No. 02-1353

In the Supreme Court of the United States

DAVID AARON TENENBAUM, PETITIONER

v.

THOMAS E. WHITE, SECRETARY OF THE ARMY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner satisfied the requirement that, before bringing suit against his federal employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, he timely contact an Equal Employment Opportunity Counselor.

2. Whether the application of equitable extension doctrines renders petitioner's Title VII claim timely.

3. Whether petitioner's Title VII claim is justiciable to the extent that it challenges decisions by the United States Army to suspend and revoke petitioner's security clearance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the *Federal Reporter*, but is reprinted at 45 Fed. Appx. 416. The order of the district court (Pet. App. 12a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2002. A petition for rehearing was denied on December 11, 2002 (Pet. App. 67a-68a). The petition for writ of certiorari was filed on March 11, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a civilian employee of the United States Army. He brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that the Army discriminated against him because of his religion. The United States District Court for the Eastern District of Michigan dismissed the suit. Pet. App. 12a-13a. The court of appeals affirmed. *Id.* at 1a-11a.

1. Since 1984, petitioner has been employed by the Army's Tank Automotive Armaments Command (TACOM) as a mechanical engineer. Pet. App. 2a, 44a-45a. Petitioner's assignments have included developing joint projects with the Israeli government. *Id.* at 2a. Petitioner alleges that, in 1992, the Army began to investigate whether he was conducting espionage on behalf of Israel, and that the investigation was initiated because he is an orthodox Jew. *Id.* at 1a-2a. Petitioner claims that in 1997, as part of its investigation, the Army conducted a coercive polygraph examination of him, searched his residence, suspended his security clearance, and placed him on administrative leave. *Id.* at 2a, 45a-48a. The government later terminated its investigation and petitioner returned to work in March 1998. *Id.* at 48a-49a.

Petitioner asserts that since his reinstatement in March 1998, his "working conditions and job assignments have not been commensurate with his GS-13 engineering level and job description." Pet. 4. Specifically, he claims that he is isolated from his co-workers and is not permitted to work on projects with the Israeli government. See Pet. App. 2a-3a. Petitioner's

security clearance, which had been suspended since 1997, was revoked on February 4, 2000. *Id.* at 3a, 48a.[1]

2. In October 1998, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the United States and various federal employees in their individual and representative capacities. The suit alleged violations of the Federal Tort Claims Act and religious discrimination in violation of Michigan law. Pet. 4; Pet. App. 43a. On April 29, 1999, the district court dismissed the religious-discrimination claims because "Title VII is the exclusive remedy for federal employment discrimination." Pet. App. 51a; see *id.* at 53a-54a; *Brown* v. *GSA*, 425 U.S. 820 (1976).

3. As a prerequisite to bringing suit against a federal employer under Title VII, the aggrieved party must contact an agency Equal Employment Opportunity (EEO) counselor within 45 days of the conduct alleged to be discriminatory. The controlling administrative regulation, promulgated by the Equal Employment Opportunity Commission pursuant to express statutory authority, see 42 U.S.C. 2000e-16(b), provides that federal employees "who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter," and "must initiate contact with a Counselor 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).

On June 3, 1999, after his state-law discrimination claims were dismissed, petitioner contacted an Army

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[1] The Army restored petitioner's security clearance in April 2003.

EEO counselor about his religious-discrimination claim. C.A. App. 106. Petitioner later filed a formal EEO complaint, which the Army dismissed on October 27, 1999. *Id.* at 137-141. The Army stated that it was dismissing the complaint because: (1) petitioner failed to provide information relevant to his complaint that the Army had requested, see 29 C.F.R. 1614.107(a)(7); (2) petitioner's EEO contact in June 1999 was not made within 45 days of the alleged discrimination, and petitioner had not established grounds for an extension of the 45-day deadline; and (3) petitioner's claims relating to the suspension of his security clearance were outside the scope of the EEO process. C.A. App. 138-139.

4. On January 19, 2000, petitioner filed this Title VII action against the Secretary of the Army. Pet. 5. On October 19, 2000, after a hearing, see Pet. App. 14a-42a, the district court entered an order granting the government's motion to dismiss, *id.* at 12a-13a. In dismissing the Title VII case, the court determined that petitioner's religious-discrimination claims are time-barred because petitioner failed to initiate an EEO contact within 45 days of the alleged discrimination, and the 45-day period was not equitably tolled. The court further determined that petitioner's claims relating to his security clearance are not justiciable. *Id.* at 34a-42a.

5. The court of appeals treated the district court's decision as a grant of summary judgment for the government, see Pet. App. 11a, and affirmed in an unpublished opinion, *id.* at 1a-11a.

Citing *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), and decisions of the District of Columbia, Fourth, Fifth, and Ninth Circuits, the court of appeals first determined that "security clearance decisions are not justiciable under Title VII." Pet. App. 3a-4a. The court expressed the view that "[e]xecutive decisions

regarding security clearance are not completely immune from scrutiny," and that judicial review might be available if petitioner had alleged a violation of constitutional rights or administrative regulations. *Id.* at 4a. The court concluded, however, that petitioner had not presented any such potentially justiciable claims. *Ibid.*

The court of appeals also agreed with the district court's conclusion that petitioner's religious-discrimination claims are time-barred. The court rejected petitioner's argument that the so-called "continuing violations doctrine" renders his June 1999 EEO contact timely. The court of appeals recognized that *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), "cabined" the application of the continuing violation doctrine, Pet. App. 5a, establishing a limitations rule that is less generous to plaintiffs who allege "serial violations" (*i.e.*, a series of related but discrete violations) than Sixth Circuit precedent had been, *id.* at 5a-6a. But the court deemed it unnecessary to consider *Morgan*'s application to this case, because "even under the old, more liberal [Sixth Circuit] standard," petitioner's claims are barred because he "has not established that a discriminatory act occurred in the limitations period." *Id.* at 7a.

The court explained that, for petitioner's EEO consultation on June 3, 1999, to have been timely, petitioner "would have to show some discriminatory act that occurred on or after April 19, 1999" (*i.e.*, within the 45 days immediately before his first EEO contact). Pet. App. 7a. The district court had determined that petitioner's objections to his conditions of employment after returning to work in March 1998 involved only ongoing effects of the alleged discrimination that occurred before March 1998, not independently actionable discrimination that occurred after April 19, 1999. *Id.* at

35a-38a; see *id.* at 8a. In affirming, the court of appeals concluded that the district court's determination was consistent with the pleadings and record evidence, and, therefore, the "serial violation" theory does not save petitioner's religious-discrimination claims from being time-barred. *Id.* at 8a.

Nor, the court of appeals determined, are petitioner's religious-discrimination claims timely on the theory that petitioner is subject to an ongoing Army policy of targeting American Jews as security risks. Pet. App. 9a. As supposed proof that the Army has an official policy of discriminating against American Jews, petitioner relied in the court of appeals on an article in a Defense Department newsletter, which discussed Israeli intelligence-gathering activities. See *ibid.* The court of appeals agreed with the district court that neither the allegations of petitioner's complaint, nor the newsletter article or any other evidence before the district court, indicated that the Army has such a discriminatory policy. *Ibid.*; see *id.* at 36a-37a.

The court of appeals next determined that the district court did not abuse its discretion when it rejected petitioner's argument that the 45-day consultation period should be extended under the equitable tolling doctrine. Pet. App. 9a-10a. The court of appeals observed that petitioner did not allege that he was unaware of the procedural prerequisites for filing a Title VII action, or that the Army misled him about his right to file such an action. *Id.* at 10a. To the contrary, the court noted, petitioner demonstrated as early as October 1998, when he filed his discrimination claim under Michigan law in federal court, that he was aware of the critical facts underlying his Title VII claim. "At that point," the court noted, petitioner "chose to file a

lawsuit rather than contact his EEO officer" to pursue a Title VII claim. *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. a. Petitioner first asserts (Pet. 8-15) that the court of appeals' decision conflicts with *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), and other decisions of this Court, insofar as it affirmed the district court's determination that petitioner suffered no discrete discriminatory acts within the 45-day period immediately before he contacted an Equal Employment Opportunity counselor. The issue raised by petitioner is entirely fact-bound, and the district court, affirmed by the court of appeals, correctly resolved it.

Morgan involved the private-employer provisions of Title VII, rather than the federal-employer provisions of 42 U.S.C. 2000e-16 and 29 C.F.R. 1614.105 that are at issue in this case. The Court held in *Morgan* that when there is a series of discrete but related Title VII violations, the plaintiff may recover only for those discriminatory acts that occurred within the applicable limitations period. 536 U.S. at 110-115. "Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113. For his suit to be timely under the rule applied in *Morgan*, petitioner must identify at least one discrete discriminatory act that occurred within 45 days before his EEO contact on June 3, 1999.

Petitioner claims that he was subjected to discriminatory acts within the 45-day period, involving his "job assignments and work responsibilities." Pet. App. 7a;

see Pet. 9-11. But the court of appeals upheld the district court's "factual determination that the current conditions of [petitioner's] employment are a consequence of the fact that"—many months before he contacted an EEO counselor—"he was accused * * * of espionage and had his security clearance revoked." Pet. App. 7a; see *id.* at 37a-38a.[2]

Petitioner does not argue that he can recover under Title VII for the lingering effects of alleged discrimination that occurred before April 19, 1999. Nor does he identify any decision of this Court, or any other court, that has allowed a Title VII claim to proceed on facts similar to the facts found by the lower courts in this case.[3] See Pet. 13-14. Rather, petitioner argues that the district court's factual determination about the origins of his alleged conditions of employment after March 1998 was "contrary to the evidence" and not suitable for resolution by summary judgment. Pet. 15.

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[2] The court of appeals separately addressed petitioner's claims relating to the suspension and revocation of his security clearance. See Pet. App. 3a-5a. Those issues are discussed below. See pp. 11-13, *infra*.

[3] In *Morgan*, the Court did not define a "discrete discriminatory act." The Court stated, however, that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify." 536 U.S. at 113-114. Petitioner's claims relate to ongoing conditions of employment, not discrete acts of that sort. Compare *Bazemore* v. *Friday*, 478 U.S. 385, 395-396 (1986) ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."), with *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 257, 259-260 (1980) (finding suit time-barred where plaintiff failed to identify discriminatory acts that continued into the limitations period), and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977) (same).

That evidentiary claim presents no issue suitable for further review.

b. Petitioner further asserts that his Title VII claims are not time-barred because he "pled facts alleging a pattern-or-practice of discrimination and/or hostile work environment" that continued after April 19, 1999. Pet. 17. Petitioner again relies on *Morgan*, in which the Court further held that, when an unlawful hostile work environment begins before the limitations period and continues into the period, the employer's Title VII liability is not limited to liability for the particular acts that occurred within the limitations period. Pet. 15-16; see *Morgan*, 536 U.S. at 115-121.

Petitioner's argument involves no *legal* disagreement with the court of appeals. Rather, petitioner contends that the court of appeals should not have affirmed the district court's *factual* determination that petitioner did not allege or produce evidence that the Army has an official policy of discriminating against American Jews. Pet. App. 9a; see *id.* at 36a-37a. Here again, the court of appeals' reasonable factual determination, in its unpublished opinion, presents no issue suitable for review by this Court.[4]

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[4] *Morgan* specifically did not address pattern-or-practice claims under Title VII. See 536 U.S. at 115 n.9. Nevertheless, petitioner argues that "the legal standards" governing pattern-or-practice cases "are virtually identical to the legal standards in adjudicating hostile work environment claims" and, therefore, the reasoning of *Morgan* should apply to pattern-or-practice claims. Pet. 16. Petitioner's argument for extending *Morgan* need not be considered in this case because, even if *Morgan* does apply to pattern-or-practice claims as petitioner suggests, petitioner failed to establish a pattern or practice of discrimination. See Pet. App. 9a. Furthermore, petitioner's claims are time-barred under *Morgan* if they are viewed as hostile-environment claims, because, as discussed above, see pp. 7-8, *supra*, no "act contributing to the claim

2. Petitioner next asserts (Pet. 20-22) that the 45-day consultation deadline should have been tolled in his case under *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), because his first lawsuit was incorrectly filed under Michigan law rather than Title VII, and the Army allegedly concealed its discriminatory conduct. Pet. 20-22.

Equitable tolling and equitable estoppel principles apply to Title VII claims. See *Morgan*, 536 U.S. at 113. As petitioner states, equitable doctrines have been used to extend limitations periods when a plaintiff "actively pursued his judicial remedies" but mistakenly filed "a defective pleading during the statutory period," or was "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. However, equitable extensions generally are not appropriate "where the claimant failed to exercise due diligence in preserving his legal rights." *Ibid.*

This case does not involve a timely court filing that, although defective, was consistent with the exercise of "due diligence" in the prosecution of petitioner's Title VII claims. See *Irwin*, 498 U.S. at 96. Although petitioner's filing of state-law discrimination claims in October 1998 indicated his awareness of the basis for his later Title VII claims, that state-law filing did not in any way substitute for, or prevent petitioner from pursuing, the administrative EEO process that was a prerequisite to bringing a Title VII claim against the Army. Nor does it matter whether petitioner's first counsel provided deficient representation in pursuing the initial discrimination case under Michigan law. See

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occur[ed] within the [45-day limitations] period." *Morgan*, 536 U.S. at 117; see Pet. App. 7a ("[Petitioner] has not established that a discriminatory act occurred in the limitations period.").

Pet. 20. If petitioner's counsel was deficient in presenting petitioner's civil claims, then petitioner's remedy is a suit for malpractice, *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 n.10 (1962)—not an exemption from the mandatory EEO consultation requirement.[5]

Petitioner further contends (Pet. 22) that the district court should have equitably extended the consultation deadline because the Army concealed certain facts that petitioner would have needed in order to pursue earlier a Title VII religious-discrimination claim. The court of appeals correctly rejected that argument as well. See Pet. App. 10a. The court of appeals explained that petitioner did not "need [to] know all the facts of his case in order to comply with Title VII's administrative exhaustion requirement." *Ibid.* It determined that petitioner's filing of a discrimination complaint in the district court in October 1998 showed that, at that time, petitioner already "knew enough critical facts" to allow him to pursue federal remedies. *Ibid.* Petitioner casts no serious doubt on the correctness of the court of appeals' resolution of that issue, see Pet. 22, and the issue does not involve any question warranting this Court's review.

3. Finally, petitioner disputes the court of appeals' determination (Pet. App. 3a-5a) that federal agencies' security-clearance determinations are not reviewable in Title VII actions. See Pet. 23-29. In dismissing petitioner's security-clearance claims, the court of appeals correctly applied *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988). In *Egan*, the Court concluded that

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[5] Contrary to petitioner's argument (Pet. 21), the filing of a claim under the Federal Tort Claims Act in October 1998 was not a substitute for satisfaction of the clearly established EEO consultation requirement. See 29 C.F.R. 1614.105(a)).

security-clearance determinations are committed to the discretion of Executive agencies, and the Merit Systems Protection Board could not review the substance of an agency's clearance decision. *Id.* at 525-534. Likewise, in this case, the district court correctly declined to review the Army's decision to suspend and ultimately revoke petitioner's security clearance. See Pet. App. 39a-41a. As petitioner acknowledges (Pet. 23-24 n.3), all the other courts of appeals that have addressed the issue have reached the same conclusion, namely, that security-clearance decisions are not judicially reviewable in Title VII cases. See Pet. App. 3a-4a (citing cases).

Petitioner argues that constitutional challenges to the Army's security-clearance decisions in this case would be justiciable. Pet. 24-27. *Webster* v. *Doe*, 486 U.S. 592 (1988), on which petitioner primarily relies (Pet. 24), did not so hold. *Webster* involved the CIA's termination of an employee pursuant to a statute that gave the CIA Director discretion to remove employees in the interests of national security. The Court determined that the employee-removal statute did not clearly express a congressional intent to bar judicial consideration of constitutional claims arising from an allegedly discriminatory termination by the Director. See 486 U.S. at 596, 601-605. Here, by contrast, Congress has established Title VII as petitioner's "exclusive judicial remedy for [his] claims of discrimination in federal employment." *Brown* v. *GSA*, 425 U.S. 820, 835 (1970). Furthermore, the court of appeals gave a complete answer to petitioner's contention that constitutional claims would be maintainable: petitioner's "complaint does not contain any constitutional claims." Pet. App. 4a. Petitioner's attempt to re-package his Title VII claims as constitutional claims for purposes of

the instant petition, see Pet. 29-30 n.5, does not change that dispositive fact.

Similarly, because petitioner "presented no specific cause of action to the district court regarding the violation of any regulations" governing security-clearance decisions, that issue was not before the court of appeals and the court of appeals did not address it on the merits. Pet. App. 4a. Although petitioner raises the issue in this Court, see Pet. 25-26, 28 (suggesting violation of Executive Orders and agency regulations), it is not ripe for the Court's review. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (Court ordinarily does not decide issues that were not raised or resolved below).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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