No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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Black's Law Dictionary (6th ed. 1990).....4

Black's Law Dictionary (10th ed. 2014).....4

Lindemann, Barbara T., et al.,
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U.S. Equal Employment Opportunity
Commission, EEOC Compliance
Manual (2008) 9

Williston, Samuel & Richard A. Lord, *A*
Treatise on the Law of Contracts
(4th ed. 1999).....22

REPLY BRIEF FOR PETITIONER

Without clear text to the contrary, filing periods run only once the claimant has a complete and present cause of action. Petitioner Marvin Green asks this Court to apply this well-established default rule to constructive discharge claims. Because a constructive discharge claim is complete when the claimant resigns, and not before, that is when the filing period begins to run.

The Court-appointed Amica reaches a contrary result only by reading into the applicable regulation an absent command that courts must focus on one element of a constructive discharge claim (precipitating conduct) to the exclusion of the other (resignation) that is no less essential. But the relevant text – from "the date of the matter alleged to be discriminatory," 29 C.F.R. § 1614.105(a)(1) – offers no basis for breaking the two elements apart. Thus, resignation starts the clock.

The Government agrees with all of this. Nevertheless, it seeks to create a dispute over the date of Mr. Green's resignation and asks this Court to resolve it. The Court should not wade into this fact-laden argument, which the Government never raised in the court of appeals. In any event, the Government is wrong. Mr. Green resigned on February 9, 2010, which is when his claim for constructive discharge first became actionable and the filing period began. His claim, filed forty-one days later, was therefore timely.

I. The Filing Period For A Constructive Discharge Claim Does Not Begin To Run Until The Employee Resigns.

A. Under The Default Rule, Filing Periods Start Only Once A Claimant Can File A Claim And Obtain Relief.

This Court interprets limitations periods "against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)); *see* U.S. Br. 17-18; Petr. Br. 14. But Amica argues that the default rule applies only when the relevant text directs that accrual of a claim triggers the limitations period. Am. Br. 15, 29-30, 32-33.

That is incorrect. This Court applies the default rule whether or not the limitations provision at issue refers to accrual. In *Woods v. Stone*, 333 U.S. 472 (1948), for instance, the Court applied the default rule to determine which of two possible events triggered a limitations provision that ran "from the date of the occurrence of the violation." *Id.* at 472, 476-77, 477 n.4. And, in *United States v. Wurts*, 303 U.S. 414 (1938), the Court applied the default rule to a limitations period that required the government to bring suit "within two years after the making of the [tax] refund," *id.* at 417 (emphasis omitted), rejecting the argument that the period could "begin to run before the right barred by it has accrued," *id.* at 418.

These cases make sense because a default rule that can be invoked only when the text specifies that

accrual starts the clock is not a default rule at all. Rather, dispensing with the default rule "require[s] language so clear as to leave room for no other reasonable construction." *Wurts*, 303 U.S. at 418; *see also Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (noting that the Court "will not infer . . . [the] odd result" of a deviation from the default rule "in the absence of any such indication in the statute").

The cases on which Amica relies underscore that the Court deviates from this rule only when the text of a statute, regulation, or contract demands it. Am. Br. 29-31. In *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199-200 (1952), for example, the Court relied on an unambiguous statutory distinction between "injury" and "disability." Because, under the statute, the claimant's "injury" triggered the statute of limitations, while the claim accrued upon the claimant's "disability," the Court was "not free" to ignore the clear statutory distinction. *Id.*

Likewise, as our opening brief explains (at 16), *Dodd v. United States*, 545 U.S. 353, 358-59, 360 (2005), held that the relevant limitations provision unambiguously required the filing period to commence on the date this Court recognized a new right, even though the cause of action accrued when this Court made the right retroactively applicable. And *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604, 610 (2013), stands for the unsurprising proposition that parties may "agree [to] contract" around the default rule.

B. Neither The Text Here Nor This Court's Title VII Jurisprudence Overcomes The Default Rule.

Nothing in the text of the regulation or this Court's Title VII jurisprudence provides any basis for straying from the default rule.

1. The text at issue contains nothing "special" that would "tag" it as a departure from the default rule. *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015) (requiring a "clear statement" to dispense with the default rule that time bars are presumptively nonjurisdictional); *accord* New England Legal Foundation Br. 3 (recognizing that Title VII's timeliness provisions contain "no special allowance" for constructive discharge claims). It provides that a claimant must "initiate contact with a[n EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1).[1]

Amica contends that "matter alleged to be discriminatory" refers only to an employer's precipitating conduct – or, as she and the Tenth Circuit put it, the "last discriminatory act." Am. Br. 20; *see* Pet. App. 20a. But as our opening brief explains (at 17), "matter" describes the whole of a plaintiff's claim – a "subject under consideration," *Black's Law Dictionary* 1126 (10th ed. 2014), or "[s]ubstantial facts forming [the] basis of [a] claim," *Black's Law Dictionary* 978 (6th ed. 1990). And as

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[1] Mr. Green agrees with both the Government and Amica that the "personnel action" clause of 29 C.F.R. § 1614.105(a)(1) is not before the Court. *See* U.S. Br. 15 n.5, 36; Am. Br. 28 n.11.

this Court held in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004), the whole of a constructive discharge claim is comprised of both precipitating conduct and a resignation. The default rule thereby directs that the filing period for a constructive discharge claim does not run until the claimant has resigned.

Amica's interpretation of the text requires that the resignation element of a constructive discharge claim be disregarded, when in fact it is necessary to prove the claim. *See Suders*, 542 U.S. at 148. Under the default rule, privileging one element over another to determine when the filing period begins, as Amica urges, would require an express textual command.

Pillsbury v. United Engineering Co., 342 U.S. 197 (1952), illustrates this point. There, the statute unambiguously differentiated the elements of the claim, specifying that the plaintiff's disability made the claim actionable, but that the statute of limitations nevertheless ran from the time of injury. *Id.* at 199-200. Here, in contrast, "matter alleged" calls no attention to any particular element of any claim, let alone the precipitating conduct element of a constructive discharge claim.

2. Nor do this Court's employment discrimination cases support Amica's suggestion that "matter alleged to be discriminatory" refers to the employer's last discriminatory act. Am. Br. 20-21. Amica reads these cases as a set of affirmative holdings that limitations periods run from that act. *Id.* at 21-28. But the Court did not hold this in any of those cases. In each case, the relevant conduct fell on the same date that the cause of action accrued. Thus, each case reflects the unexceptional proposition that,

consistent with the default rule, the filing period begins to run when the relevant claim first becomes actionable.

Consider *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), on which Amica heavily relies. Am. Br. 21-25. In those cases, the plaintiffs had actionable claims only once they were forced to resign and denied tenure, respectively. Consistent with the default rule, these were also the dates when the Court determined that the filing periods began to run. *Evans*, 431 U.S. at 558-59; *Ricks*, 449 U.S. at 258.

Amica claims that the Government misapprehends *Evans*. Am. Br. 25 n.8. But that case contains no indication the plaintiff should have filed her claim before it became actionable. As the Government explains, the filing period in *Evans* commenced only upon the plaintiff's forced resignation – that is, her constructive discharge – "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." U.S. Br. 27.

Ricks is no different. There, the filing period for the plaintiff's termination claim began when that termination became "inevitable" – which coincided with the date the plaintiff's tenure denial became final. *See* Petr. Br. 24-25; U.S. Br. 25-26 (citing *Ricks*, 449 U.S. at 257-58). *Ricks* is therefore consistent with the date-of-resignation rule because a constructive discharge claim does not become inevitable until an employee resigns. *See* Petr. Br. 25; U.S. Br. 12, 25-26.

Amica responds that *Ricks* turned not on the inevitability of the plaintiff's termination but instead on the date of the challenged employment action. Am. Br. 23. But *Ricks* did not distinguish between those two ideas. It held that the statute of limitations ran not from the plaintiff's last day of employment, but instead from the date he received notification of his tenure denial – which, as noted, is when his termination claim first became actionable. *See Ricks*, 449 U.S. at 258-59.

Amica's other cases also align with the default rule. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 631 n.3 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, this Court explained that the employee "could have, and should have, sued" when the discriminatory action was taken against her, because at that point she had a "fully formed" cause of action. Similarly, *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam), held that the limitations period began running when the employer gave the plaintiffs definitive notice of their terminations, which coincided with the accrual of their claims.

Likewise, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002), held that the filing periods for the claims at issue ran from the time each claim accrued. With regard to discrete claims, such as termination, the filing periods run from when each wrongful act occurred. *Id.* at 113-14. And for hostile work environment claims, the filing period may run from "any act that is part of the hostile work environment," *id.* at 118, that is, from any act that renders that type of claim actionable.

3. Notwithstanding the default rule, Amica argues that the principle that waivers of sovereign immunity are strictly construed requires the Court to construe the text against Mr. Green. Am. Br. 33. But the strict-construction rule does not apply here. Congress indisputably has waived the Postal Service's sovereign immunity to suit for violations of Title VII, including for constructive discharge claims. Once the Government "waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity." *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002). Thus, "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Id.* at 145 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)). Moreover, 29 C.F.R. § 1614.105(a)(1) is not itself a waiver of sovereign immunity, and so a strict-construction principle cannot apply to it. *See Gomez-Perez v. Potter*, 553 U.S. 474, 490-91 (2008).

C. Resignation Triggers The Filing Period For A Constructive Discharge Claim.

Because the default rule applies here, the filing period for a constructive discharge claim may not start until the employee resigns.

1. Amica contends that "[i]n a constructive discharge, an employee suffers injury and has a complete and present cause of action for discrimination under Title VII as soon as the employer commits the predicate unlawful discriminatory practice; the employee's later resignation changes only the damages recoverable for that violation." Am. Br. 36-37.

a. Amica may mean that resignation is not a required element of a constructive discharge claim. But this argument would run headlong into the holding in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004), that constructive discharge is a separate cause of action that necessarily includes precipitating conduct and a resignation. Both elements are indispensable to the claim, and the filing period cannot begin until both are present. Without the "employee's decision to leave," there can be no "constructive discharge assertion." *Id.* This argument is also at odds with all other relevant authority.[2]

b. Amica may instead be arguing that a constructive discharge claim is not a genuine, separate cause of action, but simply enhances the damages available for an employer's prior discriminatory acts. In this regard, she maintains that a constructive discharge is only "assimilated to a formal discharge for *remedial purposes*." Am. Br. 18 (quoting *Suders*, 542 U.S. at 141).

But in a constructive discharge claim, a resignation is not merely "damages-enhancing." Am. Br. 20 (quoting *Suders*, 542 U.S. at 148). As noted, resignation is an essential element of what an employee must prove to succeed on the merits of the claim. *See Suders*, 542 U.S. at 148; *Mac's Shell*

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[2] *Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984); *see also* U.S. Br. 19-20 (citing 1 Barbara T. Lindemann et al., *Employment Discrimination Law* 21-46 (5th ed. 2012) & EEOC Compliance Manual (BNA) § 612.9(a) at 612:0006 (2008)).

Serv., Inc. v. Shell Oil Prods. Co., 559 U.S. 175, 184 (2010); Petr. Br. 17-18.

To be sure, discriminatory conduct preceding a constructive discharge is likely to be "independently actionable." Am. Br. 19. But, as with wrongful terminations, proving a constructive discharge requires showing the additional, distinct harm of a forced departure. *Suders*, 542 U.S. at 148. This harm entitles the claimant to additional damages – the same remedies that would accompany a wrongful termination. *Id.* at 141. The antecedent conduct to which Amica refers may trigger "limitations periods associated with [other] claims arising from such prior acts." U.S. Br. 22. This truth, however, has no bearing on the point at which a constructive discharge claim accrues. As new claims arise, each "starts a new clock for filing charges." *Nat'l Passenger R.R. Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

A constructive discharge claim does carry potential damages not available while the employee remains on the job. But, once again, the same is true of an ordinary termination. For example, an employee who is first subjected to on-the-job discrimination and later fired with the same motive may be entitled to "enhanced" damages associated with the firing, such as back pay. In that case, no one disputes that the underlying claim and the firing claim are each actionable, and that the firing is subject to a separate limitations period that does not begin to run until the firing occurs. *See Morgan*, 536 U.S. at 114. The same is true here.

2. Under *Suders*, the act that renders a constructive discharge claim actionable is the

employee's resignation, which is "assimilated to" a termination. 542 U.S. at 141. This decision to resign is "legally imputed to the employer." U.S. Br. 24 (discussing *Mac's Shell*, 559 U.S at 185). As a consequence, even if Amica were correct, countertextually, that the "matter alleged to be discriminatory" in 29 C.F.R. § 1614.105(a)(1) could be said to demand a singular focus on an employer's last allegedly discriminatory act, the resignation would be the employer's "last act" triggering the filing period. Am. Br. 32. That the employee, rather than the employer, "formally puts an end to the particular legal relationship" simply makes the discharge "constructive." *Mac's Shell*, 559 U.S. at 185.

3. Our opening brief explains (at 21-23) that the great weight of authority holds that limitations periods for state-law constructive discharge and constructive eviction begin when the plaintiff terminates the legal relationship, and not before. Amica responds that Mr. Green's reliance on state-law analogues is misplaced, Am. Br. 34-35, but this Court has looked to state law for guidance in the limitations context, *see Wilson v. Garcia*, 471 U.S. 261 (1985); *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1968 (2014) (describing the general practice). And, in *Mac's Shell*, the Court relied on state-law constructive eviction principles to support its holding that a constructive termination claim under the Petroleum Marketing Practices Act could not exist until the franchisee had actually terminated its franchise. 559 U.S. at 184-85.

Amica also notes that, in the state-law constructive discharge context, many courts "did not consider whether the limitations period could run

from the time of the employer's last discriminatory act," but rather were choosing only between the employee's resignation and her last day of work. Am. Br. 34-35. That observation only underscores that, in light of the default rule, courts have not thought it plausible that the filing period could run before the claim existed.

D. The Date-Of-Resignation Rule Promotes Title VII's Goals Of Conciliation, Fairness, And Administrability.

1. *Conciliation*. The date-of-resignation rule enables employees to make informal, good-faith efforts to resolve concerns through "internal channels" before initiating more formal administrative procedures. NAACP Legal Defense & Education Fund, Inc. et al. (LDF) Br. 11; *see* Petr. Br. 34-38. Amica is right that formal EEO mediation sometimes promotes conciliation. Am. Br. 38. But informal employee-employer discussions that take place before and outside the EEO counseling process may be more effective in resolving an employment dispute.

Even if initiating "pre-complaint counseling does not entail filing a complaint," Am. Br. 39, that decision triggers strict deadlines. These deadlines push employees into adversarial proceedings even before the more informal approach they and their employers might prefer has run its course. *See* Petr. Br. 35; LDF Br. 24 (noting that "a rush to adversarial processes is counter to the spirit of Title VII"). Avoiding third-party involvement may be particularly critical for employees who fear retaliation or the possibility of being labeled a

troublemaker. *See* LDF Br. 14 (emphasizing that many employees fear that a "formal report of discrimination functionally terminates the employment relationship").

Amica contends that permitting a constructively discharged employee to seek out an EEO officer after she has resigned delays conciliation until after "the point of no return." Am. Br. 2; *see also id.* at 39. Not so. An employee's constructive discharge is no more irrevocable than an employee's termination. In both circumstances, the EEO process contemplates successful conciliation, including reinstatement.

2. *Fairness*. Amica opts not to defend the last-discriminatory-act rule on fairness grounds. She contends only that equitable doctrines, such as tolling, might rescue the lay claimant from the potentially unfair consequences of the Tenth Circuit's rule. Am. Br. 45. But the suggestion that some complainants may be able to extend a missed deadline cannot save a rule at odds with the overarching principle of "ensur[ing] that the lay complainant . . . will not risk forfeiting his rights inadvertently." *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002); *see also* Petr. Br. 32-33. Moreover, as this Court has recognized, "Federal courts have typically extended equitable relief only sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (declining to apply tolling); *see also, e.g.*, *Rivera-Díaz v. Humana Ins. of P.R., Inc.*, 748 F.3d 387, 390 (1st Cir. 2014) (equitable tolling is "reserved for exceptional cases"); *Jones v. Res-Care, Inc.*, 613 F.3d 665, 670 (7th Cir. 2010) ("The Supreme Court has instructed that equitable tolling is a

doctrine to be applied sparingly in Title VII cases." (citation omitted)).

Amica's misplaced reliance on equitable tolling underscores that, standing alone, the date-of-resignation rule is fairer to lay claimants navigating an admittedly "rigorous" administrative process. Am. Br. 44-45 (quoting *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976)); *see also* Petr. Br. 32-34; U.S. Br. 30-31. Because lower courts disagree over the working conditions that qualify as intolerable, it is especially challenging for an employee to assess whether, absent resignation, the discrimination she has suffered is sufficient to file a claim. LDF Br. 16-17, 21. Under the last-discriminatory-act rule, an employee in that position could even run out of time before she has an actionable claim for constructive discharge. This confusion may advantage sophisticated employers over unwary employees. Petr. Br. 37-39; LDF Br. 25.

3. *Administrability*. Because a resignation, like a termination, is almost always a discrete, readily identifiable event, the date-of-resignation rule is easier for agencies and courts to administer. *See* Petr. Br. 31. "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). But, as just noted, it is frequently difficult to isolate the discriminatory act that justifies an employee's decision to resign.

Amica says that evaluating any discrimination claim inherently requires identifying and classifying last discriminatory acts. Am. Br. 43. But the last-discriminatory-act rule draws forward thorny

questions of what conduct was discriminatory and what conduct was benign to the threshold stage of litigation, largely duplicating a merits inquiry. Though complexity may be unavoidable at the merits stage, that is no reason to inject it at the threshold, particularly when an easily administrable alternative – the date-of-resignation rule – is available. *See* Petr. Br. 28-32.

This Court has favored simplicity in a related context. When considering threshold issues of jurisdiction, the Court has emphasized that "rules should be clear." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002); *see also Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010) (placing "primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible"). Given the difficulties inherent in the last-discriminatory-act rule, the date-of-resignation rule aligns with this preference for a "simple approach" to limitations periods. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985).

Amica also states that the Tenth Circuit's rule adds "no unusual complexity" because claimants need only allege – not prove – when the last discriminatory act occurred. Am. Br. 43. But, when challenged, compliance with filing deadlines must be proved. *See, e.g.*, *Smith v. United States*, 133 S. Ct. 714, 721 (2013) ("[T]he Government must prove the time of the conspiracy offense if a statute-of-limitations defense is raised."); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65, 90-91 (2d Cir. 2013) (noting that the defendant's statute-of-limitations argument went to the jury). That proof would be more complex

and more frequently contested under the Tenth Circuit's rule.

In addition, Amica nowhere defends the primary concern that led the Tenth Circuit to reject the more administrable date-of-resignation rule – that claimants are apt to file delayed claims. Pet. App. 20a-21a. Amica thus tacitly acknowledges that the filing of stale claims is highly unlikely and that belated resignation jeopardizes success on the merits. *See* Petr. Br. 36-37; U.S. Br. 28; LDF Br. 24-25.[3]

Rather, Amica focuses on trying to bolster the Tenth Circuit's rule. But in doing so she introduces greater complexity into a rule that is already far less administrable than the date-of-resignation rule. Claimants, she argues, may simply amend existing complaints to add a claim for constructive discharge. Am. Br. 40. "That proposed solution leaves much to be desired." U.S. Br. 30. When constructive discharge claims are brought on a stand-alone basis, there will be no prior claim to amend, and so, for those claims, Amica's prescription is no solution at all. *See* Petr. Br. 33 (citing stand-alone constructive discharge cases). In other cases, as the Government

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[3] One amicus brief trumpets the Tenth Circuit's delay hypothesis, but without authority. Equal Employment Advisory Council et al. Br. 20-22. Constructive termination and eviction causes of action have been recognized for many decades, *see Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010), and the great weight of authority provides that the limitations periods for these actions may not run until the plaintiff severs the relationship, Petr. Br. 21-23. But this amicus brief does not cite a single case to support its assertion that the date-of-resignation rule promotes inappropriate delay.

explains, Amica's argument depends on the unfounded assumption that the request to amend will be granted. U.S. Br. 30; *see also* Petr. Br. 34. The date-of-resignation rule poses none of these problems.

II. The Government's New Argument Concerning When Petitioner Resigned Is Not Before The Court And Is Wrong In Any Event.

A. The Only Question Before This Court Is Whether The Filing Period Runs From The Date Of Resignation.

1. In a nearly verbatim reprise of its brief in opposition, the Government insists that, under his agreement with the Postal Service, Mr. Green resigned on December 16, 2009, and so his claim was untimely under the date-of-resignation rule. U.S. Br. 32. The Government did not make this argument in the court of appeals, and "this Court will affirm on grounds that have not been raised below . . . only in exceptional cases." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 272-73 (2009) (internal quotation marks omitted) (ellipsis in original). The Government's new, fact-bound argument is therefore forfeited. *Id.*; *see United States v. Jones*, 132 S. Ct. 945, 954 (2012).

What is more, the Government contended precisely the opposite in the Tenth Circuit, repeatedly maintaining that the agreement did *not* constitute Mr. Green's immediate resignation but rather gave him an option to resign before March 31, 2010, or, if he chose not to resign, to transfer to Wyoming. In designating the "issues presented for review" in its Tenth Circuit brief, the Government maintained that the "settlement agreement" provided

that Mr. Green "would either accept a transfer [to Wyoming] or resign by March 31, 2010." U.S. C.A. Br. 1-2. Similarly, the Government's brief explained that, under the settlement agreement, "Mr. Green [was] to receive full salary, while relinquishing the Englewood postmaster position and agreeing to either retire or accept transfer to Wyoming." *Id.* at 36. The Government made similar assertions at least five more times in its Tenth Circuit brief. *Id.* at 19, 24, 44, 47, 50; *see* Pet. Reply 8-9, 9 n.2 (detailing the Government's statements).

In keeping with the Government's contentions below, the Tenth Circuit viewed February 9, 2010, as Mr. Green's resignation date. That court found that the settlement agreement permitted Mr. Green to "*choose* either to retire or to work in a position that paid much less and was about 300 miles away." Pet. App. 2a (emphasis added); *see also id.* at 5a. "Ultimately," it concluded, Mr. Green "decided to retire." *Id.* at 2a. If, as the Government now suggests, Mr. Green resigned on December 16, the court of appeals would have had no reason to analyze at length its reasons for choosing the last-act rule over the date-of-resignation rule. *See* Pet. App. 15a-23a.[4]

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[4] Although the Government is correct that the district court's summary-judgment opinion indicated that Mr. Green retired by signing the agreement, *see* U.S. Br. 34, the district court stated at another point (when denying the Government's motion to dismiss the constructive discharge claim on inadequate-pleading grounds) that the agreement "mandated that by March 31, 2010, Plaintiff must either retire or transfer to a position 400 miles away in Wyoming." Order at 4 (D. Ct.

2. Forfeiture aside, this Court is "a court of final review and not first view." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001)). This Court, therefore, should not consider the issue.

In asking the Court to resolve the issue, the Government relies on cases that involved procedural circumstances markedly different from those here. *See* U.S. Br. 35-36. For instance, *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 740-41 (2013), turned on the legal definition of a "vessel." After the Court announced the applicable rule, there was "nothing to be gained" by remanding the case because no relevant facts were disputed. *Id.* at 745-46. Similarly, in *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 732-33 (2013), the Court refused to remand a case for further proceedings when the losing party had already disclaimed any intention of developing a factual record that might alter the result. And in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 70 (2006), the Court did not remand because it adopted a less stringent legal standard for the prevailing party than the one the jury had applied. *See also Global-Tech Appliances,*

Doc. 19). So the district court's understanding of the agreement is unclear.

In any case, the district court's understanding is irrelevant in light of the Tenth Circuit's statements that the settlement agreement gave Mr. Green the option, until March 31, 2010, to retire or assume the Wyoming position. Pet. App. 2a, 5a.

Inc. v. SEB S.A., 131 S. Ct. 2060, 2071 (2011) (jury's finding for the prevailing party on a fully developed factual record could not be altered on remand by applying the Court's new legal test).

Here, in contrast, there has been no trial, and the case came to the Tenth Circuit on the Government's summary-judgment motion. In addition, as explained immediately below, the record contains abundant evidence that Mr. Green resigned on February 9, not on December 16. Therefore, this Court should simply answer the question presented and reverse.

B. The Settlement Agreement Gave Mr. Green A Choice Either To Retire Or To Accept A Transfer, Making His EEO Contact Timely.

If the Court decides to wade into the issue of when Mr. Green retired, February 9, 2010, is the correct date. On summary judgment, a court views the facts "in the light most favorable to the opposing party." *Tolan v. Cotton*, 134 S. Ct. 1861, 1867 (2014) (per curiam) (internal quotation marks omitted). Following that standard, the Court should interpret the agreement as providing Mr. Green an option to retire or take a position in Wyoming, which he exercised on February 9.

In relevant part, the agreement reads: "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." J.A. 60-61. Taken as a whole, this language supports Mr.

Green's view – repeatedly advanced by the Government below and adopted by the court of appeals, Pet. App. 2a, 5a – that the agreement provided Mr. Green with the option to retire or to report to the position in Wyoming.

The Government suggests that Mr. Green's representative, Robert Podio, entered into negotiations to effect Mr. Green's immediate, unconditional resignation. U.S. Br. 4. To the contrary, Mr. Podio stated that he viewed the agreement as authorizing Mr. Green to "either retire from USPS . . . or alternatively, if he decided not to retire . . . to transfer to a lower position" in Wyoming. J.A. 63.

To be sure, the record includes a statement by the Postal Service's negotiator, David Knight, that it was his "understanding" that, by signing the agreement, Mr. Green agreed to retire and not report to Wyoming. J.A. 51; *see* U.S. Br. 34 n.15. But Mr. Knight also told the Postal Service's EEO investigator probing the constructive discharge complaint that Mr. Green had an option: "the agreement stated that if [Mr. Green] did not retire, he would assume another Postmaster position at a lower level." Resp. to Mot. for Summ. J., Ex. 26, at 8 (D. Ct. Doc. 106-26). Furthermore, Charmaine Ehrenshaft, a Postal Service labor-relations manager who was kept aware of the negotiations as they were unfolding, J.A. 53, told the same investigator that "one of the terms of [the] agreement was a retirement *option*." Resp. to Mot. for Summ. J., Ex. 26, at 6 (D. Ct. Doc. 106-26) (emphasis added). And the agency's EEO decision based on this investigation concluded that a "fair reading of the agreement" gave

Mr. Green "the choice to retire or report to a new job." J.A. 23.[5]

Despite this evidence that the agreement provided Mr. Green with an option, the Government asserts in this Court that the agreement's reference to the Wyoming position "merely provided for contingencies in which retirement did not happen by" the end of March. U.S. Br. 33. That is a puzzling interpretation. If, under the agreement, Mr. Green had in fact resigned on December 16, he would have fully performed on the contract. It would not have been necessary to plan for "contingencies."

Although it is not clear, the Government appears to suggest that, rather than providing Mr. Green with the option to go to Wyoming, the agreement provided for something akin to liquidated damages in the event that Mr. Green did not effectuate his retirement. This makes no sense. Under the Government's interpretation, Mr. Green would have breached the agreement if he had not effectuated his retirement. But the apparent damages for this breach would have gone to Mr. Green, the breaching party, in the form of continued employment with the Postal Service in Wyoming. It is odd, to say the least, that the agreement would provide Mr. Green with

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[5] Even assuming the agreement is ambiguous, that ambiguity should be construed against the Government under the "generally accepted principle that any ambiguity . . . will be interpreted against the drafter." 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 32:12 (4th ed. 1999); *accord United States v. Seckinger*, 397 U.S. 203, 210 (1970); Restatement (Second) of Contracts § 206 (Am. Law Inst. 1981).

continued employment after he breached the contract that supposedly demanded his immediate departure.

* * *

Resolving the question on which this Court granted review depends not on the Government's thirteenth-hour factual claim, but instead on application of a familiar default rule to the filing period governing constructive discharge cases. Holding the Government to its repeated assertions below that Mr. Green had an option to resign or assume another position facilitates resolution of that question: whether the last-act rule or the date-of-resignation rule controls. For the reasons explained above, the date-of-resignation rule comports with the established default rule, this Court's employment discrimination precedents, and Title VII's goals.

CONCLUSION

The judgment of the court of appeals should be reversed.

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