No. 00-1614

In the Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

ABNER MORGAN, JR.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner endorses a standard for application of the continuing violation doctrine – elucidated in *Galloway* v. *General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996), and *Sabree* v. *United Bhd. of Carpenters & Joiners, Local No. 33*, 921 F.2d 396 (1st Cir. 1990) – that gives effect to all of the statutory provisions in Title VII, is consistent with this Court's well-developed jurisprudence on the application of statutes of limitations generally, and is consistent with Title VII's remedial purpose of eradicating discrimination.

By contrast, respondent and his amici offer a hodgepodge of proposed standards for applying the continuing violation doctrine.[1] Many of respondent's arguments depend on the premise that Section 706(e) is "an exhaustion requirement, not a statute of limitations." LDF Br. 7; Resp. Br. 15-17. That astonishing premise[2] requires respondent to ignore Section 706(e)'s explicit statutory language, its legislative history, and *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), which held that Section 706(e) is a statute of limitations.

By discarding Section 706(e), respondent attempts to use the statutory language and legislative history of Section 706(g), a provision that caps the amount of backpay a Title VII plaintiff

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[1] Compare Resp. Br. 36-39 and LDF Br. 19-23 (urging adoption of the standard set forth by the Ninth Circuit below and rejection of *Berry* v. *Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983)) with Impact Br. 19-28 (urging adoption of the standard adopted in *Richards* v. *CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001)) and Lwyrs. Com. Br. 17. In *Richards*, the California Supreme Court adopted the *Berry* standard, including the third factor – "permanence" – which asks whether the allegedly discriminatory acts had the "degree of permanence which would trigger an employee's awareness of and duty to assert his rights." 715 F.2d at 981.

[2] See Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, LAW & CONTEMP. PROBS., Autumn 1986, at 53, 56 ("A second source of confusion is the now rejected theory that the statute of limitations is not a statute of limitations at all * * *. I have always considered that argument frivolous.").

may recover *after proving liability*, to infer the existence of a continuing violation doctrine that protects plaintiffs who slept on their rights. Resp. Br. 17-24; LDF Br. 5-12; Lwyrs. Com. Br. 23-26. Respondent also ignores this Court's statute-of-limitations jurisprudence without ever explaining why Title VII's statute of limitations should be treated differently than every other statute of limitations considered by the Court.

Respondent and his amici next argue that the EEOC's conception of the continuing violation doctrine – a conception adopted very recently, not a consistent 30-year interpretation as respondent and amici claim – is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Resp. Br. 26-32; LDF Br. 13-19; Lwyrs. Com. Br. 20-22. The EEOC's conception of the continuing violation doctrine, however, is not entitled to *Chevron* deference because it involves a substantive issue – not a procedural one. See 42 U.S.C. § 2000e-12(a).

Respondent and his amici then argue that the accrual rule for a cause of action in any case involving a pattern of discrimination – defined as "related" allegedly discriminatory acts – should be different from the rule for cases involving a discrete act arising under Title VII and different from the rules applied by the Court in other cases. But the scant support respondent can find for that position in a single Fair Housing Act decision of this Court and a few Title VII decisions of lower courts is overwhelmed by contrary indications in the statutory language; this Court's Title VII jurisprudence; broader limitations jurisprudence including cases decided under the NLRA, on which Title VII's remedial provisions were modeled; the consensus of Title VII decisions in the lower courts; and Title VII policy.

I. SECTION 706(g)'s TWO-YEAR CAP ON RECOVERY OF BACKPAY IS NOT A REPUDIATION OF SECTION 706(e)'s LIMITATIONS PERIOD

Respondent and his amici make two interrelated assumptions in advancing the theory that Section 706(g), not Section 706(e), is controlling: first, that Section 706(e) is not a statute

of limitations; and, second, that Section 706(g) is the only limitation on backpay liability. Both assumptions are wrong.

A. Section 706(e) Is A Statute of Limitations and Thus Limits The Amount Of Recoverable Damages

Section 706(e) is a statute of limitations – not a mere exhaustion requirement. *Zipes*, 455 U.S. at 394-395 & n.12. "Senator Humphrey * * * characterize[d] the time period for filing a claim as a 'period of limitations,' 110 Cong. Rec. 12723 (1964), and Senator Case described its purpose as preventing the pressing of 'stale' claims, *id.*, at 7243, the end served by a statute of limitations." 455 U.S. at 394; see also 118 CONG. REC. 4940 (1972) (remarks of Sen. Williams characterizing Section 706(e) as a "time limitation"); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) ("as we noted in *Zipes*, both the language and legislative history of § 2000e-5(e) indicate that the filing period operated as a statute of limitations"); *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900, 910 (1989).

Respondent and his amici claim that Section 706(e) cannot be a limitations period because Section 706(g), 42 U.S.C. § 2000e-5(g), and 42 U.S.C. § 1981a (added in 1991) have different caps on the recovery of damages. Resp. Br. 17-25; Lwyrs. Com. Br. 22-26. Caps on liability found in accordance with other provisions of the statute say nothing about whether a plaintiff is entitled to bring an action in the first instance. "[S]tatutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose * * *." *United States* v. *Kubrick*, 444 U.S. 111, 125 (1979). That Section 706(e), like other statutes of limitations, incidentally limits the recovery of damages hardly means that its interpretation must be tortured so that it becomes redundant with *other* provisions of the statute limiting damages.

In *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559 (1977), the Court distinguished a "remedy" issue from a "violation" issue. The Court contrasted the issue of the timeliness of Evans's charge with *Franks* v. *Bowman Transp. Co.*, 424 U.S.

747 (1976), in which the Court "dealt only with a question of remedy" because the "issues relating to the timeliness of the charge and the violation of Title VII had already been decided." 431 U.S. at 559; see also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 244 n.10 (1989) (plurality opinion) (declining to read "Section 706(g) – a provision defining *remedies* – to influence the substantive commands of the statute").

In *Evans*, amicus LDF argued that Section 706(g) essentially supplanted Section 706(e)'s limitations period in cases involving an alleged continuing violation. The LDF argued that the two-year cap on backpay

> can have no meaning except in the context of a continuing violation, which has been occurring over a period far in excess of the 180-day time limit for the filing of a charge, prescribed by Section 706(e). Within that context it is clear that, although back pay liability is limited, the continuing violation of Title VII is itself an unlawful employment practice which is subject to challenge before the EEOC and in the courts.

LDF *Evans* Br. 3-4. The dissent in *Evans* – the *only* part of *Evans* respondent cites (Resp. Br. 13) – adopted the LDF's argument. 431 U.S. at 561-62 (Marshall, J., dissenting). The majority, however, carefully distinguished Section 706(e)'s limitations period from the remedies provisions of Section 706(g) and (h). *Id*. at 558-560.

B. Section 706(g)'s Two-Year Cap on Backpay Is Not the Only Limitation On the Recovery of Damages Under Title VII

1. Respondent and his amici claim that Section 706(g) is the *only* limitation on the recovery of damages under Title VII. Resp. Br. 17-20; Lwyrs. Com. Br. 23-24. The statutory language does not support that conclusion. Section 706(g) provides, in part, "[b]ackpay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g)(1). Section 706(e)

provides that an administrative charge must be filed within 180 or 300 days of the allegedly unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). Neither provision states that the only limitation on the recovery of backpay is Section 706(g)'s cap.

Sections 706(e) and 706(g) can be read and applied to give effect to each provision without impinging on the other. See Laycock, *supra*, at 58. In cases of fraudulent concealment and estoppel, or hostile environment harassment cases involving continuing violations, Section 706(e)'s limitations period does not begin to run until the plaintiff knows or should have known of the violation. See, e.g., *Galloway*, 78 F.3d 1164; *O'Rourke* v. *City of Providence*, 235 F.3d 713 (1st Cir. 2000). In those cases, the two-year cap is the outside limit on backpay. This is exactly petitioner's interpretation of Sections 706(e) and 706(g).

2. Respondent and the LDF turn to Section 706(g)'s legislative history in an effort to find support for the position that the two-year cap is the only limitation on recovery of backpay. Resp. Br. 17-20; LDF Br. 5-12. Even if reference to the legislative history were necessary, no statement in Section 706(g)'s legislative history explicitly states that Section 706(g) is to be the only limitation on recovery of backpay. See LDF Br., App. A, The Legislative History of the Equal Employment Opportunity Act of 1972.

As the LDF notes, the two-year cap on backpay arose in response to "[t]he possibility of enormous monetary liability under Title VII, especially in view of the increased use of class-type suits, *regardless of the actual liability of the charged party*." LDF Br., App. A at 1 (citing Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1726, 92d Cong., 1st Sess. 476 (1971)) (emphasis added). Supporters of the two-year cap urged its adoption because the EEOC and some courts were not interpreting the charge-filing period as a limitation on recovery. See 117 CONG. REC. 31,973, 31,974, 31,981 (1971) (Rep. Erlenborn). Representative Erlenborn, the main proponent of the two-year cap on backpay, explained the rationale behind it:

> Testimony * * * established that the position of the EEOC is that remedies – including back pay – for discriminatory acts may reach back to the effective date of the Act. *It is not clear that courts have so held.* However, to preclude the *threat* of enormous back pay liability which could be utilized to coerce employers and labor organizations into surrendering their fundamental rights to a fair hearing or due process, my bill offers a new section * * * which limits liability to pattern and practice suits to a period of 2 years prior to the filing of a complaint with said court.
>
> With respect to individual complaints, therefore, back pay and other liability is limited to the statutory period for filing, formerly 90 days and extended under this bill to 180 days.

H.R. Rep. No. 92-238, at 65-66 (1971) (Minority Views on H.R. 1746) (emphasis added).

Thus, according to the architect of the two-year cap on backpay, it was included as a failsafe measure in case the courts accepted the argument that liability could extend back to the effective date of the Act. It was enacted "to make assurance doubly sure" that there was an outermost limit on liability. See *Crandon* v. *United States*, 494 U.S. 152, 174 (1990) (Scalia, J., concurring in the judgment); see also *Chickasaw Nation* v. *United States*, 534 U.S. ___, ___, ___ (2001) (slip op. 4, 9-10).

Professor Laycock has suggested that Section 706(g)'s two-year limitation on the recovery of backpay was enacted in response to the continuing *effects* doctrine first articulated in *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). That doctrine, which allowed plaintiffs to recover damages for any present effects of past discriminatory acts, was repudiated in *Evans*, 431 U.S. 553, and *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977), decided on the same day. "The continuing effects theory that brought forth the amendment is now gone. The amendment is still with us, but it no longer makes sense." Laycock, *supra*, at 57.

Section 706(e) is a statute of limitations, and Section 706(g) serves as a cap on recovery of backpay in the rare instances in which the limitations period is extended for equitable reasons.

II. THE EEOC'S PRONOUNCEMENTS ON THE CONTINUING VIOLATION DOCTRINE ARE NOT ENTITLED TO DEFERENCE

Respondent and amici argue that the EEOC's interpretation of the continuing violation doctrine is entitled to *Chevron* deference. Resp. Br. 26-32; LDF Br. 13-19; Lwyrs. Com. Br. 20-22. But the EEOC has the authority under Title VII only "to issue, amend, or rescind *suitable procedural regulations*" for implementing Section 706. 42 U.S.C. § 2000e-12(a) (emphasis added).[3] "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title." *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976). *Chevron* deference is given only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2171 (2001).

Respondent and amici claim that *Chevron* deference should be given to the EEOC's interpretation contained in briefs (Resp. Br. 27 & n.13; LDF Br. 14-15; Lwyrs. Com. Br. 21) and in the EEOC Compliance Manual (Resp. Br. 27-28; Lwyrs. Com. Br. 21). Neither of those sources is entitled to *Chevron* deference. This Court has described the level of deference to an "interpretation advanced for the first time in a litigation brief" as "near

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[3] "[B]y restricting the [C]ommission to issuance of procedural rules, Congress intended to limit it to making rules for conducting *its* business, and to deny it the power to make substantive rules that create rights and obligations." *EEOC* v. *Reynolds Metal Prods. Co.*, 530 F.2d 590, 593 (4th Cir. 1976) (emphasis added); see also *Emerson Elec. Co.* v. *Schlesinger*, 609 F.2d 898, 902 (8th Cir. 1979); cf. *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945) (classifying statutes of limitations as "substantive" for *Erie* purposes).

indifference." *Mead*, 121 S. Ct. at 2172 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988)). The EEOC's statement in its Compliance Manual also is not entitled to *Chevron* deference. *Mead*, 121 S. Ct. at 2175 ("'interpretations contained in policy statements, agency manuals, and enforcement guidelines,' * * * are beyond the *Chevron* pale") (quoting *Christensen* v. *Harris Cty.*, 529 U.S. 576, 587 (2000)).[4]

The EEOC's interpretation receives deference "only to the extent that [this] interpretation[ ] has the 'power to persuade.'" *Christensen*, 529 U.S. at 587(quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). In applying that test, the Court has considered among other things whether the language of the statute supports the agency interpretation, and whether the interpretation has been maintained consistently. *Mead*, 121 S. Ct. at 2171 & n.8; *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257-58 (1991); *Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158, 171 (1989); *Gilbert*, 429 U.S. at 410-11. Also, "[o]nce we have determined a statute's clear meaning" – as this Court's many Section 706(e) decisions have done – "we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

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[4] Although respondent and his amici also (Resp. Br. 28-32; LDF Br. 15-19) ask the Court to defer to EEOC regulations contained in 29 C.F.R. Pt. 1614 and to Management Directive 110, which implements those regulations, the regulations and the directive do not apply to private-sector cases. Congress's grant of authority to the EEOC under Section 717 to enforce Title VII with respect to federal employees is far broader than the limited authority given the EEOC in the context of non-federal employees. Compare 42 U.S.C. § 2000e-16(b) (the EEOC "shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section") with *id.* § 2000e-12(a) ("[t]he Commission shall have authority from time to time to issue, amend or rescind suitable procedural regulations to carry out the provisions of this subchapter"). In addition, Section 706(e)'s limitations period is not incorporated into Section 717. See 42 U.S.C. § 2000e-16(d) (explicitly providing that Section 706(g) through (k) applies in civil actions brought by federal employees).

Respondent and amici claim that petitioner is advocating a position at odds with the view taken by the EEOC for "three decades." LDF Br. 13; Resp. Br. 27-28; Lwyrs. Com. Br. 21. In fact, all three sources of the "official" EEOC position cited by respondent and his amici were promulgated more than thirty years *after* the enactment of Title VII.[5]

When Morgan filed his EEOC charge in 1995, the EEOC agreed with *petitioner's* position. In 1992, the Commission stated that, in determining whether an employee properly alleged a continuing violation, "an agency should consider whether a complainant had prior knowledge or suspicion of discrimination and the effect of this knowledge." *Williams* v. *Cheney*, 1992 WL 1374923, at *3 (EEOC August 25, 1992) (citing *Sabree*, 921 F.2d 396). Just last year, the Commission cited *Sabree* and *Berry* with approval. *Holmes* v. *Reno*, 2000 WL 869821, at *3 (EEOC June 21, 2000) (citing *Sabree*); *Garcia* v. *Danzig*, 2000 WL 270496, at *2 (EEOC Feb. 28, 2000) (citing *Berry*, 715 F.2d at 981, and *Sabree*). The EEOC recently *changed* its position partly *because of* the decision below:

> Prior to the revisions in the 29 C.F.R. Part 1614 regulations, the Commission cited the *Sabree* and the *Berry* decisions with approval in numerous decisions. However, the *Sabree* and *Berry* holdings are inconsistent with the Commission's goal of furthering the elimination of discriminatory employment practices by ending the fragmentation of unlawful employment practice claims in Federal sector cases. For this reason, * * * the Commission will follow the *Morgan* and *Anderson* [v. *Zubieta*, 180 F.3d 329 (D.C. Cir. 1999)] decisions, rather than the *Sabree* and *Berry* deci-

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[5] Management Directive 110 was issued on Nov. 9, 1999. See Management Directive 110, available at http://www.eeoc.gov/federal/md110.html. The new Compliance Manual including the section respondent cites was issued on May 12, 2000. The regulations relating to federal employees that respondent cites were promulgated in July 1999. 64 Fed. Reg. 37,653 (1999).

> sions, when ruling on the timeliness of continuing violation claims under the revised 29 C.F.R. Part 1614 regulations.

Anisman v. *O'Neill*, 2000 WL 402493, at *5 (EEOC Apr. 12, 2001).

Section 706(e) provides that "[a] charge * * * *shall be filed* within one hundred and eighty days after the alleged unlawful employment practice occurred * * * *except that*" different time limits, generally 300 days, apply in deferral States. 42 U.S.C. § 2000e-5(e)(1) (emphasis added). By providing a general rule and a single exception, Section 706(e) has the same structure as the statute of limitations this Court construed recently in *TRW Inc*. v. *Andrews*, 534 U.S. ___, 122 S. Ct. 441 (2001). Citing *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997), the Court observed that an "'explicit listing of exceptions' to [the] running of [a] limitations period [is] considered indicative of Congress' intent to preclude 'courts [from] read[ing] other unmentioned, open-ended "equitable" exceptions into the statute.'" *TRW*, 122 S. Ct. at 447. General principles applicable to *every* statute of limitations may fairly be read into Section 706(e) unless negated by specific statutory language – as *Zipes* holds – and we have conceded that generally applicable principles of accrual and equitable tolling may benefit certain Title VII plaintiffs. Pet. Br. 30-37. But the EEOC's *Title VII-specific* "continuing violation doctrine" finds no support in the statutory language and – as respondent concedes (Resp. Br. 32-35) – would require the Court to depart from "continuing violation" cases decided under other statutes.

Nor can the EEOC's version of the continuing violation doctrine be teased out of the single statutory phrase "alleged unlawful employment practice occurred." Citing only dictionary definitions of the single word "practice," respondent tries to distinguish an "unlawful employment practice," which he says means repeated or customary actions, from the discrete acts that ordinarily start the running of statutes of limitations. Resp. Br. 26. But see Pet. Br. 14-22 (citing Title VII decisions of this Court starting the running of the statute of limitations at the time

of a discrete unlawful act). "However, we must not analyze one term of" Section 706(e) "in isolation." *Pollard* v. *E.I. duPont de Nemours & Co.*, 532 U.S. 843, 121 S. Ct. 1946, 1951 (2001). "Unlawful employment practice" means simply the acts made unlawful by Section 703, 42 U.S.C. § 2000e-2, which is captioned "unlawful employment practices" and which describes numerous discrete acts made unlawful by the statute. Moreover, the phrase "unlawful employment practice" is based on the NLRA's limitations provision, which requires that a charge be filed within six months of an "unfair labor practice." 29 U.S.C. § 160(b). As discussed in petitioner's opening brief (at 23-25) and further below, at the time Congress modeled Title VII's remedial provisions on the NLRA, case law under the NLRA was clear that the continuing violation doctrine did not apply to extend the limitations period for discrete events simply because there was more than one allegedly unfair labor practice at issue.

III. THE "NOTICE" LIMITATION ON THE CONTINUING VIOLATION DOCTRINE IS APPROPRIATE

A. Cases Involving "Patterns" of Discrimination Are Not Subject to Any Special Rule

1. Respondent and his amici concede that the continuing violation doctrine has no role in cases involving discrete acts of discrimination. Resp. Br. 14; LDF Br. 22; Lwyrs. Com. Br. 7-12; Impact Br. 19. They argue, however, that the continuing violation doctrine should allow the plaintiff to recover for acts outside the limitations period whenever "a series of discriminatory acts * * * are so related as to be fairly regarded as a continuing" pattern regardless of whether this "pattern" comprises separate individual discrete acts each of which triggered its own limitations period. Lwyrs. Com. Br. 8-12; Resp. Br. 11-15, 36-39: LDF Br. 19-23; Impact Br. 16-19.

In support of that proposition, they rely on *Havens Realty Co.* v. *Coleman*, 455 U.S. 363 (1982), a case involving the Fair Housing Act, 42 U.S.C. § 3601 *et seq*. Resp. Br. 11-15; LDF Br. 20-21; Lwyrs. Com. Br. 7-12. The *holding* in *Havens* is of

no assistance to respondent, for two independent reasons. See Pet. Br. 30 n.8; U.S. Br. 18-19. As petitioner explained, it was only persons who brought "neighborhood" claims, complaining of "steering of persons other than the plaintiff" (455 U.S. at 375), whom the Court allowed to rely on a "continuing violation" theory. A Title VII plaintiff complaining of discriminatory acts directed against *him* has no comparable claims. And, as the Solicitor General explained, the Court rejected only petitioners' argument that plaintiffs' claims were *barred altogether*; a contingent settlement (*id*. at 371) made it unnecessary for the Court to address the scope of *relief*. Respondent and his amici have chosen not to respond to those arguments, but instead to rely on the *language* of the opinion: "whenever a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." *Id*. at 380-81. But "[i]t is to the holdings of our cases, rather than their dicta, that we must attend." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994).

Havens was not a Title VII case, and this Court neither cited Title VII statute-of-limitations precedents in *Havens* nor has cited *Havens* in later Title VII cases. See Pet. Br. 30 n.8. And this Court's Title VII cases simply do not admit of a doctrine that excuses plaintiffs who have, and know that they have, accrued causes of action from making timely EEOC charges. This Court first articulated the Title VII accrual rule in *Evans*, 431 U.S. at 558 ("A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."). It requires that a plaintiff file a claim as soon as he knew or should have known that he was discriminated against. See Pet. Br. 14-22.

In *Delaware State Coll.* v. *Ricks*, 449 U.S. 250 (1980), the plaintiff "claim[ed] a 'continuing violation' of the civil rights laws" (*id*. at 257) and alleged various non-time-barred "unusual incidents" in his complaint (*id*. at 257 n.8), but the Court did not

identify a "pattern" and allow the timely incidents to bring the untimely incidents in. Rather, the Court was impressed with counsel's concession that the timely "incidents * * * were not *independent* acts of discrimination" (*ibid.* (emphasis added)). The concession that the Court treated as *fatal* to Ricks's claim is the very affirmative contention of relatedness that respondent claims should *save* him. Furthermore, the Court thought it important that "there can be no claim here that Ricks was not abundantly forewarned" of the need to file an EEOC charge. *Id.* at 262 n.16. By contrast, respondent decries any inquiry into the plaintiff's notice as "totally inapposite to appropriate Title VII jurisprudence." Resp. Br. 43; see also LDF Br. 20-23.

In *Bazemore* v. *Friday*, 478 U.S. 385 (1986), this Court held that the defendants violated Title VII because they failed to eradicate all vestiges of a pre-Act discriminatory salary structure. The Court, however, did not apply the continuing violation doctrine to save all otherwise time-barred claims. Rather, it held that Title VII was violated by the issuance of each week's paycheck, and an actionable wrong accrued with the delivery of every paycheck. *Id.* at 395. *Bazemore* was a "pattern" case if ever there was one, but the Court did not adopt a different accrual or limitations rule for these types of claims.

Likewise in *Lorance*, a case involving an allegedly discriminatory seniority system, the Court declined to adopt a more lenient accrual rule or to extend the limitations period. 490 U.S. at 904-05. Rather, it held that the employees' claims were time barred because they failed to file charges within 300 days of the adoption of the allegedly discriminatory seniority system. *Id.* at 905-06. Respondent has offered no reason why his "pattern" case, cobbled together from widely different incidents perpetrated by a number of different people, should be treated differently from the patterns in *Bazemore* and *Lorance*.[6]

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[6] The allegedly discriminatory acts in this case ranged in nature and severity – from failure to pay respondent when he served on jury duty to suspension and termination. Pet. App. 26a-37a. Therefore, unlike the

2. Respondent and amici wish to import Fair Housing Act jurisprudence into this Title VII case but want no part of the case law from other areas of the law that undermines their position. Resp. Br. 32-35; Lwyrs. Com. Br. 19-20. They make a half-hearted attempt to distinguish the NLRA cases that apply the continuing violation doctrine. Resp. Br. 34-35; Lwyrs. Com. Br. 19-20. The NLRA, however, was the model for Title VII's remedial provisions – including Section 706(e). *Lorance*, 490 U.S. at 909. Cases interpreting the NLRA are persuasive in construing Title VII. *Ibid.*; *Pollard*, 121 S. Ct. at 1949-50; *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 226 n.8 (1982); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419-20 (1975). "Such reliance is particularly appropriate" here because "[t]he NLRA's statute of limitations * * * is even substantively similar to § 706(e)." *Lorance*, 490 U.S. at 909-10. Contrary to respondent's contention, the courts and the NLRB had grappled with Section 10(b)'s limitations period and its effect on continuing acts long before 1964. See, *e.g.*, *Local Lodge No. 1424* v. *NLRB*, 362 U.S. 411, 417 n.6, 422 n.13 (1960); Pet. Br. 23-24. Even if a continuing violation was found, remedies such as backpay were unavailable to remedy related violations before the charge-filing period. *NLRB* v. *Pennwoven, Inc.*, 194 F.2d 521, 525 (3d Cir. 1952); see generally U.S. Br. 14-15.

Respondent and the Lawyers' Committee argue that no general accrual rule can be gleaned from Clayton Act and civil RICO cases because the language of the Clayton Act statute of limitations (applied also in RICO cases, see Resp. Br. 32 & n.20) provides that any action is barred unless "commenced within four years after the cause of action accrued." Resp. Br. 32-34 (citing 15 U.S.C. § 15b). But the distinction cuts the other way: a statute that refers to an "accru[al]" gives courts

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"steering" situation in *Havens Realty*, this case does not involve identical acts manifesting an underlying policy of discrimination. A single supervisor did not perpetrate the allegedly discriminatory acts. Rather, respondent claims that at least five different supervisors at different times spanning five years were involved in the allegedly discriminatory acts. *Ibid*.

more leeway to chart their own path for accrual rules than Section 706(e), which requires that a charge be filed within a specified number of days from a specified "occurr[ence]."

The Lawyers' Committee argues that the antitrust and civil RICO cases are distinguishable because, unlike Title VII, the statutes at issue in those cases "provide for recoveries spanning remarkable periods of time" and provide for treble damages. Lwyrs. Com. Br. 19. But in Title VII cases, no less than in antitrust and RICO cases, there is an incentive to delay in filing suit to profit from the accumulation of damages. Title VII plaintiffs are able to recover both compensatory and punitive damages. See *Kolstad* v. *American Dental Ass'n*, 527 U.S. 533 (1999). Moreover, although there are caps on damages, the two-year backpay cap runs from two years before the date on which the charge was filed. Respondent filed his charge in February 1995, so his right to recover backpay if he should prevail on the merits starts nearly nine years ago. He also could be eligible for front pay not subject to any cap. *Pollard*, 121 S. Ct. at 1950.

Finally, respondent claims that the Ninth Circuit's approach has support in criminal law, where ongoing conspiracy, larceny, and embezzlement are subject to a broad continuing violation doctrine. Resp. Br. 35. That analogy has even less force in Title VII cases than in civil RICO cases, where any rule less stringent than a discovery accrual rule "would patently disserve the congressional objective of a civil enforcement scheme * * * aimed at rewarding the swift who undertake litigation in the public good." *Rotella* v. *Wood*, 528 U.S. 549, 559 (2000).

B. The Notice Limitation On the Continuing Violation Doctrine Comports With Title VII and Statute-of-Limitations Jurisprudence

1. There is an extremely broad consensus in the lower courts that notice plays an important role in Section 706(e) cases, but respondent and his amici both deny and fight the consensus. The Lawyers' Committee et al. criticize *Berry* by claiming that it can be "misread" to imply a "notice" limitation on the

continuing violation doctrine (Lwyrs. Com. Br. 17); characterize *Galloway* as "inadequate and aberrational"(*id.* at 16); and reserve perhaps their harshest words for *Sabree* (an opinion joined by then-Judge Breyer), which is said to have "create[d] from whole cloth an 'inquiry notice' rule that represents a bar to continuing violations that has no basis in § 706(e)" (*id.* at 15 n.4). They and respondent also argue that other courts of appeals have applied the continuing violation doctrine using an approach similar to the Ninth Circuit's "sufficiently related" standard. *Id.* at 11-12; Resp. Br. 36-37. But their summary of the case law in the lower courts is not accurate (see *O'Rourke*, 235 F.3d at 731 n.6), and their criticisms of the *Galloway/Sabree* and *Berry* tests are off the mark.

The *Galloway/Sabree* standard is used by the Federal Circuit, *Bosley* v. *Merit Systems Protection Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998), and has been cited with approval by the Fourth. *Emmert* v. *Runyon*, No. 98-2027, 1999 WL 253632, at *4 (4th Cir. Apr. 29, 1999).[7] The *Berry* standard is applied in the Third, Sixth, Tenth, and Eleventh Circuits. *West* v. *Philadelphia Elec. Co.*, 45 F.3d 744, 755 & n.9 (3d Cir. 1995);[8] *Bell* v. *Chesapeake & Ohio Ry.*, 929 F.2d 220, 223-25 (6th Cir.

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[7] The Fourth Circuit did not, as respondent claims, adopt a standard akin to the Ninth Circuit's in *Beall* v. *Abbott Labs.*, 130 F.3d 614 (4th Cir. 1997). In *Beall*, the court denied recovery for a hostile environment sexual harassment claim because no violation had occurred within the limitations period and thus all claims were time barred. To say that a violation within the limitations period is *necessary* for a plaintiff to recover is not to say that such a violation is *sufficient* to allow recovery for acts outside the limitations period.

[8] Respondent claims that *West* and other Third Circuit cases exemplify a standard akin to the Ninth Circuit's standard. But both *West* and *Rush* v. *Scott Specialty Gases*, 113 F.3d 476 (3d Cir. 1997), use the Fifth Circuit's *Berry* standard. Likewise, *Cardenas* v. *Massey*, No. 00-5225, 2001 WL 1230325 (3d Cir. Oct. 16, 2001), does not apply a liberal continuing violation standard in line with the Ninth Circuit. Rather, *Cardenas* is a *Bazemore*-type case in which the court of appeals reversed a district court decision holding that *all* of plaintiff's claims were time-barred because the plaintiff did not file suit at the time of the first discriminatory paycheck.

1991); *Martin* v. *Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1415 & n.6 (10th Cir. 1993); *Roberts* v. *Gadsden Mem'l Hosp.*, 835 F.2d 793, 801 (11th Cir. 1998). The scattered cases that are consistent with the *Morgan* standard are contradicted by other cases in the same courts.[9]

Respondent and amici argue that limiting reliance on the continuing violation doctrine would cause victims in hostile environment cases to "run the real risk of being both too early and too late." Impact Br. 11; Resp. Br. 39-43. But the Seventh Circuit was concerned with precisely that issue. *Galloway*, 78 F.3d at 1166. The court recognized that a plaintiff should not be forced to file suit prematurely. Rather, if the plaintiff filed her charge "as soon as harassment becomes sufficiently palpable that a reasonable person would realize that she had a substantial claim under Title VII," she would be able to rely on the continuing violation doctrine to encompass the entire course of discriminatory conduct. *Ibid.* The plaintiff in *Galloway* was permitted to rely on the continuing violation doctrine to save otherwise time-barred claims because the court held that the behavior at issue was "just the kind of verbal conduct that it would *not* be reasonable to expect an employee to base suit on the first time it occurred." *Id.* at 1167. The *Galloway* approach is consistent with the rule that "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *TRW*, 122 S. Ct. at 450 n.6.

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[9] Compare *Anderson* v. *Zubieta*, 180 F.3d at 337, with *Curry* v. *District of Columbia*, 195 F.3d 654, 661 n.4 (D.C. Cir. 1999), and *Taylor* v. *FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997); compare *Varner* v. *National Super Mkts., Inc.*, 94 F.3d 1209, 1214 (8th Cir. 1996), with *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167 (8th Cir. 1995) (en banc), and *Madison* v. *IBP Inc.*, 257 F.3d 780, 796-97 (8th Cir. 2001) ("[i]n the Eighth Circuit, plaintiffs may only recover damages on their federal employment discrimination claims for acts committed during the statute of limitations period, even if there is a continuing violation"); compare *Haithcock* v. *Frank*, 958 F.2d 671, 677-79 (6th Cir. 1992), with *Bell*, 929 U.S. at 223-25.

2. Respondent and his amici offer a smorgasbord of policy reasons purportedly supporting the rule adopted by the Ninth Circuit. All are unpersuasive.

The Impact Fund et al. claim that victims of sexual harassment should not be subject to a notice limitation on the continuing violation doctrine because they are often very distressed by the harassment and fear retaliation. Impact Br. 8-11. Congress has dealt with that threat by enacting an anti-retaliation provision in Title VII. 42 U.S.C. § 2000e-3(a). If amici believe that existing protections against retaliation are insufficient, they should seek new protections from Congress, not a textually ungrounded judicial extension of the statute of limitations.

The Impact Fund et al. also claim that a notice limitation on the continuing violation doctrine would not be appropriate in disability cases because an employee might inadvertently lose her right to proceed with a claim against her employer for failing to engage in the interactive process if the employee did not file her charge within 180 days of her first request for accommodation. Impact Br. 12-16. But nothing about petitioner's argument in this case bears at all on the entitlement of an employee to forward-looking injunctive relief. See *Galloway*, 78 F.3d at 1167 (the victim "can always seek injunctive relief against a continuation of the unlawful conduct"). The claim that "the employee demonstrated awareness of his legal rights and should be barred from assertion that he was entitled to that accommodation" (Impact Br. 14) is no more valid – and no more representative of petitioner's position – than the arguments rejected in *Bazemore* and the antitrust cases. See Pet. Br. 20-21.

Respondent and the LDF argue that a notice limitation on the continuing violation doctrine is inconsistent with Title VII's "make-whole" purpose. Resp. Br. 43-45; LDF Br. 21-23. Title VII's primary purpose, however, is to eradicate discrimination. *Albemarle*, 422 U.S. at 417; *Ford Motor Co.*, 458 U.S. at 227, 230. Compensation to victims of discrimination is "Title VII's secondary, fallback purpose." *Ibid.* The notice limita-

tion on the continuing violation doctrine furthers Title VII's primary purpose by encouraging the prompt filing of claims.

The Lawyers' Committee et al. argue that the standard proposed by petitioner will result in "multiple premature" lawsuits (Lwyrs. Com. Br. 29-30) and the Impact Fund et al. claim it will result in "confrontation and controversy" (Impact Br. 14). Those assumptions might be accurate if the employee were required to *file a lawsuit* within 300 days after the allegedly discriminatory act occurred, but the employee is required to *file an administrative charge* with an agency that is charged with investigating *and conciliating* charges of discrimination. By requiring an employee to file an administrative charge before proceeding to court, Congress sought to promote conciliation and voluntary compliance, *not* litigation. *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 77 (1984); *Ford Motor Co.*, 458 U.S. at 227.

The LDF errs in its naked policy argument that a notice limitation on the continuing violation doctrine unfairly places the burden of ending discrimination on the employee. LDF Br. 23. The undeniable statutory requirement that the employee file a charge *at all*, not any particular construction of the continuing violation doctrine, assigns some responsibility for the eradication of discrimination to the employee. Calling the employer a "wrongdoer" (*ibid.*) no more helps to resolve this than any other statute-of-limitations case. See *Kubrick*, 444 U.S. at 125. And the idea that the employee must take steps to mitigate harm before the employer will be saddled with liability is nothing new. In *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 806 (1998), the Court discussed the "policy imported from the general theory of damages, that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages'" (quoting *Ford Motor Co.*, 458 U.S. at 231 n.15). "[N]o award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Id*. at 807.

Finally, relying on dicta from *Havens Realty*, respondent and amici assert that so long as there is a continuing violation – a series of related allegedly discriminatory acts possibly stretch-

ing back to time immemorial – there is no issue of staleness of claims. LDF Br. 3, 22; Impact Br. 28; *Havens Realty*, 455 U.S. at 380 ("[w]here the challenged violation is a continuing one, the staleness concern disappears"). Outside the context of "neighborhood" steering claims, that simply is not true. Concerns about staleness of claims increase with every passing day, whether or not a continuing violation exists. For example, respondent seeks to recover for acts occurring over a five-year period involving at least five managers and numerous other potential witnesses. During that five-year period, the "memories of witnesses faded and [some potential] witnesses have disappeared." *Order of Ry. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). These problems are compounded the longer the violation is permitted to continue.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.[10]

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[10] Respondent argues that he is entitled to a new trial because of evidentiary issues raised but not decided on the appeal below. Resp. Br. 45-50. Those issues are not before this Court but may of course be raised on remand. However, contrary to respondent's assertion, the district court did permit him to present evidence of time-barred acts as it related to him. Pet. App. 40a n.9. Respondent argues that the district court unfairly restricted him because it refused to allow him or his witnesses to refer to pre-limitations period conduct as discrimination. Given that the ultimate legal question in the case was whether there was evidence of discrimination, it was reasonable for the court to conclude that respondent's and his witnesses' use of the word "discrimination" might unduly prejudice the jury. The court did permit testimony about the allegedly discriminatory acts minus respondent's editorial comments. Evidentiary issues are reviewed for abuse of discretion. See *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141-42 (1997).

Respectfully submitted,

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