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UNTANGLING THE WEB SPUN BY TITLE VII'S REFERRAL AND DEFERRAL SCHEME

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I. HOW THE SPIDER GOT THERE IN THE FIRST PLACE: AN INTRODUCTION TO THE PRINCIPLES THAT COMPRISE THE WEB

Our Founding Fathers would be proud of the careful attention that Congress paid to principles of federalism in enacting Title VII of the Civil Rights Act of 1964 (Title VII).[1] Title VII imposes a nationwide prohibition on employment discrimination, which is enforceable both by the federal agency the statute establishes and in the federal courts.[2] While rooting the Act's foundation firmly in the federal government, Congress carefully crafted Title VII's enforcement scheme to ensure the perpetuation of existing parallel state laws aimed at making inequality in the workplace unlawful.[3] Congress accomplished this by establishing a scheme of referral and deferral by the federal Equal Employment Opportunity Commission (EEOC)—the agency established by Title VII and charged with its administrative enforcement—to the agencies that administer state and local anti-discrimination laws.[4] Thus, any person alleging an unlawful employment practice in a state or locality subject to its own anti-discrimination law must first file a charge with the local authorities.[5] Only after the expiration of a sixty-day deferral period may Title VII's federal mechanisms come into play.[6] The EEOC further promotes the referral and deferral scheme by requiring that if a charge is erroneously filed with the EEOC before it is filed with the appropriate local authorities, the EEOC must refer that charge to the appropriate local agency and refrain from taking any further action on it for the sixty-day deferral period.[7]

This intricate system of referral and deferral seems to achieve its intended purpose of promoting the continued eradication of workplace inequality at the

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1. 42 U.S.C. § 2000e (2006).
2. *Id.* §§ 2000e-2–2000e-5.
3. *Id.* § 2000e-5(c)–(d).
4. *Id.*
5. *Id.* § 2000e-5(c).
6. *Id.* § 2000e-(5)(c)–(d). By way of a brief primer on Title VII procedure, a discrimination claimant must exhaust administrative remedies before he can file a lawsuit. *Id.* § 2000e-5(c). Exhaustion is accomplished by filing an administrative charge of discrimination with the EEOC or with a comparable state agency. *Id.* If a state or local agency exists, the claimant must initially file his charge there first, and the EEOC must "defer" to the state agency by taking no action on the charge for at least sixty days. *Id.* § 2000e-5(c)–(d). After expiration of the sixty-day deferral period, the claimant may continue to pursue his claim in the state system or may ask the EEOC to intervene. *Id.* § 2000e-5(f). The agency may file a lawsuit on the claimant's behalf or release the claim so that he may file it himself, but if the agency fails to complete its work on the charge in a timely manner, the claimant may request a "right-to-sue" letter and proceed to court. *Id.* Any subsequent lawsuit may be filed in either state or federal court. *Id.*; Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821 (1990) (holding that federal courts do not have *exclusive* subject-matter jurisdiction over Title VII lawsuits).
7. 29 C.F.R. § 1601.13(a)(4)(i) (2008).

local level while simultaneously creating the cooperative, mutually beneficial relationship between state and federal governments intended by Congress.[8] Referral and deferral permits state and local authorities to retain exclusive jurisdiction over employment discrimination complaints for sixty days in order to conduct an investigation and, if necessary, schedule a hearing to adjudicate the claims.[9] At the expiration of the sixty-day period, the charging party has the freedom to choose whether to continue to pursue his claim through state or local channels or, alternatively, to seek relief in the federal system by filing a charge with the EEOC.[10]

Although the referral and deferral system successfully includes states in the process, it is not without its shortcomings. The tendency to create complicated judicial preclusion issues is chief among them. This should come as no surprise. 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 levels—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 and the regulations promulgated under it expressly prohibit prosecution of a single claim in more than one—or even all—of the multiple forums to which the statute grants jurisdictional authority.[11] However, the

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8. *See* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 472–73 (1982) ("'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.'" (quoting 110 CONG. REC. 12,725 (1964) (statement of Sen. Humphrey))); N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63–64 (1980) ("Congress envisioned that Title VII's procedures and remedies would 'mes[h] 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.'" (alteration in original) (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 the 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.").

9. 29 C.F.R. § 1601.13(a)(3)(ii). Whether this sixty-day period is sufficient to permit the agency to conduct and complete an investigation and hearing—and it likely is not—is beyond the scope of this Article.

10. 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.").

11. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974) (noting "a congressional intent to allow an individual to pursue independently [a remedy] under both Title VII and other applicable state and federal statutes").

statute leaves the parameters of the dual system it creates almost entirely undefined.

In the midst of this uncertainty, the United States Supreme Court has offered little clarity in the years since Congress enacted Title VII. First, the Court has drawn a line between state administrative proceedings and any subsequent judicial review by state courts, so that state-agency determinations on unreviewed claims covered by Title VII have no preclusive effect in a subsequent suit asserting the same claims in federal court.[12] 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 to the EEOC and in a subsequent federal lawsuit.[13] This scenario is most likely to arise when the claimant does not prevail in the state or local administrative forum. Having failed to convince the local administrative authorities of his claim's merit, he may turn to the federal system with the hope of obtaining a better result. Of course, he could also seek direct review of the state agency's determination by filing an appeal with the appropriate state court.[14] However, a claimant receiving sound legal advice should be wary of following this course in light of the risk that it carries of a binding adverse determination.[15]

That risk of a binding adverse determination on appeal in the state court system illustrates the second limitation on Title VII's dual enforcement scheme. In *Kremer v. Chemical Construction Corp.*, the Court declared that federal courts must afford preclusive effect to state-court judgments entered on review of agency determinations, at least in cases in which the agency found that no discrimination occurred, the state court affirmed the agency's findings,

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12. Univ. of Tenn. v. Elliott, 478 U.S. 788, 796 (1986).

13. *Id.* at 795–96. Although it is well-established that a Title VII claimant must first exhaust his administrative remedies before seeking relief in federal court, courts disagree about the admissibility and weight of EEOC determinations in subsequent judicial proceedings. 42 U.S.C. § 2000e-5(f) (requiring exhaustion of remedies with the EEOC before filing a Title VII suit in federal court); 8 EMPLOYMENT COORDINATOR § 106:5 (West 2009) (discussing the varying approaches taken by federal circuit courts on questions of the admissibility and weight of EEOC findings). Whether to admit EEOC findings in subsequent federal-court trials and the degree of weight they are due if so admitted are questions that lie beyond the scope of this Article.

14. CONN. GEN. STAT. ANN. § 4-183(a) (West 2009) ("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 (McKinney 2009) (providing for judicial review of Human Rights Commission determinations in state supreme courts); ALBUQUERQUE, N.M., CODE ORD. § 3-1-25(F) (2009) (permitting the state courts to review rulings of the administrative Personnel Board).

15. *See* 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4471.3 (2d ed. 2002) ("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.").

and state law bars relitigation.[16] In *Kremer*, the Court held that a judgment of the New York Appellate Division affirming the findings of a state agency charged with enforcement of New York's anti-discrimination law was entitled to preclusive effect in a subsequent federal lawsuit asserting the same claim.[17] 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, codified at § 1738 of title 28 of the United States Code, which requires that federal courts afford state-court judgments the same treatment that the state's appellate courts would provide.[18] This rule remains good law despite its age; therefore, courts faced with Title VII claims that were previously found meritless by state agencies administering comparable laws must afford any state-court judgment affirming such a finding the same weight that the state appellate courts would.[19]

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 that are transactionally related to claims previously adjudicated in the parallel state systems that Congress deliberately left in place. Unreviewed state-agency determinations have no preclusive effect in subsequent federal-court lawsuits and may be relitigated.[20] By contrast, courts must give full faith and credit to any state-court judgment affirming a state-agency finding that a claim lacked merit.[21] However, many questions remain unanswered, and one cannot begin to resolve them 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.[22] Closer scrutiny of the Court's opinion, however, indicates that its holding was much more limited. The Court carefully framed the question presented and its holding narrowly 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.[23]

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16. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 485 (1982).

17. *Id.*

18. *Id.* at 476–77.

19. *See id.* at 469–70; McInnes v. California, 943 F.2d 1088, 1092–93 (9th Cir. 1991); Elliott v. Univ. of Tenn., 766 F.2d 982, 987–88 (6th Cir. 1985), *aff'd in part, rev'd in part*, 478 U.S. 788 (1986).

20. *Elliott*, 478 U.S. at 796.

21. *Kremer*, 456 U.S. at 485.

22. *See infra* notes 51–55 and accompanying text.

23. *Kremer*, 456 U.S. at 463, 485. As will be 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* p. 441 (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 a framework for identifying and handling Supreme Court dicta).

The inquiry, therefore, examines how far the *Kremer* rule extends. In other words, must a federal court afford a state-court judgment the same full faith and credit demanded in *Kremer* when the state court reverses the agency determination rather than affirming it? What about when the claimant, rather than the respondent, prevails initially in the administrative proceedings 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. The United States Court of Appeals for the Second Circuit[24] recently came down firmly on the side of the Seventh[25] and Eighth[26] Circuits 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; however, the United States Court of Appeals for the Fourth Circuit has disagreed, declaring that a claimant cannot duplicate his claims in this manner.[27]

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24. Nestor v. Pratt & Whitney, 466 F.3d 65, 69 (2d Cir. 2006).

25. Patzer v. Bd. of Regents, 763 F.2d 851, 856–57 (7th Cir. 1985).

26. Jones v. Am. State Bank, 857 F.2d 494, 495, 498 (8th Cir. 1988).

27. Chris v. Tenet, 221 F.3d 648, 655 (4th Cir. 2000). The circuit split received some attention at the time of the *Nestor* decision, but commentators have remained silent on it since then. *See* James O. Castagnera et al., *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 EMP. BULL. 3, 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."); Circuit Rev. Staff, *Current Circuit Splits*, 3 SETON HALL CIRCUIT REV. 507, 517–18 (2007) [hereinafter *Current Circuit Splits*] (identifying *Nestor* as part of the circuit split on the issue of "Title VII claims filed in federal court seeking 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. (BNA) 1200 (Oct. 10, 2006) [hereinafter *Employment Discrimination—Procedure*] (noting that the Second Circuit's decision in *Nestor* involved "an issue that has split the circuits"). While this particular issue has not received the attention 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, 149–50 (1995) (criticizing Title VII's dual-enforcement scheme on the grounds that it necessitates an 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 a complainant"); Andrea Catania & Charles A. Sullivan, *Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of* Martin v. Wilks, 57 BROOK. L. REV. 995, 996–97 (1992) (evaluating finality of judgments in employment discrimination suits after *Martin v. Wilks* and the Civil Rights Act of 1991); Michael J. Davidson, Crest*:* *Judicial Preclusion of an Independent Suit Solely for Attorneys' Fees Under Title VII?*, 18 DEL. J. CORP. L. 425, 426 (1993) (arguing that Title VII does not permit fees-only federal suits under the authority of *Crest*); Charles C. Jackson et al., *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485, 1501 (1981) (proposing a preclusion framework applicable in Title VII cases); Michael J. Maransky, *Issue Preclusion—Assessing the Issue Preclusive Effect of State Agency Decisions in*

These circuit courts have also raised another distinct but interrelated issue: whether the federal court has subject-matter jurisdiction over a claim that only seeks certain relief available under Title VII but does not request adjudication of any substantive rights granted by the statute. That is, notwithstanding that 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 *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's fees after final administrative adjudication of the underlying Title VI claims in state proceedings.[28] Although the Court has never expressly adopted this view under Title VII, some defendants have interpreted it to suggest that after final adjudication in administrative proceedings, plaintiffs cannot proceed separately in federal court to obtain attorney's fees, notwithstanding the fact that such fees would otherwise be available under the statute.[29] Thus, to spin the web analogy even further, the spider has added a layer to the preclusion controversy by weaving in a subject-matter jurisdiction debate.

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 unresolved questions and proposing a resolution to the particular problem of splitting relief that divides the circuit courts. It will justify those answers in light of the statutory language and its legislative history, 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, fleshing out the applicable rules in federal cases subsequent to state administrative determinations. Part III will unravel the state-judgment thread. It begins with a discussion of the Supreme Court's decision in *Kremer* and then

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the Third Circuit, 39 VILL. 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."); 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) (discussing the operation of the preclusion doctrine in civil-rights litigation).

28. N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6, 14–15 (1986). Title VI of the Civil Rights Act of 1964 prohibits discrimination by recipients of federal funding. *Id.* at 8 (citing 42 U.S.C. § 2000d (2006)).

29. *See, e.g.*, *Chris*, 221 F.3d at 654–55 (holding that federal courts lack jurisdiction "because a suit solely for attorney's fees and costs is not . . . a suit to enforce the substantive protections of Title VII").

examines how the lower courts have applied that decision, revealing the questions left unanswered by *Kremer* 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's 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 that have established different rules in the various circuit courts of appeal. As Part V summarizes, Parts II, III, and IV, taken together, supply a framework for adjudicating Title VII claims brought to federal court after full adjudication in the pertinent state system, suggesting that some 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 complex preclusion web quite easily. Indeed, the Supreme Court spoke directly to such cases when it decided *University of Tennessee v. Elliott*.[30] The plaintiff in *Elliott* requested a hearing before an Administrative Law Judge (ALJ) after being informed by his employer, the university, that his employment would be terminated due to poor performance and misconduct.[31] The ALJ ultimately rejected the plaintiff's contention that his discharge was racially motivated, and the vice president of the university division in which the terminated employee previously worked affirmed the ALJ's findings.[32] The plaintiff then pursued his related Title VII claims in the federal district court; however, in order to bar the plaintiff from litigating his Title VII claims, the university moved for summary judgment on the ground that the ALJ's determination was entitled to preclusive effect.[33] The district court granted the university's motion, but that decision was reversed by the United States Court of Appeals for the Sixth Circuit, which held that res judicata does not bar Title VII claims that were the subject of an unreviewed state-agency determination.[34] The Supreme Court agreed with the Sixth Circuit and held that unreviewed state-agency determinations have no preclusive effect in subsequent lawsuits asserting Title VII claims arising from the same incidents.[35] The Court reasoned that a common-law rule of preclusion would

30. Univ. of Tenn. v. Elliott, 478 U.S. 788, 792 (1986).
31. *Id.* at 790.
32. *Id.* at 791–92.
33. *Id.* at 792.
34. *Id.* at 792–94.
35. *Id.* at 796.

be inconsistent with Congress's apparent intent—reflected in the statute's provision that the EEOC must afford state-agency determinations "substantial weight"—to ensure plaintiffs *de novo* review after adjudication at the state administrative level.[36] According to the Court, "it would make little sense for Congress 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.[37] Furthermore, the Court rejected the university's contention that the decision in *Kremer* dictated a different result. The Court explained that the full faith and credit statute underlying the *Kremer* holding did not apply in this context in which an administrative agency—not a court—made the pertinent findings.[38]

The Court's holding in *Elliott* makes clear that an unreviewed agency determination adverse to the claimant has no preclusive effect.[39] 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 his ability to recover.[40] As referenced above, this may be the advisable course of action—especially in those cases in which the agency's findings are unfavorable—given the risk of a binding final judgment under *Kremer* if the employer again prevails on appeal.[41] Indeed, it is precisely because of the risk that *Kremer* poses that many cases will fall into this category, as plaintiffs facing adverse

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36. *Id.* at 795.

37. *Id.*

38. *Id.* at 796.

39. *See* 18B WRIGHT ET AL., *supra* note 15, § 4471.3 (discussing the parameters of and rationale for the *Elliott* rule that unreviewed administrative findings are not entitled to preclusive effect). There are many examples of courts adhering to this rule. *See, e.g.*, Caver v. City of Trenton, 420 F.3d 243, 258–59 (3d Cir. 2005) (affirming the district court's denial of issue preclusive effect to the findings of a state administrative law judge respecting plaintiff's fitness for duty after dismissal of related Title VII claims); Bishop v. City of Birmingham Police Dep't, 361 F.3d 607, 610 (11th Cir. 2004) (stating that the district court erred in applying issue preclusion to unreviewed findings of a state administrative agency); Kosereis v. Rhode Island, 331 F.3d 207, 212 (1st Cir. 2004) (refusing to apply preclusive effect, in light of the *Elliott* ruling, to an unreviewed state-agency determination that plaintiff had been laid off, 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 a police administrative proceeding); McInnes v. California, 943 F.2d 1088, 1095–96 (9th Cir. 1991) (reversing the district court's grant of preclusive effect to the State Personnel Board's decision).

40. One might attempt to avoid *Elliott*'s impact by suggesting that the agency was not administrative 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*. *McInnes*, 943 F.2d at 1094–95. The *McInnes* court rejected that argument, concluding that the California agency was indeed administrative and therefore triggered application of the *Elliott* rule. *Id.*

41. *See* 18B WRIGHT ET AL., *supra* note 15, § 4471.3 ("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.").

agency determinations will often choose to pursue their remedies directly in the federal forum.

Elliott covers the landscape here quite thoroughly. However, because that case involved a claimant who lost at the administrative level, one could argue that the *Elliott* rule against preclusion does not apply in those cases in which the claimant initially prevailed and subsequently sought to rely on the favorable agency findings in a later federal suit. Given the strength of the Court's conclusion, as well as prevailing policy concerns, this argument should fail.

The Court in *Elliott* based its determination primarily on relevant statutory language, the import of which does not depend on which party prevailed.[42] The Court first rejected an argument that the full faith and credit statute requires courts to respect administrative determinations.[43] "[B]ecause § 1738 [the full faith and credit statute] antedates the development of administrative agencies," the Court found inconclusive the fact that the statute does not mandate that preclusive effect be given to unreviewed state-agency determinations.[44] 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.[45] The Court reasoned that it would be nonsensical to accord preclusive effect to administrative determinations in federal court when they receive only "substantial weight" before the EEOC.[46] Thus, the Court held that neither the full faith and credit statute nor Title VII supported a policy of treating unreviewed administrative findings as binding.[47]

Likewise, prevailing policy concerns also suggest that *Elliott*'s rule against defensive use of agency determinations applies with equal force in the offensive context. In short, it would be unfair for a plaintiff who need not worry about suffering the effects of an adverse agency determination to reap the benefits of a favorable one. This is especially true in the absence of any statutory support for doing so.[48] Thus, confined to its context, the rule of

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42. Univ. of Tenn. v. Elliott, 478 U.S. 788, 795–96 (1986).

43. *Id.* at 794–95.

44. *Id.*

45. *Id.* at 795 (quoting 42 U.S.C. § 2000e-5(b) (2006)).

46. *Id.* (quoting 42 U.S.C. § 2000e-5(b)).

47. *Id.* at 796.

48. *See, e.g.*, Roth v. Koppers Indus. Inc., 993 F.2d 1058, 1062–63 (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 that the Court's unequivocal, generally applicable language is supported by plain statutory meaning, legislative history, and applicable precedents); McInnes v. California, 943 F.2d 1088, 1096 (9th Cir. 1991) (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*'s rule against preclusion does not apply to

Elliott is plain: unreviewed agency findings have no preclusive effect in subsequent federal suits brought under Title VII.[49]

III. DETACHING THE SECOND THREAD: SEEKING THE SAME REMEDIES AS IN PREVIOUS JUDICIALLY REVIEWED DETERMINATIONS

Untangling the web becomes more difficult upon reaching the second thread, which includes cases in which the plaintiff attempts to pursue the same claims and remedies in federal court that he pursued at the state administrative level after a judicial body has entered a final judgment reviewing an agency's findings.[50] The Supreme Court has entered the fray here as well, but without covering the landscape as fully as in the context of unreviewed findings. In *Kremer*, the Court held that § 1738 requires federal courts in Title VII cases to give preclusive effect to state-court judgments reviewing administrative determinations, so long as the courts of the state that rendered the judgment would do so.[51] The Court based its reasoning primarily upon the language of the two governing statutes—the full faith and credit statute and Title VII—and concluded that the latter had not repealed the former; therefore, the full-faith-

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final orders of the Secretary of Labor under the Sarbanes-Oxley Act because the Act expressly prohibits such collateral attacks).

49. *Elliott*, 478 U.S. at 796. This rule marks a departure from the prevailing law applicable to civil-rights claims under the Reconstruction Acts. In such cases, the Court has determined that agency findings *do* have preclusive effect. *See id.* at 796–99. Whether this distinction is satisfying or not is a matter of some contention, but it lies beyond the scope of this Article. *See* 18B WRIGHT ET AL., *supra* note 15, § 4471.3.

50. This discussion assumes the 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 over a claimant's request after the lapse of a specified time period. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-101 (West 2009) ("The complainant . . . may request a release from the commission if his complaint with the commission is still pending after the expiration of two hundred ten days from the date of its filing."); *see also* 42 U.S.C. § 2000e-5(f)(1) (providing that a Title VII plaintiff can obtain a right-to-sue letter from the EEOC and file a federal lawsuit 180 days after a state-agency action is filed if "the Commission has not filed a civil action under this section"); *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 is inapplicable. When the plaintiff files suit in federal court after resolution by the state agency, but while state judicial review remains pending (and thus prior to entry of a final judgment), the federal court will typically enter a stay pending resolution of the state proceedings and will then accord those proceedings preclusive effect under the rule of *Kremer*. *See* Nestor v. Pratt & Whitney, 466 F.2d 65, 69 (2d Cir. 2006) ("If [plaintiff] had filed her action in federal court (or state court) while [defendant's] appeals from the [state administrative agency's] 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 *res judicata* effect to the result." (citing Kremer v. Chem. Const. Corp., 456 U.S. 461, 487–88 n.3 (1982) (Blackmun, J., dissenting))).

51. *Kremer*, 456 U.S. at 485 (majority opinion).

and-credit command remained in force.[52] The Court also searched the text of Title VII for evidence of direct conflict with § 1738 or substitute coverage of that statute's sphere; neither, however, could be found.[53] The Court determined instead that Title VII reflected a clear intention to leave § 1738 untouched:

> 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.[54]

Applying its determination to the facts, the Court directed that preclusive effect be accorded to the state-court judgment affirming the agency's conclusion that the plaintiff's claims of discrimination lacked merit.[55]

The *Kremer* decision made clear that a final state-court judgment affirming an agency's dismissal of a Title VII discrimination claim is subject to the same preclusive effect in a subsequent federal-court suit as would be applied by the courts of the rendering state. However, the parameters and scope of the holding remained unclear, and the Court itself gave somewhat mixed messages about the reach of its decision. First, the Court began by framing the question presented in *Kremer* quite broadly, asking "whether Congress intended Title VII to supersede the principles of comity and repose embodied in § 1738."[56] In the very next sentence, however, 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.[57]

The Court's final holding includes much of the same qualifying language:

> 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

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52. *Id.* at 466–70. The Court stated: "Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatability [*sic*] between Title VII and § 1738 is enough to answer our inquiry." *Id.* at 470.

53. *Id.* at 468–69.

54. *Id.* at 469–70 (citations omitted).

55. *Id.* at 485. The plaintiff's claims were therefore barred. *Id.* at 479.

56. *Id.* at 463.

57. *Id.*

> 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*.[58]

Thus, by stating the issue and holding with specificity, the Court left room to maneuver for future litigants striving to avoid *Kremer*'s import.

A. Equal Application, Win or Lose

The argument offered most commonly to confine *Kremer*'s reach proposes limiting its application to cases presenting the situation existing in *Kremer*—the *plaintiff*, rather than the defendant, filed the appeal invoking the state judicial forum. Upon receipt of an adverse determination by both the New York State Division of Human Rights (NYHRD) and its Appeal Board on his age and religion discrimination claims, Ruben Kremer filed a petition for review with the Appellate Division of the New York Supreme Court.[59] 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.[60] The defendant responded with a motion to dismiss,[61] which the court initially denied but subsequently granted based on a change in Second Circuit authority.[62] The key fact 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 invokes the state judicial forum. The language of the Court's opinion leaves little room for debate. As discussed above, central to the Court's rationale was its conclusion that Title VII does not repeal § 1738.[63] 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.[64] The Court rejected this argument, reasoning that if state determinations are never preclusive, their finality depends entirely upon the outcome—judgments

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58. *Id.* at 485.

59. *Id.* at 464 & n.2.

60. *Id.* at 464–65.

61. Kremer v. Chem. Constr. Corp., 477 F. Supp. 587, 589 (S.D.N.Y. 1979), *aff'd*, 623 F.2d 786 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982). The motion likely should have been filed as a motion 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(b). It does not appear, however, that this distinction troubled the district court. *Kremer*, 477 F. Supp. at 590.

62. *Kremer*, 477 F. Supp. at 590–91.

63. *Kremer*, 456 U.S. at 468–70; *see also supra* notes 51–55 and accompanying text for a discussion of the Court's rationale in *Kremer*.

64. *Kremer*, 456 U.S. at 468–70.

favorable to plaintiffs would always be final, while defense judgments would be subject to subsequent lawsuits filed by unhappy plaintiffs.[65] 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 that limitation is implausible. The Court made clear its disdain for a preclusion rule dependent on which party prevailed in the first instance.

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."[66] The argument here must be that because Title VII does not mandate seeking relief through the state system, a plaintiff should not be bound when his adversary does so. The strongest appeal for this argument lies in its policy implications—that a plaintiff should not be bound by the judgment of a forum he did not choose. This argument, however, should fail. As an initial matter, the Court's statement in this regard says nothing about the preclusive effect of a judgment varying with the outcome. The statement merely suggests that a claimant may choose whether to pursue relief from an unfavorable administrative decision in state courts or to proceed to the federal system instead. The Court's statement is insufficient to overcome the broad language that it employed in holding that Title VII does not repeal § 1738. Moreover, the Court subsequently interpreted its own decision in *Kremer* to sweep broadly in its application.[67]

The pertinent statutory language in § 1738 and its underlying purposes further support equal application of the *Kremer* preclusion rule regardless of who prevailed below. Section 1738 is founded upon core federalism principles that do not vary with the outcome of the underlying litigation.[68] 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."[69] Furthermore, none of the Court's principal interpretations of the statute even hint that its application varies with changes in the identity of the prevailing party,[70] nor does Title VII reflect any

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65. *Id.* at 470.

66. *Id.* at 469; *see, e.g.*, Trujillo v. County of Santa Clara, 775 F.2d 1359, 1365 (9th Cir. 1985) (acknowledging plaintiff's reliance on that statement in an attempt to avoid *Kremer*'s import).

67. Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 381 (1985) ("*Kremer* held that § 1738 applies to a claim of employment discrimination under Title VII . . . .").

68. *See generally id.* 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.").

69. 28 U.S.C. § 1738 (2006).

70. *See, e.g.*, *Marrese*, 470 U.S. at 380 ("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. McCurry, 449 U.S. 90, 96 (1980) ("Congress has specifically required all federal courts to give

intention that plaintiffs should be free to relitigate unfavorable state-court determinations while relying on favorable ones. Instead, the provision for federal-court relief contemplates only that the state administrative agency has had the opportunity to assess the claims and does not render the viability of the federal suit contingent in any way on the state's final determination.[71]

The lower courts are in accord with the interpretation that *Kremer* preclusion does not depend on the outcome at the state level. The First and Eighth Circuits both confronted this issue shortly after the Supreme Court's decision in *Kremer*, and both relied upon 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.[72] The First Circuit summarized this point well: "[i]n 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."[73] Other courts have since expressed agreement with this position.[74] 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 broad, and preclusion applies no matter which party initiated appeal to the state court.

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preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so . . . ."); Hollimon v. Shelby County Gov't, 325 F. App'x 406, 410 (6th Cir. 2009) ("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) ("The full faith and credit statute compels federal courts to give collateral estoppel and res judicata effects to the judgments of state courts." (internal quotation marks omitted)), *aff'd*, 128 S. Ct. 2146 (2008).

71. *See* 42 U.S.C. § 2000e-5(d) (2006).

72. Gonsalves v. Alpine Country Club, 727 F.2d 27, 29 (1st Cir. 1984); *see also* Hickman v. Elec. Keyboarding, Inc., 741 F.2d 230, 232 n.3 (8th Cir. 1984) (noting that the preclusion rule of *Kremer* does not turn on which party sought review in the state court).

73. *Gonsalves*, 727 F.2d at 29.

74. *See, e.g.*, Zanders v. Nat'l R.R. Passenger Corp., 898 F.2d 1127, 1132 (6th Cir. 1990) (explaining that an alternate, but not controlling, rationale of *Kremer* was that the plaintiff had the choice whether to bring the discrimination action in state court or through the EEOC and thus deserved preclusion, although the *Kremer* Court did not make this distinction explicitly); Trujillo v. County of Santa Clara, 775 F.2d 1359, 1364 (9th Cir. 1985) (noting that instead of emphasizing which party initiated the state-court review, the *Kremer* 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'" (quoting Kremer v. Chem. Constr. Corp., 456 U.S. 461, 470 (1982))); *see also* Unger v. Consol. Foods Corp., 693 F.2d 703, 710 n.11 (7th Cir. 1982) (deeming irrelevant which party started review at the state-court level in light of *Kremer*'s holding that "Title VII does not partially repeal § 1738 and any state court decision must therefore be accorded preclusive effect, [thus] it should be immaterial whether plaintiff or defendant initiated the state court review").

B. Differential Deference

Some plaintiffs attempt to avoid *Kremer* preclusion by suggesting that it does not apply when the state court's standard of review calls for substantial deference to the agency findings.[75] This argument is appealing at first blush because application of the preclusion doctrine means respecting the judgment of the rendering court. If the court never examined the merits of the underlying claims, but simply reviewed the methods applied in the prior administrative proceeding, then it may seem natural to question the reliability of that judgment when it is offered preclusively in a subsequent suit. Thus, the court's decision arguably would not be "on the merits" as is often required for most preclusion rules to apply.[76] However, closer scrutiny of the Court's opinion in *Kremer* defeats this argument.

As a threshold matter, the *Kremer* Court expressly rejected this contention. The plaintiff in *Kremer* argued that his Title VII claim should not be prohibited by the state court's judgment "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 . . . ."[77] While this argument did not focus solely on the standard of review (because the Court also addressed 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.[78] In its review of applicable New York law, the Court concluded that the decisions of the Appellate Division evaluating the NYHRD rulings constituted "decisions on the merits"

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75. *See, e.g.*, *Gonsalves*, 727 F.2d at 29 n.3 ("The fact that the Rhode Island superior court reversed the decision of the RICHR on the basis of the administrative record does not detract from the preclusive effect to be accorded that court's decision."); *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.").

76. *See generally* San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 335 n.14 (2005) (noting the requirements of issue preclusion, one of which demands "a final judgment on the merits in the prior case"); *see also* Wernecke v. St. Maries Joint Sch. Dist. No. 401, 207 P.3d 1008, 1020 (Idaho 2009) (acknowledging five elements to determine whether issue preclusion applies, one of which is "a final judgment on the merits in the prior litigation"); McDaniel v. State, 208 P.3d 817, 825–26 (Mont. 2009) (describing the four-part test for determining the applicability of issue preclusion, the second step of which requires "a final judgment on the merits in the prior adjudication"); Cronan v. Iwon, 972 A.2d 172, 174–75 (R.I. 2009) (providing that collateral estoppel is triggered when "the previous proceeding resulted in a final judgment on the merits"); *cf.* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501–03 (2001) (recognizing that even though the common understanding that "all judgments denominated 'on the merits' are entitled to claim-preclusive effect" meant that there is a direct relation between the substance of the claims, there is an ongoing shift realizing that the phrase maintains a broader meaning and applies to judgments that are not directly based on the substantive merits of a claim).

77. *Kremer*, 456 U.S. at 479.

78. *Id.* at 480–81 n.21.

under New York law.[79] The Court then summarized its view of the governing legal principle in broadly applicable terms: "[i]t is well established that judicial affirmance of an administrative determination is entitled to preclusive effect."[80] Thus, the Court came down firmly on the side of preclusion, stating its conclusion with sufficient breadth to foreclose distinction on the basis of the standard of review in most cases.[81]

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 decision of the United States Court of Appeals for the Seventh Circuit in *Unger v. Consolidated Foods Corp.* affords an example. 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.[82] The federal district court initially rejected the defendant's contention that res judicata barred the plaintiff's related Title VII suit; however, when the Seventh Circuit took up the issue shortly after the Supreme Court decided *Kremer*, it reversed.[83] Relevant 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.[84] The plaintiff contended that *Kremer* preclusion 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."[85] The court rejected this argument, explaining that the standard of review in Illinois does not differ in any significant respect from the standard applicable in New York.[86] The court ultimately concluded not only that the standards of review in Illinois and New York are similar, but also that both are deferential.[87] This seems to suggest that differential deference will rarely, if ever, afford a basis to avoid *Kremer*'s import.

After engaging in a specific comparison of the New York and Illinois laws, the court offered a broader basis for rejecting plaintiff's argument by characterizing the *Kremer* decision as foreclosing it in most cases. The court stated:

> Further, there are at least two reasons for rejecting *any* argument directed to the absence of a state court *de novo* trial or some

79. *Id.*

80. *Id.* at 481 n.21.

81. *Id.* at 481–82 nn.21–22.

82. Unger v. Consol. Foods Corp., 693 F.2d 703, 704 (7th Cir. 1982).

83. *Id.* at 704–05, 711.

84. *Id.* at 706–07.

85. *Id.* at 706.

86. *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.").

87. *Id.*

> "decision on the merits" equivalent. First, the Supreme Court has already done so; the *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.[88]

Thus, the Seventh Circuit agreed that *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 *Kremer* is that federal courts must respect state-court judgments on closely related employment-discrimination claims.[89] Title VII does not repeal § 1738, so its full-faith-and-credit command applies.[90] 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 particular state from the one evaluated in *Kremer* is immaterial.[91] 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.[92] Therefore, it is unlikely that *Kremer*'s import is avoidable on that basis.

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. This Article refers to these exceptions as "inherent limitations,"

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88. *Id.* at 707 (emphasis added).

89. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 471–72 (1982).

90. *Id.* at 470–73.

91. *See Unger*, 693 F.2d at 707 n.7 (suggesting that the *Kremer* majority's discussion of differential deference was unnecessary 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").

92. *See Kremer*, 456 U.S. at 466–67 ("There is no question that th[e] 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." (citation omitted) (quoting N.Y. EXEC. LAW § 300 (McKinney 2009))); discussion *infra* Part IV.B (addressing potential bases for rejecting preclusion even if the law of the state that rendered the judgment would afford it); *see also* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 381 (1985) ("*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.").

because their applicability depends on 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 applicable case law demonstrates 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.[93] 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. State preclusion law is complicated, somewhat unpredictable, and often indeterminate; however, 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 reviewing administrative proceedings on the ground 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.[94] Thus, this broad limitation does not affect the application of *Kremer* preclusion in most cases.

The second inherent limitation is hardly 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.[95] As with the first limitation, 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 § 1738, *Kremer* preclusion does not apply if the

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93. *Kremer*, 456 U.S. at 466; *see also* Maniccia v. Brown, 171 F.3d 1364, 1368 (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 . . . .").

94. *Maniccia*, 171 F.3d at 1368; Zanders v. Nat'l R.R. Passenger Corp., 898 F.2d 1127, 1132 (6th Cir. 1990); Trujillo v. County of Santa Clara, 775 F.2d 1359, 1364 (9th Cir. 1985); Hirst v. California, 770 F.2d 776, 778 (9th Cir. 1985); Hickman v. Elec. Keyboarding, Inc., 741 F.2d 230, 232 (8th Cir. 1984); Burney v. Polk Cmty. Coll., 728 F.2d 1374, 1378 (11th Cir. 1984); Gonsalves v. Alpine Country Club, 727 F.2d 27, 28–29 (1st Cir. 1984); Wakeen v. Hoffman House Inc., 724 F.2d 1238, 1241–42 (7th Cir. 1983); *Unger*, 693 F.2d at 706–07. This discussion does not include those cases to be discussed *infra*, in which the courts permitted a plaintiff's federal claims to proceed—even after final adjudication of related state claims—on the grounds that he sought different relief in the federal court than in the state proceedings. *See infra* Part IV (discussing cases in which plaintiff seeks different relief in federal proceedings).

95. *Kremer*, 456 U.S. at 481–83.

state proceedings did not comport with due process.[96] The *Kremer* Court acknowledged the importance of this limitation, referring to it as a "serious contention" and dedicating several pages of discussion to it.[97] 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.[98] The inherent limitations therefore offer little maneuvering room by way of attempts to avoid *Kremer*'s reach.

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

The entanglement of the web becomes even more profound when questions of additional relief arise. This thread thus presents the hairiest issues on the web, as it includes those cases in which the plaintiff prevailed at the state or local administrative level—with or without a state-court judgment approving the administrative findings—and subsequently sought alternative relief in a federal suit on the same claims. The web entanglement is exacerbated by substantial disagreement among the courts about the governing decisional framework and the lack of any clear guidance from the Supreme Court. Some courts decide these cases without regard to preclusion principles, focusing instead on the availability of a statutory basis for the suit under Title VII.[99] Other courts disregard these questions of statutory authority in favor of

96. *Id.* at 480–82.

97. *Id.* at 480–85.

98. *See, e.g.*, *Maniccia*, 171 F.3d at 1368; *Trujillo*, 775 F.2d at 1368–69. "Pertinent" here means, roughly, that the cases arose from circumstances similar to those in the cases discussed elsewhere in this section—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.

99. *See, e.g.*, 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's 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 suits to recover only attorney's fees and costs incurred in administrative proceedings); Porter v. Winter, No. CV F 06-0880 LJO SMS, 2007 WL 708562, at *3, *5–6 (E.D. Cal. Mar. 2, 2007) (dismissing a Title VII suit seeking only attorney's fees for lack of subject-matter jurisdiction); Hansson v. Norton, 315 F. Supp. 2d 40, 45–46 (D.D.C. 2004), *vacated*, 411 F.3d 231 (D.C. Cir. 2005) (concluding that court lacked subject-matter jurisdiction in Title VII suit seeking only attorney's 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's fees only under Title VII's fee-shifting provision but concluding that plaintiff is not entitled to them on the facts of the case); Paz v. Long Island R.R. Co., 954 F. Supp. 62, 64–65 (E.D.N.Y. 1997) (holding that Title VII's fee-shifting provision does not support an independent suit for fees incurred in state-court discrimination suit), *aff'd*, 128 F.3d 121 (2d Cir. 1997).

preclusion principles.[100] Still other courts address both.[101] The result is a knotty snarl of case law that offers little instruction to future litigants and judges. The disagreement among the courts has festered for years and is ripe for Supreme Court resolution. This Part 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 on the statute (Title VII) 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 to answer questions pertaining to the statute's scope.[102] Once the question is characterized as one of statutory authority, the statute inevitably becomes the first source of inquiry.[103] Notwithstanding the relative dearth of pertinent Supreme Court precedent in this area, the most recent case on point engaged in statutory analysis.[104] Judges and litigants looking to the Supreme Court for direction are therefore likely to take a similar path. Finally, a statutory analysis is appealing, because it offers the possibility of a more concrete rationale. 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 that authorizes the district courts to hear Title VII claims.[105]

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100. Patzer v. Bd. of Regents, 763 F.2d 851, 856–58 (7th Cir. 1985) (holding that a policy-based exception to the claim-preclusion doctrine applied so plaintiff could proceed even though his Title VII claims were transactionally related to claims fully adjudicated in state court).

101. Nestor v. Pratt & Whitney, 466 F.3d 65, 70–72 (2d Cir. 2006) (holding that the district court had subject-matter jurisdiction over Title VII suit seeking compensatory and punitive damages and attorney's fees not recovered in prior state proceedings and that the claims were not precluded by prior state judgment).

102. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975).

103. Whether the question is best addressed as one of statutory inquiry is a separate question that will be addressed *infra* Part IV.

104. N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6, 11–12 (1986).

105. 42 U.S.C. § 2000e-5(f)(3) (2006); *see, e.g.*, Chris v. Tenet, 221 F.3d 648, 655 (4th Cir. 2000) ("[T]he jurisdictional grant of 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 Servs., 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).

Other courts—particularly those in which the plaintiff seeks only an award of attorney's 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.[106] Still other courts engage in a hybrid analysis, mentioning one or both of the pertinent statutory provisions without clarifying which one controls.[107] However, 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 the power to adjudicate "actions brought under this subchapter."[108] The referenced "subchapter," commonly referred to as "Title VII," is subchapter VII of title 42 of the United States Code, entitled "Equal Employment Opportunities." 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 the interpretation of this provision typically do not involve contests about whether the employer unlawfully discriminated or retaliated against the employee, because those determinations were made at the administrative level. Instead, subject-matter jurisdiction problems tend to arise in those cases seeking *additional* relief in federal court—relief that for one reason or another was not available or awarded in the prior state proceedings.[109]

A common form of additional relief is attorney's fees.[110] Plaintiffs who prevailed in state administrative proceedings may have received compensation for their injuries; however, they may not have recovered attorney's fees if the

106. 42 U.S.C. § 2000e-5(k); *see, e.g.*, Jones v. Am. State Bank, 857 F.2d 494, 497–99 (8th Cir. 1988) (concluding that the fee-shifting provision authorized a federal suit seeking only those attorney's fees incurred in administrative proceedings under Title VII); Paz v. Long Island R.R. Co., 954 F. Supp. 62, 65 (E.D.N.Y. 1997) ("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."), *aff'd*, 128 F.3d 121 (2d Cir. 1997).

107. *See* Nestor v. Pratt & Whitney, 466 F.3d 65, 67, 69–70 (2d Cir. 2006) (citing the fee-shifting provision but referring to the problem as jurisdictional without reference to the subject-matter-jurisdiction provision); Hansson v. Norton, 315 F. Supp. 2d 40, 46 (D.D.C. 2004) (citing both provisions as the basis for its conclusion that the court lacks jurisdiction over a fees-only suit), *vacated*, 411 F.3d 231 (D.C. Cir. 2005).

108. 42 U.S.C. § 2000e-5(f)(3).

109. *See Nestor*, 466 F.3d at 68–69 (assessing the viability of claims to recover attorney's 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's fees incurred in administrative proceedings); *Porter*, 2007 WL 708562, at *3 (ruling on a motion to dismiss claim for attorney's fees and costs); *Morgan*, 421 F. Supp. 2d at 893–94 (evaluating a jurisdictional objection to a Title VII suit seeking only attorney's 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.

pertinent law did not include a fee-shifting provision.[111] Indeed, the subject-matter jurisdiction argument is best suited to cases seeking *only* attorney's 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 the applicability of the pertinent legal or contractual provision and not on proof of the claim that necessitated incurring the fees. Thus, if the Title VII plaintiff seeks a form of relief other than fees, the court's subject-matter jurisdiction is less in doubt because resolution of damages claims will necessitate substantive analysis.[112] Assessment of the fees claim, however, will not require the same analysis.[113]

The United States Court of Appeals for the Second Circuit illustrated this concept in *Nestor v. Pratt & Whitney*.[114] In *Nestor*, the plaintiff prevailed on her employment-discrimination claims at the state administrative level, and the state trial and appellate courts affirmed those findings.[115] The pertinent state law permitted recovery of back pay, which the plaintiff received, but it did not offer emotional distress awards, attorney's fees, or punitive damages.[116] The plaintiff subsequently brought a federal suit under Title VII seeking those additional remedies.[117] In addition to its preclusion defense, the defendant contended that the court lacked subject-matter jurisdiction over the plaintiff's "damages-only" suit.[118] The court rejected the jurisdiction argument, reasoning that even if Title VII does not authorize a fees-only suit,[119] it nevertheless condones a suit like plaintiff'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."[120]

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111. *Chris*, 221 F.3d at 650 (considering a claim for attorney's fees after plaintiff received compensation for alleged discrimination via confidential settlement); *Morgan*, 421 F. Supp. 2d at 892–93 (assessing a claim for attorney's fees and costs under Title VII after plaintiff prevailed in state administrative proceedings on related state discrimination claims); *Hansson*, 315 F. Supp. 2d at 41–44 (evaluating the viability of a claim for attorney's fees incurred in administrative pursuit of discrimination claims that were resolved through a settlement).

112. *See, e.g.*, *Nestor*, 466 F.3d at 69–70 (rejecting a subject-matter-jurisdiction objection because the plaintiff sought compensatory and punitive damages in addition to fees, which would involve consideration of alleged unlawful conduct).

113. *See, e.g.*, *Chris*, 221 F.3d at 653 (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").

114. *Nestor*, 466 F.3d at 70.

115. *Id.* at 68.

116. *Id.* at 68–69.

117. *Id.*

118. *Id.* at 69.

119. *Id.* at 69–70. The court specifically declined to decide whether Title VII permits a fees-only suit. *Id.* at 70 n.4.

120. *Id.* at 70.

The limitation suggested by *Nestor* makes sense. If the jurisdiction argument prevails, 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]."[121] As will be discussed in more detail below, the plain language of this provision suggests that jurisdiction is proper only when the suit entails adjudication of claims implicating the substance of Title VII, such as suits alleging discrimination or retaliation.[122] A suit that seeks compensatory or punitive damages usually necessitates such analysis; however, a suit for fees alone does not. Thus, Title VII's jurisdictional grant likely 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 costs. The problem flows primarily from the statutory language. The Supreme Court has not addressed this question squarely, and its pertinent precedents leave room for argument on both sides of the issue.[123] This Part will delve into the statutory analysis and the Supreme Court precedents to illuminate the debate. It will ultimately conclude that Title VII's 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 an examination of the pertinent provision to determine if its meaning is plain and unambiguous.[124] Plain and unambiguous statutes must be enforced as written

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121. 42 U.S.C. § 2000e-5(f)(3) (2006).

122. *See infra* Part IV.A.1.a (engaging in statutory analysis of Title VII's subject-matter provision).

123. *See infra* Part IV.A.1.c.

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 & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:2 (7th ed. 2007) (collecting cases to support the 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 Caminetti v. United States, 242 U.S. 470, 485 (1917))). The Supreme Court is somewhat infamous for talking out of both sides of its mouth on this point. The Court has often stated 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 beyond the scope of this Article, but it is nevertheless a point well worth noting.

without reference to external sources.[125] Both the language of the statute and 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 the 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" contemplate 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 addressing this question largely agree that the statute is plainly and unambiguously limited to suits that claim substantive Title VII violations.[128] The decision of the United States Court of Appeals for the Fourth Circuit in *Chris v. Tenet* leads this charge and includes the most detailed analysis of the issue.[129] Relying primarily on dictionary definitions, that court interpreted the terms "actions brought 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 supported its conclusion by referencing the context in which the jurisdictional grant appears.[131] Specifically, the court noted that the sentences following the jurisdictional grant make venue in Title VII actions proper by reference to "facts associated with the alleged unlawful employment practice."[132] As such, the court concluded that the words "action[] under" must mean an action containing allegations of "discrimination or retaliation."[133] Further, the court noted that Congress used the term "action" throughout Title VII and that it is "consistently used to refer to a court

125. *Caminetti*, 242 U.S. at 485.

126. Chris v. Tenet, 221 F.3d 648, 652 (4th Cir. 2000).

127. 42 U.S.C. § 2000e-5(f)(3) (2006).

128. *Chris*, 221 F.3d at 652–53; *see also* Porter v. Winter, No. CV F 06–0880 LJO SMS, 2007 WL 708562, at *4 (E.D. Cal. Mar. 2, 2007); Morgan v. N.C. Dep't of Health & Human Servs., 421 F. Supp. 2d 890, 897 (W.D.N.C. 2006); Hansson v. Norton, 315 F. Supp. 2d 40, 46 (D.D.C. 2004), *vacated*, 411 F.3d 231 (D.C. Cir. 2005).

129. *Chris*, 221 F.3d at 652.

130. *Id.*

131. *Id.*

132. *Id.* Title VII venue is proper where unlawful employment practice is alleged, 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 652–53 (alteration in original) (citing Chris v. Tenet, 57 F. Supp. 2d 330, 336 (E.D. Va. 1999)).

proceeding to prevent or remedy an unlawful employment practice."[134] The court offered little further support for this conclusory assertion.

Other courts that have reached the same conclusion have relied primarily on the Fourth Circuit's analysis in *Chris* without addressing the jurisdictional-grant issue independently.[135] 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* found that a jurisdictional barrier did not exist on the grounds that the plaintiff's suit sought compensatory and punitive damages, the availability of which would turn upon an analysis of substantive issues regarding the defendant's alleged "discriminatory conduct and its consequences."[136] In *Jones v. American State Bank*, the Eighth Circuit decided that the 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* decision and those that have followed it relied.[137] Thus, the Fourth Circuit's decision in *Chris* remains the seminal authority for evaluation of jurisdiction objections in additional-remedy (primarily fees-only) suits. However, the Fourth Circuit's analysis is unsatisfactory not only as a matter of strict statutory interpretation, but also in light of the relevant Supreme Court precedents and the applicable body of law.

b. Problems with the Plainness Conclusion

Notwithstanding widespread 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 of an "action under" Title VII than a suit that focuses on substantive discrimination claims. Instead of arising under the core provisions of the statute that prohibit discrimination and retaliation,[138] the suit arises under the fee-shifting provision.[139] It is, however, no less of an "action

134. *Id.* at 652–53.

135. Porter v. Winter, No. CV F 06-0880 LJO SMS, 2007 WL 708562, at *3–4 (E.D. Cal. Mar. 2, 2007); Morgan v. N.C. Dep't of Health & Human Servs., 421 F. Supp. 2d 890, 896–98 (W.D.N.C. 2006). *But see* Hansson v. Norton, 315 F. Supp. 2d 40, 46–51 (D.D.C. 2004) (discussing *Chris* and engaging in 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"), *vacated*, 411 F.3d 231 (D.C. Cir. 2005).

136. Nestor v. Pratt & Whitney, 466 F.3d 65, 70 (2d Cir. 2006).

137. 857 F.2d 494, 497–99 (8th Cir. 1988) (permitting a fees-only suit under authority of Title VII's fee-shifting provision).

138. 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a) (2006) (noting the core prohibitions against discrimination and retaliation).

139. *Id.* § 2000e-5(k). See *infra* Part IV.A.2 for a discussion of whether the fee-shifting provision itself authorizes an independent action.

under" Title VII. Moreover, the statutory context does not necessarily compel the conclusion that the *Chris* court reached. Simply 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 a determination of those issues.[140] 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 neither plain nor unambiguous, one must attempt to discern the intent of the drafters to determine the provision's meaning.[141] Potential sources used in statutory interpretation of this kind include legislative history, pertinent policy goals, and considerations of reasonableness.[142] These authorities likewise reveal no clear answer. As the *Chris* court stated, 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."[143] 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."[144] On the other hand, as the *Nestor* court pointed out, Title VII also reflects a congressional goal of affording complete relief to victims of discrimination.[145]

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140. *See, e.g.*, *Nestor*, 466 F.3d at 69 (holding that res judicata does not preclude the court from having subject-matter jurisdiction over an action for attorney's fees under a Title VII action without ruling on the substance of the underlying action); Chris v. Tenet, 221 F.3d 648, 649–53 (4th Cir. 2000) (holding that the district court did not have subject-matter jurisdiction over an action for attorney's fees in two separate sex-discrimination actions under Title VII, but declining to rule on those discrimination actions).

141. *See* 2A SINGER & SINGER, *supra* note 124, §§ 45:2, :5.

142. *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 an employer from favoring older workers over younger ones); Robinson v. Shell Oil Co., 519 U.S. 337, 345–46 (1997) (turning to both "the broader context provided by other sections of the statute" and the statute's purposes to resolve ambiguity as to the meaning of the term "employees" in the anti-retaliation provision of Title VII); 2A SINGER & SINGER, *supra* note 124, § 45:13 (identifying the following as resources for interpretation: statutory language and context, legislative history and underlying policy, and concepts of reasonableness); 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. PA. J. LAB. & EMP. L. 533, 570–72 & nn.233–37 (2007) (discussing the statutory interpretation framework); Taylor, *supra* note 23, at 116–26 (discussing the statutory interpretation framework).

143. *Chris*, 221 F.3d at 653.

144. *Id.*

145. *Nestor*, 466 F.3d at 71–72 (citing N.Y. Gas Light Club, Inc. v. Carey, 447 U.S. 54, 65–68 (1980)); Clarke v. Frank, No. 88 CV 1900 (JLC), 1991 WL 99211, at *2 (E.D.N.Y. May 17,

A fees-only suit could promote this goal by affording an opportunity to recover fees that were not available in administrative proceedings; thus, the prevailing plaintiff's relief would be complete—from a Title VII standpoint—only if he recovered the fees award that the statute provides.[146]

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 reflected in Title VII. On the other hand, a fees-only suit may be the only opportunity that a plaintiff has to recoup the substantial cost he incurred in vindicating his rights. In many Title VII cases, the fees award will far exceed any damages recovered.[147] This foray into the minds of Title VII's drafters leaves one unsure as to whether the subject-matter jurisdiction provision encompasses a fees-only suit.[148]

c. Supreme Court Precedents

The pertinent Supreme Court precedents do not provide a direct answer. The Court addressed a closely related question nearly thirty years ago in *New York Gas Light Club, Inc. v. Carey*.[149] The *Carey* plaintiff prevailed on her race-discrimination claims in state administrative proceedings and received back pay and an offer of employment as a waitress.[150] While the defendant's appeal to the state courts was pending, the plaintiff received a right-to-sue notice from the EEOC, and she filed a federal suit claiming discrimination under Title VII and other civil-rights statutes.[151] After the defendant exhausted its appeals in the state courts, the parties agreed that the plaintiff's suit could be dismissed; however, she could continue to pursue her request for attorney's fees.[152] The district court denied the fee request, and the Second Circuit reversed, ruling that Title VII permits a suit solely to recover fees under these

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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 (6th Cir. 1988))).

146. *Clarke*, 1991 WL 99211, at *3.

147. *See, e.g.*, Brandau v. Kansas, 168 F.3d 1179, 1183 (10th Cir. 1999) (noting that the plaintiff was awarded $1 in nominal damages and $41,598.13 in attorney's fees—an award confirmed by the court of appeals); Gumbhir v. Curators of Univ. of Mo., 157 F.3d 1141, 1146–47 (8th Cir. 1998) (acknowledging that the district court awarded the plaintiff $110,000 in attorney's fees and $4,423.20 in lost wages, but reducing the award of attorney's fees to $46,750, which still exceeded the lost wages recovered); Abrams v. Lightolier Inc., 50 F.3d 1204, 1209, 1211 (3d Cir. 1995) (recognizing the magistrate's award to the plaintiff of $473,953.45 for pain and suffering and $546,379.59 in attorney's fees and concluding that award of attorney's fees could exceed the damages award).

148. This discussion is cursory because, as will be discussed *infra*, the question is ultimately moot. The broader grant of jurisdiction on the district courts to hear cases involving federal questions should encompass these suits. *See infra* Part IV.A.1.d (discussing federal question jurisdiction over fees-only suits).

149. 447 U.S. 54 (1980).

150. *Id.* at 57.

151. *Id.* at 58.

152. *Id.* at 59.

circumstances.[153] The Supreme Court granted certiorari, framing the question as "whether, under Title VII of the Civil Rights Act of 1964, a federal court may allow the prevailing party attorney's 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."[154] The Court answered that question in the affirmative, allowing a plaintiff to proceed in a Title VII fees-only suit.[155]

At first blush, it may appear that the Court's decision in *Carey* conclusively answered 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.[156] A closer look, however, reveals *Carey*'s limitations. First, the 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 neither specifically referenced, nor discussed, the jurisdiction provision.[157] Rather than framing the issue as a jurisdictional question, the Court focused on the fee-shifting provision of Title VII, concluding that it authorizes an independent fees-only suit.[158] Thus, the Court's decision in *Carey* at most answered only whether the fee-shifting provision supported such an independent suit; it said nothing at all about Title VII's jurisdictional grant. Indeed, the Court never made even a passing reference to the jurisdictional question. The Court's only references to the term "jurisdiction" pertain to the EEOC's authority relative to the state

153. *Id.* at 60.

154. *Id.* at 56.

155. *Id.* at 71.

156. *Id.*

157. *Id.* at 58–67. The Court referenced 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.* at 70. The Court was likely focused on paragraph (1) of section 706(f), as the Court cites section 706(f)(1) several times in its decision. *Id.* at 58 (citing section 706(f)(1) as requiring the EEOC to issue a right-to-sue letter); *id.* at 63 n.3 (noting that the statute allows a "court [to] stay 'further proceedings' pending the termination of 'State or local proceedings'" (citing 42 U.S.C. § 706(f)(1) (2006))); *id.* at 65 ("After an additional 30 days, the EEOC is authorized to bring an action, in which the complainant has an absolute right to intervene." (citing 42 U.S.C. § 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." (citing 42 U.S.C. § 706(f)(1))). The Court did not mention section 706(f)(3), which contains the jurisdictional grant, anywhere in its discussion.

158. *See Carey*, 447 U.S. 54, 60–71 (analyzing at length Title VII's fee-shifting provision). The fee-shifting provision is discussed *infra* in Part IV.A.2.

agency.[159] Consequently, to conclude 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 *Carey* arose also limits its importance. The *Carey* plaintiff filed her federal-court lawsuit while the defendant's state-court appeal was pending; her initial complaint thus went beyond the typical fees-only request by including substantive claims for relief under Title VII and other civil-rights laws.[160] The parties agreed to dismiss the substantive claims when the state appeals were completed, leaving only the fees request intact.[161] Because the propriety of the Court's jurisdiction is measured on the face of the plaintiff's complaint,[162] there was hardly any doubt in *Carey* about the Court's power over the case. The plaintiff asserted numerous substantive claims, any one of which would have been sufficient to confer jurisdiction; thus, *Carey* did not present a jurisdictional question at all.[163] Justice John Paul Stevens expressly recognized this limitation in his concurring opinion and suggested that the rule in fees-only suits at their inception should be different:

> [I]t 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.[164]

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

More recently, the Court decided *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, which likewise provides instruction but offers no definitive answer to the looming question.[165] The plaintiffs in *Crest Street* were residents of a predominantly African-American neighborhood in Durham, North Carolina.[166] When the North Carolina Department of Transportation (NCDOT) proposed a road-construction project through the Crest Street community, which would displace the community park and church and many of the neighborhood's residents, two

159. *See Carey*, 447 U.S. at 64–65.

160. *Id.* at 58.

161. *Id.* at 59.

162. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152–53 (1908).

163. *Carey*, 447 U.S. at 58. As the Court notes, the procedural posture of the case was a bit anomalous. The Court acknowledged the district-court judge's concern that the EEOC should not have issued a right-to-sue letter while state proceedings remained pending. *Id.* at 59.

164. *Id.* at 71 (Stevens, J., concurring).

165. 479 U.S. 6 (1986).

166. *Id.* at 8.

neighborhood associations filed a complaint with the United States Department of Transportation (USDOT), alleging that the proposed highway-construction project discriminated against Crest Street residents on the basis of race, in violation of Title VI of the Civil Rights Act of 1964.[167] The parties ultimately settled their claims; however, a dispute arose about NCDOT's liability for attorney's fees.[168] As a result, the plaintiffs filed a federal lawsuit seeking attorney's fees under the fee-shifting statute applicable in Title VI cases—the Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. § 1988.[169] The Supreme Court granted certiorari to resolve a circuit split regarding the viability of a fees-only suit.[170] The Court concluded that § 1988 did not support an independent action to recover fees incurred in administrative proceedings, basing its decision on the plain language of the statute as reinforced by its legislative history.[171] The statute permits an award of fees only in an "'action or proceeding *to enforce a provision of* . . . [T]itle VI'" and does not authorize a fees-only suit.[172]

Crest Street filled some of the gaps left by *Carey*, but its solution was not comprehensive. Unlike *Carey*, *Crest Street* did not have an unusual procedural posture. The federal lawsuit underlying the *Crest Street* decision began as one seeking only attorney's fees.[173] However, the context of the case distinguishes it from the Title VII cases with which this Article is concerned. The plaintiffs in *Crest Street* sought to recover attorney's fees under § 1988; such fees were incurred in the administrative pursuit of claims under Title VI before the USDOT.[174] *Crest Street* thus 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. Although the Court determined that § 1988 "does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws," it never used the term "jurisdiction" to describe the issue.[175] As such, whatever *Crest Street* may contribute to the debate about additional-remedy suits, it does not answer the jurisdictional problem directly.[176]

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167. *Id.* at 8–9 (noting that Title VII prohibits discrimination by programs receiving federal funding).

168. *Id.* at 11; *see also* 42 U.S.C. § 1988 (2006).

169. *Crest Street*, 479 U.S. at 11–12.

170. *Id.* at 11.

171. *Id.* at 12–14.

172. *Id.* at 12 (alteration in original) (emphasis added) (quoting 42 U.S.C. § 1988).

173. *Id.* at 11–12 ("The case before us is not, and was never, an action to enforce any of [the pertinent civil-rights] laws.").

174. *Id.* at 8–9, 11.

175. *Id.* at 12.

176. The import of the *Crest Street* decision for the question of statutory authority under the fee-shifting provision will be addressed *infra* in Part IV.A.2.c.

d. Evaluation: The Problem with the Jurisdiction Objection

The power of the district courts to decide claims seeking only attorney's fees remains a matter of some debate among the lower courts. The Fourth Circuit in *Chris* summarily concluded that Title VII's jurisdictional grant does not extend to cases seeking only fees and costs incurred in prior proceedings.[177] Following the Fourth Circuit's lead, several district courts have reached the same conclusion.[178] The Supreme Court has not confronted the question of jurisdiction over fees-only suits under Title VII and, outside of that particular context, offers conflicting instruction. The answer to the question, however, may be quite simple. Indeed, this Article takes the position that—even without regard to whether Title VII's specific jurisdictional grant applies[179]—there can be little doubt about the courts' *power* to decide such cases. The broad grant of power to hear cases raising federal questions should serve as a catch-all.

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 original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[180] Alternatively referred to as "arising under" or "federal question" jurisdiction, this conferral of power includes all cases in which federal law creates the cause of action.[181]

It seems beyond doubt that a suit to recover attorney's fees under Title VII arises under federal law. The claim exists because Title VII creates it by condoning fee awards to prevailing parties.[182] Without regard to whether Title VII *authorizes* an independent fees-only suit, Congress's broad conferral of federal-question jurisdiction must encompass it.[183] Remarkably, the plaintiff in *Chris* never raised § 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 judges ever considered it.[184] A suit to recover attorney's fees under 42 U.S.C. § 2000e-

177. Chris v. Tenet, 221 F.3d 648 (4th Cir. 2000).

178. Nestor v. Pratt & Whitney, 466 F.3d 65, 67, 69 (2d Cir. 2006); Braswell v. Montgomery County Dep't of Corr. and Rehab., 52 F. App'x 617, 619–20 (4th Cir. 2002); Morgan v. N.C. Dep't of Health & Human Servs., 421 F. Supp. 2d 890, 897–98 (W.D.N.C. 2006); Taylor v. Runyon, No. 90-2410-KHV, 2004 WL 303206, at *2 (D. Kan. Feb. 2, 2004).

179. This Article does not take a firm position as to whether Title VII's specific jurisdictional grant applies in this context.

180. 28 U.S.C. § 1331 (2006).

181. 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.").

182. 42 U.S.C. § 2000e-5(k) (2006).

183. The question of a court's statutory authority to decide such cases is discussed *infra* in Part IV.A.2.

184. Chris v. Tenet, 221 F.3d 648, 649, 651–52, 655 (4th Cir. 2000); Chris v. Tenet, 57 F. Supp. 2d 330, 331, 334–35, 340 (E.D. Va. 1999), *aff'd*, 221 F.3d 648 (4th Cir. 2000). It is not at all clear why this is so; however, the most likely explanation is that the court simply confused jurisdiction with the existence of a claim. This confusion of terms likely contributed to the web entanglement in the first place.

5(k) arises under federal law; thus, the power of the district courts to hear such cases is hardly debatable. 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's Fees 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. In other words, even if a court has jurisdiction over fees-only suits, the case may nevertheless be subject to immediate dismissal if the statute does not permit such suits in the first place.[185] 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."[186] For present purposes, the question is whether—absent an accompanying claim of discrimination or retaliation—that statutory provision permits an independent suit to recover fees.

a. Limited Adoption of the Fee-Provision Approach

The seminal authority adopting this approach is *Jones v. American State Bank*. In *Jones*, the United States Court of Appeals for the Eighth Circuit held that a plaintiff could proceed in an independent federal suit to recover fees under Title VII's fee-shifting provision.[187] The plaintiff filed an EEOC charge against her employer, alleging sex discrimination.[188] The EEOC referred the charge to the South Dakota Division of Human Rights, as required under Title VII, and the state agency awarded the plaintiff back pay, interest, and costs, and ordered reinstatement.[189] The state agency refused the plaintiff's request for attorney's fees on the ground that they were unavailable under South Dakota law.[190] No appeals were filed, but the plaintiff brought a separate suit in federal court to recover the attorney's fees that she incurred in the state

185. The key procedural distinction here is the device 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 jurisdictional grant. *See* 28 U.S.C. § 1331; *see also supra* Part IV.A.1.d.

186. 42 U.S.C. § 2000e-5(k).

187. Jones v. Am. State Bank, 857 F.2d 494, 498–99 (8th Cir. 1988).

188. *Id.* at 495.

189. *Id.*

190. *Id.*

administrative proceedings.[191] The district court granted the fee request, and the bank appealed.[192]

The most notable feature of the Eighth Circuit's analysis is its cursory reference to the fee-shifting provision of Title VII.[193] Although the court referred to the issue in passing as one of jurisdiction, it never mentioned Title VII's jurisdictional grant; rather, it treated the question as one of availability of a cause of action under the fee-shifting provision.[194] As such, the Eighth Circuit's approach differs somewhat markedly from that of the other courts that treat the question as one of jurisdiction; indeed, it is these differences that exacerbate the web entanglement and cause confusion, for not only do the courts reach divergent outcomes in these additional-remedy cases, but they also disagree on the decisional framework.[195]

The Eighth Circuit's statutory-authority approach is far less pervasive than the Fourth Circuit's jurisdictional approach; however, given the dubiousness of the jurisdictional objection, it is not clear why this is so. On the other hand, *Jones* has met with little agreement. The Fourth Circuit's decision in *Chris* expressly repudiates *Jones* as inconsistent with the Supreme Court's decisions in *Crest Street* and *Carey*.[196] In deciding *Paz v. Long Island Railroad Co.*, the Eastern District of New York followed an approach similar to that used by the *Jones* court. In *Paz*, the court focused on the fee-shifting provision rather than on the jurisdictional grant; however, the *Paz* court reached the opposite conclusion, holding that Title VII did not support an independent suit for fees.[197] Finally, in *Hansson v. Norton*, where no Title VII claim was raised in the state proceedings, the District Court for the District of Columbia took a hybrid approach, acknowledging both statutory provisions while also rejecting the *Jones* court's conclusion and dismissing the plaintiff's fees-only suit.[198] Thus, the Eighth Circuit's statutory-authority approach is not a popular one.

Notwithstanding this unpopularity, the question remains whether the statutory-authority approach adequately solves the additional-remedy puzzle. As noted above, the matter is at least initially one of statutory interpretation, and the same Supreme Court precedents once again must be examined.

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191. *Id.* at 495–96.

192. *Id.* at 496.

193. *Id.* at 497.

194. *Id.* at 496–97.

195. *See supra* Part IV.A.1 (discussing cases that treat the issue as one of jurisdiction).

196. Chris v. Tenet, 221 F.3d 648, 654–55 (4th Cir. 2000).

197. Paz v. Long Island R.R. Co., 954 F. Supp. 62, 65 (E.D.N.Y. 1997) (dismissing a suit to recover fees incurred in a state employment-discrimination case).

198. Hansson v. Norton, 315 F. Supp. 2d 40, 51 (D.D.C. 2004) ("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."), *vacated*, 411 F.3d 231 (D.C. Cir. 2005).

Ultimately, it appears 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

Statutory interpretation begins with an inquiry into the plainness or ambiguity of the language.[199] 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 . . . ."[200] The question is whether this statute plainly permits or prohibits an independent fees-only suit, or whether its mandate is ambiguous.

The primary focus of this inquiry is on the language "[i]n any action or proceeding under this subchapter . . . ."[201] Although the *Jones* court concluded that these terms encompassed an independent suit, the court did not parse the words in detail.[202] Instead, the court focused on the term "proceedings," finding evidence in the legislative history that it is meant to include events at the state administrative level.[203] 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.[204]

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 inadequate. Regardless of whether or not the term "proceedings" includes state administrative actions, it does not follow that the statute provides for an independent suit. In other words, even if fees incurred in state administrative proceedings are recoverable in a Title VII suit, those fees may not be recoverable in an independent action without any underlying substantive claim for relief. Interpretation of the term "proceedings" to include state administrative actions therefore leaves unanswered the question of whether attorney's fees may be recovered independently.

Contrary to the *Jones* court's conclusion, the plain statutory language actually suggests that independent fees-only suits are precluded. The statute provides that fees may be awarded "[i]n any action or proceeding under [Title VII]."[205] 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

199. *See supra* notes 124–26 and accompanying text (discussing the rules of statutory interpretation).

200. 42 U.S.C. § 2000e-5(k) (2006).

201. *Id.*

202. Jones v. Am. State Bank, 857 F.2d 494, 497–98 (8th Cir. 1988).

203. *Id.* at 497 ("Title VII uses the term 'proceedings' to describe the state action desired under the system of deferrals, suggesting that state administrative proceedings were adequate triggers for attorney's fees.").

204. *Id.* at 497–99.

205. 42 U.S.C. § 2000e-5(k).

result, it easily could have included language creating a fees-only suit; for example, Congress could have added the clause "or an independent action solely for that purpose" after the phrase quoted above. Instead, Congress expressly provided that fees may only be recovered *in* a Title VII action, which consists of a suit alleging discrimination or retaliation under 42 U.S.C. §§ 2000e-2(a) or 2000e-3(a).[206] Title VII does not authorize an independent fees-only suit on the basis of its plain language.[207]

Initially, it might appear that this conclusion contradicts the conclusion reached above with respect to the meaning of the terms "action brought under" in the subject-matter provision of Title VII.[208] However, the apparent inconsistency does not exist. The jurisdiction provision confers upon the district courts the power to hear cases brought under Title VII.[209] That may encompass an action under any provision of Title VII that authorizes a cause of action; however, whether the fee provision authorizes a cause of action is an entirely separate question. The fee provision allows for a recovery of fees *in* Title VII actions, but does not itself create an independent cause of action for that purpose.[210] 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 does not appear to do so.

c. Supreme Court Precedents

Pertinent Supreme Court precedents support the conclusion that Title VII does not authorize an independent fees-only suit. As noted above, although the Court's decisions in *Carey* and *Crest Street* do not conclusively answer the jurisdictional question, they do represent the controlling law in this area.[211] Indeed, the Eighth Circuit relied directly on the *Carey* decision in reaching its conclusion that Title VII authorizes a fees-only suit, but its reliance on *Carey*

206. *Id.* §§ 2000e-2(a), 2000e-3(a), 2000e-5(k).

207. 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]," the statute permits recovery of fees incurred in Title VII actions, but not in actions under other laws, such as the anti-discrimination laws that give rise to state administrative proceedings. *Id.* § 2000e-5(k) (emphasis added). However, the Supreme Court's decision in *New York Gas Light Club, Inc. v. Carey* relied on 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."). Accepting the proposed view would depart from Supreme Court precedent and perhaps even require overruling it. However, because the plain language suggests that the statute does not encompass an independent fees-only suit, it is not necessary to wrestle with the Court's decision in order to resolve this issue.

208. 42 U.S.C. § 2000e-5(f)(3); *see supra* Part IV.A.1 (discussing interpretations of Title VII's jurisdictional grant).

209. 42 U.S.C. § 2000e-5(f)(3).

210. *See id.* § 2000e-5(k).

211. *See supra* Part IV.A.1.c.

was misplaced.[212] Moreover, that court failed to take sufficient account of *Crest Street*.

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 Title VII discrimination claims in her original federal complaint.[213] Consequently, the case did not originate as a fees-only suit; it became a fees-only suit when the parties agreed to dismiss all of the plaintiff's substantive claims.[214] Thus, the Court's decision does not address whether Title VII authorizes an independent fees action. 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.[215]

The Court's decision simply did not approach the question of the propriety of a fees-only suit.

The Court came closer to answering that question six years later in the *Crest Street* decision in which the Court held that § 1988 does *not* authorize a fees-only suit.[216] Unfortunately, *Crest Street* does not provide a definitive answer.[217] First, *Crest Street* arose under § 1988—the fee-shifting provision generally applicable in federal civil-rights actions—rather than under § 2000e-5(k), which is the provision specific to Title VII.[218] While it is certainly persuasive authority, the Court's decision in *Crest Street* does not necessarily bind lower courts in Title VII cases. This is especially so because of the important differences between Title VII and § 1988. Section 1988 authorizes a court to award fees to the prevailing party "[i]n any action or proceeding *to enforce a provision of* . . . [T]itle VI of the Civil Rights Act of 1964 . . . ."[219] 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 laws.[220] Title VII, by contrast, refers only to "any action or proceeding *under*" Title VII.[221] It is less explicit that the action must be one to enforce rights

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212. Jones v. Am. State Bank, 857 F.2d 494, 496–97 (8th Cir. 1988).

213. N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 58 (1980).

214. *Id.* at 59.

215. *Id.* at 72 (Stevens, J., concurring) (citation omitted).

216. N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6, 15 (1986) ("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.").

217. *Id.* at 12.

218. *Id.* at 7.

219. 42 U.S.C. § 1988(b) (2006) (emphasis added).

220. *Id.* (emphasis added).

221. 42 U.S.C. § 2000e-5(k) (2006) (emphasis added).

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 on this issue, the most plausible result is that Title VII does not permit a fees-only suit. The plain language of the statute suggests this result,[222] and the *Carey* decision does not preclude it, leaving open the question of the propriety of suits that seek only fees from the outset.[223] The Court's subsequent holding in *Crest Street*, interpreting a similar statute, makes this conclusion 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.[224]

B. Applicable Preclusion Rules

After untangling the statutory-authority portion of the additional-remedy-cases thread, solely the preclusion question remains. The cases comprising this thread involve claims for relief beyond the amount recovered in related state proceedings—excluding the fees-only suits discussed in the preceding section—that arise after entry of a final judgment by a state court.[225] While the statutory provisions discussed above govern fees-only suits, preclusion rules will control in the remaining cases. Thus, the focus of the inquiry is on the preclusive effect of a state-court judgment entered on appeal from an administrative determination.

The Second Circuit's decision in *Nestor* is the seminal case presenting these issues. As discussed above, the plaintiff prevailed on her state-law sex-discrimination claims at the administrative level and in the appeal brought by the defendant.[226] The plaintiff subsequently brought a federal lawsuit under Title VII, seeking compensatory damages, punitive damages, attorney's fees, and pre-judgment interest—remedies that were not available to her under state law.[227] The district court granted the defendant's motion for summary judgment on the grounds that claim preclusion barred relitigation of the

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222. *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 27, at 450–51 (concluding that the Supreme Court intended its holding in *Crest Street* to apply in Title VII cases).

223. N.Y. Gaslight Club, Inc. v. Carey, 477 U.S. 54, 58 (1980).

224. The Court declined to address this issue by denying the plaintiff's petition for a writ of certiorari in *Chris v. Tenet*. 531 U.S. 1191 (2001). No such opportunity arose in conjunction with the more recent Second Circuit case, *Nestor v. Pratt & Whitney*, in which the defendant employer did not seek certiorari. 466 F.3d 65 (2d Cir. 2006).

225. As discussed above, Title VII does not authorize a suit solely seeking attorney's fees incurred in state proceedings. *See supra* Part IV.A.2.b.

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

227. *Id.* at 68–69.

discrimination claims resolved in the state proceedings.[228] The Second Circuit, noting that the issue presented a split among the circuits,[229] rejected the district court's conclusion.[230] The court determined that the plaintiff's Title VII claims survived regardless of whether federal or state preclusion law controlled.[231]

The United States Court of Appeals for the Seventh Circuit took a similar approach in *Patzer v. Board of Regents*.[232] In *Patzer*, the plaintiff prevailed on his sex- and race-discrimination claims in the state administrative proceedings, and the state courts affirmed those findings.[233] He subsequently filed a federal lawsuit under Title VII, seeking back pay that had not been available under state law.[234] The district court granted summary judgment on the grounds that the claim was barred, but the Seventh Circuit reversed.[235] Although the court concluded that the Title VII suit asserted the same claim as the state action and that the state judgment should therefore bar the plaintiff from proceeding,[236] it went on to find that Wisconsin law, which applied in accordance with the Supreme Court's decision in *Kremer v. Chemical Construction Corp.*, would recognize a policy-based "exception to the general rule of res judicata on the peculiar facts of this case."[237] The court found that barring the plaintiff's claims would frustrate Title VII's "policy of referral and deferral" through which Title VII proceedings are "supplementary to available state remedies for employment discrimination."[238] Thus, the application of claim preclusion would prevent a plaintiff from obtaining *complete* relief by rendering the back-pay remedy wholly unavailable, contrary to Title VII's professed policy.[239] The court therefore permitted plaintiff's duplicative litigation to proceed.[240]

Both of these cases properly note the pertinence of the Supreme Court's decision in *Kremer*, but neither applies it correctly.[241] The Supreme Court's decision in *Kremer* unequivocally commands that federal courts give full faith and credit to state-court judgments in Title VII cases.[242] 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

228. *Id.* at 69.
229. *Id.* (citation omitted).
230. *Id.* at 69–70.
231. *Id.*
232. 763 F.2d 851, 853–54 (7th Cir. 1985).
233. *Id.*
234. *Id.* at 854.
235. *Id.* at 858.
236. *Id.* at 856.
237. *Id.* at 855–56.
238. *Id.* at 856–58.
239. *Id.* at 856, 858.
240. *Id.* at 858.
241. Nestor v. Pratt & Whitney, 466 F.3d 65, 72 (2d Cir. 2006); *Patzer*, 763 F.2d at 854–55.
242. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 & n.6 (1982).

governing state's preclusion rules provide leeway, the court should take account of Title VII's policy against inefficiency and duplicative litigation, as reflected in the legislative history.[243] 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 potentially friendlier state forum, rather than pursuing additional remedies in federal court.

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

The Supreme Court's decision in *Kremer* unequivocally held that the federal full faith and credit statute applies in Title VII cases.[244] The Court carefully considered whether Title VII repealed § 1738 and determined that it did not.[245] To that end, the Court found no conflict between Title VII and § 1738, concluding instead that the statutes were by no means incompatible.[246] According to the Court, this interpretation avoided an anomalous result: absent § 1738's full-faith-and-credit directive, the finality of state-court decisions "would depend on which side prevailed in a given case."[247] Thus, a judgment favorable to the plaintiff would remain final, while a judgment for the defendant would lead to an inevitable subsequent suit in federal court. These concerns led the Court to conclude that Title VII did not result in an implied repeal of § 1738 and that the statutes should operate together.[248]

The Court bolstered its conclusion by reference to pertinent legislative history.[249] Specifically, the Court found ample evidence in the legislative debates—concerning both the original enactment and the 1972 amendments—indicating that Congress intended to leave the full faith and credit statute intact in Title VII cases.[250] The most significant evidence included comments suggesting that Congress did not intend for a single claim to be fully litigated in multiple forums.[251] Perhaps the best indication of Congress's vision arose in conjunction with the 1972 amendments, described by the Court as follows:

> 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 judgments is found in an exchange between

243. *See infra* Part IV.B.2.c.

244. *Kremer*, 456 U.S. at 466 & n.6.

245. *Id.* at 468–76.

246. *Id.* at 470, 471 n.8, 476.

247. *Id.* at 470.

248. *Id.* at 475–76.

249. *Id.* 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."). The Court was quick to point out, however, that resort to the legislative history was unnecessary given the compatibility between Title VII and § 1738. *Id.*

250. *Id.* at 468–76.

251. *Id.* at 473–74.

> Senator [Jacob] Javits, a manager of the 1972 bill, and Senator [Roman] 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:
>
> > "[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."[252]

The Court also quoted Senator Harrison Williams, "another proponent of the 1972 bill," as stating that he "'d[id] 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.'"[253] The plain import of this legislative history, therefore, reinforces the conclusion that the Court reached by reference to the statutes: that Title VII did not supplant § 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 *Carey*, its holding clarified *Carey's* limited scope. The *Carey* Court held that a plaintiff who prevailed in state administrative proceedings could recover attorney's fees from such proceedings in a subsequent suit in federal court.[254] 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 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.[255] 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

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252. *Id.* at 475 (quoting 118 CONG. REC. 3370 (1972) (statement of Sen. Javits)).

253. *Id.* at 476 (quoting 118 CONG. REC. 3372 (1972) (statement of Sen. Williams)).

254. N.Y. Gas Light Club, Inc. v. Carey, 447 U.S. 54, 61 (1980); *see also supra* notes 149–64 and accompanying text (discussing the *Carey* decision).

255. *Kremer*, 456 U.S. at 475–76.

relitigation of the same claim whether the available remedies differ or not.[256] The plaintiff's discrimination claims were merged into his prior suit; thus, the judgment rendered in that suit bars him 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 that a plaintiff who prevails in state administrative proceedings can pursue recovery of the attorney's fees he incurred in those proceedings in a subsequent federal-court suit.[257] 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 the controlling precedent on that issue.

The Second Circuit in *Nestor* 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: "we 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 unavailable in the state court."[258] The court's rationale undermines both *Kremer*'s clear command and 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.[259] The *Nestor* court would limit that holding, rendering it inapplicable when the plaintiff is seeking additional remedies.[260] Indeed, its decision could even be construed to suggest that state-court judgments deserve *issue*-preclusive effect in Title VII cases such that the state's "decision on the merits of a discrimination claim is entitled to full faith and credit," but that *claim* preclusion does not apply.[261] From this vantage point, the court would give full faith and credit to the state's liability determination but would allow the plaintiff to proceed on identical claims for separate relief. The plaintiff could have his cake and eat it too, relying on *Kremer*'s full faith and credit to his benefit, without suffering its burden. The Court's decision in *Kremer*, however, neither suggests nor permits such an approach. The full faith and

256. The preclusive effect of the state judgment is, of course, determined by the law of the state that rendered it. *See* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 373–74 (1985); *Kremer*, 456 U.S. at 481–82. The effect of typical state preclusion law, and the policy concerns that should influence it, are discussed *infra* in Part IV.B.2.

257. *Carey*, 447 U.S. at 71.

258. Nestor v. Pratt & Whitney, 466 F.3d 65, 72 (2d Cir. 2006).

259. *Kremer*, 456 U.S. at 468–70.

260. *Nestor*, 466 F.3d at 72.

261. *Id.*

credit statute includes no additional-relief exception, and *Kremer* leaves no room to apply one.[262]

The policy concerns that prevailed in *Kremer* suggest that the *Nestor* court's reading is implausible. The *Kremer* Court emphasized that Title VII's drafters did not envision an inefficient system that fosters duplicative litigation.[263] To the contrary, the court noted that "[n]othing 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."[264] In addition to the Senate commentary excerpted above,[265] the Court also highlighted the remarks of Senator Everett Dirksen, 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?'"[266]

The import of these excerpts is clear: Title VII's referral and deferral scheme should not breed multiple suits, and uncompromising loyalty to § 1738's full-faith-and-credit command also produces this result.

The *Kremer* Court found that strict adherence to § 1738 not only promotes the efficiency concerns expressed by Title VII's drafters, but also supports the "comity and federalism interests embodied in § 1738."[267] 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:

> [S]tripping 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

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262. *Kremer*, 456 U.S. at 473–76 (1982).

263. *See id.* at 473–78 (discussing Title VII's legislative history and noting that it is unlikely that Congress considered it necessary to provide a relitigation right in federal court).

264. *Id.* at 473.

265. *See supra* notes 249–53 and accompanying text (discussing portions of legislative history relied on by the Court in *Kremer*).

266. *Kremer*, 456 U.S. at 474 n.14 (quoting 110 CONG. REC. 6449 (1964) (statement of Sen. Dirksen)).

267. *Id.* at 478.

> the incentive for States to work towards effective and meaningful antidiscrimination systems.[268]

The Court's decision in *Kremer* therefore left little to no room for variation. According to the *Kremer* Court's analysis, the language of both Title VII and § 1738 suggests that federal courts should accord state judgments full faith and credit and that prevailing policy concerns of efficiency, federalism, and comity compel that result.[269]

Subsequent Supreme Court decisions clearly show that *Kremer*'s directive applies without limitation. In *Marrese v. American Academy of Orthopaedic Surgeons*, the Court not only cited *Kremer* approvingly, but also relied upon its analytical framework, noting that "*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."[270] The *Marrese* Court went on to apply that principle to the facts 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.[271] The Court's decision in *Marrese* embodies the enduring and pervasive impact of *Kremer*'s resolve.[272]

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."[273] However, the court went on to discredit *Kremer*'s import on the facts of the case, suggesting that it "would frustrate the supplementary purpose of Title VII as surely as treating the administrative decision itself as a bar."[274] *Kremer*'s full-faith-and-credit directive is not optional, and it leaves no room for such loose, policy-based erosions. In casting aside the *Kremer* rule, the *Patzer* court disregarded controlling precedent without sufficient reason.

The *Patzer* court attempted to further justify its divergence from the Supreme Court's precedent on the grounds that 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

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268. *Id.* (footnote omitted) (citation omitted).

269. *Id.*

270. Morrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 381 (1985).

271. *Id.* at 384–86.

272. *Id.*; *see also* Matsushita Elec. Indus. Co. 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.'" (alteration in original) (quoting *Kremer*, 456 U.S. at 481–82)).

273. Patzer v. Bd. of Regents, 763 F.2d 851, 858 (7th Cir. 1985).

274. *Id.*

court could not."[275] This is, indeed, a possibility under *Kremer*, yet no matter how anomalous this scenario may be, it results directly from the unbending rule that the *Kremer* Court established, which is still in effect today. The *Patzer* court's disregard of it lacks foundation, because *Kremer* directs federal district courts to accord full faith and credit to state-court judgments in Title VII cases.[276] In that respect, *Kremer's* 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, making sweeping generalizations about the outcome of every Title VII case is virtually impossible. However, many states have adopted the rules reflected in the *Second Restatement of Judgments* or close approximations thereof, which provides some degree of uniformity in such cases.[277] Thus, discussion of the governing principles in a jurisdiction that applies the *Restatement* is appropriate. Application of the *Restatement* preclusion rules should bar a plaintiff from splitting his 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:

> When 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.[278]

Paragraph two of the same section offers further insight about the requisite relatedness:

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275. *Id.*

276. *Kremer*, 456 U.S. at 481–82.

277. *See, e.g.*, Nestor v. Pratt & Whitney, 466 F.3d 65, 73 (2d Cir. 2006) ("Connecticut law applies the 'transactional test' described in Section 24 of the Restatement (Second) of Judgments . . . ."); Fayer v. Town of Middlebury, 258 F.3d 117, 124 (2nd Cir. 2001) (noting the explanation given by the *Second Restatement of Judgments* and commenting that "[a] judgment . . . does not preclude claims that could not have been made in the forum from which the judgment issues"); Simmons v. New Pub. Sch. Dist. No. Eight, 251 F.3d 1210, 1214 (8th Cir. 2001) (citing *Second Restatement of Judgments*); Staats v. County of Sawyer, 220 F.3d 511, 515 (7th Cir. 2000) (analyzing whether jurisdiction is proper by resort to the *Second Restatement of Judgments*).

278. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980).

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such 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.[279]

It is hardly debatable that a plaintiff who has filed suit for discrimination and who also has an additional-remedy claim satisfies this definition. In the typical additional-remedy case, a plaintiff seeks a compensatory or punitive damage award for which the applicable state law in the prior proceedings did not provide. For example, in *Nestor*, the plaintiff sought attorney's fees, compensatory damages for emotional distress, and punitive damages after recovering only back pay and interest in the state proceedings.[280] The plaintiff in *Patzer* sought back pay and attorney's fees in federal court to supplement the injunctive relief he obtained at the state level.[281] In both cases, it is clear that the plaintiffs' federal suits arose from the same transactions as the claims pursued in the state proceedings.[282] Each plaintiff simply sought to recover additional relief on the exact same claim of discrimination previously adjudicated.[283] This is likely true in most additional-remedies cases 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 § 26(1)(c) of the *Second Restatement of Judgments*, which preserves 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.[284]

279. *Id.* § 24.
280. *Nestor*, 466 F.3d at 67.
281. Patzer v. Bd. of Regents, 763 F.2d 851, 853 (7th Cir. 1985).
282. *Nestor*, 466 F.3d at 72; *Patzer*, 763 F.2d at 855.
283. *Nestor*, 466 F.3d at 72; *Patzer*, 763 F.2d at 855.
284. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1980).

The *Nestor* court, applying Connecticut law, and the *Patzer* court, adhering to the law of Wisconsin, both found this exception controlling and permitted the plaintiffs to proceed in their additional-remedy suits.[285]

The error of these courts 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. 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, however, when the plaintiff's free choice led him to that forum.[286] Although the *Restatement* does not speak explicitly on this point, it implies it by reserving the jurisdictional-limit exception for those cases in which the plaintiff never had the opportunity to assert the related claims:

> The general rule [against claim splitting found in] . . . § 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

285. *Nestor*, 466 F.3d at 73–74; *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.").

286. *See, e.g.*, Strickland v. City of Albuquerque, 130 F.3d 1408, 1412–13 (10th Cir. 1997) (refusing to apply an exception to res judicata to plaintiff's federal constitutional claims because they could have been asserted in the state-court proceedings reviewing a related administrative determination); Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 864–65 (7th Cir. 1996) ("If a plaintiff has a collection of claims that arise from one set of events and has an unconstrained choice between a forum of limited jurisdiction and a forum of broad jurisdiction, a decision to proceed in the more limited forum precludes her from bringing the unlitigated claims in a subsequent proceeding."); Bio-Tech. Gen. Corp. v. Genentech, Inc., 80 F.3d 1553, 1563 (Fed. Cir. 1996) (suggesting that the exception in section 26(1)(c) of the *Second Restatement of Judgments* does not apply when plaintiff chose a forum of limited jurisdiction); Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994) ("Thus, where a plaintiff was precluded from recovering damages in the initial action by formal jurisdictional or statutory barriers, not by plaintiff's choice, a subsequent action for damages will not normally be barred by res judicata even where it arises from the same factual circumstances as the initial action."); Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1326–27 (7th Cir. 1992) (stating that the exception in section 26(1)(c) of the *Second Restatement of Judgments* "does not extend to cases in which claim-splitting flows from the plaintiff's choice [because] [r]es judicata is a doctrine of defendant's protection, not of plaintiff's right").

> modes of procedure—the forms of action or the separation of law from equity or vestigial procedural doctrines associated with either.[287]

By implication, where the plaintiff *did* have the option to take his case to a different forum, his failure to do so should bar him from splitting his 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.[288]

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 on the complainant's claims.[289] After the expiration of that sixty-day period, the complainant is free to pursue his claim in the federal system and drop his state charge at any time. Further, a plaintiff who continues to pursue his claims in the state administrative 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.[290] The Supreme Court has declared unequivocally that Title VII claims do not lie within the exclusive jurisdiction of the federal courts.[291] Thus, most cases will present a plaintiff with the option either to drop his state claim entirely and pursue remedies in the federal system or to add Title VII claims once the case reaches the state courts. The *Restatement*'s jurisdictional-limit exception should not apply whenever these choices are available but are bypassed.

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287. RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. c (1980).

288. *Id.* § 25 cmt. f.

289. 42 U.S.C. § 2000e-5(c) (2006); 29 C.F.R. § 1601.13(a)(3)(i)–(ii) (2008).

290. Whether the state agencies might have jurisdiction to hear Title VII claims is a question of state law that is beyond the scope of this Article. This Article proceeds on the assumption that they do not. If they did possess such jurisdiction, however, it seems clear that the jurisdictional-limit exception in section 26(1)(c) of the *Second Restatement of Judgments* would not apply, and preclusion would bar plaintiff's subsequent Title VII suit.

291. Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821 (1990).

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 decision of the United States Court of Appeals for the Tenth Circuit in *Strickland v. City of Albuquerque* affords an excellent example.[292] The plaintiff in *Strickland* pursued employment-discrimination claims in the state administrative system.[293] Dissatisfied with the agency's finding that his employer had 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.[294] Both the state district court and the state court of appeals affirmed the agency's findings, resulting in entry of a final judgment against the plaintiff.[295] When the plaintiff then pursued a civil-rights claim arising out of the same events in federal court under § 1983 of title 42 of the United States Code, the defendant sought summary judgment on the ground that the claim was barred by res judicata.[296] The district court granted the defendant's motion, and the plaintiff appealed.[297] The Tenth Circuit affirmed, rejecting the plaintiff's contention that the jurisdictional limitations of the original state administrative forum exempt related federal claims from the usual claim-preclusion bar.[298] Even though the plaintiff might not have been able to assert his § 1983 claim in the state administrative proceedings, he could have joined that claim to the suit brought in state court.[299] Claim preclusion bars the plaintiff from later pursuing the § 1983 claim that could have been joined to the suit in state court.

The *Strickland* court does not directly address the choice that plaintiffs pursuing discrimination claims covered by Title VII face: to opt out of the state administrative forum after expiration of the sixty-day deferral period in favor of a forum (state or federal) that can hear his Title VII claims. Nevertheless, *Strickland*'s holding is instructive. The core principle underlying *Strickland*, and other cases like it, is that when the plaintiff fails to pursue related claims by virtue of his own choice—whether that is a choice of forum, a choice of pleading, or otherwise—he cannot pursue the selectively omitted claims in a subsequent proceeding.[300] This is the essence of the preclusion doctrine.

The *Strickland* decision also raises another important point about the choices a plaintiff faces in the additional-remedy cases with which this Article is concerned: even if the plaintiff does *not* opt out of the state administrative

292. 130 F.3d 1408 (10th Cir. 1997).
293. *Id.* at 1410.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at 1410–11.
298. *Id.* at 1411–13.
299. *Id.* at 1412.
300. *Id.* at 1413 (citing Ford v. N.M. Dep't of Pub. Safety, 891 P.2d 546, 555 (N.M. Ct. App. 1994)).

forum, he still may *choose* to assert his Title VII claim if and when the claim reaches the state courts. In such circumstances, state courts would have jurisdiction over Title VII claims in proceedings reviewing agency findings just as the state court in *Strickland* would have had jurisdiction over the plaintiff's § 1983 claim.[301]

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."[302] In contrast, the *Patzer* court held that additional-remedy plaintiffs could bring Title VII actions for supplementary remedies in state or federal court.[303] The plaintiff did not, however, begin to pursue his federal remedies until approximately ten years after filing his initial charge, at which time he finally requested and received a right-to-sue letter from the EEOC.[304] During the passage of that ten-year period, the state agency adjudicated the plaintiff's initial claim, two state courts affirmed those findings on appeal, and the plaintiff filed a separate suit in state court.[305] At no point during that process did he ever attempt to pursue federal remedies. He could have done so much sooner, but he elected instead to allow his federal claims to lie dormant. The courts in *Nestor* and *Patzer* 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 jurisdictional-limit exception blindly would disservice Title VII, Supreme Court precedents, and fairness and efficiency. First, as discussed above, *Kremer* stated that § 1738 controls in Title VII suits, and nothing about the Court's opinion suggests that that command should vary depending on whether claim preclusion or issue preclusion applies.[306] However, that is exactly what would happen if the jurisdictional-limit exception prevailed. A plaintiff would be free to pursue his transactionally related claims without regard to the claim-preclusion doctrine, but he could freely rely on issue preclusion 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.

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301. Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821–26 (1990) (holding that state courts may adjudicate Title VII cases).

302. Nestor v. Pratt & Whitney, 466 F.3d 65, 68 (2d Cir. 2006).

303. Patzer v. Bd. of Regents, 763 F.2d 851, 853–54 (1985).

304. *Id.* at 853–54.

305. *Id.*

306. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 468 (1982).

> 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 forums.[307]

The Court bolstered this conclusion with multiple citations to Title VII's legislative history, making plain that Congress never envisioned the kind of claim splitting that the *Nestor* approach condoned.[308]

Fairness concerns also necessitate adhering to preclusion rules when perceived jurisdictional defects that might suggest application of the jurisdictional-limit 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. The *Nestor* court acknowledged that the plaintiff benefited from both representation by staff counsel at a substantial cost savings over a private attorney and from "flexible evidentiary rules, no requirement of discovery, and speed[ier] proceedings."[309] Common systemic distinctions like these render it extraordinarily unfair to permit a plaintiff who opts to pursue his claims in a friendlier forum to subsequently subject the defendant to additional, duplicative litigation in order to pursue supplemental remedies that were not available in the first chosen forum. The fairness problem is exacerbated when the court in the subsequent suit accords the original judgment full faith and credit selectively—allowing the plaintiff's duplicative claim to proceed without reference to claim preclusion yet permitting him to rely upon issue preclusion to establish the defendant's liability. Although this fairness problem plagued the *Nestor* court's decision, the court's faulty rationale should not endure.[310]

Precluding a plaintiff from duplicating his claims when he has a choice of forum is not inconsistent with federalism principles, despite the suggestions of this view's opponents. It is true that barring his Title VII claims in these circumstances may incentivize him to abandon the state *administrative* forum at the earliest opportunity; however, that does not mean he must jettison the state system altogether. A plaintiff can still invoke the protections his state affords by filing a lawsuit in state court while leaving intact the federal-state balance underlying Title VII.

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307. *Id.* at 473–74.

308. *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 would be permitted.'" (quoting 118 CONG. REC. 3370 (1972) (statement 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.'" (alteration in original) (quoting 118 CONG. REC. 3372 (1972) (statement of Sen. Williams))).

309. Nestor v. Pratt & Whitney, 466 F.3d 65, 68 (2d Cir. 2006).

310. *Id.* at 72–73; *see also supra* notes 258–69 and accompanying text (discussing the *Nestor* court's erroneous reconciliation of *Kremer* and *Carey* so as to permit a plaintiff to seek supplemental Title VII remedies while relying on the prior administrative liability determination).

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 him from proceeding under Title VII in a subsequent suit. *Kremer* dictates this result by requiring that federal courts accord state judgments full faith and credit in Title VII cases.[311] As the *Kremer* Court recognized, the original drafters of Title VII did not intend that its referral and deferral scheme would perpetuate a multiplicity of litigation.[312] To the contrary, the legislative history shows that Congress intended to afford Title VII plaintiffs the right to pursue their grievances under any applicable state law, while offering them the option to pursue a federal claim instead when they perceive the state system as inadequate.[313] Fairness concerns amply support the policy argument against inefficiency and multiplicity that Title VII reflects. The law affords plaintiffs a choice to pursue relief under state law, under federal law, or under both, but it does not allow them to manipulate the system by seeking separate remedies in sequence. A plaintiff cannot have his 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 circuits. As mentioned above, the *Nestor* decision attracted some attention among legal commentators because of the circuit split that it referenced.[314] Notably, however, the Second Circuit's approach differed somewhat markedly from that of the other courts comprising the split.[315] The majority of courts confronting additional-remedy cases in recent years have employed a statutory analysis to ascertain the viability of the suit.[316] The Fourth Circuit led this charge with its decision in *Chris*, accompanied by the Eighth Circuit through its *Jones* decision.[317] The *Nestor* court briefly considered the defendant's statutory-jurisdiction argument but focused most of its attention on the preclusion doctrine, ultimately deciding that the plaintiff's Title VII additional-remedy claims were not barred.[318] Of

311. *Kremer*, 456 U.S. at 466.

312. *Id.* at 475–76.

313. *Id.* (discussing the legislative history of Title VII and the disfavor of duplicative litigation that it reflects); *see also supra* notes 249–53 and accompanying text.

314. *See* Castagnera et al., *supra* note 27, at 3; *Current Circuit Splits*, *supra* note 27, at 517; *Employment Discrimination—Procedure*, *supra* note 27, at 1200–01.

315. *Compare* Nestor v. Pratt & Whitney, 466 F.3d 65, 70, 71–74 (2d Cir. 2006) (focusing on the preclusion doctrine), *with* Chris v. Tenet, 221 F.3d 648, 651–53 (4th Cir. 2000) (employing statutory analysis), *and* Jones v. Am. State Bank, 857 F.2d 494, 494–98 (8th Cir. 1988) (same).

316. *See supra* notes 105–07 and accompanying text (discussing recent additional-remedy cases decided under Title VII).

317. *Chris*, 221 F.3d at 651–52; *Jones*, 857 F.2d at 497–98.

318. *Nestor*, 466 F.3d at 71–74.

the cases comprising the core of the split, only one other relied on the preclusion doctrine—the Seventh Circuit's decision in *Patzer*.[319]

The most plausible explanation for the difference in approaches taken by the *Patzer* and *Nestor* courts, on the one hand, and the *Jones* and *Chris* courts, on the other, is not that the courts disagree about how to resolve additional-remedy cases. Some 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.[320] It is therefore natural that the courts in those cases would focus on preclusion principles, because the presence of a valid final judgment disposing of the same claims is not only a core component of the preclusion doctrine, but indeed cries out for the court's consideration. 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.[321] The plaintiff in *Chris* sought attorney's fees in federal court after settling her discrimination claims during administrative proceedings.[322] It is therefore not surprising that neither court addressed preclusion principles, because neither case involved a state-court judgment, rendering preclusion wholly inapplicable from the start.

Given the distinct procedural postures, the commentators who have cited these cases as part of a circuit split may have at least partially misrepresented the situation.[323] The different procedural context in which each case arose may explain the contrasting outcomes, suggesting that 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;[324] the *Nestor* and *Patzer* cases turned on preclusion principles because they did.[325]

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 opportunity to resolve his claims.[326] Sometimes a grievance goes no further,

319. Patzer v. Bd. of Regents, 763 F.2d 851, 854–56 (7th Cir. 1985).

320. *Nestor*, 466 F.3d at 67; *Patzer*, 763 F.2d at 853–54.

321. *Jones*, 857 F.2d at 495–96.

322. *Chris*, 221 F.3d at 649–50.

323. *See* sources cited *supra* note 314.

324. *Chris*, 221 F.3d at 650; *Jones*, 857 F.2d at 495.

325. *Nestor*, 466 F.3d at 68–69; *Patzer*, 763 F.2d at 853.

326. 42 U.S.C. § 2000e-5(f) (2006); Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 821 (1990) (explaining that federal courts do not have exclusive subject-matter jurisdiction over Title VII lawsuits).

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 claims that the plaintiff asserts.

The Supreme Court's decisions on these issues offer limited instruction. *Elliott* makes clear that unreviewed state-agency determinations deserve no preclusive effect; therefore, a plaintiff who proceeds directly from the state agency to federal court typically may pursue his Title VII claims without limitation.[327] By contrast, the federal courts must accord state judgments full faith and credit under *Kremer*.[328] While the scope of the Court's decision in *Kremer* is not entirely clear, the better interpretation suggests that the holding 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.[329]

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 under state law. The federal courts disagree on the proper approach in these cases: some frame the issue as one of statutory authority, others treat it as a matter of preclusion, and still others craft 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, however, the differential outcomes may not give rise to a circuit split at all; rather, they may be explained as nothing more than differing approaches in response to distinct procedural postures.

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's fees incurred in state proceedings comprise one category. These types of 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 to federal court, the fact that they arise solely under federal law should be sufficient to permit the district court to proceed. The statutory defect in these

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327. Univ. of Tenn. v. Elliott, 478 U.S. 788, 789 (1986); *see also supra* Part II (discussing the import and breadth of the *Elliott* decision).

328. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 (1982).

329. *See supra* Part III (discussing the scope of the *Kremer* decision).

cases lies instead in Title VII's fee-shifting provision. Title VII likely does not support an independent fees-only suit, and courts should dismiss such cases on those grounds.

Other additional-remedy cases, such as those seeking more than just fees, should not face statutory challenges but are no less vulnerable, because preclusion rules will—or at the very least should—often bar them. The Supreme Court's edict in *Kremer* that federal courts must accord full faith and credit to state judgments in Title VII suits means that the outcome in each case will turn on state preclusion law. Therefore, variants in the governing rules are inevitable. By way of a far-reaching example, 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 for its referral and deferral scheme to breed inefficient multiplicity of claims.[330] 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 subsequently importing that determination into a federal suit seeking additional remedies. Those remedies are available at the outset should the plaintiff choose to pursue them. Where he elects to proceed otherwise, he must live with his choice. Neither the statutory language of Title VII, the apparent intent of its drafters, nor prevailing policy concerns support permitting a plaintiff to split his claims between the state and federal forums, at least not where he had a choice. These efforts should, therefore, be thwarted.

The disentanglement of the web ultimately reveals that the viability of federal Title VII suit depends on its procedural 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 were not available in state proceedings often will also falter: fees-only suits may fail because of their lack of a sufficient statutory basis, and others will falter because policy and fairness concerns dictate that claim preclusion apply. The web may be knotty, but not impossibly so, and the just result lurks at its core.

330. *See supra* notes 263–66 and accompanying text.