No. 14-613

In the Supreme Court of the United States

MARVIN GREEN, PETITIONER

v.

PATRICK R. DONAHOE, POSTMASTER GENERAL

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's constructive-discharge claim under Title VII of the Civil Rights Act of 1964 was time-barred under 29 C.F.R. 1614.105(a)(1), which requires an aggrieved person to "initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 760 F.3d 1135. The opinion of the district court (Pet. App. 28a-50a) is not published in the *Federal Supplement* but is available at 2013 WL 424777.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2014. On October 6, 2014, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 26, 2014. The petition was filed on November 25, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 that applies to the pri-

vate sector, it is an "unlawful employment practice" for an employer to discriminate against employees or applicants who oppose practices that Title VII makes unlawful, or who participate in proceedings, investigations, or hearings involving charges of discrimination. 42 U.S.C. 2000e–3(a). Although that provision has not itself been incorporated into the federal-sector provisions of Title VII, courts have construed Title VII as extending the private-sector ban on retaliation to federal employers. See, *e.g.*, *Taylor* v. *Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009); cf. *Gomez-Perez* v. *Potter*, 553 U.S. 474, 488 n.4 (2008) (reserving the question).

Before filing a suit in district court alleging a Title VII violation, a federal agency employee is required to exhaust administrative remedies. 42 U.S.C. 2000e–16(c). To initiate the administrative process, the employee must "initiate contact" with an equal employment opportunity (EEO) counselor at his or her agency "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. 1614.105(a)(1).

2. Petitioner is a black man who was employed by the United States Postal Service from 1973 until 2010. Pet. App. 3a. Beginning in 2002, he served as the postmaster in Englewood, Colorado. *Ibid.* In 2008, he applied for a postmaster position in Boulder, Colorado, but he was not selected for the job. *Ibid.* He then filed a formal charge with the Postal Service's EEO office alleging discrimination on the basis of race. *Ibid.* Petitioner and the agency settled that matter, but in May and July 2009, he filed informal EEO charges alleging that he had been retaliated against because of his EEO activity. *Ibid.* After an investigation, the Postal Ser-

vice informed petitioner that he could file a formal charge, but he did not do so. *Id.* at 3a-4a.

In November 2009, the Postal Service directed petitioner to appear for an investigative interview to discuss allegations that he had not complied with agency procedures when processing subordinate employees' grievances, which had resulted in adverse decisions requiring the Postal Service to pay damages and penalties. Pet. App. 4a. Petitioner, accompanied by his representative from the National Association of Postmasters, appeared at the interview on December 11, 2009, which was conducted by David Knight, the human-resources manager for the Postal Service's Colorado/Wyoming district, and Charmaine Ehrenshaft, the district's manager of labor relations. *Id.* at 4a, 30a. Petitioner was asked, *inter alia*, about allegations that he had intentionally delayed the mail by failing to timely sign and return receipts for certified letters relating to the grievances. *Id.* at 4a, 31a. After that interview, petitioner met with two agents from the Postal Service Office of Inspector General, which had begun an independent investigation of the potentially criminal allegations that petitioner had intentionally delayed the mail. *Id.* at 4a-5a, 31a. Immediately after petitioner's meeting with the agents, Knight and Ehrenshaft gave petitioner a letter informing him that, under the agency's emergency-placement policy, he was being immediately removed from duty because of his disruption of "day-to-day postal operations." *Id.* at 5a, 31a. The letter further stated that he would be returned to duty "when the cause for nonpay status ceases." *Id.* at 5a.

The next day, petitioner's representative initiated negotiations with Knight to resolve the issues that had

been raised in the investigative interview. Pet. App. 5a, 32a.

On December 16, 2009, the settlement negotiations concluded. Pet. App. 5a, 32a. In an agreement signed that day by petitioner, by his representative, and by Knight, the Postal Service agreed that it would not pursue any charges against petitioner based on the issues discussed during the December 11, 2009 interview. C.A. App. 610. In return, petitioner agreed that he would "immediately relinquish" his level-22 position as the postmaster in Englewood and accept a demotion to a lower-paying level-13 postmaster position in Wyoming. *Ibid.* The agreement also provided that petitioner would receive "saved salary" (*i.e.*, at the higher rate of pay associated with his former position) until March 30, 2010, and that he would be allowed to use annual leave and then sick leave during the period running from December 14, 2009, until March 31, 2010. *Ibid.* Finally, the agreement provided as follows:

> Mr. Green agrees to retire from the Postal Service no later than March 31, 2010. Mr. Green agrees to take all necessary steps to effect his retirement on or before March 31, 2010. If retirement from the Postal Service does not occur Mr. Green will report for duty in Wamsutter, Wyoming on April 1, 2010 and the saved salary shall immediately cease.

Ibid. As contemplated by the agreement, petitioner began using annual leave and sick leave (at full pay based on his prior position), and on February 9, 2010, petitioner submitted papers requesting that his retirement be made effective on March 31, 2010. Pet. App. 5a-6a.

Meanwhile, on January 7, 2010, petitioner had met with an EEO counselor and filed an informal charge

alleging that the Postal Service had retaliated against him for his earlier EEO activities when it issued the emergency-placement letter and removed him from his Englewood position. Pet. App. 6a. Petitioner filed a formal charge of retaliation on February 17, 2010. *Ibid.* The agency EEO office ultimately dismissed petitioner's charge as precluded by the December 16, 2009 settlement agreement, and the Office of Federal Operations at the Equal Employment Opportunity Commission (EEOC) upheld that dismissal. *Ibid.*

On March 22, 2010, however, petitioner contacted an EEO counselor and filed another informal charge, this time alleging that he had been constructively discharged. Pet. App. 6a, 32a. Petitioner filed a formal charge making that allegation on April 23, 2010. *Id.* at 6a. The agency EEO office dismissed petitioner's charge "for failure to state a claim, for constituting a collateral attack on a settlement agreement, and for stating the same claim" that had already been decided by the agency and the EEOC. C.A. App. 88.

3. On September 8, 2010, petitioner filed this suit in district court. Pet. App. 7a, 32a. In his amended complaint, petitioner alleges five counts of retaliation in violation of Title VII on account of his prior EEO activity, including his constructive discharge by forced retirement. *Id.* at 7a, 32a-33a. The district court granted the Postal Service's motion to dismiss three claims that are no longer at issue. *Id.* at 33a; Pet. 9.

As relevant here, the district court granted summary judgment to the Postal Service on petitioner's remaining two claims, including the one for constructive discharge. Pet. App. 33a-50a. The court held that petitioner's constructive-discharge claim accrued no later than December 16, 2009, the date of the settlement

agreement. *Id.* at 37a-40a. The court noted that petitioner did not allege that the Postal Service had engaged in any retaliatory acts after that date, and that the agency actions that petitioner alleged forced him to retire had culminated with the signing of the settlement agreement. *Id.* at 37a. The court acknowledged precedent cited by petitioner holding that a constructive-discharge claim accrues when the employee provides "definitive notice of her intent to retire." *Id.* at 38a. But the court concluded that petitioner's claim would fail even under that standard, because petitioner "notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day." *Id.* at 39a.

Separately, the district court granted summary judgment to the Postal Service on petitioner's emergency-placement claim on the ground that the placement was not a materially adverse action. *Id.* at 40a-48a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-27a.

a. The court of appeals affirmed the district court's grant of summary judgment to the Postal Service on petitioner's constructive-discharge claim. Pet. App. 15a-23a. The court concluded that petitioner's claim was untimely because all of the allegedly discriminatory or retaliatory acts occurred on or before December 16, 2009, and he did not initiate his administrative complaint within 45 days of that date. *Id.* at 16a.

After discussing the genesis and history of constructive-discharge claims, the court of appeals noted that, because such a claim "'involves *both* an employee's decision to leave and [the employer's] precipitating conduct,'" it "creates interesting issues regarding when

such a claim accrues, and hence when it is timely." Pet. App. 18a (quoting and adding emphasis and bracketed language to *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 148 (2004)). The court recognized that, to the extent that a constructive-discharge claim requires the employee to have quit, that counsels in favor of having the statute of limitations run from the date on which "the employee quits or announces his future departure." *Ibid.*

The court of appeals noted that "[f]ew court opinions have discussed the issue, either under Title VII or in other contexts," though it acknowledged that most of the courts that have discussed the issue have "said that the constructive-discharge claim accrued when the employee gave notice of departure." Pet. App. 18a. The court identified other circuits that had held—as petitioner had argued—that a constructive-discharge claim accrues "on the date the employee resigned." *Id.* at 19a. It suggested that those decisions could "[p]erhaps * * * be distinguished on the ground that the last act of discrimination [by the employer] was within the limitations period." *Id.* at 20a. In any event, the court concluded that it could not "endorse the legal fiction that the employee's resignation, or notice of resignation, is a 'discriminatory act' of the employer" for purposes of the limitations period defined in 29 C.F.R. 1614.105(a)(1). Pet. App. 20a. Relying on this Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the court of appeals explained that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Pet. App. 20a (quoting and omitting brackets from *Ricks*, 449 U.S. at 258). The court expressed "particular concern" that "delaying

accrual past the date of the last discriminatory act and setting it at the date of notice of resignation would run counter to an essential feature of limitations periods by allowing the employee to extend the date of accrual indefinitely." *Id.* at 20a-21a. Accordingly, the court "agree[d] with the courts that have required some discriminatory act by the employer within the limitations period." *Id.* at 22a.

Because petitioner "does not claim that the Postal Service did anything more to him" after he signed the settlement agreement on December 16, 2009, and he did not initiate EEO counseling on his constructive-discharge claim until March 22, 2010, "well beyond 45 days later," the court of appeals concluded that he had not timely exhausted that claim. Pet. App. 23a.

b. The court of appeals separately reversed the grant of summary judgment on petitioner's emergency-placement claim. Pet. App. 23a-26a. In the court's view, petitioner could establish that his placement on emergency off-duty status was materially adverse because, when he received notice of that action, he did not know that he would ultimately be paid. *Id.* at 25a. Because it was "unclear," however, whether petitioner could "establish the other elements of his emergency-placement claim," the court remanded to the district court for further proceedings on that claim. *Id.* at 26a.

ARGUMENT

Petitioner contends (Pet. 11-27) that this Court should resolve an alleged circuit conflict regarding when a constructive-discharge claim accrues under Title VII. In petitioner's view, five circuits have held that a constructive-discharge claim accrues when the employee gives definite notice of resignation (Pet. 11-15), while three other circuits have held that the limita-

tions period begins to run at the time of the last discriminatory act by the employer that gave rise to the resignation (Pet. 15-16). Review by this Court, however, would be premature, because the timing of those decisions has kept the lower courts from grappling with the potential differences between Title VII claims that involve (as in this case) discrete acts of discrimination and those that involve (as in nearly all of the cases in the majority of petitioner's alleged split) claims based on a hostile work environment.

Moreover, even if the question were otherwise ripe for this Court's review, this case would be a poor vehicle for its resolution for two independent reasons. First, petitioner's claim was untimely even under the rule he asks this Court to adopt, because, as the district court found, his own agreement to retire occurred more than 45 days before he initiated the EEO process alleging a constructive discharge. Second, his settlement with the agency (and retention of the consideration he received pursuant to that settlement) will prevent him from maintaining his claim on the merits. Further review is not warranted.

1. Petitioner asserts (Pet. 11) that the courts of appeals are "intractably split" over when a constructive-discharge claim under Title VII accrues for purposes of administrative exhaustion requirements. Petitioner contends that five circuits have held, in decisions dating between 1987 and 2000, that a constructive-discharge claim accrues on the date when an employee resigns or (if it is earlier) when the employee gives definite notice of his resignation. Pet. 11-14 (discussing *Flaherty* v. *Metromail Corp.*, 235 F.3d 133, 138-139 (2d Cir. 2000); *Draper* v. *Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998); *American Airlines, Inc.* v. *Cardoza-*

Rodriguez, 133 F.3d 111, 123 (1st Cir. 1998); *Hukkanen* v. *International Union of Operating Eng'rs*, 3 F.3d 281, 285 (8th Cir. 1993); *Young* v. *National Ctr. for Health Servs. Research*, 828 F.2d 235, 237-239 (4th Cir. 1987)). In petitioner's view, those decisions conflict with the decision below and with decisions of two other circuits, which require an employee to allege that the employer itself committed some discriminatory act during the limitations period. Pet. 15-16 (discussing *Mayers* v. *Laborers' Health & Safety Fund of N. Am.*, 478 F.3d 364, 370 (D.C. Cir. 2007) (per curiam); *Davidson* v. *Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992)).

a. Petitioner dismisses (Pet. 13-14) out of hand the court of appeals' suggestion that the decisions on which he relies "[p]erhaps * * * could be distinguished on the ground that the last act of discrimination was within the limitations period." Pet. App. 20a. Yet, with the exception of the First Circuit's decision in *American Airlines*, which is discussed further below, all of those cases involved allegations of what would now be called a hostile work environment,[1] and all of them were decided before this Court's decision in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002).

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[1] See *Flaherty*, 235 F.3d at 138 (plaintiff alleged that a "series of acts by various of her supervisors" caused an "intolerable atmosphere"); *Draper*, 147 F.3d at 1110 (plaintiff resigned as a "result of the cumulative effect of [her supervisor's] repeated acts of discrimination"); *Hukkanen*, 3 F.3d at 284 (plaintiff "alleged that through various continuing actions [of her supervisor] spanning a two-year period, * * * the situation became so intolerable that she felt forced to resign"); *Young*, 828 F.2d at 238 (plaintiff alleged she had been subjected to "continual harassment" by her employer that led "to her feeling sick and feeling forced to resign").

In *Morgan*, the Court drew a distinction, for statute-of-limitations purposes, between claims that are based on discrete acts and those that are based on allegedly hostile work environments. 536 U.S. at 115. The Court explained that "[h]ostile environment claims are different in kind from discrete acts," because "[t]heir very nature involves repeated conduct" and they "are based on the cumulative effect of individual acts." *Ibid.* As a result, the statute-of-limitations rules that apply in the context of hostile-environment claims may not translate neatly to the different context of discrete-act claims. Thus, in *Morgan* itself, the Court concluded that, in the context of a discrete-act claim, an employee "can only file a charge to cover discrete acts that 'occurred' within the appropriate time period," *id.* at 114, but that, in the context of a hostile-environment claim, the employee may challenge the "*entire* hostile work environment" rather than just the acts that occurred within the limitations period, as long as "any act that is part of the hostile work environment" occurs within the limitations period, *id.* at 117-118 (emphasis added).

Petitioner's argument essentially requires the employee's act of resigning (or giving notice of his resignation) to be treated as the "discriminatory 'act'" in every constructive-discharge case. Pet. 11 (quoting *Young*, 828 F.2d at 238). But the rationale for using the date of notice of resignation in hostile-environment cases may not apply in other cases in which the constructive discharge is triggered by a discrete act, rather than the cumulative effect of a series of prior acts.

b. Tellingly, the only two cases in petitioner's alleged split that postdate *Morgan*—the decision below and the D.C. Circuit's decision in *Mayers*—did not apply petitioner's proposed rule in the context of dis-

crete discriminatory acts. See Pet. App. 20a-22a; *Mayers*, 478 F.3d at 368-369 (expressly relying on "limiting principles" from *Morgan*). When the D.C. Circuit considered the plaintiff's constructive-discharge claim in *Mayers*, it noted that it had "not yet had occasion to say whether, after *Morgan*, constructive discharge claims (like hostile work environment claims)" are "amenable to continuing violations analysis." *Id.* at 370. It assumed without deciding that they are, but still found the claim untimely because the plaintiff had not identified "one offending act within the statutory period." *Ibid.*

Moreover, the Seventh Circuit—the third court in the minority of petitioner's putative split—has indicated, since *Morgan*, that it sees no conflict between the two lines of cases that petitioner contrasts. In *Davidson*, *supra*, the Seventh Circuit held that there must be an adverse action by the employer in the relevant limitations period; it rejected the plaintiff's argument that her constructive-discharge claim accrued on the date she resigned because the limitations period "begins to run on the date that the defendant takes some adverse personnel action against the plaintiff." 953 F.2d at 1059. In a subsequent case, however, the court cited *Davidson* as well as *Flaherty* and *Draper*—the Second and Ninth Circuit's hostile-environment constructive-discharge cases—in support of its statement that "[l]ike other circuits, we have held that the clock starts with the events that constitute a constructive discharge." *Cigan* v. *Chippewa Falls Sch. Dist.*, 388 F.3d 331, 334 (7th Cir. 2004).

In addition, there is reason to question whether the Second Circuit itself would extend *Flaherty* beyond the hostile-work-environment context. In *Alleyne* v. *Amer-*

ican Airlines, 548 F.3d 219 (2d Cir. 2008), the court held that, although the plaintiff was discharged within the limitations period, his discrimination claim was time-barred "because the only alleged discriminatory *act* was [his] loss of seniority." *Id.* at 220. Because the plaintiff's "discharge was merely the delayed, neutral effect of alleged discrimination that took place outside the period of limitations," the court held that the claim was time-barred. *Id.* at 222.[2]

c. Nor is there even a square conflict between the decision below and those of the First Circuit. In *American Airlines*, *supra*—the sole case in petitioner's majority that did not involve a hostile-work-environment claim—the First Circuit considered claims that an employer "misled [the plaintiffs] into believing that they were faced with an impossible choice: retire with enhanced benefits or face termination when" certain operations were discontinued. 133 F.3d at 122. The court rejected the plaintiffs' argument that their claims did not accrue until they actually stopped working. *Id.* at 123. The court held that, "*at the latest*, the applicable statutes began to run when each employee accepted the [voluntary early retirement program]." *Ibid.* (emphasis added). Nevertheless, it pointedly failed to adopt a rule like the one that petitioner proposes, because it used the date on which each employee actually signed the

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[2] Although it did not involve a constructive-discharge claim, the Eighth Circuit's decision in *Tademe* v. *Saint Cloud State University*, 328 F.3d 982 (2003), noted that, under *Morgan*, discrete discriminatory acts are "not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 987 (quoting *Morgan*, 536 U.S. at 113). As a result, it could also ultimately conclude that its holding in *Hukkanen* does not extend beyond the hostile-work-environment context.

agreement to participate in the voluntary early retirement program, without accounting for the fact that the agreement expressly gave them another seven days during which they could rescind their participation. *Id.* at 114, 123. In other words, the First Circuit did not delay accrual until there was a definite or final retirement decision.

Moreover, the First Circuit's subsequent decision in *Jorge* v. *Rumsfeld*, 404 F.3d 556 (2005), indicates that it sees a distinction between constructive-discharge cases involving discrete acts and those involving a hostile work environment. While the court acknowledged that an employer's offer of early retirement *can* constitute a constructive discharge, it rejected the plaintiff's attempt to rely on the date of that offer because she did not allege that the offer itself had been discriminatory. *Id.* at 562. The court explained that a prior involuntary-transfer order had been the "last independent discriminatory act visited upon her." *Ibid.* Furthermore, *Jorge* expressly distinguished the Second Circuit's decision in *Flaherty* on the ground that the employee there had "continued, up to the date of her resignation, to suffer indignities attributable to a discriminatorily hostile work environment." *Id.* at 563 n.5.

d. Thus, notwithstanding the apparent age of the putative disagreement that petitioner identifies, there is no well-developed split in the courts below, in large part because nearly all of the cases predate this Court's decision in *Morgan*, which articulated distinctions between hostile-work-environment and discrete-act claims. The cases also precede *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004), on which petitioner relies for the "important" proposition that "'a constructive discharge involves *both* an employee's decision

to leave *and* precipitating conduct.'" Pet. 27 (quoting and adding emphases to *Suders*, 542 U.S. at 148). As a result, the lower courts have had no occasion to consider whether, in the wake of *Morgan* and *Suders*, an employee's own decision to leave should extend the accrual date of a claim that otherwise would have accrued when the employer engaged in precipitating conduct that involved discrete acts.

Regardless of whether petitioner's proposed rule or that of the decision below ultimately proves to be correct in the context of certain kinds of discrete-act claims, the paucity of cases that even present the question, and the almost-total lack of post-*Morgan* discussion about it—either by courts or by the EEOC[3]—demonstrates that review by this Court would be premature.

2. In any event, even if this Court's review of the question presented were otherwise appropriate at this time, petitioner himself would not prevail under the accrual standard he advocates, which depends on "the date when [the employee] gives 'definite notice' of his decision to leave." Pet. 2 (quoting *Flaherty*, 235 F.3d at 138). As petitioner acknowledges (Pet. 20), there is no

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[3] The EEOC amicus brief on which petitioner relies (Pet. 19) also predated *Morgan* (and involved a case in which the employee elected *not* to resign and was ultimately terminated). 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). The only subsequent EEOC administrative decision that petitioner identifies (Pet. 19 n.6) involved a hostile-work-environment, not a discrete-act, claim. See *Complainant* v. *Shinseki*, EEOC Decision No. 0120141607, 2014 WL 3697473 (July 18, 2014). And there do not appear to be any EEOC decisions after *Morgan* addressing a constructive-discharge claim where an employee was given an option to retire.

practical difference between his proposed rule and that of the decision below "[i]n cases where the last act said to give rise to the resignation occurs on the same day as the resignation itself." Yet, that is precisely what happened in this case. As the district court held, even if the date of definitive notice of an intention to retire controls, that notice was given here when petitioner "notified the Postal Service on December 16, 2009, that he was retiring by signing the settlement agreement that day." Pet. App. 38a-39a.

Petitioner characterizes (Pet. 10) the December 16 settlement agreement as giving him "a choice between retirement and relocation to Wyoming." But that is not what the agreement said. Rather, it expressly provided that petitioner "*agrees to retire* from the Postal Service no later than March 31, 2010" and that petitioner "*agrees to take all necessary steps to effect his retirement* on or before March 31, 2010." C.A. App. 610 (emphases added). Although the next sentence of the agreement stated that petitioner would be required to "report for duty" in Wyoming on April 1 "[i]f retirement from the Postal Service does not occur," *ibid.*, it did not affirmatively give him an option to revoke his agreement to retire. Nor did it purport to allow petitioner to decide at some later point whether he would in fact retire. Instead, that last sentence merely provided for contingencies in which retirement did not happen by that date (whether because petitioner reneged on his agreement, or because, through someone else's fault, the retirement had not yet become final, or because of some other reason). The district court thus correctly concluded that petitioner's agreement to retire did in

fact occur on the date when he signed the page declaring that he "agree[d] to retire." *Ibid.*[4]

If petitioner were correct in maintaining that his initial agreement to retire was insufficiently definite, there would be little reason to use the subsequent date on which he actually "submitted his resignation" (Pet. 9), because he could just as well have sought to revoke *that* act at some point before April 1. And the same thing could be said in any case in which an employee agrees to resign on one date and makes his resignation effective at a later date. But, as petitioner concedes (Pet. 12), even the cases on which he relies have not adopted that approach. See also Pet. App. 18a-19a

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[4] The government introduced evidence that the human-resources manager who negotiated the agreement for the Postal Service understood "that [petitioner] would follow through on that agreement and would therefore not be reporting to the lower-level position." Gov't Mot. for Summ. J. 20 (D. Ct. Doc. 90). In response, petitioner relied only on the text of the agreement. See Pet. Resp. to Mot. for Summ. J. 18 (D. Ct. Doc. 106). In the court of appeals, petitioner assumed that the agreement permitted him to decide at a later date whether to retire, but he did not clearly attack the alternative ground for the district court's exhaustion holding. Instead, he identified certain parts of the district court's discussion as being "disputed" facts, but he did not include in his list the sentence stating that he gave notification of his retirement by signing the agreement. See Pet. C.A. Br. 50. The government's brief explained that, "[b]y signing" the agreement, petitioner "agreed to retire," Gov't C.A. Br. 27, though it also included other characterizations suggesting, without citing anything other than the agreement, that he agreed to retire "or accept [a] transfer," *id.* at 36, 44, 47. In light of its decision, the court of appeals did not need to (and did not purport to) address the factual determination underlying the district court's alternative holding, though it did characterize the settlement agreement as giving petitioner a choice about whether "to retire or to work in a position that paid much less." Pet. App. 2a; see *id.* at 5a.

(citing additional cases rejecting plaintiffs' requests to use the effective date of resignations as the trigger date). Indeed, in the *American Airlines* case that petitioner invokes (Pet. 13), the First Circuit held that "the latest" possible date for starting the limitations period was "when each employee accepted" the voluntary early retirement program—even though the agreement at issue there provided for "*a seven day rescission period* after an election to participate." 133 F.3d at 114, 123 (emphasis added). The court did not think it was necessary to wait for the rescission period to elapse before the employees had fully manifested their acceptance.

Thus, even if petitioner's settlement agreement were construed as containing an implicit rescission clause, his claim would still be barred by his December 16 agreement to retire. That alone provides sufficient reason to deny further review.

3. Finally, even assuming *arguendo* that petitioner's constructive-discharge claim were somehow found to be timely, this case would still be a poor vehicle for another reason: because his claim should be barred on the merits by the settlement agreement he reached with the agency.

When petitioner filed his EEO complaint challenging his emergency placement and demotion from his Englewood position, the agency dismissed that complaint on the ground that it was precluded by the settlement agreement, and the EEOC's Office of Federal Operations affirmed that rationale and the dismissal. Pet. App. 6a. The EEOC cited 29 C.F.R. 1614.504(a), which provides that "[a]ny settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties." C.A. App. 73. It further noted that petitioner

had "presented no evidence establishing that he did not knowingly and voluntarily enter into the settlement agreement." *Id.* at 74. The Postal Service also dismissed petitioner's EEO complaint alleging a constructive discharge, finding, *inter alia*, that it also "constitut[ed] a collateral attack on a settlement agreement." *Id.* at 88.

Here, petitioner is attempting to retain the benefits he received from the agreement (*e.g.*, more than three months of paid leave at the higher salary of his prior position and avoidance of potential discipline), while effectively reneging on the voluntary retirement to which he agreed when he signed the settlement. Petitioner has not offered to return the consideration received, nor has he alleged that the Postal Service breached the agreement. Thus, he has ratified the agreement and is bound by its terms, which are incompatible with a finding of constructive discharge. See *Harris* v. *Brownlee*, 477 F.3d 1043, 1047 (8th Cir. 2007) (settlement agreements, "including those entered into by the government" in the Title VII context, "are viewed in light of governing contract principles"; a plaintiff "is not entitled to rescission of a contract absent a material breach of the agreement"); *Brown* v. *City of S. Burlington*, 393 F.3d 337, 344 (2d Cir. 2004) ("[i]n order to avoid a finding of ratification where consideration has been paid, it is essential that the releasor tender back the sum received"); *Saksenasingh* v. *Secretary of Educ.*, 126 F.3d 347, 350 (D.C. Cir. 1997) (if district court in Title VII case finds that federal agency "did not breach the agreement, then the settlement will

bar [the plaintiff] from proceeding with her original [Title VII] claim").[5]

Any contrary finding would undermine Congress's "strong preference for encouraging voluntary settlement of employment discrimination claims" under Title VII. See *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). As this Court has emphasized: "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" Congress's goal in enacting Title VII of "assur[ing] equality of employment opportunities." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). If plaintiffs could obtain the benefits of a settlement in the administrative process and then sue in court to obtain additional relief beyond the agreement's terms, agencies would have little incentive to settle Title VII claims. "Allowing one party to renounce an agreement and sue for additional relief would undermine [courts'] longstanding policy of encouraging settlement, thereby creating a disincentive to the amicable resolution of legal disputes and defeating the purposes of title VII." *Jackson* v. *Widnall*, 99 F.3d 710, 714 (5th Cir. 1996).

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[5] In the district court, the agency contended in relevant part that there was no constructive discharge because the settlement agreement established that petitioner had retired voluntarily. Gov't Mot. for Summ. J. 29. Because it found petitioner's constructive-discharge claim had not been properly exhausted, the district court did not reach this argument for summary judgment. Pet. App. 39a-40a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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