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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 NANCY WILLIAMS, ET AL.,)
4 Petitioners,)
5 v.) No. 23-191
6 FITZGERALD WASHINGTON, ALABAMA)
7 SECRETARY OF LABOR,)
8 Respondent.)
9 - - - - -
10
11 Washington, D.C.
12 Monday, October 7, 2024
13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:05 a.m.
17
18 APPEARANCES:
19 ADAM G. UNIKOWSKY, ESQUIRE, Washington, D.C.; on
20 behalf of the Petitioners.
21 EDMUND G. LaCOUR, JR., Solicitor General, Montgomery,
22 Alabama; on behalf of the Respondent.
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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this term in Case 23-191,
5 Williams versus Fitzgerald.

6 Mr. Unikowsky.

7 ORAL ARGUMENT OF ADAM G. UNIKOWSKY

8 ON BEHALF OF THE PETITIONERS

9 MR. UNIKOWSKY: Mr. Chief Justice, and
10 may it please the Court:

11 Patsy and Felder control this case.
12 In Patsy, this Court held that a failure to
13 exhaust was not a defense to liability under
14 Section 1983. In this case, however, the
15 Supreme Court of Alabama dismissed Petitioners'
16 claims because Petitioners failed to exhaust,
17 contradicting Patsy's holding.

18 Felder confirms that Patsy applies in
19 state court. This Court reasoned that the
20 dominant characteristic of a civil rights claim
21 is that it's judicially enforceable in the first
22 instance, and that characteristic does not vary
23 depending on whether the suit is filed in
24 federal or state court. The same reasoning
25 applies to this case.

1 Respondent characterizes Alabama's
2 statute as a neutral procedural rule. But
3 there's nothing neutral about it. A claimant
4 has to seek relief from the Secretary before
5 suing the Secretary. The claimant never -- the
6 Secretary never has to seek relief from the
7 claimant for anything and never has any reason
8 to exhaust any remedy.

9 Respondent also emphasizes that
10 Alabama's law is jurisdictional. But this Court
11 has held that a state cannot avoid preemption by
12 defining the jurisdiction of state courts to
13 exclude cases in which the defendant asserts an
14 affirmative defense that this Court has held is
15 not available. And that's exactly what happened
16 in this case.

17 Finally and at a minimum, the Alabama
18 statute is preempted as applied to this case in
19 which the Alabama Supreme Court reached the
20 Kafkaesque conclusion that Petitioners could not
21 challenge their inability to exhaust precisely
22 because of their inability to exhaust.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: Mr. Unikowsky, would
25 you have the same objection if Alabama required

1 these claims to be made in a lower state court?

2 MR. UNIKOWSKY: No, Your Honor. I
3 think the state is allowed to direct these
4 claims to a -- to a court as long as there's no
5 exhaustion requirement.

6 JUSTICE THOMAS: Well, what's the
7 difference? And if it's on -- if -- if -- let's
8 say -- and I'm just speculating -- that it
9 required that it goes to something the
10 equivalent of a municipal court before it --
11 before it goes to its trial court, how is that
12 different from going to an agency? Isn't it a
13 similar exhaustion problem?

14 MR. UNIKOWSKY: I don't think so.
15 When I think of an exhaustion requirement, I
16 think of a requirement to seek relief from the
17 very person you're planning to sue before suing
18 that person. So that's how Alabama's system
19 works. You have to seek relief from the
20 Secretary. You file a claim with an examiner,
21 who is -- reports to the Secretary. You appeal
22 to an appeals tribunal, which also reports to
23 the Secretary. So you're seeking relief from
24 the very entity that you're ultimately going to
25 sue.

1 And that's the defect the Court
2 identified in the Felder case. I view that as
3 different as the state setting up its judicial
4 system to direct courts -- parties to a
5 third-party neutral.

6 CHIEF JUSTICE ROBERTS: What if
7 instead of the -- requirement you're
8 complaining -- the exhaustion requirement, what
9 if the requirement were simply that parties had
10 to go through a mediation process?

11 I -- I think several jurisdictions
12 have that. I mean, it may -- it may not last
13 long, but before you can proceed with your suit,
14 you have to sit down, and there's a mediator
15 that sees -- tries to see if you can work it
16 out.

17 MR. UNIKOWSKY: So I think that sounds
18 a little bit like the rule in Felder. So I -- I
19 probably would say that it's preempted, but I
20 think that would boil down to as to -- to
21 whether it's really an exhaustion requirement.

22 The rule I extract from -- from Patsy
23 is that exhaustion requirements are -- are
24 preempted. You know, I think there are some
25 borderline cases about whether something really

1 qualifies as an exhaustion requirement. I -- I
2 think that that question is not presented here
3 because it pretty clearly is a requirement of
4 that nature.

5 CHIEF JUSTICE ROBERTS: Well, I -- I
6 would have thought that your -- your complaint
7 is focusing on the sort of delay, which is what
8 the exhaustion requirement simply imposes, and
9 if it's simply you've got -- you've got to try
10 mediation for a while, I don't know why you
11 would say that's also objectionable.

12 MR. UNIKOWSKY: Well, I think it would
13 depend on exactly what the nuts and bolts of the
14 requirements are. I mean, if you have to
15 present some version of a notice of claim to the
16 state agency and then go through a mediation
17 process, I might say that looks like the notice
18 of claim requirement in Wisconsin.

19 If you can sue right away and then the
20 court just sends the parties off to mediation
21 while the claim is pending, that doesn't sound
22 like an exhaustion requirement at all. It is
23 judicially enforceable in the first instance,
24 and then the court is just applying a particular
25 procedure to try to encourage a settlement.

1 So I think it would -- it would depend
2 on how the mediation rule worked.

3 JUSTICE BARRETT: Mr. Unikowsky, when
4 did the state statute of limitations start
5 running, or has it?

6 MR. UNIKOWSKY: So I -- I think that's
7 an -- an unresolved question whether it would be
8 tolled or not. I think there is some risk that
9 it wouldn't be tolled, the state might say that,
10 you know, it expired before you got the chance
11 to exhaust because that would be the rule in
12 federal court. But I don't think that the --
13 the -- the lower courts decided whether there
14 would be tolling during the exhaustion process.

15 JUSTICE BARRETT: Has it expired for
16 federal purposes? You know, if your -- if your
17 plaintiffs -- if your plaintiffs -- if your
18 clients were to file in federal court --

19 MR. UNIKOWSKY: No, I don't think --

20 JUSTICE BARRETT: -- would they do so?

21 MR. UNIKOWSKY: We're seeking
22 forward-looking relief, injunctive relief, so
23 we're saying there's a continuing harm. So, no,
24 I think we could still file our -- our lawsuit
25 in federal court.

1 JUSTICE BARRETT: And just out of
2 curiosity, why didn't you file a lawsuit in
3 federal court? Why did you go to state?

4 MR. UNIKOWSKY: I -- I think we felt
5 the state court was -- was best positioned to
6 enter an injunction against the -- the state
7 agency. State courts hear the overwhelming
8 majority of unemployment insurance claims. We
9 just felt the state court would be in the best
10 position to enter and administer an injunction.
11 So that's why it went to state court.

12 JUSTICE SOTOMAYOR: I'm -- I'm very
13 confused by this system. First of all, I'm not
14 sure what the exhaustion is. Is it just merely
15 of the claim for benefits, or do you also have
16 to -- it's the way I read the lower court's
17 decision -- Supreme Court decision, which is you
18 have to exhaust your due process claim before
19 the agency as well.

20 MR. UNIKOWSKY: Right. So that --

21 JUSTICE SOTOMAYOR: They said both
22 things, not just that you have to exhaust trying
23 to get your remedies, but you have to go to the
24 very agency you're accusing of a due process
25 violation to cure it, correct?

1 MR. UNIKOWSKY: Correct. That was the
2 holding as a matter of state law. We argued
3 below that you had to exhaust your claim for
4 benefits but not the claim that the agency was
5 too slow. But we lost as a matter of state law
6 on that issue.

7 JUSTICE SOTOMAYOR: All right. Just
8 so I -- I'm clear in my own mind, I think what
9 Justice Barrett was getting at, and I -- and I'm
10 not sure I understand this completely, how this
11 would work, can you go to state court? You
12 can't go to federal court to claim a due process
13 violation until you've -- denied the process,
14 correct?

15 MR. UNIKOWSKY: That's correct.

16 JUSTICE SOTOMAYOR: So, if you -- do
17 you really have a workable alternative to go to
18 federal court as opposed to state court?

19 MR. UNIKOWSKY: Well --

20 JUSTICE SOTOMAYOR: You have to file
21 with the state to claim the benefits to start
22 with, correct?

23 MR. UNIKOWSKY: Correct.

24 JUSTICE SOTOMAYOR: And so you have to
25 be there. So how and when can you go to federal

1 court?

2 MR. UNIKOWSKY: Well, I think --

3 JUSTICE SOTOMAYOR: That -- that's
4 what I don't understand from the other side, but
5 do you understand it?

6 MR. UNIKOWSKY: I think you can go to
7 federal court at any time, and your claim might
8 lose on the merits if you haven't tried out the
9 process from the state court, but you can still
10 go. It's just the ground for dismissal wouldn't
11 be a lack of exhaustion.

12 JUSTICE GORSUCH: It might be a lack
13 of ripeness perhaps, though?

14 MR. UNIKOWSKY: Right. The -- in
15 principle, a federal court could dismiss for
16 lack of ripeness, yes, but it just wouldn't be
17 an exhaustion dismissal.

18 JUSTICE GORSUCH: What's --

19 JUSTICE SOTOMAYOR: So -- so you're
20 really stuck in a state process with a loop that
21 you can't get out of?

22 MR. UNIKOWSKY: Well -- our view is
23 that if we went to federal court in this case,
24 this -- the federal court would not dismiss for
25 lack of exhaustion under Patsy and would -- it

1 would entertain our due process claims on the
2 merits.

3 JUSTICE GORSUCH: Did you try a
4 futility exception argument?

5 MR. UNIKOWSKY: I don't -- no, I don't
6 think we -- we made that argument below.

7 JUSTICE GORSUCH: Do you -- do you
8 have any reason to believe that Alabama doesn't
9 recognize a futility exception requirement?

10 MR. UNIKOWSKY: Well, I -- I mean, we
11 argued below that it would be absurd. In our
12 brief --

13 JUSTICE GORSUCH: Yeah.

14 MR. UNIKOWSKY: -- we argued it would
15 be absurd to --

16 JUSTICE GORSUCH: You argued it would
17 be absurd and Catch 22 and --

18 MR. UNIKOWSKY: Right.

19 JUSTICE GORSUCH: -- Heller was trotted
20 out. And we -- we hear that from time to time,
21 but that's what a futility exception exists
22 to -- to address. And I'm just curious whether
23 you know whether Alabama law permits a futility
24 argument, and -- and -- and you're saying, as I
25 understand it, that none was attempted here in

1 any event?

2 MR. UNIKOWSKY: So I don't know the
3 answer to the question. Alabama does say this
4 is a jurisdictional limitation, which implies to
5 me that there aren't equitable exceptions like
6 futility, but I -- I'm not sure.

7 JUSTICE GORSUCH: You don't know?

8 MR. UNIKOWSKY: I don't know.

9 JUSTICE GORSUCH: Okay. And then,
10 if -- if one were challenging a benefits
11 decision by the federal -- by the federal
12 government, there -- there's almost assuredly
13 going to be an exhaustion requirement, Social
14 Security disability benefits or whatever, in --
15 in federal court, and I'm just curious what you
16 might say about the incongruity of refusing to
17 allow a state to have a similar exhaustion
18 requirement that the federal government imposes
19 on Americans.

20 MR. UNIKOWSKY: Well, I don't think
21 it's incongruous at all because I think the
22 practical effect of our rule is that most claims
23 would be dismissed in state court if you're just
24 seeking benefits for -- for lack of merit
25 because you've gotten enough process.

1 In other words, if you -- if you just
2 file a claim in a state agency saying, I want
3 benefits, and then you get a bad decision from
4 the hearing examiner, and then you just go
5 straight to federal court and say, well, that
6 was a due process violation, I didn't get a good
7 hearing before the examiner, you would lose in
8 federal court. The federal court would say
9 there's no due process violation. You have
10 plenty of process in --

11 JUSTICE GORSUCH: No, I -- I --

12 MR. UNIKOWSKY: -- the state court.

13 JUSTICE GORSUCH: -- understand that.

14 I think we're speaking past each other.

15 So you -- you're -- you're saying that
16 Alabama can't have an exhaustion requirement,
17 correct?

18 MR. UNIKOWSKY: Only as applied to
19 Section 1983 claims.

20 JUSTICE GORSUCH: Right. Yeah. Yeah.
21 Right. Okay.

22 But, if I were to challenge my federal
23 disability benefit claim, identical claim, just
24 against a different government, here, instead of
25 the state, the federal government, you'd almost

1 assuredly have to exhaust your administrative
2 remedies before you could challenge that
3 decision, and I'm -- I'm just curious how you
4 reconcile that fact with -- with the relief you
5 seek here.

6 MR. UNIKOWSKY: So I'm actually not
7 sure that's the case if it's the type of claim
8 we're asserting here. Like, suppose you filed a
9 Social Security claim and it was stuck in the
10 agency for five, 10, 15 years.

11 JUSTICE GORSUCH: You'd have a
12 futility argument for sure.

13 MR. UNIKOWSKY: Yeah. I think you'd
14 be able to go to federal court.

15 JUSTICE GORSUCH: Yeah.

16 MR. UNIKOWSKY: That's right.

17 JUSTICE GORSUCH: Right. But,
18 otherwise, you'd have to exhaust, right?

19 MR. UNIKOWSKY: Right, unless --

20 JUSTICE GORSUCH: And that's what I'm
21 getting at, okay?

22 So, on the federal system, you have an
23 exhaustion requirement with a futility
24 exception. Assuming Alabama recognizes a
25 futility exception -- and I'll have that

1 question for counsel, I've done a little
2 research on it, it seems to have one -- why --
3 why shouldn't the state be allowed to have the
4 exact parallel situation that you'd have on the
5 federal system?

6 MR. UNIKOWSKY: I guess I think that
7 argument is incompatible with -- with the Felder
8 case. I mean, look at all the reasoning of the
9 Felder case. I think it would rebut that --
10 that suggestion. I mean, the Court held that
11 it's -- the state is not permitted to put that
12 type of barrier in front of the vindication of
13 the full right.

14 JUSTICE KAVANAUGH: What -- what does
15 Felder -- because that is the linchpin of your
16 argument, is that we've already decided this.
17 So what does -- what kind of state procedural
18 rules or rules does Felder still leave, and how
19 would you define the scope of that?

20 MR. UNIKOWSKY: So Felder left two
21 categories of rules that the State could apply
22 in its own courts.

23 One are neutral procedural rules. So
24 it gave the example of rules governing
25 substitution of parties and service of process,

1 rules that don't just apply to plaintiffs who
2 sue governmental defendants.

3 And then the second category was
4 certain jurisdictional rules. And Haywood
5 elaborated on this. The Court said that
6 jurisdictional rules that reflect concerns over
7 competence over the subject matter and the power
8 over the person, that jurisdictional rules are
9 designed to protect.

10 So, you know, examples of such rules
11 would be like in the -- the Herb case, a
12 jurisdictional rule that a territory -- a city
13 court can only hear cases arising from its
14 territorial limits. The Court upheld such a
15 rule. Or a case saying that the state won't
16 exercise jurisdiction over out-of-state
17 defendants if it's an out-of-state plaintiff.
18 The Court upheld such a rule in the Douglas case
19 from 1929.

20 So those are the types of
21 jurisdictional rules --

22 JUSTICE KAVANAUGH: Do you --

23 MR. UNIKOWSKY: -- that would --

24 JUSTICE KAVANAUGH: -- and do you view
25 Felder as a preemption decision then?

1 MR. UNIKOWSKY: Yes, I view Felder as
2 a preemption decision.

3 JUSTICE KAVANAUGH: And what -- on
4 what basis was the preemption?

5 MR. UNIKOWSKY: So the Court talked
6 about purposes and objectives preemption in its
7 opinion. And we actually have no problem with
8 that. We agree with all of its analysis.

9 I actually think there would be a --
10 there's a straighter path to the result in
11 Felder. I just think there's a -- a direct
12 conflict because, when the Court holds -- holds
13 that an affirmative defense is not available, it
14 just means it's not available, regardless of
15 whether the adjudicator is a federal or state
16 judge.

17 So I view sort of direct -- I view
18 Felder as a direct conflict preemption case.
19 The Court did couch it in -- in purposes and
20 objectives language, possibly because, in that
21 case, it actually wasn't clear whether it was an
22 exhaustion requirement at all.

23 Unlike typical exhaustion
24 requirements, you don't have to wait to the
25 agency to rule. And so one of Wisconsin's

1 arguments in that case was this isn't exhaustion
2 like in Patsy. I think that's why the Court
3 walked through all of the -- the reasons that
4 the statute conflicted with, you know, the
5 purpose of Congress. And then it said, well,
6 actually, we think it is an exhaustion
7 requirement, and then Patsy's reasoning just --
8 just follows.

9 JUSTICE JACKSON: What -- what I guess
10 I'm confused about -- from your answer to
11 Justice Kavanaugh is how the jurisdictional and
12 neutral requirements relate to the -- the
13 analysis in Felder.

14 I mean, Felder's rule about whether or
15 not it was preempted didn't seem to have
16 anything to do with whether the rule was
17 jurisdictional or neutral.

18 So why do you suggest that that's
19 somehow a way to get out of Felder's analysis
20 about preemption?

21 MR. UNIKOWSKY: You know well, I
22 think -- so Felder specifically said the rule in
23 that case wasn't neutral. So the Court has this
24 whole discussion about how -- you know, it only
25 applies to -- to plaintiffs who sue the

1 government. And so that's -- that's not neutral
2 as the Court --

3 JUSTICE JACKSON: Yeah, but that's not
4 what --

5 MR. UNIKOWSKY: -- understood the
6 question.

7 JUSTICE JACKSON: I mean, I'm looking
8 at the analysis in Felder and it -- as you said
9 subsequently, it's a direct preemption case. It
10 says that the notice of claim statute undermines
11 the uniquely federal remedy that is Section 1983
12 in several interrelated ways.

13 And then it talks about three ways,
14 one of which is that it conditions the right of
15 recovery that Congress has authorized. The
16 second is that it discriminates against the
17 federal right. And the third is that it -- it
18 looks like an exhaustion requirement, all right?

19 MR. UNIKOWSKY: Mm-hmm.

20 JUSTICE JACKSON: But, really, the
21 reason it's preempted is because it undermines
22 the federal right. And it seems to me that
23 Alabama's law is doing all of those three
24 interrelated things. So I don't understand why
25 we care whether or not it's jurisdictional or

1 whether or not it's neutral in -- in any given
2 sense. It's doing what Felder says you can't do
3 because it undermines the federal right.

4 MR. UNIKOWSKY: So I agree the Court
5 doesn't have to care about any of that stuff.
6 In fact, there is language in Felder that says
7 that even if a rule is neutral and procedural,
8 it still -- if, you know, it -- it -- it -- if
9 it undermines a federal right, it's still
10 preempted. And we'd be perfectly fine if the
11 Court went in that direction.

12 JUSTICE ALITO: Well --

13 MR. UNIKOWSKY: I -- I don't think
14 it's neutral and procedural, but -- I'm sorry,
15 Your Honor.

16 JUSTICE ALITO: Well, do you contest
17 the principle that state courts are generally
18 completely free to define the jurisdiction of
19 their courts?

20 MR. UNIKOWSKY: No, I don't contest
21 that general principle.

22 JUSTICE ALITO: But there are some
23 exceptions, right?

24 MR. UNIKOWSKY: Yes.

25 JUSTICE ALITO: So why isn't that body

1 of case law the appropriate body of case law to
2 apply here since the Alabama Supreme Court tells
3 us that this rule is jurisdictional? We
4 assume -- presumably have to accept that. This
5 is a matter of state court jurisdiction.

6 So why don't we look to the body of
7 case law that explains when this general rule
8 that the state courts can define the
9 jurisdiction of their own courts gives way?

10 I know you want to talk about Patsy
11 and Felder, but why is that -- neither of those
12 involves jurisdiction.

13 MR. UNIKOWSKY: That's right. So this
14 Court has upheld some jurisdictional rules and
15 struck down others, and we're happy to talk
16 about those cases.

17 So, in Howlett and most recently in
18 Haywood, this Court held that jurisdictional
19 rules were preempted, and in both those cases,
20 the -- the rule of decision was that the state
21 courts in general hear 1983 claims and the state
22 courts sometimes hear claims against these
23 particular defendants, and so the state cannot
24 avoid preemption just by defining the
25 jurisdiction of the state courts to exclude

1 cases where this defense is asserted.

2 And, in fact, in the Howlett case,
3 there's actually this language that says that
4 Felder would not have come out the other way if
5 Wisconsin had said that state courts lack
6 jurisdiction over claims in which the notice of
7 claim requirement wasn't satisfied.

8 JUSTICE ALITO: Well, in Haywood, the
9 courts -- the Court concluded that the New York
10 rule evinced hostility toward 1983.

11 Can that be said here, when the
12 Alabama courts will entertain the 1983 claim,
13 it's just a question of when they will do it?

14 MR. UNIKOWSKY: Well, I think that you
15 would -- I mean, "hostility" is too strong a
16 word. But I think the State has a policy
17 disagreement with Congress over the merit of
18 hearing unexhausted claims.

19 Respondent's brief emphasizes that
20 Alabama made the policy judgment that exhaustion
21 is a good idea, it really helps the claimant.
22 And that's the policy judgment that is
23 inconsistent with the policy judgment that
24 Congress made when it enacted Section 1983
25 without an exhaustion requirement.

1 JUSTICE KAGAN: You have a -- a broad
2 argument, Mr. Unikowsky, that if it's an
3 exhaustion requirement, it -- it -- it can't get
4 in the way of a lawsuit.

5 You also have a narrower argument that
6 has to do with this case. But what would be --
7 if you had to define a narrower class of cases
8 that are preempted so that if we wanted to avoid
9 the question of whether all preemption -- excuse
10 me, whether all exhaustion requirements were
11 preempted, what would that narrower class of
12 cases look like, and what justifies the
13 parameters?

14 MR. UNIKOWSKY: So I think the Court
15 could say that it's not going to rule on whether
16 all exhaustion requirements are preempted, but
17 it's going to say that this particular statute
18 is preempted as applied to all 1983 claims. And
19 that holding would avoid looking at the facts of
20 this particular case.

21 And I think the Court could reach that
22 conclusion by comparing the time limits here to
23 the time limits in Felder. So, in Felder, the
24 Court held that the statute undermines Section
25 1983 because the claimant only had 120 days to

1 bring the suit, and, therefore, the practical
2 effect of the notice of claim statute was to
3 immunize the state against many types of 1983
4 claims.

5 And so I think, you know, this case,
6 the time limits are actually much shorter.
7 It's -- it's seven days from receipt or 15 days
8 from mailing of a decision to file an internal
9 appeal to the appeals tribunal. It's also 15
10 days to go to the board of appeals. One of the
11 Petitioners in this case alleges that he
12 couldn't appeal because that entire period came
13 and went when he was in the hospital on a
14 ventilator because of COVID.

15 So I think that the Court can hold
16 that this particular statute has the same type
17 of adverse effects on claimants as --

18 JUSTICE KAGAN: Just -- so it would be
19 a line about the degree of burden that's
20 attached to the 1983 right?

21 MR. UNIKOWSKY: That -- that's right.
22 It could -- it could go in that direction
23 because that was part of Felder's reasoning, and
24 so I think the Court can incorporate that.

25 JUSTICE KAGAN: I mean, it was part of

1 Felder's reasoning. Felder has this -- some
2 language that suggests a very broad rule
3 applying to all exhaustion requirements, but
4 then it also goes into the time limits. It has
5 a lot to do with, like, how much burden there is
6 on the 1983 right, and it also discusses the
7 purposes of the statute and whether those
8 purposes suggest a conflict with the policy of
9 1983.

10 And the relationship between or among
11 all of those things is not particularly clear
12 from the language of the opinion. It sort of
13 suggests that they don't really believe that
14 there's a absolute bar when it comes to
15 exhaustion requirements.

16 Do you agree with that? Do you have
17 any, you know, views about the relationship
18 among those three aspects of the Court's
19 reasoning?

20 MR. UNIKOWSKY: Yeah, I -- I'm not
21 sure I agree with that because I think the
22 reason there were so many different arguments in
23 Felder was that it wasn't really clear that was
24 an exhaustion requirement in the typical way of
25 you file your claim to the agency, you wait for

1 a couple years, you're trapped in purgatory, and
2 then you leave the agency, right? Because it
3 was just a notice of claim requirement, you just
4 submit your claim, and if you wait a particular
5 period and they haven't answered, you get to
6 sue.

7 And, in fact, in -- in -- in the part
8 of the opinion talking about exhaustion and --
9 and -- and Patsy, the Court says, well, you
10 know, the state says it's de minimis, implying
11 that, you know, maybe some exhaustion
12 requirements fall under Patsy, but this just
13 isn't one. And the Court says no, no, no, this
14 really looks like an exhaustion requirement.
15 But, because of that dispute, I think the Court
16 felt the need to go through, you know, all of
17 the other doctrinal machinery.

18 I think this exhaustion requirement is
19 exactly like the ones in Patsy. It's an
20 absolutely classic exhaustion requirement. You
21 go to the agency. You have to wait for it to
22 rule. As this case illustrates, you might have
23 to wait for several years before getting a
24 chance to go to court. And so I think Patsy's
25 reasoning that this is just not an affirmative

1 defense to a Section 1983 -- claim carries over
2 to this case.

3 JUSTICE BARRETT: Mr. Unikowsky,
4 how -- you know, we've said in our own contexts
5 about jurisdiction it's a term of many, many
6 meanings, too many. How are we supposed to --
7 like, let's say I agree with you that the
8 definition of jurisdiction has to be a federal
9 one.

10 How are we supposed to decide?
11 Because a different test does apply, right, if
12 this is a jurisdictional requirement than if
13 it's just a straight-up, you know, more
14 Felder-like scheme. So what is the test? How
15 do we decide if a state rule is really
16 jurisdictional or not?

17 MR. UNIKOWSKY: So the -- the words of
18 this Court's cases, which I'm sure Your Honor
19 knows very well, is that it's really
20 jurisdictional if it -- reflects concerns over
21 the power over the person or competence over the
22 subject matter that jurisdictional rules are
23 designed to protect.

24 JUSTICE BARRETT: Mm-hmm.

25 MR. UNIKOWSKY: I certainly understand

1 that that formulation will not resolve any or
2 even many cases, but I think that just looking
3 at how the Courts in Howlett and Haywood reached
4 their conclusions -- so, in both cases, the
5 Court held that, number one, the state courts
6 have general jurisdiction over 1983 claims.

7 JUSTICE BARRETT: Mm-hmm.

8 MR. UNIKOWSKY: Number two, the state
9 courts in general had authority over these
10 defendants as long as certain other, you know,
11 conditions were satisfied. So, for example,
12 you -- in Haywood, the Court emphasizes that you
13 can get injunctive relief against these
14 defendants. And so the Court said, well, if
15 there's power over 1983 claims in general, power
16 over these defendants in general, the rule is
17 not a bona fide jurisdictional rule.

18 I think that that's the -- the
19 reasoning in those cases. And, again, carried
20 over to this case, I think you'd have the same
21 reasoning. Alabama courts generally have
22 jurisdiction over Section 1983 claims. There is
23 jurisdiction over this defendant as long as the
24 claim is exhausted. There's claim --
25 jurisdiction over unexhausted claims when there

1 is no exhaustion requirement in the particular
2 scheme.

3 All that's happening here is that the
4 state is cutting out from jurisdiction claims in
5 which the -- the -- the defendant has this
6 particular affirmative defense, even though this
7 Court has held that that's not a defense under
8 Section 1983.

9 And so I don't think the Court really
10 has to elaborate the exact lines here. Its --
11 its lines are a little bit blurry, but I think
12 that, you know, as applied to these particular
13 facts, you can just --

14 JUSTICE BARRETT: It's like a claims
15 processing rule --

16 MR. UNIKOWSKY: Right. Exactly.

17 JUSTICE BARRETT: -- rather than a
18 jurisdictional rule?

19 MR. UNIKOWSKY: Exactly. So, I mean,
20 you know, I think there's going to be a lot of
21 borderline cases, but I don't think this is --
22 this is one.

23 JUSTICE ALITO: I --

24 JUSTICE BARRETT: And let me just ask
25 you one question about how this scheme works

1 because I agree it's very odd. Is there some
2 mechanism when you're before this intermediate
3 tribunal where you actually fill out a piece of
4 paper and say, I'm asserting a due process claim
5 in addition to my claim for benefits? How would
6 one even exhaust the due process portion of
7 this?

8 MR. UNIKOWSKY: So I've been wondering
9 that too. I mean, maybe you can just go back
10 right now to the appeals tribunal and, like,
11 file, like, a 28(j) letter saying, hey, enough
12 time has passed; you know, there's a due process
13 violation. I don't -- I don't know if there's
14 any procedural mechanism to do that that I'm
15 aware of, but that does seem to be what the
16 state court is requiring here.

17 JUSTICE ALITO: I -- I came into this
18 case thinking that perhaps there wasn't a great
19 deal at stake since a plaintiff like your
20 plaintiffs could always file in federal court
21 and avoid the exhaustion requirement by doing
22 that.

23 But what you just said in response to
24 Justice Barrett makes me think that this could
25 be much more important because, if we are going

1 to read into the general rule that state courts
2 can define their jurisdiction, what we have done
3 in determining whether federal statutes are
4 jurisdictional, which is pretty much to say,
5 boy, it's really hard for us to conclude that
6 anything is jurisdictional, then you are really
7 asking for a significant weakening of this
8 general rule which has been a -- a -- a landmark
9 rule for hundreds of years.

10 MR. UNIKOWSKY: So I'm not sure the
11 Court should engage in the sort of statutory
12 interpretation of state statutes that it would
13 engage in for federal statutes. That's not the
14 rule we're asking for, all right?

15 We're not quarreling with the state
16 court that, as a matter of state law, this is a
17 jurisdictional statute.

18 JUSTICE ALITO: Okay. Fine. All
19 right.

20 MR. UNIKOWSKY: Okay? What we're just
21 saying is it's -- not all jurisdictional rules
22 are created alike for purposes of federal law,
23 and that distinction might sort of match the
24 jurisdictional versus claim processing type of
25 distinction that this Court has articulated --

1 JUSTICE ALITO: Okay.

2 MR. UNIKOWSKY: -- in federal cases.

3 JUSTICE JACKSON: And are you saying
4 that, assuming this is a state jurisdictional
5 rule, it cannot or can be preempted? What is --
6 I -- I thought this case was about preemption,
7 not about the characterization of the state law.

8 So, if we agree and assume that the
9 state law is jurisdictional, what implication
10 for whether or not it can be preempted by
11 federal law?

12 MR. UNIKOWSKY: In -- in this case, I
13 think there's no implications. It's preempted
14 regardless of whether it's jurisdictional.

15 JUSTICE JACKSON: Why?

16 MR. UNIKOWSKY: Because this Court has
17 held as far back as, like, the Mondou case in
18 1912 that a state court cannot decline
19 jurisdiction over a federal claim because of a
20 disagreement with -- with the federal policy
21 allowing the claim to proceed.

22 And I think that's what's happening in
23 this case. Alabama has the view that exhaustion
24 is a good idea, and it has imposed that by
25 statute. But Congress has decided that that's

1 not the case, that you should be able to bring
2 1983 claims without having to exhaust. And so
3 the rule --

4 JUSTICE JACKSON: And so it's a
5 Supremacy Clause issue in terms of whether or
6 not that has to be the outcome?

7 MR. UNIKOWSKY: Yeah. I think the
8 rule of decision applied by the state court in
9 this case is inconsistent with the rule of
10 decision that Section 1983 requires the state
11 court to adopt. So I think there's just direct
12 preemption in that way.

13 We're not disagreeing with the purpose
14 and objectives analysis in Felder. We agree
15 with that too. But I think there's an even more
16 straightforward way to get to the same outcome.

17 JUSTICE KAVANAUGH: Put aside Felder.
18 What is the problem with just going to federal
19 court?

20 MR. UNIKOWSKY: Well, we could have
21 gone to federal court, but there's a lot of
22 cases from this Court. I won't mention Felder,
23 but there's a lot of other cases --

24 JUSTICE KAVANAUGH: Well, what is the
25 real-world problem with just going to federal

1 court? Or maybe there aren't any and you're
2 just saying precedent says we can go to state
3 court. But do you have any real-world problems
4 with just going to federal court?

5 MR. UNIKOWSKY: Yeah, I think there's
6 a lot of reasons that you would want to go to
7 state court. So, first of all, the -- the
8 Pennhurst doctrine sometimes prohibits
9 plaintiffs from bringing state law claims in
10 federal court. Federal courts also often
11 talk -- have abstention doctrines that prohibit
12 bringing the claim in federal court. There's
13 a -- there's a brief from two religious freedom
14 organizations that talks about the abstention
15 doctrines in some detail.

16 Also, there's practical concerns.
17 Like, in some cases, lawyers would just be more
18 familiar with the local state court. The vast
19 majority of unemployment insurance litigation in
20 Alabama happens in state court. And so, if a
21 lawyer may be more familiar with that tribunal,
22 they may spend their entire career practicing in
23 state court, and if they have a civil rights
24 claim from a claimant, then it makes sense for
25 them to go to state court.

1 JUSTICE KAVANAUGH: And you mentioned
2 this earlier, but a procedural due process claim
3 usually requires that you go through the state
4 processes first. Maybe that's how this case got
5 on the -- on the wrong track.

6 Do you agree with that?

7 MR. UNIKOWSKY: In general, yes. I
8 think that if you went to federal court and
9 asserted your due process claim without
10 exhausting, you'd usually lose, except in an
11 unusual case like this, where you're actually
12 challenging the inability to exhaust.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 I -- I want to make sure I have your
16 complete answer to the line of questioning I --
17 I understood Justice Kagan to be pursuing, I
18 mean -- and I think why you called this
19 Kafkaesque, which is because you're being told
20 you have to go to the state -- your -- your
21 claim is the state doesn't handle these things
22 in a timely fashion, they lose the papers, you
23 can't answer the phone, so why send them back?
24 If you have to go back there, that's -- your
25 whole point is you -- you -- you can't go back

1 there because they do such a -- that's what
2 you're challenging.

3 And I just want to make sure
4 whether -- if you had the most efficient state
5 procedure imaginable, you know, they answer the
6 phone on the first ring and -- and -- they
7 quickly give you a decision, would your argument
8 be the same, that it doesn't matter?

9 MR. UNIKOWSKY: It -- it would be the
10 same. We would definitely lose in that
11 scenario, but it would be the same argument,
12 that you wouldn't have to exhaust. So, if such
13 a claim was filed --

14 CHIEF JUSTICE ROBERTS: You would --
15 I'm just -- you would lose? In other words --

16 MR. UNIKOWSKY: On the merits. On the
17 merits, we would lose.

18 CHIEF JUSTICE ROBERTS: You would
19 not -- then the ruling would be you do not --
20 you -- you do -- you do have to go to the state
21 before pursuing your 1983 action?

22 MR. UNIKOWSKY: We don't think that --

23 CHIEF JUSTICE ROBERTS: I mean the
24 state agency.

25 MR. UNIKOWSKY: So we don't think

1 there should ever be an exhaustion requirement.

2 If you filed a suit in federal court
3 and said, you know, even though they answered on
4 the first ring, they should have been even
5 faster, there wouldn't be an exhaustion problem.
6 This -- the federal court would just say there's
7 no due process violation. It's a great state
8 agency. It's very effective.

9 And we just want the state court to
10 apply the same rule of decision, right? You
11 don't have to exhaust, but your claim loses
12 because you're getting plenty of process and
13 there's no problem with the process.

14 CHIEF JUSTICE ROBERTS: Okay. Well,
15 then what was Kafkaesque about the process? I
16 understood you to say that that was the problem,
17 that it was -- it imposed a burden on your --
18 the exercise of your -- your federal right.

19 MR. UNIKOWSKY: No. What was
20 Kafkaesque is the ruling that we couldn't
21 challenge our inability to exhaust precisely
22 because we haven't exhausted. That -- that --
23 that was the problem.

24 Like, our -- the problem was we can't
25 exhaust effectively, and the state court held

1 that because you didn't exhaust --

2 CHIEF JUSTICE ROBERTS: Well, but what
3 if you can --

4 MR. UNIKOWSKY: -- you can't challenge
5 that.

6 CHIEF JUSTICE ROBERTS: -- what if you
7 can exhaust effectively?

8 MR. UNIKOWSKY: Well, then you
9 wouldn't have a -- a claim.

10 I mean, I -- the problem is, as
11 applied to this fact pattern, I think it doesn't
12 make sense to apply an exhaustion requirement,
13 and that's why we think that, as applied,
14 effectively, what the statute is doing is
15 granting the state immunity in the state courts
16 from this.

17 CHIEF JUSTICE ROBERTS: Okay. My last
18 question: You say "as applied to this fact
19 pattern."

20 MR. UNIKOWSKY: Yes.

21 CHIEF JUSTICE ROBERTS: So tell me
22 what the particulars of this fact pattern are
23 that may not be the case in other situations.

24 MR. UNIKOWSKY: The particulars of
25 this fact pattern is when the Petitioners are

1 challenging their failure to exhaust and they're
2 told that they can't challenge their failure to
3 exhaust until they have, in fact, exhausted.

4 The problem with that is that as a
5 practical matter, you're immunizing the state in
6 the state court from the 1983 claim because you
7 can't exhaust. So you're incapable of
8 challenging your inability to exhaust because
9 the state is saying you have to exhaust until
10 you can bring the challenge.

11 So there's no way to challenge in
12 state court at all, and so it's a de facto
13 immunity akin to the immunities that were in the
14 Haywood and -- and the Howlett case. So that's
15 our -- our narrowest argument on this.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 Justice Alito?

20 JUSTICE ALITO: Could you have sought
21 mandamus in state court to get a ruling in these
22 cases?

23 MR. UNIKOWSKY: So --

24 JUSTICE ALITO: An administrative
25 ruling in these cases?

1 MR. UNIKOWSKY: So there's a dictum
2 that is cited by a respondent from a 1997
3 intermediate appellate court case that says
4 that, in principle, mandamus could be available
5 if an agency intentionally sits on a claim and
6 drags its feet, but no mandamus claim was
7 asserted there.

8 I -- I think mandamus wouldn't be very
9 effective in this case for a few reasons.

10 So, first of all, of course, you have
11 to show a clear and indisputable right to the
12 writ, which is a higher standard than in an
13 ordinary civil case.

14 Also, you wouldn't -- the only thing
15 the state court could do is tell the state
16 agency to rule. It couldn't enter the other
17 remedies that -- that we're seeking in this
18 case. Mandamus is also a discretionary remedy,
19 and so I just don't think it's an effective
20 substitute for the 1983 claims we're asserting
21 today.

22 JUSTICE ALITO: What if a state has
23 a -- a regime under which the -- the -- the
24 person seeking the benefits first has to file
25 the claim and then there -- there's a -- there

1 are two levels of -- of appellate review,
2 administrative review, and after -- I assume
3 that you would admit that if the case were filed
4 in federal court, the -- the person would have
5 to seek the benefits in the first instance,
6 right?

7 MR. UNIKOWSKY: Yes. They wouldn't
8 have to -- it wouldn't be an exhaustion problem
9 under Patsy.

10 JUSTICE ALITO: No. Okay.

11 MR. UNIKOWSKY: They'd have to seek
12 the benefits because there's no violation if you
13 haven't tried the benefits.

14 JUSTICE ALITO: All right. And then
15 the -- then the -- the person says, oh, this
16 process is too long, I -- I want a quick
17 decision, they denied my claim. Then what?

18 MR. UNIKOWSKY: So --

19 JUSTICE ALITO: It's a violation of my
20 due process rights because this is more
21 elaborate than it needs to be.

22 MR. UNIKOWSKY: So, if your claim was
23 denied --

24 JUSTICE ALITO: Right.

25 MR. UNIKOWSKY: -- you can go to

1 federal court and you can file your claim and
2 you can say there was a due process violation,
3 and the court would adjudicate that.

4 If you jumped the gun and didn't wait
5 for all the process to wrap up, then probably
6 the federal court would say that there's no due
7 process problem. The state's given you plenty
8 of process. And we'd want the state court to
9 reach the same ruling.

10 And if that's not the case, if you
11 were collaterally attacking the state court
12 administrative process and you finished it and
13 there was still a due process violation, then
14 maybe you'd win in federal court. And if you'd
15 win in federal court, you should win in state
16 court too. We're just asking to align the
17 rules.

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: Counsel, I -- you
22 say this is not a neutral rule because, in every
23 other case where there's a due process violation
24 of an agent -- of an agency's process in some
25 way, people can go directly to state court,

1 correct?

2 MR. UNIKOWSKY: That -- that's one
3 reason it's not neutral. Another reason is
4 Felder's reason, which is that it only applies
5 to plaintiffs who sue the government.

6 JUSTICE SOTOMAYOR: Plaintiffs who sue
7 the government but for this particular type of
8 benefit?

9 MR. UNIKOWSKY: Right.

10 JUSTICE SOTOMAYOR: So it is sui
11 generis to just one class of plaintiffs on one
12 potential constitutional violation?

13 MR. UNIKOWSKY: That's right.

14 JUSTICE SOTOMAYOR: Or take --

15 MR. UNIKOWSKY: It does apply to --
16 I -- it does apply to state law claims. I
17 acknowledge that. But it's not neutral in the
18 sense that it doesn't apply in private tort
19 litigation. It doesn't apply to other lawsuits
20 against the government.

21 JUSTICE SOTOMAYOR: I -- I guess I'm
22 having trouble with the jurisdictional argument
23 that my colleagues are concerned about.

24 This is not jurisdictional in the
25 sense of we're telling state courts that they

1 can't hear a claim, correct?

2 MR. UNIKOWSKY: That -- that -- I
3 agree with that, Your Honor.

4 JUSTICE SOTOMAYOR: All right. We're
5 not saying this is a federal claim, so it has to
6 go to federal court. We're saying, no, you
7 state courts have the power to hear
8 constitutional -- 1983 constitutional claims.
9 That your legislature permits you to do.

10 So it's not as if they're -- filed a
11 neutral rule that says you can't hear 1983
12 claims, correct?

13 MR. UNIKOWSKY: Mm-hmm. I agree, Your
14 Honor.

15 JUSTICE SOTOMAYOR: And so all we're
16 saying is you, state courts, should decide in
17 the first instance whether there is a due
18 process violation, correct?

19 MR. UNIKOWSKY: That's correct. We're
20 not saying in this Court that we necessarily
21 deserve to win. We just want a chance to be
22 heard.

23 JUSTICE SOTOMAYOR: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: In the colloquy that

1 you had with the Chief Justice, you started with
2 the broad form of your argument and ended up
3 with a narrower form, a much narrower form. In
4 the delta between the two, it seems to me you're
5 going to lose on the merits anyway.

6 In other words, if somebody goes in
7 and says, I got \$100, I really deserve \$200,
8 they didn't listen to a certain category of
9 evidence, that's a due process violation. You
10 know -- you've not made the argument, they're
11 just going to throw you out, whether it's -- you
12 call it on the merits or for -- for -- because
13 your claim isn't ripe.

14 So why should we go to the broad form
15 of the argument when nobody's going to win in
16 that category of cases anyhow?

17 MR. UNIKOWSKY: I -- I guess I just
18 think that's the cleanest reading of Felder. I
19 mean, Felder has a lots of different rationales,
20 and I think all those rationales apply to
21 exhaustion requirements in general. Or, even
22 more narrowly, all those rationales apply to
23 this statute whenever it's applied.

24 So the Court could go narrow. I
25 just -- I just don't see a way of distinguishing

1 Felder from any other case in which the
2 exhaustion requirement is invoked.

3 But, you know, if the Court rules in
4 our favor narrowly, obviously, that's -- that's
5 fine from our perspective.

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 JUSTICE GORSUCH: This new narrow
10 theory, what -- what -- what exactly does it
11 encompass? What class of cases?

12 MR. UNIKOWSKY: So the narrowest
13 argument that I've articulated is, when there's
14 a de facto immunity from the application of the
15 rule, then there's a preemption problem.

16 JUSTICE GORSUCH: When it's impossible
17 to exhaust? Is that -- is that another way of
18 saying it?

19 MR. UNIKOWSKY: Well, when the very
20 thing you're challenging is your failure to
21 exhaust, then the state can't say you -- you
22 failed to exhaust because, once you've
23 exhausted, then your -- then your claim goes
24 away because you -- you've exhausted and it
25 becomes moot at that point.

1 So, essentially, you're immunizing the
2 state from these claims that there's a due
3 process violation in connection with the
4 exhaustion procedure.

5 JUSTICE GORSUCH: I -- I'm not sure
6 I've got it, but let me try. That it's
7 impossible to bring your claim?

8 MR. UNIKOWSKY: Yeah. I think,
9 applying this rule, it's impossible to challenge
10 the exhaustion requirement in a state court,
11 yes.

12 JUSTICE GORSUCH: Okay. And what if
13 it's not impossible here because of mandamus,
14 because you might have a futility argument? We
15 just don't know. Then what?

16 MR. UNIKOWSKY: So I -- I don't think
17 Respondent has argued in favor of futility
18 argument.

19 JUSTICE GORSUCH: Well, I think all of
20 this is kind of new, to be honest with you,
21 this -- this narrow theory. I -- I read your
22 brief as pressing the broad theory, but here we
23 are. Let -- let's say we just don't know
24 whether it is truly impossible here. What do we
25 do then?

1 MR. UNIKOWSKY: Well, I -- even if
2 it's not truly --

3 JUSTICE GORSUCH: Putting aside your
4 broad theory.

5 MR. UNIKOWSKY: No, I understand, Your
6 Honor.

7 Even if it's not truly impossible, I
8 still think that at least it's -- it -- it puts
9 a condition, a significant condition in front of
10 the vindication of the claim that's no less
11 significant than the condition in -- in the
12 Felder case.

13 JUSTICE GORSUCH: What if they're the
14 same sorts of conditions that exist in the
15 federal administrative realm? When we're
16 dealing with a federal benefit and an agency
17 doesn't rule, I'd make a futility argument and
18 I'd maybe mandamus the agency.

19 MR. UNIKOWSKY: I guess I think
20 nine -- Section 1983 is a special statute. This
21 Court held --

22 JUSTICE GORSUCH: Okay.

23 MR. UNIKOWSKY: -- in Patsy that
24 there's no exhaustion requirement. There's
25 immediate access to a judicial forum. So I just

1 think that's different from the mine-run case in
2 which you're challenging a decision from the
3 Social Security agency.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 Justice Barrett?

8 JUSTICE BARRETT: I just want to
9 clarify your answer to Justice Gorsuch.

10 He asked you to stick to the narrow
11 theory, but to answer, you reverted to the broad
12 one, that Patsy just precludes exhaustion
13 requirements generally.

14 If we do not agree with your reading
15 of Patsy, can you articulate -- try one more
16 time to articulate that narrow theory that
17 doesn't rely on Patsy?

18 MR. UNIKOWSKY: Sure. I would say
19 that there is a significant barrier to the
20 vindication of a claim challenging the inability
21 to exhaust a remedy when the court holds that
22 you have to exhaust a remedy in -- in order to
23 bring that claim.

24 I mean, what we're trying to do is get
25 the state agency to give us hearings and give us

1 adequate notice. And what the state court said
2 is that because you didn't exhaust those
3 remedies precisely because we didn't get the
4 hearing and the notice, you can't bring your
5 claim.

6 So, even if Justice Gorsuch is correct
7 that there's some theoretical way with mandamus,
8 which we don't think this is an adequate
9 substitute of bringing the claim, I mean,
10 there's still a very significant barrier which
11 is -- to the bringing of the claim. So, you
12 know, that does place the type of barrier that I
13 think would conflict with Congress's objectives
14 when it enacted Section 1983.

15 JUSTICE BARRETT: Okay. Thanks.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 Thank you, counsel.

19 Mr. LaCour.

20 ORAL ARGUMENT OF EDMUND G. LaCOUR, JR.

21 ON BEHALF OF THE RESPONDENT

22 MR. LaCOUR: Mr. Chief Justice, and
23 may it please the Court:

24 This Court finds historic state powers
25 to be preempted only when the text of federal

1 law makes that result clear. Nothing in 42
2 U.S.C. Section 1983 makes clear that it was
3 meant to preempt neutral jurisdictional rules
4 like the one at issue here.

5 Petitioners' reliance on Patsy ignores
6 the key difference between exhaustion rules
7 created by Congress and exhaustion doctrines
8 crafted by courts. The former may preempt, but
9 the latter do not. They are judge-made timing
10 rules, like ripeness and abstention, they do not
11 add elements to a federal right but merely
12 determine when a federal court is going to hear
13 it.

14 This Court's ripeness and abstention
15 holdings do not apply to state courts. Nor does
16 its determination that federal courts generally
17 should not send 1983 plaintiffs to the states.
18 Precedent confirms that 1983 does not contain a
19 categorical no-exhaustion element. In Johnson
20 v. Fankell, the Court did not require immediate
21 appellate review of a 1983 defense. In Ohio
22 Civil Rights Commission v. Dayton Christian
23 Schools from 1986, this Court applied Younger
24 abstention to force a 1983 plaintiff back into
25 state agency proceedings.

1 These decisions show that deferring
2 consideration of a federal right does not
3 necessarily alter or defeat it. Thus, while
4 some notice of claims rules, like the one in
5 Felder, are preempted as obstacles to
6 adjudication and liability, agency review is
7 typically a means of adjudication and does not
8 inherently conflict with 1983's remedial
9 purpose.

10 But, even if immediate judicial
11 consideration were an unwritten element of 1983,
12 neutral jurisdictional rules like Alabama's are
13 still a valid excuse for declining jurisdiction.
14 Reading 1983 to preempt such laws would raise
15 serious constitutional questions that are best
16 avoided.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Well, Mr. Unikowsky's
19 argument as I understand it is that the
20 exhaustion rules in Alabama makes it impossible
21 for -- for him to pursue the due process claims
22 that he has under 1983.

23 So would you respond to that?

24 MR. LaCOUR: Yes, Your Honor. Two
25 points. One, as Justice Gorsuch was alluding

1 to, that is a new argument that was not
2 presented to the Alabama Supreme Court. It was
3 not passed upon by the Alabama Supreme Court.
4 It's not in the cert petition, and it's not
5 properly before this Court. Their only argument
6 is that even the most perfect agency
7 adjudication, if it has an exhaustion rule, is
8 preempted. And we think that, as Justice Kagan
9 was alluding to with Felder, that that rule has
10 already been rejected by this Court.

11 But looking at this as-applied
12 challenge to Alabama's law, we don't think that
13 it is the case that it functions as an immunity.
14 Mandamus is still available. There is still the
15 potential for a futility argument, one that was
16 not raised below.

17 And so it's simply not the case that
18 it is impossible to get an adjudication here.

19 JUSTICE SOTOMAYOR: I'm not sure how
20 it is possible given that, as I read the court's
21 decision below, you have to bring the -- due
22 process argument to the agency, and I don't see
23 any procedure to do that within the agency.

24 MR. LaCOUR: Well, Your Honor --

25 JUSTICE SOTOMAYOR: There's nothing

1 that -- there's no mandamus within the agency.
2 I don't know how the mandamus court would have
3 jurisdiction because it requires exhaustion.

4 So you're in a loop that I'm not sure
5 how this claimant gets out of.

6 MR. LaCOUR: Your Honor, I don't think
7 mandamus would require exhaustion. The point of
8 mandamus would be to break the sort of logjam
9 that Plaintiffs are complaining about here, but
10 they didn't take advantage of mandamus.

11 JUSTICE SOTOMAYOR: Well, Alabama --
12 Alabama ruled very broadly. It didn't say that
13 Mr. Williams, for example, who had a final
14 judgment that he was attacking, had a claim that
15 could be heard in court. And you seem to
16 concede in your briefs that he did. He got his
17 claim thrown out because he didn't file the
18 notice of claim.

19 Then he brought a due process argument
20 saying that the notice he received was
21 inadequate or the time limits were not proper
22 under due process. And the Alabama court --
23 court dismissed his action as unexhausted. That
24 sounds to me as if the due process claim has to
25 be exhausted within the agency.

1 MR. LaCOUR: Well, Your Honor, if --
2 if he had exhausted it and it was final, he had
3 the ability to file a direct appeal to the
4 circuit court.

5 JUSTICE SOTOMAYOR: He did.

6 MR. LaCOUR: No, Your Honor --

7 JUSTICE SOTOMAYOR: And the court --
8 he did. The court did what it did. And, all of
9 a sudden, he goes up to the Alabama Supreme
10 Court and it dismisses it as unexhausted.

11 MR. LaCOUR: Your Honor, I -- I think
12 it's important to remember how this was actually
13 litigated before the state courts. Their
14 primary argument, if you go back to their briefs
15 before the state courts, was that this
16 exhaustion requirement didn't apply to sort of
17 procedural challenges whatsoever. There was no
18 1983 claim --

19 JUSTICE SOTOMAYOR: Well, please just
20 tell me what form -- where is it in this process
21 that tells litigants, if we're not acting, you
22 can go to the appeals council and file something
23 and get them to order the agency to do
24 something, and then, if the agency doesn't do
25 it, maybe you've exhausted and you have a

1 futility argument to go seek mandamus or to go
2 do something in state court.

3 This is a Kafkaesque type of process
4 that's going on here.

5 MR. LaCOUR: Your Honor, I don't think
6 so. Alabama case law makes clear that mandamus
7 is available and that you may be able to raise
8 futility arguments.

9 JUSTICE SOTOMAYOR: It's discretionary
10 mandamus, isn't it?

11 MR. LaCOUR: Correct, but we -- we
12 presume that state courts --

13 JUSTICE SOTOMAYOR: And I don't know
14 how --

15 MR. LaCOUR: -- are going to follow
16 the federal Constitution.

17 JUSTICE SOTOMAYOR: -- I actually
18 don't know how mandamus operates with respect to
19 the exhaustion requirement.

20 MR. LaCOUR: Well, and -- and that
21 just points out the waiver problems that I was
22 addressing earlier. None of this was briefed up
23 below. None of this was argued in the blue
24 brief either. And so what we are dealing with
25 here is this categorical rule. And we don't

1 think that even Patsy supports this categorical
2 rule.

3 JUSTICE KAVANAUGH: Well, General,
4 on -- on that question, you started the day but
5 with the -- the text of federal law does not
6 preempt, you know, and that's a fair argument
7 and a good argument. It's just the argument
8 that was in the dissent in Felder. Justice
9 O'Connor made exactly those same points, but it
10 was a dissent in Felder. And in the majority in
11 Felder, it -- it made clear that the exhaustion
12 requirement by Wisconsin's law was problematic.
13 It said it "doesn't involve lengthy or expensive
14 administrative proceedings, but it forces
15 injured persons to seek satisfaction from those
16 alleged to have caused the injury in the first
17 place. Such a dispute resolution system may
18 have much to commend it, but that is a judgment
19 the current Congress must make."

20 In other words, the language in Felder
21 does seem -- contra Justice O'Connor's dissent,
22 the language in the majority in Felder does
23 seem to suggest that exhaustion requirements
24 generally -- and we can talk about how to define
25 those -- but generally are preempted even though

1 there's no text.

2 MR. LaCOUR: Well, a -- a few things
3 on that point, Your Honor.

4 First is -- Felder did not just say
5 Patsy ruled and then, in a two-page opinion, end
6 the case. There was a detailed, nearly 15-page
7 preemption analysis there. And the Court made
8 clear there were really two key problems with
9 the Wisconsin law. One was that, in purpose and
10 effect, it minimized liability. And so there's
11 your clear conflict. You have a federal law
12 designed to impose liability and a state law
13 designed to minimize it. I think that is the
14 through line from Felder to Howlett to Haywood,
15 is those are immunity laws.

16 And, second, the Court said that the
17 law in Wisconsin frequently and predictably
18 defeated the 1983 claim. Now "defeat" means
19 that you're going to exercise jurisdiction over
20 it and then dismiss it with prejudice because it
21 is an affirmative defense that the defendants
22 were handed by Wisconsin, and that did result in
23 dismissals with prejudice.

24 Jurisdiction -- like the law at issue
25 in Alabama, jurisdiction's not an affirmative

1 defense. You would never say that an amount in
2 controversy requirement is an affirmative
3 defense. And it doesn't defeat the right. It
4 simply says we're not going to consider it.

5 And so there's no way for Alabama to
6 alter the 1983 right by merely --

7 JUSTICE JACKSON: But that's not all
8 that Felder --

9 MR. LaCOUR: -- declining jurisdiction
10 over it.

11 JUSTICE JACKSON: Counsel, that -- I
12 appreciate that summary of what Felder said, but
13 in the section on page 141 where it talks about
14 what it means to undermine for preemption
15 purposes, it, first of all, has three things,
16 not just two, and the three things aren't just
17 minimizing liability and defeating the 1983
18 claim.

19 It says it conditions the right of
20 recovery that Congress has authorized and does
21 so for a reason manifestly inconsistent with the
22 purposes of the federal statute. So that's one
23 thing.

24 And I appreciate that it coloned to
25 minimize government liability --

1 MR. LaCOUR: Yes.

2 JUSTICE JACKSON: -- but the point is
3 that it's inconsistent with the purposes of the
4 federal statute.

5 Second, the notice provision
6 discriminates against the federal right, and it
7 talks about the differences in the time limits
8 in -- in a way that discriminates.

9 And then, finally, it operates in part
10 as an exhaustion requirement.

11 Now I appreciate that your counsel on
12 the other side is just homing in on the
13 exhaustion requirement, but Felder seems to take
14 it even beyond that. So can you explain why
15 Alabama's law is not doing the three things that
16 mattered in Felder to the preemption analysis?

17 MR. LaCOUR: Yes. So agency
18 adjudication is not a means of minimizing
19 liability. It is a means of adjudicating
20 whether or not claimants are entitled to money.
21 I think that's far different from the notice of
22 claims requirement in Felder, which had no
23 benefit whatsoever to plaintiffs.

24 Unlike here, the exhaustion
25 requirement in Alabama law can be beneficial to

1 plaintiffs because it keeps their well-heeled
2 employers or the Secretary from taking them to
3 court immediately --

4 JUSTICE JACKSON: Right. But can you
5 talk about the purposes of the federal statute,
6 right?

7 MR. LaCOUR: Yes. It --

8 JUSTICE JACKSON: Because I understood
9 preemption to be about inconsistency --

10 MR. LaCOUR: Right.

11 JUSTICE JACKSON: -- with the reasons
12 or the goals the federal statute was there.

13 So isn't a requirement like Alabama's,
14 which prohibits the ability to bring a due
15 process claim under these circumstances,
16 inconsistent with Section 1983, which is
17 supposed to be giving people the ability to make
18 these kinds of claims?

19 MR. LaCOUR: Your Honor, we're not
20 prohibiting anyone from bringing them. You get
21 to raise those very claims in front of the
22 agency first. And I think that's a key
23 difference between the Wisconsin law --

24 JUSTICE JACKSON: But not if the
25 agency won't process your papers.

1 MR. LaCOUR: Well, and -- and, Your
2 Honor, that's why we have mandamus. That's why
3 the futility arguments are -- are present as
4 well.

5 And then, second, there's -- there's a
6 key difference between going to an agency for an
7 adjudication and just being forced to go park
8 your claim for 120 days with the police officers
9 who purportedly beat you up, the law at issue in
10 Felder. Again, that in no way can benefit
11 plaintiffs. But the exhaustion requirement can
12 benefit plaintiffs.

13 And also, my -- my friend is -- is
14 incorrect. The exhaustion requirement does
15 apply to the Secretary as it applies to
16 claimants as well.

17 JUSTICE JACKSON: So your argument at
18 bottom is that this is consistent with
19 Congress's objectives in 1983? Because I
20 understood that to be the sort of umbrella
21 consideration with respect to preemption, which
22 is what I thought we were talking about here.

23 MR. LaCOUR: Yes. I -- I don't see
24 any conflict with the way Alabama has structured
25 judicial administration and with the purposes of

1 1983, which are to impose liability.

2 This is not a liability-minimizing
3 scheme. It was not designed to do that. It was
4 invented in 1935 to make unemployment benefits
5 available to people.

6 No one would think that the --

7 JUSTICE JACKSON: Has anybody ever
8 recovered in 1983 making these kinds of claims
9 in Alabama state court that you're aware of?

10 MR. LaCOUR: Your Honor, I -- I'm not
11 aware. I have not -- not seen one cited by my
12 friends and have not found one myself.

13 But I don't think anyone would say
14 that the Social Security Administration is set
15 up as an obstacle to people who are trying to
16 get disability benefits. It is the avenue for
17 getting that.

18 And it's the same thing for Department
19 of Labor.

20 JUSTICE KAGAN: So can I -- ask about
21 the dimensions of your argument in two different
22 ways? I'll give you just a couple of
23 hypotheticals.

24 So one is suppose we take this out of
25 the employment context. We're not talking about

1 a benefit of any kind. There's a person who
2 has, like, a quintessential 1983 claim, which is
3 the improper use of police force, and Alabama
4 sets up a scheme where you have to go to the
5 police department first and you have to go
6 through these three levels of review before you
7 can bring that to court.

8 Is that perfectly okay? Does -- or
9 does that change matters?

10 MR. LaCOUR: I think, Your Honor, if
11 we're talking about case by case, then I think
12 it's time to affirm the Alabama Supreme Court's
13 decision because it was just this categorical
14 argument.

15 But, second, to get to your question,
16 you need to look to see does this look like a
17 rule of judicial administration or not.

18 It may be looking a lot more like
19 Felder and thus might be more suspect, but --

20 JUSTICE KAGAN: I -- I don't
21 understand. What makes it more suspect?

22 MR. LaCOUR: Well, it -- it might be
23 what are -- like, who is it that's doing the
24 adjudication? What are the sort of requirements
25 that bind them?

1 JUSTICE KAGAN: Yeah, I mean, it's
2 sort of set up the same way, but there, it's a
3 police board. You know, police officers are on
4 these boards, and they make you go through
5 three -- three different stages, and we make you
6 do all that for police boards of different
7 levels before you can take the claim to court.

8 MR. LaCOUR: Your Honor, the -- again,
9 if it's particularly stringent, you might run
10 into some problems like in the Brown case from
11 1949. If it looks like it's designed to
12 minimize liability, you might run into some
13 Felder problems.

14 JUSTICE KAGAN: Well, if, if, if.

15 Let's just say it's the same kind of
16 thing, but it's in the police context.

17 MR. LaCOUR: Your Honor --

18 JUSTICE KAGAN: It's the same time
19 limits. It's the same everything. There's no
20 piece of paper that says we're doing this to
21 prevent good claims. You know, it's -- but --
22 but it's in a -- it's in a different context, a
23 non-benefits context, a quintessential 1983
24 context.

25 MR. LaCOUR: The Court has said in

1 Howlett and Haywood that neutral rules of
2 judicial administration are a valid excuse for
3 refusing to entertain a federal claim.

4 So, if that is a valid and -- and
5 jurisdictional rule that's been set up, then I
6 think that would be okay.

7 JUSTICE ALITO: Well, why wouldn't --

8 JUSTICE KAGAN: Okay.

9 JUSTICE ALITO: -- that look an awful
10 lot like Haywood itself, a -- a -- a rule that
11 evinces hostility to the 1983 claim? Because
12 there's no tradition of requiring this sort of
13 thing when a plaintiff wants to sue -- wants to
14 bring a classic Fourth Amendment 1983 claim.

15 MR. LaCOUR: Well, I think that
16 history could factor in. But, the same time, in
17 Haywood, there was no way to get into state
18 court whatsoever.

19 I took it in Justice Kagan's
20 hypothetical that you -- you would get to court
21 eventually to raise your claim. And so -- and
22 this Court has said -- I think this Court's
23 rulings show that merely deferring consideration
24 of a claim is very different than defeating it.

25 So look at Johnson v. Fankell, where

1 you had a 1983 defense of qualified immunity
2 that was denied at summary judgment stage in the
3 Idaho trial court, and they wanted to take that
4 up immediately to the Idaho Supreme Court and
5 were not able to do so. 1983 did not give them
6 some right of interlocutory appeal. And I think
7 that's essentially what Petitioners are asking
8 for here, is a right of interlocutory appeal.

9 JUSTICE ALITO: Well, I -- I don't
10 want to derail -- Justice Kagan, I think, had a
11 number of hypotheticals, but -- so I -- I don't
12 want to interrupt that. But then, eventually, I
13 do want to ask you about Mr. Unikowsky's narrow
14 argument.

15 Did you want to --

16 JUSTICE KAGAN: It -- it -- it doesn't
17 matter which way we do it.

18 JUSTICE ALITO: Okay. I'm not sure I
19 can capture exactly what his narrow argument is.
20 But suppose the narrow argument is that there's
21 no exhaustion requirement in a 1983 case in
22 state court, where it is, as a practical matter,
23 impossible or extraordinarily onerous to get a
24 decision. How would the state be hurt by that?
25 What would be wrong with that?

1 MR. LaCOUR: I think there might still
2 be some -- some sovereignty interest if you're
3 going to be reading the statute to require state
4 courts to exercise jurisdiction that the state
5 has never given them jurisdiction to exercise.

6 And that's why the Court has been
7 careful in -- even in Haywood to say that these
8 neutral and -- and truly jurisdictional rules
9 are a valid excuse for declining jurisdiction.

10 That's the nature of any
11 jurisdictional rule. That's going to keep some
12 cases out of court, so that can't be the test.

13 JUSTICE GORSUCH: But in it -- it --
14 couldn't it be, though, that in some of those
15 cases at least, where it's truly impossible and
16 it really is a Catch 22, that that is evincing
17 hostility to the plaintiffs' claims and a Felder
18 argument might be made there?

19 MR. LaCOUR: Absolutely. Or even a
20 Haywood argument.

21 JUSTICE GORSUCH: Or even a Haywood
22 argument. I mean, you -- we just don't know
23 it -- whether that's the case here.

24 MR. LaCOUR: Right.

25 JUSTICE GORSUCH: Yeah. All right.

1 JUSTICE KAGAN: How about if -- you
2 know, in Felder, there is a lot of talk about
3 the time limits. Here, the time limits are even
4 more stringent than they were in Felder.

5 Suppose we make them even more
6 stringent still, and let's add another bunch of
7 things. Let's say that instead of three levels
8 of review, there are five levels of review.
9 Let's say between each level you have to proceed
10 within five days, and then you have to bring
11 your court claim at the very end within five
12 days.

13 Let's say we have empirical evidence
14 that suggests that because the state
15 administrative process is very slow, it takes an
16 average of 10 years to actually get to court.

17 At that point, can we say that this is
18 so -- so onerous a process that it has to be in
19 conflict with 1983?

20 MR. LaCOUR: Your Honor, that sounds
21 like it -- it could fall under Haywood and --
22 and potentially be in conflict with 1983 under a
23 Haywood theory. Even if it is a truly
24 jurisdictional rule, that starts to look like an
25 evasion rather than something that's really

1 about the competence over the subject matter.

2 But, here, this truly is about
3 competence over the subject matter. You have an
4 expert agency -- like, since these claims
5 existed for the first time in 1935, they've
6 always been adjudicated in the first instance by
7 these hearing officers. They have expertise
8 when it comes to hearing these types of claims
9 because they hear thousands or hundreds of
10 thousands a year. They're applying the statutes
11 and regs again and again.

12 It's the exact sort of situation that
13 this Court confronted in *Elgin v. Department of*
14 *Treasury*, a *Thunder Basin* case about the Merit
15 Systems Protection Board, where the Court
16 recognized that the MSPB has certain expertise
17 because they hear these personnel claims
18 again --

19 JUSTICE KAVANAUGH: You're making a --

20 JUSTICE BARRETT: But the expert --
21 oh.

22 The expertise is in adjudicating the
23 entitle -- entitlement to unemployment, not the
24 due process claim, right?

25 MR. LaCOUR: But, Your Honor, a

1 similar argument was made in Elgin that the MSPB
2 doesn't typically hear constitutional claims.
3 And what the Court recognized was well, no, they
4 are going to hear some similar types of claims
5 that are going to come up again and again in
6 this context. For example, it -- it's not fair
7 because I didn't get my notice on time;
8 therefore, excuse my lack of -- of --

9 JUSTICE BARRETT: But --

10 MR. LaCOUR: -- of filing the appeal.
11 And then that can be considered by the board of
12 appeals, the appeals tribunal, or -- or the
13 circuit court eventually.

14 JUSTICE BARRETT: So tell me -- and
15 this is just the clarifying question I was
16 trying to ask Mr. Unikowsky -- how does one
17 assert these due process claims, say, before the
18 intermediate tribunal? Is there a mechanism for
19 doing that? It just seems like everything that
20 was a description in the briefs was talking
21 about how to pursue getting your unemployment
22 benefit. How does one go about making this due
23 process argument before the agency?

24 MR. LaCOUR: Your Honor, my
25 understanding is it's a fairly informal process.

1 I -- I think it would be as -- as simple as
2 arguing that this is not fair because the notice
3 was ineffective, for example.

4 But, again, ultimately, that issue was
5 not thoroughly briefed because that wasn't the
6 argument they were pressing before the state
7 supreme court.

8 JUSTICE KAVANAUGH: You're making your
9 position seem benign, but we have amicus briefs
10 from a wide variety of groups, from ACLU and
11 Public Citizen to religious liberty groups, to
12 the Chamber of Commerce, all of which say that
13 your rule will really hinder federal civil
14 rights claims from getting into state court.

15 The religious liberty plaintiffs say
16 that your position would "grind religious
17 litigants into submission before they are able
18 to have their claims heard in court." We see
19 the same thing from the ACLU's brief. You want
20 to respond to that?

21 MR. LaCOUR: Yeah. No, I -- I think
22 this Court's precedents in cases like Felder and
23 Haywood help to guard against that. Plus, if
24 the --

25 JUSTICE KAVANAUGH: They -- don't they

1 guard against it by saying that exhaustion is
2 not a requirement before you bring a 1983 suit
3 in state court?

4 MR. LaCOUR: No, I -- Felder, again,
5 did not deal with an agency adjudication. It
6 dealt with a law that said park your claim here
7 for four months and then -- and if you don't do
8 that, you have an affirmative defense you're
9 going to be facing and you're going to lose,
10 which I think is -- is far different than --

11 JUSTICE KAVANAUGH: But -- but
12 every -- just to pause there, your answer
13 suggests that I'm misreading Felder. Every
14 state supreme court that has considered the
15 issue, I think, before the Alabama Supreme Court
16 has read it just the way I just said.

17 MR. LaCOUR: No. Your Honor, I
18 think -- I think South Dakota was on our side,
19 and then, in some of those cases, you're dealing
20 with --

21 JUSTICE KAVANAUGH: The vast majority
22 of state supreme courts.

23 MR. LaCOUR: We're definitely on the
24 short side of the split, but we don't spend --

25 JUSTICE KAVANAUGH: And the short side

1 of the split is because those state supreme
2 courts, almost uniformly, have read Felder to
3 mean you can't have exhaustion requirements -- a
4 very simple rule, you can't have exhaustion
5 requirements for 1983 in federal or state court.

6 And you have a good argument to the
7 contrary. The problem is -- it's in the
8 O'Connor dissent, not in the majority in Felder.

9 MR. LaCOUR: No, Your Honor, I -- I --
10 again, I think you have to read those statements
11 from Felder in their context, and, of course,
12 opinions are not statutes, but, if they were,
13 I'd invoke the presumption against superfluity.
14 There -- there's a lot more in Felder to suggest
15 that what was really the problem was that it was
16 trying to minimize liability. And there, the
17 conflict couldn't be clearer with 1983.

18 But I -- I -- I cannot find in the
19 text or in Patsy this categorical no-exhaustion
20 rule, and I don't see how you square that with
21 cases like Ohio Civil Rights Commission, which
22 I -- I mentioned in my opening, and I apologize
23 it's not in the briefs, but it's a 1986 decision
24 where this Court applied Younger abstention to a
25 1983 claim to force that claimant back into a

1 state agency proceeding. Dayton Christian
2 Schools had fired a teacher on religious
3 grounds, sort of a precursor to Hosanna-Tabor.
4 The teacher went to the Civil Rights Commission
5 and said this was based on sex, and the
6 Commission opened an investigation. That 1983
7 plaintiff went to federal court and said we have
8 a free exercise right to be free from these
9 state proceedings altogether. And in an opinion
10 by then Justice Rehnquist, the Court said no,
11 take it up in the state agency, which again
12 shows that deferring consideration does not
13 defeat. And it also suggests that my friend's
14 position would lead to very strange outcomes
15 where a federal court in Ohio did not have to
16 hear that particular 1983 claim, but a state
17 court would have to. And -- that just simply
18 doesn't add up.

19 And I think that gets to the point --

20 JUSTICE KAVANAUGH: You have just one
21 more. You -- you've invoked federalism and
22 respect for states, but I think the practical
23 effect of your rule, if we were to adopt it,
24 would be everyone or most people would go more
25 quickly to federal court and haul the state

1 before federal court. I'm just -- the irony of
2 that, can you comment on that?

3 MR. LaCOUR: I don't think so, Your
4 Honor. I don't think there's an incentive for
5 states to structure their courts in a way that's
6 necessarily going to send everything to federal
7 court. If they do, then so be it. But, at the
8 same time, that might be an incentive for --

9 JUSTICE KAVANAUGH: Well, these kinds
10 of claims, if you had problems, you know, a free
11 exercise problem, a religion problem, or a
12 procedural due process problem with the
13 unemployment scheme in Alabama, you're just
14 going to go to federal court, right?

15 MR. LaCOUR: Right, and as
16 Mr. Unikowsky acknowledged, you'll lose on the
17 merits. So I don't think that's going to be a
18 serious problem here for Alabama.

19 JUSTICE JACKSON: Can I --

20 JUSTICE SOTOMAYOR: That's the point
21 of suppressing the federal right in state court,
22 isn't it? If you make the hoops so difficult to
23 go through, then they have no remedy. Here,
24 Mr. Williams was thrown out of -- out of the
25 state process because he didn't receive notice

1 because he was unconscious because of COVID, and
2 he's had no remedy in their state court.

3 So, basically, what you're really
4 saying is no, we're not hostile to a federal
5 right because we know we're going to win in --
6 no matter what we do.

7 MR. LaCOUR: No. Your Honor, I -- I
8 think --

9 JUSTICE SOTOMAYOR: And -- and one
10 last question. Tell me where in your
11 regulations there is a process set out that --
12 that claimants can go through to speed up the
13 process.

14 MR. LaCOUR: Well, Your Honor --

15 JUSTICE SOTOMAYOR: All of them have
16 told me that they've appealed on time, they've
17 called a -- not all of them, but we have 21
18 plaintiffs here. Many of them filed their
19 appeal notices, letter after letter, phone call
20 after phone call, years and years that passed
21 before they received anything or, when they
22 received something, with no explanation.

23 So tell me where in your regulations
24 you tell claimants what they can do before the
25 agency if there's a due process violation.

1 MR. LaCOUR: Your Honor, I don't have
2 chapter and verse for you because, again, this
3 was not raised --

4 JUSTICE SOTOMAYOR: You can provide a
5 letter. I don't want to hear about mandamus
6 or -- I want to hear where in the regulations
7 these people didn't do what the regulations said
8 they could have done.

9 MR. LaCOUR: Your Honor, mandamus is
10 not something they're required to do, but it is
11 something that is available --

12 JUSTICE SOTOMAYOR: And it's --

13 MR. LaCOUR: -- to them.

14 JUSTICE SOTOMAYOR: -- discretionary,
15 correct?

16 JUSTICE JACKSON: Counsel, can --

17 MR. LaCOUR: Yes, Your Honor, but it
18 is one way to avoid due process problems.

19 JUSTICE KAGAN: In the --

20 JUSTICE JACKSON: Counsel, can I
21 just -- oh, go ahead.

22 JUSTICE KAGAN: No, go ahead.

23 JUSTICE JACKSON: Can I just get you
24 to focus in quickly on Felder, and you -- you've
25 said many times that you see that case as the

1 problem being about minimizing liability.

2 But I'm quoting from the case when it
3 says that this is "essentially" -- "the question
4 is essentially one of preemption. Is the
5 application of the state's law to Section 1983
6 actions brought in state courts consistent with
7 the goals of the federal civil rights laws, or
8 does the enforcement of such a requirement
9 instead stand as an obstacle to the
10 accomplishment and execution of the full
11 purposes of the objectives of Congress?"

12 I thought we were thinking about is it
13 an obstacle, is it consistent? And what I'm
14 worried about is that if we start moving away
15 from that conception of what it means to be
16 preempted, that same kind of thought process and
17 doctrine is used in other laws, not just 1983.

18 For example, we have the Federal
19 Arbitration Act, which has a preemption standard
20 that is almost identical to what Felder just
21 said about whether or not it's consistent. And
22 we've repeatedly said that state laws that do
23 things like -- you know, related to contracts,
24 et cetera, et cetera, are preempted by the FAA
25 for the very same reasons.

1 So can you help us not to be concerned
2 about shifting the standard of what it means to
3 preempt and the way in which that might actually
4 implicate other preemption doctrines and other
5 laws?

6 MR. LaCOUR: So, Your Honor, I
7 think -- I think the real concern would be
8 adopting the view of preemption from my friend,
9 which doesn't really seem to line up with the
10 more disciplined and text-based approach that
11 this Court traditionally --

12 JUSTICE JACKSON: No, I -- we can --

13 MR. LaCOUR: -- takes in the
14 preemption context.

15 JUSTICE JACKSON: Let's say we reject
16 saying there's something about Felder that is
17 focused on exhaustion. I'm looking at Felder as
18 a preemption case that has a standard that talks
19 about the inconsistency with the purposes of the
20 federal statute --

21 MR. LaCOUR: Mm-hmm.

22 JUSTICE JACKSON: -- is it an obstacle
23 to the accomplishment and execution?

24 And I got to tell you, in the
25 Concepcion case in AT&T versus Mobility, that

1 exact same concept is governing what the Court
2 is doing with respect to preemption. So, if we
3 move from that, if we're focused more on
4 minimizing liability or whatever else you say
5 you think Felder means, I'm worried that that's
6 going to bleed over into these other kinds of
7 preemption areas.

8 MR. LaCOUR: Your Honor, what I'd say
9 to that is, why was the law an obstacle? And
10 the text answers that question. State officials
11 shall be liable. What's the state law do?
12 Minimizes liability. So there is your
13 text-based preemption problem right there on the
14 face of the statute.

15 JUSTICE JACKSON: It's not in the text
16 of the statute.

17 MR. LaCOUR: Shall be liable --

18 JUSTICE JACKSON: Minimizing liability
19 is not in --

20 MR. LaCOUR: Correct. But the -- the
21 law at issue there was part of a broader
22 liability scheme -- the Felder Court recognized
23 this -- that was enacted after Wisconsin had
24 done away with judicial immunity. The Wisconsin
25 Supreme Court had done away with judicial

1 immunity. And so this new immunity statute was
2 enacted that had damages caps and also had this
3 notice of claims requirement. Wisconsin
4 extolled this as a way to minimize liability.

5 So there wasn't really a question as
6 to what the law was doing. But --

7 JUSTICE KAGAN: You believe that
8 plaintiffs here could have brought suit
9 immediately in federal court, is that right?

10 MR. LaCOUR: Yes, Your Honor.

11 JUSTICE KAGAN: So, I mean, this is
12 Felder's -- it seems to me there's a lot going
13 on in Felder. But one -- its most essential
14 holding is it -- it quotes Patsy, and it says --
15 you know, Patsy said, too bad about an
16 exhaustion requirement. You have to be able to
17 bring suit in federal court immediately.

18 And then -- and this is on page 147 --
19 it said should there be any different rule with
20 respect to state courts, and it says, given the
21 evil at which the federal civil rights
22 legislation was aimed, there's simply no reason
23 to suppose that Congress meant to have that kind
24 of distinction.

25 So, I mean, that seems just like a

1 very clear-cut understanding of Felder, that
2 once we say that the exhaustion requirement does
3 not preclude suit in state courts, we understand
4 1980 -- does not preclude suit in federal court,
5 we understand 1983 to do the same thing with
6 respect to state courts.

7 MR. LaCOUR: Your Honor, even if I
8 grant you that, this is still a jurisdictional
9 rule, and you've still said in Howlett and
10 Haywood that neutral jurisdictional rules are a
11 valid excuse to keeping federal claims out.

12 So, even if there is some
13 get-to-court-immediately element of 1983, our --
14 our courts do not exercise jurisdiction over
15 that type of claim.

16 JUSTICE KAGAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas, anything further?

20 Justice Alito?

21 Justice Sotomayor?

22 Justice Kagan?

23 JUSTICE GORSUCH: Your friend on the
24 other side said, if it went to federal court,
25 there might be a ripeness issue and an

1 abstention issue. What are your thoughts?

2 MR. LaCOUR: I -- I think that is --
3 that's likely true. We've seen that in a lot of
4 courts of appeals decisions. We cited Cotton
5 v. Jackson as a -- I think it's a 2011 circuit
6 decision, where they lost on the merits for not
7 taking advantage of the process and running to
8 federal court too soon.

9 JUSTICE GORSUCH: Okay. And I take
10 your point that -- as I understand it, it's --
11 your argument is it's hard for this to be --
12 an exhaustion requirement of administrative
13 agency processes to be an obstacle that's
14 improper given that the federal government has
15 similar administrative exhaustion requirements.

16 But there does seem to be a tremendous
17 record of difficulty of -- of individuals
18 accessing that administrative process here.

19 What assurance do you have or can you
20 give us that -- that -- that the State is
21 addressing these claims in -- in a proper and
22 timely manner?

23 MR. LaCOUR: Yes, Your Honor, two
24 points.

25 The reason we point to the federal

1 analog is to show that this really does concern
2 competence over the subject matter, like the
3 Court has discussed in Howlett and Haywood.

4 And then, as to assurances that the
5 State is taking this seriously -- this is
6 obviously outside of the record because we're
7 the motion to dismiss stage -- but we have
8 tripled the number of hearing officers we have
9 from eight to 25, and we have greatly reduced
10 the backlog. I think, in -- in January of 2022,
11 that backlog of people who had waited at least
12 21 days for a hearing was up to over 131,000.
13 Today, it's down to about 7,410, and we
14 anticipate clearing that backlog by the end of
15 the year.

16 JUSTICE GORSUCH: Was some of that
17 backlog due to COVID or -- or other things?

18 MR. LaCOUR: Absolutely, Your Honor.
19 I think a million additional unemployment
20 claims. And then, of course, when you have
21 COVID, it makes it harder to -- to hire people
22 and makes it harder to retain people too during
23 the height of the pandemic.

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 Justice Barrett?

3 JUSTICE BARRETT: I asked
4 Mr. Unikowsky about the state statute of
5 limitations. So I'm going to ask you the same
6 question. When does the state statute of
7 limitations start running on these claims?

8 And to clarify, my concern is, if
9 somehow the state statute of limitations is
10 running, you know, because the due process
11 violation has already begun in the agency, is it
12 the case that that statute of limitations might
13 run in state, for purposes of state court,
14 before they can even get there?

15 MR. LaCOUR: Your Honor, of course,
16 this hasn't been briefed. I -- I don't think
17 that would be an issue because, I mean, the due
18 process violation is incomplete until the
19 process has run out.

20 So I -- I think -- and, certainly, if
21 they were to appeal out of the agency proceeding
22 directly to the circuit court, there wouldn't be
23 any statute of limitations problem in that
24 situation either.

25 JUSTICE BARRETT: Okay. My other

1 question is: So a couple times in your brief
2 you called the agency proceeding a proper
3 proceeding for redress under 1983, and you said
4 there's no reason for this Court to distinguish
5 between bringing a 1983 claim in something
6 that's called a court versus sending it to an
7 agency.

8 Is that somehow different than the
9 exhaustion requirement? Can you just --

10 MR. LaCOUR: I think, Your Honor --

11 JUSTICE BARRETT: -- let me know what
12 you're saying?

13 MR. LaCOUR: -- our -- our point there
14 is that we think the language suggests that
15 there is a great deal of discretion for the
16 states in terms of structuring their
17 adjudicatory processes.

18 And, in this instance, we have the
19 agency first functioning sort of as an adjunct.
20 They compile a useful record. That can then go
21 up for the circuit court to -- to review with de
22 novo review.

23 And that -- that's particularly
24 helpful for uncounseled claimants who maybe
25 don't have a lot of means because they just lost

1 their job. They can go through this informal
2 process, have a record. They don't have to go
3 through formal discovery and have a lawyer to
4 have that record when they do get to the circuit
5 court.

6 JUSTICE BARRETT: So is the
7 argument -- I mean, I guess I'm trying to
8 distinguish between an exhaustion requirement,
9 which is almost kind of like a pregame thing,
10 you know, it's a -- it's a threshold.

11 And this makes it sound like, if
12 you're saying this is part of the 1983 claim
13 itself or part of the adjudication, it's
14 actually not a delay of the 1983 claim. But is
15 your argument instead that this is actually part
16 of adjudicating the constitutional violation?

17 MR. LaCOUR: Your Honor, we -- we do
18 think it's advancing the purposes of 1983, which
19 are sort of remedial in ensuring that federal
20 rights are not being violated. But it's not a
21 1983 claim inside of the agency.

22 JUSTICE BARRETT: Okay. So that's --
23 okay. I just wanted to make sure I understood
24 your argument. Thank you.

25 MR. LaCOUR: Yes.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

3 Thank you, counsel.

4 MR. LaCOUR: Thank you.

5 CHIEF JUSTICE ROBERTS: Rebuttal,
6 Mr. Unikowsky?

7 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY
8 ON BEHALF OF THE PETITIONERS

9 MR. UNIKOWSKY: Thank you, Your Honor.

10 I just wanted to clarify one answer I
11 gave to Justice Gorsuch about ripeness. I did
12 acknowledge that ripeness is in general a
13 defense that a federal court can vindicate in a
14 Section 1983 case.

15 I wasn't trying to suggest that in
16 this particular case, if we went to federal
17 court, there would be a ripeness defense. I
18 think we waited long enough and our -- our claim
19 is ripe. So it was more a general point about
20 federal courts' powers to dismiss cases.

21 I'd like to say a couple of words
22 about the Felder case.

23 There's a lot of discussion this
24 morning about whether or not exhaustion was an
25 independent holding or whether the decision was

1 partly based on exhaustion, partly on other
2 considerations.

3 Even if the latter formulation is
4 correct, I actually think that every single
5 consideration in Felder also applies to this
6 case.

7 It's true that Felder talked about
8 whether the state was trying to minimize
9 liability. And my colleague said that the
10 agency system in general wasn't trying to
11 minimize liability.

12 I don't think that's the question. I
13 think the question is whether the exhaustion
14 requirement in particular is trying to minimize
15 liability, and I think the answer has to be yes.

16 The sole function of the exhaustion
17 requirement is to cause claims to be dismissed
18 when they're brought in circuit court. And
19 because the time limits are so tight, claims are
20 going to be predictably dismissed a lot more
21 frequently than the notice of claim requirement
22 at issue in -- in Wisconsin. And so -- in -- in
23 the Felder case. And so, ultimately, I think
24 every single consideration in Felder really
25 applies with equal force to this case.

1 So the Court doesn't need to parse out
2 which aspects of -- of the holding were holding
3 and which were alternative holdings, which were
4 dicta, because I think the entire decision
5 applies to this fact pattern.

6 On the question of jurisdictional
7 rules, I think the Court would really have to
8 overrule a lot of cases dating back to 1912 to
9 vindicate the argument that this is a
10 jurisdictional argument that can survive
11 preemption.

12 I think it's notable that the amicus
13 brief by several states actually does advocate
14 overruling all these cases back to 1912.
15 Respondent doesn't ask for that. And I think,
16 if the Court keeps those cases, then the result
17 in this case follows.

18 As back -- as far back as 1912, the
19 Court said that to -- the Court -- a state court
20 cannot decline jurisdiction based on
21 disagreement with the policy judgment of
22 Congress that a defense is unavailable. And
23 that's simply the principle we're asking to
24 carry forward today.

25 Finally, on this as-applied challenge,

1 I just wanted to point out that in the
2 proceedings below, immediately after asserting
3 our argument based on Patsy, we said it would be
4 absurd to make us wait for years in the
5 administrative process and then bring our
6 claims, which I think is reasonably construed as
7 the same type of as-applied argument we're
8 making this morning.

9 And we did make this argument in the
10 blue brief as well as the yellow brief, so I do
11 think it's teed up for the Court's
12 consideration.

13 If there's no further questions, we'd
14 ask the Court to reverse.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 11:21 a.m., the case
18 was submitted.)
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