No. 14-___

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

PATRICK R. DONAHOE, Postmaster General,
United States Postal Service,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marvin Green respectfully petitions for a writ of certiorari to review 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 App. 28a) is unpublished but is available at 2013 WL 424777.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. On October 6, 2014, Justice Sotomayor extended the time to file this petition for a writ of certiorari to and including November 26, 2014. *See* No. 14A368. 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."

INTRODUCTION

Every year, thousands of employees bring constructive discharge claims under Title VII of the Civil Rights Act of 1964 and related statutes prohibiting workplace discrimination. Under constructive discharge doctrine, if those employees "resign because of unendurable working conditions," they are entitled to the same remedies available to employees who have been formally discharged in violation of those anti-discrimination statutes. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). To bring such claims to court, employees must first seek redress in mandatory administrative proceedings.

Yet the federal courts of appeals are intractably divided over *when* employees must initiate those proceedings. Five courts of appeals have held that the filing period for a constructive discharge claim begins when the employee resigns, defined as the date when he gives "definite notice" of his decision to leave. *Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000). This is the earliest date that the claim is complete and actionable. By contrast, three other courts of appeals, including the Tenth Circuit below, start the filing period with the employer's last discriminatory act allegedly giving rise to the resignation – before the constructive discharge claim exists.

The federal government itself has provided conflicting answers to the question presented. The Equal Employment Opportunity Commission (EEOC)

has taken a position consistent with the majority rule, but in the proceedings below the United States Postal Service, represented by the Department of Justice, argued for the minority's last-act rule.

This case – in which the choice between these two timeliness rules is outcome-determinative – provides the Court with an ideal vehicle to restore uniformity to the legal landscape, ensuring that constructive discharge claims will no longer turn on geographical happenstance.

STATEMENT OF THE CASE

A. Legal Background

1. Constructive discharge 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 emerged in the 1930s, when it proved necessary to resolve labor disputes "in which employers coerced employees to resign," rather than simply discharging them. *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 it was applied in these new statutory contexts. *Id.* at 141-42.

A constructive discharge claim "involves both an employee's decision to leave and precipitating conduct." *Suders*, 542 U.S. at 148. 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?" *Id.* at 141.

In federal anti-discrimination law, as in other contexts, the doctrine aims 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. 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-33 (5th ed. 2012). For that reason, employees who prove a constructive discharge may recover "all damages available for formal discharge . . . including both backpay and, in fitting circumstances, frontpay." *Suders*, 542 U.S. at 147 n.8.

2. Employees bring thousands of constructive discharge claims to the federal Equal Employment Opportunity Commission (EEOC) every year.[1] These complaints principally arise under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin; the Age Discrimination in Employment Act (ADEA), which prohibits discrimination against older workers; and the Americans with Disabilities Act (ADA), which prohibits discrimination against workers with disabilities. The major employment discrimination statutes all prohibit retaliation against an employee who advanced a prior claim of discrimination. *See* 42

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[1] *See Statutes by Issue FY 2010 – FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Nov. 19, 2014).

U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a) (ADA).

These employment discrimination laws share a common approach to enforcement, requiring employees first to pursue their claims through administrative channels before turning to the courts. *See Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1308-09 (10th Cir. 2005). These 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). The process includes certain time windows – 180 or 300 days after discrimination occurs for private-sector employees, 45 days for federal government employees – within which employees are expected to report discrimination.[2]

Although some aspects of the process are different for federal employees than they are for

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[2] In the federal sector, employees pursuing claims under any of the major employment discrimination statutes "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. § 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) (Title VII); *see also* 42 U.S.C. § 12117(a) (incorporating the Title VII process for ADA complaints); 29 U.S.C. § 626(d)(1) (setting forth the same time limits for ADEA complaints).

private-sector employees, courts regularly apply timeliness and other procedural rules recognized in one sector to the other. *See, e.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 981-82 (7th Cir. 2008) (finding that a timeliness rule developed in a private sector context "provides the appropriate standard" in federal-sector cases); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (holding that equitable tolling rules "applicable to suits against private defendants should also apply to suits against the United States"). For both categories of employees, a failure to initiate a complaint in the administrative process within the applicable timeframe creates a nonjurisdictional bar to any later suit. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

B. Factual And Procedural Background

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

In 2008, Mr. Green, then postmaster for Englewood, Colorado, applied for a promotion. Pet. App. 29a. Building on a thirty-five 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. Appellant's Court of Appeals Appendix (CA10 App.) 32; Pet. App. 3a. Despite an unblemished record, he was passed over for the job. *Id.* Believing that the person hired was less experienced and had not even submitted an application, CA10 App. 34, Mr. Green thought he was being discriminated against because he is black. Pet.

App. 3a. He contacted a Postal Service EEO counselor to have his concerns investigated. *Id.*

Relations with his supervisors soured in the wake of his discrimination complaint. Pet. App. 3a. In 2009, while his complaint proceeded through administrative channels, Mr. Green expressed concern that he was the victim of retaliation, twice seeking help from Postal Service EEO counselors. *Id.* Things came to a head in November of that year. Shortly after the EEOC assigned an administrative law judge to oversee discovery concerning the nonpromotion, *see* CA10 App. 673-77, Mr. Green received a one-page letter from his Postal Service superiors, summoning him to appear for an "investigative interview" and suggesting that he consider having a union representative present, *id.* 433.

At that meeting, held on December 11, 2009, Postal Service supervisors confronted him with various mismanagement allegations, most seriously accusing him, without any prior notice, of "intentionally delaying the mail" – a criminal charge. CA10 App. 714-15, 804. Agents from the Postal Service's Office of the Inspector General (OIG), who had been contacted about the mail-delay charge, also showed up at the December 11 meeting to investigate, and Mr. Green was ordered to meet with them. Pet. App. 4a. Finally, citing Mr. Green's alleged "[d]isruption of day-to-day postal operations," his superiors reassigned him, effective immediately, to "Emergency Placement in Off-Duty Status." CA10 App. 600. They informed him that he could not return to duty until "the cause for nonpay status cease[d]" and suspended his pay. *Id.* 600, 795.

Rattled, Mr. Green sought help from his union representative, who in turn entered into a flurry of negotiations with a 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 union representative that "the OIG is all over this" and the charge is a "criminal issue" that "could be a life changer." CA10 App. 974.

After several days of back-and-forth, a deal was struck and signed on December 16, 2009. Pet. App. 5a. Under the agreement, Mr. Green's emergency placement ended, and he was allowed to use accumulated annual and sick leave to receive his then-current salary through March. CA10 App. 610. But he was also removed from his Englewood position and demoted to a placement in Wamsutter, Wyoming. Pet. App. 5a. 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." CA10 App. 610. If he had reported to Wamsutter, his pay would have been cut by nearly $40,000 per year. *Id.* 73. In sum, 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.

After spending January 2010 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. Mr. Green contacted an EEO counselor on March 22, forty-one days after his February 9 resignation. Pet. App. 6a. He alleged that, given the choice he was forced to make, he had been constructively discharged in retaliation for protected Title VII activity. CA10 App. 722-25. The agency accepted the complaint for investigation. Pet. App. 6a-7a.

The parties agree that Mr. Green's complaint of constructive discharge, if timely, properly initiated the EEO process. They also agree that Mr. Green thereafter timely pursued the remaining administrative remedies available to him. *See* CA10 App. 40, 199.

3. Mr. Green then filed suit in the District of Colorado against respondent, the Postmaster General. The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1343.

Mr. Green alleged, in five distinct claims, unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964. Pet. App. 7a. Three of those claims were dismissed on procedural grounds by both the district court and the Tenth Circuit and are not at issue here. *Id.* 2a, 7a. The district court also dismissed another claim based on Mr. Green's placement on "emergency" unpaid leave for five days, but the Tenth Circuit reversed the lower court's finding that the placement was not adverse and remanded. *Id.* 23a-27a. That claim also is not before this Court.

Regarding the claim at issue here – Mr. Green's constructive discharge – the district court found that his signing the December 16 agreement triggered the forty-five-day filing period, even though the agreement left him a choice between retirement and relocation to Wyoming. Pet. App. 37a-39a. The district court concluded that when the agreement was signed the Postal Service's conduct had "culminated" and the writing was on the wall. *Id.* Because Mr. Green had not initiated contact with an EEO counselor on his constructive discharge claim within forty-five days of that date, the court held, his claim was time-barred. *Id.*

4. The Tenth Circuit affirmed, holding, 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-22a.

The court of appeals recognized that other circuits have embraced a different rule – that the filing period begins "on the date the employee resigned." Pet. App. 19a. And it acknowledged that its decision was at odds with the practical reality 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. The panel instead joined two other circuits in holding that the limitations period is triggered by the "last discriminatory act" of the employer allegedly giving rise to the resignation. *Id.* 20a. Finding that Mr.

Green could not show that "the Postal Service did anything more to him after December 16," the panel held that his March 22 contact with an EEO counselor was outside the forty-five-day limitations period. *Id.* 22a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Intractably Split Over When The Filing Period For A Constructive Discharge Claim Begins To Run.

The courts of appeals are divided over which of two conflicting rules governs when the filing window for a constructive discharge claim opens under federal employment discrimination law. The Tenth Circuit's decision deepened that split, which will not be resolved without this Court's definitive guidance.

A. Five Courts Of Appeals Have Held That The Filing Period Starts When An Employee Resigns.

1. A majority of the circuits to have considered the question have ruled that the filing period for a constructive discharge claim begins to run on the date the employee resigns. In declining to adopt that approach, the Tenth Circuit acknowledged that its view is at odds with the established rule of several other circuits. Pet. App. 19a.

The Fourth Circuit first articulated the majority rule over twenty-five years ago. It held that "resignation *is* a constructive discharge – 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) (emphasis added). Young resigned from work eight

days after her employer's discriminatory conduct resulted in her suspension. *Id.* at 237. The district court decision below had measured the time period from the suspension date and dismissed the claim. *Id.* at 238-39.[3] But because the court treated Young's resignation as an "act" of her employer, it concluded that she had timely filed her claim and reversed. *Id.* at 237-39.

The Ninth Circuit has reached the same conclusion, holding, "like the Fourth Circuit, that in constructive discharge cases periods of limitation begin to run on the date of resignation." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998).

Expressly "agree[ing] with the Ninth Circuit," the Second Circuit in *Flaherty v. Metromail Corp.*, 235 F.3d 133 (2000), held that the filing period begins when an employee gives "definite notice of her intention to retire" – a rule, the court emphasized, that "should be the same in all cases of constructive discharge." *Id.* at 138. The court made clear that the date of notice – and not the employee's last day at work several months later or any act of the employer – started the filing period. *Id.* at 138-39.

In addition to those three circuits, which the Tenth Circuit acknowledged have adopted a date-of-resignation rule, Pet. App. 19a, the First and Eighth Circuits have adopted the same rule. In *Hukkanen v.*

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[3] *See Young v. Nat'l Ctr. for Health Servs. Research*, 704 F. Supp. 88, 88 & n.* (D. Md. 1988) (setting forth relevant dates), *aff'd*, 887 F.2d 1082 (4th Cir. 1989), *cert. granted, judgment vacated*, 498 U.S. 1019 (1991).

Int'l Union of Operating Eng'rs, Hoisting & Portable Local No. 101, 3 F.3d 281 (8th Cir. 1993), the Eighth Circuit held that an employee's discrimination charge was timely after concluding that her employer's "last act of discrimination against [her] *was* her constructive discharge," or forced resignation. *Id.* at 285 (emphasis added). Hukkanen was subjected to sex discrimination through August 1984. *Id.* She resigned in October and filed her EEOC charge in March 1985. *Id.* Given the 180-day filing period, her charge was timely when measured from the date of resignation. But it would have been untimely if measured from the employer's alleged last act of discrimination, as the Tenth Circuit's rule would have required.

Similarly, the First Circuit has held that, for a constructive discharge claim, "the limitations period commenced when the employees elected to participate" in an early retirement program. *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 123 (1st Cir. 1998). There, American Airlines had presented a "'take it or leave it'" choice of retiring early or risking involuntary termination – its sole allegedly discriminatory act – to all the employees on the same date, but it gave them roughly two months to decide whether to accept. *Id.* The court used the various individual dates on which each employee submitted his or her formal resignation as the beginning of the filing periods. *Id.* at 123 & n.12.

2. The Tenth Circuit was wrong when it suggested that "[p]erhaps" the conflicting cases it had identified from other circuits "could be distinguished

on the ground that the last act of discrimination was within the limitations period." Pet. App. 20a.

In *Young*, for example, the claim was timely only because the Fourth Circuit measured the filing window from the date the employee officially resigned. 828 F.2d at 238. At the time, federal employees like Young and Green had thirty days to contact an EEO counselor. *See id.* at 237. Young filed her EEO claim thirty-seven days after her suspension – the employer's last act giving rise to her resignation. *See id.*; *Young*, 704 F. Supp. at 88 n.*. She resigned, however, twenty-nine days before she filed, and, on that basis, the claim was timely. *Young*, 828 F.2d at 238.

Moreover, in the Eighth Circuit's decision in *Hukkanen* – which the Tenth Circuit did not discuss – the offending conduct extended through August, the employee resigned at the end of October, and she filed an EEOC charge the following March. 3 F.3d at 285. Given the 180-day filing window, had the court applied the Tenth Circuit's rule, the clock would have run out in February, making her March charge untimely. *See id.*

In any case, the remaining decisions cited by the Tenth Circuit cannot be "distinguished" because each establishes a generally applicable rule governing future constructive discharge cases. The Ninth Circuit expressly adopted the general rule established by the Fourth Circuit in *Young*. *See Draper*, 147 F.3d at 1111. And the Second Circuit, as noted, stated that its date-of-resignation rule "should be the same in all cases of constructive discharge." *Flaherty*, 235 F.3d at 138.

In sum, had Mr. Green been employed in any of the circuits that have a date-of-resignation rule, binding precedent would have rendered his claim timely and required it to be resolved on its merits.

B. Three Courts Of Appeals, Including The Tenth Circuit Below, Have Rejected The Majority Rule.

By contrast, in three circuits, employees like Mr. Green lose their claims before reaching the merits. That is what happened to Mr. Green in the Tenth Circuit, which joined two other circuits in pegging the running of the filing period to "some discriminatory act by the employer within the limitations period." Pet. App. 22a.

The Seventh Circuit was the first to hold that the filing period for a claim of constructive discharge is triggered on the date that an employer "takes some adverse personnel action" against its employee. *Davidson v. Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992). It endorsed the district court's conclusion that the employee, who had alleged harassment by a supervisor, did not timely file her claim because she presented it "more than 180 days after her transfer out of [her supervisor's] department, where the last discriminatory act against her took place." *Id.*

The D.C. Circuit adopted the same rule in *Mayers v. Laborers' Health & Safety Fund of North America*, 478 F.3d 364 (D.C. Cir. 2007) (per curiam). Because an employee alleging constructive discharge under the ADA "failed to identify a single act of discrimination or retaliation" within the limitations period – apart from her resignation, which the court

declined to treat as an "act" of her employer – the court dismissed her constructive discharge claim as untimely. *Id.* at 370.

The Court should grant review to resolve this deep and longstanding conflict among the circuits.

II. The Question Presented Is Important To Employees And Employers.

As long as the question presented remains unanswered by this Court, thousands of employees and their employers operate in a legal environment lacking predictability and uniformity. Not only have eight courts of appeals arrived at conflicting rules, but the federal government itself has advanced different positions over the years. This uncertainty should not persist.

1. This Court views timeliness questions under the anti-discrimination statutes as important. Thus, the Court repeatedly has granted review to resolve questions about how time limits apply to employees pursuing employment discrimination claims. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621, 623-32 (2007) (disparate pay claim was untimely); *Nat'l Passenger R.R. Corp. v. Morgan*, 536 U.S. 101, 105 (2002) (hostile work environment claim was timely if underlying conduct outside the statutory period was related to any conduct within it); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 108-09 (2002) (claim initiated but not verified within the applicable filing period was timely); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (equitable tolling applied to federal- and private-sector timeliness requirements alike); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123-25 (1988) (300-

day federal filing period applied even when a state-agency charge was untimely under state law); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (time limit for filing administrative claim was non-jurisdictional); *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-59 (1980) (claim was untimely because filing period began when discriminatory decision was made); *Int'l Union of Elec., Radio & Mach. Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 241-44 (1976) (discharge claim was timely given retroactive application of expanded filing window).

The Court should grant review here as well. Thousands of constructive discharge claims are brought each year. In 2013 alone, the EEOC received 4,297 constructive discharge complaints under Title VII, 1,185 under the ADEA, and 1,705 under the ADA.[4] More than 5,000 complaints received by the EEOC in 2013 alleged constructive discharges that, like Mr. Green's, were retaliation for prior protected EEO activity.[5] Agencies and courts must determine the timeliness of each of these administrative complaints, and they cannot do so consistently absent a clear answer as to when the clock starts running.

2. While the split over this question persists, employers' liability for otherwise identical

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[4] *Statutes by Issue FY 2010 – FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Nov. 19, 2014).

[5] *Bases by Issue FY 2010 – FY 2013*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm (last visited Nov. 19, 2014).

constructive discharge claims varies from circuit to circuit.

Allowing geographical happenstance to affect the timeliness of the thousands of constructive discharge claims brought each year produces untenable results for employers as well as employees. For instance, a company operating both in the District of Columbia, where the D.C. Circuit's rule controls, and in its suburbs, where the Fourth Circuit's rule controls, faces different consequences for otherwise identical constructive discharge claims, depending on the jurisdiction in which those claims arise. Moreover, companies that operate nationwide not only must litigate under both rules, but also face uncertainty in the handful of circuits where no rule has yet been announced.

By contrast, clear and uniform limitation periods vindicate the interests of both employees and employers. Because limitation periods protect employees "who promptly assert their rights" as well as employers "from the burden of defending claims arising from employment decisions that are long past," *Ricks*, 449 U.S. at 256-57, this Court can provide clarity that will benefit all parties and promote proper resolution of claims. Indeed, because constructive discharge claims have "profound consequences in employment litigation, with respect to both liability and damages," there is a particular need to resolve the circuit conflict presented here. 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-2 (5th ed. 2012).

3. The Government's own position has been inconsistent, heightening the importance of resolving the question presented.

Although Department of Justice lawyers argued below for what is now the Tenth Circuit's rule, Def. C.A. Br. 40-47, the EEOC has taken a contrary view. In an amicus brief, the EEOC – the federal agency charged with interpreting and enforcing federal employment discrimination law – cited the First, Second, Fourth, and Ninth Circuit decisions that adopted the date-of-resignation rule and *agreed* with them. *See* Brief of the EEOC as Amicus Curiae in Support of the Appellant at 9-10, 12, *Bailey v. United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245. The EEOC explained that the "operative date" for opening the filing window is "the date on which the *employee acts* on the option" to retire or risk termination. *Id.* at 10 (emphasis added). In other words, the limitations period begins to run when the employee "'effectively communicate[s] her intention to resign.'" *Id.* at 9 (alteration in original) (quoting *Flaherty v. Metromail Corp.*, 235 F.3d 133, 139 (2d Cir. 2000)). The EEOC went on to say that this approach is correct because "[a]n employee . . . should not have his hand forced before a claim has ripened." *Id.* at 12. Moreover, in its adjudicative capacity, the EEOC has adopted a variation of the date-of-resignation rule, tying the running of the clock to the effective date of an employee's resignation.[6]

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[6] *See* Gard v. Frank, EEOC Doc. No. 05890730, 1989 WL 1007278 (Sept. 8, 1989) (applying the effective-date rule to reverse an agency's dismissal for untimeliness); *see also, e.g.*, [Anonymous] v. Shinseki, EEOC Doc. No. 0120141607, 2014 WL 3697473 (July 18, 2014) (same).

III. This Case Is An Ideal Vehicle For Resolving The Conflict Among The Circuits.

This case provides this Court a particularly suitable vehicle to resolve the question presented.

1. An answer to the question presented will be outcome determinative for Mr. Green's constructive discharge claim. Under the majority rule, Mr. Green's claim would be timely, but under the minority rule, it was time-barred.

2. This case provides an opportunity to distinguish between the employee's resignation and the employer's last discriminatory act said to give rise to the resignation – dates that may overlap in other cases. In cases where the last act said to give rise to the resignation occurs on the same day as the resignation itself, it is impossible to consider the two rules except in the abstract. By contrast, here, these dates are distinct and uncontested, making this case an ideal vehicle for this Court to test the competing theories of timeliness over which the lower courts are divided.

3. A favorable outcome for Mr. Green will enable him to recover "all damages available for formal discharge," including backpay and possibly frontpay as well. *Pa. State Police v. Suders*, 542 U.S. 129, 147 n.8 (2004). By contrast, the remaining claim in the case, now remanded to the district court, allows only for the recovery of damages arising from the five days Mr. Green spent on emergency leave. Thus, his constructive discharge claim is fundamental to the further conduct of his case. *See Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945).

IV. The Tenth Circuit's Decision Is Incorrect.

The filing period for raising constructive discharge claims should not begin before the employee resigns. The Tenth Circuit's contrary holding – that the period runs from an employer's "last discriminatory act" allegedly giving rise to the resignation – disregards this Court's precedent and the purpose of constructive discharge doctrine. The Court should grant review and reverse the decision below.

1. The majority rule correctly begins the filing period when all elements of a constructive discharge claim are present, consistent with the default rule for limitations periods.

The 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). This well-established default 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).

Nothing in the relevant federal employment discrimination statutes alters that default rule here. An employee must actually resign to have a valid claim for constructive discharge. 1 Barbara T. Lindemann et al., Employment Discrimination Law 21-46 (5th ed. 2012). And because resignation is a

required element of constructive discharge, it makes no sense for the filing period for a constructive discharge claim to begin before the employee has resigned.

The Tenth Circuit's rule, however, allows the filing period to begin before all elements of a constructive discharge claim are present. Accordingly, the court of appeals held that Mr. Green's filing period expired ten days before he resigned. His opportunity to contest his constructive discharge came and went before he had any claim to bring. The majority rule properly rejects this anomalous result.

2. Particularly in light of the EEOC enforcement regime to which its rule applies, the Tenth Circuit erred in adopting an ambiguous standard that is difficult to administer.

Administrability is especially important in the employment discrimination context, where thousands of complaints are considered by administrative agencies and federal courts each year. That principle undergirded 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 agencies whether that claim was timely under state law or not. Electing the rule that avoided "embroil[ing] the EEOC in complicated issues" at the threshold stage, the Court rejected an alternative that would have required the EEOC to undertake burdensome case-by-case analyses of state law. *Id.* at 124.

The minority rule adopted by the Tenth Circuit below contravenes this principle by requiring agencies and courts to conduct a nuanced inquiry at the threshold of a constructive discharge case. Determining whether an employer's conduct rises to the level of a discriminatory act is a context-dependent endeavor because the significance of any given act "often depends on a constellation of surrounding circumstances, expectations, and relationships." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (internal quotation marks omitted). By pegging the beginning of the filing period to the employer's last discriminatory act, the minority rule may require an adjudicator to sift through disputed timelines and contested evidence to determine which acts were discriminatory for the purposes of the timing inquiry and when exactly they occurred.

The majority rule, by contrast, is easy to administer. The claim accrues, and the limitations period begins to run, when the employee resigns – a discrete, readily identifiable act. That rule is "easily understood by complainants and easily administered by the EEOC." *Commercial Office Prods.*, 486 U.S. at 124.

To be sure, courts must sometimes inquire into the date of an alleged last discriminatory act. But this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), instructs that whether this inquiry is necessary "varies with the practice" at issue. *Id.* at 110. The "very nature" of a hostile work environment claim, for instance, "involves repeated conduct." *Id.* at 115. As such, courts have no option but to undertake the challenge

of identifying a "last act" among many to determine when a filing period begins. But although such last acts are difficult to ascertain, "[d]iscrete acts such as termination . . . are easy to identify." *Id.* at 114. Indeed, as noted earlier, constructive discharge claims cannot exist until the occurrence of a particular discrete act – the employee's resignation. A last-act rule is both unnecessary and ill-fitting.

3. Clear rules are especially appropriate in a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Commercial Office Prods.*, 486 U.S. at 124.

The need to accommodate laypeople provides "a guiding principle for construing the provisions of Title VII." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982). In *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), for example, this Court declined to 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. In other words, "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." *Del. State Coll. v. Ricks*, 449 U.S. 250, 262 n.16 (1980).

Under the Tenth Circuit's rule, however, the limitations period begins to run before the employee has resigned. Employees are unlikely to know or even suspect that their filing period is limited in this way, presenting an obstacle nowhere evident in the relevant statutes or regulations. The majority rule, by contrast, gives employees ample opportunity to present meritorious claims.

Aware that its rule could result in employees unwittingly forfeiting valid claims, the Tenth Circuit suggested that employees "could likely amend" earlier-filed administrative charges to include a constructive discharge claim. Pet. App. 22a.

But the possibility of amending is not the panacea the Tenth Circuit envisioned. The need to amend is particularly problematic for laypeople, who likely will not know about it. The Tenth Circuit's approach thus injects a needless additional procedural hurdle at which an employee "risk[s] forfeiting his rights inadvertently," *Edelman*, 535 U.S. at 115. And because constructive discharge is "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), some constructively discharged employees will have no earlier complaint to amend.

4. Contrary to the Tenth Circuit's concerns, under the date-of-resignation rule currently prevailing in five circuits, employees have no incentive "to extend the date of accrual indefinitely" or to submit unmeritorious claims. Pet. App. 20a.

There is little reason to believe that delayed suits would materialize. A long-postponed resignation cannot form the basis of a successful constructive discharge claim, absent some compelling reason for waiting. The "freshness of the instances of harassment" affects any adjudication on the merits. *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1110 n.2 (9th Cir. 1998). Employees, then, have every incentive to bring meritorious claims before they are stale, and courts can easily dispose of claims predicated on long-past conduct on the merits. In the

rare case where it is necessary, employers also can assert a laches defense. *Morgan*, 536 U.S. at 121.

Under the Tenth Circuit's rule, it is *employers* who have an incentive to use delaying tactics – to discourage employees from preserving their claims. Employers seeking to avoid liability for constructive discharge may, for example, propose coercive severance agreements or settlements with fairly long periods for employees to consider their options. 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 she decided that resignation was the lesser of two evils.

In other words, by tethering the running of the clock to alleged acts of the employer, the Tenth Circuit's rule encourages what the constructive discharge cause of action seeks to curb – that is, it enables employers to "accomplish indirectly what the law prohibits being done directly," Lindemann, *supra*, 21-33.

5. Contrary to the Tenth Circuit's suggestion, the majority rule better comports with this Court's reasoning in *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Ricks held that the filing period begins with the occurrence of the discriminatory act at issue – in that case, an employer's decision to deny tenure – and not when a "delayed but inevitable consequence" of that act is felt. 449 U.S. at 257-58. The Tenth Circuit erroneously concluded that *Ricks*' focus on the "'time of the *discriminatory acts*,'" Pet. App. 20a (quoting *Ricks*, 449 U.S. at 258), precluded the use of the

employee's resignation date as the beginning of the limitations period for a constructive discharge claim.

But the Tenth Circuit's analysis overlooks an important aspect of constructive discharge doctrine. It is well established that a "constructive discharge involves *both* an employee's decision to leave *and* precipitating conduct." *Suders*, 542 U.S at 148 (emphases added). For this reason, an employee's resignation cannot be "inevitable" – and the discriminatory act of constructive discharge cannot be complete – until the employee elects to depart rather than tolerate the working conditions created by the employer. Here, for example, Mr. Green's resignation did not become inevitable until he actually decided to retire rather than relocate to Wyoming.

By contrast, the majority rule correctly recognizes that a constructive discharge is itself a discriminatory act, not a delayed but inevitable consequence of prior discrimination. Indeed, the EEOC has interpreted *Ricks* consistent with this view.[7] A faithful application of *Ricks* yields the majority rule: the limitations period for a constructive discharge claim can only begin once the employee has resigned.

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[7] *See* Brief of the EEOC as Amicus Curiae in Support of the Appellant at 5-8, 10-11, *Bailey v. United Airlines, Inc.*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245 (citing *Ricks*, 449 U.S. at 257-58).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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