No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

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

BRIEF FOR RESPONDENT

Brian H. Fletcher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Wright
R. Russell Hollenbeck
Raffi Melkonian
Counsel of Record
WRIGHT CLOSE &
BARGER, LLP
One Riverway, Suite 2200
Houston, TX 77056
(713) 572-4321
melkonian@
wrightclosebarger.com

QUESTION PRESENTED

Whether Title VII's administrative exhaustion requirement is subject to waiver and forfeiture.

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BRIEF FOR RESPONDENT

Respondent Lois Davis respectfully requests that this Court affirm the judgment of the court of appeals.

INTRODUCTION

Everyone agrees that Title VII requires employees like Ms. Davis to submit a charge to the Equal Employment Opportunity Commission (EEOC) before filing suit in court. Everyone also agrees that this exhaustion requirement is an important part of Title VII's remedial scheme. And everyone agrees that a court must enforce the requirement when a defendant timely raises it. The only question in this case is what happens when a defendant like petitioner fails to raise the issue of exhaustion until years into the litigation.

This Court's approach to questions of that sort is now well-settled. The Court has emphasized that a statutory requirement is subject to ordinary principles of waiver and forfeiture unless it limits the subject-matter jurisdiction of the courts. The Court has repeatedly instructed that a requirement may be deemed jurisdictional only if Congress "clearly states" that it is. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). And time and again, the Court has held that statutory requirements are subject to waiver and forfeiture where, as here, they "do[] not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515 (citation omitted).

Seeking to escape that straightforward conclusion, petitioner offers up a theory that it neither raised below nor previewed in its petition for certiorari. Petitioner now asserts that there is a special exception to the clear-statement rule for exhaustion requirements. Petitioner insists that those requirements are

jurisdictional whenever it is "fairly discernible" that Congress intended them to be—and that the requisite intent is "fairly discernible" from virtually any "statutory scheme of administrative and judicial review" that requires parties to present their claims to an expert agency before going to court. Petr. Br. 20 (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 8-10 (2012)).

Petitioner does not cite—and we have not found—any decision endorsing (or even entertaining) that new theory. That is no surprise, because the decisions on which petitioner relies have nothing to do with the question presented here. The "fairly discernible" standard set forth in *Elgin* determines whether a statutory scheme granting courts of appeals exclusive jurisdiction to review the decisions of an administrative agency strips district courts of jurisdiction over related claims by displacing "the general grant of federal-question jurisdiction in 28 U.S.C. § 1331." 567 U.S. at 9. It decides *which court* has jurisdiction, not *which requirements* are jurisdictional.

The latter question is the only one at issue here. And as to that question, this Court has explained that "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit" are governed by the established clear-statement rule and are ordinarily "nonjurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). Title VII's exhaustion requirement is no exception.

STATEMENT OF THE CASE

A. Legal background

Title VII prohibits employers from discriminating based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). It also prohibits retaliation

against employees who assert their rights under the statute. *Id.* § 2000e-3(a). To enforce those prohibitions, Congress gave employees the right to bring suit after satisfying administrative preconditions aimed at securing voluntary compliance.

1. An employee who seeks to recover for a violation of Title VII must file a charge with the EEOC within 180 days of the violation. 42 U.S.C. § 2000e-5(e)(1). If a state agency has authority to enforce a parallel state law, that deadline is extended to 300 days and the state agency must be given 60 days to address the matter before a charge is filed with the Commission. *Id.* § 2000e-5(c), (e)(1); 29 C.F.R. § 1601.13.

A written submission need not satisfy formal requirements to be a charge. Instead, it is sufficient if it identifies the employer, generally describes the alleged unlawful practice, and is "reasonably construed as a request for the agency to take remedial action." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (addressing parallel provisions of the Age Discrimination in Employment Act (ADEA)); *see* 29 C.F.R. § 1601.12(b). The employee may "clarify and amplify" her allegations after the charge is filed, and may allege additional violations "related to or growing out of the subject matter of the original charge." 29 C.F.R. § 1601.12(b). Those flexible, informal procedures reflect a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Holowecki*, 552 U.S. at 402 (citation omitted).

When the EEOC receives a charge, it notifies the employer and conducts an investigation. 42 U.S.C. § 2000e-5(b). If the Commission finds "reasonable cause" to believe that the employer violated Title VII, it must try to redress the violation through "informal

methods of conference, conciliation, and persuasion." *Id.* The EEOC has no "direct powers of enforcement"—it cannot "adjudicate claims or impose administrative sanctions." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Instead, if the Commission cannot secure a conciliation agreement, either the Commission or the Department of Justice may bring an enforcement action in court. 42 U.S.C. § 2000e-5(f)(1).

2. "Title VII also makes private lawsuits by aggrieved employees an important part of its means of enforcement." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595 (1981). If the EEOC finds no reasonable cause, it must issue the employee a right-to-sue letter. 42 U.S.C. § 2000e-5(b), (f)(1). And if, as is common, the EEOC has not resolved a charge within 180 days, an employee who is "dissatisfied with the progress the EEOC is making" may terminate the administrative process and request a right-to-sue letter at any time. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977); *see* 29 C.F.R. § 1601.28(a).

Title VII provides that "within ninety days" after the issuance of a right-to-sue letter, "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). Employees who file suit have "the right to *de novo* consideration of their Title VII claims," with no deference to any findings by the EEOC. *Chandler v. Roudebush*, 425 U.S. 840, 844 (1976).

Title VII's reliance on private suits reflects Congress's recognition that the EEOC lacks the resources to fully and promptly investigate the enormous volume of charges it receives, or to bring suits to remedy all of the violations it finds. *See Occidental*, 432 U.S. at 361-66. In 2017, for example,

the Commission received nearly 60,000 Title VII charges but concluded just 719 successful conciliations and brought only 107 enforcement suits.[1]

B. Factual background

1. Ms. Davis is a "devout Christian." J.A. 44. An active member of her church, she has long attended 8:00 AM and 10:00 AM services every Sunday. *Id.* She also attends Tuesday-night Bible studies and plays "an important role" in the church's administration. *Id.* "All of those actions are directly motivated and required by Ms. Davis's personal religious faith." *Id.*

In December 2007, petitioner hired Ms. Davis as a supervisor in its IT Department. J.A. 40. She was responsible for managing fifteen employees. *Id.* As the sole provider for her son, she was committed to "doing the best job possible" in order to "get [him] graduated from high school, and off to college." *Id.* 75.

Soon after Ms. Davis started her job, the Director of the IT Department, Charles Cook, began subjecting her to "constant sexual harassment and assaults." Pet. App. 17a n.2; *see* J.A. 40-41. Ms. Davis complained to petitioner's Human Resources office, which ultimately substantiated her allegations. Pet. App. 17a n.2. Mr. Cook resigned. *Id.*

Ms. Davis's supervisor, Kenneth Ford, was a close friend of Mr. Cook's. Pet. App. 17a n.2. After Mr. Cook resigned, Mr. Ford reduced Ms. Davis's "direct reports from fifteen to four," "removed [her] from projects she had previously managed," "superseded her authority"

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[1] EEOC, *Title VII of the Civil Rights Act of 1964 Charges FY1997 - FY2017*, http://tinyurl.com/y5gnjfhz; EEOC, *Litigation Statistics, FY1997 through FY2017*, http://tinyurl.com/y28ou6oj.

with her subordinates, and "removed her administrative rights" to the server. *Id.* In response, Ms. Davis filed a charge with the Texas Workforce Commission (TWC), which investigates Title VII claims under a work-sharing agreement with the EEOC. *Id.* 2a. The charge alleged retaliation and sex discrimination. *Id.*

2. In March 2011, while the charge was pending, petitioner assigned Ms. Davis to help install computer equipment in a new facility. Pet. App. 18a n.2. Ms. Davis worked tirelessly on the project that spring, logging sixty or more hours a week. J.A. 44-45. In June, Mr. Ford told Ms. Davis and others that they would have to be available to work on the installation over the holiday weekend of July 2-4. *Id.* 45. Ms. Davis advised him that she needed to attend a "special church service" for a few hours that Sunday, and she arranged for another employee to fulfill her responsibilities during that time. Pet. App. 18a n.2. She also made clear that she was "more than willing" to resume work as soon as the service ended. *Id.*

Mr. Ford refused to accommodate Ms. Davis's religious observance. Instead, he told her that attending her church service would be "grounds for a write-up or termination." Pet. App. 18a n.2. And when Ms. Davis nevertheless fulfilled her religious obligations, she was "immediately terminated." *Id.* 19a. Yet no similar fate befell a coworker who took time off that weekend to attend a secular parade. *Id.*

3. After her firing, Ms. Davis amended her TWC intake form to include "Religion" as one of the "Employment Harms" she suffered. J.A. 90; *see* Pet. App. 2a, 20a. She also added two new complaints to that section of the form: "Discharge" and "Reasonable Accommodation." J.A. 90.

A few months later, the TWC issued a letter advising Ms. Davis that, barring new developments, it would dismiss her charge because it had not found sufficient evidence that petitioner had discriminated against her "based on Sex, Retaliation, or any other reason prohibited by the laws [the TWC] enforce[s]." J.A. 92. Shortly thereafter, the TWC and the federal government issued Ms. Davis right-to-sue letters. *Id.* 97-98, 105-06.

C. The proceedings below

1. Ms. Davis filed a Title VII suit alleging religious discrimination, sex discrimination, and retaliation. The district court initially granted summary judgment to petitioner, but the Fifth Circuit reversed and remanded for further proceedings on Ms. Davis's religious-discrimination claim. 765 F.3d 480 (2014). The Fifth Circuit held that the district court had impermissibly second-guessed Ms. Davis's religious beliefs by concluding that the church service was a mere "personal commitment." *Id.* at 486. Instead, the Fifth Circuit determined that Ms. Davis had offered sufficient evidence that she missed work because of a sincere "religious need." *Id.* at 487. It further held that there was at least a genuine issue of material fact about whether petitioner "would have suffered undue hardship in accommodating [her] religious observance." *Id.* at 489. This Court denied petitioner's request for certiorari. 135 S. Ct. 2804 (2015).

2. It was only after the case returned to the district court—five years into the litigation—that petitioner first asserted that Ms. Davis had not adequately raised her religious-discrimination claim during administrative proceedings. Pet. App. 3a, 14a. Ms. Davis responded that petitioner had forfeited that

objection, and, in the alternative, that she had exhausted her claim. *Id.* 4a. The district court granted petitioner's motion to dismiss. *Id.* 17a-38a. It held that Ms. Davis's forfeiture argument was "irrelevant" because Title VII's exhaustion requirement is "jurisdictional." *Id.* 27a & n.7. It also concluded that Ms. Davis had not properly exhausted her claim. *Id.* 37a.

3. The Fifth Circuit reversed. Pet. App. 1a-15a. The court explained that a requirement limits the jurisdiction of the courts only if Congress "clearly states that [it] shall count as jurisdictional." *Id.* 10a (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)). And the court held that "Congress did not suggest—much less clearly state—that Title VII's administrative exhaustion requirement is jurisdictional." *Id.* The court emphasized that the exhaustion requirement "is not expressed in jurisdictional terms" and that the statute "says nothing about a connection between the EEOC enforcement process and the power of a court to hear a Title VII case." *Id.* 10a-11a.

The Fifth Circuit emphasized that "[j]ust because Title VII's administrative exhaustion requirement is not jurisdictional does not mean that [it] should be ignored." Pet. App. 13a. Here, however, the court found it "abundantly clear" that petitioner had "forfeited" the issue by "wait[ing] five years and an entire round of appeals all the way to the Supreme Court before it argued that Davis failed to exhaust." *Id.* 14a-15a. The court therefore determined that it "need not address" Ms. Davis's argument that she had in fact exhausted her claim. *Id.* 15a n.5.

SUMMARY OF THE ARGUMENT

Title VII's exhaustion requirement is a non-jurisdictional claim-processing rule subject to normal principles of waiver and forfeiture.

I. In recent years, this Court has repeatedly instructed that a statutory requirement may be deemed jurisdictional only if Congress "clearly states" that it limits the jurisdiction of the courts. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). That clear-statement rule resolves this case. In fact, Title VII's text and structure make clear that the exhaustion requirement is *not* jurisdictional.

Title VII specifies that within ninety days after the EEOC issues a right-to-sue letter, "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). All agree that this provision requires an employee to obtain a right-to-sue letter before bringing suit. But in imposing that requirement, Section 2000e-5(f)(1) neither refers to jurisdiction nor purports to limit the jurisdictional grants that authorize courts to hear Title VII claims. And in case after case, this Court has held that statutes are not jurisdictional where, as here, they "do[] not speak to a court's authority, but only to a party's procedural obligations." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014).

Petitioner fails to muster anything resembling the showing this Court has demanded before deeming a statutory requirement jurisdictional. Petitioner does not seriously dispute the absence of jurisdictional language from Section 2000e-5(f)(1)'s text. Its attempt to derive an implied jurisdictional limit from

attenuated structural inferences only underscores the lack of a clear statement. And petitioner's remaining statutory arguments largely reduce to the observation that the EEOC process is an important part of Title VII's remedial scheme. But this Court has rejected the suggestion that a requirement "should be ranked as jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 169 n.9 (2010).

Like countless other important rules, Title VII's exhaustion requirement must be enforced when properly raised, but can be forfeited where, as here, "the party asserting the rule waits too long to raise the point." *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004). A nonjurisdictional requirement still gives employees every incentive to present their claims to the EEOC. But it avoids the unfairness, delay, and waste of judicial resources caused by the belated objections that would inevitably accompany a jurisdictional rule.

II. Attempting to escape the result that follows inexorably from this Court's clear-statement rule, petitioner resorts to a theory that it neither raised below nor included in the petition for certiorari. Petitioner now asserts that there is an exception to the clear-statement rule for exhaustion requirements. Petitioner maintains that those requirements are jurisdictional whenever it is "fairly discernible" that Congress intended them to be—and that such intent is fairly discernible almost any time Congress creates an integrated scheme of administrative and judicial review requiring "that an issue be presented to an expert agency in the first instance." Petr. Br. 20. In effect, petitioner proposes to stand the clear-statement rule on its head by presuming that exhaustion

requirements *are* jurisdictional unless Congress provides otherwise.

No court has endorsed that novel departure from the clear-statement rule, and for good reason. Petitioner's "fairly discernible" standard is plucked from decisions addressing an entirely different issue. Those decisions did not involve any question about whether a litigant's failure to comply with an exhaustion requirement deprived a court of jurisdiction that would otherwise exist. Instead, they asked whether statutory schemes granting courts of appeals exclusive jurisdiction to review certain administrative decisions stripped district courts of jurisdiction over related claims by withdrawing the general grant of federal-question jurisdiction. The "fairly discernible" standard is a means of deciding *which court* has jurisdiction over a claim—not *which requirements* are jurisdictional.

That latter question is the only one presented here, and it is governed by the clear-statement rule. Indeed, although petitioner does not acknowledge the relevant decisions, this Court has applied the rule to hold that other exhaustion requirements are not jurisdictional. *See, e.g.*, *Homer City*, 572 U.S. at 512. More broadly, the Court has recognized that "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit" are classic examples of nonjurisdictional claim-processing rules. *Reed Elsevier*, 559 U.S. at 166. That perfectly describes Title VII's requirement that an employee file a charge and obtain a right-to-sue letter before bringing suit.

ARGUMENT

I. Title VII's exhaustion requirement is subject to waiver and forfeiture because Congress has not clearly stated that it is jurisdictional.

A litigant's failure to satisfy a procedural requirement deprives the courts of jurisdiction over her claim only if Congress "clearly states" that the requirement "shall count as jurisdictional." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). Every court of appeals that has considered the question in light of that clear-statement rule has concluded, without dissent, that Title VII's exhaustion requirement is not jurisdictional.[2] As the Fifth Circuit recognized, the clear-statement rule makes this an easy case: "Congress did not suggest—much less clearly state—that Title VII's administrative exhaustion requirement is jurisdictional." Pet. App. 10a.

A. A statutory requirement is subject to waiver and forfeiture unless Congress clearly states that it is jurisdictional.

1. "Jurisdiction," this Court has often observed, "is a word of many, too many, meanings." *Arbaugh*, 546

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[2] *See, e.g.*, Pet. App. 9a-11a; *Adamov v. U.S. Bank Nat'l Ass'n*, 726 F.3d 851, 855-56 (6th Cir. 2013); *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1184-85 (10th Cir. 2018); *Artis v. Bernanke*, 630 F.3d 1031, 1034 (D.C. Cir. 2011) (joined by Kavanaugh, J.); *cf. Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035-40 (10th Cir. 2015) (joined by Gorsuch, J.). Those circuits joined others that had reached the same result even before *Arbaugh*. *See, e.g.*, *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 505 (1st Cir. 1996); *Boos v. Runyon*, 201 F.3d 178, 181-84 (2d Cir. 2000) (joined by Sotomayor, J.); *Anjelino v. N.Y. Times Co.*, 200 F.3d 73, 87 (3d Cir. 1999); *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000).

U.S. at 510 (citation omitted). Over the years, "[c]ourts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). Recently, however, the Court has sought "to bring some discipline to the use of this term." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). It has emphasized that a rule should be labeled "jurisdictional" only if it "governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Id.*

The "distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not," is critical. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (citation omitted). "Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of the adversarial system." *Henderson*, 562 U.S. at 434. "[C]ourts are generally limited to addressing the claims and arguments advanced by the parties." *Id.* But because "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," they must "raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Id.*

Treating a requirement as jurisdictional can "waste . . . judicial resources" and "unfairly prejudice litigants." *Henderson*, 562 U.S. at 434. "For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." *Id.* But "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh*, 546 U.S. at 514 (citation omitted). Jurisdictional objections "may be

raised at any time," even after trial or on appeal—and even if the objecting party "previously acknowledged the trial court's jurisdiction." *Henderson*, 562 U.S. at 434-35. When those tardy objections succeed, "many months of work on the part of the attorneys and the court may be wasted." *Id.* at 435.

2. This Court has refused to "lightly attach those 'drastic' consequences to limits Congress has enacted." *Gonzalez*, 565 U.S. at 141 (citation omitted). It has therefore adopted a straightforward "clear-statement principle." *Id.* at 142. Unless Congress "clearly states" that a requirement "shall count as jurisdictional," courts "should treat the restriction as nonjurisdictional." *Arbaugh*, 546 U.S. at 515-16. Because jurisdictional rules depart from the normal functioning of our adversarial system, that approach "capture[s] Congress' likely intent." *Henderson*, 562 U.S. at 436. And because it is a "readily administrable bright line," it ensures that "courts and litigants will be duly instructed and will not be left to wrestle" with disputes about the status of particular requirements. *Arbaugh*, 546 U.S. at 515-16.

Since *Arbaugh*, the Court has consistently applied the clear-statement rule to answer questions like the one presented here—and has held that statutory requirements of many different stripes are not jurisdictional because they lack the requisite clear statement. *See, e.g.*, *Musacchio v. United States*, 136 S. Ct. 709, 717-18 (2016); *United States v. Wong*, 135 S. Ct. 1625, 1632-33 (2015); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511-12 (2014); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-55 (2013); *Gonzalez*, 565 U.S. at 141-45; *Stern v. Marshall*, 564 U.S. 462, 479-80 (2011); *Henderson*, 562 U.S. at 436-

42; *Reed Elsevier*, 559 U.S. at 161-66; *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 81-83 (2009); *Arbaugh*, 546 U.S. at 515-16.

3. In holding that those requirements are not jurisdictional, this Court has emphasized that "calling a rule nonjurisdictional does not mean that it is not mandatory or that a timely objection can be ignored." *Gonzalez*, 565 U.S. at 146. Instead, it simply means that the rule can be waived or forfeited if "the party asserting the rule waits too long to raise the point." *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004).

B. Congress has not clearly stated that Title VII's exhaustion requirement is jurisdictional.

Title VII requires exhaustion, and a court must enforce that requirement if a defendant timely raises the issue. But an employee's failure to exhaust does not deprive the district court of jurisdiction because Congress has not clearly stated that the exhaustion requirement is jurisdictional. Quite the opposite: The statutory text and structure demonstrate that the exhaustion requirement is not jurisdictional, and this Court's decisions reinforce that conclusion.

1. Section 2000e-5(f)(1)'s text shows that the exhaustion requirement is not jurisdictional.

a. To determine whether Congress has clearly stated that a requirement is jurisdictional, "[w]e begin, as always, with the text." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). Congress need not "incant magic words." *Wong*, 135 S. Ct. at 1632 (citation omitted). But "in case after case," this Court has "emphasized" that "jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *Id.* at 1633 n.4. The Court has

thus repeatedly held that statutes do not impose jurisdictional requirements when they "do[] not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Arbaugh*, 546 U.S. at 515 (citation omitted); *see, e.g.*, *Wong*, 135 S. Ct. at 1633 (same); *Gonzalez*, 565 U.S. at 143 (same); *Henderson*, 562 U.S. at 438 (same).

Congress knows how to impose a jurisdictional limit when it wishes to do so. It has "exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts" in a variety of statutes. *Arbaugh*, 546 U.S. at 515 n.11. Those provisions clearly speak to the authority of the courts—by providing, for example, that "[n]o court shall have jurisdiction" over a claim unless specified requirements are met, *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467-68 (2007) (quoting 31 U.S.C. § 3730(e)(4)(A) (2006)), or that parties "shall be immune from the jurisdiction of the courts of the United States" except under certain conditions, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318 (2017) (quoting 28 U.S.C. § 1604). *See Arbaugh*, 546 U.S. at 511 n.11 (collecting examples).

b. Congress emphatically declined to follow that model in Title VII. The provision at issue here specifies that "within ninety days" after the EEOC issues a right-to-sue letter, "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). That provision requires an employee to "obtain a right-to-sue letter before bringing suit." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652 (2015). But in imposing that requirement, Section 2000e-5(f)(1)

neither uses the word "jurisdiction" nor otherwise refers to the courts' authority to hear Title VII cases.

Instead, Section 2000e-5(f)(1) simply specifies the circumstances under which an employee "may" file suit. The U.S. Code is replete with provisions using materially identical language to refer to conditions that plainly are not jurisdictional. Congress often provides, for example, that a suit "may" be brought when a statute has been violated—but no one could reasonably argue that those provisions require the plaintiff to prove a violation to establish jurisdiction.[3]

This Court has, moreover, applied the clear-statement rule to hold that various preconditions to suit—including preconditions framed in far more emphatic terms than this one—are not jurisdictional. For example:

- A statute directing that "[o]nly an objection . . . raised with reasonable specificity" during administrative proceedings "may be raised during judicial review" of a regulation. 42 U.S.C. § 7607(d)(7)(B); *see Homer City*, 572 U.S. at 511-12.
- A statute mandating that "no civil action for [copyright] infringement . . . shall be instituted until preregistration or registration of the copyright claim has been made" with the Copyright Office. 17 U.S.C. § 411(a); *see Reed Elsevier*, 559 U.S. at 160-66.

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[3] *See, e.g.*, 5 U.S.C. § 552a(g)(1)(D) (Privacy Act); 17 U.S.C. §§ 1009(a)-(b), 1203(a) (Copyright Act); 29 U.S.C. § 1132(a)(3), (4), (8) (Employee Retirement Income Security Act); 31 U.S.C. § 3730(b)(1) (False Claims Act); 35 U.S.C. § 292(b) (Patent Act).

- A statute specifying that "[a] tort claim against the United States shall be forever barred unless it is presented" to an agency "within two years" and filed in court "within six months" after the agency acts. 28 U.S.C. § 2401(b); *see Wong*, 135 S. Ct. at 1632-33.

Like those statutes, Section 2000e-5(f)(1) is not jurisdictional because "[i]t does not speak to a court's authority, but only to a party's procedural obligations." *Homer City*, 572 U.S. at 512.

c. Although petitioner devotes scant attention to the operative statutory text, it asserts that Section 2000e-5(f)(1) is "similar" to provisions that "this Court has deemed jurisdictional." Petr. Br. 42 (citation omitted). But the only provision petitioner cites actually undermines its position. Petitioner emphasizes that 42 U.S.C. § 405(g), the statute at issue in *Mathews v. Eldridge*, 424 U.S. 319 (1976), provides that a party "may" bring a civil action to obtain review of certain decisions related to Social Security benefits. But unlike Section 2000e-5(f)(1), Section 405(g) is expressly framed in jurisdictional terms. It provides that "[t]he court shall have power" to review the relevant decisions, and it is paired with an explicit withdrawal of other jurisdictional grants. *See* 42 U.S.C. § 405(h) ("No action . . . shall be brought under [S]ection 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter."). Accordingly, although *Mathews* predates this Court's articulation of the clear-statement rule, it further illustrates that jurisdictional statutes "speak in jurisdictional terms." *Arbaugh*, 546 U.S. at 515 (citation omitted).

2. Title VII's structure confirms that the exhaustion requirement is not jurisdictional.

The broader statutory structure confirms that Title VII's exhaustion requirement is a nonjurisdictional claim-processing rule subject to waiver and forfeiture.

a. As this Court explained in *Arbaugh*, district courts have jurisdiction over Title VII suits under both the general federal-question statute, 28 U.S.C. § 1331, and a specific provision directing that district courts "shall have jurisdiction of actions brought under [Title VII]," 42 U.S.C. § 2000e-5(f)(3). 546 U.S. at 505-06. State courts have concurrent jurisdiction because Title VII does not divest them of their "inherent authority" to decide claims arising under federal law. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (citation omitted).

None of those sources of jurisdiction "conditions its jurisdictional grant," *Reed Elsevier*, 559 U.S. at 165, on whether the plaintiff properly exhausted her claim before the EEOC. The exhaustion requirement is located in Section 2000e-5(f)(1), "a provision 'separate' from those granting federal courts subject-matter jurisdiction." *Id.* at 164 (citation omitted). And nothing in that provision refers to or purports to limit the broad, unconditional grants of jurisdiction in Section 1331 and Section 2000e-5(f)(3)—or state courts' inherent authority to hear Title VII claims.

b. Petitioner maintains that various structural features of Title VII show that exhaustion is a jurisdictional requirement. Petr. Br. 41-45. They do not. And the lengths to which petitioner must go to try to establish the point only confirm that Congress did

not "clearly state[]" that the exhaustion requirement is jurisdictional. *Arbaugh*, 546 U.S. at 515.

First, petitioner asserts that Section 2000e-5(f)(1) is jurisdictional because Section 2000e-5(f) is "captioned 'jurisdiction.'" Petr. Br. 14; *see id.* 42-43. But that caption was not enacted by Congress; it was added to the U.S. Code by the Office of the Law Revision Counsel. *Cf.* Pub. L. No. 92-261, § 4, 86 Stat. 103, 105 (1972). And the sixty-three-word caption simply summarizes, in order, *all* of the various provisions in the five paragraphs of Section 2000e-5(f). The context makes clear that "jurisdiction" refers to the jurisdictional grant in Section 2000e-5(f)(3). The caption calls exhaustion a "precondition[]"—not a jurisdictional limit.

Second, petitioner observes that both the provision making exhaustion a precondition to suit and Section 2000e-5(f)(3)'s grant of jurisdiction are in Section 2000e-5(f). Petr. Br. 42-43. But "[m]ere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." *Gonzalez*, 565 U.S. at 147; *accord Auburn*, 568 U.S. at 155. Here, as in *Gonzalez*, Congress "set off" the exhaustion requirement and the jurisdictional provision in "distinct paragraphs" and "excluded the jurisdictional terms in one from the other." 565 U.S. at 145.

Third, petitioner asserts that the exhaustion requirement is "linked" to Section 2000e-5(f)(3)'s jurisdictional grant because that provision confers jurisdiction over actions "brought under [Title VII]," and a claim is not properly "brought" under Title VII unless it is exhausted. Petr. Br. 42-43 (citation omitted). But this Court has held that even an explicit "cross-reference[]" to a jurisdictional provision does

not confer jurisdictional status on a separate statutory requirement. *Gonzalez*, 565 U.S. at 145. The "link[]" petitioner posits here is far more attenuated—and would give jurisdictional status to *all* of the requirements for properly bringing a Title VII action, including requirements this Court has held to be nonjurisdictional. *See* pp. 22-24, *infra*.

In any event, even if Section 2000e-5(f)(3)'s specific jurisdictional grant were somehow limited to properly exhausted claims, that would not yield the result petitioner seeks. The general grant of federal-question jurisdiction in 28 U.S.C. § 1331 is not so limited, because a Title VII claim still "aris[es] under" federal law even if it is not exhausted. And this Court has already held that Section 1331 independently confers jurisdiction over Title VII suits: Section 2000e-5(f)(3) does not add to or restrict Section 1331, but "serve[s] simply to underscore Congress' intention to provide a federal forum for Title VII claims." *Arbaugh*, 546 U.S. at 506.[4] The Court has likewise held that Section 2000e-5(f)(3) does not "oust[] state courts of their presumptive jurisdiction" to hear Title VII claims. *Yellow Freight Sys.*, 494 U.S. at 823.

Fourth, petitioner notes that various provisions governing Title VII suits "rely on the premise that a charge has been filed with the [EEOC]"—for example, by referring to the defendant as the "respondent" named in the charge. Petr. Br. 43-44. But those references simply reflect the fact that filing a charge is

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[4] Although Section 2000e-5(f)(3) no longer adds anything to Section 1331, it had independent effect before 1980, when Section 1331 included a $10,000 amount-in-controversy requirement. *Arbaugh*, 546 U.S. at 505-06.

a required precondition to suit—something we have never denied. They do not make that requirement jurisdictional.

Fifth, petitioner asserts that "[t]he absence of any statutory exceptions to the exhaustion requirement" shows that it is jurisdictional. Petr. Br. 44. But as petitioner later acknowledges (*id.* 48-49), Title VII *does* make an exception to the exhaustion requirement for unnamed members of a class action. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770-71 (1976). In any event, petitioner exaggerates the significance of exceptions. This Court's decision in *Reed Elsevier* did not, as petitioner suggests, hold that exceptions were the "most significant" evidence that the copyright-registration requirement is nonjurisdictional. Petr. Br. 44 (brackets and citation omitted). It was simply the "most significant[]" of the "other factor[s]" the Court considered *after* analyzing the statutory text. 559 U.S. at 165. And the Court has often held that requirements are not jurisdictional even though they are "exception-free." *Wong*, 135 S. Ct. at 1632; *see, e.g.*, *Gonzalez*, 565 U.S. at 141-45; *Stern*, 564 U.S. at 479-80; *Arbaugh*, 546 U.S. at 515-16.

3. This Court's decisions reinforce the conclusion that the exhaustion requirement is not jurisdictional.

This Court's decisions addressing Title VII and related statutes further confirm what is apparent from the statutory text and structure: Title VII's exhaustion requirement can be waived or forfeited.

a. The Court has specifically addressed the jurisdictional status of two other provisions of Title

VII. It deemed both of them nonjurisdictional for reasons that apply equally here.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit." *Id.* at 393. As petitioner notes, the specific holding in *Zipes* was that *timely* exhaustion is not a jurisdictional requirement. Petr. Br. 32-35. But the Court's textual and structural reasons for reaching that conclusion confirm that *no* aspect of the exhaustion requirement is jurisdictional. The Court emphasized that the time limit in Section 2000e-5(e)(1) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts" and that it "appears as an entirely separate provision" from Title VII's jurisdictional grant. *Zipes*, 455 U.S. at 394. The same is true of the exhaustion requirement.

What's more, *Zipes* made the nonjurisdictional status of the exhaustion requirement an explicit premise of its decision. The Court explained that in amending Title VII in 1972, Congress ratified circuit-court decisions awarding relief "to class members who had not exhausted administrative remedies before the EEOC." 455 U.S. at 397. The Court concluded that in so doing, "Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit." *Id.* That logic remains equally valid today, and provides still more reason to conclude that no part of the exhaustion requirement is jurisdictional.

The Court's other decision specifically addressing the status of a Title VII requirement was *Arbaugh* itself. There, the Court applied the clear-statement rule to hold that the provision limiting Title VII's

coverage to employers with more than fifteen employees is not jurisdictional. 546 U.S. at 515-16. As in *Zipes*, the Court emphasized that the employee-numerosity requirement is not found in the relevant jurisdictional grants but rather "appears in a separate provision that 'does not speak in jurisdictional terms.'" *Id.* at 515 (quoting *Zipes*, 455 U.S. at 394).

In seeking to distinguish *Arbaugh*, petitioner focuses on features of that case that had no bearing on the Court's application of the clear-statement rule. Petr. Br. 49-50. For example, petitioner notes that the fifteen-employee threshold is an "element" of a Title VII claim rather than a prerequisite to suit. *Id.* 49. But nothing in *Arbaugh* turned on that characterization—and this Court has since rejected any distinction between "an element of a Title VII claim" and "a prerequisite to initiating a lawsuit." *Reed Elsevier*, 559 U.S. at 165-66. Petitioner's remaining distinctions recycle its erroneous structural arguments—including its insistence that the exhaustion requirement is found in the same provision as Title VII's jurisdictional grant. Petr. Br. 50. That is not true, no matter how many times petitioner says it: "Title VII's jurisdictional provision" is "42 U.S.C. § 2000e-5(f)(3)"—not Section 2000e-5(f)(1). *Arbaugh*, 546 U.S. at 515.

b. In addition to *Zipes* and *Arbaugh*, this Court has issued two other decisions resting on the premise that preconditions closely resembling Title VII's exhaustion requirement are not jurisdictional.

In *Mach Mining*, the Court addressed the EEOC's obligation to attempt conciliation before bringing an enforcement action. 135 S. Ct. at 1651-53. Section 2000e-5(f)(1) makes compliance with that obligation a condition precedent to suit in language materially

identical to the language at issue here, specifying that the EEOC "may bring a civil action" if it "has been unable to secure . . . a conciliation agreement." The necessary implication of petitioner's position—which its amici make explicit, *see* Ctr. for Workplace Compliance Br. 7—is that conciliation is a jurisdictional precondition to an EEOC suit. But *Mach Mining* held that if the Commission fails to conciliate, "the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance" while "stay[ing]" the litigation. 135 S. Ct. at 1656. That remedy would be impermissible if the conciliation requirement were jurisdictional: It is axiomatic that when jurisdiction is lacking, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citation omitted).

Similarly, in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Court addressed the provision of the ADEA specifying that "no suit may be brought . . . before the expiration of sixty days" after the employee files a charge of discrimination with the relevant state agency. 29 U.S.C. § 633(b). Again, petitioner's position necessarily implies that this exhaustion requirement is jurisdictional. But again, this Court held that the remedy when an employee fails to comply is to "hold [the] suit in abeyance" until she does—not to dismiss the action. 441 U.S. at 765 & n.13. As with *Mach Mining*, the Court could not adopt petitioner's position without repudiating that aspect of *Oscar Mayer*.

c. Petitioner asserts that this Court has "twice held" that filing a charge with the EEOC is a jurisdictional requirement. Petr. Br. 48. That is not so.

The decisions on which petitioner relies stated in passing that "filing timely charges of employment discrimination with the Commission" is one of the "jurisdictional prerequisites" to a Title VII suit. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). But the Court has already specifically disapproved those "scattered references," explaining that "the legal character of the requirement was not at issue in those cases." *Zipes*, 455 U.S. at 395; *see id.* at 393 n.6 (citing *Alexander*, 415 U.S. at 47, and *McDonnell Douglas*, 411 U.S. at 798). And the Court has reiterated that such "'drive-by'" jurisdictional characterizations "should be accorded 'no precedential effect.'" *Arbaugh*, 546 U.S. at 511 (citation omitted).[5]

Those disapproved, drive-by characterizations do not remotely resemble the sort of "long line of this Court's decisions left undisturbed by Congress" that the Court has on two occasions found sufficient to make clear that a requirement is jurisdictional. *Henderson*, 562 U.S. at 436 (citation omitted). In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), the Court relied on a line of cases dating to 1883 that had *held*—not merely stated in passing—that the limitations period at issue was jurisdictional. *Id.* at 135-36. Similarly, the Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), relied on "a century's worth of precedent" holding that time limits for notices

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[5] Petitioner also invokes the statement in *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 (1984), that the existence of a charge "is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." Petr. Br. 45. That was another drive-by characterization, and it is entitled to no more weight than the statements in *Alexander* and *McDonnell Douglas*.

of appeal in civil cases are jurisdictional. *Id.* at 209-10 & n.2. This is nothing like those "exceptional" cases. *Auburn*, 568 U.S. at 155.

C. Petitioner's arguments based on Title VII's purpose do not supply the clear statement that is absent from the statutory text.

Lacking any sound footing in text, structure, or precedent, petitioner relies heavily on the assertion that treating the exhaustion requirement as jurisdictional would further Title VII's purposes. Petr. Br. 27-32, 45-47. Even if that were true, appeals to statutory purpose could not supply the clear statement that is missing from Section 2000e-5(f)(1)'s text. The point of the clear-statement rule is to provide a "readily administrable bright line" so that courts and litigants will not be forced to "wrestle" with questions of jurisdictional status. *Arbaugh*, 546 U.S. at 515-16. That benefit would be lost if courts could imply extra-textual jurisdictional requirements based on their views of what would best serve a statute's purpose. In any event, petitioner's purpose-based arguments are unpersuasive even on their own terms. In fact, the delay, inefficiency, and unfairness caused by a jurisdictional exhaustion requirement would *undermine* Title VII.

1. Petitioner's purpose-based arguments are unpersuasive.

a. Most of petitioner's purpose-based arguments simply emphasize that Congress intended to require employees to present Title VII claims to the EEOC before proceeding to Court and that the exhaustion requirement serves important purposes. Petr. Br. 27-32, 45-47. That is true enough so far as it goes: No

one disputes that "an employee must obtain a right-to-sue letter before bringing suit," and no one disputes that courts should "typically insist on satisfaction of that condition." *Mach Mining*, 135 S. Ct. at 1651. But that is irrelevant to the question presented here. Countless statutory requirements—including the elements of virtually every cause of action and the vast majority of procedural rules—are "important and mandatory," but nonetheless subject to forfeiture if a party fails to raise them. *Henderson*, 562 U.S. at 435.

In *Reed Elsevier*, moreover, the Court rejected a virtually identical purpose-based argument. Like petitioner, the court-appointed amicus there argued at length that the copyright-registration requirement should be deemed jurisdictional because it serves important "system-related goals." Amicus Br. at 44-45, *Reed Elsevier*, 559 U.S. 154 (No. 08-103) (quoting *John R. Sand*, 522 U.S. at 133); *see id.* at 45-56. The Court dismissed that argument in a single sentence that could just as easily be a response to much of petitioner's brief: "We do not agree that a condition should be ranked as jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier*, 559 U.S. at 169 n.9.

b. Moreover, the policy objectives petitioner identifies would be equally well-served by a mandatory claim-processing rule. Courts that treat the exhaustion requirement as nonjurisdictional still enforce it when an employer timely raises the issue—typically by dismissing the unexhausted claims or granting

summary judgment to the employer.[6] Faced with that prospect, no rational employee would intentionally bypass the EEOC process in the hopes that defense counsel would simply fail to notice—particularly because filing a charge is neither burdensome nor time-consuming, and can only benefit the employee.

Resisting that natural conclusion, petitioner insists that defendants are "unlikely" to object to an employee's failure to exhaust. Petr. Br. 30. That assertion is, to put it mildly, perplexing. A defendant has every incentive to assert that a Title VII plaintiff has failed to exhaust because such an objection, if timely and meritorious, prevents the plaintiff from recovering. Defense-oriented practice guides thus instruct that "before filing an answer to the Complaint, it is important to determine whether the plaintiff(s) has/have exhausted his/her/their administrative remedies and consider filing a motion to dismiss." Matt W. Lampe & Kristina A. Yost, Jones Day, *Employment Discrimination Class and Collective Actions: Special Issues and Considerations* 6-7 (2018), http://tinyurl.com/y4778tag. And the associations of employers that have filed an amicus brief supporting petitioner conspicuously decline to endorse its description of employers' litigation incentives.

Experience confirms what common sense suggests: Although many circuits have long treated the exhaustion requirement as nonjurisdictional, petitioner musters no evidence that plaintiffs have intentionally

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[6] *See, e.g.*, *Cervantes v. Ardagh Grp.*, 914 F.3d 560, 564-66 (7th Cir. 2019); *Bonilla-Ramirez v. MVM, Inc.*, 904 F.3d 88, 93 (1st Cir. 2018); *Littlejohn v. City of N.Y.*, 795 F.3d 297, 321-22 & n.19 (2d Cir. 2015).

circumvented the EEOC process, or that defendants have strategically declined to object. A decision confirming the nonjurisdictional status of the exhaustion requirement would thus pose no threat to the EEOC's role in Title VII's remedial scheme.

c. Finally, petitioner asserts that Section 2000e-5(f)(1)'s exhaustion requirement "limits the scope of a governmental waiver of sovereign immunity" because States and state agencies are subject to Title VII suits. Petr. Br. 46 (brackets and citation omitted). But Congress validly and unambiguously "abrogat[ed] States' sovereign immunity in Title VII." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729-30 (2003). This Court has never suggested that a statutory requirement should be deemed jurisdictional merely because it is attached to such an abrogation. To the contrary, *Arbaugh* and *Zipes* held that other Title VII requirements were not jurisdictional even though they, too, could be characterized as limits on the scope of Title VII's abrogation of state sovereign immunity.[7]

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[7] Petitioner also asserts that the exhaustion requirement "indirectly" limits a waiver of federal sovereign immunity because it is "incorporate[d]" into Title VII's federal-sector provision, 42 U.S.C. § 2000e-16. Petr. Br. 46. But whatever relevance sovereign immunity might have to the status of the federal-sector exhaustion requirement, it has no bearing on the question presented here. The federal-sector provision establishes a distinct exhaustion regime, requiring federal employees to present discrimination claims in the first instance to their employing agencies rather than directly to the EEOC. 42 U.S.C. § 2000e-16(c); *see* 29 C.F.R. §§ 1614.101 *et seq.* And although the federal-sector provision incorporates "the provisions of section 2000e-5(f) through (k) . . . as applicable," 42 U.S.C. § 2000e-16(d), it does not incorporate the language at issue here because it makes

2. A jurisdictional exhaustion requirement would undermine Title VII litigation.

A jurisdictional exhaustion requirement is not merely unnecessary to achieve Title VII's goals; it would actually thwart the efficient administration of the statute by burdening both courts and litigants.

a. Start with courts. As petitioner acknowledges, federal courts "have a duty to analyze jurisdictional issues on their own initiative at the outset of a case." Petr. Br. 40. Title VII is one of the most frequently litigated federal statutes, and requiring district courts to determine sua sponte whether every Title VII claim is properly exhausted would drain scarce judicial resources. That is particularly true because Title VII's exhaustion requirement differs markedly from the "[s]imple jurisdictional rules" this Court ordinarily prefers in order to ensure that courts can "readily assure themselves of their power to hear a case." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

A reader of petitioner's brief might assume that Title VII exhaustion questions typically arise when an employee "skip[s] the administrative process" entirely. Petr. Br. 26. But that did not happen here, and it seldom happens at all. Petitioner, for example, cited some thirty circuit-court decisions in arguing that the courts of appeals are divided on the question presented. Pet. 10-16. In only two of them does it appear possible

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exhaustion a prerequisite to suit using different language. *See id.* § 2000e-16(c) (providing that an employee "aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5").

that there was no administrative submission.[8] In the others—as in this case—the issue was the *adequacy* of the administrative submissions: whether they were sufficient to qualify as a charge or otherwise start the administrative process[9]; whether the charge was procedurally proper[10]; whether the claims asserted in court were sufficiently related to the allegations in the charge[11]; whether a charge naming related entities was sufficient to exhaust a claim against an unnamed defendant[12]; whether an employee could rely on a

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[8] *Ziya v. Glob. Linguistic Sol.*, 645 Fed. Appx. 573, 574 (9th Cir. 2016); *Manning v. Carlin*, 786 F.2d 1108, 1109 (11th Cir. 1986).

[9] *Artis*, 630 F.3d at 1034-38; *Sommatino v. United States*, 255 F.3d 704, 709-11 (9th Cir. 2001); *Edwards v. Dep't of the Army*, 708 F.2d 1344, 1347-48 (8th Cir. 1983).

[10] *Davis v. N.C. Dep't of Corr.*, 48 F.3d 134, 138-40 (4th Cir. 1995); *see* Br. for Appellees at 14, *Rester v. Stephens Media, LLC*, 739 F.3d 1127 (8th Cir. 2014) (No. 12-3934).

[11] *Lincoln*, 900 F.3d at 1179-80; *Ruffin v. Lockheed Martin Corp.*, 659 Fed. Appx. 744, 746-47 (4th Cir. 2016); *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 386-87 (2d Cir. 2015); *Tonkin v. Shadow Mgmt., Inc.*, 605 Fed. Appx. 194, 194 (4th Cir. 2015); *Salas v. Indep. Elec. Contractors, Inc.*, 603 Fed. Appx. 607, 608 (9th Cir. 2015); *Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 415-16 (4th Cir. 2014); *Whitaker v. Nash Cty.*, 504 Fed. Appx. 237, 240 (4th Cir. 2013); *Hill v. Nicholson*, 383 Fed. Appx. 503, 508 (6th Cir. 2010); *Jones v. Calvert Grp.*, 551 F.3d 297, 300-04 (4th Cir. 2009); *Robinson v. Geithner*, 359 Fed. Appx. 726, 729-30 (9th Cir. 2009); *Thomas v. Nicholson*, 263 Fed. Appx. 814, 815 n.1 (11th Cir. 2008); *Frederique-Alexandre v. Dep't of Nat. & Envtl. Res.*, 478 F.3d 433, 439-40 (1st Cir. 2007); *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 643-46 (8th Cir. 2002); *Gibson*, 201 F.3d at 991; *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898-99 (9th Cir. 1994).

[12] *Peppers v. Cobb Cty.*, 835 F.3d 1289, 1296-97 (11th Cir. 2016); *Wilson v. MVM, Inc.*, 475 F.3d 166, 171, 173-76 (3d Cir.

charge filed by another employee[13]; or whether the employee cooperated with the EEOC's investigation.[14]

Answering those questions often requires "a relatively fact-intensive analysis." *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 644 (8th Cir. 2002). And because the administrative process is informal and employees may supplement or amend their allegations during the EEOC's investigation, *see* 29 C.F.R. § 1601.12(b), even routine exhaustion issues can require a court to make factual findings based on "evidence beyond the pleadings," including all of the employee's communications with the EEOC and the "documents generated" during the investigation. *Jenkins v. Educ. Credit Mgmt. Corp.*, 212 Fed. Appx. 729, 732 (10th Cir. 2007).

If the exhaustion requirement were jurisdictional, courts—including courts of appeals—would be obligated to undertake those fact-intensive inquiries sua sponte. And because a federal court "may not rule on the merits of a case without first determining that it has jurisdiction," *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007), courts would have to answer complex or difficult exhaustion

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2007); *McKinnon*, 83 F.3d at 504-05; *Stache v. Int'l Union of Bricklayers*, 852 F.2d 1231, 1233-34 (9th Cir. 1988); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1000, 1010-11 (11th Cir. 1982).

[13] *Robinson*, 359 Fed. Appx. at 729; *De Medina v. Reinhardt*, 686 F.2d 997, 1012-13 (D.C. Cir. 1982); *Jackson*, 678 F.2d at 1011.

[14] *Brown v. Snow*, 440 F.3d 1259, 1263-65 (11th Cir. 2006); *Crawford v. Babbitt*, 186 F.3d 1322, 1326-27 (11th Cir. 1999).

questions even in cases that could easily be dismissed on the merits.[15]

b. Next, consider the opportunities for vexatious behavior by defendants. If the exhaustion requirement were jurisdictional, an employee's asserted failure to satisfy it could be raised at any time—even after trial, on appeal, or for the first time in this Court. Defendants faced with unfavorable outcomes—such as an adverse verdict or, as here, the reversal of summary judgment—would have powerful incentives to scour the record to find some arguable failure to exhaust in the hopes of securing a jurisdictional dismissal. *See, e.g.*, *Francis v. City of N.Y.*, 235 F.3d 763, 765-66 (2d Cir. 2000) (objection raised "[o]ver a month" after "judgment for the plaintiff"); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1000 (11th Cir. 1982) (objection raised "in [a] motion to vacate the judgment").

Those "[t]ardy jurisdictional objections" would "result in a waste of adjudicatory resources" and "disturbingly disarm litigants." *Auburn*, 568 U.S. at 153. This case vividly illustrates the problem. The district court, the Fifth Circuit, and this Court devoted substantial resources to the merits of Ms. Davis's claim during the five years before petitioner raised the exhaustion issue. The Fifth Circuit's prior decision has become an important precedent on religious discrimination, which Westlaw indicates has been cited in nearly 150 other cases. 765 F.3d 480 (2014). If Ms. Davis's claim were dismissed for lack of jurisdiction, that decision would be vacated and all of the courts'

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[15] *See, e.g.*, *Hill*, 383 Fed. Appx. at 508 (holding that exhaustion is nonjurisdictional in order to bypass the issue and affirm a dismissal on the merits); *Boos*, 201 F.3d at 181-84 (same).

work would be for naught. And even if the Fifth Circuit ultimately held that Ms. Davis properly exhausted, petitioner's belated jurisdictional objection still would have delayed the resolution of her claim by more than three years . That sort of unfairness, inefficiency, and delay would be particularly out of place in Title VII litigation, which Congress required to be "in every way expedited." 42 U.S.C. § 2000e-5(f)(5).

c. Petitioner does not address the burdens a jurisdictional exhaustion requirement would impose on courts, or the inefficiency and delay that would be spawned by belated objections. But petitioner asserts that a jurisdictional requirement would not "create inequities" for employees because "Title VII's timeliness requirement is non-jurisdictional." Petr. Br. 40. Petitioner's theory is apparently that if an employee's claim were dismissed for failure to exhaust, she could still return to court by filing an out-of-time charge with the EEOC and then asking the district court to equitably toll the statute of limitations. *Id.* But it is not clear that the Commission or the courts would routinely find equitable tolling appropriate under those circumstances. *Cf. Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) (describing the general standard for equitable tolling). And even if they did, it would make little sense to allow a defendant's belated objection to compel the dismissal of a case after years of litigation, only to have the parties start all over again following the exhaustion of the EEOC process.

II. There is no special exception to the clear-statement rule for exhaustion requirements.

In seeking certiorari, petitioner argued that a few circuits have continued to treat the exhaustion requirement as jurisdictional. Pet. 10-14. But petitioner

does not rely on the reasoning of those courts' decisions, which either pre-dated *Arbaugh* or uncritically echoed pre-*Arbaugh* precedents. Instead, petitioner now rests its case on an entirely new theory that *no* court has adopted—and that petitioner itself debuts in its merits brief in this Court. Petr. Br. 15-40.

Petitioner's new theory is that there is a previously unannounced exception to the clear-statement rule for exhaustion requirements. Petitioner maintains that those requirements are jurisdictional if it is "fairly discernible" that Congress intended them to be—and that the requisite intent is fairly discernible virtually any time Congress requires parties to present their claims to an expert agency before proceeding to court.

There is a good reason no court has endorsed (or even suggested) that novel inversion of the clear-statement rule. Petitioner relies on language plucked from decisions addressing an entirely different issue. And petitioner ignores this Court's instruction that the clear-statement rule determines the jurisdictional status of *all* statutory requirements—including exhaustion requirements.

A. Petitioner's "fairly discernible" standard is drawn from decisions addressing an entirely different issue.

1. Petitioner initially frames its new test as asking whether "the 'text, structure, and purpose' of the statute make it 'fairly discernible' that Congress intended to limit jurisdiction" by requiring exhaustion. Petr. Br. 17-18 (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 8-10 (2012)). Taken at face value, that would be an unwarranted departure from the clear-statement rule, but it would not change the outcome here: As the

Fifth Circuit held—and as we showed in Part I—Title VII's text, structure, and purpose do not even "suggest" that the exhaustion requirement is jurisdictional, much less make it fairly discernible. Pet. App. 10a.

Petitioner soon reveals, however, that its "fairly discernible" standard is in fact a presumption that exhaustion requirements are jurisdictional unless Congress specifically provides otherwise. Petitioner asserts that "it is generally 'fairly discernible' that Congress intended to limit jurisdiction" if it established an "'integrated' and 'comprehensive'" scheme requiring parties to present their claims to an expert agency before proceeding to court, and if the agency process furthers the statutory purpose. Petr. Br. 20. Or, as petitioner later puts it, a statutory exhaustion requirement should be deemed jurisdictional absent "an explicit statutory indication" that it is not. *Id.* 52.

2. Petitioner purports to ground that presumption in this Court's decisions in *Elgin*, *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). But those decisions addressed an entirely different sort of jurisdictional question. Petitioner's conflation of that question with this one proves once more that "[j]urisdiction . . . is a word of many, too many, meanings." *Arbaugh*, 546 U.S. at 510 (citation omitted).

Elgin, Free Enterprise Fund, and *Thunder Basin* did not present any question about "whether a procedural rule is 'jurisdictional.'" *Henderson*, 562 U.S. at 434. Instead, each of those cases involved a dispute about whether a statutory scheme giving courts of appeals exclusive jurisdiction to review certain decisions by an administrative agency

precluded district courts from exercising jurisdiction over related claims under 28 U.S.C. § 1331. The "fairly discernible" standard articulated in those decisions is a means of deciding *which court* has jurisdiction over a class of claims—not *which procedural requirements* are jurisdictional.

Thunder Basin involved a statute authorizing the Secretary of Labor to enforce mine safety requirements and providing for review of the Secretary's actions by the Federal Mine Safety and Health Review Commission (FMSHRC). 510 U.S. at 202-04. The statute granted the courts of appeals "exclusive jurisdiction" to review the FMSHRC's decisions. 30 U.S.C. § 816(a)(1); *see Thunder Basin*, 510 U.S. at 208. This Court held that the statute "precludes district court jurisdiction" over challenges to mine safety rules. *Thunder Basin*, 510 U.S. at 207. The Court explained that although the statute does not expressly withdraw jurisdiction under Section 1331, its "comprehensive enforcement structure . . . establishes a 'fairly discernible' intent to preclude district court review." *Id.* at 216 (citation omitted). In so doing, the Court applied the same "fairly discernible" standard that it had previously used to decide whether Congress precluded judicial review of a particular category of agency action. *See, e.g.*, *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 157 (1970).

Free Enterprise Fund also involved a statute giving courts of appeals exclusive jurisdiction over final decisions by an administrative agency—there, the Securities and Exchange Commission (SEC). 15 U.S.C. § 78y(a)(3); *see* 561 U.S. at 489. Invoking *Thunder Basin*, the Government argued that the statute impliedly withdrew district-court jurisdiction

over challenges to the constitutionality of the Public Company Accounting Oversight Board, an entity within the SEC. *Free Enterprise Fund*, 561 U.S. at 489. This Court disagreed, holding that it was not "fairly discernible" that Congress intended to strip the district courts of jurisdiction over such claims. *Id.* (citation omitted). The Court explained that a scheme of administrative and judicial review does not preclude jurisdiction under Section 1331 where "a finding of preclusion could foreclose all meaningful judicial review," where the suit is "wholly collateral to a statute's review provisions," or where the claims are "outside the agency's expertise." *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13).

Elgin fits the same mold. It involved statutes authorizing federal employees to challenge adverse personnel actions before the Merit Systems Protection Board (MSPB) and giving the Federal Circuit "exclusive jurisdiction" to review the MSPB's decisions. 28 U.S.C. § 1295(a)(9); *see* 5 U.S.C. § 7703(b)(1); *Elgin*, 567 U.S. at 5-6. As this Court explained, that statutory scheme—like the one at issue in *Thunder Basin*—"channel[ed] judicial review" of the covered claims "to a particular court." *Elgin*, 567 U.S. at 9. A group of former federal employees tried to escape that channel by invoking Section 1331 to bring constitutional challenges in district court. *Id.* at 6-8. This Court held that the comprehensive nature of the MSPB review procedures made it "'fairly discernible' that Congress precluded district court jurisdiction over [the employees'] claims," which could instead proceed only through the MSPB and the Federal Circuit. *Id.* at 10 (citation omitted); *see id.* at 10-24.

3. This case does not involve any question like the ones presented in *Elgin*, *Free Enterprise Fund*, and *Thunder Basin*. There are no dueling jurisdictional grants, and it is undisputed that Section 1331 and Section 2000e-5(f)(3) give district courts jurisdiction to hear Title VII claims. The only question in this case—as in others in the clear-statement line—is whether a litigant's failure to comply with a procedural rule deprives a court of jurisdiction under those otherwise-applicable jurisdictional statutes.

Elgin, *Free Enterprise Fund*, and *Thunder Basin* did not involve any question of that sort, and the "fairly discernible" standard applied in those cases is not a test for distinguishing exhaustion requirements that are jurisdictional from those that are not. The plaintiffs in *Elgin* and *Thunder Basin*, for example, could not have sued in district court even if they *had* exhausted administrative remedies, because Congress entirely withdrew district-court jurisdiction over the relevant class of claims. *See Elgin*, 567 U.S. at 5; *Thunder Basin*, 510 U.S. at 209. Conversely, *Free Enterprise Fund*'s holding that the "fairly discernible" standard was not satisfied did not mean that exhaustion was a nonjurisdictional requirement subject to waiver and forfeiture. Instead, it meant that the plaintiffs were not required to exhaust their claims at all, and could proceed in district court despite the Government's timely objection. 561 U.S. at 489-90.

4. Of course, a question like the one presented here certainly *can* arise under the statutory schemes at issue in *Elgin*, *Free Enterprise Fund*, and *Thunder Basin*. A federal employee might, for example, seek to assert a claim in the Federal Circuit that she failed to raise in the MSPB. If the government failed to object

in a timely fashion, the Federal Circuit would have to decide whether the relevant statutes make exhaustion of all claims a jurisdictional requirement.[16] But *Elgin*, *Free Enterprise Fund*, and *Thunder Basin* had no occasion to consider that sort of question—and they provide no reason to think that it should be answered using anything other than the established clear-statement rule.

B. Petitioner identifies no other basis for departing from the clear-statement rule or treating exhaustion requirements as presumptively jurisdictional.

In addition to invoking the inapposite "fairly discernible" cases, petitioner suggests more generally that exhaustion requirements should be exempt from the clear-statement rule because this Court has treated them as presumptively jurisdictional. Petr. Br. 20-23, 35-36. In fact, the Court has applied the clear-statement rule to exhaustion requirements—and has specifically identified them as paradigmatic examples of nonjurisdictional claim-processing rules. The scattered pre-*Arbaugh* decisions on which petitioner relies are not to the contrary.

1. Petitioner starts from the mistaken premise that this Court has not applied the clear-statement rule in "the exhaustion context." Petr. Br. 40. In fact, the Court has twice applied the rule to hold that an exhaustion requirement in a "statutory scheme of

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[16] In fact, although the Federal Circuit "ordinarily [will] not consider questions not raised before the [MSPB]," it has long treated that limitation as nonjurisdictional and has made exceptions when, for example, exhaustion would have been futile. *Beard v. GSA*, 801 F.2d 1318, 1321 (1986).

administrative and judicial review" (Petr. Br. 20) is not jurisdictional.

In *Homer City*, the Court applied the clear-statement rule to the Clean Air Act's requirement that parties seeking judicial review of administrative regulations must first raise their objections with "reasonable specificity" before the agency. 572 U.S. at 511 (quoting 42 U.S.C. § 7607(d)(7)(B)). Citing *Arbaugh*, the Court held that this exhaustion requirement is not jurisdictional because it "does not speak to a court's authority." *Id.*

In *Union Pacific*, the Court applied the clear-statement rule to the Railway Labor Act's requirement that employees and rail carriers "attempt settlement 'in conference'" before resorting to arbitration and potential judicial review. 558 U.S. at 73-74 (quoting 45 U.S.C. § 152). The Court held that "the requirement to conference is not 'jurisdictional'" because it is not framed in jurisdictional terms. *Id.* at 83. In so doing, the Court analogized that requirement to the one at issue here, explaining that "conferencing is surely no more 'jurisdictional' than is the presuit resort to the EEOC held forfeitable in *Zipes*." *Id.*

More broadly, a plurality of this Court recently identified "an exhaustion requirement"—along with "a filing deadline"—as one of two paradigmatic examples of a nonjurisdictional "claim-processing rule." *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018). And the Court has "treated as nonjurisdictional" other "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." *Reed Elsevier*, 559 U.S. at 166; *see, e.g.*, *id.* at 161-166 (copyright registration requirement); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007) (Prison Litigation Reform Act exhaustion

requirement); *Woodford v. Ngo*, 548 U.S. 81, 101 (2006) (same); *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (habeas statute exhaustion requirement).

2. Courts of appeals, too, have held that "under *Arbaugh*" and its progeny, "absent a clear statement from Congress, exhaustion requirements will be found to be nonjurisdictional." *Munsell v. Dep't of Agric.*, 509 F.3d 572, 581 (D.C. Cir. 2007). Applying this rule, courts have held that 7 U.S.C. § 6912(e)—which mandates that a plaintiff "exhaust all administrative appeal procedures" before bringing an action in court—is a "mandatory, but nonjurisdictional, exhaustion requirement." *Munsell*, 509 F.3d at 581; *see, e.g.*, *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 606-07 (5th Cir. 2007).

To take just one of many other examples, courts of appeals have also applied the clear-statement rule to a statute prescribing that a "judgment for damages shall not be awarded" in certain suits against the Internal Revenue Service "unless the court determines that the plaintiff has exhausted the administrative remedies available." 26 U.S.C. § 7433(d). "In the aftermath of *Arbaugh*," the Sixth Circuit held, "it no longer is appropriate to treat the exhaustion requirements for bringing a § 7433 claim as jurisdictional." *Hoogerheide v. IRS*, 637 F.3d 634, 636 (2011); *see, e.g.*, *Hassen v. Gov't of Virgin Islands*, 861 F.3d 108, 114 (3d Cir. 2017).

3. Of course, the fact that exhaustion requirements are subject to the clear-statement rule and are ordinarily nonjurisdictional does not mean that they are *never* jurisdictional. Congress may, if it speaks clearly, condition a court's subject-matter jurisdiction on a specified administrative action. The Hobbs Act,

for example, provides that the courts of appeals have "jurisdiction" to review a variety of administrative actions, including "final orders" of the Federal Communication Commission and other agencies. 28 U.S.C. § 158. That express jurisdictional language makes clear that a final administrative decision is a jurisdictional requirement—just as a final district court decision is a jurisdictional requirement for an appeal under 28 U.S.C. § 1291.

But the exhaustion requirement at issue here is entirely different. Title VII does not grant district courts jurisdiction to review final decisions by the EEOC—indeed, it does not empower the EEOC to decide Title VII claims at all. *See Alexander*, 415 U.S. at 44. Instead, Title VII merely requires an employee to file a charge with the EEOC and obtain a right-to-sue letter before bringing a de novo suit in district court. That is a garden-variety "prerequisite to suit," *Mach Mining*, 135 S. Ct. at 1651-52—not a jurisdictional requirement.

4. The hodgepodge of other decisions on which petitioner relies (Petr. Br. 20-23, 52-54) do not support its assertion that exhaustion requirements are presumptively jurisdictional. All of those decisions pre-dated this Court's articulation of the clear-statement rule—in most cases by decades. Some of them thus simply reflect "less than meticulous" use of the term "jurisdictional" to refer to something other than the subject-matter jurisdiction of the courts. *Arbaugh*, 546 U.S. at 511; *see Sims v. Apfel*, 530 U.S. 103, 108 (2000); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 49-50 (1998); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-46

(1959); *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540, 544-45 (1946).

Other decisions are irrelevant because they did not address whether the requirement at issue was jurisdictional. In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Court expressly stated that it "need not determine whether [the relevant provision] is jurisdictional." *Id.* at 31. And in *McNeil v. United States*, 508 U.S 106 (1993), the Court affirmed the dismissal of a plaintiff's claim for failure to satisfy 28 U.S.C. § 2675(a)'s exhaustion requirement, but did not endorse the lower courts' statement that the requirement is jurisdictional. *Id.* at 113. As the Government had explained, the Court was not required to "reach the question whether Section 2675(a)'s requirements are jurisdictional" because the Government had preserved the exhaustion issue below. U.S. Br. at 15 n.8, *McNeil*, 508 U.S. 106 (No. 92-6033); *see also FPC v. Colo. Interstate Gas Co.*, 348 U.S. 492, 498-99 (1955) (enforcing an exhaustion requirement without addressing its jurisdictional status).

Petitioner's remaining decisions involve the provisions governing review of certain Social Security benefit determinations, 42 U.S.C. § 405(g) and (h). Petr. Br. 21. But unlike Section 2000e-5(f)(1), those statutes include express jurisdictional language. Section 405(g) grants district courts jurisdiction to review the relevant administrative decisions, and Section 405(h) expressly withdraws jurisdiction "under [S]ection 1331 or 1346 of Title 28." And even then, the decisions on which petitioner relies do not interpret those provisions to create the sort of jurisdictional requirement that petitioner seeks here. For example, they do not deprive the courts of

jurisdiction to consider a claim that the plaintiff "failed to raise" during administrative proceedings. *Mathews*, 424 U.S. at 329-30.

* * *

In *Arbaugh*, this Court adopted the clear-statement rule as a "readily administrable bright line" for Congress, the courts, and litigants. 546 U.S. at 516. In the intervening years, this Court's consistent application of that bright-line rule has brought much-needed clarity and certainty to an area of the law that had been plagued by confusion. The clear-statement rule resolves this case, and the Court should decline petitioner's invitation to depart from it.[17]

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[17] Petitioner asserts that if the Court holds that exhaustion is a jurisdictional requirement, it should also hold that Ms. Davis failed to exhaust her religious-discrimination claim. Petr. Br. 54-56. Ms. Davis did, in fact, exhaust that claim. BIO 22-23. But petitioner provides no reason for this Court to address in the first instance a factbound question that was neither passed upon below nor "fairly included" in the question petitioner asked this Court to decide. Sup. Ct. R. 14.1(a).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

Brian H. Fletcher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Wright
R. Russell Hollenbeck
Raffi Melkonian
Counsel of Record
WRIGHT CLOSE &
BARGER, LLP
One Riverway, Suite 2200
Houston, TX 77056
(713) 572-4321
melkonian@
wrightclosebarger.com

March 27, 2019