No. 14-613

In the Supreme Court of the United States

MARVIN GREEN, PETITIONER

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL

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

BRIEF FOR RESPONDENT IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the filing period for a constructive-discharge claim begins to run when an employee resigns or at the time of the employer's last discriminatory act giving rise to the resignation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 760 F.3d 1135. The opinion of the district court (Pet. App. 28a-50a) is not published in the *Federal Supplement* but is available at 2013 WL 424777.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. On October 6, 2014, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 26, 2014. The petition was filed on November 25, 2014. The petition was granted on April 27, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the appendix to this brief.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits various discriminatory employment practices by both private and public employers. By its terms, the principal federal-sector provision of Title VII requires "[a]ll personnel actions affecting employees" of various federal entities including, as relevant here, the United States Postal Service to be "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e–16(a). In the private sector, Congress has expressly made it an "unlawful employment practice" for an employer to discriminate against employees or applicants who oppose practices that Title VII makes unlawful, or who participate in proceedings, investigations, or hearings involving charges of discrimination. 42 U.S.C. 2000e–3(a). Although that anti-retaliation provision has not been directly incorporated into the federal-sector provisions, courts have generally construed Title VII as extending the private-sector ban on retaliation to the federal government. See, *e.g.*, *Taylor* v. *Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009); cf. *Gómez-Pérez* v. *Potter*, 553 U.S. 474, 488 n.4 (2008) (reserving the question).

Before filing a suit in district court alleging a Title VII violation, a federal-agency employee is required to exhaust administrative remedies. 42 U.S.C. 2000e–16(c). A regulation specifies that, to invoke the administrative process, the employee "must initiate contact" with an equal employment opportunity (EEO) counse-

lor at his or her agency "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1).[1]

2. Petitioner is an African-American man who was employed by the United States Postal Service from 1973 until 2010. Pet. App. 3a, 28a-29a. Beginning in 2002, he served as the postmaster in Englewood, Colorado. *Id.* at 3a, 29a. In 2008, he applied for a more senior postmaster position in Boulder, Colorado, but he was not selected for that higher-paying job. *Ibid.* He then filed a formal complaint with the agency's EEO office, alleging discrimination on the basis of race. *Ibid.* Petitioner and the agency settled that matter, but in May and July 2009, petitioner filed informal EEO complaints alleging that he had been retaliated against because of his EEO activity. *Ibid.* After an investigation, the Postal Service informed petitioner that he could file a formal retaliation complaint, but he did not do so. *Id.* at 3a-4a, 30a.

In November 2009, the Postal Service directed petitioner to appear for an investigative interview to discuss allegations that he had not complied with agency procedures when processing subordinate employees' grievances, which had resulted in adverse decisions requiring the Postal Service to pay damages and penalties. Pet. App. 4a, 30a. Petitioner, accompanied by a

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[1] Private-sector and non-federal public employees are similarly required to file a timely charge with the EEOC before filing a Title VII suit in district court, although they are allowed more time than federal employees—either 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e–5(e)(1), 2000e–16c(b)(1); see *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623-624 (2007).

representative from the National Association of Postmasters, Robert Podio, appeared at the interview on December 11, 2009, which was conducted by David Knight, the human-resources manager for the Postal Service's Colorado/Wyoming district, and Charmaine Ehrenshaft, the district's manager of labor relations. *Ibid.* Petitioner was asked, *inter alia*, about allegations that he had intentionally delayed the mail by failing to timely sign and return receipts for certified letters relating to the grievances. *Id.* at 4a, 31a. After that interview, petitioner met with two agents from the Postal Service's Office of Inspector General, which had, as a result of a congressional inquiry, begun an investigation of potentially criminal allegations that petitioner had intentionally delayed the mail. *Id.* at 4a-5a, 31a; J.A. 32. Immediately after petitioner's meeting with the agents, Knight and Ehrenshaft gave petitioner a letter informing him that, under the agency's emergency-placement policy, he was being removed from duty because he had disrupted "day-to-day postal operations." Pet. App. 5a, 31a. The letter further stated that he would be returned to duty "when the cause for nonpay status ceases." *Id.* at 5a.

The next day, petitioner's representative, Podio, initiated negotiations with Knight to resolve the issues that had been raised in the interview. Pet. App. 5a, 32a. Podio asked Knight whether he would end his investigation "[i]f I can get [petitioner] to retire." J.A. 54. Knight responded favorably, stating "[i]f he retires I will not charge him." *Ibid.* Podio said he would "start to work toward" an agreement under which petitioner would "sign retirement paperwork," remain on paid leave for the interim, and not be able to "revoke" the retirement. *Ibid.*

On December 16, 2009, the settlement negotiations concluded. Pet. App. 5a, 32a. In an agreement signed that day by petitioner, Podio, and Knight, the Postal Service agreed that it would not pursue any charges against petitioner based on the issues discussed during the December 11, 2009 interviews. J.A. 60-61. In return, petitioner agreed that he would "immediately relinquish" his level-22 position as the postmaster in Englewood and accept a demotion to a lower-paying level-13 postmaster position in Wyoming. J.A. 60. (Removing petitioner from the Englewood position was necessary to allow someone else to fill that important slot immediately. J.A. 51.) The agreement also provided that petitioner would receive "saved salary" (*i.e.*, the higher rate of pay associated with his former position) until March 30, 2010, and that he would be allowed to use annual leave and then sick leave during the period running from December 14, 2009, until March 31, 2010. J.A. 60. Finally, the agreement provided as follows:

> Mr. Green agrees to retire from the Postal Service no later than March 31, 2010. Mr. Green agrees to take all necessary steps to effect his retirement on or before March 31, 2010. If retirement from the Postal Service does not occur Mr. Green will report for duty in Wamsutter, Wyoming on April 1, 2010 and the saved salary shall immediately cease.

J.A. 60-61.

As contemplated by the agreement, petitioner began using annual leave and sick leave (at full pay based on his prior position), and on February 9, 2010, petitioner submitted papers requesting that his retirement be made effective on March 31, 2010. Pet. App. 5a-6a.

Meanwhile, on January 7, 2010, petitioner had met with an EEO counselor and filed an informal complaint alleging that the Postal Service had retaliated against him for his earlier EEO activities when it removed him from his Englewood position and issued the emergency-placement letter. Pet. App. 6a. On February 5, 2010, the EEO counselor notified petitioner (and his retained counsel) that he could file a formal complaint of retaliation on the basis of the removal and emergency placement, C.A. App. 59-61, and petitioner filed such a complaint on February 17, 2010, Pet. App. 6a. The agency EEO office ultimately dismissed petitioner's complaint as precluded by the December 16, 2009 settlement agreement, and the Office of Federal Operations at the Equal Employment Opportunity Commission (EEOC) upheld that dismissal. *Ibid.*

On March 22, 2010, however, petitioner contacted an EEO counselor and filed another informal complaint, this time alleging that he had been constructively discharged in retaliation for his earlier EEO activities. Pet. App. 6a, 32a; J.A. 64-67. Petitioner filed a formal complaint making that allegation on April 26, 2010. Pet. App. 32a; J.A. 22. The agency EEO office dismissed petitioner's complaint "for failure to state a claim, for constituting a collateral attack on a settlement agreement, and for stating the same claim" that had already been decided by the agency and the EEOC. J.A. 25.[2]

3. On September 8, 2010, petitioner filed this suit in district court. Pet. App. 7a, 32a. In his amended complaint, petitioner alleges five acts of retaliation in vio-

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[2] The EEO office also determined that, even assuming it could consider petitioner's retaliatory-constructive-discharge claim, the claim would fail on the merits. J.A. 25-44.

lation of Title VII on account of his prior EEO activity, including his constructive discharge by forced retirement. *Id.* at 7a, 32a-33a; J.A. 8-20. The district court granted the Postal Service's motion to dismiss three claims that are no longer at issue. Pet. App. 33a.

After discovery, the district court granted summary judgment to the Postal Service on petitioner's remaining two retaliation claims, including, as relevant here, the claim for constructive discharge. Pet. App. 33a-50a. The court held that the constructive-discharge claim could not have accrued any later than December 16, 2009, the date of the settlement agreement. *Id.* at 37a-40a. The court noted that petitioner does not allege that the Postal Service engaged in any retaliatory acts after that date, and that the agency actions that petitioner alleges forced him to retire culminated in the signing of the agreement. *Id.* at 37a-38a.

The district court acknowledged precedent cited by petitioner holding that a constructive-discharge claim accrues when the employee provides "definitive notice of her intent to retire." Pet. App. 38a. But the court concluded that, even under that standard, petitioner's claim would fail because he "notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day." *Id.* at 39a. Because that was more than 45 days before his March 22 contact with the EEO counselor, petitioner had "failed to properly exhaust" the claim. *Id.* at 38a, 39a.[3]

4. The court of appeals affirmed in relevant part and reversed in part. Pet. App. 1a-27a.

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[3] The district court also granted summary judgment to the Postal Service on petitioner's emergency-placement claim on the ground that the placement was not a materially adverse action. Pet. App. 40a-48a.

The court of appeals affirmed the district court's grant of summary judgment to the Postal Service on petitioner's constructive-discharge claim. Pet. App. 15a-23a. The court concluded that petitioner's claim was untimely because all of the allegedly discriminatory or retaliatory acts occurred on or before December 16, 2009, and he did not initiate his administrative complaint within 45 days of that date. *Id.* at 16a.

After discussing the genesis and history of constructive-discharge claims, the court of appeals noted that those claims "'involve[] *both* an employee's decision to leave and [the employer's] precipitating conduct,'" thus creating "interesting issues regarding when such a claim accrues, and hence when a claim is untimely." Pet. App. 18a (quoting and adding emphasis and bracketed language to *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004)). As the court of appeals observed, in the context of a constructive discharge, "quitting is an element of the claim," and "generally a claim does not accrue before all its elements can be satisfied." *Ibid.* That aspect of a constructive-discharge claim, the court of appeals acknowledged, counsels in favor of having the statute of limitations run from the date on which "the employee quits or announces his future departure." *Ibid.*

The court of appeals likewise acknowledged that, although "[f]ew court opinions have discussed the issue, either under Title VII or in other contexts," most of them have "said that the constructive-discharge claim accrued when the employee gave notice of departure." Pet. App. 18a.

The court of appeals, however, concluded that it could not "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminato-

ry act' of the employer" for purposes of the limitations period defined in 29 C.F.R. 1614.105(a)(1). Pet. App. 20a. Relying on *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the court explained that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Pet. App. 20a (quoting and omitting brackets from *Ricks*, 449 U.S. at 258). The court expressed "particular concern" that "delaying accrual past the date of the last discriminatory act and setting it at the date of notice of resignation would run counter to an essential feature of limitations periods by allowing the employee to extend the date of accrual indefinitely." *Id.* at 20a-21a. Accordingly, the court "agree[d] with the courts that have required some discriminatory act by the employer within the limitations period." *Id.* at 22a.

The court of appeals thus concluded that petitioner had not timely exhausted his constructive-discharge claim because he "does not claim that the Postal Service did anything more to him" after he signed the settlement agreement on December 16, 2009, and he did not initiate EEO counseling on his constructive-discharge claim until March 22, 2010, "well beyond 45 days later." Pet. App. 23a.[4]

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[4] The court of appeals reversed the grant of summary judgment on petitioner's emergency-placement claim. Pet. App. 23a-26a. In the court's view, petitioner could establish that his placement on emergency off-duty status was a materially adverse action because, when he received notice of that action, he did not know that he would ultimately be paid. *Id.* at 25a. Because it was "unclear," however, whether petitioner could "establish the other elements of his emergency-placement claim," the court remanded to the district court for further proceedings. *Id.* at 26a.

5. In this Court, the government's brief opposing the petition for a writ of certiorari did not express a position about the correctness of the rationale of the court of appeals' decision, see Br. in Opp. 8-15; Cert. Reply Br. 1, but it did contend that "petitioner himself would not prevail under the accrual standard he advocates," Br. in Opp. 15. On June 30, 2015, a few days before petitioner filed his brief on the merits, the government informed the Court by letter that it would not defend the rationale of the court of appeals' decision but that it would continue to defend the court of appeals' judgment, and that, under the circumstances, the Court may wish to invite an amicus curiae to file a brief to defend the rationale of the court of appeals' decision.

SUMMARY OF ARGUMENT

When a Title VII retaliation claim depends on the presence of a constructive discharge, the period for initiating administrative consideration of that claim does not begin until the employee gives notice of his resignation.

A. As a federal-sector employee, petitioner was required by 29 C.F.R. 1614.105(a)(1) to initiate contact with an EEO counselor within 45 days in order to begin the process of exhausting his administrative remedies. The Court has treated Title VII's other timely-filing requirements, in both the private- and federal-sector contexts, as being like statutes of limitations, and the regulation's 45-day requirement warrants similar treatment. The Court has also explained that, barring a compelling textual justification to the contrary, a limitations period will commence only when a plaintiff has a complete and present cause of action on which he can file suit and obtain relief.

B. When this Court recognized that Title VII encompasses constructive-discharge liability, it explained that "[a] constructive discharge involves both an employee's decision to leave and [the employer's] precipitating conduct." *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004). In other words, the discharge does not occur—and the cause of action is not present—until the employee decides to leave. As a result, under the general rule, the employer's precipitating conduct is, taken alone, not enough to initiate the period for raising a claim that depends upon the existence of a constructive discharge. Instead, as petitioner recognizes, that period begins when the employee gives notice to the employer of his decision to leave (or, in the absence of advance notice, resigns).

C. The court of appeals recognized that its holding was a departure from the general rule but felt obliged to focus on the employer's own actions and expressed concern about allowing the employee, by dictating the time of resignation, to extend the accrual date. Such considerations are of diminished significance in the constructive-discharge context for several reasons.

First, applying the notice-of-resignation rule does not permit an employee to delay suit on his actual injury because, in the specific context of a constructive-discharge claim, the relevant species of harm (*i.e.*, the resignation that is allegedly a constructive discharge) does not occur until there is a decision to resign.

Second, the notice-of-resignation rule does not truly place the limitations period in the plaintiff's hands, because the decision to resign is not entirely his own. Instead, the resignation is considered a *constructive* discharge precisely because it is legally imputed to the employer (the only one with the power of discharge).

Third, the constructive-discharge context is distinguishable from the denial-of-tenure challenge in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), in which the Court emphasized that "the proper focus is upon the time of the *discriminatory acts*" rather than when "the *consequences* of the acts became most painful." *Id.* at 258 (brackets and citation omitted). In the constructive-discharge context, unlike in *Ricks*, the relevant consequence (resignation) is not "a delayed, but inevitable, consequence" of the challenged conduct, *id.* at 257-258, but rather a new, intervening act which is imputed to the employer.

Fourth, as a practical matter, an employee has no unilateral power to determine when the limitations period begins, because constructive-discharge doctrine requires him to establish that the employer created (or permitted) circumstances under which "a reasonable person in the employee's position would have felt *compelled* to resign." *Suders*, 542 U.S. at 141 (emphasis added). An employee alleging a constructive discharge thus cannot wait too long, because the necessary allegation that the employer's actions created "unendurable working conditions" (*ibid.*) grows less plausible the longer he endures them.

D. Additional policy considerations counsel against the court of appeals' departure from the usual limitations rule. The court suggested that an employee should simply file one challenge to the employer's precipitating conduct and, in the event of a later resignation, amend the charge to include a constructive-discharge allegation. Even if such an amendment were possible, that procedure would complicate a process intended to be navigated by lay complainants, result in the multiplication of claims, and offer little comfort to

employees whose resignation decisions came too long after the precipitating conduct. Finally, it bears noting that the basic premises of the notice-of-resignation rule in the constructive-discharge context have long been recognized by several courts of appeals, as well as by the EEOC, and (in the context of constructive-discharge claims under other statutes) by the Department of Labor's Administrative Review Board.

E. Although the court of appeals erred in rejecting the notice-of-resignation rule, its judgment should be affirmed, because petitioner's March 22, 2010 contact with an EEO counselor came more than 45 days after his notice of resignation. As the district court held, petitioner gave his notice of resignation on December 16, 2009, when he signed an agreement stating that he "*agrees to retire* from the Postal Service no later than March 31, 2010" and that he "*agrees to take all necessary steps to effect his retirement* on or before March 31, 2010." J.A. 60-61 (emphases added). Although the court of appeals did not address the district court's construction of the agreement, if this Court adopts the notice-of-resignation rule, it should apply that standard to the facts of the case as determined by the district court when it construed the plain meaning of the relevant provision of the December 16 agreement.

Finally, both parties and both courts below have proceeded on the premise that the timeliness question in this case is governed by the first clause of the regulation governing federal-sector Title VII claims, which requires a plaintiff to make contact with a counselor "within 45 days of the date of the matter alleged to be discriminatory," rather than by the second clause of that regulation, which requires a plaintiff to act, "in the case of a personnel action, within 45 days of the

effective date of the action." 29 C.F.R. 1614.105(a)(1). The Court should decide the case on that same assumption (which would also effectively allow the Court to speak to the non-federal-sector rule). Although that premise—on which petitioner still affirmatively relies—is not obviously correct, departing from it now would raise several other issues that have not been briefed by the parties or addressed by the courts below, and on which the case law is unsettled.

ARGUMENT

WHEN A TITLE VII RETALIATION CLAIM DEPENDS ON THE PRESENCE OF A CONSTRUCTIVE DISCHARGE, THE PERIOD FOR INITIATING ADMINISTRATIVE CONSIDERATION OF THAT CLAIM DOES NOT BEGIN UNTIL THE EMPLOYEE GIVES NOTICE OF RESIGNATION

When evaluating the timeliness of initiating administrative consideration of a Title VII claim, this Court has repeatedly emphasized the importance of "identifying precisely the unlawful employment practice of which [the plaintiff] complains." *Lewis* v. *City of Chicago*, 560 U.S. 205, 211 (2010) (citation, internal quotation marks, and brackets omitted); see *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007) ("[W]e have stressed the need to identify with care the specific employment practice that is at issue."). Here, petitioner alleges that he was constructively discharged in retaliation for his prior EEO activities. Because there could not have been any constructive discharge until he gave notice of his resignation, the 45-day period under 29 C.F.R. 1614.105(a)(1) for initiating contact with an EEO counselor about a constructive-discharge claim did not begin to run until he gave that notice. The court of appeals accordingly erred in holding that the period ran from the employer's "last

discriminatory act." Pet. App. 20a. Nevertheless, its decision should be affirmed because petitioner gave his notice of resignation on December 16, 2009, when he signed an agreement containing his express promise to retire and to submit his retirement papers, J.A. 60-61, and he indisputably failed to initiate contact within 45 days of that notice, see Pet. Br. 14.

A. Limitations Periods Generally Begin To Run Only When The Plaintiff Has A Complete And Present Cause Of Action

The question before the Court is whether petitioner was timely in satisfying the requirement that he exhaust his administrative remedies before filing this Title VII suit in district court. 42 U.S.C. 2000e–16(c). His exhaustion efforts were timely only if he "initiate[d] contact" with an EEO counselor at the Postal Service "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1).[5]

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[5] As he has at previous points in this case, petitioner contends that the applicable portion of the regulation is the reference in its first clause to the period "within 45 days of the date of the matter alleged to be discriminatory"; petitioner does not invoke the regulation's second clause, which would require contact "within 45 days of the effective date of [a personnel] action." See Pet. Br. 17-18; see also Pet. App. 20a n.3 (court of appeals' observation that petitioner "has not suggested that his notice of resignation was a personnel action under the regulation"). That second clause has no analogue in cases brought against private employers and state and local-government employers, where a discrete act "must be challenged within 180 [or] 300 days of the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date." EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a, www.eeoc.gov/policy/docs/

1. Whether or not that regulation governing the timeliness of an administrative proceeding is, considered strictly, a statute of limitations, this Court has repeatedly drawn upon statute-of-limitations principles when construing closely related provisions of Title VII. In *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the Court held that the requirement in 42 U.S.C. 2000e–5(e) to file a timely charge of discrimination with the EEOC against a private employer, "like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 393; see *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 123 (2002) (O'Connor, J., concurring in part and dissenting in part) ("The Court today holds that, for discrete discriminatory acts, § 2000e–5(e)(1) serves as a form of statute of limitations."). The Court later noted that *Zipes* "foreclosed" an employer's contention that there were no equitable exceptions to the deadline under 42 U.S.C. 2000e–5(f)(1) for filing a district-court suit against a private employer. *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 349 n.3 (1983). And it again relied on *Zipes* when holding that the deadline under 42 U.S.C. 2000e–16(c) for filing a district-court suit against a federal employer is similarly subject to equitable tolling. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 & n.2 (1990).

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threshold.html (last visited July 27, 2015); see 42 U.S.C. 2000e–5(e)(1) (requiring charge to be filed within 180 or 300 days "after the alleged unlawful employment practice occurred"). Because the government has not previously contended otherwise, the bulk of the following discussion shares petitioner's premise that the first clause governs. That premise, however, is not obviously correct. See pp. 37-38, *infra*.

Section 1614.105(a)(1) is subject to equitable exceptions,[6] and the courts of appeals have therefore applied similar reasoning in concluding that a failure to satisfy its 45-day deadline "equates to the violation of a statute of limitations." *Smith* v. *Potter*, 445 F.3d 1000, 1007 (7th Cir. 2006); see, *e.g.*, *Fitzgerald* v. *Henderson*, 251 F.3d 345, 359 (2d Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Bowden* v. *United States*, 106 F.3d 433, 437 (D.C. Cir. 1997). In that light, the deadline requires the "diligent prosecution of known claims," but it does not operate as an absolute bar to liability without regard to the timing of "the accrual of any cause of action" or of the occurrence or discovery of injury. *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182, 2183 (2014) (citations and internal quotation marks omitted).

2. In applying statutes of limitations, the Court has "repeatedly recognized * * * the standard rule that the limitations period commences when the plaintiff has a complete and present cause of action." *Graham County Soil & Water Conservation Dist.* v. *United States*, 545 U.S. 409, 418 (2005) (citation and internal quotation marks omitted). That moment occurs when "the plaintiff can file suit and obtain relief." *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997). Although the Court has recognized that "it is theoretically pos-

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[6] The agency and the EEOC are affirmatively authorized to extend the 45-day period if the employee shows, for instance, that he was unaware of the time limits, that he "did not know and reasonably should not have * * * known that the discriminatory matter or personnel action occurred," or that other "reasons considered sufficient" support an extension. 29 C.F.R. 1614.105(a)(2); see 29 C.F.R. 1614.604(c) (making all time limits in Part 1614 "subject to waiver, estoppel and equitable tolling").

sible" for a statute of limitations to begin running (and perhaps even to expire) before suit can be filed on the associated cause of action, *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993), the Court has rarely countenanced such a result and has done so only where the plain text of a statute or the parties' contract compelled a departure from the general rule.[7]

B. A Claim Alleging A Constructive Discharge Does Not Accrue Until An Employee Gives Notice Of Resignation (Or, In The Absence Of Advance Notice, Resigns)

Here, petitioner challenged a series of five allegedly retaliatory acts attributable to the Postal Service, see Pet. App. 7a, but the only claim currently at issue is that he was constructively discharged. Thus, for purposes of applying the "standard rule" governing the limitations period, the question is when petitioner had "a complete and present cause of action" turning on

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[7] See, *e.g.*, *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 615 (2013) (holding that the plain terms of an ERISA plan could bind the parties to a limitations period that would usually provide a participant at least one year to file suit after internal review of a disability-benefits claim; acknowledging that this rule would in "rare cases" allow less time, and perhaps no time, to file suit, but would probably have that effect only for participants who had "not diligently pursued their rights"); *Dodd* v. *United States*, 545 U.S. 353, 358 (2005) (holding that, under "the only natural reading of the [statutory] text," one period for seeking collateral review of a conviction under 28 U.S.C. 2255 ran from the date this Court recognized a right, even if it had not made that right retroactively applicable to cases on collateral review, a result that would altogether preclude many second or successive applications for relief).

that constructive discharge. *Graham County*, 545 U.S. at 418.[8]

1. In 2004, the Court held "that Title VII encompasses employer liability for a constructive discharge." *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 143. The Court explained that, "[u]nder the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." *Id.* at 141. It further recognized that "[a] constructive discharge involves both an employee's decision to leave and precipitating conduct," and whether the precipitating conduct can be attributed to the employer may require, in part, a determination that it "involve[s] official action," such as "a demotion or a reduction in compensation." *Id.* at 148.

In light of *Suders*'s observation that a constructive discharge involves both "precipitating conduct" *and* "an employee's decision to leave," the decision below correctly recognized that a charge alleging a constructive discharge cannot exist "before the employee quits his job" or "announces his future departure." Pet. App. 18a, 22a. That is consistent with hornbook law in the Title VII context. See 1 Barbara T. Lindemann et al., *Employment Discrimination Law* 21-46 (5th ed. 2012) ("An employee claiming constructive discharge must actually leave employment."); 2 EEOC Compli-

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[8] We assume for current purposes that petitioner would be able to establish that there was indeed a constructive discharge. See *Lewis*, 560 U.S. at 212 (observing that whether plaintiffs "adequately proved" an action had a disparate impact was not before the Court; "[w]hat matters [for purposes of determining timeliness] is that their allegations, based on the City's actual implementation of its policy, stated a cognizable [disparate-impact] claim").

ance Manual (BNA) § 612.9(a), at 612:0006 (2008) ("A constructive discharge occurs when an employee resigns from his/her employment because (s)he is being subjected to unlawful employment practices."). Indeed, this Court recently said as much. When determining what could constitute a "constructive termination" of a petroleum franchise for purposes of the Petroleum Marketing Practices Act, 15 U.S.C. 2801 *et seq.*, the Court analogized such a constructive-termination claim to one for "constructive discharge in the field of employment law" and explained that "[t]o recover for constructive discharge * * * an employee generally is required to quit his or her job." *Mac's Shell Serv., Inc.* v. *Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010).

2. As petitioner explains (Br. 17), because the cause of action does not become complete until the employee decides to resign, "the general [limitations] rule dictates that the filing period for constructive discharge should run from the date of resignation, barring an unambiguous textual provision to the contrary." There is no suggestion that the text of the statute or regulation prescribes otherwise.

Although petitioner repeatedly characterizes that result as the "date-of-resignation rule," *e.g.*, Br. 11, 12, 13, 18, 24, 26, 28, 31, 32, he further correctly explains that "the date of resignation will be when the employee gives notice or simply leaves the workplace," Br. 32. If an employee gives definitive notice that he is resigning and the resignation will take effect weeks or months later, the clock begins running on the earlier date on which notice is given, not on his last day of work. See *Flaherty* v. *Metromail Corp.*, 235 F.3d 133, 138-139 (2d Cir. 2000). Petitioner himself contends that he gave

notice on February 9 that he would be resigning effective on March 31, and he counts from February 9 rather than March 31. See Pet. Br. 14. Using the date of notice of resignation when it is earlier than the actual date of separation is consistent with the federal cases on which petitioner relies (Br. 31 n.8)[9] as well as with most of the state-court decisions about non-Title VII constructive discharges on which he relies (Br. 23 n.6).[10] Using the earlier notice-of-resignation date is

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[9] See *Flaherty*, 235 F.3d at 138-139 (using date employee gave notice of resignation, not later date on which resignation became effective); *Draper* v. *Coeur Rochester, Inc.*, 147 F.3d 1104, 1106, 1111 (9th Cir. 1998) (using date on which employee quit, which was the same as her last day); *American Airlines, Inc.* v. *Cardoza-Rodriguez*, 133 F.3d 111, 114, 123 (1st Cir. 1998) (using dates employees gave notice they were accepting early retirement, not their subsequent termination dates); *Hukkanen* v. *International Union of Operating Eng'rs*, 3 F.3d 281, 284, 285 (8th Cir. 1993) (using date on which employee "resigned her job," which was apparently the same date that notice was given); *Young* v. *National Ctr. for Health Servs. Research*, 828 F.2d 235, 237-239 (4th Cir. 1987) (using date of employee's resignation, which was apparently the same date that notice was given); see also Pet. 12 (relying on *Flaherty*, which "made clear that the date of notice—and not the employee's last day at work several months later * * * —started the filing period").

[10] See *Hancock* v. *Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 590 (D.C. 1994) (using date of notice of resignation, not later effective date); *Patterson* v. *State Dep't of Health & Welfare*, 256 P.3d 718, 725 (Idaho 2011) (same); *Whye* v. *City Council*, 102 P.3d 384, 385, 387 (Kan. 2004) (same); *Jeffery* v. *City of Nashua*, 48 A.3d 931, 934, 936 (N.H. 2012) (same); but see *Stupek* v. *Wyle Labs. Corp.*, 963 P.2d 678, 680-682 (Or. 1998) (using effective date of termination, not earlier dates on which employee gave notice of resignation and signed notice of termination). Two other cases petitioner invokes are equivocal. See *Mullins* v. *Rockwell Int'l Corp.*, 936 P. 2d 1246, 1247, 1248, 1252-1253 (Cal. 1997) (using "actual termination" date,

also necessary to ensure, as petitioner proposes, that the "date-of-resignation analysis mirrors the easily administered date-of-termination rule" (Pet. Br. 31) that applies when there is an actual, rather than constructive, termination. See generally EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a, www.eeoc.gov/policy/docs/threshold.html (last visited July 27, 2015) (noting that, for cases involving private employers, the time for challenging "[a] discrete act, such as * * * termination," runs from "the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date").

In short, before the "employee's decision to leave," *Suders*, 542 U.S. at 148, there is no constructive discharge. Any prior conduct of the employer—conduct that *might* precipitate a decision to resign—may be actionable in its own right, and limitations periods associated with claims arising from such prior acts will already have been triggered. See *Morgan*, 536 U.S. at 113 ("Each discrete discriminatory act starts a new clock for filing charges alleging that act."). But a claim that depends on the presence of a constructive dis-

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rather than date of employer's last precipitating act, but not specifying whether the trigger date was when employee submitted his resignation on September 20, 1989, or the "unspecified date in October 1989" when he "actually retired"; claims would have been timely under either date); *Douchette* v. *Bethel Sch. Dist. No. 403*, 818 P.2d 1362, 1367 & n.9 (Wash. 1991) (for wrongful-discharge claim, using date employee submitted her letter of resignation rather than its later effective date, when employee did not work after she submitted the letter; observing that "in a claim for constructive discharge, the date may be the date the employee gives notice to the employer or the last day of actual employment," but declining to "decide the date on which such a claim accrues").

charge will not be complete and present until the employee gives notice of his decision to leave. Thus, as the court of appeals recognized, the standard limitations rule supports postponing the trigger date for such claims "until the employee quits or announces his future departure." Pet. App. 18a.

C. The Court Of Appeals' Countervailing Concerns Are Of Diminished Significance In The Constructive-Discharge Context

Notwithstanding the conceded oddity of allowing the limitations period for a Title VII claim in the context of a constructive discharge to begin (and perhaps finish) running before that claim could even be brought, the court of appeals felt obliged to focus on the employer's own actions and expressed "particular concern" that allowing the limitations period to begin "at the date of notice of resignation would run counter to an essential feature of limitations periods by allowing the employee to extend the date of accrual indefinitely." Pet. App. 20a-21a. In the abstract, those concerns were legitimate. As a general matter, a

> tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. * * * Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the sole hands of the party seeking relief.

Wallace v. *Kato*, 549 U.S. 384, 391 (2007) (citations and internal quotation marks omitted). Such considerations, however, are of limited applicability in this context.

1. Petitioner has not brought a generic claim of retaliation or discrimination, but a specific one that depends on his allegation that he suffered a discrete retaliatory act—a constructive discharge. Because he could not have alleged such a constructive discharge until he had actually given notice of his resignation, this is not an instance in which the employer's "wrongful act or omission" had already "result[ed] in damages" but petitioner waited to complain until he was "satisfied that he had been harmed enough," *Wallace*, 549 U.S. at 391. Instead, the relevant species of harm (*i.e.*, the resignation that is allegedly a constructive discharge) had not yet occurred.

2. Nor does it make sense to characterize a notice-of-resignation rule as placing the limitations period in "the sole hands of the party seeking relief." *Wallace*, 549 U.S. at 391. In the constructive-discharge context, the employee's act of resigning is not entirely in his own hands, but is instead legally imputed to the employer (the only one with the power of discharge). That is precisely why it is considered a *constructive* discharge: because the employee's act is, counterfactually, treated by the law as if it had been the employer's. See *Mac's Shell Serv.*, 559 U.S. at 185 ("[A] termination is deemed 'constructive' because it is the plaintiff, rather than the defendant, who formally puts an end to the [employment] relationship."). That aspect of the doctrine casts serious doubt on the court of appeals' reluctance to "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer." Pet. App. 20a; see *Black's Law Dictionary* 380 (10th ed. 2014) (defining *constructive* as "[l]egally imputed; existing by virtue of legal fiction though not existing in fact").

3. The court of appeals grounded its reasoning in this Court's declaration that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Pet. App. 20a (quoting and omitting brackets and internal quotation marks from *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 258 (1980)). In *Ricks*, a faculty member alleged that discrimination had caused him to be denied tenure, which, in turn, meant that he was "offered a 'terminal' contract to teach one additional year," after which his employment at the college ended. 449 U.S. at 253, 254-255. He argued that the 180-day charge-filing period did not begin to run until his final termination, but the Court held that "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks." *Id.* at 258. That was so "even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Ibid.* The Court added that, "[i]f Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment." *Id.* at 257.

There is, to be sure, a parallel between *Ricks* and this case; in both cases, the only discriminatory act that the employer directly committed occurred at one point in time, and the employee filed charges only after his employment was later terminated, without any further intervening acts of the employer. But there is also a salient difference. In *Ricks*, the Court's analysis turned on its understanding that the plaintiff's "termination of employment" at the school was "a

delayed, but inevitable, consequence of the denial of tenure." 449 U.S. at 257-258. Here, by contrast, it was not inevitable that the employer's conduct would precipitate a decision to resign until petitioner actually decided to resign. In the absence of that decision, there would have been no discharge. But if that decision to resign can, as discussed above, be legally imputed to the employer, then the constructive discharge can reasonably be deemed a discriminatory act of the employer. And once the act of resignation is imputed to the employer, there *is*—as in *Ricks* there was not—an intervening act of the employer.

The distinctive nature of constructive-discharge claims was foreshadowed by *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), which *Ricks* cited favorably, see 449 U.S. at 258. In *Evans*, the Court considered the potentially discriminatory effects of a seniority system that denied the plaintiff credit for her previous stint with the same company as a flight attendant, which had ended in February 1968 when she was about to be married and "was therefore forced to resign" under the company's "policy of refusing to allow its female flight attendants to be married." 431 U.S. at 554; see Pet. Br. at 4, *Evans*, *supra* (No. 76-333) (noting that the plaintiff "involuntarily resigned in anticipation of her marriage"). The Court focused on whether there was a "present *violation*" of Title VII in denying her seniority credit after she was rehired in 1972, and held that there was not. 431 U.S. at 558. But the Court's discussions of the plaintiff's failure to file a timely challenge to her forced resignation (or, in other words, her constructive discharge[11]) indicate that

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[11] See *Ledbetter*, 550 U.S. at 651 (Ginsburg, J., dissenting) (noting that *Evans* "involved * * * a constructive discharge").

the period for filing such a charge would have begun with her February 1968 separation—not at any previous point when it had already been made clear to her that the employer's longstanding policy would require her to separate if she became married. The Court noted that the plaintiff "did not initiate any proceedings of her own in 1968 by filing a charge with the EEOC *within 90 days of her separation*," *id.* at 554-555 (emphasis added), and that it was therefore "too late to obtain relief based on an unlawful employment practice *which occurred in 1968*," *id.* at 557 (emphasis added). In other words, the employer could have been held liable for the inevitable effects of its pre-1968 policy on the basis of the constructive discharge that did not happen until the plaintiff resigned in anticipation of her impending marriage, but the limitations period for such a claim did not start until the resulting resignation had occurred.

4. Constructive-discharge doctrine will not, however, permit an employee's resignation to be imputed to the employer unless the employee has satisfied a demanding standard. For a resignation to rise to the level of a constructive discharge, the employee will have to show that the employer created (or permitted) circumstances under which "a reasonable person in the employee's position would have felt *compelled* to resign" and will further have to establish that the resignation-precipitating conduct is attributable to "official" acts of the company (or else overcome an affirmative defense to confirm that vicarious liability is appropriate). *Suders*, 542 U.S. at 141, 148-149 (emphasis added). In such circumstances, the Court has agreed with the EEOC's observation that an employer "is responsible for a constructive discharge in the same manner

that it is responsible for the outright discriminatory discharge of a charging party." *Id.* at 142 (quoting 2 EEOC Compliance Manual § 612.9(a) (2002)). But the very conditions that make it reasonable to hold the employer "responsible" militate against the conclusion that the employee possesses an essentially unilateral power to determine when the limitations period begins.

Practical considerations associated with constructive-discharge-based claims also reduce the risk that an employee will foment uncertainty and create evidentiary problems for his employer by "extend[ing] the date of accrual indefinitely." Pet. App. 21a. Once an employer has taken a discrete act that may trigger a resignation (for instance, demoting or transferring an employee), the employee may need some time to confirm that his "fears" about an "intolerable job environment" will actually materialize. 1 Lindemann et al., *Employment Discrimination Law*, at 21-41. But remaining on the job for an extended period will likely make it more difficult to prove on the merits that the resignation should be deemed a constructive discharge. The employee will generally need to establish that the employer's actions created "unendurable working conditions," *Suders*, 542 U.S. at 141—a proposition that will grow less plausible the longer he endures them before announcing his resignation. See, *e.g.*, *Gerald* v. *University of P.R.*, 707 F.3d 7, 26 (1st Cir. 2013) ("If a plaintiff does not resign within a reasonable time period after the alleged harassment, he was not constructively discharged.") (citation omitted); *ibid.* (holding that eight-month delay after plaintiff's transfer made her resignation "too late * * * to be labeled a constructive discharge"; citing other deci-

sions holding that six- and seven-month delays were too long to support a constructive discharge); *Poland* v. *Chertoff*, 494 F.3d 1174, 1185 (9th Cir. 2007) (holding that cross-country transfer did not constitute constructive discharge in part because employee "worked in [the new job] for five months before deciding to retire" and then "worked the same job for three more months" before retiring). This self-limiting nature of the constructive-discharge calculus will thus prevent scenarios of the kind feared by the Court in *Ledbetter*, in which an employee "could file a timely EEOC charge today" on the basis of "a single discriminatory pay decision made 20 years ago." 550 U.S. at 639.

In any event, when the employee is given an affirmative choice between resigning and being subjected to materially changed terms or conditions of employment, the employer can add still another safeguard against delay by establishing a reasonable deadline by which the employee must make his choice. Yet, under the court of appeals' approach, the claim accrues when the employer presents such a choice, which means the employee could be time-barred even before his choice is made.

All in all, because "the specific employment practice that is at issue" (*Ledbetter*, 550 U.S. at 624) in this case is an alleged constructive discharge, the court of appeals' concerns about permitting the plaintiff to control the running of the statute of limitations by choosing whether and when to resign do not warrant a departure from the strong presumption that a limitations period begins only when the relevant "cause of action [is] fully formed and present," *id.* at 631 n.3.

D. Additional Policy Considerations Counsel Against The Court Of Appeals' Departure From the Usual Limitations Rule

Other policy considerations support calculating timeliness from the date the employee gives notice of resignation (or, in the absence of advance notice, the actual resignation date) rather than the date of the employer's last precipitating conduct.

1. In light of the unusual prospect that the limitations period would begin (and perhaps even end) before the critical event could even be alleged, the court of appeals suggested that an employee subjected to an employer's unfavorable action should challenge it in isolation; and if he "later decides he cannot take it any longer and therefore quits his job," he "likely" could "amend [the] timely charge to include an allegation of constructive discharge." Pet. App. 22a.

That proposed solution leaves much to be desired. Even assuming it were permissible, that approach would require the employee to multiply his claims, bringing one challenge to the precipitating conduct—essentially a lesser-included charge—simply to preserve the possibility of making a later constructive-discharge claim in light of what could otherwise be considered a separate discrete act (the resignation, if it occurs). And, as petitioner notes (Br. 34), depending on how much time passes between the original charge and the decision to resign, the court of appeals' approach could still render untimely an attempt to amend a charge to allege constructive discharge.

In any event, adding such complications to the exhaustion process would also be undesirable, since the Court has recognized that Title VII's initial procedural hurdles will often be navigated by "lay complainant[s]"

without the assistance of counsel. *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 115 (2002); see *Zipes*, 455 U.S. at 397.

2. Although there is frankly not much evidence that the question arises frequently—especially in the context of allegations that a discrete act (as opposed to a hostile work environment) precipitated a constructive discharge[12]—it bears noting that the basic premises of the notice-of-resignation rule in the constructive-discharge context have long been recognized by several courts of appeals,[13] as well as by the EEOC, see EEOC Amicus Br., *Bailey* v. *United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245, at *9-*11 (filed Mar. 26, 2001). In addition, the Department of Labor's Administrative Review

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[12] See 3 Lex K. Larson, *Labor and Employment Law* § 59.05[8], at 59-48 (2015) ("The most commonly alleged grounds for constructive discharge are that the employer has created, or allowed the creation of, an atmosphere of harassment or hostility which renders working conditions intolerable."). While petitioner notes (Br. 27) that the EEOC received more than 4000 charges alleging constructive discharge in violation of Title VII in 2014, that category accounted for only a small fraction of the 63,589 Title VII charges it received that year. See EEOC, *Title VII of the Civil Rights Act of 1964 Charges, FY 1997 – FY 2014*, www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited July 27, 2015). Moreover, those statistics pertain to private-sector and state and local-government employees, for whom the limitations period is substantially longer (180 or 300 days), see note 1, *supra*, which would make any gap between the employer's own acts and the employee's resignation less likely to be dispositive.

[13] See note 9, *supra*; see also 3 Larson, *Labor and Employment Law* § 81.07[2][b], at 81-21 to 81-22 & n.30 ("In cases involving allegations of constructive discharge, the limitations period runs from the date the employee gives notice.") (citing 1998 and 2000 decisions, and noting contrary decision below in this case).

Board has used a similar approach when determining the timeliness of claims of retaliatory constructive discharges under other statutes—counting from the date that the employee gave notice of resignation, rather than from the earlier acts that triggered the resignation decision or the resignation's later effective date. See, *e.g.*, *Barrett* v. *e-Smart Techs., Inc.*, No. 11-088, 2013 WL 1874820, at *3-*4 (Admin. Rev. Bd. Apr. 25, 2013); *Peters* v. *American Eagle Airlines, Inc.*, No. 08-126, 2010 WL 3878524, at *3-*4 (Admin. Rev. Bd. Sept. 28, 2010).

Accordingly, we believe the Court should hold that the limitations period for a Title VII claim that is dependent on the existence of a constructive discharge should run from the date the employee gives notice of the resignation that is allegedly attributable to the employer rather than from the last allegedly discriminatory act that the employer directly committed.

E. In This Case The Limitations Period Was Triggered By Petitioner's December 16 Agreement To Retire By March 31

Although the court of appeals erred in concluding that the limitations period was triggered by the employer's last "discriminatory act" rather than the employee's notice of resignation, Pet. App. 22a, its judgment should nevertheless be affirmed, because, in this case, the employer's last act and the employee's notice of resignation both occurred on the same day.

1. As the district court held, if the employee's notice of resignation triggers the limitations period, petitioner gave that notice when he "notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day." Pet. App. 38a-39a.

Petitioner characterizes (Br. 7) the December 16 settlement agreement as permitting him to "choose one of two alternatives": retirement or relocation to a lower-paying job in Wyoming. But that is not what the agreement said. Rather, it expressly provided that petitioner "*agrees to retire* from the Postal Service no later than March 31, 2010" and that he "*agrees to take all necessary steps to effect his retirement* on or before March 31, 2010." J.A. 60-61 (emphases added).

Although the next sentence of the agreement stated that petitioner would be required to "report for duty" in Wyoming on April 1 "[i]f retirement from the Postal Service does not occur," J.A. 61, it did not thereby give him an option to revoke his agreement to retire. Nor did it purport to allow petitioner to decide at some later point whether he would in fact retire. Instead, that last sentence merely provided for contingencies in which retirement did not happen by that date (whether because petitioner reneged on his agreement, or because, through someone else's fault, the retirement had not yet become final).[14]

Even if that sentence of the agreement were seen as an implicit rescission clause, that would not alter the notice-of-resignation date, as shown by the most analogous case on which petitioner relies (Br. 31 n.8). In *American Airlines, Inc.* v. *Cardoza-Rodriguez*, 133

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[14] Any contract may, of course, be characterized as effectively creating an option between fulfilling it and being subject to suit for the damages associated with breaching it. But there is a clear difference between exercising an option actually provided in a contract and affirmatively breaching one's contractual obligations. See *Rousey* v. *Jacoway*, 544 U.S. 320, 328 (2005) ("[A] contracting party" does not have "an unrestricted right to breach a contract simply because the price of doing so is the payment of damages.").

F.3d 111 (1st Cir. 1998), the court held that "the latest" possible date for starting the limitations period was "when each employee accepted" an offer to participate in a voluntary early retirement program—even though the agreement at issue there provided for "a seven day rescission period after an election to participate." *Id.* at 114, 123. The court did not think it was necessary to wait for the rescission period to elapse before the employees had fully manifested their acceptance. That result makes good sense because, by definition, each employee had ultimately elected *not* to rescind, and should not have had an extra seven days to challenge his original, unchanged decision. Similarly, petitioner's failure to revoke his retirement agreement throughout the period from December 16 until March 31 should not extend the deadline for challenging his original, ultimately unchanged decision.

The district court thus correctly concluded that petitioner's agreement to retire occurred on the date when he signed the document declaring plainly that he "agree[d] to retire." J.A. 60.[15]

2. In light of its own holding, the court of appeals did not need to (and did not purport to) address the factual determination underlying the district court's alternative holding, though it did characterize the

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[15] In moving for summary judgment, the government relied on evidence that the human-resources manager who negotiated the agreement for the Postal Service understood "that [petitioner] would follow through on that agreement and therefore would not be reporting to the" lower-level position. J.A. 51; see Gov't Mot. for Summ. J. 20 (D. Ct. Doc. 90); see also J.A. 54 (petitioner's representative proposing settlement in which petitioner would agree to retire at future date and be unable to "revoke that date to retire"). In response, petitioner relied only on the text of the agreement. See Pet. Resp. to Mot. for Summ. J. 18 (D. Ct. Doc. 106).

settlement agreement as giving petitioner a choice about whether "to retire or to work in a position that paid much less." Pet. App. 2a; see *id.* at 5a.[16] As a result, this Court could decline to consider how its legal test would apply to the facts of this case and remand to allow the court of appeals to review the district court's alternative holding. But the Court has often elected to answer such questions itself. See, *e.g.*, *Lozman* v. *City of Riviera Beach*, 133 S. Ct. 735, 745-746 (2013) (applying newly declared legal standard to facts of case, despite government's suggestion of remand); *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 732-733 (2013) (same); *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2071-2072 (2011) (finding evidence sufficient to support jury verdict under "the correct standard," which had not been applied by the court of appeals). Indeed, it has followed such an approach in other Title VII cases. See *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 67, 70, 73 (2006) (rejecting standards applied in courts of appeals

[16] In the court of appeals, petitioner continued to say that the agreement permitted him to decide at a later date whether to retire, Pet. C.A. Br. 49, but he did not clearly attack the alternative ground for the district court's untimeliness holding. Instead, he identified certain parts of the district court's discussion as being "disputed" facts, but he did not include in his list the sentence stating that he gave notification of his retirement by signing the agreement. See *id.* at 50. The government's brief explained that, "[b]y signing" the agreement, petitioner had "agreed to retire from the Postal Service by March 31, 2010." Gov't C.A. Br. 27. That brief also included several other characterizations suggesting, without citing anything other than the agreement, that he had agreed to retire "or accept [a] transfer," *id.* at 36, 44, 47, 50. Even so, petitioner then accused the government of "fail[ing] to acknowledge, as did the trial court, that [petitioner] had an option" under the agreement. Pet. C.A. Reply Br. 17.

to limit actionable retaliation under Title VII, but affirming judgment after applying Court's new "standard to the facts of th[e] case"); *Irwin*, 498 U.S. at 95-96 (finding that court of appeals erroneously believed it lacked jurisdiction to consider an untimely claim, but holding that, under the facts of the case, petitioner's "garden variety claim of excusable neglect" would not support equitable tolling). And the Court should do so here. Because the dispute at issue involves principally the interpretation of a single clause in the agreement —a clause that the district court itself has already interpreted—the Court should apply its standard and affirm the judgment below.

3. Finally, the foregoing discussion has shared petitioner's premise that the timeliness question here is controlled by the first clause of the regulation governing federal-sector Title VII claims, which requires a plaintiff to make contact with a counselor "within 45 days of the date of the matter alleged to be discriminatory," rather than by the second clause of that regulation, which requires a plaintiff to act "in the case of a personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1). See note 5, *supra*. Both parties and both courts below have proceeded on the premise that the first clause governs, see Pet. App. 20a & n.3, 36a, and petitioner continues to rely affirmatively on that clause of the regulation, Br. 17-18. It is therefore appropriate for the Court to decide the case on that same assumption. That would also effectively allow the Court to speak to the non-federal-sector rule, which parallels the first clause of the regulation.[17]

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[17] See 42 U.S.C. 2000e–5(e)(1) (requiring charge to be filed within 180 or 300 days "after the alleged unlawful employment practice

Yet, setting aside that procedural history for the moment, we note that the premise of petitioner's argument is not obviously correct. Indeed, the premise masks several issues that could otherwise arise in a federal-sector case, but do not arise here, and as to which the case law is currently unsettled.

First, although petitioner suggests that he is seeking to enforce the "broad protection from retaliation" contained in 42 U.S.C. 2000e–3(a), Pet. Br. 2 (quoting *Burlington N. & Santa Fe Ry.*, 548 U.S. at 67), the text of the federal-sector provision of Title VII requires only that "[a]ll *personnel actions* affecting employees" be "made free from any discrimination based on race, color, religion, sex, or national origin," 42 U.S.C. 2000e–16(a) (emphasis added).[18] Thus, it is

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occurred"); EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a (explaining that deadline runs from "the date that the charging party received unequivocal written or oral notification of the action, *regardless of the action's effective date*") (emphasis added).

[18] As noted above (see p. 2, *supra*), this Court's 2008 decision in *Gómez-Pérez* v. *Potter*, 553 U.S. 474, did not address whether (or how) "Title VII bans retaliation in federal employment." *Id.* at 488 n.4. The government contends that retaliation is prohibited in the federal sector by Section 2000e–16(a)'s reference to discriminatory "personnel actions," which encompasses a narrower range of adverse actions than does Section 2000e–3(a) under *Burlington Northern & Santa Fe Railway.* See, *e.g.*, United States Amicus Br. at 19 n.5, *Burlington N. & Santa Fe Ry.*, *supra* (No. 05-259) ("the federal government's potential liability under Title VII and its [waiver] of sovereign immunity are limited to retaliation that rises to the level of a 'personnel action'"). At least two courts of appeals since *Gómez-Pérez* have found it unnecessary to reach that contention. See *Morales-Vallellanes* v. *Potter*, 605 F.3d 27, 36 n.12 (1st Cir. 2010), cert. denied, 131 S. Ct. 978 (2011); *Ziskie* v. *Mineta*, 547 F.3d 220, 229 (4th Cir. 2008); but see *Caldwell* v. *Johnson*,

not entirely clear whether a retaliatory constructive discharge such as that alleged here is a "matter alleged to be discriminatory" governed by the first clause of the regulation or a "personnel action" governed by the second clause.

Second, if a constructive discharge is a "personnel action" within the meaning of the second clause, there is a further question whether the limitations period commences on the date that notice of resignation is given or instead on the day of separation. There is scant, but conflicting, authority on that question.[19]

Third, assuming the employee's separation date marks the commencement of the limitations period, there is yet a further question of what happens when the EEO contact occurs in advance of the commencement of the limitations period—in other words, whether a premature EEO contact is nevertheless timely.[20]

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289 Fed. Appx. 579, 588-592 (4th Cir. 2008) (unpublished opinion rejecting contention).

[19] Compare, *e.g.*, *Complainant* v. *McDonald*, EEOC Appeal No. 0120142695, 2015 WL 227117, at *2 (Office of Fed. Ops. Jan. 8, 2015) ("It is the effective date of a personnel action that controls timeliness, not when [c]omplainant submitted his letter of resignation."); *Saleem* v. *McHugh*, EEOC Appeal No. 0120113121, 2011 WL 5507293, at *1 (Office of Fed. Ops. Nov. 4, 2011) (calculating 45 days from January 17 when "[c]omplainant's January 14, 2011 letter indicated that her constructive discharge/resignation was not effective until January 17"); *Tofsfrud* v. *Potter*, No. CV-10-90, 2010 WL 3938173, at *4-*5 (E.D. Wash. Oct. 5, 2010), with *Stewart* v. *Gates*, 786 F. Supp. 2d 155, 160, 165-166 & n.4 (D.D.C. 2011) (using the "effective date" of a personnel action but calculating the 45-day limitations period for an alleged constructive discharge from the date on which the employee "announced * * * that she would resign").

[20] Assuming the "effective date" of petitioner's constructive discharge was March 31, 2010, then his March 22 contact with an

Those issues have not been briefed by the parties or decided by the lower courts in this action, and thus the Court should leave their resolution for another day.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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EEO counselor would have been premature. Cf. *Isbell* v. *United States Postal Serv.*, EEOC Appeal No. 01832803, 1984 WL 485159, at *1-*2 (Office of Fed. Ops. Apr. 3, 1984) (complainant's August 25, 1982 performance review approved a 4% salary increase that would be effective on July 23, 1983; finding that March 25, 1983 contact was untimely as a challenge to the salary increase, because it was not "within 30 calendar days of the effective date").

APPENDIX

1. 42 U.S.C. 2000e–3 provides in pertinent part:

Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * * * *

2. 42 U.S.C. 2000e–5 provides in pertinent part:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e–2 or 2000e–3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its

action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant

or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts up on which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less

[1] So in original. Probably should be subsection "(b)".

than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority

system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expi-

ration of any period of reference under subsection (c) or (d) or this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

* * * * *

3. 42 U.S.C. 2000e–16 provides:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for em-

ployment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating

officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or until to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in

which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e–5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e–5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties..[1]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e–5(e)(3) of this title applicable to compensation discrimination

Section 2000e–5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

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[1] So in original.

4. 29 C.F.R. 1614.105 provides in pertinent part:

Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

* * * * *