Untangling the Web Spun by Title VII's Referral & Deferral Scheme

Lisa D Taylor
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By Lisa M. Durham Taylor

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beneficial relationship between state and federal governments. It permits state and local authorities to retain exclusive jurisdiction over complaints of employment discrimination for sixty (60) days to conduct an investigation and, if necessary, schedule a hearing to adjudicate the claims. At that point, the charging party has the freedom to choose whether to continue pursuit of his claim through the state or local channels, or to seek relief instead in the federal system by filing a charge with the EEOC.

Acknowledging this success, though, omits an important part of the story, for the system is not also without its shortcomings. Perhaps chief among them is the potential to create complicated preclusion issues. It should come as no surprise that this is the case. Any enforcement scheme that permits pursuit of a single claim in as many as four forums – administrative and judicial, on both the state and federal level – will inevitably give rise to situations in which a forum confronts a claim previously adjudicated, in whole or in part, by another. Indeed, nothing about Title VII itself, or the regulations promulgated under it, expressly prohibits prosecution of a single claim in more than one, or even all, of the multiple forums to whom the statute grants jurisdictional authority. Yet the statute itself leaves the parameters of the dual system it creates almost entirely undefined.

Amidst all this uncertainty, the Supreme Court has clarified a few limitations in the years since Title VII’s enactment. First, the Court has drawn a line between the state administrative proceedings and any subsequent judicial review of them by that state’s courts, so that that state agency determinations on claims covered by Title VII that remain unreviewed have no preclusive effect in a subsequent federal-court lawsuit asserting the same claims. Thus, a claimant whose grievance receives full consideration by the relevant state or local agency but does not reach the state courts may, without facing a preclusive bar, assert that same claim in a charge of discrimination to the EEOC.

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6 See 110 Cong. Rec. 12725 (1964) (“We recognized that many States already have functioning antidiscrimination programs to insure equal access to places of public accommodation and equal employment opportunity. We sought merely to guarantee that these States – and other States which may establish such programs – will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government” (statement of Sen. Humphrey)), quoted in Kremer v. Chem. Consr. Corp., 456 U.S. 461, 473 (1982); N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63-64 (1980) (“Congress envisioned that Title VII’s procedures and remedies would ‘mesh[ ] nicely, logically, and coherently with the State and city legislation,’ and that remedying employment discrimination would be an area in which ‘[t]he Federal Government and the State governments could cooperate effectively’ ”) (quoting 110 Cong. Rec. 7205 (1964) (statement of Sen. Clark)); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979) (stating that deferral provisions of Title VII are “intended to give state agencies a limited opportunity to resolve problems of employment discrimination”); Love v. Pullman Co., 404 U.S. 522, 526 (1972) (identifying purpose of deferral provisions as “to give state agencies a prior opportunity to consider discrimination complaints”); 29 C.F.R. § 1601.13(a)(4)(i) (“It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies”).

7 Whether this 60-day period is sufficient to permit the agency to conduct and complete an investigation and hearing (and it probably is not) is beyond the scope of this article.

8 42 U.S.C. § 2000e-5(c); 29 C.F.R. § 1601.3(a)(3)(ii) (“Section 706(c) of Title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days . . . . After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination”).


10 Univ. of Tenn. v. Elliott, 478 U.S. 788, 796 (1986).
and in a subsequent federal court lawsuit.\textsuperscript{11} This scenario is most likely to arise when the claimant does not prevail in the state/local administrative forum. Having failed to convince the local administrative authorities of her claim’s merit, she may turn to the federal system in hopes of a better result. Of course, she could also seek review of the state agency’s determination directly, by filing an appeal with the appropriate state court.\textsuperscript{12} A claimant receiving good legal advice should probably hesitate to follow this course, though, in light of the risk it brings of a binding adverse determination.\textsuperscript{13}

That risk of a binding adverse determination upon appeal in the state court system brings us to the second limitation on Title VII’s dual enforcement scheme made clear in recent years. That is, the Court has also declared that federal courts must afford preclusive effect to state court judgments entered upon review of agency determinations, at least when the agency found that no discrimination occurred, the state court affirmed, and that state’s law would bar relitigation.\textsuperscript{14} That precise question came before the United States Supreme Court in 1982 in \textit{Kremer v. Chemical Construction Co.}. In \textit{Kremer}, the Court held that a judgment of the New York Appellate Division, affirming the findings of the New York state agency charged with enforcement of that state’s anti-discrimination law that a claim lacked merit, was entitled to preclusive effect in a subsequent federal lawsuit asserting the same claim under the governing state law.\textsuperscript{15} The Court reasoned that state preclusion law should apply in those circumstances because Title VII did not supersede the centuries-old full faith and credit statute, 28 U.S.C. § 1738, which requires that federal courts afford state-court judgments the same treatment as courts of the rendering state. Albeit itself over a quarter of a century old, this rule apparently remains good law, so that courts faced with Title VII claims previously found meritless by state agencies administering comparable laws must afford any state-court judgment affirming such finding the same weight that the courts of that state would give it.\textsuperscript{16}

\begin{footnotes}
\item[11] Id. at 175-96. While it is well established that a Title VII claimant must first exhaust his administrative remedies before seeking relief in federal court, the courts disagree about the admissibility and weight to be given those EEOC determination in subsequent judicial proceedings. 42 U.S.C. § 2000e-5 (requiring exhaustion of remedies with EEOC before filing federal court lawsuit under Title VII); 8 Emp. Coord. Employment Practices § 106:5 (discussing varying approaches taken by federal circuit courts on questions of admissibility and weight of EEOC findings). Whether to admit EEOC findings in subsequent federal court trials, and if so, the degree of weight they are due, are questions that lie beyond the scope of this Article.
\item[12] See, e.g., Conn. Gen. Stat. 4-183 (“A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section.”); N.Y. Exec. Law § 298 (providing for judicial review of Human Rights Commission determinations in state supreme courts); N.M. Merit Sys. Ord. § 2-9-25(D)(5) (permitting review of Personnel Board rulings in New Mexico state courts).
\item[13] See 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4471.3 (2d ed.) (“The distinction between administrative orders that have been reviewed and those that have not been reviewed creates an incentive to avoid state-court review of adverse findings.”).
\item[14] \textit{Kremer}, 456 U.S. at 485.
\item[15] Id.
\item[16] See, e.g., \textit{Kremer}, 456 U.S. at 469-70; McInnes v. State of Cal., 943 F.2d 1088, 1092-93 (9th Cir. 1991); Elliott v. Univ. of Tenn., 766 F.2d 982, 987-88 (6th Cir. 1985).
\end{footnotes}
Thus, in the nearly fifty years since Title VII’s enactment, the Court has provided some instruction on the proper treatment of Title VII claims transactionally-related to claims previously adjudicated in the parallel state systems that Congress so painstakingly left in place. Unreviewed state agency determinations have no preclusive effect in subsequent federal court lawsuits and may be relitigated in their entirety.\(^17\) By contrast, courts must give full faith and credit to any state-court judgment affirming a state agency finding that a claim lacked merit.\(^18\) Yet many questions remain unanswered.

One cannot begin to offer answers to these open questions without first identifying them with some precision. Broadly construed, *Kremer* could stand for the proposition that federal courts must give full faith and credit to any final state court judgment entered on review of a state administrative determination in the employment discrimination context. Indeed, much of the Court’s opinion suggests as much.\(^19\) Closer scrutiny of the Court’s opinion, however, indicates that its holding was actually much more limited. While its analysis could potentially sweep broadly, the Court took care to frame the question presented for review and announce its holding within bounds that are somewhat narrower, by reiterating the precise circumstances giving rise to that case: the respondent prevailed at the administrative level, and the claimant invoked the state judicial forum, where the agency findings were affirmed.\(^20\) The question therefore becomes just how far the *Kremer* rule extends. That is, must a federal court afford a state-court judgment the same full faith and credit as demanded in *Kremer* when the state court reverses the agency determination, rather than affirms it? What about when the claimant prevails initially (in the administrative proceedings), rather than the respondent, as was the case in *Kremer*? Moreover, to extend the problem further, what if the claimant seeks relief in federal court that was not available at the state level? It is the last of these questions that has created the most dissension among the circuit courts. That is, the Second Circuit\(^21\) recently came down firmly on the side of the Seventh\(^22\) and Eighth\(^23\) Circuit courts by permitting a claimant to seek relief that was unavailable in state proceedings even after entry of final judgment by a state court on the same claims, but the Fourth Circuit\(^24\) has disagreed, declaring that a claimant cannot duplicate her claims in this manner.\(^25\)

\(^{17}\) *Elliott*, 478 U.S. at 796.

\(^{18}\) *Kremer*, 456 U.S. at 485.

\(^{19}\) *See infra* notes 17 to 20 and accompanying text.

\(^{20}\) *Kremer*, 456 U.S. at 463, 485. As discussed below, the lower courts have generally adopted the broader view of *Kremer*’s reach, reflective of their tendency to feel at least somewhat bound by Supreme Court dicta. *See infra* Notes 21 to 24 and accompanying text (discussing application of *Kremer* in the lower courts); *see generally* Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75 (2008) (proposing framework for identifying and handling Supreme Court dicta).

\(^{21}\) Nestor v. Pratt & Whitney, 466 F.3d 65, 69 (2nd Cir. 2006).

\(^{22}\) Patzer v. Bd. of Regents of Univ. of Wis. Sys., 763 F.2d 851, 856-57 (7th Cir. 1985).

\(^{23}\) Jones v. Am. State Bank, 857 F.2d 494, 498 (8th Cir. 1988).

\(^{24}\) Chris v. Tenet, 221 F.3d 648, 655 (4th Cir. 2000).

\(^{25}\) The “circuit split” received some attention at the time of the *Nestor* decision, but commentators have remained silent on it since then. *See Current Circuit Splits*, 3 SETON HALL CIRCUIT REVIEW 507, 517 (2007) (identifying *Nestor* as part of circuit split on issue of “Title VII claims filed in federal court seeking
As if matters didn’t seem sufficiently complicated at this juncture, these circuit court cases also raise another distinct but interrelated issue – whether the federal court has subject-matter jurisdiction over a claim that seeks only certain forms of relief available under Title VII but does not request adjudication of any substantive rights granted by that statute. That is, notwithstanding whether the claims may be barred, do the federal courts have jurisdiction to hear independent claims for certain remedies after full adjudication of the underlying substantive claims in state administrative and judicial proceedings? The Supreme Court has addressed this issue outside of the Title VII context. In the 1986 case of North Carolina Department of Transportation v. Crest Street Community Council, Inc., the Court held that the federal district courts lack subject-matter jurisdiction over independent suits seeking only attorney fees after final administrative adjudication of the underlying Title VI claims in state proceedings. The Court has never expressly adopted this view under Title VII, but some defendants have drawn upon it to suggest that after final adjudication in administrative proceedings, plaintiffs cannot proceed separately in federal court to obtain attorney fees.

supplemental remedies unavailable in state court"); Employment Discrimination – Procedure: Title VII Plaintiff Who Wins at State Level Obtains Supplemental Relief in Federal Court, 75 U.S.L.W. 1200 (Oct. 10, 2006) (“An employee who prevailed on her discrimination claim under Title VII of the 1964 Civil Rights Act before a state administrative agency and state courts can later sue in federal court for relief that was unavailable in the state proceedings, the U.S. Court of Appeals for the Second Circuit held Oct. 4 on an issue that has split the circuits”); James O Castagnera, Patrick J. Cihon, Andrew M. Morriss, Second Circuit Allows Title VII Plaintiff “Second Bite at the Apple” for Federal Remedies Not Available in State Administrative Proceeding, 22 No. 12 TERMINATION OF EMPLOYMENT BULLETIN 3 (Dec. 2006) (“The Second Circuit joined the Seventh and Eighth Circuits in allowing employees to bring a state administrative action under state anti-discrimination laws and, after prevailing, bring a subsequent federal action for additional remedies such as attorney’s fees and punitive damages available in federal court”). While this particular issue has not received the attention of late that it deserves, the finality of judgments in employment-discrimination suits has warranted substantial attention over the years since Title VII’s enactment. See, e.g., David C. Belt, Election of Remedies in Employment Discrimination Law: Doorway into the Legal Hall of Mirrors, 46 Case W. Res. L. Rev. 145, 149 (1995) (criticizing Title VII’s dual enforcement scheme on grounds it necessitates election of remedies in such a way that “runs contrary both to the theory of employment discrimination law generally and to its own desired effects of streamlining procedures while preserving the autonomy of the complainant”); Michael J. Maransky, Issue Preclusion – Assessing the Issue Preclusive Effect of State Agency Decisions in the Third Circuit, 39 VILLANOVA L. REV. 1079, 1079-80 (1994) (“When federal litigation commences after state agency proceedings have been completed, debate exists about whether the factual findings of the state agency, or agencies, have issue preclusive effect in the subsequent lawsuit based on the federal statute.”); Michael J. Davidson, Crest: Judicial Preclusion of an Independent Suit Solely for Attorneys’ Fees Under Title VII?, 18 DEL. J. CORP. L. 425 (1993) (arguing that Title VII does not permit fees-only federal suits under the authority of Crest Street); Andrea Catania & Charles A. Sullivan, Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of Martin v. Wilks, 47 BROOKLYN L. REV. 996 (1992) (evaluating finality of judgments in employment discrimination suits after Martin v. Wilks and the Civil Rights Act of 1991); Robert H. Thomas, Comment, Gaining Access to a Federal Forum: The Preclusive Effect of Unreviewed Administrative Determinations in Section 1983 Actions, 9 U. HAW. L. REV. 643 (1987) (discussion operation of preclusion doctrine in civil rights litigation); Charles C. Jackson, John H. Matheson & Thomas J. Piskorski, The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits, 79 MICH. L. REV. 1485 (1980) (proposing preclusion framework applicable in Title VII cases).

notwithstanding that such fees would otherwise be available on those claims under the statute. Thus, to spin the web analogy even further (pun intended), the spider has added a layer of subject-matter jurisdiction debate to the pre-existent foundation of preclusion controversy.

The knotty web of preclusion and jurisdiction issues spun by Title VII’s dual enforcement scheme and exacerbated by seemingly irreconcilable case law cries out for disentanglement but has received very little attention from scholars in the modern era. This Article will attempt to fill that void by untangling the web – offering answers to the open questions and proposing a resolution to the particular problem of splitting relief that has divided the circuit courts. It will justify those answers in light of the statutory language and its legislative history, the relevant Supreme Court precedents, and prevailing policy concerns. The Article proceeds in three parts, with each Part disentangling another of the web’s threads. Part II examines the administrative layer of the web, flushing out the applicable rules in federal cases that follow state administrative determinations. Part III will unravel the state-judgment thread. It begins with discussion of the Supreme Court’s decision in Kremer, then examines how the lower courts have applied that decision, revealing the questions that it leaves open and proposing answers to them. Part IV tackles the most complex part of the web—the additional-remedy cases. It first unwinds the thread comprised of cases seeking only attorney fees incurred in prior state proceedings, proposing a controlling statutory framework. It then delves into the remainder of the additional-remedy cases and the preclusion rules that govern them. Part and parcel to this unraveling is a parsing of the cases comprising the above-referenced circuit split and a revelation that maybe the disagreement is not what it seems. As summarized in Part V, Parts II, III and IV together supply a framework for adjudicating Title VII claims brought to federal court after full adjudication in the pertinent state system, suggesting that some such claims ought to proceed, but that others cannot, either because the court lacks authority to decide them or because they should be barred by the operation of common-law preclusion.

II. SEPARATING THE FIRST THREAD: UNREVIEWED AGENCY DETERMINATIONS.

The first category of cases – those previously adjudicated in state administrative proceedings but otherwise unreviewed – breaks free from the otherwise complex preclusion web quite readily. Indeed, the Supreme Court spoke directly to the cases in this category when it decided University of Tennessee v. Elliott. The plaintiff in Elliott requested a hearing before an Administrative Law Judge after being informed by his employer, the University of Tennessee, that his employment would be terminated due to poor performance and misconduct. After hearing extensive evidence, the ALJ ultimately rejected the plaintiff’s contention that his discharge was racially motivated, and the Vice President of the University’s division at which he previously worked

27 See, e.g., Chris, 221 F.3d at 654-55.
28 478 U.S. at 788-89.
29 Elliott, 478 U.S. at 790.
affirmed those findings. Plaintiff then pursued his related Title VII claims (among others) in the federal district court, but the University sought summary judgment, seeking to bar plaintiff from litigating his Title VII claims on grounds the ALJ’s determination was entitled to preclusive effect. The district court granted the motion, but the appellate court reversed, holding that res judicata does not bar Title VII claims that were the subject of a state agency determination that remains unreviewed. The United States Supreme Court agreed with the appellate court, and held that unreviewed state agency determinations have no preclusive effect in subsequent lawsuits asserting Title VII claims arising from the same incidents. The Court reasoned that a common-law rule of preclusion would be inconsistent with Congress’s apparent intention to ensure plaintiffs a trial de novo even after adjudication at the state administrative level, as reflected in the statute’s provision that the EEOC must afford state agency determinations “substantial weight.” According to the Court, “it would make little sense to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court” because such an interpretation would render that provision superfluous. Further, the Court rejected the University’s contention that the Court’s decision in Kremer v. Chemical Construction Corp. dictated a different result, explaining that the Full Faith & Credit Statute underlying the Kremer holding did not apply in this context, where an administrative agency made the pertinent findings, not a court.

The Court’s holding in Elliott makes clear that an unreviewed agency determination adverse to the claimant has no preclusive effect. Thus, a claimant who has sought relief at the state administrative level may, after exhausting his remedies before the EEOC, proceed directly to federal court, without concern that the agency’s adverse findings will affect her ability to recover. As referenced above, this may be the

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30 Id. at 791.
31 Id. at 792.
32 Id. at 793-94.
33 Elliott, 478 U.S. at 796.
34 Id. at 795.
35 Id.
36 Id. at 795-96.
37 See also Wright, Miller, & Cooper, supra at 12 for a discussion on parameters of and rationale for Elliott rule that unreviewed administrative findings are not entitled to preclusive effect. Examples of courts adhering to this rule are plentiful. See, e.g., Caver v. City of Trenton, 420 F.3d 243, 258-59 (3d Cir. 2005) (affirming district court’s denial of issue-preclusive effect to findings of state administrative law judge respecting plaintiff’s fitness for duty after dismissal of related Title VII claims on defendant’s motion for summary judgment); Bishop v. Birmingham Police Dep’t, 361 F.3d 607, 610 (11th Cir. 2004) (stating that district court erred in applying issue preclusion to unreviewed findings of state administrative agency); Kosereis v. Rhode Island, 331 F.3d 207, 212 (1st Cir. 2004) (denying preclusive effect to unreviewed state agency determination that plaintiff had been laid off in light of Elliott ruling, notwithstanding that state courts would afford that finding preclusive effect); Raniola v. Bratton, 243 F.3d 610, 624 (2d Cir. 2001) (refusing preclusive effect to unreviewed findings in police administrative proceedings); McInnes v. State of Cal., 943 F.2d 1088, 1094 (9th Cir. 1991).
38 One might attempt to avoid Elliott’s impact by suggesting the agency was not administrative at all but rather acted judicially, such that its decision should be treated as one rendered by a court. The defendant-employer made this argument, unsuccessfully, in McInnes v. State of Cal., 943 F.2d 1088, 1094 (9th Cir. 1991). The court rejected that argument upon concluding that the California agency was indeed administrative, so that the Elliott rule applied. Id.
advisable course of action especially in those cases where the agency’s findings are unfavorable, given the risk of a binding final judgment under *Kremer* if the employer again prevails on appeal.\(^{39}\) Indeed, it is perhaps precisely because of the risk *Kremer* poses that many cases will fall into this category, as plaintiffs facing adverse agency determinations will therefore often choose to pursue their remedies in the federal forum right away.

*Elliott* covers the landscape here quite thoroughly. Because, however, that case involved a claimant who lost at the administrative level, one could potentially argue that the *Elliott* rule against preclusion does not apply in those cases where the claimant initially prevailed, then sought to rely upon the favorable agency findings in a subsequent federal court lawsuit. This argument should fail, though, given the strength of the Court’s conclusion, as well as prevailing policy concerns.

The Court in *Elliott* based its determination primarily upon relevant statutory language, the import of which does not depend upon which party emerged victorious.\(^{40}\) First, the Court rejected an argument that the Full Faith and Credit statute, 28 U.S.C. § 1738, requires courts to respect administrative determinations.\(^{41}\) The Court treated Congress’s exclusion of administrative agencies from the scope of § 1738 as intentional since administrative agencies existed at the time of that statute’s enactment.\(^{42}\) Turning to the language of Title VII, the Court focused on § 2000e-5(b)’s mandate that the EEOC give “substantial weight” to local agency findings.\(^{43}\) The Court reasoned that it would be non-sensical to accord preclusive effect to administrative determinations in federal court, when they receive only “substantial weight” before the EEOC.\(^{44}\) Thus, neither the Full Faith and Credit statute nor Title VII itself supported treating unreviewed administrative findings as binding.

Prevailing policy concerns likewise suggest that *Elliott*’s rule against defensive use of agency determinations apply with equal force in the offensive context. In short, it would be unfair for a plaintiff who remains safe from suffering the effects of an adverse agency determination to reap the benefits of a favorable one. This is especially so in the absence of any statutory support for doing so.\(^{45}\) Thus, the rule of *Elliott*, confined to its

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\(^{39}\) *See also* Wright, Miller, & Cooper, *supra* at 12 (“The distinction between orders that have been reviewed and those that have not been reviewed creates an incentive to avoid state-court review of adverse findings”).

\(^{40}\) *Elliott*, 478 U.S. at 795-96.

\(^{41}\) *Id.* at 795.

\(^{42}\) *Id.*

\(^{43}\) *Id.*

\(^{44}\) *Id.*

\(^{45}\) *See, e.g.*, Roth v. Koppers Indus. Inc., 993 F.2d 1058, 1062 (3d Cir. 1993) (noting that “*Elliott* applies with equal force when a Title VII plaintiff attempts to assert collateral estoppel on the basis of a favorable factfinding in an unreviewed state administrative proceeding” and noting the Court’s unequivocal, generally applicable language as supported by plain statutory meaning, legislative history, and applicable precedents); McInnes, 943 F.2d at 1096 (holding that plaintiff was not barred from proceeding on her Title VII suit in federal district court even though she prevailed and obtained relief from a state administrative agency based on the same claims); cf. Tice v. Bristol-Myers Squibb Co., 515 F. Supp. 2d 580, 599-600 (W.D. Pa. 2007) (determining that *Elliott* rule against preclusion does not apply to final
context, is plain: unreviewed agency findings have no preclusive effect in subsequent federal-court Title VII suits.\textsuperscript{46}

\textbf{III. DETACHING THE SECOND THREAD: SEEKING THE SAME REMEDIES AS IN PREVIOUS JUDICIALLY-REVIEWED DETERMINATIONS.}

Untangling the web becomes somewhat more difficult upon turning to the second thread, which includes all those cases in which the plaintiff attempts to pursue the same claims and remedies in federal court that she pursued at the state administrative level, after a judicial body has entered a final judgment reviewing the agency’s findings.\textsuperscript{47} The Supreme Court has entered the fray here, as well, but without covering the landscape as fully. In \textit{Kremer} v. Chemical Construction Corp., the Court held that the Full Faith and Credit Statute, 28 U.S.C. § 1738, requires federal courts in Title VII cases to give preclusive effect to state court judgments on review of administrative determinations, so long as the courts of the state that rendered the judgment would do so.\textsuperscript{48} The Court based its reasoning primarily upon the language of the two governing statutes – § 1738 and Title VII – concluding that the latter had not repealed the former, so that its full-faith-and-credit command stood fast.\textsuperscript{49} The Court searched the text of Title VII for evidence of direct conflict with § 1738 or substitutionary coverage of § 1738’s sphere, but found neither.\textsuperscript{50} The Court determined that, instead, Title VII reflected a clear intention to leave § 1738 untouched:

orders of the Secretary of Labor under the Sarbanes-Oxley Act (“SOX”) because SOX expressly prohibits such collateral attacks).\textsuperscript{46} This rule marks a departure from the prevailing law applicable to civil rights claims under the Reconstruction Acts, as to which the Court has determined that agency findings do have preclusive effect. See \textit{Elliott}, 478 U.S. at 796-99. Whether this distinction is satisfying or not is a matter of some contention but lies beyond the scope of this Article. See Wright, Miller, & Cooper, supra at 12.\textsuperscript{47} This discussion contemplates conclusion of the state proceedings via a state court’s entry of final judgment on review of administrative determinations. The stage at which the plaintiff invokes the federal forum makes a difference. Most state and local anti-discrimination laws provide that the administrative agency must relinquish jurisdiction on claimant’s request after lapse of a specified time period. See, e.g., Conn. Gen. Stat. §§46a-100, 101 (210 days); see also 42 U.S.C. § 2000e-5(f)(1) (providing that a Title VII plaintiff can obtain right-to-sue letter from EEOC and file federal lawsuit 240 days after state agency action filed, even if state proceedings not complete); \textit{id.} § 2000e-5(c), (d) (permitting the EEOC to act on a charge after deferring to a state agency for sixty days). Under those circumstances, there would be no state determination and thus no question that preclusion does not apply. When the plaintiff files her federal court suit after resolution at the state agency but while state judicial review remains pending (i.e., prior to entry of a final judgment), the federal court will typically enter a stay pending resolution of the state proceedings, then accord them preclusive effect under the rule of \textit{Kremer}. See \textit{Nestor}, 466 F.2d at 68. (“If [plaintiff] had filed her action in federal court (or state court) while [defendant’s] appeals from the [state administrative] determination was [sic] still pending, the issue presented on this appeal would likely not arise: A federal court will typically stay the action pending the state appeals and (when the appeals are decided) give \textit{res judicata} effect to the result”) (citing \textit{Kremer}, 456 U.S. at 487 n.3).\textsuperscript{48} \textit{Kremer}, 456 U.S. at 466-67.\textsuperscript{49} \textit{Kremer}, 456 U.S. at 468-70. The Court stated: “Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatibility between Title VII and § 1738 is enough to answer our inquiry.” \textit{Id.} at 470.\textsuperscript{50} \textit{Id.} at 468-69.
No provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action, nor does the Act specify the weight a federal court should afford a final judgment by a state court if such a remedy is sought. While we have interpreted the “civil action” authorized to follow consideration by federal and state administrative agencies to be a “trial de novo,” . . . neither the statute nor our decisions indicate that the final judgment of a state court is subject to redetermination at such trial.\footnote{Kremer, 456 U.S. at 469 (citations omitted) (emphasis in original).
}

Applying its determination to the facts, the Court directed the district court to accord preclusive effect to the judgment of the New York state court affirming the agency’s conclusion that plaintiff Kremer’s claims of national origin and religion discrimination lacked merit.\footnote{Id. at 485.} Kremer’s claims were therefore barred.

The \textit{Kremer} decision made clear that a final state-court judgment affirming an agency’s dismissal of a Title VII plaintiff’s discrimination claims has the same preclusive effect in a subsequent federal-court suit that the courts of the rendering state would give it. Yet the parameters and scope of the holding remained unclear. The Court itself gave somewhat mixed messages about the reach of its decision. First, the Court began by framing the question presented in \textit{Kremer} quite broadly, as “whether Congress intended Title VII to supersede the principles of comity and repose embodied in § 1738.”\footnote{Id. at 485.} In the very next sentence, though, the Court articulated the issue more narrowly: “Specifically, we decide whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency’s rejection of an employment discrimination claim as meritless when the state court’s decision would be res judicata in the State’s own courts.”\footnote{Id. at 463.} The Court’s final holding includes much of the same qualifying language:

\begin{quote}
Because there is no “affirmative showing” of a “clear and manifest” legislative purpose in Title VII to deny res judicata or collateral estoppel effect to a state court judgment affirming that a claim of employment discrimination is unproved, and because the procedures provided in New York for the determination of such claims offer a full and fair opportunity to litigate the merits, the judgment of the Court of Appeals is affirmed.\footnote{Id. at 485.}
\end{quote}

By stating the issue and holding with such specificity, the Court left maneuvering room for future litigants striving to avoid \textit{Kremer}’s import.

\section*{A. Equal Application, Win or Lose.}

\footnotesize
\footnote{Kremer, 456 U.S. at 469 (citations omitted) (emphasis in original).}
\footnote{Id. at 485.}
\footnote{Id. at 485.}
\footnote{Id. at 485.}
\footnote{Id. at 485.}

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The primary (and most common) argument offered to confine Kremer’s reach proposes limiting its application to those cases in which the plaintiff, as opposed to the defendant, filed the appeal invoking the state judicial forum. That was the case in Kremer itself. Upon receipt of an adverse determination by the New York Human Rights Division and its Appeal Board on his claims of national origin and religion discrimination, Ruben Kremer filed a petition for review with the Appellate Division of the New York Supreme Court. When that court unanimously affirmed the administrative findings, Kremer obtained a right-to-sue notice from the EEOC (where his charge had been pending during the state proceedings) and filed a Title VII action in federal district court. The defendant responded with a motion to dismiss, which the court initially denied but subsequently granted based on a change in Second Circuit authority. The key fact here for those wishing to limit Kremer’s reach is that the plaintiff invoked the state judicial forum, whose judgment ultimately barred him from proceeding in federal court.

The Kremer preclusion rule should apply regardless of which party invoked the state judicial forum – whether it was plaintiff or defendant who filed the administrative appeal that brought the case into the state courts. The language of the Court’s opinion leaves little room for debate here. As discussed above, central to the Court’s rationale was its conclusion that Title VII does not repeal the Full Faith and Credit Statute Upon finding no express repeal in Title VII, the Court turned to the plaintiff’s suggestion that because Title VII directs the EEOC to accord state determinations only “substantial weight,” those determinations do not warrant preclusive effect in a federal court. The Court rejected this argument as non-sensical, reasoning that if state determinations are never preclusive, then their finality depends entirely upon the outcome – judgments favorable to plaintiffs would always be final, while defense judgments would yield to subsequent lawsuits filed by unhappy plaintiffs. Thus, even though the Court did not expressly limit its holding to cases in which the plaintiff invoked the state judicial forum, its rationale strongly suggests that limitation is implausible. The Court made clear its disdain for a preclusion rule dependent upon which party prevailed the first time around.

Plaintiffs hoping to avoid the effect of an unfavorable state-court determination may point to the Kremer Court’s statement that “[n]o provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action.” The

56 Id. at 464.
57 Id. at 465.
58 The motion likely should have been filed as one for summary judgment under Federal Rule of Civil Procedure 56 because of the necessity of reviewing transcripts and pleadings from the state-court proceedings in order to decide the motion. See Fed. R. Civ. P. 12(d). It does not appear, however, that this distinction troubled the district court. Kremer v. Chem. Constr. Corp., 477 F. Supp. 587, 590 (S.D.N.Y. 1979).
59 Kremer, 477 F. Supp. at 591.
60 Kremer, 456 U.S. at 469-70; see also supra notes ___ to ___ and accompanying text discussing Court’s rationale in Kremer.
61 Kremer, 456 U.S. at 469-70.
62 Id. at 470.
63 Kremer, 456 U.S. at 469; see, e.g., Trujillo v. County of Santa Clara, 775 F.2d 1359, 1365 (9th Cir. 1985) (noting plaintiff’s reliance on that statement in an attempt to avoid Kremer’s import).
argument here must be that because Title VII does not mandate seeking relief through the state system, a plaintiff should not be bound when her adversary does so. The strongest appeal for this argument lies in its policy implications. The argument is that as a policy matter, a plaintiff should not be bound by the judgment of a forum she did not choose. This argument should fail. As an initial matter, the Court’s statement in that regard says nothing about the preclusive effect of a judgment varying with the outcome. All that statement suggests is that a claimant may choose whether to pursue relief from an unfavorable administrative decision in that state’s courts or to proceed to the federal system instead. This statement is insufficient to overcome the broad language the Court employed in holding that Title VII does not repeal § 1738. Moreover, the Court subsequently interpreted its own decision in *Kremer* to sweep broadly.

The pertinent statutory language and purposes likewise support equal application of the *Kremer* preclusion rule, regardless of who prevailed below. The Full Faith and Credit Statute is founded upon core federalism principles that do not vary with the outcome of the underlying litigation. The language of the statute itself is unequivocal: “[The] Acts, records and judicial proceedings… [of the States] shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.” And none of the Court’s principal interpretations of the Act even hint that its application varies with changes in the identity of the prevailing party. Nor does Title VII reflect any intention that plaintiffs be free to relitigate unfavorable state-court determinations while relying upon favorable ones. Instead, the provision for federal court relief contemplates only that the state administrative agency have had the opportunity to assess the claims, and does not render the viability of the federal suit in any way contingent upon the state’s final determination.

The lower courts are in accord with the interpretation that *Kremer* preclusion does not depend upon the outcome at the state level. The First and Eighth Circuits both confronted this issue shortly after the Court’s decision in *Kremer*, and both relied upon

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64 See supra notes ___ to ___ and accompanying text (discussing *Kremer*’s broad language).
65 Marrese v. Am. Acad. of Orthopedic Surgeons, 470 U.S. 373, 381 (1985) (“*Kremer* held that § 1738 applies to a claim of employment discrimination under Title VII . . . ”).
66 See generally *Marrese*, 470 U.S. at 380 (“Section 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts”).
68 See, e.g., *Marrese*, 470 U.S. at 380 (applying Illinois law) (“The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute…”); Allen v. McMurry, 449 U.S. 90, 95 (1980) (applying Missouri law) (“Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so”) (citing 28 U.S.C. § 1738); Hollimon v. Shelby County Gov’t, No. 08-6035, 2009 WL 1119282, at *2 (6th Cir. April, 28 2009) (applying Tennessee law) (“Federal courts must give state-court judgments—including those affirming state administrative-agency decisions—the same preclusive effect that the state courts would give them. That is no less true for Title VII actions”) (citations omitted); Engquist v. Or. Dep’t of Agric., 478 F.3d 985, 1007 (9th Cir. 2007) (applying Oregon law) (“The ‘full faith and credit’ statute compels federal courts to give collateral estoppel and res judicata effects to the judgments of state courts”).
the Court’s statement that “the finality of state court decisions should not ‘depend on which side prevailed in a given case’” to conclude that Kremer sweeps broadly. The First Circuit summarized this point well: “In short, a fair reading of Kremer shows that its rationale rests on neutral principles, not on the happenstance of which party – employer or employee – brings the state court action.” Other courts have since expressed agreement. Indeed, a thorough review of federal court decisions did not reveal any case in which a plaintiff’s argument to limit Kremer to cases in which the defendant invoked the state judicial forum prevailed. Thus, Kremer’s reach is, and should remain, broad, so that preclusion applies no matter who initiated appeal to the state court.

B. Differential Deference.

Some plaintiffs attempt to avoid Kremer preclusion by suggesting that it does not apply where the state-court standard of review calls for substantial deference to the agency findings. This argument is appealing at first blush. Application of preclusion doctrine means respecting the judgment of the rendering court. If that court never approached the merits of the underlying claims but rather simply reviewed the procedures applied in a prior administrative proceeding, then it may seem natural to question the reliability of that judgment when it is offered preclusively in a subsequent suit. Perhaps the court’s decision was not “on the merits” as is often required for most preclusion rules to apply. Closer scrutiny of the Court’s opinion in Kremer, though, defeats this argument.

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71 Gonsalves, 727 F.2d at 29.
72 See, e.g., Zanders v. Nat’l R.R. Passenger Corp., 898 F.2d 1127, 1132 (6th Cir. 1990) (“That the Supreme Court did not consider this distinction controlling, however, is indicated by its determination that the finality of state court judgments should not ‘depend upon which side prevailed in a given case’”); Trujillo, 775 F.2d at 1364 (“It is significant, however, that the Court focused on the existence of the state court judgment and indicated that the finality of state court judgments should not ‘depend on which side prevailed in a given case’”); see also Unger v. Consol. Foods Corp., 693 F.2d 703, 710 n.11 (7th Cir. 1982) (“Given the Supreme Court’s holding that Title VII does not partially repeal § 1738 and any state court decision must therefore be accorded preclusive effect, it should be immaterial whether plaintiff or defendant initiated the state court review”).
73 See, e.g., Unger, 693 F.2d at 706 (“[Plaintiff’s] contention is that a prior judgment can have preclusive effect only if it was a decision on the very question presented to the second court”); Gonsalves, 727 F.2d at 29 n.3 (“The fact that the Rhode Island superior court reversed the decision of the RI-CHR on the basis of the administrative record does not detract from the preclusive effect to be accorded that court’s decision”).
74 See generally San Remo Hotel, L.P. v. City and County of S.F., Cal., 545 U.S. 323, 335 FN14 (2005) (California courts apply issue preclusion to a final judgment in earlier litigation between the same parties if . . . “there was a final judgment on the merits in the prior case . . .”); Cronan v. Iwon, 972 A.2d 172, 174-75 (R.I. 2009) (“collateral estoppel operates to bar the relitigation of an issue when: . . . (2) the previous proceeding resulted in a final judgment on the merits . . .”); McDaniel v. State, 208 P.3d 817, 825-26 (Mont. 2009) (A four-part test is used to determine whether issue preclusion applies, one of which is whether there was a “final judgment on the merits in the prior adjudication”); Wernecke v. St. Maries Joint Sch. Dist. No. 401, 207 P.3d 1008, 1020 (Idaho 2009) (Five elements are required for issue preclusion to apply, one of which is that there was “a final judgment on the merits in the prior litigation”); cf. Semtek Int’l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 497-98 (2001) (“Although the original connotation of a
As a threshold matter, the *Kremer* court expressly rejected this contention. The plaintiff in *Kremer* argued that the New York Supreme Court’s judgment should not bar his Title VII action “because the New York courts did not resolve the issue that the District Court must hear under Title VII – whether Kremer had suffered discriminatory treatment.”75 While this argument did not focus solely on the standard of review – the Court also addressed here the absence of any meaningful distinction between the governing state anti-discrimination laws and Title VII – the Court nevertheless devoted substantial attention to the law that governed the state court’s assessment.76 The Court reviewed applicable New York law, concluding that decisions of the Supreme Court Appellate Division on review of New York Human Rights Division (“NYHRD”) rulings constitute “decisions on the merits” under New York law.77 The Court went on to summarize its view of the governing legal principle in broadly applicable terms: “It is well established that judicial affirmance of an administrative determination is entitled to preclusive effect.”78 Thus, the Court came down firmly on the side of the preclusion, stating its conclusion with sufficient breadth to foreclose distinction on the basis of the standard of review in most cases.

Subsequent lower court decisions reflect the limited viability of attempts to avoid *Kremer* preclusion by reference to the degree of deference afforded under the reviewing state’s law. The Seventh Circuit’s decision in *Unger v. Consolidated Foods Corp.* is exemplary.79 The plaintiff in *Unger* sought administrative review in the Circuit Court of Cook County, Illinois after that state’s Fair Employment Practices Commission rejected her sex discrimination claims.80 The federal district court initially rejected the defendant’s contention that res judicata barred plaintiff’s related Title VII suit, but when the Seventh Circuit took up the issue shortly after the Supreme Court decided *Kremer*, it reversed.81 Part and parcel to that determination was the court’s analysis of Unger’s argument that *Kremer* did not apply because the Illinois courts afford greater deference to administrative decisions than do the courts of New York, as evaluated in *Kremer*.82 Plaintiff contended that *Kremer* preclusion therefore did not apply because “the Illinois courts’ review, being deferential, was a review of the administrative proceeding and thus did not constitute a finding one way or the other as to whether she was a victim of discrimination.”83 The court rejected Unger’s contention, explaining first that the standard of review in Illinois does not differ in any significant respect from that

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75 *Kremer*, 456 U.S. at 479.
76 *Id.* at 480 n.21.
77 *Id.*
78 *Kremer*, 456 U.S. at 480 n.21.
79 693 F.2d 703 (7th Cir. 1982).
80 *Id.* at 704.
81 *Id.* at 711.
82 *Id.* at 705-08.
83 *Id.* at 706.
applicable in New York.\textsuperscript{84} The court concluded not only that the standards of review in Illinois and New York are similar, but that both are deferential, suggesting that differential deference will rarely, if ever, afford a basis to avoid \textit{Kremer}'s import.\textsuperscript{85} Indeed, after engaging in a specific comparison of the New York and Illinois laws, the court went on to offer a broader basis for rejecting plaintiff’s argument by characterizing the \textit{Kremer} decision as foreclosing it in most cases. The court stated:

Further, there are at least two reasons for rejecting \textit{any} argument directed to the absence of a state court \textit{de novo} trial or some “decision on the merits” equivalent. First, the Supreme Court has already done so; the \textit{Kremer} Court was fully aware that the New York state courts were conducting an administrative review of a state agency proceeding. Second, Unger’s argument proves too much: by her logic, no state court administrative review decision would have to be accorded preclusive effect by the federal courts regardless of whether that state’s courts would do so. That, however, would be clearly inconsistent with Section 1738 which is the statutory version of the full faith and credit clause.\textsuperscript{86}

Thus, the Seventh Circuit agreed that \textit{Kremer} left little room for argument on the basis of standard of review.

Finally, a well-established principle of even broader application suggests that this standard-of-review argument will likely fail in most cases. The essence of the Court’s holding in \textit{Kremer} is that federal courts must respect state-court judgments on closely related employment-discrimination claims.\textsuperscript{87} Title VII does not repeal Section 1738, so its full-faith-and-credit command applies.\textsuperscript{88} As such, the preclusive effect of a state-court administrative appeal should turn on the preclusion law of that state. How the standard of administrative review differs in that state from the one evaluated in \textit{Kremer} is immaterial.\textsuperscript{89} The only question is whether the courts of the state that rendered the judgment would deem it preclusive, and the answer to that question lies primarily in the law of that state.\textsuperscript{90} \textit{Kremer}'s import therefore probably cannot be avoided on that basis.

\textsuperscript{84} \textit{Id.} at 706-07 (“We do not, however, discern any practical difference in the standards of review applied by the Illinois and New York courts”).
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Unger}, 693 F.2d at 707 (emphasis added).
\textsuperscript{87} \textit{Kremer}, 456 U.S. at 471-72.
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{See Unger}, 693 F.2d at 707 n.7 (suggesting that the \textit{Kremer} majority’s discussion of differential deference was unnecessary and even improper because “[g]iven that the majority Justices found no support in the legislative history of Title VII for a partial repeal of Section 1738, a federal court should be foreclosed from inquiring into the nature of the state court decision if the state would grant it preclusive effect and assuming the due process concerns noted above were satisfied”).
\textsuperscript{90} \textit{See Kremer}, 456 U.S. at 466-67 (“There is no question that the judicial determination [on review from the NYHRD] precludes Kremer from bringing ‘any other action, civil or criminal, based upon the same grievance’ in the New York courts. By its terms, therefore, § 1738 would appear to preclude Kremer from relitigating the same question in federal court”) (quoting N.Y. Exec. Law § 300 (McKinney 1972)); \textit{see also Marrese}, 470 U.S. at 381 (“\textit{Kremer} indicates that § 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment”). The discussion \textit{infra},
C. **Inherent Limitations.**

The foregoing discussion suggests that *Kremer* preclusion is nearly absolute and will apply in most cases. The decision does, however, carve out two exceptions. I call these “inherent limitations” because their applicability depends upon the circumstances of the case. These limitations differ from those discussed in the preceding two sections because there is little debate about their existence – courts are in virtually unanimous agreement that *Kremer* does not apply when these limitations come into play. Even so, a review of the case law shows that situations in which these limitations might affect the outcome are rare.

The first inherent limitation arises directly from *Kremer*’s holding. *Kremer* directs federal courts to give full faith and credit to state-court judgments, which implies that preclusion operates only when the law of the state that rendered the judgment says that it should.\(^91\) The root of its variable application is therefore plain: whether a judgment deserves preclusive effect or not turns on the law of that jurisdiction. As such, any judgment unworthy of preclusive effect under the law of the rendering jurisdiction would not bind the federal courts, either. State preclusion law is complicated, somewhat unpredictable, and often indeterminate. Yet the result in lower-court cases applying *Kremer* remains quite uniform in favor of preclusion. A review of the relevant case law did not reveal any case in which a federal court, heeding *Kremer*’s advice, declined to give preclusive effect to a state-court judgment on review of administrative proceedings on grounds that the law of the rendering state so dictates. Instead, all of the principal cases applying the *Kremer* rule ultimately concluded that preclusion should apply, at least to some extent.\(^92\) Thus, this broadly-applicable “limitation” does not affect the application of *Kremer* preclusion in most cases.

The second inherent limitation is no less debatable. No judgment rendered in violation of the Fourteenth Amendment’s Due Process guarantees – whether under anti-discrimination law or in any other context – is entitled to preclusive effect.\(^93\) As with the first, the Court in *Kremer* also made the second limitation abundantly clear and left little room to question its existence. Indeed, this limitation is constitutionally sourced and compelled – notwithstanding Section 1738, *Kremer* preclusion does not apply if the state

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91 *Kremer*, 456 U.S. at 466-67; see also Maniccia v. Brown, 171 F.3d 1364 (11th Cir. 1999) (“A state court’s decision upholding an administrative body’s findings has preclusive effect in a subsequent federal court proceeding if . . . the courts of that state would be bound by the decision . . .”).

92 *Zanders*, 898 F.2d at 1132; *Unger*, 693 F.2d at 706-07; *Hickman*, 741 F.2d at 232; *Gonsalves*, 727 F.2d at 28-9; *Trujillo*, 775 F.2d at 1364; *Maniccia* 171 F.3d at 1368; *Hirst* v. State of Cal., 770 F.2d 776, 778 (9th Cir. 1985); Burney v. Polk Cnty. Coll., 728 F.2d 1374, 1378 (11th Cir. 1984); Wakeen v. Hoffman House Inc., 742 F.2d 1238, 1241-42 (7th Cir. 1983). This discussion does not include those cases to be discussed *infra*, in which the court permitted a plaintiff’s federal claims to proceed even after final adjudication of related state claims on grounds that she sought different relief in the federal court than in the state proceedings. See *infra* Part III (discussing cases in which plaintiff seeks different relief in federal proceedings).

93 *Kremer*, 456 U.S. at 481-83.
proceedings did not comport with due process. The Kremer Court acknowledged the importance of this limitation, referring to it as a “serious contention” and dedicating several pages of discussion to it. But a review of the pertinent case law did not reveal any case in which the court declined to give a judgment preclusive effect on grounds it failed to comport with due process. To the contrary, those courts that addressed a due process concern found the proceedings sufficient in each instance. The inherent limitations therefore offer little maneuvering room by way of attempts to avoid Kremer’s reach. Its application is pervasive.

IV. UNRAVELING THE THIRD THREAD: THE AVAILABILITY OF ALTERNATIVE REMEDIES.

The entanglement of the web becomes profound when questions of additional relief arise. This thread thus presents the hairiest issues on the web. It includes all those cases in which the plaintiff prevailed at the state or local administrative level and, with or without a state-court judgment approving the administrative findings, then sought alternative or different relief in a subsequent federal suit on the same claims. The web entanglement is exacerbated here by substantial disagreement among the courts about the decisional basis for these cases, and the lack of any clear guidance from the Supreme Court. Some courts decide these cases without regard to preclusion principles, instead focusing on the availability of a statutory basis for the suit under Title VII. Other courts disregard these questions of statutory authority in favor of preclusion principles. Some courts address both. The result is a knotty snarl of case law that offers little in the way

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94 Kremer, 456 U.S. at 480-81.
95 Id. at 480-85.
96 “Pertinent” here means, roughly, that the cases arose from similar circumstances as those cases discussed elsewhere in this subpart – i.e., federal-court suits brought by plaintiffs who previously pursued related claims in state administrative and judicial proceedings, in which one party sought to invoke preclusion on the basis of the prior state-court judgment.
97 E.g., Maniccia, 171 F.3d at 368; Trujillo, 775 F.2d at 1368-69.
98 Chris v. Tenet, 221 F.3d 648, 653 (4th Cir. 2000) (holding that Title VII’s jurisdictional grant does not reach independent actions seeking only attorney fees and costs incurred in administrative proceedings); Jones v. Am. State Bank, 857 F.2d 494, 497 (8th Cir. 1988) (determining that Title VII’s fee-shifting provision permits suit to recover only attorney fees and costs incurred in administrative proceedings); Porter v. Winter, No. CV F 06-0880 LJO SMS, 2007 WL 708562, at *3, 5 (E.D. Cal. Mar. 2, 2007) (dismissing Title VII suit seeking only attorney fees for lack of subject-matter jurisdiction); Hansson v. Norton, 315 F. Supp. 2d 40, 45-46 (D.D.C. 2004) (concluding that court lacked subject-matter jurisdiction in Title VII suit seeking only attorney fees, and discussing both Title VII’s fee-shifting provision and its jurisdictional grant); Cassas v. Lenox Hill Hosp., 39 F. Supp. 2d 389, 392-93 (S.D.N.Y. 1999) (permitting plaintiff to make claim for attorney fees alone under Title VII’s fee-shifting provision but concluding that plaintiff is not entitled to them on facts); Paz v. Long Island R.R. Co., 954 F. Supp. 62, 64-65 (E.D.N.Y. 1997) (holding that Title VII fee-shifting provision does not support independent suit for fees incurred in state-court discrimination suit).
99 Patzer v. Bd. of Regents of the Univ. of Wis. Sys., 763 F.2d 851, 855, 859 (7th Cir. 1985) (holding that policy-based exception to claim preclusion doctrine applied so plaintiff could proceed on Title VII claims even though transactionally related to claims fully adjudicated in state court).
100 Nestor v. Pratt & Whitney, 466 F.3d 65, 70-72 (2nd Cir. 2006) (holding that district court had subject-matter jurisdiction over Title VII suit seeking compensatory and punitive damages and attorney fees not recovered in prior state proceedings and that claims were not precluded by prior state judgment).
of instruction to future litigants and judges. The disagreement among the courts has been festering for years and is primed for resolution by the Supreme Court. This Part thus attempts to unfurl the knot by untangling the quagmire of statutory and case law and suggesting the applicable rules by which future additional-remedy cases should be resolved.

A. **Statutory Authority.**

Courts commonly rely upon the statute to decide the additional-remedies suits that comprise this part of the web. There are several potential explanations for the prevalence of this theory. First, it is beyond cavil that a court should first look to the language of the statute itself to answer questions pertaining to the statute’s scope.\(^\text{101}\) Thus, once the question is characterized as one of statutory authority, the statute inevitably becomes the first source of inquiry.\(^\text{102}\) Second, notwithstanding the relative dearth of pertinent Supreme Court precedents, the most recent relevant case engages a statutory analysis.\(^\text{103}\) Judges and litigants looking to the Supreme Court for direction are therefore likely to take a similar path. Finally, a statutory analysis offers the appeal of potential for a more concrete rationale.\(^\text{104}\) Accordingly, it is common for courts to resolve disputes about the viability of a suit for additional remedies after resolution of discrimination claims in the state system by reference to Title VII.

While the majority of courts addressing these issues seem to agree that the statute should govern, there is no consensus about which provision controls. Some courts treat the problem as one of subject-matter jurisdiction, governed by the provision of Title VII that authorizes the district courts to hear Title VII claims.\(^\text{105}\) Other courts – especially those in which the plaintiff seeks only an award of attorney fees (as opposed to some other forms of additional relief) – focus instead on Title VII’s fee-shifting provision, which authorizes the court to award fees to the prevailing party.\(^\text{106}\) Still others engage a hybrid analysis, mentioning one or both of the pertinent statutory provisions without

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\(^{101}\) See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

\(^{102}\) Whether the question is best addressed as one of statutory inquiry or not is a separate question. That question will be dealt with *infra*, Part ___.


\(^{104}\) Whether the analysis is *actually* more concrete is also a separate question.

\(^{105}\) 42 U.S.C. § 2000e-5(f)(3); see, e.g., *Chris*, 221 F.3d at 655 (“[T]he jurisdictional grant in 42 U.S.C. § 2000e-5(f)(3) does not extend to an independent action solely for attorney’s fees and costs incurred during the course of the Title VII administrative process”); Porter v. Winter, No. CV F 06-0880 LJO SMS, 2007 WL 708562, at *6 (E.D. Cal. Mar. 2, 2007) (concluding that Title VII’s jurisdictional grant does not confer “jurisdiction to adjudicate solely a claim for attorney’s fees without a claim of a substantive violation of Title VII”); Morgan v. N.C. Dep’t of Health and Human Serv.’s, 421 F. Supp. 2d 890, 897-98 (W.D.N.C. 2006) (applying holding of *Chris* v. *Tenet* and concluding that court lacked subject-matter jurisdiction over fees-only suit).

\(^{106}\) 42 U.S.C. § 2000e-5(k); see, e.g., *Am. State Bank*, 857 F.2d at 497-99 (concluding that fee-shifting provision authorizes federal suit seeking solely attorney fees incurred in administrative proceedings under Title VII); *Paz*, 954 F. Supp. at 65 (“42 U.S.C. 2000e-5(k) does not permit a party to sue for attorney’s fees incurred in a state action for employment discrimination when that action is unrelated to any claim brought under Title VII”).
Neither provision offers an entirely satisfactory response to this legal question.

1. **Subject-matter jurisdiction provision.**

Title VII’s jurisdictional grant confers upon the district courts power to adjudicate “actions brought under this subchapter.” The referenced “subchapter” is Subchapter VII of Title 42 of the United States Code, entitled “Equal Employment Opportunities,” which is commonly referred to as “Title VII.” Critical to understanding the parameters of the subject-matter jurisdiction objection is identification of the context in which it might arise. The cases that turn upon interpretation of this provision typically do not involve contests about whether the employer unlawfully discriminated or retaliated against the employee – those determinations were made at the administrative level. Subject-matter jurisdiction problems instead tend to arise in those cases seeking only additional relief in federal court – relief that for one reason or another was not available or awarded in the prior state proceedings.

The most common form of additional relief is attorney fees. Plaintiffs who prevailed in state administrative (or other prior) proceedings may have received compensation for their injuries but may not have recovered any attorney fees if the pertinent law did not include a fee-shifting provision. Indeed, the subject-matter jurisdiction argument is best suited to cases seeking only attorney fees because of the nature of the determination involved. Resolution of a claim for fees typically will not, and need not, approach the merits of the underlying wrong. The availability of the claimed fees turns upon applicability of the pertinent legal or contractual provision, rather than on proof of the claim that necessitated incurring the fees to begin with. Thus, if the Title VII plaintiff seeks forms of relief other than fees, the court’s subject-matter jurisdiction is less in doubt because resolution of damages claims will, by its nature, necessitate substantive analysis. Assessment of the fees claim, however, will not.

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107 See Nestor, 466 F.3d at 67, 69-70 (citing fee-shifting provision but referring to the problem as jurisdictional without reference to the subject-matter jurisdiction statute); Hansson, 315 F. Supp. 2d at 46 (citing both provisions on way to conclusion that court lacks jurisdiction over fees-only suit).


109 See Nestor, 466 F.3d at 69 (assessing viability of claim to recover attorney fees, compensatory damages for emotional distress, and punitive damages incurred in conjunction with discrimination claims resolved in state proceedings); Chris 221 F.3d at 649 (adjudicating claim for attorney fees incurred in administrative proceedings); Porter, 2007 WL 708562, at *3 (ruling on motion to dismiss claim for attorney fees and costs only); Morgan, 421 F. Supp. 2d at 893-94 (evaluating jurisdictional objection to Title VII suit seeking only attorney fees and costs).

110 Chris 221 F.3d at 651; Porter, 2007 WL 708562, at *1; Morgan, 421 F. Supp. 2d at 893; Hansson, 315 F. Supp. 2d at 41.

111 Chris 221 F.3d at 650 (considering claim for attorney fees after plaintiff received compensation for alleged discrimination via confidential settlement); Morgan, 421 F. Supp. 2d at 892-93 (assessing claim for fees and costs under Title VII after plaintiff prevailed in state administrative proceedings on related state discrimination claims); Hansson, 315 F. Supp. 2d at 41-42 (evaluating viability of claim for attorney fees incurred in administrative pursuit of discrimination claims resolved by settlement).

112 See e.g., Nestor, 466 F.3d at 69-70 (rejecting subject-matter jurisdiction objection because plaintiff sought compensatory and punitive damages in addition to fees which would involve consideration of alleged unlawful conduct).
The Seventh Circuit’s recent decision in Nestor v. Pratt & Whitney illustrates this concept. The Nestor plaintiff prevailed on her employment discrimination claims at the state administrative level, and the state appellate courts affirmed those findings. The pertinent state law afforded a back pay remedy, which Nestor received, but did not provide compensation for emotional distress, attorney fees or punitive damages. Nestor therefore brought a federal suit under Title VII seeking those additional remedies. In addition to its preclusion defense, Pratt & Whitney contended that the court lacked subject-matter jurisdiction over Nestor’s “damages-only” suit. The court rejected the jurisdiction argument, reasoning that even if Title VII does not authorize a fees-only suit, it nevertheless condones a suit like Nestor’s that “entails litigation of substantive issues: for example, whether Nestor suffered any emotional distress caused by Pratt’s discrimination and whether Pratt’s conduct was malicious.”

The limitation suggested by Nestor makes sense. If the subject-matter jurisdiction argument is to prevail at all, it must be confined to those cases that do not approach the merits of the alleged Title VII violation. The plain statutory language dictates this result. Section 2000e-5(f)(3) confers upon the district courts jurisdiction to hear “actions brought under [Title VII].” As will be discussed in more detail below, the plain language of this provision, taken in its context, suggests that jurisdiction is proper only when the suit entails adjudication of claims implicating the substance of Title VII – i.e., discrimination and/or retaliation. A suit that seeks compensatory or punitive damages will usually necessitate such analysis, but a suit for fees alone probably will not. Thus, Title VII’s jurisdictional grant probably extends to cases seeking relief in addition to that obtained in prior proceedings so long as resolution of the claims will require proof of facts constituting unlawful discrimination or retaliation.

The court’s subject-matter jurisdiction is more vulnerable in cases seeking only fees and/or costs. The problem flows primarily from the statutory language itself, especially when examined in its context. The Supreme Court has not addressed this question squarely, and its pertinent precedents leave room for argument on both sides of the issue. This Part will delve into the statutory analysis and the Supreme Court precedents to illuminate the debate, and will ultimately conclude that Title VII’s

\[\text{See, e.g., Chris 221 F.3d at 655 (concluding that Title VII’s subject-matter jurisdiction provision “limits the complainant to claiming fees and costs solely in the forum where the substantive claims are ultimately resolved”)).}\]
\[\text{466 F.3d 65 (7th Cir. 2006).}\]
\[\text{Id. at 68.}\]
\[\text{Id.}\]
\[\text{Id. at 68-69.}\]
\[\text{The court’s preclusion analysis will be discussed in more detail infra Part IV.B.}\]
\[\text{Nestor, 466 F.3d at 69.}\]
\[\text{The court specifically declined to decide whether Title VII permits a fees-only suit. Id. at 70 n.4.}\]
\[\text{Id. at 70.}\]
\[\text{See infra notes ___ to ___ and accompanying text (engaging in statutory analysis of Title VII’s subject-matter provision).}\]
jurisdictional grant does not afford a satisfactory resolution to the problem of suits seeking additional relief.

a) The “plain and unambiguous” interpretation of the jurisdictional grant.

The well-established rules of statutory interpretation begin with examination of the pertinent provision to determine if its meaning is plain and unambiguous.124 Plain and unambiguous statutes must be enforced as written, without reference to external sources.125 Both the language of the statute itself as well as the context in which it appears are pertinent to the plainness or ambiguity of the statute.126

Title VII’s jurisdictional grant confers upon the district courts power to adjudicate “actions brought under this subchapter [Title VII].”127 The initial statutory-interpretation question is thus whether the terms “actions brought under” are plain and unambiguous. More specifically, does the language “actions brought under” mean only civil lawsuits seeking to enforce the substantive rights conferred by Title VII, or does it encompass fees-only suits as well?

The principal cases addressed to this question mostly agree that the statute is plainly and unambiguously limited to suits that claim substantive Title VII violations.128 The Fourth Circuit’s decision in Chris v. Tenet leads this charge and includes the most detailed analysis of the issue.129 Relying primarily upon dictionary definitions, that court interpreted the terms “actions under this subchapter” to mean “legal proceedings in a court of law to enforce the substantive rights guaranteed by Title VII, specifically the right to be free from employment discrimination on the basis of race, color, religion, sex, or national origin.”130 The court went on to buttress its conclusion by reference to the context in which the jurisdictional grant appears.131 Specifically, the court noted that the

124 See Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003) (indicating that if the language is unambiguous then the inquiry is complete); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (same); see also 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:02, at 6-11 (6th ed. 2000) (collecting cases to support proposition that “’[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion’” (quoting McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980))). The Supreme Court is somewhat infamous for talking out of both sides of its mouth on this point. The Court often states that the cardinal rule of statutory interpretation is to apply the plain and unambiguous meaning if it can be discerned. See, e.g., Desert Palace, 539 U.S. at 98 (stating rule and purporting to apply it); Robinson, 519 U.S. at 340 (same). A deeper inquiry, however, would likely reveal that the plainness inquiry itself is tainted by the ultimate outcome that the Court desires to reach. A probing analysis of that problem lies well beyond the scope of this Article, but it is nevertheless a point well worth noting.
126 Chris, 221 F.3d at 652 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).
128 Chris, 221 F.3d at 652; see also Morgan, 421 F. Supp. 2d at 897; Porter, 2007 WL 708562, at *4; Hansson, 315 F. Supp. 2d at 46.
129 Chris, 221 F.3d 648 (4th Cir. 2000).
130 Id. at 652 (citing WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY, BLACKS LAW DICTIONARY, and the DICTIONARY OF MODERN LEGAL USAGE).
131 Id.
sentences that follow the jurisdictional grant make venue in Title VII actions proper by reference to “facts associated with the alleged unlawful employment practice.” As such, the court concluded, the terms “action under” must mean an action containing allegations of discrimination or retaliation. Further, the court noted that Congress used the term “action” throughout Title VII and that it is “consistently used to refer to a court proceeding to prevent or remedy an unlawful employment practice.” The court offered little further support for this conclusory assertion.

Other courts that have reached the same conclusion have mostly relied upon the Fourth Circuit’s analysis in Chris v. Tenet without engaging the issue independently. Courts that have rejected subject-matter jurisdiction challenges in this context have usually done so on alternative grounds. For example, the Second Circuit in Nestor v. Pratt & Whitney found no jurisdictional barrier on grounds the plaintiff’s suit sought compensatory and punitive damages, the availability of which would turn upon analysis of substantive issues regarding the defendant’s alleged discriminatory conduct and its consequences. The Eighth Circuit in Jones v. American State Bank decided that plaintiff could proceed on her fees-only Title VII suit under the authority of the fee-shifting provision without reference to the jurisdictional grant on which the Chris court and those that have followed it relied. Thus, the Fourth Circuit’s decision in Chris remains the seminal authority for evaluation of subject-matter jurisdiction objections in additional-remedy (primarily fees-only) suits. But the Fourth Circuit’s analysis is unsatisfactory, not only as a matter of strict statutory interpretation but also in light of the pertinent Supreme Court precedents and the applicable body of law more generally.

b) Problems with the plainness conclusion.

Notwithstanding the near universal agreement with the Fourth Circuit’s conclusion that Title VII’s jurisdictional grant is plain and unambiguous in its exclusion of fees-only suits, a closer look reveals that the opposite interpretation is equally plausible. First, a fees-only suit provisioned under the authority of Title VII’s fee-shifting provision is no less a suit “under” Title VII than a suit that focuses on substantive discrimination claims. Instead of arising under the core provisions of the statute that

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132 Id. Title VII venue is proper where the unlawful employment practice is alleged to have been committed, where the employment records relevant to the alleged unlawful employment practice are maintained, where the aggrieved party would have worked absent the alleged unlawful employment practice, or, if the defendant is not found in any of these places, where it has its principal office. 42 U.S.C. § 2000e-5(f)(3).

133 Chris, 221 F.3d at 652-63.

134 Morgan, 421 F. Supp. 2d at 896-98; Porter, 2007 WL 708562, at *3-4; but see Hansson, 315 F. Supp. 2d at 46-51 (discussing Chris but also engaging in some minimal independent statutory analysis, and concluding summarily that “the plain language of [Title VII’s jurisdictional grant] seems to indicate that ‘actions brought under this subchapter’ refers to court proceedings to enforce the rights guaranteed, or redress the wrongs prohibited, by Title VII”).

135 Nestor, 466 F.3d at 70.

136 857 F.2d 494, 497-99 (8th Cir. 1988); see also Paz, 954 F. Supp. at 63-65 (permitting fees-only suit under authority of fee-shifting provision, without reference to jurisdictional grant).
prohibit discrimination and retaliation, \textsuperscript{137} the suit arises under the fee-shifting provision,\textsuperscript{138} but it is no less an “action under” Title VII. Nor does the statutory context necessarily compel the conclusion that the Chris court reached. Just because the statute makes the propriety of venue turn upon facts relating to the underlying “unlawful employment practice” does not mean that the claim must involve determination of those issues. At a minimum, both interpretations are equally plausible. The conclusions that the Fourth Circuit reached are not without foundation, but the opposite result is also supportable. As such, the rules of statutory interpretation necessitate further examination of the issue.

When the statutory language is not plain and unambiguous, one must attempt to discern the intent of the drafters as to the provision’s meaning.\textsuperscript{139} Potential sources include legislative history, pertinent policy goals, and considerations of reasonableness.\textsuperscript{140} The authorities here likewise reveal no clear answer. As the court in Chris v. Tenet noted, Title VII “reflects a congressional intent to use administrative conciliation as the primary means of handling claims, thereby encouraging quicker, less formal, and less expensive resolution of disputes.”\textsuperscript{141} As such, interpreting the jurisdictional grant “as permitting a suit solely for attorney’s fees and costs incurred during the course of the Title VII administrative process would run counter to the congressional aim of quick, less formal, and less expensive resolution of employment disputes.”\textsuperscript{142} On the other hand, as the Nestor v. Pratt & Whitney court pointed out, Title VII also reflects a congressional goal of affording complete relief to victims of discrimination.\textsuperscript{143} A fees-only suit could promote this goal by affording an opportunity to recover fees that were not available in administrative proceedings. The prevailing

\begin{footnotes}
\item[137] 42 U.S.C. §§ 2000e-2(a)(1) & 2000e-3(a) (core prohibitions against discrimination and retaliation, respectively).
\item[138] Id. at § 2000e-5(k). Whether the fee-shifting provision itself authorizes an independent action is a separate question that will be discussed infra Part IV.A.2.
\item[139] SINGER, supra note 122, § 45:02, at 11–12 & § 45:05, at 25.
\item[140] See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (referencing “text, structure, purpose, and history of the ADEA” as interpretive resources supporting the conclusion that the ADEA is not intended to prohibit employer from favoring older workers over younger ones); Robinson, 519 U.S. at 345–46 (turning to the “broader context provided by other sections of the statute” and the statute’s purposes in resolving ambiguity as to the meaning of the term “employees” in the anti-retaliation provision of Title VII); SINGER, supra note 122, § 45:13, at 107–08 (identifying the following as resources of interpretation: statutory language and context, legislative history and underlying policy, and concepts of reasonableness); see also Lisa M. Durham Taylor, Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Railway Co. v. White, 9 U. P A. J. LAB. & EMP. L. 533, 570–72 & nn. 233–37 (2006) (discussing this statutory interpretation framework); Taylor, supra Note 20, at 116-26 (same).
\item[141] Chris, 221 F.3d at 653.
\item[142] Id.
\item[143] Nestor, 466 F.3d at 71-72 (citing N.Y. Gas Light Club, Inc. v. Carey, 447 U.S. 54, 65-68 (1980)); United States v. N.Y. City Bd. of Educ., 85 F. Supp. 2d 130, 146 (E.D.N.Y. 2000) (“a court evaluating the relief afforded identifiable victims of discrimination under a settlement agreement must be guided by one of the central purposes of Title VII, that is ’... to make persons whole for injuries suffered on account of unlawful employment discrimination’”); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (same); Clarke v. Frank, No. 88 CV 1900(LJC), 1991 WL 99211, at *2 (E.D.N.Y. May 17, 1991) (“The goal of Title VII remedies is to make people whole for injuries suffered as a result of unlawful discrimination”) (citing Gutzwiller v. Fenik, 860 F.2d 1317, 1333 (E.D.N.Y. 1991)).
\end{footnotes}
plaintiff’s relief would be “complete” from a Title VII standpoint only upon recovering the fees award that it provides.\textsuperscript{144}

Both of these lines of reasoning have some appeal. On the one hand, permitting a fees-only suit is inefficient and counterproductive to the conciliatory and cost-reduction goals that Title VII reflects. On the other hand, a fees-only suit may be the only opportunity that a plaintiff has to recoup the substantial expenditure that vindicating her rights caused her to incur. Indeed, in many Title VII cases, the fees award will far exceed any damages recovered.\textsuperscript{145} Cursory as it may be,\textsuperscript{146} this foray into the minds of Title VII’s drafters likewise leaves one in equipoise as to whether the subject-matter jurisdiction provision encompasses a fees-only suit.

c) Supreme Court precedents.

Nor do the pertinent Supreme Court precedents provide a direct answer. The Court addressed a closely related question nearly thirty years ago in \textit{New York Gas Light Club, Inc. v. Carey}.\textsuperscript{147} The \textit{Carey} plaintiff prevailed on her race discrimination claims in state administrative proceedings and received back pay and injunctive relief.\textsuperscript{148} While defendant’s appeals to the state courts remained pending, plaintiff received a notice of right to sue from the Equal Employment Opportunity Commission (“EEOC”) and filed a federal court lawsuit asserting discrimination claims under Title VII and other civil rights statutes.\textsuperscript{149} After defendant’s appeals were exhausted in the state courts, the parties agreed that Carey’s suit could be dismissed except for her request for attorney fees.\textsuperscript{150} The district court denied the fee request, but the United States Court of Appeals for the Second Circuit reversed, ruling that Title VII permits a suit to recover fees alone under these circumstances.\textsuperscript{151} The Supreme Court granted certiorari, framing the question presented in its majority opinion as “whether, under Title VII of the Civil Rights Act of 1964, a federal court may allow the prevailing party attorney fees for legal services performed in prosecuting an employment discrimination claim in state administrative and judicial proceedings that Title VII requires federal claimants to invoke.”\textsuperscript{152} The Court

\textsuperscript{144} \textit{Id.}\textsuperscript{145} \textit{See, e.g.}, Gumbhir v. Curators of Univ. of Mo., 157 F.3d 1141, 1146 (8th Cir. 1998) (A jury awarded plaintiff $110,000 in attorney fees and $4,423.20 in lost wages; court of appeals later reversed the award of attorney fees and lowered it to $46,750, which still exceeds the lost wages received by the plaintiff); Abrams v. Lightolier Inc., 50 F.3d 1204, 1211 (3rd Cir. 1995) (plaintiff was awarded $473,953.45 for pain and suffering and $546,379.59 in attorney fees; on appeal the court held that attorney fees could exceed the amount of damages awarded); Brandau v. State of Kansas, 168 F.3d 1179, 1183 (10th Cir. 1999) (plaintiff was awarded $1 in nominal damages and $41,598.13 in attorney fees; this award was affirmed by the court of appeals).

\textsuperscript{146} The discussion here is cursory because, as will be discussed below, the question is ultimately moot because the broader grant of jurisdiction upon the district courts to hear cases involving federal questions should encompass these suits. See \textit{infra} Part IV.A.1(d) (discussing federal-question jurisdiction over fees-only suits).

\textsuperscript{147} 447 U.S. 54 (1980).

\textsuperscript{148} \textit{Id.} at 57.

\textsuperscript{149} \textit{Carey}, 447 U.S. at 58.

\textsuperscript{150} \textit{Id.} at 59.

\textsuperscript{151} \textit{Id.} at 60.

\textsuperscript{152} \textit{Id.} at 56.
answered that question in the affirmative, allowing a plaintiff to proceed in a Title VII fees-only suit.  

At first blush, it may appear that the Court’s decision in Carey conclusively answers this question by interpreting Title VII to “authorize a federal-court action to recover an award of attorney’s fees for work done” in state administrative proceedings. A closer look, however, reveals Carey’s shortcomings. First, the Carey court gave no consideration to Title VII’s jurisdictional grant. While the Court cited the provision of the statute in which the jurisdictional grant appears, it never specifically referenced, much less discussed, the jurisdiction provision. Rather than framing it as a jurisdictional question, the Court instead focused on the fee-shifting provision of Title VII, concluding that it authorizes an independent fees-only suit. Thus, the Court’s decision in Carey at most answers only whether the fee-shifting provision supports such an independent suit and says nothing at all about Title VII’s jurisdictional grant. Indeed, the Court never makes even passing reference to the question as jurisdictional at all. Its only references to the term “jurisdiction” pertain to the EEOC’s authority relative to the state agency. As such, to say that Carey supports federal-court jurisdiction over fees-only suits at best overstates its holding, and perhaps entirely misrepresents it.

The factual context in which the Carey case arose likewise limits its import. The Carey plaintiff filed her federal court lawsuit while defendant’s state-court appeals remained pending. Her initial complaint therefore went beyond the typical fees-only request to include substantive claims for relief under Title VII and other civil rights laws. The parties agreed to dismiss the substantive claims when the state appeals were complete, leaving only the fees request in tact. Since the propriety of the Court’s jurisdiction is measured by the face of the complaint, there was never any doubt in Carey about the court’s power over the case. Plaintiff asserted numerous substantive claims, any one of which alone would have been enough to confer jurisdiction. The

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153 Id. at 71.
154 Id.
155 The Court references “[section] 706(f)” of Title VII, which is codified at 42 U.S.C. § 2000e-5(f) in its final statement of its holding: “In sum, we conclude that §§ 706(f) and 706(k) of Title VII authorize a federal-court action to recover an award of attorney’s fees for work done by the prevailing complainant in state proceedings . . . .” Id. The Court’s reference there, however, is likely to paragraph (1) of that section, as the Court cites section 706(f)(1) several times in its decision. Id. at 58 (citing § 706(f)(1) as requiring EEOC to issue right to sue letter), Id. at 63 n.3 (“court may stay ‘further proceedings’ pending the termination of ‘State or local proceedings’”) (citing § 706(f)(1)), Id. at 64 (“After an additional 30 days, the EEOC is authorized to bring an action, in which the complainant has an absolute right to intervene.”) (citing § 706(f)), Id. at 66 (“Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706(f)(1)’s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney’s fees for legal work done in state and local proceedings.”), Id. at 66 n.6 (“Section 706(f)(1) requires the EEOC to give the complainant a ‘right to sue’ letter . . . .”), Id. at 67 (“Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums.”). Not once does the Court mention section 706(f)(3), which contains the jurisdictional grant.
156 Carey, 447 U.S. at 60-71. The fee-shifting provision is discussed infra, Part ___.
157 Id. at 58.
158 Id. at 59.
The Carey case therefore did not present a jurisdictional question at all. Justice Stevens expressly recognized this limitation on the case in his concurring opinion, and went on to suggest that the rule in fees-only suits at their inception should be different:

While I agree with most of what is said in the Court’s opinion, it is useful to emphasize that this federal litigation was commenced in order to obtain relief for respondent on the merits of her basic dispute with petitioners, and not simply to recover attorney’s fees. Whether Congress intended to authorize a separate federal action solely to recover costs, including attorney’s fees, incurred in obtaining administrative relief in either a deferral or a nondeferral State is not only doubtful but is a question that is plainly not presented by this record.

Justice Stevens’s comments are of course not binding precedent, though, so the question of jurisdiction over a fees-only suit remained open.

The Court’s more recent decision in North Carolina Department of Transportation v. Crest Street Community Council, Inc. likewise provides instruction but still offers no definitive answer. The plaintiffs in the Crest Street case were residents of a predominantly black neighborhood in Durham, North Carolina. When the North Carolina Department of Transportation (“NCDOT”) proposed a road construction project that would run through the Crest Street community, displacing the community park and church and many of the neighborhood’s residents, two representative neighborhood associations filed a complaint with the federal Department of Transportation (“DOT”) alleging that the NCDOT’s proposed highway construction project discriminated against Crest Street residents on the basis of their race, in violation of Title VI of the Civil Rights Act of 1964, which prohibits discrimination by programs receiving federal funding. The parties ultimately settled their claims, but a dispute arose about the NCDOT’s liability for attorney fees. The plaintiffs therefore filed a federal lawsuit seeking attorney fees under the fee-shifting statute applicable in Title VI cases – the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988. The lower courts disagreed about the viability of such a fees-only suit, and the Supreme Court granted certiorari. The Court concluded that § 1988 did not support an independent action to recover fees incurred in administrative proceedings, based on the plain language of the statute, as reinforced by its legislative history. The statute permits an award of fees only in an

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160 As the Court itself notes, the procedural posture of the case was itself a bit anomalous. The Court noted the district judge’s concern that the EEOC should not have issued a right to sue letter while state proceedings remained pending. Carey, 447 U.S. at 59.
161 Id. at 71 (Stevens, J., concurring).
162 479 U.S. 6 (1986).
163 Id. at 8.
164 Id.
165 N.C. Dep’t of Transp., 479 U.S. at 11.
166 Id. at 11-12.
167 Id. at 11.
168 Id. at 12-14.
“action or proceeding to enforce a provision of … Title VI…” and does not authorize a fees-only suit.\(^{169}\)

The *Crest Street* case fills some of the gaps left by *Carey* but still is not determinative. Unlike *Carey*, the *Crest Street* case does not suffer the plight of an unusual procedural posture. The federal lawsuit underlying the *Crest Street* decision began as one seeking only attorney fees.\(^{170}\) But the context distinguishes it from the Title VII cases with which this Article is concerned. The plaintiffs in *Crest Street* sought to recover attorney fees under Section 1988, incurred in administrative pursuit of claims under Title VI before the DOT.\(^{171}\) The *Crest Street* case therefore arose under a different fee-shifting provision pertinent to a different statute. Moreover, *Crest Street*, like *Carey*, did not frame the issue in jurisdictional terms. The Court determined that Section 1988 “does not authorize a court to award attorney’s fees except in an action to enforce the listed civil rights laws” but never used the term “jurisdiction” to describe the problem.\(^{172}\) As such, whatever *Crest Street* may contribute to the debate about additional-remedy suits, it does not answer the jurisdictional problem.\(^{173}\)

d) Evaluation – the problem with the jurisdiction objection.

The power of the district courts to decide claims seeking solely attorney fees remains a matter of some debate among the lower courts, but perhaps needlessly so. The Fourth Circuit in *Chris v. Tenet* summarily concluded that Title VII’s jurisdictional grant does not extend to cases seeking only fees and costs incurred in prior proceedings.\(^{174}\) Several district courts, following the Fourth Circuit’s lead, have reached the same conclusion.\(^{175}\) The Supreme Court has not confronted the question of jurisdiction over fees-only suits under Title VII and, outside that context, offers conflicting instruction. The answer to the question, however, may be quite simple. Indeed, in my view, there can be little doubt about the courts’ power to decide such cases, without regard to whether Title VII’s specific jurisdictional grant reaches them or not. For even if the specific jurisdictional provision does not apply,\(^{176}\) the broad grant of power to hear cases raising federal questions should serve as a catchall.

Section 1331 of Title 28 confers upon the district courts the power to hear all cases involving federal questions. The grant is broad: “The district courts shall have

\(^{169}\) Id. at 12 (quoting 42 U.S.C. § 1988) (emphasis added).

\(^{170}\) Id. at 11, 12 (“The case before us is not, and was never, an action to enforce any of [the pertinent civil rights] laws”).

\(^{171}\) Id. at 8.

\(^{172}\) Id. at 12.

\(^{173}\) The import of the *Crest Street* decision for the question of statutory authority under the fee-shifting provision will be addressed *infra*, Part ___.

\(^{174}\) 221 F.3d at 648.


\(^{176}\) And without taking any firm position on whether it does or not.
original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Alternatively referred to as “arising-under” or “federal-question” jurisdiction, this conferral of power includes all those cases in which federal law creates the cause of action.\(^{178}\)

It seems beyond doubt that a suit to recover attorney fees under Title VII arises under federal law. The claim exists because Title VII creates it, by condoning fee awards to prevailing parties.\(^{179}\) Without regard to whether Title VII authorizes an independent fees-only suit,\(^ {180}\) Congress’s broad conferral of federal-question jurisdiction must encompass it. Remarkably, the plaintiff in \textit{Chris} v. \textit{Tenet} never raised Section 1331 as a potential source of the court’s power to hear the case, and it appears that neither the district judge nor the circuit panel ever considered it.\(^ {181}\) It is not at all clear why this is so.\(^ {182}\) But the answer to the question is no less obvious as a result. A suit to recover attorney fees under 42 U.S.C. § 2000e-5(k) arises under federal law. Thus, setting aside whether the statute permits independent recovery of fees, the power of the district courts to hear such cases is unquestionable. There is no need to delve into exercises in statutory interpretation because the federal-question statute affords a basis for jurisdiction without regard to the applicability of Title VII’s specific jurisdictional grant.

2. Attorney-Fee Provision.

The federal courts clearly have § 1331 jurisdiction to determine whether Title VII creates a fees-only cause of action, but the question remains whether such a claim exists. That is, even if the court has jurisdiction over fees-only suits, they may nevertheless be subject to immediate dismissal if the statute does not permit them.\(^ {183}\) The question of statutory authority focuses on Title VII’s fee-shifting provision. Section 2000e-5(k) of Title 42 provides that “[i]n any action or proceeding under this subchapter [Title VII] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee.”\(^ {184}\) For present purposes, the question is whether that statutory provision permits an independent suit to recover fees alone, without any accompanying claim for discrimination or retaliation.

a) Limited adoption of the fee-provision approach.

\(^{178}\) Am. Well Works Co. v. Layne & Bowler, 241 U.S. 257, 260 (1916) (“a suit arises under the law that creates the cause of action”).
\(^{180}\) The question of the court’s statutory authority to decide the case is discussed \textit{infra}, Part ____.
\(^{181}\) [Cites to plaintiff’s appellate brief & reply brief and to district & circuit court decisions.]
\(^{182}\) The most likely explanation is that the court simply confused jurisdiction with the existence of a claim. This confusion of terms surely contributed to the web entanglement in the first place.
\(^{183}\) The key distinction here, as a procedural matter, is the device to be employed. A motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) should be denied on the grounds discussed in the preceding section – because the court has jurisdiction, without regard to the applicability of Title VII’s specific grant – under 28 U.S.C. § 1331. The type of dismissal contemplated in this section would operate under Federal Rule of Civil Procedure 12(b)(6).
The seminal authority adopting this approach is the United States Court of Appeals for the Eighth Circuit. In *Jones v. American State Bank*, that court held that a plaintiff could proceed on an independent federal suit to recover fees under Title VII’s fee-shifting provision. The plaintiff in *Jones* filled an EEOC charge against her employer bank, alleging sex discrimination. The EEOC referred the charge to the South Dakota Division of Human rights, as it was required to do under Title VII, and the state agency awarded Jones back pay, interest and costs, and ordered reinstatement. The state agency refused Jones’s request for attorney fees, on grounds they were unavailable under the applicable South Dakota law. No appeals were filed, but Jones instituted a separate suit in federal court to recover the attorney fees she incurred in the state administrative proceedings. The district court granted the fee request, and the bank appealed.

The most notable feature of the Eighth Circuit’s analysis is its singular reference to the fee-shifting provision of Title VII. Although the court refers in passing to the issue as one of “jurisdiction,” it never mentions Title VII’s jurisdictional grant. It treats the question as one of the availability of a cause of action under the fee-shifting provision instead. As such, the Eighth Circuit’s approach differs somewhat markedly from that of the other courts who approach the issue jurisdictionally. Indeed, it is these differences among the courts in framing the issues at the outset that exacerbates the web entanglement and causes confusion, for not only do the courts reach divergent outcomes in these additional-remedy cases, but they also disagree on the decisional framework.

The Eighth Circuit’s statutory-authority approach is far less pervasive than the Fourth Circuit’s jurisdictional approach. Given the dubiousness of the jurisdictional objection, it is not clear why this is so. Yet the *Jones* case has met with little agreement. The Fourth Circuit’s decision in *Chris v. Tenet* expressly repudiates it as inconsistent with the Supreme Court’s decisions in *Crest Street* and *Carey*. The Eastern District of New York in *Paz v. Long Island Railroad Company* took the same approach, focusing on the fee-shifting provision instead of the jurisdictional grant, but reached the opposite conclusion, holding that Title VII did not support an independent suit for fees alone. And the District Court for the District of Columbia in *Hansson v. Norton* took a hybrid approach, acknowledging both statutory provisions, but also rejecting the *Jones* court’s

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185 857 F.2d 494, 498-99 (8th Cir. 1988).
186 *Id.* at 495.
187 *Id.*
188 *Id.*
189 *Id.* at 495-96.
190 *Id.* at 496.
191 *Id.* at 497.
192 *Id.* at 496.
193 See infra Part IV.A.1 (discussing cases that treat the issue as one of jurisdiction).
194 *Chris*, 221 F.3d at 654-55.
conclusion, and dismissing the plaintiff’s fees-only suit.\textsuperscript{196} Thus, the Eighth Circuit’s statutory-authority approach is not a popular one.

Notwithstanding that it has not spread like wildfire, the question remains whether the statutory-authority approach adequately solves the additional-remedy puzzle. As above, the matter is at least initially one of statutory interpretation, and the same Supreme Court precedents once again must be examined. In the end, it seems that the statute does not permit such suits at all, and the Supreme Court’s decisions support this conclusion.

b) Statutory analysis of the fee provision.

The exercise in statutory interpretation again begins with inquiry into the plainness or ambiguity of the language.\textsuperscript{197} A reexamination of the statute in question is therefore imperative. The fee provision states: “In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee (including expert fees) as part of the costs . . . .”\textsuperscript{198} The question is whether this statute plainly permits or prohibits an independent fees-only suit. Or is it ambiguous?

The primary focus here is upon the language “[i]n any action or proceeding under this subchapter.” The Jones court concluded that these terms encompassed an independent suit, but without parsing the words in any detail.\textsuperscript{199} Instead, the court focused singularly on the term “proceedings,” finding evidence in the legislative history it is meant to include events at the state administrative level.\textsuperscript{200} The court therefore concluded that because Title VII aims to provide complete relief for aggrieved parties, the fee provision must permit a fees-only suit.\textsuperscript{201}

While this analysis offers the appeal of a foundation in the statutory language, buttressed by reinforcement in the legislative goals and history, it is nevertheless incomplete and therefore inadequate. As a threshold matter, the fact (as it may or may not be) that the term “proceedings” includes state administrative actions does not equate with provision for an independent suit. That is, even if fees incurred in state administrative proceedings are recoverable in a Title VII suit, those fees still may not be recovered in an independent action, absent any substantive claim for relief. Interpretation of the term “proceedings” to include state administrative actions therefore does not answer the question.

\textsuperscript{196} Hansson, 315 F. Supp. 2d at 51 (“The Court finds that the plain language and purposes of Sections 706(f)(3) and 706(k) comport more readily with the view that an action solely for attorneys’ fees, after an agreement between the parties has put to rest any substantive Title VII dispute, is not within the subject matter jurisdiction of the federal district courts.”).
\textsuperscript{197} See supra notes __ to __ and accompanying text (discussing rules of statutory interpretation).
\textsuperscript{198} 42 U.S.C. § 2000e-5(k).
\textsuperscript{199} 857 F.2d 494, 497 (8th Cir. 1988).
\textsuperscript{200} Id. (“Title VII uses the term ‘proceedings’ to describe the state action desired under a system of deferrals, suggesting that state administrative proceedings were adequate triggers for attorney’s fees”).
\textsuperscript{201} Id. at 497-99.
Contrary to the conclusion reached by the Jones court, the plain statutory language actually suggests that independent suits are precluded. The statute provides that fees may be awarded “in any action or proceeding under [Title VII].” As such, it permits the court to award fees in a Title VII action, but does not authorize a suit solely for that purpose. If Congress desired that result, it easily could have achieved it by adding express provision for a fees-only suit – e.g., by adding the clause “or an independent action solely for that purpose” after the phrase quoted above. Instead Congress expressly provided only that fees may be recovered in a Title VII action. An “action under [Title VII]” consists of a suit alleging discrimination or retaliation under 42 U.S.C. §§ 2000e-2(a) or 2000e-3. Title VII does not authorize an independent fees-only suit on this view.

At first blush, it might appear that this conclusion contradicts the conclusion reached above with respect to the meaning of the terms “action under” in the subject-matter provision of Title VII. The apparent inconsistency does not exist, though. The jurisdiction provision confers upon the district courts power to hear cases arising under Title VII. That may encompass an action under any provision of Title VII that authorizes a cause of action. Whether the fee provision authorizes a cause of action is therefore an entirely separate question. The fee provision allows recovery of fees in Title VII actions, but does not itself create an independent cause of action for that purpose. Thus, Title VII’s jurisdictional grant could encompass an independent fees-only suit, but only if the statute created such a cause of action. As discussed above, it apparently does not.

c) The Supreme Court precedents.

The pertinent Supreme Court precedents support the conclusion that Title VII does not authorize an independent fees-only suit. Again, as above, the Court’s decisions in New York Gas Light Club, Inc. v. Carey and North Carolina Department of Transportation v. Crest Street Community Council, Inc. control. Indeed, the Eighth Circuit relied directly upon the Carey decision in reaching its conclusion that Title VII

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203 The plain language of the statute also suggests that fees incurred in state administrative proceedings are not recoverable at all. By providing for recovery of fees “in an action or proceeding under [Title VII],” it permits recovery of fees incurred in Title VII actions, but not in actions under other laws, like the state anti-discrimination laws that give rise to state administrative proceedings. The Supreme Court’s decision in New York Gas Light Club, Inc. v. Carey relies upon a contrary conclusion. 447 U.S. 54, 63 (1980) (“The conclusion that fees are authorized for work done at the state and local levels is inescapable”). Thus, accepting this view would depart from Supreme Court precedent, and perhaps even require overruling it. Because, however, the plain language suggests that the statute does not encompass an independent fees-only suit to begin with, it is not necessary to wrestle with the Court’s decision in order to resolve this issue.
204 See supra notes __ to __ and accompanying text (discussing interpretation of Title VII’s jurisdictional grant).
207 479 U.S. 6 (1986).
authorizes a fees-only suit, but its reliance upon Carey was misplaced. Moreover, that court failed to take sufficient account of the Crest Street case.

The Supreme Court’s decision in Carey does not answer whether Title VII authorizes an independent fees-only suit because the plaintiff in that case included claims of Title VII discrimination in her original federal complaint. The case therefore did not involve a fees-only suit. It became a fees-only suit when the parties agreed to dismiss all of plaintiff’s substantive claims, but it did not begin that way. Thus, the Court’s decision does not address Title VII’s provision, or not, for an independent fees action. Indeed, Justice Stevens, in his concurrence, expressly recognized this limitation on the Court’s decision: “It is by no means clear that the statute, which merely empowers a ‘court’ to award fees, would authorize a fee allowance when there is no need for litigation in the federal court to resolve the merits of the underlying dispute. … In any event, the facts of this case present no occasion for the Court’s resolution of the issue.”

The Court’s decision simply did not approach that question.

The Court came closer to answering that question six years later in the Crest Street decision. There, the Court held that Section 1988 does not authorize a fees-only suit. To the extent that the language of Section 1988 closely parallels the fee provision of Title VII, the Crest Street decision suggests that the same result should attain under that statute. Crest Street does not, however, provide a definitive answer. First, that case arose under a different statute – Section 1988, the fee-shifting provision generally applicable in federal civil rights actions, rather than Section 2000e-5(k), the provision specific to Title VII. As such, while it is certainly persuasive authority, the Court’s decision in Crest Street does not necessarily bind the courts in Title VII cases. This is especially so because, while the language of Section 1988 is similar to Title VII, it is not identical, and the differences are important. Section 1988 authorizes a court to award fees to the prevailing party “[i]n any action or proceeding to enforce a provision of … Title VI of the Civil Rights Act of 1964.” The statute explicitly provides that the action in which fee-shifting may occur must be one “to enforce a provision” of one of the applicable civil rights law. Title VII, by contrast, refers only to “an action or proceeding under [that statute].” It is less explicit that the action must be one to enforce rights conferred thereunder. As such, one might argue that Crest Street leaves ample room for a contrary conclusion under Title VII. At a minimum, it does not compel either result.

Notwithstanding that the Supreme Court has not provided direct instruction, the most plausible result nevertheless seems to be that Title VII does not permit a fees-only

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208 447 U.S. at 58.
209 Id. at 59.
210 Id. at 72 (Stevens, J., concurring).
211 N.C. Dep’t of Transp., 479 U.S. at 15 (“Under the plain language and legislative history of § 1988, however, only a court in an action to enforce one of the civil rights laws listed in § 1988 may award attorney’s fees”).
suit. The plain language of the statute suggests this result.\(^{214}\) The *Carey* decision does not preclude it, leaving open the question of suits that seek only fees from the outset. And, the Court’s subsequent holding in *Crest Street*, interpreting a similar statute, makes this conclusion all the more likely. The issue is ripe for decision by the Court in the Title VII context, and the Court is likely to address it when the “right” case arises, squarely presenting the issue.\(^{215}\)

B. **Applicable Preclusion Rules.**

Having untangled the statutory-authority portion of the additional-remedy-cases thread, only the question of preclusion remains. The cases comprising this thread involve claims for relief beyond that recovered in related state proceedings, excluding the fees-only suits discussed in the preceding section, and arise after entry of a final judgment by a state court.\(^{216}\) While the statutory provisions discussed above govern in the fees-only suits, preclusion rules will control in the remaining cases. The focus of the inquiry is upon the preclusive effect of a state-court judgment entered on appeal from an administrative determination.

The seminal circuit court case presenting these issues is the Second Circuit’s decision in *Nestor v. Pratt & Whitney*.\(^{217}\) As discussed above,\(^{218}\) the *Nestor* plaintiff prevailed on her state-law sex discrimination claims at the administrative level and in the defendant-employer’s state-court appeals.\(^{219}\) She subsequently brought a federal lawsuit under Title VII, seeking compensatory damages, punitive damages, attorney fees and prejudgment interest – remedies that were not available to her under state law.\(^{220}\) The district court granted defendant’s motion for summary judgment on grounds claim preclusion barred relitigation of the discrimination claims resolved in the state proceedings.\(^{221}\) The Second Circuit, noting that the issue presented a split among the circuit courts of appeals,\(^{222}\) rejected the district court’s conclusion.\(^{223}\) The court determined that plaintiff Nestor’s Title VII claims survived, whether federal or state preclusion law controlled.\(^{224}\)

\(^{214}\) *See Supra* Part IV.A.2(b) (interpreting plain language of Title VII’s fee-shifting provision to preclude independent fees-only suit). *See generally* Davidson, *supra* note __, at 450-51 (concluding that Supreme Court intended its holding in *Crest Street* to apply in Title VII cases).

\(^{215}\) The Court declined to foray into this arena by denying the plaintiff employee’s petition for a writ of certiorari from the United States Courts of Appeals for the Fourth Circuit in *Chris v. Tenet*. 531 U.S. 1191 (2001). No such opportunity arose in conjunction with the more recent Seventh Circuit case, *Nestor v. Pratt & Whitney*, in which the defendant employer did not seek certiorari. 466 F.3d 65 (2nd Cir. 2006).

\(^{216}\) As discussed above, Title VII does not authorize a suit seeking solely attorney fees incurred in state proceedings. *Supra* Part IV.A.2.

\(^{217}\) 466 F.3d 65 (2nd Cir. 2006).

\(^{218}\) *See supra* Part IV.A.1 (discussing facts of *Nestor* case).

\(^{219}\) *Nestor*, 466 F.3d at 68.

\(^{220}\) *Id.* at 68-69.

\(^{221}\) *Id.* at 69.


\(^{223}\) *Nestor*, 466 F.3d at 70.

\(^{224}\) *Id.*
The Seventh Circuit has taken a similar approach. In *Patzer v. Board of Regents*, the plaintiff prevailed on his sex and race discrimination claims in state administrative proceedings, and the state courts affirmed those findings.\(^{225}\) He subsequently filed a federal lawsuit under Title VII, seeking back pay that had not been available under state law. The district court granted summary judgment on grounds the claim was barred, but the United States Court of Appeals for the Seventh Circuit reversed.\(^{226}\) The court concluded that the Title VII suit asserted the same “claim” as the state action, so that the judgment of the state court should bar plaintiff from proceeding.\(^{227}\) The court went on, however, to find that the law of Wisconsin, which applied by virtue of the Supreme Court’s command in *Kremer v. Chemical Construction Corp.*, would recognize a policy-based exception “to general rule of res judicata on the peculiar facts of this case.”\(^{228}\) Barring plaintiff’s claims would frustrate Title VII’s “policy of referral and deferral,” by which proceedings under Title VII are “supplementary to available state remedies for employment discrimination.”\(^{229}\) Application of claim preclusion would prevent plaintiff from obtaining “complete relief” by rendering the back pay remedy wholly unavailable, contrary to Title VII policy.\(^{230}\) The court therefore permitted plaintiff’s duplicative litigation to proceed.\(^{231}\)

Both of these cases properly note the pertinence of the Supreme Court’s decision in *Kremer v. Chemical Construction Corp.*,\(^ {232}\) but neither applies it correctly. The Supreme Court’s decision in *Kremer* commands unequivocally that courts give full faith and credit to state-court judgments in Title VII cases.\(^ {233}\) The application of state preclusion law will cause the result to vary from state to state, but the same prevailing policy concerns should apply nationwide. Thus, where the governing state’s preclusion rules leave wiggle room, the court should take account of Title VII’s policy against inefficiency and duplicative litigation, as reflected in the legislative history. These policy concerns, coupled with traditional notions of fairness, militate heavily against permitting a plaintiff to manipulate Title VII’s deferral scheme by seeking a liability determination in the perhaps-friendlier state forum, then pursuing additional remedies in federal court.

1. *Kremer’s Full-Faith-and-Credit Command*

The Supreme Court’s decision in *Kremer v. Chemical Construction Corp.* unequivocally decrees that the federal full-faith-and-credit statute applies in Title VII cases.\(^ {234}\) The Court carefully considered whether Title VII in some way repealed Section

\(^{225}\) 763 F.2d 851, 853-54 (7th Cir. 1985).
\(^{226}\) Id. at 858.
\(^{227}\) Id. at 856.
\(^{228}\) Id.
\(^{229}\) Id. at 856-58.
\(^{230}\) Id. at 856, 858.
\(^{231}\) Id. at 858.
\(^{233}\) Id. at 485.
\(^{234}\) 456 U.S. 461, 468-70 (1982).
1738 and determined that it did not.\textsuperscript{235} To that end, the Court found no conflict between Title VII and Section 1738, concluding instead that the statutes complement one another well.\textsuperscript{236} This interpretation, according to the Court, avoided an anomalous result. That is, absent Section 1738’s full-faith-and-credit directive, the finality of state-court decisions “would depend upon which side prevailed in a given case”\textsuperscript{237} — a judgment favorable to plaintiff would remain final, while a judgment against her would yield to her inevitable subsequent federal-court suit. These concerns led the Court to conclude that Title VII did not effect an implied repeal of Section 1738, and the statutes should operate together.\textsuperscript{238}

The Court bolstered its conclusion by reference to pertinent legislative history.\textsuperscript{239} Specifically, the Court found ample evidence in the legislative debates surrounding both the original enactment and the 1972 amendments that Congress intended to leave the full faith and credit statute in tact in Title VII cases. Most significant for these purposes were comments suggesting that Congress did not intend full litigation of a single claim in multiple forums.\textsuperscript{240} Perhaps the best indication of Congress’s vision arose in conjunction with the 1972 amendments, described by the Court:

An important indication that Congress did not intend Title VII to repeal § 1738’s requirement that federal courts give full faith and credit to state court judgment is found in an exchange between Senator Javits, a manager of the 1972 bill, and Senator Hruska. Senator Hruska, concerned with the potential for multiple independent proceedings on a single discrimination charge, had introduced an amendment which would have eliminated many of the duplicative remedies for employment discrimination. Senator Javits argued that the amendment was unnecessary because the doctrine of res judicata would prevent repetitive litigation against a single defendant:

\begin{quote}
[T]here is the real capability in this situation of dealing with the question on the basis of res judicata. In other words once there is a litigation – a litigation started by the Commission, a litigation started by the Attorney General, or a litigation started by the individual – the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted. . . .
\end{quote}

\begin{thebibliography}{9}
\bibitem{235} Id.
\bibitem{236} Id.
\bibitem{237} Id. at 470.
\bibitem{238} Id.
\bibitem{239} The Court was quick to point out that resort to legislative history was unnecessary given the compatibility between Title VII and Section 1738. \textit{See Kremer}, 456 U.S. at 470 (“Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatibility between Title VII and § 1738 is enough to answer our inquiry”).
\bibitem{240} Id. at 473-74.
\bibitem{241} \textit{Kremer}, 456 U.S. at 475 (quoting 118 Cong. Rec. 3370 (1972)).
\end{thebibliography}
The Court also quoted Senator Williams, described as “another proponent of the 1972 bill”: “I do not believe that the individual claimant should be allowed to litigate his claim to completion in one forum, and then if dissatisfied, go to another forum to try again.” The plain import of this legislative history therefore reinforced the conclusion that the Court reached by reference to the statutes themselves – Title VII did not supplant Section 1738. As such, the command of Kremer is clear and indubitable: the federal courts must give full faith and credit to state court judgments in Title VII cases.

While Kremer did not expressly overrule the Court’s earlier decision in New York Gas Light Club, Inc. v. Carey, its holding clarified the limited scope of Carey’s import. The Carey Court held that a plaintiff who prevailed in state administrative proceedings could recover attorney fees incurred there in a subsequent federal court suit. A broad reading of that decision would permit a Title VII fees-only suit in any such case, and could even be construed to condone pursuit of any other additional remedies that were not available in prior state proceedings. Kremer, however, made clear that Carey does not sweep so broadly. As discussed above, Kremer instructs the federal courts to accord full faith and credit to state-court judgments in Title VII suits. A court cannot obey this directive while simultaneously applying a broad reading of Carey because according full faith and credit to the state judgment often means giving it claim-preclusive effect. Where the state judgment receives claim-preclusive effect, it should bar relitigation of the same claim, whether the available remedies differ or not. The plaintiff’s discrimination claims merge into her prior suit, and the judgment rendered in that suit bars her from pursuing the same claims repetitively.

A narrower reading of Carey better comports with the Court’s subsequent decision in Kremer. The Carey Court held only that a plaintiff who prevails in state administrative proceedings can pursue the attorney fees she incurred there in a subsequent federal court suit. The case presented no preclusion issues and therefore says nothing about how they should be resolved. Kremer subsequently addressed preclusion in the Title VII context, and remains controlling precedent on that issue.

The Second Circuit in Nestor v. Pratt & Whitney misapplied Kremer by giving the Court’s decision in Carey too much weight. The Nestor court expressly rejected the defendant’s argument that Kremer eroded Carey, reconciling the cases by limiting Kremer’s reach: “[W]e can read the two cases together as holding that a state court’s decision on the merits of a discrimination claim is entitled to full faith and credit, but that Title VII permits a claimant to seek – in federal court – ‘supplemental’ relief that was

242 Id. at 476 (quoting 118 Cong. Rec. 3372 (1972)).
243 N.Y. Gas Light Club, Inc. v. Carey, 447 U.S. 54, 61 (1980); see also supra notes 239 to 239 (discussing Carey decision in some detail).
244 Id. at 475-76.
245 The preclusive effect of the state judgment is, of course, determined by the law of the state that rendered it. See Kremer, 456 U.S. at 461; Maresse v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 373-74. The effect of typical state preclusion law, and the policy concerns that should influence it, are discussed infra Parts IV.B.2-3.
246 Carey, 447 U.S. at 71.
unavailable in the state court.”247 The court’s rationale not only denigrates Kremer’s clear command but also flies in the face of critical policy concerns.

The Court in Kremer placed no qualifications or limits on its determination that state-court judgments deserve full faith and credit in federal Title VII suits.248 The Nestor court would limit that holding, rendering it inapplicable when the plaintiff seeks additional remedies.249 Indeed, its decision could even be construed to suggest that state-court judgments deserve issue-preclusive effect in Title VII cases – so that the state’s “decision on the merits of the discrimination claim is entitled to full faith and credit” – but that claim preclusion does not apply. From this vantage, the court would give full faith and credit to the state’s liability determination but allow the plaintiff to proceed on identical claims for separate relief. The plaintiff could have her cake and eat it too, relying upon Kremer’s full faith and credit to her benefit, without suffering its burden. The Court’s decision in Kremer, however, neither suggests nor permits such an approach. The Full Faith and Credit Statute includes no additional-relief exception, and Kremer leaves no room to apply one.

The policy concerns that prevailed in Kremer likewise implore that the Nestor court’s reading is implausible. The Kremer Court emphasized that Title VII’s drafters did not envision an inefficient system that fostering duplicative litigation.250 Quite the contrary: “Nothing in the legislative history of the 1964 Act suggests that Congress considered it necessary, or desirable, to provide an absolute right to relitigate in federal court an issue resolved by a state court.”251 In addition to the Senate commentary excerpted above,252 the Court also highlighted the remarks of a principal drafter of the original 1964 Senate bill:

Senator Dirksen . . . stated in no uncertain terms his desire to avoid multiple suits arising out of the same discrimination: ‘What a layering upon layer of enforcement. What if the court orders differed in their terms or requirements? There would be no assurance that they would be identical. Should we have the Federal forces of justice pull on the one arm, and the State forces of justice tug on the other? Should we draw and quarter the victim?’253

The import of these excerpts is clear: Title VII’s referral and deferral scheme should not breed multiple suits. And uncompromising loyalty to Section 1738’s full-faith-and-credit command best yields this result.

247 Nestor, 466 F.3d at 72.
248 Kremer, 456 U.S. at 468-69.
249 Nestor, 466 F.3d at 72.
250 Kremer, 456 U.S. at 473-78.
251 Id. at 473.
252 See supra notes ___ to ___ and accompanying text (discussing portions of legislative history relied upon by Court in Kremer).
253 Kremer, 456 U.S. at 475 n.14 (quoting 110 Cong. Rec. 6449 (1964)).
The Kremer Court found that strict adherence to Section 1738 not only promotes the efficiency concerns expressed by Title VII’s drafters but also supports the “comity and federalism interests embodied in [Section] 1738.”

Responding to the plaintiff’s concern that according full faith and credit to state-court judgments will “deter claimants from seeking state court review of their claims ultimately leading to a deterioration in the quality of the state administrative process,” the Court found countervailing considerations more persuasive:

On the contrary, stripping state court judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by state officials. Depriving state judgments of finality not only would violate basic tenets of comity and federalism, . . . but also would reduce the incentive for States to work towards effective and meaningful antidiscrimination systems.

The Court’s decision in Kremer therefore left little to no room for variation. The language of Title VII and Section 1738 both suggest that federal courts should accord state judgments full faith and credit, and prevailing policy concerns of efficiency, federalism and comity compel that result.

Subsequent Supreme Court decisions make plain that Kremer’s directive applies without limitation. Maresse v. American Academy of Orthopaedic Surgeons is exemplary. There, the Court not only cited Kremer approvingly, but also relied upon its analytical framework. The Maresse Court framed the Kremer holding broadly: “Kremer indicates that [Section] 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment.” The Court went on to apply that same principle in the case at hand, concluding that state preclusion law should govern the effect of a state judgment rendered on a claim within the exclusive jurisdiction of the federal courts. The Court’s decision in Maresse embodies the enduring and pervasive impact of Kremer’s resolve.

Like the Second Circuit in Nestor, the Seventh Circuit in Patzer also gave insufficient weight to Kremer’s edict. The Patzer court accurately described Kremer’s holding in broad terms, citing Kremer for the proposition that “[i]n general, a judgment affirming an administrative decision is res judicata as to the claims adjudicated, no less than a judgment entered after a trial on the merits.” The court went on, however, to discredit Kremer’s import on the facts of the case, suggesting it “would frustrate the

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254 Kremer, 456 U.S. at 478.
255 Id.
257 Id. at 381.
258 Id. at 384-86.
259 Id.; see also Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 373 (1996) (“Federal courts may not ‘employ their own rules . . . in determining the effect of state judgments,’ but must ‘accept the rules chosen by the State from which the judgment is taken’ ”) (citing Kremer, 456 U.S. at 481-82).
260 Patzer, 763 F.2d at 858.
supplementary purpose of Title VII as surely as treating the administrative decision itself as a bar. K remer’s full-faith-and-credit directive is not optional, though, and it leaves no room for such loose, policy-based erosions. In casting aside the Kremer rule, the court disregarded controlling precedent without sufficient reason.

The Patzer court attempted to further justify its deviance from the Supreme Court’s precedent on grounds adherence to the Kremer full-faith-and-credit rule would create an “anomaly: a complainant who prevailed [in administrative proceedings] without suffering an appeal to state court would be entitled to seek supplementary Title VII remedies in state court, but one who prevailed [administratively] and prevailed again on appeal in state court could not.” This is indeed a possibility under Kremer. However anomalous this scenario may be, though, it results directly from unbending rule the Court established. Unless and until either the Supreme Court or Congress changes this rule, it remains in effect. The Patzer court’s disregard of it lacks foundation. Kremer directs federal district courts to accord full faith and credit to state-court judgments in Title VII cases. In that respect, its rule is absolute.

2. The Import of Typical State Preclusion Rules.

The Kremer Court’s unequivocal full-faith-and-credit command leaves room for variation only under the law of the state that rendered the original judgment. Because each state follows its own preclusion rules, sweeping proclamations about the outcome in every Title VII case are not possible. Many states, however, have adopted the rules reflected in the Second Restatement of Judgments, or close approximations thereof. Thus, discussion of the governing principles in a Restatement jurisdiction is appropriate. Application of the Restatement preclusion rules should bar a plaintiff from splitting her claim between the state and federal forums in most cases, especially in light of pertinent policy concerns.

a) The core concepts of merger and bar.

The crucial starting point in these cases is the Restatement’s rule against splitting claims that arise from the same transaction. Section 24(1) of the second Restatement of Judgments directs that “[w]hen a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar…, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.” Paragraph two of the same section offers further insight about the requisite relatedness: “What factual grouping constitutes a ‘transaction,’ and what groupings constitute a ‘series,’ are to be determined pragmatically, giving weight to such

261 Id.
262 Id.
263 See Nestor, 466 F.3d at 73; Fayer v. Town of Middlebury, 258 F.3d 117, 124 (2nd Cir. 2001); Staats v. County of Sawyer, 220 F.3d 511, 515-16 (7th Cir. 2000); Simmons v. New Pub. Sch. Dist. No. Eight, 251 F.3d 1210, 1214 (8th Cir. 2001).
264 Restatement (second) of Judgments § 26(1) (1982).
considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.”

It is indubitable that a discrimination plaintiff’s additional-remedy claims satisfy this definition. In the typical additional-remedy case, a plaintiff seeks a compensatory or punitive damage award for which the state law applicable in prior proceedings did not provide. For example, in Nestor v. Pratt & Whitney, the plaintiff sought attorney fees, compensatory damages for emotional distress, and punitive damages after recovering only back pay and interest in state proceedings. The plaintiff in Patzer v. Board of Regents sought back pay and attorney fees in federal court to supplement the injunctive relief he obtained at the state level. In both cases, no one doubted that the plaintiff’s federal suit arose from the same transaction as the claims pursued in state proceedings. Each plaintiff simply sought to recover additional relief on the exact same claim of discrimination adjudicated previously. This would likely be the case in most any additional-remedies case comprising this thread of the web.

b) The jurisdictional-limit exception.

Both the Nestor and Patzer courts avoided the import of the merger rule by applying an exception found in Section 26(1)(c) of the Second Restatement. That provision rescues claims otherwise barred under the general rule when “[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.”

The Nestor court, applying Connecticut law, and the Patzer court, adhering to the law of Wisconsin, both found this exception controlling, and permitted the plaintiff to proceed in her additional-remedy suit as a result.

The error of these courts, and any others similarly situated, lies in their failure to take sufficient account of the circumstances giving rise to the plaintiff’s suit and the plaintiff’s control over them. That is, while the Restatement does provide an exception to the rule against claim splitting when the court that rendered the original judgment lacked jurisdiction to entertain or award certain remedies, the exception should not apply when the plaintiff’s free choice led it to that forum. The Restatement is not express on this

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265 Id. at § 26(2).
266 Nestor, 466 F.3d at 67.
267 Patzer, 763 F.2d at 853.
268 Nestor, 466 F.3d at 73; Patzer, 763 F.2d at 855.
269 Restatement (second) of Judgments § 26(1)(c) (1982).
270 Nestor, 466 F.3d at 73-74 (quoting Restatement (second) of Judgments § 26(1)(c) (1982)); Patzer, 763 F.2d at 857 (“In general, res judicata does not operate to bar matters that were not raised before the administrative agency and over which it did not have jurisdiction”).
271 Strickland v. City of Albuquerque, 130 F.3d 1408, 1412-13 (10th Cir. 1997) (refusing to apply Restatement § 26(1)(c) exception to plaintiff’s federal constitutional claims because they could have been asserted in state court proceedings on review of related administrative determination); Waid v. Merrill Area
point, but implies it by limiting the jurisdictional-limit exception to those cases in which plaintiff never had the opportunity to assert the related claims:

The general rule [against claim splitting] of § 24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant’s presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first. … The formal barriers referred to may stem from limitations on the competency of the system of courts in which the first action was instituted, or from the persistence in the system of courts of older modes of procedure—the forms of action or the separation of law from equity or vestigial procedural doctrines associated with either.\textsuperscript{272}

By implication, where the plaintiff did have the option to take her case to a different forum, her failure to do so should bar her from splitting her claims. Section 25 of the Restatement bolsters this result:

As the result of a single transaction or a connected series of transactions giving rise to a unitary claim, the plaintiff may be entitled to a number of alternative or cumulative remedies or forms of relief against the defendant. In a modern system of procedure it is ordinarily open to the plaintiff to pursue in one action all the possible remedies whether or not consistent, whether alternative or cumulative, and whether of the types historically called legal or equitable. … Therefore it is fair to hold that after judgment for or against the plaintiff, the claim is ordinarily exhausted so that the plaintiff is precluded from seeking any other remedies deriving from the same grouping of facts.\textsuperscript{273}

\textsuperscript{272} Rest. 2d Judg. § 26 cmt. c.
\textsuperscript{273} Id. § 25 cmt. f.
The referral and deferral scheme of Title VII requires only that the EEOC refrain from acting on a charge for sixty days, in order to give any applicable state agency time to consider and act upon the complainant’s claims. After the expiration of that sixty-day period, the complainant is free to pursue her claim in the federal system and drop her state charge at any time. Further, a plaintiff who continues to pursue her claims in the state system is not necessarily precluded from seeking any relief available under Title VII once the claims reach the state courts. While the state administrative agencies might lack jurisdiction to decide any claims under Title VII, it is clear that the state courts would not – the Supreme Court has declared unequivocally that Title VII claims do not lie within the exclusive jurisdiction of the federal courts. Thus, most cases will present plaintiff the option to either drop her state claim entirely and pursue remedies in the federal system, or to add Title VII claims once the case reaches the state courts. Whenever these choices became available but were bypassed, the Restatement’s jurisdictional-limit exception should not apply.

Although no court has properly applied these rules in a Title VII additional-remedies case of the sort relevant here, several courts have applied them properly in other contexts. The Tenth Circuit’s decision in Strickland v. Albuquerque affords an excellent example. The plaintiff in Strickland pursued employment discrimination claims in the state administrative system. Dissatisfied with the agency’s finding that his employer had just cause to terminate his employment and in accordance with applicable New Mexico law, the plaintiff appealed the agency determination in the New Mexico state courts. Both the state district court and the state court of appeals affirmed the agency’s findings, resulting in entry of a final judgment against him. When plaintiff then pursued a federal-court civil rights claim under 42 U.S.C. § 1983 arising out of the same events, the employer sought summary judgment on grounds the claim was barred by res judicata. The district court granted the employer’s motion, and the plaintiff appealed. The Tenth Circuit affirmed, rejecting plaintiff’s contention that the jurisdictional limitations of the original state administrative forum except related federal claims from the usual claim preclusion bar. Even though the plaintiff might not have been able to assert his § 1983 claim in the state administrative proceedings, he could have joined it to the state-court suit. Because he chose not to, claim preclusion bars him from pursuing it later.

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275 Whether the state agencies might have jurisdiction to hear Title VII claims is a question of state law that lies mostly beyond the scope of this Article. This Article proceeds on the assumption that the does not. If they possessed such jurisdiction, though, it seems clear that the Restatement § 26(1)(c) jurisdictional-limit exception would not apply, and preclusion would bar plaintiff’s subsequent Title VII suit.
277 130 F.3d 1408 (10th Cir. 1997).
278 Id. at 1410.
279 Id.
280 Id.
281 Id.
282 Id. at 1410-11.
283 Id. at 1412-13.
284 Id. at 1412.
The Strickland court does not address directly the kind of choice that plaintiffs pursuing discrimination claims covered by Title VII have – i.e., to opt out of the state administrative forum after expiration of the 60-day deferral period, in favor of a forum (state or federal) that can hear her Title VII claims. But its holding is nevertheless instructive. The core principle underlying the Strickland case, and others like it, is that when the plaintiff fails to pursue related claims by virtue of her own choice – whether that is a choice of forum, a choice of pleading, or otherwise – she cannot pursue the selectively omitted claims in a subsequent proceeding. This is the essence of preclusion doctrine.

The Strickland decision also raises another important point about the choices plaintiffs face in the additional-remedy cases with which this Article is concerned. That is, even if the plaintiff doesn’t opt out of the state administrative forum, she still could choose to assert her Title VII claim if and when the claim reaches the state courts. Just like the state court in Strickland would have had jurisdiction over the plaintiff’s § 1983 claim, so the state courts would likely have jurisdiction over Title VII claims in proceedings on review of agency findings.285

The additional-remedy plaintiffs in both Nestor and Patzer faced these choices and opted to forego federal remedies. The Nestor court was explicit in this regard: “Nestor had a choice: she could pursue the [state administrative] proceeding, or after passage of a ‘deferral’ period, she could have requested a ‘right to sue’ letter and brought an action in state or federal court to recover full relief.”286 The Patzer court did not address plaintiff’s choice in this regard, and the procedural history of that case is a bit murkier.287 The plaintiff did not, however, begin to pursue his federal remedies until some ten years after filing his initial charge, when he finally requested and received a right-to-sue letter from the EEOC.288 During the passage of that ten-year period, the state agency adjudicated his initial claim, two state courts affirmed those findings on appeal, and he filed a separate state-court suit.289 At no point during that process did he ever attempt to pursue federal remedies. He surely could have done so much sooner, but he elected instead to allow is federal claims to lie dormant. These courts erred in failing to take account of these choices, and the errors have substantial policy implications.

c) Law and policy against the jurisdictional-limit exception.

To apply the Restatement’s 26(1)(c) jurisdictional-limit exception blindly would do a disservice to Title VII, the Supreme Court’s pronouncements, and fairness and efficiency concerns. First, as discussed above, Kremer says that § 1738 controls in Title VII suits. Nothing about the Court’s opinion in Kremer suggests that command should

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285 This would likely be determined by the applicable state law.
286 Nestor, 466 F.3d at 68.
287 Patzer, 763 F.2d at 853-54.
288 Id. at 854.
289 Id.
vary depending upon whether claim preclusion or issue preclusion applies, but that is just what would happen if the jurisdictional-limit exception prevails. A plaintiff would be free to pursue her transactionally-related claims without regard to claim preclusion doctrine, but could rely upon issue preclusion freely to establish the defendant’s liability. The *Kremer* Court, however, was explicit about its abhorrence for such inefficiency:

Nothing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court. While striving to craft an optimal niche for the States in the overall enforcement scheme, the legislators did not envision full litigation of a single claim in both state and federal forum.290

The Court bolstered this conclusion with multiple citations to Title VII’s legislative history, each making plain that Congress never envisioned the kind of claim-splitting that proponents of the *Nestor* approach condone.291

Fairness concerns also necessitate adhering to preclusion rules when perceived jurisdictional defects that might suggest application of the Restatement 26(1)(c) exception result from the plaintiff’s choice of forum. State administrative proceedings offer certain advantages to plaintiffs. The Connecticut law applied in *Nestor* provides an example. There, the court acknowledged that the plaintiff benefited from representation by staff counsel at a substantial cost savings over a private attorney, “flexible evidentiary rules, no requirement of discovery, and speed[ier] proceedings.”292 Common systemic distinctions like these render it extraordinarily unfair to permit a plaintiff who opts to pursue her claims in a friendlier forum to then subject the defendant to additional, duplicative litigation in order to pursue supplemental remedies that were not available in the forum she chose. That fairness problem is exacerbated when the court in the subsequent suit accords the original judgment full faith and credit only selectively, by allowing the plaintiff’s duplicative claim to proceed (i.e. refusing to bar it under claim preclusion) and then permitting her to rely upon issue preclusion to establish the defendant’s liability. This fairness problem plagued the *Nestor* court’s decision, but the court’s faulty rationale should not endure.293


291 *Id.* at 474 n.14 (citing Congressional Record for proposition that Title VII’s principal drafter “desire[d] to avoid multiple suits arising out of the same discrimination”); *id.* at 475 (“[O]nce there is a litigation…the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum can be permitted.” (quoting 118 Cong. Rec. 3370 (1972) (comments of Sen. Javits)); *id.* at 476 (“[I] do not believe that the individual claimant should be allowed to litigate his claim to completion in one forum, and then if dissatisfied, go to another forum to try again.”) (quoting Cong. Rec. 3372 (1972) (comments of Sen. Williams)).

292 *Nestor*, 466 F.3d at 68.

293 *Id.* at 72; see also supra notes to (discussing *Nestor* court’s erroneous reconciliation of *Kremer* and *Carey* so as to permit a plaintiff to seek supplemental Title VII remedies while relying upon the prior administrative liability determination).
Precluding a plaintiff from duplicating her claims when she has a choice of forum is also not inconsistent with federalism principles, contrary to the suggestion of this view’s opponents. It is true that barring her Title VII claims in these circumstances may incentivize her to abandon the state administrative forum at the earliest opportunity. But that does not mean she must jettison the state system altogether. She can still invoke the protections her state affords by filing a lawsuit in its courts. The federal-state balance underlying Title VII remains in tact.

Once a plaintiff bypasses the opportunity to pursue Title VII remedies in state or federal court, choosing instead the advantages of the friendlier state administrative forum, preclusion rules should bar her from proceeding under Title VII in a subsequent suit. Kremer dictates this result by requiring federal courts to accord state judgments full faith and credit in Title VII cases. As the Kremer Court recognized, the original drafters of Title VII did not intend that its referral and deferral scheme perpetuate multiplicity of litigation. To the contrary, the legislative history shows that Congress intended to afford the discrimination plaintiff the right to pursue her grievance under any applicable state law, while offering her the option to pursue a federal claim instead when she perceives the state system as in some way inadequate.\footnote{Kremer, 456 U.S. at 470-76 (discussing legislative history of Title VII and the disfavor of duplicative litigation that it reflects); see also supra notes ___ to ___ and accompanying text (discussing same).} Fairness concerns amply support the policy against inefficiency and multiplicity that Title VII reflects. The law affords plaintiff a choice to pursue relief under state law, under federal law or both, but it does not allow her to manipulate the system by seeking separate remedies in sequence. A plaintiff cannot have her cake and eat it too.

C. The Heart of the Matter: The Disentanglement’s Revelation About the Circuit Split.

Unraveling the final threads of the web leads to an important revelation about the apparent split among the circuit courts of appeals. As mentioned above, the Nestor decision attracted some attention among legal commentators because of the circuit split that it referenced.\footnote{See Current Circuit Splits, 3 SETON HALL CIRCUIT REVIEW 507, 517 (2007); Employment Discrimination – Procedure: Title VII Plaintiff Who Wins at State Level Obtains Supplemental Relief in Federal Court, 75 U.S.L.W. 1200 (Oct. 10, 2006); James O. Castagnera, Patrick J. Cihon, Andrew M. Morriss, Second Circuit Allows Title VII Plaintiff “Second Bite at the Apple” for Federal Remedies Not Available in State Administrative Proceeding, 22 No. 12 TERMINATION OF EMPLOYMENT BULLETIN 3 (Dec. 2006).} Notably, however, the Second Circuit’s approach differed somewhat markedly from that of the other courts comprising the split. The majority of courts confronting additional-remedy cases in recent years have employed a statutory analysis to ascertain the viability of the suit – the approach discussed in Part ___, above.\footnote{See supra Part IV.B (discussing recent additional-remedy cases decided under Title VII).} The Fourth Circuit in \textit{Chris v. Tenet} leads this charge, along with the Eighth Circuit as reflected in \textit{Jones v. American State Bank}.\footnote{Chris, 221 F.3d at 651-52; Am. State Bank, 857 F.2d at 497-98.} The Nestor court briefly considered the defendant’s statutory jurisdiction argument, but focused most of its attention on
preclusion doctrine, ultimately deciding that it did not bar plaintiff’s Title VII additional-remedy claims.\textsuperscript{298} Of the cases comprising the core of the split, only one other relied upon preclusion doctrine – the Seventh Circuit’s decision in Patzer v. Board of Regents.\textsuperscript{299}

The most plausible explanation for the difference in approaches taken by the Patzer and Nestor courts, on one hand, as opposed to the Jones and Chris courts, on the other, is not, however, that the courts disagree about how to resolve additional-remedy cases. Some such disagreement lurks in the decisions. But at their core, the courts take contrasting approaches because of differences in procedural posture. The federal lawsuits in both Patzer and Nestor followed final state-court judgments entered on appeal from state administrative proceedings.\textsuperscript{300} It is therefore only natural that the courts in those cases would focus on preclusion principles, as the presence of a valid final judgment disposing of the same claims is not only a core component of preclusion doctrine but indeed cries out for consideration of it. By contrast, neither Jones nor Chris involved a state-court judgment. The plaintiff in Jones filed her federal lawsuit after prevailing in a state administrative hearing, from which the defendant employer never sought appeal.\textsuperscript{301} And the plaintiff in Chris sought attorney fees in federal court after settling her discrimination claims during administrative proceedings.\textsuperscript{302} It is therefore not surprising that neither court addressed preclusion principles – neither case involved a state-court judgment, rendering preclusion wholly inapplicable from the start.

Given their distinct procedural posture, the commentators who have cited all of these cases as part of a circuit split may have at least partially misrepresented the situation.\textsuperscript{303} The differing procedural context in which each case arose may explain the contrasting outcomes, suggesting there may not be a split of authority at all, or at least that it is narrower than once thought. The Jones and Chris cases raised no preclusion issues because they involved no prior judgment.\textsuperscript{304} The Nestor and Patzer cases turned upon preclusion principles because they did.\textsuperscript{305}

V. CONCLUSION

Title VII’s referral and deferral scheme embodies important federalism goals but also creates knotty preclusion and jurisdiction issues. The law requires a plaintiff to give any pertinent state or local administrative agency the first shot at resolving her claims.

\begin{itemize}
\item \textsuperscript{298} Nestor, 466 F.3d at 71-74.
\item \textsuperscript{299} 763 F.2d 851 (7th Cir. 1985).
\item \textsuperscript{300} Id. at 853-54; Nestor, 466 F.3d at 67.
\item \textsuperscript{301} Am. State Bank, 857 F.2d at 495.
\item \textsuperscript{302} Tenet, 221 F.3d at 650.
\item \textsuperscript{304} Am. State Bank, 857 F.2d at 495; Chris, 221 F.3d at 650.
\item \textsuperscript{305} Nestor, 466 F.3d at 68-9; Patzer, 763 F.2d at 853.
\end{itemize}
Sometimes a grievance goes no further. But often the state administrative proceeding is only the beginning of the adjudicative process, and the dual state-federal enforcement scheme that Title VII creates may mean that a state agency, a state court, the federal EEOC, or some combination thereof may all have touched the plaintiff’s claim by the time it reaches a federal court. The federal court must then grapple with such questions as whether any prior state determination or judgment precludes the plaintiff’s federal claims in part or in their entirety, and whether Title VII authorizes the post-state-determination claims that the plaintiff asserts.

The Supreme Court’s decisions on these issues offer limited instruction. *University of Tennessee v. Elliott* made clear that unreviewed state agency determinations deserve no preclusive effect, so a plaintiff who proceeds directly from the state agency to federal court typically may pursue her Title VII claims without limitation. By contrast, the federal courts must accord state judgments full faith and credit under *Kremer v. Chemical Construction Corp.* While the scope of the Court’s decision in *Kremer* is not entirely clear, the better view is that it sweeps broadly, so that its full-faith-and-credit command applies regardless of which party prevailed initially and regardless of the degree of deference afforded to administrative determinations under the applicable state law.

Beyond the confines of *Elliott* and *Kremer*, the Court has left the state of the law in this arena in substantial doubt, particularly as to those cases in which the plaintiff files a Title VII suit in federal court after prevailing in state proceedings seeking additional remedies that were not available there. The federal courts disagree on the proper approach in these cases, with some framing the issue as one of statutory authority, others treating it as a matter of preclusion, and still others crafting a hybrid approach. Courts and commentators proffer that the cases give rise to a circuit split, with some permitting such additional-remedy cases to proceed while others do not. At its core, though, the differential outcomes may not give rise to a “circuit split” at all, but rather may be explained as nothing more than differing approaches taken in response to distinct procedural posturing.

This Article untangles the knotty web these cases create by revealing that the posture of the case should dictate the governing rule, and proposing the outcome in each that best comports with Title VII policy and traditional notions of fairness. Cases in which the plaintiff seeks solely attorney fees incurred in state proceedings comprise one category. Most such cases should be dismissed, but not due to a jurisdictional defect, as some courts suggest. Even if Title VII’s jurisdictional grant does not support bringing such cases in federal court, the fact that they arise from federal law alone should be sufficient to permit the district court to proceed. The statutory defect in these cases lies instead in Title VII’s fee-shifting provision. That statute likely does not support an independent fees-only suit, and courts should dismiss such cases on those grounds.

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306 *Elliott*, 478 U.S. at 789; see also supra Part II (discussing import and breadth of *Elliott* decision).
307 *Kremer*, 456 U.S. at 461.
308 See supra Part III (discussing scope of *Kremer* decision).
Other additional-remedy cases (those seeking more than just fees) should not face statutory challenges but are no less vulnerable, for preclusion rules will (or should) often bar them. The Supreme Court’s edict in *Kremer* that federal courts accord full faith and credit to state judgments in Title VII suits means that the outcome in each such case will turn on state preclusion law. Variants in the governing rules are therefore inevitable. By way of far-reaching example, though, the law of those states that follow the Second Restatement of Judgments should compel the court to bar plaintiffs from pursuing duplicative litigation in most cases. The original drafters of Title VII did not intend that its referral and deferral scheme breed inefficient multiplicity of claims. Moreover, traditional notions of fairness mandate that courts halt any attempts to manipulate the system by obtaining a favorable liability judgment under relaxed rules and then importing that determination into a federal court suit in order to recover additional remedies. Those remedies are available at the outset should the plaintiff choose to pursue them. Where she elects to proceed otherwise, she must live with her choice. Neither the statutory language of Title VII, the apparent intent of its drafters, nor prevailing policy concerns support permitting a plaintiff to split her claims between the state and federal forums, at least not where she had a choice. Most such efforts should therefore be thwarted.

In the end, the disentanglement of the web reveals that whether a federal Title VII suit may proceed or not depends upon its posture. Federal Title VII suits that follow unreviewed state administrative determinations may proceed unabashed. State-court judgments reviewing those administrative determinations, on the other hand, warrant preclusive effect. Thus, federal suits that seek the same remedies as those sought in state proceedings will usually fall to a claim-preclusion defense. Cases seeking remedies that weren’t available in state proceedings often will also falter – the fees-only suits due to their lack of a sufficient statutory basis, and the others because policy and fairness concerns dictate that claim preclusion apply. The web may be knotty, but not impossibly so. And the result that is just and right lurks at the core.