No. 05-1074

In The Supreme Court of the United States

LILLY M. LEDBETTER,

Petitioner,

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

NEAL D. MOLLEN
Counsel of Record
CARSON H. SULLIVAN
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

KAREN R. HARNED
ELIZABETH A. GAUDIO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F STREET, N.W., SUITE 200
WASHINGTON, D.C. 20004
(800) 552-6342

Attorneys for Amici Curiae
The Chamber of Commerce of the United States of America and National Federation of Independent Business Legal Foundation

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INTERESTS OF AMICI CURIAE

1. The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents a membership of over three million businesses and business organizations of every size and in every industry sector and geographic region of the country. The Chamber has been a voice for the business community for more than ninety years. To fulfill this role, the Chamber frequently files *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.[1]

2. The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), is a nonprofit, public interest law firm established to be a voice for small business in the nation's courts and the legal resource for small business. The NFIB Legal Foundation is the legal arm of the National Federation of Independent Business (NFIB), which is the nation's leading small-business advocacy association, with offices in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

3. This case involves the administration of Title VII of the Civil Rights Act of 1964 ("Title VII" or "Act"), 42 U.S.C. § 2000e *et seq.*, an act to which the vast majority of Chamber and NFIB members are subject. Title VII's specific charge-filing requirement, which operates as a statute of limitations, was adopted in large measure to protect employers from the burden of defending decisions made in the distant past. Indeed, Congress selected for Title VII a particularly brief period of limitation precisely because it recognized the special need to put such workplace controversies to rest quickly.

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[1] Petitioner and respondent have given consent to the filing of amicus briefs. Both parties' letters of consent are on file in the Office of the Clerk. No party has authored this brief in whole or in part, and no party has made a monetary contribution to the preparation or filing of this brief. *See* S. Ct. R. 37.6.

4. Petitioner, however, seeks a rule that would effectively eliminate any meaningful period of limitations in certain kinds of pay discrimination claims, allowing an employee to wait years or even decades to challenge an allegedly discriminatory decision so long as the economic consequences of that decision have continued into the limitations period. Such a rule would be irreconcilable with Congress' design for the administration of Title VII, and would subject the employers covered by the Act to damages for entirely innocent decisions that have nonetheless become difficult or impossible to defend solely because of the passage of time.

5. The Chamber, NFIB, and their members are particularly well positioned to explain to the Court the practical implications of such a rule. Because such a rule would impose an unwarranted and excessive burden on employers, the Chamber and NFIB urge this Court to reject it.

SUMMARY OF ARGUMENT

1. To be timely, an administrative charge of discrimination under Title VII of the Civil Rights Act of 1964 must be filed with the appropriate agency within a relatively brief period of time after the alleged unlawful employment practice occurred. *See* 42 U.S.C. § 2000e-5(e)(1). Petitioner concedes that "[i]f the unlawful employment practice in a disparate pay case is the pay-setting *decision* (and only that decision), then the violation occurs at the time of that decision and the limitations period runs from that date." Pet. br. at 18 (emphasis in original). Petitioner claims, however, that the limitations period should run from the date on which the *consequences* of the challenged decision becomes real to the complainant, here when each paycheck reflecting allegedly disparate compensation is issued.

This is not a question of first impression for the Court. In fact, the Court has held on a number of occasions that in a discrimination case, "the alleged illegal act [and thus the alleged

unlawful employment practice is] the . . . decision" to discriminate.[2] Once "the operative decision [is] made — and notice given," the limitations period begins to run. *Chardon*, 454 U.S. at 8.

Most recently, in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Court confirmed that this rule of law applies to all "discrete acts" of alleged discrimination, even when these discrete acts, taken together, form a pattern of discrimination or continuing course of conduct. A "discrete act," the Court held, is marked by two distinguishing characteristics: (a) they "are easy to identify"; and (b) "[e]ach [such] incident . . . constitutes a separate actionable 'unlawful employment practice.'" 536 U.S. at 114.[3] And because each discrete act is both easy to identify (it "happens" on a specific date) and is separately actionable, the disappointed employee is expected to file a charge of discrimination shortly after the incident occurs. *Id.* at 114-15.

Like the promotion and other claims described in *Morgan*, pay claims fit in the "discrete act" category. They "happen" at once, on a specific date, not incrementally over an extended period of time. Each compensation decision is independently actionable. Petitioner's pay claim is governed by this general rule of limitations.

2. Petitioner offers two reasons for a special rule applicable only to compensation cases. First, she argues that the time limit selected by Congress is too short in the pay dispute context,

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[2] *Chardon v. Fernandez*, 454 U.S. 6, 8 (1982) (discrimination claims under 42 U.S.C. § 1983); *see also United Airlines, Inc. v. Evans*, 431 U.S. 553, 554-58 (1977); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) ("the filing limitations period[] commenced at the time the tenure decision was made and communicated"); *Bazemore v. Friday*, 478 U.S. 385, 396 n.6 (1986) (where salary system maintained *within* the limitations period was a "mere continuation of the pre-1965 discriminatory pay structure, . . [employer could not claim that it had] made all [of its] employment *decisions* in a wholly nondiscriminatory way" within the period and thus limitations period renewed with each paycheck) (emphasis added).

[3] Conversely, hostile environment claims are cumulative in nature. It is difficult or impossible for would-be complainants to determine whether any particular incident of harassment is, by itself, actionable, and in most cases, the course of conduct becomes actionable only after a number of such incidents combine to create the hostile environment. Special accrual rules apply to such claims. *See Morgan,* 536 U.S. at 115-17.

primarily because would-be complainants are less willing to "rock the boat" with respect to compensation claims than they are with respect to "more serious" violations. Pet. br. at 25-26. Additionally, petitioner notes that the rules of limitation applied to all other discrete acts make it more difficult for Title VII to fulfill its statutory purpose, which she claims to be providing compensation to injured parties.

Congress, however, purposefully selected "quite obviously short deadlines" for filing charges of discrimination under Title VII[4] because it recognized that periods of limitation "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[5] Statutes of limitation *always* cut off the right to seek compensation — that is their only purpose — but doing so furthers another legislative goal comprehended in Title VII. And while a charge of discrimination undoubtedly "rocks the boat" at work for all concerned, whether it comes early or late, the Court concluded in *Ricks* that this provides no basis for modifying the limitations rule Congress prescribed.[6]

The rule urged by petitioner would punish innocent employers, reward indolence or gamesmanship by complainants, and would be irreconcilable with the unambiguous intent of Congress, which intended that Title VII claims be rapidly resolved. This case is a perfect example of the machinations invited by the rule petitioner seeks. Petitioner remained silent about her claim of discrimination throughout her tenure with Goodyear and waited until she had decided to retire before filing her charge. By the time the matter went to trial, the manager she

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[4] *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980).

[5] *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

[6] *Ricks*, 449 U.S. at 256 (rejecting argument that, because a charge might damage "working relationships and divert attention from the proper fulfillment of job responsibilities," limitations period did not begin to run when decision was made and made known to complainant).

had accused of discrimination had died of cancer, and the employer had been authorized by federal law to dispose of the records it had once maintained regarding the decisions she belatedly challenged. This sort of delay – whether resulting from tactical considerations or inattention - is antithetical to the manner in which Congress envisioned Title VII claims would be administered.

Second, petitioner finds support for a special rule of limitations in *Bazemore v. Friday*, 478 U.S. 385 (1986). This Court has previously explained, however, that *Bazemore*'s reach is limited to its facts: a facially discriminatory pay system, operating into the limitations period. Such a *de jure* discriminatory system renders every pay decision made — and every paycheck issued — within the period an independently actionable decision. An employer that perpetuates such a facially discriminatory system cannot defend a lawsuit by arguing that it had also engaged in that conduct outside of the limitations period without complaint.[7]

Petitioner alleges no comparable facts. She claims that her pay was depressed because certain individual Goodyear managers falsified data and defied Goodyear's policies and procedures, primarily because she refused to date one of them. As a result, petitioner claims, she was rated unfairly on her performance evaluation; this poor evaluation, she claims, then led to a pay increase that was smaller than she deserved. Petitioner complains of discrete acts of discrimination, subject to the general rule, not the sort of facially biased pay structure that might justify application of the *Bazemore* rule.

3. In an attempt to identify the "alleged unlawful employment" practice that triggers the limitations period, petitioner suggests that a court must focus on the *results* of the salary setting process, "not [on] the [employer's] compensation *decisions*." Pet. br. at 23 (emphasis in original). A focus on results is not only contrary to the Court's prior cases, however, but it

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[7] *See Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 912 n.5 (1989) (*superseded by statute on other grounds*).

effectively cleaves the substantive Title VII claim from the intent requirement that is its essential prerequisite. A violation of the Act requires the marriage of two things: an *intent* to discriminate (*i.e.*, a decision) and an *act* of discrimination (*i.e.*, an adverse employment action).[8] Petitioner claims that the intent to discriminate and the adverse consequences can be separated by years or even decades, and that the individual possessing the biased intent need not be (or even know) the individual who effects the adverse employment action. That remarkable proposition cannot be squared with the Court's prior cases. If intent is the *sina qua non* of a disparate treatment claim, the "violation" that triggers the limitation period must include it.

ARGUMENT

I. ALL TITLE VII CLAIMS ARE SUBJECT TO THE ACT'S EXPRESS CHARGE-FILING LIMITATIONS PERIOD

A. For Discrete Acts Of Discrimination, The Title VII Charge-Filing Limitations Period Commences When The Challenged Employment Decision Is Made, And Is Not Renewed Every Time The Consequences Of That Decision Are Made Palpable

Congress has specified that, in order to preserve a claim of discrimination, an administrative charge of discrimination "*shall be filed* within one hundred and eighty days [or 300 days, depending on the jurisdiction] after the alleged unlawful employment practice occurred . . . ." 42 U.S.C. § 2000e-5(e)(1) (emphasis added). This requirement does not vary on its face depending on the form of discrimination involved; whether the employer is alleged to have discriminated in hiring or with respect to promotions or terminations, the statute treats all allegedly discriminatory decisions the same. In this sense, the statutory language is unqualified and absolute.

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[8] *See United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983) (critical factual inquiry in *every* Title VII disparate treatment case is "whether the defendant *intentionally* discriminated against the plaintiff") (emphasis added); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2411-12 (adverse employment action required for discrimination claim).

"Determining the timeliness of [an] EEOC complaint, and [an] ensuing lawsuit," then, requires the court to "identify precisely the 'unlawful employment practice'" of which the charge complains and the date on which it "occurred." *Ricks*, 449 U.S. at 257; *Morgan*, 536 U.S. at 110. The Court has addressed this question on several occasions, and on each occasion, it has held unambiguously that, with the exception of hostile environment harassment claims, Title VII's limitations period begins to run when the alleged discriminatory decision is made and communicated, not when the complainant feels the consequences of that decision.[9]

a. *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). Evans was employed as a flight attendant at United Air Lines. She was forced to resign when she married, however, because the airline had a rule against employing married female flight attendants. 431 U.S. at 554.

The no-marriage rule was subsequently eliminated, and Evans was rehired, but the airline refused to give her seniority credit for the period during which she was prohibited from working for the airline. *Id.* at 554-55. Evans sued, but she did not seek back pay for the period during which she had been compelled to stop working. Rather, she complained that her then-current pay rate was unlawfully depressed by the company's prior discrimination. *Id.* at 557. Accordingly, she sought compensation for the shortfall in each of the paychecks she had received within the limitations period. *Id.*

The Court held, however, that Evans' then-current, ongoing economic disadvantage — the shortfall in each of her paychecks — was merely a lingering consequence of a *prior* statutory violation (*i.e.*, a discriminatory decision combined with an adverse employment action)

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[9] The Eleventh Circuit thought it at least possible in the search for an improperly motivated affirmative decision directly affecting pay, a complainant "may reach outside the limitations period created with her EEOC charge no further than the last such decision immediately preceding the start of the limitations period." *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1177-78 (11th Cir. 2005). The Court noted however, that "[w]e do not hold that an employee may reach back even that far; what we hold is that she may reach back no further." *Id.* at 1178. *Amici* agree with the *result* reached below, but disagree that any decision occurring outside the limitations period may be challenged.

occurring outside the limitations period, and not a statutory violation itself. Evans' claim, therefore, was time-barred. *Id.* at 558-59.

"United was entitled to treat that past act [*i.e.* Evan's termination] as lawful after respondent failed to file a charge of discrimination" within the statutorily prescribed period. *Id.* at 558. Although Evans claimed that a *current* violation existed because each paycheck she received was smaller than the check she would have received had there been no discrimination, the Court held that the violation occurred when the events that *caused* the disparity happened, not when the continuing *consequences* of those events became painful. *Id.* Nearly every act of unlawful discrimination has an ongoing financial impact, the Court reasoned, and a rule that treats *consequences* rather than *decisions* as statutory violations "would substitute a claim for seniority credit for almost every claim which is barred by limitations." *Id.* at 560. The timeliness of a claim, the Court held, cannot depend on such easily manipulated matters of pleading. *Id.*

b. *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980). Ricks was denied tenure by the college where he worked, but, as was the college's custom, he was given a one-year "terminal contract." 449 U.S. at 253. Ricks waited until the one-year contract had ended before he filed his charge of discrimination. *Id. at* 254.

The Court held that the delayed charge came too late. Again, the Court held that the proper focus "is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful. . . . The emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present *violation* exists.'" *Id.* at 258 (quoting *Evans*, 431 U.S. at 558) (emphasis in original). The "discriminatory act," the Court

held, was the decision to deny Ricks tenure, and "the filing limitations period[] commenced at the time the tenure decision was made and communicated to Ricks." *Id.* at 258.

c. In *Chardon v. Fernandez*, 454 U.S. 6 (1981), two employees were terminated by the Puerto Rican Department of Education. Each was informed in advance of the date on which the termination would be effected. 454 U.S. at 7-8. Well after receiving the letters, but shortly after their actual termination, both filed lawsuits under 42 U.S.C. § 1983. *Id.*

The Court held again that the limitations period begins to run when the employer's decision is made and is communicated, not when the plaintiff felt the decision's pinch. "The fact of termination," the Court held, "is not an illegal act." *Id.* at 8. Rather, "the alleged illegal act [is] the . . . decision" to terminate. *Id.* Once "the operative decision was made — and notice given," the limitations period began to run. *Id.*

d. Following *Evans, Ricks*, and *Chardon*, courts continued to have difficulty distinguishing for timeliness purposes between the discriminatory *acts* and their *consequences*. As a result, a number of courts continued to apply a "continuing violations" doctrine applied to out-dated claims that were factually or contextually related to discriminatory decisions made *within* the limitations period. Under this doctrine, a series of independent but related promotion decisions, for example, might have constituted a "continuing violation" so long as at least one such decision was made within the period.

Although "[t]he continuing violations theory [had been] contradicted"[10] by the Court on a number of occasions, it did not die easily. Most recently in *Morgan*, the Court again faced a claim that a series of connected but separately actionable employment decisions could constitute

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[10] *Lorance*, 490 U.S. at 906 ("The continuing violation theory is contradicted most clearly by two decisions, [*Evans* and *Ricks*]").

a "continuing violation" and therefore extend the limitations period for an indefinite period. Again, the Court "contradicted" the theory.

The *Morgan* Court focused on the statutory language that requires charges to be filed promptly after the statutory violation "occurs." The Court divided the universe of statutory violations into two distinct, mutually exclusive categories. The first category is composed of what the Court called "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire . . . ." *Morgan*, 536 U.S. at 114. For each such discrete act, the charging party must file a charge within the requisite period or forever lose the opportunity to challenge that decision. *Id.*

Discrete acts, the Court observed, are characterized by two defining characteristics: (a) they "are easy to identify"; and (b) "[e]ach [such] incident . . . constitutes a separate actionable 'unlawful employment practice.'" *Id.* And because each discrete act is both easy to identify — it "happens" on a specific date — and is separately actionable, the complainant is expected to file a charge of discrimination shortly after the incident occurs. *Id.* at 114-15. This is true, the Court held, even if it the act is part of a series of separately actionable discriminatory decisions that together form a pattern extending into the limitations period. *Id.*

The Court distinguished this common category of Title VII violations from the *sui generis* category of hostile environment claims. The Court observed that, in a hostile environment case, "[t]he 'unlawful employment practice' . . . cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* at 115. The statutory violation "is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice'" because the individual events forming the violation are not separately

actionable. For that reason, the Court said, the "practice" "occurs" when the last of the events transpires, and if one such event "occurs" within the limitations period, the complainant can challenge the entire chain of events, including those that occurred outside the limitations period. *Id.* at 117.

B. Pay Decisions Are Discrete Acts

Pay claims fall into the *Morgan* "discrete acts" category because they possess both of the diagnostic criteria for discrete act treatment. First, pay decisions "happen" at once on a specific date, not incrementally over an extended period of time. In this case, for example, Goodyear decided petitioner's starting salary on a specific day when she started work, and thereafter decided on her annual salary increase at a specific time each year. Petitioner does not allege that she was unaware when these decisions were made.[11]

Second, each compensation decision is independently actionable. Unlike a harassment claim, which may be comprised of a series of jokes or uncivil comments made over time, none of which would independently be a violation of Title VII, one incident of pay discrimination is invariably "actionable on its own." *Morgan,* 536 U.S. at 115. Because petitioner was *entitled* to file a charge with respect to each discrete pay decision she believed to have been discriminatory,

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[11] Petitioner notes that the salaries of *other* employees are generally kept confidential and suggests that this fact warrants an effectively unlimited time for filing a charge of discrimination. As explained in the text and *infra* at 7-10, the Court has previously and repeatedly held that the limitations period begins to run when the challenged *decision* is made and communicated, not when the complainant has amassed some specific quantity of evidence suggesting discrimination; such a rule would be unworkable and would lead to vastly differing treatment for indistinguishable claims. In any event, petitioner *in this case* does not claim to have been ignorant of the facts necessary to support a charge, and it would be unnecessary and unwarranted for the Court to reach out to decide whether or in what circumstances equitable tolling or the application of estoppel might be appropriate. The lower courts have proven themselves to be capable of developing the law on these equitable doctrines on a case-by-case basis. *See, e.g., Nunnally v. MacCausland*, 996 F.2d 1, 4 (1st Cir. 1993) ("relief from limitations periods through equitable tolling ... remains subject to careful case-by-case scrutiny."); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987) (equitable tolling may apply "when defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action" and equitable estoppel may apply when, "despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline.").

she was *obligated* to do so. She was not entitled to wait until she had decided to retire and then attempt to reach back to challenge decisions made much earlier.

II. CATEGORIZING PAY CLAIMS AS DISCRETE ACTS FAIRLY ACCOMMODATES COMPETING SOCIETAL INTERESTS, AND IS CONSISTENT WITH *BAZEMORE*

Petitioner claims that, for two reasons, a different rule of limitations should apply to what she calls "disparate pay claims" than is routinely applied to every other form of non-harassment employment discrimination claim under Title VII. First, petitioner laments the "unfairness" that would result if the commonly understood rule of limitations is applied here: compensation discrepancies are said to be too small to "be worth fighting over," Pet. br. at 14; the limitations period selected by Congress — "a few short months" — is said to be too short, *id.*; and employees are hypothesized to be more reluctant in the pay context to "rock the boat" by filing a charge than they are with respect to "more serious" violations. Pet. br. at 25-26. The many errors in this argument are explained in Section A below.

Second, petitioner reads the Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), as permitting complainants in pay cases to wait years or even decades before filing a charge of discrimination. As explained in Section B below, *Bazemore*'s holding is far more limited than petitioner suggests, and, in fact, that decision is irreconcilable with the application of a special continuing violations rule in this case.

A. It Is Both Fair And Appropriate To Require Complainants To File Charges Of Discrimination Promptly

1. Strict Adherence to Rules of Limitation Guarantees Evenhanded Administration of the Law

Petitioner claims that a rule permitting an employee to challenge a salary-setting decision years after it is made — indeed, after the complainant's career is over and she has decided to retire, as petitioner did here — would fulfill the purpose of Title VII which, she says, is to make

whole victims of discrimination. Pet. br. at 24. To be sure, Title VII's aim to make victims whole is *one* of the Act's important purposes, but like all major pieces of legislation, Title VII represents the accommodation of competing values and it is a mistake to view it in monolithic terms.

If compensation had been Congress' only interest in passing Title VII, it could have enacted the statute petitioner envisions, *i.e.*, one that had no meaningful period of limitations and left employers to their common law defenses such as laches. Doing so would certainly have made it possible to "make [more] persons whole." Pet. br. at 24. Congress made a different choice, however. After substantial debate, Congress consciously selected "quite obviously short deadlines" for filing charges of discrimination under Title VII. *Mohasco*, 447 U.S. at 825. It did so because it recognized that periods of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *American Pipe*, 414 U.S. at 554. A period of limitation, then, represents a balance between competing interests: it

> "afford[s] plaintiffs what the legislature deems a reasonable time to present their claims, [while simultaneously] protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."

United States v. Kubrick, 444 U.S. 111, 117 (1979).

And so in *Morgan*, the Court reiterated that "strict adherence [to statutes of limitations] is the best guarantee of evenhanded administration of the law." *Morgan*, 536 U.S. at 108 (*quoting Mohasco*, 447 U.S. at 826); *see also Kavanagh v. Noble*, 332 U.S. 535, 539 (1947) ("Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and

they must be strictly adhered to by the judiciary . . . . Remedies for resulting inequities are to be provided by Congress, not the courts.") (internal citation omitted).

Petitioner argues that the "few short months",[12] Pet. br. at 14, selected by Congress as the appropriate limitations period is too short. In fact, the brief period of limitations selected by Congress serves compelling public interests, as explained *infra* at 13, but more importantly, it was Congress' choice to make. Petitioner's complaint is better addressed to the legislature.

Similarly, petitioner argues that employees are unwilling to "rock the boat" by filing a charge, and therefore should be given special dispensation (although only in pay cases) for filing charges long after the operative decisions have been made and announced. The Court rejected almost precisely this argument in *Ricks*. There, the plaintiff had argued that requiring a timely charge would damage "working relationships and divert attention from the proper fulfillment of job responsibilities," and yet the Court enforced the statutorily prescribed limitations period. *Ricks*, 449 U.S. at 256. A reluctance to "rock the boat" — or even a genuine fear of retaliation — will not excuse a complainant's failure to utilize the Act's procedures. *See, e.g., Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 270 (4th Cir. 2001) ("The bringing of a retaliation claim [], rather than failing to report ... is the proper method for dealing with retaliatory acts.").

Finally, petitioner argues that a would-be complainant should not be punished for giving the employer the "benefit of the doubt," or the time necessary to see the error of its ways and do-the-right-thing. Pet. br. at 14. Again, this contention is answered by *Ricks*. There, the plaintiff had filed a grievance and hoped that, through this process, the college would reverse its decision. The possibility that the employer could conceivably "un-do" a decision, however, does not alter the date on which the decision was made, and, as the Court has repeatedly held, once "the

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[12] The period is actually either six or ten months, approximately, depending on the jurisdiction.

operative decision [has been] made — and notice given," the limitations period begins to run. *Chardon*, 454 U.S. at 8; *see also Ricks*, 449 U.S. at 261 ("limitations periods normally commence when the employer's decision is made.").

2. Strict Enforcement Of Title VII's Brief Limitations Period Is Necessary To Accommodate Employer and Employee Rights

The interest in repose is particularly compelling in the employment setting. To defeat a claim of discrimination, an employer must be able to articulate its rationale for the challenged decision, and to do so convincingly. The plaintiff attempts to show at trial that the rationale proffered by the employer is merely a pretext for discrimination, and the jury must decide whom to believe. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *St. Mary's Honor Ctr. v. Hicks.*, 509 U.S. 502, 506-07, 513-14 (1993). In most instances, the testimony devolves to a "he said/she said" battle of recollections; the most vivid rendition of events often prevails.

But an employer's ability to tell its story dissipates sharply as time passes. Memories fade; managers quit, retire or die, business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or abandoned altogether. Unless an employer receives prompt notice that it will be called upon to defend a specific decision or describe a series of events, it will have no "opportunity to gather and preserve the evidence with which to sustain [itself]. . . ." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977) (quoting Congressman Erlenborn, 117 Cong. Rec. 31972 (1971)).

This problem is becoming ever more acute for employers, exacerbated by trends in employee mobility, mergers, acquisitions, reductions-in-force, divestitures and reorganizations. The likelihood that all of the decision-makers, witnesses, and human resources representatives an employer needs to tell its story convincingly will still be working for the defendant-employer at

the time of a trial dwindles as the challenged decision recedes into the past. The American workforce currently has a median job tenure of only four years.[13] This number is substantially lower (2.9) for workers between ages 25 and 30, and is lower still (1.3) for workers in their early twenties. *Id.* It also varies by job category. For example, employees in "administrative and support services" and "accommodation and food services" have median tenures of only 1.9 and 1.6 years respectively. *Id.* Thus when an employee of even moderate tenure delays in bringing a claim, the employer is unlikely to have the necessary witnesses at its disposal to defend itself.

Petitioner assures the Court that, "in reality, [true prejudice to the employer will be] rare in disparate pay cases [because] employers document the basis of pay decisions and retain those records for years." Pet. br. at 28. The suggestion is misguided for four reasons. First, in practice, employers rarely record detailed explanations as to why one employee might have received an incrementally lower or higher pay increase than his or her co-worker. Second, even if this kind of documentation existed, few defendants would be likely to prevail at a trial — even when the challenged decision was entirely bias-free — by meeting the live, detailed, and often tear-stained testimony of the plaintiff with a few words recorded on a document.

Third, the Equal Employment Opportunity Commission ("EEOC") requires that employers keep only certain specified employment records (including those relating to "rates of pay or other terms of compensation"), and then only requires that the records be kept for one year. *See* 29 C.F.R. § 1602.14. The agency selected one year as the appropriate period "so that there [would be] *no possibility* that an employer or labor organization [would] have legally destroyed its employment records before being notified that a charge [had] been filed." 54 Fed.

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[13] *See* Employee Tenure Summary, Sept. 8, 2006; U.S. Department of Labor, Bureau of Labor Statistics News, www.bls.gov/news.release/tenure.nr0.htm (last viewed on 10/23/06).

Reg. 6551 (Feb. 13, 1989) (emphasis added).[14] If petitioner prevails here, employers would be obligated to keep these records, not for one year, but in perpetuity.

Finally, petitioner's suggestion that an employer can avoid material prejudice merely by improving its record retention program is undermined by the facts of this case. Petitioner claims that she was denied the compensation she was owed because she refused to go out on a date with her then-supervisor, Mike Maudsley. Pet. br. at 5-6. But it is unlikely that Goodyear keeps any records that might be relevant to this sort of allegation, and Mr. Maudsley was unavailable either to admit or deny petitioner's allegations; he had died of cancer by the time the case went to trial.

3. The Equitable Defense of Laches Is Not An Adequate Substitute For Congress' Design

Congress intended timeliness questions under Title VII to be analyzed as they are with most causes of action: an express limitations period sets the time available to a complainant for filing, and the courts retain the equitable authority to ameliorate the operation of that limitation in particular cases where exceptional facts justify deviation from the general rule. *See Morgan*, 536 U.S. at 113-14. Petitioner seeks to turn this statutory scheme upside down. In her view, complainants in salary-setting cases should generally be excused from an obligation to file charges promptly, and the employer's hopes should rest with the laches defense.

Not only would that suggestion do violence to Congress' evident design for administration of the Act, it would effectively prevent employers from mounting a vigorous defense to even the most baseless claims. The laches defense is only available under "the most unusual circumstances," and poses a "particularly difficult [standard for employers] to establish."

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[14] *See also EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1204 (11th Cir. 1982) ("Once defendants satisfy the EEOC's record retention requirement in Title VII enforcement actions, they should not be punished for failing to exceed standards mandated by the very Commission that promulgated them."); *see also Jeffries v. Chicago Transit Authority*, 770 F.2d 676, 681 (7th Cir. 1985) ("We do not read [29 C.F.R § 1602.14] to require the [company] to maintain records indefinately [sic].").

Albemarle Paper Co. v. Moody, 422 U.S. 405, 440 (1975) (Marshall, J. concurring).[15] For this reason, laches is not an adequate substitute for a period of limitations; as the Court has recently recognized, statutes of limitation exist for the very purpose of creating "a presumption [of prejudice from the passage of time] which renders proof [of prejudice] unnecessary." *Stogner v. California*, 539 U.S. 607, 616 (2003), (*quoting with approval Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

That presumption is necessary because, in the great run of cases, significant delay will almost always result in prejudice that is nonetheless unprovable. Even when all of the relevant witnesses are alive and can be located, they may also be unavailable or unhelpful — relocated, disinclined to volunteer to help a former employer, or simply unable to recall the events at issue. In these circumstances, the employer will typically be unable to make the particularized showing of prejudice courts often require.[16] No one can doubt that the memories of witnesses fade over time, and that their testimony regarding historical events — who said what to whom and why — will become correspondingly less vivid and less compelling as time passes. But it typically will be impossible for the employer to show with specificity the important details that its witnesses (a) formerly remembered but (b) have now forgotten, and if those forgotten details cannot be

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[15] For example, it *might* be sufficient in some cases to show that a key witness has died, but in others it might not. *See, e.g., Springer v. Partners in Care*, 17 F. Supp. 2d 133, 139 (E.D.N.Y. 1998) (denying defendant's laches defense even though defendant "no longer possess[ed] documentation relating to plaintiff or his employment" and no longer employed "any individuals who possess personal knowledge of plaintiff's claims."); *Myree v. Local 41, IBEW*, 789 F. Supp. 597, 616 (W.D.N.Y. 1992) (finding that laches did not bar plaintiff's recovery, even though several individuals involved in events relevant to the lawsuit, who "might have been key witnesses for the defense," were dead); *Harris v. Ford Motor Co.*, 487 F. Supp. 429, 432 (W.D. Mo. 1980) (denying defendant's laches defense because "prejudice is not enough.").

[16] *See, e.g., Brown v. Continental Can Co.*, 765 F.2d 810 (9th Cir. 1985) (laches unavailable even though prejudice to defendant was likely through loss of witnesses and documents); *Anderson v. Anheuser-Busch, Inc.*, 65 F. Supp. 2d 218 (S.D.N.Y. 1999) (twelve year delay between notice of right to sue and lawsuit insufficient to warrant application of laches); *Askins v. Imperial Reading Corp.*, 420 F. Supp. 413 (W.D. Va. 1976) (four year delay insufficient to warrant application of laches, where defendant could not particularize its claim of what testimony had been affected by delay).

recalled, they cannot be proven in aid of a laches defense. Similarly, an employer can generally claim prejudice stemming from the loss of a document only if it can (a) prove that the document once existed and (b) describe to some degree what the document contained and why it would have helped. Such a showing will often be impossible if the document was destroyed before the employer knew it existed or that it would be needed.[17]

Statutes of limitations are the general rule precisely because that kind of prejudice is assumed to occur as a matter of course, but is, in most circumstances, difficult or impossible to prove. It is in this respect, and for this reason, that rules of limitation create "a presumption [of prejudice] which renders proof unnecessary." *Stogner*, 539 U.S. at 616.

B. Petitioner Advances A Fundamental Misreading Of Bazemore

1. *Bazemore* applies only to facially discriminatory systems perpetuated within the limitation period

Petitioner finds support for a special compensation-only limitations period in *Bazemore*, but she extends that case far beyond what its factual context and the language of the opinion allow. Prior to the passage of Title VII, the state agriculture extension service in North Carolina had been organized into two separate divisions — a so-called "Negro Branch," which was staffed exclusively by African Americans and served only black farmers throughout the state, and a second branch (which had no racial designation) that was staffed only by whites. 478 U.S. at 390-91. The white employees who served white farmers had a pay scale applicable only to them. Agents in the "Negro Branch" had their own formal pay structure, and it uniformly paid them less to do the same work as similarly situated whites. *Id.*

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[17] Although, as noted *supra*, the EEOC requires that employers keep certain specific records, it is impossible for an employer to know what *other* records might prove vital to its defense until issue is joined by the filing of a charge. For example, travel information — not among the kinds of records the EEOC requires the employer to keep — showing that the complainant was in another city at the time of a critical meeting or conversation could be devastating to complainant's credibility — and could thus win the employer a trial — yet may well be innocently and lawfully destroyed while the complainant waits years to file a charge.

When Title VII became law, the agency eliminated its race-specific labels and began slowly reducing the pay disparities that had previously existed. The disparities continued after Title VII became applicable to the states in 1972, however, and work assignments allegedly continued to be race-based. *Id.* at 391. The *Bazemore* plaintiffs complained that the state agency was, at the time of the suit (and thus within the limitations period), perpetuating "separate wage systems" that deliberately paid African Americans less than similarly situated white employees. *See* 1986 No. 85-93, WL 728395 at * 6-9 (Jan. 10, 1986). (brief of *Bazemore* petitioners). Moreover, the perpetuation of the prior segregated pay structure had been acknowledged in writing by the agency's director. *Id.* at 9.

The court of appeals held that the employees' discrimination claims were time-barred because the pay *raises* given within the limitations period were not adverse to black employees, but this Court reversed. In defining when the actionable violation had occurred, the Court held that an employer could not defend a *current facially discriminatory pay structure* by arguing that it had previously engaged in the same discriminatory conduct without complaint. 478 U.S. 386-88. "[T]o the extent an employer continue[s] to engage in [a discriminatory] act or practice [within the limitations period], it is liable" under Title VII, even if it also made discriminatory decisions *before* the limitations period without a timely charge having been filed. *Id.* at 394-96 (emphasis added). The Court distinguished its prior decision in *Evans* by noting that in that case, the "Respondent [had] made no allegation that *the seniority system itself* was intentionally designed to discriminate." *Id.* at 396 n.6 (emphasis added). The Court thus drew a bright line between "system[s] intentionally designed to discriminate" operating within the limitations period, which can be challenged every time the system is applied (the facts in *Bazemore*) and

compensation decisions made pursuant to a facially neutral pay structure, which must be challenged at the time they occur.

The Court also noted that in *Evans*, the employer's discriminatory *decision* had been made and effected well outside the limitations period, and that the employer had made no *decision* within the limitations period other than the refusal to un-do the consequences of those prior, time-barred decisions. In *Bazemore*, by contrast,

> petitioners are alleging that in continuing to pay blacks less than similarly situated whites, respondents *have not from the date of the Act forward "made all their employment* ***decisions*** *in a wholly nondiscriminatory way."* *Ibid.* Our holding in no sense gives legal effect to the [time-barred] actions, but, consistent with *Evans* . . ., focuses on the present salary structure, which is illegal *if it is a mere continuation of the pre-1965 discriminatory pay structure.*

478 U.S. at 396 n.6 (emphasis added). It was in this context that Justice Brennan observed that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96.

In *Lorance*, the Court had another occasion to explain the relationship between the *Evans* general rule and the *Bazemore* exception. In that case, the plaintiffs challenged an allegedly discriminatory seniority system. Although the system was neutral on its face, the plaintiffs alleged that it had been adopted with the specific purpose of discriminating against women. The Court explained that with

> a facially *neutral* system [that nonetheless was specifically designed to discriminate], the discriminatory act occurs only at the time of adoption . . . . [Conversely,] a facially *discriminatory* system [like the pay structure at issue in *Bazemore*] by definition discriminates every time it is applied. This is a material difference for purposes of the analysis we employed in *Evans* and *Ricks* — which focuses on the timing of the discriminatory act for purposes of the statute of limitations. It . . . also [explains the "each week's

> paycheck" language] of *Bazemore v. Friday*. . . . *Id.* at 912 n.5 (emphasis added).[18]

Lorance thus underscored the ingredient essential to application of the *Bazemore* exception to the *Evans/Ricks* general rule: a "facially discriminatory system" discriminates every time it is applied, and thus is a violation of the Act "occurs" whenever it operates.[19] A facially neutral system is not.[20]

2. The *Bazemore* exception to the general rule does not apply here

Petitioner's claims are resolved by *Evans* and *Ricks*, not by *Bazemore.* Petitioner does not allege what the *Bazemore* rule requires: a facially discriminatory pay structure, established and perpetuated specifically to impose disparate pay. To the contrary, petitioner insists that she was the victim of Goodyear managers who *violated* the employer's explicit rules *against* discrimination and ignored the company's pay guidelines. *See. e.g.*, Pet. br. at 6 (supervisor "did not make his pay recommendations in accordance with Goodyear's purported policy").[21] Petitioner never argued that Goodyear's salary structure was designed and implemented in order to discriminate or that it was facially discriminatory; she argued that her relatively low pay was

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[18] The *Morgan* Court also specifically noted that in *Bazemore*, it had considered a discriminatory "salary structure," 536 U.S. at 112.

[19] It would not be enough for application of the *Bazemore* exception for a plaintiff to allege that the employer's facially neutral pay system discriminates against a protected class as a whole — *i.e.*, a pattern or practice of discrimination. Rather, the *Bazemore* exception applies *only* when the pay system is discriminatory *on its face*, and is imposed by the employer for that very purpose, as was the case in *Bazemore.*

[20] *Lorance's* application to seniority systems was superseded by the Civil Rights Act of 1991, but nothing in the 1991 Act undermined the Court's definition of a "facially discriminatory system," or the Court's analysis of *Bazemore. See, e.g., Law v. Continental Airlines Corp. Inc.*, 399 F.3d 330, 333 (D.C. Cir. 2005) (quoting *Lorance*, 490 U.S. at 912)). The statute also left the *Evans/Ricks* limitations rule unaffected outside of the seniority system context, *see, e.g.,* 137 Cong. Rec. S15485 (Oct. 30, 1991) (interpretive memorandum of Sen. Danforth ("[t]his legislation should not be interpreted to affect the sound rulings of the Supreme Court regarding 'continuing violations' theory under Title VII.").

[21] According to petitioner, Goodyear based annual pay raises on recommendations from the Business Center Manager, who made recommendations based on annual employee performance evaluations. These annual evaluations were in turn based on production data, managerial judgments about the employee's work performance, and on reports from Performance Auditors about employee performance. *See* Pet. br. at 5.

the down-stream consequence of falsified audits of her work and a poor performance evaluation given to her because she refused to go on a date with her boss. *See* Pet. br. at 5.[22]

In sum, petitioner alleges conduct by managers taken *in contravention* of the employer's policies and procedures (what petitioner calls the company's "neutral merit system," Pet. br. at 5, 26); *Bazemore* involved and implemented policies and procedures *designed and implemented* by the employer from the outset to disadvantage the protected class. *Bazemore* does not apply.[23]

C. Petitioner's Attempt to Divorce Intent From Adverse Action Is Fundamentally At Odds With The Purpose of Title VII And The Court's Prior Cases

A claim of disparate treatment discrimination requires the coincidence of two elements: an *intent* to discriminate and an *act* of discrimination, *i.e.*, an adverse employment action. *See United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983) (critical factual inquiry in *every* Title VII disparate treatment case is "whether the defendant *intentionally* discriminated against the plaintiff") (emphasis added); *see also Burlington N. & Santa Fe Ry.*

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[22] Petitioner's complaint regarding the persisting impact of now-time-barred pay decisions theoretically might also have been cast as an argument in support of a disparate impact claim, but there are three reasons such a claim is no answer for petitioner here. First, petitioner never pursued a disparate impact claim, and so it is too late to do so now. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53-54 (2003). Second, the Court has held that a pay disparity based on some factor other than sex — the essential attribute of a disparate impact claim — is never actionable in a Title VII sex discrimination case. *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981) ("[E]mployers [can] defend against charges of [sex] discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'") (citations omitted); *see also Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 710, n.20 (1978) (gender-based disparity in pension benefits "determined by . . . actual life span [and] thus [is] 'based on [a] factor other than sex,' and consequently [is] immune from challenge"). Finally, discrimination in compensation is prohibited by Section 703(a)(1); the Court observed just last term in *Smith v. City of Jackson*, that the language of that provision "does not encompass disparate impact liability." 544 U.S. 228, 236 n. 6 (2005) (construing identical language in the Age Discrimination in Employment Act). Conversely, Section 703(a)(2), the Title VII language that provides the textual basis for disparate impact claims, does not prohibit compensation discrimination, but only those employer actions that "tend to deprive individuals of employment opportunities or otherwise adversely affect their status as employees."

[23] *Compare Shea v. Rice*, 409 F.3d 448 (D.C. Cir. 2005) (denying employer's motion to dismiss because plaintiff alleged a currently operating facially discriminatory diversity policy that set up a two-class pay structure); *Law*, 399 F.3d at 333 (explaining that a facially discriminatory system *categorically*, *purposefully*, and *invariably* treats similarly situated employees differently) (quoting *Lorance*, 490 U.S. at 912)); *see also Int'l Union, UAW, v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (employer policy expressly designed and purposefully implemented to deny women certain employment opportunities).

Co. v. White, 126 S. Ct. 2405, 2411-12 (2006) (adverse employment action required for discrimination claim). It is not sufficient for a plaintiff to show only a biased turn of mind or an inequality of result.[24]

In petitioner's view, however, at least in the salary setting context, the two need not coincide in any respect; the animus and the adverse result can be separated by decades, and the individuals responsible for taking the adverse action — here issuing a pay check, or at least causing a computer to do so — need not be the same as (or even known by) the individual who harbored the discriminatory intent, who may be retired, dead, or working elsewhere when the adverse action occurs. Thus, petitioner concedes that

> If the unlawful employment practice in a disparate pay case is the pay-setting *decision* (and only that decision), then the violation occurs at the time of that decision and the limitations period runs from that date.

Pet. br. at 18.

But petitioner and her *amici* insist that Title VII prohibits discrimination with respect to the *result* of the salary setting process, "not with respect to compensation *decisions*." Pet. br. at 23 (emphasis in original). Petitioner's *amici* posit that "[d]iscriminatory paychecks are not actionable simply because they are 'sufficiently related' to a pay *decision* that occurred outside the limitations period. . . . They are actionable because they pay less money to an employee because of sex." Br. of Nat'l Partnership for Women & Families, *et al.* at 8-9 (emphasis added).

As noted above, the Court has repeatedly and expressly held otherwise; it is the *decision* that causes the limitations period to commence. In *Ricks*, the Court held that "the limitations

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[24] Petitioner argues in passing that the court of appeals erred when it concluded that the only salary setting decision made within the limitations period was not biased. *See. e.g.*, Pet. br. 11. Petitioner did not seek, and the Court did not grant, *certiorari* to resolve that question, however, and, as the case comes to the Court, we presume that this decision was correct and address it no further.

period[] commenced at the time the [allegedly discriminatory] *decision* was made and communicated" to the complainant. In *Chardon* (a § 1983 discrimination case), the Court again held that the limitations period began to run when "the operative decision was made — and notice [was] given" — to the complainant. 454 U.S. at 8.

And in *Bazemore*, the Court reiterated that it was not sufficient for a complainant to allege a discriminatory decision outside the limitations period resulting in financial damage within the limitations period. It held that a unique rule of limitations was warranted there only because petitioners were alleging that the respondents "*have not from the date of the Act forward 'made all* [*their*] *employment* ***decisions*** *in a wholly nondiscriminatory way*,'" 478 U.S. at 396 n.6 (emphasis added).

Petitioner thus has a mistaken view regarding the centrality of the *decision* and the pre-requisite, concurrent intent to the timeliness question, and this has led her to place great stock in "a wide variety of statutory and common law claims [with respect to which] recurring payments give rise to recurring causes of action under the Equal Pay Act, the Fair Labor Standards Act, the common law of contract, and a range of other analogous contexts." Pet. br. at 13. Petitioner misses the obvious difference between those schemes and Title VII: liability under those other statutory and common law schemes *does not hinge upon the defendant's intent*, and thus on the employer's *decision* to take a particular action. The EPA, for example, imposes "a form of strict liability" on employers who pay males more than females for performing the same work. *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310 (10th Cir. 2006). "[I]n other words, the plaintiff in an EPA case need not prove that the employer acted with discriminatory intent." *Id.* (citing *Ryduchowski v. Port Auth. of N.Y. and N.J.*, 203 F.3d 135, 142 (2d Cir. 2000)). A plaintiff makes out a *prima facie case* of liability under the EPA simply by showing "that the

employer pays unequal wages for equal work, as defined in the Act." *Mitchell v. Jefferson County Bd. of Educ.*, 936 F.2d 539, 547 (11th Cir. 1991) (EPA "plaintiff is not required to prove intentional discrimination").[25] For Title VII liability, that is not sufficient; there must be an effectuated *decision* to pay unequal wages, and that *decision* must be premised on unlawful bias.

III. THE EEOC'S INTERPRETATION OF SUPREME COURT PRECEDENT IS NOT ENTITLED TO DEFERENCE BECAUSE PARSING CASES DOES NOT REQUIRE SPECIAL AGENCY EXPERTISE

Petitioner seeks support for her position in what she describes as the EEOC's "consistent" position on the application of *Bazemore* to compensation cases. Pet. br. at 32. This reliance is misplaced for two reasons.

First, the EEOC's position on this question does not depend upon an "interpretation of the statute," but rather represents the EEOC's reading of *Bazemore* and therefore is not entitled to deference. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336, n.5 (2000) (affording no deference to a longstanding Justice Department practice that was based on its interpretation of a Supreme Court case). Courts "are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc),*vacated on other grounds*, 524 U.S. 11 (1998)). "[A]gencies have no special qualifications of legitimacy in interpreting Court opinions. There is therefore no reason for courts — the supposed experts in analyzing judicial decisions — to defer to agency interpretations of the Court's opinions." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (quoting *Akins*, 101 F.3d at 740)); *see also NLRB v. IBEW, Local 340*, 481 U.S.

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[25] The question of intent is also not relevant to whether a plaintiff is entitled to recovery under the FLSA. Under the FLSA, intent is only relevant to questions of 1) whether an employee is entitled to double liquidated damages and 2) whether the statute of limitations should be extended from two to three years. *See* 29 U.S.C. §§ 216(b), 255, 260; *see also McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-33 (1988). Likewise, in an ordinary breach of contract case, the motive of the breaching party is irrelevant to a determination of damages. *See Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 203 (4th Cir. 1988) (citing *Holland v. Spartanburg Herald-Journal Co.*, 166 S. Ct. 454, 465 (1932)).

573, 597 (1987) ("We defer to agencies ... in their construction of their statutes, not of our opinions.") (Scalia, J., concurring).

In claiming a special rule of limitations for salary-setting cases, the EEOC has attempted to construe this Court's decisions and not the text of Title VII. The EEOC's current, revised Compliance Manual, which for the first time specifically refers to discriminatory paychecks as "repeated occurrences of the same discriminatory employment action," makes clear that the agency's "paycheck" position is based on its interpretation of *Bazemore*'s meaning in the wake of *Morgan*.[26] *See* EEOC Compliance Manual (July 21, 2005) (Revision to Threshold Issues: "The revision conforms the Manual's discussion of the continuing violation doctrine to the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*"). When discussing paychecks, the EEOC's Compliance Manual does not attempt to parse the language of 42 U.S.C. § 2000e-5(e)(1), *id.* at p. 42, but *does* cite directly to *Bazemore*, n. 183; *compare Burlington Northern*, 126 S.Ct. at 2413 (detailing the EEOC's interpretation of the *language* of Title VII's retaliation provision).

Tellingly, the EEOC argued below that the issue in this case is not one of statutory construction, but rather amounts to a dispute over the construction of this Court's "decision in *Bazemore v. Friday*." *See* EEOC's Br. in Support of Petition for Rehearing and Suggestions for Rehearing En Banc at 6.[27] In fact, the EEOC never *asked* the Eleventh Circuit for deference to its interpretation of *Bazemore*, nor has it asked this Court for such deference.

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[26] *Compare* EEOC Compliance Manual § 2-IV.C.2.b. at 35 and n.184 (July 27, 2000) (citing to *Bazemore* and referring to Title VII pay discrimination claims as one of two types of continuing violation) *with* EEOC Compliance Manual § 2-IV.C.1.a. at 42 and n. 183 (July 21, 2005) (also citing *Bazemore*, but stating that each occurrence of Title VII pay discrimination, "such as discriminatory paychecks," is a discrete act).

[27] "We believe that [the Eleventh Circuit's] decision is inconsistent with decisions of the Supreme Court and of this Court. . . ." EEOC's Br. in Support of Petition for Rehearing and Suggestions for Rehearing En Banc at 3 (www.eeoc.gov/briefs/Ledbetter.txt (last visited 10/23/06)) (page references are based on on-line version of brief found on EEOC website).

Second, although petitioner claims that the EEOC's position on the application of *Bazemore* has been both clear and consistent, it has been neither. Below, the agency had this to say about the law applicable to this case:

> If it were the case that a Goodyear manager made an openly discriminatory salary-setting decision back in 1979 (when Ledbetter was hired), and that all of the company's decisions affecting her salary since then were non-discriminatory, Ledbetter *could and should have challenged* that 1979 decision by filing a timely charge.

EEOC br. at 7 (emphasis added). *Amici* fully endorse this construction of the *Evans* rule, and believe that it should guide the Court in this case. Each salary-setting decision is a discrete act, is independently actionable, and every such a decision "could and should" be challenged, if at all, within the statutorily prescribed period.

The very next sentence in the EEOC's brief, however, asserts that "petitioner's failure to do so [*i.e.*, to "challenge[] that 1979 decision by filing a timely charge"] does not deprive her of her right to seek relief [for] discriminatory paychecks she received in 1997 and 1998." *Id.* at 8. These sentences are irreconcilable, and they reflect an almost schizophrenic confusion at the EEOC over the event that triggers the Act's filing requirement.

Moreover, while the agency's Compliance Manual has construed *Bazemore* to require a special limitations rule applicable only to salary-setting decisions, the agency has also stated — in its regulation implementing Title VII's recordkeeping requirements[28] (which is entitled to judicial deference) — that employers must keep compensation records for just one year, and has explained that doing so will eliminate any "*possibility* that an employer or labor organization will have legally destroyed its employment records before being notified that a charge has been filed." 54 Fed. Reg. 6551 (Feb. 13, 1989) (emphasis added). This directive cannot be reconciled

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[28] 29 C.F.R. §1602.14.

with the EEOC's articulated view that an employer can be called upon to defend salary setting-decisions made years or decades before the charge.

IV. THE DISTINCTION BETWEEN "PAY" CASES ON THE ONE HAND, AND "EVERYTHING ELSE" ON THE OTHER, IS AN ILLUSION

Petitioner suggests that the Court distinguish between "disparate pay claims" and all other forms of discrimination for limitations purposes. This taxonomy is deceptive and would encourage the sort of artful pleading this Court anticipated and attempted to forestall in *Evans*. 431 U.S. at 560.[29] Nearly every form of adverse employment action has an impact on compensation — denied promotions, demotions, transfers, reassignments, tenure decisions, suspensions and other discipline — they *all* have the potential to affect pay. Expanding the *Bazemore* exception to include any decision that impacts pay would turn the exception into the rule, and the general rule established in *Evans* and *Ricks* into a dead letter.

Presumably petitioner would agree that the pay consequences of a denied promotion would not bring a case within the special *Bazemore* exception, but if that is so it is difficult to see what in *her* case makes *Bazemore* applicable. This case is a "disparate pay dispute" only in the most derivative sense.[30] Petitioner's core complaints relate to a poor performance evaluation.

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[29] These false distinctions have led to peculiar and inconsistent results as courts struggle to separate pay *qua* pay from the consequences of non-pay decisions *See, e.g., Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013 (7th Cir. 2003) (finding a denial of raise claim filed three years after the actual denial to be timely because the case did not involve a "discrete discriminatory act such as a failure to promote."); *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982 (8th Cir. 2003) (dismissing claims based on 1996 denial of tenure and 1998 discriminatory promotion, but allowing "salary discrimination" stemming from much earlier 1991 decision to proceed to summary judgment); *see also Taylor v. Northeast Ill. Reg'l R.R. Corp.*, No. 01 C 6319, 2004 WL 635058 (N.D. Ill. 2004) ("To the extent that Taylor's charge of discrimination is based on his being hired as a P8 paralegal at a lower starting salary than non-black P8 paralegals, he states a strict paycheck claim. This means that checks received by Taylor within the 300-day limitations period which reflect [the employer's] initial decision to pay him less than non-black P8 paralegals will not be time-barred. . . . But, to the extent that Taylor's charge of discrimination is based on his being given a lower annual salary increase than non-black P8 paralegals, he complains of discrete acts of discrimination that are subject to the 300-day limitations period.").

[30] Petitioner's term — "disparate pay claim" — is confusing. Petitioner's proposed rule would not apply to many forms of pay, such as bonuses and stock grants, that are one-time events and do not affect each paycheck. Conversely, as explained in the text, petitioner would extend the rule to cases that involve employer actions that affect employee pay only in a derivative sense.

That evaluation, she alleges, was prepared by her manager as retribution because petitioner refused to go on a date with him. The compensation *consequences* of that evaluation appeared in petitioner's paychecks, but only in the same way that a denied promotional opportunity would have a continuing monetary consequence for the unsuccessful candidate, and petitioner does not appear to argue that *Bazemore* would apply in that latter circumstance.[31] Thus, it is difficult to divine the rule petitioner would use to distinguish her own "pay disparity case" — allegedly covered by *Bazemore* — from the run of the mill cases governed by *Evans*.

CONCLUSION

For the foregoing reasons, the decision of the district court dismissing petitioner's pay discrimination claim with prejudice should be affirmed.

Respectfully submitted,

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

KAREN R. HARNED
ELIZABETH A. GAUDIO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F STREET, N.W., SUITE 200
WASHINGTON, D.C. 20004
(800) 552-6342

NEAL D. MOLLEN
Counsel of Record
CARSON H. SULLIVAN
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

[31] Poor performance evaluations are themselves actionable when they affect grade or salary. *See Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003); *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377 (4th Cir. 2004).

Attorneys for Amici Curiae
The Chamber of Commerce of the United States of America and
National Federation of Independent Business Legal Foundation