No. 18-525

In the Supreme Court of the United States

FORT BEND COUNTY, TEXAS,

Petitioner,

v.

LOIS M. DAVIS,

Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, AND NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

Lisa Soronen
STATE & LOCAL LEGAL CENTER
444 N. Capitol St. N.W.
Washington, D.C. 20001
(202) 434-4845

Collin O'Connor Udell
Counsel of Record
Mara E. Finkelstein
JACKSON LEWIS P.C.
90 State House Squ, 8th Fl.
Hartford, CT 06103-3708
(860) 522-0404
Collin.udell@
Jacksonlewis.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose mission is to advance the interests of state and local government officials and thereby ensure the smooth functioning of state and local government. *Amici* monitor and analyze legal developments that have a distinct impact on the business of state and local governments, and they take positions advocating for greater protection of government officials as they serve the public good.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National Association of Counties ("NACo") is the only national organization that represents

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Petitioner and Respondent have filed a blanket consent with this Court to the filing of all *amicus* briefs.

county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources ("IPMA-HR") represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National School Boards Association ("NSBA"), through its state associations of school boards, represents the Nation's 90,000 school board members, who, in turn, govern approximately 13,800 local school districts serving more than 50 million public school students. NSBA's mission is to

promote equity and excellence in public education through school board leadership.

This case directly impacts the interests of *amici* and their members. If the Fifth Circuit's decision is affirmed, courts would be allowed to exercise jurisdiction over unexhausted claims. The resulting costs, efficiency losses, and abrogation of sovereign immunity would impose a heavy burden on state and local governments.

Amici have a strong interest in ensuring the financial viability of state and local governments so they can provide the critical services to the public they were created to deliver. Moreover, sovereign immunity is designed to protect governments from such burdens, and *amici* have a strong interest in ensuring any abrogation of that immunity is narrowly construed. The Fifth Circuit's decision imperils those interests, and it should be reversed.

SUMMARY OF ARGUMENT

The undersigned *amici* urge this Court to reverse the decision below. The Court should hold that Title VII's exhaustion requirement is jurisdictional so that employees are required to proceed through the EEOC's informal phases of investigation and conciliation. This procedure promotes judicial efficiency and resolution of disputes inexpensively and outside of court.

Requiring employees to exhaust their administrative remedies is not burdensome. All but three of the States have entered into work-sharing agreements with the EEOC, eliminating duplication by providing that only one agency processes a complaint. That one agency investigates, mediates, conciliates, and issues a determination on the employee's federal and state law claims. Moreover, the majority of state agencies have procedures that mirror the investigatory and conciliatory process of the EEOC. In most states, complainants need only file a complaint and request a notice of right to sue in order to exhaust their administrative remedies. The agencies work in concert so that complaints under state and federal law move through the pipeline in lockstep. Once those administrative remedies are exhausted, plaintiffs can file one civil action that encompasses both federal and state claims.

If this Court holds that Title VII's administrative exhaustion requirement is not jurisdictional, it would eliminate some meaningful settlement opportunities. The agency's screening function, particularly in the conciliation and mediation phases of the administrative process, helps prevent cases from proceeding to court—cases that could have been resolved at the agency level. Indeed, a significant percentage of employment discrimination disputes are resolved during that process.

Moreover, a holding by this Court that Title VII's administrative exhaustion requirement is a mere claims-processing rule would impose signifi-

cant costs on state and local governments. Title VII claims that proceed to the courthouse constitute a substantial drain on state and local government treasuries, based as they are on factual issues surrounding whether intentional discrimination occurred. State and local governments, with their limited budgets and the critical nature of the services they must provide to the public, are poorly positioned to contend with such suits and thus are subjected to immense pressure to settle even nonmeritorious cases.

Moreover, if the Court holds that Title VII's administrative exhaustion requirement is a mere claims-processing rule, it would constitute a further abrogation of the States' sovereign immunity. As Justice Kennedy wrote in *Alden v. Maine*, 527 U.S. 706 (1999), "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ." *Id.* at 713. As Title VII itself constitutes an abrogation of State sovereign immunity, this further abrogration should be narrowly construed if it is entertained at all.

Congress enacted the 1972 Amendments to Title VII under an exception to the doctrine of sovereign immunity—Section 5 of the Fourteenth Amendment. Congress took such action based on serious, documented instances of intentional discrimination by state governments, backed up by empirical evidence contained in committee reports. By holding that Title VII's administrative exhaus-

tion requirement is not jurisdictional, this Court would further abrogate the States' sovereign immunity—without Congress's involvement, without careful review of studies and committee reports, and without bicameralism and presentment. This further abrogation should not occur at all, but if it ever does, it should be due to an action by Congress, not the Court.

Based on these concerns regarding efficiency, cost, and sovereign immunity, as well as those voiced by Petitioner, *amici* urge this Court to reverse the decision below and hold that Title VII's administrative exhaustion requirement is jurisdictional.

ARGUMENT

I. This Court Should Hold that Title VII's Exhaustion Requirement Is Jurisdictional Because the Administrative Process Is Not Burdensome and Provides Opportunities for Inexpensive Dispute Resolution.

Congress carefully crafted the statutory scheme in Title VII of the Civil Rights Act of 1964,[2] which

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[2] Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

created the Equal Employment Opportunity Commission ("EEOC"). Recognizing that employment disputes are plentiful, Congress imbued the EEOC with the authority to enforce the statute by investigating complaints of discrimination, allowing the employer and employee to see if the claim had merit or some accommodation could be reached during a 180-day cooling-off period. Congress intended by the statute's very terms that issues be resolved through what is an effective pre-suit mediation effort. As Petitioner argues, this Court should support the intent of Congress. *See* Pet. Br. 4, 27-28, 29 (arguing that proponents of the 1972 Amendments to Title VII "expected that litigation would be 'the exception and not the rule,' with 'the vast majority' of cases resolved outside of court.") (citing 118 CONG. REC. 7168 (1972) (Conf. Rep.)).

A majority of states followed suit and enacted anti-discrimination statutes mirroring Title VII's statutory scheme. Most of those statutes, like Title VII, require employees to exhaust their administrative remedies by first filing complaints or charges of discrimination with an administrative agency before commencing a civil action.

As noted, the purpose of Title VII's exhaustion requirement is "to give the administrative agency the opportunity to investigate, mediate, and take

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such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a).

remedial action." *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384 (2d Cir. 2015); *see also* 42 U.S.C. § 2000e-5(b) (if "reasonable cause" exists to believe the charge is true, the EEOC must attempt to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."). If those efforts fail, the EEOC may either bring suit in federal court or notify the employee so that he or she may file an employment discrimination suit within 90 days of the notification. *See* 42 U.S.C. § 2000e-5(f)(1). In the event the employer is a "government, governmental agency, or political subdivision . . . the [EEOC] shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court." *Id.*

Some states have authorized an agency to grant relief for prohibited employment discrimination. *See id.* § 2000e-5(c). Employees who choose to file with a state agency shall also file a "charge" with the EEOC within 300 days of the alleged unlawful employment practice, or within 30 days after receiving notice that the analogous state agency has terminated proceedings, whichever is earlier. *See id.* § 2000e-5(e)(1).

A. The Exhaustion Scheme Is Not Burdensome.

The requirement that employees exhaust their administrative remedies is not burdensome. Indeed,

it promotes judicial efficiency. Requiring exhaustion in every case allows the investigative phase of the administrative process to bring to light facts that surface meritless claims. The agency's conciliation process may also bring about efficient and inexpensive resolution. *See* 42 U.S.C. § 2000e-5(b).

This efficiency is aided, in part, by the work-sharing agreements between the EEOC and forty-seven state agencies.[3] The only states without such work-sharing agreements are Alabama, Mississippi, and Arkansas.[4] These work-share agreements promote efficiency by having one agency process and investigate a complaint.

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[3] *See* https://www.eeoc.gov/field/atlanta/fepa.cfm; https://www.eeoc.gov/field/birmingham/fepa.cfm; https://www.eeoc.gov/field/charlotte/fepa.cfm; https://www.eeoc.gov/field/chicago/fepa.cfm; https://www.eeoc.gov/field/dallas/fepa.cfm; https://www.eeoc.gov/field/indianapolis/fepa.cfm; https://www.eeoc.gov/field/losangeles/fepa.cfm; https://www.eeoc.gov/field/memphis/fepa.cfm; https://www.eeoc.gov/field/miami/fepa.cfm; https://www.eeoc.gov/field/newyork/fepa.cfm; https://www.eeoc.gov/field/philadelphia/fepa.cfm; https://www.eeoc.gov/field/phoenix/fepa.cfm; https://www.eeoc.gov/field/sanfrancisco/fepa.cfm; https://www.eeoc.gov/field/stlouis/fepa.cfm.

[4] *See* https://www.eeoc.gov/field/littlerock/fepa.cfm (no local agencies in Arkansas or Mississippi); https://www.eeoc.gov/field/birmingham/fepa.cfm (showing only Florida, which falls under the jurisdiction of the Birmingham office).

Specifically, employees that file a complaint with the EEOC can also choose to file a complaint with the associated state agency and vice versa. One agency will then mediate, conciliate, investigate, and issue a determination on all the claims under both federal and state law. This process allows the claims of discrimination under state and federal law to proceed on one track rather than in separate, duplicative claims. The EEOC and those agencies with which it has entered into work-share agreements now operate in a carefully balanced, symbiotic relationship. If this Court held that the Title VII administrative exhaustion requirement was not jurisdictional, this balance would suffer severe disruption.

1. Exhaustion of Administrative Remedies with the EEOC Is Straightforward.

Title VII provides that any aggrieved person can file a written charge, under oath or affirmation, with the EEOC. 42 U.S.C. § 2000e-(5)(b). As noted, an aggrieved person must file a charge within 300 days if there is a state or local agency that prohibits discrimination. *Id.* § 2000e-(5)(e)(1). If there is no such state or local agency, an aggrieved person must file within 180 days of the alleged discriminatory act. *Id.*

The process for filing a charge is simple and straightforward. Aggrieved employees can file a charge on-line or in person.

https://tinyurl.com/y6aehlq3. The EEOC's public portal allows an employee to submit an inquiry, schedule an appointment, and file a charge. *Id.* When the employee submits an inquiry through the public portal, the on-line assessment asks him or her to check off boxes regarding the type of employer (i.e., private, governmental, union, etc.), the date of the alleged discriminatory conduct, the state, the employee's protected classification, and the number of employees. https://tinyurl.com/y67dvffa. The aggrieved employee will then schedule an interview with the EEOC's intake unit. At the interview, an EEOC staff member asks the employee questions and prepares a charge for the employee's signature. Once the form is complete, the employee signs the charge, which will be filed. https://www.eeoc.gov/employees/howtofile.cfm.

If the employee prefers, he or she can meet with the EEOC in person by scheduling an appointment on-line or going to the EEOC's office closest to him or her for a walk-in appointment. *Id.* The EEOC staff member prepares the charge based on the information provided by the employee. The employee reviews the form and signs it on-line by logging into his or her account. *Id.*

Although the EEOC will not take a charge over the telephone, it will accept calls to discuss the employee's situation, determine if the situation is covered by the relevant laws, and explain how to file a charge. *Id.*

Once the charge is filed, the EEOC will serve the charge on the Respondent and conduct an investigation. *Id.* § 2000e-(5)(b). This investigation will result in a determination that (1) there is no reasonable cause to determine that discrimination occurred and issuance of a Notice of Right to Sue; or (2) there is reasonable cause to suspect discrimination. *Id.* §§ 2000e-(5)(b), 2000e-5(f). If the EEOC issues the latter determination, it invites the parties to conciliation. *Id.* § 2000e-5(b).

If conciliation efforts fail, the EEOC can either file a civil action in federal court or issue the complainant a Notice of Right to Sue. *Id.* § 2000e-(5)(f)(1). With respect to the first option, if a case is meritorious, the EEOC has a right of first refusal to bring litigation. *Id.* Such EEOC-filed suits are often more streamlined and efficient than those filed by private parties. If the respondent is a government, a government agency, or a political subdivision, the case is referred to the Attorney General to file suit. *Id.*

A Complainant has 90 days from the issuance of the Notice of Right to Sue to file suit. *Id.* He or she can request a Notice of Right to Sue, as a matter of right, if the request is made 180 days after filing and the EEOC has not completed its investigation of the charge. 29 C.F.R. § 1601.28(a)(1). However, a Complainant may request a Notice of Right to Sue before the expiration of 180 days, and the EEOC will issue the Notice if it determines that it will be unable to complete its investigation within six

months of filing. 42 U.S.C. § 2000e-(5)(f)(1); 29 C.F.R. § 1601.28(a)(2).

2. Most States Have Administrative Exhaustion Procedures that Mirror the EEOC's Procedures.

The majority of state agency procedures mirror the EEOC's investigatory and exhaustion process. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1481(D); CAL. GOV'T. CODE § 12965; COLO. REV. STAT. § 24-34-306(14); CONN. GEN. STAT. § 46a-101; DEL. CODE ANN. tit. 19, § 712(B); FL. STAT. §§ 760.11(4), 760.11(8); HAW. REV. STAT. §§ 368-(11), 368-(12); IDAHO CODE. ANN. § 67-5908(2); 775 ILL. COMP. STAT. §§ 5/7A-102(C)(4), 5/7A-102(C-1); IND. CODE § 22-9-8-3; IOWA CODE § 216.16; KAN. STAT. ANN. § 44-1005(i); ME. REV. STAT. 5 § 4612(6); MD. CODE. ANN. STATE GOV'T § 20-1013(a); MASS. GEN. LAWS ch. 151B § 9; MO. REV. STAT. § 213.111; MONT. CODE ANN. § 49-2-512; NEV. REV. STAT. § 613.420; N.H. REV. STAT. ANN. § 354-A:21-a; N.M. CODE R. § 9-1-1.8(I); OKLA. STAT. tit. 25, § 21-1350(B); 43 PA. CONST. STAT. § 962(c)(1); R.I. GEN. LAWS ANN. § 28-5-24.1; S.C. CODE ANN. § 1-13-90(d)(6)-(8); S.D. CODIFIED LAWS § 20-13-35.1; TEXAS LAB. CODE § 21.252-54; W. VA. CODE § 5-11-13(b).

Due to this mirroring of the EEOC's procedures in the majority of states, not to mention the fact that 47 out of 50 states are parties to work-share agreements with the EEOC, aggrieved individuals need only file a complaint and request a notice of right to

sue to exhaust their administrative remedies. These requirements are not remotely burdensome.

3. A Minority of States Enacted Statutes that Do Not Require Employees To Exhaust State Administrative Remedies.

A minority of states do not require employees to exhaust administrative remedies prior to commencing a civil action because no such requirements appear in the relevant state statute. For example, Alaska does not require individuals aggrieved under its non-discrimination statute to first file suit with the Alaska State Commission on Human Rights. *See* ALASKA STAT. § 18.80.145. Other such states are Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Tennessee, Vermont, Virginia, and Washington. *See* KY. REV. STAT. ANN § 344, *et seq.*;[5] LA. REV. STAT. ANN. § 23.303; MICH. COMP. LAWS § 37.2803; MINN. STAT. § 363A.28; NEB. REV. STAT. § 20-148; N.J. STAT. ANN. § 10:5-13; N.Y. EXEC. LAW § 297(9); N.D. CENT. CODE § 14-02.4-19; OHIO REV. CODE ANN. § 4112.99; OR. ADMIN R. 839-003-0020(2)(a); TENN. CODE ANN. § 4-21-401(d)(5); VT.

[5] Kentucky's statute does not require employees to exhaust their administrative remedies. Instead, an employee can elect to file an administrative complaint or immediately file a civil action for their state law claims. *See Owen v. Univ. of Ky.*, 486 S.W.3d 266, 269 (Ky. 2016).

STAT. ANN. tit. 21, § 5-495(b); VA. CODE ANN. § 2.2-3903(c); WASH. REV. CODE § 49.60.020.

A smaller number of states do not have administrative exhaustion requirements at the state level because they do not permit private suits. Employees aggrieved under Title VII in jurisdictions with no state or local agency and no relevant state statute must follow the EEOC's administrative requirements. These states include Alabama[6] and Mississippi.[7] In Georgia, the Georgia Fair Employment Practices Act of 1978, GA. CODE ANN. § 45-19-20, *et seq.*, provides protections only to public employees. *See id.* § 45-19-21. However, it does not permit private suits, so those employees may not bring a claim directly to state court. Public employees may only *appeal* the final determination of the administrative agency to Georgia's state courts or request a Notice of Right to Sue from the EEOC and bring a civil action on their federal claims. *Id.* § 45-19-39.

Four states have state agencies that investigate and enforce but do not permit private suits. The North Carolina Human Relations Commission

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[6] *See* Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 48 (2015) (noting that Alabama has no statewide law forbidding discrimination in employment or public accommodations).

[7] *Id.* at n.149. Without a state agency, it makes sense that these are two of the three states without work-share agreements. *See supra* p. 10.

in the Civil Rights Division of the Office of Administrative Hearings is authorized to receive and investigate complaints of discrimination filed with the EEOC, but does not enforce North Carolina's Equal Employment Practices Act. N.C. GEN STAT. ANN. § 143-422.1-3. The same is true for Utah's Anti-discrimination and Labor Division. *See* UTAH CODE ANN. § 34A-5-107(15)-(16). Wisconsin and Wyoming both have state agencies—the Wisconsin Equal Rights Division and the Wyoming Department of Employment, Labor Standards Division—that investigate and enforce the state statutes, but those statutes do not permit private suits. WIS. STAT. § 111.02, *et seq.*;[8] WYO. STAT. ANN. § 27-9-106.

Finally, although Arkansas has a state statute that permits private suits, it has no administrative agency to investigate and enforce such complaints.[9] Therefore, employees aggrieved under its statute may file their state claim directly in state court within one year of the alleged discriminatory act or within ninety days of receiving a Right to Sue Notice from the EEOC, whichever is later. ARK. CODE ANN. § 16-123-107(c).

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[8] *See also Bachand v. Connecticut Gen. Life Ins. Co.*, 305 N.W.2d 149, 152 (Wis. Ct. App. 1981).

[9] Arkansas is the third state without a work-share agreement, again, because it has no administrative agency. *See supra* p. 10.

In sum, neither the EEOC nor the state procedures are onerous. The presence of work-share agreements with the EEOC in 47 of the 50 states and the fact that most state procedures mirror the EEOC's procedures make the process straightforward for plaintiffs.

B. Allowing Courts To Exercise Jurisdiction Over Unexhausted Claims Would Eliminate Meaningful Opportunities To Settle the Case in Conciliation Proceedings.

Most agencies, including the EEOC, have a screening function, due to the conciliation and mediation phases of the administrative process, which resolve a significant percentage of employment discrimination claims. Absent the jurisdictional requirement to exhaust administrative remedies, those opportunities would be lost every time a plaintiff proceeds directly to federal court.[10]

For example, in 2017:

- The Connecticut Commission on Human Rights and Opportunities received 1,963 complaints of employment discrimination and 2,376 complaints generally. That same year,

[10] This is especially true for pro se litigants who often rely on agency investigators and mediators for assistance in settlement negotiations.

1,050 complaints were withdrawn after the parties reached settlement, and only 540 requested a release of jurisdiction so as to file a civil action. https://www.ct.gov/chro/lib/chro/CHRO_Case_Processing_Report_FY_2016-17.pdf at 1-2.

- The California Department of Fair Employment and Housing (DFEH) received a total of 24,779 complaints, of which 12,872 were employment complaints filed along with a request for an immediate Right-to-Sue letter, and 6,160 complaints were filed as the result of an intake interview conducted by a DFEH investigator. Of those 6,160 complaints, 4,346 were employment complaints. DFEH facilitated resolution in 888 cases. https://tinyurl.com/yxh6rcv4 at 8-9.

- The Illinois Department of Human Rights received a total of 3,201 new complaints; 2,748 of those were for employment discrimination. In that same year, the Department settled 809 complaints. https://tinyurl.com/yag3t9l9 at 15-16.

- The Massachusetts Commission Against Discrimination administratively closed 1,561 cases. Of those 1,561 cases only 319 were removed to Court; 774 were settled or conciliated, and the remaining were administratively dismissed. https://www.mass.gov/

files/documents/2018/06/20/2017%20Annual%20Report%20FINAL%2006-12-2018.pdf at 17.

- The Texas Workforce Commission received 11,056 employment discrimination complaints. Of those complaints, 1,687 were settled or withdrawn with benefits or conciliated. https://twc.texas.gov/files/news/2017-twc-annual-report-twc.pdf at 38 (Tables 2-3).

These numbers reflect the fact that exhausting administrative remedies results in a significant number of settled or closed claims. The EEOC and state equivalents provide an important function by weeding out those cases that do not require judicial intervention or oversight. Allowing courts to exercise jurisdiction over unexhausted claims serves no one. Reversal of the decision below is warranted.

C. Holding that Title VII's Administrative Exhaustion Requirement is a Mere Claims-Processing Rule as Opposed to a Jurisdictional Prerequisite to Suit Will Impose Burdensome Costs on State and Local Governments.

This Court should hold that Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit. Otherwise, allowing plaintiffs to proceed directly to federal court without exhausting their administrative remedies would impose sig-

nificant costs on Title VII defendants, including state and local governments. *Cf. Williams v. Pa. Human Rels. Comm'n*, 870 F.3d 294, 299 (3d Cir. 2017) (warning against "thwart[ing] Congress's carefully crafted administrative scheme by throwing open a back door to the federal courthouse when the front door is purposefully fortified.").

Title VII claims are a significant drain on state and local government resources. Such claims are notorious for engendering dueling versions of events and "the elusive factual question of intentional discrimination," *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 n.8 (1981), and the expense can be crippling. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003) (describing the expense as "potentially crushing") (quoting *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Posner, J.)). The factual inquiry into whether the employer intentionally discriminated against the employee is "both sensitive and difficult" and usually cannot be answered by direct evidence, making Title VII cases more expensive than most. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

Costly litigation is particularly hard on state and local governments, which must provide critical public services on a very limited budget. Every dollar spent on Title VII litigation is money taken away from the provision of public services. Litigation costs lead many governments to settle employment discrimination lawsuits once they are in court—even

those that are completely meritless. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 617 (2001) (Scalia, J., concurring) (noting that defendants sometimes "'abandon[]the fray' because the cost of litigation—either financial or in terms of public relations—would be too great"), *superseded on other grounds by* 5 U.S.C. § 552(a)(4)(E).

Administrative exhaustion provides the parties with an opportunity to proceed through conciliation and inexpensively settle the case. Moreover, the intended policy of allowing the employer and employee to hear each other and accommodate each other's issues would be thwarted if the employee failed to bring a grievance to the employer's attention during the conciliation process but then was allowed to sue on that grievance. If an employee can bring suit on any issue, whether raised or not with the EEOC, the courts will be faced with suits based on later-contrived claims when conciliation fails. Allowing courts to exercise jurisdiction over unexhausted claims does not serve the best interests of either party.

II. This Court Should Hold that Title VII's Exhaustion Requirement Is Jurisdictional To Prevent an Unwarranted Abrogation of Sovereign Immunity.

Principles of federalism should inform the Court's analysis as it determines whether Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit. "[I]t was the insight of

the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J. and O'Connor, J., concurring). Holding that the exhaustion requirement was merely a claims-processing rule would constitute an abrogation of the States' sovereign immunity, impinging on federalism interests. Sovereign immunity was designed to protect state governments from the burdens of expensive lawsuits such as Title VII actions. This Court should narrowly construe any such abrogation.

A. The Eleventh Amendment and State Sovereign Immunity

The Eleventh Amendment embodies the premise of sovereign immunity, described as "foundational" to our government, which provides that "States, as sovereigns, are immune from suits for damages, save as they elect to waive that defense." *Coleman v. Court of Appeals*, 566 U.S. 30, 35 (2012) (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *Alden v. Maine*, 527 U.S. 706 (1999)). It provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

While originating in the English common law theory that "the King can do no wrong," the modern view of sovereign immunity "now rests on policy

considerations including separation of powers, the protection of public funds, and the efficient and uninterrupted administration of government functions." Amanda Coffey, *Local Government Sovereign Immunity 201: Florida*, https://www.americanbar.org/content/dam/aba/administrative/state_local_government/SovImm201.authcheckdam.pdf at 1.

This Court has viewed the Eleventh Amendment as a "specific constitutional bar against hearing even federal claims that otherwise would be within the jurisdiction of the federal courts." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984). A state government agency is part of the state for purposes of the Eleventh Amendment. *See Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981).

B. Holding that Title VII's Administrative Exhaustion Requirement Is Not Jurisdictional Would Constitute a Further Abrogation of the States' Sovereign Immunity.

State sovereign immunity is not absolute; exceptions exist. One of those exceptions is Congressional abrogation.[11]

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[11] Other exceptions include the *Ex Parte Young* doctrine, *Ex parte Young*, 209 U.S. 123 (1908); the "arm of the state" doc-

Congress can abrogate State sovereign immunity by enacting a federal law pursuant to Section 5 of the Fourteenth Amendment that is intended to impose liability on State governments. *See Coleman v. Court of Appeals*, 566 U.S. 30, 35 (2012). In recent years, the Court has held that laws passed pursuant to Section 5 are valid only if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), *superseded on other grounds by* 42 U.S.C. § 2000cc-1(b). Specifically, Congress may abrogate State sovereign immunity under Section 5 only when the statutory provision specifically remedies "conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999).

Congress's enactment of the Equal Employment Opportunity Act of 1972, amending Title VII ("1972 Amendments"), was just such an abrogation. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 & n.9 (1976) ("There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment.") (citing H.R. REP. NO. 92-238, at 19 (1971); S. REP. NO. 92-

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trine, *Alden v. Maine*, 527 U.S. 706, 756 (1999); and voluntary waiver, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 235, 238 (1986); *see also Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

415, at 10-11 (1971)). The 1972 Amendments authorized federal courts to award money damages in favor of a private individual against a state government that subjected that individual to employment discrimination on the basis of race, color, religion, sex, or national origin. *Fitzpatrick*, 427 U.S. at 447-48. These amendments "retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf, upon satisfaction of the statutory procedural prerequisites, and made clear that the right was being extended to persons aggrieved by *public* employers." *Id.* at 449 n.2 (emphasis added) (citing, *inter alia*, 1972 Amendments, Pub. L. No. 92-261, § 4(a), 86 Stat. 104, 42 U.S.C. §§ 2000e-5(a)-(g)).

This was not done lightly. Congress extended Title VII to the States by "inferr[ing] a broad pattern of discrimination[,] combining documented instances of intentional discrimination by state governments with extensive numerical evidence of race- and gender-based disparities in pay and promotions." Claude Platton, *Title VII Disparate Impact Suits Against State Governments after Hibbs and Lane*, 55 DUKE L.J. 641, 661 (2005). Congress relied "in large part" on a 1969 report by the United States Commission on Civil Rights regarding racial and national-origin discrimination in state and local government employment. *Id.* at 657 & n.11 (citing U.S. COMM'N ON CIVIL RIGHTS, FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE: A REPORT ON EQUAL OPPORTUNITY IN STATE AND LOCAL GOVERNMENT EMPLOYMENT (1969)).

The House Committee on Education and Labor stated that the Commission's 1969 report "documented that 'widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices.'" *Id.* at 657 & n.113 (quoting H.R. REP. NO. 92-238, at 17-18 (1971), *reprinted in* SUBCOMM. ON LABOR, S. COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 77-78 (1982)). The House Committee stated that "[t]he report cites widespread perpetuation of past discriminatory practices through *de facto* segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities." H.R. REP. NO. 92-238, at 17. Further, the Committee stated that, according to the report, "employment discrimination in State and local governments is more pervasive than in the private sector." *Id.*; *see also* Platton, *supra* p. 26, at 657-59 (discussing reports). As this Court stated in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), "Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964 . . . ." *Id.* at 729.

Holding that Title VII's administrative exhaustion requirement is not jurisdictional is a *further* abrogation of the States' sovereign immunity. But the distinguishing factors between Respondent's ef-

forts here and Congress's enactment of the 1972 Amendments to Title VII are legion.

Put simply, the Court is not Congress. Congress intended Title VII's exhaustion requirement to be jurisdictional, and if that is to change, it is Congress rather than the Court that should take action. This Court has held that the legislative process is the proper way to protect State sovereign interests. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-52, 556 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations . . . . The political process ensures that laws that unduly burden the States will not be promulgated."), *superseded on other grounds by* the Fair Labor Standards Act of 1985, Pub. L. 99-150, 99th Cong., 1st Sess. 10, 99 Stat. 787 (codified as amended in 29 U.S.C. § 207(o)(1)) (quoting THE FEDERALIST NO. 62, at 408 (James Madison) (B. Wright ed. 1961) (describing the States' equal representation in the Senate as "at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty."); THE FEDERALIST NO. 43, at 315 (James Madison) (B. Wright ed. 1961) ("the residuary sovereignty of the States [is] implied *and secured* by that principle of representation in one branch of the [federal] legislature." (emphasis added); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435 (1819)).

This further abrogation urged by Respondents has not been entrusted to voted-in representatives enacting legislation after careful review and consideration in standing committees, and in accordance with the trusted procedures of bicameralism and presentment. No extensive studies have been conducted; there have been no findings on discrimination, no statistical support, nothing justifying this infringement of the States' sovereign right not to be haled into court without the benefits of the administrative process designed and enacted by Congress.

Sovereign immunity is a doctrine designed to protect state governments from just such burdens. As one scholar has written, sovereign immunity is "one of the Constitution's (implicit) austerity measures, allowing governments to balance the public interest against their contractual obligations and liabilities to individuals." Ernest A. Young, *Law in an Age of Austerity: Its Hour Come Round at Last?*, 35 HARV. J.L. & PUB. POL'Y 593, 621 (2012). And it is there that *amici*'s arguments in support of Petitioner coalesce, grounded in concerns regarding efficiency, cost, and sovereign immunity—the doctrine that strikes that balance. All of these interests support *amici*'s request that this Court hold Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit. This Court should reverse the decision below.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

Lisa Soronen
STATE & LOCAL LEGAL CENTER
444 N. Capitol St. N.W.
Washington, D.C. 20001
(202) 434-4845

Collin O'Connor Udell
Counsel of Record
Mara E. Finkelstein
JACKSON LEWIS P.C.
90 State House Square
Eighth Floor
Hartford, CT 06103
(860) 522-0404
Collin.udell@
jacksonlewis.com

Counsel for Amici Curiae

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