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 FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE ASIAN AMERICAN JUSTICE CENTER, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AARP AND THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN BRITTAIN
MICHAEL FOREMAN
SARAH CRAWFORD
ADAM STOFSKY
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW, Suite 400
Washington, DC 20005
(202) 662-8600

TERISA E. CHAW
EXECUTIVE DIRECTOR
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

JOSEPH M. SELLERS
Counsel of Record
CHRISTINE E. WEBBER
COHEN, MILSTEIN, HAUSFELD & TOLL, PLLC
1100 New York Avenue, NW, Suite 500
Washington, DC 20005
(202) 408-4600

JAMES M. FINBERG
EVE H. CERVANTEZ
JAHAN C. SAGAFI
PETER LECKMAN
DANIEL HUTCHINSON
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111
(415) 956-1000

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

AIMEE J. BALDILLO
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036
(202) 296-2300

DENNIS COURTLAND HAYES
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 580-5797

THOMAS W. OSBORNE
DANIEL B. KOHRMAN
LAURIE A. MCCANN
AARP FOUNDATION LITIGATION
MELVIN RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060

PATRICIA A. SHIU
SHELLEY A. GREGORY
SHARON TERMAN
THE LEGAL AID SOCIETY
EMPLOYMENT LAW CENTER
600 Harrison Street, Suite 120
San Francisco, CA 94107
(415) 864-8848

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTES, REGULATIONS AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association, the Lawyers' Committee for Civil Rights Under Law, the Asian American Justice Center, the National Association for the Advancement of Colored People, AARP and The Legal Aid Society – Employment Law Center respectfully submit this brief as *amici curiae* in support of Petitioner pursuant to Supreme Court Rule 37.3(a), upon the consent of the parties.

Amici are interested in furthering the goal of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination. In this case, *Amici* seek to ensure that longstanding interpretations of the civil rights laws are not upended, and that workers will have a fair opportunity to protect their right to equal pay for each day of equal work during the limitations period. In an effort to assist the Court in its interpretation of the laws aimed at eliminating unlawful employment discrimination, *Amici* have filed *amicus* briefs in Title VII cases including *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101 (2002); *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 1671 (2006); *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

Fuller statements of interest for all *amici* are included in the appendix to this brief.

---

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amici curiae* certify that this brief was not written, in whole or in part, by counsel for a party, and that no person or entity, other than *amici curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

SUMMARY OF ARGUMENT

Amici ask the Court to reaffirm longstanding precedent that in a pay discrimination case, each discriminatory paycheck is a discrete actionable wrong, regardless of when the discriminatory wage was set. This standard, articulated expressly in *Bazemore v. Friday*, 478 U.S. 385 (1986), is in harmony with the plain language of Title VII, has consistently been applied by lower courts, the Equal Employment Opportunity Commission, and other federal enforcement agencies, and makes practical sense. This standard, as evidenced by two decades of consistent application, is faithful to Title VII's careful balance between providing redress to victims of pay discrimination and protecting employers from excessive back pay or stale claims.

The Eleventh Circuit's holding would make it impossible for an employee to challenge current and ongoing discrimination in pay. This interpretation is directly contrary to Supreme Court precedent set out in *Bazemore*. *Bazemore* has been applied consistently and visibly since 1986. In 1991, Congress passed the Civil Rights Act of 1991, which abrogated several Supreme Court interpretations of Title VII. Despite these significant changes, Congress made no changes that would undermine *Bazemore*, but rather endorsed that case's interpretation of Title VII.

Further, the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing Title VII, has issued and reaffirmed guidance that every paycheck issued constitutes a discrete act by the employer. Because the EEOC's interpretation is reasonable and consistent with statutory language, legislative intent, and past decisions of this Court, it deserves deference. Finally, this rule is consistent with parallel interpretations of the Equal Pay Act, the National Labor Relations Act, and the Fair Labor Standards Act.

Title VII was passed to provide robust protection for victims of discrimination. Congress balanced this interest with protections for employers, for example, a two-year limitation on any award of back pay. The Court, the EEOC, and Congress have all recognized that the rule set forth in *Bazemore* is the correct interpretation of that balance, and the Court should continue to affirm that rule today.

ARGUMENT

I. EACH PAYCHECK THAT COMPENSATES A CHARGING PARTY LESS THAN SIMILARLY SITUATED EMPLOYEES BECAUSE OF SEX VIOLATES THE PLAIN LANGUAGE OF SECTION 706(e) OF TITLE VII AND ESTABLISHED PRECEDENT OF THIS COURT.

Two decades ago, in unequivocal language, this Court ruled that "[e]ach week's paycheck that delivers less to a black than 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." *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring).[2] This holding honors the plain language of Title VII, makes practical sense, and has been consistently applied by the courts and federal enforcement agencies. The ruling below contravenes *Bazemore* and the plain language of Title VII. If upheld, the Eleventh Circuit's ruling would render obsolete longstanding and consistently applied precedent of this Court and virtually every lower court in the country. It also ignores Congress' ratification of this Court's longstanding interpretation of the provision of Title VII that governs the timeliness of pay discrimination

[2] *Bazemore* was decided with a *per curiam* opinion, and Justice Brennan's concurrence was joined by all Members of the Court. *Bazemore*, 478 U.S. at 388.

charges. Finally, the ruling below is inconsistent with the EEOC's interpretation of Title VII, to which deference is ordinarily accorded.

A. Title VII Authorizes Petitioner to Challenge Disparities in Each Paycheck Received During the Time Period Covered by Her Charge.

The "most salient source for guidance" in interpreting § 706(e) of Title VII "is the statutory text." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002). In establishing the time limit for filing charges, Title VII states:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . .

42 U.S.C. § 2000e-5(e)(1). *Morgan* addressed the "critical questions" of: (a) "[w]hat constitutes an 'unlawful employment practice'" and, (b) when that practice "occurs." *Morgan*, 536 U.S. at 110. Without elaboration, the Court held that a practice has "occurred" on the day that it "happened." *Id.* Addressing the very issue now before this Court, *Morgan* explained that "unlawful employment practice" referred to discrete incidents and, invoking *Bazemore,* reiterated that each paycheck is a "discrete" incident in a pay discrimination claim. *Id.* at 111-12, *quoting Bazemore*, 478 U.S. at 395-96. Further, the *Morgan* Court ruled that "[t]he existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts . . . ." *Id.* at 113. Therefore, starting with a purely textual analysis, *Morgan* reached the same conclusion as *Bazemore* had 20 years before, and embraced the same analysis that *Bazemore* had adopted. Finally, *Morgan* held that the issuance of discriminatory paychecks prior to the limitations period does not bar a recipient of

subsequent, related paychecks from challenging them as discriminatory during the limitations period.[3] *Id.*

The facts of this case closely parallel those of *Bazemore*, and the arguments squarely rejected by the Court in *Bazemore* closely parallel the rationale employed by the Eleventh Circuit below. In *Bazemore*, a pay disparity arose prior to the enactment of Title VII. *Id.* at 393 n.4, 394-95. Even prior to 1972, when Title VII was first applicable to state employers, the employer began reducing the disparities in pay between African American and Caucasian employees. However, as of 1972 and continuing thereafter, African American employees were still, on average, paid less than similarly situated Caucasian employees. *Id.* at 394-95. The disparities in pay *before* 1972 did not constitute a violation of Title VII. *Id.* at 394. Similarly, the pay disparity here began prior to the limitations period applicable to Petitioner's Title VII charge and continued thereafter. *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1180-81 (11th Cir. 2005). Such disparities in pay, which are "not made the basis for a timely charge" are "the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Airlines v. Evans*, 431 U.S. 553, 558 (1977). Thus, the pay disparities that Petitioner experienced at Goodyear prior to 1997 are the legal equivalent of the pay disparities that the *Bazemore* plaintiffs experienced prior to 1972. *Id.*

[3] The issue before the Eleventh Circuit is more properly characterized as a question of the period within which damages may be recovered rather than the period within which a charge may be filed. Under *Bazemore*, and the language of Title VII, Petitioner's claim was timely filed, and the real issue presented is whether her recovery is limited to the unequal pay received during the 180 day period within which charges may be filed, specified by 42 U.S.C. § 2000e-5(e)(1), the two year period within which back pay may be recovered, pursuant to 42 U.S.C. § 2000e-5(g)(1), or is governed by some other time period. But these are not the issues currently before the Court.

The Fourth Circuit in *Bazemore* ruled that the pay differences, which were indisputably *created* prior to 1965, could not be challenged in 1972, because the decision to pay African American employees less than Caucasians had been made when Title VII did not apply to that employer. Accordingly, the Fourth Circuit held that the African American employees could not challenge the entire salary disparity, but could only challenge the pay-raise decisions made during the time that Title VII applied to them. Finally, the Fourth Circuit held that the pay-raise decisions made after 1972 were not discriminatory. *Id.* at 394-95.

Similarly, the Eleventh Circuit ruled here that only the decisions that originated the pay disparity could be challenged, and, as they occurred before the limitations period applicable to the Petitioner's charge, they were beyond challenge. Accordingly, the Eleventh Circuit reasoned, any challenge to pay disparities occurring within the limitations period was untimely as the disparities originated with decisions made prior to the limitations period. *Ledbetter*, 421 F.3d at 1179-81. Employing an analysis strikingly similar to the reasoning applied by the Fourth Circuit in *Bazemore*, the Eleventh Circuit ruled that Petitioner could not challenge "every dollar of difference between her salary and her male co-worker's salaries." *Id.* at 1181. Instead, the Petitioner was limited to challenging pay-raise decisions made during or immediately before the limitations period. *Id.* at 1180, 1182-83. Having limited the scope of the Petitioner's claim, the Eleventh Circuit held there was insufficient evidence of pay discrimination within the limitations period to support the verdict for Petitioner. *Id.* at 1186-87.

The Court's decision in *Bazemore* rejected each of the Fourth Circuit's rulings and the same analysis compels reversal of the Eleventh Circuit here. As this Court explained in *Bazemore*:

> The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII.
>
> . . .
>
> Each 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.

Bazemore, 478 U.S. at 395-96. The Court ruled that the employer "was under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII," and thus it was error to consider only the pay-raise decisions made after the effective date of Title VII in assessing liability, instead of the total disparity in salary. *Id.* at 397.

The Eleventh Circuit's myopic focus on pay-raise activity during the time period covered by Petitioner's charge cannot be reconciled with *Bazemore*'s decision that it is error to limit the ambit of a pay claim to pay raises within the limitations period, rather than reviewing the entire salary disparity, in assessing liability. *Compare Ledbetter*, 421 F.3d at 1180-81, 1186-87 *with Bazemore* at 395-97. Fundamentally inconsistent with the holding in *Bazemore*, the decision below should be reversed.

The Eleventh Circuit mistakenly regards the pay disparity that originated before the limitations period as immune from challenge when the disparity continues into the limitations period simply because the initial decision creating the disparity occurred outside the range of liability. Indeed, the Eleventh Circuit faulted the district court for permitting Petitioner to challenge "every dollar of difference between her salary and her male co-workers'

salaries." *Ledbetter*, 421 F.3d at 1181. Notwithstanding that the pay disparities, which originated before the limitations period, continued into the limitations period with the issuance of each paycheck, the Eleventh Circuit limited the assessment of liability and measure of losses to the pay raises that occurred within the limitations period. This decision conflicts with *Morgan*'s holding that a failure to file a charge challenging earlier discriminatory actions is no bar to filing a charge challenging timely, related actions. *Morgan*, 536 U.S. at 113. Title VII makes it unlawful for Respondent "to discriminate against any individual with respect to his compensation," not merely with respect to "changes in compensation." § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1). Therefore, each paycheck Petitioner received should be examined in its entirety – not merely that portion of the paycheck that was changed by the employer during the limitations period.[4]

[4] Notwithstanding the Respondent's reference to *Lorance v. AT&T*, 490 U.S. 900 (1989) in its opposition to the petition for certiorari, *Lorance* does not alter the calculus prescribed by *Bazemore* and *Morgan*. *Lorance* addresses a different issue than *Bazemore* and one not before the Court here. In *Lorance*, the plaintiffs alleged that a *bona fide* seniority system was conceived with a discriminatory purpose, but did "not allege that the seniority system treats similarly situated employees differently." *Lorance*, 490 U.S. at 905. As such, the only act susceptible to challenge as intentionally discriminatory was the conception of the seniority system. Here, however, Petitioner alleges that Goodyear has treated her differently from similarly situated men each time it issues her a paycheck. Had the seniority system been facially discriminatory, that is, had it treated "similarly situated employees differently" *Lorance* would have permitted its challenge at any time. *Id*. at 912. Therefore, *Lorance* would treat Petitioner's claim as timely, because she is challenging a system in which she is regularly treated differently than similarly situated men. The courts of appeal have interpreted *Lorance* in the same manner. *See Anderson v. Zubieta*, 180 F.3d 329, 336 (D.C. Cir. 1999); *Cardenas v. Massey*, 269 F.3d 251, 257 (3d Cir. 2001).

B. The Courts of Appeal Have Uniformly Held That Each Paycheck Is a New Violation of Title VII and Congress Ratified This Rule in the Civil Rights Act of 1991.

Until the Eleventh Circuit's decision below, every circuit court interpreted *Bazemore* to bar disparities in pay within the applicable limitations period, regardless of when the disparity originated. Moreover, this ruling has been consistently held to apply to cases involving individual claims, rather than pattern-or-practice cases, and to cases in which pay disparities arose prior to the statute of limitations, rather than prior to the application of Title VII. *See, e.g., Cardenas v. Massey*, 269 F.3d 251, 257-58 (3d Cir. 2001) (applying *Bazemore* in individual case where pay disparity arose prior to statute of limitations); *Brinkley-Obu v. Hughes Training, Inc.,* 36 F.3d 336, 345-48 (4th Cir. 1994) (same); *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996) (applying *Bazemore* in case where pay disparity arose prior to when a release of claims was executed, but continued thereafter); *Ashley v. Boyle's Famous Corned Beef Co.,* 66 F.3d 164, 168 (8th Cir. 1995) (en banc) (applying *Bazemore* in individual case where pay disparity arose prior to statute of limitations); *Goodwin v. Gen. Motors Corp.,* 275 F.3d 1005, 1009-10 (10th Cir. 2002) (same); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448-49 (11th Cir. 1993) (same); *Anderson v. Zubieta,* 180 F.3d 329, 335-36 (D.C. Cir. 1999).

Bazemore's ruling, that each paycheck may give rise to a new act of discrimination, was also ratified by Congress. Five years after *Bazemore* was decided and cited repeatedly by the lower courts, Congress passed the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). This act, *inter alia*, amended Title VII to abrogate several rulings of the Court that Congress concluded had misinterpreted various provisions of Title VII. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994), *citing* Pub. L. No. 102-166, § 3(4), 105 Stat. 1071. Although the legislation made numerous changes to Title VII, including

changes to when seniority systems could be timely challenged, *see* 42 U.S.C. § 2000e-5(e)(2), Congress declined to disturb or modify the holding in *Bazemore*. Pub. L. No. 102-166, 105 Stat. 1071. Indeed, legislative history demonstrates that in predecessor bills to the Civil Rights Act of 1991, Congress expressly endorsed the holding in *Bazemore.* S. Rep. No. 101-315, text at nn.44-45, 1990 WL 259315 (1990) (referencing "the result correctly reached in *Bazemore*"); 136 Cong. Rec. S15376-01, S15381 (1990) (confirming that a new provision would not affect the precedent set in *Bazemore*); H.R. Rep. No. 101-644(II), at n.41 (1990); H.R. Rep. No. 102-40(I), at 62 & n.58 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549; H.R. Rep. No. 102-40(II), at 23, 24 & n.39 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549.

Where Congress has been aware of the Court's interpretation of a statute, has had the opportunity to amend the statute to achieve a different result, and has chosen not to do so, this Court has concluded that Congress has endorsed the interpretation, and it should be respected as the view of the legislature. As the Court held in *Faragher*:

> We are bound to honor *Meritor* [*Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)] on this point not merely because of the high value placed on *stare decisis* in statutory interpretation, *supra*, at 2286, but for a further reason as well. With the amendments enacted by the Civil Rights Act of 1991, Congress both expanded the monetary relief available under Title VII to include compensatory and punitive damages, see § 102, 105 Stat. 1072, 42 U.S.C. § 1981a, and modified the statutory grounds of several of our decisions, see § 101 *et seq*. The decision of Congress to leave *Meritor* intact is conspicuous. We thus have to assume that in expanding employers' potential liability under Title VII, Congress relied on our statements in *Meritor* about the limits of employer liability. To disregard those statements now (even if we were convinced of reasons for doing so)

> would be not only to disregard *stare decisis* in statutory interpretation, but to substitute our revised judgment about the proper allocation of the costs of harassment for Congress's considered decision on the subject.

Faragher v. Boca Raton, 524 U.S. 775, 804 n.4 (1998); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 118 (2002) ("By amending the law without repudiating the regulation, Congress 'suggests its consent to the Commission's practice.' ") (*quoting EEOC v. Associated Dry Goods Corp.,* 449 U.S. 590, 600 n.17 (1981)). In light of the other changes made by Congress in enacting the Civil Rights Act of 1991, "the decision to leave" the holding of *Bazemore* "intact is conspicuous," and the Court should not alter its interpretation here. *Faragher*, 524 U.S. at 804 n.4.

Moreover, the circuit courts, other than the Eleventh Circuit below, have consistently held that *Morgan* preserved the holding in *Bazemore*: that disparities in pay received within the limitations period may be challenged in their entirety, regardless of when they originated. *See, e.g., Elmenayer v. ABF Freight Sys., Inc.,* 318 F.3d 130, 134 (2d Cir. 2003); *Forsyth v. Fed'n Employment & Guidance Serv.*, 409 F.3d 565, 572-73 (2d Cir. 2005); *Williams v. Giant Food, Inc.,* 370 F.3d 423, 429 (4th Cir. 2004); *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1009 (7th Cir. 2003); *Hildebrandt v. Ill. Dep't of Natural Res.,* 347 F.3d 1014, 1027 (7th Cir. 2003); *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 989 (8th Cir. 2003); *Lyons v. Eng.*, 307 F.3d 1092, 1107 n.7 (9th Cir. 2002); *Davidson v. Am. Online, Inc.,* 337 F.3d 1179, 1186 (10th Cir. 2003); *Shea v. Rice*, 409 F.3d 448 (D.C. Cir. 2005).

C. The EEOC's Interpretation of § 706 – That Each Paycheck Constitutes a Discrete Act – is Fully Consistent With the Language of Title VII, Is Reasonable and Consistent With Legislative Intent, and Warrants This Court's Deference.

EEOC guidance constitutes a body of experience and informed judgment to which courts and litigants may properly resort for direction. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2413-14 (2006); *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Griggs v. Duke Power Co*., 401 U.S. 424, 433-34 (1971). Courts rely on the EEOC's interpretations to inform their understanding of Title VII and other employment discrimination laws. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). Indeed, in the Court's most recent decision in a Title VII case, the Court relied in part on sub-regulatory guidance issued by the EEOC. *See Burlington N.*, 126 S. Ct. at 2413-14 (*citing* with approval the EEOC's interpretation of Title VII's anti-retaliation provision, as stated in the EEOC Compliance Manual). Consistent with long-standing judicial interpretation, the EEOC has promulgated well-reasoned guidance that each paycheck constitutes a discrete act susceptible to challenge under Title VII. This interpretation should be adopted because it has the "power to persuade" as described in *Skidmore*, when one considers "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all th[e other] factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Gonzales v. Oregon*, 126 S. Ct. 904, 922 (2006). Relying upon close examination of *Bazemore* and *Morgan,* as well as the plain language and purpose of Title VII's prohibition of discrimination in pay, the EEOC's well-reasoned interpretation is entitled to deference.

As new authority is issued by the courts, the EEOC's policy guidance on *Bazemore* has been reissued, demonstrating that it has accounted for the latest jurisprudence on the subject. Before the *Morgan* decision, EEOC guidance referred to *Bazemore*'s holding that each paycheck constitutes "a wrong actionable under Title VII." EEOC Compliance Manual, "Threshold Issues: Timeliness" § 2-IV.C at n.183 (issued July 27, 2000) (citations omitted).

After *Morgan*, the EEOC promulgated new guidance which concluded that the principles enunciated in *Bazemore* still apply and, therefore, each paycheck may constitute a discrete act of discrimination. In 2005, the EEOC issued an update to its Compliance Manual to "conform[ ] the . . . discussion of the continuing violation doctrine to the Supreme Court's decision in . . . *Morgan*." *See* EEOC Compliance Manual Discussion, New Manual: Section 2: Threshold Issues (May 12, 2000) *available at* http://www.eeoc.gov/policy/compliance.html. The revised language provides:

> In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court ruled that the timeliness of a charge depends upon whether it involves a discrete act or a hostile work environment claim. . . . A discrete act, such as failure to hire or promote, termination, or denial of transfer, is independently actionable if it is the subject of a timely charge. Such acts must be challenged within 180/300 days of the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date. . . . *Repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period. See Bazemore v. Friday*, 478 U.S. 385, 395-96 (Brennan, J., concurring).

EEOC Compliance Manual, "Threshold Issues: Timeliness" § 2-IV.C (issued July 21, 2005) (citations and footnotes omitted) (emphasis added).

Consistent with this interpretive guidance, the EEOC filed an *amicus* brief with the Eleventh Circuit below. There, the EEOC argued that the principles enunciated in *Bazemore* still apply after *Morgan*:

> What *Bazemore* teaches is that Ledbetter need not prove that Goodyear made a conscious decision to discriminate against her on the basis of her sex during – or just before – the limitations period. The decision to discriminate may have been made years ago – even, as in *Bazemore*, before such discrimination became unlawful. . . . 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 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. But her failure to do so does not deprive her of the right to seek relief for discriminatory paychecks she received in 1997 and 1998.

EEOC Br. in Support of Pet. for Reh'g and Suggestion for Reh'g En Banc (Oct. 26, 2005) at 12 & 14.

The EEOC also has consistently applied these principles in deciding pay-discrimination cases brought by federal employees. One recent decision explained that the Commission's interpretation is entirely consistent with *Morgan*:

> In *Morgan*, the Supreme Court expressly relied on its statement in [*Bazemore*], regarding each paycheck paid at a discriminatory rate as an example of an actionable "discrete act or single occurrence, even when it has a connection to other acts." The Court did not characterize *Bazemore*

> as involving a "continuing violation" or as embracing a continuing violation doctrine. Instead, the Court reaffirmed the *Bazemore* statement that each discriminatory paycheck was a separate discriminatory act. Therefore, reading *Bazemore* in light of *Morgan*, as long as one incident of alleged disparate pay occurred within the time limits for bringing the claim, the complaint should be accepted for investigation.

Amft v. Mineta, Appeal No. 07A40116, 2006 EEOPUB LEXIS 1472, at *13-14 (E.E.O.C. Dec. Apr. 6, 2006) (citations omitted).

In another post-*Morgan* decision, the EEOC accepted an Equal Pay Act complaint for investigation because at least "one incident of alleged disparate pay occurred within the time limits for bringing the claim." *McCrae v. Gutierrez*, Appeal No. 01A53762, 2005 EEOPUB LEXIS 4298 (E.E.O.C. Dec. Sept. 9, 2005). The EEOC explained:

> [I]t [is] well settled that repeated occurrences of an alleged discriminatory act such as the issuance of a paycheck, is a wrong that is actionable. . . . This means that as long as one incident of alleged disparate pay occurred within the time limits for bringing the claim, the complaint should be accepted for investigation.

Id. at *2 (citations omitted). As demonstrated by these administrative decisions, the EEOC has consistently applied its well-reasoned interpretation of *Bazemore* and *Morgan*.

As an "administrative interpretation of [Title VII] by the enforcing agency," *Griggs*, 401 U.S. at 433-34, EEOC guidance "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Gen. Elec.*, 429 U.S. at 141-42, *quoting Skidmore,* 323 U.S. at 140; *see also Burlington N.*, 126 S. Ct. at 2413-14 (deferring to the EEOC's interpretation of Title VII's anti-retaliation provision); *Smith*, 544 U.S. at 235 (citing EEOC guidance to support the conclusion that

a disparate-impact theory is cognizable under the Age Discrimination in Employment Act). After *Morgan*, the EEOC concluded that the principles enunciated in *Bazemore* still apply, and that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period." EEOC Compliance Manual, § 2-IV.C.1.a (issued July 21, 2005) (footnotes omitted). As the federal agency charged with interpreting and enforcing Title VII, its consistent view that each paycheck may constitute a new act of discrimination should be accorded deference.

D. The Issuance of Each Paycheck that Compensates Similarly-Situated Men and Women Differently May Reflect an Intent to Discriminate.

The Eleventh Circuit is mistaken in ruling that only the decisions originally creating the disparity in pay may qualify as actionable discrimination and that issuance of each successive paycheck in which those disparities persist fails to qualify as conduct that violates Title VII. The court below required evidence of an "affirmative decision" to set pay levels in order to constitute actionable conduct and dismissed as legally inconsequential the actions of Goodyear to perpetuate the pay disparity with each new paycheck it issued. *Ledbetter*, 421 F.3d at 1177, 1180, 1183, 1184 (referring to an "affirmative decision" on five separate occasions). Moreover, the Eleventh Circuit appears to confuse the Title VII requirement that evidence of intent to discriminate be shown with an expectation that "ill will" be demonstrated. In doing so, the court failed to appreciate the ways in which intent to discriminate was manifested in Petitioner's case below. *Id.* at 1186 ("There was no evidence that he bore any ill will towards Ledbetter or toward women generally."). These are fundamental errors in application of Title VII. Because the Eleventh Circuit was looking for an "affirmative decision" which reflected

"ill will" during the limitations period, the court overlooked the myriad ways in which intentional discrimination can be shown to have existed at Goodyear during the time period encompassed by Petitioner's charge.

An "affirmative decision" is not a required element of proof to establish liability under Title VII. A plaintiff establishes a *prima facie* case of discrimination in compensation by demonstrating she is a member of a protected class, performs work substantially equal to that of persons outside that protected class, and is compensated less than those similarly situated. *Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271, 273 (D.C. Cir. 1998); *Aman v. Cort Furniture Rental Corp.,* 85 F.3d 1074, 1087 (3d Cir. 1996); *Miranda v. B & B Cash Grocery Store, Inc.,* 975 F.2d 1518, 1529 (11th Cir. 1992) (*prima facie* case consists of showing membership in protected class and that plaintiff's job is similar to higher paying jobs occupied by non-class members). A plaintiff must show she is treated less favorably than others similarly-situated, but not that the difference in pay is the result of an "affirmative decision." *Goodwin*, 275 F.3d at 1012. *Bazemore* recognized, for example, that an employer has an affirmative "obligation to eradicate" salary disparities due to past discriminatory decisions, even if those earlier discriminatory decisions were lawful at the time they were made. *Bazemore*, 478 U.S. at 397. The perpetuation of those pay disparities into a period when they are prohibited creates liability under Title VII. *Id*. Whether this conduct qualifies as an "affirmative decision" or not, nothing more is required to violate Title VII.[5] Thus, the Eleventh Circuit erred by requiring evidence of an "affirmative decision" within the limitations period beyond the decision to issue a paycheck.

[5] The EEOC likewise has interpreted Title VII to require an employer to eliminate pay disparities where they can be attributed to a prohibited ground, regardless of when the disparity first occurred. EEOC Compliance Manual § 10-III (2006).

Nor is the Eleventh Circuit correct in requiring evidence of ill will to demonstrate intentional discrimination. This Court has defined intentional discrimination: "To discriminate is to make a distinction, to make a difference in treatment or favor." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (*quoting* 110 Cong. Rec. 7213 (1964)). This Court has explicitly rejected the argument, which the Eleventh Circuit embraced below, that a showing of animus against women is required to show an intentional difference in treatment. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991); *see also EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1283-84 (11th Cir. 2000).

The record below reveals that Goodyear manifested an intention to pay Petitioner less than similarly-situated men, which violated Title VII. With the issuance of each paycheck, Goodyear had the opportunity and the obligation to "eradicate" the disparity in pay between Ms. Ledbetter and similarly situated men. *Bazemore*, 478 U.S. at 397. Goodyear could have eliminated the pay disparity during its annual pay-raise reviews, but it *chose* not to do so. Goodyear's repeated failure to eliminate disparities in pay that it perpetuated with each paycheck creates an inference of intentional discrimination within the applicable limitations period. The Eleventh Circuit erred by concluding otherwise.

The Eleventh Circuit mistakenly regarded Goodyear's compensation system as operating automatically, leaving no discretion to adjust pay levels or eliminate the preexisting pay disparities. *Ledbetter*, 421 F.3d at 1172-73, 1182. Issuance of paychecks to each employee, of course, can be terminated when employees are discharged. Similarly, errors in paychecks can be corrected. Nothing precluded Goodyear from eliminating the gender-based pay disparities, and the issuance of each paycheck afforded it regular opportunities to do so. A compensation system that can be adjusted to stop payment to discharged employees

or correct errors in withholding or other administrative actions is equally available to eliminate unlawful pay disparities. Goodyear simply declined to do so and that failure constitutes intentional discrimination. Even the frequency with which an employer reviews the compensation levels of its workforce is a matter of choice. Vigilant employers that seek to ensure against illegitimate disparities in pay can, and often do, regularly examine the pay levels of their workers and, where disparities are observed that may suggest impermissible factors, investigate those anomalies to determine whether they should be adjusted. Employers also have the choice whether to reexamine total compensation levels or just whether a pay adjustment is warranted. The choice to circumscribe compensation review to the more limited inquiry of whether a pay raise is warranted cannot relieve an employer of its responsibility to ensure that its total compensation is equitable.[6] EEOC Compliance Manual §§ 10-III and 10-III(A)(1)(c)(2) (discrimination may be found where "[a]n employer pays employees inside a protected class less than similarly situated employees outside the protected class" and the employer's explanation does not account for "the entire compensation disparity."). In either event, Title VII makes employers responsible for ensuring the total compensation paid does not differ due to gender, race or other prohibited grounds.[7]

---

[6] Indeed, if an employer considers only whether a pay raise is warranted, it ratifies the prior base salary, and adopts any discriminatory intent that motivated the earlier decision.

[7] The situation is unlike *United Airlines v. Evans*, 431 U.S. 553 (1977) in which the employer had a facially neutral seniority system in which no employee who was rehired was given any seniority credit for prior service, and thus both male and female employees were treated alike. At Goodyear, men who were paid the same salary as Petitioner in 1979 were paid a substantially higher salary than she was in 1998, even though both were doing the same job. Thus, in *Evans* the plaintiff complained that she was treated differently than men in the past, and that therefore it was unfair for her to be treated the same as men who

(Continued on following page)

As the entity with the best access to, and often the only access to, information about the compensation paid to similarly-situated employees, employers have been entrusted by Title VII with the responsibility for ensuring against unlawful disparities in pay. The failure to correct known disparities that are attributable to prohibited grounds supports an inference of intentional discrimination.[8] "When the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences [here], a strong inference that the adverse effects were desired can reasonably be drawn." *Personnel Admin'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979).

Nor is a company's prior conduct irrelevant in assessing whether its present pay practices evidence an intent to discriminate. The Court has held:

> Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision-making process had undergone little change.

---

were terminated for lawful reasons in the past. However, in the case at bar, Petitioner complains that she was treated the same as her male peer in the past (1979), but that her current treatment, specifically the disparity in pay, is unlawful. The wrong of which *Evans* complained was in the past, but the wrong of which Petitioner complains is in the present.

[8] In general, actions which have "foreseeable and anticipated" consequences can be found to have been taken with the "forbidden purpose" of achieving those consequences. "Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.' " *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979).

Bazemore, 478 U.S. at 402, *quoting Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309-10 (1977). Prior discriminatory conduct committed by Goodyear, even if not actionable, was certainly relevant in assessing the lawfulness of its conduct committed within the limitations period. *See Evans*, 431 U.S. at 558; *see also Morgan*, 536 U.S. at 113. Thus, the issuance of disparate paychecks to similarly situated individuals constitutes actionable discrimination. For all of these reasons, the Eleventh Circuit's decision must be reversed.

II. TITLE VII WAS ENACTED AND AMENDED AGAINST A BACKDROP OF STATUTORY INTERPRETATION ALLOWING PLAINTIFFS TO RECOVER FOR RECURRING VIOLATIONS OF PAST WRONGS.

Congress enacted and amended Title VII, and this Court should interpret Title VII, against a backdrop of other statutes that consistently have been interpreted to allow plaintiffs to recover for recurring violations of statutes, even when the initial violation occurred outside the limitations period.[9] Both before and after *Morgan*, for example, courts have held that each discriminatory

[9] In some of the cases cited herein, courts permitting recovery for recurring violations within the limitations period, where a violation had begun outside of the limitations period, referred to this as a "continuing violation." However, examination of the analysis in these cases reveals that the courts were not endorsing the sort of "continuing violation" that *Morgan* found inapplicable to discrete violations of Title VII, in which a plaintiff is permitted to recover for an entire series of violations, even those violations that pre-date the statute of limitations, but instead were following the rule adopted in *Bazemore* that fresh violations within the limitations period were actionable. *Morgan*, 536 U.S. at 110-12; *Bazemore*, 478 U.S. at 395-96. Commentators have recognized that courts often use the phrase "continuing violation" to describe both of these distinct concepts. *See* Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemporary Problems 53, 55-57 (1986).

paycheck that falls under the Equal Pay Act of 1963 ("EPA") constitutes a discrete actionable harm. Similarly, Congress modeled Title VII's limitations provisions after the National Labor Relations Act ("NLRA"), which – as courts have consistently held – allows plaintiffs to sue on recurring instances of an illegal act, even if the initial illegal act occurred outside the limitations period. *See, e.g.*, *Atlas Air, Inc. v. Air Line Pilots Ass'n*, 232 F.3d 218, 226 (D.C. Cir. 2000) (holding that "maintaining and continuing to maintain" an exclusionary profit-sharing plan during the limitations period constituted an actionable violation, despite the fact that the profit-sharing plan originated outside the limitations period); *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.*, 927 F.2d 1283, 1296 (3d Cir. 1991). Likewise, each paycheck that fails to compensate an employee for overtime hours worked in violation of the Fair Labor Standards Act ("FLSA") constitutes a distinct statutory violation that starts the statute of limitations period anew. *See, e.g.*, *Knight v. Columbus, Ga.*, 19 F.3d 579, 581-82 (11th Cir. 1994) (collecting FLSA cases); *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050 (5th Cir. 1973) (applying equal pay provisions of the FLSA).[10]

There is no reason to believe that Congress, legislating against this statutory backdrop, intended to abandon this limitations framework when passing Title VII. *See*, *supra*, Section I.B. Moreover, as a matter of policy, courts, including this Court, should attempt to interpret statutes consistently and harmoniously. "Harmony and consistency are positive values in our legal system, because they serve the interests of impartiality and minimize arbitrariness. Construing statutes by reference to others advances those

[10] The accrual of Title VII pay discrimination claims at the time of payment is consistent not only with other employment and civil rights statutes, but also with other long-standing statutory schemes such as the Sherman Act. *See*, *e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (collecting antitrust authorities).

values. In fact, courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done." 2B Sutherland Statutory Construction § 53:1 (6th ed. 2005). Just as is the case in the statutory schemes described below, a claimant's prior notice of an ongoing Title VII violation does not deprive that claimant of the ability to recover for the violations that continue into the charge-filing period.

A. Title VII Should Be Construed in Accordance With Equal Pay Act Precedent Holding That Each Paycheck Constitutes a Discrete Violation.

Like Title VII, the Equal Pay Act of 1963 ("EPA") prohibits wage discrimination.[11] Although the EPA and Title VII differ in some respects, courts have consistently held that Title VII and the EPA are *in pari materia* and thus should be construed similarly.[12] *See, e.g., Lavin-McEleney v.*

[11] The EPA is violated when an employer "discriminate[s] . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1) (2006).

[12] Although this Court has not addressed the issue directly, in *County of Washington v. Gunther*, 452 U.S. 161 (1981), it said the two statutes should be construed *in pari materia*. In interpreting the Bennett Amendment to Title VII, the Court held that, "[t]he Bennett Amendment was offered as a 'technical amendment' designed to resolve any potential conflicts between Title VII and the Equal Pay Act. Thus . . . the Bennett Amendment has the effect of guaranteeing that courts and administrative agencies adopt a consistent interpretation of like provisions in both statutes. Otherwise, they might develop inconsistent bodies of case law interpreting two sets of nearly identical language." *Id.* at 170. In his dissenting opinion, Justice Rehnquist agreed with the fundamental conclusion that "there can be no doubt that the Equal Pay Act and Title VII should be construed *in pari materia*" and that "Congress intended to incorporate the substantive standards of the Equal Pay Act into Title VII." *Id*. at 189 & 190.

Marist Coll., 239 F.3d 476, 483 (2d Cir. 2001); *Gunther v. County of Wash.*, 623 F.2d 1303, 1309 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981); *Di Salvo v. Chamber of Commerce of Greater Kan. City*, 568 F.2d 593, 596 (8th Cir. 1978); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir. 1970).

In deciding statute of limitations issues in EPA cases, courts have looked to *Bazemore* and *Morgan* for guidance. In EPA cases decided both before and after *Morgan*, courts consistently have held that each paycheck issued under a discriminatory wage policy is a discrete violation of the EPA. Prior to *Morgan*, it was well settled among the circuits that "each issuance of a paycheck to a female employee at a lower wage than that issued to her male counterpart constitutes a new discriminatory action for purposes of Equal Pay Act limitations accrual." *Brinkley-Obu*, 36 F.3d at 347, *citing Nealon v. Stone*, 958 F.2d 584, 591 (4th Cir. 1992); *see also Pollis v. The New Sch. for Social Research*, 132 F.3d 115, 119 (2d Cir. 1997); *Ashley*, 66 F.3d at 167-68; *Gandy v. Sullivan County, Tenn.*, 24 F.3d 861, 864 (6th Cir. 1994) ("The Equal Pay Act is violated each time an employer presents an 'unequal' paycheck to an employee for equal work." (citations omitted)); *Erickson v. N.Y. Law Sch.*, 585 F. Supp. 209, 213 (S.D.N.Y. 1984) ("Under the [Equal Pay Act], a separate claim accrues each time the aggrieved employee receives a paycheck reflecting discriminatory wages.").

Post-*Morgan*, lower courts have continued to hold that each paycheck issued under a discriminatory wage policy is a discrete violation of the EPA. *See Byrne v. Telesector Res. Group, Inc.*, No. 04-CV-76S, 2005 WL 464941, at *11 (W.D.N.Y. Feb. 25, 2005); *Downes v. JP Morgan Chase & Co.*, No. 03 Civ.8991(GEL), 2004 WL 1277991, at *7 (S.D.N.Y. June 8, 2004) ("A new claim accrues each time an employee receives a paycheck under a discriminatory wage policy."); *Calvello v. Elec. Data Sys.*, No. 00CV800, 2004 WL 941809, at *2 (W.D.N.Y. Apr. 15, 2004), *aff'd*, 151 Fed. Appx. 35 (2d Cir. 2005) (*citing* both *Morgan* and

Bazemore to reach the conclusion that "[f]or the Equal Pay Act or wage discrimination aspects of plaintiff's Title VII claim, each paycheck constitutes an actionable discrete act for which the statute of limitations runs.").

Because Title VII and the EPA are *in pari materia*, Title VII should also be construed to permit a claim of compensation discrimination if the plaintiff received a discriminatory paycheck within the statute of limitations, even if the decision to pay her a lower wage originated outside the statutory period.

B. Congress Modeled Title VII's Limitation Period on the NLRA's Limitation Period, Which Allows Plaintiffs to Recover for the Recurring Application of Violations That Began Prior to the Limitations Period.

Because Congress fashioned the remedial scheme in Title VII, including its limitations period for filing an administrative charge, after the NLRA, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & 421 n.11 (1975), Congress must have intended courts to apply the two statutes' limitations periods in a similar manner. Indeed, Title VII's limitations period originates from and is substantially similar to the NLRA's statute of limitations. *Compare* 42 U.S.C. § 2000e-5 *with* 29 U.S.C. § 160(b).[13] Accordingly, courts often rely on NLRA § 10(b) (29 U.S.C. § 160(b)) to help interpret § 706(e) of Title VII. Such reliance is particularly appropriate since the unusual requirement of an administrative charge is common to the two statutes. *Id.*; *see also Zipes v. TWA*, 455 U.S. 385, 395 n.11 (1982) (finding that the time limitations of

[13] Section 10(b) of the NLRA provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of [a] charge with the [National Labor Relations] Board and the service of a copy thereof upon the person against whom such charge is made." 29 U.S.C. § 160(b).

§ 706(e) should be treated in the same manner as those contained in the NLRA). Thus, when interpreting § 706(e), "reference must be made to actual operation and experience in administering the [NLRA]." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 774-75 n.34 (1976); *cf. Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 849 (2001) (stating that the Courts' construction of NLRA § 10(c) before the enactment of Civil Rights Act of 1964 provides "guidance as to the proper meaning of the same language in § 706(g) of Title VII"). Subsequent amendments to Title VII have not altered Title VII's reliance on the NLRA model. In 1972, Congress expanded Title VII's limitations period. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 818-24 (1980). The House and Senate committee reports on the 1972 amendments labeled the structure of the new limitations period as "similar to" or "identical to" the six-month limitations period that applied under § 10(b) of the NLRA. *See* S. Rep. No. 92-415 (1971); H.R. Rep. No. 92-238 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 2137, 2174-75 (Minority Views).

Courts have long held that § 10(b) of the NLRA allows plaintiffs to recover for the recurring application of violations decided upon and begun prior to the limitations period. Under the NLRA, a plaintiff may challenge a recurring unfair labor practice that causes harm within the six-month statutory period, even if a charge alleging the same violation, or a similar and related violation, could have been brought before the six-month period. *See, e.g.*, *N.L.R.B. v. F.H. McGraw & Co.*, 206 F.2d 635, 639 (6th Cir. 1953) (finding an actionable claim where "the unfair labor practice alleged in the complaint was not the execution of this contract, but its enforcement and implementation . . . within the period of limitations"); *Katz v. N.L.R.B.*, 196 F.2d 411, 415 (9th Cir. 1952) ("continued and continuous enforcement" of illegal union shop agreement constituted a redressable violation); *N.L.R.B. v. Carpenters Local Union No. 1028*, 232 F.2d 454, 456 (10th Cir. 1956) (discriminatory enforcement of closed-shop agreement

during limitations period satisfies Section 10(b)); *Melville Confections, Inc.*, 142 N.L.R.B. 1334, 1335 & n.1, 1337-39 (1963) (finding that a profit-sharing plan adopted in 1957 "and made known to [the company's] employees at all times thereafter" warranted relief when charge was filed in September 1962), *enforced*, 327 F.2d 689, 692 (7th Cir. 1964).

Given Congress' reliance on the NLRA when passing and amending Title VII, and given courts' and the NLRB's established practice of permitting suit for recurring violations within the limitations period despite the fact that the original wrong-doing occurred outside the statutory period, there is every reason to believe that Congress intended the same principle to apply in the Title VII context. Under the NLRA, where a party continues to issue deficient paychecks that cause recurring harm within the limitations period, each failure to pay the required amount is actionable conduct that gives rise to a new cause of action. *See*, *e.g.*, *Farmingdale Iron Works*, 249 N.L.R.B. 98, 99 (1980) ("[E]ach failure to make the contractually required monthly benefit fund payments constituted a separate and distinct violation of Respondents' bargaining obligation and, therefore, that any benefit fund payment due [within the limitations period] is subject to the Board's remedial powers."); *The Kroger Co.*, 334 N.L.R.B. 847 (2001) (ordering a union to refrain from continually deducting union dues from the plaintiff's paycheck). The same should hold true in the Title VII context.

C. The Treatment of Recurring Violations in the Fair Labor Standards Act and Title VII Should Be Parallel.

Long before passage of Title VII, it was well settled that, under the FLSA, "[a] separate cause of action for overtime compensation 'accrues' at each regular payday immediately following the work period during which the

services were rendered and for which the overtime compensation is claimed." *Dunlop v. State of R.I.*, 398 F. Supp. 1269, 1286 (D.R.I. 1975) (*citing Mitchell, Sec'y of Labor v. Lancaster Milk Co.*, 185 F. Supp. 66, 70 (M.D. Pa. 1960) (same quote) and *Shandelman v. Schuman*, 92 F. Supp. 334, 335 (E.D. Pa. 1950) (same quote)). Thus, the statute of limitations under the FLSA begins anew with each wrongfully calculated paycheck, with no reference to the moment when the employer actually decided to classify an employee as exempt from overtime pay requirements. Of course, the classification decision, even if it was made several years earlier, is nonetheless relevant to litigation over the existence of a current violation of the FLSA, because employers are immune from liability for their wrongfully calculated paychecks if they can prove that the classification decision was made in "good faith." 29 U.S.C. § 260. Yet the FLSA allows claims for each paycheck wrongly calculated, regardless of when the exemption classification decision was made.

Thus, under the FLSA, each new paycheck is a violation. "Each failure to pay overtime constitutes a *new* violation." *Knight*, 19 F.3d at 581 (emphasis in original); 22A Fed. Proc., L. Ed. § 52:1714 (2006) ("A cause of action accrues when an employer fails to pay required compensation. . . . A new cause of action accrues each time an employer fails to pay full compensation on the regular payday."); 29 C.F.R. § 790.21(b) ("The courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime compensation and for liquidated damages 'accrues' when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends." (citing cases)); Ellen C. Kearns, The Fair Labor Standards Act § 18.VI.B.6 (1999), at 1210 ("It is well established under the FLSA that an action seeking payment of the minimum wage or overtime compensation accrues when the employer fails to pay the required compensation then due."). Congress enacted Title VII

against the backdrop of earlier decisions under the FLSA, holding that each paycheck that failed to include overtime compensation constituted a recurring statutory violation which started anew the statute of limitations, and this Court should interpret Title VII in the same way, and hold that each paycheck which pays a woman less than a similarly situated man constitutes a new Title VII violation for limitations purposes.

Preventing an employee from remedying a recurring violation simply because the conduct is long-standing serves no purpose. The employer is aware of the continued consequences of its illegal acts, and employees continue to suffer – with ever-growing heft – the expense of that conduct. The law permits suit on recurring violations carried out during the limitations period pursuant to decisions to violate the law which pre-date the limitations period because that wrongful intent is equally present in each application of the earlier decision. A contrary rule would permit the wrongdoer to benefit from its wrongful act indefinitely merely because the first instance of the repeated wrongdoing was not timely challenged.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

JOHN BRITTAIN
MICHAEL FOREMAN
SARAH CRAWFORD
ADAM STOFSKY
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW, Suite 400
Washington, DC 20005
(202) 662-8600

TERISA E. CHAW
EXECUTIVE DIRECTOR
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

JOSEPH M. SELLERS
Counsel of Record
CHRISTINE E. WEBBER
COHEN, MILSTEIN, HAUSFELD & TOLL, PLLC
1100 New York Avenue, NW, Suite 500
Washington, DC 20005
(202) 408-4600

JAMES M. FINBERG
EVE H. CERVANTEZ
JAHAN C. SAGAFI
PETER LECKMAN
DANIEL HUTCHINSON
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111
(415) 956-1000

[Additional Counsel Listed on Inside Cover]

APPENDIX

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The Lawyers' Committee for Civil Rights Under Law is a non-profit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice for all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in employment discrimination cases across the country. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. AAJC have a long-standing interest in racial discrimination issues that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Association for the Advancement of Colored People (NAACP) is a non-profit membership corporation chartered by the State of New York and traces its roots to 1909. The NAACP has over 2,200 units in the United States and abroad. As the nation's oldest and largest civil rights organization, its mission is to ensure the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. With that, the NAACP has long fought against discrimination in employment and to protect the civil rights of workers.

AARP is a nonpartisan, nonprofit membership organization of people age 50 and older dedicated to addressing the needs and interests of older Americans. Almost half of AARP's more than 36 million members are in the work force and are, thus, protected by the federal civil rights laws prohibiting employment discrimination. The proper interpretation and vigorous enforcement of these laws is of paramount importance to AARP and its working members, who rely on them to deter and remedy invidious bias in the work place. Since 1985, as part of its

advocacy efforts, AARP has filed *amicus curiae* briefs in many cases in this Court involving the proper construction and interpretation of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other federal workplace antidiscrimination statutes. AARP supports the rights of older workers under the ADEA, whose prohibitions are derived from and interpreted *in pari materia* with those of Title VII. Since the Court's decision in this case will necessarily impact the ADEA, by submitting this brief *amicus curiae* AARP seeks to preserve and protect the rights of all older workers.

The Legal Aid Society – Employment Law Center ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally underrepresented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor.

The LAS-ELC's interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding. *Amicus* has a particular interest in the interpretation of established precedent concerning Title VII's limitations period, given its involvement in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). The LAS-ELC has also appeared in this Court on numerous other occasions both as counsel for plaintiffs, *see*, *e.g.*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g., Burlington*

Northern and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006); *Suders v. Pennsylvania State Police*, 542 U.S. 129 (2004); *United States v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).