No. 18-____

IN THE
Supreme Court of the United States

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, requires plaintiffs to exhaust claims of employment discrimination with the EEOC before filing suit in federal court. *Id.* § 2000e-5(b), (f)(1). The question presented is:

Whether Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit, as three Circuits have held, or a waivable claim-processing rule, as eight Circuits have held.

PARTIES TO THE PROCEEDING

Fort Bend County, petitioner on review, was the defendant-appellee below.

Lois M. Davis, respondent on review, was the plaintiff-appellant below.

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Fort Bend County respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-15a) is reported at 893 F.3d 300. The District Court's opinion (Pet. App. 16a-38a) is not reported, and is available at 2016 WL 4479527. The Fifth's Circuit's order denying panel rehearing and rehearing en banc (Pet. App. 39a-40a) is not reported.

JURISDICTION

The Fifth Circuit entered judgment on June 20, 2018. Petitioner filed a timely petition for rehearing en banc, which was denied on July 20, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at Pet. App. 41a-52a.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 requires individuals complaining of employment discrimination to file a charge with the Equal Employment Opportunity Commission (EEOC) before proceeding to federal court. 42 U.S.C. § 2000e-5(b), (f). This exhaustion requirement ensures that the EEOC has an opportunity to investigate and resolve credible claims of discrimination before those claims give rise to litigation. And it guarantees employers fair notice of the charges against them, and a chance to remediate the discriminatory practices being complained of.

Nonetheless, the Circuits are intractably divided, 8-3, over whether courts may exercise jurisdiction over Title VII claims that plaintiffs *never* raised with the EEOC. Three Circuits—the Fourth, the Ninth, and the Eleventh—hold that Title VII's exhaustion requirement is jurisdictional, and that courts accordingly lack subject matter jurisdiction over claims that were never presented to the EEOC. Eight Circuits, however, disagree. They characterize the exhaustion requirement as a claim-processing rule that is subject to waiver, forfeiture, and other equitable defenses. Indeed, the Executive Branch *itself* is

internally divided on the question, with the Department of Justice describing Title VII's exhaustion requirement as jurisdictional, and the EEOC siding with those courts that take the opposite view.

This Court's intervention is badly needed. The Circuits' disagreement will not resolve itself; on the contrary, the circuit split has dramatically hardened in recent years, with two Circuits (the Fifth and the Tenth) taking a side in the last four months alone. Furthermore, the question presented is of "considerable practical importance," given the significant consequences that deeming a requirement jurisdictional has for litigants and courts alike. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). And the view adopted by the majority of lower courts is incorrect: Title VII expressly refers to the exhaustion requirement in jurisdictional terms, and requires exhaustion to advance system-wide goals, not to protect case-specific interests that litigants should be free to waive.

This case is an ideal vehicle to resolve the split. Lois Davis sued Fort Bend County for religious discrimination despite the fact that Davis plainly never raised a charge of religious discrimination before the EEOC. The district court properly dismissed Davis's suit for lack of subject matter jurisdiction. But the Fifth Circuit reversed, holding that administrative exhaustion is not a jurisdictional prerequisite to suit, and that the County forfeited a failure-to-exhaust defense by raising it too late.

Three Circuits would have reached a different conclusion on these facts. And those courts have the better view of the law. The writ of certiorari should

be granted and the decision below should be reversed.

STATEMENT

1. Fort Bend County hired Lois Davis as an information technology supervisor in 2007. Pet. App. 17a n.2. In 2010, Davis informed the County's human resources department that the County's director of information technology had been sexually harassing her. *Id.* The County immediately placed Davis on leave, and conducted an investigation that led to the IT director's resignation three weeks later. *Id.*

In March 2011, Davis filed a charge of discrimination with the Texas Workforce Commission and the EEOC. *Id.* at 19a; *see* D. Ct. Dkt. 49-2, at 1, 27. Davis alleged both that she had been the subject of sexual harassment and that, after she complained to the human resources department, her supervisor had retaliated against her. D. Ct. Dkt. 49-2, at 9. In the "Discrimination Statement" section of her charge, Davis stated that "I believe I have been discriminated against *** because of my gender/sex, female, and in retaliation for my complaint of harassment." *Id.* Davis also checked boxes indicating that she was complaining of discrimination based on "Sex" and "Retaliation." *Id.* Davis did not claim any discrimination based on religion.

While Davis's EEOC charge was pending, the County completed preparations to relocate its offices to a new facility. Pet. App. 18a n.2. The final relocation was scheduled for the weekend of July 4, 2011, and the County told all technical support employees, including Davis, that they needed to be present to set up the County's computer system. *Id.* Davis refused to attend, citing a "previous religious commitment."

Id. After repeated warnings that failure to attend would result in disciplinary action, Davis did not appear for the scheduled move, and the County terminated her employment. *Id.*

Following her termination, Davis modified an "intake questionnaire" she had submitted to the Texas Workforce Commission alongside her charge of discrimination by handwriting the word "religion" next to a checklist labeled "Employment Harms or Actions." *Id.* at 19a-20a; *see* D. Ct. Dkt. 49-2, at 2, 17. Davis did not explain the meaning of this one-word notation or describe the events surrounding her termination. Pet. App. 32a-33a. She also did not amend her charge of discrimination.

In November 2011, the Texas Workforce Commission informed Davis that it had made a preliminary decision to dismiss her charge. *Id.* at 21a. The Commission explained that "it cannot be established that the employer has discriminated against you based on Sex, Retaliation, or any other reason prohibited by the laws we enforce." *Id.* The Workforce Commission and the U.S. Department of Justice subsequently sent Davis letters informing her that she had a right to sue under Title VII. *Id.*

2. In January 2012, Davis sued the County in the Southern District of Texas. As in her EEOC charge, Davis claimed that County employees violated Title VII by allegedly retaliating against her for complaining of sexual harassment. D. Ct. Dkt. 1, at 7-8. For the first time, Davis also claimed that the County engaged in religious discrimination by requiring

Davis to appear for work on Sunday, July 3, to assist in the relocation efforts. *Id.* at 6-7.[1]

Following discovery, the County moved for summary judgment on all counts. The District Court granted the motion, finding that each of Davis's claims failed on the merits. *Davis* v. *Fort Bend Cty.*, 2013 WL 5157191, at *7 (S.D. Tex. Sept. 11, 2013). The Fifth Circuit reversed in part. *Davis* v. *Fort Bend Cty.*, 765 F.3d 480, 491 (5th Cir. 2014). It found a "genuine dispute of material fact" as to whether the County had a sufficiently compelling reason for requiring Davis to work on Sunday. *Id.* at 489. Accordingly, it remanded the case for further consideration of her religious discrimination claim. *Id.* at 491. This Court denied certiorari. *Fort Bend Cty.* v. *Davis*, 135 S. Ct. 2804 (2015) (mem.).

3. On remand, Davis amended her complaint to substantially expand her claim of religious discrimination. D. Ct. Dkt. 39. The County moved to dismiss the claim, arguing that the district court lacked subject matter jurisdiction to consider this claim because Davis did not raise it in her EEOC charge. Pet. App. 21a-22a.

The District Court granted the motion to dismiss. *Id.* at 16a. It explained that "there is disagreement in this circuit" as to whether Title VII's administrative exhaustion requirement "is merely a prerequisite to suit, and thus subject to waiver and estoppel,

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[1] Davis also raised a claim of intentional infliction of emotional distress. The district court granted summary judgment against this claim, and Davis did not challenge that ruling on appeal. Pet. App. 2a-3a & n.1.

or whether it is a requirement that implicates subject matter jurisdiction." *Id.* at 24a (internal quotation marks omitted). The District Court found "more persuasive" the reasoning of those courts that deemed exhaustion "a jurisdictional bar to suit." *Id.* at 25a-26a. Accordingly, it explained, it was "irrelevant" that the County had not raised the question of exhaustion sooner, because "challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment." *Id.* at 27a n.7 (alterations and citation omitted).

The District Court further held that Davis failed to administratively exhaust her religious discrimination claim. *Id.* at 37a. Davis "d[id] not mention religious discrimination" in her charge of discrimination. *Id.* at 29a. And she did not sufficiently raise the charge by belatedly writing the single word "religion" on her intake questionnaire. Among other problems, an "intake questionnaire does not constitute a charge"; there is "no evidence that Defendant was aware of [the] amendment"; Davis "did not include any additional information" or "expla[nation]" alongside that solitary word; and—in light of the inadequacy of this amendment—the EEOC was not aware of and did not investigate any potential religious discrimination. *Id.* at 29a-34a. The District Court rejected Davis's argument that exhaustion "would have been futile," explaining that because "the exhaustion requirement is jurisdictional," it "cannot be excused by futility." *Id.* at 36a-37a.

4. A divided panel of the Fifth Circuit reversed. *Id.* at 1a.[2] Like the District Court, the panel majority observed that "[i]n our circuit, there is disagreement on whether Title VII's administrative exhaustion requirement is a jurisdictional requirement that implicates subject matter jurisdiction or merely a prerequisite to suit (and thus subject to waiver or estoppel)." *Id.* at 5a. Indeed, the panel observed that three different lines of Fifth Circuit cases pointed in three different directions. One line of cases "characterize[d] Title VII's administrative exhaustion requirement as jurisdictional." *Id.* at 6a. Another line of cases "treated Title VII's exhaustion requirement as merely a prerequisite to suit." *Id.* And yet "a *third* line of cases * * * acknowledge[d] an intra-circuit split but d[id] 'not take sides in this dispute.'" *Id.* at 7a. This division, unsurprisingly, "ha[d] caused confusion for district courts." *Id.*

The panel resolved the intra-circuit dispute by siding with those panels that concluded that "Title VII's administrative exhaustion requirement is not a jurisdictional bar to suit." *Id.* at 12a. The panel explained that this was the position taken by the earliest-in-time Fifth Circuit decision, which took precedence under the Circuit's "rule of orderliness." *Id.* at 8a-9a. Moreover, the panel reasoned, a contrary rule would be "out-of-step with the Supreme Court's approach in" *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), given that the panel thought that "Title VII's administrative exhaustion requirement is not expressed in jurisdictional terms." Pet. App. 11a.

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[2] Judge Jones concurred in the result only.

The panel also noted that this conclusion was "consistent with" the holdings of a majority, but not all, of its sister circuits. *Id.* at 12a.

Consequently, the panel held that ""[f]ailure to exhaust is an affirmative defense that should be pleaded." *Id.* at 14a. Because the County did not raise its exhaustion defense until the case was remanded to the District Court, the panel found it "abundantly clear" that the County "forfeited its opportunity to assert this claim." *Id.* at 15a.

The Fifth Circuit denied panel rehearing and rehearing en banc. *Id.* at 39a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The Fifth Circuit's decision cements an intractable circuit split on a question of great importance: whether Title VII's requirement that plaintiffs exhaust claims before the EEOC is a jurisdictional prerequisite to suit. Now that the Fifth Circuit has taken a side on the issue, the split stands at 8-3: Three Circuits hold that Title VII's administrative exhaustion requirement is jurisdictional; eight Circuits hold that it is not; and only one Circuit, the Eighth, remains undecided. What is more, the Executive Branch *itself* is internally divided on this issue, with the Department of Justice and the EEOC taking diametrically opposing positions.

Numerous courts, including the panel below, have acknowledged this split of authority. *See, e.g.*, Pet. App. 12a; *Wilson* v. *MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007). And in recent years, it has only gotten worse, to the point that nearly every Court of Ap-

peals with jurisdiction over Title VII claims has now picked a side. It is time for the Court to grant certiorari and resolve this disagreement once and for all.

1. As the split now stands, three Circuits—the Fourth, Ninth, and Eleventh Circuits—hold that Title VII's administrative exhaustion requirement is jurisdictional.

a. The Fourth Circuit first adopted this position more than two decades ago. In *Davis* v. *North Carolina Department of Correction*, 48 F.3d 134 (4th Cir. 1995), the plaintiff attempted to raise a Title VII claim even though he "never had a charge properly pending before the EEOC." *Id.* at 140. The Fourth Circuit explained that "[b]efore a federal court may assume jurisdiction over a claim under Title VII, * * * a claimant must exhaust the administrative procedures enumerated in 42 U.S.C. § 2000e-5(b)." *Id.* at 137. Furthermore, it continued, because exhaustion "is a jurisdictional prerequisite," it "must be alleged in a plaintiff's complaint," not merely raised as an affirmative defense. *Id.* at 140. That meant that, "the federal district court had no jurisdiction over [the plaintiff's] claim," and it should properly have been dismissed for lack of jurisdiction. *Id.*

The Fourth Circuit has repeatedly reaffirmed this position in the decades since. *See, e.g.*, *Hentosh* v. *Old Dominion Univ.*, 767 F.3d 413, 416 (4th Cir. 2014) ("[A] failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim." (quoting *Jones* v. *Calvert Group, Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009)). Furthermore, the Fourth Circuit has repeatedly applied this position to dismiss Title VII claims for lack of juris-

diction because they were not properly raised in an EEOC charge—even if the plaintiff filed an EEOC charge raising *other* claims of discrimination. *See, e.g.*, *Tonkin* v. *Shadow Mgmt., Inc.*, 605 F. App'x 194, 194-195 (4th Cir. 2015) (per curiam) (dismissing unexhausted retaliation claim even though the plaintiff filed an EEOC charge alleging pregnancy discrimination); *see also Ruffin* v. *Lockheed Martin Corp.*, 659 F. App'x 744, 746-747 (4th Cir. 2016) (per curiam); *Whitaker* v. *Nash Cty.*, 504 F. App'x 237, 240 (4th Cir. 2013) (per curiam).

b. The Ninth Circuit shares the same position. For many years Ninth Circuit panels were divided on this question: Some panels held that exhaustion before the EEOC was a jurisdictional requirement, *e.g. EEOC* v. *Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994), while others deemed it merely a waivable prerequisite to suit, *e.g. Stache* v. *Int'l Union of Bricklayers & Allied Craftsmen*, 852 F.2d 1231, 1233 (9th Cir. 1988).

In *Sommatino* v. *United States*, 255 F.3d 704 (9th Cir. 2001), the Ninth Circuit reconciled these lines of precedent and sided with the Fourth Circuit. It explained that, under its precedents, certain "administrative exhaustion requirements," such as the requirement to "file a *timely* EEOC administrative complaint," are "not jurisdictional," but rather "conditions precedent to filing an action which a defendant may waive or be estopped from asserting." *Id.* at 708 (emphasis added). "However," the court continued, "our case law also holds that substantial compliance with the presentment of discrimination complaints to an appropriate administrative agency *is* a jurisdictional prerequisite." *Id.* (emphasis in

original). Consequently, it held, "[t]he jurisdictional scope of a Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation," and "where a plaintiff has never presented a discrimination complaint to the [EEOC], * * * the district court does not have subject matter jurisdiction." *Id.*

The Ninth Circuit has consistently followed this rule since. Ninth Circuit panels have repeatedly held that they lack jurisdiction over Title VII claims that the plaintiff did not raise in an EEOC charge. *See, e.g.*, *Salas* v. *Indep. Elec. Contractors Inc.*, 603 F. App'x 607, 608 (9th Cir. 2015); *Robinson* v. *Geithner*, 359 F. App'x 726, 728 (9th Cir. 2009). And, consistent with the Ninth Circuit's characterization of this requirement as "jurisdictional," they have refused to excuse a plaintiff's failure to exhaust on the grounds of waiver, forfeiture, or other equitable defenses. *See, e.g.*, *Ziya* v. *Glob. Linguistic Sol.*, 645 F. App'x 573, 574 (9th Cir. 2016) (explaining that "[e]quitable remedies are unavailable in federal court when the record shows that no administrative filing was ever made" (quoting *Sommatino*, 255 F.3d at 710)).[3]

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[3] The panel below suggested that *Kraus* v. *Presidio Trust Facilities Division/Residential Management Branch*, 572 F.3d 1039 (9th Cir. 2009) held that Title VII exhaustion is non-jurisdictional. *See* Pet. App. 12a. The panel was mistaken. *Kraus* did not involve Title VII's exhaustion requirement at all; instead, it considered whether a *regulation* requiring that a plaintiff "initiate contact with an EEO Counselor within 45 days" of each alleged discriminatory act was jurisdictional. 572 F.3d at 1043. The Ninth Circuit held that this requirement was non-jurisdictional in large part because, as a regulation, it

c. The Eleventh Circuit has also "treated the administrative exhaustion requirement as a 'jurisdictional prerequisite to filing a Title VII action.'" *Peppers* v. *Cobb Cty.*, 835 F.3d 1289, 1296-97 (11th Cir. 2016) (quoting *Crawford* v. *Babbitt*, 186 F.3d 1322, 1326 (11th Cir. 1999)). Like the Ninth Circuit, the Eleventh Circuit for many years had lines of competing precedent on this question, with some panels describing the exhaustion requirement as jurisdictional, *Manning* v. *Carlin*, 786 F.2d 1108, 1109 (11th Cir. 1986), and others broadly characterizing "conditions precedent to filing a Title VII suit" as non-jurisdictional, *Jackson* v. *Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1003 (11th Cir. 1982). In its 1999 *Crawford* decision, however, the Eleventh Circuit clarified that a plaintiff "must pursue and exhaust her administrative remedies as *a jurisdictional prerequisite* to filing a Title VII action," and affirmed the jurisdictional dismissal of an unexhausted Title VII claim on that basis. 186 F.3d at 1326 (emphasis added).

Since then, Eleventh Circuit panels have uniformly "applied the exhaustion requirement to affirm dismissals for lack of subject matter jurisdiction." *Brown* v. *Snow*, 440 F.3d 1259, 1263 (11th Cir. 2006); *see Thomas* v. *Nicholson*, 263 F. App'x 814, 815 n.1 (11th Cir. 2008) (per curiam) ("It is well-settled that, as a jurisdictional prerequisite, a federal employee must timely exhaust administrative remedies prior to filing an employment discrimination suit under

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"d[id] not carry the full weight of statutory authority." *Id.* That holding had no bearing on the nature of Title VII's *statutory* exhaustion requirement.

Title VII."). Indeed, in 2006, the Eleventh Circuit expressly noted its disagreement with the Second Circuit on this question, explaining that whereas "[t]he Second Circuit [has] reasoned that administrative exhaustion is not jurisdictional, * * * our precedents say otherwise." *Brown*, 440 F.3d at 1264 (citing *Boos* v. *Runyon*, 201 F.3d 178, 181-182 (2d Cir. 2000)).

2. In contrast with the views of the Fourth, Ninth, and Eleventh Circuits, eight Circuits hold that administrative exhaustion is not a jurisdictional prerequisite to suit under Title VII.

The D.C. Circuit has held that a district court may permissibly consider the claim of a Title VII plaintiff who "ha[s] not filed a charge with the [EEOC]." *De Medina* v. *Reinhardt*, 686 F.2d 997, 1012 (D.C. Cir. 1982); *see also Artis* v. *Bernanke*, 630 F.3d 1031, 1034 n.4 (D.C. Cir. 2011) (stating that "Title VII's exhaustion requirements are not jurisdictional," and skipping over exhaustion issue to address the merits). The First and Second Circuits have similarly held that exhaustion "is nonjurisdictional, [and] thus subject to waiver, estoppel, and equitable tolling." *McKinnon* v. *Kwong Wah Rest.*, 83 F.3d 498, 505 (1st Cir. 1996); *Frederique-Alexandre* v. *Dep't of Nat. & Envtl. Res. of Puerto Rico*, 478 F.3d 433, 440 (1st Cir. 2007) ("[T]he exhaustion requirement is not a jurisdictional prerequisite, but rather is subject to waiver, estoppel, and equitable tolling."); *Fowlkes* v. *Ironworkers Local 40*, 790 F.3d 378, 385 (2d Cir. 2015) ("[T]he failure of a Title VII plaintiff to exhaust administrative remedies raises no jurisdictional bar to the claim proceeding in federal court.")

The same is true of the Third, Sixth, Seventh, and Tenth Circuits. Each of those courts has held that the exhaustion requirement may not be "characteriz[ed] . . . as jurisdictional." *Wilson*, 475 F.3d at 175; *Hill* v. *Nicholson*, 383 F. App'x 503, 508 (6th Cir. 2010) ("exhaustion is not a jurisdictional prerequisite"); *Gibson* v. *West*, 201 F.3d 990, 994 (7th Cir. 2000) ("as a general matter, the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement"); *Lincoln* v. *BNSF Ry. Co.*, 900 F.3d 1166, 1185 (10th Cir. 2018) ("a plaintiff's failure to file an EEOC charge * * * does not bar a federal court from assuming jurisdiction over a claim").

In the decision below, the Fifth Circuit joined this side of the split, holding that "a Title VII plaintiff's failure to exhaust her administrative remedies is not a jurisdictional bar but rather a prudential prerequisite to suit." Pet. App. 7a, 9a. It then rejected the County's exhaustion defense solely on the ground that the County "forfeited its opportunity to assert this claim." *Id.* at 15a.

Now, only a single Circuit with jurisdiction over Title VII claims—the Eighth—has yet to pick a side on the question presented. And the Eight Circuit exhibits profound internal division on this question. One line of Eighth Circuit cases claims that it is "*well-settled* that exhaustion of administrative remedies is a jurisdictional prerequisite to a private civil action under Title VII." *Mohr* v. *Dustrol, Inc.*, 306 F.3d 636, 643 (8th Cir. 2002) (emphasis added), *abrogated on other grounds by Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003); *see Edwards* v. *Dep't of*

Army, 708 F.2d 1344, 1346 (8th Cir. 1983) (per curiam) ("It is well settled that administrative remedies must be fully exhausted before jurisdiction [over Title VII claims] vests in the federal courts."). Another, equally categorical line of precedents asserts that a plaintiff's "fail[ure] to exhaust her administrative remedies * * * does not impact our jurisdiction." *Rester* v. *Stephens Media, LLC*, 739 F.3d 1127, 1130 n.2 (8th Cir. 2014). Unsurprisingly, that has left district courts in the Eighth Circuit in a state of deep disarray, with plaintiffs facing different rules depending on which district judge they draw.[4] The only certainty is that, whichever way the Eighth Circuit ultimately holds, it will not eliminate the longstanding and deep division between the Circuits.

Nor is there any prospect that this circuit split will resolve itself. Indeed, in the wake of this Court's 2006 decision in *Arbaugh*, the most recent Supreme Court precedent regarding the EEOC's prerequisites to suit, the circuit split has merely hardened. For example, the Fourth Circuit expressly refused to alter its holding that the exhaustion requirement is jurisdictional, explaining that *Arbaugh* "d[id] not address exhaustion" at all. *Tonkin*, 605 F. App'x at 195. And the Ninth and Eleventh Circuits have

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[4] *Compare Wilkie* v. *Dep't of Health & Human Servs.*, 2010 WL 1257927, at *8 (D.N.D. Mar. 26, 2010) (dismissing claim for "lack[] [of] subject matter jurisdiction" because the plaintiff "failed to exhaust her available administrative remedies"), *aff'd*, 638 F.3d 944 (8th Cir. 2011), *with Stadther* v. *Dep't of Homeland Sec.*, 2012 WL 4372570, at *7 (D. Minn. Aug. 7, 2012) ("Exhaustion of administrative remedies is not a jurisdictional requirement for a Title VII claim."), *report and recommendation adopted*, 2012 WL 4372567 (D. Minn. Sept. 25, 2012).

similarly reaffirmed their allegiance to this side of the split. *See, eg.*, *Salas*, 603 F. App'x at 608 (2015 decision reiterating Ninth Circuit's conclusion that exhaustion is jurisdictional); *Thomas*, 263 F. App'x at 815 n.1 (2008 decision noting that it is "well-settled" that exhaustion is a jurisdictional requirement in the Eleventh Circuit). By contrast, courts on the other side have viewed *Arbaugh* as support for the proposition that exhaustion may be waived, providing further evidence that the split is likely to endure without this Court's intervention. *See, e.g.*, Pet. App. 11a (asserting that *Arbaugh* suggests that exhaustion is non-jurisdictional); *Hill*, 383 F. App'x at 508 (relying on *Arbaugh* for the proposition that "exhaustion is not a jurisdictional prerequisite").

Moreover, the courts of appeals have struggled to achieve consensus on this issue even within a single circuit. As noted, both the Ninth and Eleventh Circuits reached the conclusion that exhaustion is jurisdictional in cases that resolved prior competing panel decisions on the issue. *See supra* pp. 11-13. Courts on the other side of the split have faced similar predicaments. In the decision below, the Fifth Circuit was forced to decide between *three* competing strands of Fifth Circuit precedent. Pet. App. 6a-7a. And the Second, Sixth, and Seventh Circuits were similarly forced to confront contrasting lines of precedent before holding that the exhaustion requirement may be waived. *See Fowlkes*, 790 F.3d at 385 (resolving the disagreement between competing Second Circuit precedents); *Hill*, 383 F. App'x at 508 (describing disparate Sixth Circuit decisions); *Gibson,* 201 F.3d at 994 (*"*clear[ing] up the confusion" for the Seventh Circuit). Meanwhile, the Eighth Circuit's internal disagreement is still unresolved.

See supra pp. 15-16. This quantity of intracircuit division indicates a level of confusion on the question that will abate only through this Court's intervention.

3. On top of the Circuits' disagreement, the Executive Branch itself is intractably divided on the question presented. Two federal agencies have responsibility for litigating Title VII claims—the Department of Justice and the EEOC, *see* 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6—and they have taken diametrically opposite positions on the issue at hand.

The Department of Justice, for its part, sides with the three Circuits that hold that administrative exhaustion is a jurisdictional prerequisite to a Title VII suit. In 1999, the Solicitor General flatly told this Court that "[i]f a federal employee fails to exhaust the administrative process, the district court *has no jurisdiction* over the employee's Title VII claims." Br. in Opposition 8-9, *Barnes* v. *Levitt*, No. 97-1354 (U.S. Apr. 20, 1998), 1998 WL 34111957, at *8-9 (emphasis added). The Department of Justice has taken the same position in Court of Appeals briefs filed on both sides of the circuit split, arguing that "[w]hile the *timeliness* of exhaustion is not jurisdictional, a failure to file an administrative charge at all is a jurisdictional bar to filing suit under Title VII." Br. for Appellees U.S. Marshals Serv. et al. 45, *Barkley* v. *U.S. Marshals Serv.*, No. 12-5306 (D.C. Cir. Jan. 10, 2014), 2014 WL 97352, at *45 (emphasis in original).[5]

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[5] *See also* Br. for Federal Appellees 31, *Wilson*, 475 F.3d 166 (No. 05-3204), 2006 WL 5155872, at *31; Br. for Appellees 19 & n.11, *Ferren* v. *Norton*, No. 03-35811 (9th Cir. Dec. 29, 2003),

The EEOC takes the contrary view. For over a decade, it has argued that courts on the short side of the split are "incorrect that exhaustion of administrative remedies is a jurisdictional prerequisite to suit under Title VII." Br. of EEOC as *Amicus Curiae* 8 n.2, *Jones* v. *Needham*, No. 16-6156 (10th Cir. Oct. 4, 2016), 2016 WL 5869486, at *8 n.2.[6] Furthermore, last year, the EEOC successfully persuaded the Tenth Circuit to overturn its contrary precedents, and hold that "exhaustion of administrative remedies is not a jurisdictional prerequisite to suit" under Title VII or the Americans with Disabilities Act. Br. of EEOC as *Amicus Curiae* 8-13, *Lincoln*, 900 F.3d 1166 (No. 17-3120), 2017 WL 4349417, at *8-13; *see Lincoln*, 900 F.3d at 1184-85.

* * *

In short, the Circuits and the Executive Branch are deeply divided on the question presented. That means that a plaintiff's ability to skip the EEOC process and go straight to court varies depending on which jurisdiction she files her claim in. And the likelihood that the Federal Government will weigh in on her side depends on which agency happens to have jurisdiction over her particular grievance. This

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2003 WL 25656148, at *19 & n.11; Br. for Appellee 11 & n.6, *Wells* v. *Peters*, No. 99-11079 (11th Cir. Oct. 19, 1999), 1999 WL 33645665, at *11 & n.6.

[6] *See also* Br. for EEOC as *Amicus Curiae* 15 n.6, *Shikles* v. *Sprint/United Mgmt. Co.*, No. 03-3326 (10th Cir. Mar. 12, 2004), 2004 WL 3770077, at *15 n.6; Br. of EEOC as *Amicus Curiae* 7 n.3, *Holland* v. *Project Return Found.*, No. 99-7084 (2d Cir. Mar. 25, 1999), 1999 WL 33630777, at *7 n.3.

untenable situation requires this Court's intervention.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG.

The Court should also grant certiorari because the position taken by the Fifth Circuit panel and the majority of Circuits is wrong. Under this Court's precedents, the requirement to raise a claim before the EEOC is properly deemed jurisdictional—indeed, this Court's precedents have repeatedly characterized it as such.

The plain text of Title VII makes federal jurisdiction contingent on the existence of an EEOC charge. It provides that, once the EEOC and the Attorney General decline to act on a charge of discrimination, "a civil action may be brought *against the respondent named in the charge * * * by the person claiming to be aggrieved*." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). This text refers to the exhaustion requirement in "jurisdictional language," *Patchak* v. *Zinke*, 138 S. Ct. 897, 905 (2018): It limits the circumstances in which an "action" may be "brought." That language is "similar to other statutes that this Court has deemed jurisdictional." *Id.* (finding that a statute "uses jurisdictional language" because it limits the circumstances in which "an 'action' " may be " 'filed or maintained,' " and giving similar examples). A similar result is warranted here.

In fact, this Court has "long interpreted" Title VII's exhaustion requirement just that way. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134 (2008). In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the Court stated that exhaustion is one of the "jurisdictional prerequisites to a

federal action" under Title VII. *Id.* at 798. Likewise, in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court stated that Title VII "specifies with precision the *jurisdictional prerequisites* that an individual must satisfy before he is entitled to institute a lawsuit," and that these include "receiv[ing] and act[ing] upon the Commission's statutory notice of the right to sue." *Id.* at 47 (emphasis added). These rulings, issued close in time to the enactment of Title VII, are entitled to considerable weight in understanding its meaning. And they gain added weight from the fact that they have been "left undisturbed by Congress" despite Congress's repeated amendments to the very statutory provision at issue. *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1642 (2015); *see* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 107, 112-113, 105 Stat. 1071, 1075, 1078-79.

This conclusion is reinforced by other indicia that the exhaustion requirement is jurisdictional. Administrative exhaustion before the EEOC is not designed to "protect a defendant's case-specific interest[s]," but rather "to achieve a broader system-related goal," *John R. Sand & Gravel Co.*, 552 U.S. at 133—namely, ensuring that the EEOC and the Department of Justice have an opportunity to investigate and resolve claims on their own, before the parties litigate the dispute in federal court. It would thus make little sense to permit parties to agree to waive this requirement, and unilaterally cut the relevant federal agencies out of the process. Furthermore, the statute's exhaustion requirement contains no exceptions. That is generally a sign that Congress considers a requirement jurisdictional, *see Reed Elsevier* v.

Muchnick, 559 U.S. 154, 166 (2010), and is particularly notable here given this Court's longstanding rule that it "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001); *see also McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992).

Nor do *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and *Arbaugh* warrant a contrary conclusion. *Zipes* held that "the statutory *time limit* for filing charges under Title VII" is not jurisdictional. 455 U.S. at 387 (emphasis added). That, however, was because the statute's jurisdiction-conferring provision "contains no reference to the timely-filing requirement" and the statute's legislative history describes it as an ordinary statute of limitations. *Id.* at 393-395. The same is not true of the exhaustion requirement, which is expressly incorporated into the statute's "jurisdictional language," has for decades been understood by this Court to be jurisdictional, and—unlike a statute of limitations—is not a "quintessential claim-processing rule[]." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013).

Arbaugh is even further afield. That case involved the question whether Title VII's definition of "employer" is jurisdictional. 546 U.S. at 503. By its terms, that requirement plainly describes an "element of a [federal] claim for relief." *Id.* at 516. And it contains no language or contextual evidence whatever suggesting that it is jurisdictional in nature.

III. THE QUESTION PRESENTED IS IMPORTANT.

This question is profoundly important. The Court has repeatedly noted the "considerable practical

importance" of whether a procedural rule ranks as "jurisdictional," given that jurisdictional requirements cannot be forfeited by litigants or overlooked by courts. *Henderson*, 562 U.S. at 434. Accordingly, the Court has repeatedly granted certiorari in recent years to resolve splits of authority regarding the jurisdictional status of procedural requirements. *See id.* (listing examples); *see also Kwai Fun Wong*, 135 S. Ct. at 1630; *Sebelius*, 568 U.S. at 152-153; *Gonzalez* v. *Thaler*, 565 U.S. 134, 139-140 (2012); *Union Pac. R.R. Co.* v. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 71, 75 (2009); *Arbaugh*, 546 U.S. at 509; *Scarborough* v. *Principi*, 541 U.S. 401, 412 (2004); *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004).

This case, moreover, involves an uncommonly important statutory requirement. Roughly 60,000 charges are filed with the EEOC each year that raise claims under Title VII. EEOC, *Title VII of the Civil Rights Act of 1964 Charges*, https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Oct. 18, 2018). If the exhaustion requirement were non-jurisdictional, many of those plaintiffs could bring their claims directly to court, flooding the federal courts with additional employment litigation. And as the enormous number of circuit cases addressing this question makes clear, the question of whether exhaustion is jurisdictional has substantial practical effects for litigants already. *See supra* pp. 10-18.

Further, this case presents an ideal vehicle to resolve this issue. There is no serious question that Davis failed to present her religious-discrimination claim to the EEOC. Her only arguable reference to

that claim before the EEOC was the handwritten word "religion" on her intake questionnaire, added without explanation months after Davis's charge was filed. Pet. App. 19a. As the District Court found, that inscrutable amendment to the wrong document could not possibly place the EEOC on notice of the religious discrimination claim that Davis ultimately chose to bring. *Id.* at 29a-34a.

Consequently, the question presented is dispositive. If exhaustion goes to the court's subject-matter jurisdiction, Davis's suit must be dismissed. But if it does not, the County has forfeited any exhaustion defense by failing to raise it until Davis's case was remanded to the District Court. This case thus presents a clean opportunity for the Court at least to resolve an issue the Circuits have struggled with for decades.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2018