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 FOR PETITIONER

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QUESTION PRESENTED

Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation?

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BRIEF FOR PETITIONER

Petitioner Marvin Green respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 760 F.3d 1135. The opinion of the district court (Pet. App. 28a) is unpublished but is available at 2013 WL 424777.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. Pet. App. 1a. Justice Sotomayor granted an extension of time within which to file a petition for a writ of certiorari to and including November 26, 2014. 14A368. The petition was filed on November 25, 2014, and granted on April 27, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 2000e-3(a) provides in relevant part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . 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."

29 C.F.R. § 1614.105(a)(1) provides that "[a]n 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."

STATEMENT OF THE CASE

This case concerns a timeliness defense asserted by the Postal Service to defeat petitioner Marvin Green's constructive discharge claim.

A. Legal Background

1. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2. Title VII also provides employees who advance discrimination complaints "broad protection from retaliation" by their employers. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006); *see* 42 U.S.C. § 2000e-3(a).

Furthermore, to ensure that employers cannot "accomplish indirectly what the law prohibits being done directly" – namely, circumvent various prohibitions against firing employees for discriminatory or retaliatory reasons – Title VII recognizes claims for constructive discharge. 1 Barbara T. Lindemann et al., *Employment Discrimination Law* 21-33 (5th ed. 2012). This doctrine treats "an employee's reasonable decision to resign because of unendurable working conditions" as a termination by the employer. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984). The doctrine

traces its roots to the 1930s, when it proved necessary to resolve labor disputes in which employers retaliated against employees by creating intolerable working conditions. *Suders*, 542 U.S. at 141. By the time Congress began enacting statutes prohibiting employment discrimination in the 1960s, the claim was "solidly established in the federal courts" and was applied in these new statutory contexts. *Id.* at 141-42.

2. A constructive discharge claim "involves both an employee's decision to leave and precipitating conduct." *Suders*, 542 U.S. at 148; *accord* 2 *EEOC Compliance Manual* § 612.9(a) (2008). At its heart, the claim turns on whether the employee's resignation should be treated as a termination. "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 542 U.S. at 141. Because a constructive discharge is treated as a termination, employees who prove a constructive discharge may recover "all damages available for formal discharge . . . including both backpay and, in fitting circumstances, frontpay." *Id.* at 147 n.8.

Just as a claim for wrongful termination cannot be brought before an employee has been fired, a claim for constructive discharge cannot be brought until an employee has quit, *see Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972, 978 (7th Cir. 2009);

Lindemann, *supra*, at 21-46. Prior to an employee's resignation no cause of action exists, and any suit brought before resignation will fail to state a claim.[1]

3. Title VII generally requires employees first to pursue their grievances through administrative channels before turning to the courts. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Employees therefore bring thousands of constructive discharge claims to the federal Equal Employment Opportunity Commission (EEOC) every year.[2] These administrative redress procedures form part of a system "in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

This system includes several time windows. To initiate a claim, federal employees are required to report discrimination to an EEO counselor within 45 days of the matter that the employee alleges was unlawful.[3] This report – the timeliness of which is at

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[1] *See, e.g.*, *EEOC v. La Rana Hawaii, LLC*, 888 F. Supp. 2d 1019, 1047 (D. Haw. 2012); *Mills v. Willams*, 476 F. Supp. 2d 653, 663 (E.D. Mich. 2007), *aff'd* 276 F. App'x 417 (6th Cir. 2008).

[2] *See* EEOC, *Statutes by Issue FY 2010 – FY 2014*, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited July 2, 2015).

[3] Federal employees, such as petitioner Marvin Green, pursuing claims under Title VII "must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action." 29 C.F.R.

issue in this case, *see* Pet. App. 9a, 15a-16a – sets in motion a multi-stage process. If the discrimination claim is not resolved at the initial stage, the EEO counselor must inform the employee within 30 days of the initial meeting that the employee may file a formal complaint. 29 C.F.R. § 1614.105(d). The employee then has 15 days to file a formal complaint. *Id.* Generally, the agency then has 180 days to complete an investigation of the complaint. *Id.* § 1614.108(e), (f). The employee then has 30 days after receiving the investigative file to request a final decision from the agency or review of the complaint before an administrative judge. *Id.* § 1614.108(f). The employee generally has 90 days from a final adverse administrative decision to sue in federal district court. 42 U.S.C § 2000e-16(c).

A claimant's failure to initiate any stage of this process within the applicable timeframe creates a nonjurisdictional bar to any later suit. *See, e.g.*, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

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§ 1614.105(a)(1). In the private sector, "[a] charge . . . shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," or, if state proceedings are also initiated, "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." 42 U.S.C. § 2000e-5(e)(1).

B. Factual And Procedural Background

1. In 2008, Mr. Green, then postmaster for Englewood, Colorado, applied for a promotion. Pet. App. 29a. Building on a 35-year career in which he began as a letter carrier and rose through the ranks of the Postal Service, Mr. Green sought to fill a recently vacated postmaster position in nearby Boulder, Colorado. J.A. 9-10 (¶¶ 8-13); Pet. App. 3a. Despite an unblemished record, he was passed over for the job. Pet. App. 3a. Mr. Green, who is black, thereafter contacted a Postal Service EEO counselor, alleging that he was denied the promotion because of his race. *Id.*; J.A. 12 (¶¶ 28-29).

Relations with his supervisors soured in the wake of that discrimination complaint. Pet. App. 3a; J.A. 12-14. In 2009, while his complaint proceeded through administrative channels, Mr. Green expressed concern that he was the victim of retaliation, twice more seeking help from Postal Service EEO counselors. Pet. App. 3a. In November of that year, shortly after the EEOC assigned an administrative law judge to oversee discovery concerning his original nonpromotion claim, *see* J.A. 15 (¶ 51); CA10 App. 673-77, Mr. Green received a letter from his Postal Service superiors summoning him to appear for an "investigative interview" and indicating that he could have a representative with him, J.A. 15 (¶ 52); CA10 App. 433.

At that meeting, held on December 11, 2009, Postal Service supervisors confronted Mr. Green with various allegations, most seriously accusing him, without any prior notice, of "intentionally delaying the mail" – a criminal charge. J.A. 16 (¶ 59); *see* J.A.

58-59. They informed him that they had contacted the Postal Service's Office of the Inspector General (OIG) about the mail-delay charge and that OIG agents had just arrived to interview him as part of their investigation. Pet. App. 4a. Mr. Green's supervisors then reassigned him, effective immediately, to "Emergency Placement in Off-Duty Status," citing his alleged "[d]isruption of day-to-day postal operations." J.A. 17 (¶ 71); CA10 App. 600. They suspended his pay and informed him that he could not return to duty until "the cause for nonpay status cease[d]." J.A. 17 (¶ 71).

Rattled, Mr. Green sought help from his union representative, who entered into a flurry of negotiations with a Postal Service senior human resources manager, David Knight. Pet. App. 5a. While the negotiations unfolded, Mr. Green remained without pay, on indefinite leave, and, he believed, under threat of criminal prosecution.

In fact, "[u]nknown to Green, the OIG agents had concluded at the end of the [December 11] interview that Green had not intentionally delayed the mail." Pet. App. 5a. Nevertheless, the next day, Mr. Knight told Mr. Green's representative that "the OIG is all over this" and the charge is a "criminal issue" that "could be a life changer." J.A. 53.

After several days of back-and-forth, an agreement was signed on December 16, 2009. Pet. App. 5a. In exchange for a promise by the Postal Service not to pursue criminal charges, Mr. Green agreed to "relinquish" his current post and choose one of two alternatives. J.A. 60. First, he could leave Englewood (part of the Denver metropolitan area)

and accept a position in Wamsutter, Wyoming (population 451) at a salary approximately $40,000 less than he currently earned. *Id.* 60, 67. Second, he could tender his resignation and leave the Postal Service entirely. *Id.* 60. In other words, Mr. Green "could choose either to retire or to work in a position that paid much less and was about 300 miles away." Pet. App. 2a.

The agreement expressly provided Mr. Green with time to contemplate the decision. J.A. 60. The Postal Service agreed to end Mr. Green's emergency placement and allowed him to use his accumulated annual and sick leave to receive his then-current salary through the end of March. *Id.* At that point, the agreement required him to either "report for duty in Wamsutter . . . on April 1" or "take all necessary steps to effect his retirement on or before March 31." *Id.*

After spending January going through the Postal Service's internal EEO process to challenge the original emergency placement decision – without success – Mr. Green submitted his resignation on February 9, effective on the last day of March. Pet. App. 6a.

2. On March 22, 41 days after resigning, Mr. Green contacted an EEO counselor to report his constructive discharge. Pet. App. 6a. He contended that his supervisors had threatened criminal charges – and negotiated the resulting agreement – in retaliation for his original discrimination complaint. J.A. 67. Given the choice he had to make, Mr. Green alleged that he had been forced to resign in violation

of Title VII. *Id.* 64-67. The agency accepted the complaint for investigation. Pet. App. 6a-7a.

The parties agree that Mr. Green's complaint of constructive discharge, if timely under the applicable 45-day rule, properly initiated the EEO process. They also agree that Mr. Green thereafter timely pursued the remaining administrative remedies available to him. J.A. 19 (¶¶ 83-85); *id.* 48 (¶¶ 83-85). The administrative process did not resolve the dispute.

3. Mr. Green then filed suit in the District of Colorado against respondent, the Postmaster General. Mr. Green alleged, in five distinct causes of action, unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964. Pet. App. 7a.

Regarding the only cause of action at issue here – constructive discharge – the district court found that the 45-day filing period was triggered not when Mr. Green resigned, but rather when both parties signed the earlier, December 16 settlement agreement. Pet App. 37a-39a. The court reasoned that the Postal Service's conduct had "culminated" at that point, even though Mr. Green had not decided to resign. *Id.* Because Mr. Green had not initiated contact with an EEO counselor on his constructive discharge claim within 45 days of that date, the court held, his claim was time-barred. *Id.*

4. The Tenth Circuit affirmed. The court of appeals recognized that other circuits had held that the filing period begins "on the date the employee resigned." Pet. App. 19a. And it acknowledged that a claim for constructive discharge "cannot be submitted before the employee quits his job." *Id.* 22a.

But concerned that the other circuits' position would "allow[] the employee to extend the date of accrual indefinitely," the Tenth Circuit rejected the date-of-resignation rule. Pet. App. 20a-22a. Instead, it held as a general proposition that the filing period for a constructive discharge claim begins to run from the time of the employer's alleged "last discriminatory act" said to give rise to the resignation, not from the resignation itself. Pet. App. 15a-23a. And finding that the Postal Service's last relevant act had occurred on or before December 16, when the Postal Service signed the settlement agreement, the court of appeals held that Mr. Green's March 22 contact with an EEO counselor was outside the 45-day limitations period. *Id.* 23a.

SUMMARY OF THE ARGUMENT

The filing period for a constructive discharge claim begins to run when an employee resigns.

I. Limitations periods generally do not run until a cause of action exists, and there is no basis for deviating from that general rule here.

A. This Court has long recognized that, absent clear textual indications to the contrary, limitations periods begin to run only once a plaintiff can file a claim and obtain relief. When the text creating a filing period is ambiguous, the Court will apply this general rule and construe the limitations period to begin only when the cause of action is complete.

B. In constructive discharge cases, the cause of action does not become complete until the claimant resigns. Therefore, the limitations period runs from the date of resignation, unless the operative text

demonstrates clear intent to the contrary. Here, it does not. The relevant regulation provides that the period runs from the date of the "matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). With respect to constructive discharge, the "matter" necessarily culminates with the employee's resignation.

Any other construction would flout the judicial consensus that the regulation here is a statute of limitations, not a statute of repose. Statutes of limitations begin to run only when a cause of action is complete and are subject to equitable tolling. Statutes of repose, by contrast, begin to run at the last act of a defendant and are not subject to tolling under any circumstances. The Tenth Circuit's last-discriminatory-act rule – which treats the regulation as if it were a statute of repose – contravenes the consensus that the regulation here is a statute of limitations subject to equitable tolling.

C. In analogous situations where the claimant's decision to end a relationship completes the cause of action, the general rule prevails. In suits for constructive termination of a franchise or constructive eviction of a tenant, both the cause of action accrues and the limitations period begins when the plaintiff, under duress, chooses to end the relationship. And in state-law constructive discharge cases, nearly all courts to address the issue hold that the limitations period begins when the cause of action is complete.

II. The date-of-resignation rule comports with this Court's decisions concerning the timeliness of other kinds of Title VII claims. *Delaware State*

College v. Ricks, 449 U.S. 250 (1980), held that the filing period in a formal discharge claim begins when termination of the employee becomes inevitable. In a constructive discharge claim, an employee must resign before termination is inevitable. Thus, resignation is the first date at which the filing period can run consistent with *Ricks*. Moreover, *National Railroad Passenger Co. v. Morgan*, 536 U.S. 101 (2002), held that where an employment claim involves multiple components, the most recent event contributing to the claim triggers the filing period. Similarly, because a constructive discharge includes both precipitating conduct and the employee's subsequent resignation, the resignation triggers the filing period.

III. The date-of-resignation rule furthers Title VII's goals by promoting administrable rules for adjudicators, fairness for laypeople, and conciliation between employers and employees.

A. This Court construes statutes of limitations to provide clarity at the outset of litigation. The date-of-resignation rule does just that, offering a discrete, readily identifiable event that triggers the limitations period. By contrast, the Tenth Circuit's last-discriminatory-act rule would force courts to determine which "acts" are sufficiently "discriminatory" to trigger the limitations period. This would be a difficult task. Courts might look to this Court's substantive discrimination jurisprudence, but determining whether an employer's conduct affected the terms, conditions, or privileges of employment is challenging, particularly in hostile work environment cases, where not all allegedly discriminatory conduct is independently

actionable. Likewise, in retaliation cases, courts would have to determine whether an employer's act would tend to discourage reporting in light of the unique circumstances, expectations, and relationships existing in a given workplace. This complexity is unnecessary because the simpler date-of-resignation rule provides a better alternative.

B. The date-of-resignation rule also promotes fairness in an administrative system designed to accommodate unrepresented lay claimants. A last-discriminatory-act rule would result in employees unwittingly forfeiting constructive discharge claims, because they are unlikely to know that the filing period to allege constructive discharge could begin, let alone end, before they resign. The ability to amend prior complaints is no panacea for several reasons, including that claimants with standalone constructive discharge claims will have no prior complaints to amend.

C. The date-of-resignation rule also promotes conciliation between employers and employees without encouraging inappropriate delay. Due to habit, financial necessity, or optimism, some employees will attempt to persevere on the job and make good-faith efforts to reconcile with employers despite objectively intolerable conditions. But a last-discriminatory-act rule would encourage these employees to file complaints and quit immediately after employer misconduct to avoid a time bar. The date-of-resignation rule, by contrast, gives employees time to try to work out disagreements without resorting immediately to resignation.

ARGUMENT

The filing period for constructive discharge claims under Title VII begins to run when an employee resigns. Petitioner Marvin Green resigned on February 9, 2010, and contacted an EEO counselor 41 days later. His constructive discharge claim is therefore timely and should be heard on its merits.

I. Consistent With The General Rule, The Filing Period For A Constructive Discharge Claim Does Not Begin Until All Elements Of The Claim Are Present.

A. Absent Clear Textual Indications To The Contrary, Limitations Periods Do Not Commence Until A Claimant Can File A Claim And Obtain Relief.

1. This Court has "repeatedly recognized that Congress legislates 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) (internal quotation marks omitted). Unless the text creating a limitations period clearly indicates otherwise, "a cause of action does not become 'complete and present' for limitations purposes until 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) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)). Thus, in nearly all cases, limitations periods do not begin to run until all elements of a claim are present.

This default rule has its origins in the first statute of limitations for personal actions enacted in England, 21 Jac. 1, c. 16 (1623), and was incorporated early on into American law. From the mid-nineteenth century, it was widely recognized that limitations periods begin to run only "when and as soon as the party has a right to apply to the proper tribunals for relief." *See Angell on Limitations* 41 (1846); *accord* 2 *Story on Equity Jurisprudence* § 1521(a) (1853). In *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583 (1874), this Court stated the rule without qualification: "All statutes of limitation begin to run when the right of action is complete." *Id.* at 589.

The general rule exists in part because "[i]t would clearly be unfair to charge the plaintiff with the expiration of any time before the plaintiff's cause of action could be prosecuted to a successful conclusion." 1 Calvin W. Corman, *Limitation of Actions* § 6.1 (1991). Far from "encourag[ing] the prompt presentation of claims," *United States v. Kubrick*, 444 U.S. 111, 117 (1979), a statute of limitations that began to run before a cause of action existed could bar even claims that are brought forward immediately.

2. Although it is "theoretically possible" to create a limitations period that begins before a claimant can obtain relief, courts "will not infer such an odd result in the absence of any such indication in the statute." *Reiter v. Cooper*, 507 U.S. 258, 267 (1993). This Court recognizes that drafters have been "operating against the background rule . . . for a very long time" and that when Congress "has wanted us to apply a different rule . . . it has said so." *TRW Inc. v.*

Andrews, 534 U.S. 19, 38 (2001) (Scalia, J., concurring in the judgment).

Thus, when the text creating a filing period is unclear, the Court will defer to the general rule and "adopt the construction that starts the time limit running when the cause of action . . . accrues." *Graham Cnty.*, 545 U.S. at 419; *see also Johnson v. United States*, 544 U.S. 295, 308 (2005) (the general rule "should be reconciled with the statutory language if it can be"). In *Graham County*, for example, the Court faced text that was "ambiguous." 545 U.S. at 417. Under one of two "reasonable readings," the time period could run before the relevant claim existed, thus allowing the action "to be time barred before it ever accrue[d]." *Id.* at 415, 421. Absent clear evidence that Congress had intended such "counterintuitive results," the Court chose the reading that followed the general rule. *Id.* at 421.

This Court has applied a different rule only rarely, when the text of a provision or the record of its enactment leaves no doubt about the drafters' intent – for example, when the parties contracted unambiguously to allow the clock to run before the plaintiff could obtain relief, *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 610 (2013), or when the statutory text unmistakably demanded a different starting point, *Dodd v. United States*, 545 U.S. 353, 358 (2005) (construing the limitations provision of the federal habeas statute, under which the period runs from this Court's initial recognition of the right asserted).

B. The Regulation Here Comports With The General Rule That Limitations Periods May Not Run Until A Claim Accrues.

1. Because a cause of action for constructive discharge exists only once a claimant resigns, *see supra* at 3-4, the general rule dictates that the filing period for constructive discharge should run from the date of resignation, barring an unambiguous textual provision to the contrary.

The relevant statute, 42 U.S.C. § 2000e-16(b), does nothing to override the general rule, but merely authorizes the EEOC to issue regulations to implement Title VII's protections for federal employees. And far from establishing an intent to upend settled practice, the relevant EEOC regulation is consistent with the general rule. That regulation, 29 C.F.R. § 1614.105(a)(1), provides that an "aggrieved person" has 45 days to file a claim from the date of a "matter alleged to be discriminatory." *Id.* The Tenth Circuit, however, ignored the words "matter alleged" and instead held that the limitations period runs from the defendant's last allegedly discriminatory "act," Pet. App. 20a, a word appearing nowhere in the regulation.

A "matter" refers to more than just a particular "act"; rather, it broadly describes the "subject under consideration." *Black's Law Dictionary* 1126 (10th ed. 2014); *see also Black's Law Dictionary* 978 (6th ed. 1990) ("Substantial facts forming basis of claim."); IX *Oxford English Dictionary* 481 (2d ed. 1989) ("Something which is to be tried or proved."). Where a claimant seeks to prove constructive discharge, the subject under consideration necessarily comprises

resignation, not just an employer's earlier acts. *See Ekstrand v. Sch. Dist. of Somerset*, 583 F.3d 972, 978 (7th Cir. 2009) ("[T]here couldn't have been a constructive discharge while the employment relationship continued."); Pet. App. 22a. Thus, in constructive discharge, a "matter" alleged to be discriminatory includes resignation.

Similarly, by using the phrase "matter *alleged*," the regulation focuses on the employee's grievance and ensures that the complainant is "the master of the claim" with the right to define the legal matter to be adjudicated. *Cf. Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (plaintiffs may choose which laws to rely on in their pleadings). Because claimants cannot properly "allege" constructive discharge before they resign, a rule that could time-bar constructive discharge claims prior to resignation would prevent some claimants from alleging the legal matter they want adjudicated.

In any case, even if the Tenth Circuit were correct that a "matter alleged" was equivalent to a particular "act," an employee's resignation in the face of intolerable circumstances is, itself, a "distinct discriminatory 'act' for which there is a distinct cause of action." *Young v. Nat'l Ctr. For Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987). Because a resignation is the final necessary element of a constructive discharge, it is the act that triggers the filing period for that claim.

2. The date-of-resignation rule comports with the distinction this Court has drawn between statutes of limitations and statutes of repose.

a. This Court has recognized that statutes of limitations and statutes of repose are fundamentally different. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014). Statutes of limitations measure time from the date the plaintiff's cause of action accrues and are subject to equitable defenses such as tolling. *Id.*; *see also, e.g., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94-95 (1990); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). In contrast, statutes of repose measure time from the date of the defendant's last relevant act (such as manufacturing or selling a particular product), regardless of whether the plaintiff's claim has accrued, and are not subject to equitable tolling under any circumstances. *Waldburger*, 134 S. Ct. at 2182.

The two key distinctions between statutes of limitations and statutes of repose – when the clock starts running and whether the clock may be paused – reflect the same underlying difference in purpose. *See Waldburger*, 134 S. Ct. at 2183. Because statutes of limitations exist in part to encourage *plaintiffs* to seek remedies on a timely basis, they run only once relief is available to the plaintiff and may be paused if fairness to the plaintiff warrants it. *Id.* Statutes of repose, by contrast, exist solely to protect *defendants* – and thus measure time only from the defendant's acts and continue to run regardless of the plaintiff's misfortune. *Id.*

b. All courts agree that 29 C.F.R. § 1614.105(a)(1) functions as a statute of limitations – not as a statute of repose – when assessing the availability of equitable defenses. In *Zipes*, 455 U.S. 385, this Court held that the filing period for private

sector Title VII administrative claims was "like a statute of limitations . . . subject to waiver, estoppel, and equitable tolling." *Id.* at 393. By 1990, all ten circuits to consider the issue had applied *Zipes* to the equivalent federal sector period at issue here and held that it too was a statute of limitations subject to tolling. *See Rennie v. Garrett*, 896 F.2d 1057, 1059-60, 1062 (7th Cir. 1990) (collecting cases). And two years later, the EEOC codified the availability of standard equitable defenses in the regulation itself. 29 C.F.R. § 1614.604(c); *see* 57 Fed. Reg. 12634, 12662 (April 10, 1992).

The Tenth Circuit's holding runs headlong into this consensus because it interpreted 29 C.F.R. § 1614.105(a)(1) as if it were a statute of repose. A "distinguishing feature" of statutes of repose is that their filing periods "begin[] when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." 54 C.J.S. *Limitations of Actions* § 7 (2010); *accord Waldburger*, 134 S. Ct. at 2187-88. By causing the regulation to function as a statute of repose for one purpose (when the filing period begins), and as a statute of limitations for another (whether equitable defenses are available), the court of appeals' last-discriminatory-act standard contravenes the "clear distinction" between statutes of limitation and statutes of repose, *id.* at 2186.

C. In Other Situations Where A Claimant's Conduct Completes The Cause Of Action, Courts Hold That The Limitations Period Does Not Begin To Run Until The Cause Of Action Exists.

In constructive discharge cases, the claimant's conduct completes the cause of action. *See Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). In other areas where this occurs, courts routinely find that the limitations period does not begin before a claimant can seek relief.

1. Courts that recognize "constructive termination" allow franchisees who are "compelled . . . to abandon their franchises" by a franchisor's wrongful conduct to sue as though the franchisor had ended the relationship. *See Mac's Shell Services, Inc. v. Shell Oil Products Co.*, 559 U.S. 175, 177-78 (2010). In *Mac's Shell*, the Court rejected an attempt by gas station franchisees to bring claims for constructive termination under the Petroleum Marketing Practices Act while the franchisees "continue[d] operating a franchise." *Id.* at 178, 182-84. Just as an employee must "quit his or her job" before claiming constructive discharge, the Court reasoned, franchisees cannot sue for constructive termination until they actually "abandon their franchises." *Id.* at 184.

In support of its holding, the Court rebuffed an argument that the applicable statute of limitations could run from a franchisor's wrongful act committed prior to a franchise's termination – a standard similar to the Tenth Circuit's last-discriminatory-act rule. *Mac's Shell*, 559 U.S. at 189-90; *see* Br. of

Petrs. 22, *Mac's Shell Services, Inc. v. Shell Oil Products Co.*, 559 U.S. 175 (2010) (No. 08-240), 2009 WL 3391431. Instead, the Court indicated, the limitations period for constructive termination could not run until the franchise relationship formally ended. *Id.*[4] Because this is the same moment at which a claim for constructive termination becomes complete, the Court's decision confirms – in keeping with the general rule – that the statute of limitations in constructive termination cases cannot begin to run before a claim exists.[5]

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[4] In *Mac's Shell*, the limitations period ran from "(1) 'the date of termination of the franchise' or (2) 'the date the franchisor fails to comply with the requirements of' the Act." 559 U.S. at 189 (quoting 15 U.S.C. § 2805(a)). The Court held that the second limitations period applied only to franchisors' "post-termination violations," *id.* at 190, meaning that the earliest the limitations period could begin to run was from termination of the franchise. *Id.* 189-90.

[5] Indeed, at oral argument in *Mac's Shell*, the Government (as amicus supporting respondent Shell Oil Products Co.) maintained that the general rule applies in both the constructive termination *and* constructive discharge contexts. *See* Tr. of Oral Arg. at 21, *Mac's Shell Services, Inc. v. Shell Oil Products Co.*, 559 U.S. 175 (2010) (No. 08-240) (Justice Sotomayor: "At what point would the statute of limitations begin to run . . . ?" Mr. O'Neill (on behalf of the United States): "When the franchisee is actually forced to end one of the statutory elements of the franchise in response to the franchisor's conduct. And that's the same test that would be applied in the constructive discharge or constructive eviction context.").

2. Similarly, "landlord-tenant law has long recognized the concept of constructive eviction," in which tenants who are wrongfully coerced into vacating property may sue as though they were evicted. *See Mac's Shell*, 559 U.S. at 184. Again, as with constructive discharge, claims for constructive eviction do not accrue until tenants "actually move out," *id*. And consistent with the general rule, the statute of limitations does not begin to run until a cause of action for constructive eviction exists. *See Nat'l R.R. Passenger Corp. v. Notter*, 677 F. Supp. 1, 4 (D.D.C. 1987).

3. Many states recognize constructive discharge in the context of state common law and statutory wrongful employment termination claims. In those cases, seven of the eight state courts of last resort to address the issue follow the general rule by holding that the limitations period begins at the same time an employee's cause of action accrues – whether that happens at or after resignation – while only one holds to the contrary.[6]

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[6] *See Mullins v. Rockwell Int'l Corp.*, 936 P.2d 1246, 1253 (Cal. 1997); *Patterson v. State Dep't of Health & Welfare*, 256 P.3d 718, 725 (Idaho 2011); *Whye v. City Council for the City of Topeka*, 102 P.3d 384, 387 (Kan. 2004); *Hancock v. Bureau of Nat'l Affairs, Inc.*, 645 A.2d 588, 590 (D.C. 1994); *Jeffery v. City of Nashua*, 48 A.3d 931, 936 (N.H. 2012); *Douchette v. Bethel Sch. Dist. No. 403*, 818 P.2d 1362, 1367 (Wash. 1991); *see also Stupek v. Wyle Labs. Corp.*, 963 P.2d 678, 682 (Or. 1998) (limitations period began to run at employee's last day of employment, where cause of action existed only once plaintiff

II. The Date-Of-Resignation Rule Is Consistent With This Court's Decisions Regarding The Timeliness Of Other Types of Title VII Claims.

In rejecting the date-of-resignation rule, the Tenth Circuit asserted that *Delaware State College v. Ricks*, 449 U.S. 250 (1980), demands a focus on "the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." Pet. App. 20a (emphasis and internal quotation marks omitted) (quoting *Ricks*, 449 U.S. at 258). But that application of *Ricks* was mistaken. *Ricks* supports the view that the filing period for a constructive discharge claim may not begin until an employee resigns.

In *Ricks*, the plaintiff, a college teacher, was denied tenure – first by the college's tenure committee, whose recommendation was then approved by the Faculty Senate. *Id.* at 252. The Board of Trustees then "formally voted" to deny tenure and offered the plaintiff a terminal one-year contract. *Id.* at 252. This Court held that the filing period for the plaintiff's formal discharge claim began

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was no longer employed); *cf. Joliet v. Pitoniak*, 715 N.W.2d 60, 68 (Mich. 2006) (limitations period began to run at employer's last act, but only where constructive discharge was "not a cause of action" under state law). *But see Harmon v. Higgins*, 426 S.E.2d 344, 347 (W. Va. 1992) (acknowledging the general rule, but holding that the limitations period began to run at date of employer's "last offensive contact").

to run when the employer stated its "official position" and "termination of employment" becomes "inevitable." 449 U.S. at 257-58. Applying that rule, this Court accepted the date on which tenure was formally denied and the terminal contract offered as the date on which the filing period began to run. *See id.* at 261-62. The limitations period did not start when termination first became possible, or even probable.

By this logic, the filing period in constructive discharge cases likewise starts only when the employee's separation from employment becomes inevitable. In constructive discharge cases, "discharge" is not inevitable until the employee's "decision to leave." *See Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004). Indeed, as this Court has put it, in a constructive discharge claim, the acts of an employer are only "precipitating conduct" to the employee's decision to resign. *Id.*

The EEOC agrees. As the Commission has explained in applying *Ricks* to a constructive discharge claim, when an employee is given an *option* to retire, "the decision to terminate is tentative; *the employee himself* can avoid the adverse employment decision by accepting the [other] option." Br. of the EEOC as Amicus Curiae in Support of the Appellant at *11 & n.2, *Bailey v. United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245. The EEOC therefore concluded that constructive discharge claims accrue "on the date on which [the plaintiff] informed [the defendant] of his intention to accept the resignation option." *Id.* at *9-10; *see also [Anonymous] v. Shinseki*, EEOC Doc. No. 0120141607, 2014 WL 3697473 (July 18, 2014).

These views of the EEOC – which has been charged by Congress with interpreting and enforcing Title VII – are "entitled to respect," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002) (EEOC interpretations entitled to *Skidmore* deference).

The date-of-resignation rule finds further support in *Morgan*. There, this Court explained that the appropriate starting point for limitations periods "varies with the [employment] practice" at issue. *Morgan*, 536 U.S. at 110. *Morgan* dealt with a hostile work environment claim, which is "different in kind from discrete acts," *id.* at 115, because it "is composed of a series of separate acts that collectively constitute one 'unlawful employment practice,'" *id.* at 114, 117 (quoting 42 U.S.C. § 2000e-5(e)(1)). Because many acts of the employer may contribute to a hostile environment and thus "encompass[] a single unlawful employment practice," the most recent event "contributing to the claim" triggers the filing period. *Id.* at 117-18.

Likewise here, as this Court has recognized, a constructive discharge is composed of multiple acts: "both an employee's decision to leave and precipitating conduct." *Suders*, 542 U.S. at 148. Accordingly, resignation triggers the filing period for a constructive discharge claim.

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

A. The Date-Of-Resignation Rule Is Easy To Administer.

1. This Court has recognized that "the legislative purpose to create an effective remedy" is frustrated by "uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." *Wilson v. Garcia*, 471 U.S 261, 275 (1985). Needlessly complicated limitations analyses are "costly to all parties," because plaintiffs "may be denied their just remedy" if they anticipate the wrong statute of limitations, while defendants "cannot calculate their contingent liabilities" without knowing when claims will expire. *Id.* at 275 n.34.

In the Title VII context, administrability is particularly important, as thousands of complaints are considered each year by administrative agencies (and many, thereafter, by federal courts). In 2014, for example, the EEOC received more than 4,000 constructive discharge complaints under Title VII alone.[7]

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[7] EEOC, *Statutes by Issue FY 2010 – FY 2014*, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited July 2, 2015).

Administrability concerns motivated this Court's decision in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988), which held that a 300-day federal filing window applies to employees who lodge complaints with state fair employment agencies whether their claims are timely under state law or not. *Id.* at 124-25. The Court declined to adopt a requirement that "would embroil the EEOC in complicated issues of state law," observing that the EEOC "has neither the time nor the expertise" to address those issues, and instead embraced a rule that was "both easily understood by complainants and easily administered by the EEOC." *Id.* Likewise here, the date-of-resignation rule is the "simple approach," *Wilson*, 471 U.S at 275 n.34, which is easy to understand and apply.

2. The Tenth Circuit's "last discriminatory act" rule contravenes these principles, requiring a complex inquiry at the outset of constructive discharge cases.

For one thing, pegging the beginning of the filing period to the employer's "last discriminatory act" would require adjudicators, before claims can be heard on their merits, to sift through disputed timelines and contested evidence to determine whether, and exactly when, particular acts took place. *See, e.g.*, *Barone v. United Airlines, Inc.*, 355 Fed. App'x. 169, 173, 184-85 (10th Cir. 2009) (reversing summary judgment in a constructive discharge case by crediting a plaintiff's view of several meetings even though "the timing of these meetings [was] unclear, and the parties dispute[d] [their] substance").

In addition, if the Tenth Circuit's rule were adopted, courts necessarily would struggle to develop a standard (or standards) for what constitutes a "discriminatory act" sufficient to trigger the limitations period. In determining which "acts" count for statute of limitations purposes, courts might consider two existing categories of employment discrimination claims, but neither formulation would provide a sensible way to determine when the clock begins to run in constructive discharge cases.

First, with regard to Title VII's substantive antidiscrimination provision, courts construe the language of the statute itself, which prohibits disparate treatment affecting the "terms, conditions, or privileges of employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *see also* 42 U.S.C. § 2000e-2(a)(1). Determining what constitutes a term, condition, or privilege of employment can be a difficult task.

For example, when a constructive discharge emerges from an allegedly hostile work environment, a court might have to pick from a series of acts of varying severity to determine whether the discriminatory conduct affected the terms, conditions, or privileges of employment. Assessing when a hostile work environment existed "is not, and by its nature cannot be, a mathematically precise test." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). In fact, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor*, 477 U.S. at 67. So agency adjudicators and lower courts would struggle to determine whether non-actionable conduct is a

"last act" rising to the level of "discriminatory" solely for the purpose of triggering the constructive discharge filing period.

Second, in retaliation cases, the Court requires conduct that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). This analysis, too, is "simply not reducible to a comprehensive set of clear rules." *Thompson v. N. American Stainless, LP*, 562 U.S. 170, 175 (2011).

If the matter, as in this case, were a retaliatory constructive discharge, a court could be required to ask the highly context-dependent question whether the employer's "last act" would tend to discourage reporting of discrimination given the "constellation of surrounding circumstances, expectations, and relationships." *Burlington Northern*, 548 U.S. at 69 (citation and internal quotation marks omitted). For instance, a "change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children." *Id.* Indeed, in this case, the district court and the court of appeals disagreed over whether Mr. Green's emergency placement was materially adverse under *Burlington Northern*. *See* Pet. App. 24a-26a.

The Tenth Circuit's approach thus would demand "analysis of the particular facts of each claim," which would "inevitably breed[] uncertainty and time-consuming litigation." *Wilson*, 471 U.S. at 273. This Court reached an analogous conclusion in the constructive termination context, finding

"indeterminate and unworkable" a standard that would have required lower courts "to determine whether a breach [by the defendant-franchisor] is serious enough effectively to end a franchise." *Mac's Shell Serv., Inc. v. Shell Oil Products Co.*, 559 U.S. 175, 187 (2010). Accordingly, the Court chose a more administrable standard, finding that constructive termination may occur only when a franchisee actually abandons the franchise. *Id.* at 182-83.

3. When deciding issues of substantive anti-discrimination law, courts sometimes cannot avoid complex questions. But with respect to the threshold timeliness question presented here, choosing among different discrimination standards – each of which would force administrators and courts to decide which acts count for starting the filing period – is unnecessary. Five circuits already have developed an easily administered test: the date-of-resignation rule.[8] Under this test, the limitations period begins with a discrete, readily identifiable act: the employee's resignation. This date-of-resignation analysis mirrors the easily administered date-of-termination rule, which is effective because "[d]iscrete acts such as termination" are "easy to

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[8] *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998); *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998); *Hukkanen v. Int'l Union of Operating Eng'rs Hoisting & Portable Local No. 101*, 3 F.3d 281, 285 (8th Cir. 1993); *Young v. Nat'l Ctr. For Health Servs. Research*, 828 F.2d 235, 238 (4th Cir. 1987).

identify." *National R. R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Likewise, in constructive discharge cases, the date of resignation will be when the employee gives notice or simply leaves the workplace.

B. The Date-Of-Resignation Rule Promotes Fairness For Lay Claimants.

Under Title VII, "laypersons, rather than lawyers, are expected to initiate the process" of adjudication. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988). That being so, a "guiding principle" when construing Title VII is to accommodate laypeople and avoid onerous filing procedures. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982).[9] Clear rules like the date-of-resignation rule further that goal.

"[L]imitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Del. State Coll. v. Ricks*, 449 U.S. 250, 262 n.16 (1980). In *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), for example, this Court declined to

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[9] The EEOC's online overview of the administrative complaint process for federal sector employees is directed at lay claimants and never suggests that a claimant would be represented by an attorney. *See* EEOC, *Overview of Federal Sector EEO Complaint Process*, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited July 2, 2015).

construe Title VII to require that an employment discrimination charge be verified within the filing period, in part to "ensure[] that the lay complainant . . . will not risk forfeiting his rights inadvertently." *Id.* at 115.

The Tenth Circuit's last-discriminatory-act standard would result in employees unwittingly forfeiting constructive discharge claims. Especially given the general rule (and reasonable intuition) to the contrary, employees are unlikely to know that their filing period begins before they resign, as this limitation appears nowhere in the relevant statutes and regulations. Even more troubling, a layperson's opportunity to challenge a forced resignation could *end*, as it did here, before his resignation. No reasonable employee would think that his claim for constructive discharge could conceivably lapse before he resigned.

Acknowledging this anomaly, the Tenth Circuit suggested that employees "could likely amend" earlier-filed administrative charges to include a constructive discharge claim. Pet. App. 22a. But the Tenth Circuit's view misconstrues constructive discharge claims. Constructive discharge is *itself* an independent cause of action that does not require a prior discriminatory act rising to the level of an independent Title VII violation. *See Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004). Because a constructive discharge claim will not necessarily be paired with another employment discrimination claim, some constructively discharged employees have no earlier complaints to amend. *See, e.g.*, *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1112-13 (1st Cir. 1989); *Young v. Nat'l Ctr. For Health*

Servs. Research, 828 F.2d 235 (4th Cir. 1987). And in any event, many laypeople will not know that they must amend, let alone know how.

Furthermore, even if a claimant had filed an earlier administrative complaint and had the wherewithal to try to amend it, an amendment still might not solve the problem. The EEOC informs claimants that "[t]he fact that you filed an earlier charge may not extend the deadline" because "the strict deadlines for filing a charge also apply when you want to amend a charge." EEOC, *After You Have Filed a Charge*.[10] Under the EEOC's standard, even if Mr. Green had immediately filed a discrimination complaint on December 16, he might not have been able to amend that complaint to include constructive discharge, as he resigned 55 days after signing the agreement. The Tenth Circuit's trap for the unwary would persist.

C. The Date-Of-Resignation Rule Promotes Conciliation.

As this Court has recognized, "[v]oluntary compliance with Title VII . . . is an important public policy. Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983). To this end, the Court has

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[10] http://www.eeoc.gov/employees/afterfiling.cfm (last visited July 2, 2015).

looked to whether an action would "effect Congress' intention to promote conciliation rather than litigation in the Title VII context." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). Starting the filing period at resignation encourages cooperative efforts between employers and employees without allowing inappropriate delay.

1. The date-of-resignation rule permits employees to make good-faith efforts to continue employment and resolve concerns with their employers. Where employment relationships have begun to deteriorate, this rule encourages employees to stay on the job and try to work things out informally, thus promoting workplace stability.

The court of appeals' rule, by contrast, would encourage employees to quit soon after perceived discriminatory acts to avoid a time bar, rather than make good-faith efforts to resolve matters internally. As the EEOC has observed, "[s]uch an approach to timeliness encourages the filing of unnecessary charges, forcing the employee to act while he is deliberating an option that may well render the filing of any charge moot." Br. of the EEOC as Amicus Curiae in Support of the Appellant at *13, *Bailey v. United Airlines, Inc.*, 279 F3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245.

Furthermore, the Tenth Circuit's rule would hinder conciliation even for employees attempting to stay at their jobs despite working conditions that a reasonable person could find intolerable. As this Court noted in *Mac's Shell Service, Inc. v. Shell Oil Products Co.*, "'sunk costs, optimism, and the habit of years might lead franchisees to try to make the new

arrangements work, even when the terms have changed so materially as to make success impossible.' But surely these same factors compel employees and tenants – no less than service-station franchisees – to try to make their changed arrangements work." 559 U.S. 175, 185 (2010) (citation omitted).

Moreover, filing a complaint while on the job may strain relationships with an employer and exacerbate already onerous working conditions. This result is all the more likely when (as here) the employee has already experienced discriminatory retaliation. An employer who has previously responded to an employee's discrimination claim by taking adverse actions against that employee is likely to respond to subsequent complaints with further retaliation. This could make conciliation efforts impossible even if an employee made good-faith efforts to stay at her current job.

If distorted incentives were not enough, employees face a catch-22 under the last-discriminatory-act rule. If employees delay filing their claims, they risk running out the limitations period. But employees who quit immediately risk forfeiting their claims, because courts "generally require that the employee must give higher levels of management the opportunity to correct an adverse situation before quitting and claiming constructive discharge." *See* Lindemann, *supra*, at 21-44.

2. Contrary to the Tenth Circuit's suggestion, the date-of-resignation rule would not encourage employees "to extend the date of accrual indefinitely." Pet. App. 20a.

Unlike other claims, where there may be financial incentives to delay a suit, *see Petrella v. MGM, Inc.*, 134 S. Ct. 1962, 1976 (2014), an employee does not benefit from waiting to bring a constructive discharge claim. A claim for back pay under Title VII does not increase in value if a suit is delayed because no back pay accumulates when a person is still employed and receiving a paycheck.

Furthermore, employees who delay filing constructive discharge claims will have difficulty proving "working conditions so intolerable that a reasonable person would have felt compelled to resign." *Suders*, 542 U.S. at 147. Courts have recognized that the "freshness of the instances of harassment" will affect whether an employee's resignation was really a constructive discharge. *See, e.g.*, *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 n.2 (9th Cir. 1998). Put another way, the longer an employee delays her resignation, "the more difficult it may be to prove that the allegedly intolerable conditions of employment actually were intolerable on an objective basis, or that it was these conditions that caused the employee's resignation." *Mullins v. Rockwell Int'l Corp.*, 936 P.2d 1246, 1251 (Cal. 1997) (internal citation omitted) (adopting date-of-resignation rule for constructive wrongful discharge).

3. A last-act rule also would enable employers to lull unwary employees into letting their claims lapse. A federal employer could offer an employee a resignation option and give the employee more than 45 days to consider retiring, thereby insulating itself from a constructive discharge claim. In that situation, the clock would begin to run when the

employer imposed the choice, but an unwary employee would not know to file a constructive discharge complaint before deciding that resignation was the lesser of two evils. This would subvert Title VII's anti-discrimination purpose and allow employers to "accomplish indirectly what the law prohibits being done directly." Lindemann, *supra*, at 21-33.

Thus, under the last-act rule, some claimants like Mr. Green would find that the 45-day period to bring their claims came and went while they were considering whether to stick it out or resign. That rule – which punishes employees for trying to make reasoned decisions about their professional futures – undermines the purposes of Title VII, which seeks both to root out discrimination and to promote employer-employee harmony.

CONCLUSION

The judgment of the court of appeals should be reversed.

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