# **SUPREME COURT OF THE UNITED STATES**

IN THE	SUPREME	COURT	OF	THE	UNITED	STATES
FORT BEND COUN	IY, TEXA	.S ,			)	
:	Petition	er,			)	
v.					) No. 1	L8-525
LOIS M. DAVIS,					)	
1	Responde	nt.			)	

Pages: 1 through 64

- Place: Washington, D.C.
- Date: April 22, 2019

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 3 FORT BEND COUNTY, TEXAS, ) Petitioner, 4 ) 5 ) No. 18-525 v. 6 LOIS M. DAVIS, ) 7 Respondent. ) 8 \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ 9 10 Washington, D.C. 11 Monday, April 22, 2019 12 13 The above-entitled matter came on for 14 oral argument before the Supreme Court of the 15 United States at 11:09 a.m. 16 17 **APPEARANCES:** COLLEEN E. ROH SINZDAK, ESQ., Washington, D.C.; on 18 19 behalf of the Petitioner. 20 RAFFI MELKONIAN, ESQ., Houston, Texas; on behalf 21 of the Respondent. 22 JONATHAN C. BOND, Assistant to the Solicitor General, 23 Department of Justice, Washington, D.C.; for the 24 United States, as amicus curiae, in support of the 25 Respondent.

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1	PROCEEDINGS
2	(11:09 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear
4	argument next this morning in Case 18-525, Fort
5	Bend County versus Davis.
6	Ms. Sinzdak.
7	ORAL ARGUMENT OF COLLEEN E. ROH SINZDAK
8	ON BEHALF OF THE PETITIONER
9	MS. SINZDAK: Mr. Chief Justice, and
10	may it please the Court:
11	When Title VII's exhaustion
12	requirement is satisfied, the power to address
13	an employment discrimination claim shifts from
14	the executive to the judicial branch. The
15	exhaustion requirement is, therefore,
16	jurisdictional in the plainest sense of that
17	word.
18	And that is confirmed in at least
19	three ways. First, the text and structure of
20	Section 2000e-5 demonstrates that the
21	exhaustion requirement is jurisdictional,
22	ensuring that courts do not reach the merits of
23	a claim before it has been presented to the
24	expert agency.
25	JUSTICE GINSBURG: But the expert

agency, unlike the examples that you give of agencies that have adjudicatory authority, the EEOC has no authority to adjudicate. Yes, you have to let the complaint stay there for 180 days, but they don't decide anything, or even if they decide they dismiss your claim, that has no preclusive effect in the court.

8 So it's one thing to say when Congress 9 sets up a scheme where the agency is the 10 equivalent of a court of first instance, it 11 makes a decision and that decision is reviewed. 12 But, in a Title VII case, the court is never 13 reviewing the decision of the EEOC because they 14 don't have any authority to make decisions.

MS. SINZDAK: Well, Justice Ginsburg, I think the important question with respect to jurisdiction is whether the agency has been empowered to attempt to resolve a claim.

I don't think whether the resolution
-- the way that it resolves it, whether -whether -- the way that it's been empowered to
resolve it, whether it's adjudicatory or
non-adversarial, I don't think that matters.
What matters is whether Congress vested
authority in the agency to attempt to resolve

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1 it.

2 And I think, with respect to Title 3 VII, it's correct, the agency is not using 4 adversarial proceedings. And that's because, 5 as we know, Congress intended for employment 6 discrimination claims to be resolved in a 7 non-adversarial manner, to be resolved through 8 conciliation or cooperation or means like that. 9 And so it wanted the agency to have the power to do that. 10 11 And leaving the door open for the 12 adversarial judicial process at the same time 13 would certainly have undercut that intention. 14 And I would also say that the -- that 15 the agency does, in fact, make decisions. Ιt makes a no cause or a cause determination. 16 And it -- it -- it supervises conciliation, and if 17 there's a conciliation, then there is no right 18 19 then to go to the court. So it is --20 JUSTICE GINSBURG: How -- how -- it's 21 also the case that if the EEOC does nothing 22 within 180 days, you can go to court and -- and 23 the agency has done absolutely nothing at all. 24 MS. SINZDAK: That's correct. It's 25 similar to McNeil, another -- another case this

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1 Court had with the Federal Tort Claims Act 2 where --3 JUSTICE GINSBURG: The Federal Tort 4 Claims Act did have a question -- Federal Claim 5 -- Tort Claims Act, you are suing the 6 government, you suing the United States. The 7 United States has sovereign immunity, and it 8 can say you can't sue us, unless -- there's no 9 question about sovereign immunity here. MS. SINZDAK: Oh, there -- there very 10 much is in -- in two important ways. 11 First of 12 all, state sovereign immunity is certainly implicated by Section 2000e-5 because it gives 13 14 parties the right to sue states. 15 But also Section 2000e-5 and the 16 exhaustion requirement we're speaking --17 JUSTICE GINSBURG: Let's -- let's qo 18 back. How did -- how does -- how does Congress 19 give the states the -- give a party the right 20 to sue a state as Congress has waived immunity? 21 MS. SINZDAK: That -- that's correct. 22 But the question is how narrowly to construe 23 the waiver of sovereign immunity. And this Court has repeatedly held that waivers of 24 25 sovereign immunity, both with respect to states

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and the federal government, need to be narrowly
 construed.

3 And I'd also just like to add Section 4 2000e-5 does implicate the federal government's 5 sovereign immunity because Section 2000e-5(f) 6 is expressly incorporated in 2000e-16, which is 7 the provision that allows for parties to sue 8 the federal government. 9 JUSTICE GINSBURG: Yes, but I thought 10 that -- that Title VII waives that immunity.

MS. SINZDAK: It -- it waives the immunity, but, again, the question is how broad a waiver is there. And we know it needs to be narrowly construed.

15 If Congress said, yes, you can bring 16 suit against the federal government, yes, you may bring suits against a state but only after 17 18 you have attempted to resolve this claim 19 through non-adjudicatory methods, then we need 20 to -- to honor Congress's decision about the 21 breadth of the waiver that's at stake in that 22 case.

JUSTICE GINSBURG: Do you think that
Congress meant that if you take a case, Title
VII case, take it to a district court, take it

1 to a court of appeals, and the defendant has 2 said not one word about exhaustion, the 3 defendant loses in district court, loses in the 4 court of appeals and says, a-ha, there was no 5 exhaustion, all bets are off, we win? 6 MS. SINZDAK: I think that is one 7 effect of this being jurisdictional and, yes, 8 Congress very much did say that this is a 9 jurisdictional rule. But I think that that is focusing on 10 one relatively rare instance rather than on the 11 12 reasons that Congress would make a provision 13 like this jurisdictional. 14 JUSTICE GINSBURG: What about the --15 the notion that if Congress wants to make 16 something jurisdictional, of course, it can, like it's made the amount in controversy 17 jurisdictional in diversity cases. But it 18 19 didn't do that here. It didn't say it's 20 jurisdictional. MS. SINZDAK: I -- I think that it 21 I think that the text of Section 2000e-5 22 did. 23 makes very clear that a civil action may be brought only after the EEOC has either 24 dismissed the claim or has -- 180 days have 25

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1 passed. And then Section 2000e-5(f)(3) only 2 confers jurisdiction over actions brought under 3 this subchapter. So I think it's pretty --4 JUSTICE GINSBURG: There are two 5 separate sections. One is the jurisdictional 6 section, that's step 3, and that doesn't say 7 anything at all about exhaustion. Exhaustion 8 is in a separate provision. They're not linked 9 together in one provision. 10 MS. SINZDAK: So they are both in 11 subsection (f). And one is subsection (f)(1), 12 and the other is subsection (f)(3). And they are certainly linked by the -- the specific 13 14 textual clues, which is that subsection (f)(3) 15 says you only have jurisdiction over actions 16 brought under this subchapter. And then subsection (f)(1), in exactly the same terms, 17 18 says a civil action may be brought only after 19 the -- the -- the claims have been dismissed by the EEOC or after a -- after 180 20 21 days have passed. 22 So I think they're --23 JUSTICE GINSBURG: How does that 24 differ from a suit for copyright infringement

25 may not be brought until the copyright is

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1 registered? 2 MS. SINZDAK: Well, there, I don't 3 think there was -- it wasn't in the same 4 provision as the express jurisdictional grant. 5 I also think, you know, we're not just looking 6 at text in isolation. 7 You have to look at text in context. 8 And here we have this very -- this text linking 9 explicitly to the jurisdictional provision, and 10 it's part of an intricate scheme for statutory and judicial review. 11 12 And this Court, in case after case, 13 has said that when Congress sets out --14 JUSTICE GINSBURG: But it's not -- you 15 just used the word "review." It's not judicial 16 review. It's an agency -- and then the court is hearing the case de novo; it is not 17 18 reviewing anything that the agency has done. 19 MS. SINZDAK: Well, that's -- the court has used the term "review" to refer to 20 21 what the agency does. And so I don't think it's using "review" in the sense of there has 22

23 to be a decision in front of it that it's
24 looking at.

And, in fact, we know that because it

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1 used the term --2 JUSTICE GINSBURG: But you used the 3 word "judicial review." So it was the 4 judiciary is reviewing something. But, here, 5 in the -- in a Title VII case, the judiciary is 6 reviewing nothing. MS. SINZDAK: No, it's reviewing the 7 8 actions. It's reviewing the -- the claim of --9 of employment discrimination in the same way 10 that the agency is reviewing the claim of employment discrimination in the first 11 12 instance. 13 JUSTICE GINSBURG: It's adjudicating 14 that claim de novo. There's no -- the word 15 review -- "review" is reviewing something. It isn't -- it's taking a first view. And a first 16 17 view is different from review. MS. SINZDAK: Well, I'm not sure that 18 19 that's how the court has been using it because it refers to administrative review and we all 20 21 agree that the agency is acting in the first instance. So I think it is referring to 22 23 reviewing a claim. 24 And, certainly, the -- the courts are 25 reviewing a claim. But, again, I don't want to

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1 get too -- too bogged down in this. I -- I --2 there is de novo review, but we think, again, 3 that that is because Congress was setting out a 4 scheme that was designed to encourage litigants 5 to first go to this non-adversarial process. 6 JUSTICE GINSBURG: Well, that's 7 satisfied by making it mandatory. This is a 8 mandatory rule. And if the defendant raises 9 it, that's it. 10 But when a defendant doesn't raise it -- let me ask you a question about the premises 11 of our system. Ordinarily, we follow, as civil 12 law courts don't, the principle of party 13 14 presentation. 15 So it's left to parties to frame their 16 complaint, frame their answer, and the Court doesn't frame the questions and you don't frame 17 18 the defenses. So what you're suggesting really 19 runs up against that main theme that it's up to 20 the parties to state their claims, up to the 21 defendant to raise objections, defenses? 22 MS. SINZDAK: I think that in John R. 23 Sand, the Court recognized that jurisdictional rules don't function in that way and they don't 24 25 function in that way because they are generally

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1 intended to vindicate system-related goals. 2 And -- and it's very clear here that -- that titles having an exhaustion requirement 3 4 is vindicating system-related goals. As we were discussing, it's helping to protect 5 6 sovereign immunity. It's also ensuring that 7 the EEOC has its central role in the employment 8 discrimination context. 9 And it can't have that role if 10 litigants are able to sort of do side agreements and just evade the EEOC entirely. 11 12 JUSTICE GINSBURG: What do we do with one other facet of Title VII? Title VII is 13 14 written for employees to state their 15 grievances, and in many of these cases, these 16 people are not represented at all or, if they are represented, it's not counsel of your 17 18 quality. 19 Is that a factor that should be taken 20 into account? MS. SINZDAK: I think that in 21 22 enforcing the exhaustion requirement, courts 23 have taken that into account. And it's sort of similar to the notice of appeal setting, where 24 25 a notice of appeal is a jurisdictional

14

1 requirement.

2 But this Court has been relatively 3 flexible in order to recognize that sometimes 4 there might be difficulty in satisfying that 5 and to ensure that people do have their day in 6 court. 7 And so I think if you look at the 8 cases --9 CHIEF JUSTICE ROBERTS: Well, no. Ι 10 mean, maybe we've been flexible in regarding some things as notices of appeal when they're 11 12 not phrased as such, but that's the end of it. 13 We've never been -- that's the whole point. 14 It's jurisdictional. You don't get any slack,

15 no matter how equitable it may seem to give you 16 some.

MS. SINZDAK: That's exactly right, Mr. Chief Justice. And I wouldn't disagree with that. But -- but it is that flexibility in what is regarded as a notice of appeal that I think has translated into the EEOC context, where there is some flexibility in what is regarded as an adequate charge.

But what there is no flexibility on,and I would agree with you completely, because

1 this is a jurisdictional requirement, there
2 isn't flexibility on whether a charge is
3 required.

And -- and -- and, again, I think
there -- there's multiple reasons for that.
There's a long line --

JUSTICE ALITO: But you place some considerable reliance on 2000e-5(f)(3), the jurisdictional provision for Title VII, but what if that didn't exist, so that a plaintiff would have to rely solely on 1331? Would you have the same argument?

13 MS. SINZDAK: It would be a different 14 argument, guite candidly, because we do have a 15 textual link here between the exhaustion 16 requirement and explicit grant of jurisdiction. But -- but we know that when Title VII 17 was first enacted in 1964, this was it, because 18 19 2000e-5(f)(3) was it, because 1331 had this 20 amount in controversy requirement, and so 21 Congress created a special grant of 22 jurisdiction. It textually linked that to the exhaustion requirement. And I don't think this 23 24 Court has ever held that 1331 can sort of be 25 used as a -- a get out of jail free card.

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1 In -- you know, the general grant does 2 not apply where a specific remedial scheme has -- has demonstrated that it isn't available. 3 4 And we see that in Thunder Basin. We see that 5 in Free Enterprise Fund and in Elgin --6 JUSTICE GINSBURG: But since it --7 MS. SINZDAK: -- where the Court is 8 looking at whether that general grant of 9 jurisdiction under 1331 has been displaced by a 10 specific remedial scheme and that's --11 JUSTICE GINSBURG: When -- when 12 Congress does that, as it did in Social Security Act, so we have 405 and it says 1331 13 14 is not available. So, when Congress doesn't 15 want 30 -- 1331 to be there, it says so. MS. SINZDAK: I -- I don't think 16 that's always true. In fact, again, in Thunder 17 18 Basin, it was facially silent, and yet this 19 Court held that 1331 was displaced. 20 Even in some of this Court's Social Security Act cases, it has said: Well, this 21 22 particular claim isn't really covered by these 23 explicit provisions, but we don't think that 24 Congress would have wanted claimants to be able 25 to evade this remedial scheme by using 1331.

1 And that's exactly, again, what we 2 have -- what we have here. And as we note, 3 it's not just these more recent cases but cases 4 dating back over 100 years, that --5 JUSTICE GINSBURG: Yes, 100 years when 6 courts use expressions like mandatory and 7 jurisdictional. And, as you know, this Court has said that courts have used the word 8 9 "jurisdictional" to mean many things, too many 10 things. 11 And this Court tried to bring some 12 order into a division between claim processing 13 rules and jurisdictional rules. And your 14 argument seems to want us to back away from 15 that division. 16 MS. SINZDAK: No, absolutely not. Our argument is that this type of exhaustion 17 18 requirement fundamentally affects the power of 19 the courts because it -- Congress, rather than 20 vesting power in the courts, Congress vests 21 power in the administrative agents --

JUSTICE SOTOMAYOR: Can you imagine any administrative scheme that would not be jurisdictional? You seem to imply that we were wrong in -- in Reed Elsevier and in Homer City

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1	because, in both of them, there were
2	administrative processes and yet we didn't find
3	their preconditions to be jurisdictional.
4	So tell me, I think your it's a new
5	rule, I have never seen us say it, if you have
б	to exhaust, it's always jurisdictional if you
7	don't? And why does Congress bother writing
8	into statutes something like they did in
9	Thunder Basin, where they said, if you don't
10	raise something before the agency, the Court
11	can't consider it? Why bother with that?
12	MS. SINZDAK: Sure.
13	JUSTICE SOTOMAYOR: That's what you're
14	saying now.
15	MS. SINZDAK: No, we're we're
16	absolutely not saying that. We're not saying
17	that every single type of exhaustion
18	requirement out there, whether it's about
19	notice-and-comment rulemaking or state
20	administrative procedures or whether it's a
21	statute that makes clear that the
22	administrative scheme is not exclusive, any of
23	that, no, no, you got to you know, the
24	exhaustion requirement is jurisdictional.
25	No, we're saying that when Congress

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1 sets out a scheme that is clearly designed to 2 be the exclusive scheme for individualized 3 resolution of claims, that this Court has held 4 -- and this isn't a new rule -- this Court has repeatedly held that, when it does that, it 5 6 doesn't leave the courtroom door open so that 7 litigants may evade that careful scheme by 8 going directly to the courts. 9 And, again, that's not a new rule. 10 That's what this Court has been saying since as far as back as -- as Texas and Pacific Railway 11 in 1907. It was saying it about the NLRA, 12 13 which is --14 JUSTICE GINSBURG: The NLRA is an adjudicatory body, and then it goes to a court 15 16 of appeals that reviews the decision. And this is just -- the EEOC doesn't have that kind of 17 18 authority. 19 The EEOC can't adjudicate anything. 20 It can't make any findings. It can resolve 21 something only if the parties, both sides, 22 agree to it. 23 MS. SINZDAK: So, Justice Ginsburg, 24 the NLRA has been repeatedly looked to as the model for Title -- Title VII's remedial 25

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1 provisions. 2 And, in fact, in Zipes, this Court 3 held that the NLRA's timely filing requirement 4 was not jurisdictional, and that was good 5 evidence for why Title VII's timely filing 6 requirement should be non-jurisdictional. 7 Now that was -- you know, the NLRA 8 scheme there was adjudicative, but the Court 9 didn't think that difference was -- was 10 significant. And it's not significant in this case 11 12 either because what is important is that Congress empowered the agency, not the courts, 13 to address the -- to address Title VII claims 14 15 in the first instance. JUSTICE GINSBURG: But not to resolve 16 it, not to resolve it. And that's an enormous 17 18 difference between Social Security 19 Administration or the NLRB. 20 They decide a case in the first 21 instance. A court then reviews it. Here, the EEOC can't decide anything. 22 23 MS. SINZDAK: I don't think decision 24 can be key, and that's because of this Court's 25 decision in Elgin.

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In Elgin, the Court acknowledged that it was very possible that the agency had no authority to decide the constitutional claims at stake there. But, nonetheless, the Court held that it was a jurisdictional rule --JUSTICE GINSBURG: But you had to go there first, even though you might have a constitutional question, and the court carefully explained that the court might -- the case might drop out on another ground and, therefore, the court would never have to get to the constitutional question. So, Social Security, you have to go

15 before the agency first, you may be -- you may 16 have a constitutional question, but it may be 17 that you don't qualify because of one of the 18 statutory grounds. And that's what the agency 19 can adjudicate and must do before the court can 20 consider the case.

21 MS. SINZDAK: And -- and that's 22 exactly right. What this Court was concerned 23 with was the fact that a case or a claim might 24 be fully resolved before the judicial -- the 25 judicial branch had to weigh in. And that's

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1 exactly what we have here.

2 Congress created a scheme that limited 3 the jurisdiction of the -- of the judiciary by 4 giving authority first to an agency that would 5 resolve some of the claims so that the 6 judiciary never has to pass on it. 7 JUSTICE GINSBURG: Not resolve any 8 legal question, nothing, it -- it can only be 9 -- has a conciliation role. It can do that, 10 but to conciliate, both parties have to say 11 yes. It can't decide any disputed issue. 12 You would agree to that? The EEOC has no 13 14 authority to decide an issue that the parties 15 dispute. There's de novo review 16 MS. SINZDAK: of what the EEOC does decide, which is cause or 17 18 no cause. I would also say it's performing a 19 very effective funneling function regardless. I think that -- that in -- in around -- in 20 21 2016, the EEOC had about 70,000 claims, and 22 Lexis estimates that there are about 7,000 EEOC 23 suits. 24 So it is performing a function --

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JUSTICE KAVANAUGH: As a --

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MS. SINZDAK: -- exactly the funneling
 function.

3 JUSTICE KAVANAUGH: -- as a -- as a 4 practical matter, that will still be true so 5 long as defendants raise the argument that 6 something has not been properly exhausted. And 7 on the practical implications, wouldn't your 8 rule put a new burden on courts to look through 9 the record to make sure each claim was specifically exhausted, and isn't that very 10 fact-bound, and why shouldn't the courts be 11 12 able to rely on defendants to do that in the 13 first instance, rather than doing it themselves 14 in each and every case? 15 MS. SINZDAK: I think because the incentives of the -- that a defendant has 16 aren't precisely aligned with the 17 18 system-related goals that the exhaustion 19 requirement is vindicating. 20 And so there are going to be instances 21 where defendants aren't raising the exhaustion 22 requirement. There are actually lots of cases 23 where courts -- in the circuits where it is 24 jurisdictional have to address it sua sponte. 25 And Congress intended --

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1	JUSTICE GINSBURG: Why would a
2	defendant not want to raise an objection that
3	results in dismissal of the case?
4	MS. SINZDAK: It won't always result
5	well, it will result in dismissal of the
6	case, but it may be that the the employee
7	might be able to go back to the to the EEOC,
8	exhaust, and then return to court.
9	So, in that instance, of course
10	JUSTICE GINSBURG: Isn't there a time
11	problem with doing that?
12	MS. SINZDAK: There may or may not be.
13	If this system is functioning effectively such
14	that when, for example, a pro se litigant files
15	a suit without having gone to the EEOC, that
16	that it will be promptly dismissed, there's 180
17	days and there's equitable tolling. So so
18	so and in some circumstances, there's
19	actually 300 days.
20	So the idea that this will just
21	that every time if if an employer raises it
22	right at the outset that it will just get rid
23	of the suit
24	CHIEF JUSTICE ROBERTS: Well, but the
25	EEOC procedure is likely to be a real waste of

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1	time. I mean, here, the parties have been
2	litigating for how long?
3	MS. SINZDAK: At least five years.
4	CHIEF JUSTICE ROBERTS: Five years.
5	MS. SINZDAK: Although, actually
6	CHIEF JUSTICE ROBERTS: And now and
7	now you would have them assuming you can get
8	through the time barriers, you would have them
9	go back and say, well, let's go back to the
10	EEOC and see if we can work this thing out.
11	There have been there's been a lot
12	of time and energy invested in trying to win as
13	opposed to resolve it. There'd be no
14	there'd be no real purpose in sending it back
15	to the EEOC in this case.
16	MS. SINZDAK: Well, I think this is a
17	marginal case. And, of course, the question is
18	what Congress intended, not what might happen
19	in this specific case, which is very rare as
20	far as we can tell. There are only two other
21	examples that Respondents have been able to
22	point to where anything like this has happened.
23	One's from 1982 and one's from 2000.
24	So this isn't something that's coming
25	up all the time. But even if it were, the

1 question is, what did Congress dictate? Did 2 Congress say that this was jurisdictional? 3 And we've pointed out that the text, 4 the structure, the purposes, all demonstrate 5 that it did. 6 CHIEF JUSTICE ROBERTS: If it had 7 passed this legislation after 2006, it seems to 8 be about the time we adopted a much more 9 focused understanding of jurisdictional, 10 requiring a pretty clear statement, you really wouldn't have much of a case, would you? 11 MS. SINZDAK: I -- I don't think 12 that's correct. Again, I think there is --13 14 that the text makes it pretty clear. I also 15 think that from 2006 on, the Court has 16 regularly recognized that the clear statement 17 rule applies to the extent it accurately 18 reflects congressional intent, which means that 19 when a long line of this Court's precedent, 20 undisturbed by Congress, treats a particular 21 type of statutory condition as jurisdictional, 22 the Court will presume that it follows suit. 23 And as we've pointed to, there is a 24 long line of this Court's precedent that

25 establishes that when Congress creates an

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1 intricate scheme of administrative and then 2 judicial review, it generally intends that to 3 be --4 JUSTICE KAVANAUGH: How do you 5 distinguish --6 MS. SINZDAK: -- exclusive. 7 JUSTICE KAVANAUGH: Sorry. How do you 8 distinguish EME Homer on that point? 9 MS. SINZDAK: EME Homer is about 10 notice and comment review. It isn't about --11 JUSTICE KAVANAUGH: But it's about a 12 scheme designed to make sure that the claim or 13 the issue -- I shouldn't say claim -- the issue 14 is first raised to the agency, with the idea 15 that the agency would then take that into 16 account. MS. SINZDAK: I think, in -- in this 17 18 case and in all of the examples we've cited, 19 what we're talking about in terms of 20 administrative review provisions is 21 individualized claim resolution provisions. 22 So, once you have a claim, what do you -- where 23 do you go? Do you need to go to the agency, or 24 can you go directly to the courts? 25 EME Homer wasn't about that. It was

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1 about notice-and-comment review. First of all, 2 that's not individualized. You don't actually 3 even have a claim --4 JUSTICE KAVANAUGH: So --5 MS. SINZDAK: -- at the point --6 JUSTICE KAVANAUGH: So, when it is 7 individualized, to pick up on Justice 8 Sotomayor's question from earlier, are you 9 saying that we should usually presume that 10 Congress intended an administrative exhaustion scheme to be jurisdictional? 11 12 MS. SINZDAK: The question is congressional intent. That -- that is what 13 14 this Court needs to look at. 15 Now, yes --16 JUSTICE KAVANAUGH: But how -- how would we look at that? In a scheme --17 18 individualized claim proceeding, administrative 19 exhaustion requirement, that's all we know. 20 What else do we need to know? MS. SINZDAK: Well, as the Court said 21 22 in -- in Elgin, you look at the text, you look 23 at the structure, and you look at the purposes. So you look at the text to see how intricate is 24 25 this scheme and how comprehensive is it. Does

1 it seem to actually cover all claims, or does 2 it seem pretty isolated? 3 I think Brown versus Community -- or, 4 pardon me, Block versus Community Nutrition is 5 an example of that. There, the scheme really 6 wasn't comprehensive, and so the Court didn't 7 find that it precluded any -- any direct avenue 8 to the district courts. 9 So, after you look at the -- the text, 10 you look at the structure. Again -- and there's a little bit of overlap here. 11 It's 12 basically is there a detailed administrative review scheme and then -- that culminates in 13 14 judicial review. Again, you have that here. 15 And then you look at the purposes. Is 16 this the sort of scheme that would best be forwarded by have -- channeling all things to 17 18 the administrative agency in the first 19 instance? And, again, that's certainly the 20 case here. 21 And if I could reserve the remainder 22 of my time? 23 CHIEF JUSTICE ROBERTS: Thank you, 24 counsel. 25 Mr. Melkonian.

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ORAL ARGUMENT OF RAFFI MELKONIAN ON BEHALF OF THE RESPONDENT MR. MELKONIAN: Mr. Chief Justice, and 4 may it please the Court: This Court has held numerous times in Zipes and Arbaugh and in many other cases that statutory limitations are not jurisdictional, unless this -- unless Congress has said they are jurisdictional in a clear statement. That is meant to be a readily administrable bright-line rule. There was 11 12 no --CHIEF JUSTICE ROBERTS: Well, the 14 statute, of course, was passed before that.

15 MR. MELKONIAN: Yes, Your Honor. But 16 I think that the Arbaugh clear statement rule is intended to be the best way to discern 17 18 congressional intent. That's what this Court 19 said in Henderson. And when you're talking 20 about a situation where Congress might have 21 been doing something very unusual, that is, 22 imbuing a statute with jurisdictional status, 23 with all the harsh consequences that come with 24 jurisdictional status, the waste of time, the 25 burden that this would place on the district

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1	courts, I think it's right that the Court
2	should demand a clear statement from Congress
3	before saying that Congress meant to make a
4	jurisdictional rule.
5	And you do that in other kinds of
6	contexts with these kinds of consequences as
7	well, such as extraterritorial
8	extraterritorial application, things like that.
9	You ask for a clear statement because the
10	consequences could be very severe.
11	And then, if I could answer your
12	question sort of jurisprudentially directly,
13	you have held that Arbaugh, the clear statement
14	rule, applies to preexisting statutes again and
15	again. The only
16	JUSTICE GINSBURG: That was Title VII.
17	MR. MELKONIAN: Excuse me, Your Honor?
18	JUSTICE GINSBURG: Arbaugh was a Title
19	VII case.
20	MR. MELKONIAN: Arbaugh was a Title
21	VII case, and then every single case other than
22	Patchak was applied the clear statement rule
23	to a statute that preexisted Arbaugh.
24	CHIEF JUSTICE ROBERTS: Well, how does
25	that make sense? I mean, the idea is of the

clear statement rule is we're going to look for
 a clear statement because of this, starting
 now. I mean, everybody knows it was a real
 mess before then.

5 But you can't sort of say that 6 Congress was on notice that it had to give a 7 clear statement prior to the time that we said 8 that.

9 MR. MELKONIAN: No, Your Honor, and 10 that's where I come back to my first answer, which is that this is the way of discerning 11 12 congressional intent in these very important cases where the question we're asking is, is 13 14 this of the high level that it would have to be 15 to be a jurisdictional status? So are we going 16 to want to impose these kind of costs on the 17 court and on the parties and litigants, and do 18 we want to give Congress clear guidance on what they're supposed to be doing in the future when 19 20 they're deciding what to do with statutes, 21 whether to amend them or -- or whatever else? 22 JUSTICE SOTOMAYOR: The reality is 23 that I doubt Congress even thinks about or in 24 the past has thought about this issue. 25 MR. MELKONIAN: That's probably right,

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1 Your Honor. 2 JUSTICE SOTOMAYOR: And so in the 3 absence of the clear statement rule is intended 4 to give us guideposts of how to discern that. 5 MR. MELKONIAN: I agree with that, 6 Your Honor. 7 JUSTICE SOTOMAYOR: And -- because if 8 there's clear history, as there was in whether 9 an appellate rule is jurisdictional or not, we 10 follow the history. 11 MR. MELKONIAN: That's right. And I 12 think that's a way of discerning clear -- a 13 clear statement from Congress. 14 JUSTICE SOTOMAYOR: But there's no 15 history here. 16 MR. MELKONIAN: There's absolutely no 17 history here, Your Honor. Those cases that you're talking about, I think it is Bowles and 18 19 John R. Sand & Gravel, those are cases where 20 there's 100 years of direct precedent of this 21 Court and of all the courts of appeals. 22 There is nothing like that in this 23 case. In fact, the only cases we have are 24 Zipes and Arbaugh, essentially, and those are 25 cases that cut in our favor.

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1	Every other case that this Court has
2	analyzed jurisdictional rules in, where the
3	scheme is similar to us, you have to do
4	something before you go to district court.
5	Those have looked exactly like our
6	case in terms of the final resolution. This
7	Court has held that they are not
8	jurisdictional.
9	So EME Homer City, Union Pacific, Mach
10	Mining, all those cases, Henderson, Reed
11	Elsevier, all of them come out our way.
12	And in some of those the language and
13	the text of the statute is better for our
14	friends on the other side than this statute
15	here.
16	CHIEF JUSTICE ROBERTS: Well, what
17	about Elgin?
18	MR. MELKONIAN: Elgin, Your Honor, I
19	think handles a very different set of
20	circumstances. As Justice Ginsburg was saying,
21	those are cases where essentially jurisdiction
22	has been stripped from the district courts.
23	An administrative agency adjudicates
24	the case, and then there is judicial review
25	that's funneled to a particular court of appeal

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or a district court -- it doesn't matter -- but 1 2 it is funneled to a court. 3 And those are completely different. 4 The EEOC doesn't adjudicate anything. There's 5 no review. There's no administrative record. 6 There's no risk of sort of differing -- some of 7 the cases our friends cite in their reply brief are about inconsistency and tariffs across the 8 9 country, and there's nothing like that here 10 either. So I think the Elgin line, the Thunder 11 12 Basin, all those cases address a very different 13 set of --14 JUSTICE KAGAN: Are --15 MR. MELKONIAN: -- circumstances. 16 JUSTICE KAGAN: Are you suggesting that if the EEOC did resolve these kinds of 17 18 claims, that there would be a different answer? 19 MR. MELKONIAN: I -- I'm not saying 20 that if it resolved it in the way of a normal 21 exhaustion requirement, the way we were talking 22 about in Woodford v. Ngo, but what I'm saying 23 is that if you designed an EEOC structure that looked like Thunder Basin or Elgin, so that 24 25 where, you know, you get counsel, you go to the

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1 court -- you go to the administrative agency, 2 there's no district court jurisdiction at all at the first instance, then you get a judicial 3 4 administrative record, you go up to court of 5 appeal. Congress could do that, if they 6 wanted, but they haven't chosen to do that. 7 JUSTICE KAGAN: Well, I guess what I'm 8 asking is suppose that everything in this 9 statutory structure is exactly the same, except 10 that the EEOC had actually been given the ability to resolve claims rather than simply to 11 12 assist in the mediation of claims. 13 MR. MELKONIAN: Right. And I think 14 the case comes out the same way, because then I think it looks still like just an exhaustion 15 16 requirement, not like a Thunder Basin/Elgin 17 line case. 18 And I don't think, as our friends 19 argue, that there is an exception from the 20 Arbaugh clear statement rule for 21 exhaustion-type schemes. I think --22 JUSTICE KAVANAUGH: Well, I -- I think 23 they're arguing that even if there isn't one, that we should recognize one or create one, an 24 25 -- an exception for administrative exhaustion

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1 schemes. 2 And so can you just take that 3 directly, why that would be a bad idea? 4 MR. MELKONIAN: Yes, Your Honor. Ι 5 think it would be a bad idea for several 6 reasons. Let me start with the burden that it 7 would impose on the district courts in cases 8 like this one. 9 You'd be asking district courts in 10 every single Title VII case at the beginning of the case to look into not whether there was a 11 12 charge filed or not, that's relatively easy, courts could probably do that, but into whether 13 14 the charge captures the things that are in the 15 complaint. 16 And not just captures them, but consistent with the rules that the EEOC has and 17 district courts have, that it could also be 18 19 reasonably related to what's in the charge, not 20 just that it's directly what's in the charge. So district courts would have to 21 22 engage in this extremely articulated analysis 23 at the beginning of every single case, sua sponte because they have to assure themselves 24 of their federal jurisdiction. 25

1 That's an extraordinary burden to 2 place on the district courts and on the 3 parties, such as in our case, where we've been 4 litigating for five years. And it would wipe 5 out two grounds of appeals to the Fifth 6 Circuit, all kinds of other litigation that we've been doing below. Well --7 8 JUSTICE GINSBURG: But only for one 9 party, not the defendant. MR. MELKONIAN: I'm sorry, Your Honor. 10 JUSTICE GINSBURG: You said it would 11 12 be a burden on the parties, meaning a burden on 13 the plaintiff? 14 MR. MELKONIAN: It would be a burden on the plaintiff, yes, Your Honor. It wouldn't 15 necessarily be a burden on the defendant 16 because they would be able to get out of this 17 18 lawsuit, that's true. 19 Let me turn a little bit to the -- the 20 incentives plaintiffs and defendants have to 21 bring up this defense because my friend talked

I don't understand this argument that defendants don't have an incentive to bring up the charge -- the lack of a charge or the --

about that a little bit earlier.

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1 the fact that the charge isn't good enough. As 2 we noted in our brief, we point out a defense 3 manual for Title VII cases. It says bring up 4 these defenses immediately. 5 And that's because most of the time 6 you will be able to get rid of the claim. Ιt 7 is a mandatory requirement. If the charge 8 isn't good enough, the claim will be dismissed. 9 And the -- there is not enough time in 10 most cases for the plaintiff to go back to the 11 agency, get an amended charge, and come back to the district court. The 300-day period will 12 13 have run. 14 And so it -- in most cases, it is effectively a win on the merits to get this 15 16 case out on the lack of the charge requirement. 17 CHIEF JUSTICE ROBERTS: Would --18 JUSTICE ALITO: Do you think that --19 CHIEF JUSTICE ROBERTS: Go ahead. 20 JUSTICE ALITO: -- if it's -- if it's 21 just a mandatory claims processing rule, do you 22 think that a district court would nevertheless 23 have discretion to raise it sua sponte? 24 MR. MELKONIAN: I think so under Day 25 v. McDonough, Your Honor, with the one caveat

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1	that it's it's different than Day v.
2	McDonough in that that was just a time
3	calculation. So that's easy to do.
4	As I was just talking about a couple
5	minutes ago, this is quite complicated because
6	there might have to be discovery, you might
7	have to figure out whether the charge could
8	grow into the complaint and that sort of thing.
9	So we I would urge district courts
10	not to do it in general because it's dangerous,
11	but I think they have the discretion to do it.
12	And then it is just an abuse of discretion
13	analysis on appeal, if you get there.
14	If I could just turn to the I
15	we've been talking about incentives defendants
16	have to raise the charge requirement as a
17	defense, but plaintiffs also have extremely
18	strong incentives to go to the EEOC.
19	First of all, of course, they'll lose
20	if they don't. So that's a big problem. But,
21	more to the point, you want to have that chance
22	that the EEOC will come into your case on your
23	side. That's an extremely powerful tool in the
24	hands of plaintiffs.
25	There is a conciliation process that

1 could be extremely useful for plaintiffs to 2 use. And there's also mediation, a more 3 informal process that the EEOC has to help get 4 you resolution. 5 So I think the incentives for 6 plaintiffs are even more powerful than 7 incentives for defendants to comply with the 8 EEOC --9 JUSTICE ALITO: Do you have any idea 10 what percentage of the charges filed with the EEOC are resolved through a conciliation and, 11 12 therefore, never have to be litigated? 13 MR. MELKONIAN: I don't have the exact 14 number, Your Honor. I know it's very low. I 15 think most cases don't get resolved. 16 I think maybe the United States might have that number exactly, but it's -- it's --17 18 unless my memory is serving me wrong, I think 19 it's under 20 percent. 20 JUSTICE GINSBURG: Under what? 21 MR. MELKONIAN: Twenty percent, Your 22 Honor. 23 So I think the incentives plaintiffs 24 have are very strong for going to the EEOC. 25 And --

1	JUSTICE ALITO: Well, if it's even
2	20 percent, wouldn't it be important from the
3	perspective of the courts to require the
4	plaintiffs to do that? That's 20 percent or
5	15 percent fewer cases that have to be
6	litigated?
7	MR. MELKONIAN: It's absolutely
8	important, Your Honor. And our position
9	throughout this litigation has been the charge
10	requirement is crucial to the way Title VII
11	works. And we don't dispute that.
12	In most cases, if you don't comply
13	with a Title VII requirement, you're going to
14	lose. And that's the way the statute should
15	work.
16	But it's just not a jurisdictional
17	bar. It doesn't comply with the clear
18	statement rule set forth in Arbaugh for the
19	the high level of burden you have to get to for
20	it to be a jurisdictional rule.
21	And and one other point on these
22	incentives, we have been running a a natural
23	experiment across this country on whether our
24	rule works or not. As our friends on the other
25	side concede, there's at least eight circuits

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1 that have already adopted our rule. 2 And there is no indication, not a 3 shred of empirical evidence that our friends on 4 the other side can point to that there is a 5 problem with our rule or how it is working in 6 the district courts or in the courts of appeal. 7 And, indeed, the EEOC is with us in 8 this case through the United States, and they 9 don't think that their prerogatives are being 10 \_ \_ 11 CHIEF JUSTICE ROBERTS: What -- what 12 would that --13 MR. MELKONIAN: -- jeopardized. 14 CHIEF JUSTICE ROBERTS: What sort of 15 empirical evidence are you -- are you looking 16 for? 17 MR. MELKONIAN: It would be very hard 18 to -- to find it, Your Honor. I -- I concede 19 that. 20 CHIEF JUSTICE ROBERTS: I know. We --21 we get this argument quite a bit. The rule's 22 been here --23 MR. MELKONIAN: Yup. 24 CHIEF JUSTICE ROBERTS: -- and, look, there's no great crisis there, there's no great 25

crisis there, but it's -- it's hard when you
 think about it to try to think about how that
 evidence would be compiled.

4 MR. MELKONIAN: Absolutely. And I 5 have two answers to that to try to get there. 6 One is that I think the EEOC has the empirical 7 tools to observe what's happening in the 8 district courts, to make sure the same number 9 of charges are going forward, there's not some 10 sudden drop-off of charges because suddenly the rule is non-jurisdictional. So I think they 11 12 could see if something was happening.

13 It's their world. And I think they14 would be able to notice.

15 The other thing is it's true that, in 16 general, it -- it's hard for it to bubble up because these kind of cases are rare. But I 17 18 still see you -- think you would see some evidence in the courts of appeals as people 19 20 come with these claims that they haven't gone 21 to the EEOC at all on. And then the court of 22 appeals starts saying, well, why -- why do we have this case at all? 23

24 And there's just not a single case 25 that looks like that. The cases that there are

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all look like this case, where there is a charge, the question is, is this charge sufficient? Is there enough in the charge to get you to the allegations? CHIEF JUSTICE ROBERTS: You -- you've looked and there -- and you -- and there's not a single case like that? MR. MELKONIAN: We haven't found one, and maybe I'm misremembering right now, but I don't think we found a case that is like what I'm describing. CHIEF JUSTICE ROBERTS: Well, I quess they -- probably most of them would be unreported in the first place, I would assume. MR. MELKONIAN: Probably so, Your Honor, if they were -- if there was no charge and they were coming up to the court of appeals. JUSTICE SOTOMAYOR: How many cases have you find like this one where there's been a finding by a circuit court that a party has basically waived the mandatory rule? MR. MELKONIAN: It -- it's not that many, but there are some. We have them in our

25 brief in the footnotes from the courts of

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1	appeals. But also when I'm think about that
2	question, I also think Zipes and Arbaugh are
3	this kind of case. And so it has come up
4	before in this Court.
5	I I think it's Zipes that was
6	actually brought up after trial, and so that
7	just shows you that this kind of problem could
8	be very harmful to the way the courts work.
9	Well, if there are no further
10	questions, I could leave this Court with one
11	final thought, which is that this Court has
12	done a lot of work in the last 15 years to
13	clear up the profligate use of the word
14	"jurisdictional."
15	Our friends on the other side want you
16	to blur that line again and reinject
17	uncertainty back into these cases. We urge you
18	not to do that and affirm the judgment below.
19	Thank you.
20	CHIEF JUSTICE ROBERTS: Thank you,
21	counsel.
22	Mr. Bond.
23	
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1 ORAL ARGUMENT OF JONATHAN C. BOND 2 FOR THE UNITED STATES, AS AMICUS CURIAE, 3 IN SUPPORT OF THE RESPONDENT 4 MR. BOND: Mr. Chief Justice, and may 5 it please the Court: 6 Arbaugh's bright-line rule resolves 7 this case. Title VII's charge filing 8 requirement is not jurisdictional because 9 Congress did not clearly state that it is. 10 Now, Petitioner's primary submission that the Court should manufacture exceptions to 11 12 that clear statement rule based on inapposite 13 doctrines. But the Court should reject that for several reasons: 14 15 First, those exceptions do not exist 16 in this Court's case law. Second, adopting them would require blurring Arbaugh's bright 17 line and overturning decisions of this Court. 18 19 And, third, as I think has come up already, 20 those exceptions would not apply here, in any 21 event. Now I'd like to touch on four 22 23 particular points, but first, Justice Alito, 24 the number you're looking for is approximately 25 one percent per year of -- of cases that are

successfully conciliated. The cite is in note
 of our brief. The Commission's web site
 details these statistics.

4 Now, the four topics I'd like to cover are, first, Petitioner's exception for 5 6 exhaustion requirements. Second, the provision 7 in e-16 for federal employer discrimination 8 claims. Third, the argument that this 9 requirement serves too important a purpose to be waivable. And, finally, the analogy to 10 Thunder Basin. 11

12 Now turning first to the exhaustion exception that Petitioner proposes, as I think 13 14 has already been explored this morning, that 15 exception would not apply to Title VII's charge 16 filing requirement in any event, because as 17 this Court already recognized in Woodford 18 versus Ngo in rejecting this same analogy, it is not in any sense an exhaustion requirement. 19 20 You're not asking the agency for a decision. 21 It is not deciding anything on, again, the 22 non-federal employer side; 16 is a little bit different as I'll get to. 23

And the analogy to the NLRA actuallyworks against Petitioner because, as the Court

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1 noted in Zipes and Petitioner acknowledges, the 2 NLRA was a model for much of Title VII's 3 remedial scheme, but Congress did not copy over 4 the critical feature of the NLRA, which is in 5 160(e) of Title 29, which is the provision that 6 grants jurisdiction over enforcement actions, 7 and a corresponding provision grants review to 8 the court -- jurisdiction to review decisions 9 by the board to the court of appeals. And it 10 goes on to say a court may not consider an issue not presented to the board. 11 That's the 12 provision on the basis of which this Court has held that there's no jurisdiction over issues 13 14 not presented to the board. 15 But even if you thought this fell within the ambit of some exhaustion 16 requirement, this Court's cases do not 17 18 recognize that kind of exception. Petitioner 19 points to no case that has held that. And none 20 of Petitioner's case before Arbaugh recognize 21 any kind of bright-line rule or even 22 presumption that those requirements are 23 jurisdictional. 24 JUSTICE ALITO: Well, what if there

25 were an exhaustion requirement but the -- the

1 agency's decision -- but the -- the losing 2 party before the agency could get a de novo 3 lawsuit in district court? 4 Under those circumstances, wouldn't it -- wouldn't the inference that Congress made 5 6 that jurisdictional be a reasonable one? 7 MR. BOND: Not on those -- on those 8 facts standing alone, but Congress certainly 9 could and in some statutes has made it 10 jurisdictional through the language it's enacted. A good example is actually the FTCA, 11 12 the Federal Tort Claims Act, which this Court addressed in McNeil, which is a pre-Arbaugh 13 14 case but we think was correct under Arbaugh, 15 because the jurisdictional grant in Section 16 1346(b) begins by saying, "subject to the provisions of Chapter 171 of Title 28," which 17 18 includes the presentment requirement that 19 McNeil addressed.

20 So that satisfies the clear statement 21 rule because there is an express link between 22 the jurisdictional grant and the presentment 23 requirement, on top of which it involves only 24 claims that, as Justice Ginsburg noted, 25 implicate federal sovereign immunity, which is

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1	jurisdictional on its own.
2	JUSTICE GORSUCH: Mr. Bond?
3	MR. BOND: Mm-hmm?
4	JUSTICE GORSUCH: What do you say to
5	the Chief Justice's concern that this is a
б	statute that predates Arbaugh? Now, I know
7	you're going to tell me immediately that we've
8	done this before and applied Arbaugh
9	retroactively to statutes preexisting Arbaugh.
10	But besides that argument, what
11	rationale do you think supports us doing so?
12	MR. BOND: So I would point to the
13	rationale that Arbaugh gave. It was about
14	reflecting or ascertaining Congress's intent.
15	Arbaugh went through, before announcing the
16	clear statement rule, the severe consequences
17	of deeming a requirement jurisdictional,
18	including that it means courts must raise this
19	sua sponte; it can wipe out litigation years
20	after the fact or up on appeal; it means
21	judges, instead of juries, are deciding these
22	questions in the typical case. And for all of
23	those reasons, given those consequences, courts
24	should not assume that Congress does that
25	lightly or inadvertently.

1 And as Mr. Melkonian suggested, it's 2 the same with other presumptions that this 3 Court applies that are interpretive 4 presumptions aimed at getting to Congress's 5 intent with --6 JUSTICE GORSUCH: Even if we apply our 7 interpretive presumptions and all judicial 8 decisions retroactively, I'm mean that's --9 that's our consistent rule or it's supposed to be, right? 10 MR. BOND: We -- we certainly do apply 11 12 them to existing statutes, as you do in the 13 extraterritoriality context. 14 JUSTICE GORSUCH: Well, our decisions 15 are normally retroactive in their application, 16 not merely prospective. 17 MR. BOND: Exactly right. That's 18 right. So an additional virtue of Arbaugh is 19 that it's -- as the Court said, leaves the ball 20 in Congress's court by creating a clear 21 baseline, but it's certainly not the case that 22 that presumption or any other applies only 23 going forward. 24 And I think the problem that if you

25 created an exhaustion exception now is that you

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1 would blur Arbaugh's bright-line rule and you 2 would not only create uncertainty for lower 3 courts about exactly how this rule applies, but 4 you'd also make it more difficult for Congress 5 to say in the future whether it means a 6 requirement to be jurisdictional. 7 And as has already been explored, this 8 Court has applied Arbaugh to exhaustion 9 requirements like EME Homer City and has 10 explained in Reed that it applies across the board to elements and to prerequisites to suit 11 12 -- to suit alike. Now, if I could turn second to Section 13 14 16(c), the provision that governs suits 15 claiming discrimination by federal employers, it's very different legally and practically 16 from what's at issue here under 5(f). 17 The legal differences are twofold. First, it 18 involves suits against the government or 19 20 government agencies, so it always involves 21 federal sovereign immunity. 22 And, second, on top of that, the 23 language is starkly different in 16(c). It doesn't say someone aggrieved by 24

25 discrimination. It says someone who's

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1	aggrieved by the final disposition of his
2	complaint or the failure to act on his
3	complaint. That looks like the FTCA, where you
4	your your whole grievance for coming into
5	court is that the agency has handled your claim
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7	JUSTICE SOTOMAYOR: Why would we have
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9	MR. BOND: in a way
10	JUSTICE SOTOMAYOR: to get into
11	this at all?
12	MR. BOND: No, we don't think you need
13	to resolve 16(c), and we're happy for the Court
14	not to address that here in case
15	JUSTICE SOTOMAYOR: This is a footnote
16	
17	MR. BOND: where it's not presented
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19	JUSTICE SOTOMAYOR: reserving your
20	argument?
21	MR. BOND: Exactly. That's exactly
22	right. So if I can turn third then to the
23	argument that the purpose of the charge filing
24	requirement requires or compels this Court to
25	treat it as jurisdictional, as a legal matter,

1 that's incorrect under this Court's decision in 2 Reed in footnote 9.

But as a practical matter, I want to 3 4 emphasize that deeming this requirement 5 non-jurisdictional does not undermine its 6 purpose at all. The government strongly agrees 7 that this serves an important purpose, but 8 whether it's jurisdictional or not, as counsel 9 for respondent was explaining, plaintiffs have 10 an overwhelming incentive to file a charge and -- not only because if they -- if they 11 12 don't do so, they bypass any chance of getting assistance from the commission but also because 13 their suit will face a fatal obstacle in court. 14

15 So the only real question here is in the narrow subset of cases where a plaintiff 16 nevertheless doesn't do so and the defendant, 17 for whatever reason, doesn't raise that 18 19 objection, must you wipe out everything else in 20 the suit that's come to that point?

21 And we don't see any basis in Title 22 VII policy for that result, which wastes -wastes courts' time, which creates unfair 23 surprise to plaintiffs, which creates 24 25 unjustified windfalls to defendants, and could

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1 impede the commission's own efforts because the 2 logic of Petitioner's position would extend, we 3 think, to conciliation efforts by the 4 commission. 5 JUSTICE ALITO: At what point must a 6 defendant raise this? In the answer? 7 MR. BOND: So we understand this to be 8 a condition precedent that is governed by 9 Federal Rule of Civil Procedure 9(c), which 10 means it must be pleaded generally but must be denied with particularity. Denying it with 11 12 particularity may also -- you know, may frequently entail putting in additional 13 14 information that turns into summary judgment. 15 The lower courts are a little uncertain over whether it has to be raised in 16 something akin to a motion to -- to dismiss or 17 answer or whether it can be raised at summary 18 19 judgment. But I think the most important point 20 is that by the time you get to appeal and 21 beyond that, the defendant has missed the 22 chance to raise that argument. 23 If I could turn finally just to the 24 analogy to Thunder Basin and just briefly 25 explain why we don't think this implicates

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that. And I have a general point and a Title VII-specific point. The general point is that Title VII -or that Thunder Basin applies where you have two jurisdictional grants that are undisputedly addressing the adjudicatory authority of courts and agencies and you're just applying ordinary principles to reconcile where the boundary line is between them. Arbaugh is about when you have a particular box that a plaintiff must check to get relief, is that jurisdictional at all? And for all the reasons the Court gave in Arbaugh, we think that you should assume it is not jurisdictional unless Congress says otherwise. The Title VII specific response is that for three reasons Thunder Basin wouldn't apply here. First, in Thunder Basin and Elgin, you have a statute that arguably has peeled back by implication 1331. We know that's not true in Title VII because Arbaugh said so and because the point of Title VII's jurisdictional

25 provision was to expand jurisdiction.

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Second, Respondent didn't try to bring a different kind of suit in a different forum than Title VII contemplates. She sued under Title VII for a de novo determination of her claim in district court. And finally, she's not trying to end run any adjudicatory process in the agency because for non-federal employers there is no agency adjudicator. The EEOC investigates charges and ultimately decides whether to bring its own suit. It doesn't render a decision. And so extending Thunder Basin over here, we -- we submit, does not -- is not supported by any of the rationals the Court gave in Thunder Basin and Elgin. And just to touch briefly on the question about Elgin, in that case it's true that arguably some issues were beyond the agency's competence. And reasonable minds could disagree there, although we think the Court had the -- had the right answer. But here where there is no agency

24 decision at all, nothing in Thunder Basin or 25 Elgin's reasoning supports precluding review in

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1 district courts entirely. 2 If the Court has no questions, we ask 3 that you affirm. 4 CHIEF JUSTICE ROBERTS: Thank you, 5 counsel. 6 Four minutes, Ms. Sinzdak. 7 REBUTTAL ARGUMENT OF COLLEEN E. ROH SINZDAK 8 ON BEHALF OF THE PETITIONER 9 MS. SINZDAK: Thank you. Just a few 10 points. 11 I want to start out by -- by noting that a lot of this argument and particularly 12 13 Respondent's argument focused on the 14 practicalities. But when it comes to 15 jurisdiction, we know that Congress controls 16 jurisdiction. 17 Congress determines when this Court 18 has power to do things. And so the key is 19 statutory intent. It's not what the agency that's implementing the statute thinks. It's 20 21 not what the practicalities might suggest. 22 It's what Congress actually said. And 23 here in (f)(1) it said a civil action may be 24 brought only after a suit is dismissed -- only after a claim is dismissed or 180 days have 25

1 passed.

2 And then in (f)(3) it said that there 3 is jurisdiction only over -- over actions 4 brought under this subchapter. 5 But if we do want to address the 6 practicalities, I think there's a little bit to 7 clean up here. 8 Justice Alito, you asked: Well, how 9 many of these things are being resolved? And the government said: Well, only one percent are being conciliated. But the government's own web site, the one that they cite at

10 11 12 13 footnote 5, demonstrates that about 14 percent 14 of EEOC claims are actually being -- are being 15 resolved to the benefit of the employee.

16 And if you look at the Texas Workforce Commission's web site, its annual report 17 18 suggests that 25 percent of the claims that 19 it's resolving are actually resolved to the 20 benefit of the employee.

21 So and -- and then this question 22 about, well, why would a plaintiff ever not 23 exhaust? Well, we looked and just in the last 24 two months on Westlaw, there are at least 50 25 opinions in which the courts are dismissing

1 claims because they're unexhausted.

2 So there are many reasons you can 3 speculate about, but it is certainly the case 4 that right now, in our natural experiment, 5 plaintiffs are not bringing their -- are not 6 bringing their claims to the EEOC as Congress 7 directed.

8 JUSTICE GINSBURG: How many of those 9 are cases like this one where there was a 10 complaint -- she started out with a complaint of, I think, gender-based discrimination and 11 12 retaliation, but then in the end the claim she wanted to put forward was a religion base, so 13 14 it's not that she didn't file a charge. She 15 did.

16 And she even tried to amend it by 17 scratching -- writing in the word "religion" 18 but not stating anything about it.

19 So how many of those cases where there 20 was no exhaustion of the claim brought to court 21 were cases like this, where there was a charge 22 of some kind, but the charge didn't charge for 23 the right thing?

MS. SINZDAK: So we found eight caseswhere there just had been no trip to the EEOC

1 at all. So that's about a sixth of the cases 2 are exactly the no trip to the EEOC at all. 3 The remainder, yes, are this sort of 4 But I -- I would, again, emphasize case. 5 courts universally apply a -- a -- a 6 pretty plaintiff-friendly position with respect 7 to whether somebody has exhausted or not. So 8 they look at whether it's related to or grows 9 out of the charge.

10 So -- so when we're talking about not 11 raised at all, we're talking about they didn't 12 even mention this type of discrimination, the 13 EEOC had no idea, it's something that happened 14 after the EEOC's investigation was concluded.

But I want to move on to my third point because there's a lot of suggestion here that what we're asking for is a new rule, but we are not.

We are pointing to cases dating back from 1907, in which this Court has held that when Congress vests authority first in the hands of an expert agency, it intends to displace the original jurisdiction of the district courts.

25 And they've --

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1	JUSTICE GINSBURG: But that was
2	MS. SINZDAK: attempted to
3	JUSTICE GINSBURG: That was because
4	they gave the agency the authority to do what
5	ordinarily district courts do, that is, the
6	agency was the tribunal of first instance.
7	That's an entirely different pattern.
8	I mean, the the NLRB, the Social
9	Security Administration, they all act as
10	tribunals of first instance
11	MS. SINZDAK: No
12	JUSTICE GINSBURG: and then the
13	review is appellate review.
14	Here the EEOC is not acting as any
15	kind of first instance forum.
16	MS. SINZDAK: Justice Ginsburg, in
17	McNeil that it was a scenario exactly like
18	this. What the agency was empowered to do was
19	to attempt to reach a settlement or they could
20	just not act for six months.
21	JUSTICE GINSBURG: Then we that
22	was, again, the suing the government, it was
23	under the Tort Claims Act, and the government
24	can waive or not waive sovereign immunity, as
25	it will.

```
MS. SINZDAK: And -- and -- and
 1
      Justice Ginsburg, 2000e-5 does apply to the
 2
      government.
 3
               If there are no further questions, I
 4
 5
      would ask this Court to reverse. Thank you.
 6
               CHIEF JUSTICE ROBERTS: Thank you,
 7
      counsel. The case is submitted.
 8
               (Whereupon, at 12:03 p.m., the case
 9
      was submitted.)
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