No. 00-1614

In the Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

ABNER MORGAN, JR.,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly held that a plaintiff who has knowingly allowed the statute of limitations to lapse on alleged violations of federal anti-discrimination statutes may nevertheless sue on such time-barred claims whenever incidents within the limitations period are "sufficiently related" to the otherwise time-barred claims.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit:

1. National Railroad Passenger Corporation, a federally chartered corporation, dba Amtrak, defendant-appellee; and

2. Abner Morgan, Jr., plaintiff-appellant.

Petitioner National Railroad Passenger Corporation is federally chartered and is not a publicly traded corporation. The United States of America owns 100% of the preferred shares under the name of the Secretary of Transportation. The following companies each own10% or more of the corporation's common stock: Burlington Northern Santa Fe Corporation and American Premier Underwriters (successor to the Penn Central Railroad).

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 232 F.3d 1008. The order of the court denying rehearing and rehearing en banc (Pet. App. 23a-24a) is unreported. The district court's opinion granting partial summary judgment to petitioner (Pet. App. 25a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2000. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on January 22, 2001. Pet. App. 23a-24a. The petition for writ of certiorari was filed on April 23, 2001, and was granted on June 25, 2001. J.A. 11a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission ("EEOC")] within one hundred and eighty days after the alleged unlawful employment practice occurred * * *, except [when] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * *, such charge shall be filed [with the EEOC] * * * within three hundred days after the alleged unlawful employment practice occurred * * *.

STATEMENT

1. Petitioner is the National Railroad Passenger Corporation, colloquially known as "Amtrak." Respondent Abner J. Morgan, Jr. ("Morgan"), an African-American male, worked at Amtrak from August 1990 to March 1995, and filed his only administrative charge alleging violations of Title VII on February 27, 1995. The question before this Court is

whether Morgan's EEOC charge allows him to bring suit only on the events that occurred within the 300 days preceding February 27, 1995, or instead allows him to reach back to the entire period of his employment with Amtrak. The district court dismissed all the counts of the complaint based on time-barred incidents, but held a jury trial – at which Amtrak prevailed – on the allegations that stated a claim for violation of Title VII during the 300 days preceding February 27, 1995. The Ninth Circuit reversed, holding that a jury could conclude that all of the incidents were part of a "continuing violation."

Morgan began working at Amtrak in August 1990 as an electrician's helper in the Oakland Maintenance Yard (the "Yard"). Pet. App. 7a. Morgan claimed that he believed that he was being hired as an electrician, that he performed the work of an electrician, and that less qualified Caucasians were hired as electricians. *Ibid.* According to Morgan, his job was not reclassified, nor was his pay increased, until April 1992. *Ibid.*

Morgan claims that, shortly after he began working at Amtrak, he was subjected to a pattern of racially discriminatory and retaliatory acts perpetrated by a group of Amtrak managers, specifically Robert Vandenburg, the Facility Manager of the Yard, Jerry Denton, Mike Bordenave, Ray Borge, and Earl Geske. Pet. App. 6a. That conduct allegedly continued throughout his employment with Amtrak and culminated in his termination in March 1995. *Ibid.*

Morgan testified that the first discriminatory act occurred in February 1991, when he was charged with violating a disciplinary rule for refusing to attend a meeting without union representation. Pet. App. 7a. Under applicable work rules, an employee is entitled to union representation at any meeting that might lead to disciplinary action. *Id.* at 7a n.4. Morgan was ordered to attend a meeting with Vandenburg and Denton the day after he had called in sick. Believing that the meeting might lead to disciplinary action, Morgan refused to attend. On March 22, 1991, following a full investigatory hearing into the

incident, Morgan was terminated. *Ibid.*[1] The termination later was reduced to a ten-day suspension, and Morgan received backpay for all but ten days. *Ibid.*

Morgan claims that he requested entrance into the electrician apprentice program in August 1991. Pet. App. 7a-8a. He claims that he received no official response from Amtrak's personnel office, but that Vandenburg told him that he stood "a snowball's chance in hell of becoming an electrician." *Id.* at 8a.

Morgan recognized early in his employment that the alleged conduct of his supervisors and co-workers could be grounds for legal action. In October 1991, following the termination/suspension and the alleged denial of training, Morgan first complained about racial discrimination at Amtrak. Pet. App. 8a. Morgan filed a written complaint with Amtrak's internal EEO office citing "blatant racism" and offering specific instances of allegedly discriminatory conduct. *Ibid.* He sent a copy of that letter to Congressman Ron Dellums. *Ibid.* Morgan testified that he never received a formal response to his complaint. *Ibid.*

Throughout the remainder of Morgan's employment at Amtrak, he continued to make complaints of racial discrimination and retaliation both internally to Amtrak's EEO office and externally. Morgan and a group of other Amtrak employees met with Congresswoman Barbara Boxer to express their concerns about discriminatory conditions at the Yard in late

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[1] Morgan's employment was covered by a collective bargaining agreement. Pet. App. 27a. Therefore, before he could be disciplined for rules infractions, he was entitled to be notified of the charges against him and to have a full investigatory hearing at which he would be represented by his union and could present evidence and cross-examine witnesses. *Id.* at 27a n.4. The hearing is conducted by a Hearing Officer, who determines whether the charges are proven. If the charges are proven, the Hearing Officer's decision is forwarded to the department head, who imposes discipline. *Ibid.* These determinations are subject to multi-layered review and ultimately can be appealed to the National Railroad Adjustment Board established by Section 3 of the Railway Labor Act, 45 U.S.C. § 153.

1991. Pet. App. 8a. In response to the complaint, Congresswoman Boxer contacted Amtrak's Inspector General, Fred Weiderhold. *Id.* at 40a. Weiderhold visited the Yard three times in 1992. *Ibid.* On one of those occasions, Weiderhold met Morgan. *Ibid.* Morgan claims that he "tried repeatedly to bring the continuing discriminatory and retaliatory practices at Amtrak to [Weiderhold's] attention." *Ibid.*

Morgan also continued to complain about racial discrimination to Amtrak's EEO office. In May 1993, Morgan filed two separate internal complaints alleging racial discrimination and retaliation with Amtrak's EEO office. Pet. App. 29a, 30a. Morgan claimed that in October 1993 Vandenburg assaulted him by placing his hands on Morgan's shoulders, pushing down, and whispering in his ear. *Id.* at 10a. Morgan reported the alleged assault to the police and filed a formal complaint with Amtrak's EEO office. *Id.* at 31a. Morgan testified that Amtrak did not investigate his complaint. In January 1994, Morgan again complained about racial discrimination to Amtrak's EEO office following the cancellation of scheduled training. *Id.* at 11a. Again, Morgan claims that Amtrak did not formally respond to the complaint. *Ibid.* In October 1994, Morgan made his last complaint of racial discrimination to Amtrak's EEO office and again, according to Morgan, no response was forthcoming. *Ibid.* In sum, by the time Morgan was suspended in February 1995 and terminated in March 1995, he had complained about racial discrimination or retaliation at least nine times over the course of four years.

Morgan claims that he was subjected to discriminatory or retaliatory discipline on at least ten occasions between October 1991 and the end of his employment in March 1995. Pet. App. 8a-12a. The discipline consisted of being issued written and oral counselings; being charged, allegedly unfairly, with rules violations; being suspended; and ultimately having his employment terminated. In addition, he claims that he was unfairly denied training on four occasions.

Although Morgan believed that the alleged conduct was discriminatory and unlawful, he nevertheless refrained from filing an administrative charge until February 27, 1995, two days after he was suspended. Pet. App. 13a. At that time, he filed a charge alleging discrimination and retaliation with the EEOC and cross-filed with the California Department of Fair Employment and Housing. *Ibid.* On March 3, 1995, following a full investigatory hearing, Morgan was terminated. *Id.* at 12a. On March 8, 1995, Morgan amended his charge to allege that this termination constituted unlawful discrimination and retaliation. *Id.* at 37a. At the time he filed his administrative charge in February 1995, only six allegedly discriminatory incidents fell within the 300-day limitations period (May 3, 1994, to February 27, 1995).

2. The district court granted partial summary judgment in Amtrak's favor on all acts of alleged discrimination that occurred more than 300 days before Morgan filed his administrative charge of discrimination. Pet. App. 38a-40a. The court also granted partial summary judgment on three of Morgan's six timely claims of alleged discrimination: (1) denial of pay for jury duty in June 1994 and January and February 1995, (2) denial of access to review his work file in December 1994, and (3) denial of union representation during a December 1994 meeting; the court ruled that Morgan failed to establish a prima facie case of discrimination with respect to each of those claims. *Id.* at 49a-50a, 51a. The court held that Morgan failed to establish a prima facie case of discrimination for denial of pay for jury duty because he offered no evidence that the action was discriminatory or retaliatory. *Id.* at 49a-50a. The court held that Morgan failed to establish a prima facie case of discrimination relating to the alleged refusal to allow him to review his work file because he could not identify an adverse employment action flowing from that denial. *Id.* at 51a. The court also held that Morgan could not recover for the alleged denial of union representation at a December 1994 meeting because he never addressed that claim in his opposition to Amtrak's summary judgment motion. *Ibid.*

In rejecting Morgan's argument that the "continuing violation doctrine" resuscitated all of his claims dating back to 1991, the district court relied on *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996); *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, modified, 850 F.2d 1549 (11th Cir. 1988); and *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983). Pet. App. 38a-40a. The court, quoting *Galloway*, held that a plaintiff may not base a suit on conduct that "occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in light of events that occurred later, within the period of the statute of limitations." *Id.* at 39a (quoting 78 F.3d at 1167). The court held that Morgan was not entitled to invoke the continuing violation doctrine because as early as 1991 he claimed to be the victim of discrimination and retaliation by Amtrak and yet he did not file his administrative charge until 1995. *Id.* 39a-40a. The court did, however, permit Morgan to present evidence at trial of acts occurring before the limitations period to the extent they were relevant to his timely claims of discrimination and retaliation. *Id.* 40a n.9.

The remaining claims of alleged discrimination – suspension in September 1994, denial of training in October 1994, suspension in February 1995, and termination in March 1995 – were tried before a jury. Pet. App. 13a. During the trial, Morgan introduced evidence spanning the entire period of his employment at Amtrak. The jury returned a unanimous verdict in favor of Amtrak. *Ibid.*

3. The court of appeals reversed the district court's grant of partial summary judgment, holding that the lower court erroneously relied on *Galloway* to reject Morgan's reliance on the continuing violation doctrine. Pet. App. 15a. The Ninth Circuit did not cite a single decision of this Court dealing with

limitations issues.[2] But the Ninth Circuit held that *it* "has never adopted a strict notice requirement as a litmus test for application of the continuing violation doctrine." *Ibid.* Citing its own decisions in *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999), and *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1007 (9th Cir. 1998), the court of appeals stated that the only relevant inquiry in determining whether the continuing violation doctrine applies is whether the pre-limitations conduct at issue is "sufficiently related" to the post-limitations conduct. Pet. App. 16a. Using that test, the court of appeals analyzed Morgan's "three distinct Title VII claims": "discrimination, hostile environment, and retaliation." *Id.* at 17a. "In light of the totality of the circumstances" (*id.* at 18a), the court held that Morgan could rely on the continuing violation doctrine with respect to each of his three claims. *Id.* at 18a-20a. The court of appeals vacated the grant of partial summary judgment and the judgment on the verdict and granted Morgan a new trial on all three of his claims. *Id.* at 22a.

SUMMARY OF ARGUMENT

The limitations period in Section 706(e) runs from the date of a discrete allegedly discriminatory act, not from the date the last effect of that act is felt. In multiple Title VII cases, this Court has upheld a statute-of-limitations defense against em-

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[2] The only decisions of this Court that the Ninth Circuit cited at all (Pet. App. 18a, 19a) were *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which deals with the framework for evaluating discrimination claims, and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), which was the first case in this Court to deem harassment actionable "discrimination" under Title VII. In the principal predecessor to the decision below, *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), petition for cert. pending, No. 00-1397, the majority opinion cited only one decision of this Court, *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), *cited at* 218 F.3d at 984. The dissent in *Fielder*, by contrast, relied heavily on this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1981), which does deal with Title VII's statute of limitations. *See* 218 F.3d at 991, 999-1000 (Kleinfeld, J., dissenting).

ployees who brought an EEOC charge or filed suit within the requisite time period after some adverse action, but sought to challenge an earlier, related act as discriminatory. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), *superseded on other grounds by* 42 U.S.C. § 2000e-5(e)(2); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1981); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Int'l Union of Elec. Radio Mach. Workers, AFL-CIO v. Robbins & Myers, Inc.*, 429 U.S. 22 (1976). The result should be no different here.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), the plaintiffs did prevail over a statute-of-limitations defense, but on grounds not applicable here. The discriminatory salary structure at issue in that case resulted in a new violation of Title VII with each week's paycheck. The statute of limitations thus constantly began to run anew. Similarly, the statute of limitations begins to run anew in antitrust cases every time a transaction takes place at a fixed price, even if the price-fixing agreement was reached many years ago. But the damages are still limited by the statute of limitations, and events that took place before the limitations period have no present legal consequences.

This accrual rule that a statute of limitations begins to run no later than the time when the plaintiff has notice of his injury is applied under many statutes. Most pertinent here is its consistent application under the National Labor Relations Act, on which Title VII's limitations provision was patterned. Indeed, the rule was settled under the NLRA at the time Title VII was passed, making it particularly apparent that the rule is incorporated into Section 706(e). Recent decisions of this Court under civil RICO likewise show that the Ninth Circuit went too far and that statutes of limitations have consequences when plaintiffs sleep on their rights. The Ninth Circuit's "sufficiently related" test, by contrast, attaches no limitations consequence to the various discrete acts of which Morgan now belatedly complains. It cannot be reconciled with this Court's cases.

A continuing violation doctrine does, however, have a proper role to play in some Title VII cases. In some hostile

environment cases, only over time will the employee's treatment rise to the level of actionable conduct. Those are archetypal "continuing violations," in which the employee truly is blameless for not bringing suit earlier. The equitable tolling principles that this Court has read into all statutes of limitations, including Title VII's, in the absence of a contrary direction from Congress are a vehicle to allow such plaintiffs to sue on events occurring more than 300 days before they filed an EEOC charge, though the use of those principles must be sparing and must not protect those who have knowingly failed to file sustainable claims on a timely basis.

Three approaches to the continuing violation doctrine have developed in the lower courts. One approach, championed particularly by the First and Seventh Circuits, best comports with these principles and should be adopted by this Court. That approach provides great predictability without denying relief – either as a theoretical matter or, as case law shows, as a practical matter – to those deserving plaintiffs who did not sleep on their rights. Furthermore, by providing employees with an incentive to act quickly after violations occur, it serves Title VII's primary purpose of eradicating discrimination from the workplace. The Fifth Circuit's multi-factor approach likewise soundly emphasizes the plaintiff's diligence, and thus is far more consistent with this Court's decisions than the Ninth Circuit's approach, but does not provide the same desirable predictability as does the approach of the First and Seventh Circuits. Nor is it clear that anything is gained from the Fifth Circuit's approach, since its factors other than notice boil down to the same things taken into account in defining the substantive violation of Title VII. The Ninth Circuit's approach, under which it is irrelevant that the plaintiff did not act diligently, has nothing to be said for it except that it prevents (old) Title VII violations from going unremedied. But that "benefit" is nothing more than naked hostility to the whole limitations concept, and thus cannot be reconciled with either Congress's decision to place a limitations period in Title VII or this Court's many

decisions recognizing the important interests that statutes of limitations serve.

ARGUMENT

I. IN A TITLE VII CASE, A CAUSE OF ACTION ACCRUES AND SECTION 706(e)'s LIMITATIONS PERIOD RUNS FROM THE DATE OF THE DISCRETE ALLEGEDLY DISCRIMINATORY ACT

A. Section 706(e) Was Drafted With Precision And Serves Important Purposes

Title VII was enacted to "assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). It creates a comprehensive statutory system to vindicate civil rights. *Johnson v. Ry. Express*, 421 U.S. 454, 455 (1975). That system includes a limitations period: Section 706(e). Section 706(e) requires employees who believe that they have been subjected to unlawful discrimination to file a claim with an administrative agency before proceeding to court. 42 U.S.C. § 2000e-5(e)(1). A claim is time barred unless the employee files a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged unlawful occurrence, or within 300 days of the allegedly unlawful occurrence if the employee first files the charge with a state or local agency, as respondent did in this case. *Ibid; United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977) ("[t]imely filing is a prerequisite to maintenance of a Title VII action"). If, after 180 days, the EEOC is not successful in obtaining voluntary compliance from the employer and elects not to file suit on behalf of the employee, the employee may demand a right-to-sue letter and institute a private action against the employer. 42 U.S.C. § 2000e-5(f)(1). The employee must institute the lawsuit within 90 days after receiving the right-to-sue letter or lose his claim. *Alexander*, 415 U.S. at 47.

The Ninth Circuit effectively nullified Title VII's limitations period by permitting recovery for discrete acts of alleged discrimination years after the expiration of the limitations period. There is no statutory basis for this interpretation of Section 706(e). Moreover, the lower court's decision conflicts with the rule that a Title VII cause of action accrues and the limitations period begins to run when a discrete allegedly discriminatory act occurs. This notice accrual rule is implicit in the Court's cases applying Section 706(e)'s limitation period, is derived from the traditional federal discovery accrual rule, and is consistent with the discovery accrual rule applied in the context of other remedial statutes, including the Clayton Act, 15 U.S.C. §§ 12-27, civil RICO, 18 U.S.C. § 1961 *et seq.*, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158 *et seq.*

It is fair to say that the Ninth Circuit's decision in this case, and the Ninth Circuit precedents on which it relies, demonstrate – if not outright hostility to the limitations defense – at least a lack of enthusiasm for allowing limitations to get in the way of what might be an otherwise meritorious claim by a plaintiff. But this Court has consistently shown a very different attitude. Statutes of limitations have been characterized as a "meritorious defense, in itself serving a public interest." *Guar. Trust Co. v. United States*, 304 U.S. 126, 136 (1938). "Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice" of the right to defend himself. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citing *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). Statutes of limitations are "statutes of repose" that balance plaintiffs' needs for sufficient time to pursue claims with defendants' and courts' rights to be free of stale claims. *Id*. at 117; *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965); *Order of Ry. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

This Court has described the purposes behind statutes of limitations as "promot[ing] 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. * * * [E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Ry. Telegraphers*, 321 U.S. at 348-49; *see also Kubrick*, 444 U.S. at 124 ("It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable."). This Court's decisions have instructed that statutes of limitations in general, and Section 706(e) in particular, are to be strictly enforced, subject only to narrow exceptions that apply when consistent with the overall purpose of the statute.

Congress defined Title VII's jurisdictional prerequisites "with precision." *Alexander*, 415 U.S. at 47. An EEOC charge must be filed within the specified number of days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). The sole textual extension of Section 706(e)'s limitations period – undisputedly applicable here, but in no way supportive of the Ninth Circuit's holding – occurs when the "person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from" the alleged discriminatory practice. 42 U.S.C. § 2000e-5(e)(1); *Robbins & Myers, Inc.*, 429 U.S. at 240.

When a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (holding the terms of the statute applicable because this "is not one of the rare cases in which 'the literal application of the

statute will produce a result demonstrably at odds with the intentions of its drafters'"); *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 28 (1989) (noting that the words of the statute are conclusive). The language of Section 706(e) is plain – it provides that a charge of discrimination "shall be filed" with the EEOC within 180 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). As this Court noted, "[a]s a general rule, if an action is barred by the terms of a statute, it must be dismissed." *Hallstrom*, 493 U.S. at 31.[3]

Thus, to assess the timeliness of an administrative charge challenging an allegedly unlawful employment practice, courts are required to identify the complained-of unlawful employment practice with precision. *Lorance*, 490 U.S. at 904. In cases in which a discrete act such as a termination, failure to promote, denial of transfer, or refusal to hire occurs, identifying the "alleged unlawful employment practice" (42 U.S.C. § 2000e-5(e)(1)) is simple, and the limitations period runs from the date of the discrete act. In hostile environment cases in which there is no discrete allegedly discriminatory act, we submit that the cause of action accrues and the limitations period runs, at the latest, from the time when the employee knew or should have known of acts sufficient to constitute a violation of Title VII.[4]

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[3] However, most statutes of limitations – and Title VII's in particular – are not "jurisdictional." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Therefore, even if the discrete act triggering the limitations period has been correctly identified and the plaintiff did not sue or file an administrative charge within the statutory period, waiver, estoppel, or equitable tolling may excuse the untimely filing. *Ibid*. There is no contention, however, that waiver or estoppel has any relevance to this case or to "continuing violation" cases in general. The applicability of principles of equitable tolling to "continuing violation" cases is explored in Part II, *infra*.

[4] This case presents no occasion to choose between an "injury" rule of accrual and an "injury discovery" rule of accrual in the Title VII context. *Cf. Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 196-202 (1997) (Scalia, J., concurring in part and concurring in the judgment) (advocating rejection of "injury discovery" rule in RICO context in favor of "injury" accrual rule

B. A Title VII Cause Of Action Accrues and Section 706(e)'s Limitations Period Is Triggered By A Discrete Adverse Employment Action

1. The Court repeatedly has ruled that Section 706(e)'s limitations period runs from the date of the discrete allegedly discriminatory act, not from the date the last effect of that act is felt. *Evans*, 431 U.S. at 558; *Ricks*, 449 U.S. at 257-58; *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) ("the proper focus is on the time of the discriminatory act, not at the point at which the *consequences* of the act become painful"); *Robbins & Myers*, 429 U.S. at 234; 2 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1349 (3d ed. 1996) (this Court's cases "seem to establish a relatively simple 'notice' rule as to when discrimination 'occurs' (so as to start the running of the charge-filing period)"); *see also* 1 CALVIN CORMAN, LIMITATION OF ACTIONS § 6.5.2 (Supp. 1993) ("In determining the date of accrual of the cause of action, a distinction must be made between Title VII employment discrimination and breach of an at-will employment contract. In the former, the wrongful act * * * is the time of the commission of the unlawful act of discrimination, regardless of whether loss of employment ensues as a result thereof."). Accordingly, this Court has rejected attempts to extend the limitations period when a discrete allegedly discriminatory act has put the plaintiff on notice of a potential claim.[5]

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derived from Clayton Act). There is no allegation of any time lag between any allegedly unlawful acts and respondent's discovery of them, so the dates of accrual would be the same under either rule. Indeed, it would be the rare Title VII case (and one probably resolvable under the doctrine of equitable tolling) in which an employee suffered discrimination or harassment but was unaware of it. Accordingly, the distinction between "injury" and "injury discovery" accrual rules, much debated in this Court's RICO cases, has played little or no role in the development of Title VII limitations jurisprudence in the lower courts.

[5] With the exception of the Ninth Circuit, the courts of appeals have followed this Court's precedents and have held that discrete acts trigger the

This Court articulated the notice accrual rule in the Title VII context in *United Air Lines, Inc. v. Evans*, 431 U.S. 553. The plaintiff in *Evans* was terminated pursuant to a discriminatory "no-marriage" policy for female flight attendants. *Evans*, 431 U.S. at 554. Although the policy was facially discriminatory, the plaintiff did not file an administrative charge following her dismissal. *Id.* at 555. The discriminatory policy was later abolished, and the plaintiff was re-hired. She was not credited with seniority for her prior service, however, because of a provision in the collective bargaining agreement that seniority was irrevocably lost when an employee resigned or was terminated for cause. *Id.* at 555 n.6. The plaintiff argued that

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running of Title VII's limitations period even when plaintiff alleges subsequent discriminatory acts. *See, e.g., Amini v. Oberlin Coll.*, ___ F.3d ___, 2001 WL 867422, *4 (6th Cir. Aug. 2, 2001) ("we reaffirm our practice of running the Title VII and ADEA limitations provisions from the date on which the alleged discriminatory act * * * was communicated to the plaintiff"); *High v. Univ. of Minnesota*, 236 F.3d 909 (8th Cir. 2000) (failure to promote is a discrete event triggering the limitations period); *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 850 (11th Cir. 2000) (precluding use of continuing violation doctrine as denial of transfer is a discrete event triggering the limitations period); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1310 (10th Cir. 1999) (refusal to hire is a discrete event triggering limitations period; claim could not be revived by combining it with timely refusal-to-hire claim); *Huckabay v. Moore*, 142 F.3d 233, 239-40 (5th Cir. 1998) (preventing combining stale demotion and failure-to-promote claims with timely harassment claims as "demotion is the sort of discrete and salient event that should put an employee on notice that a cause of action has accrued"); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 483-84 (3d Cir. 1997) (failure to promote and denial of training are discrete events that "cannot be regarded as having been timely by reason of [plaintiff's] other allegations of discriminatory treatment"); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167 (8th Cir. 1995) (en banc); *see also Williams v. City of New York*, 2001 WL 770933, at *3 (S.D.N.Y. July 10, 2001) ("Transfers, demotions, and failures to promote are considered completed, discrete acts that do not constitute continuing violations. Any holding to the contrary would read the statute of limitations period out of the statute.") (citations omitted); *cf. West v. Philadelphia Electric Co.*, 45 F.3d 744, 756 (3d Cir. 1995) ("[T]he harassment did not cause a discrete event such as a lost job or a denied promotion and, thus, it did not trigger a duty of the plaintiff to assert his rights arising from the deprivation.").

the seniority system gave present effect to past discrimination and therefore, constituted a continuing violation. *Id.* at 558. The Court rejected that argument, holding that "the critical question is whether any present violation exists." *Ibid.* The Court described the plaintiff's earlier termination as "merely an unfortunate event in history which has no present legal consequences." *Ibid.*

In *Robbins & Myers*, the plaintiff believed that she was fired because of her race in violation of both the applicable collective bargaining agreement and Title VII. She promptly filed a grievance with the union alleging unfair action, but waited until after the expiration of Title VII's limitations period to file her charge with the EEOC. 429 U.S. at 229. The plaintiff conceded that filing her grievance did not prevent her from immediately filing an EEOC charge. *Id.* at 238 n.10. She argued, however, that her charge was timely filed because the alleged unlawful employment practice occurred at the conclusion of the grievance-arbitration proceedings, not on the date of her termination. *Id.* at 238. This Court rejected the plaintiff's argument, holding that the accrual date for purposes of the limitations period was the date of her termination. *Id.* at 234-35.

Likewise, in *Ricks*, this Court rejected a plaintiff's attempt to use the continuing violation doctrine to extend the limitations period to resuscitate his time-barred discrimination claim. 449 U.S. at 257-58. In *Ricks*, a black Liberian college professor was denied tenure in February 1973. *Id*. at 252. Following a denial of an appeal of the tenure decision, the college's Board of Trustees offered Ricks a one-year terminal contract. *Id.* at 253. Ricks accepted the contract and worked until its expiration in June 1975. *Id.* at 253-54. In April 1975, Ricks filed a charge with the EEOC alleging discrimination based on national origin. *Id.* at 254. The district court held that Ricks's claim was time barred because the denial of tenure occurred more than 180 days before the filing of the EEO charge. *Id.* at 254-55. The court of appeals reversed the district court, holding that the limitations period did not begin to run until June 1975 upon the

expiration of the one-year contract. *Id.* at 255-56. This Court in turn reversed and held that, for purposes of the limitations period, the inquiry must focus on the date of the allegedly unlawful conduct – the denial of tenure. *Id.* at 256-57. This Court held that the limitations period normally commences when the employer's decision is made, even when the effects of that decision linger for some time. *Id.* at 261.

In *Lorance*, the Court applied Section 706(e)'s limitations period to bar claims brought by female employees challenging AT&T's allegedly discriminatory seniority system. 490 U.S. at 905. To determine when the limitations period began running, the Court analyzed plaintiffs' claims and held that the complained-of unfair employment practice was the adoption of the facially neutral seniority system in 1979. *Id.* at 904-05. The seniority system neither treated similarly situated employees differently nor had been operated in an intentionally discriminatory manner. *Id.* at 905. The plaintiffs asserted, however, that the purpose of its adoption in 1979 was "to protect incumbent male testers and to discourage women from promoting into the traditionally-male tester jobs." *Id.* at 903 (internal quotation marks omitted). The female employees did not file charges with the EEOC until 1983, when they themselves were demoted as a result of the application of the seniority system adopted in 1979. *Id.* at 902. The employees argued that their charges were timely filed because they filed within 300 days of being demoted. The Court rejected that argument and held that the employees' claims were time barred because they failed to file charges within 300 days of the adoption of the allegedly discriminatory seniority system. *Id.* at 905-06.

The Court "recognized, of course, that it is possible to establish a different theoretical construct: to regard the employer as having been guilty of a continuing violation which 'occurred,' for purposes of § 706(e), not only when the contractual right was eliminated but also when each of the concrete effects of the elimination was felt." 490 U.S. at 906. But "[t]he answer" to that approach was "that our cases have rejected" it.

Ibid.; *see also* 490 U.S. at 913 (Stevens, J., concurring) ("the Court has correctly applied" its precedents "to the case at hand"). "*The continuing violation theory is contradicted most clearly,*" this Court stated, by *Ricks* and *Evans*. 490 U.S. at 906 (emphasis added).

One struggles in vain to figure out why Ms. Evans, Ms. Guy (the complainant in *Robbins & Myers*), Professor Ricks, and Ms. Lorance lost substantial rights by not filing an EEOC charge within the statutory period after the discriminatory events affecting them, yet Mr. Morgan (according to the Ninth Circuit) lost nothing by failing to follow up with a timely EEOC charge after "alleged unlawful employment practice[s] occurred" (42 U.S.C. § 2000e-5(e)(1)) in 1991 and 1993. The distinction cannot be merely that "sufficiently related" (Pet. App. 16a) conduct occurred later, because each of the losing plaintiffs in this Court's earlier cases filed an EEOC charge within the statutory period following employer conduct closely related to the actions of which they complained.

2. Plaintiffs do not always lose limitations cases in this Court. When they do win, however, there is a reason other than hostility to the limitations defense. In particular, defendants have been known to overreach in their identification of the discrete event that triggered the plaintiff's duty to file in certain cases (or to advance meritless objections to the application of equitable tolling, *see* Part II, *infra*). The limitations cases in which plaintiffs have prevailed, however, lend no support to the Ninth Circuit's "continuing violation" theory.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), the Court held that the defendants violated Title VII because they failed to eradicate all vestiges of a pre-Title VII discriminatory salary structure. The Court held that Title VII was violated by the issuance of each week's paycheck, stating, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.* at 395.

Consistent with all the rest of this Court's jurisprudence, *Bazemore* demonstrates that a *new* violation triggers a *new* statute of limitations even if the violation is identical to, even rooted in, past practices that are themselves beyond challenge because of the statute of limitations – what Justice Stevens for the Court in *Evans* called "unfortunate event[s] in history which ha[ve] no present legal consequences," 431 U.S. at 558. That this is the correct interpretation of *Bazemore* can be seen from the language of the Court itself (identifying a recurring "wrong actionable under Title VII"); from the Court's subsequent refusal in *Lorance*, 490 U.S. at 912 n.3, to interpret *Bazemore* as support for allowing plaintiffs demoted in 1983 to challenge a seniority system adopted in 1979; and from this Court's antitrust jurisprudence, which identifies a theory of recurring wrongs exactly like the one applied in *Bazemore* yet explicitly contradicts the Ninth Circuit's theory in this case.[6]

In antitrust, each separate violation triggers the limitations period on that separate violation. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-39 (1970); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 (1968). Each overt act that is part of a violation and that injures the plaintiff starts the statutory limitations period running again regardless of the plaintiff's knowledge of the alleged illegality at earlier times. *Klehr*, 521 U.S. at 189 (quoting 2 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶

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[6] Antitrust law has a particularly well-developed jurisprudence regarding violations that have continued over an extended period of time. Accordingly, Professor Laycock soundly suggested some time ago that antitrust law's treatment of such "continuing violations" can serve as a guide for Title VII cases. *See* Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, LAW & CONTEMP. PROBS., Autumn 1986, at 53, 55 (1986) ("Part of the problem is that this debate [on the application of the continuing violation doctrine] has been carried on in a Title VII vacuum, without regard to continuing violation law in other substantive areas. There is a well-developed continuing violation jurisprudence, especially in antitrust law, and Title VII lawyers ought to look at it.").

338b, at 145 (rev. ed. 1995)). In *Zenith*, 401 U.S. at 338-39 (*emphasis added*), the Court reiterated the basic accrual rule for a continuing or recurring violation:

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. * * * In the context of a [continuing or recurring violation] this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act, and that, as to those damages, *the statute of limitations runs from the commission of the act*. * * * To recover those damages, he must sue within the requisite [time] from the accrual of the action.

This accrual rule is exemplified in *Hanover Shoe*. The plaintiff in *Hanover Shoe* filed suit in 1955, alleging that United's restrictive system of distributing shoe machinery violated the antitrust laws. United argued that Hanover's claim was barred because it had applied the unlawful system to Hanover for more than forty years. 392 U.S. at 502 n.15. The Court concluded that, although United could not continue its unlawful conduct forever merely because it had gone unchallenged since before World War I, neither could Hanover recover for more than 40 years of damages. The Court held that the plaintiff could sue but could recover only for damages suffered during the limitations period. *Id.* at 502.

In *Bazemore* as in these antitrust cases, the result of applying the separate accrual rule was that each separate violation, *i.e.*, the issuance of each week's paycheck, gave rise to a cause of action and triggered Section 706(e)'s limitations period.[7]

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[7] It might clarify analysis to abandon the "continuing violation" terminology with respect to cases like *Bazemore* and *Zenith* and *Hanover Shoe* and refer instead to "recurring violations," saving usage of the phrase "continuing violation" for the types of cases discussed in Part II, *infra*. *But cf. Klehr*, 521 U.S. at 189 (referring to "a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a

That result is consistent with the Court's holdings in *Evans, Robbins & Myers*, and *Ricks*. The notice accrual rule is also consistent with the traditional federal discovery accrual rule that is grafted onto statutes of limitations in federal question cases in the absence of a contrary directive by Congress.

C. Title VII's Notice Accrual Rule Is Consistent With The Traditional Federal Discovery Accrual Rule

Title VII's notice accrual rule is an iteration of the traditional federal discovery accrual rule. *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (federal courts generally apply a discovery accrual rule when a statute is silent on the issue); *see Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (claim for equitable relief under the Federal Farm Loan Act); *United States v. Mottaz*, 476 U.S. 834, 842-43 (1986) (claim under the Quiet Title Act); *Kubrick*, 444 U.S. 111, 120-22 & n.7 (claim under Federal Tort Claims Act); *Urie v. Thompson*, 337 U.S. 163, 170 (1949)(claim under Federal Employer's Liability Act); *Exploration Co. v. United States*, 247 U.S. 437, 447 (1918) (bankruptcy fraud claim). The discovery component of the federal accrual rule is tied to discovery of the injury, not to discovery of each element of a claim. As the Court explained

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period of years"). The *substance* – as opposed to the terminology – of this Court's antitrust jurisprudence makes it clear that calling something a "continuing violation" may defeat a statute-of-limitations defense if the plaintiff can identify *actual violations* that occurred within the limitations period, but *never* allows the plaintiff to resuscitate challenges to events that occurred before the limitations period. *See also Lorance*, 490 U.S. at 912 n.3 ("a facially discriminatory system * * * by definition discriminates *each time* it is applied") (emphasis added). True "continuing violations," such as patterns of harassment that develop over time and become actionable only once they cross a threshold of severity or pervasiveness, have different legal consequences. *See Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997) (Williams, J.) ("For statute of limitations purposes, a continuing violation is 'one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period,' typically because it is only its cumulative impact (as in the case of a hostile work environment) that reveals its illegality.") (citations omitted).

in *Rotella*, 528 U.S. at 555, "in applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of other elements of a claim, is what starts the clock." In a Title VII case, generally because of the nature of the discrete acts involved – termination, demotion, failure to promote – the plaintiff's knowledge of his injury is contemporaneous with his knowledge of the discrete allegedly discriminatory act. *See* note 4, *supra*. It is particularly relevant that this traditional discovery accrual rule is applied in National Labor Relations Act cases because Title VII's remedial provisions are based on the NLRA's parallel provisions.

1. The Traditional Federal Discovery Accrual Rule Applies To Cases Arising Under The NLRA

Title VII's remedial provisions, including Section 706(e)'s limitations period, are expressly modeled on the analogous remedial provisions in the National Labor Relations Act ("NLRA"). 29 U.S.C. § 160(b); *Lorance*, 490 U.S. at 909-10; *Zipes*, 455 U.S. at 394-95. Reliance on NLRA decisions is particularly appropriate in interpreting Section 706(e)'s limitations period, "since the highly unusual feature of requiring an administrative complaint before a civil action can be filed against a private party is common to both statutes." *Lorance*, 490 U.S. at 909 (noting that the NLRA's limitations period is "substantially similar" to Title VII's limitations period). Thus, principles developed under the NLRA provide guidance on interpreting Title VII. *Lorance*, 490 U.S. at 909; *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982).

Under the NLRA, the courts apply the traditional federal discovery accrual rule that the limitations period begins to run when the employee knew or in the exercise of reasonable diligence should have known of the acts constituting the alleged violation. *Armco Inc. v. NLRB*, 83 F.3d 357, 362 (6th Cir. 1988); *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 304 (7th Cir. 1983); *Benson v. Gen. Motors Co.*, 716 F.2d 862, 864 (11th Cir. 1983) ("For the purpose of determining when the

[NLRA] §10(b) period begins to run, we look to when plaintiffs either were or should have been aware of the injury itself, not to when plaintiffs became aware of one of the injury's many manifestations"); *NLRB v. Don Burgess Constr. Co.*, 596 F.2d 378, 382 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). In instances in which a discrete act such as a discharge or discriminatory refusal to reinstate is at issue, the NLRA's limitations period runs from the date of that act. *Ansom v. Hiram Walker & Sons, Inc.*, 248 F.2d 380, 382 (7th Cir. 1957); *NLRB v. Textile Machine Works, Inc.*, 214 F.2d 929 (3d Cir. 1954); *NLRB v. Pennwoven, Inc.*, 194 F.2d 521 (3d Cir. 1952).

The plaintiffs in *Ansom* had been discharged three years before they filed a charge challenging the discharge. *Ansom*, 248 F.2d at 381. The Seventh Circuit rejected their attempt to rely on the continuing violation doctrine to save their claim of wrongful discharge, holding, "plaintiffs make a direct averment that they had been wrongfully discharged in 1952. Their cause of action arose then." *Id.* at 382.

Likewise, in *Pennwoven*, the Third Circuit rejected the plaintiffs' attempt to invoke a continuing violation doctrine based on a continuing tort theory akin to nuisance to save their claims of discriminatory refusal to reinstate. 194 F.2d at 524-25. Noting that "Congress inserted this limitation provision because there had been complaints that people were being brought to book upon stale claims," the court reasoned that permitting the plaintiffs to rely on a continuing violation doctrine would thwart the limitations provision because the employee's case then would "never be closed until it is finally litigated." *Ibid.* Thus, the court held that the limitations period began to run from the date that the employer refused to reinstate the employees and "they knew it and knew, or thought they knew, why they had not been called back." *Id.* at 525; *see also Textile Machine Works, Inc.*, 214 F.2d 929 (holding that claims of employees who sought reinstatement were barred, but permitting claims of applicants for employment that had been unlawfully denied employment during the limitations period to proceed).

The NLRA's discovery accrual rule was established before Congress passed Title VII. It can be assumed that Congress was aware of the rule and approved of its use in the Title VII context when it used the NLRA's remedial provisions as a model. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419-20 (1975) (assuming Congress was aware of the Board's provision of backpay when it used the NLRA's remedial provisions as a model for Title VII); c*f. Lorillard v. Pons,* 434 U.S. 575, 581 (1978) ("When * * * Congress adopts a new law incorporating a section of a prior law, Congress normally can be presumed to have knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). Thus, application of the notice accrual rule to Title VII cases is grounded in the application of the discovery rule to NLRA cases.

2. The Court Has Rejected Less Demanding Accrual Rules In The Context of Civil RICO Cases

This traditional discovery accrual rule has been applied in the context of remedial statutes like Title VII. Indeed, the Court has held that the discovery accrual rule furthers the remedial purposes of statutes that encourage civil actions by individuals to supplement the government's efforts to deter or to eradicate unlawful behaviors. Accordingly, the Court has rejected less demanding accrual rules in the context of civil RICO claims, reasoning that such rules are inconsistent with the statute's remedial purpose.

In *Klehr* and *Rotella,* the Court addressed the appropriate accrual rule for civil RICO actions. In *Klehr*, the Court rejected plaintiffs' attempts to rely on a last-predicate-act rule of accrual to salvage their otherwise untimely civil RICO claim. *Klehr*, 521 U.S. 179. The dairy farmer plaintiffs in *Klehr* purchased a silo to store cattle feed from defendant in 1974. The plaintiffs claimed that they purchased the silo based on what later proved to be false representations about the fresh and healthful condition in which the silo would maintain the cattle

feed. *Id*. at 183-84. The plaintiffs alleged that they discovered the poor state of the cattle feed stored in the silo and consequent falsehood of the representations by defendant in 1991, so that their action filed in 1993 was brought within the four-year limitations period. *Id.* at 185. This Court, however, held that the plaintiffs' suit was untimely. The Court rejected the Third Circuit's last-predicate-act rule of accrual, which would have provided that the limitations period ran from the time the plaintiff knew or should have known of the *last injury or last predicate act* that is part of the pattern of racketeering. *Id.* at 186. That accrual rule – like the version of the continuing violation doctrine espoused by the Ninth Circuit in this case – permits a plaintiff to recover not only for harm caused by acts committed within the limitations period, but also for all acts that make up the total pattern of racketeering activity regardless of when he knew or in the exercise of due diligence should have known about the injury. *Id*. at 186-87.

"The Clayton Act help[ed]" the Court to decide *Klehr* "because it ma[de] clear precisely where, and how, the Third Circuit's rule [went] too far." 521 U.S. at 189. The Court compared the last-predicate-act accrual rule to continuing violation (or recurring violation) jurisprudence under the Clayton Act, noting that in antitrust cases the plaintiff cannot use a later predicate act as a bootstrap to recover injuries caused by earlier predicate acts that took place outside the limitations period. *Id.* at 189-90. Accordingly, the Court unanimously rejected the last-predicate-act accrual rule, reasoning that "the rule would permit plaintiffs who know of the defendant's pattern of activity simply to wait 'sleeping on their rights,' as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the 'memories of witnesses have faded or evidence lost.'" *Id.* at 187 (citing *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

In *Rotella*, the Court had a second opportunity to consider the appropriate accrual rule for causes of action in civil RICO. This time, the Court unanimously rejected the "injury-and-pattern-discovery" rule, under which a civil RICO claim

accrues only when the claimant discovers or should have discovered both an injury and a pattern or RICO activity, in favor of the "injury discovery" rule under which a civil RICO claim accrues, at the latest, when a plaintiff knew or should have known of his injury. 528 U.S. at 555. The Court rejected the injury-and-pattern-discovery rule because a pattern discovery rule – like the continuing violation doctrine applied by the Ninth Circuit in this case – would allow proof of defendant's acts that are remote from the time of trial and would foster "litigation even more at odds with the basic principles of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 554. The Court noted that a plaintiff who is aware of the fact of the injury has the responsibility to investigate and determine whether he should bring a claim within the limitations period. *Id.* at 556-57.

There is no basis for requiring of Title VII plaintiffs a lesser degree of responsibility to pursue claims promptly than is required of plaintiffs bringing actions to enforce civil RICO, antitrust laws, the FTCA, the NLRA, or any of the other federal statutes that apply the discovery accrual rule. *See Rotella*, 528 U.S. at 556-57; *Kubrick*, 444 U.S. at 122, 124. Indeed, there is less complexity in determining whether an employer's actions might be discriminatory than there is in discovering racketeering activity that by its very nature may be concealed (as in *Rotella*) or in identifying medical malpractice that may require resort to expert opinion (as in *Kubrick*). Nevertheless, the Court has adopted injury discovery rules in both these contexts. In *Rotella*, the Court reasoned that any less stringent accrual rule "would patently disserve the congressional objective of a civil enforcement scheme * * * aimed at rewarding the swift who undertake litigation in the public good." *Rotella*, 528 U.S. at 559. The challenged acts under Title VII are less complex than those challenged under civil RICO, and *a fortiori* there can be no justification for a less stringent accrual rule in Title VII cases.

Moreover, like civil RICO, Title VII primarily serves a remedial purpose. It is designed to eradicate employment discrimination by "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group * * * over other employees." *Albemarle Paper Co.*, 422 U.S. at 417 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 429-30 (1971)); *Ford Motor Co.*, 458 U.S. at 227; 230. Compensation to victims of employment discrimination is "Title VII's secondary, fallback purpose." *Ford Motor Co.*, 458 U.S. at 230. To accomplish Title VII's primary deterrent goal, the Court has recognized that legal rules fashioned to implement Title VII should be designed to encourage employers to end discrimination, *id*. at 228, and has adopted such rules. *See, e.g.*, *Ford Motor Co.*, 458 U.S. 219 (recognizing rule that further accrual of backpay liability is tolled when the defendant offers the claimant the job originally sought); *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-07 (1998); *Ellerth*, 524 U.S. at 764 (recognizing an affirmative defense for employers in hostile environment sexual harassment cases where the hostile environment is caused by an immediate supervisor if the employer can demonstrate that (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of corrective measures or otherwise avoid harm).

Strict application of statutory limitations periods is particularly appropriate in cases involving remedial statutes – like Title VII – because prompt filing of claims promotes the societal interests at the heart of these statutes. *See, e.g.*, *Alexander*, 415 U.S. at 45 ("Congress gave private individuals a significant role in the enforcement process of Title VII. * * * [T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.") (citations omitted); *Rotella*, 528 U.S. at 558 ("[i]t would * * * be strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit civil RICO might realize").

D. The Ninth Circuit's "Sufficiently Related" Test Ignores Title VII's Notice Accrual Rule

Under the Ninth Circuit's test, a plaintiff is permitted to recover damages for untimely claims provided that they are "sufficiently related" to any act occurring within the limitations period. Pet. App. 16a. The Ninth Circuit's "sufficiently related" test disregards the traditional accrual rules applicable to Title VII because it ignores the existence of a discrete act as the trigger for the running of the limitations period.

In this case, the first alleged act of discrimination occurred in February 1991, when Amtrak terminated Morgan. Pet. App. 7a. Shortly after that termination (which was reduced to a suspension), Morgan complained that he was the victim of racial discrimination and specifically cited the termination as an example of discrimination. *Id.* at 8a. The February 1991 termination triggered the running of Section 706(e)'s limitations period. Morgan, however, failed to file a timely charge. He did not file a charge until four years later.

Thus, the February 1991 termination – like the other discrete events that were not the subject of timely charges – "is merely an unfortunate event in history which has no present legal consequences," *Evans*, 431 U.S. at 558, and Amtrak "is entitled to treat the past act as lawful." *Ibid.* The Ninth Circuit, however, held that, because acts occurring within the limitations period were sufficiently related to untimely acts, Morgan should be permitted to recover damages for all past acts including the 1991 termination. Pet. App. 18a-20a. The result of the Ninth Circuit's "sufficiently related" test is that the notice accrual rule is abolished and the limitations period for discrete, allegedly discriminatory acts is extended indefinitely. The Ninth Circuit's "sufficiently related" test for a continuing violation cannot be reconciled with *Evans*, *Ricks*, *Bazemore*, or the

broader body of this Court's statute-of-limitations jurisprudence.[8]

II. THE CONTINUING VIOLATION DOCTRINE IS APPLICABLE, IF AT ALL, ONLY IN CASES INVOLVING HOSTILE ENVIRONMENT CLAIMS

Nearly every Title VII case involves some discrete allegedly discriminatory act that triggers the running of the limitations period. In rare cases, however, the Title VII violation is a hostile environment claim composed only of a pattern of harassment extending over time or a pattern of harassment that cul-

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[8] Despite the reasons to apply statute-of-limitations jurisprudence across different statutory schemes, this Court has allowed Fair Housing Act statute-of-limitations jurisprudence to develop independently of its Title VII jurisprudence. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982), the Court addressed a "continuing violation" question without mention of its decision earlier the same Term in *Chardon v. Fernandez*, its decision the prior Term in *Delaware State Coll. v. Ricks*, its five-year-old decision in *United Air Lines v. Evans*, or its six-year-old decision in *Robbins & Myers*. Similarly, when the Court addressed an important Title VII statute-of-limitations issue in *Lorance*, the brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioners, in footnote 14 and its accompanying text, invited the Court to link its Title VII and Fair Housing Act jurisprudence and asserted that "*Havens Realty* seems clearly to indicate" that the Title VII statute of limitations had not expired in that case. Yet the Court held that the statute of limitations *had* expired, and in so holding did not find it necessary to mention or distinguish *Havens Realty*. To the extent the two bodies of case law can or need to be reconciled, it appears that this Court conceives of the underlying violation in certain Fair Housing Act cases differently than it conceives of a Title VII violation. The Court afforded standing to certain plaintiffs in *Havens Realty* based on "an adverse impact on the neighborhood in which the plaintiff resides resulting from the steering of persons other than the plaintiff." 455 U.S. at 375. With respect to those "'neighborhood' claims," *id.* at 381, and only with respect to the neighborhood claims, the Court thought the violation to consist of "petitioners' continuing pattern, practice, and policy of unlawful racial steering" (*ibid.*) rather than any single act or even series of acts specifically directed against the plaintiffs. With respect to the plaintiff who did make untimely allegations of acts specifically directed against her, however, the Court actually reversed the decision of the court of appeals that had allowed her to proceed on a "continuing violation" theory. *Ibid.*

minates in a discrete allegedly discriminatory act that apprises the employee for the first time that the prior conduct might have been discriminatory. *See, e.g., O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001); *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996). These are archetypal "continuing violations." Title VII's notice accrual rule should be applied to these cases with the result that the cause of action accrues when an employee knows or in the exercise of reasonable diligence should have known that the acts constituted harassment. The application of the notice accrual rule to hostile environment claims, in some cases, will result in plaintiffs' being able to recover damages for acts that otherwise would be time barred. Consistent application of the notice accrual rule to hostile environment cases leads in most instances to the same results as application of the judicially created equitable tolling rule known as the continuing violation doctrine.

A. Equitable Tolling Doctrines, Including the Continuing Violation Doctrine, Extend The Limitations Period In Rare Cases

Shortly after the passage of Title VII, the courts began to recognize a judicially created continuing violation exception to Title VII's short limitations period in cases in which a defendant's conduct was deemed continuing in nature. *See, e.g., Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1136 (8th Cir. 1977); *Richard v. McDonnell Douglas Co.*, 469 F.2d 1249 (8th Cir. 1972); *Cox v. United States Gypsum Co.*, 409 F.2d 289, 290-91 (7th Cir. 1969). In these cases, the courts used the continuing violation doctrine to allow plaintiffs to recover based on acts that otherwise would be time-barred. The continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated. *Alldread v. City of Grenada*, 988 F.2d 1425, 1432 (5th Cir. 1993); *see also Zipes*, 455 U.S. at 393

(Section 706(e)'s limitations period is "subject to waiver, estoppel, and equitable tolling").

Equitable tolling doctrines, like the continuing violation doctrine, may be used to extend the limitations period in cases in which the limitations period has run before the plaintiff obtained information essential to deciding whether he had a claim. Note, *The Charge-Filing Requirements of The Age Discrimination in Employment Act: Accrual and Equitable Modification*, 91 MICH. L. REV. 798, 807-10 (1993) (discussing Supreme Court doctrine with respect to accrual and equitable modification of Title VII's limitation period); *see also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) (discussing accrual and equitable modification of ADEA's limitations period). Equitable relief from statutes of limitations, however, is rare. *Rotella*, 528 U.S. at 561 ("[t]he virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule"); *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[f]ederal courts have extended equitable relief only sparingly"): *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984). Equitable tolling rules cannot be used by a plaintiff who knowingly fails to file within the limitations period. *See Irwin*, 498 U.S. at 458 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *Baldwin County Welcome Center*, 466 U.S. at 152 ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."); *Amini*, 2001 WL 867422, at *5-*7 ("equitable tolling relief should be granted only sparingly," and plaintiff who could have filed earlier but did not was "far from diligent").

In *Baldwin County Welcome Center*, the plaintiff received a right-to-sue notice from the EEOC and mailed the notice to the district court along with a request for appointment of counsel. 466 U.S. at 148. The district court received the right-to-sue notice within 90 days after the plaintiff had received it from the EEOC. *Ibid.* The district court, nevertheless, dismissed the

case because the right-to-sue notice did not meet the requirements for a complaint under Rule 8, including a factual statement to support the discrimination claim. *Id.* at 149. The court of appeals reversed, citing the remedial purposes of Title VII, and held that the filing of the right-to-sue notice tolled the running of the limitations period. This Court in turn reversed, agreeing with the district court that the right-to-sue notice did not constitute an adequate complaint. It also rejected the application of equitable tolling premised on the plaintiff's "diligent efforts." *Ibid.* The Court listed cases in which equitable tolling might be appropriate, including those in which the plaintiff received inadequate notice; there is a motion for appointment of counsel pending; the court led the plaintiff to believe that she had done everything required of her; or there was affirmative misconduct by the defendant that lulled the plaintiff into inaction. *Id.* at 151-52. The Court noted that none of those factors justifying application of equitable tolling was present, and rejected plaintiff's argument that the lack of prejudice to the defendant should be a factor justifying equitable tolling of Section 706(e)'s limitations period. *Id.* at 152. The Court stated (*ibid.*),

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, 477 U.S. 807, 826 (1980), * * * "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

Likewise, in *Irwin*, the Court rejected a plaintiff's attempt to rely on equitable tolling to extend the 30-day period in which he was required to file suit after receiving his right-to-sue letter from the EEOC. *Irwin*, 498 U.S. at 96. The plaintiff argued that his attorney was absent from the office when his right-to-sue letter was delivered and that he had filed suit within 30 days of actually receiving the letter. The Court observed that

equitable tolling is appropriate in cases where the plaintiff actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the plaintiff has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Ibid.* The Court characterized the delay in *Irwin*, by contrast, as "garden variety * * * excusable neglect" and found no extraordinary or exceptional circumstances warranting equitable tolling. *Ibid.*

The sparing use of equitable tolling doctrines to extend statutory limitations periods applies with full force to Title VII claims. This Court repeatedly has recognized that the Title VII limitations period facilitates the delicate balance among the interests of the employee in protecting his civil rights; the societal interest in promoting prompt filing of discrimination claims, thereby enhancing the likelihood of accurate determinations; and the employer's interest in being protected from untimely claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (limitations periods are "intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights."); *Ricks*, 449 U.S. at 259-60 ("it should not be forgotten that time-limitations provisions themselves promote important interests; 'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones'") (citation omitted); *Evans*, 454 U.S. at 559 (employer is "entitled to treat that past [discriminatory] act as lawful after [the employee] failed to file a charge of discrimination" within the limitations period); *Robbins & Myers*, 429 U.S. at 240 ("[a]dherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII").

Thus, this Court has expressly rejected equitable tolling rules that would extend the limitations period for plaintiffs who knowingly fail to assert their rights pursuant to Section 706(e).

Ricks, 449 U.S. at 257-58; *Chardon*, 454 U.S. at 8; *Evans*, 431 U.S. at 558; *Robbins & Myers*, 429 U.S. at 239-40.[9]

In *Robbins & Myers*, this Court rejected an employee's argument that the Title VII limitations period was tolled during the pendency of a grievance procedure challenging her allegedly discriminatory and unfair termination. 429 U.S. 229. The employee filed a grievance pursuant to the applicable collective bargaining agreement two days after her termination challenging it as "unfair." However, she waited until after the grievance procedure was complete and after the Title VII limitations period had run to file her charge with the EEOC. *Id.* at 231-32. In arguing that Title VII's statutory limitations period should be tolled during the pendency of grievance/arbitration proceedings, the employee noted that any delay would be slight and that failure to permit such tolling might force an employee into court prematurely. This Court, citing *Alexander*, 415 U.S. 36, and *Johnson*, 421 U.S. 454, reaffirmed the independence of remedies under a collective bargaining agreement and Title VII and held that "Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90

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[9] Likewise, this Court has rejected an equitable tolling rule when a plaintiff tried to rely on Title VII to extend the limitations period for his Section 1981 claim. In *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, the plaintiff filed a timely charge with the EEOC alleging race discrimination. More than three years later, the EEOC issued a right-to-sue letter. The plaintiff filed suit alleging violations of both Title VII and Section 1981. He argued that the one-year limitations period applicable to his Section 1981 claim was tolled during the pendency of the processing of his Title VII claim by the EEOC. This Court rejected the plaintiff's arguments and held that the one-year limitations period on his Section 1981 claim had expired. This Court held, "plaintiff has slept on his § 1981 rights. The facts that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent. * * * We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently." 421 U.S. at 466.

days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight.'" *Id.* at 240 (citation omitted).

This Court also has rejected attempts by plaintiffs who knowingly let the limitations period expire to use the continuing violation doctrine to salvage stale claims. As discussed above, the Court rejected the plaintiff's attempt to use the continuing violation doctrine to extend Title VII's limitations period in *Ricks*. 449 U.S. 252. The plaintiff argued that the continuing violation doctrine should apply to save his claim of discriminatory denial of tenure in part because a number of "unusual incidents" – including an alleged assault by the department chairman – occurred between the denial of tenure and his termination more than a year later. *Id.* at 257 n.8. This Court noted, "[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protects employers from the burden of defending claims arising from employment decisions that are long past." *Id.* at 256-57. Accordingly, this Court rejected the plaintiff's reliance on the continuing violation doctrine and held that his claim was time barred.[10] Of course, the Ninth Circuit would have reached the opposite result, deeming the assault and other unusual incidents capable of being interpreted as retaliatory and thus "sufficiently related" to allow litigation over the denial of tenure. *See Fielder*, 218 F.3d at 986-87 (ostensibly unrelated verbal reprimand long after incidents of alleged harassment could be considered both retaliatory and related, and thus entire case, including otherwise time-barred harassment claims, must go to

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[10] *See also Evans*, 431 U.S. 553 (rejecting plaintiff's reliance on continuing violation doctrine to save discriminatory seniority claim where the allegedly discriminatory policy had been discontinued earlier and plaintiff's claim was based on the current effects of the past policy); *cf. Chardon*, 454 U.S. at 7-8 (rejecting plaintiffs' reliance on termination date as date on which the limitations period began running where the plaintiffs had advance notice of their terminations).

jury). But it is this Court's decisions that bind the Ninth Circuit, not the other way around.

In *Lorance*, the Court rejected plaintiffs' reliance on the continuing violation doctrine to extend Section 706(e)'s limitations period. 490 U.S. at 906. The *Lorance* plaintiffs failed to challenge the imposition of a discriminatory seniority system within 300 days. They did, however, file administrative charges within 300 days of being demoted pursuant to that seniority system. *Id.* at 903-04. The plaintiffs did not claim that they were unaware of the adoption of the discriminatory seniority system, but rather argued that under a continuing violation theory the discriminatory conduct occurred when they were demoted, not when the seniority system went into effect. *Id.* at 906. The Court rejected that argument, holding that plaintiffs' claims were wholly dependent on discriminatory conduct occurring outside the limitations period and that the demotions were merely inevitable consequences of the prior discriminatory conduct. *Id.* at 907-08.

Thus, in the Title VII context, the Court consistently has rejected the use of the continuing violation doctrine to extend the statutory limitations period when a plaintiff knowingly fails to pursue his claims in a timely fashion. Nothing, however, prevents the sparing use of the continuing violation doctrine, like other equitable tolling approaches, to protect those few Title VII plaintiffs who could not reasonably have been expected to bring an EEOC charge within 180 or 300 days of the first act or acts that in retrospect appear discriminatory. We turn now to an examination of the approaches that have been developed in the courts of appeals to see which is most consistent with this Court's precedents.

B. The Continuing Violation Doctrine Should Apply Only In Hostile Environment Cases Where The Plaintiff Reasonably Did Not Know The Conduct Was Discriminatory Or Where The Discriminatory Nature Of The Conduct Is Recognized As Discriminatory Only In Light Of Later Occurring Events

Early development of the continuing violation doctrine was aptly described as "inconsistent and confusing." *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 977 (5th Cir. 1980). That confusion continues today. The courts of appeals have interpreted the doctrine in widely divergent ways and apply different standards to interpret similar facts, resulting in contradictory outcomes. The widespread inconsistency and confusion has been recognized by both the courts and commentators. *See Galloway*, 78 F.3d at 1165 ("The question when conduct occurring outside the statute of limitations may, by virtue of its link with recent conduct, be made a basis for a legal claim is a vexing one * * *."); Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531 (2000) (describing the "increasingly complex and divergent application of the continuing violation doctrine in sexual harassment and other types of employment discrimination cases"); 2 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1351 (3d ed. 1996) (citing the continuing violation doctrine as "the most muddled area in all of employment discrimination law."); R.L. Paetzold & A.M. O'Leary-Kelly, *Continuing Violation and Hostile Environment Sexual Harassment: When is Enough, Enough?*, 31 AM. BUS. L.J. 365, 382-83 (1993) ("[b]ecause of the limited guidance from the U.S. Supreme Court, the federal circuits have adopted different standards for implementing the continuing violation doctrine"); T. Crivens, *The Continuing Violation Theory and Systematic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 VAND. L. REV. 1171, 1172 (1988) (the continuing violation doctrine is "one of the most confusing theories in employment discrimination law").

Three different approaches to the continuing violation doctrine have emerged. The Seventh Circuit's approach articulated by Judge Posner in *Galloway*, 78 F.3d 1164, limits the application of the continuing violation doctrine to cases in which "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Galloway*, 78 F.3d at 1167. The First and Federal Circuits use the same approach. *See Sabree v. United Bhd. of Carpenters and Joiners, Local* 33, 921 F.2d 396 (1st Cir. 1990); *Bosley v. Merit Systems Protection Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998) (Bryson, J.); *see also Fitzgerald v. Henderson*, 251 F.3d 345, 372 (2d Cir. 2001) (Korman, J., dissenting).

The Fifth Circuit's approach articulated in *Berry v. Board of Supervisors*, 715 F.2d 971 (1983), permits use of the continuing violation doctrine to save otherwise time-barred claims if the alleged acts are similar, if they are recurring, and if the untimely acts did not have the "degree of permanence which would trigger an employee's awareness of and duty to assert his rights." *Id.* at 981. The third factor, "permanence," is considered most important. *Ibid.* Therefore, if the early untimely act is sufficiently "permanent" in nature, a plaintiff may not rely on the continuing violation doctrine. The Fifth Circuit identified these three factors as relevant, not exhaustive. *Ibid.*

The third approach, advocated by the Ninth Circuit in this case and in *Fielder*, rejects both the *Galloway* and *Berry* analyses and permits use of the continuing violation doctrine to defeat a statute-of-limitations defense and recover damages for pre-limitations conduct so long as any act occurring outside the limitations period is "sufficiently related" to allegedly discriminatory conduct occurring within the limitations period. Pet. App. 15a, 18a; *see also Fitzgerald*, 251 F.3d 345.[11] This

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[11] The 2-1 decision in *Fitzgerald*, which was rendered after the petition for

approach ignores controlling precedent, effectively nullifies Section 706(e)'s limitations period, and undermines Title VII's remedial purpose of eradicating discrimination.

1. The "Notice" Limitation On The Continuing Violation Doctrine Is Consistent With The Notice Accrual Rule, Effectuates Title VII's Remedial Purpose Of Eradicating Discrimination, And Results In Predictable Outcomes

The *Galloway* approach to the continuing violation doctrine is consistent with both the notice accrual rule applicable to Title VII cases and Title VII's remedial purpose of eradicating discrimination. Moreover, the *Galloway* approach, which requires a focused inquiry into the facts of each case, results in predictable outcomes.

In *Galloway*, the Seventh Circuit recognized that equitable tolling doctrines including the continuing violation doctrine should be applied to save hostile environment claims from the Catch-22 of either filing prematurely or filing after the limitations period has run. The *Galloway* court stated that equitable tolling was appropriate in certain sexual harassment cases because "[i]n its early stages it may not be diagnosable as sex discrimination, or may not cross the threshold that separates the nonactionable from the actionable, or may not cause sufficient distress to be worth making a federal case out of, or may not have gone on for long enough to charge the employer with knowledge and a negligent failure to take effective remedial measures." *Galloway*, 78 F.3d at 1166. To avoid encouraging premature or precipitate litigation, the Seventh Circuit held that conduct that is not the subject of an immediate complaint is not time barred provided "the victim of sexual harassment sues as soon as harassment becomes sufficiently palpable that a reason-

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a writ of certiorari in this case was filed, appears to put the Second Circuit on the same side of the widespread circuit split as the Ninth Circuit, though the majority opinion in *Fitzgerald* makes little effort to analyze its consistency with other circuits' jurisprudence.

able person would realize that she had a substantial claim under Title VII." *Ibid.* If a plaintiff does so "then she sues in time and can allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable." *Ibid.*

The *Galloway* court, however, rejected the use of equitable doctrines in cases in which it was evident long before the plaintiff sued that she was a victim of actionable harassment. 78 F.3d at 1166. In such cases – as in *Bazemore* and the antitrust cases – the plaintiff is permitted to sue provided that the last act occurred within the limitations period, but she is not permitted to reach back and base her suit on or recover for damages incurred outside the limitations period. 78 F.3d at 1167. Thus, the court concluded that "a plaintiff may not base her * * * suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statue ran on that conduct." *Ibid.* In arriving at that conclusion, the Seventh Circuit reconciled the social interest in "encouraging the prompt filing of claims[,] and by doing so of enhancing the likelihood of accurate determinations and removing debilitating uncertainty about legal liabilities," with the equitable interest in protecting a plaintiff who files a Title VII charge as soon as he is or reasonably should be aware of an actionable injury. *Id.* at 1165, 1166.

In *Sabree*, the First Circuit applied a similar analysis, holding that the critical inquiry in determining whether a continuing violation tolled the limitations period is "what the plaintiff knew or should have known at the time of the discriminatory act." *Sabree*, 921 F.2d at 402. Consistent with the notice accrual rule applicable to Title VII cases, the *Sabree* court held,

> What matters is whether, when and to what extent the plaintiff was on inquiry notice. *A claim arising out of an injury which is "continuing" only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the [300] day limitation period.* It is this factor that is the undoing of

> Sabree, for he has admitted that he believed, at every turn, that he was being discriminated against. *A knowing plaintiff has an obligation to file promptly or lose his claim.* This can be distinguished from a plaintiff who is unable to appreciate that he is being discriminated against until he has lived through a series of acts and thereby is able to perceive the overall discriminatory pattern. After all, [e]mployers as well as employees are entitled to procedural safeguards in the precincts patrolled by Title VII.

Ibid. (emphasis added; internal quotations and citations omitted).[12]

This notice limitation on the continuing violation doctrine is consistent with Title VII's notice accrual rule because it requires a knowing plaintiff to file his administrative charge promptly or lose his claim. It recognizes that the application of equitable principles, including the continuing violation doctrine, is appropriate when extraordinary or exceptional circumstances have prevented the plaintiff from recognizing that he is the victim of discrimination until some period of time has elapsed. Thus, the notice limitation on the continuing violation doctrine is consistent with and a logical adjunct to this Court's rulings interpreting Section 706(e)'s limitations period.

Moreover, the notice limitation effectuates Title VII's primary policy of eradicating discrimination without compromising its secondary, "fallback" policy of compensating victims of discrimination. *Galloway*, 78 F.3d at 1167. Prompt filing of an administrative charge alleging discrimination "is almost certain to stop the [discrimination], so that unlike certain cases of

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[12] The court "f[ou]nd the permanence factor [*i.e.*, the notice factor] dispositive of Sabree's case," and therefore "express[ed] no opinion as to the viability of * * * other factors" that other courts have taken into account. 921 F.2d at 402 n.12. Subsequent First Circuit cases have likewise pretermitted inquiry into any other factors when the plaintiff was on notice and did not file a charge within 300 days. *E.g.*, *Provencher v. CVS Pharmacy*, 145 F.3d 5, 15 (1st Cir. 1998). The First Circuit's approach, which is identical to the Seventh and Federal Circuits' approach, thus is pointedly *not* a balancing test.

nuisance the plaintiff will not be put to the expense of bringing successive suits. What is more, she can always seek injunctive relief against a continuation of the unlawful conduct." *Ibid.* Indeed, a plaintiff loses his claim and opportunity for compensation only when – like respondent Morgan – he fails to file within 300 days of the alleged violation. The notice limitation preserves the claims of employees who, in the exercise of due diligence, do not immediately appreciate the wrongful nature of the treatment they receive.

Statutes of limitations are designed to afford some predictability for both defendants and plaintiffs. The notice limitation on the continuing violation doctrine leads to predictable – yet not unduly harsh – results.

In cases involving hostile environment claims, courts applying the notice limitation routinely decide that the continuing violation doctrine cannot be used by plaintiffs who admit that they knew of the alleged discrimination before the limitations period.[13] *See Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 612 (1st Cir. 2000) (handwritten note by plaintiff identifying acts as discriminatory written more than a year before the charge filed precluded plaintiff from relying on the continuing violation doctrine); *Provencher*, 145 F.3d at 15 (plaintiff's admission that he knew he was being harassed long before he filed charge precluded invocation of the continuing violation doctrine); *Dasgupta v. Univ. of Wis. Bd. of Regents*, 121 F.2d 1138, 1140 (7th Cir. 1997) (allegations of outright discrimination in pay and promotion, coupled with the defendant's failure to protect employee from gross harassment, were sufficient to support a Title VII claim years before the employee filed suit, thereby precluding him from relying on the con-

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[13] Though critical of the case law placing weight on this factor, the author of Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 TEX. L. REV. 531, acknowledges that "courts have consistently rejected the continuing violation theory where plaintiffs have admitted to being aware of the sexual or discriminatory nature of the untimely acts." *Id.* at 553.

tinuing violation doctrine); *Speer v. Rand McNally & Co.*, 123 F.3d 658, 663-64 (7th Cir. 1997) (plaintiff's admission that she knew of the nature of alleged sexual harassment at the time it occurred and complained about it long before the limitations period expired precluded her from relying on the continuing violation doctrine); *Garrison v. Burke*, 165 F.3d 565, 570 (7th Cir. 1999) (sexual assault would have put any reasonable person on notice that she had a substantial claim under the law and therefore she could not rely on the continuing violation doctrine to defeat the statute of limitations); *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1004 (7th Cir. 2000) (plaintiff who confronted supervisor with suspicion of pregnancy discrimination more than a year before filing an administrative charge could not rely on continuing violation doctrine).

By contrast, in cases in which the plaintiffs are able to identify the discriminatory conduct only in light of later events, the courts routinely decide that the continuing violation doctrine applies and the plaintiffs are permitted to reach back to otherwise time-barred conduct. *See, e.g.*, *O'Rourke*, 235 F.3d at 732-33 (continuing violation doctrine applied where the complained-of conduct was discriminatory only because of sheer volume and repetition); *Wilson v. Chrysler Co.*, 172 F.3d 500, 510 (7th Cir. 1999) (continuing violation applied to save at least a portion of plaintiff's claim); *Galloway*, 78 F.3d at 1167 (continuing violation doctrine applied where the complained-of verbal conduct was not of the kind that it would be reasonable to expect an employee to base a suit on the first time it occurred).

The *Berry* test for determining the application of the continuing violation doctrine recognizes the importance of notice to the plaintiff and thus is not inconsistent with Title VII's notice accrual rule. However, *Berry's* three-pronged test, augmented at times with unspecified additional factors, provides very little concrete guidance to courts or prospective litigants, particularly in cases in which the three factors point in different directions. Thus, application of the *Berry* test can lead

to inconsistent results as the lower courts engage in fact-specific inquiries that "turn[] on the facts and context of each particular case." 715 F.2d at 981.

Moreover, both the first and second *Berry* factors – connectedness and frequency – are virtually foregone conclusions in hostile environment cases, in which a plaintiff has an actionable claim only when the complained-of conduct is severe and pervasive. *Meritor Sav. Bank*, 477 U.S. 57; *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993); s*ee Rush*, 113 F.3d at 483 ("failure to claim harassment in the 1991 EEOC charge does not destroy [plaintiff's] claim, because the evidence shows that the harassment intensified after the charge was filed, and moreover, she did not realize early on how pervasive or severe the harassment was"); *see also Huckabay*, 142 F.3d at 239 (tolling of statute of limitations was justified where "pattern of harassment was not the kind of violation that * * * would put a worker on notice that his rights had been violated"). Accordingly, in the context of hostile environment cases, *Berry*'s three factors can be distilled to the notice factor alone.

Under either *Galloway* or *Berry*, respondent's claims relating to events occurring before the limitations period would have been considered time barred because his admission that he was on notice of the allegedly discriminatory nature of petitioner's conduct bars his reliance on the continuing violation doctrine. Only under the Ninth Circuit's "sufficiently related" test is respondent or any other plaintiff who knowingly sits on his or her rights able to invoke an equitable continuing violation doctrine to save time-barred claims.

2. The Ninth Circuit's "Sufficiently Related" Test Cannot Be Reconciled With The Court's Application Of The Notice Accrual Rule in Title VII Cases, Undermines Title VII's Remedial Purpose Of Eradicating Discrimination, and Yields Unpredictable Results

The Ninth Circuit's approach to the continuing violation doctrine articulated in *Fielder* and reaffirmed in this case rejects both *Galloway* and *Berry*. Pet. App. 15a. The lower court held that Ninth Circuit precedent "precludes * * * a notice limitation on the continuing violation doctrine." *Ibid.* The result is a formless, limitless test for applying a continuing violation exception that asks only if the otherwise time-barred acts are "sufficiently related" to any allegedly discriminatory act occurring within the limitations period.[14] Under the Ninth Circuit test, the continuing violation exception has swallowed the statute of limitations rule. Indeed, the Ninth Circuit compounded its error by applying its "sufficiently related" test to respondent's discrimination and retaliation claims, not just his hostile environment claim, and concluding that he could rely on the continuing violation doctrine with respect to each of those three claims. Pet. App. 18a-20a. As discussed above, that result contradicts this Court's holdings in *Evans*, *Ricks*, and *Lorance*, which require application of the notice accrual rule to all Title VII claims.

The Ninth Circuit's "sufficiently related" test cannot be reconciled with this Court's rulings limiting use of equitable tolling rules, including the continuing violation doctrine, to unknowing plaintiffs. This Court's statute of limitations and equitable tolling cases have successfully reconciled the rights of defendants to be free of stale claims, the societal interest in

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[14] Furthermore, the Ninth Circuit requires juries, not judges, to apply the "sufficiently related" "test." *Fielder*, 218 F.3d at 986-87 ("If a jury finds that Bibler's reprimand was an act of retaliation, it becomes an issue of fact whether the retaliation was of the same kind alleged before the 300-day period."). The mind boggles at how juries in such cases are to be instructed.

promoting prompt adjudication of claims, and plaintiffs' interest in being able to pursue legal remedies. Using the continuing violation doctrine, the Ninth Circuit puts its thumb on the scale and tips it in favor of allowing plaintiffs to combine timely and untimely claims with little regard to the existence of the limitations period. Indeed, the lower court would permit a plaintiff who knew that his rights were being violated to sit on his rights indefinitely, allowing damages to pile up rather than seeking to rectify the situation. *But see Klehr*, 521 U.S. at 187 (criticizing a rule that "would permit plaintiffs who know of the defendant's pattern of activity simply to wait 'sleeping on their rights,' as the pattern continues and * * * damages accumulate").

In both this case and *Fielder*, the employees admitted to believing that they were being discriminated against years before they filed administrative charges. Pet. App. 28a; *Fielder*, 218 F.3d at 979. As Judge Kleinfeld noted in his dissent in *Fielder*, "[t]he practical consequence of the majority opinion is to keep alive incidents of claimed [discrimination] permanently, with no statute of limitations at all." 218 F.3d at 990; *see also Anderson*, 190 F.3d at 936-37 (permitting recovery for more than 11 years of allegedly discriminatory conduct without reference to whether plaintiff knew or should have known of conduct at some prior time); *Draper*, 147 F.3d at 1108-10 (permitting plaintiff to rely on continuing violation doctrine even though she complained to management about allegedly discriminatory conduct more than a year before filing an administrative charge).

Not only is the "sufficiently related" test at odds with controlling precedent, but the Ninth Circuit's continuing violation rule is so indeterminate that it cannot be applied in a consistent manner. Under the lower court's approach, the district courts – and juries – are vested with unlimited discretion to determine in individual cases which acts are "sufficiently related" with respect to their subject matter and temporal proximity. The threshold of relatedness is low. In this case, the lower court

permitted respondent to revive time-barred claims of harassment including an alleged assault, allegedly unfair discipline, denial of training, and a prior termination by pointing to three discrete events including cancellation of training, a suspension, and a suspension leading to termination. Pet. App. 18a-20a. In *Fielder*, the plaintiff was permitted to revive time-barred claims of sexual harassment involving a coworker by pointing to two discrete instances of alleged retaliation by her supervisor. 218 F.3d at 987-88. In light of these results, it is difficult to imagine two separate acts of discrimination that the court of appeals would not allow a jury to find to be "sufficiently related" for purposes of applying the continuing violation doctrine.

Finally, the Ninth Circuit's approach undermines Title VII's primary remedial purpose of eradicating discrimination. Instead of encouraging prompt filing of claims with the benefit of eradicating discrimination, the Ninth Circuit's approach encourages putative victims to endure discriminatory treatment for as long as possible in order to maximize their potential damages.[15] Not only is that result unfair to employers, but it dilutes any positive societal benefit flowing from Title VII.

In the final analysis, there is nothing to be said for the Ninth Circuit's rule – and the Ninth Circuit has made no serious

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[15] This result is antithetical to the avoidable consequences doctrine that Title VII borrows from tort law. *Ellerth*, 524 U.S. at 764 (citing *Ford Motor Co.*, 458 U.S. at 232 n.15). Under that doctrine, "'[w]here one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.'" *Ford Motor Co.*, 458 U.S. at 232 n.15 (quoting C. MCCORMICK, LAW OF DAMAGES 127 (1935)); *see also Faragher*, 524 U.S. at 807; *Gebser v. Lago Vista Sch. Dist.*, 524 U.S. 274, 307 (1998) (Ginsburg, J., dissenting) ("to the extent that a plaintiff unreasonably fail[s] to avail herself of * * * preventative and remedial measures, and consequently suffer[s] avoidable harm, she would not qualify for Title IX relief") (citing MCCORMICK, *supra*, at 127-159).

attempt to justify it, other than to cite its own precedents and belittle the approaches of other circuits – except that it allows plaintiffs to win more often and thus lets employers "get away with" fewer violations of Title VII. But, of course, that could be said about any excuse for ignoring the statute of limitations. Furthermore, employees like Morgan have the means to avoid *any* ill consequences of the statute of limitations just by filing EEOC charges within 300 days of what they believe to be acts of discrimination. For those who do not have that ability because a charge would be dismissed as premature, the *Galloway*/*Sabree* rule provides the needed protection. The "continuing violation doctrine" has a legitimate role to play in protecting such employees, but not in protecting Abner Morgan or the others whom the Ninth Circuit would relieve of the avoidable consequences of their own decisions not to pursue Title VII remedies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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