No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY, TX,
Petitioner,
v.
LOIS M. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITIONER

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Suite 200
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Small Business Legal Center

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Center for Workplace Compliance

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DARYL JOSEFFER
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

STEPHANIE MARTZ
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Suite 1200
Washington, DC 20005
(202) 783-7971

Attorneys for *Amicus Curiae* National Retail Federation

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The Center for Workplace Compliance, National Federation of Independent Business Small Business Legal Center, Chamber of Commerce of the United States of America, and National Retail Federation respectfully submit this brief as *amici curiae*.[1] The

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or

brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.

INTEREST OF THE *AMICI CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of employment-related regulations.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents businesses nationwide.

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their counsel contributed money to fund the brief's preparation or submission.

The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

The National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to annual GDP. As the world's umbrella retail federation, NRF has long advocated before Congress and the courts on a host of employment-related issues, including but not limited to arbitration clauses, workplace rules, and anti-discrimination laws.

Most if not all of *amici's* members are employers, or representatives of employers, subject to the federal employment nondiscrimination statutes enforced by

the U.S. Equal Employment Opportunity Commission (EEOC), including Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Accordingly, as potential respondents to discrimination charges subject to investigation and enforcement by the EEOC, the issue presented in this case is extremely important to the nationwide constituencies that *amici* represent.

As national representatives of large corporations and small businesses alike, *amici* have perspectives and experience that can help the Court assess issues of law and public policy that have been raised in this case, beyond the help that the lawyers for the parties can provide. Accordingly, *amici* seek to bring these policy considerations to the Court's attention and assist the Court in understanding the broader implications of the case to the employer community as a whole.

Amici have participated in numerous cases before this Court involving the proper scope and interpretation of Title VII. Because of their extensive experience in these matters, *amici* are especially well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Lois Davis worked for Petitioner Fort Bend County, Texas as an information technology supervisor. Pet. App. 2a. In 2010, she filed an internal complaint accusing her director of sexual harassment, which led to an investigation and the director's eventual employment resignation. *Id.* In March 2011, Davis filed a formal discrimination charge with the Equal Employment Opportunity Commission (EEOC) alleging that she was sexually harassed by her

director and that her immediate supervisor subjected her to unlawful retaliation for complaining about it. Pet. App. 2a; Jt. App. 70.

That summer, the County finalized plans to relocate its offices to a new facility, and required all technical support personnel, including Davis, to work the weekend of July 4, 2011. Pet. App. 18a. Citing a "previous religious commitment," Davis advised that she would not attend. *Id.* Despite repeated warnings that noncompliance would result in disciplinary action, Davis nevertheless failed to report to work as required, resulting in the termination of her employment. *Id.*

Subsequently, Davis amended an intake questionnaire accompanying her charge by handwriting the word "religion" next to a section titled, "Employment Harms and Actions," but failed to provide any additional details or actually amend her filed charge. Pet. App. 2a. After receiving a right-to-sue notice, she brought a Title VII action alleging that the County retaliated against her for complaining about sexual harassment and discriminated against her based on religion by requiring her to work on Sunday, July 3, as part of the facility relocation. *Id.*

The County moved to dismiss Davis's religious discrimination claim, arguing that because she failed to raise the claim in her EEOC charge, she failed to exhaust administrative remedies, thus depriving the district court of subject matter jurisdiction over the matter. Pet. App. 3a. The trial court acknowledged a disagreement among courts within the Fifth Circuit as to whether Title VII's administrative exhaustion requirement is jurisdictional, or merely a precondition to suit that is subject to equitable waiver. Pet. App. 23a-27a. Siding with the former view, and concluding that Davis's single-word notation on the intake form

did not constitute a charge or put the County or the EEOC on notice of her religious discrimination claim, the district court held that Davis failed to exhaust her administrative remedies and granted the County's motion. Pet. App. 29a-37a.

The Fifth Circuit reversed. Pet. App. 15a. Also acknowledging the circuit split, it joined the majority of courts that have found Title VII's administrative exhaustion requirement to be non-jurisdictional. Pet. App. 12a-13a. It then held that, because the County waived its exhaustion defense by failing to raise it earlier in the litigation, Davis could proceed with her suit notwithstanding her failure to exhaust. Pet. App. 13a-15a.

The County filed a Petition for a Writ of Certiorari, which this Court granted on January 11, 2019. *Ft. Bend County, TX v. Davis*, 2019 WL 166880 (U.S. Jan. 11, 2019).

SUMMARY OF ARGUMENT

As the Petition explains, elaborate and detailed administrative exhaustion requirements are by their nature jurisdictional. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., provides a quintessential example of such a scheme. In addition to establishing broad workplace nondiscrimination protections, Title VII created the Equal Employment Opportunity Commission (EEOC), which would serve as the chief federal agency authorized to enforce the Act. 42 U.S.C. § 2000e-4.

Among the EEOC's principal responsibilities are to make, receive, and investigate written charges of discrimination. 42 U.S.C. § 2000e-5(b). Where it finds reasonable cause to believe that unlawful discrimination has occurred, the statute requires that the

agency seek to resolve the matter informally through "conference, conciliation and persuasion." *Id.* Where its efforts to achieve voluntary compliance prove unsuccessful, the EEOC must notify the charging party of his or her right to sue the accused employer in federal court. Although Congress subsequently amended Title VII to give the EEOC litigation authority,[2] its duty to investigate, attempt conciliation, and thereafter provide the charging party with written authorization to sue, remained undisturbed.

Thus, a Title VII plaintiff may bring suit only upon receipt of a right-to-sue notice from the EEOC. In other words, Title VII precludes suit by any individual who has not received authorization from the EEOC to do so – such authorization being in the form of a right-to-sue notice issued after the agency has completed its administrative obligations with respect to a filed charge, including engaging in statutory conciliation efforts. As this Court has said, "That obligation is a key component of the statutory scheme." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citation omitted). It also is a task that the EEOC must complete before it may bring suit in its own name, and one which cannot be accomplished absent administrative exhaustion. In other words, courts may not hear unexhausted claims no matter who brings them (the complainant or the EEOC) or when they are brought.

Title VII's detailed administrative and enforcement scheme thus is both premised and dependent upon the exhaustion of administrative remedies. Treating that requirement as anything less than jurisdictional would diminish its role in the statutory scheme and be

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[2] See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

inconsistent with many of the purposes underlying Title VII, such as empowering the EEOC to investigate and attempt to resolve discrimination claims informally, reserving litigation as an avenue of last resort.

Whether Title VII's administrative exhaustion requirement is jurisdictional or simply a prerequisite to suit that may be waived is an issue of significant practical importance to employers. If the latter is true, *private* parties could subvert (intentionally or inadvertently) the *public* and *governmental* interest in administrative consideration and perhaps resolution of claims. Moreover, charging parties would have less incentive to craft thoughtful and complete administrative charges, leading to critical omissions resulting in unfair surprise to their employers months, or even years, after the alleged incidents occurred. It also could deprive employers of the opportunity to investigate and resolve workplace disputes quickly and informally.

It is especially important that employers be able to investigate and resolve allegations of workplace harassment as soon as possible, not only to remedy the environment for the complainant but also to identify and correct behavior or circumstances that could lead to future problems or undermine the employer's efforts to promote a harassment-free workplace. Moreover, administrative conciliation is confidential, which helps the parties resolve matters in a less acrimonious environment before positions become hardened in litigation. All of those interests help confirm the centrality of exhaustion in Congress's detailed and comprehensive remedial scheme.

ARGUMENT

I. TITLE VII'S PLAIN TEXT AND POLICY AIMS FIRMLY ESTABLISH THAT EXHAUSTION OF ADMINISTRATIVE REMEDIES IS A NON-WAIVABLE, JURISDICTIONAL PREREQUISITE TO SUIT

As Petitioner explains, detailed and comprehensive administrative exhaustion schemes are typically jurisdictional. Brief for Pet. 15-18. Title VII of the Civil Rights Act of 1964 (Title VII) – which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1) – provides precisely such a scheme. It is enforced by the Equal Employment Opportunity Commission (EEOC), which "is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title." 42 U.S.C. § 2000e-5(a). "When Congress first enacted Title VII in 1964 it selected (c)ooperation and voluntary compliance as the preferred means for achieving the goal of equality of employment opportunities." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367-68 (1977) (citation omitted). In furtherance of that aim, "Congress created the EEOC and established an administrative procedure whereby the EEOC 'would have the opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.'" *Id.* at 368 (citation omitted).

A. While No One Can Be Forced To File A Charge, Title VII's Plain Text Categorically Precludes Suit By Any Party – Aggrieved Person And EEOC Alike – That Fails To Exhaust Administrative Remedies

Title VII provides, and this Court has confirmed, that the path to federal court for a Title VII plaintiff begins with the filing of a timely charge of discrimination. 42 U.S.C. § 2000e-5(b), (e). Indeed, the statute sets forth "'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life*, 432 U.S. at 359) (footnote omitted); see also *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015). Although the statute does not require all discrimination victims to file an EEOC charge, doing so irrefutably is a mandatory precondition for those seeking to commence a Title VII action in federal court. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (characterizing the timely filing of a discrimination charge, and "receiving and acting upon the Commission's statutory notice of the right to sue," as "jurisdictional prerequisites to federal action") (citations omitted); see also *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981) ("[E]ach step in the Commission's administrative process is designed to be a prerequisite to the following step and, ultimately, to suit") (citation omitted). Moreover, "'[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice' that must be individually addressed before the EEOC." *Sellers v. Deere & Co.*, 791 F.3d 938, 943 (8th Cir. 2015) (quoting *Richter v.*

Advance Auto Parts, Inc., 686 F.3d 847, 851 (8th Cir. 2012)) (*per curiam*).

1. Title VII forecloses judicial review of claims that were not subject to a valid EEOC charge

Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Subsection (f) of Section 2000e-5 provides, in relevant part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section … or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, *the Commission … shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge* (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

42 U.S.C. § 2000e-5(f)(1) (emphasis added).

Thus, a civil action for Title VII discrimination may be commenced only upon receipt of a "right-to-sue" notice, as it is so called, which effectively serves as a release of the EEOC's jurisdiction over the charge, thereby permitting the charging party to pursue his or

her claim in federal court. The EEOC in its Title VII procedural regulations explicitly characterizes the right-to-sue notice as a charging party's "authorization" to proceed with a private action. See 29 C.F.R. § 1601.28(e)(1) ("The notice of right to sue shall include: (1) Authorization to the aggrieved person to bring a civil action under title VII … within 90 days from receipt of such authorization"). As this Court has observed, "an employee *must* obtain a right-to-sue letter before bringing suit—and a court will typically insist on satisfaction of that condition." *Mach Mining*, 135 S. Ct. at 1651 (citations omitted) (emphasis added).

2. EEOC civil enforcement also depends on the agency's completion of administrative preconditions tied to the underlying charge

Title VII sets forth a detailed administrative procedure that the EEOC must follow in every instance, including informal (and confidential) conciliation designed to provide prompt notice to the employer and avoid protracted court battles:

> [T]he Commission shall serve a notice of the charge ... within ten days, and shall make an investigation thereof. ... If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge .... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination through this administrative framework of charge investigations and informal conciliation. Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). "Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act." *Occidental Life*, 432 U.S. at 368. Thus, even in conferring the EEOC with the authority to litigate, Congress retained the statute's requirement that the agency fulfill all of its investigative duties as a strict precondition to suit. *Id.*

One such obligation is that the EEOC must attempt to resolve meritorious discrimination claims administratively through conciliation. "Title VII, as the Government acknowledges, imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit. … That obligation is a key component of the statutory scheme." *Mach Mining, LLC*, 135 S. Ct. at 1651 (citation omitted). Accordingly, this Court in *Mach Mining* found conciliation to be a required prerequisite to an EEOC public enforcement action, observing that if the EEOC were to make no reasonable effort to conciliate prior to filing suit, it "would have failed to satisfy a necessary condition of litigation." *Id.* at 1652.

The EEOC literally cannot satisfy its statutory pre-suit obligations where an alleged discrimination

victim fails to exhaust administrative remedies with the agency. Indeed, the EEOC "relies on charges not only as its principal source of information regarding unlawful conduct, but also, in the case of Title VII and the ADA, *as a statutory prerequisite for its investigations and proceedings*." EEOC, *Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes*, at (III)(A) n.4 (Apr. 1997) (citations omitted) (emphasis added).[3]

Thus, while Congress has authorized the EEOC to enforce Title VII through civil actions in federal court, the agency simply cannot do so in the absence of a charge. In other words, "completion of the full administrative process is a prerequisite to the EEOC's power to bring suit in its own name." *Am. Nat'l Bank*, 652 F.2d at 1186. It would make little sense to conclude, in establishing a multifaceted administrative enforcement scheme that is triggered *only* by a pending charge, that Congress would have at the same time made the act of filing a charge, and thus exhausting administrative remedies, nothing more than a waivable claim-processing rule. Giving private parties discretion to undo the mandatory scheme, either intentionally or inadvertently, would prevent the EEOC from performing its important role.

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[3] *Available at* https://www.eeoc.gov/policy/docs/waiver.html (last visited Mar. 4, 2019).

B. The EEOC Was Established In Title VII To Prevent And Correct Discriminatory Employment Practices Whenever Possible Through Voluntary Means – Which Cannot Be Accomplished Absent Administrative Exhaustion

Apart from serving as the principal means through which the EEOC may prosecute Title VII violations in court, administrative charges provide a basis for the EEOC to review, assess, and seek changes to employment practices and decisions that may be impeding equal employment opportunity and nondiscrimination. That important policy objective provides further confirmation that Title VII's detailed remedial scheme serves objectives beyond those served by non-jurisdictional claim-processing rules. Relieving plaintiffs of the obligation to exhaust Title VII's administrative remedies by filing a charge with the EEOC thus almost certainly would not only impede meaningful and consistent antidiscrimination enforcement by the EEOC, but also would undermine its efforts to secure compliance through voluntary means.

One of the bedrock policies underlying Title VII is that the favored means of resolving employment discrimination issues is not through litigation, but through voluntary compliance and cooperation. See, *e.g.*, *Gardner-Denver,* 415 U.S. at 52. Indeed, Title VII expressly *requires* the EEOC to attempt to eliminate unlawful employment practices through "informal methods of conference, conciliation, and persuasion" before resorting to litigation. See 42 U.S.C. § 2000e-5(b).

EEOC conciliation unquestionably plays a critical role in effectuating Title VII's ultimate goal of voluntary compliance. The EEOC in its procedural regula-

tions observes that in enacting Title VII, Congress "strongly encouraged employers … to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action." 29 C.F.R. § 1608.1(b). EEOC conciliation is intended to facilitate those efforts under the watchful eye of the agency whose responsibility is to ensure that federal public policy is served. Thus, EEOC conciliation is aptly characterized as "the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law. Each step in the process – investigation, determination, conciliation, and if necessary suit – is intimately related to the others." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1305 (W.D. Pa. 1977).

In addition to promoting judicial efficiencies by avoiding protracted litigation of unvetted claims, exhaustion allows the EEOC to counsel would-be charging parties about their rights and assist them in crafting proper charges, and enables the agency to apply its considerable Title VII subject matter expertise in determining which claims are meritorious. While charging parties may bring suit even on exhausted claims that were found by the EEOC to have no merit, having vetted their claim with the EEOC invariably will help inform the decision whether to exercise that right and how to frame any claims in court.

C. There Is A Profound Difference Between Filing A Charge On Time, And Not Filing At All

Under Title VII, charging parties generally are required to file a charge "in writing under oath or

affirmation" with the EEOC no later than 300 days from the date of the alleged violation. 42 U.S.C. § 2000e-5(e)(1). This Court has held that timely charge filing "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (footnote omitted). The Court reasoned:

> The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.
>
> The provision granting district courts jurisdiction under Title VII, 42 U.S.C. §§ 2000e-5(e) and (f), does not limit jurisdiction to those cases in which there has been a timely-filing with the EEOC. It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

Id. at 393-94 (footnotes omitted).

Zipes provides ready support for treating administrative exhaustion as a jurisdictional mandate, rather than as simply a "prudential" prerequisite to suit. As this Court pointed out there, the parts of Title VII establishing federal court subject matter jurisdiction – Sections 2000e-5(e) and (f) – do not make timely charge filing a jurisdictional requirement. As noted above, however, Section 2000e-5(f) specifies that the EEOC *shall* provide a right-to-sue notice and "within ninety days after the giving of such notice a civil action *may be brought against the respondent*

named in the charge." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). If "receiving and acting upon the Commission's statutory notice of the right to sue" is a "jurisdictional prerequisite[]," *McDonnell Douglas*, 411 U.S. at 798, then so too must the obligation to actually file a charge, without which there is no right-to-sue notice. Put simply, failing to exhaust administrative remedies has a fundamentally different legal effect than simply filing a charge outside the applicable limitations period. In other words, courts may not hear unexhausted claims no matter who brings them (the complainant or the EEOC) or when they are brought.

This Court has explained:

> Among the types of rules that should not be described as jurisdictional are what we have called 'claim-processing rules.' These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times. Filing deadlines … are quintessential claim-processing rules.

Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 435 (2011) (citations omitted). Receipt of a right-to-sue notice signaling exhaustion of administrative remedies is not a "claim-processing rule" at all.

Rather, administrative exhaustion serves to authorize the charging party – whose charge at this point has been fully "processed" by the EEOC – to pursue a lawsuit in federal court. It is thus quite unlike other charge-related requirements that are subject to equitable waiver (or, as in the case of the ten-day notice requirement, have been treated as waivable). Instead, it serves the other important statutory objectives discussed above.

To treat the failure to exhaust administrative remedies as less than jurisdictional would be to upend Title VII's entire enforcement scheme and introduce procedural complexities that Congress could not have contemplated. For instance, if a Title VII plaintiff asserts an unexhausted sex discrimination claim in federal court, what limitations period applies? Title VII provides two limitations periods – one pertaining to the timeframe within which a charge must be filed with the EEOC and the other pertaining to when a charging party may file suit after having received a right-to-sue notice. Would timeliness be determined based on when the plaintiff could or should have exhausted his or her remedies? It is difficult to conceive of a workable standard for answering those questions, much less the circumstances under which a failure to exhaust should be excused on equitable grounds.

II. TREATING TITLE VII'S EXHAUSTION REQUIREMENT AS A NON-JURISDICTIONAL PRECONDITION SUBJECT TO EQUITABLE WAIVER WOULD UNDERMINE PROACTIVE DISCRIMINATION PREVENTION EFFORTS

Timely, competent processing of discrimination claims by the EEOC also is vital to ensuring compliance with the equity and fairness principles underlying Title VII to which *amici* are deeply committed. Among other things, it promotes sound employment relations and compliance programs by encouraging early detection and correction of potential violations, without resort to protracted federal court litigation. For instance, and as noted above, proper EEOC charge investigation sets the stage for meaningful and confidential conciliation of meritorious claims, which

benefits respondents seeking to avoid the cost and reputational damage associated with employment discrimination litigation, as well as charging parties seeking speedy resolution to their workplace disputes. None of those objectives can be achieved if Title VII's administrative exhaustion requirement is not strictly enforced. Rather, failure to exhaust administrative remedies impedes proactive prevention, and swift correction, of workplace discrimination.

Title VII expressly requires the EEOC to serve an employer with notice of a charge of discrimination within ten days of its filing date. 42 U.S.C. § 2000e-5(e)(1). "[T]he principal objective of the provision seems to have been to provide employers fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation by the EEOC." *Shell Oil*, 466 U.S. at 74. The statutory notice provision serves important practical purposes as well.

For instance, many employers use formal notice of the filing of an EEOC charge to initiate an internal investigation to determine what action, if any, should be taken to mitigate harm to the complainant or others. Often a charging party will have bypassed a company's internal dispute resolution procedures in favor of submitting a charge to the EEOC. Under those circumstances, the employer will not have had an opportunity to review and address the claims until served with the charge. If an opportunity to resolve the matter quickly without resort to a lengthy investigation or litigation exists, most employers will pursue it. Once litigation commences, any real chance to resolve the matter amicably and informally is lost.

Particularly in the case of workplace harassment, employers have a strong interest in being able to

promptly investigate and pursue immediate corrective action not only to remedy the environment for the complainant but also to protect others from being victimized. As this Court observed, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms [which] would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (citations omitted).

In addition to increasing the risk of legal liability and reputational damage, inattention to workplace harassment issues can have a significant impact on the workplace – costing American businesses millions annually in lost productivity, absenteeism and turnover, as well as in increased medical costs. See, *e.g.*, EEOC Select Task Force on the Study of Harassment in the Workplace, *Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 18 (June 2016).[4] Efforts to learn about workplace issues – and to use those lessons to better prevent, detect, and correct harassment – are undermined by failure to strictly enforce the exhaustion requirement.

Exhaustion of administrative remedies also gives the employer an opportunity—before it is publicly accused in court of the most serious civil-rights violations—to resolve the matter privately. Congress imposed a conciliation obligation because it recognized that lengthy, expensive litigation does not best advance the interests of businesses or employees; a quick, cheap resolution is often preferable for both

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[4] *Available at* https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf (last visited Mar. 4, 2019).

sides. See *Ellerth*, 524 U.S. at 764. And Congress further recognized that such a resolution is most likely to be achieved out of the public eye, before positions harden through the adversarial judicial process. Accordingly, Congress guaranteed employers a chance for private resolution. See 42 U.S.C. § 2000e-5(b) ("Nothing said or done during and as a part of such informal endeavors may be made public ...."). That is exactly why Congress made conciliation "a key component of the statutory scheme." *Mach Mining*, 135 S. Ct. at 1651.

Finally, employers need to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. As noted above, treating exhaustion as non-jurisdictional would raise a serious question as to what limitations period if any applies and when it begins to run. Interpreting Title VII's exhaustion requirement as anything other than jurisdictional would prejudice employers that reasonably and lawfully disposed of employment records that were not relevant at the time to any pending investigation or proceeding. It also would unfairly hamper employers' ability to defend themselves against unexhausted claims in court.

CONCLUSION

For the foregoing reasons, *amici curiae* Center for Workplace Compliance, National Federation of Independent Business Small Business Legal Center, Chamber of Commerce of the United States of America, and National Retail Federation respectfully submit that the decision below should be reversed.

Respectfully submitted,

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Suite 200
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Small Business Legal Center

DARYL JOSEFFER
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Center for Workplace Compliance

STEPHANIE MARTZ
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Suite 1200
Washington, DC 20005
(202) 783-7971

Attorneys for *Amicus Curiae* National Retail Federation

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