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Catching Up to the Supreme Court: Applying the Arbaugh-Bowles Test to Title VII’s Presentment Requirement

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INTRODUCTION

It was evident in 1964 that achieving widespread compliance with the Civil Rights Act, and therein, eradicating workplace discrimination, would prove difficult. Therefore, Congress sought to make it easy for untrained litigants of limited means to bring claims asserting workplace discrimination. Accordingly, Congress designed the Equal Employment Opportunity Commission (EEOC) process to offer such litigants an opportunity to raise concerns with the agency, pursue voluntary conciliation with the employer, and achieve curative results for the claimant. Unfortunately, judge-imposed procedural restrictions jeopardize the effectiveness of the EEOC process and limit the opportunity for claimants to seek relief.

Title VII delineates unlawful employment practices and provides the process through which victims can claim violations. Included in that process are requirements to pursue a claim with the EEOC prior to bringing a suit in federal court. Presentment is among the requirements that courts have extrapolated from this section. This rule requires a party to adequately present an issue to an agency before seeking judicial

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1 BA 2009, Northwestern University; JD Candidate 2015, The University of Chicago Law School.
3 See *Babrocky v Jewel Food Co.*, 773 F2d 857, 864 (7th Cir 1985) (explaining the liberal standard that judges should apply while assessing the presentment requirement on a claim brought by a layperson plaintiff).
4 See 28 USC § 2000e.
This Comment does not challenge the rule itself. Indeed, presentment adds substantial benefit to Title VII enforcement. However, some circuits have abused this requirement by treating it as jurisdictional. In so doing, courts risk dismissing otherwise proper claims for relief without using their equitable discretion to evaluate a claim. This unfairly burdens the layperson claimants that Title VII sought to empower, who may not have the legal acumen to comply precisely with administrative procedure.

This Comment argues that the Supreme Court’s recent jurisprudence on jurisdiction provides sufficient guidance to resolve the circuit split in favor of treating presentment as non-jurisdictional. Part I provides a summary of subject matter jurisdiction, explains the problem with the way courts have used the doctrine, and describes the Supreme Court’s efforts to curtail such improper use. Part II examines jurisdictional and non-jurisdictional treatment of exhaustion requirements under Title VII, including timeliness, receipt of a right-to-sue notice, and presentment. Part III argues that the Supreme Court’s recent jurisdiction jurisprudence established a test that should be used to evaluate whether or not presentment is jurisdictional going forward. Part IV applies that test to demonstrate that presentment is not a jurisdictional requirement. In sum, although the Supreme Court did not rule specifically on presentment, its recent decisions on jurisdiction sufficiently instruct circuit courts to avoid jurisdictional treatment of the requirement.

I. SUBJECT MATTER JURISDICTION

This Comment suggests in Part III that the recent effort by the Supreme Court to bring clarity to the concept of jurisdiction provides a clear path for defining presentment as non-jurisdictional. Before making that argument, Part I will review subject matter jurisdiction, describe the profligate use of

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7 See Part II.C.
8 See Part II.C.2, citing, for example, Alfano v Costello, 294 F3d 365, 381 (2d Cir 2002); Brown v Department of Public Safety, 446 Fed Appx 70, 73 (9th Cir 2011); Dalvit v United Airlines, Inc, 359 Fed Appx 904, 911 (10th Cir 2009).
“jurisdiction” by courts, and summarize the Court’s recent jurisprudence to stop such use.

A. Background

Subject matter jurisdiction determines whether or not a court has the power to consider a particular matter. As the Supreme Court explained, “jurisdiction is power, and in its absence, the court’s only function is to dismiss the case.” Thus, establishing jurisdiction is a preliminary and critical function for any party seeking relief in the federal courts. The Constitution provides the absolute limit of judicial power, but it does not vest all of that power in the district courts. Instead, the Constitution vested in Congress the power to create inferior courts and grant judicial authority, provided that authority does not exceed the bounds of the Constitution. Therefore, although federal question jurisdiction—the power to hear cases arising under laws of the United States—is within the Constitutional limit of the judicial authority that Congress can grant, Congress did not grant jurisdiction over federal question cases to the district courts until 1875.

At first glance, district courts appear to have jurisdiction over claims that arise under federal law. Unfortunately, jurisdiction it is not that simple. Most federal laws contain several requirements for bringing a claim. The challenge for courts is determining whether those requirements relate to subject matter jurisdiction or are elements of the claim for relief.

Federal question jurisdiction encapsulates Title VII, which is a law of the United States. Moreover, Title VII specifically

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12 US Const Art III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).
13 Marbury v Madison, 5 US 137 (1803) (holding a statute unconstitutional that purported to grant original jurisdiction beyond that granted in Article III of the Constitution).
14 US Const Art III, § 2, cl 1 (“The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, . . . .”).
15 Act of March 3, 1875, § 1, 18 Stat 470, codified at 28 USC § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).
grants federal courts the authority to adjudicate civil actions brought thereunder. However, a case that arises under Title VII invokes a federal law that requires administrative exhaustion as a prerequisite. This raises the critical question: does Title VII incorporate administrative exhaustion as a jurisdictional prerequisite, or is administrative exhaustion an element of a claim for relief? As explored below, this determination has serious implications including access to justice, efficiency and fairness, and the constitutionality of adjudication.

B. The Profligate Use of “Jurisdiction”

Complicating things further, “courts have been less than meticulous” on the distinction between jurisdictional prerequisites and non-jurisdictional requirements. Multiple appellate courts, including the Supreme Court, have acknowledged careless use of jurisdictional terms in a descriptive sense, rather than a legal sense. Often, this mistake involves referring to claim-processing rules, which are subject to waiver, as jurisdictional requirements, which are not. Regrettably, the rhetorical distinction between the two conditions precedent pales in comparison to the difference of practical effect between them. Jurisdictional requirements are not subject to waiver, estoppel, or equitable tolling. The

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16 42 USC § 2000e-5(f)(3) (“Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.”).
17 See Logsdon v Turbines, Inc, 399 F Appx 376, 378 (10th Cir 2010).
18 Arbaugh v Y&H Corp, 546 US 500, 511 (2006), citing, for example, Hishon v King & Spalding, 467 US 69 (1984) (noting that the district court’s reasoning made clear jurisdiction-based dismissal was for failure to state a claim under Title VII, not on jurisdictional grounds).
19 See Steel Co v Citizens for a Better Environment, 523 US 83, 90 (1998) (explaining that jurisdiction has been a “word of many, too many, meanings”) (internal quotation marks omitted); Zipes v Trans World Airlines, Inc, 455 US 385, 395 (1982) (“Although our cases contain scattered references to the timely-filing requirement as jurisdictional, the legal character of the requirement was not at issue in those cases.”); Francis v City of New York, 235 F3d 763, 767–68 (2d Cir 2000) (“It is true that in [a prior decision] we referred, in passing, to Title VII’s exhaustion requirements as a matter of jurisdiction, echoing similar references in prior decisions. . . . [T]his characterization, however, played no part in our holding[s].”) (internal citation omitted) (emphasis removed).
21 See Zipes, 455 US 385, 393 (1982); Sebelius v Auburn Regional Medical Center,
absence of waiver means that subject matter jurisdiction can be challenged, or raised *sua sponte* by the judge, at any point during litigation. The corresponding procedural implications could have adverse consequences on litigants, especially disadvantaged plaintiffs. For example, treating a requirement as jurisdictional would place the burden of establishing jurisdiction on plaintiffs, increasing the difficulty and cost of bringing a suit. Moreover, procedural rules such as waiver were introduced for efficiency and fairness. Sidestepping these rules may waste judicial resources, for instance, by allowing challenges to jurisdiction to be raised for the first time on appeal, potentially rendering the entire previous trial superfluous. On the other hand, an erroneous exercise of jurisdiction means that a court is acting outside of its authority and therein, in violation of the Constitution.

C. The Supreme Court’s Effort to Bring Clarity to the Jurisdiction Doctrine

The Supreme Court, recognizing the importance of jurisdictional determinations, recently issued a series of decisions seeking to correct the haphazard use of jurisdictional terms and bring more clarity to the doctrine. One of the first cases in the series considered whether Title VII’s numerosity...
requirement, which only applies Title VII to employers with more than fifteen employees, constituted a jurisdictional prerequisite for suit.

In *Arbaugh v. Y&H Corp.*, the plaintiff was a bartender/waitress who brought sexual harassment and constructive discharge claims against the restaurant’s owners. After a two-day jury trial, the trial court entered judgment in favor of the plaintiff. The defendants subsequently filed a post-trial motion to dismiss for lack of subject matter jurisdiction, asserting for the first time that the company did not meet the statutory definition of an employer because it had fewer than fifteen employees. Though critical of the defendant’s delay in raising the jurisdictional challenge, the district court allowed discovery on the matter, vacated its judgment, and dismissed the discrimination claim with prejudice. The Fifth Circuit affirmed. The Supreme Court granted certiorari to “resolve conflicting opinions in Courts of Appeals . . . on whether Title VII’s employee-numerosity requirement [ ] is jurisdictional or simply an element of a plaintiff’s claim for relief.”

The Supreme Court reversed, taking care to distinguish between jurisdictional requirements and elements of a claim for relief. The key difference between the types of conditions precedent, according to the Court, is the language with which Congress created them. In holding that the employee-numerosity requirement is not jurisdictional, the Court articulated a “readily administrable bright line” to enhance clarity of the subject:

If the Legislature clearly states that a threshold limitation on a statute's scope shall count as

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30 Id at 507.
31 Id at 508 (noting that the parties consented to trial before a Magistrate Judge).
32 Id (citing 42 USC § 2000e(b), which defines an employer to include fifteen or more employees).
33 *Arbaugh*, 546 US at 509. The determination ultimately turned on whether truck drivers and owners were considered employees for the purposes of Title VII. Id.
34 Id ("[D]efendant’s failure to qualify as an employer under Title VII deprives a district court of subject matter jurisdiction.") (internal quotation marks omitted), citing *Dumas v Mt Vernon*, 612 F2d 974, 980 (5th Cir 1980).
35 *Arbaugh*, 546 US at 509.
36 Id at 516.
37 Id at 514–15.
jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.\(^3\)

Throughout the opinion, the Court compared the numerosity requirement to the amount-in-controversy threshold for diversity jurisdiction.\(^3\) There, Congress was clear that meeting the minimum amount-in-controversy was a requirement for diversity jurisdiction.\(^4\) On the other hand, "neither 28 USC § 1331, nor Title VII’s jurisdictional provision, 42 USC § 2000e-5(f)(3), specifies any threshold ingredient."\(^5\) Indeed, the employee-numerosity requirement only appeared in the Definitions section of Title VII.\(^6\) Therefore, the Court had no trouble applying the “readily administrable bright line” to hold that the numerosity requirement was not jurisdictional.\(^7\) Lower courts have applied this bright line to hold that requirements for bringing a Title VII claim are non-jurisdictional.\(^8\)

Shortly after Arbaugh, the Court declined to apply the “bright line” rule when holding that the timely filing of a notice of appeal in a civil case was jurisdictional.\(^9\) In Bowles v Russell,\(^10\) the Court considered whether the Sixth Circuit had jurisdiction to entertain an appeal in a civil action that was filed after the period allowed by statute.\(^11\) The plaintiff, after being convicted of murder in state court, brought a civil action for

\(^{38}\) Id at 515–16 (internal citations and footnote omitted).

\(^{39}\) Arbaugh, 546 US at 515–16.

\(^{40}\) Id at 515, citing 28 USC § 1332 (providing an amount-in-controversy requirement for diversity jurisdiction).

\(^{41}\) Arbaugh, 546 US at 515 (noting that the numerosity requirement appears in a different provision that does not speak to jurisdictional terms), citing Zipes, 455 US at 394.

\(^{42}\) 42 USC § 2000e.

\(^{43}\) Arbaugh, 546 US at 515–16.

\(^{44}\) See, for example, Kaiser v Trofholz Technologies, Inc, 935 F Supp 2d 1286, 1292 (MD Ala 2013) (finding that the defendant’s status as the plaintiff’s employer is a non-jurisdictional element of the substantive cause of action); Smith v Angel Food Ministries, Inc, 611 F Supp 2d 1346, 1351 (MD Ga 2009) (holding that the religious exemption in Title VII is non-jurisdictional in character).


\(^{46}\) 551 US 205 (2007).

\(^{47}\) Id at 207.
habeas relief that was denied by the district court. After missing the 30-day limit to appeal that was provided by 28 USC § 2107(a), the plaintiff moved to extend the filing period. The district court granted the extension, and the Sixth Circuit ultimately dismissed for jurisdictional deficiencies.

The Supreme Court narrowly affirmed, holding “that the timely filing of a notice to appeal in a civil case is a jurisdictional requirement.” The Court examined the statute but relied more heavily on the Court’s prior case law, considering it “well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals.” The Court distinguished Arbaugh by pointing out that the employee-numerosity requirement in that case was different from the time limit in the instant case. The Court also offered a policy justification for treating the time limit as jurisdictional, explaining that “[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.”

Four justices dissented because they considered the time limit to be precisely the type of claim-processing rule that should be treated as non-jurisdictional. The dissent argued that statutory time limits are not automatically jurisdictional. Instead, pursuant to the Arbaugh “bright line,” a time limit should only be considered jurisdictional if Congress specifically

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48 Id.
49 Id at 207–08.
50 Bowles, 551 US at 207–08. The specific jurisdictional issue arose because the district court judge “inexplicably” gave the plaintiff an extension of seventeen days, rather than the fourteen days permitted by 28 USC § 2107(c)(2). Id at 207.
51 Id at 214.
52 Id at 209 (“This Court has long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional.”) (internal quotation marks omitted), citing Griggs v Provident Consumer Discount Co, 459 US 56, 61 (1982), Hohn v United States, 524 US 236, 247 (1998), Torres v Oakland Scavenger Co, 487 US 312, 314–15 (1988), and other cases.
54 Bowles, 551 US at 211 (Souter dissenting) (distinguishing Bowles from the series of recent Supreme Court decisions which sought to clarify the distinction between non-jurisdictional requirements and jurisdictional prerequisites). The Court provided little reasoning to support this distinction.
55 Id at 212–13 (Souter dissenting).
56 Id at 218 (Souter dissenting).
57 Id at 217 (Souter dissenting).
articulates it as such.\textsuperscript{58} For the dissent, \textit{Bowles} is a particularly good candidate for equitable discretion: the plaintiff missed the deadline because the judge gave him the wrong due date.\textsuperscript{59} However, the plaintiff's reliance on the statements of the district court judge ended up costing him his appeal when the Court held the time limit to be jurisdictional based on prior case law. The Court made this ruling even though it sidestepped more recent cases, notably \textit{Arbaugh}, to reach that result. The irony of the Court's reasoning was not lost on the dissent:

In ruling that \textit{Bowles} cannot depend on the word of a District Court Judge, the Court demonstrates that no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this Court. Yet more incongruously, all of these pronouncements by the Court, along with two \cite{to three} of our cases, are jettisoned in a ruling for which the leading justification is \textit{stare decisis}.\ldots \textsuperscript{60}

The dissent's frustration highlights confusion in the case law: what is the appropriate standard to determine jurisdictional prerequisites? \textit{Arbaugh} presents a "readily administrable bright line" based on clear statutory language. \textit{Bowles} stands for the importance of consistent jurisprudence on the topic, even if the statutory language is not clear. The Court has tried to settle this confusion in more recent cases.

In \textit{Reed Elsevier, Inc v Muchnick},\textsuperscript{51} the Court reconciled \textit{Arbaugh} and \textit{Bowles}.\textsuperscript{62} The Court, basing its reasoning on \textit{Arbaugh}, found that the presence of the word "jurisdiction" in the statute did not sufficiently indicate that the registration requirement is jurisdictional.\textsuperscript{63} Similar to the statute in \textit{Arbaugh}, this text was in a separate section from the one

\textsuperscript{58} \textit{Bowles}, 551 US at 217 (Souter dissenting).
\textsuperscript{59} Id at 207. For a discussion of the implications this decision has on the fairness of the judicial system, see David S. Kantorowitz, \textit{Note, Caveat Emptor: Jurisdictional Rules, Bowles v. Russell, and Reliance on Our Judicial System}, 89 BU L Rev 265 (2009) (arguing that the unjust result in \textit{Bowles} could be remedied by legislative action to give judges more discretion).
\textsuperscript{60} \textit{Bowles}, 551 US at 220 (Souter dissenting) (emphasis added) (footnote omitted).
\textsuperscript{61} 559 US 154 (2010).
\textsuperscript{62} Id at 167--68 (holding that the Copyright Act's requirement that copyright holders register their works before suing for infringement is non-jurisdictional).
\textsuperscript{63} Id at 164.
granting courts jurisdiction. Additionally, the Court rejected the argument that Bowles commanded a different result. Amicus argued that a condition should be treated as jurisdictional if consistently treated as jurisdictional by courts without interruption by Congress—even in the absence of clear statutory language suggesting jurisdictional treatment. On the contrary, "Bowles stands for the proposition that context, including [the] Court’s interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." Thus, the Court found the Bowles emphasis on prior case law to be consistent with the Arbaugh emphasis on legislative language.

These opinions provide guidance for lower courts seeking to determine whether a requirement is jurisdictional. Recognizing the importance of such determinations, the Court set a stringent standard for jurisdictional requirements. Part II will demonstrate the development of the jurisdictional and non-jurisdictional treatment of Title VII's exhaustion requirements. This discussion will illustrate the circuit split over presentment, which this Comment suggests is resolved by the Court's recent jurisdiction jurisprudence.

II. TITLE VII

The circuits are split as to whether presentment constitutes a jurisdictional prerequisite or a non-jurisdictional condition precedent for bringing a suit under Title VII. Lower courts have generally required plaintiffs to exhaust their administrative remedies prior to filing a federal lawsuit. Specifically, courts have required timeliness, receipt of a right-to-sue notice, and presentment. The Supreme Court has explicitly stated that the

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64 Id at 164–65 ("Neither [28 USC] § 1331, which confers subject-matter jurisdiction . . . nor [28 USC] § 1338(a), which is specific to copyright claims, conditions its jurisdictional grant on [the registration requirement].").

65 Reed Elsevier, 559 US at 167. It is worth noting that Justice Thomas effectively rejected an argument he laid out in a Bowles footnote. See Bowles, 551 US at 209 n 2 ("[I]t is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century. . . . Given the choice between calling into question some dicta in our recent opinions and effectively overruling a century’s worth of practice, we think the former option is the only prudent course.").

66 Reed Elsevier, 559 US at 167 (explaining that Bowles examined statutory language and Supreme Court jurisprudence to rank the requirement as jurisdictional).

67 Id.
statutory time limit for filing charges under Title VII is not jurisdictional. However, because the Supreme Court limited its decision to timeliness, lower courts are divided as to the proper treatment of the other two requirements. The circuit split on presentment remains active, even in light of the Court’s recent decisions regarding jurisdiction.

A. Timeliness

The Supreme Court has held that timeliness, Title VII’s requirement that charges be brought within 180-days of an unlawful employment practice, is not a jurisdictional prerequisite to suit in federal court. As the only controlling precedent on Title VII exhaustion requirements, this important ruling is often consulted for determinations of other questions related to exhaustion.

In *Zipes v Trans World Airlines, Inc.*, female flight attendants brought a class action against employer-airline alleging unlawful sex discrimination. The class plaintiffs claimed that the airline’s policy of grounding female flight attendants who became mothers, but not male flight attendants who became fathers, violated Title VII. The district court granted summary judgment for the plaintiffs and the Seventh Circuit affirmed on the airline’s liability. However, the appellate court limited the holding to those plaintiffs who were terminated within Title VII’s timeliness requirement, even though the defendant-employer did not plead the affirmative defense. It did so because the Seventh Circuit declared the timeliness requirement to be jurisdictional.

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68 *Zipes*, 455 US at 393.
69 42 USC § 2000e-5(e)(1).
70 *Zipes*, 455 US at 393 (holding that the statutory time limit for filing a Title VII claim with the EEOC is not a jurisdictional requirement for bringing a civil action). Title VII has several time requirements. This case considered the time limit for initiating an action with the EEOC after the occurrence of a violating offense. Id at 387.
71 455 US 385 (1982).
72 Id at 388.
73 Id at 389 (summarizing the proceedings in the lower courts).
74 In re Consolidated Pretrial Proceedings in the Airline Cases, 582 F2d 1142, 1150-51 (7th Cir 1978) ("We hold the 90-day filing period to be jurisdictional and therefore the employer’s failure to plead it did not constitute a waiver.").
The Seventh Circuit held that the 90-day requirement is jurisdictional—rather than in the nature of a statute of limitations—due in part to the clear statutory language. Reading the statute, the panel found "nothing of significance to indicate the 90-day filing requirement is not jurisdictional." Additionally, the panel noted its decision was in accord with prior Supreme Court jurisprudence that described the requirement as jurisdictional.

The Supreme Court reversed, holding that the statutory time limit for filing charges under Title VII was not jurisdictional. Rather than looking for reasons why the requirement was not jurisdictional, the Court shifted the presumption by emphasizing an absence of signals that it was jurisdictional. Pointing to the structure of Title VII, the Court noted that the provisions discussing timeliness are separated from those discussing jurisdiction of the federal courts. Next, the Court explained that prior case law supported the holding.

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75 Title VII was amended in 1972 to extend the filing period from 90 days to 180 days, but the extension did not have retroactive effect on this suit. Airline Cases, 582 F2d at 1148 n 10.
76 Id at 1151 ("The language of the statute is clear: A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred.").
77 Id at 1151 ("The language of the statute is clear: A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred.").
78 Id, citing United Air Lines, Inc v Evans, 431 US 553, 555 n 4 (1977) ("Timely filing is a prerequisite to the maintenance of a Title VII action."); Alexander v Gardner-Denver Co, 415 US 36, 47 (1974) (holding that an employee's resort to a collective bargaining agreement's grievance-arbitration process does not waive Title VII remedies); McDonnell Douglas Corp v Green, 411 US 792, 798 (1973) ("Respondent satisfied the jurisdictional prerequisites to a federal action [ ] by filing timely charges."). However, it appears that only McDonnell Douglas actually describes Title VII's timeliness requirement as jurisdictional.
79 Zipes, 455 US at 393 ("We hold that filing a timely charge of discrimination with the EEOC 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.").
80 Id at 392-93.
81 Id at 393-94 (noting that 42 USC §§ 2000e-5(e)-(f) do not limit jurisdiction to those cases that met the timely filing requirement). See also id at 394-95 (analyzing legislative history that associates the filing provision with a period of limitations).
82 Zipes, 455 US at 395-97, citing Franks v Bowman Transportation Co, 424 US 747 (1976) (refusing to deny relief for unnamed class members who had not filed administrative charges with the EEOC); Albemarl Paper Co v Moody, 422 US 405 (1975) (making the same refusal); Love v Pullman Co, 404 US 522 (1972) (rejecting a technical reading for a filing provision under Title VII because the scheme's process is initiated by laymen); Intl Union of Electrical, Radio, and Machine Workers v Robbins & Myers, Inc, 429 US 229 (1976) (denying argument that timely-filing requirement should be tolled while the plaintiff pursued grievance procedure set forth in a collective-bargaining agreement); Mahaney Corp v Silver, 447 US 897 (1980) (neglecting to dismiss...
The Court dismissed prior descriptions of the timely-filing requirement as jurisdictional because the "legal character of the requirement was not at issue in those cases." Finally, the Court reasoned that treating the filing period as a requirement subject to waiver and tolling accords with the remedial purpose of Title VII, “without negating the particular purpose of the filing requirement, to give prompt notice to the employer.”

Since the Supreme Court’s decision in *Zipes*, lower courts have permitted waiver, estoppel, and equitable tolling of the statutory filing requirement. To this day, *Zipes* is the only Supreme Court decision addressing whether or not a Title VII exhaustion requirement is jurisdictional. It thus provides important guidance for any court addressing presentment. However, while the Supreme Court explicitly ruled on timeliness, the Court did not address either the right-to-sue notice or presentment. Therefore, each requirement deserves its own inquiry.

**B. Right-to-Sue Notice**

Title VII permits a private party to bring a civil action for unlawful employment discrimination against a respondent named in an EEOC charge, provided that the party brought the suit within 90 days of receiving a right-to-sue notice from the
In accordance with the statute, courts have dismissed actions in which plaintiffs do not demonstrate the issuance of a right-to-sue letter by the EEOC.

Though the right-to-sue notice is a statutory requirement, courts are not in agreement as to whether to treat it as jurisdictional in nature. The Second Circuit, for example, has interpreted Zipes and prior circuit precedent to hold that all administrative exhaustion requirements are prerequisites rather than jurisdictional requirements. The Ninth Circuit has specifically indicated that a right-to-sue notice is not jurisdictional. On the other hand, a district court in the Ninth Circuit recently explained, in spite of fairly clear circuit precedent, that a plaintiff must initiate suit after receipt of a right-to-sue notice in order to establish subject-matter jurisdiction. Although the right-to-sue notice is not the focus of this Comment, the disagreement over whether to treat this prerequisite as jurisdictional in many ways resembles the circuit split over the presentment requirement.

C. Presentment

Circuits are split regarding whether presentment is a jurisdictional requirement for bringing suit under Title VII. Administrative exhaustion requires a party to adequately present an issue to an agency before seeking judicial review. Unlike timeliness and the right-to-sue notice, presentment is not explicitly defined in Title VII. The relevant portion of Title VII reads:

87 42 USC § 2000e-5(f)(1) (identifying, in addition, the conditions that lead to such notice and the initial responses of a district court).
88 See, for example, Daoud v City of Wilmington, 894 F Supp 2d 544, 555–56 (D Del 2012) (noting that the plaintiff cannot simultaneously seek relief in the EEOC and the district court at the same time). See generally Saunders v Mills, 842 F Supp 2d 284 (DDC 2012); Tani v FPL/Next Era Energy, 811 F Supp 2d 1004 (D Del 2011).
89 Francis, 235 F3d at 768 (“[A]s a general matter, the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement.”) (internal quotation marks omitted).
90 Surratt v California Water Service Co, 518 F3d 1097, 1104–05 (9th Cir 2008) (“Failure to obtain a federal right-to-sue letter does not preclude federal jurisdiction.”).
91 Gao v Hawaii Dept of Atty Gen, 2010 WL 99355, at *2 (D Hawaii) (dismissing employment discrimination claim because the plaintiff failed to bring suit within the statutory time limit imposed after receiving right-to-sue notice).
If a charge filed with the [EEOC] 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) of this section, 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 [ ] by the person claiming to be aggrieved ... by the alleged unlawful employment practice.\textsuperscript{93}

Although it is not explicitly defined, presentment follows logically from the text. The statute permits claimants to bring civil actions upon receipt of a right-to-sue notice.\textsuperscript{94} Receipt of that notice is contingent upon a charge having completed the administrative process for one or another reason.\textsuperscript{95} It follows that the ability to bring a civil action is contingent upon having brought a charge before the EEOC. Moreover, that charge is tied to a party affected by an "alleged unlawful employment practice."\textsuperscript{96} Thus, a civil action is not authorized if it arises out of an unlawful employment practice unrelated to the charge that completed the administrative process.\textsuperscript{97} But the statutory language says nothing about the content of that charge compared to the civil action. Therefore, presentment is an implied or judicially created requirement.\textsuperscript{98}

Several courts have held that a party is not entitled to judicial review of an issue that was not presented during the administrative proceedings.\textsuperscript{99} However, the Supreme Court has

\textsuperscript{93} 42 USC § 2000e-5(f)(1).
\textsuperscript{94} 42 USC § 2000e-5(f)(1). See also I.B.2.
\textsuperscript{95} 42 USC § 2000e-5(f)(1).
\textsuperscript{96} 42 USC § 2000e-5(f)(1).
\textsuperscript{97} But see Macfarlane, 21 Geo Mason Civ Rts L J at 248 (classifying presentment as a meaningless exercise) (cited in note 24).
\textsuperscript{98} For a discussion of whether a court should impose a non-jurisdictional exhaustion requirement, see Sims v Apfel, 530 US 103, 106–12 (2000) (holding that courts should not require exhaustion in non-adversarial proceedings, such as those before the Social Security Administration).
\textsuperscript{99} See, for example, Unemployment Compensation Commission of Alaska v Aragan, 329 US 143, 155 (1946); Public Citizen, Inc v US EPA, 343 F3d 449, 461 (5th Cir 2003).
held that presentment is jurisdictional in some circumstances and that it is a non-jurisdictional prerequisite in others.\textsuperscript{100} In the absence of clear Supreme Court guidance, the circuits are split as to whether presentment is a jurisdictional requirement under Title VII.\textsuperscript{101}

1. Multiple circuits have held that presentment is not a jurisdictional requirement.

Both the Sixth and Seventh Circuits have held that presentment is not a jurisdictional requirement for bringing suit under Title VII. The Seventh Circuit held in \textit{Babrocky v Jewel Food Co}\textsuperscript{102} that presentment is not jurisdictional, but rather akin to a condition precedent.\textsuperscript{103} In \textit{Babrocky}, the plaintiffs filed a complaint against their supermarket-employer and union alleging unlawful sex discrimination because job classifications were sex segregated.\textsuperscript{104} The district court granted summary judgment to the defendants on some counts and dismissed others for lack of subject matter jurisdiction because the claims were not included in the original EEOC charge.\textsuperscript{105} The Seventh Circuit reversed the dismissal and provided a thorough analysis of why presentment is not jurisdictional.\textsuperscript{106}

\textsuperscript{100} Compare Woelke & Romero Framing, Inc \textit{v} NLRB, 456 US 645, 665–66 (1982) (vacating part of appellate court’s opinion regarding lawfulness of union picketing for lack of subject matter jurisdiction), with Sims, 530 US at 106 (noting that issue exhaustion is non-jurisdictional).

\textsuperscript{101} It is noteworthy that many of the cases cited in this section include discrimination claims against the government. Employment discrimination claims against the federal government were authorized by an amendment to Title VII in 1972, and are governed by 42 USC § 2000e-16. Some may argue that these claims warrant different treatment, however the amended statute explicitly relies on procedural elements introduced in § 2000e-5. Therefore, this Comment will evaluate all claims under the procedural requirements of § 2000e-5.

\textsuperscript{102} 773 F2d 857 (7th Cir 1985).

\textsuperscript{103} Id at 863–64.

\textsuperscript{104} Id at 860.

\textsuperscript{105} Id at 859 (summarizing lower court proceedings).

\textsuperscript{106} \textit{Babrocky}, 773 F2d at 863–64.
The court began by comparing presentment to the timeliness requirement addressed by Zipes. Timeliness is central to the statutory scheme because it enables the EEOC to pursue settlement through conferences, conciliation, and persuasion before a lawsuit is filed. However, noting the remedial nature of Title VII, the court cautioned that technical constructions should be avoided and when appropriate, equitable considerations should be incorporated. Presentment, like timeliness, gives the EEOC the opportunity to seek conciliation and voluntary compliance and provides notice of the charge to the charged party. Therefore, if timeliness is not jurisdictional, then neither is presentment.

The court then showed how presentment differs from more common elements of subject matter jurisdiction. The primary distinction raised is that subject matter jurisdiction typically can be determined facially, whereas presentment always entails “an inquiry beyond the face of the complaint into the legal characterizations” that surround the factual allegations in the charge. Based on this and the above reasoning, the court concluded that presentment is akin to a condition precedent, rather than a jurisdictional requirement. The court then applied the “like or reasonably related” test to determine that plaintiff’s allegations of discrimination were sufficiently within the scope of the EEOC charge brought based on sex segregated classifications.

The Seventh Circuit later reiterated the Babrocky rule in Cheek v Western and Southern Life Insurance Company, where it held that an unlawful sexual harassment claim was not

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107 Id at 863.
108 Id (internal citations omitted).
109 Id at 863, citing Zipes, 455 US at 393, 397–398.
110 Babrocky, 773 F2d at 863.
111 Id (“The Supreme Court’s directive that the requirement of timeliness is not strictly jurisdictional implies that the requirement of scope should be similarly interpreted.”).
112 Id at 863–64.
113 Id.
114 Babrocky, 773 F2d at 864 (“So characterizing the requirement recognizes the similarity between this [and the timeliness requirement], and gives full force to the concerns regarding the remedial nature of Title VII and its underlying Congressional policy.”).
115 Id at 865.
116 31 F3d 497 (7th Cir 1994).
within the scope of the hostile work environment charge the plaintiff brought to the EEOC.\textsuperscript{117} Again, the court emphasized that “allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would frustrate the EEOC’s investigatory and conciliatory role, as well as deprive the charged party of notice of the charge.”\textsuperscript{118} The court also echoed Babrocky by adding that—in determining whether a claim is included in or reasonably related to an EEOC charge—significant leeway should be offered to Title VII plaintiffs, who are typically laypersons.\textsuperscript{119} Courts in the Seventh Circuit have recently applied these standards to permit or refuse discrimination claims on non-jurisdictional grounds.\textsuperscript{120}

Also recently, the Sixth Circuit held that presentment is not a jurisdictional requirement under Title VII. In Adamov v US Bank National Association,\textsuperscript{121} the plaintiff filed a complaint alleging unlawful discharge due to national origin and retaliation for complaints of discrimination.\textsuperscript{122} The plaintiff’s complaint included both the national origin and retaliation claims, however, a draft complaint submitted to the district court prior to its filing omitted the retaliation claim.\textsuperscript{123} Raising jurisdiction \textit{sua sponte}, the district court dismissed the

\textsuperscript{117} Id at 505.

\textsuperscript{118} Id at 500 (noting that although not jurisdictional, the presentment requirement is critical).

\textsuperscript{119} Id, citing \textit{Taylor v Western and Southern Life Ins Co}, 966 F2d 1188, 1195 (7th Cir 1992). See also Babrocky, 773 F2d at 864 (stating that the like or reasonably related standard should be a "liberal one in order to effectuate the remedial purposes of Title VII, which itself depends on lay persons, often unschooled, to enforce its provisions"); \textit{Duncan v Delta Consolidated Industries, Inc}, 371 F3d 1020, 1025 (8th Cir 2004) ("Courts should not use Title VII's administrative procedures as a trap for unwary pro se civil-rights plaintiffs.") (internal citation omitted).

\textsuperscript{120} See generally \textit{Lavalais v Village of Melrose Park}, 734 F3d 629 (7th Cir 2013) (permitting denial of transfer claim which was reasonably related to the plaintiff’s EEOC charge); \textit{Moses v USW Local Union 1014}, 2013 WL 2177577 (ND Ind) (granting summary judgment to the defendant because the plaintiff’s complaint alleged a new theory of liability); \textit{O’Leary v Will County Sheriff’s Office}, 2013 WL 158056 (ND Ill) (granting motion to dismiss because the plaintiff’s allegations were not reasonably related to the EEOC charge).

\textsuperscript{121} 726 F3d 851 (6th Cir 2013).

\textsuperscript{122} Id at 852.

\textsuperscript{123} Id at 853–54. This case followed an unusual procedure, reaching the district court on diversity jurisdiction over the plaintiff’s state-law discrimination claims. The plaintiff subsequently filed an EEOC complaint pursuant to Title VII and received a right-to-sue letter, however, it appears that the district court only considered a draft complaint that Adamov filed to avert preemption issues. Id.
plaintiff’s retaliation claim for lack of subject matter jurisdiction because it was not exhausted.\textsuperscript{124}

The Sixth Circuit reversed, explaining that “where a plaintiff has not exhausted administrative remedies, a district court may not dismiss the claim on jurisdictional grounds.”\textsuperscript{125}

This shift in circuit precedent was directly attributed to the recent Supreme Court jurisprudence with regards to jurisdiction. Following the Court’s decision in \textit{Arbaugh}, the Sixth Circuit held in \textit{Adamov} that Congress did not speak in jurisdictional terms with regards to its presentment requirement.\textsuperscript{126} This application will be explored in greater detail in Part III.B.

2. Several circuits have held that presentment is a jurisdictional requirement.

The Second, Ninth, and Tenth Circuits have all held that presentment is a jurisdictional requirement. In \textit{Alfano v Costello},\textsuperscript{127} the Second Circuit considered whether a plaintiff’s claim that her termination constituted unlawful sex discrimination was reasonably related to the conduct alleged in the initial charge brought before the EEOC.\textsuperscript{128} The panel explained as follows:

\begin{quote}
Jurisdiction exists over Title VII claims only if they have been included in an EEOC charge, or are based on conduct subsequent to the EEOC charge which is reasonably related to that alleged in the EEOC charge.\textsuperscript{129}
\end{quote}

The court then reviewed the district court’s analysis and affirmed dismissal of the termination claim. Despite the contrast with the prior and more general Second Circuit precedent,
district courts have taken presentment to be a jurisdictional requirement.\textsuperscript{130}

Prior cases in the Second Circuit considered the jurisdictional treatment of presentment as an essential element of Title VII’s statutory scheme.\textsuperscript{131} As the court saw it, permitting a plaintiff to litigate a claim not previously presented to and investigated by the EEOC would defeat efforts to encourage settlement through conciliation and voluntary compliance.\textsuperscript{132}

The Ninth Circuit has also explained that presentment is a jurisdictional requirement to bringing a civil action in federal court.\textsuperscript{133} In \textit{B.K.B. v Maui Police Dept},\textsuperscript{134} the court reviewed a district court’s dismissal for lack of subject matter jurisdiction.\textsuperscript{135} The plaintiff filed an EEOC charge indicating she had been subjected to discrimination based on race, sex, and national origin, and that she had been subject to harassment, but she did not sufficiently develop facts to support the charges. In her complaint to the federal court, the plaintiff made allegations of sex discrimination and sexual harassment. The defendant challenged the EEOC charge as insufficient to support these claims.\textsuperscript{136} The district court dismissed these claims for lack of subject matter jurisdiction because the plaintiff failed to exhaust her administrative remedies as to the sexual harassment claims.\textsuperscript{137}

\textsuperscript{130} See \textit{Figueroa v Napolitano}, 2012 WL 3683558, *3 (EDNY) (refusing to permit amendment of complaint because a plaintiff cannot establish jurisdiction for new, specific allegations with generalized claims of discrimination in original EEOC complaint); \textit{Shub v Westchester Community College}, 2008 WL 1957731, *5 (SDNY) (asserting jurisdiction because subsequent conduct was reasonably related to the conduct in EEOC charge); \textit{Sigmon v Parker Chapin Flattau & Klimpl}, 901 F Supp 667, 675 (SDNY 1995) (limiting jurisdiction of district court to those claims properly presented to EEOC).

\textsuperscript{131} \textit{Butts v City of New York Dept of Housing Preservation and Development}, 990 F2d 1397, 1401 (2d Cir 1993) (superseded by statute on other grounds). \textit{Butts} was criticized for its careless use of jurisdictional terms by the \textit{Francis} court, however \textit{Butts} was cited as authoritative two years later in \textit{Alfano}.

\textsuperscript{132} \textit{Miller v International Telephone and Telegraph Corp}, 755 F2d 20, 26 (2d Cir 1985) (highlighting the importance of presentment as a notice provision that encourages conciliation and voluntary compliance).

\textsuperscript{133} See \textit{Lyons v England}, 307 F3d 1092 (9th Cir 2002); \textit{B.K.B. v Maui Police Dept}, 276 F3d 1091 (9th Cir 2002).

\textsuperscript{134} 276 F3d 1091 (9th Cir 2002).

\textsuperscript{135} Id at 1099.

\textsuperscript{136} Id at 1100-01.

\textsuperscript{137} Id at 1099.
On review, the Ninth Circuit first affirmed that exhaustion and presentment are requirements for subject matter jurisdiction. The court then reversed the district court’s dismissal because the language of EEOC charges is to be construed “with the utmost liberality.” With that in mind, the court read the EEOC charge such that “harassment” incorporated racial and sexual harassment that appeared in her complaint. Another Ninth Circuit panel subsequently cited B.K.B. to explain that presentment is jurisdictional.

More recently, the Ninth Circuit held in Brown v Hawaii Department of Public Safety that the district court did not have jurisdiction because the plaintiff failed to meet the presentment requirement. In this case, the court did not offer a liberal construction of the EEOC charge because the plaintiff was represented by an attorney throughout the process. In the absence of such a construction, the claims were outside of the EEOC charge and the complaint was dismissed. Subsequent district court opinions treated presentment as jurisdictional but applied a liberal standard to enforce the requirement upon layperson litigants.

The Tenth Circuit has also held that administrative exhaustion, including presentment, is a jurisdictional requirement to bringing a claim in federal court. Announcing

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138 B.K.B., 276 F3d at 1100 (‘Subject matter jurisdiction extends over all allegations of discrimination that either fell within the scope of the EEOC’s actual investigation or an EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.’) (internal quotation marks omitted) (emphasis omitted). Interestingly, the court cited Babrocky to support the importance of exhaustion, which the Ninth Circuit considers jurisdictional.

139 Id at 1100 (internal quotation omitted).

140 Id at 1103.

141 Lyons, 307 F3d at 1103 (reversing district court dismissal because the plaintiff’s allegations were well within the scope of the EEOC charge).

142 446 Fed Appx 70 (9th Cir 2011).

143 Brown v Hawaii Department of Public Safety, 446 Fed Appx 70, 73 (9th Cir 2011).

144 Id.

145 Id.

146 See generally Cohen v Clark County School Dist, 2012 WL 2326721 (D Nev) (dismissing for failure to establish subject matter jurisdiction because gender based discrimination claim was not sufficiently related to EEOC charge of retaliation); Padilla v Bechtel Construction Co, 2007 WL 1219737 (D Ariz 2007) (granting motion to dismiss because amended complaint was not reasonably related to allegations in the EEOC charge); Oshilaja v Watterson, 2007 WL 2903029 (D Ariz 2007) (granting motion to dismiss for the same reason).

147 Jones v Runyon, 91 F3d 1398, 1398 (10th Cir 1996).
the principle in *Jones v Runyon*, the court included a lengthy footnote detailing the circuit split regarding treatment of exhaustion following *Zipes*. As explored above, the court noted that some circuits expanded the *Zipes* holding to exhaustion requirements beyond timeliness. The court also pointed to circuits that consider administrative exhaustion to be jurisdictional. Then, the court addressed its own precedent, noting that, while timely filing may not be jurisdictional, the requirement of an EEOC filing is. That precedent treated presentment as jurisdictional to encourage conciliation and reduce the burden on federal courts, and to allow the EEOC to develop a record, use its expertise, and exercise its discretion.

*Jones* was decided before *Arbaugh*; however, in *Dalvit v United Airlines, Inc*, the Tenth Circuit applied the *Jones* reasoning to hold that presentment is jurisdictional. In *Dalvit*, the plaintiffs sued employer-airline for discrimination and retaliation in violation of Title VII. The plaintiff’s complaint alleged “numerous adverse actions not described in their EEOC charge.” On review, the court affirmed the district court’s dismissal of these claims for lack of jurisdiction due to the plaintiff’s failure to exhaust the administrative remedy. District courts in the Tenth Circuit have also treated presentment as a jurisdictional requirement for civil actions against private employers. Indeed, the Tenth Circuit has

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148 91 F3d 1398 (10th Cir 1996).
149 Id at 1399 n 1 (pointing out that the characterization was not dispositive in the instant case).
150 Id, citing *Temengil v Trust Territory of Pacific Islands*, 881 F2d 647, 654 (9th Cir 1989); *Womble v Bhangu*, 864 F2d 1212, 1213 (5th Cir 1989); *Jackson v Seaboard Coast Line RR Co*, 678 F2d 992, 1005 (11th Cir 1982). But see *B.KB*, 276 F3d at 1091.
152 *Jones*, 91 F3d at 1399 n 1.
153 *Harbison v Goldschmidt*, 693 F2d 115, 118 (10th Cir 1982).
154 359 Fed Appx 904 (10th Cir 2009).
155 Id at 911.
156 Id.
157 Id (holding that a plaintiff may not cure a jurisdictional defect by pursuing administrative remedies after filing suit).
158 See generally *Bankston v Antlers Hilton Hotel*, 2011 WL 6153024 (D Colo 2011) (dismissing wrongful termination claim for lack of subject matter jurisdiction because it was not within the scope of an accommodation charge brought before the EEOC); *Dovy v HP*, 2011 WL 2607160 (D Colo 2011) (dismissing claim for lack of subject matter
continued to hold that exhaustion, including presentment, is a jurisdictional requirement for bringing a Title VII claim.  

In sum, courts are not in agreement as to the proper treatment of the exhaustion requirements in Title VII. Presentment, in particular, has created significant disagreement among circuits. Part III suggests that this circuit split can be resolved by applying the Supreme Court’s recent jurisprudence that brought clarity to the doctrine of jurisdiction.

III. THE ARBAUGH-BOWLES TEST

The Supreme Court’s recent efforts to bring clarity to jurisdiction doctrine spawned a two-factor test to determine whether a prerequisite to bringing a suit ranks as jurisdictional. This test, which this Comment calls the “Arbaugh-Bowles test,” requires courts to look first for a clear statutory indication that Congress wanted the rule to be jurisdictional. Second, the court may consider context, including prior interpretations of similar provisions. The circuits should adopt the Arbaugh-Bowles test because it provides a better method than those used by most of the circuits to determine whether presentment is jurisdictional.

A. Foundations of the Arbaugh-Bowles Test

This test is based, not surprisingly, on the holdings in Arbaugh and Bowles, as reconciled by Reed Elsevier. It instructs courts to look for a “clear” indication that Congress wanted the rule to be jurisdictional (“Arbaugh factor”), taking into account context, including prior interpretations of similar provisions (“Bowles factor”). The Court most recently applied

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150 See generally Freppon v City of Chandler, 528 Fed Appx 892 (10th Cir 2013) (affirming dismissal for lack of subject matter jurisdiction because the plaintiff failed to present wrongful termination claim that was not reasonably related to the pregnancy discrimination charge brought before the EEOC).

151 But see Micah J. Revell, Comment, Prudential Standing, The Zone of Interests, and the New Jurisprudence of Jurisdiction, 63 Emory L J 221, 250–51 (2013) (describing the same factors as a three-step test).

152 Prior to Reed Elsevier, Arbaugh (statutory text) and Bowles (context) presented two distinct methods of assessing jurisdiction. In Reed Elsevier, Justice Thomas (the Bowles author) reconciled the decisions explaining that context is relevant, but not dispositive. See Part I.C.

153 Henderson v Shinseki, 131 S Ct 1197, 1203 (2011) (holding that a deadline for
this test in *Sebelius v Auburn Regional Medical Center*,\(^{163}\) when it held that a 180-day limit for health care providers to file an administrative appeal from an initial determination of reimbursement due to them was not jurisdictional.\(^{164}\)

In *Auburn Regional*, the Court first examined the statutory language, finding that it did not suggest that Congress meant to treat the requirement as jurisdictional.\(^ {165}\) Next, the Court explained the importance of prior case law, which consistently held filing deadlines to be non-jurisdictional.\(^ {166}\) Additionally, the Court provided guidance for weighing the two factors against each other, explaining that only the exceptional case “with a century’s worth of precedent” can make a time limit jurisdictional.\(^ {167}\) This demonstrates the dramatic context the Court expects for the *Bowles* factor to outweigh the *Arbaugh* factor. In other words, the *Arbaugh* factor dominates the test; the *Bowles* factor is the rare exception.

**B. The *Arbaugh-Bowles* Test Should Replace Prior Circuit Court Approaches**

The *Arbaugh-Bowles* test is the best way to resolve the circuit split for a number of reasons. First, and most importantly, it is the appropriate application of binding Supreme Court decisions. The Court’s recent effort to bring clarity to the doctrine of jurisdiction directly affects the question of whether or not presentment is jurisdictional under Title VII. Although decisions such as *Arbaugh* have yet to be applied in this context by every circuit, courts are bound to do so going forward. The Sixth Circuit’s recent decision in *Adamov* reflects this.

Second, other methods used by the circuits are prone to challenge. For example, the Seventh Circuit’s decision in *Babrocky* presented the most exhaustive examination of the issue. However, that decision relied too heavily on the Supreme Court’s application of the *Arbaugh-Bowles* test.

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\(^{163}\) 133 S Ct 817 (2013).

\(^{164}\) Id at 821–22.

\(^{165}\) Id at 824–25.

\(^{166}\) Id at 825 (“Key to our decision, we have repeatedly held that filing deadlines ordinarily are not jurisdictional; indeed, we have described them as quintessential claim-processing rules.”) (internal quotation marks omitted).

\(^{167}\) *Auburn Regional*, 133 S Ct at 825.
Court’s decision in Zipes because, although timeliness is related to presentment, the Court based much of its decision on reasoning that does not apply to presentment.\(^{168}\) On the other hand, circuits that treated presentment as a jurisdictional requirement appear to have conflated jurisdictional requirements with non-jurisdictional, yet still mandatory, requirements. The Second and Tenth Circuits’ shared rationale for enforcing a strict presentment requirement—to encourage conciliation—is persuasive.\(^{169}\) However, the instant question is not whether presentment should be discarded, but whether it should be treated as jurisdictional. Those goals can still be achieved with a non-jurisdictional presentment requirement that is subject to waiver, estoppel, and equitable tolling.\(^{170}\)

The Ninth Circuit’s reasoning can be challenged because it likewise does not compel jurisdictional treatment of presentment. This circuit considers presentment to be jurisdictional but maintains a liberal standard under which it applies the requirement.\(^{171}\) Although the circuits disagree on whether presentment is jurisdictional, the Ninth Circuit’s liberal standard seems identical to treatment in the Seventh Circuit, which does not consider presentment to be jurisdictional.\(^{172}\)

\(^{168}\) See, for example, Pacheco v Mineta, 448 F3d 783, 788 n 7 (5th Cir 2006) (“The reasoning in Zipes . . . relies heavily on legislative history and Supreme Court precedents that characterize the filing deadlines as statutes of limitations.”). Presentment is less of a time requirement than it is a substantive requirement. While time requirements are the typical example of claim-processing rules, substantive requirements are not so clearly in that category. In this sense, presentment resembles Federal Rule of Civil Procedure 52(a)(6) which mandates the “clearly erroneous” standard for appellate review of district court findings of fact. Both rules serve to protect the lower tribunal’s ability to resolve matters. Moreover, the two share similar goals of providing notice to opposing parties and pushing adjudication to the administrative process. But presentment is also focused on encouraging settlement and conciliation through voluntary compliance, a goal that would be severely hindered if the plaintiff can hide charges during the administrative process in anticipation of a sneak-attack in court.

\(^{169}\) See Part II.C.2 (recognizing the point that presentment is critical for encouraging settlement through conciliation and voluntary compliance).

\(^{170}\) See Part I.B (reviewing the implications of treating a requirement as jurisdictional). In addition, a mandatory presentment rule would allow agencies to use expertise, exercise discretion, and develop a record. This allays the Tenth Circuit’s second concern. See Part II.C.2.

\(^{171}\) See Part II.C.2.

\(^{172}\) Compare B.K.B., 276 F3d at 1100 (permitting allegations of sexual harassment which reasonably relate to claims of sex, gender, national origin discrimination, and harassment in an EEOC complaint), with Jenkins v Blue Cross Mutual Hospital Insurance, Inc, 538 F2d 164, 167 (7th Cir 1976) (permitting allegations of sex discrimination which reasonably relate to claims of race discrimination in an EEOC complaint).
Applying a liberal standard to evaluate presentment does not correlate with the nature of a jurisdictional inquiry. Jurisdiction is meant to be determined facially, not through exhaustive consideration.\textsuperscript{173} Such treatment is more appropriate in the context of equitable consideration, which is prohibited for matters that lack jurisdiction. In sum, each of these approaches is imperfect. The most glaring problem, however, is that they do not take into account relevant Supreme Court jurisprudence from the last decade. The \textit{Arbaugh-Bowles} test fixes that.

IV. APPLYING THE \textbf{ARBAUGH-BOWLES} TEST

Applying the \textit{Arbaugh-Bowles} test resolves the circuit split by determining that presentment is not a jurisdictional requirement. Presentment, a non-statutory requirement, fails the \textit{Arbaugh} factor, which looks for a clear statement by Congress making a requirement jurisdictional. It also fails the \textit{Bowles} factor, which demands extraordinarily consistent treatment of similar provisions as jurisdictional. Indeed, a recent Sixth Circuit decision implicitly used this test to hold that presentment is not jurisdictional. Given the clarity of Supreme Court precedent, other circuits are bound to follow suit.

A. Applying the \textit{Arbaugh-Bowles} Test: the \textit{Arbaugh} Factor

The first factor of the \textit{Arbaugh-Bowles} test applies the readily administrable bright line, which looks for a clear statement by the legislature that a statute’s scope should be jurisdictional.\textsuperscript{174} The Court purposely created a strict standard, explaining that if Congress disagrees, it can amend the statute and make the language clearer.\textsuperscript{175} Presentment does not meet this stringent standard of clarity.

As a preliminary matter, the presentment requirement is not made explicit in the statute.\textsuperscript{176} The heightened \textit{Arbaugh} standard for jurisdictional requirements demands significantly more clarity than an inferred prerequisite.\textsuperscript{177} Finding otherwise

\textsuperscript{173} See Part II.C.1, citing Babrocky, 773 F2d at 863–64.
\textsuperscript{174} \textit{Arbaugh}, 546 US at 515–16. See also Part I.C.
\textsuperscript{175} \textit{Arbaugh}, 546 US at 515–16.
\textsuperscript{176} See Part II.C.
\textsuperscript{177} \textit{Arbaugh}, 546 US at 515–16 (explaining the presumption that a requirement is
would require stretching an interpretation in a manner that Arbaugh prohibits. Even absent that major hurdle, however, presentment fails the other considerations typical for the Arbaugh factor. Title VII’s jurisdictional provision was designed to be purposefully broad to grant access to the federal courts for claims of employment discrimination. According to the Supreme Court, Title VII’s grant of jurisdiction was designed such that plaintiffs could circumvent the amount-in-controversy requirement typical for federal question claims. This broad grant of jurisdiction conflicts with the jurisdictional treatment of non-statutory prerequisites to bringing suit.

Moreover, Title VII’s exhaustion requirements are structurally separated from the statute’s grant of jurisdiction. Arbaugh emphasized that the employee-numerosity threshold appears in a separate provision from the provision that provided federal district courts’ jurisdiction over Title VII claims. Presentment, though not explicit in the text, stems from language in 42 USC § 2000e-5(e)-(f)(1). These provisions do “not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.” Instead, jurisdiction is granted in § 2000e–5(f)(3). The Court already rejected this structural separation in Zipes, a case that the Arbaugh Court relied upon in forming its standard.

Congress explicitly made presentment jurisdictional in other labor statutes. Pursuant to § 10(e) of the National Labor Relations Act (NLRA), “[n]o objection that has not been urged before the Board . . . shall be considered by the court.” The Supreme Court held that this was a clear statement that presentment was jurisdictional. The Court also held that similar language in the Civil Service Reform Act (CSRA) made

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178 Id.
179 See id at 505–06.
180 Id (noting that when Title VII was passed, 28 USC § 1331 had such a requirement that was eliminated in 1980).
181 Arbaugh, 546 US at 505–06. See also Part I.C.
182 Arbaugh, 546 US at 515.
183 See Part I.C. The timeliness requirement at issue in Arbaugh relies upon the same statutory provisions as presentment.
184 29 USC § 160(e).
presentment jurisdictional. These comparisons illustrate the heightened level of clarity that Congress seeks. They also suggest that Congress knew how to make a requirement jurisdictional if it wanted to. Clearly, Congress did not do that in Title VII. Therefore, the presumption is that presentment is not jurisdictional.

In sum, the Arbaugh factor looks for a clear statement by Congress that a requirement is jurisdictional. Short of a clear statement, presentment is not even mentioned in Title VII. Treating such a rule as jurisdictional conflicts with Title VII’s broad grant of authority to district courts. Moreover, the relevant provisions, from which the inference of presentment is drawn, do not speak in jurisdictional terms and are separated from the provision that grants jurisdiction. This treatment falls well short of other presentment requirements in labor and workforce statutes, which explicitly state that presentment is jurisdictional. Therefore, presentment does not meet this stringent standard.

B. Applying the Arbaugh-Bowles Test: the Bowles Factor

The Bowles factor permits a court to consider context, including prior court interpretations of similar provisions, to determine whether a requirement is jurisdictional. Discussion of context involves decisions on jurisdictional questions related to other Title VII requirements and decisions on presentment in other statutes. In the end, a review of this Supreme Court jurisprudence falls well short of “a century’s worth of precedent” that would be required to declare presentment jurisdictional absent a clear statement from Congress.

The Supreme Court’s rulings on other Title VII prerequisites suggest that presentment is not jurisdictional. First, the Court held in Zipes that timeliness is a non-jurisdictional requirement. Although Zipes can be

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186 EEOC v Federal Labor Relations Authority, 475 US 19, 23 (1986) (evaluating 5 USC § 7123(c), which the Court found to be virtually identical to § 10(e) of the NLRA).
187 The Civil Rights Act of 1964 was passed after the NLRA (1935) and before the CSRA (1978). This indicates that the clear statement of jurisdictional treatment was an available tool for legislation related to labor and the workplace.
188 Arbaugh, 546 US at 515–16.
189 Auburn Medical, 133 S Ct at 825, citing Bowles, 551 US at 209 n 2.
distinguished, the bottom line is that presentment is also an element of exhaustion, and therefore, the holding is appropriately part of the Bowles inquiry. More recently, the Court held in Arbaugh that employee-numerosity is not a jurisdictional requirement. Although this was not an element of exhaustion, it shows that the Court has typically not held Title VII requirements to be jurisdictional. Together, these holdings show an absence of the unequivocal precedent required for the Court to rank a requirement jurisdictional.

The Supreme Court has also treated other judicially created presentment requirements as non-jurisdictional. In Sims v Apfel, the Court considered whether a Social Security claimant’s failure to exhaust an issue in the administrative appeals process waives judicial review. Rejecting the entire issue-exhaustion requirement, the Court noted in dicta that “even were a court-imposed issue-exhaustion requirement proper, the Fifth Circuit erred in treating it as jurisdictional.” The Court explained that exhaustion requirements for administrative proceedings are often justified by allusions to appellate procedure. This is less persuasive in administrative proceedings that are not adversarial, such as Social Security proceedings. The distinction does not apply to EEOC proceedings; however, it is sufficient that the Court dismissed the jurisdictional treatment of issue exhaustion in dicta to consider Sims as context for the presentment requirement.

The Bowles factor requires consistent Supreme Court precedent demonstrating that provisions similar to Title VII’s presentment requirement have been interpreted as jurisdictional. Although comparisons to Zipes, Arbaugh, and Sims are imperfect, the decisions sufficiently demonstrate an

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190 See note 168 (distinguishing presentment from the timely filing requirement in Zipes).


192 Id at 106.

193 Id at 106 n 1.

194 Id at 109, citing Hormel v Helvering, 312 US 552 (1941).

195 Sims, 530 US at 110.

196 While the claimant’s relationship with the EEOC may not be adversarial, the employer’s relationship is. Thus, an EEOC proceeding is adversarial. See National Casualty Co v Forge Industrial Staffing Inc, 567 F3d 871, 877 n 1 (7th Cir 2009) (noting the adversarial nature of EEOC proceedings). But see Macfarlane, 21 Geo Mason Civ Rts L J at 246 (“Like the proceedings before the Social Security Administration, a claimant’s relationship with the EEOC is not adversarial.”) (cited in note 24).
absence of consistent precedent. Therefore, it is clear that presentment fails to meet the extraordinarily high standard called for by Bowles. Title VII’s presentment requirement thus fails both factors of the Arbaugh-Bowles test. This test embodies the Supreme Court’s recent method for determining whether or not a requirement is jurisdictional. Consequently, presentment is not a jurisdictional requirement.

C. The Arbaugh-Bowles Test in Practice: Adamov

The Sixth Circuit applied the Arbaugh-Bowles test, without explicitly saying so, in Adamov to determine that presentment is a non-jurisdictional requirement to bring a suit under Title VII.197 This represented a shift in circuit precedent; however, the Sixth Circuit acknowledged that Arbaugh warranted taking a different approach.198 The court applied the Arbaugh factor, finding that the various parts of 42 USC § 2000e-5 that discuss the EEOC process do not speak in jurisdictional terms.199 The court then noted the “deliberately broad grant of access to federal courts,” which appears in a different provision than those that discuss the EEOC process.200 The court also applied the Bowles factor, noting decisions in the Sixth and other circuits since Arbaugh that have declined to treat exhaustion as jurisdictional under Title VII.201 The court concluded that Title VII does not speak in jurisdictional terms and that the context did not demand a different result. It therefore held that presentment is a non-jurisdictional requirement. This decision, though it did not explicitly say so, represents an application of the Arbaugh-Bowles test.

V. CONCLUSION

The circuit split over whether or not presentment is jurisdictional jeopardizes Title VII’s goal of empowering

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197 For a brief summary of the background of the case, see Part II.C.1.
199 Adamov, 726 F3d at 856.
200 Id.
201 Id, citing Hill, 383 Fed Appx at 503; Vera v McHugh, 622 F3d 17, 29–30 (1st Cir 2010) (explaining that timeliness is not jurisdictional); Douglas v Donovan, 559 F3d 549, 556 n 4 (DC Cir 2009) (noting in dicta that exhaustion is not jurisdictional).
layperson litigants to pursue relief. The Supreme Court’s recent jurisprudence clarifying the doctrine of jurisdiction, however, allays that concern. The Court’s recent decisions formed a test that can, and should, be applied directly to this question. Doing so leads to the conclusion that presentment is not a jurisdictional requirement, but instead, a mandatory prerequisite for bringing a suit that is subject to waiver, estoppel, and equitable tolling. The other circuits should follow the Sixth Circuit’s lead and apply this test to presentment issues going forward.

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202 Loe v Heckler, 768 F2d 409, 417 (DDC 1985).