'll just say --
21 I'm going to say one more time, I think there's
22 substantial merit to your position that the courts have
23 gone too far. But you have given us no midway, no -- no
24 alternative.

25 MS. SAHARSKY: Well --

1 JUSTICE KENNEDY: Other than to say, no
2 judicial review. And I think that's a serious -- it's a
3 serious suggestion to make.

4 MS. SAHARSKY: I think that there are some
5 options that Justice Kagan laid out, along with Justice
6 Breyer, in terms of some minimal requirements for the
7 agency. But the point that I would just like to make
8 clear to the Court is that they're nothing like what's
9 happening in the court of appeals. And some of those
10 courts of appeals start at the same place where some
11 members of the Court are today, which just -- which is,
12 let's just ask for a minimal level of good faith review,
13 and it is nonetheless the case that it has devolved into
14 really searching review that can't be justified on the
15 statute's text.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Ms. Saharsky.

19 Mr. Goldstein, you have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

21 ON BEHALF OF THE PETITIONERS

22 MR. GOLDSTEIN: Thank you, Your Honor.

23 I'm going to work on the assumption that the
24 Court is going to find that there needs to be some
25 judicial review. Then the Court is going to face the

1 following question: Should it announce the rudiments,
2 or should it simply reverse the court of appeals?

3 Because all the court of appeals said is that there is
4 no judicial review after the letter. The ordinary
5 practice of the Court would be decide what the court of
6 appeals did, and you've been assured by the agency that
7 if you do do that the agency will promulgate the
8 rudiments, and so there's a good reason to do that.

9 But you have been interested in what the
10 rudiments would be. Here's what they are. They're
11 taken directly from the cases and from the statute. The
12 first obligation is to conference. We think the
13 rudiment of conference is you tell the employer: Get in
14 touch. If you want to conciliate, the employer says, I
15 want to talk. You are willing to talk, if it's by
16 letter, if it's by phone, if it's in person. That's the
17 rudiment of conferencing.

18 Conciliation. If we're going to endeavor to
19 resolve this by conciliation, I have to tell you what
20 the minimum will be. The reasonable cause determination
21 doesn't say that. It says, we're going to sue you; it
22 doesn't say what it would take to resolve the case. So
23 I've got to tell you what it would be at a minimum, and
24 that has to be --

25 JUSTICE KAGAN: Wait, wait, wait, wait. Do

1 you want them to put their minimum offer on the table?

2 MR. GOLDSTEIN: No, no, no.

3 JUSTICE KAGAN: That's a necessary part of
4 conciliation?

5 MR. GOLDSTEIN: Justice Kagan, not their
6 minimum, but the following: That is, if I'm the
7 employer and I say, I want to talk, here's my offer, the
8 EEOC can't steadfastly refuse to say what would be an
9 acceptable conciliation, their -- their absolute last
10 best offer. If that's their position, then they have no
11 intention to conciliate.

12 JUSTICE KENNEDY: That's just good faith
13 bargaining. Then all you're doing is referring us to a
14 body of law in both labor and contracts for good faith
15 bargaining.

16 MR. GOLDSTEIN: The only --

17 JUSTICE KENNEDY: And that is a morass.

18 MR. GOLDSTEIN: Justice Kennedy, I'm giving
19 some -- a few basic things.

20 I will say about that that that is the
21 statutory scheme that Congress enacted in the NLRA, and
22 the board has issued regulations about that.

23 JUSTICE GINSBURG: Now, we just started with
24 a tremendous difference.

25 A mutual obligation to bargain and the

1 subjects of bargaining are well-known. You're can
2 bargain about wages. You can bargain about hours, about
3 working conditions. This is quite different.

4 MR. GOLDSTEIN: Justice Ginsburg, could I
5 just briefly get out the rudiments, because I think
6 there's been significant interest in that. The offer
7 that they say, what will be acceptable to us, has to be
8 something they could legally get. That is to say it's a
9 claim that's in the reasonable cause determination and
10 it's something that they could get in court.

11 And persuasion is just to provide the basics
12 of where that comes from. You can't expect the employer
13 or the employer's insurer to say, okay, I'll give you a
14 million dollars, if the EEOC won't even say where -- the
15 basics of where the million dollars came from. That is
16 to say, we've got about 20 employees; we think that
17 their damages are roughly \$50,000.

18 This is not an intrusive inquiry into the
19 details of --

20 JUSTICE GINSBURG: Why is it satisfactory --

21 JUSTICE KAGAN: That is intrusive. I mean,
22 you're doing your best job of proving Ms. Saharsky's
23 point here, because you're saying they have to put all
24 the reasons on the table, they have to say why it is
25 that they're asking for what it is that they're asking

1 for, they have to say, you know, what they would be --
2 the only -- the last thing that they would find
3 acceptable.

4 MR. GOLDSTEIN: Justice Kagan --

5 CHIEF JUSTICE ROBERTS: In the context, just
6 to -- where we're not supposed to look at any of that
7 stuff at all?

8 MR. GOLDSTEIN: We disagree with that,
9 obviously, Mr. Chief Justice. I am trying to illustrate
10 for the Court that, despite the rhetoric of the EEOC,
11 this is a statute that has been administered for 4
12 decades --

13 JUSTICE KENNEDY: Do you have any other
14 rudiments? Because you're running out of time.

15 MR. GOLDSTEIN: No, I don't have any other
16 rudiments. Those are all my rudiments. But I think the
17 better course here is: They say they have training and
18 guidelines. They say they know how to do this. But the
19 game here is for them to say, but we don't want to --

20 JUSTICE SOTOMAYOR: Shouldn't the game be on
21 you? They come in and say, we conciliated. Shouldn't
22 you have to waive confidentiality and set forth
23 circumstances? I'm going back to Justice Breyer's point
24 about the IRS case, because there we required the party
25 saying that something --

1 MR. GOLDSTEIN: Yes.

2 JUSTICE SOTOMAYOR: -- was in bad faith --

3 MR. GOLDSTEIN: Yes.

4 JUSTICE SOTOMAYOR: -- or didn't happen --

5 MR. GOLDSTEIN: Yes, yes, yes, yes.

6 JUSTICE SOTOMAYOR: -- to set forth the
7 circumstances. All right? But you didn't do that here.

8 MR. GOLDSTEIN: Well, Justice Sotomayor,
9 what happened is, we've stated an affirmative defense,
10 and they moved to dismiss as a matter of law on the
11 ground that the statute was unenforceable. The case
12 never went anywhere. We never had an opportunity to do
13 any of those things.

14 We think that there is a presumption of
15 regularity, but it's called the presumption of
16 regularity because then you can disprove it. We don't
17 assume that agencies follow the law. We don't have a --
18 administrative law gets upended if you announce a rule
19 that says, this is a broad statute that gives a lot of
20 -- the agency a lot of flexibility; we won't enforce it.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 The case is submitted.

23 (Whereupon, at 11:09 a.m., the case in the
24 above-entitled matter was submitted.)

25

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