No. 05-1074

IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,

Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY,

Respondent.

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

BRIEF FOR RESPONDENT

JAY ST. CLAIR
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

GLEN D. NAGER
(Counsel of Record)
MICHAEL A. CARVIN
SHAY DVORETZKY
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondent

CORPORATE DISCLOSURE STATEMENT

Respondent makes the following corporate disclosure statement pursuant to Supreme Court Rule 29.6:

The Goodyear Tire & Rubber Company has no parent company. No publicly held company owns 10% or more of The Goodyear Tire & Rubber Company's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

Statutes & Regulations

TABLE OF AUTHORITIES
(Continued)

Page

Legislative & Agency Materials

Other Authorities

COUNTERSTATEMENT OF THE CASE

Lilly Ledbetter worked for The Goodyear Tire & Rubber Company for 19 years, first as a Supervisor and subsequently as an Area Manager. Ledbetter began her employment at the same salary as male Supervisors. During the ensuing 19 years, several different managers made discrete annual decisions regarding what merit increase Ledbetter should receive in her salary. In some years, the increases that Ledbetter received were greater than those awarded to male co-workers. In other years, they were less. In still other years, Ledbetter was on layoff, or was about to be laid off, and thus was not eligible for an increase. In this lawsuit, Ledbetter seeks to challenge the collective effect of those 19 years of salary determinations, particularly focusing on alleged discrimination occurring in the 1980's and early 1990's. Each of the alleged acts occurred well before Ledbetter filed a charge with the EEOC in 1998 alleging intentional pay discrimination. Applying Title VII's text and this Court's cases construing that text, the court below correctly held that Ledbetter could not pursue such a stale claim.

1. Ledbetter was hired on February 5, 1979 as a Supervisor Trainee at Goodyear's tire assembly plant in Gadsden, Alabama. Pet. App. 5a. Shortly thereafter, she became a Supervisor. Ledbetter was paid the same salary, $16,760.52, as the other Supervisors at the Gadsden plant. J.A. 39, 151-52. Moreover, in 1980 and 1981, Ledbetter received the same lockstep pay increases, based on cost-of-living adjustments, as the other Supervisors (15.59% in 1980 and 9.25% in 1981). J.A. 224; Tr. 125-28.

a. In 1982, Goodyear implemented a merit-based compensation program. Pet. App. 4a; J.A. 114-42. Under the "Pay for Performance" program, each "Business Center Manager" within a plant became responsible for determining annual merit increases for the salaried employees under his or her supervision. Pet. App. 4a-5a; J.A. 120-21. In doing

so, the Business Center Manager was required to take each employee's existing salary at the time as a given starting point; the manager was to focus only on appropriate salary increases. J.A. 69-70, 87-88, 120-21; Tr. 256-57. In that regard, the manager was also to take into account each employee's performance ranking for the year; where the employee's existing salary stood within the salary range for his or her position; and the amount and timing of the employee's most recent increase. Pet. App. 4a-5a; J.A. 120-21, 174-77. Each employee's annual increase could not exceed a specified maximum percentage, and the total amount of increases awarded in each Business Center could not exceed a set budget. Pet. App. 4a-5a, 48a; J.A. 87-88, 120-21.

b. Between 1982 and 1985 (when her title changed to Area Manager), Ledbetter received annual salary increases of 7.65%, 6.39%, 5.34%, and 7.19%. J.A. 224. For fifteen months beginning in 1986 and extending into 1987, Ledbetter was on layoff, and, as a result, she was not eligible for pay increases in 1986, 1987, or 1988. Pet. App. 5a; J.A. 167; Tr. 39, 128-31. Upon being recalled, Ledbetter's salary was less than the salaries of Area Managers who had not been laid off and had been eligible for increases during those years. J.A. 167, 195. In 1989, Ledbetter received a 5.99% increase. J.A. 224. But she was included in another layoff later in 1989; as a result, she was ineligible for a pay increase in 1990. Pet. App. 5a; J.A. 224. In 1991 and 1992, she received pay increases of 8.86% and 6.65%, respectively. J.A. 224. Ledbetter conceded at trial that Mike Nunn, her supervisor between 1990 and 1992, did not discriminate against her in determining her pay increases in those years. Tr. 132-33.

c. Between 1993 and 1996, Mike Tucker evaluated Ledbetter. In 1993, Tucker ranked Ledbetter third out of the four Area Managers and fifth out of the six salaried employees whom he supervised. Pet. App. 5a-6a; J.A. 174. Jimmy Todd, who was ranked last, received no pay increase

for the year, while Ledbetter received a 5.28% increase, the largest percentage increase awarded to any Area Manager under Tucker's supervision. Pet. App. 5a-6a; J.A. 174.

In 1994, Tucker ranked Ledbetter last among the four Area Managers and last among the six salaried employees whom he supervised. Pet. App. 6a; J.A. 175. She nevertheless received a 5% pay increase. Pet. App. 6a; J.A. 175.

In 1995, Tucker awarded Ledbetter the maximum "individual performance award"—4%—available under the compensation guidelines for that year. Pet. App. 6a; Tr. 348. Tucker awarded Ledbetter an additional increase of 3.85% in 1995 as a "top performance award" in order to raise her salary. Pet. App. 6a; Tr. 348, 363.

In 1996, Tucker ranked Ledbetter 23rd out of 24 salaried employees, and 15th out of 16 Area Managers. Pet. App. 7a; J.A. 176-77; Tr. 344. Tucker ranked Jimmy Todd 24th, and both he and the 22nd-ranked employee received no raises. Pet. App. 7a; J.A. 176-77. Because Ledbetter's 1995 raise became effective on December 1, 1995, she was not eligible for another increase in 1996. Pet. App. 7a; Tr. 141, 344.

The cumulative amount of pay increases that Ledbetter received between 1993 and 1996 was higher than the increases for three of the four male Area Managers working for Tucker. J.A. 193.

d. Because the Gadsden plant was experiencing declining production, Goodyear slated Ledbetter and Jimmy Todd—the two lowest-performing Area Managers in 1995—for layoff at the end of 1996. Pet. App. 7a, 49a. However, because other Area Managers went out on extended medical leaves, Ledbetter's layoff never took effect. Pet. App. 7a. But, having been slated for layoff, she did not receive a pay increase in 1997. Pet. App. 8a & n.4, 9a; Tr. 296-97, 318.

Throughout 1997, Ledbetter's new manager, Jerry Jones, expressed concerns to Ledbetter about her performance. Pet.

App. 8a. He eventually suggested that she apply for a non-supervisory Technology Engineer position. Pet. App. 8a. Ledbetter did so, but continued working as an Area Manager through the end of 1997. Pet. App. 8a.

In late 1997, Kelly Owen replaced Jones as the Business Center Manager responsible for evaluating Ledbetter. Pet. App. 8a. In his evaluation of Ledbetter's 1997 performance, Owen ranked Ledbetter 23rd out of 24 salaried employees, and 15th out of 16 Area Managers. Pet. App. 9a; J.A. 189-92. Dean Nance, a man, was ranked last; the two people ranked directly above Ledbetter were also men. Pet. App. 9a; J.A. 189-92. These four employees—the lowest-rated employees under Owen's supervision—did not receive merit increases in 1998. Pet. App. 9a; J.A. 189-92.

e. In August 1998, Goodyear offered an early retirement option. Pet. App. 9a. Ledbetter took early retirement effective November 1, 1998. Pet. App. 9a.

2. Ledbetter did not file an EEOC charge challenging the cumulative effect of these 19 years of salary determinations until July 21, 1998. Pet. App. 9a; J.A. 147-50. The record shows that she had previous experience with the EEOC charge process. The record also shows that she was aware, by no later than 1992, of a disparity between her pay and that of certain male Supervisors/Area Managers.

a. Specifically, in 1982, Ledbetter had filed a charge with the EEOC alleging that Mike Maudsley, a former department foreman who was deceased by the time of trial in this case, had sexually harassed her. J.A. 103-09. Ledbetter and Goodyear resolved these allegations without litigation. J.A. 42-43.

b. With regard to her pay, Ledbetter testified that "[d]ifferent people that [she] worked for along the way had *always* told [her] that [her] pay was extremely low." J.A. 233 (emphasis added). She recalled that her manager told her in 1992 that her pay was lower than that of other Area Managers, and that by 1994 or 1995, she had learned the

amount of the difference. J.A. 230-33. In 1995, Ledbetter told Mike Tucker that she "needed to earn an increase in pay" because she "wanted to get in line with where [her] peers were, because . . . at that time [she] knew definitely that they were all making a thousand [dollars] at least more per month . . . ." J.A. 231-32; *see also* J.A. 236-37, 239-40.

c. On March 25, 1998, Ledbetter filed a questionnaire with the EEOC alleging that she had been forced into the Technology Engineer position. J.A. 143-46. On July 21, 1998, she filed a formal charge in which she further alleged that she was being paid a discriminatorily low salary. J.A. 147-50.

3. After receiving a right-to-sue letter, Ledbetter filed suit, asserting multiple claims of intentional age discrimination, sex discrimination, and retaliation, in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17; the Equal Pay Act, 29 U.S.C. § 206(d); and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34. J.A. 13-21.

a. A magistrate judge recommended that summary judgment be granted to Goodyear on all but one of Ledbetter's claims—a claim relating to a three-day suspension that she received in 1998 for a manufacturing error. With respect to Ledbetter's intentional pay discrimination claim under Title VII, the magistrate judge found that, because "plaintiff's performance was ranked at or near the bottom of Area Managers," Ledbetter had not "cast sufficient doubt on [Goodyear's] proffered nondiscriminatory reason[]" for paying her less than other Area Managers. Pet. App. 67a (internal citations and quotation marks omitted). With respect to Ledbetter's Equal Pay Act claim, the magistrate judge concluded that Ledbetter had not "established a prima facie case with respect to Area Managers outside the Business Center in which she worked," who were not appropriate comparators. Pet. App. 73a. As the magistrate judge explained, "[e]ach of the defendant's

Business Centers had a particular purpose, and made different products," so that "varied" and "specialized skill[s] w[ere] required . . . to supervise employees in the different business centers." Pet. App. 72a-73a. The magistrate judge further concluded that "the disparity between [Ledbetter's] pay and that of her comparators" in her *own* Business Center was "based on factors other than sex," namely, Ledbetter's "weak" performance. Pet. App. 73a, 74a.

b. Finding "credibility" disputes in the testimony of Mike Tucker concerning his recommendations about Ledbetter's salary increases between 1992 and 1995, the district court denied summary judgment on Ledbetter's intentional pay discrimination claim. D. Ct. Dkt. #33 (Mem. Op.), at 1-2; D. Ct. Dkt. #34 (order). The district court also denied summary judgment on Ledbetter's transfer, retaliation, and discipline claims. D. Ct. Dkt. #33 (Mem. Op.), at 2-3; D. Ct. Dkt. #34 (order). But the district court entered summary judgment on all remaining claims, including Ledbetter's Equal Pay Act claim. D. Ct. Dkt. #33 (Mem. Op.), at 3; D. Ct. Dkt. #34 (order).

c. At trial, at the close of the evidence, the district court granted judgment as a matter of law on Ledbetter's claims of disparate discipline and retaliatory refusal to rehire, but not on Ledbetter's disparate pay and involuntary transfer claims. Pet. App. 10a; J.A. 98; Tr. 382, 384. A jury then found for Goodyear on the transfer claim but returned a verdict for Ledbetter on the pay claim. Pet. App. 10a-11a. The jury awarded Ledbetter $223,776 in back pay, $4,662 in damages for mental anguish, and $3,285,979 in punitive damages. Pet. App. 11a.

d. In post-trial motions, Goodyear renewed its argument made at trial that Ledbetter's pay claim was time-barred as to all pay decisions made prior to September 26, 1997 (six months prior to the filing of Ledbetter's EEOC questionnaire). Goodyear also argued that no reasonable jury could have concluded that the one pay decision made

within the charge-filing period, by Kelly Owen, was intentionally discriminatory. The district court rejected both arguments, stating that:

> The jury could reasonably have found that Terry Amberson is an appropriate comparator. Apparently, both he and the Plaintiff were paid the same salary on April 1, 1979, and again on April 16, 1979. The jury could reasonably have concluded that but for the gender discrimination, their salaries would have been the same up to November 1, 1998.

Pet. App. 41a (internal citation omitted). The court did, however, remit the total award to $360,000, including $300,000 in compensatory and punitive damages and $60,000 in backpay, plus attorneys' fees and costs. Pet. App. 11a, 38a-39a. The district court held that Ledbetter was entitled to two years of backpay "[b]ecause of the continuing nature of the disparate salary payments . . . ." Pet. App. 41a.

4. The Eleventh Circuit reversed. That court concluded that a pay claim is "clear[ly] . . . governed by that part" of *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), that "address[es] claims alleging 'discrete acts of discrimination.'" Pet. App. 17a. It further concluded that Ledbetter could "state a timely cause of action for disparate pay only to the extent that the 'discrete acts of discrimination' of which she complains occurred within the limitations period . . . ." Pet App. 19a.

The Eleventh Circuit noted that "a series of pre-*Morgan* cases," applying this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), had held that "an employee's pay [claim] was not time-barred so long as the plaintiff received within the limitations period at least one paycheck implementing the pay rate the employee challenged as unlawful." Pet. App. 20a. But the court found that, even "[a]ssuming that these cases survive *Morgan* . . . they do not speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the

central, requisite element of every successful disparate treatment claim." Pet. App. 22a-23a. The court noted that, "[u]nless there is a claim that the person—or, more likely today, the computer—who actually issued the paychecks in question did so with intent to discriminate, the operative act of discrimination will always be . . . the act of making the underlying decision about what the plaintiff should be paid." Pet. App. 23a. The court further found that allowing a plaintiff to "question every decision made contributing to his or her" present salary level would entirely nullify Title VII's charge-filing requirement. Pet. App. 23a. For these reasons, the court held that "an employee looking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a.

The Eleventh Circuit next held that Ledbetter had not provided legally sufficient evidence that either the "one raise decision that was made within the limitations period"—*i.e.*, Kelly Owen's decision that she not receive a raise in 1998—or the preceding decision that she not receive a raise in 1997 was motivated by Ledbetter's sex. Pet. App. 27a-31a. With regard to the former, the court noted that Ledbetter had been ranked 23rd out of 24 employees in Tire Assembly, and 15th out of 16 Area Managers, based on her performance; that the men ranked at the bottom with Ledbetter also had been denied raises; and that there was "no evidence that Owen purposefully underrated Ledbetter's performance for 1997." Pet. App. 31a. With regard to the 1997 decision, the court found that the "uncontradicted evidence . . . established that Ledbetter's impending layoff was the reason for her being denied a raise . . . ." Pet. App. 32a.

SUMMARY OF THE ARGUMENT

Ledbetter lost her Equal Pay Act claim in the district court; she did not assert a Title VII disparate impact claim; and the Eleventh Circuit found legally insufficient evidence

of intentional pay discrimination during the Title VII charge-filing period. The only question left is whether Ledbetter can nonetheless pursue a claim that her present salary is the result of allegedly intentionally discriminatory decisions occurring outside of Title VII's charge-filing period. She cannot.

I. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), requires that "[a] charge under this section shall be filed within [180] days after the alleged unlawful employment practice occurred." This charge-filing requirement, which this Court has described as a compromise essential to the enactment of Title VII as a whole, protects courts and defendants against stale claims and promotes conciliation rather than litigation.

To honor both the text and the purposes of section 706(e), this Court has repeatedly stressed the need to identify the *precise* "unlawful employment practice" at issue and to determine when that practice "occurred." In doing so, the Court has repeatedly held that section 706(e) bars a private plaintiff from bringing an intentional discrimination claim challenging discriminatory conduct occurring outside of the charge-filing period, even if that past conduct continues to have adverse effects into the charge-filing period. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111-13 (2002); *Lorance v. A T & T Techs., Inc.*, 490 U.S. 900, 905-08 (1989); *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

Under that case law, Ledbetter's intentional pay discrimination claim is time-barred. There is no evidence that Goodyear issued paychecks during the 180-day period in a discriminatory manner or with a discriminatory intent. Moreover, the court below held that Ledbetter did not have legally sufficient evidence that the single salary decision made during the charge-filing period was discriminatory—a holding that is not before this Court. Ledbetter complains

that allegedly discriminatory decisions made by different managers extending back over 19 years have lingering effects within the charge-filing period. But that is precisely the kind of stale claim that section 706(e) and this Court's cases establish is untimely. There is no basis for applying a different charge-filing rule to discrete acts of intentional pay discrimination than to other kinds of discrete acts. Indeed, allowing Ledbetter to bring such an untimely intentional discrimination claim would completely defeat the interests in repose and conciliation that underlie section 706(e).

II. *Bazemore v. Friday*, 478 U.S. 385 (1986), is not to the contrary. *Bazemore* involved a claim by the United States that concerned allegations of *present* intentional discrimination in pay. This Court held that the employer could not defend against those allegations of present discrimination on the ground that the discrimination had begun prior to the effective date of Title VII. There was no claim, much less a holding, that a present intentional pay discrimination claim by a private plaintiff may rest wholly on allegedly discriminatory decisions made outside of section 706(e)'s charge-filing period. Indeed, section 706(e) was not even in issue in *Bazemore* because claims brought by the United States are not subject to that provision.

III. Ledbetter's remaining arguments are also in error. The policy concerns that she raises provide no legal basis to rewrite the statutory charge-filing requirement. The argument that this Court should acquiesce in the position of some courts of appeals and the EEOC is unfounded: The lower courts and the EEOC have not had a consistent position, and this Court should enforce the statute as enacted, not as misconstrued by some lower courts and the EEOC. Moreover, while Ledbetter contends that numerous analogous contexts demonstrate that her claim should be considered timely, the only relevant analogy that she identifies—cases under the National Labor Relations Act—confirms that her claim is time-barred. Finally, Ledbetter's

reliance on the legislative history of statutory provisions other than section 706(e) is meritless.

ARGUMENT

As it comes to this Court, this case turns on section 706(e)'s requirement that a plaintiff raising an intentional discrimination claim under Title VII must file a timely administrative charge. Specifically, to have a timely claim, Ledbetter had to allege and prove that, during the 180-day limitations period preceding the charge filing, Goodyear intentionally discriminated against her because of her gender in setting her salary and/or in issuing her paychecks. Ledbetter sought to satisfy this burden by showing that Goodyear's facially neutral pay actions during the limitations period gave present effect to allegedly discriminatory salary decisions made outside of the charge-filing period. The Eleventh Circuit correctly rejected this claim.

In considering the issue, it is useful to note three preliminary points: First, there is no question in this case about whether Goodyear actually intentionally discriminated on the basis of gender in setting Ledbetter's salary and/or in issuing her paychecks during the charge-filing period. The Eleventh Circuit held that there was not legally sufficient evidence to support such an intentional discrimination claim, and Ledbetter did not seek or obtain certiorari review of that holding. Second, contrary to Ledbetter's misstatement (Pet. Br. at 15), there is no question here whether Goodyear paid Ledbetter less money for equal work on the basis of her sex. The district court granted summary judgment against Ledbetter on her claim under the Equal Pay Act, and she did not appeal that ruling (much less seek and obtain certiorari with respect to it). Finally, there is no claim here that Goodyear's facially neutral "Pay for Performance" compensation program—including its provision, for both men and women, that the prior year's existing salary is taken as a given and is subject only to a maximum annual merit increase—has an unlawful disparate impact on women.

There is serious doubt whether such a disparate impact claim is cognizable under Title VII. *See, e.g.*, *County of Wash. v. Gunther*, 452 U.S. 161, 170-71 (1981); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139-42 (1977); *Am. Fed'n of State, County, & Mun. Employees v. Wash.*, 770 F.2d 1401, 1405-06 (9th Cir. 1985). But, equally important, Ledbetter never asserted any disparate impact claim in the district court—instead asserting only intentional discrimination claims on which she could obtain a jury trial and request an award of compensatory and punitive damages.

Rather, the only question presented here is whether Ledbetter has a cognizable intentional discrimination claim for a disparity in pay during the limitations period that she claims "is the result of intentionally discriminatory pay decisions that occurred outside the limitations period"—*i.e.*, a claim of alleged discrimination that Ledbetter was aware of by no later than 1992 and that she has never claimed should be the subject of equitable tolling or estoppel. Pet. at i; Pet. App. 19a n.16. Section 706(e) and this Court's cases make it clear that no such claim is cognizable.

I. LEDBETTER DOES NOT HAVE A TIMELY INTENTIONAL PAY DISCRIMINATION CLAIM FOR ACTIONS TAKEN OUTSIDE THE CHARGE-FILING PERIOD.

As the court below recognized, Title VII requires allegedly aggrieved employees like Ledbetter to assert their intentional discrimination claims within the 180-day charge-filing period or lose them. Moreover, as the court below also recognized, Title VII's charge-filing requirement does not allow an aggrieved employee to revive an intentional discrimination claim for which no timely charge was filed merely by arguing that an unlawful action outside the charge-filing period continues to have adverse effects in later time periods. But that is all that Ledbetter is arguing in this Court. Accordingly, her arguments should be rejected, and the judgment below should be affirmed.

A. Section 706(e) Bars A Private Plaintiff From Bringing An Intentional Discrimination Claim Concerning The Lingering Effects Of Decisions Occurring Outside Of The Charge-Filing Period.

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred" (or within 300 days in a state that has an agency with the authority to grant or seek relief with respect to the unlawful employment practice). Under this provision, it is "mandatory" that a plaintiff file a charge within the requisite days after the "unlawful employment practice" "occurred," or "lose the ability to recover for it." *Morgan*, 536 U.S. at 109-10.

1. The Court has long recognized that section 706(e) "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Ricks*, 449 U.S. at 260 (internal quotation marks omitted). Section 706(e) "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Id.* at 256-57. Indeed, the Court has held that an employer is "entitled to treat [a] past [discriminatory] act as lawful after [the employee] failed to file a charge of discrimination" within the prescribed period. *Evans*, 431 U.S. at 558.

In so holding, the Court has recognized that, as an *administrative* filing requirement, section 706(e) not only "assures prompt notification to the employer of a charge of an alleged violation of Title VII," *Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 n.14 (1976), but also "promote[s] conciliation rather than litigation in the Title VII context," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). Section 706(e) "bring[s] to bear," as promptly as possible, "the voluntary compliance and conciliation functions of the EEOC," *Bowe*

v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969), and thereby "promot[es] . . . dispute resolution through accommodation rather than litigation . . . ." *Weise v. Syracuse Univ.*, 522 F.2d 397, 412 (2d Cir. 1975) (citing Henry J. Friendly, *Federal Jurisdiction: A General View* 78 (1973)).

The Court has stated that "[b]y choosing what are obviously quite short deadlines [in Title VII], Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). Indeed, the Court has recognized that section 706(e) and its prompt filing requirement were a critical part of the legislative "compromise" leading to the enactment of Title VII, *id.* at 826, and has admonished lower courts to "strict[ly] adher[e]" to it. *Morgan*, 536 U.S. at 108.

2. To honor section 706(e)'s text and fulfill its statutory purposes, the Court has repeatedly stressed the need both to identify at the outset the specific "unlawful employment practice" at issue and to determine when that practice "occurred." *Id.* at 109-10; *see also Lorance*, 490 U.S. at 904; *Ricks*, 449 U.S. at 257-58. In doing so, the Court has repeatedly held that section 706(e) bars a private plaintiff from pursuing an intentional discrimination claim based wholly on conduct occurring outside of the charge-filing period, even if the past conduct continues to have adverse effects in the charge-filing period. *See, e.g.*, *Lorance*, 490 U.S. at 905-08; *Ricks*, 449 U.S. at 257.

a. The Court first addressed this matter in *United Air Lines v. Evans*. There, a female flight attendant claimed that her pay and benefits were unlawfully depressed because she had previously been forced to resign pursuant to an illegal policy prohibiting flight attendants from being married. *See* 431 U.S. at 554, 558. Specifically, Evans had resigned in 1968, but was rehired in 1972 after the illegal policy was abolished. *See id.* at 554-55. However, on

rehire, pursuant to a collective bargaining agreement, Evans' employer did not credit her with seniority for prior service, and thus her pay and benefits were adversely affected. *See id.* at 555 & n.6. Evans claimed that the employer was violating Title VII by "giv[ing] present effect to the past illegal act" and was unlawfully "perpetuat[ing] the consequences of forbidden [past] discrimination." *Id.* at 557.

In rejecting Evans' claim, the Court began by stating that "the critical question is whether any present *violation* exists." *Id.* at 558 (emphasis in original). The Court answered that question in the negative on the ground that the employer's seniority system was "neutral in its operation." *Id.* The Court further noted that Evans did not allege that the seniority system "discriminate[d] against former female employees or that it treat[ed] former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason." *Id.*

The Court recognized that the seniority policy had a "continuing impact on [Evans'] pay and fringe benefits" and gave "present effect to [the employer's] past act of discrimination." *Id.* But the employer "was entitled to treat that past act as lawful after [Evans] failed to file a charge of discrimination within the [limitations period] allowed" by section 706(e). *Id.* The Court said that the discriminatory act in 1968, which was "not made the basis for a timely charge," was "merely an unfortunate event in history" that had "no *present* legal consequences." *Id.* (emphasis added).

b. The Court next addressed the issue in *Delaware State College v. Ricks*. There, a black college professor was denied tenure by Delaware State College. *See* 449 U.S. at 252. Following its "policy of not discharging immediately a junior faculty member who does not receive tenure," the College communicated the tenure denial decision and offered Ricks a "'terminal' contract to teach one additional year," which he accepted. *Id.* at 253. Ricks waited until more than

180 days after the denial of tenure, but shortly before his one-year terminal contract expired, to file a Title VII charge. *See id.* at 254. This Court held that Ricks' claim was untimely. *See id.* at 262.

The Court emphasized that determining the timeliness of Ricks' claim "requires . . . identify[ing] *precisely* the 'unlawful employment practice' of which he complains." *Id.* at 257 (quoting 42 U.S.C. § 2000e-5(e)) (emphasis added). The Court found that Ricks was claiming intentional discrimination by the College in denying him tenure. *See id.* at 257-58. The Court thus concluded that the alleged intentional discrimination "occurred—and the filing limitations period[] therefore commenced—at the time the tenure decision was made and communicated to Ricks," more than 180 days before his charge. *Id.* at 258.

The Court acknowledged that one of the "*effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* (emphasis in original). But, to the Court, Ricks' termination was simply the "delayed" but "inevitable[] consequence of the denial of tenure." *Id.* at 257-58. Indeed, the Court noted that, for the limitations period to have run from the date that his contract expired, "Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure." *Id.* at 258. The Court reiterated that "[i]t is simply insufficient for Ricks to allege that his termination gives present effect to [a] past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* (internal quotation marks omitted).

c. The Court again spoke to the issue in *Lorance v. A T & T Technologies, Inc.* In that case, the Court considered "when the limitations period begins to run in a lawsuit arising out of a seniority system not alleged to be discriminatory on its face or as presently applied" that was

allegedly adopted for a discriminatory purpose outside of the limitations period. 490 U.S. at 903. The plaintiffs in *Lorance* did not allege that, within the limitations period, the facially neutral seniority system "treat[ed] similarly situated employees differently or that it [was] operated in an intentionally discriminatory manner." *Id.* at 905. Rather, the plaintiffs were alleging that the seniority system had been adopted for the discriminatory purpose of favoring male over female employees. *See id.* Because that alleged discriminatory act occurred "well outside the period of limitations," the Court ruled that the plaintiffs' claims were "time barred under § 706(e)." *Id.* at 906.

The Court explained that its "cases have rejected" the "alternative approaches" put forth by the plaintiffs. *Id.* The Court noted that it had twice before rejected the theory that an employer is "guilty of a continuing violation which 'occurred,' for purposes of § 706(e), not only when the" seniority system was discriminatorily adopted, "but also when each of the concrete effects" of that adoption "was felt." *Id.* And the Court pointed to other decisions holding that section 703(h) of Title VII bars disparate impact claims based on the continuing adverse effects of a seniority system. *See id.* at 908-09.

The *Lorance* Court also rested its conclusion on its decision in *Machinists Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 413-14 (1960). Although *Machinists* arose under the National Labor Relations Act ("NLRA"), the *Lorance* Court found that the NLRA "was the model for Title VII's remedial provisions" and has a similar charge-filing period. 490 U.S. at 909-10. The *Lorance* Court further found that *Machinists* had "considered and rejected an approach to the limitations period identical to that advanced" by the plaintiffs in *Lorance*. *Id.* at 910. Specifically, the *Machinists* Court had held that where "'a complaint based upon [an] earlier event is time-barred,'" to "'permit the event itself' 'to cloak with illegality that which was otherwise lawful' 'in effect results in reviving a legally defunct unfair

labor practice,'" and in essence nullifies the limitations period altogether. *Id.* at 911 (quoting *Machinists*, 362 U.S. at 417). The Court in *Lorance* found this reasoning "squarely in point": "Because the claimed invalidity of the facially nondiscriminatory and neutrally applied . . . seniority system" in *Lorance* was "wholly dependent on the alleged illegality" of its adoption, "the date of that [adoption] governs the limitations period." *Id.*

d. The Court most recently reaffirmed this reasoning—and its construction of section 706(e)—in *National Railroad Passenger Corp. v. Morgan.* The plaintiff in *Morgan* alleged that he had been subject to discrete discriminatory and retaliatory acts by his employer and had experienced a racially hostile work environment. *See* 536 U.S. at 104. While some of the alleged discriminatory acts occurred within the charge-filing period, others took place prior to that period. *See id.* at 106. In determining which, if any, of these claims had been timely asserted, the Court reiterated that "[t]he critical questions" are "[w]hat constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Id.* at 110.

As to discrete acts, "such as termination, failure to promote, denial of transfer, or refusal to hire," the Court ruled that each discrete "incident of discrimination . . . constitutes a separate actionable 'unlawful employment practice'" that "starts a new clock for filing charges alleging that act." *Id.* at 113, 114. The Court held that each such act "'occurred' on the day that it 'happened,'" and that a plaintiff "must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it." *Id.* at 110. The Court rejected Morgan's argument that the term "practice" in section 706(e) "converts related discrete acts," including those occurring outside the limitations period, "into a single unlawful practice for the purposes of timely filing." *Id.* at 111. Rather, discussing *Evans* and *Ricks*, the Court reaffirmed that "discrete acts that fall within the statutory time period do not make timely acts that fall

outside the time period." *Id.* at 112. The Court held that, while the existence of discriminatory acts outside the limitations period "does not bar employees from filing charges about related discrete acts" within the charge-filing period, the plaintiff must allege present acts that "are *independently* discriminatory" and must file a "timely" charge "addressing those acts." *Id.* at 113 (emphasis added). The "emphasis" is on whether any "present" and "independently" actionable "violation existed." *Id.* at 112-13 (internal quotation marks and emphasis omitted).

In contrast, the Court found that "[h]ostile environment claims" must be treated differently. *Id.* at 115. The Court determined that, because the "very nature" of a hostile environment claim "involves repeated conduct" and "the cumulative effect of individual acts," the "'unlawful employment practice'" cannot "be said to occur on any particular day." *Id.* Rather, the Court found that, "in direct contrast to" a discrete discriminatory act, "a single act of harassment may not be actionable on its own," *id.*, and that "[a] hostile work environment claim is," by its nature, "composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Id.* at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)). Accordingly, the Court concluded that "the entire time period of the hostile environment may be considered by a court," "[p]rovided that an act contributing to the claim occurs within the filing period." *Id.*

On this analysis, the Court determined that, while Morgan's hostile environment claim was timely, his claims concerning "discrete discriminatory acts" occurring prior to the charge-filing period were not. *Id.* at 114-15, 120-21. Reaffirming that "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law," the Court held that those claims were "no longer actionable." *Id.* at 108, 115 (internal quotation marks omitted).

B. Ledbetter's Intentional Pay Discrimination Claim Is Time-Barred Because She Challenges The Present Effects of Salary Decisions Occurring Outside Of The Charge-Filing Period.

These cases confirm that the court below correctly held that Ledbetter's intentional pay discrimination claim is time-barred. Ledbetter was entitled to pursue her claim of intentional pay discrimination concerning acts occurring during the 180-day charge-filing period. But she was not entitled to base that claim on acts occurring outside of the period.

First, as Ledbetter necessarily concedes (Pet. Br. at 13, 18, 22, 32), her intentional pay discrimination claim challenges "discrete" acts within the meaning of *Morgan*. *Morgan* itself referred to pay discrimination claims as concerning discrete acts. *See* 536 U.S. at 111-12. Moreover, as the court below explained (Pet. App. 17a-18a), a plaintiff alleging intentional pay discrimination "must point to some specific, conscious conduct that was tainted" by unlawful discrimination. Whether a plaintiff challenges a "decision[] setting the plaintiff's salary" or "the issuance of a confirming paycheck" as "the operative act of discrimination," that act is, "'like termination, failure to promote, denial of transfer, or refusal to hire,' . . . discrete in time, easy to identify, and—if done with the requisite intent—independently actionable." Pet. App. 18a (quoting *Morgan*, 536 U.S. at 114). Indeed, because the "'unlawful employment practice' *can be* said to occur on a particular day," and "a single discriminatory act *is* actionable on its own," intentional pay discrimination claims lack "those characteristics that led the Court to devise a separate rule governing the timing of hostile work environment claims." Pet. App. 18a (emphasis added). Rather, each discrete act of alleged pay discrimination "starts a new clock for filing charges," and a plaintiff must file a charge within 180 days of that act "or lose the ability to recover for it." *Morgan*, 536 U.S. at 110, 113.

Second, though she characterizes the paychecks received during and after the 180-day period as the product of intentional discrimination, Ledbetter has no cognizable claim that any intentional discrimination occurred during the charge-filing period. The Eleventh Circuit held that Ledbetter did not have legally sufficient evidence that the single salary decision made during the charge-filing period was motivated by gender (Pet. App. 31a), and Ledbetter did not seek or obtain certiorari on that question. Moreover, Ledbetter offered no evidence that the paychecks received during that period were themselves issued with discriminatory intent; on the contrary, Goodyear's payroll system mechanically implements the salary determinations made pursuant to the merit-based compensation system, and the resulting paychecks are simply the "inevitable[] consequence[s]" of earlier pay decisions. *Ricks*, 449 U.S. at 257-58.

Ledbetter is thus left to complain that, by taking her existing salary as the starting point for determining the salary to pay her during the charge-filing period, Goodyear perpetuated the effects of earlier salary decisions. But Ledbetter offered no evidence that, during the charge-filing period, Goodyear knowingly relied on those decisions "'because of,'" as opposed to "'in spite of,'" their allegedly discriminatory purpose. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). On the contrary, the facts are undisputed that Goodyear had no discriminatory purpose: under the "Pay for Performance" program, taking existing salary as the starting point for present salary decisions was a facially neutral practice applied to all men and women alike. J.A. 69-70, 87-88, 120-21; Tr. 256-57, 344, 351. There is no evidence that Goodyear discriminatorily administered that facially neutral practice. And Ledbetter has never advanced a claim that this facially neutral practice, used by almost all private- and public-sector employers, was maintained with a discriminatory purpose or had an unlawful disparate impact on women. Rather, Ledbetter simply claims that her salary

during the charge-filing period reflected the lingering effects of allegedly discriminatory decisions made outside of the charge-filing period by various supervisors. This is precisely the kind of stale "perpetuation" claim that *Evans, Ricks, Lorance,* and *Morgan* hold is too late to bring. *See Morgan*, 536 U.S. at 112-13; *Lorance*, 490 U.S. at 906-07; *Ricks*, 449 U.S. at 258; *Evans*, 431 U.S. at 558; *see also Chardon v. Fernandez*, 454 U.S. 6, 7-8 (1981) (per curiam).

There is no basis for applying a different charge-filing rule to discrete acts of intentional pay discrimination than to other discrete acts like hiring, promotion, assignment, and termination. The statutory text draws no distinction between pay claims and those other kinds of claims, and *Morgan* itself mentions pay claims in describing the limitations rule applicable to discrete acts of alleged discrimination. *See Morgan*, 536 U.S. at 112-13. Moreover, a pay decision is no more or less discrete, and no more or less continuous, than an act of termination, failure to promote, denial of transfer, or the like. With respect to all, a decision is made and is then implemented; with respect to all, the employer can generally change the decision at any time or leave it as initially made. The employer reaffirms a pay decision no more or less than any of the other kinds of decisions by allowing it to take effect in subsequent time periods; an employer continues to carry out, for example, a failure to promote or denial of transfer by continuing to employ an individual in one capacity rather than another at a specified rate of pay and benefits. In fact, these other decisions are defined, in whole or in part, by the pay associated with them. There is no principled or manageable basis for applying different charge-filing rules to these various kinds of discrete employment decisions (or, to the extent that a decision is in part defined by a pay change, two charge-filing rules to the same decision).

Finally, to allow Ledbetter to bring such an untimely intentional discrimination claim would completely defeat section 706(e)'s twin goals of protecting defendants and

courts from the hazards of stale claims and of encouraging prompt conciliation instead of delayed litigation. Ledbetter's late-filed claim is contrary to both statutory purposes.

Here, there was little information available at trial in 2003 about the determinations made regarding Ledbetter's salary between 1979 and 1992 and about her comparative performance during that time. Yet most of the shortfall of which Ledbetter complains arose during that time. J.A. 166, 195. Moreover, Mike Maudsley, who Ledbetter claimed at trial was responsible for the alleged discrimination against her in the 1980's, was deceased by the time of trial. Allowing Ledbetter to base a present liability claim on such long-past acts—particularly when the record demonstrates that she knew by no later than 1982 how to avail herself of the EEOC charge-filing process, and that she knew by no later than 1992 of a disparity between her salary and those of some male Area Managers—would authorize precisely the sort of litigation over stale claims that section 706(e) seeks to prevent.

Moreover, permitting such stale claims would impose wholly unfair risks and burdens on employers. In order to avoid and/or defend against such claims, employers would annually have to investigate all prior salary decisions and attempt to determine whether or not they were based solely on non-discriminatory factors. In many circumstances, documents relevant to such investigations would no longer exist, as record retention laws have limited timeframes and limited scope, *see, e.g.*, 29 C.F.R. § 1602.14 (2006); *see also* Pet. Br. at 28 n.14, and as the burdens of keeping records for long periods can be substantial. Moreover, documents rarely tell the entire story, and yet relevant witnesses will often have moved on, retired, or died, or simply will no longer remember critical facts. Further, as former Justice Marshall once noted, "acts that may constitute Title VII violations are generally effected through the actions of individuals," not through "company[-]wide discriminatory policies violative of Title VII," and those individuals "often" may "take . . .

step[s] even in defiance of company policy" prohibiting discrimination. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring). In short, past intentional discrimination frequently is unknown to the current management of an employer like Goodyear, and often will be difficult if not impossible to uncover.

In sum, it would be extraordinarily improper to permit Ledbetter's stale intentional pay discrimination claim to go forward. That claim could have previously been brought in a timely manner. It was not. It is based on allegations that a deceased prior manager or other such individual managers may have acted some years earlier in a discriminatory manner in defiance of company policy. This Court has consistently construed section 706(e) to bar private plaintiffs from bringing such untimely claims.

II. *BAZEMORE v. FRIDAY* DOES NOT AUTHORIZE AN INTENTIONAL PAY DISCRIMINATION CLAIM BY A PRIVATE PARTY CONCERNING ALLEGED DISCRIMINATION OCCURRING OUTSIDE OF THE CHARGE-FILING PERIOD.

In arguing that she may bring an intentional pay discrimination claim based on the effects of decisions made outside of Section 706(e)'s charge-filing period, Ledbetter and her amici rely almost exclusively on snippets of language from this Court's decision in *Bazemore*. But *Bazemore* involved a claim by the United States that could not previously have been brought; that was not subject to section 706(e); and that concerned intentional discrimination in pay that allegedly was continuing. Section 706(e) was not in issue; and there was no claim, much less a holding, that a present intentional pay discrimination claim by a private party could rest entirely on actions taken outside of the charge-filing period. *Bazemore* simply is not proper authority for the kind of untimely intentional pay discrimination claim that Ledbetter seeks to pursue.

A. *Bazemore* Involved Allegations By The United States Of Present Intentional Discrimination; And This Court Merely Rejected The Employer's Defense That The Claim Was Barred Because The Alleged Discrimination Began Before Title VII's Effective Date.

At issue in *Bazemore* were the pay practices of the North Carolina Agricultural Extension Service after 1972, when Title VII first became applicable to public employers. The case came to the Court on a record showing that, until August 1, 1965, when Title VII became effective for private employers, the Extension Service had been "divided into two branches: a white branch and a 'Negro branch.'" *Bazemore*, 478 U.S. at 390. "The white branch employed no blacks . . . ." *Id.* "The 'Negro branch' was composed entirely of black personnel and served only black farmers, homemakers, and youth." *Id.* The Extension Service openly paid blacks less than whites who performed the same work in these two branches. *See id.* While the Extension Service "merged the two branches . . . into a single organization" on August 1, 1965, it did not, going forward, change its practice of paying blacks at a lower rate than whites. *Id.* at 390-91. Rather, after 1965, the Extension Service made annual salary adjustments "on a nondiscriminatory basis," but maintained the institutionally segregated base salaries created by the facially discriminatory, pre-1965 salary practices. *Bazemore v. Friday*, 751 F.2d 662, 666 (4th Cir. 1984).

The United States alleged that, in compensating black employees after 1972, the Extension Service was, for discriminatory purposes, knowingly and intentionally continuing the institutionally segregated salaries that previously had been established. *See id.* at 671. The district court found that the weight of the evidence did not support the United States' claim. *See id.* at 665-66, 671-72. A Fourth Circuit panel affirmed, holding that the United States' claim was barred because the alleged salary discrimination had begun prior to the statute's effective date, and further

holding that the United States' evidence—and, in particular, its regression analysis—was legally insufficient to establish intentional pay discrimination after 1972. *See id.* at 670-74. Judge Phillips wrote a vigorous dissent on both counts. *See id.* at 689-96 (Phillips, J., dissenting) (describing evidence of intentional discrimination after 1972, including "weighty" testimonial "evidence of knowing, intentional continuation of acknowledged discriminatory [salary] policies").

In this Court, the United States again argued that, although the Extension Service first decided "to pay black employees less than whites for the same work . . . before Title VII became applicable to public employers," the Extension Service's "compensation scheme remained *intentionally* discriminatory" after 1972. Br. for the Federal Petitioners, *Bazemore v. Friday*, 1985 WL 669751, at *20 n.18 (emphasis added). The United States argued that the post-1972 salary practices violated Title VII not because there was a mere continuation of the pre-1972 "disparity in salaries," *id.*, but because the Extension Service "ha[d] *purposely* continued [its] discriminatory system subsequent to the enactment of Title VII." Reply Br. for the Federal Petitioners, *Bazemore v. Friday*, 1986 WL 728399, at *4-*5 (emphasis added). Indeed, the United States argued that, "[r]ather than simply failing to remedy the effect of a discrete pre-Act discriminatory action, the [Service] continu[ed] its intentional discrimination on the basis of race." *Id.* at *5. The amicus briefs filed in *Bazemore* reflected this same understanding of the facts and allegations in the case. *See, e.g.*, Br. of the AFL-CIO as Amicus Curiae Supporting Petitioners, *Bazemore v. Friday*, 1986 WL 728218, at *10 (arguing that the United States had "shown that the employer . . . maintained [a] race-skewed differential *with discriminatory intent*") (emphasis added).

This Court reversed, both with regard to whether the origin of the salary disparities could serve as a defense to the United States' claim, and with regard to the evaluation of the United States' evidence of intentional discrimination in pay

after 1972. *See Bazemore*, 478 U.S. at 386-87. As the United States did in its briefs, Justice Brennan's concurring opinion (joined by all members of the Court) stressed that the "'critical question'" is "'whether any *present violation* exists.'" *Id.* at 396 n.6 (quoting *Evans*, 431 U.S. at 558) (emphasis in *Bazemore*). Justice Brennan distinguished *Evans* and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), on the ground that, in those cases, "the employer was not engaged in discriminatory practices at the time [of] suit." 478 U.S. at 396 n.6. Justice Brennan stated that, in *Bazemore*, in contrast, the United States had alleged that the employer did "*not* from the date of the Act forward 'ma[ke] all [of its] employment decisions in a wholly nondiscriminatory way.'" *Id.* (quoting *Hazelwood*, 433 U.S. at 309) (emphasis in original). And, finally, Justice Brennan explained the errors that the court of appeals had committed in evaluating whether the post-1972 salary decisions were made because of, rather than in spite of, race. *See id.* at 397-404.

In short, contrary to Ledbetter and her amici, the Court in *Bazemore* had no occasion to hold that section 706(e) allows a private plaintiff to bring an intentional pay discrimination claim concerning present pay disparities that are merely the result of pay decisions made outside of the charge-filing period. The United States is not subject to section 706(e) or any other statute of limitations under Title VII, *see Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977), and section 706(e) thus was not even at issue in *Bazemore*. Moreover, *Bazemore* did not involve a claim that previously could have been but, as here, was not timely brought. Indeed, there is an obvious difference between pre-Act discrimination and discrimination against an employee which occurs outside the charge-filing period. In the former situation, a finding that deliberate perpetuation of pre-Act discrimination is permissible would "have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks."

Bazemore, 478 U.S. at 395. In contrast, discrimination prior to the charge-filing period is in no way exempt from Title VII's reach because employees (and/or the Government) can timely avail themselves of the statute's protections.

In any event, in contrast to Ledbetter's claim here, the United States did not claim in *Bazemore* that unlawful pay discrimination could be established wholly by reference to allegedly discriminatory acts occurring outside of an applicable limitations period—much less acts that could have been, but were not, made the subject of a timely charge. Rather, the United States asserted in *Bazemore* that the challenged pay practices reflected ongoing intentional discrimination by the Extension Service itself. That claim of ongoing intentional pay discrimination by the Extension Service post-1972 was the claim that the Court held could be pursued (and was not barred simply because the alleged discriminatory policy and practice had been initiated before Title VII's effective date). Indeed, that was the claim with respect to which the Court further held that the Fourth Circuit had erred in evaluating the proof of the Extension Service's continuing discriminatory intent—proof that would have been irrelevant if the post-1972 salary disparities were themselves sufficient to establish a present claim. The claim of present, continuing, intentional discrimination was key to *Bazemore*. *See id.* ("A [pre-Act discriminatory] pattern or practice . . . became a violation upon Title VII's effective date, and *to the extent an employer continued to engage* in that act or practice, it is liable under that statute.") (emphasis added). But Ledbetter has no such claim here.

This Court's decision in *Lorance* confirms this understanding of *Bazemore*. In *Lorance*, the Court held that a claim of intentional discrimination in the adoption of a seniority system was untimely when not filed within 180 days of the adoption of that system, even though the resulting facially neutral seniority system was applied within the charge-filing period. The *Lorance* Court distinguished *Bazemore* on the ground that *Bazemore* did not involve a

claim merely concerning the present effects of past intentional discrimination. *See Lorance*, 490 U.S. at 913 n.5. Rather, consistent with the briefing and opinion in *Bazemore*, the *Lorance* Court described *Bazemore* as a case involving allegations of intentional discrimination that occurred after the effective date of Title VII—specifically, what the Court in *Lorance* described as intentional discrimination arising from the application of a "facially discriminatory" pay policy that "discriminates each time it is applied." *Id.* But, as the Question Presented here makes clear, the claim in this case does not concern allegations of facial discrimination, or any other kind of intentional discrimination, within the limitations period. Thus, as understood by this Court in *Lorance*, *Bazemore* cannot properly be said to authorize Ledbetter's claim.

In short, *Bazemore* held only that an employer could not defend the continuation of racially segregated salaries for discriminatory purposes by pointing out that the discrimination began pre-Act. *Bazemore* does not support Ledbetter's sweeping assertion that nondiscriminatory implementation of a facially neutral system can somehow constitute unlawful discrimination simply because there were discriminatory departures from that neutral policy by individual supervisors in the past. Any such rule would run headlong into both *Lorance*'s interpretation of *Bazemore* and the settled principle that acts within the charge-filing period are not actionable simply because they perpetuate the effects of prior discriminatory acts.

B. Ledbetter Misconstrues Snippets Of Language In Justice Brennan's *Bazemore* Concurrence.

In arguing to the contrary, Ledbetter and her amici seize upon snippets of language in Justice Brennan's concurring opinion in *Bazemore*. They claim that this language supports two broader, alternative understandings of *Bazemore*. But the language that they seize upon cannot sustain the legal rule that they seek to create.

1. Ledbetter initially argues (Pet. Br. 3, 20-22) that her claim is timely presented because, under Justice Brennan's opinion in *Bazemore*, each "week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . . ." *Bazemore*, 478 U.S. at 395. But that language has no proper application to Ledbetter's claim here.

As explained above, unlike this case, *Bazemore* involved allegations of *present* intentional discrimination—to wit, the alleged maintenance of institutionally segregated pay rates for a discriminatory purpose. Moreover, in *Bazemore*, the employer sought to defend against those allegations by asserting that the discriminatory pay structure had been created before the effective date of the statute. It was in this context that Justice Brennan stated that "[e]ach 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." 478 U.S. at 395-96.

Contrary to Ledbetter and her amici, the "[e]ach week's paycheck" language cannot properly be understood apart from the context in which it was written. The emphasis in the sentence itself is on an illegal "pattern" of intentional pay discrimination begun before, and allegedly continued after, the statute's effective date. *Id.* at 395. The opinion goes on to reiterate that, under *Evans* and *Hazelwood*, the "'critical question'" is "'whether any *present violation* exists.'" *Id.* at 396 n.6 (quoting *Evans*, 431 U.S. at 558) (emphasis in *Bazemore*). Thus, in *Bazemore*, the alleged maintenance of institutionally segregated pay rates for a discriminatory purpose after 1972 constituted the requisite "present violation" and, if proved, would render each paycheck issued an intentionally discriminatory, independently actionable act that violated Title VII (and that was not subject to a statute of limitations when challenged by the United States). But Justice Brennan did not suggest that, absent sufficient evidence of present intentional discrimination, paychecks

delivering different amounts to black and white employees would by themselves constitute a violation of Title VII; on the contrary, the next part of Justice Brennan's opinion proceeds from the premise that legally sufficient evidence of present intentional discrimination was required. *See id.* at 397-404. Thus, in distinguishing the same "[e]ach week's paycheck" language, the *Lorance* Court stressed that the limitations inquiry "focuses on the timing of the *discriminatory* acts . . . ." *Lorance*, 490 U.S. at 913 n.5 (emphasis in original).

Here, there is no comparable argument that Goodyear maintained institutionally segregated pay rates for a discriminatory purpose within the charge-filing period. The Eleventh Circuit found no evidence of intentional discrimination in pay during the charge-filing period, in either the salary rate decision or the issuance of paychecks. Pet. App. 31a. Moreover, while Ledbetter complains that her salary within the charge-filing period reflects the effects of past, allegedly discriminatory decisions by individual managers, Ledbetter has never adduced evidence that, during the charge-filing period, Goodyear perpetuated the base rate of her salary with the *purpose* of discriminating against her. *See Feeney*, 442 U.S. at 279 (question is whether defendant made the challenged decision "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" women). On the contrary, the use of existing salary as the base pay rate is part of Goodyear's facially neutral "Pay for Performance" program, which is applied to all men and women alike. J.A. 69-70, 87-88, 120-21; Tr. 256-57, 344, 351. In short, as the Question Presented presumes, there is no present intentional discrimination at issue here, and the lack of any *present* intentional discrimination renders the "[e]ach week's paycheck" language wholly inapplicable.

2. Ledbetter alternatively argues that *Bazemore* recognized an "'obligation'" on the part of employers to "'eradicate salary disparities based on race'" or sex even if the disparity arose outside the limitations period. Pet. Br. at

42 (quoting *Bazemore*, 478 U.S. at 397). Once again, Ledbetter is improperly stripping the language of Justice Brennan's opinion from the context in which it was used.

As explained above, in *Bazemore*, the Extension Service employed a facially discriminatory compensation system before 1965, segregating blacks and whites into two separate branches and paying blacks less than whites who performed the same work. *See Bazemore*, 478 U.S. at 390. Although the Extension Service combined the two branches in 1965, it continued thereafter, allegedly for discriminatory purposes, to pay blacks and whites completely different salaries for the same work, and even continued doing so after Title VII became effective for public employers in 1972. It was in this context—of a prior facially discriminatory pay policy creating institutionally segregated salaries that were allegedly continued for discriminatory purposes—that Justice Brennan made the statement that "the Extension Service was under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII . . . ." *Id.* at 397.

Contrary to Ledbetter and her amici, the "obligation to eradicate salary disparities based on race" language cannot properly be applied without regard to whether the case involves institutionally segregated salaries that arose from a facially discriminatory pay structure and that were allegedly continued for intentionally discriminatory purposes. In the same breath in *Bazemore*, Justice Brennan reiterated that the United States was "alleging that in continuing to pay blacks less than similarly situated whites, respondents have *not* from the date of the Act forward 'made all [their] employment decisions in a wholly nondiscriminatory way.'" *Id.* at 396 n.6 (quoting *Hazelwood*, 433 U.S. at 309) (emphasis and brackets in *Bazemore*). Justice Brennan further reiterated that the Court's decision "in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* and *Hazelwood*, focuses on the present salary *structure*, which is illegal if it is a mere continuation of the

pre-1965 discriminatory pay *structure*." *Id.* (emphasis added). And Justice Brennan went on to evaluate the evidence of the alleged continuing discriminatory purpose—an evaluation that, again, was unnecessary if there was an unqualified obligation to eliminate any disparities attributable to past discrimination. *See id.* at 397-404. In other words, Justice Brennan tied the "obligation to eradicate salary disparities based on race" language to institutionally segregated salaries (arising from a prior facially discriminatory pay structure) that allegedly were purposefully continued, because of race, into the present, actionable time period. Justice Brennan did not purport to be establishing an untethered obligation to identify and correct all present effects of past intentional discrimination by any supervisor, whether known or unknown to the employer, whether continued with discriminatory purpose or not, and whether subject to section 706(e) or not.

Here, of course, Goodyear's compensation system was facially neutral. Pet. Br. at 5, 48. Ledbetter received the same starting salary as male supervisors. J.A. 39, 151-52. She was subject to the same salary adjustment rules as were male employees—including the rule that each year's salary decision took existing salary as a given and only provided an adjustment up to a maximum percentage increase. J.A. 69-70, 87-88, 120-21; Tr. 256-57, 344, 351. Further, Ledbetter received larger percentage salary adjustments in some years than did male supervisors (Pet. App. 5a-6a; J.A. 174, 193); and she admitted that at least one of her managers, Mike Nunn, did not discriminate against her in her pay between 1990 and 1992 (Tr. 132-33). Thus, unlike in *Bazemore*, where it was undisputed that the Extension Service facially discriminated against all blacks in compensation until 1965, and it was alleged that the Extension Service continued these segregated compensation rates thereafter for intentionally discriminatory purposes, here there were no alleged "male" and "female" pay rates for Goodyear to dismantle and eradicate. Rather, here, Ledbetter is merely complaining that

individual managers sometimes adjusted her salary on a discriminatory basis years before she filed her EEOC charge. Justice Brennan's "obligation to eradicate" language was aimed at the Extension Service's facially discriminatory pay structure and the purposeful continuing use of the institutionally segregated pay rates that arose from it; that language was not aimed at the kinds of isolated and discrete decisions by multiple lower-level managers at different points in time over a 19-year period that Ledbetter is challenging, and Justice Brennan's language cannot fairly be read to contemplate the sweeping and burdensome duty on employers that Ledbetter would impose.

Indeed, Ledbetter's argument that *Bazemore* recognized a continuing affirmative duty to eradicate the effects of all past intentional pay discrimination—whether known or unknown to the employer, whether continued for discriminatory reasons or not, whether untimely under section 706(e) or not—cannot be reconciled with the language and structure of Title VII. Such a duty is contrary to section 706(e) and this Court's holding that it forecloses claims based on mere "perpetuati[on]" of effects. *Evans,* 431 U.S. at 557. Such a duty would also wrongly transform section 703(a)(1)'s *prohibition* on discrimination into a requirement of affirmative conduct by employers, akin to the leave requirements of the Family and Medical Leave Act, the reasonable accommodation requirements of the Americans with Disabilities Act, and other provisions of so-called "minimum employment standards" statutes. Such a duty would contravene section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), which provides that nothing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment to any . . . group . . . on account of" a *de facto* imbalance in the employer's work force. And such a duty would conflict with the Bennett Amendment set forth in section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which makes the Equal Pay Act, not Title VII, the governing law for claims about gender-related pay practices that are not

presently intentionally discriminatory. *See Gunther*, 452 U.S. at 170-71.

3. In sum, the language that Ledbetter and her amici seize upon in Justice Brennan's opinion in *Bazemore* need not and should not be read as they suggest. While the language has potentially broad implications when read in isolation, the language is of much more limited significance when read in the context of the facts, allegations, and opinion to which it is tied. Moreover, the language—as construed by Ledbetter and her amici—plainly goes beyond the limited holding of *Bazemore* (concerning whether the Extension Service could defend against the United States' claim by showing that the challenged disparity had its origins in pre-Act discrimination); and this Court has repeatedly said that "[i]t is to the holdings of our cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994). Indeed, the Court has warned against "dissect[ing]" the language of its prior opinions "as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). That warning is particularly apt here, since the broader understandings of Justice Brennan's language that Ledbetter and her amici urge directly conflict with the Court's decisions in *Evans*, *Ricks*, *Lorance*, and *Morgan*—all of which reject the notion that Title VII allows private plaintiffs to base intentional discrimination claims on discrete acts occurring outside of the charge-filing period. The Court should decline Ledbetter's invitation to create such a conflict between its cases.

III. LEDBETTER'S REMAINING ARGUMENTS ARE ALSO IN ERROR.

In addition to her erroneous construction of *Bazemore*, Ledbetter offers four other arguments for construing Title VII to allow her untimely claim. Each argument is flawed.

A. Ledbetter's Empirical And Policy Arguments Wrongly Ask The Court To Rewrite Section 706(e).

Ledbetter and her amici suggest that various empirical and policy considerations should cause the Court to construe section 706(e) to allow intentional pay discrimination claims challenging effects of past decisions. They assert that women are generally offered lower starting salaries than men; that employees, fearing retaliation, may be "understandabl[y]" "reluctan[t] to rock the boat" by promptly challenging pay decisions; and that employees may lack the incentives or information to challenge intentional pay discrimination until the "harm" from discrete salary decisions has "accumulat[ed]." *See* Pet. Br. at 22-29; Br. of Nat'l P'ship for Women & Families as Amicus Curiae In Support of Petitioner at 3. On the basis of these assertions, they further argue that alleged victims of discrimination should not be denied a remedy and that the equitable doctrine of laches and the two-year limit on backpay imposed by section 706(g)(1), 42 U.S.C. § 2000e-5(g)(1), "adequately protect[] employers' interest in avoiding stale claims." Pet. Br. at 28. But these arguments provide no legal basis for rewriting the statutory text that this Court has already authoritatively construed to the contrary.

First, the record of this case provides little support for the sweeping assertions that Ledbetter and her amici advance. Ledbetter started at the same salary as other male supervisors. J.A. 39, 151-52. In a number of years, she received larger percentage raises than her male co-workers. Pet. App. 5a-6a; J.A. 174, 193. While her absolute salary did not grow over time to the same extent as those of some male co-workers, she was on layoff early in her career when most of them were not, and she received lower performance evaluations in many years. Pet. App. 5a-7a, 9a; J.A. 174-77, 189-92. Moreover, while Ledbetter offered anecdotal testimony that Goodyear hired few other women supervisors at this plant and paid them less than it paid men, she did not

substantiate this speculation with supporting documents. Nor did she offer any of the qualified labor market data or appropriately controlled statistical studies that this Court has held are necessary to draw a legitimate inference of discrimination (particularly an inference of systemic discrimination). *See, e.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-58 (1989); *Hazelwood*, 433 U.S. at 307-13. Furthermore, early in her career, Ledbetter filed a charge of discrimination with the EEOC, J.A. 103-09—showing that at least some employees are willing promptly to assert their rights and that, when they do so, nonretaliatory responses and amicable resolutions are possible. In addition, although she waited until 1998 to file a charge alleging intentional pay discrimination, Ledbetter was aware, by no later than 1992, of a disparity between her salary and the salaries of some male supervisors, and, by 1995, had learned that this disparity was "a thousand [dollars] at least more per month . . . ." J.A. 231-32; *see also* J.A. 233, 236-37, 239-40. Indeed, Ledbetter testified that "[d]ifferent people that [she] worked for along the way had *always* told [her] that [her] pay was extremely low." J.A. 233 (emphasis added). Thus, by her own admissions, Ledbetter had notice of a substantial wage disparity—providing plenty of financial incentive for a claim—years before she first brought her intentional pay discrimination charge. Whatever the case may be more generally with respect to the "legislative facts" asserted, the record of this proceeding—*i.e.*, the conventional basis for drawing judicial inferences—paints a very different picture than has been suggested.

Second, the law already contains numerous provisions that address the concerns that Ledbetter and her amici raise. In addition to the substantive requirements of the Equal Pay Act and the prohibition on discrimination in compensation in section 703(a)(1) of Title VII, section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), allows a prevailing Title VII plaintiff to recover reasonable attorneys' fees. That provision was intended to "make it easier for a plaintiff of limited means"

to obtain legal representation and "to bring a meritorious [discrimination] suit" even if the potential recovery is small. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978) (internal quotation marks omitted). In addition, Title VII allows compensatory and punitive damages awards both as a further incentive for plaintiffs to bring meritorious cases and as a deterrent to employers from violating the law. *See* 42 U.S.C. § 1981a. Moreover, Title VII's anti-retaliation provision provides an employee with "broad protection" from retaliation "because that individual 'opposed any practice' made unlawful by Title VII or 'made a charge, testified, assisted, or participated in' a Title VII proceeding or investigation." *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2408, 2413 (2006) (quoting 42 U.S.C. § 2000e-3(a)). And the "time period for filing a charge [under section 706(e)] is subject to equitable doctrines such as tolling or estoppel" if appropriate circumstances, such as a defendant's concealment of the basis for a plaintiff's cause of action, are established. *Morgan*, 536 U.S. at 113; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Third, at bottom, Ledbetter is asking this Court to rewrite the statute so that it will favor a plaintiff's right to challenge past acts of alleged discrimination over the interests served by section 706(e). But this Court has repeatedly rejected the argument that "strict adherence" to the requirements of section 706(e) is "'unfair' or that 'a less literal reading'" of section 706(e) would better effectuate the purposes of Title VII. *Morgan*, 536 U.S. at 108-09 (quoting *Mohasco*, 447 U.S. at 824-25).

It is true, of course, that strict adherence to section 706(e) will bar some claims that otherwise might be meritorious. But section 706(e) reflects Congress's judgment "concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Ricks*, 449 U.S. at 259-60 (internal quotation marks omitted). Particularly where

"Congress carefully prescribed a series of deadlines," reflecting a "compromise" essential to the enactment of Title VII as a whole, this Court "must respect" the choice "embodied in [Congress's] words," and may not "simply . . . alter the balance struck by Congress . . . by favoring one side or the other in matters of statutory construction." *Mohasco*, 447 U.S. at 825-26.

Furthermore, contrary to the impression that Ledbetter and her amici seek to create, honoring the balance struck by section 706(e) does not leave victims of intentional pay discrimination claims without a remedy. They can bring timely Title VII claims. Moreover, the EEOC and the United States can seek relief on their behalf, and are not subject to section 706(e). Perhaps even more importantly, women such as Ledbetter may bring claims under the Equal Pay Act, which is subject to a longer limitations period, *see* 29 U.S.C. § 255, and which focuses on the question of equal pay for "equal work," *id.* § 206(d)(1), rather than on stale questions of intent in past decisions in years gone by.

Finally, the defense of laches and the two-year limit on backpay in section 706(g)(1) do not adequately protect employers' interest in avoiding stale claims. "[A]n employer may raise a laches defense" "[i]n *addition* to other [available] equitable defenses" and the protection against stale claims afforded by a statute of limitations. *Morgan*, 536 U.S. at 121 (emphasis added). But "laches is not a *substitute* for a statute of limitations," 27A Am. Jur. 2d *Equity* § 148 (2d ed. 2006) (emphasis added), particularly not for the "carefully prescribed" one measured precisely "by numbers of days" established in section 706(e). *Mohasco*, 447 U.S. at 825. Likewise, while the two-year backpay rule provides some protection for employers in Title VII cases, there are no comparable backpay limit rules in other employment statutes that contain limitation periods like that in section 706(e). Further, the two-year backpay limit is no justification for allowing a liability award—that may include compensatory and punitive damages—on a claim that section

706(e) defines as stale. As this Court has recognized, section 706(g) is not an appropriate basis for relaxing the charge-filing requirement or expanding the scope of liability under Title VII. *See, e.g.*, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 578-82 (1984); *Evans*, 431 U.S. at 558-59.

B. Ledbetter's Argument For Acquiescence In Allegedly Consistent Positions Of Most Courts Of Appeals And The EEOC Is Meritless.

Ledbetter next suggests (Pet. Br. at 29-33) that this Court should acquiesce in the positions of most courts of appeals and the EEOC, which she claims have consistently allowed plaintiffs to raise intentional pay discrimination claims based on alleged acts of discrimination taking place outside of the charge-filing period. This suggestion is meritless.

1. The courts of appeals simply have not consistently adopted the position that Ledbetter advocates. Rather, as she argued in her petition, "[t]he [c]ourts of [a]ppeals [a]re [i]ntractably [d]ivided [o]ver the [q]uestion [p]resented" in this case, and "the proper treatment of disparate pay claims under *Morgan* and *Bazemore* has generated considerable conflict and confusion in [the] circuits . . . ." Pet. at 9, 13.

First, some courts—like the court below—have held that an intentional pay discrimination claim is untimely if it merely challenges the present effects of acts taken outside of the charge-filing period. As Ledbetter admitted in her petition (Pet. at 13-14), *Dasgupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997), also held that a plaintiff's pay claim was untimely because "[t]here were no new violations during the limitations period, but merely a refusal to rectify the consequences of time-barred violations." *Id.* at 1140. "[A]n untimely Title VII suit," the court explained, "cannot be revived by pointing to effects within the limitations period of unlawful acts that occurred earlier." *Id.*

Second, while some courts have adopted Ledbetter's position, these courts have disagreed regarding how far back a plaintiff may reach in seeking damages. Some have held that backpay is limited to the disparity in salary during the limitations period. *See, e.g.*, *Forsyth v. Fed'n Employment & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005). Others have held that plaintiffs can recover up to two years of backpay. *See, e.g.*, *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1011 (10th Cir. 2002). And still others have allowed recovery to the date of the earliest discrimination. *See, e.g.*, *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1398, 1400 (9th Cir. 1986).

Third, most of the courts adopting the position urged by Ledbetter have reasoned that intentional pay discrimination constitutes a "continuing violation," so that as long as the plaintiff receives one disparate paycheck during the limitations period, a charge with respect to related discriminatory acts outside the period is timely. *See, e.g.*, *Goodwin*, 275 F.3d at 1009; *Cardenas v. Massey*, 269 F.3d 251, 258 (3d Cir. 2001); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347 (4th Cir. 1994); *Bartelt v. Berlitz Sch. of Languages of Am., Inc.*, 698 F.2d 1003, 1004 (9th Cir. 1983); *Hall v. Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir. 1982). As the court below correctly noted, however, *Morgan* rejected the "continuing violation" theory on which these cases are based.

In sum, there is simply no consistent position of the courts of appeals in which this Court can acquiesce.

2. Nor should this Court acquiesce in the EEOC's present view that an intentional pay discrimination claim is timely as long as the plaintiff received a single disparate paycheck within the limitations period. Ledbetter herself does not argue, nor could she, that the EEOC's view is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See*

Morgan, 536 U.S. at 110 n.6 ("[W]e have held that the EEOC's interpretive guidelines do not receive *Chevron* deference."). Nor is the EEOC's interpretation "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The present version of the EEOC Compliance Manual, citing *Bazemore*, provides that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period." EEOC Compliance Manual § 2-IV.C. But, as noted above, *Bazemore* involved allegations of present intentional discrimination, and does not establish the timeliness of a claim based only on the effects of past discrimination.

Moreover, prior to 2001, the EEOC had justified its position on a different ground—by reference to "continuing violations" doctrine. Thus, the 2000 version of the EEOC Compliance Manual discussed the timeliness of intentional pay discrimination claims under the section entitled "Continuing Violations," and provided that, if "a charge raises a continuing violation, all of the events forming part of the continuing violation, including those that transpired outside the filing period, are considered timely, and relief may be obtained for all of the discriminatory events." EEOC Compliance Manual § 2-IV.C.2, at 5741 (July 27, 2000); *see also id.* at 5743. Similarly, prior to 2001, the EEOC reasoned in briefs and administrative decisions that such intentional pay discrimination claims were timely on a "continuing violation" theory. *See, e.g.*, Br. of the EEOC as Amicus Curiae, *Cardenas v. Massey* (3d Cir. 2001), 2000 WL 33988483, at *13 n.10; *Wintner v. Cisneros*, No. APL 01962705, 1996 WL 713995, at *1 (E.E.O.C. Dec. 5, 1996). The EEOC abandoned this view, and adopted its present view, only in the wake of *Morgan's* rejection of the "continuing violation" theory.

In short, the EEOC's present view rests on a misconstruction of *Bazemore*, and its prior view was rejected in *Morgan*. Considering the lack of "thoroughness," "validity," or "consistency" in the EEOC's pronouncements, its views are not entitled to any respect at all. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (internal quotation marks omitted).

3. In all events, this Court has stressed that "no deference is due to . . . interpretations at odds with the plain language of [a] statute itself." *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989); *see also Mohasco*, 447 U.S. at 825. For that reason, this Court has not hesitated to reach conclusions that are contrary to the unanimous positions of the courts of appeals and the EEOC. *See, e.g.*, *Betts*, 492 U.S. at 175 (rejecting the position of the EEOC and all five courts of appeals that considered the question presented); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 346 n.28 (1977) (rejecting a position that "enjoyed wholesale adoption in the Courts of Appeals" and by the EEOC); *Gilbert*, 429 U.S. at 145-46 (rejecting the position of the EEOC and all six courts of appeals that addressed the question presented). The language of section 706(e) and this Court's cases interpreting it make clear that the Court should do so here as well.

C. Ledbetter's Inapt Analogies Concern Claims About Present Violations of Law.

Ledbetter also contends (Pet. Br. at 34-38, 42-46) that numerous "analogous contexts" demonstrate that her challenge to the present effects of alleged unlawful discrimination outside the charge-filing period should be considered timely. But the only relevant analogy that Ledbetter identifies—cases under the NLRA—in fact confirms that her claim is time-barred. Her remaining analogies are inapposite.

1. As Ledbetter correctly argues, the NLRA "served [as] a model for many of Title VII's enforcement

provisions." Pet. Br. at 36 (citing *Lorance*, 490 U.S. at 909). But, as *Lorance* held, this Court's principal NLRA limitations case, *Machinists*, confirms that the limitations period on an intentional discrimination claim begins to run with the adoption of a discriminatory policy, and not with each application of that policy. *See Lorance*, 490 U.S. at 911. Where a complaint based on events outside the limitations period is time-barred, permitting those events "to cloak with illegality" conduct within the limitations period that is "otherwise lawful" and did not independently violate the law "in effect results in reviving a legally defunct" claim, contrary to the limitations period set by Congress. *Machinists*, 362 U.S. at 417.

Moreover, *News Printing Co.*, 116 N.L.R.B. 210 (1956), which is cited in *Machinists*, 362 U.S. at 421 n.13, confirms that no different analysis applies in the context of a pay claim. In *News Printing Co.*, the complaint alleged that the employer had violated the NLRA by refusing to grant wage increases to employees because they had supported a union. 116 N.L.R.B. at 210. However, the only evidence presented "involved conduct occurring more than 6 months before the filing of the [relevant] charge[] . . . ." *Id.* at 211. The NLRB explained that, "[w]hile evidence . . . concerning conduct which occurred prior to the statutory 6-month period may be utilized as background evidence to evaluate a Respondent's subsequent conduct, it is well established that Section 10(b) of the Act precludes . . . giving independent and controlling weight to such evidence." *Id.* at 212 (footnote omitted).

The NLRA cases upon which Ledbetter relies are not to the contrary. Each case involved an *independent* violation of the NLRA within the limitations period. *See Gen. Motors Acceptance Corp. v. NLRB*, 476 F.2d 850, 853 (1st Cir. 1973) (finding a present violation of the NLRA based not on the employer's decision outside the limitations period to stop giving merit increases to its employees, but "upon a number of acts committed *within the limitations period* which . . . indicate that [the employer] was attempting to

discredit the union") (emphasis added); *Melville Confections, Inc. v. NLRB*, 327 F.2d 689, 691 (7th Cir. 1964) (explaining that maintenance of a facially discriminatory profit-sharing plan that excluded unionized employees from participation "carried with it its own inherent evidence of intent" to "discourage[] union membership" and constituted a complete violation of the NLRA without reference to conduct outside the limitations period) (internal quotation marks omitted); *NLRB v. F.H. McGraw & Co.*, 206 F.2d 635, 639 (6th Cir. 1953) (noting, before *Machinists* was decided, that the enforcement of a closed shop agreement, which on its face violates the NLRA, constitutes independently actionable conduct without reference to the circumstances of the adoption of the agreement outside the limitations period); *Farmingdale Iron Works, Inc.*, 249 N.L.R.B. 98, 99 (1980) (concluding that each failure to make contractually required benefit fund payments within the limitations period constituted an independent, "separate and distinct" violation of the NLRA without the need to examine conduct outside the limitations period).

2. Ledbetter's other analogies are also flawed: In each instance, the alleged unlawful act—as defined in each pertinent area of law—occurs during the limitations period.

For example, under the Equal Pay Act, "[a] violation occurs when an employer pays lower wages to an employee of one gender than to substantially equivalent employees of the opposite gender in similar circumstances"—without the "need [to] prove that the pay disparity was motivated by . . . discriminat[ion] . . . ." *Pollis v. New Sch. for Social Research*, 132 F.3d 115, 118 (2d Cir. 1997) (discussing 29 U.S.C. § 206(d)). Thus, the mere payment of a disparate wage constitutes an independent violation and starts a new limitations period each time that it occurs.

So, too, under the Fair Labor Standards Act, "the source of [an employee's] recovery is the failure to pay [the employee] overtime, not the [employer's] rationale for not

paying" overtime. *Knight v. City of Columbus*, 19 F.3d 579, 582 (11th Cir. 1994). Liability for a failure to pay overtime within the limitations period does not depend on the original "decision to classify overtime-eligible employees as exempt," which may have occurred outside the limitations period. *Id.* Thus, "[e]ach failure to pay overtime constitutes a new" and complete "violation." *Id.* at 581 (emphasis omitted).

Contract law governing other sorts of installment obligations is to the same effect. "[A] cause of action in contract accrues at the time of the breach or failure to do the thing that is the subject of the agreement." 31 Richard A. Lord, *Williston on Contracts* § 79:14, at 316 (4th ed. 1990) (internal citations omitted). If, under the contract, "money is payable in installments," each installment constitutes a separate obligation, and each failure to pay constitutes a separately actionable breach with its own limitations period. *Id.* at 338. The same rule governs each separately actionable failure of an employer "to make each withdrawal liability payment when due" under the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1381(a). *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 208 (1997).

Similarly, in antitrust law, each "unlawfully high priced sale[]" constitutes a new violation because that sale from a continuing restraint of trade is the "separate," single act that violates the Sherman Act. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). Accordingly, a plaintiff may recover for present violations regardless of the plaintiff's knowledge of other earlier violations that were not timely challenged (though "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period"). *Id.*

Finally, Ledbetter's reliance on myriad other criminal and civil rights analogies is likewise inapposite. In some of the

cases that Ledbetter cites, the affirmative defense of the statute of limitations was not even in issue. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222 (1985); *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978). Others involved allegedly discriminatory policies that were reenacted during "each year[]" of the limitations period, and that, in any event, were challenged by some plaintiffs within the limitations period of the original enactment. *Palmer v. Bd. of Educ. of Cmty. Unit Sch. Dist. 201-U*, 46 F.3d 682, 685, 686 (7th Cir. 1995); *see also Manhart*, 435 U.S. at 715 (policy at issue discriminated "[o]n its face"). Still others quite properly apply the rule that, in appropriate circumstances, evidence of conduct outside the limitations period may be used in conjunction with other evidence to establish a *present* violation. *See, e.g.*, *United States v. Carlson*, 235 F.3d 466, 470 (9th Cir. 2000); *United States v. Ashdown*, 509 F.2d 793, 798 (5th Cir. 1975). But such "prior" conduct can serve as no more than "background evidence in support of a *timely* claim." *Morgan*, 536 U.S. at 113 (emphasis added).

D. Ledbetter's Reliance On The Legislative History Of Statutory Provisions Other Than Section 706(e) Is Without Merit.

Ledbetter also argues that the legislative history of the failed Civil Rights Act of 1990 and of the enacted Civil Rights Act of 1991 supports the limitations rule that she advocates. Ledbetter is wrong again.

Neither the failed 1990 legislative effort nor the 1991 statute amended the pertinent statutory language in section 706(e), which was first enacted in 1964. This Court has cautioned repeatedly that "[t]he views of members of a later Congress, concerning [a] different section[] of Title VII" than the one at issue, "are entitled to little if any weight." *Teamsters*, 431 U.S. at 354 n.39; *see also, e.g., Betts*, 492 U.S. at 168 (noting that, where a subsequent amendment to a statute did not modify the language of the provision at issue, "the interpretation given by one Congress (or a committee or

Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute"); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977) (explaining that "[l]egislative observations 10 years after passage of [a statute] are in no sense" relevant). Indeed, the legislative history of "failed legislative proposals" like the Civil Rights Act of 1990 is "a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (internal citation and brackets omitted).

In any event, neither piece of legislative history supports Ledbetter's position. The Senate Report for the Civil Rights Act of 1990 merely approved "the result correctly reached in *Bazemore*." *Civil Rights Act of 1990—Report from the Senate Labor and Human Resources Committee*, S. Rep. No. 101-315, at 54 (1990). As described above, the result reached in *Bazemore*—to wit, that an employer cannot justify post-Act discrimination by showing that the discrimination began prior to the statute's effective date—is not at issue in this case. Moreover, the interpretive memorandum of the sponsors of the Civil Rights Act of 1991 emphasized that "[t]his legislation should not be interpreted to affect the sound ruling[] of the Supreme Court" in *Ricks*. 137 Cong. Rec. S15472-01, S15485 (daily ed. Oct. 30, 1991). That decision—in which this Court reaffirmed that "[i]t is simply insufficient" for a plaintiff raising an intentional discrimination claim to challenge the "'present effect[s] [of a] past illegal act'" that was not made the basis for a timely charge, *Ricks*, 449 U.S. at 258 (internal citation omitted)—demonstrates that, contrary to Ledbetter's contention, the intentional pay discrimination claim at issue in this case is time-barred.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

JAY ST. CLAIR
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

GLEN D. NAGER
(*Counsel of Record*)
MICHAEL A. CARVIN
SHAY DVORETZKY
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondent

October 23, 2006