No. 14-613

In the Supreme Court of the United States

MARVIN GREEN, PETITIONER

v.

MEGAN J. BRENNAN, POSTMASTER GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR RESPONDENT

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Our opening brief contended that the court of appeals adopted an erroneous rationale but still reached the correct result in this case. In our view, when a retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, depends on the presence of a constructive discharge, the period for initiating administrative consideration of that claim does not begin until the employee gives notice of the resignation that is allegedly attributable to the employer. Resp. Br. 14-32.[1]

In defending the court of appeals' rationale, the Court-appointed amicus curiae contends (Br. 2) that the period instead begins when the employer commits "the last discriminatory act * * * that led to [the

[1] Our opening brief contended that the court of appeals reached the correct result because petitioner gave his notice of resignation on the same day as the employer's last act. Resp. Br. 32-39. This reply brief does not address that portion of our argument, on which we are not "supporting petitioner," Sup. Ct. R. 25.3.

employee's] resignation," a date that often occurs before a plaintiff's constructive-discharge claim has even accrued. That is incorrect. The regulatory text on which the amicus relies does not dictate her result, because its reference to the "matter alleged to be discriminatory" (29 C.F.R. 1614.105(a)(1)) merely poses rather than resolves the question whether the constructive discharge itself is a discriminatory act that is imputed to the employer. Equally to the point, her position is based largely on the assumption that a constructive-discharge claim and a claim based on the underlying conduct without an accompanying resignation are the same claim, and the discharge merely expands the available remedies. But the claims are not the same; indeed, *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), described a constructive-discharge claim and a claim about the underlying conduct absent resignation as "two claims." *Id.* at 149. Nor do policy considerations support the court of appeals' rationale, since the supposed threat posed by allowing an employee to extend the limitations period by delaying his resignation is counterbalanced by the need, in the constructive-discharge context, to prove that working conditions were unendurable.

The Court should reject the rationale of the decision below and instead endorse the notice-of-resignation rule adopted by most of the courts of appeals that have confronted the question, which has been applied for many years without giving rise to any evident practical difficulties.

A. The Period For Raising A Constructive-Discharge Claim Should Not Begin Before It Can Even Be Established That There Will Be A Discharge

As relevant here, a federal-sector employee raising a Title VII claim must "initiate contact" with an equal-employment-opportunity (EEO) counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. 1614.105(a)(1); see Resp. Br. 15 & n.5.[2] In the constructive-discharge context, that 45-day period should not begin until the employee has given notice of the resignation that will, if a constructive-discharge is proved, be attributable to the employer.

The amicus does not dispute our previous explanation that, under standard statute-of-limitations principles—which have generally been applied to the time limits associated with the exhaustion and filing of Title VII claims in the private and federal sectors (Resp. Br. 16-17)—a limitations period will commence only when a plaintiff has a complete and present cause of action on which he can file suit and obtain relief (*id.* at 17-18). Nor does she deny that an employee cannot even allege that there has been a constructive discharge until he has made and announced his decision to resign. *Id.* at 18-23. Instead, the amicus contends (Br. 29-33) that the usual rule is inapplicable here because the text of

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[2] As the amicus notes (Br. 8), the Equal Employment Opportunity Commission (EEOC or Commission) has announced its intention to issue a notice of proposed rulemaking to amend Part 1614's provisions governing the federal-sector EEO complaint process. The Commission sought comments on a wide variety of issues that might be addressed in that rulemaking, including whether the 45-day deadline, or any of the other time limits, should be changed. See 80 Fed. Reg. 6669 (Feb. 6, 2015). It has not indicated what the scope of its proposal will be or when it will be published.

the regulation supposedly requires otherwise. But that view depends on a false equivalence between the constructive discharge itself and the underlying discriminatory conduct that precipitated the employee's decision to resign.

1. The amicus characterizes (Br. 17-21) a constructive-discharge claim as materially identical to a potentially antecedent claim challenging the employer's discriminatory conduct before it was known to be resignation-precipitating conduct. In her view, the only difference between those two claims is the ability to request remedies (such as reinstatement and back pay) that would not be available in the absence of a discharge. This argument relies on snippets from *Suders*, *supra*, but disregards their context.

a. *Suders* did state that a constructive discharge is "assimilated to a formal discharge for remedial purposes," 542 U.S. at 141, and that the two kinds of discharges are "functionally the same * * * in damages-enhancing respects," *id.* at 148. But the Court did not, as the amicus infers, declare that the extent of remedies is the "only" (Amicus Br. 20) way in which discharge claims can be assimilated.

Suders was about "one subset of Title VII constructive discharge claims"—those involving a hostile work environment "attributable to a supervisor," 542 U.S. at 143—and the employer's ability to invoke the affirmative defense articulated in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *Boca Raton*, 524 U.S. 775 (1998), for cases in which supervisor harassment is unaccompanied by an adverse official act. The Court explained that a constructive discharge "may be effected through co-worker conduct, unofficial supervisory conduct, or official company

acts." *Suders*, 542 U.S. at 148. And it held that the affirmative defense is not available when the constructive discharge does involve an "official" act. *Id.* at 140, 148. In doing so, the Court did not deal only with what form any remedy would take. Instead, it addressed when an employer could or could not be held liable at all for the consequences of its supervisor's actions.

b. The amicus is, of course, correct in noting (Br. 19) that there will be no valid constructive-discharge claim that is independent of any discriminatory (or retaliatory) conduct. That is a function of Title VII itself, which prohibits federal-sector personnel actions only when they are not "free from any discrimination." 42 U.S.C. 2000e–16(a); see also 42 U.S.C. 2000e–2(a), 2000e–3(a) (defining unlawful employment practices for private employers). But that does not mean that a constructive discharge and the conduct that preceded the resignation are always a single claim.

To suggest the opposite, the amicus contends (Br. 19) that the discriminatory conduct that underlies a constructive discharge will be "independently actionable." In fact, that will often, but not necessarily always, be true. In *EEOC* v. *University of Chicago Hospitals*, 276 F.3d 326 (7th Cir. 2002), for instance, the Commission brought a stand-alone constructive-discharge claim where statements reflecting religious discrimination did not rise to the level of creating a hostile work environment yet created an allegedly reasonable belief in the employee that she would be fired if she did not resign. *Id.* at 332-333. The Seventh Circuit recognized that "it is not necessary that the incidents that surround the constructive discharge themselves constitute actionable religious discrimination." *Id.* at 333. But see *Ames* v. *Nationwide Mut.*

Ins. Co., 760 F.3d 763, 769 (8th Cir. 2014) (noting that the court has not recognized the Seventh Circuit's alternative form of constructive discharge), cert. denied, 135 S. Ct. 947 (2015).

More to the point, *Suders* itself implicitly rejects the amicus' conclusion (Br. 20) that a constructive-discharge claim is *the same claim* as one based only on the underlying discriminatory conduct. For hostile-work-environment purposes, *Suders* describes a plaintiff's need to prove "two claims" and characterizes the underlying hostile-environment claim as a "lesser included component" of "the graver claim of hostile-environment constructive discharge." 542 U.S. at 149 (emphasis omitted). And that makes good sense. Just as a termination is a separate claim from one about a preceding demotion, an employee's resignation—when treated constructively as a termination—may be a separate claim from an independently actionable one that preceded it.

Suders is entirely consistent with that approach. The amicus suggests otherwise, asserting (Br. 19) that the employer's "predicate discrimination"—rather than the "working conditions" that result—is the exclusive "target of [a constructive-discharge] claim." But the Court expressly held that a constructive discharge requires more than underlying discrimination; the employee must also "show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." 542 U.S. at 134; see *id.* at 141 (a constructive discharge is "an employee's reasonable decision to resign because of unendurable working conditions").[3] And it recognized that "[a]

[3] *Suders* thus rejected the reform proposed by the law-review comment on which the amicus relies (Br. 19, 42 n.16). See Cathy

constructive discharge" always involves more than the employer's own conduct, because it "involves *both* an employee's decision to leave and precipitating conduct." *Id.* at 148 (emphasis added); accord *Mac's Shell Serv., Inc.* v. *Shell Oil Prods. Co.*, 559 U.S. 175, 184 (2010); see Resp. Br. 19-20.

c. Despite *Suders*'s focus on when a constructive discharge can be sufficiently attributable to official action to permit the employer to be held liable, the amicus (like the court of appeals) refuses (Br. 20) to "endorse the *legal fiction* that the employee's resignation, or notice of resignation is a 'discriminatory act' of the employer." Pet. App. 20a (emphasis added). Abjuring legal fictions can be a good thing. But doing so here flouts the reason for having a *constructive*-discharge doctrine, which, as the plain meaning of its name conveys, deems a discharge to "exist[] by virtue of legal fiction" even when there is none "in fact." *Black's Law Dictionary* 380 (10th ed. 2014) (definition of *constructive*). Although a resignation is, in actuality, the act of an employee, it is one that is "[l]egally imputed" (*ibid.*) to the employer in the form of a discharge. See Resp. Br. 24.

What is more, the purpose of recharacterizing the employee's resignation as a discharge by the employer is to permit the employer to be held "responsible for a constructive discharge in the same manner that it is responsible for [an] outright discriminatory dis-

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Shuck, Comment, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. L. 401, 445 (2002) (proposing that courts should ask only whether an employee resigned "in response to an employer's intentional, illegal discrimination" and cease to "inquir[e] into the reasonableness of the employee's resignation").

charge." *Suders*, 542 U.S. at 142 (quoting 2 EEOC Compliance Manual § 612.9(a) (2002)). That purpose would be defeated if the Court were to disregard the resignation when identifying the last act necessary to give rise to a constructive-discharge claim, because the limitations periods would then not run from the time that the discharge is announced in both kinds of cases.

2. Like the court of appeals (Pet. App. 22a), the amicus attempts to square the circle by noting (Br. 40) that an employee may avail himself of the right to "amend [an administrative] complaint at any time prior to the conclusion of the [agency's] investigation to include issues or claims like or related to those raised in the complaint." 29 C.F.R. 1614.106(d). In claiming, however, that "the EEOC has long endorsed this procedure" (Br. 40), the amicus invokes a document that belies her fundamental rationale.

Under the amicus' conception, an employee who has been subjected to discriminatory conduct that *might* precipitate a subsequent resignation should follow a two-step process to protect any eventual constructive-discharge claim. He should initiate a timely challenge to the underlying conduct alone, and then, "should he later resign," he may "amend his complaint to include a related constructive-discharge claim." Amicus Br. 40. To illustrate the potential for such an amendment, the amicus identifies (Br. 40-41) the following example from an EEOC manual:

> An agency employee files a complaint of discrimination when his request for a hardship transfer is denied. During the investigation into his complaint, the complainant sends a letter to the EEO office stating that he has decided to resign from the agency because of the agency's failure to transfer

> him and the resulting stress. He further states that he is no longer seeking the transfer as a remedy to his complaint, but asserts he is entitled to a compensatory damages award instead. The EEO office should amend the original complaint to include the complainant's new like or related claim of constructive discharge.

EEOC, *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110)*, at 5-13 (2015), www.eeoc.gov/federal/directives/upload/md-110.pdf. While appropriately seizing on that example as proof of the *possibility* of an amendment "in the precise context of constructive discharge," Amicus Br. 40, the amicus overlooks the example's purpose, which supports our understanding about the separate nature of the claims (and does not remotely suggest that a mandatory two-step process would be more consistent with Title VII's purposes, cf. pp. 17-19, *infra*).

The example is part of the Commission's explanation of what should happen "when an alleged discriminatory incident occurs after the filing of an EEO complaint." *EEO-MD-110*, at 5-10. Such a "discriminatory incident" may fall into one of three categories: (1) it may be "additional evidence offered to support the existing claim, but" not "a new claim in and of itself"; (2) it may "raise[] a new claim that is like or related to the claim(s) raised in the pending complaint"; or (3) it may "raise[] a new claim that is not like or related to" pending claims and should therefore be the subject of a separate EEO complaint. *Ibid.* (emphasis omitted). The constructive-discharge example is used to illustrate the second category (a new claim). What is more, according to the Commission's description, it consti-

tutes a new claim even when the employer has done nothing new; the only development is the hypothetical employee's "deci[sion] to resign"; and the employee makes it clear that the "new * * * claim of constructive discharge" is causing him to seek a new "remedy" ("compensatory damages" rather than a "transfer"). *Id.* at 5-13. The example could scarcely be further from the amicus' basic premise, under which this scenario should have been placed in the first category (as involving only new evidence about the scope of remedies available under the original discriminatory-failure-to-transfer claim).[4]

In other words, the Commission understands that a constructive-discharge claim really is different from one that involves *only* the employer's underlying conduct (before any decision to resign). That is not to say that an employee could not, as the court of appeals contemplated, bring two claims and have them consolidated (just as he could if a demotion were later followed by a termination).[5] But that possibility should not rule out the straightforward approach of treating a constructive discharge as a new claim arising out of

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[4] The EEOC's willingness to treat a constructive discharge as a "new incident of alleged discrimination," *EEO-MD-110*, at 5-10, 5-13, squarely refutes the suggestion (Amicus Br. 28 n.10) that a resignation cannot, once imputed to the employer, be a "matter alleged to be discriminatory" under 29 C.F.R. 1614.105(a)(1).

[5] Consolidating two claims into one complaint would not, as the amicus suggests, prevent the *claims* from "multiplying," Br. 41 n.15 (brackets omitted), because what could have been one claim of constructive discharge would instead be two claims. And if the two-step process were needed to preserve the viability of inchoate constructive-discharge claims, that would invite more prophylactic claims at step one than would otherwise be brought as ripened constructive-discharge claims under the notice-of-resignation rule.

a new discriminatory act attributable to the employer, which therefore triggers a new limitations period. See *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002) ("Each discrete discriminatory act starts a new clock for filing charges alleging that act.").

3. Nor is the court of appeals' approach compelled by this Court's pre-*Suders* decisions discussing the timeliness of non-constructive-discharge claims.

The amicus understandably emphasizes (Br. 21-23) the distinction that the Court drew in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), between "the time of the *discriminatory* acts" and "the time at which the *consequences* of the acts become most painful." *Id.* at 258 (citation omitted). But, as discussed in our opening brief (Resp. Br. 25-26), the logic of *Ricks* was limited to the particular consequences that were inherent in the original discriminatory acts (there, a termination of employment that was a "delayed, but inevitable, consequence of the denial of tenure"). 449 U.S. at 257-258. The same is true of *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam), which is "indistinguishable" from *Ricks*, *id.* at 8. In both cases, the employer had made a single decision that, when it was made, necessarily meant that the employee would later be terminated. The limitations period for challenging the termination therefore began to run when "the operative decision was made—and notice given." *Ibid.*

Here, by contrast, the employer's decision was not the "operative" one for purposes of a constructive discharge, because, until petitioner gave notice of his own decision to resign, the employer's own actions had been insufficient to create a discharge (constructive or otherwise). Indeed, in applying *Ricks* to the facts of this case, the amicus says that, once petitioner "agreed

to retire," there was "no further decision to make." Amicus Br. 23; see *id.* at 22 ("[T]he only discrimination alleged in [petitioner's] amended complaint occurred when (or before) he received and signed the settlement agreement."). But that conflates two different events: the presentation to petitioner of an offer that included his retirement, and his acceptance of that offer. Until petitioner gave notice that he had decided to retire, it had not yet become clear that the consequences of the Postal Service's actions would include his retirement.[6]

4. Focusing on the moment when there is definitive notice that a resignation will occur also provides an important symmetry between actual- and constructive-discharge claims. As the EEOC has explained in the context of cases against private employers, the time for challenging "[a] discrete act, such as * * * termination," runs from "the date that the charging party received unequivocal written or oral notification of the action, regardless of the action's effective date." EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a, www.eeoc.gov/policy/docs/threshold.html (last visited Oct. 27, 2015).

The Commission recognized the value of conforming the limitations periods for both kinds of discharges in a 2001 amicus brief. See EEOC Amicus Br., *Bailey* v. *United Airlines*, 279 F.3d 194 (3d Cir. 2002) (No. 00-2537), 2001 WL 34105245 (filed Mar. 26, 2001) (EEOC *Bailey* Br.). The amicus suggests that the EEOC's position is not entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), because the brief did not "reflect[] the EEOC's considered views" about

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[6] While we disagree, as a factual matter, with petitioner about *when* he gave notice of his decision to retire, petitioner agrees that such notice is the trigger. See Pet. Br. 32.

constructive discharges. Amicus Br. 26 n.9. It is true that the facts of *Bailey* v. *United Airlines*, 279 F.3d 194 (3d Cir. 2002), did not involve a constructive discharge, because the employee there chose not to resign and was ultimately terminated. *Id.* at 197. But the EEOC's explanation of what should happen in a case of constructive discharge was nonetheless fully "considered." Amicus participation in that private litigation had to be approved by the Commission itself.[7] And the brief's specific conclusion about constructive-discharge cases—*i.e.*, that "the limitations period on a claim of constructive discharge begins to run when the employee 'effectively communicate[s] her intention to resign,'" EEOC *Bailey* Br. at *9 (quoting *Flaherty* v. *Metromail Corp.*, 235 F.3d 133, 139 (2d Cir. 2000))—was integral to its reasoning about what rule should apply to Bailey's termination. The Commission concluded it would "make[] no sense" to allow the constructively discharged employee (the one who "accept[s] the resignation option") to have "a full 300 days from [the resignation] date to file a charge, while a person [like Bailey] who rejects the resignation option is limited to 300 days from the [earlier] date on which the resignation/termination option is tendered." *Id.* at *10. Its solution was to use the date of definitive notice, whether from the employer or the employee, in both the case of termination and that of resignation.[8]

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[7] See EEOC, *National Enforcement Plan*, Part V.D, www.eeoc.gov/eeoc/plan/nep.cfm (last visited Oct. 27, 2015).

[8] The Third Circuit acknowledged but did not address the EEOC's argument, because it concluded that the employee had forfeited the argument and that summary judgment in favor of the employer had been erroneous even under the argument that the employee had preserved. *Bailey*, 279 F.3d at 202.

The amicus further contends (Br. 26 n.9) that the *Bailey* brief "conflict[s]" with the EEOC's other observations that the period for initiating a complaint "begin[s] to run at the time of the unlawful event or practice." But the cited statements simply said that the period begins with "the discriminatory event" (57 Fed. Reg. 12,635 (Apr. 10, 1992)) or with the date when a party receives unequivocal notice of a "discrete act" (EEOC Compliance Manual, *Threshold Issues* § 2-IV C.1.a). They did not indicate whether the relevant "act" or "event" in a constructive-discharge case should be the employer's precipitating conduct or the employee's notice of resignation. The Management Directive discussed above—which addresses application of the regulation governing federal-sector administrative proceedings that the Commission has promulgated under 42 U.S.C. 2000e–16(b)—shows that the Commission is comfortable with characterizing an employee's resignation as a "discriminatory" event in the constructive-discharge context. See note 4, *supra*. There is accordingly no conflict between the *Bailey* brief and the EEOC's other statements.

The Commission, in short, has concluded that valuable consistency would be achieved by equating the date that an employer gives unequivocal notice of a termination with the date that an employee gives notice of a resignation. That is the same congruity sought by the parties here. See Pet. Br. 31; Resp. Br. 22-23.[9] There is no impediment to recognizing the persuasive force of that long-standing EEOC position.

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[9] The same rule was also applied in another agency decision that the amicus cites (Br. 29 n.11) for a different proposition. See *Cabello* v. *Casellas*, EEOC Appeal No. 01951093, 1996 WL 159158, at *3-*4 (E.E.O.C. Mar. 28, 1996) (holding that "the time limit for

B. Statute-of-Limitations Principles And Title VII Policy Considerations Support The Notice-Of-Resignation Rule

1. The amicus does not dispute "the standard rule that [a] limitations period commences" when "the plaintiff can file suit and obtain relief." Resp. Br. 17 (citations omitted). She nevertheless contends (Br. 29-33) that that rule has been displaced here by the particular wording of the regulation, which speaks of the period "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. 1614.105(a)(1). As explained above, however, the EEOC manifestly disagrees with the amicus' contention that a resignation cannot be the "discriminatory" matter, and the EEOC's view is consistent with the definition of *constructive*, which indicates that the employee's own act is being imputed to the employer in the context of a constructive-discharge claim.

Because the amicus' interpretation is simply wrong, this is not a case in which the regulation's plain text compels a departure from the general rule that prevents a limitations period from beginning before the plaintiff can even allege that a constructive discharge has occurred. That suffices to distinguish the textual commands in the cases discussed by the amicus (Br. 30-31). See *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 611 (2013); *Dodd* v. *United States*, 545 U.S. 353, 358-359 (2005); *Pillsbury* v. *Unit-*

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contacting an EEO Counselor [for incidents of harassment culminating in an alleged constructive discharge] was triggered with appellant's resignation," not by the "preceding incidents of harassment").

ed Eng'g Co., 342 U.S. 197, 199-200 (1952); *McMahon* v. *United States*, 342 U.S. 25, 27 (1951).[10]

2. The notice-of-resignation rule is also consistent with how the Court has described the operation of limitations principles in the Title VII context. Title VII's comparatively short deadlines seek to "guarantee[] the protection of the civil rights laws to those who promptly assert their rights" while "also protect[ing] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-257; accord *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007).

As explained in our opening brief (Resp. Br. 28-29), a constructive-discharge claim is inherently self-limiting in a way that protects employers from the proliferation of stale claims. Such a claim requires an employee to prove that the employer's actions created "unendurable working conditions" that would "compel[]" a reasonable person to resign, *Suders*, 542 U.S. at 141—something that becomes less plausible the longer the employee waits before resigning. As a

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[10] Similarly, although the amicus correctly notes (Br. 33) that the limitations period here is a condition on Congress's waiver of the federal government's sovereign immunity, a reasonable construction of the regulation is consistent with the notice-of-resignation rule, which does not "expand the time limits beyond what the EEOC has set." Pet. App. 22a. In any event, an unduly strict construction would be particularly inappropriate where the agency with authority to prescribe the deadlines associated with the federal-sector EEO complaint process (see 42 U.S.C. 2000e–16(b)) has specified that the 45-day period is subject to waiver, estoppel, equitable tolling, and extension for various reasons, including any "reasons considered sufficient by the [employer] agency or the Commission," 29 C.F.R. 1614.105(a)(2), 1614.604(c). Cf. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

result, even under the notice-of-resignation rule, an employee cannot simply extend the limitations period indefinitely by delaying his resignation. See Resp. Br. 28-29 (citing cases in which delays of five, six, seven, and eight months were fatal).

3. More general Title VII policy concerns are also better served by the notice-of-resignation rule than by the court of appeals' approach.

a. The two-step process contemplated by the court of appeals—in which an employee is encouraged to file an effectively inchoate complaint and later amend it in the event of a resignation—is likely to multiply claims and be needlessly cumbersome in light of Congress's expectation that Title VII's initial procedural hurdles would be navigated by "lay complainant[s]." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 115 (2002); see Resp. Br. 30-31; note 5, *supra*.

Moreover, the complaint-amendment process could have the counter-intuitive effect of giving the employee *more* time to inform the employer that his "resignation is not the typical kind daily occurring in the work force." *Suders*, 542 U.S. at 148. Under the notice-of-resignation rule urged by petitioner and respondent, the employee would have to complain within 45 days of giving notice. But if the employee already has a pending complaint based on conduct that had not yet risen to the level of causing a resignation when the complaint was filed, and he subsequently resigns, then he will be permitted to amend the complaint "at any time prior to the conclusion of the [agency's] investigation," which may take *up to "180 days"* after the "filing of the complaint" or even longer if "the parties agree in writing to extend the time period." 29 C.F.R. 1614.106(d) and (e)(2) (emphasis added).

b. Nor is the notice-of-resignation rule likely to have adverse effects on the possibility of resolving disputes at the pre-complaint counseling stage.[11] The amicus' contrary argument (Br. 38-40) apparently assumes that informal efforts at resolution will not work if they do not begin until the employee has already decided to resign. As she puts it (Br. 38), "informal resolution may still be possible" when the employee can "remain employed." But that is misguided for several reasons.

First, the notice-of-resignation rule does not turn on the employee's actual departure date; instead, the discharge claim ripens when the employee gives notice of his decision to resign, even if that resignation will take place at a later date. See Resp. Br. 20-22. Second, there may be room for voluntary settlement even after the employment relationship has ended. Otherwise, actual termination claims would be exempt from informal counseling. Third, the amicus suggests (Br. 39) that settlement will be "all but impossible" if an employee has weighed the higher stakes and already decided to resign. But that implicitly assumes that flexibility should come only from the employee. It is equally possible that the *employer* will have more reason to compromise once it is made aware that the allegations rise to the level of a constructive discharge.

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[11] Pre-complaint counseling occurs only in the federal sector; it permits an EEO counselor within the agency to "conduct a limited inquiry" and to "facilitate resolution" but not to "develop[] or advocate specific terms of an agreement." *EEO-MD-110*, at 2-12, 2-14. What is generally known as the "conciliation process" applies to complaints against non-federal respondents. See *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649-1650 (2015). It contemplates more active "endeavor[s]" by the EEOC to promote relief it deems appropriate. 42 U.S.C. 2000e–5(b).

Fourth, to the extent that the pendency of a complaint leads the parties' positions to "harden[]," Amicus Br. 38 (quoting 57 Fed. Reg. at 12,635), that would also suggest there is some danger in the court of appeals' approach of forcing an employee to complain about allegedly discriminatory conduct even before he has had the chance to determine whether it is sufficiently severe to warrant resignation.

4. Finally, the Court should take some comfort from experience. Between 1987 and 2000, five courts of appeals adopted the notice-of-resignation rule in the constructive-discharge context. Resp. Br. 21 n.9.[12] And the Department of Labor has adopted a similar approach when evaluating retaliatory constructive discharges under whistleblower-protection statutes. See *id.* at 31-32. As we noted in our opening brief (*id.* at 31 & n.12), and as the amicus also concludes (Br. 44), the question of how to handle the limitations period associated with a constructive discharge does not appear to have frequently arisen. But, notwithstanding five circuits' use of a notice-of-resignation rule for 15 to 28 years, no one suggests any evidence of proliferation in the use of constructive-discharge claims to revive otherwise-stale discrimination claims.

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[12] The amicus quotes one of those decisions for the purportedly contrary proposition that "administrative deadlines run from the time of the discriminatory act." Amicus Br. 43 (quoting *Young* v. *National Ctr. for Health Servs. Research*, 828 F.2d 235, 237 (4th Cir. 1987)). But *Young* rejected an employer's attempt to invoke *Ricks* in the constructive-discharge context and expressly held that, when a resignation is "a constructive discharge," it is not "merely the consequence of past discrimination" but "a *distinct discriminatory 'act'* for which there is a distinct cause of action." 828 F.2d at 237-238 (emphasis added).

* * * * *

For the foregoing reasons and those stated in our opening brief, the Court should not adopt the rationale of the court of appeals' decision. But, for the reasons stated at pages 32-39 of our opening brief, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2015