19-7389

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Nicole Rena McCrea
Petitioner

V.

D.C. OFFICE OF HUMAN RIGHTS, et al
Respondent(s)

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Nicole Rena McCrea

(Name)

5205 East Capitol St, SE

(Address)

Washington, DC 20019

(City, State, Zip Code)

202-491-9656

(Phone Number)

QUESTION(S) PRESENTED

1. Was the Petitioner adversely aggrieved by the District of Columbia Office of Human Rights and U.S. Equal Employment Opportunity Commission- DC Field office's actions aborting her efforts to exhaust her administrative remedies for her administrative claims?

2. Is the Supreme Court of the United States precedent established in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 - Supreme Court 2015, applicable to the Petitioner's assertions of being adversely aggrieved by the actions of the U.S. Equal Employment Opportunity Commission- DC Field office that were contrary to its statutory obligations?

3. Is Superior Court Rule – Civil Rule 57 ("SCR-Rule 57"), a congressionally mandated grant of general equity powers to the Superior Court of the District of Columbia applicable to the Appellant's assertions of being adversely aggrieved by the actions of the U.S. Equal Employment Opportunity Commission- DC Field office that were contrary to its statutory obligations?

4. As defined by the Court in its May 22, 2019 Judgment, is there substantial controversy as pertains to the statutory requirement to exhaust all available administrative remedies for federal administrative claims, prior to filing in federal court?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:
District of Columbia Office of Human Rights and U.S. Equal Employment Opportunity Commission- DC Field office

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PETITIONER'S PETITION FOR REHEARING EN BANC for consolidated cases 17-cv-0987 and case 18-cv-1289.

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment below.

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment below.

OPINIONS BELOW

For cases from **state courts:**

The opinion of the highest state court to review the merits appears at
Appendix A to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Superior Court of the District of Columbia – Civil Division
appears at Appendix B to the petition and is
[ ] reported at _____ or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

For cases from **state courts:**

The date on which the highest state court decided my case was 05-22-2019.
A copy of that decision appears at Appendix A.
[X] A timely petition for rehearing was thereafter denied on the following date 10-23-2019 and a copy of order denying rehearing appears at Appendix C

[ ] An extension of time to file the petition for a writ of certiorari was granted
to and including _____ (date) on _____ (date)
in Application No. _____

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S. Code §702 – Right to review states:

"A person suffering legal wrong because of agency action, or *adversely affected or aggrieved by agency action within the meaning of a relevant statute*, is *entitled to judicial review thereof.*[emphasis added] An action in a court of the United States *seeking relief other than money damages* [emphasis added]and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or *under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party* [emphasis added]. *The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States* [emphasis added]: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)"

5 U.S. Code §706 – Scope of Review states:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2)hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)"

28 U.S. Code § 2201(a) Creation of remedy states, in relevant parts,

"In a case of actual controversy within its jurisdiction, [...] as determined by the administering authority, *any court of the United States*, [emphasis added]upon the filing of an appropriate

pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought* [emphasis added]. "

Superior Court Rule for Civil Procedure-Civil Rule 57. Declaratory Judgment states, in relevant parts,

"These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201 or otherwise.[...] *The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate* [emphasis added].

Comment: Identical to Federal Rule of Civil Procedure 57 except for addition of the words "or otherwise" following reference to 28 U.S.C. § 2201 so as to comprehend also authority for issuance of declaratory judgments founded on the **Congressional grant to the Superior Court of *general equity powers* [Emphasis added] and the related prescription that the Court conduct its business according to the Federal Rules of Civil Procedure wherever possible**. See *D.C. Code §§ 11-921 and 11-946 (1973 Ed.)*"

DC Human Rights Act D.C. Code 2-1403.16(a). states, in relevant parts,

"It provides that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of competent jurisdiction ... *unless* such person has filed a complaint hereunder[.]...where one opts to file with OHR, he or she generally may not also file a complaint in court.

STATEMENT OF THE CASE

The Petitioner is a former Firefighter/EMT of the District of Columbia Fire and Emergency Medical Services Department ("DCFEMS"). On **May 30-31, 2013** the Petitioner was the victim of a sexual harassment incident involving three DC Fire and EMS employees. On **June 01, 2013** the Metropolitan Police for the District of Columbia classified the sexual harassment incident as a misdemeanor sexual assault. On **November 21, 2013**, the Petitioner filed Charge 15-710-P (CNTR), with the U.S. Equal Employment Opportunity Commission- DC Field office ("USEEOC-DC"). From **May 24, 2014 through November 06, 2015**, the Petitioner filed her multiple and continuous charges of violations, asserting: race discrimination and harassment; sex discrimination and harassment and disability discrimination and harassment; hostile work environment and retaliation with the District of Columbia Office of Human Rights ("DCOHR").

On **April 28, 2016**, the Petitioner filed her Federal Complaint before the United States District Court for the District of Columbia ("USDC-DC"); *McCrea v. District of Columbia, et. al*, Civil Case Number 1:16-cv-00808-TSC, asserting claims under Federal Discrimination Statutes and State Tort laws, outside of the DCOHR's jurisdiction. On **August 02, 2016**, the DCOHR sent the Petitioner a letter stating that she is *NOT* entitled to seek supplement redress of Constitutional claims, *outside of DCOHR's jurisdiction.* On **August 31, 2016** the Petitioner received several notices from the DCOHR stating that they were dismissing all of her Charges, Dismissal without Prejudice. **September 12, 2016**, the Petitioner received several notices dismissing all of her cross-filed Charges "Dismissal and Notice of Rights" from the USEEOC-DC. The USEEOC-DC stated reason for closing the Petitioner's Charges was "Administrative Closure—Charging Party Filed in Court".

On **September 19, 2016**, the Petitioner filed a Petition for Review of Agency Decision, before the Superior Court of the District of Columbia-Civil Division ("Superior Court") seeking ***relief*** through the Superior Court's affirmation/ declaratory judgment that she has ***exhausted all of her available administrative remedies,*** prior to supplementing the USDC-DC Federal Complaint with her administrative claims. On **February 02, 2017**, the USEEOC-DC filed a Motion to Dismiss the Petition for Review of Agency Decision. On **February 02, 2017**, the DCOHR filed a Motion for Summary Affirmance of the DCOHR's decision. On **July 28, 2017**, the parties appeared before the Superior Court for a Hearing. On **July 28, 2017**, the Superior Court issued an Oral Judgment DISMISSING the Petitioner's Petition for Review of Agency Decision, *with Prejudice.* [**APPENDIX D**]. On **August 24, 2017**, the Petitioner filed three (3) Post- Judgment Motions: the Petitioner's Non- Consent Motion to Alter and Amend the July 28, 2017 Oral Judgment; the Petitioner's Non- Consent Motion to Amend Findings of Fact and Make Additional Findings of Fact; the Petitioner's Non- Consent Motion for a New Trial. On **August 28, 2017**, the Petitioner filed a Notice of Appeal for the July 28, 2017 Oral Judgment; expressly seeking relief through declaratory judgment that she had exhausted all of her administrative remedies. Appeal No. 17-cv-0987 stems from the Petitioner's **August 28, 2017** Notice of Appeal for the Superior Court's July 28, 2017 Oral Judgment. On **November 10, 2018** the Superior Court issued and filed an Omnibus Order DENYING: the Petitioner's Non- Consent Motion to Alter and Amend the July 28, 2017 Oral Judgment; the Petitioner's Non- Consent Motion to Amend Findings of Fact and Make Additional Findings of Fact; and the Petitioner's Non-Consent Motion for a New Trial [**APPENDIX B**]. On **December 10, 2018**, the Petitioner filed a Notice of Appeal for the July 28, 2017 Oral Judgment and the November 10, 2018 Omnibus Order. Appeal No. 18-cv-1289 stems from the Petitioner's **December 10, 2018** Notice of

Appeal for the Superior Court's July 28, 2017 Oral Judgment , in addition to the Superior Court's November 10, 2018 Omnibus Order denying the Appellant's three (3) Post-Judgment Motions filed on **August 24, 2017**. On **January 07, 2019**, the Petitioner filed the Petitioner's Motion for Summary Reversal before the District of Columbia Court of Appeals ("DCCA"); case 17-cv-0987 [**APPENDIX E]**. On **March 11, 2019**, the Petitioner filed the Petitioner's Motion to Consolidate case 18-cv- 1289 with case 17-cv-0987 before the DCCA [**APPENDIX F]**. On **April 08, 2019**, the Petitioner filed the Petitioner's Motion for Summary Reversal before the DCCA; case 18-cv-1289 [**APPENDIX G]**. On **April 09, 2019**, the Petitioner filed the Petitioner's Reply to the DC Office of Human Rights in Support of the Petitioner's Motion for Summary Reversal before the DCCA; case 17-cv-0987. [**APPENDIX H]**. On **April 11, 2019**, the Petitioner filed the Petitioner's Reply to the US Equal Employment Opportunity Commission- DC Field office in Support of the Petitioner's Motion for Summary Reversal before the DCCA; case 17-cv-0987 [**APPENDIX I]**. On **May 06, 2019**, the Petitioner filed the Petitioner's Reply to the DC Office of Human Rights in Support of the Petitioner's Motion for Summary Reversal before the DCCA; case 18-cv-1289 [**APPENDIX J]**. On **May 22, 2019**, the DCCA issued an Order/Judgment AFFIRMING the Superior Court's November 10, 2018 Order **[APPENDIX A]**. On **June 05, 2019**, the Petitioner filed the Petitioner's Petition for Rehearing and Petitioner's Petition for Rehearing En Banc for consolidated cases 17-cv-0987 and case 18-cv-1289 [**APPENDIX K]**. On **October 23, 2019**, the DCCA issued an Order DENYING the Petitioner's Petition for Rehearing and Petitioner's Petition for Rehearing En Banc for consolidated cases 17-cv-0987 and case 18-cv-1289 [**APPENDIX C]**.

The controversy presented for decision in this case is the impact that the USEEOC-DC and the DCOHR administrative decisions to dismiss the Appellant's administrative Charges to the

Appellant's ability to show that she has meet the statutory requirement to exhaust all of her available administrative remedies, prior to filing in Federal Court. Exhaustion "applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." *Davis & Assocs.*, 892 A.2d at 1148 & n. 5; *Barnett v. District of Columbia Dep't of Employment Servs.*, 491 A.2d 1156, 1162 (D.C.1985). The Superior Court and this Court unquestionably have authority to consider this question. *Capitol Hill Hosp. v. District of Columbia State Health Planning & Dev. Agency*, 600 A.2d 793, 799 (D.C.1991) (court has subject matter jurisdiction if case is one the sovereign has empowered it to entertain); *District of Columbia Employees' Comp. Appeals Bd. v. Henry*, 516 A.2d 941, 944 (D.C. 1986) (Superior Court lacked subject matter jurisdiction to hear appeal from decision of Secretary of Labor because "contrary result would impermissibly defy the intent of Congress"). The Superior Court disregarded and/or refused to support its conclusory denial of the Appellant's three Post Judgment Motions with analysis of the case law or legal arguments set forth. The Superior Court and the DCCA has repeatedly refused to provide analysis or supporting authority showing why the Appellant is not entitled to Declaratory Judgment. The DCCA has asserted that "[t]he nature of a motion is determined by the relief sought, not by its label or caption." *Wallace v. Warehouse Employees Union No. 730*,482 A.2d 801, 804 (D.C.1984)". Both the Superior Court and the DCCA refuse to adequately address the Appellant's exhaustion of administrative remedies requirement. It is clear from the face of the Petition that the Petitioner is seeking a *review of an agency decision in order to satisfy the express statutory requirement that she exhaust her administrative remedies*, an expressed relief that the Petitioner stated, with particularity. The issue of whether the Superior Court erred in DISMISSING the Appellant's Petition to Review Agency Decision, with prejudice; the Superior

Court erred in DENYING the Appellant's three Post Judgment Motions the DCCA erred in AFFIRMING the Superior Court's rulings, is a narrow and clear-cut issue of law and the Petitioner's efforts seeking Declaratory Judgment that she had *exhausted all of her available administrative remedies*, after adverse agency actions, prior to filing in Federal Court are mandatory. The Superior Court and the DCCA unquestionably have authority to consider this question. *Capitol Hill Hosp. v. District of Columbia State Health Planning & Dev. Agency*, 600 A.2d 793, 799 (D.C.1991) (court has subject matter jurisdiction if case is one the sovereign has empowered it to entertain); *District of Columbia Employees' Comp. Appeals Bd. v. Henry*, 516 A.2d 941, 944 (D.C. 1986). There are several Federal and Local Codes and/or rules, in addition to SCOTUS precedent, repeatedly asserted by the Appellant, that expressly authorize and/or permit judicial review of the agency decisions of the USEEOC-DC and the DCOHR: *5 U.S. Code §7025; U.S. Code §706; Superior Court's Rule 57 Declaratory Judgmen; 4 DCMR §§ 121.1 and 121.3; Johnson v. Railway Express Agency, Inc.*, 421 US 454 - Supreme Court 1975; *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 396-397- Supreme Court (1987); *Lujan v. National Wildlife Federation*, 497 US 871 at 882-884 - Supreme Court 1990; *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 - Supreme Court 2015. The Superior Court and the DCCA have disregarded Supreme Court of the United States ("SCOTUS") and its own precedent to AFFIRM and/or Grant the various motions of the DCOHR and USEEOC-DC.

REASONS FOR GRANTING THE PETITION

A Writ of Certiorari is warranted due to the fact that the Superior Court and the DCCA's decisions are in conflict with controlling SCOTUS precedent, in addition to the precedents of the Federal Circuit and the DC Circuit, as it pertains to exhaustion of administrative remedies and the statute of limitations applicable to the **filing a parallel suit in federal district court based on the same acts; although they are concurrently before an administrative agency**. Claimants have a choice to pursue administrative remedies as well as judicial remedies and that these ***remedies are independent even though the different claims arise from the same course of behavior***. Administrative exhaustion is not a prerequisite to the initiation of a federal claim premised on § 1981 and § 1983, therefore a plaintiff cannot toll the three-year statute of limitations during the pendency of administrative remedies.

The DCCA reviews a Superior Court ruling on an [agency] decision in the same fashion in which we would review an [agency] decision if it were appealable directly to the Court. *Bagenstose v. District of Columbia Office of Employee Appeals*, 888 A.2d 1155, 1157 (D.C.2005); *see Kennedy v. District of Columbia*, 654 A.2d 847, 853 (D.C.1994) ("[O]ur primary task is not simply to review the Superior Court's decision for error or abuse of discretion. Rather, we approach the case as if the appeal arose directly from the administrative agency." DCCA must examine the agency record to determine whether there is substantial evidence to support the agency's findings of fact and whether the agency's action was "arbitrary, capricious, or an abuse of discretion." *Bagenstose*, 888 A.2d at 1157; *see D.C.Code § 2-510(a)(3) (2001)*. However, "[w]here questions of law are concerned, [DCCA] review[] the agency's rulings *de novo*" because "we are presumed to have the greater expertise when the agency's decision rests on a question of law, and we therefore remain `the final authority on issues of statutory

construction.'" *Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Emp't Servs.*, 683 A.2d 470, 472 (D.C.1996) (quoting *Harris v. District of Columbia Office of Worker's Comp.*, 660 A.2d 404, 407 (D.C.1995)). Although our review of legal issues (such as interpretation of statutes and regulations) is *de novo,* we defer to the agency's interpretation of the statute and regulations it is charged by the legislature to administer, unless its interpretation is unreasonable or is inconsistent with the statutory language or purpose. *See Foggy Bottom Ass'n v. District of Columbia Zoning Comm'n,*979 A.2d 1160, 1167 (D.C.2009). "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *1330 Connecticut Ave. Inc. v. District of Columbia Zoning Comm'n,* 669 A.2d 708, 714-15 (D.C.1995) (internal quotation marks omitted); *see Schonberger v. District of Columbia Bd. of Zoning Adjustment,* 940 A.2d 159, 162 (D.C.2008) (deferring to agency interpretation where regulations were ambiguous or silent). That deference is based on "the agency's presumed expertise in construing the statute it administers." *United States Parole Comm'n v. Noble,* 693 A.2d 1084, 1096 (D.C.1997), *adopted on reh'g,* 711 A.2d 85 (D.C.1998) (en banc). Another reason for judicial deference is respect for separation of powers, based on the legislature's choice of an agency to implement a statute by issuing regulations. *See Continental Airlines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1454 (D.C.Cir.1988) (stating that legislative choice also presumes greater expertise in the agency than in the court). But even when deference to agency expertise would normally be owed, "plain statutory language or clear legislative history" may require DCCA to reject an agency's interpretation. *United States Parole Comm'n,* 693 A.2d at 1097-98. And where the issue "is purely one of law not involving an agency's attention to gaps or ambiguities in the statute it administers or to technical applications," this Court does not defer to an agency interpretation. *Id.* at 1098.

The *D.C. Human Rights Act* requires complainants to choose between an administrative or a judicial forum in which to pursue their [*DCHRA*] claims. "It provides that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of competent jurisdiction ... *unless* such person has filed a complaint *hereunder*[.]...where one opts to file with OHR, he or she *generally* may not also file a complaint [*under DCHRA*] in court. D.C. Code 2-1403.16(a). The statute recognizes two exceptions: the complainant may bring a lawsuit in court "as if no [OHR] complaint had been filed" if (1) OHR dismisses the complaint for "administrative convenience" or (2) the complainant withdraws her OHR complaint before OHR has decided it. *Id.* However, the Petitioner is statutorily required to file with the USEEOC and/or cross-file through DCOHR her federal administrative claims under Title VII and her ADA prior to filing those claims in federal court. *Timus v. Dept. of Human Rights*, 633 A. 2d 751 - DC: Court of Appeals 1993; *Lawlor v. District of Columbia*, 758 A. 2d 964 - DC: Court of Appeals 2000. The DCCA has asserted that were a statue provides an administrative forum to resolve disputes, the prescribed administrative remedy must be exhausted before judicial relief may be sought. *Kovach v. District of Columbia*, 805 A. 2d 957 - DC: Court of Appeals 2002.

It is a rule of long standing that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Fisher v. District of Columbia*, 803 A.2d 962, 964 (D.C.2002), It is well settled that unless a plaintiff complies with the exhaustion requirements of section 706(c) of Title VII, federal courts lack subject-matter jurisdiction over the plaintiff's claim. *See, e.g., Davis v. North Carolina Dep't of Correction*, 48 F.3d 134, 136-37 (4th Cir.1995). Title VII establishes a comprehensive enforcement scheme in which state agencies are given a "limited opportunity to resolve problems of employment

discrimination, thereby [making] unnecessary resort to federal relief by victims of the discrimination." *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979). Congress envisioned that Title VII's procedures would "mes[h] nicely, logically, and coherently with the State and city legislation," and that remedying employment discrimination would be an area in which "[t]he Federal Government and the State governments could cooperate effectively." *See* New York Gaslight Club v. Carey, 447 U.S. 54, 63, 100 S.Ct. 2024 (citing 110 Cong. Rec. 7205 (1964) (remarks of Sen. Clark)). Dismissal results when a plaintiff fails to exhaust administrative remedies. Hansen v. Billington, 644 F.Supp.2d 97, 105 (D.D.C.2009) (dismissing an ADA claim because the plaintiff failed to exhaust administrative remedies); Gillet v. King, 931 F.Supp. 9, 12-13 (D.D.C.1996) (dismissing a Title VII claim when the plaintiff failed to exhaust administrative remedies).

Under Title VII, a plaintiff must timely exhaust his administrative remedies before bringing an action in federal court. Payne v. Salazar, 619 F.3d 56, 65 (D.C.Cir.2010). To be timely, a claimant first must file an administrative charge alleging that the employer has engaged in an unlawful employment practice within a specified period (either 180 or 300 days) after the practice has occurred. Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618, 623-24, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007). Only those claims that are contained in the administrative complaint or that are "like or reasonably related" to the allegations of the administrative complaint can be raised in a Title VII lawsuit. Park v. Howard Univ., 71 F.3d 904, 907 (D.C.Cir.1995); *see also* Bailey v. Verizon Comm., Inc., 544 F.Supp.2d 33, 37-38 (D.D.C.2008) (noting that "[i]f a plaintiff's EEOC charge makes a class of allegation altogether different from that which she later alleges when seeking relief in federal district court, she will have failed to exhaust administrative remedies"). Such claims "must arise from `the

administrative investigation that can reasonably be expected to follow the charge of discrimination.'" *Park*, 71 F.3d at 907 (quoting *Chisholm v. U.S. Postal Serv.*, 665 F.2d 482, 491 (4th Cir.1981)). The exhaustion requirement provides the EEOC the opportunity to investigate and "serves the important purpose of giving the charged party notice of the claim and `narrow[ing] the issue for prompt adjudication and decision.'" *Id.* (quoting *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472 n. 325 (D.C.Cir.1976)). The exhaustion of remedies doctrine is distinguishable from the doctrine of primary jurisdiction.

The primary jurisdiction rule "[comes] into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Drayton v. Poretsky Mgmt., Inc.* 462 A.2d 1115, 1118 (D.C.1983) (quoting *Western Pac., supra*, 352 U.S. at 63-64, 77 S.Ct. 161). The Petitioner's common law claims accompanying her sex discrimination claims are "pendent," similar to a state law claim that might be pendent to a federal claim if "derive[d] from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

The Title VII statutory scheme requires a plaintiff to exhaust her administrative remedies before filing a civil action in federal court. *See Robinson-Reeder v. Am. Council on Educ.*, 532 F.Supp.2d 6, 12 (D.D.C.2008). "Because untimely exhaustion of administrative remedies is an affirmative defense, the defendant bears the responsibility of pleading and proving it." *Bowden v. United States*, 106 F.3d 433, 437 (D.C.Cir.1997)(citing *Brown v. Marsh*, 777 F.2d 8, 13 (D.C.Cir.1985)). The exhaustion of administrative remedies is not a jurisdictional prerequisite to

suit in this Court, but rather "a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). In a Title VII case, "[i]t is appropriate to grant a defendant's motion for summary judgment when a plaintiff fails to demonstrate exhaustion of administrative remedies." *Greer v. O'Neill*, No. CIV.A. 01-1398, 2003 WL 25653036, at *2 (D.D.C. Sept. 25, 2003) (citing *Siegel v. Kreps*, 654 F.2d 773 (D.C.Cir.1981)). Title VII rights are independent of the rights created by other statutes, and where remedies coincide the claimant is allowed to utilize all avenues of available relief. Administrative complaints do not toll the statute of limitations that dictate that the Petitioner timely files her Federal and State Claims. *Banks v. Chesapeake and Potomac Telephone Co.*, 802 F. 2d 1416 - Court of Appeals, Dist. of Columbia Circuit 1986; *Adams v. District of Columbia*, 740 F. Supp. 2d 173 - Dist. Court, Dist. of Columbia 2010. The standard for a prima facie case of retaliation under the DCHRA mirrors the standard under Title VII. *Chandamuri v. Georgetown Univ.*, 274 F.Supp.2d 71, 85 (D.D.C.2003) (Lamberth, J.) (citing *Howard Univ. v. Green*, 652 A.2d 41, 45 (D.C.1994)); *Stith v. Chadbourne & Parke, LLP*, 160 F.Supp.2d 1, 11 (D.D.C.2001) (Lamberth, J.) (DCHRA claims are "analyzed in the same manner as claims arising under Title VII . . . [u]nder the framework established by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)") (citing *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1553 (D.C.Cir.1997)). *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C.Cir.1995); *Caldwell v. ServiceMaster Corp.*, 966 F.Supp. 33, 49 (D.D.C.1997).

A limitations period does not toll when a plaintiff is not required but chooses to exhaust his administrative remedies before pursuing a claim in court. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 461, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975)(holding that the timely filing of

an EEOC charge did not toll the running of the statute of limitations for a claim brought pursuant to 42 U.S.C. § 1981); *see also* Carter v. Dist. of Columbia, 14 F.Supp.2d 97, 102 (D.D.C.1998) (holding that the statute of limitations for the plaintiff's claim that did not require exhaustion did not toll during the pendency of administrative action on another claim); *Russo-Lubrano v. Brooklyn Fed. Sav. Bank*, 2007 WL 121431, at *6 & n. 17 (E.D.N.Y. Jan. 12, 2007) (declining to toll the statute of limitations based on the plaintiff's EEOC filing because the plaintiff's state law claim did not require exhaustion); *cf. Intn'l Union of Electrical v. Robbins & Myers, Inc.*, 429 U.S. 229, 237, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976) (noting that Supreme Court rulings have "virtually foreclosed" "arguments for tolling the statutory period for filing a claim with the EEOC during the pendency of grievance or arbitration procedures". Although the DCHRA tolls the "one-year statute of limitations for filing a claim *under the DCHRA,"* Ellis, 631 F.Supp.2d at 78 (emphasis added), it does not expressly toll the statute of limitations applicable to claims under the Rehabilitation Act, *see* D.C. CODE § 2-1403.16(a). Moreover, the Supreme Court has held that the statute of limitations continues to run on a claim that requires no administrative exhaustion while a plaintiff pursues administrative remedies on a separate claim that does have such a requirement. *Johnson*, 421 U.S. at 461, 95 S.Ct. 1716 (reasoning that the administrative and litigatory remedies "although related, and although directed to most of the same ends, are separate, distinct, and independent"); *see also* Carter, 14 F.Supp.2d at 102 (D.D.C.1998).

SCOTUS precedent articulated in *Johnson v. Railway Express Agency, Inc.*, 421 US 454 - Supreme Court 1975 , is established and controlling in the D.C. Circuit. The Petitioner's timely filing of DCOHR, and Equal Employment Opportunity Commission ("EEOC") administrative complaints did not preclude her filing of her Federal and State Claims nor does it toll the statute

of limitations that dictate her filing of her Federal and State Claims. *Laffey v. Northwest Airlines, Inc.*, 567 F. 2d 429 at 445 - Court of Appeals, Dist. of Columbia Circuit 1976; *Bouchet v. National Urban League, Inc.*, 730 F. 2d 799 at 804 - Court of Appeals, Dist. of Columbia Circuit 1984; *Cornish v. Dist. of Columbia*, 67 F. Supp. 3d 345 AT 372-373- Dist. Court, Dist. Of Columbia 2014; *Battle v. Dist. of Columbia*, 105 F. Supp. 3d 69 AT 74 - Dist. Court, Dist. Of Columbia 2015; *Williams-Jefferies v. AARP*, Dist. Court, Dist. of Columbia 2016

SCOTUS has held that the statute of limitations for a Section 1981 claim relating to a Title VII action is not tolled when a complaint is filed with the EEOC. *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). The Supreme Court has stated that legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. *Alexander v.Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) ; *Patsy v. Board of Regents of Fla.*, 457 US 496 - Supreme Court 1982; *Perry v. Gallaudet University*, 738 A. 2d 1222 - DC: Court of Appeals 1999.; *Bowie v. Gonzales*, 433 F. Supp. 2d 24 - Dist. Court, Dist. of Columbia 2006

The Seventh and Ninth Circuit Court of Appeals have adopted the view that filing an EEOC claim does not toll the statute of limitations applicable to State causes of action. *See Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992); *Arnold v. United States*, 816 F.2d 1306 (9th Cir.1987). In *Juarez,* the court dismissed plaintiff's argument that tolling the statute of limitations on State claims was consistent with the purpose and intent of Title VII. *Juarez*, 957 F.2d at 322-23. The court relied on the reasoning in *Johnson* that ***Congress' intent was to offer a "separate and independent" remedy; even though State causes of action arise from the same facts***, the court ruled, the claims are independent and the filing of a complaint with the EEOC has no effect on the State statute of limitations. *Id.* Similarly,

in *Arnold,* the Ninth Circuit found that State claims of assault, false imprisonment, and intentional infliction of emotional distress *were distinct from claims under Title VII.* Arnold, 816 F.2d at 1312-13. The court reasoned that Congress did not intend the separate administrative remedy under Title VII to "delay independent avenues of redress." *Id.* at 1313.

The D.C Circuit also follows the Precedent Established in Johnson v. Railway Express Agency, Inc:

a. *LAFFEY V. NORTHWEST AIRLINES, INC.*, 567 F. 2d 429 AT 445 - COURT OF APPEALS, DIST. OF COLUMBIA CIRCUIT 1976

"The Court has also noted that the legislative history of Title VII "manifests a congressional intent to allow an individual to pursue independently his rights under Title VII and other applicable state and federal statutes [...] The Court has also noted that the legislative history of Title VII "manifests a congressional intent to ***allow an individual to pursue independently his rights under Title VII and other applicable state and federal statutes***.. [...] Congress rejected a proposed amendment which would have made Title VII the exclusive remedy for the unlawful employment practices it covers, and thereby evinced a congressional purpose to ***leave open other modes of relief available*** to victims of discriminatory employment practices. "(emphasis added)

b. *BOUCHET V. NATIONAL URBAN LEAGUE, INC.*, 730 F. 2d 799 AT 804 - COURT OF APPEALS, DIST. OF COLUMBIA CIRCUIT 1984

"It is clear, however, that the "incidental" nature of legal claims does not deprive them of their ***entitlement to separate relief and jury consideration***, *see* Ross v. Bernhard, 396 U.S. 531, 537-38, 90 S.Ct. 733, 737-38, 24 L.Ed.2d 729 (1970), and that ***Title VII does not "subsume" other claims based on the same set of facts***, 42 U.S.C. § 2000e-7." (emphasis added)

c. *CORNISH V. DIST. OF COLUMBIA*, 67 F. SUPP. 3d 345 AT 372-373- DIST. COURT, DIST. OF COLUMBIA 2014

"Cases in this Circuit have consistently held that exhaustion of Title VII remedies does not toll the statute of limitations for factually related claims that do not independently require exhaustion.[13] For example, in *Carter v. District of Columbia,* this Court held that the plaintiff's § 1981 and § 1983 claims were not tolled while exhausting the Title VII administrative remedies. 14 F.Supp.2d 97, 102 (D.D.C.1998) (citing *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 465-66, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (explaining that ***plaintiffs with pending EEOC charges should file their § 1981 claims*** and request a stay until the EEOC charges are resolved)). The Court reached the same conclusion regarding a § 1981 claim in *Peart v. Latham & Watkins LLP*, 985 F.Supp.2d 72, 85 (D.D.C.2013), and similarly, in *Adams v. District of Columbia* the Court held that the ***plaintiff's pursuit of Title VII administrative remedies did not toll the statute of limitations*** for his Rehabilitation Act claims. 740 F.Supp.2d 173, 183 (D.D.C.2010)." (emphasis added)

d. *BATTLE V. DIST. OF COLUMBIA*, 105 F. SUPP. 3d 69 AT 74 - DIST. COURT, DIST. OF COLUMBIA 2015

"[P]laintiff's DCHRA claim was timely because it was tolled during the pendency of her administrative complaint, but they argue that "***a pending administrative complaint does not toll the statutory period for a plaintiff's common law claims***." (citing *Cornish v. District of Columbia*, 67 F.Supp.3d 345, No. 13-cv-1140, 2014 WL 4583637 (D.D.C. Sept. 16, 2014); *Adams v. District of Columbia*, 740 F.Supp.2d 173 (D.D.C.2010))." (emphasis added). The Court reasoned that the defendant's assertion was an untimely defense.

e. *WILLIAMS-JEFFERIES V. AARP*, DIST. COURT, DIST. OF COLUMBIA 2016

"[T]he Supreme Court has squarely rejected this argument in the context of *federal* causes of action, holding that the limitations period applicable to 42 U.S.C. § 1981 is not tolled while a

plaintiff separately exhausts his administrative remedies under Title VII. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 465-66 (1975) ("It is conceivable, and perhaps almost to be expected, that failure to toll will have the effect of pressing a civil rights complainant . . . into court before the EEOC has completed its administrative proceeding."). In light of *Johnson,* the Second, Seventh, and Ninth Circuits have rejected the argument that—at least as a matter of federal law—***the exhaustion of administrative remedies under Title VII operates to toll the statute of limitations for state-law claims***. *See* Castagna v. Luceno, 744 F.3d 254, 256-57 (2d Cir. 2014); *Juarez v. Ameritech Mobile Commc'ns, Inc.*, 957 F.2d 317, 323 (7th Cir. 1992); *Arnold v. United States*, 816 F.2d 1306, 1313 (9th Cir. 1987); *see also* Cornish v. District of Columbia, 67 F. Supp. 3d 345, 372 (D.D.C. 2014). [...][T]he D.C. Court of Appeals has often emphasized that D.C. statutes of limitations are "strictly construed in accordance with their terms," *Atiba v. Wash. Hosp. Ctr.*, 43 A.3d 940, 941 (D.C. 2012), and that the District "is one of a minority of jurisdictions that has not adopted a general equitable `saving' statute to toll statutes of limitations in cases of reasonable mistake," *East v. Graphic Arts Indus. Joint Pension Tr.*, 718 A.2d 153, 156 (D.C. 1998). *See also Curtis v. Aluminum Ass'n*, 607 A.2d 509, 512 (D.C. 1992) (Rogers, C.J., concurring) (arguing that the Court of Appeals should overrule its "current rule," which "means that, contrary to the usual concern about judicial economy, much less making the courts available and avoiding unnecessary litigation and litigation costs, ***a plaintiff must file in all possible fora in order to avoid a later limitations bar***"). There, accordingly, is ***no basis under D.C. law*** for applying a rule that would toll [...] while [a Plaintiff] exhausted [...]Title VII claims." (emphasis added)

The D.C. Municipal Regulation ("D.C.M.R.") 4 DCMR §§ 121.1 and 121.3 as directed by the DCOHR in each of its Notices of dismissal authorizes and supports the Appellant's right and

statutory requirement to utilize and exhaust all of her available administrative remedies. The Appellant's exercised right to the statutorily authorized review of the agency decisions of the DCOHR also provides an appropriate avenue to address the Agency decisions of the USEEOC-DC under 5 U.S. Code §702 as repeatedly asserted by the Appellant. "It is a `long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638 (1938)). Courts in this jurisdiction have recognized a number of interrelated exceptions to the exhaustion doctrine, among them inadequate remedy, unavailable remedy, and futility *Dano Resource v. District of Columbia*, 566 A. 2d 483 - DC: Court of Appeals 1989 (quoting, *Randolph Sheppard Vendors of America v. Weinberger*, 254 U.S.App.D.C. 45, 62, 795 F.2d 90, 107 (1986). Generally, a dissatisfied party must pursue and exhaust its administrative remedy before it resorts to the courts ("in the absence of some clear evidence that the appeal procedure is inadequate or unavailable...." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 512, 87 S.Ct. 1177, 1182, 18 L.Ed.2d 256 (1967) (quoting *United States v. Holpuch Co.*, 328 U.S. 234, 240, 66 S.Ct. 1000, 1003, 90 L.Ed. 1192 (1946)). *Dano Resource v. District of Columbia*, 566 A. 2d 483 - DC: Court of Appeals 1989. As a part of its statutory obligations the USEEOC-DC was required to provide the Petitioner with written documentation for seeking appeal of their actions dismissing her Charges. They did not. The Petitioner made several attempts to seek remedies from USEEOC-DC, as pertaining to DCOHR's actions, prior to and after, USEEOC-DC's dismissal of her Charges and the steps to appeal or seek reconsideration of the USEEOC-DC's actions. The Petitioner's efforts were frustrated by various direct acts to not properly informing the Petitioner how to seek review; appeal and/or reconsideration of the USEEOC-DC's decisions.

In Mach Mining v. EEOC, SCOTUS ruled by unanimous decision that Courts have authority to review whether the EEOC has fulfilled its Title VII duties, pursuant to the statutory language of 42 U.S.C. § 2000e-5(b). SCOTUS asserted that "there is a strong presumption in favor of Judicial review, the Court will only hold that judicial review is in appropriate when Congress has expressly stated in a statute that an agency is permitted to police itself, Despite the fact that Congress granted the EEOC broad leeway on when to begin and end conciliation, *there is no indication that Congress intended to make the EEOC immune to* ***judicial review***.

Mach Mining decided whether and how courts may review whether the EEOC has satisfied a *statutory obligation*, before a party files suit. The Supreme Court expressly asserted,

"Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a "strong presumption" favoring judicial review of administrative action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986). That presumption is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. See *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 351, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). But the agency bears a "heavy burden" in attempting to show that Congress "prohibit[ed] *all judicial review*" of the agency's *compliance with a legislative mandate*. [Emphasis added] *Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975)" .

Mach Mining, LLC v. EEOC, 135 S. Ct. 1645 - Supreme Court 2015

In Mach Mining the SCOTUS detailed that *failure to exhaust prerequisites prior to filing a suit in a Title VII* litigation is grounds for dismissal. In *Carroll v. Office of Fed. Contract Compl. Program*, 235 F. Supp. 3d 79@83 - Dist. Court, Dist Columbia 2017 the DC circuit asserts Mach Mining and the SCOTUS's holding that that Administrative procedure act allows for judicial review of administrative actions. To determine whether an action is reviewable, a court must "`consider both the nature of the administrative action at issue and the language and structure of the [law] that supplies the applicable legal standards for reviewing that action.'" *Sierra Club*, 648

F.3d at 855 (quoting *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006)).

The Superior Court and the DCCA disregarded the Appellant's assertions and repeatedly failed to consider whether the agency action of the EEOC and the DCOHR, under the circumstances were unlawful and to "set aside agency action, findings, and conclusions" that were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" (5 U.S.C. §706(2)(A)), in excess of statutory authority (*id.* §706(2)(C)), or "without observance of procedures required by law" (*id.*), §706(2)(D). In doing so the Superior Court erred as a matter of law. Further, the Superior Court and the DCCA has repeatedly refused to consider whether the Petition for Review of Agency Decision would be an appropriate remedy in equity, against the EEOC and the DCOHR, in light of the Appellant's assertions. The Superior Court and the DCCA have been steadfast in asserting that the EEOC was not capable of being sued; a fact that is contrary to the Appellant's filed Petition for Review and her expressed request for Declaratory Judgment.

For the Petitioner seeking equitable relief from adverse Federal agency action, Congress has provided the necessary waiver of immunity in *5 U.S. C. § 702.* "Agency action made reviewable by statute and final agency action *for which there is no other adequate remedy in a court* are subject to judicial review.[emphasis added] " *5 U.S. C. § 704.* The DC Circuit affirms this right as pertaining to the actions of federal agencies; "Congress has seen fit to provide broadly for judicial review of those actions, affecting as they do the lives and liberties of the American people. This is fully in keeping with fundamental notions in our policy that the exercise of governmental power, as a general matter, should not go unchecked." *Md. Dep't of Human Res. v.*

Dep't of Health & Human Servs., 763 F.2d 1441, 1445 n. 1 (D.C.Cir.1985); *cf.* *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 318 (D.C.Cir.1988). In *Clarke v.Securities Industry Assn.*, the SCOTUS defined what qualifies as adversely affected or aggrieved, "[T]o be "adversely affected or aggrieved ... within the meaning" of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. See *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 396-397 (1987)." In *Lujan v. National Wildlife Federation*, the SCOTUS outlined the two requirements that a person adversely affected or aggrieved by agency action must be meet to utilize the provisions of *5 U.S.C. § 702*:

"Th[e] provision [of 5 U.S. C. § 702] contains two separate requirements. First, the person claiming a right to [Judicial Review] must identify some "agency action" that affects him in the specified fashion; it is judicial review "thereof" to which he is entitled. The meaning of "agency action" for purposes of § 702 is set forth in 5 U.S. C. § 551(13), see 5 U.S. C. § 701(b)(2) ("For the purpose of this chapter . . . `agency action' ha[s] the meanin[g] given ... by section 551 of this title"), which defines the term as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act,"5 U.S. C. § 551(13).

Second, the party seeking review under § 702 must show that he has "suffer[ed] legal wrong" because of the challenged agency action, or is "adversely affected or aggrieved" by that action "within the meaning of a relevant statute."

Lujan v. National Wildlife Federation, 497 US 871 at 882-884 - Supreme Court 1990.

In implementing an amendment to *5 U.S. C. § 702* , 1976—Pub. L. 94–574, Congress "***removed the defense of sovereign immunity*** as a bar to judicial review of Federal administrative action otherwise subject to judicial review" ***in actions, not seeking monetary damages***, against Federal agencies. As cited above the Superior Court and this Court have adjudicated and/or reviewed actions and/or claims of grievance and/ or injury by a federal agency that is in the zone of interest of a right that the federal agency is supposed to protect. *Md. Dep't of Human Res. v.*

Dep't of Health & Human Servs., 763 F.2d 1441, 1445 n. 1 (D.C.Cir.1985); *cf. Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 318 (D.C.Cir.1988); *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 396-397 (1987).

The Petitioner did not withdraw her Charges from the USEEOC-DC nor has she filed Charges under Title VII in *any Court*. The USEEOC-DC administratively dismissed the Petitioner's Charges. The USEEOC-DC did not provide the Petitioner with the information needed to timely appeal its decision through the USEEOC-DC. The Petitioner sought to avert the dismissal of her Title VII Charges *prior* to their dismissal. The Petitioner sought timely remedies for appealing the dismissal of her Title VII Charges, through DC-USEEOC *after* it dismissed her Title VII Charges. The Petitioner turned to *the Superior Court* for review of DC-USEEOC's dismissal and exhaustion of her administrative remedies because, through DC-USEEOC's work-sharing agreement with DCOHR, *the administrative review outlined in the DCHRA* was the only administrative remedy available to her. "In federal court, state administrative exhaustion requirements are considered `non-jurisdictional.'" *Burton v. Office of Employee Appeals*, 30 A. 3d 789 - DC: Court of Appeals 2011. "Nevertheless, a failure to exhaust state administrative remedies implicates `federalism and comity considerations ... tilting the scales ... in favor of requiring exhaustion.' *Id.* "Where ... a plaintiff neglects to exhaust *fully* his available state administrative remedies, dismissal for failure to sufficiently plead a necessary element of a federal cause of action is appropriate *Id.* . On **September 19, 2016**, in reliance on expressed directives within the DCOHR's Notices of Dismissal, referencing 4 DCMR § 121.3, and in compliance with the Superior Court Rules of Civil Procedure-Agency Review Rule 1 (d) ("SCR-Civil-Agency Review"), the Petitioner filed her Notice of Petition for Review of Agency Decision with the Court with attached copies of Notices of Dismissal and/or Right to Sue Letters

from the DC-USEEOC. *Ashcroft v. Iqbal*, 556 U.S. at 678-79, 129 S.Ct. 1937 (2009). The Petitioner is statutorily required to use the *administrative remedies available* to her to address the USEEOC-DC's adverse actions and injuries.

The Petitioner recognizes that the DCOHR has a statutory right to decide how to utilize its resources. However, the DCOHR's manner of asserting this right triggers resolution of the question, *for whose convenience this administrative dismissal was triggered*? As articulated in the Petitioner's concise statement for her Petition for Review of Agency Decision, the DCOHR offered *several varied and conflicting* reasons for dismissing the Petitioner's Charges, before stating that it was dismissing for administrative convenience. **(R.2867)** In doing so the District of Columbia, through DCOHR, articulated reasons just vague enough to leave the District of Columbia, through DCFEMS, a viable affirmative defense for dismissal, when the Petitioner proceeded to fill her DCHRA Claim, in addition to her federal administrative claims, in the USDC of DC. The District of Columbia, through DCOHR, did not have a legitimate basis in law to demand the dismissal of the Petitioner's USDC of DC Complaint. The *District of Columbia's* dismissal of the Petitioner's Charges "because she filed her USDC of DC Complaint premised on federal and Constitutional rules and/or rights" is *pretext*. "In federal court, state administrative exhaustion requirements are considered `non-jurisdictional.'" *Burton v. Office of Employee Appeals*, 30 A. 3d 789 - DC: Court of Appeals 2011. "Nevertheless, *a failure to exhaust state administrative remedies* implicates `federalism and comity considerations ... tilting the scales ... in favor of *requiring exhaustion*." *Id.* "Where ... a plaintiff neglects to exhaust *fully* his *available state* administrative remedies, *dismissal for failure to sufficiently plead a necessary element of a federal cause of action is appropriate Id.* "The "key element" of a dismissal for administrative convenience is the *agency's* exercise of prosecutorial discretion not to commit resources to a

claim" (**R. 2867**, quoting Carter, 980 A.2d at 1224) The Petitioner expressly seeks judicial review to affirm that the *District of Columbia*, through DCOHR, dismissed her Charges for *DCOHR's* administrative convenience, thereby **exhausting her administrative remedies.** *Benefits Communication Corp. v. Klieforth*, 642 A. 2d 1299 - DC: Court of Appeals 1994; *Estenos v. PAHO/WHO Federal Credit Union*, 952 A. 2d 878 - DC: Court of Appeals 2008; *Carter-Obayuwana v. Howard University*, 764 A. 2d 779 - DC: Court of Appeals 2001

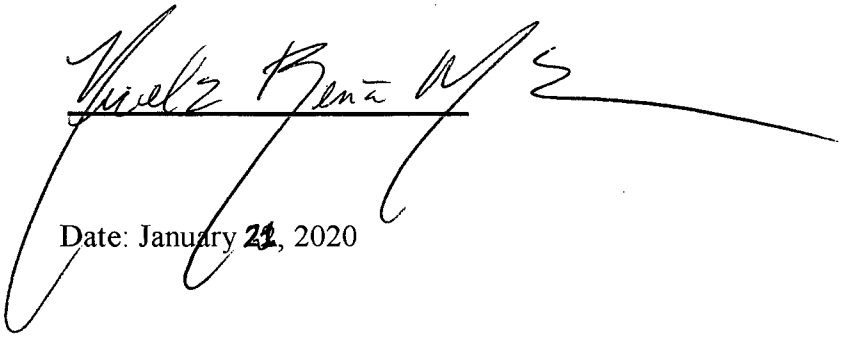
The DCCA's articulation that "*no "substantial controversy"" exists* to warrant a declaratory judgment is at odds with its latter statement that expressly states that the Appellant's statutory requirement for "exhaustion of administrative remedies *appears to be moot"* only to say the issue is properly reserved for the federal district court, further encouraging the Appellees, once in federal district court, to then change tactics and challenge the Appellant's exhaustion as an affirmative defense. All of which is at odds with this Court's precedential assertion that where a statue provides an administrative forum to resolve disputes, the prescribed administrative remedy must be exhausted *before* judicial relief may be sought. *Kovach v. District of Columbia*, 805 A. 2d 957 - DC: Court of Appeals 2002. The DCCA overlooked its own precedent in order to disregard the Appellant's arguments, with supporting authority contesting the actions of both the DCOHR and the USEEOC- DC that have adversely affected or aggrieved her ability to file her administrative claims in federal district court and avert any defense from the Appellees that she has not exhausted her available remedies. *Robinson-Reeder v. Am. Council on Educ.*, 532 F.Supp.2d 6, 12 (D.D.C.2008) (The Title VII statutory scheme requires a plaintiff to exhaust her administrative remedies before filing a civil action in federal court); *Burton v. Office of Employee Appeals*, 30 A. 3d 789 - DC: Court of Appeals 2011 ("Where ... a plaintiff neglects to

exhaust *fully* his *available state* administrative remedies, *dismissal for failure to sufficiently plead a necessary element of a federal cause of action is appropriate*"[Emphasis added]).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: January 21, 2020