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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 18-525, Fort Bend County versus Davis.

Ms. Sinzdak.

ORAL ARGUMENT OF COLLEEN E. ROH SINZDAK

ON BEHALF OF THE PETITIONER

MS. SINZDAK: Mr. Chief Justice, and may it please the Court:

When Title VII's exhaustion requirement is satisfied, the power to address an employment discrimination claim shifts from the executive to the judicial branch. The exhaustion requirement is, therefore, jurisdictional in the plainest sense of that word.

And that is confirmed in at least three ways. First, the text and structure of Section 2000e-5 demonstrates that the exhaustion requirement is jurisdictional, ensuring that courts do not reach the merits of a claim before it has been presented to the expert agency.

JUSTICE GINSBURG: But the expert

1 agency, unlike the examples that you give of
2 agencies that have adjudicatory authority, the
3 EEOC has no authority to adjudicate. Yes, you
4 have to let the complaint stay there for 180
5 days, but they don't decide anything, or even
6 if they decide they dismiss your claim, that
7 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.

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

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

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
10 to do that.

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. It
16 makes a no cause or a cause determination. And
17 it -- it supervises conciliation, and if
18 there's a conciliation, then there is no right
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

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.

10 MS. SINZDAK: Oh, there -- there very
11 much is in -- in two important ways. First of
12 all, state sovereign immunity is certainly
13 implicated by Section 2000e-5 because it gives
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 go
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
24 Court has repeatedly held that waivers of
25 sovereign immunity, both with respect to states

1 and the federal government, need to be narrowly
2 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.

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

15 If Congress said, yes, you can bring
16 suit against the federal government, yes, you
17 may bring suits against a state but only after
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.

23 JUSTICE GINSBURG: Do you think that
24 Congress meant that if you take a case, Title
25 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.

10 But I think that that is focusing on
11 one relatively rare instance rather than on the
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,
17 like it's made the amount in controversy
18 jurisdictional in diversity cases. But it
19 didn't do that here. It didn't say it's
20 jurisdictional.

21 MS. SINZDAK: I -- I think that it
22 did. I think that the text of Section 2000e-5
23 makes very clear that a civil action may be
24 brought only after the EEOC has either
25 dismissed the claim or has -- 180 days have

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
13 are certainly linked by the -- the specific
14 textual clues, which is that subsection (f)(3)
15 says you only have jurisdiction over actions
16 brought under this subchapter. And then
17 subsection (f)(1), in exactly the same terms,
18 says a civil action may be brought only after
19 the -- the -- the -- the claims have been
20 dismissed by the EEOC or after a -- after 180
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

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
11 and judicial review.

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
17 is hearing the case de novo; it is not
18 reviewing anything that the agency has done.

19 MS. SINZDAK: Well, that's -- the
20 court has used the term "review" to refer to
21 what the agency does. And so I don't think
22 it's using "review" in the sense of there has
23 to be a decision in front of it that it's
24 looking at.

25 And, in fact, we know that because it

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.

7 MS. SINZDAK: No, it's reviewing the
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
11 employment discrimination in the first
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
16 isn't -- it's taking a first view. And a first
17 view is different from review.

18 MS. SINZDAK: Well, I'm not sure that
19 that's how the court has been using it because
20 it refers to administrative review and we all
21 agree that the agency is acting in the first
22 instance. So I think it is referring to
23 reviewing a claim.

24 And, certainly, the -- the courts are
25 reviewing a claim. But, again, I don't want to

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
11 -- let me ask you a question about the premises
12 of our system. Ordinarily, we follow, as civil
13 law courts don't, the principle of party
14 presentation.

15 So it's left to parties to frame their
16 complaint, frame their answer, and the Court
17 doesn't frame the questions and you don't frame
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
24 rules don't function in that way and they don't
25 function in that way because they are generally

1 intended to vindicate system-related goals.

2 And -- and it's very clear here that
3 -- that titles having an exhaustion requirement
4 is vindicating system-related goals. As we
5 were discussing, it's helping to protect
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
11 agreements and just evade the EEOC entirely.

12 JUSTICE GINSBURG: What do we do with
13 one other facet of Title VII? Title VII is
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
17 are represented, it's not counsel of your
18 quality.

19 Is that a factor that should be taken
20 into account?

21 MS. SINZDAK: I think that in
22 enforcing the exhaustion requirement, courts
23 have taken that into account. And it's sort of
24 similar to the notice of appeal setting, where
25 a notice of appeal is a jurisdictional

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. I
10 mean, maybe we've been flexible in regarding
11 some things as notices of appeal when they're
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.

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

24 But what there is no flexibility on,
25 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.

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

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

13 MS. SINZDAK: It would be a different
14 argument, quite candidly, because we do have a
15 textual link here between the exhaustion
16 requirement and explicit grant of jurisdiction.

17 But -- but we know that when Title VII
18 was first enacted in 1964, this was it, because
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
23 exhaustion requirement. And I don't think this
24 Court has ever held that 1331 can sort of be
25 used as a -- a get out of jail free card.

1 In -- you know, the general grant does
2 not apply where a specific remedial scheme has
3 -- has demonstrated that it isn't available.
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
13 Security Act, so we have 405 and it says 1331
14 is not available. So, when Congress doesn't
15 want 30 -- 1331 to be there, it says so.

16 MS. SINZDAK: I -- I don't think
17 that's always true. In fact, again, in Thunder
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
21 Security Act cases, it has said: Well, this
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
8 has said that courts have used the word
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
17 argument is that this type of exhaustion
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 --

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

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
6 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

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
5 repeatedly held that, when it does that, it
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
11 far as back as -- as Texas and Pacific Railway
12 in 1907. It was saying it about the NLRA,
13 which is --

14 JUSTICE GINSBURG: The NLRA is an
15 adjudicatory body, and then it goes to a court
16 of appeals that reviews the decision. And this
17 is just -- the EEOC doesn't have that kind of
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
25 model for Title -- Title VII's remedial

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.

11 And it's not significant in this case
12 either because what is important is that
13 Congress empowered the agency, not the courts,
14 to address the -- to address Title VII claims
15 in the first instance.

16 JUSTICE GINSBURG: But not to resolve
17 it, not to resolve it. And that's an enormous
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
22 EEOC can't decide anything.

23 MS. SINZDAK: I don't think decision
24 can be key, and that's because of this Court's
25 decision in Elgin.

1 In Elgin, the Court acknowledged that
2 it was very possible that the agency had no
3 authority to decide the constitutional claims
4 at stake there.

5 But, nonetheless, the Court held that
6 it was a jurisdictional rule --

7 JUSTICE GINSBURG: But you had to go
8 there first, even though you might have a
9 constitutional question, and the court
10 carefully explained that the court might -- the
11 case might drop out on another ground and,
12 therefore, the court would never have to get to
13 the constitutional question.

14 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

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.

12 It can't decide any disputed issue.
13 You would agree to that? The EEOC has no
14 authority to decide an issue that the parties
15 dispute.

16 MS. SINZDAK: There's de novo review
17 of what the EEOC does decide, which is cause or
18 no cause. I would also say it's performing a
19 very effective funneling function regardless.
20 I think that -- that in around -- in 2016, the
21 EEOC had about 70,000 claims, and Lexis
22 estimates that there are about 7,000 EEOC
23 suits.

24 So it is performing a function --

25 JUSTICE KAVANAUGH: As a --

1 MS. SINZDAK: -- exactly the funneling
2 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
10 specifically exhausted, and isn't that very
11 fact-bound, and why shouldn't the courts be
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
16 incentives of the -- that a defendant has
17 aren't precisely aligned with the
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 --

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 they 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 will just get rid of
23 the suit --

24 CHIEF JUSTICE ROBERTS: Well, but the
25 EEOC procedure is likely to be a real waste of

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
11 wouldn't have much of a case, would you?

12 MS. SINZDAK: I don't think that's
13 correct. Again, I think there is -- that the
14 text makes it pretty clear. I also think that
15 from 2006 on, the Court has regularly
16 recognized that the clear statement rule
17 applies to the extent it accurately reflects
18 congressional intent, which means that when a
19 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

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.

17 MS. SINZDAK: I think, in -- in this
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

1 about notice-and-comment review. First of all,
2 that's not individualized. You don't actually
3 even have a claim at the point --

4 JUSTICE KAVANAUGH: So -- so, when it
5 is individualized, to pick up on Justice
6 Sotomayor's question from earlier, are you
7 saying that we should usually presume that
8 Congress intended an administrative exhaustion
9 scheme to be jurisdictional?

10 MS. SINZDAK: The question is
11 congressional intent. That -- that is what
12 this Court needs to look at.

13 Now, yes --

14 JUSTICE KAVANAUGH: And how -- how
15 would we look at that? In a scheme --
16 individualized claim proceeding, administrative
17 exhaustion requirement, that's all we know.
18 What else do we need to know?

19 MS. SINZDAK: Well, as the Court said
20 in -- in Elgin, you look at the text, you look
21 at the structure, and you look at the purposes.
22 So you look at the text to see how intricate is
23 this scheme and how comprehensive is it. Does
24 it seem to actually cover all claims, or does
25 it seem pretty isolated?

1 I think Brown versus Community -- or,
2 pardon me, Block versus Community Nutrition is
3 an example of that. There, the scheme really
4 wasn't comprehensive, and so the Court didn't
5 find that it precluded any -- any direct avenue
6 to the district courts.

7 So, after you look at the -- the text,
8 you look at the structure. Again -- and
9 there's a little bit of overlap here. It's
10 basically is there a detailed administrative
11 review scheme and then -- that culminates in
12 judicial review. Again, you have that here.

13 And then you look at the purposes. Is
14 this the sort of scheme that would best be
15 forwarded by have -- channeling all things to
16 the administrative agency in the first
17 instance? And, again, that's certainly the
18 case here.

19 And if I could reserve the remainder
20 of my time.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Melkonian.

24

25

1 ORAL ARGUMENT OF RAFFI MELKONIAN
2 ON BEHALF OF THE RESPONDENT

3 MR. MELKONIAN: Mr. Chief Justice, and
4 may it please the Court:

5 This Court has held numerous times in
6 Zipes and Arbaugh and in many other cases that
7 statutory limitations are not jurisdictional,
8 unless this -- unless Congress has said they
9 are jurisdictional in a clear statement.

10 That is meant to be a readily
11 administrable bright-line rule. There was
12 no --

13 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
17 is intended to be the best way to discern
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

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

1 clear statement rule is we're going to look for
2 a clear statement because of this, starting
3 now. I mean, everybody knows it was a real
4 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,
11 which is that this is the way of discerning
12 congressional intent in these very important
13 cases where the question we're asking is, is
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
19 they're supposed to be doing in the future when
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,

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
18 you're talking about, I think it is Bowles and
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.

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

1 or a district court -- it doesn't matter -- but
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
8 are about inconsistency and tariffs across the
9 country, and there's nothing like that here
10 either.

11 So I think the Elgin line, the Thunder
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
17 that if the EEOC did resolve these kinds of
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
24 looked like Thunder Basin or Elgin, so that
25 where, you know, you get counsel, you go to the

1 court -- you go to an administrative agency,
2 there's no district court jurisdiction at all
3 at the first instance, then you get a judicial
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
11 ability to resolve claims rather than simply to
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
15 think it looks still like just an exhaustion
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,
24 that we should recognize one or create one, an
25 exception for administrative exhaustion

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. I
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
11 the case to look into not whether there was a
12 charge filed or not, that's relatively easy,
13 courts could probably do that, but into whether
14 the charge captures the things that are in the
15 complaint.

16 And not just captures them, but
17 consistent with the rules that the EEOC has and
18 district courts have, that it could also be
19 reasonably related to what's in the charge, not
20 just that it's directly what's in the charge.

21 So district courts would have to
22 engage in this extremely articulated analysis
23 at the beginning of every single case, sua
24 sponte because they have to assure themselves
25 of their federal jurisdiction.

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
7 we've been doing below.

8 JUSTICE GINSBURG: But only for one
9 party, not the defendant?

10 MR. MELKONIAN: I'm sorry, Your Honor.

11 JUSTICE GINSBURG: You said it would
12 be a burden on the parties, meaning a burden on
13 the plaintiff?

14 MR. MELKONIAN: It would be a burden
15 on the plaintiff, yes, Your Honor. It wouldn't
16 necessarily be a burden on the defendant
17 because they would be able to get out of this
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
22 about that a little bit earlier.

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

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. It
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
12 the district court. The 300-day period will
13 have run.

14 And so it -- in most cases, it is
15 effectively a win on the merits to get this
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

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
11 EEOC are resolved through a conciliation and,
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
17 have that number exactly, but it's -- it's --
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 is 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 on 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

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 jeopardized.

11 CHIEF JUSTICE ROBERTS: What sort of
12 empirical evidence are you -- are you looking
13 for?

14 MR. MELKONIAN: It would be very hard
15 to -- to find it, Your Honor. I -- I concede
16 that.

17 CHIEF JUSTICE ROBERTS: I know. We
18 get this argument quite a bit. The rule's been
19 here --

20 MR. MELKONIAN: Yup.

21 CHIEF JUSTICE ROBERTS: -- and, look,
22 there's no great crisis there, there's no great
23 crisis there, but it's -- it's hard when you
24 think about it to try to think about how that
25 evidence would be compiled.

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

10 It's their world. And I think they
11 would be able to notice.

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

21 And there's just not a single case
22 that looks like that. The cases that there are
23 all look like this case, where there is a
24 charge, the question is, is this charge
25 sufficient? Is there enough in the charge to

1 get you to the allegations?

2 CHIEF JUSTICE ROBERTS: You -- you've
3 looked and there -- and you -- and there's not
4 a single case like that?

5 MR. MELKONIAN: We haven't found one,
6 and maybe I'm misremembering right now, but I
7 don't think we found a case that is like what
8 I'm describing.

9 CHIEF JUSTICE ROBERTS: Well, I guess
10 they -- probably most of them would be
11 unreported in the first place, I would assume.

12 MR. MELKONIAN: Probably so, Your
13 Honor, if they were -- if there was no charge
14 and they were coming up to the court of
15 appeals.

16 JUSTICE SOTOMAYOR: How many cases
17 have you find like this one where there's been
18 a finding by a circuit court that a party has
19 basically waived the mandatory rule?

20 MR. MELKONIAN: It -- it's not that
21 many, but there are some. We have them in our
22 brief in the footnotes from the courts of
23 appeals. But also when I'm -- think about that
24 question, I also think Zipes and Arbaugh are
25 this kind of case. And so it has come up

1 before in this Court.

2 I -- I think it's Zipes that was
3 actually brought up after trial, and so that
4 just shows you that this kind of problem could
5 be very harmful to the way the courts work.

6 Well, if there are no further
7 questions, I could leave this Court with one
8 final thought, which is that this Court has
9 done a lot of work in the last 15 years to
10 clear up the profligate use of the word
11 "jurisdictional."

12 Our friends on the other side want you
13 to blur that line again and reinject
14 uncertainty back into these cases. We urge you
15 not to do that and affirm the judgment below.
16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Bond.

20 ORAL ARGUMENT OF JONATHAN C. BOND
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 IN SUPPORT OF THE RESPONDENT

23 MR. BOND: Mr. Chief Justice, and may
24 it please the Court:

25 Arbaugh's bright-line rule resolves

1 this case. Title VII's charge filing
2 requirement is not jurisdictional because
3 Congress did not clearly state that it is.

4 Now, Petitioner's primary submission
5 that the Court should manufacture exceptions to
6 that clear statement rule based on inapposite
7 doctrines. But the Court should reject that
8 for several reasons.

9 First, those exceptions do not exist
10 in this Court's case law. Second, adopting
11 them would require blurring Arbaugh's bright
12 line and overturning decisions of this Court.
13 And, third, as I think has come up already,
14 those exceptions would not apply here, in any
15 event.

16 Now I'd like to touch on four
17 particular points, but first, Justice Alito,
18 the number you're looking for is approximately
19 one percent per year of -- of cases that are
20 successfully conciliated. The cite is in note
21 5 of our brief. The Commission's web site
22 details these statistics.

23 Now, the four topics I'd like to cover
24 are, first, Petitioner's exception for
25 exhaustion requirements. Second, the provision

1 in e-16 for federal employer discrimination
2 claims. Third, the argument that this
3 requirement serves too important a purpose to
4 be waivable. And, finally, the analogy to
5 Thunder Basin.

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

18 And the analogy to the NLRA actually
19 works against Petitioner because, as the Court
20 noted in Zipes and Petitioner acknowledges, the
21 NLRA was a model for much of Title VII's
22 remedial scheme, but Congress did not copy over
23 the critical feature of NLRA, which is in
24 160(e) of Title 29, which is the provision that
25 grants jurisdiction over enforcement actions,

1 and a corresponding provision grants review to
2 the court -- jurisdiction to review decisions
3 by the board to the court of appeals. And it
4 goes on to say a court may not consider an
5 issue not presented to the board. That's the
6 provision on the basis of which this Court has
7 held that there's no jurisdiction over issues
8 not presented to the board.

9 But even if you thought this fell
10 within the ambit of some exhaustion
11 requirement, this Court's cases do not
12 recognize that kind of exception. Petitioner
13 points to no case that has held that. And none
14 of Petitioner's case before Arbaugh recognize
15 any kind of bright-line rule or even
16 presumption that those requirements are
17 jurisdictional.

18 JUSTICE ALITO: Well, what if there
19 were an exhaustion requirement but the -- the
20 agency's decision -- but the -- the losing
21 party before the agency could get a de novo
22 lawsuit in district court?

23 Under those circumstances, wouldn't it
24 -- wouldn't the inference that Congress made
25 that jurisdictional be a reasonable one?

1 MR. BOND: Not on those -- on those
2 facts standing alone, but Congress certainly
3 could and in some statutes has made it
4 jurisdictional through the language it's
5 enacted. A good example is actually the FTCA,
6 the Federal Tort Claims Act, which this Court
7 addressed in McNeil, which is a pre-Arbaugh
8 case but we think was correct under Arbaugh,
9 because the jurisdictional grant in Section
10 1346(b) begins by saying, "subject to the
11 provisions of Chapter 171 of Title 28," which
12 includes the presentment requirement that
13 McNeil addressed.

14 So that satisfies the clear statement
15 rule because there is an express link between
16 the jurisdictional grant and the presentment
17 requirement, on top of which it involves only
18 claims that, as Justice Ginsburg noted,
19 implicate federal sovereign immunity, which is
20 jurisdictional on its own.

21 JUSTICE GORSUCH: Mr. Bond?

22 MR. BOND: Mm-hmm?

23 JUSTICE GORSUCH: What do you say to
24 the Chief Justice's concern that this is a
25 statute that predates Arbaugh? Now, I know

1 you're going to tell me immediately that we've
2 done this before and applied Arbaugh
3 retroactively to statutes preexisting Arbaugh.

4 But besides that argument, what
5 rationale do you think supports us doing so?

6 MR. BOND: So I would point to the
7 rational³ that Arbaugh gave. It was about
8 reflecting or ascertaining Congress's intent.
9 Arbaugh went through, before announcing the
10 clear statement rule, the severe consequences
11 of deeming a requirement jurisdictional,
12 including that it means courts must raise this
13 sua sponte; it can wipe out litigation years
14 after the fact or up on appeal; it means
15 judges, instead of juries, are deciding these
16 questions in the typical case. And for all of
17 those reasons, given those consequences, courts
18 should not assume that Congress does that
19 lightly or inadvertently.

20 And as Mr. Melkonian suggested, it's
21 the same with other presumptions that this
22 Court applies that are interpretive
23 presumptions aimed at getting to Congress's
24 intent with --

25 JUSTICE GORSUCH: Even if we apply our

1 interpretive presumptions and all judicial
2 decisions retroactively, I'm mean that's --
3 that's our consistent rule or it's supposed to
4 be, right?

5 MR. BOND: We -- we certainly do apply
6 them to existing statutes, as you do in the
7 extraterritoriality context.

8 JUSTICE GORSUCH: Well, our decisions
9 are normally retroactive in their application,
10 not merely prospective.

11 MR. BOND: Exactly right. That's
12 right. So an additional virtue of Arbaugh is
13 that it's -- as the Court said, leaves the ball
14 in Congress's court by creating a clear
15 baseline, but it's certainly not the case that
16 that presumption or any other applies only
17 going forward.

18 And I think the problem that if you
19 created an exhaustion exception now is that you
20 would blur Arbaugh's bright-line rule and you
21 would not only create uncertainty for lower
22 courts about exactly how this rule applies, but
23 you'd also make it more difficult for Congress
24 to say in the future whether it means a
25 requirement to be jurisdictional.

1 And as has already been explored, this
2 Court has applied Arbaugh to exhaustion
3 requirements like EME Homer City and has
4 explained in Reed that it applies across the
5 board to elements and to prerequisites to suit
6 -- to suit alike.

7 Now, if I could turn second to Section
8 16(c), the provision that governs suits
9 claiming discrimination by federal employers,
10 it's very different legally and practically
11 from what's at issue here under 5(f). The
12 legal differences are twofold. First, it
13 involves suits against the government or
14 government agencies, so it always involves
15 federal sovereign immunity.

16 And, second, on top of that, the
17 language is starkly different in 16(c). It
18 doesn't say someone aggrieved by
19 discrimination. It says someone who's
20 aggrieved by the final disposition of his
21 complaint or the failure to act on his
22 complaint. That looks like the FTCA, where you
23 your -- your whole grievance for coming into
24 court is that the agency has handled your claim
25 --

1 JUSTICE SOTOMAYOR: Why would we have

2 --

3 MR. BOND: -- in a way --

4 JUSTICE SOTOMAYOR: -- to get into
5 this at all?

6 MR. BOND: No, we don't think you need
7 to resolve 16(c), and we're happy for the Court
8 not to address that here in case --

9 JUSTICE SOTOMAYOR: This is a footnote
10 --

11 MR. BOND: -- where it's not presented
12 --

13 JUSTICE SOTOMAYOR: -- reserving your
14 argument?

15 MR. BOND: Exactly. That's exactly
16 right. So if I can turn third then to the
17 argument that the purpose of the charge filing
18 requirement requires or compels this Court to
19 treat it as jurisdictional, as a legal matter,
20 that's incorrect under this Court's decision in
21 Reed in footnote 9.

22 But as a practical matter, I want to
23 emphasize that deeming this requirement
24 non-jurisdictional does not undermine its
25 purpose at all. The government strongly agrees

1 that this serves an important purpose, but
2 whether it's jurisdictional or not, as counsel
3 for respondent was explaining, plaintiffs have
4 an overwhelming incentive to file a charge
5 and -- not only because if they -- if they
6 don't do so, they bypass any chance of getting
7 assistance from the commission but also because
8 their suit will face a fatal obstacle in court.

9 So the only real question here is in
10 the narrow subset of cases where a plaintiff
11 nevertheless doesn't do so and the defendant,
12 for whatever reason, doesn't raise that
13 objection, must you wipe out everything else in
14 the suit that's come to that point?

15 And we don't see any basis in Title
16 VII policy for that result, which wastes --
17 wastes courts' time, which creates unfair
18 surprise to plaintiffs, which creates
19 unjustified windfalls to defendants, and could
20 impede the commission's own efforts because the
21 logic of Petitioner's position would extend, we
22 think, to conciliation efforts by the
23 commission.

24 JUSTICE ALITO: At what point must a
25 defendant raise this? In the answer?

1 MR. BOND: So we understand this to be
2 a condition precedent that is governed by
3 Federal Rule of Civil Procedure 9(c), which
4 means it must be pleaded generally but must be
5 denied with particularity. Denying it with
6 particularity may also -- you know, may
7 frequently entail putting in additional
8 information that turns into summary judgment.

9 The lower courts are a little
10 uncertain over whether it has to be raised in
11 something akin to a motion to -- to dismiss or
12 answer or whether it can be raised at summary
13 judgment. But I think the most important point
14 is that by the time you get to appeal and
15 beyond that, the defendant has missed the
16 chance to raise that argument.

17 If I could turn finally just to the
18 analogy to Thunder Basin and just briefly
19 explain why we don't think this implicates
20 that. And I have a general point and a Title
21 VII-specific point.

22 The general point is that Title VII --
23 or that Thunder Basin applies where you have
24 two jurisdictional grants that are undisputedly
25 addressing the adjudicatory authority of courts

1 and agencies and you're just applying ordinary
2 principles to reconcile where the boundary line
3 is between them.

4 Arbaugh is about when you have a
5 particular box that a plaintiff must check to
6 get relief, is that jurisdictional at all?

7 And for all the reasons the Court gave
8 in Arbaugh, we think that you should assume it
9 is not jurisdictional unless Congress says
10 otherwise.

11 The Title VII specific response is
12 that for three reasons Thunder Basin wouldn't
13 apply here.

14 First, in Thunder Basin and Elgin, you
15 have a statute that arguably has peeled back by
16 implication 1331. We know that's not true in
17 Title VII because Arbaugh said so and because
18 the point of Title VII's jurisdictional
19 provision was to expand jurisdiction.

20 Second, Respondent didn't try to bring
21 a different kind of suit in a different forum
22 than Title VII contemplates. She sued under
23 Title VII for a de novo determination of her
24 claim in district court.

25 And finally, she's not trying to end

1 run any adjudicatory process in the agency
2 because for non-federal employers there is no
3 agency adjudicator.

4 The EEOC investigates charges and
5 ultimately decides whether to bring its own
6 suit. It doesn't render a decision.

7 And so extending Thunder Basin over
8 here, we -- we submit, does not -- is not
9 supported by any of the rationals the Court
10 gave in Thunder Basin and Elgin.

11 And just to touch briefly on the
12 question about Elgin, in that case it's true
13 that arguably some issues were beyond the
14 agency's competence. And reasonable minds
15 could disagree there, although we think the
16 Court had the -- had the right answer.

17 But here where there is no agency
18 decision at all, nothing in Thunder Basin or
19 Elgin's reasoning supports precluding review in
20 district courts entirely.

21 If the Court has no questions, we ask
22 that you affirm.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Four minutes, Ms. Sinzduk.

1 REBUTTAL ARGUMENT OF COLLEEN E. ROH SINZDAK

2 ON BEHALF OF THE PETITIONER

3 MS. SINZDAK: Thank you. Just a few
4 points.

5 I want to start out by -- by noting
6 that a lot of this argument and particularly
7 Respondent's argument focused on the
8 practicalities. But when it comes to
9 jurisdiction, we know that Congress controls
10 jurisdiction.

11 Congress determines when this Court
12 has power to do things. And so the key is
13 statutory intent. It's not what the agency
14 that's implementing the statute thinks. It's
15 not what the practicalities might suggest.

16 It's what Congress actually said. And
17 here in (f)(1) it said a civil action may be
18 brought only after a suit is dismissed -- only
19 after a claim is dismissed or 180 days have
20 passed.

21 And then in (f)(3) it said that there
22 is jurisdiction only over -- over actions
23 brought under this subchapter.

24 But if we do want to address the
25 practicalities, I think there's a little bit to

1 clean up here.

2 Justice Alito, you asked: Well, how
3 many of these things are being resolved? And
4 the government said: Well, only one percent
5 are being conciliated. But the government's
6 own web site, the one that they cite at
7 footnote 5, demonstrates that about 14 percent
8 of EEOC claims are actually being -- are being
9 resolved to the benefit of the employee.

10 And if you look at the Texas Workforce
11 Commission's web site, its annual report
12 suggests that 25 percent of the claims that
13 it's resolving are actually resolved to the
14 benefit of the employee.

15 So and -- and then this question
16 about, well, why would a plaintiff ever not
17 exhaust? Well, we looked and just in the last
18 two months on Westlaw, there are at least 50
19 opinions in which the courts are dismissing
20 claims because they're unexhausted.

21 So there are many reasons you can
22 speculate about, but it is certainly the case
23 that right now, in our natural experiment,
24 plaintiffs are not bringing their -- are not
25 bringing their claims to the EEOC as Congress

1 directed.

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

10 And she even tried to amend it by
11 scratching -- writing in the word religion but
12 not stating anything about it.

13 So how many of those cases where there
14 was no exhaustion of the claim brought to court
15 were cases like this, where there was a charge
16 of some kind, but the charge didn't charge for
17 the right thing?

18 MS. SINZDAK: So we found eight cases
19 where there just had been no trip to the EEOC
20 at all. So that's about a sixth of the cases
21 are exactly the no trip to the EEOC at all.

22 The remainder, yes, are this sort of
23 case. But I -- I would, again, emphasize
24 courts universally apply a -- a -- a -- a
25 pretty plaintiff-friendly position with respect

1 to whether somebody has exhausted or not. So
2 they look at whether it's related to or grows
3 out of the charge.

4 So -- so when we're talking about not
5 raised at all, we're talking about they didn't
6 even mention this type of discrimination, the
7 EEOC had no idea, it's something that happened
8 after the EEOC's investigation was concluded.

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

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

19 And they've --

20 JUSTICE GINSBURG: But that was --

21 MS. SINZDAK: -- attempted to --

22 JUSTICE GINSBURG: That was because
23 they gave the agency the authority to do what
24 ordinarily district courts do, that is, the
25 agency was the tribunal of first instance.

1 That's an entirely different pattern.

2 I mean, the -- the NLRB, the Social
3 Security Administration, they all act as
4 tribunals of first instance --

5 MS. SINZDAK: No --

6 JUSTICE GINSBURG: -- and then the
7 review is appellate review.

8 Here the EEOC is not acting as any
9 kind of first instance forum.

10 MS. SINZDAK: Justice Ginsburg, in
11 McNeil that -- it was a scenario exactly like
12 this. What the agency was empowered to do was
13 to attempt to reach a settlement or they could
14 just not act for six months.

15 JUSTICE GINSBURG: Then we -- that
16 was, again, the -- suing the government, it was
17 under the Tort Claims Act, and the government
18 can waive or not waive sovereign immunity as it
19 will.

20 MS. SINZDAK: And -- and -- and
21 Justice Ginsburg, 2000e-5 does apply to the
22 government.

23 If there are no further questions, I
24 would ask this Court to reverse. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:03 p.m., the case
3 was submitted.)

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Official - Subject to Final Review

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