No. 18-525

In the Supreme Court of the United States

SOCIETY FOR HUMAN RESOURCE MANAGEMENT, A ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose mission is to advance the interests of state and local government officials and thereby ensure the smooth functioning of state and local government. *Amici* monitor and analyze legal developments that have a distinct impact on the business of state and local governments, and they take positions advocating for greater protection of government officials as they serve the public good.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National Association of Counties ("NACo") is the only national organization that represents

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Petitioner and Respondent have filed a blanket consent with this Court to the filing of all *amicus* briefs.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources ("IPMA-HR") represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National School Boards Association ("NSBA"), through its state associations of school boards, represents the Nation's 90,000 school board members, who, in turn, govern approximately 13,800 local school districts serving more than 50 million public school students. NSBA's mission is to

promote equity and excellence in public education through school board leadership.

This case directly impacts the interests of *amici* and their members. If the Fifth Circuit's decision is affirmed, courts would be allowed to exercise jurisdiction over unexhausted claims. The resulting costs, efficiency losses, and abrogation of sovereign

Requiring employees to exhaust their administrative remedies is not burdensome. All but three of the States have entered into work-sharing agreements with the EEOC, eliminating duplication by providing that only one agency processes a complaint. That one r5.669998164(u)10(t)-22.a.0(na)-2.299cc p038( )-22.89 t 0001(

tion requirement is not jurisdictional, this Court would further abrogate the States' sovereign immunity—without Congress's involvement, without careful review of studies and committee reports, and without bicameralism and presentment. This further abrogation should not occur at all, but if it ever does, it should be due to an action by Congress, not the Court.

Based on these concerns regarding efficiency, cost, and sovereign immunity, as well as those voiced by Petitioner, *amici* urge this Court to reverse the decision below and hold that Title VII's administrative exhaustion requirement is jurisdictional.

ARGUMENT

I. This Court Should Hold that Title VII's Exhaustion Requirement Is Jurisdictional Because the Administrative Process Is Not Burdensome and Provides Opportunities for Inexpensive Dispute Resolution.

Congress carefully crafted the statutory scheme in Title VII of the Civil Rights Act of 1964,[2] which

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[2] Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, cp-

created the Equal Employment Opportunity Commission ("EEOC"). Recognizing that employment disputes are plentiful, Congress imbued the EEOC

remedial action." *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384 (2d Cir. 2015); *see also* 42 U.S.C. § 2000e-5(b) (if "reasonable cause" exists to believe the charge is true, the EEOC must attempt to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."). If those efforts fail, the EEOC may either bring suit in federal court or notify the employee so that he or she may file an employment discrimination suit within 90 days of the notification. *See* 42 U.S.C. § 2000e-5(f)(1). In the event the employer is a "government, governmental agency, or political subdivision . . . the [EEOC] shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court." *Id.*

Some states have authorized an agency to grant relief for prohibited employment discrimination. *See id.* § 2000e-5(c). Employees who choose to file with a state agency shall also file a "charge" with the EEOC within 300 days of the alleged unlawful employment practice, or within 30 days after receiving notice that the analogous state agency has terminated proceedings, h2( )-211.800003( )-221(m)8(S1,02(l)-4.9e)8( )-42(560000

it promotes judicial efficiency. Requiring exhaustion in every case allows the investigative phase of the administrative process to bring to light facts that surface meritless claims. The agency's conciliation process may also bring about efficient and inexpensive resolution. *See* 42 U.S.C. § 2000e-5(b).

This efficiency is aided, in part, by the work-sharing agreements between the EEOC and forty-seven state agencies.[3] The only states without such work-sharing agreements are Alabama, Mississippi,

Specifically, employees that file a complaint with the EEOC can also choose to file a complaint with the associated state agency and vice versa. One agency will then mediate, conciliate, investigate, and issue a determination on all the claims under both federal and state law. This process allows the claims of discrimination under state and federal law to proceed on one track rather than in separate, duplicative claims. The EEOC and those agencies with which it has entered into work-share agreements now operate in a carefully balanced, symbiotic relationship. If this Court held that the Title VII administrative exhaustion requirement was not jurisdictional, this balance would suffer severe disruption.

1. Exhaustion of Administrative Remedies with the EEOC Is Straightforward.

Title VII provides that any aggrieved person can file a written charge, under oath or affirmation, with the EEOC. 42 U.S.C. § 2000e-(5)(b). As noted, an aggrieved person must file a charge within 300

https://tinyurl.com/y6aehlq3. The EEOC's public portal allows an employee to submit an inquiry, schedule an appointment, and file a charge. *Id.* When the employee submits an inquiry through the public portal, the on-line assessment asks him or her to check off boxes regarding the type of employer (i.e., private, governmental, union, etc.), the date of the alleged discriminatory conduct, the state, the employee's protected classification, and the number of employees. https://tinyurl.com/y67dvffa. The aggrieved employee will then schedule an interview with the EEOC's intake unit. At the interview, an EEOC staff member asks the employee questions and prepares a charge for the employee's signature. Once the form is complete, the employee signs the charge, which will be filed. https://www.eeoc.gov/employees/howtofile.cfm.

If the employee prefers, he or she can meet with the EEOC in person by scheduling an appointment on-line or going to the EEOC's office closest to him or her for a walk-in appointment. *Id.* The EEOC staff member prepares the charge based on the information provided by the employee. The employee reviews the form and signs it on-line by logging into his or her account. *Id.*

Although the EEOC will not take a charge over the telephone, it will accept calls to discuss the employee's situation, determine if the situation is covered by the relevant laws, and explain how to file a charge. *Id.*

months of filing. 42 U.S.C. § 2000e-(5)(f)(1); 29 C.F.R. § 1601.28(a)(2).

2. Most States Have Administrative Exhaustion Procedures that Mirror the EEOC's Procedures.

The majority of state agency procedures mirror the EEOC's investigatory and exhaustion process. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1481(D); CAL. GOV'T. CODE § 12965; COLO. REV. STAT. § 24-34-306(14); CONN. GEN. STAT. § 46a-101; DEL. CODE ANN. tit. 19, § 712(B); FL. STAT. §§ 760.11(4), 760.11(8); HAW. REV. STAT. §§ 368-(11), 368-(12); IDAHO CODE. ANN. § 67-5908(2); 775 ILL. COMP. STAT. §§ 5/7A-102(C)(4), 5/7A-102(C-1); IND. CODE § 22-9-8-3; IOWA CODE § 216.16; KAN. STAT. ANN. § 44-1005(i); ME. REV. STAT. 5 § 4612(6); MD. CODE. ANN. STATE GOV'T § 20-1013(a); MASS. GEN. LAWS ch. 151B § 9; MO. REV. STAT. § 213.111; MONT. CODE ANN. § 49-2-512; NEV. REV. STAT. § 613.420; N.H. REV. STAT. ANN. § 354-A:21-a; N.M. CODE R. § 9-1-1.8(I); OKLA. STAT. tit. 25, § 21-1350(B); 43 PA. CONST. STAT. § 962(c)(1); R.I. GEN. LAWS ANN. § 28-5-24.1; S.C. CODE ANN. § 1-13-90(d)(6)-(8); S.D. CODIFIED LAWS § 20-13-35.1; TEXAS LAB. CODE § 21.252-54; W. VA. CODE § 5-11-13(b).

Due to this mirroring of the EEOC's procedures in t1000000vf -3.119999.900000§TT0 12 Tf 25.20000010000002( )-292(.89963

sue to exhaust their administrative remedies. These requirements are not remotely burdensome.

3. A Minority of States Enacted Statutes that Do Not Require Employees To Exhaust State Administrative Remedies.

A minority of states do not require employees to exhaust administrative remedies prior to commencing a civil action because no such requirements appear in the relevant state statute. For example, Alaska does not require individuals aggrieved under its non-discrimination statute to first file suit with the Alaska State Commission on Human Rights. *See* ALASKA STAT. § 18.80.145. Other such states are Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Tennessee, Vermont, Virginia, and Washington. *See* KY. REV. STAT. ANN § 344, *et seq.*;[5] LA. REV. STAT. ANN. § 23.303; MICH. COMP. LAWS § 37.2803; MINN. STAT. § 363A.28; NEB. REV. STAT. § 20-148; N.J. STAT. ANN. § 10:5-13; N.Y. EXEC. LAW § 297(9); N.D. CENT. CODE § 14-02.4-19; OHIO REV. CODE ANN. § 4112.99; OR. ADMIN R. 839-003-0020(2)(a); TENN. CODE ANN. § 4-21-401(d)(5); VT.

[5] Kentucky's statute does not require employees to exhaust their administrative remedies. Instead, an employee can elect to file an administrative complaint or immediately file a civil

STAT. ANN. tit. 21, § 5-495(b); VA. CODE ANN. § 2.2-3903(c); WASH. REV. CODE § 49.60.020.

A smaller number of states do not have administrative exhaustion requirements at the state level because they do not permit private suits. Employees aggrieved under Title VII in jurisdictions with no state or local agency and no relevant state statute must follow the EEOC's administrative requirements. These states include Alabama[6] and Mississippi.[7] In Georgia, the Georgia Fair Employment Practices Act of 1978, GA. CODE ANN. § 45-19-20, *et seq.*, provides protections only to public employees. *See id.* § 45-19-21. However, it does not permit private suits, so those employees may not

In sum, neither the EEOC nor the state procedures are onerous. The presence of work-share agreements with the EEOC in 47 of the 50 states and the fact that most state procedures mirror the EEOC's procedures make the process straightforward for plaintiffs.

B. Allowing Courts To Exercise Jurisdiction Over Unexhausted Claims Would Eliminate Meaningful Opportunities To Settle the Case in Conciliation Proceedings.

Most agencies, including the EEOC, have a

1,050 complaints were withdrawn after the parties reached settlement, and only 540 requested a release of jurisdiction so as to file a civil action. https://www.ct.gov/chro/lib/chro/CHRO_Case_Processing_Report_FY_2016-17.pdf at 1-2.

The California Department of Fair Employment and Housing (DFEH) received a total of 24,779 complaints, of which 12,872 were employment complaints filed along with a request for an immediate Right-to-Sue letter, and 6,160 complaints were filed as the result of an intake interview conducted by a DFEH investigator. Of those 6,160 complaints, 4,346 were employment complaints. DFEH facilitated resolution in

> files/documents/2018/06/20/2017%20Annual%20Report%20FINAL%2006-12-2018.pdf at 17.
>
> The Texas Workforce Commission received 11,056 employment discrimination complaints. Of those complaints, 1,687 were settled or withdrawn with benefits or conciliated. https://twc.texas.gov/files/news/2017-twc-annual-report-twc.pdf at 38 (Tables 2-3).

These numbers reflect the fact that exhausting administrative remedies results in a significant number of settled or closed claims. The EEOC and state equivalents provide an important function by weeding out those cases that do not require judicial intervention or oversight. Allowing courts to exercise jurisdiction over unexhausted claims serves no one. Reversal of the decision below is warranted.

C. Holding that Title VII's Administrative Exhaustion Requirement is a Mere Claims-Processing Rule as Opposed to a Jurisdictional Prerequisite to Suit Will Impose Burdensome Costs on State and Local Governments.

This Court should hold that Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit. Otherwise, allowing plaintiffs to proceed directly to federal court without exhausting their administrative remedies would impose sig-

nificant costs on Title VII defendants, including state and local governments. *Cf. Williams v. Pa. Human Rels. Comm'n*, 870 F.3d 294, 299 (3d Cir. 2017) (warning against "thwart[ing] Congress's carefully crafted administrative scheme by throwing open a back door to the federal courthouse when the front door is purposefully fortified.").

Title VII claims are a significant drain on state and local government resources. Such claims are notorious for engendering dueling versions of events and "the elusive factual question of intentional discrimination," *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 n.8 (1981), and the expense can be crippling. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003) (describing the expense as "potentially crushing") (quoting *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Posner, J.)). The factual inquiry into whether the employer intentionally discriminated against the employee is "both sensitive and difficult" and usually cannot be answered by direct evidence, making Title VII cases more expensive than most. *U.S. Postal Serv. Bd. of Governors v. ev 29(7)-44(6)-4.80000020*

those that are completely meritless. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 617 (2001) (Scalia, J., concurring) (noting that defendants sometimes "'abandon[]the fray' because the cost of litigation—either financial or in terms of public relations—would be too great"), *superseded on other grounds by* 5 U.S.C. § 552(a)(4)(E).

Administrative exhaustion provides the parties with an opportunity to proceed through conciliation and inexpensively settle the case. Moreover, the intended policy of allowing the employer and employee to hear each other and accommodate each other's issues would be thwarted if the employee failed to bring

the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J. and O'Connor, J., concurring). Holding that the exhaustion requirement was merely a claims-processing rule would constitute an abrogation of the States' sovereign immunity, impinging on federalism interests. Sovereign immunity was designed to protect state governments from the burdens of expensive lawsuits such as Title VII actions. This Court should narrowly construe any such abrogation.

A. The Eleventh Amendment and State Sovereign Immunity

The Eleventh Amendment embodies the premise of sovereign immunity, described as "foundational" to our government, which provides that "States, as sovereigns, are immune from suits for damages, save as they elect to waive that defense." *Coleman v. Court of Appeals*, 566 U.S. 30, 35 (2012) (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *Alden v. Maine*, 527 U.S. 706 (1999)). It provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

While originating in the English common law theory that "the King can do no wrong," the modern view of sovereign immunity "now rests on policy

considerations including separation of powers, the protection of public funds, and the efficient and un-

Congress can abrogate State sovereign immunity by enacting a federal law pursuant to Section 5 of the Fourteenth Amendment that is intended to impose liability on State governments. *See Coleman v. Court of Appeals*, 566 U.S. 30, 35 (2012). In recent years, the Court has held that laws passed pursuant to Section 5 are valid only if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), *superseded on other grounds by* 42 U.S.C. § 2000cc-1(b). Specifically, Congress may abrogate State sovereign immunity under Section 5 only when the statutory provision specifically remedies "conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999).

Congress's enactment of the Equal Employment Opportunity Act of 1(S)10.8000002(.)ee082.700001(a62(5)6.6999923900( )8

415, at 10-11 (1971)). The 1972 Amendments authorized federal courts to award money damages in favor of a private individual against a state government that subjected that individual to employment discrimination on the basis of race, color, religion, sex, or national origin. *Fitzpatrick*, 427 U.S. at 447-

The House Committee on Education and Labor stated that the Commission's 1969 report "documented that 'widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices.'" *Id.* at 657 & n.113 (quoting H.R. REP. NO. 92-238, at 17-18 (1971), *reprinted in* SUBCOMM. ON LABOR, S. COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF

forts here and Congress's enactment of the 1972 Amendments to Title VII are legion.

Put simply, the Court is not Congress. Congress intended Title VII's exhaustion requirement to be jurisdictional, and if that is to change, it is Congress rather than the Court that should take action. This Court has held that the legislative process is the proper way to protect State sovereign interests. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-52, 556 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limita-

pleas.cyp(e3g2(e)0001(the)3( )-181.88999999(i)5.85000004(2)5.0990000075-5(s)2.

This further abrogation urged by Respondents has not been entrusted to voted-in representatives enacting legislation after careful review and consideration in standing committees, and in accordance with

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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