No. 98-238

In the Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

v.

MICHAEL GIBSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission has the authority to award compensatory damages against agencies of the federal government for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 137 F.3d 992. The opinion of the district court (Pet. App. 15a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. A petition for rehearing was denied on May 7, 1998 (Pet. App. 29a). A petition for a writ of certiorari was filed on August 5, 1998, and was granted on January 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 42 of the United States Code are set forth in the appendix to the petition.

STATEMENT

This case concerns whether compensatory damages are among the administrative remedies available to federal employees, or applicants for federal employment, who assert claims against federal agencies for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

1. In 1972, Congress extended Title VII's prohibition against employment discrimination on the basis of "race, color, religion, sex, or national origin" to the federal government. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. 2000e-16(a) (1994 & Supp. II 1996)); see *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 825 (1976) ("Until it was amended in 1972 * * * , Title VII did not protect federal employees."). But Title VII was not to apply to the federal government in precisely the same manner that it applied to other employers. Congress crafted a distinct set of "administrative and judicial enforcement mechanisms," *Brown*, 425 U.S. at 831, for claims of employment discrimination asserted by federal employees and applicants for federal employment.[1]

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[1] Section 2000(e)-16(a) extends the protections of Title VII to civilian employees or applicants for employment in executive agencies, military departments, the Postal Service, the Postal Rate Commission, the Government Printing Office, the General Accounting Office, the Library of Congress, the Smithsonian Institution, and those units of the judicial branch of the federal government and of the District of Columbia government having positions in the

Congress delegated initially to the Civil Service Commission, and later to the Equal Employment Opportunity Commission (EEOC),[2] the authority to "enforce" Title VII against the federal government "through appropriate remedies, including reinstatement or hiring of employees with or without back pay." 42 U.S.C. 2000e-16(b). At the same time, Congress imposed "certain preconditions," *Brown*, 425 U.S. at 832, on a federal employee's ability to file a civil action in federal district court with respect to a claim of employment discrimination. See 42 U.S.C. 2000e-16(c). Those prerequisites are designed to provide an opportunity for the resolution of an employment-discrimination claim in an administrative process, including "through conference, conciliation, and persuasion[,] before the aggrieved party [is] permitted to file a lawsuit." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

The federal employee first "must seek relief in the agency that has allegedly discriminated against him." *Brown*, 425 U.S. at 832. If the employee is dissatisfied with the agency's disposition of his claim, he may "seek further administrative review with the [EEOC]" or, alternatively, may "file suit in federal district court without appealing to the [EEOC]." *Ibid.* If the employee does appeal to the EEOC, but is dissatisfied with the EEOC's decision, he then may file suit in district court. *Ibid.* An employee also "may file a civil

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competitive service. 42 U.S.C. 2000e-16(a) (Supp. II 1996); Pub. L. No. 105-220, § 341(a), 112 Stat. 1092.

[2] All responsibility for enforcing equal opportunity in federal employment was transferred to the EEOC from the Civil Service Commission in Reorganization Plan No. 1 of 1978, § 3, 43 Fed. Reg. 19,807 (1978). See 42 U.S.C. 2000e-4 note (1994).

action if, after 180 days from the filing of the charge or the appeal, the agency or [the EEOC] has not taken final action." *Ibid.*

The EEOC has promulgated regulations to govern the administrative processing of claims of employment discrimination against federal agencies. An aggrieved employee first must notify an equal employment opportunity (EEO) counselor at his employing agency of the allegedly discriminatory act. 29 C.F.R. 1614.105(a). If the EEO counselor determines that the matter cannot be resolved informally, the employee is advised of his right to file a formal complaint with the agency. 29 C.F.R. 1614.105(d). The agency is required to conclude "a complete and fair investigation" of the complaint within 180 days unless the parties agree to extend the period. 29 C.F.R. 1614.106(d)(2), 1614.108(e). Once the agency has completed the investigation and provided the employee with a copy of the investigative file, the employee may request a hearing before an EEOC administrative judge or an immediate final decision from the agency. 29 C.F.R. 108(f). If the employee requests a hearing, the administrative judge is required to issue findings of fact and conclusions of law, and to "order appropriate relief where discrimination is found," within 180 days of the hearing request unless good cause exists for extending that time. 29 C.F.R. 1614.109(g). Within 60 days after receiving the administrative judge's decision or the employee's request for a final decision without a hearing, the agency is required to issue a final decision, which "shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief." 29 C.F.R. 1614.110.

2. In 1991, Congress authorized awards of compensatory damages in "action[s] brought by a complaining

party under section 706 or 717 of the Civil Rights Act of 1964." Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)). Section 717, 42 U.S.C. 2000e-16, is the provision of the Civil Rights Act of 1964 governing Title VII claims against the federal government, while Section 706, 42 U.S.C. 2000e-5, is the provision governing Title VII claims against other employers. Title VII had previously authorized only back pay and equitable remedies. See 42 U.S.C. 2000e-5(g)(1).[3]

Since 1992, the EEOC has taken the position that "the Civil Rights Act of 1991 * * * makes compensatory damages available to federal sector complainants in the administrative process." *Jackson* v. *United States Postal Serv.*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. 3.[4] The EEOC has announced procedures to ensure that federal agencies include compensatory damages among the "appropriate remedies and relief," 29 C.F.R. 1614.110, awarded to their employees who are found to be victims of discrimination. If an employee indicates during the administrative process that he has sustained damages as a consequence of the alleged discrimination,[5] the agency must request from

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[3] The Civil Rights Act of 1991 also authorized awards of punitive damages in Title VII actions against private employers, but not in those against "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1).

[4] See also *Price* v. *United States Postal Serv.*, EEOC Appeal No. 01945860, 1996 WL 600763, at *3 (Oct. 11, 1996); *McCormick* v. *United States Postal Serv.*, EEOC Appeal No. 01954168, 1996 WL 562668, at *2 (Sept. 25, 1996).

[5] The EEOC has made clear that "a complainant need not use legal terms of art such as 'compensatory damages,' but may merely use words or phrases to put the agency on notice that the relevant

the employee "objective evidence that he or she has incurred compensatory damages, and that the damages are related to the alleged unlawful discrimination." *Jackson*, slip op. 3. If the employee presents such evidence, the agency must address the issue of compensatory damages in any decision finding liability. See, *e.g.*, *Taunton* v. *Brown*, EEOC Appeal No. 01943687, 1995 WL 481019, at *4-*5 (Aug. 9, 1995); *Larochelle* v. *Dalton*, EEOC Appeal No. 01934530, 1993 WL 762933, at *2-*3 (Dec. 21, 1993).

3. In 1992, respondent Michael Gibson, an accountant employed by the Department of Veterans Affairs (VA), was denied a promotion. The position went to a woman instead. Gibson filed a complaint with the VA, alleging sex discrimination in violation of Title VII. He sought back pay and a transfer to another VA hospital. The VA issued a decision finding no discrimination. Pet. App. 2a, 16a.

Gibson appealed the decision to the EEOC, which found that the VA had discriminated against him. The EEOC ordered the VA to promote Gibson with back pay. Pet. App. 2a-3a, 16a-17a.

4. Gibson filed suit in federal district court to compel the VA's compliance with the EEOC's order.[6] He also

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pecuniary or non-pecuniary loss has been incurred." *Price*, 1996 WL 600763, at *3.

[6] The VA had not acted within the period prescribed by the EEOC to promote Gibson and to calculate his back pay. The EEOC had directed that Gibson be promoted by December 6, 1995, but the VA did not actually promote him until December 23, 1995. The EEOC had directed that Gibson's back pay be calculated by January 5, 1996, and that Gibson be paid by March 5, 1996; in fact, the VA calculated Gibson's back pay on January 29, 1996, and paid him on February 22 and 24, 1996. Gibson filed this action in the district court on January 11, 1996. Pet. App. 16a-17a.

sought compensatory damages—which he had not sought at the administrative level—for alleged "humiliation, mental anguish and emotional distress." Pet. App. 3a-4a, 21a.

The district court dismissed those claims. The court determined that Gibson's claims for promotion and back pay were moot because the VA had by that time fully complied with the EEOC's order. Pet. App. 21-22a, 26a. The court rejected Gibson's claim for compensatory damages on the ground that he had failed to exhaust his administrative remedies by not presenting that claim to the VA and the EEOC. *Id.* at 20a-24a.[7]

5. The court of appeals reversed the dismissal of Gibson's claim for compensatory damages, reasoning that federal employees need not exhaust administrative remedies on such claims. Pet. App. 5a-14a. The court asserted that "exhaustion is not required if [an agency] 'lack[s] authority to grant the type of relief requested.'" *Id.* at 6a (quoting *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992)). The court then concluded that the EEOC does not have the authority under Title VII to award compensatory damages against federal agencies. *Id.* at 9a-13a.

The court of appeals conceded that "[n]othing in the statute or regulations explicitly rules out" the EEOC's awarding compensatory damages to federal employees

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[7] The court also rejected Gibson's claims for front pay and a job transfer. Pet. App. 24a-25a. The court reasoned that front pay is unwarranted where, as here, the claimant receives the promotion that he was previously denied. *Ibid.* And the court concluded that Gibson had "not even come close to establishing that he is entitled to the extraordinary remedy of a job transfer." *Id.* at 25a. The court did conclude that Gibson was entitled to an award of attorneys' fees, because the VA had not fully complied with the EEOC's order by the time that the suit was filed. *Id.* at 26a-27a.

for violations of Title VII. Pet. App. 6a. The court also acknowledged that "[i]t is not unreasonable to conclude" that the EEOC's statutory mandate to adjudicate Title VII claims against federal agencies "might be broad enough to allow the EEOC to award compensation for mental anguish and emotional distress." *Id.* at 7a. And the court noted that the Fifth Circuit had recently held that the EEOC had the authority to award compensatory damages on Title VII claims arising in the federal sector. *Ibid.* (citing *Fitzgerald* v. *Secretary, United States Dep't of Veterans Affairs*, 121 F.3d 203, 207 (1997)). The court nonetheless held that several factors compelled a contrary conclusion.

The court of appeals principally relied on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." Pet. App. 9a-10a. A "trial by jury" cannot, of course, occur in an administrative proceeding. The court recognized that Section 1981a(c)(1) might be construed to mean that "the EEOC has the right to issue compensatory damages in the first instance, and the losing party may seek de novo review of the damages by demanding a jury trial" in district court. *Id.* at 9a. But the court rejected that construction. The court noted that a federal agency is bound by the EEOC's disposition of a Title VII complaint, although an employee is not and may seek relief de novo in district court. *Id.* at 9a-10a. A federal agency thus could not demand a jury trial to review an EEOC award of compensatory damages to an employee. The court consequently declined to construe Title VII in a manner that would deprive federal agencies of what the court characterized as the "significant procedural right" to a jury trial on compensatory damages claims. *Id.* at 10a.

The court of appeals found further support for its position in the language of 42 U.S.C. 1981a(a)(1), which provides for compensatory damages awards in "an action brought by a complaining party" under, *inter alia*, the statutory provision allowing Title VII claims against the federal government. Pet. App. 10a. The court declined to defer to the EEOC's own construction of Section 1981a(a)(1) as encompassing administrative as well as judicial proceedings. The court concluded that Congress generally used the term "actions" in Title VII to refer to "civil actions filed in federal court, not complaints of discrimination lodged with the EEOC." *Id.* at 11a.

Finally, the court of appeals invoked the principle that any waiver of the federal government's sovereign immunity should be strictly construed. Pet. App. 12a (citing *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981)). The court recognized that Congress has expressly waived the government's sovereign immunity with respect to civil actions for compensatory damages under Title VII. *Id.* at 11a-12a. But the court declined in the absence of a clearer expression of congressional intent "to extend the waiver of sovereign immunity so that the government may be liable for compensatory damages without the benefit of a jury trial." *Id.* at 12a.

The court of appeals remanded Gibson's compensatory damages claim to the district court, "so that it may be tried to a jury, which is what he has demanded in his complaint and what the statute allows." Pet. App. 14a.

SUMMARY OF ARGUMENT

The Equal Employment Opportunity Commission (EEOC) possesses the authority to award compensatory damages against agencies of the federal government for violations of Title VII of the Civil Rights Act

of 1964. That conclusion is supported by the text of the relevant statutory provisions, the legislative history, and the congressional purpose to enable federal employees to obtain full relief at the administrative level for violations of Title VII.

I. Congress has vested the EEOC with broad authority to enforce Title VII in the federal workplace, including the authority to provide all "appropriate remedies" to federal employees who are victims of employment discrimination. 42 U.S.C. 2000e-16(b). And Congress has made clear that the appropriate remedies for violations of Title VII by federal agencies include compensatory damages. 42 U.S.C. 1981a(a)(1). The EEOC itself has recognized since 1992 that compensatory damages are available to federal employees in the administrative process.

A contrary rule would be inconsistent with the statutory requirement that federal employees exhaust administrative remedies with respect to Title VII claims, 42 U.S.C. 2000e-16(c), which was designed to provide a mechanism to resolve such claims fully without resort to the courts. A federal employee still would have to pursue his Title VII claim in the administrative process in order to obtain an award of back pay and equitable relief against his employing agency. But even if the employee fully prevailed in the administrative process, he would then have to go to court to obtain compensatory damages. Such a rule would impose burdens on federal employees, federal agencies, and the federal courts that Congress could not have intended.

Congress has elsewhere evinced its understanding that compensatory damages are among the remedies that may appropriately be awarded in the administrative process for violations of Title VII. In 1991 and again in 1995, as part of comprehensive legislation

extending the protections of Title VII to congressional employees, Congress crafted an administrative enforcement scheme, which was modeled on the existing administrative enforcement scheme for employees of the Executive Branch. Congress made clear that compensatory damages were among the remedies to be available to congressional employees in that administrative enforcement scheme. 2 U.S.C. 1405(g) (Supp. II 1996). Congress must have understood, therefore, that the same remedies were available in the administrative enforcement scheme applicable to employees of federal agencies under 42 U.S.C. 2000e-16.

II. The court of appeals acknowledged in this case that "[n]othing in the statute or regulations explicitly rules out the idea" that the EEOC may award compensatory damages to federal employees in the administrative process. Pet. App. 6a. But the court nonetheless reached a contrary conclusion, based on three reasons that are ultimately unpersuasive.

First, the court of appeals noted that Congress, in 42 U.S.C. 1981a(a)(1), authorized compensatory damages "[i]n an action * * * under section * * * 717 of the Civil Rights Act of 1964," 42 U.S.C. 2000e-16, the provision that extends Title VII to the federal government. The court construed Section 1981a(a)(1) as referring only to civil actions in federal district court. But nowhere did Congress define the term "action" for purposes of Section 1981a(a)(1) in such a narrow manner. The term "action," in context, is broad enough to encompass both administrative and judicial proceedings under Section 2000e-16. And, whether or not administrative proceedings are "actions," Congress, by making compensatory damages available in judicial proceedings, gave the EEOC the authority to award

compensatory damages as an "appropriate remed[y]" in administrative proceedings as well.

Second, the court of appeals relied on 42 U.S.C. 1981a(c)(1), which provides that, "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." But that provision is most sensibly construed as providing a jury trial right only if an individual's Title VII claim should ripen into a civil action in federal district court. It does not preclude a federal employee from seeking, or the EEOC or an employing federal agency from awarding, compensatory damages in the administrative process. The court of appeals' contrary construction was based on the assumption that Section 1981a(c)(1) was designed to confer "a significant procedural right" on federal agencies and other employers. Pet. App. 10a. But that assumption finds no support in the text or legislative history of Section 1981a(c)(1). Congress could reasonably have concluded that the interests of federal agencies as employers would adequately be served when compensatory damages were awarded by the EEOC or the agency itself rather than by a jury.

Finally, the court of appeals perceived that Congress did not specifically waive the United States' sovereign immunity from Title VII compensatory damages claims in the administrative process. But a sovereign's express waiver of immunity with respect to proceedings in its courts—which the court of appeals conceded occurred here—surely encompasses a waiver of immunity with respect to proceedings in its own administrative agencies. In any event, by granting the EEOC broad authority to award all "appropriate remedies" against federal agencies for violations of Title VII, and by subsequently including compensatory damages among

the remedies available generally under Title VII against all employers including federal agencies, Congress has expressed with sufficient clarity its intent to waive the United States' immunity with respect to Title VII compensatory damages claims in administrative and judicial proceedings alike.

ARGUMENT

THE EEOC HAS THE AUTHORITY TO AWARD COMPENSATORY DAMAGES AGAINST AGENCIES OF THE FEDERAL GOVERNMENT ON CLAIMS OF EMPLOYMENT DISCRIMINATION IN VIOLATION OF TITLE VII

A. The EEOC's Statutory Authority To Enforce Title VII In The Federal Workplace "Through Appropriate Remedies" Includes The Authority To Award Compensatory Damages

Congress has given the EEOC broad authority to resolve, at the administrative level, complaints of employment discrimination against agencies of the federal government. And Congress has required that such complaints initially be pursued at the administrative level. It may reasonably be inferred from that statutory scheme that, once compensatory damages became available in 1991 on claims of employment discrimination against the federal government, the EEOC gained the authority to award such damages at the administrative level. A contrary result would require federal employees to pursue their claims of employment discrimination in two forums—first at the administrative level to determine liability, back pay, and equitable relief, and afterward in federal district court to determine compensatory damages—thereby undermining the statutory exhaustion requirement and complicating

the resolution of such claims both for employees and for the government.

1. Congress has delegated to the EEOC "full authority to enforce" Title VII against the federal government "through *appropriate remedies*, including reinstatement or hiring of employees with or without back pay." *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 831-832 (1976) (quoting 42 U.S.C. 2000e-16(b)) (emphasis added). Congress has further authorized the EEOC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities" to ensure that federal personnel decisions are "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a) and (b); see *Fitzgerald* v. *Secretary, United States Dep't of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997) (noting the EEOC's "wide-ranging authority" under Section 2000e-16(b) to enforce Title VII in the federal sector).

Congress thus did not specify which particular remedies the EEOC may, and may not, award against federal agencies that have violated Title VII. Congress instead vested the EEOC with broad discretion to determine which "remedies," among those authorized by law, are "appropriate" based upon its expertise with regard to employment discrimination generally and in the federal workplace specifically. This Court has repeatedly recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)).

Congress intended that the term "appropriate remedies" in Section 2000e-16(b) would be expansively construed so as to make victims of employment discrimination whole. The Senate Report on the legislation that extended the protections of Title VII to federal employees explained that "[t]hese remedies may include back pay for applicants, as well as employees, denied promotion opportunities, reinstatement, hire, immediate promotion *and any other remedy needed to fully recompense the employee for his loss, both financially and professionally*." S. Rep. No. 415, 92d Cong., 1st Sess. 45 (1971) (emphasis added).

In 1991, Congress added compensatory damages to the array of remedies available under Title VII against employers, including agencies of the federal government. Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)) (authorizing compensatory damages in any "action brought by a complaining party under section * * * 717 of the Civil Rights Act of 1964"—the provision that extended Title VII to the federal government—"against a respondent who engaged in unlawful intentional discrimination"). Nowhere in the text of the Civil Rights Act of 1991 did Congress expressly preclude the EEOC from making the new compensatory damages remedy available to federal employees in administrative proceedings under Title VII. Nor does the legislative history of the 1991 Act contain *any* statement, from *any* member of Congress, that compensatory damages are not to be awarded in such administrative proceedings.[8]

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[8] The legislative history of the Civil Rights Act of 1991 contains no extended discussion of the applicability of the compensatory damages remedy to federal employees. It does, however, include

The EEOC subsequently determined that "the Civil Rights Act of 1991 * * * makes compensatory damages available to federal sector complainants in the administrative process." *Jackson* v. *United States Postal Serv.*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. 3. In making the determination, the EEOC was acting within its congressionally delegated "authority to enforce" Title VII in the federal sector "through appropriate remedies," 42 U.S.C. 2000e-16(b), which necessarily includes the authority to determine which of the "remedies" generally available under Title VII are "appropriate" to be awarded against federal agencies in the administrative process. Congress, by making compensatory damages available in judicial proceedings in the Civil Rights Act of 1991, thus gave the EEOC the authority to award the same relief in administrative proceedings. See *Fitzgerald*, 121 F.3d at 207 (concluding that the EEOC's statutory mandate to enforce the anti-discrimination laws in the federal workplace "is sufficiently broad to allow the EEOC to offer * * * full relief that includes compensatory damages").

2. The conclusion that compensatory damages are among the "appropriate remedies" available in the administrative process is supported by the statutory

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an analysis by the Congressional Budget Office of the costs of the Act to the federal government. The Congressional Budget Office stated that the costs of "administrative settlements" of employment-discrimination claims against the federal government "could increase under the bill because compensatory damages could be awarded in some cases involving the federal government." H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 108 (1991). The statement appears to reflect an understanding that compensatory damages would be available to federal employees in the administrative process.

exhaustion requirement, see 42 U.S.C. 2000e-16(c), which reflects Congress's design to encourage the resolution of employment-discrimination claims against federal agencies at the administrative level.[9] At the time that Congress extended Title VII to the federal government, adopting both the provision that authorizes the EEOC to grant "appropriate remedies" and the provision that requires federal employees to exhaust administrative remedies, Congress understood that those "provisions * * * will enable the Commission to grant *full relief* to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate." S. Rep. No. 415, *supra*, at 16 (emphasis added).[10] An individual would need to file suit in federal district court only if he was "not satisfied with the agency or Commission decision." *Ibid.*

This Court has recognized that a requirement that a claimant exhaust administrative remedies may serve a variety of purposes. See *McKart* v. *United States*, 395 U.S. 185, 194-195 (1969) (enumerating purposes). The exhaustion requirement contained in Section 2000e-16(c) serves at least three of those purposes: It provides the employing agency with "a chance to discover and correct its own errors," *id.* at 195; it enables the EEOC, the entity charged with enforcing the anti-discrimination laws in the federal sector, to "apply its expertise," *id.* at 194; and it serves "practical notions of judicial

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[9] Under Section 2000e-16(c), an employee must first present his Title VII claim to the agency that allegedly discriminated against him. If the employee does not obtain full relief from the agency, he may either appeal to the EEOC or sue in federal district court. He may also go to district court if his EEOC appeal is unsuccessful.

[10] The Senate Report's reference to "the Commission" was to the Civil Service Commission, which initially had the authority to enforce Title VII in the federal sector. See note 2, *supra*.

efficiency" because, if "[a] complaining party [is] successful in vindicating his rights in the administrative process," then "the courts may never have to intervene," *id.* at 195. See *Jordan* v. *United States*, 522 F.2d 1128, 1132 (8th Cir. 1975) (noting purposes served by exhaustion requirement of Section 2000e-16(c)); accord *Tolbert* v. *United States*, 916 F.2d 245, 249 n.1 (5th Cir. 1990).

All of those purposes would be undermined if a federal employee could not recover compensatory damages in the administrative process, whether from his employing agency, in the first instance, or from the EEOC on appeal.[11] An employee who sought equitable relief, back pay, and compensatory damages for a single violation of Title VII then could not obtain full relief at the administrative level. The employee would still, of

[11] While the Seventh Circuit in this case did not expressly address whether an employing agency may award compensatory damages to an employee who has suffered discrimination in violation of Title VII, the Seventh Circuit's rationale could lead to the conclusion that the agency, like the EEOC, has no such authority. In holding that respondent did not violate the administrative exhaustion requirement of Section 2000e-16(c) when he failed to raise his compensatory damages claim before either the VA or the EEOC, the Seventh Circuit apparently assumed that the VA, like the EEOC, could not award such damages and, consequently, that respondent was not required to seek them at either stage of the administrative process. Respondent thus was permitted to assert his compensatory damages claim for the first time in a civil action in federal district court. The Eleventh Circuit, in a decision adopting the Seventh Circuit's rationale in this case, held that an employing agency lacks the authority to act in accordance with "the EEOC's requirement that an agency award an employee discrimination victim compensatory damages where necessary for 'full relief.'" *Crawford* v. *Babbitt*, 148 F.3d 1318, 1325 (1998), petition for cert. pending, No. 98-1332.

course, have to exhaust administrative remedies with respect to his claims for equitable relief and back pay. However, even if the employee entirely prevailed at the administrative level, receiving all of the back pay and equitable relief that he sought, he would have to file suit in district court to pursue his claim for compensatory damages. The agency would be denied the opportunity fully to correct its own errors. The EEOC would be prevented from applying its expertise concerning employment discrimination in the federal workplace, both with respect to specifying the rules that the agency must apply in considering the employee's compensatory damages claim initially and with respect to reviewing the agency's resolution of that claim on any administrative appeal. And the federal courts would inevitably have to intervene in the matter because the employee could never be fully "successful in vindicating his rights in the administrative process." *McKart*, 395 U.S. at 195. It is unlikely that Congress intended to create such a costly, inefficient, and time-consuming procedure for resolving Title VII complaints —a procedure that is contrary to the interests of federal employees, the federal government as employer, and the already overburdened federal courts. See *Fitzgerald*, 121 F.3d at 207 (expressing doubt that "Congress would have created an administrative process capable of providing only partial relief"); *Jackson*, slip op. at 7 (recognizing that such a process could result in "the filing of unnecessary lawsuits").[12]

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[12] Cf. *New York Gaslight Club* v. *Carey*, 447 U.S. 54, 65, 66 n.6 (1980) (construing statute authorizing attorneys' fees awards in "proceedings" under Title VII to include state and local proceedings in order to "ensure[] incorporation of state procedures as a meaningful part of the Title VII enforcement scheme" and avoid unnecessary federal proceedings).

According to the EEOC, some 28,947 formal administrative complaints of employment discrimination were filed against federal agencies in fiscal 1997 alone. Office of Federal Operations, EEOC, *Federal Sector Report on Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1997*, at 1 (1998).[13] Such complaints often seek compensatory damages as well as equitable relief. The majority of such complaints are resolved within the agency itself, without the filing of an appeal to the EEOC or a civil action in district court. See *id.* at T-33 (in fiscal 1997, agencies closed 6,252 employment-discrimination cases with corrective action, granting total compensatory damages of $3,723,873). In fiscal 1997, however, the EEOC closed 5,480 appeals of cases raising claims under Title VII, often ordering corrective action, including compensatory damages. *Id.* at T-68; see also, *e.g.*, *Turner* v. *Babbitt*, EEOC Appeal No. 1956390, 1998 WL 223578, at *5-6 (Apr. 27, 1998) (citing administrative appeals in which the EEOC awarded compensatory damages). If the EEOC does not have the authority to award compensatory damages against federal agencies, many such cases could not be closed at the administrative level and instead would reach the federal courts. And if federal agencies likewise cannot award compensatory damages at the first stage of the administrative process (see note 11, *supra*), the number of cases reaching the federal courts would be still greater. It thus could require many years of administrative and judicial proceedings before a federal

[13] The number includes not only claims of discrimination on the basis of race, color, religion, sex, or national origin, within the scope of Title VII, but also claims of discrimination on the basis of age and disability.

employee could ever recover compensatory damages under Title VII.

3. Congress's understanding that the administrative enforcement scheme for Title VII claims against federal agencies includes compensatory damages awards, as well as other "appropriate remedies" that would be available in court, is reflected in Congress's enactment of similar administrative enforcement schemes for Title VII claims against itself. Congress has twice in recent years crafted comprehensive statutory schemes governing Title VII claims by its own employees—in 1991, when Congress extended Title VII to employees of the United States Senate, and in 1995, when Congress extended Title VII to all congressional employees. On both occasions, Congress included compensatory damages among the remedies available to congressional employees in the administrative process. And, on both occasions, Congress recognized that it was creating for its own employees an administrative process that was similar to that already in place for employees of federal agencies.

As part of the Civil Rights Act of 1991, Congress adopted a series of provisions, titled the Government Employee Rights Act, that extended Title VII and other federal anti-discrimination laws to Senate employees. See Civil Rights Act of 1991, Pub. L. No. 102-166, Title III, §§ 301-325, 105 Stat. 1088-1099.[14] Congress provided that Senate personnel actions "shall be made free from any discrimination based on," *inter alia*, "race, color, religion, sex, or national origin, within the

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[14] No comparable legislation was adopted at that time with respect to employees of the House of Representatives. The House applied Title VII to itself beginning in 1988 through House Resolution 558 (100th Congress).

meaning of Section 717 of the Civil Rights Act of 1964," the section applicable to personnel actions of the Executive Branch. § 302(1), 105 Stat. 1088. A Senate employee could, for the first time, file a complaint alleging employment discrimination in violation of Title VII, which would be decided by a three-member board of independent hearing officers appointed by an Office of Senate Fair Employment Practices. § 307, 105 Stat. 1091. Congress then provided that "[i]f the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under [42 U.S.C. 2000e-5(g) and (k)]," *i.e.*, equitable relief, back pay, attorneys' fees, and costs, "and may also order the award of such compensatory damages as would be appropriate if awarded under [42 U.S.C. 1981 and 42 U.S.C. 1981a(a) and (b)(2)]." § 307(h), 105 Stat. 1092.[15] Congress contemplated that the authority of the hearing board with respect to Title VII claims of Senate employees—presumably including the authority to award compensatory damages—would be analogous to the authority of the EEOC with respect to Title VII claims of employees of federal agencies. See 137 Cong. Rec. 28,903 (1991) (statement of Sen. Mitchell, co-sponsor) (explaining that the legislation was designed "[t]o give the people who work here in the Senate * * * a process similar to that available to their counterparts in the civil service").

In 1995, Congress adopted more comprehensive legislation that extended the protections of Title VII

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[15] The decision of the hearing board was subject to review by the Select Committee on Ethics and the Court of Appeals for the Federal Circuit. §§ 308-309, 105 Stat. 1092-1094. But neither the employee nor his employer had any right to a jury trial on any issue of liability or remedy.

and other federal anti-discrimination statutes to most congressional employees, superseding the 1991 legislation applicable only to Senate employees. Congressional Accountability Act of 1995, Pub. L. No. 104-1, Title I, §§ 101-102, 109 Stat. 4-6 (codified at 2 U.S.C. 1301 *et seq.* (Supp. II 1996)).[16] Under the 1995 Act, a congressional employee, after undergoing mandatory counseling and mediation, may elect to file a complaint either with a newly created Office of Compliance or in federal district court. 2 U.S.C. 1404. If the employee elects to pursue his claim through the administrative process, the Office of Compliance may "order such remedies as are appropriate pursuant to subchapter II of this chapter," which include compensatory damages. 2 U.S.C. 1405(g); see 2 U.S.C. 1311(b)(1)(B) (compensatory damages provision).[17] Again, as in 1991, Congress sought to model its own administrative enforcement scheme for employees' Title VII claims after that of the Executive Branch. See 141 Cong. Rec. 659 (1995) (statement of Sen. Lieberman, co-sponsor) ("this measure we are considering establishes an

[16] All statutory citations to provisions of the Congressional Accountability Act are to the 1996 Supplement.

[17] Either party may appeal the decision of the Office of Compliance to its Board of Directors and subsequently to the Court of Appeals for the Federal Circuit. 2 U.S.C. 1406(a), 1407(a). The standard of review in each instance is a deferential one. 2 U.S.C. 1406(c), 1407(d). Unless the congressional employee elects to pursue his claim in district court, rather than through the administrative process, his employing office has no right to a jury trial, including on the issue of compensatory damages. Cf. 2 U.S.C. 1408(c) (providing jury trial right in district court proceedings).

independent office to function as a legislative branch equivalent of the executive enforcement agencies").[18]

It is thus evident that Congress has perceived nothing untoward in the award in the administrative process of compensatory damages to be paid out of the federal treasury. That is precisely what Congress provided for Title VII claims against itself. Indeed, although Congress chose not to bring itself within the same administrative enforcement scheme as the Executive Branch, apparently out of concern for its own independence, Congress consciously sought to replicate that existing administrative enforcement scheme. Congress must have understood, therefore, that compensatory damages were among the remedies available in that scheme.

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[18] The administrative enforcement scheme for Title VII claims by employees of federal agencies was already in place in 1991, when compensatory damages were made available generally as a remedy for Title VII violations. In contrast, the administrative enforcement schemes for Title VII claims by Senate employees, in the 1991 legislation, and for all congressional employees, in the 1995 legislation, were created at the same time that compensatory damages were made available as a remedy to those employees. It is thus understandable that the legislation creating the latter schemes expressly mentioned compensatory damages as among the remedies available in the administrative process. The absence of a similar express reference to compensatory damages in 42 U.S.C. 2000e-16, the provision creating the administrative enforcement scheme applicable to federal agencies, does not suggest that Congress did not intend that compensatory damages be available in that scheme. Congress would have recognized that Section 2000e-16(b) already authorized all "appropriate remedies" in the administrative process—a term expansive enough to include compensatory damages once authorized generally by Congress with respect to Title VII claims against all employers, including the federal government.

B. The Court of Appeals' Reasons for Concluding That The EEOC Has No Authority To Award Compensatory Damages In Administrative Proceedings Are Unpersuasive

The court of appeals acknowledged in this case that "[n]othing in the statute or regulations explicitly rules out the idea" that the EEOC may award compensatory damages on Title VII claims in administrative proceedings. Pet. App. 6a. The court nonetheless concluded that the EEOC lacked the authority to do so. None of the three reasons offered by the court to justify that conclusion is persuasive.

1. The court of appeals relied in part on 42 U.S.C. 1981a(a)(1), which states that "[i]n an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] * * * the complaining party may recover compensatory and punitive damages." The court construed that provision to mean that compensatory damages are available "only" in "a civil action" in district court as opposed to in "an administrative proceeding." Pet. App. 10a-11a.

a. Section 1981a does not, however, define the term "action" as being limited to judicial proceedings. The statutory language, read in context, suggests that no such limitation was intended. Section 1981(a)(1) refers to "an action brought by a complaining party under section * * * 717 of the Civil Rights Act of 1964," 42 U.S.C. 2000e-16, the section that authorizes both administrative and judicial proceedings against federal agencies for violations of Title VII. If Congress had meant to refer only to civil actions in district court, Congress presumably would have cited specifically to Section 717(c), 2000e-16(c), the subsection titled "Civil action by employee or applicant for employment for redress of grievances." Section 1981a(d), which defines

a "complaining party" for purposes of Section 1981a(a)(1) as "a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964," provides further indication that Congress did not intend to limit Section 1981a(a)(1) to civil actions in district court.

The reference to Section 717, 42 U.S.C. 2000e-16, was included in the provision that became Section 1981a(a)(1) during the Senate debate on the Civil Rights Act of 1991, as a result of an amendment offered by Senator Warner to "clarify" that the compensatory damages provision applied to federal employees. 137 Cong. Rec. 29,020 (1991). In introducing the amendment, Senator Warner described the process for resolving federal employees' complaints of employment discrimination, including informal counseling, the filing of a formal complaint with the employing agency, review by the EEOC, and a civil action in district court. *Id.* at 29,021. Senator Warner then turned to what he termed "the heart of the matter":

> Remedies available under present law include:
>
> One, reinstatement; two, back pay; three, restoration of benefits; and, four, public notice.
>
> My amendment would add to the list of remedies compensatory damages including those covering pain and suffering, and that is a very important subject.

Ibid. Senator Warner drew no distinction between the remedies available in the administrative process and the remedies available in the judicial process. Nor did any other member of the Senate.

The EEOC's decision in *Jackson*, which concluded that compensatory damages are available at the admin-

istrative level, was based, in part, on the EEOC's view that the term "action" in Section 1981a(a)(1) was intended to encompass administrative proceedings. Slip op. 4-7. To be sure, since Congress did not expressly give the EEOC regulatory authority with respect to Section 1981a, as Congress did with respect to Section 2000e-16, the EEOC's interpretation of Section 1981a(a)(1) may not be entitled to *Chevron* deference. But the EEOC's interpretation of Section 1981a(a)(1) is nonetheless a "well-reasoned view[] of the agenc[y] implementing [the] statute" to which the Court "may properly resort for guidance." *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2207 (1998) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

b. In any event, as discussed in Part I above, the EEOC's authority to award compensatory damages does not turn on whether or not an administrative proceeding is an "action" within the meaning of Section 1981a(a)(1). It is enough that Section 1981a(a)(1) expands the remedies available under Title VII against employers generally, and the federal government specifically, to include compensatory damages. In so doing, Section 1981a(a)(1) gives the EEOC the authority to include compensatory damages among the "appropriate remedies," 42 U.S.C. 2000e-16(b), that may be awarded in administrative proceedings for violations of Title VII. See *Fitzgerald*, 121 F.3d at 207 ("[r]egardless" whether the term "action" in Section 1981a(a)(1) "refers to a district court suit, an administrative proceeding, or both," the EEOC's "mandate, as described in § 2000e-16(b), is sufficiently broad to allow the EEOC to offer * * * compensatory damages for emotional injuries").

In view of the EEOC's broad mandate under Section 2000e-16(b) to enforce Title VII in the federal sector, if Congress had intended that compensatory damages not

be available to federal employees in administrative proceedings, Congress could be expected to have said so expressly. It did not.

2. The court of appeals also rested its decision in this case on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory or punitive damages under this section," then "any party may demand a trial by jury." The court reasoned that, if the EEOC could award compensatory damages against a federal agency, the agency would be deprived of that statutory right to a jury trial, because agencies are bound by the EEOC's dispositions of Title VII claims. Pet. App. 10a; see 42 U.S.C. 2000e-16(c) (providing for civil actions only by "an employee or applicant for employment" who does not prevail at the administrative level); 29 C.F.R. 1614.504(a) (1996).

a. The court of appeals read too much into the statutory language. Section 1981a(c)(1) is most sensibly construed simply as providing a jury trial right, to either party, if a Title VII claim should ripen into a civil action in district court. But it does not preclude a federal employee from seeking, or the EEOC or an employing federal agency from awarding, compensatory damages on a Title VII claim in the administrative process.[19]

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[19] Section 1981a(c)(1) does not state that, *whenever* a complaining party seeks compensatory damages on a Title VII claim, any party may demand a jury trial. It states only that any party may demand a jury trial "[i]f a complaining party seeks compensatory or punitive damages *under this section*"—that is, under 42 U.S.C. 1981a, the section of the Civil Rights Act of 1991 that authorizes compensatory damages "[i]n an action brought by a complaining party" under Title VII. Arguably, at least, a federal employee is not proceeding "under this section," within the meaning of Section 1981a(c)(1), when he seeks compensatory damages in the admin-

The jury trial right provided to federal agencies by the Civil Rights Act of 1991 is, under that construction of Section 1981a(c)(1), essentially equivalent to the jury trial right provided to Congress itself by the Congressional Accountability Act of 1995. As noted above, a congressional employee has the option to prosecute a Title VII complaint, which may include a claim for compensatory damages, either in an administrative process or in district court. 2 U.S.C. 1404. If the employee elects to proceed in district court, the Congressional Accountability Act states, in terms virtually identical to Section 1981a(c)(1), that "[a]ny party may demand a jury trial. " 2 U.S.C. 1408(c). But if the employee elects to pursue his complaint in the administrative process, with ultimate review in the Court of Appeals for the Federal Circuit, neither he nor his congressional employer has any right to a jury trial, including on the issue of compensatory damages.

b. The court of appeals' reliance on Section 1981a(c)(1) is premised on its perception that the provision was designed to confer "a significant procedural right" on federal agencies and other employers. Pet. App. 10a. But Congress itself does not appear to have viewed Section 1981a(c)(1) in that manner.

To the contrary, to the extent that members of Congress addressed the jury trial provision that became Section 1981a(c)(1) during their consideration of the Civil Rights Act of 1991, they portrayed the provision as a benefit to employees and a detriment to em-

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istrative process; he is instead proceeding under 42 U.S.C. 2000e-16(b), which, as discussed above, gives the EEOC the "authority to enforce" Title VII against federal agencies "through appropriate remedies." Section 1981a does, of course, inform which remedies may appropriately be awarded by the EEOC in the administrative process.

ployers.[20] The House Report specifically addressed concerns expressed by employers that juries would award disproportionately high damages to employees in Title VII cases, noting that jury discretion would be constrained by damages caps, by restricting damages to cases of intentional discrimination, and by the "additional check" provided by judges. H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 72 (1991); see 42 U.S.C. 1981a(a)(1), (2) (intent requirement); 42 U.S.C.

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[20] See, *e.g.*, 137 Cong. Rec. 29,053-29,054 (1991) (statement of Sen. Wallop) (expressing concern that jury awards in Title VII cases would have an "economically devastating" impact on employers); *id.* at 29,051 (statement of Sen. Leahy) (noting that "[f]or the first time, women and the disabled could recover damages and have jury trials for claims of intentional discrimination" as a result of the legislation); *id.* at 29,041 (statement of Sen. Bumpers) (acknowledging employers' concerns about "being exposed to a runaway jury"); *id.* at 29,030 (statement of Sen. Symms) (asserting that "huge monetary award amounts are encouraged through jury trials"); *id.* at 29,021-29,022 (statement of Sen. Wirth) (stating that legislation "laid aside the misguided idea of denying women from having a jury determine whether or not they have been wronged"); *id.* at 28,926 (statement of Sen. Heflin) (describing provision as "allow[ing] jury trials for victims of sexual bias").

See also, *e.g.*, 137 Cong. Rec. 30,690 (1991) (statement of Rep. Dixon) (describing provision as "permit[ting] jury trials for victims of bias"); *id.* at 30,677 (statement of Rep. Hyde) (expressing concern that provision would operate to the detriment of employers); *id.* at 30,668 (statement of Rep. Ford) (describing provision as "providing all victims of intentional discrimination a right to trial by jury"); *id.* at 30,644 (statement of Rep. Doolittle) (describing various provisions of legislation, including "jury trials" provision, as creating "a tremendous injustice and burden to any employer").

All of those quoted, other than Senators Wallop and Symms and Representative Doolittle, ultimately voted in favor of the legislation.

1981a(b)(3) (damages caps).[21] President Bush, in signing the Civil Rights Act of 1991, also expressed the view that the jury trial provision, in particular, was an "important source of the controversy that delayed enactment of this legislation," which was resolved only by placing caps on the damages that juries could award against employers. *Statement of President George Bush Upon Signing S. 1745*, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 25, 1991). No similar concerns were expressed that juries might, out of sympathy for employers, award disproportionately low damages in Title VII cases.

The perception that jury trials in employment-discrimination cases tend to be beneficial to employees, and detrimental to employers, is generally shared by legal scholars, practitioners, and employers. In 1989, for example, Professor Eisenberg noted, based on data compiled by the Administrative Office of the United States Courts for the period 1979 to 1987, "the abysmal success rate of plaintiffs in employment-discrimination cases tried before judges (19.2%), a rate less than one-half that of employment trials before juries." Theodore

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[21] The jury trial provision of the Civil Rights Act of 1991, as well as the predecessor legislation that was vetoed by President Bush in 1990, was generally opposed by employer interests. See, *e.g.*, *Civil Rights Act of 1991: Hearings on H.R. 1 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 125-126 (1991) (representative of the National Association of Manufacturers and the Society for Human Resource Management); 2 *Hearings on H.R. 4000, The Civil Rights Act of 1990: Joint Hearings Before the House Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 126-130 (1990) (representative of the U.S. Chamber of Commerce); *id.* at 221-223 (representative of the National Retail Federation).

Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 Geo. L.J. 1567, 1597 (1989). Professor Eisenberg relied on some of the same data in subsequently testifying before Congress in favor of the jury trial and compensatory and punitive damages provisions of the Civil Rights Act of 1991. 2 *Hearings on H.R. 4000, The Civil Rights Act of 1990: Joint Hearings Before the House Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 154-155 (1990) (noting that plaintiffs' success rate in employment-discrimination cases tried to juries was 39%).[22]

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[22] See also, *e.g.*, John J. Ross, *The Employment-Law Year in Review (1991-1992)*, 441 PLI Litig. & Admin. Practice Course Handbook Series 7, 13 (1992) ("From an employer's viewpoint many believe the availability of jury trials, under Title VII and the Americans with Disabilities Act, is the most troubling aspect of the Civil Rights Act of 1991."); accord Rachel H. Yarkon, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 Harv. Negotiation L. Rev. 165, 174-175 (1997) ("The 1991 Act increased potential liability for employers * * * by creating the right to a jury trial."); Donna M. Gitter, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 Comp. Lab. L.J. 488, 521 (1994) (observing that "judges in the United States are perceived as less likely than a lay jury to be sympathetic to and deliver a verdict in favor of a plaintiff" in an employment-discrimination case); Sharlene A. McEvoy, *The Umpire Strikes Out: Postema v. National League: Major League Gender Discrimination*, 11 U. Miami Ent. & Sports L. Rev. 1, 25 (1993) ("Jury trials are viewed as being harder for employers to win than trials heard by judges, because juries generally consist of peers of the employee."); Mary Kathryn Lynch, *The Equal Employment Opportunity Commission: Comments on the Agency and Its Role in Employment Discrimination Law*, 20 Ga. J. Int'l & Comp. L. 89,

Congress could thus have concluded that federal agencies did not need, and would not want, a jury trial right on all claims for compensatory damages under Title VII—a right that would preclude many such claims from being fully resolved at the administrative level without resort to the courts. Congress could instead have decided that the EEOC, with its expertise in adjudicating Title VII claims in the federal sector, would provide agencies sufficient protection against unwarranted damages claims.

3. The court of appeals also rested its decision in this case on the view that Congress did not specifically waive the United States' sovereign immunity from compensatory damages awards by the EEOC. Pet. App. 11a-12a. The court correctly recognized the well-settled rule that "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 119 S. Ct. 687, 691 (1999); accord *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) ("limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied"). But the court did not correctly apply that rule to the circumstances of this case.

The court of appeals acknowledged that Congress has waived the United States' immunity with respect to compensatory damages claims in Title VII actions in district court. Pet. App. 11a-12a; see 42 U.S.C. 1981a(a)(1). Indeed, the court noted that Congress has even consented, on behalf of the United States, to the trial of such claims before a jury, at the demand of the plaintiff. Pet. App. 12a; see 42 U.S.C. 1981a(c)(1). The

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103 (1990) ("Juries are now seen to be more sympathetic to Title VII claimants than are the judges.").

only question that remains, therefore, is whether such a waiver extends to administrative proceedings before the EEOC. The court offered no authority or logic for concluding that a waiver of a sovereign's immunity, which indisputably applies in the sovereign's courts, should not also presumptively apply in the sovereign's administrative agencies. Such agencies could be expected to accord the sovereign's interests at least as much consideration as would a judge or a jury.

Here, moreover, Congress has expressly granted the EEOC broad adjudicatory authority over claims against the United States under Title VII, including the authority to award all "appropriate remedies" with respect to such claims. 42 U.S.C. 2000e-16(b). Those remedies have historically included monetary ones (*e.g.*, "back pay") as well as equitable ones (*e.g.*, "reinstatement or hiring"). *Ibid.* Accordingly, Section 1981a(a)(1) and Section 2000e-16(b), construed together, express with sufficient clarity Congress's intent to waive the United States' sovereign immunity with respect to all Title VII compensatory damages awards, in administrative and judicial proceedings alike.[23]

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[23] A waiver of sovereign immunity that encompasses both judicial and administrative proceedings is coextensive with the waiver of sovereign immunity in the Congressional Accountability Act of 1995, which expressly makes compensatory damages available to congressional employees in administrative proceedings as well as judicial proceedings. See pp. 22-24, *supra*. Such a waiver of sovereign immunity is also consistent with that in the Government Employee Rights Act, a portion of the Civil Rights Act of 1991, which expressly made compensatory damages available to Senate employees in administrative proceedings. It would be anomalous for Congress to have waived sovereign immunity with respect to administrative proceedings involving congressional employees but not to have waived sovereign immunity with respect to administrative proceedings involving employees of federal agencies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1999