

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CHARLES Z. STEVENS, III., Petitioner
v. DEPARTMENT OF THE TREASURY

CASE NO: 89-1821

PLACE: Washington, D.C.

DATE: March 19, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES Z. STEVENS, III, :
Petitioner :
v. : No. 89-1821
DEPARTMENT OF THE TREASURY, :
ET AL. :

- - - - -X
Washington, D.C.
Tuesday, March 19, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:
ALISON STEINER, ESQ., Hattiesburg, Mississippi; on behalf of the Petitioner.
AMY L. WAX, ESQ., Assistant to the Solicitor General; Department of Justice, Washington, D.C.; pro hac vice, on behalf of the Respondent.

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1 PROCEEDINGS

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 89-1821, Charles Z. Stevens, III
5 versus the Department of the Treasury.

6 Ms. Steiner.

7 ORAL ARGUMENT OF ALISON STEINER

8 ON BEHALF OF THE PETITIONER

9 MS. STEINER: Mr. Chief Justice, and may it
10 please the Court:

11 Petitioner Charles Stevens, a 67-year-old
12 employee of the Internal Revenue Service is before this
13 Court today, asking it to reverse the decision of the
14 court below, dismissing his age discrimination and
15 employment case and to remand this case for a decision on
16 the merits in Federal district court. The respondent
17 agrees that the Age Discrimination and Employment Act
18 entitles petitioner to this relief.

19 Section 15(c) of the ADEA gives Federal
20 employees the right to file civil actions in Federal
21 district court to remedy age discrimination in their
22 employment. The parties agree that the only statutory
23 precondition to this is that the employee must, under
24 section 15(d), give not less than 30 days' notice of his
25 intent to sue before filing sue, and must give that notice

1 within 180 days of the allegedly discriminatory event. It
2 is undisputed the petitioner in this case did both of
3 these things.

4 The court before however held incorrectly that
5 suit had to be filed within 30 days of the notice, and
6 therefore, dismissed the petitioner's suit as being filed
7 too long after his notice. This error was urged in the
8 court of appeals by the Government who is charged with the
9 statute's enforcement and has caused some confusion in
10 courts throughout the country which have made similar
11 though not identical errors.

12 QUESTION: Ms. Steiner, did your client or you
13 urge this point in the court of appeals relying on 633(d)?

14 MS. STEINER: It was not argued in the body of
15 the brief. It was subsumed within the question presented,
16 and the respondent argued it at some length in its brief.

17 QUESTION: What was the question presented that
18 subsumed it?

19 MS. STEINER: The question presented stated that
20 if an aggrieved party fails to file an administrative age
21 discrimination complaint in the time frame of the general
22 administrative provision of the Equal Employment
23 Opportunity Commission -- the Commission -- does such
24 failure deprive a Federal district court of jurisdiction
25 to hear a civil action filed under the Age Discrimination

1 and Employment Act where a charge has been timely filed
2 there under. He was alleging that he had timely filed his
3 15(d) charge in that question. He did not, however, argue
4 that in the body of his brief.

5 The court did, however, decide this question and
6 dismissed his suit, although it found that the notice
7 under 15(d) was timely as -- in relation to the allegedly
8 discriminatory act. It concluded that the suit was
9 untimely as having been filed 7 months after the notice.
10 It adopted in that respect a specific holding of the
11 district court that the -- that the suit had to be filed
12 within 30 days.

13 There's a second question that arises in this
14 case, and it has to do with a separate section of the act,
15 section 15(b), which creates an administrative process to
16 which Federal employees may also turn if they wish. The
17 parties here today agree that this separate administrative
18 process is not a statutory precondition to 15(c)
19 jurisdiction. And a Federal employee's efforts in the
20 administrative arena --

21 QUESTION: (Inaudible)?

22 MS. STEINER: The court of appeals and the
23 district court both decided that issue and concluded that
24 this petitioner's tardiness in the administrative arena
25 provided a separate ground for the dismissal of his

1 lawsuit. They ruled on both questions.

2 QUESTION: The court of appeals did?

3 MS. STEINER: The court of appeals adopted the
4 district court's ruling when it affirmed the holding that
5 the administrative tardiness mandated dismissal. The
6 court of appeals opinion alludes to both rulings. And --

7 QUESTION: Well, I thought its ground was -- on
8 which you lost was this mistake you just mentioned.

9 MS. STEINER: That is the ground that is cited
10 at the conclusion of the court of appeals' opinion. It
11 also, in the body of its opinion, makes the specific
12 finding that the district court determined that the
13 administrative filing was not timely and affirmed that
14 finding. A -- very shortly after this decision, the court
15 of appeals also made circuit precedence that it would
16 invoke -- would require exhaustion of remedies in the case
17 of White v. Frank. So there is no question that circuit
18 precedence in the Fifth Circuit is to that effect and that
19 it conflicts directly with circuit precedent in, among
20 other circuits the Sixth, in the Langford case.

21 QUESTION: There's nobody representing that
22 other point of view here really, is there?

23 MS. STEINER: No, Your Honor.

24 QUESTION: The Government agrees with you on
25 this point?

1 MS. STEINER: Yes.

2 QUESTION: And it agrees with you on the next
3 point you're going to argue.

4 MS. STEINER: It agrees --

5 QUESTION: So we're not going to get a whole lot
6 of help.

7 MS. STEINER: I -- well, the Government agrees
8 that -- that there should be no exhaustion --

9 QUESTION: Uh-huh.

10 MS. STEINER: -- and that this case was timely
11 filed.

12 It is undisputed, of course, that the petitioner
13 attempted to press his claim in the 15(b) administrative
14 arena but was denied the right to do so because he started
15 that too late. And we do not dispute that.

16 The court below, in affirming the district
17 court, erroneously found a linkage between the
18 petitioner's tardiness and the -- and its right to dismiss
19 the suit, and thus construed his time default in the
20 administrative arena as a failure to exhaust the remedies
21 which supported its dismissal of the suit.

22 The issue was raised in the district court,
23 argued at some length by the respondent taking the
24 opposite position that it is taking here today, and
25 decided -- and even conceded by respondent in its brief in

1 opposition to certiorari as a plausible interpretation of
2 the court of appeals' decision.

3 It is the subject of a clear conflict among the
4 circuits desperately needing resolution. And I believe it
5 would be necessary to ensure in this case that the court
6 of appeals does not simply reiterate the failure in the
7 administrative arena as grounds for affirming the
8 dismissal since it has already ruled that the untimeliness
9 was, to some degree, linked.

10 The timeliness question, almost to state it,
11 resolves it. The statute, section 15(d), contains two
12 deadlines. First, that within 180 days of the
13 discrimination, the aggrieved employee must give notice
14 that he intends to file suit, and second, that that notice
15 remain on file for not less than 30 days before civil
16 action is instituted.

17 The parties are in complete accord that
18 petitioner did meet both these deadlines. And the court
19 of appeals' error was based on a misreading of the second
20 deadline of 15(d) to mean that the suit was untimely
21 because it was filed more than 30 days later.

22 This question, as I say, this provision of the
23 statute, the two deadlines, have created some confusion in
24 dictum fortunately in other courts of appeals and does
25 warrant correction by this Court in connection with its

1 grant of certiorari on the first question presented.

2 The 15(b) exhaustion of remedies questioned is
3 easy to resolve simply by reference to the statutory
4 language. At the threshold, it should be noted that the
5 petitioner did in fact allow the administrative process in
6 this case to reach a final outcome of rejection of his
7 complaint as being filed too late in the administrative
8 arena. And he awaited that determination before he filed
9 his suit.

10 However, neither the district court nor the
11 court of appeals considered this sufficient to meet the
12 exhaustion requirement each believed should be imposed.
13 Instead, they articulated an exhaustion requirement
14 analogous to that imposed on Federal employees who are
15 seeking relief under title VII for race, sex, religion,
16 national origin, or color-base discrimination. And that
17 exhaustion requirement does, under the precedent of this
18 Court and the express terms of that statute, bar review on
19 the merits of a claim if the administrative process has
20 been invoked in an untimely fashion as it was here.

21 The clear language of section -- of the ADEA,
22 however, distinguishes the ADEA of -- from title VII with
23 respect to the conditions they impose on seeking Federal
24 relief. As noted, the ADEA requires only that civil
25 action be proceeded by a brief notice period during which

1 the prospective defendant may learn of the claim and
2 remove the cause for it if that is possible within the
3 time frame.

4 In contract, title VII expressly conditions
5 district court jurisdiction on the aggrieved employee's
6 participation in the administrative process and
7 specifically ties the jurisdiction of the Federal court
8 and the right of the employee to file his or her suit to
9 the date on which the administrative process is either
10 concluded or deemed by statute to have been exhausted by
11 the elapsing of a 180-day period.

12 In light of these differences, the analogy to
13 title VII is clearly inappropriate and should be rejected
14 by this Court. The courts below have -- will -- who have
15 found such an exhaustion requirement have relied heavily
16 on that analogy.

17 An interpretation requiring exhaustion has also
18 been rejected by the Equal Employment Opportunity
19 Commission, which is the agency charged by both statutes
20 with implementing the administrative enforcement
21 procedures under those statutes. Under its customary
22 practice, this Court should defer to this interpretation
23 should it need to look at any other body after reviewing
24 plain language of the statute, because this is clearly a
25 very plausible reading of the statute, consistent with its

1 purpose, and because this is a longstanding interpretation
2 by the agency charged with the enforcement of the statute
3 on the basis of the agency expertise.

4 QUESTION: How does the agency get to rule on
5 that particular issue? I mean, how does that --

6 MS. STEINER: By what means has it ruled?

7 QUESTION: Why is that issue relevant to the
8 agency's administration of the act?

9 MS. STEINER: The agency has been directed by
10 the act to establish an administrative procedure for those
11 employees who wish to invoke it. It has also been
12 designated by the act as the body to receive section 15(d)
13 notices and has promulgated certain regulations, including
14 a regulation permitting you to give the notice to the
15 agency of employment as the agent of the EEOC.

16 QUESTION: Right, but the issue here has nothing
17 to do with when the agency receives it or when the agency
18 won't receive it. The issue here has to do with when a
19 court will be precluded from entertaining an action.
20 Isn't that the only thing we're talking about?

21 MS. STEINER: Yes. Yes, that is correct.

22 QUESTION: And that doesn't really have anything
23 to do -- I mean, assuming we give deference to the EEOC,
24 it doesn't seem to me that we would give deference to the
25 EEOC on a point that really concerns the courts and not

1 the EEOC.

2 MS. STEINER: The EEOC has interpreted it in --
3 to create the end point of its -- to create a process
4 which -- wherein if they accept a complaint for
5 processing, they then make specific provision in their
6 regulations that at any time after that complaint is
7 accepted, or even if it is rejected, to go to court.

8 QUESTION: Well, it seems to me they can decide
9 when they'll process, but we can decide when we accept
10 suits.

11 MS. STEINER: Certainly.

12 QUESTION: It seems to me that's out of their
13 bailiwick.

14 MS. STEINER: Certainly the -- this Court is the
15 arbiter of what the law says. The EEOC has spoken on the
16 subject. Whether or not it's within the ambit is for this
17 Court to decide.

18 QUESTION: Well, you know, I mean, that's --
19 it's all within our ambit of course.

20 MS. STEINER: Certainly.

21 QUESTION: But many things are initially at
22 least within the ambit of the EEOC. This thing doesn't
23 seem to me initially within their ambit.

24 MS. STEINER: Well --

25 QUESTION: It's initially within the ambit of

1 the court.

2 MS. STEINER: Certainly.

3 If there are not more questions at this time, we
4 would reserve the balance of our time.

5 QUESTION: Very well, Ms. Steiner.

6 Ms. Wax, we'll hear now from you.

7 ORAL ARGUMENT OF AMY L. WAX

8 PRO HAC VICE,

9 ON BEHALF OF THE RESPONDENT

10 MS. WAX: Mr. Chief Justice, and may it please
11 the Court:

12 The Government has no serious disagreement with
13 petitioner's position on the merits in this case. With
14 all due respect to this Court, however, we remain puzzled
15 as to why we are here at all.

16 The Court has repeatedly stated that it will not
17 pass on issues neither presented nor decided in the courts
18 below. The Government adheres to its position which was
19 stated in our opposition to certiorari and in our brief
20 that petitioner never asked the courts below to rule on
21 the issue he now wishes this Court to consider: whether
22 he is entitled to direct judicial consideration of his age
23 discrimination claim without prior administrative review.

24 QUESTION: Ms. Wax, the court of appeals did in
25 fact consider and rule on that point though, did it not?

1 MS. WAX: Your Honor, we don't think it did.
2 The court of appeals spontaneously addressed the
3 requirements for suit under section 15(d) of the Age
4 Discrimination Act. It is our view that the petitioner
5 did not ask them to do so, but they did. And they decided
6 that the district court had erred in saying that suit had
7 to be filed within 180 days of a discriminatory event.
8 They corrected that mistake, but then they went on to say
9 that petitioner's lawsuit was -- his filing of a lawsuit
10 was not effective.

11 They ruled that both the administrative route to
12 relief and the direct judicial route to relief under
13 section 15(d) was blocked. They never considered -- they
14 never needed to consider or address the issue -- or at
15 least one of the main issues -- the issue on which there's
16 a circuit split, whether there is an exhaustion or
17 election of remedies requirement under the Age Act.
18 Because both paths were blocked, they never had occasion
19 to consider what would happen if one path was open.

20 QUESTION: How about the first question
21 presented in the petition, the construction of 1633(a)(d)?

22 MS. WAX: Your Honor, our theory of the case is
23 that it doesn't really matter what the court says if in
24 fact their comments or their statements are not
25 encompassed by the question as framed by the petitioner.

1 Our understanding of the question framed by the petitioner
2 is a quite narrow one. Was the agency's ruling that the
3 administrative complaint was untimely, was that ruling in
4 error? That is, as we understand it, the issue presented
5 by petitioner to the court. And that's confirmed by what
6 petitioner argued to the court of appeals.

7 QUESTION: But it -- it seems to me in other
8 cases -- now maybe I'm wrong -- we have treated as
9 available for our consideration issues that were decided
10 by a court of appeals, even though they may not have been
11 proper -- even though the court of appeals could properly
12 have said to the appellant or the appellee, you have not
13 properly preserved this. If the court of appeals go ahead
14 -- goes and decides it, I think we've said then we can
15 decide it.

16 MS. WAX: Your Honor, that may be the case. And
17 we -- we agree that there certainly is a way of looking at
18 this case. There is possibly a way of looking at this
19 case such that at least question 1 is implicated in
20 petitioner's submission.

21 We -- the analogy we would draw is this. Let me
22 -- let me give you a comparison. It's as if petitioner
23 came into a lower court and said, we want damages, we
24 deserve damages. And respondent said, you don't deserve
25 damages, and you don't deserve equitable relief either,

1 because you don't have clean hands. The court agreed, you
2 don't deserve equitable relief. They both happened to be
3 wrong about equitable relief, but petitioner didn't ask
4 them for that.

5 Petitioner argued to the court of appeals,
6 reverse the district court on your ruling that my
7 administrative filing was untimely.

8 QUESTION: Let me just interrupt and stick with
9 your hypothetical for a second. Supposing they just asked
10 for damages, but -- and didn't have a prayer for equitable
11 relief. Then the Government comes in and says, you're not
12 entitled to either. And the court says, you're not
13 entitled to either. And then they appeal. And -- can
14 they not then argue that there's enough in the complaint
15 so the matter of remedy can be addressed later? I don't
16 think that they forfeit potential remedy, because they
17 didn't put it in the complaint.

18 MS. WAX: Your Honor --

19 QUESTION: I -- it seems to me your example
20 proves the opposite of what you're contending.

21 MS. WAX: Well, as we understand -- I mean, if
22 in fact that's the case, it -- it allows a respondent or a
23 court to load into a lawsuit all sorts of issues that
24 might be quite extraneous.

25 QUESTION: Well, the court of appeals and the

1 Government in your example that loaded an issue in --

2 QUESTION: And that's what happened in this
3 case. Didn't your brief in the court of appeals argue the
4 exhaustion point? They quoted -- and maybe this is wrong
5 -- but in their reply brief, they quote what purports to
6 be the Government's brief, arguing exhaustion apparently
7 thinking the court of appeals had to decide that in order
8 to affirm the judgment of the district court. And if they
9 didn't decide it, how could they possibly affirm the
10 judgment?

11 MS. WAX: Well, Your Honor, it's true that we
12 did make a statement about exhaustion in our court of
13 appeals brief. That's correct. There were two lines in a
14 court of appeals brief that addressed exhaustion.

15 QUESTION: And if they didn't rely on that
16 ground, why did they affirm?

17 MS. WAX: Your Honor, we -- we submit that it
18 may be that the reading -- what 15(d) requires was decided
19 by the court of appeals, but in no way was exhaustion
20 decided by the court of appeals. It simply never got to
21 the point where it needed to decide that. It decided that
22 both paths were blocked. You could -- he could not get
23 administrative relief because he did not file timely --

24 QUESTION: Well, what difference would it make
25 -- if you don't require exhaustion, what difference would

1 it make if you couldn't get administrative relief?

2 MS. WAX: Well --

3 QUESTION: It seems to me that's integrally
4 related to the exhaustion argument.

5 MS. WAX: It's related, but the exhaustion
6 question is farther down the line. The courts decide
7 questions all the time which, if they had decided them
8 differently, would require them to go on and decide a
9 further question.

10 QUESTION: Well, they review judgments. And the
11 judgment of the district court was the complaint had to be
12 dismissed. And they affirmed that judgment. And I don't
13 understand under your presentation why they affirmed the
14 judgment if they didn't decide some legal basis for doing
15 so.

16 QUESTION: Well, they could have affirmed but
17 just on the narrow ground that their suit was ineffective,
18 because it wasn't filed in time.

19 MS. WAX: Exactly. That's the ground on which
20 we understand they affirmed it. The court of appeals'
21 opinion --

22 QUESTION: Well, then -- and certainly that
23 issue is open here, isn't it?

24 MS. WAX: Well, if this Court --

25 QUESTION: Well, they -- the court of appeals

1 decided it.

2 MS. WAX: They appeared to decide --

3 QUESTION: And they -- and the petitioner
4 complains about that here. As a matter of fact, you
5 conceded in your -- I thought you conceded in your
6 petition for certiorari that the court was dead wrong on
7 that point.

8 MS. WAX: Well, we went on --

9 QUESTION: I mean in your response.

10 MS. WAX: We went on to address the issue, Your
11 Honor, because we felt that this Court wanted us to do so.
12 But we stand by our argument that at least -- we are firm
13 in our view that the exhaustion and election issue was
14 neither argued nor decided, because the court of appeals
15 did not have to decide it. The court of appeals decided
16 that the administrative filing was untimely and the civil
17 action filing was untimely.

18 QUESTION: Well, what if -- what if we agree
19 with you on that? It still leaves the question of whether
20 the court of appeals was right on the time question. And
21 you could -- I think you concede that it was not.

22 MS. WAX: We -- we certainly concede that it's
23 not, Your Honor.

24 QUESTION: I mean at the time of filing this
25 suit.

1 MS. WAX: Well, the petitioner asked this Court
2 to review this case, because there was a circuit split on
3 the exhaustion and election issue.

4 QUESTION: Well, just stick to my question.

5 MS. WAX: Yes.

6 QUESTION: What about the issue of the time?
7 That's here. It's got to be decided, and you concede this
8 court of appeals was wrong.

9 MS. WAX: That's correct, Your Honor.

10 QUESTION: All right, if it was wrong, and say
11 we agree with you on the exhaustion thing, that it isn't
12 here. But the other one is. And what should we do then?
13 We reverse the court of appeals. Do we?

14 MS. WAX: That would certainly be an appropriate
15 course of action.

16 Respectfully, Your Honor, at the time that we
17 opposed certiorari, we viewed the first question as not
18 one that would warrant a plenary consideration since it
19 was such an obvious error. That's the only reason that we
20 -- we also believed that that question wasn't properly
21 presented.

22 QUESTION: Well, I know. But we -- but the
23 question is here. We -- there is -- the issue is here now
24 and it's being argued. And you agree that the court of
25 appeals was dead wrong.

1 MS. WAX: We do, Your Honor.

2 QUESTION: You're entitled to argue certainly or
3 make the point that perhaps the writ should be dismissed
4 as improvidently granted, but I wouldn't spend a great
5 deal of time on it I think after the Court has granted
6 certiorari.

7 MS. WAX: Yes, Your Honor.

8 Turning to the merits of the exhaustion and
9 election of remedies issue --

10 QUESTION: Well, you're going to tell us the
11 same thing that the other side told us, right?

12 MS. WAX: Yes.

13 QUESTION: That's very nice. We have the
14 Government who has a -- who has an interest in coming out
15 that way. The EEOC would like the ADEA to be interpreted
16 as strictly as possible, and we have a claimant who would
17 like it to be interpreted as strictly as possible. And
18 who's representing the other point of this issue? And
19 there is a circuit split. There are private employers who
20 are going to be hit with suits under the ADEA. And that
21 side of -- that side of the case is never going to be
22 heard here.

23 MS. WAX: Your Honor, we couldn't agree more.

24 And --

25 QUESTION: Well, that isn't right. You

1 represent the employer here, don't you?

2 MS. WAX: We represent the Department of the
3 Treasury.

4 QUESTION: Which is the employer.

5 MS. WAX: Which is the employer.

6 QUESTION: We you do -- we do have an employer
7 before us.

8 MS. WAX: Yes, Your Honor.

9 QUESTION: I thought you represented the United
10 States, which includes not just the Treasury but also the
11 Equal Employment Opportunity Commission whose interest in
12 this matter is quite different from that of Treasury.

13 MS. WAX: Correct, Your Honor. We agree with
14 the EEOC's interpretation of the statutes. And we happen
15 to be here defending their regulations. But our client is
16 the Department of Treasury.

17 At this point there -- they have agreed that on
18 the law -- on their interpretation of the law, that might
19 not have been the case. I mean, in another -- one could
20 imagine a situation where that might not have been the
21 case.

22 QUESTION: And you didn't agree in the lower
23 court either on the exhaustion issue, did you?

24 MS. WAX: We took a different position, Your
25 Honor.

1 QUESTION: That's right.

2 MS. WAX: But we have reconsidered our position.

3 But the fact that there's no -- there no one up
4 here arguing the other side, and the very fact that we're
5 here arguing an obvious question of law, an obvious error,
6 is testimony to the defects in the presentation below.
7 Not to belabor this point, Chief Justice Rehnquist, but we
8 believe that if petitioner had squarely argued the issue
9 to the court of appeals and corrected our misstatement of
10 the law -- what we concede to be a misstatement at 15(d)
11 -- this problem would never have come up on 15(d), and the
12 lower court would have had a chance to decide the
13 exhaustion election issue, which they never even
14 addressed.

15 QUESTION: May I ask why, if it's such plain
16 error, who the Solicitor General didn't suggest that we
17 grant, vacate, and remand for -- to correct the obvious
18 error? Why did you suggest we deny certiorari?

19 MS. WAX: We did, Your Honor. In our opposition
20 to cert. in this case, we suggested in the alternative
21 that this case be remanded to the court of appeals to
22 consider the exhaustion and election of remedies issue
23 because the court had never had the opportunity to
24 consider it. And it is a vexed issue, and one on which
25 the courts have disagreed. And there's been a great deal

1 of confusion. We agree with that.

2 QUESTION: Well, of course, the Solicitor
3 General isn't bound to recommend a grant, vacate, and
4 remand every time a lower court makes an error in favor of
5 the Government. I mean, there are numerous erroneous
6 decisions that this Court can't review and that we're
7 quite content to deny certiorari on

8 MS. WAX: We -- we -- our first line
9 recommendation in our position was to deny. But given
10 some ambiguity perhaps in what was presented below, we
11 said in the alternative, grant, vacate, and remand. We
12 also think that affirming would be a legitimate course of
13 action because we think that the 30-day -- the
14 administrative timeliness issue was really the only one
15 that was central to the case.

16 There are a number of possible courses of
17 action. With --

18 QUESTION: How can you say affirming would be
19 proper if it's plain that the court of appeals committed
20 error?

21 MS. WAX: Well --

22 QUESTION: But you concede. And this is a
23 litigant who will not have his day in court, because the
24 district court committed an obvious error, and the court
25 of appeals committed an obvious error. And you say we

1 should affirm?

2 MS. WAX: Well, respectfully, Your Honor, that
3 rests on our view of this case as presenting the issue
4 only of the timeliness of the administrative filing. The
5 -- the issue of whether the Court could directly consider
6 the claim was one that we view as being injected by the
7 court and the respondent. Now, it's clear that the Court
8 doesn't agree.

9 QUESTION: Well, why wasn't it injected by your
10 reply brief in the court of appeals? Why wasn't that
11 injecting the issue? I don't understand that.

12 MS. WAX: Your Honor --

13 QUESTION: They do quote correctly from your
14 brief in the court --

15 MS. WAX: They do, Your Honor.

16 QUESTION: Okay, I see --

17 MS. WAX: Only on our theory that a respondent
18 cannot really enlarge the issue that's argued by a
19 plaintiff. The plaintiff frames the issue for the court.
20 That's the way we view the analysis. And that's our
21 analysis.

22 Just a few comments on the merits. We do see
23 this as a Chevron case, one in which the agency -- the
24 EEOC -- has been charged with deciding what administrative
25 process is necessary to resolve a discrimination claim and

1 when that administrative process is done.

2 Given that the statute is completely silent on
3 the administrative prerequisites to filing of a civil
4 action, which all age litigants are entitled to do, save
5 the requirement that there be notice to the Equal
6 Employment Opportunity Commission, we believe that the
7 EEOC's regulations are reasonable and should be given
8 deference under the act.

9 QUESTION: Now -- you're now addressing the
10 first question or the -- or the second question on the
11 merit?

12 MS. WAX: We are addressing the second question,
13 the exhaustion and election question. But we'd be happy
14 to address the first. We've already conceded that --

15 QUESTION: Yes.

16 MS. WAX: -- the court is in error on the first.

17 QUESTION: But in your -- your first position on
18 the second question, if I'm right, is that we should not
19 reach it?

20 MS. WAX: Correct, Your Honor.

21 QUESTION: And now -- but now you're saying if
22 we do reach it, this is the correct result to reach?

23 MS. WAX: Correct, Your Honor.

24 We understood the Court as wanting us to reach
25 the question in granting certiorari on both questions.

1 QUESTION: Well, there are really three
2 questions here, right?

3 MS. WAX: Yes, correct.

4 QUESTION: On all of which you are arguing the
5 other side's point of view of the case on the merits.
6 Right?

7 MS. WAX: Probably right. We have in fact had
8 two positions on exhaustion and election. Our position is
9 that there's no exhaustion requirement whatsoever. But
10 that even if there is one, petitioner did everything that
11 should be required under this act, because he waited for a
12 final agency decision. It was a decision on timeliness,
13 but it was a final agency decision.

14 Just on that particular --

15 QUESTION: You could have divided up the
16 argument with the other side. You could have argued one
17 point and they could have argued two.

18 (Laughter.)

19 MS. WAX: Yes, Your Honor.

20 Just to make one point on this. If the Court
21 does reach the exhaustion issue, it is not necessary for
22 this Court to decide whether it is sufficient for an Age
23 Act plaintiff -- is sufficient for him to file a claim
24 with the agency and then go to court anytime he wants,
25 thereby prematurely terminating his agency process.

1 This particular plaintiff, petitioner Mr.
2 Stevens, did not do that. He got a final agency decision.
3 It is our position that this final agency decision was
4 enough under the act. The act does not require any
5 plaintiff at all to go to the agency before they go to
6 court. As far as Congress was concerned, all Age Act
7 plaintiffs could go directly to court. Therefore, it
8 makes no sense to require an individual to get a ruling on
9 the merits from the agency before going to court. It
10 would only make sense minimally to require someone to get
11 a final decision, which this person did.

12 Now, it is also our position that that is also
13 unreasonable for reasons stated in our brief, mainly
14 because the Act does not allow plaintiffs to bail out of
15 the administrative process after 180 days, like the --
16 like title VII does. So it does not make sense to even
17 require petitioner to do what he did here.

18 However, we agree with petitioner that this
19 individual was entitled to have his age discrimination
20 suit decided on the merits by the district court.

21 If there are not further questions.

22 QUESTION: Thank you, Ms. Wax.

23 Ms. Steiner, do you have rebuttal? You have 15
24 minutes remaining.

25 MS. STEINER: Your Honor, unless there are

1 further questions from the Court --

2 QUESTION: Thank you, Ms. Steiner.

3 CHIEF JUSTICE REHNQUIST: The case is submitted.

4 (Whereupon, at 10:43 a.m., the case in the
5 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

89-1821 CHARLES Z. STEVENS, III, Petitioner, v. DEPARTMENT

OF THE TREASURY

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Raymond H. Hartzel

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