No. 18-525

IN THE
Supreme Court of the United States

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

For more than thirty years, courts have wrestled with whether Title VII's exhaustion requirement is jurisdictional. Circuits have sharply divided on this issue, and acknowledged that they are so divided. Panels *within* Circuits have divided, requiring no fewer than six Circuits, including the court below, to resolve their own internal division on the question. And different components of the Federal Government have been unable to settle on a single position.

In Davis's telling, however, this decades-long debate has been premised on a misunderstanding.

When courts and the Department of Justice have referred to Title VII's exhaustion requirement as "jurisdictional," Davis contends, they were simply engaged in "'profligate' use of that term." Opp. 1. In reality, none of them really meant that exhaustion is an unwaivable requirement. And even if they did (respondent somewhat contradictorily argues) they will soon "reconsider[ ] and abrogate[ ]" that position. Opp. 17.

That argument is as implausible as it sounds. The Circuits that have long deemed Title VII exhaustion a jurisdictional requirement are neither confused nor careless; they have fully acknowledged the serious consequences of this designation. Eight other Circuits, including the panel below, have held otherwise. The time is ripe for this Court to step in and resolve this intractable disagreement.

Respondent's other reasons for opposing review are equally insubstantial. Davis claims that this Court's precedents so clearly support the approach taken by the panel below that certiorari is unnecessary. But her argument is self-refuting: To muster support for her position, Davis must disregard this Court's express statements to the contrary, Opp. 9-10, and distinguish contradictory precedents on the basis of irrelevant factual distinctions, Opp. 10. Davis also contends that the question presented is unimportant. But this Court has time and again emphasized the significance of characterizing a requirement as jurisdictional. And the dozens of appellate opinions that have disputed this particular jurisdictional question are proof in and of themselves of its paramount importance.

A writ of certiorari should be granted.

ARGUMENT

I. THE CIRCUITS ARE INTRACTABLY DIVIDED.

The brief in opposition makes clear that respondent has identified no real basis to contest the circuit split. Rather than start with the split, she begins with a lengthy discussion of the merits. Opp. 6-13. When Davis does finally get there, she does not dispute that three Circuits—the Fourth, the Ninth, and the Eleventh—have held that Title VII's exhaustion requirement is jurisdictional, while eight have held that it is not. Opp. 14-15.

Davis attempts to minimize this conflict by asserting that the Circuits that disagree with the panel below have "mislabel[led]" their own precedents. Opp. 14. Although these courts have repeatedly used the word "jurisdictional," Davis says, in reality they meant that exhaustion is a "claim-processing rule[ ]," subject to equitable defenses such as waiver. Opp. 14-15.

It would be surprising, to say the least, if that were correct. In recent times, this Court has regularly cautioned courts against misuse of the term "jurisdictional," and courts have heeded those warnings. Thus, when the Fourth, Ninth, and Eleventh Circuits have called Title VII's exhaustion requirement "jurisdictional," they have meant it.

1.a. The Fourth Circuit has squarely held more than a dozen times that "a failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of *subject matter jurisdiction* over the claim." *Jones* v. *Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009) (empha-

sis added).[1] And it has expressly described the consequences of that rule: Where a Title VII plaintiff "failed to exhaust her administrative remedies * * * the district court ha[s] *no* authority to award judgment on the merits," and "'the *only* function remaining to the court [i]s that of announcing the fact and dismissing the cause[s].'" *Id.* at 301 (emphases added) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).

Davis quibbles (at 16) that none of the Fourth Circuit's cases has specifically stated that a failure-to-exhaust defense is not waivable. But it is axiomatic that "a lack of subject matter jurisdiction cannot be waived or forfeited." *United States* v. *Wilson*, 699 F.3d 789, 793 (4th Cir. 2012). District courts in the Fourth Circuit have therefore held that "directly controlling Fourth Court authority" makes clear that an objection for failure to exhaust a Title VII claim "may be raised at any time, including after trial and entry of judgment," and that a court is compelled to consider the objection even if the court would otherwise "deem [it] waived." *Bland* v. *Fairfax Cty.*, 2011 WL 2580343, at *4 & n.2 (E.D. Va. June 29, 2011); *see, e.g.*, *Stewart* v. *Lee*, 243 F. Supp. 3d 722, 728 n.4 (E.D. Va. 2017) (similar).

Davis also claims (at 15) that *Edelman* v. *Lynchburg College*, 300 F.3d 400 (4th Cir. 2002) described Title VII's exhaustion requirement as "'subject to

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[1] *See, e.g.*, *Ruffin* v. *Lockheed Martin Corp.*, 659 F. App'x 744, 746 (4th Cir. 2016) (per curiam) (same); *Mercer* v. *PHH Corp.*, 641 F. App'x 233, 238 (4th Cir. 2016) (same); *Balas* v. *Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 406 (4th Cir. 2013) (same).

waiver, estoppel, and equitable tolling.'" *Id.* at 404 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)). That is incorrect. As its citation to *Zipes* suggests, *Edelman* was not discussing Title VII's exhaustion requirement, but rather the requirement that a plaintiff "*timely* file[ ] a charge with the EEOC." *Id.* at 403 (emphasis added). The Fourth Circuit has repeatedly distinguished between filing an untimely administrative claim and never filing a claim with the agency at all: Under *Zipes*, the "failure to timely file an EEOC charge * * * *does not* deprive the district court of subject matter jurisdiction," but a plaintiff's complete failure to present the claim to the agency "deprives the federal courts of subject matter jurisdiction." *Hentosh* v. *Old Dominion Univ.*, 767 F.3d 413, 416-417 (4th Cir. 2014) (emphasis added).

b. The Ninth Circuit has likewise made clear that it views a plaintiff's failure to exhaust as depriving it of subject matter jurisdiction. In *Sommatino* v. *United States*, 255 F.3d 704 (9th Cir. 2001), the Ninth Circuit recognized that the requirement to "file a timely EEOC administrative complaint," is "not jurisdictional." *Id.* at 708. However, it concluded, "where a plaintiff has never presented a discrimination complaint to the appropriate administrative authority, * * * the district court does *not* have subject matter jurisdiction." *Id.* (emphasis added). Thus, the court concluded, "equitable remedies are unavailable in federal court when the record shows that no administrative filing was ever made." *Id.* at 710.

In light of this clear holding, Davis does not even attempt to claim that *Sommatino* was a mere case of

mislabeling. Instead, she contends that *Sommatino*'s holding is limited to the circumstance in which the defendant made "*no* administrative filing," but does not apply where, as here, the defendant failed to exhaust a particular *claim* before the EEOC. Opp. 17 (emphasis added).

Sommatino itself forecloses that reading. It held that " '[t]he jurisdictional *scope* of a Title VII claimant's court action depends upon the *scope* of both the EEOC charge and the EEOC investigation,' " and that a district court "has jurisdiction over any charges of discrimination that are 'like or reasonably related' to the allegations in the EEOC charge." 255 F.3d at 708 (emphases added). Subsequent Ninth Circuit decisions have likewise made clear that subject-matter jurisdiction over a Title VII complaint must be assessed claim-by-claim. *See Curry* v. *Shinseki*, 356 F. App'x 983, 985 (9th Cir. 2009) (finding that the plaintiff properly exhausted one Title VII claim, but that the district court "should have found that it lacked subject matter jurisdiction over [the plaintiff's] non-exhausted Title VII claims"); *see also, e.g.*, *Salas* v. *Indep. Elec. Contractors Inc.*, 603 F. App'x 607, 608 (9th Cir. 2015); *Robinson* v. *Geithner*, 359 F. App'x 726, 729 (9th Cir. 2009).[2]

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[2] Davis contends (at 17) that "the Ninth Circuit continues to apply equitable principles to debates involving the failure-to-exhaust defense." But neither of the two cases Davis cites involved a failure to raise a claim with the EEOC. *See Lopez* v. *Produce Exch.*, 171 F. App'x 11, 13-14 (9th Cir. 2006) (plaintiff allegedly failed to cooperate with EEOC); *Kaapanu* v. *Potter*, 51 F. App'x 244, 247 (9th Cir. 2002) (plaintiff allegedly failed to file timely appeal). And even in those dissimilar circumstances,

Lacking any plausible way of distinguishing *Sommatino*, Davis claims (at 17-18) that she is confident that the Ninth Circuit will "reconsider[]" *Sommatino* and its progeny in light of *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006). *Arbaugh*, however, was issued twelve years ago. Since then, the Ninth Circuit has repeatedly reapplied and reaffirmed *Sommatino*'s holding, without a word of dissent. *See, e.g.*, *Salas*, 603 F. App'x at 608 (2015); *Curry*, 356 F. App'x at 985 (2009); *Robinson*, 359 F. App'x at 729 (2009).

c. The Eleventh Circuit has likewise made clear that it deems exhaustion a jurisdictional requirement. In *Crawford* v. *Babbitt*, 186 F.3d 1322 (11th Cir. 1999), the Eleventh Circuit held that exhaustion is "a jurisdictional prerequisite to filing a Title VII action." *Id.* at 1326. And in *Brown* v. *Snow*, 440 F.3d 1259, 1263 (11th Cir. 2006), the court expressly stated that it disagreed with those Circuits that had held that "administrative exhaustion [under Title VII] is not jurisdictional," explaining that "*our precedents say otherwise*." *Id.* at 1264 (emphasis added).

Davis claims the Eleventh Circuit's view is uncertain because one case from 2014 allegedly deemed an exhaustion defense waived. Opp. 18-19 (citing *Garner* v. *G.D. Searle Pharm. Co.*, 581 F. App'x 782 (11th Cir. 2014) (per curiam)). Again, however, Davis is conflating two different concepts. *Garner* concerned a plaintiff's "fail[ure] to file a *timely* EEOC charge," 581 F. App'x at 784 (emphasis added), whereas *Crawford* and its progeny—like this case—

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neither case applied an equitable defense or even stated that one might be available.

involved a plaintiff's failure to raise a claim before the EEOC *at all*. *See Brown*, 440 F.3d at 1263 (distinguishing untimely filing of an EEOC complaint from plaintiff's "failure to exhaust administrative remedies").

2. Davis does not contest that, in contrast to these three Circuits, eight Circuits have held that Title VII's exhaustion requirement is non-jurisdictional. Opp. 14-15. Nor does she dispute that many of those Circuits had to resolve deep internal divisions of their own. For instance, in *Boos* v. *Runyon*, 201 F.3d 178 (2d Cir. 2000), the Second Circuit documented its longstanding "confusion" on this question and attempted to resolve that disagreement. *Id.* at 182; *see* Opp. 15. Likewise, the Fifth, Sixth, and Seventh Circuits—like the Ninth and the Eleventh—have issued decisions resolving their own internal two- or three-way splits. Pet. 17; *see* Pet. App. 6a-7a.

Indeed, the Eighth Circuit is still internally divided on this question. Pet. 15-16. Davis claims (at 15 n.2) that two Eighth Circuit decisions since *Arbaugh* have characterized the exhaustion requirements as non-jurisdictional. But—once again—those cases concerned the *timeliness* of an EEOC charge, not a plaintiff's failure to file a claim with the EEOC at all, and neither case even cited *Arbaugh*, let alone suggested it overruled the Eighth Circuit's precedents deeming exhaustion jurisdictional. *See Rester* v. *Stephens Media, LLC*, 739 F.3d 1127, 1130 n.2 (8th Cir. 2014); *Gordon* v. *Shafer Contracting Co.*, 469 F.3d 1191, 1194 (8th Cir. 2006). Unsurprisingly, district courts in the Eighth Circuit have also continued to express division on the issue. *See* Pet. 16 n.4.

3. Finally, Davis cannot explain away the Executive Branch's division. As Davis acknowledges (at 19), the EEOC has deemed the exhaustion requirement non-jurisdictional. In contrast, the Department of Justice, including the Solicitor General, has repeatedly argued that the exhaustion requirement is "jurisdictional." Davis suggests that, by using that "label[ ]," the Department did not suggest any view on "whether the requirement could be waived." Opp. 19. But it strains credulity to imagine that the Department of Justice was unaware of that consequence—particularly in cases in which it was specifically urging courts to apply this designation to the exhaustion requirement. *See* Pet. 18-19 & n.5.

II. THE DECISION BELOW IS INCORRECT, AND ONLY THIS COURT CAN PROVIDE THE REQUISITE CLARITY.

Davis's discussion of the merits only confirms the need for this Court's intervention. As Davis concedes (at 9), two decisions of this Court—both issued close in time to the enactment of Title VII—flatly state that Title VII's exhaustion requirement is a "jurisdictional prerequisite[ ]" to suit. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Davis claims that *Zipes* repudiated that language. But *Zipes* disagreed only with the Court's earlier "references to the timely-filing requirement as jurisdictional," in large part because "as or more often in the same or other cases, we have referred to th[at] provision as a limitations statute." 455 U.S. at 395. *Zipes* said nothing about the characterization of the *exhaustion* requirement as jurisdictional. And Davis has pointed to no case in which the Court has de-

scribed that requirement in non-jurisdictional terms. As lower courts are not free to assume this Court has overruled its prior precedents "by implication," those holdings remain binding. *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997).[3]

What is more, this Court's recent cases have reinforced the fact that Title VII's exhaustion requirement is a "jurisdictional prerequisite." In *Patchak* v. *Zinke*, 138 S. Ct. 897 (2018), the Court described language specifying when an "action" could be "filed or maintained" as "jurisdictional." *Id.* at 905. Title VII's exhaustion provision uses precisely that kind of "jurisdictional language," *id.*, dictating when "*a civil action may be brought* against the respondent named in the charge * * * by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). Respondent observes (at 10) that *Patchak* involved "Indian gaming" whereas Title VII relates to employment discrimination, but that factual distinction is plainly immaterial to the interpretive question at hand.

Davis also cites a number of other statutory provisions the Court has deemed non-jurisdictional, and claims that those provisions speak in terms similar to Title VII. But before deeming those provisions non-jurisdictional, this Court pointed to some clear textual indication in the statute supporting that

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[3] Contrary to Davis's description, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), merely held that "unnamed class members" did not need to file claims before the EEOC to be afforded "class-based relief." *Id.* at 771. It did not consider the court's subject-matter jurisdiction, or suggest that its holding applied outside the class-action context.

conclusion: either the requirement in question was "subject to [multiple] exceptions," *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010), or the statute expressly permitted courts to address the merits "without first requiring" compliance with the rule at issue, *Woodford* v. *Ngo*, 548 U.S. 81, 100 (2006) (quoting 42 U.S.C. § 1997e(c)(2)). Davis has pointed to no similar indication that Title VII's exhaustion requirement is waivable.

Finally, Davis appeals to Title VII's "structure." Opp. 12. But Davis ignores the most relevant structural feature: that the exhaustion requirement exists not "to protect a defendant's case-specific interest" but to achieve the "system-related goal" of ensuring that the EEOC and the Department of Justice can attempt to resolve claims before they proceed to litigation. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134 (2008).

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT AND WIDELY RECURRING QUESTION.

This case presents an ideal vehicle to resolve the question presented. There is no dispute that the issue was pressed and passed on below in a reasoned opinion. Davis objects (at 22) that the Fifth Circuit did not decide whether she "exhaust[ed] her administrative remedies." But the District Court explained at length why respondent did not even come close to exhausting the religious discrimination claim she now wishes to bring. Pet. App. 29a-37a.

Davis's attempts to relitigate that well-supported holding are meritless. Davis points to the fact that she added the word "religion" to an intake form, but

as the District Court explained, that amended form was not even presented to the EEOC, and her one-word handwritten amendment did not describe even the rudiments of her complaint. Pet. App. 29a-33a. Davis also claims that the agency should have uncovered evidence of her religious discrimination claim in the course of investigating her retaliation and sexual harassment complaint. But the District Court rejected that contention too, observing that the two claims had virtually nothing in common: They involved different individuals, at different times, and concerned different conduct. Pet. App. 33a-35a. And even if this Court found any merit to petitioner's nitpicking, that would not present a vehicle problem: The Fifth Circuit did not decide whether respondent exhausted her administrative remedies because it believed that issue was waived. If this Court holds that exhaustion is jurisdictional—as it should—the Court is free to remand to the Fifth Circuit to consider whether respondent did in fact exhaust.

Davis's attempts to gainsay the importance of the question presented are equally meritless. The decision whether to designate *any* requirement as jurisdictional is of "considerable practical importance." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). And that is doubly true for Title VII's exhaustion requirement, which is one of the central provisions of one of the most frequently litigated statutes in the U.S. Code.

Davis suggests (at 19) that the issue will hardly ever arise. But the issue *has* arisen in dozens of appellate cases, so much so that it has caused splits between and among the Circuits, and led the Executive Branch to take conflicting views. That is unsur-

prising. Tens of thousands of Title VII charges are brought each year, and every one of those plaintiffs must comply with the statute's exhaustion requirement before suing. Pet. 23. It is of paramount importance for courts and litigants alike to understand whether that requirement is jurisdictional.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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