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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF AFFIRMANCE

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The Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae* in support of the decision below.[1]

[1] The parties have consented to the filing of this brief. Counsel for *amici curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small

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amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

businesses nationwide, such as the case before the Court in this action.

Many of *amici*'s members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici*'s members have a substantial interest in the issue presented in this case regarding the point at which the statute of limitations begins to run on a claim for constructive discharge under the Act. The Tenth Circuit below correctly held that the limitations period begins to run as of the date of the last alleged discriminatory act of the employer, not as of the plaintiff's eventual resignation.

As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can assist the Court to assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC and NFIB have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved important questions of Title VII's proper interpretation and application. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

Marvin Green was employed by the United States Postal Service (Postal Service) as a Level-22 Postmaster for Englewood, Colorado. Pet. App. 3a. In 2008, Green applied for promotion to a more senior postmaster position in Boulder, Colorado, but was not selected. *Id.* Later that year, Green filed a failure to promote race discrimination claim with the Postal Service's Equal Employment Opportunity (EEO) Office. *Id.* In May and July 2009, Green again complained, this time alleging that he had been subjected to unlawful retaliation because of his prior EEO activity. Pet. App. 3a-4a.

In November 2009, the Postal Service ordered Green to appear for an investigative interview to discuss allegations that he had violated agency procedures when processing subordinate employees' grievances. Pet. App. 4a. On December 11, 2009, Green appeared at the interview, and met with the Postal Service's human resources and labor relations managers to discuss the allegations. *Id.* Later that day, the Postal Service informed Green that he was being removed from duty because of his disruption of day-to-day postal operations, and that he would be returned to duty "when the cause for nonpay status ceases." Pet. App. 5a.

On December 16, 2009, Green and the Postal Service executed a settlement agreement in which the agency agreed not to pursue any charges against Green based on the issues discussed during the December 11, 2009 interview. Pet. App. 5a. In exchange, Green agreed to "immediately relinquish" his Level-22 Postmaster position, and to accept a demotion to a lower paying, Level-13 position in Wyoming. J.A. 60. In addition, the Postal Service agreed to provide Green with "saved

salary" (*i.e.*, the higher rate of pay associated with his former position) until March 30, 2010, and allow him to use accrued annual and sick leave from December 14, 2009 through March 31, 2010. *Id.* Finally, the agreement provided:

> 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, Green began using annual and sick leave and on February 9, 2010, submitted his retirement papers, with an effective date of March 31, 2010. Pet. App. 6a.

On March 22, 2010, Green contacted an EEO counselor and filed an informal complaint alleging "that he had been constructively discharged by being forced to retire in retaliation for prior EEO activity." Pet. App. 6a, 32a. He filed a formal complaint on April 23, 2010, which the Postal Service's EEO Office eventually dismissed. J.A. 25.

Green subsequently sued the Postal Service for, among other things, constructive discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended. J.A. 8-21. He claimed that the Postal Service engaged in a course of retaliatory conduct that "included, but [was] not limited to, a calculated pattern of harassment, bullying, insults, humiliation, and unjustified discriminatory actions," J.A. 20, and which culminated in his forced retirement on March 31, 2010. J.A. 8-21.

The Postal Service moved for summary judgment on the ground that Green failed to timely file an administrative claim of constructive discharge and therefore was barred from suing on that basis. J.A. 90-105. The district court agreed, finding that Green was required to file his EEO complaint within 45 days of execution of the settlement agreement – which called for his transfer and eventual retirement on March 31, 2010. Pet. App. 35a-37a. It concluded that because Green waited until March 22, 2010 to complain about alleged constructive discharge, his subsequent claim on that basis was untimely. Pet. App. 33a-50a.

On appeal, the Tenth Circuit affirmed, concluding that because all of the Postal Service's allegedly discriminatory or retaliatory acts on which Green's constructive discharge claim was based occurred on or before December 16, 2009, *i.e.*, the date the parties entered into the settlement agreement, Green was required to have lodged his EEO complaint within 45 days of that date, *i.e.*, on or about January 30, 2010. Pet. App. 15a-23a. Because he did not make contact with the Postal Service's EEO Office until March 22, 2010 – over 90 days after the last alleged discriminatory act – the Tenth Circuit agreed that Green could not proceed with his constructive discharge claim. Pet. App. 16a, 23a.

Acknowledging that the majority of courts to have considered the issue have held that a constructive discharge claim accrues as of the date of resignation, Pet. App. 18a, the Tenth Circuit refused to "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer" for purposes of the 45-day limitations period. Pet. App. 20a. It thus held that "the start

of the limitations period for constructive-discharge claims is the same as for other claims of discrimination[,]" which in most instances is the date of the last alleged discriminatory act of the employer. Pet. App. 16a, 22a.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, requires an aggrieved individual to file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of the allegedly discriminatory event. *See United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 257-58 (1980); *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). As this Court made clear in *Delaware State College v. Ricks*, "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." 449 U.S. at 258 (citation and internal quotation omitted) (emphasis added in *Ricks*).

To establish a constructive discharge under Title VII, a claimant must demonstrate that due to the employer's discriminatory actions, the individual's working conditions became "so intolerable that a reasonable person in the employee's position would have felt compelled to resign[.]" *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). Under this Court's longstanding Title VII precedent, the statute of limitations on a constructive discharge claim should run from the employer's alleged discriminatory act,

rather than from the claimant's eventual resignation – which merely is a lingering consequence of the prior alleged discrimination.

Indeed, allowing limitations for constructive discharge claims to belatedly run from the date an individual ultimately elects to resign would be contrary to the purpose of statutes of limitations, which serve the important function of preventing litigation of stale claims. With the passage of time, memories fade, witnesses scatter, and records become unavailable. Indeed, many employment records lawfully may be destroyed after as little as one year under current federal regulations. *See* 29 C.F.R. § 1602.14. Limitations periods are intended to protect those "who promptly assert their rights, [but] also protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57 (citations omitted).

This Court has recognized that Title VII's statutory scheme provides for relatively brief limitations periods, which Congress deliberately established to encourage prompt processing of all charges of discrimination. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 825-26 (1980). Promptly filed claims yield the benefit of providing early notice to an employer of alleged workplace discrimination, thereby offering an opportunity for informal and cooperative resolution of the issue, in accordance with the well-recognized objectives of Title VII.

If, as Petitioner suggests, the time for initiating an administrative charge of constructive discharge does not begin to run until the employee ultimately resigns, regardless of when the underlying discriminatory act that allegedly compelled the resignation occurred, the result would be the virtual elimination of the brief

limitations period that Congress intended. The net effect of the position urged by Petitioner in this case would be to increase dramatically the litigation of stale constructive discharge claims. This Court should not endorse such a result.

ARGUMENT

I. THE TIME FOR FILING AN ADMINISTRATIVE CHARGE OF CONSTRUCTIVE DISCHARGE UNDER TITLE VII BEGINS TO RUN AFTER THE LAST DISCRIMINATORY ACT OCCURS, NOT WHEN THE COMPLAINANT EVENTUALLY DECIDES TO QUIT

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, prohibits discrimination in the terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Among the various types of actions that can give rise to a violation, this Court has recognized that Title VII "encompasses employer liability for a constructive discharge." *Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004). Constructive discharge occurs when, due to the discriminatory actions of his or her employer, an individual's working conditions are rendered "so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Id.* at 147.

A. Title VII Requires An Aggrieved Individual To Exhaust Administrative Remedies Within A Specified Time Period

Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 US. 36, 47 (1974). In the private sector, Title VII requires that any aggrieved person alleging a violation of the Act file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged discriminatory act occurred, 42 U.S.C. § 2000e-5(e), except where the individual has filed a discrimination charge with a state or local enforcement agency with authority to grant or seek relief, in which case he or she has "three hundred days after the alleged unlawful employment practice occurred" to file an EEOC charge. 42 U.S.C. § 2000e-5(e)(1). Generally, no other exceptions extend the length of Title VII's limitations period in the private sector. *Cf. infra* Section I(B).

That charge filing limitations period accrues from the date of the "alleged unlawful employment practice," 42 U.S.C. § 2000e-5(e)(1), which in the case of a "discrete" act (such as, for instance, a constructive discharge) is the date on which the act "occurred" or "happened."[2] *National R.R. Passenger Corp. v.*

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[2] *Morgan* distinguished hostile work environment claims from claims involving "discrete" acts, explaining that a hostile work environment generally involves repeated conduct that occurs over a period of time — perhaps even years. *Morgan*, 536 U.S. at 115. While a single act may not be sufficient to support a claim of hostile environment discrimination under Title VII, the Court

Morgan, 536 U.S. 101, 110, 113 (2002). As this Court has observed, "An individual must file a charge within the statutory time period and serve notice upon the person against whom the charge is made. … A claim is time barred if it is not filed within these time limits." *Id.* at 109.

B. From *Evans* To *Ledbetter*, This Court Consistently Has Held That The Lingering Consequences Of Past Acts Have No Legal Effect Under Title VII

Once again, this Court has been called upon "to apply established precedent in a slightly different context." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). From its 1977 decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), to its 2007 ruling in *Ledbetter v. Goodyear*, this Court consistently has held that the lingering consequences of past acts, even past discriminatory acts, have no present legal effect and thus are not actionable under Title VII. *See Evans*, 431 U.S. at 558; *Delaware State Coll. v. Ricks*, 449 U.S. 250, 257-58 (1980); *Morgan*, 536 U.S. at 113; *Ledbetter*, 550 U.S. at 636.

The plaintiff in *Evans* worked as a flight attendant from 1966 to 1968. When she married in 1968, she was required to resign her employment pursuant to a company policy in place at the time that barred married women from working as flight attendants. In 1972, United rehired Evans as a new employee. She

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said, the cumulative total may. *Id.* Therefore, this Court interpreted Title VII as giving individuals 180 or 300 days from *any* act that forms part of the hostile environment claim to file an EEOC charge of harassment. *Id.* at 117-18.

was not given any seniority credit for her prior service, and "for seniority purposes, she [was] treated as though she had no prior service with United." 431 U.S. at 555 (footnote omitted).

Evans claimed that United was guilty of a present violation of Title VII because it did not give her credit after her rehire for service prior to her forced resignation in 1968. The Court explained that assuming her 1968 separation violated Title VII, "the question now presented is whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972 [when she was rehired]." *Id.* at 554. As the district court there noted, Evans was "seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation." *Id.* at 556 n.8.

This Court held that Evans had failed to file a timely charge of discrimination. *Id.* at 558 (United Air Lines "was entitled to treat that past act *as lawful* after respondent failed to file a [timely] charge") (emphasis added). It also rejected Evans' claim that her employer's failure to credit her with past seniority could be considered a "present *violation*." *Id.* An alleged discriminatory act that has not been made the subject of a timely charge, the Court held, "is the legal equivalent of a discriminatory act which occurred before the statute was passed." *Id.* Thus, it is "merely an unfortunate event in history which has *no present legal consequences*." *Id.* (emphasis added).

Subsequent decisions of this Court have followed that principle. In *Delaware State College v. Ricks*, the Court held that the plaintiff's discriminatory termination claim began to run upon notice of tenure denial, *not* termination, which was the "delayed, but

inevitable consequence of the denial of tenure." 449 U.S. at 257-58. Applying *Evans*, it explained that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination," *id.* at 257 (citation omitted), and that "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis added in *Ricks*). Relying again on *Evans* and *Ricks*, the Court in *National Railroad Passenger Corp. v. Morgan* held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 536 U.S. 101, 113 (2002).

This Court reaffirmed *Evans*, *Ricks*, and *Morgan* five years later in *Ledbetter*. There, the plaintiff sought to challenge pay decisions made throughout her nearly 20-year career on the theory that the sum total led to her being paid substantially less than her male colleagues. Concluding that she failed to timely file a Title VII discrimination charge with the EEOC, thus depriving the federal courts of jurisdiction over the matter, this Court pointed out:

> The instruction provided by *Evans, Ricks*, … and *Morgan* is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

550 U.S. at 628 (citation omitted), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). It thus expressly rejected "the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period." *Id.* at 632.

That reasoning applies with equal force here, where an act of alleged constructive discharge remained unchallenged from the time Petitioner's resignation was negotiated then memorialized in a written settlement agreement, to just shortly before Petitioner would be required to hold up his side of the bargain. As an initial matter, Petitioner's contention that his resignation, which was a term of the agreement he negotiated with the Postal Service, was "forced" is disingenuous at best. Nevertheless, to the extent that he has suggested the settlement agreement he signed was somehow part and parcel of a course of conduct intended to force his constructive discharge (that is, even if he felt compelled to sign), he still was required to lodge a timely complaint within 45 days of having done so.[3]

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[3] In 2009, Congress amended Title VII to extend the time period for bringing a claim of unlawful compensation discrimination under the Act. The Ledbetter Fair Pay Act of 2009 (Fair Pay Act), Pub. L. No. 111-2, 123 Stat. 5 (2009) provides:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, 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

Virtually all forms of employment discrimination have some consequential effect on their victims. Nevertheless, this Court's rulings confirm that continuing effects alone cannot justify the failure to file a timely discrimination charge. *Evans*, 431 U.S. at 557; *Ricks*, 449 U.S. at 258; *Morgan*, 536 U.S. at 114; *Ledbetter*, 550 U.S. at 625. That principle applies equally to claims brought by federal sector employees like Petitioner, who are subject to a 45-day limitations period, as to private sector claims subject to the 180/300-day limitations period.

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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.

42 U.S.C. § 2000e-5(e)(3)(A). The Fair Pay Act also extends the time period for bringing a compensation discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. § 626(d)(3), the Americans with Disabilities Act, 42 U.S.C. § 12117(a), and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791(f), 794(d).

The Fair Pay Act thus permits those alleging compensation discrimination to file an EEOC charge within 300 days of receipt of a paycheck or other form of compensation that carries forward the effects of past discriminatory compensation practices, whether or not the discrimination actually occurred within the statutory charge filing limitations period. Because constructive discharge is not a "compensation decision," however, the Fair Pay Act does not operate to save Petitioner's untimely claim.

II. EXTENDING THE STATUTE OF LIMITATIONS FOR A CONSTRUCTIVE DISCHARGE CLAIM TO A POINT LONG AFTER THE ALLEGED DISCRIMINATORY ACT ON WHICH IT IS BASED IS CONTRARY TO THE PURPOSES UNDERLYING STATUTES OF LIMITATIONS GENERALLY, AND TITLE VII'S CHARGE FILING PERIODS IN PARTICULAR, AND WOULD FRUSTRATE EMPLOYER COMPLIANCE EFFORTS

A. Title VII's Relatively Short Limitations Periods Are Intended To Encourage Prompt Resolution Of Charges

A principal objective of Title VII is to promote prompt and efficient resolution of discrimination claims. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("[i]n pursuing the goal of 'bring[ing] employment discrimination to an end,' Congress chose '[c]ooperation and voluntary compliance' as its 'preferred means'") (citation omitted); *see also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be the "preferred means of enforcing Title VII") (citation omitted). To further that aim, Congress deliberately set a relatively short period within which charges alleging Title VII violations must be filed. As this Court observed:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination ... [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days – rather than months or years – we may not simply interject an

> additional ... period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980) (footnote omitted*); see also Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976) ("Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation and footnote omitted).[4]

The Court in *Mohasco* also recognized that in choosing Title VII's charge filing limitations period, Congress intentionally risked leaving some victims of discrimination without a remedy in order to avoid litigation of stale claims, reasoning that the choice "must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." 447 U.S. at 820. Thus, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is

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[4] The 1972 amendments to Title VII enlarged the limitations period from 90 to 180 days. 42 U.S.C. § 2000e-5(e).

the best guarantee of evenhanded administration of the law." *Id*. at 826.

1. Statutes of limitations discourage litigation of stale claims

Employers must be permitted to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims.

Indeed, they are "designed to assure fairness to defendants" and to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). The interest of an individual who fails to undertake the "minimal" step of filing a timely charge to preserve his or her Title VII claim must, therefore, give way to the interest of avoiding stale claims. *See Ricks*, 449 U.S. at 256-57 ("[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past") (citations omitted); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones").

2. Prompt filing of discrimination charges provides employers with opportunity to timely investigate and correct potential violations

In addition to triggering the EEOC's investigation process, a charge also serves the important purpose of providing employers with "fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation from the EEOC." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 74 (1984). This early notice often operates as the employer's first warning of a potential workplace problem, and typically serves as the impetus for conducting an internal investigation into the matter. Where at the conclusion of such an investigation potential violations are uncovered, responsible employers make every effort to correct the problem and take steps to ensure it does not recur. Such efforts serve to advance Congress's desire that voluntary compliance be the "preferred means of achieving the objectives of Title VII." *See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

An employer's earnest attempt to voluntarily comply with Title VII is severely hampered whenever an employee waits months or years to complain about suspected discrimination. As this Court observed in *Ricks*, "We recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." 449 U.S. at 262 n.16. But here, as in *Ricks*, "there can be no claim" that Petitioner was not "abundantly forewarned." *Id.* Nor can

he claim ignorance of the applicable statute of limitations given his prior experience with invoking the complaint process.

B. Allowing Plaintiffs To Control When Limitations Run For Constructive Discharge Claims, Without Regard To When The Underlying Alleged Discriminatory Act Actually Occurred, Effectively Would Eliminate A Limitations Period For Such Claims

Affirming the decision below would encourage employees to report perceived discrimination more quickly – whether internally or externally with the EEOC. As relevant here, doing so would encourage more employees to report alleged discrimination prior to resigning, thereby allowing the employer an opportunity to promptly address and correct any issues and preserve the employment relationship. Such efforts further Title VII's goal of informal, cooperative resolution of disputes. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982) ("Title VII's primary goal, of course, *is* to end discrimination; the victims of job discrimination want jobs, not lawsuits") (footnote omitted).

Conversely, if the time for filing an administrative claim for constructive discharge does not begin to run until the employee ultimately resigns, he or she can (and would be incentivized to) take as long as the individual chooses to complain. The employee would have complete autonomy to decide when limitations would begin to run based upon when he or she eventually elects to quit. Allowing the claimant to determine when the limitations period starts to run could encourage, for instance, opportunistic plaintiffs to delay resigning, and put off bringing a constructive discharge claim, until after a scheduled bonus is paid, an

increase in salary is received, and/or another job is secured. Such action would have the potential to result in increased damages, should the claimant eventually prevail in his or her suit. *See Suders*, 542 U.S. at 147 n.8 (a constructive discharge plaintiff "is entitled to all damages available for a formal discharge[,]" including backpay and potential frontpay).

The potential for prejudice to employers is especially stark in the private sector, in which most individuals have up to 300 days to initiate administrative proceedings. If the limitations period for constructive discharge claims were extended as contemplated by Petitioner, an employer might not receive notice of an issue until a year or more after the relevant events actually occurred. Here, assuming the clock began to run when the settlement agreement was signed, Petitioner took more than twice the time statutorily allowed to lodge his complaint. In the private sector, that could equate to a 600-day delay. Moreover, extending the limitations period well beyond 300 days in cases involving constructive discharge would prejudice employers who reasonably have relied on EEOC regulations permitting employers to lawfully destroy employment records after one year, unless a charge has been filed. *See* 29 C.F.R. § 1602.14.

Inherent in Petitioner's argument is a theory completely contrary to the Title VII policy that favors limiting the life of claims. As noted, statutes of limitations serve to encourage parties to promptly assert their rights, and to avoid precisely the prejudice to employers that results from defending against stale claims. Yet, if this Court holds that the period for filing a constructive discharge claim runs from whenever the claimant ultimately elects to resign, regardless of when the allegedly discriminatory employment

actions occurred, employers indeed will be forced to defend against stale claims, and do so despite the fact that key documents may have been lawfully destroyed and key witnesses may be unavailable. In contrast, faithful adherence to Title VII limitations period conventions will encourage the prompt filing of constructive discharge claims, which in turn will promote prompt and effective remedial action. Indeed, the very nature of constructive discharge claims makes the principles enunciated time and again by this Court even more compelling. Unlike an actual discharge, in the case of a constructive discharge, "the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force." *Suders*, 542 U.S. at 148.

Under Petitioner's approach, any time an employee quits,[5] he or she would be free to file a charge purporting to transform the resignation into a constructive discharge relating back to allegedly discriminatory acts that occurred at any point months or even years prior to separation. While an employee ultimately might not be able to make out a viable case on the merits, the employer nevertheless will have expended significant time and expense to defend the claim.

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[5] The U.S. Department of Labor's Bureau of Labor Statistics (BLS) reported that, in July 2015 alone, there were 2.7 million "quits" in the United States, defined as "voluntary separations by employees (except for retirements, which are reported as other separations)." *See* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Job Openings and Labor Turnover – July 2015* (Sept. 9, 2015), *available at* http://www.bls.gov/news.release/pdf/jolts.pdf (last visited October 2, 2015).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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