

# PENNSYLVANIA STATE



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## The Dickinson School of Law

**TESTIMONY OF PROFESSOR MICHAEL FOREMAN  
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**BEFORE THE HOUSE COMMITTEE ON EDUCATION AND THE  
WORKFORCE  
SUBCOMMITTEE ON WORKFORCE PROTECTIONS  
ON  
HR 4959: EEOC TRANSPARENCY AND ACCOUNTABILITY ACT; HR  
5422: LITIGATION OVERSIGHT ACT OF 2014; HR 5423: CERTAINTY  
IN ENFORCEMENT ACT OF 2014**

**WEDNESDAY, SEPTEMBER 17, 2014  
2175 RAYBURN HOUSE OFFICE BUILDING  
10:00 A.M.**

**HR 4959: EEOC TRANSPARENCY AND ACCOUNTABILITY ACT; HR 5422:  
LITIGATION OVERSIGHT ACT OF 2014; HR 5423: CERTAINTY IN  
ENFORCEMENT ACT OF 2014**

Chairman Walberg, Ranking Member Courtney and members of the Subcommittee, I thank you for the opportunity to express my views on the proposed legislation. Unfortunately, however well intended, these proposed changes to the federal employment discrimination statutes are unnecessary, premature and in practical effect, would thwart the effective law enforcement function of the EEOC.

I am the Director of the Civil Rights Appellate Clinic at the Pennsylvania State University Dickinson School of Law where I also teach an advanced employment discrimination course. For over three decades, I have specialized in civil rights law and more specifically employment discrimination law. I have handled employment matters through all phases of their processing from the administrative filing, at trial and through appeal. I have represented both employers and employees. Perhaps as relevant I have worked at the EEOC in its appellate division, was the General Counsel for the Maryland Commission on Civil Rights and also prosecuted employment discrimination cases with the Pennsylvania Human Relations Commission. It is from this broad perspective that I provide my testimony.<sup>1</sup> I have a thorough understanding of what it takes to enable a government agency to effectively fulfill its statutory duty to fight the evil of workplace discrimination, and conversely what undermines the pursuit of this mission. The proposed legislative changes would stifle the EEOC's ability to serve as a law enforcement agency and undermine Congress' original intent of Title VII – to "...assure equality of employment opportunities and eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."<sup>2</sup>

**I. SUMMARY OF THE PROPOSED LEGISLATIVE CHANGES**

H.R. 4959: The EEOC Transparency and Accountability Act (hereinafter, "Transparency Act") requires the EEOC to post information to its website regarding charges and actions brought by the Commission. This information is to include: a description of each case brought in court, not later than 30 days after judgment is made with respect to any cause of action in the case, regardless of whether the judgment is final; the total number of charges of an alleged unlawful employment practice brought under section 706(b) of the Civil Rights Act of 1964, section 107(a) of the Americans with Disabilities Act of 1009, systemic discrimination cases, and any cases in which the EEOC was ordered to pay any fees or costs; and whether the case was authorized by Commission majority vote or the General Counsel. The proposed bill would amend Section 706(b) of the Civil Rights Act of 1964 to impose upon the EEOC requirements of "good faith" conference, conciliation, and persuasion, and "bone fide conciliation efforts" by the EEOC, subject to judicial review. The bill also requires the Inspector General of the Commission to report to Congress regarding cases in which the EEOC is ordered to pay fees and costs or sanctions within 14 days of the court's decision; conduct an investigation to determine why sanction, fees, or costs were imposed; and submit a report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor,

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<sup>1</sup> A copy of my biography is attached.

<sup>2</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

and Pensions of the Senate within 90 days.

H.R. 5422: The Litigation Oversight Act of 2014 (hereinafter, “Oversight Act”) requires the Commission to approve by majority vote whether to file or intervene in litigation involving multiple plaintiffs, or an allegation of systemic discrimination or a pattern or practice of discrimination, and requires the Commission to post and maintain information on its website with respect to the litigation, including the vote of each Commissioner. The proposed bill also gives any member of the Commission the power to require a majority vote on any litigation.

H.R. 5423: The Certainty in Enforcement Act of 2014 (hereinafter, “Enforcement Act”) amends Title VII of the Civil Rights Act of 1964, and would create a broad exception for employment practices that are required by Federal, State, or local law.

## **II. THESE PROPOSED CHANGES UNDERMINE THE CORE PURPOSE OF TITLE VII**

It is beyond dispute that “the primary objective of Title VII is to bring employment discrimination to an end.”<sup>3</sup> When Title VII was passed it was a transformational law. When compared to many of the other civil rights laws passed around the same time Title VII has been described “as having the most significant impact in helping to shape the legal and policy discourse on the meaning of equality.”<sup>4</sup>

Congress created the EEOC as the law enforcement agency tasked to “vindicate ‘a policy that Congress considered of the highest priority.’”<sup>5</sup> Title VII gives the Commission the power “to prevent any person from engaging in any unlawful employment practice.”<sup>6</sup> When created in 1964 the enforcement power of the EEOC was severely limited. The Commission was empowered to use only “informal methods of conference, conciliation, and persuasion”<sup>7</sup> to end employment discrimination. However, Congress quickly realized that the “failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII.”<sup>8</sup> Indeed, because of this lack of enforcement power, the EEOC was characterized as a “poor enfeebled thing.”<sup>9</sup>

In response, Congress amended Title VII in 1972 to expressly give the EEOC the enforcement powers needed to fulfill the primary purpose of Title VII.<sup>10</sup> The proposed legislation rather than furthering this national goal, will have a chilling impact on the EEOC’s ability to enforce the law and will divert what limited resources the EEOC has to data collection

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<sup>3</sup> *Ford Motor Company*, 458 U.S. 219, 228 (1982).

<sup>4</sup> Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death and Resurrection of Disparate Impact Theory of Discrimination*, 22 Hofstra Lab. and Emp. L.J. 431, 432 (2005).

<sup>5</sup> *Christiansburg Garment Co v. EEOC*, 434 U.S. 412, 412 (1978).

<sup>6</sup> 42 U.S.C. § 2000e-5(a).

<sup>7</sup> 42 U.S.C. § 2000e-5(b).

<sup>8</sup> 7 S.Rep. No. 92-415, p. 4 (1971).

<sup>9</sup> Michael I. Sovern, *Legal Restraints on Racial Discrimination In Employment* 205 (1966).

<sup>10</sup> If “the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent.” 42 U.S.C. § 2000e-5(f)(1).

and website management.<sup>11</sup>

Sadly our nation has not yet achieved Title VII's worthy goal. In 2013 the EEOC received 93,727 total discrimination charges.<sup>12</sup> The EEOC negotiated 5,927 settlements and successfully conciliated nearly 1,000 charges of discrimination with respect to Title VII alone.<sup>13</sup> During that same period, the Commission litigated 148 lawsuits under the array of federal statutes it has authority to enforce, including Title VII (78 lawsuits) and the Americans with Disabilities Act ("ADA") (51 lawsuits), recovering nearly \$40 million in monetary benefits for victims of discrimination. This hardly paints a picture of a workforce free from unlawful discrimination.

Tragically, the courts also continue to see employment discrimination of the most vile kind. There is an ample number of these disturbing types of cases; I only highlight two brazen examples here. For example, in *May v. Chrysler*, a gruesome portrait of race and religious discrimination, the court observed:

More than fifty times between 2002 and 2005, Otto May, Jr., a pipefitter at Chrysler's Belvedere Assembly Plant, was the target of racist, xenophobic, homophobic, and anti-Semitic graffiti that appeared in and around the plant's paint department. Examples, unfortunately, are necessary to show how disturbingly vile and aggressive the messages were: "Otto Cuban Jew fag die," "Otto Cuban good Jew is a dead Jew," "death to the Cuban Jew," "f\*\*\* Otto Cuban Jew fag," "get the Cuban Jew," and "f\*\*\* Otto Cuban Jew n\*\*\*\*\* lover." In addition to the graffiti, more than half-a-dozen times May found death-threat notes in his toolbox. Different medium, same themes: "Otto Cuban Jew m\*\*\*\*\* f\*\*\*\*\* bastard get our message your family is not safe we will get you good Jew is a dead Jew say hi to your hore wife death to the jews heil hitler [swastika]." The harassment was not confined to prose. [it included] a dead bird wrapped in toilet paper to look like a Ku Klux Klansman (complete with pointy hat).<sup>14</sup>

Similarly *Smith v. Wilson* is another ugly reminder that extreme racial discrimination still exists.<sup>15</sup> Testimony in that case revealed a troubling environment in the Police Department

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<sup>11</sup> While employment discrimination continues to be an obstacle to the achievement of a society inclusive of everyone, the resources allocated to EEOC hamper its ability to aggressively enforce Title VII. From Fiscal Year 2000 through 2008, EEOC staffing and funding dropped almost 30%. While EEOC received some additional resources in 2009, these provided limited relief when funding was reduced and hiring freezes were implemented in Fiscal Year 2011 and Fiscal Year 2012. U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016, pg. 4. <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

<sup>12</sup> These broke down as: 33,068 race based, 27,687 sex based, 10,642 national origin based, 3,721 religion based, 3,146 color based, 38,539 retaliation based, 21,396 age based, 25,957 disability based, 1,019 EPA based, 333 GINA based. Equal Opportunity Employment Comm'n, Charge Statistics FY 1997-FY 2013 (2014), <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

<sup>13</sup> Equal Opportunity Employment Comm'n, Title VII of the Civil Rights Act of 1964 Charges (including concurrent charges with ADEA, ADA and EPA) FY 1997-FY 2013 (2014), <http://eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm>.

<sup>14</sup> *May v. Chrysler Group LLC.*, 716 F.3d 963, 963 (2012).

<sup>15</sup> I recognize that this is a 42 USC §1981 claim but we believe it is a good example both with regard to the ugly racism that occurs in the workplace, and it highlights that this can occur in state and local government.

where racial slurs were used regularly in the workplace. The Police Chief “repeatedly referred to people of color as ‘n\*\*\*\*\*,’ ‘sand-n\*\*\*\*\*,’ ‘towel heads,’ and ‘spics.’”<sup>16</sup> The workplace was laden with a litany of racist comments including but not limited to “[T]hat stupid n\*\*\*\*\* isn't going to work or tow for me”; ‘I'm not letting that goddamn n\*\*\*\*\* tow for us’; ‘That goddamn n\*\*\*\*\* is not towing for us and that's the bottom line’.”<sup>17</sup> The Court of Appeals noted that at the city this type of racism “was unfortunately, not aberrational,” and described the evidence of racial bigotry presented at trial as both “staggering and regrettable.”<sup>18</sup> While the Court of Appeals upheld a finding of no liability because of the heavy burden of proof that plaintiffs carry in discrimination cases, the Seventh Circuit concluded with the chilling observation that “[w]e would have liked to believe that this kind of behavior faded into the darker recesses of our country’s history many years ago.”<sup>19</sup>

There is obviously work to be done by the EEOC. The EEOC’s power to commit its limited resources to aggressive enforcement should not be diverted, nor should its ability to enforce the anti-discrimination statutes be constrained. The proposed legislation will have the effect of restricting the EEOC’s ability to enforce the law.

The proposed Oversight Act will weaken the EEOC’s effectiveness as a self-functioning federal enforcement agency. It would instead turn the enforcement of federal anti-discrimination law into a politically driven process. This process would feature politically appointed commissioners voting on who should (or should not) be sued for violating the law. Political opinions and affiliations have no place in the fair and impartial enforcement of the law. Further, the inefficiencies of the bill’s proposed process would deplete the limited resources available for enforcing the law. Title VII was passed and the EEOC was created to bring all employment discrimination to an end.

The proposed Enforcement Act strips the EEOC of its congressionally vested power to enforce and prevent all discriminatory employment practices. The enforcement ability of the EEOC would effectively turn on what laws state and local legislatures decided they wanted to implement. Unlawful employment practices enumerated in Title VII will become unenforceable if there is a Federal<sup>20</sup>, State or local law requiring the employment practice. This would grant states and local legislatures unfettered discretion to circumvent Title VII leaving the EEOC without enforcement power. Congress should avoid adopting amendments to Title VII that directly contradict its enumerated purpose.

Finally, the Transparency Act, rather than provide transparency, would sap resources from the enforcement ability of the EEOC and the primary purpose Title VII to eliminate discrimination. The duplicative and burdensome reporting adds little of value to the public and much of the information is already provided. It instead diverts EEOC resources to reporting, and away from enforcement of the law.

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<sup>16</sup> *Smith v. Wilson*, 705 F.3d 674, 676 (2013).

<sup>17</sup> *Smith v. Wilson*, 705 F.3d at 674, 677.

<sup>18</sup> *Smith v. Wilson*, 705 F.3d at 674, 676-677.

<sup>19</sup> *Smith v. Wilson*, 705 F.3d at 674, 682.

<sup>20</sup> Title VII already has an exemption for federal law. 42 U.S.C. § 2000e-2(n)(1)(A).

### **III. PROVISIONS OF THESE BILLS ARE INCONSISTENT WITH THE SUPREMACY CLAUSE AND EFFECTIVELY REPEAL VITAL PARTS OF TITLE VII**

The Enforcement Act seeks to amend section 703 of Title VII by adding the following language: “it shall not be an unlawful employment practice” to comply with any local or state law created “in an area such as, but not limited to, health care, childcare, in-home services, policing, security, education, finance, employee benefits, and fiduciary duties.” If adopted, this provision would allow states and local governments to avoid Title VII scrutiny simply by implementing requirements ostensibly related to the areas listed in the bill. This would have obvious implications under the Supremacy Clause of the United States Constitution as it would hinge enforcement of federal law on the whims of local and state legislatures.

The Enforcement Act also would effectively repeal section 708 (2000e-7) conflict-with-state-law provision by making practices that offend Title VII outside Title VII’s scope of enforcement. When Title VII was passed and later amended, section 2000e-7 was written for a very obvious and important reason. Congress wanted it to be absolutely clear that Title VII covers local and state laws that were discriminatory. The Enforcement Act strips Title VII and the EEOC of precisely that power. Local and state governments could make laws that directly contradict the anti-discrimination purpose of Title VII and leave the EEOC powerless under section 2000e-7.

For example, a local government could pass legislation that prohibits anyone who has ever been arrested or convicted of any crime, regardless of how minor, from holding a public service job. This hypothetical legislation would have a disparate impact on minorities. Despite decades of developed law under Title VII as to how these types of restrictions should be analyzed, these laws would be exempt from examination under Title VII. More profoundly, the local government could pass a law requiring GEDs for anyone working in in-home service, which would be shielded from Title VII. These types of situations could become a reality despite the bedrock principle established by the Supreme Court in *Griggs v. Duke Power Co.*<sup>21</sup> that Title VII covers employment practices that appear fair in form but discriminatory in operation. Never-the-less the EEOC would be powerless to address this blatantly discriminatory practice if the Enforcement Act is passed.

### **IV. THE OVERSIGHT ACT ALLOWS POLITICAL INFLUENCE TO DICTATE ENFORCEMENT OF FEDERALLY PROTECTED RIGHTS**

The Oversight Act promotes political considerations in prosecution decisions, which is inconsistent with the justice that Title VII was designed to achieve. The Oversight Act requires commissioners to vote before the EEOC would be permitted to bring cases alleging systemic discrimination, a pattern or practice of discrimination, cases with multiple plaintiffs, or when the

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<sup>21</sup> 401 U.S 424 (1971).

EEOC seeks to intervene.<sup>22</sup> More troubling under the proposed bill, any member of the Commission will be given authority to call a required vote to proceed on “any litigation.” This would bring any meaningful enforcement activity to standstill as interested parties will lobby commissioners on whether EEOC should, or should not, pursue litigation.

The Oversight Act also requires that there be a disclosure of each commissioner’s vote within 30 days of commencing any approved litigation. Imagine if district attorneys had to have their litigation decisions all approved by a majority vote, or if indictment proceedings by grand juries were made public. These “second thought” provisions will result in party politics rather than seeking justice for injured parties. The blurred vision that is promoted by the mandatory votes and publications will dramatically alter the administration of justice by the EEOC and Title VII.

## **V. THE PROPOSED CHANGES ARE REDUNDANT, COSTLY, EXTRA LAYERS OF PROCEDURE WHICH DO NOTHING TO SECURE THE RIGHT TO BE FREE FROM EMPLOYMENT DISCRIMINATION**

### **A. There is Not a Crisis of Abusive Litigation by the EEOC**

There is no crisis or epidemic of abusive litigation by the EEOC. As EEOC general counsel David Lopez notes, litigation is an outcome in only 0.5% of all charges filed with the EEOC and only 5% of all charges in which the Commission issues a cause finding.<sup>23</sup> These numbers hardly reflect a pattern of overzealous and hasty litigation by the EEOC. Those who would argue the contrary, that a pattern of EEOC abusive litigation exists, rely on an insignificant number of cases when one considers how much the EEOC litigates in its effort to combat workplace discrimination.<sup>24</sup> All of these cases are reasonable good-faith efforts to

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<sup>22</sup> The EEOC already requires a vote for certain cases, but delegates the majority of the decision making to the General Counsel. The EEOC’s Strategic Enforcement Plan states: “The Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following: cases involving a major expenditure of resources, cases that present issues in a developing area of law, cases that the General Counsel reasonably believes to be appropriate for submission and all recommendations in favor of Commission participating as *amicus curiae*. U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016, pg. 20 <http://www.eeoc.gov/eeoc/plan/sep.cfm>.”

<sup>23</sup> <http://www.law360.com/articles/496715/eeoc-overreach-analysis-distorted-the-record>

<sup>24</sup> The cases repeatedly used to show abuse are as follows: In *EEOC v. CRST Van Expedited*, 679 F.3d 657 (8<sup>th</sup> Cir. Iowa 2012), the EEOC was sanctioned for failure to reasonably investigate and conciliate its claims prior to filing suit. A substantial number of the plaintiffs could not be found for deposition, were dropped for timeliness issues, or were found to have an insufficient basis for their claims. In *EEOC v. Kaplan Higher Education Corporation*, 790 F. Supp. 2d 619 (N.D. Ohio 2011), a partial motion to dismiss was granted for failure to timely file the charge, and the case was ultimately dismissed because the EEOC’s expert witness evidence was found inadmissible, rendering the EEOC unable to prove its case. These rulings indicate a failure to meet the burden of proof, rather than abusive litigation practices. In *EEOC v. PeopleMark*, 732 F. 3d 584 (6<sup>th</sup> Cir. 2013), the defendant was awarded fees and costs because the EEOC was unable to prove its allegations and withdrew the case; although the claim was ultimately found to be groundless, the Court noted that “the Commission’s case was not groundless when filed.” Incorrect statements by the defendant’s Vice President “gave the Commission a basis to file the complaint” but these statements later proved false. It is worth nothing that the proposed legislation’s new requirements (to submit information to its website, vote on whether to intervene, and exempt practices required by Federal, state, or local law) would not have prevented these sort of outcomes.

enforce the law and vindicate victims' rights with the appropriate amount of zeal--perhaps not what the employer would deem preferable or reasonable, but certainly not as unfounded, baseless, and frivolous in its claims and methods as to constitute "abusive" litigation.

More importantly these criticisms ignore the EEOC's impressive record of enforcement of the discrimination laws. In fiscal year 2013, the EEOC secured \$372.1 million in monetary benefits through administrative enforcement activities including mediation, settlements, conciliations, and withdrawals with benefits.<sup>25</sup> These administrative enforcement successes secured benefits for more than 70,522 people. 209 merits lawsuits were resolved for a total monetary recovery of \$39 million. 300 systemic investigations were completed, resulting in 63 settlements or conciliation agreements, recovering approximately \$40 million. More than \$56.3 million was secured in relief for parties who requested hearings in the federal sector. Furthermore, EEOC General Counsel David Lopez has highlighted some of the recent landmark litigation by the agency in his recent Law360 article.<sup>26</sup> These are also set forth on the EEOC.gov public website and will not be repeated here.<sup>27</sup> The EEOC's enforcement record clearly shows that it is an effective enforcement agency.

Rather than handcuffing these efforts, the EEOC's zealous representation of the public interest in ending discrimination in the workplace should be applauded and encouraged. In those rare cases where a trial court finds that the EEOC did not play by the rules, the federal courts have the power, and the cases reflect the courts exercise this power, to address any overreach by the EEOC. There is no reason to add another layer of process or otherwise hamper the EEOC's enforcement power.

**B. Title VII Provides a Means of Controlling Overzealous Litigants, Including the EEOC**

In addition to the protections for defendants built innately into the standards of proof and division of burdens in litigation generally and Title VII's elements specifically<sup>28</sup>, Title VII provides mechanisms for controlling overzealous litigation. Sec. 706(k) of the Civil Rights Act of 1964 provides "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United

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<sup>25</sup> [http://www.eeoc.gov/eeoc/plan/2013parhigh\\_discussion.cfm](http://www.eeoc.gov/eeoc/plan/2013parhigh_discussion.cfm).

<sup>26</sup> <http://www.law360.com/articles/496715/eeoc-overreach-analysis-distorted-the-record>

<sup>27</sup> <http://www.eeoc.gov/eeoc/newsroom/>.

<sup>28</sup> Traditionally, plaintiffs bear the burden of proof, and litigation under Title VII is no exception. Plaintiffs always carry the burden of proving unlawful discrimination, and must first establish a *prima facie* case before the defendant must even defend their motives and decision, which ultimately the plaintiff bears the burden of proving to be pretext. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978). Similarly in disparate impact cases, the plaintiff bears the burden of first proving disparate impact occurred before the defendant must rebut with proof of business necessity, and only if the plaintiff ultimately proves the challenged practice was not a business necessity can they prevail. 42 U.S.C. § 2000e-2(k). In addition, section 705(g) of Title VII places limits on what remedies plaintiffs may obtain under certain circumstances (so even plaintiffs who "win" judgment may have drastically different substantive remedies available). 42 U.S.C. § 2000e-5(g). Taken together these constraints create a litigation environment in which Title VII plaintiffs, be they the EEOC or private parties, have a heavy burden to carry and cannot succeed on a claim without ample evidence, let alone a frivolous claim.



States shall be liable for costs the same as a private person.”<sup>29</sup> This provision makes it clear that the EEOC (as well as the United States) is subject to the same rules regarding liability for costs as private parties when acting as litigants in Title VII actions. *In Christiansburg Garment Co.*, the Court made clear that a defendant may be a “prevailing party” and thus be eligible to recover attorney’s fees as costs covered under sec. 706(k). “In sum, a district court may in its discretion award attorney’s fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought subjective bad faith.”<sup>30</sup> Thus Title VII authorizes a trial court to exercise its discretion and award attorney’s fees and costs to a defendant who prevails in suit brought by the EEOC if the EEOC is neglecting its statutory responsibilities and litigating improperly.

**C. Federal Rule of Civil Procedure 11 Also Gives Courts the Power to Sanction Improperly Brought or Groundless Litigation**

Claims by the EEOC, like all civil claims, are subject to the Federal Rules of Civil Procedure.<sup>31</sup> Accordingly, the EEOC would also be subject to the strictures of Fed. R. Civ. P. 11 when filing pleadings, and to sanctions for any deviations from the requirements of Rule 11. When the EEOC files a complaint pursuing a claim of unlawful discrimination under Title VII it must certify that to the best of its knowledge, information, and belief that there is a valid basis for its claim(s) and that it has complied with all statutory duties and requirements to bring a valid claim. If the EEOC brings an action that violates any of these requirements Rule 11 sanctions would be available to deter the conduct and compensate for it, either by motion of the defendant or on the court’s own motion.

In short, to the extent that the EEOC may be engaging in overly aggressive litigation, which its enforcement record does not reflect, federal law provides employers all the protection that is needed and no additional legislation is needed.

**VI. THE PROPOSED LEGISLATION CIRCUMVENTS THE COURTS’ CONSTITUTIONALLY MANDATED JOB OF JUDICIAL REVIEW AND INTERPRETATION.**

It is a fundamental and basic concept of our American government that Congress enacts the laws and the Courts go on to interpret those laws. The “comingling” of the separate branches of the United States has long been an evil that legislators and judges alike have tried to avoid.<sup>32</sup>

Today, as Congress considers these proposed legislative changes, two of the core issues supposedly meant to be addressed by the legislation are before the federal courts. One before the United States Supreme Court and the other working its way through the federal courts. Congress

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<sup>29</sup> 42 U.S.C.A. § 2000e-5 (West).

<sup>30</sup> *Christiansburg Garment Co.* 434 U.S. at 421.

<sup>31</sup> Although the application of certain rules may be distinct when the EEOC is a party. *See General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980) (treatment of EEOC claims by Fed. R. Civ. P. 23).

<sup>32</sup> *See Mistretta v. United States*, 488 U.S. 361, 426-27 (1989) (Scalia, J., dissenting) (relying on the writings of the Framers in his dissent to make his argument for a strict separation of powers).

should not intervene before the courts have a proper chance to analyze the legal issues involved. This would be ill advised and bad public policy.

Separation of powers is a political doctrine originating in the writings of 18<sup>th</sup> Century French Political Philosopher Charles Montesquieu in his classic 1748 work The Spirit of the Laws, in which Montesquieu urged for three separate branches of government.<sup>33</sup> Montesquieu envisioned a system in which each of the three branches would have distinct capabilities to “check the powers” of the other branches. This philosophy heavily influenced the writing of the United States Constitution, according to which our Executive, Legislative and Judicial branches are kept particularly distinct in order to prevent abuses of power by any one branch. Congress has the power to legislate for the United States. The judicial power however, (that is the power to decide cases and controversies involving laws that the federal and state legislatures pass), is vested in the United States Supreme Court and any inferior federal courts established by Congress.

As discussed earlier, Section three of the proposed Transparency Act seeks to write into Title VII of the 1964 Civil Rights Act a “good faith conciliation standard” that the EEOC must meet in order to file suit against a company. The Transparency Act requires (1) good faith review, (2) exhaustion and (3) judicial review. The bill would insert into Title VII the following language:

No action or suit may be brought by the Commission under this title unless the Commission has in good faith exhausted its conciliation obligations as set forth in this subsection. No action or suit shall be brought by the Commission unless it has certified that conciliation is at impasse. The determination as to whether the Commission engaged in bone fide conciliation efforts shall be subject to judicial review.

This language mimics, almost verbatim, the language of a question presented currently before the United States Supreme Court. The issue in *Mach Mining, LLC v. EEOC* is “whether and to what extent a court may enforce the Equal Employment Opportunity Commission's mandatory duty to conciliate discrimination claims before filing suit”.<sup>34</sup> The Court is also asked to deal with whether allowing judicial review of the EEOC’s conciliation requirement conflicts with the confidentiality provision of Title VII.<sup>35</sup> The question as to whether the EEOC’s conciliation requirement is subject to judicial review is best left to the judicial branch of government.

If the Supreme Court were to answer the question presented in *Mach Mining, LLC v. EEOC* in the affirmative, Section three of the proposed Transparency Act would be meaningless.

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<sup>33</sup> See generally Charles Montesquieu, *The Spirit of the Laws*, (Prometheus Books, 2002).

<sup>34</sup> *Mach Mining, LLC v. EEOC*, 134 S. Ct. 2872 (U.S.2014) (cert granted June 30, 2014). The merits brief for Mach Mining has already been filed with the Court. The United States Brief will be filed late next month.

<sup>35</sup> In §2000e-5(b) of Title VII, Congress made it a crime (subject to \$1000 fine and imprisonment of up to a year) the act making conciliation records and procedures open to the public without written consent. It is possible (and the U.S Supreme Court will soon answer this exact question) that requiring judicial review of conciliation would force criminal activity in direct conflict with certain explicit provisions Title VII. See *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 175 (7th Cir. Ill.2013).

If the Court were to answer it in the negative, at that time (in light of a dispositive resolution by the judicial branch of government), it may be appropriate for the legislative branch to consider if a response is necessary and what the appropriate response should be. However, taking on such an issue before the Supreme Court has had a chance to answer a question currently in front of them would undermine a co-equal branch of government.

Similarly, the proposed Enforcement Act likewise seeks to present a premature legislative solution to a problem squarely in the court of the judicial branch currently. This bill would amend Section 703 of the Civil Rights Act, which outlines unlawful employment practices under the Act, to create an exception in cases where federal, state or local laws contradict the prohibited practices outlined in federal law.

On August 20, 2014 the state of Texas filed suit in the case of *Texas v. EEOC*. In its complaint, the state of Texas seeks a “declaration of its right to maintain and enforce its laws and policies that absolutely bar convicted felons from ... government service”.<sup>36</sup> This issue is the exact same issue that the Enforcement Act seeks to resolve. Indeed, if this is the new and accepted practice (where Congress will just seek to change laws before any Court even has an opportunity to interpret it) what is the role of the American Judicial Branch in the 21<sup>st</sup> Century?

Like the issue in *Mach Mining, LLC v. EEOC*, Congress should not take up this issue before the Judicial Branch of government has had a chance analyze the issues presented by the EEOC’s actions.

The Courts should be permitted to do their constitutionally mandated job. Before Congress explores dangerous anticipatory legislation that raises far more legal issues than it resolves and does so before Congress receives any reasoned analysis from the Courts which would provide important context on what if any changes in Title VII are warranted. The Transparency Act and Enforcement Act are solutions in search of a problem. Additionally, they are unwarranted legislative intrusions into the constitutional authority of an independent branch of government.

Thank you for the opportunity to testify today. I would be happy to answer any questions.

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<sup>36</sup> Complaint at 2, *Texas v. EEOC*, (No. 5:13-cv-00255-C).



Professor Michael Foreman focuses on appellate representation in civil rights issues and employment discrimination cases and directs [Penn State's Civil Rights Appellate Clinic](#), which has served as counsel on numerous cases in United States Supreme Court and the federal appellate courts. He is involved in several cases currently pending. In 2012 he argued *Coleman v. Maryland Court of Appeals* before the United States Supreme Court. In addition to other work, the clinic has served as counsel on *amicus* briefs filed with the Supreme Court in many of the Court's recent employment cases including; *Nassar v. Southwestern Medical Center*, *Vance v. Ball State*, *Thompson v. North American Stainless, LP*, *Staub v. Proctor Hospital*, *Rent-A-Center, West, Inc. v. Jackson*, *Gross v FBL Financial Services, Inc.*, *Ricci v. DeStefano*, and *Pyett v. 14 Penn Plaza, LLC*.

Immediately prior to joining Penn State Law he served as the Deputy Director of Legal Programs for the Lawyers' Committee for Civil Rights Under Law, where he was responsible for supervising all litigation in employment discrimination, housing, education, voting rights, and environmental justice. Professor Foreman was also Acting Deputy General Counsel for the U.S. Commission on Civil Rights, where he also was the lead attorney for the commission's investigation of the voting irregularities in the 2000 presidential election. He was a partner in the Baltimore, Maryland, law firm Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A., where he led the firm's Employment Law Group. Professor Foreman was also General Counsel for the Maryland Commission on Human Relations, an appellate attorney with the Equal Employment Opportunity Commission and regional counsel for the Pennsylvania Commission on Human Relations.

Professor Foreman's professional and scholarly focus has centers on civil rights issues and employment discrimination and he is frequently called upon to testify before Congress and the EEOC on the impact of the Supreme Court decisions affecting civil rights and employment issues.

He is a recipient of the Carnegie Medal for Outstanding Heroism. Professor Foreman has been honored by Shippensburg University with the Jesse S. Heiges Distinguished Alumnus Award. He was also selected by Harvard Law School as a Wasserstein Fellow, which recognizes dedicated service in the public interest. He is admitted to practice in Maryland, Pennsylvania, the District of Columbia, Texas, numerous federal courts and the U.S. Supreme Court.