No. 06-1431

In the Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION BRIEF

Petitioner files this Reply Brief to address certain legal arguments made in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of *Certiorari* to this Court.

A. Two Recent Supreme Court Cases Further Support Petitioner's Arguments for Granting *Certiorari* and Undercut Respondent's Arguments in Opposition.

The Court's reasoning in *Ledbetter v. The Goodyear Tire & Rubber Company, Inc.*, __ U.S. __, 127 S. Ct. 2162 (2007), and *National Association of Home Builders v. Defenders of Wildlife*, __ U.S. __, 168 L. E. 2d 467 (2007), further illustrates the importance of granting this petition and undercuts Respondent's Brief in Opposition. If the Court does not address the sole legal issue presented here - whether a race retaliation claim is cognizable under 42 U.S.C. § 1981 - the lower courts will retain *carte blanche* to ignore the administrative prerequisites of Title VII, and employees will continue to circumvent those same prerequisites.

1. *Ledbetter v. The Goodyear Tire & Rubber Company, Inc.*, __ U.S. __, 127 S. Ct. 2162 (2007).

In *Ledbetter v. The Goodyear Tire & Rubber Company, Inc.*, __ U.S. __, 127 S. Ct. 2162 (2007), the Court, in an opinion written by Justice Alito, specifically addressed the importance of the administrative scheme in Title VII, which is under assault by the Seventh Circuit's decision at issue in this petition. In particular, the Court focused on the issue of whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 based on pay discrimination where the actual decision to implement discriminatory pay took place

outside Title VII's statute of limitations, but the employee received some discriminatory pay within the statute of limitations. *Id.* at 2166.

The Court responded that where an employee seeks to challenge an alleged unlawful employment practice like discriminatory pay (or like in this petition, retaliation), the employee must file an EEOC charge within 180 days after the alleged unlawful employment practice occurs. *Id.* If the employee fails to do so, "the employee may not challenge [the alleged unlawful] practice in court." *Id.* at 2166-67 (citing 42 U.S.C. § 2000e-5(f)(1)).

The Court reinforced its long-standing view that "[s]tatutes of limitations serve a policy of repose." *Id.* at 2170. In particular, "[t]he EEOC filing deadline 'protects employers from the burden of defending claims arising from employment decisions that are long past.'" *Id.* (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980)). Congress has specifically demonstrated a "strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation" by virtue of its mandate that employees file charges within 180 days after an alleged unlawful employment practice occurs. *Id.* at 2170-71.

If an employee fails to comply with Congress' mandated statutes of limitations for filing a charge or a lawsuit under Title VII, the employee is without a remedy under Title VII, a result Congress has endorsed in the employment realm. *Id.* at 2171-72 (citing *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), for the proposition that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law"). *See also* 42 U.S.C. § 2000e-5(e)(1) (2006) (barring an employee

from bringing a charge of discrimination against an employer if he/she does not do so "within one hundred and eighty days after the alleged unlawful employment practice"); 42 U.S.C. § 2000e-5(f)(1) (2006) (barring a charging party from filing a lawsuit in federal court if he/she does not do so within 90 days of receiving a notice of right to sue letter from the EEOC).

The Seventh Circuit's holding in this case allows would-be plaintiffs to bring a retaliation claim against an employer under 42 U.S.C. § 1981 even though the employee fails to comply with Title VII's procedural requirements and its statutes of limitations. The Seventh Circuit's decision allows these plaintiffs to circumvent the statutory requirements created by Congress in Title VII by reading 42 U.S.C. § 1981 "to have the same substantive content as Title VII, but without [the] features [that] employees find inconvenient" and Congress found necessary. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 409 (Easterbrook, J., dissenting).

The Respondent in this case has thus far successfully convinced the lower courts that compliance with Title VII's procedural requirements is unnecessary because Respondent and similar employee plaintiffs can currently use Section 1981 to revive Title VII's remedies, including retaliation, after those remedies are precluded due to the running of the 180-day or 90-day statute of limitations. *See id.* at 389, 391 (noting that "[t]he district court dismissed [Respondent's] Title VII claims due to procedural deficiencies").

As Judge Easterbrook correctly pointed out in his dissenting opinion at the Seventh Circuit Court of Appeals, "[t]his is not the first time a disgruntled employee has turned to § 1981 after missing the [90-day] deadline for litigation under Title VII." *Id.* at 409 (Easterbrook, J., dissenting). If

this Court does not address the merits of this case, it certainly will not be the last time an employee ignores the Congressional requirements of Title VII in employment discrimination cases.

The Court should grant *certiorari* in this case and put an end to the lower courts' misapplication of Congress' clear instructions regarding Title VII and employment discrimination.

2. *National Association of Home Builders v. Defenders of Wildlife*, __ U.S. __, L. E. 2d 467 (2007).

In *National Association of Home Builders v. Defenders of Wildlife*, __ U.S. __, 168 L. E. 2d 467, 476 (2007), the Court, in a decision written by Justice Alito, addressed the interplay between two federal environmental statutes: (1) Section 402(b) of the Clean Water Act ("CWA") at 33 U.S.C. § 1342(b); and (2) Section 7(a)(2) of the Endangered Species Act of 1973 ("ESA") at 16 U.S.C. § 1536(a)(2). In particular, the Court analyzed the effect a general statute (§ 7(a)(2) of the ESA) has over a specific statute (§ 402(b) of the CWA).

Section 402(b) of the CWA provides that the Environmental Protection Agency "shall approve a transfer application" to a state desiring to administer its own permit program for discharges into navigable waters "unless it determines that the State lacks adequate authority to perform [an exclusive list of] nine functions specified in the section." *Id.* at 483 (internal quotes deleted). Section 7(a)(2) of the ESA "provides that each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . .

is not likely to jeopardize endangered or threatened species or their habitats." *Id.* at 484 (internal quotes deleted).

In the context of statutory repeals by implication, Justice Alito, writing for the majority, stated the following: "We will not infer a statutory repeal unless [a] later statute expressly contradicts the original act or unless such a construction is absolutely necessary . . . in order that the words of the later statute shall have any meaning at all." *Id.* (internal quotes deleted). Based on this proposition of law, the Court deemed that the Ninth Circuit's broad reading of Section 7(a)(2) of the ESA subsumed the more specific statute (Section 402(b) of the CWA) and in effect eviscerated Congress' intent with regards to the more specific statute. *Id.* at 485 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), for the proposition that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum"). In other words, it is illogical to conclude that Congress would create a statute with specific requirements only to have that statute subsequently take a back seat to a more general statute.

National Association of Home Builders relates to this petition for one reason – Respondent herein, with the Seventh Circuit's endorsement, seeks to use a later enacted broad statute addressing racial discrimination in contracts (Section 1981, as amended in 1991) to subsume a more specific statute that expressly addresses retaliation in the employment context (Title VII). Respondent seeks to include a claim for retaliation in the employment context under Section 1981, which would effectively nullify the administrative requirements and statutes of limitations prescribed by Congress in Title VII as they pertain to claims of retaliation in the employment setting.

The Court should address the merits of this petition because the lower courts are permitting Title VII to take a back seat to Section 1981 by reading a retaliation clause into Section 1981 where Congress did not specifically include one.

B. Respondent's Brief in Opposition Ignores the Difference Between Retaliation and Discrimination Based on Race.

Respondent asserts that Congress broadened 42 U.S.C. § 1981 in the 1991 Civil Rights Amendments for purposes of including a cause of action for retaliation where an individual is retaliated against for filing a complaint about racial discrimination. Brief of Respondent in Opposition at 4. This claim, however, ignores the real distinction between anti-discrimination and anti-retaliation provisions, which, in the end, shows that Congress actually intended to exclude retaliation from 42 U.S.C. § 1981.

In 2006, the Court, in an opinion written by Justice Breyer, distinguished between the anti-discrimination clause and the anti-retaliation clause in Title VII:

> The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial . . . status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision [addressing race] seeks to prevent injury to individuals based on who they are, *i.e.*, their ***status***. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their ***conduct***.

Burlington N. & Santa Fe Ry. v. White, __ U.S. __, 126 S. Ct. 2405, 2412 (2006).

By its plain language, 42 U.S.C. § 1981 does not have a clause providing for a cause of action to prevent harm to an individual based on what he/she does (*e.g.*, his/her filing a discrimination complaint). Section 1981 only provides that "all persons . . . shall have the same right in every state and territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (2006). If a contracting party under Section 1981 retaliates because the other party complained about discrimination, the retaliation is based on the fact that the complaining party complained (*i.e.*, it is based on the complaining party's conduct), not because that person is being denied a right enjoyed by white citizens. *See Burlington N. & Santa Fe Ry.*, 126 S. Ct. at 2412. Section 1981 protects individuals based on their status, not their conduct.

The Seventh Circuit's contravention and lack of insight into *Burlington Northern & Santa Fe Railway's* distinction between race-based discrimination and retaliation shows that the law, as written by Congress, is being ignored. Accordingly, this petition should be granted to address the current misapplication of 42 U.S.C. § 1981 to claims of retaliation.

C. Respondent Fails to Recognize the Distinct Differences Between *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), and the Present Petition.

Respondent asserts that the Court's decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), governs whether the Court should grant or deny this petition for a writ of *certiorari*. However, *Jackson* not only does not

control the issue in this case, but Title IX, to which *Jackson* is addressed, is fundamentally different than 42 U.S.C. § 1981.

In *Jackson*, 544 U.S. at 173-74, the Court, in an opinion written by Justice O'Connor, did hold that retaliation is actionable under Title IX. Furthermore, as Respondent aptly points out, "like Title IX, Section 1981 does not use the word 'retaliation.'" Brief of Respondent in Opposition at 11. However, Section 1981, unlike Title IX, has a corresponding statute (*i.e.*, Title VII) that provides for fundamental relief based on retaliation in the employment context - the same context in which Respondent seeks relief in this case.

Respondent herein seeks to enforce a retaliation claim in the employment context against his employer under Section 1981 after the lower court refused to enforce his Title VII claims as procedurally barred. However, he does so despite the fact that Section 1981 specifically does not provide for retaliation.

Title VII's retaliation provision provides a specific procedural structure for employees, like Respondent, who seek to bring a cause of action for retaliation in the employment context. Such a structure did not exist under Title IX for the plaintiff in *Jackson*. Therefore, Respondent's argument that *Jackson* is herein applicable is not supported by law or fact.

CONCLUSION

A writ of *certiorari* should be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals in this matter to determine whether a claim for retaliation exists under Section 1981. As noted earlier, this case "is not

the first time a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII." *Humphries*, 474 F.3d at 409 (Easterbrook, J., dissenting). If the Court does not address the merits of this case, it certainly will not be the last time an employee ignores the Congressional requirements of Title VII in employment discrimination cases, nor will it be the last time courts ignore the applicability of specific statutes and the clear intent of Congress.

For the reasons in this Reply Brief, and those in Petitioner's original Petition for Writ of *Certiorari*, the Court should grant *certiorari* in this case.

Respectfully submitted,

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