No. 05-1074

IN THE
Supreme Court of the United States

LILLY M. LEDBETTER,
Petitioner,

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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November 14, 2006

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REPLY BRIEF FOR THE PETITIONER

Neither respondent nor the Solicitor General defends the rule that was the basis of the decision below. Instead, both ask this Court to affirm on the alternate ground that paying a worker less than similarly situated coworkers for the past week's work because of her sex does not constitute a present violation of Title VII. The Court should reject this invitation.

Respondent does not contest that its interpretation is inconsistent with the rule applied in the vast majority of the circuits during the more than 40 years since Title VII was enacted, that the courts uniformly permitted claims like petitioner's at the time Congress amended Title VII's limitations provision in 1991, or that its position conflicts with the long-standing rule applied by the EEOC in processing charges of discrimination. It further concedes that the paycheck accrual rule applied by the courts and the EEOC follows the common law and statutory tradition of treating each pay period as a separate transaction, giving rise to a new pay-related claim with its own limitations period.

Respondent nonetheless contends that Congress would not have intended the traditional paycheck accrual rule to apply because it exposes employers to prejudice from undue delay in challenging pay decisions. Yet Goodyear admits that the doctrine of laches independently precludes suits in which an employer is actually prejudiced by undue delay. Thus, the principal difference between the rule presently applied by the courts and the rule proposed by respondent is that under Goodyear's rule, meritorious claims will be dismissed whenever an employee, through no fault of her own, fails to discover the disparity in her pay or grounds for believing that the disparity is discriminatory, within 180 or 300 days of the pay-setting decision, even when the delay imposes no prejudice upon the employer. That rule risks imposing great harm – giving the victim of discrimination a choice between quitting her job or a career of perpetual second-class

treatment because of her sex – for no correspondingly good reason.

There is no evidence Congress intended to provide such unnecessary protection at such a high cost to the enforcement of this important statute. Indeed, respondent acknowledges that the risk of stale claims did not prevent Congress from authorizing suits challenging pay decisions outside the limitations period under the parallel provisions of the Equal Pay Act (EPA), when a Title VII suit is brought by the Attorney General or the EEOC, or when a private plaintiff alleges that the disparity is a result of a written or unwritten "policy" of discrimination.

This Court should reject respondent's anomalous construction in favor of the one adopted by the Court in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), embraced by the agency tasked by Congress to administer the timely filing requirement, and consistently applied by the courts of appeals for decades without incident: each paycheck that offers a woman less pay than a man because of her sex constitutes a new violation of Title VII that can be challenged within the limitations period of Section 706(e).

I. This Case Is Controlled By *Bazemore* Not *Evans*.

A. Respondent's Reliance On The *Evans* Line Of Cases Is Misplaced.

The parties agree that petitioner may challenge any "unlawful employment practice" that occurred within 180 days of her EEOC charge, even if she failed to challenge prior instances of that practice. See *Nat'l Railroad Passengers Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002). All agree, moreover, that under *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977), and its progeny, the unlawful employment practice itself must occur during the limitations period. See *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980).

The question is whether payment of an intentionally

disparate wage constitutes a present violation of Title VII – in which case the *Evans* line of cases has no relevance, see *Bazemore*, 478 U.S. at 396 n.6 – or whether Title VII only prohibits the making of discriminatory pay decisions – in which case, the disparate paycheck might be seen as simply a continuing consequence of a prior unlawful act under *Evans*. But nothing in *Evans* itself, or any of its progeny, resolves that question, for none involved an ordinary disparate pay claim like petitioner's. In *Evans*, the plaintiff acknowledged that she was paid the same as other similarly situated workers, under a pay system that was neutral on its face and in application. 431 U.S. at 557-58. Evans claimed that she would be *differently* situated in terms of seniority had she not been unlawfully terminated years before. But that claim, the Court held, was an untimely challenge to the prior termination, not a claim of present pay discrimination. *Ibid.*

Petitioner, on the other hand, brings an ordinary disparate pay claim. She asserts that she was paid less because Goodyear decided to pay her less because of her sex, not because she had less seniority as a result of some other kind of unlawful employment action that happened in the past. And because sex was directly taken into account in making the pay decision, Goodyear's pay system – unlike United Airlines's system in *Evans* – was not "neutral in its operation," 431 U.S. at 558, but rather "treat[ed] similarly situated employees differently." *Lorance*, 490 U.S. at 912.

The question then is whether that kind of discrimination violates Title VII only when the pay decision is made or every time it is implemented. While the Court had no occasion to decide that question in *Evans*, the issue was squarely presented and resolved in *Bazemore*.

B. *Bazemore* Applies To This Case.

Although *Bazemore* did not interpret Title VII's limitations provision, it necessarily decided the central question presented here: in a disparate pay case, "[w]hat constitutes an 'unlawful employment practice' and when has

that practice 'occurred'?" *Morgan*, 536 U.S. at 110. If, as respondent argues, Title VII prohibits only the making of discriminatory pay decisions, but not the payment of discriminatory wages, the Fourth Circuit would have been correct in deciding that the present disparity in the *Bazemore* plaintiffs' pay simply gave "present effect to a past act of discrimination" that was legal when it occurred. *Bazemore* v. *Friday*, 751 F.2d 662, 670 (CA4 1984) (quoting *Evans*, 431 U.S. at 558). But this Court rejected that view, concluding that the present execution of a past discriminatory pay decision was itself a present and independent violation of Title VII. Specifically identifying both the exact violation and when it occurs, the Court held 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.

Respondent's and the Solicitor General's attempts to distinguish *Bazemore* fail.

1. Respondent asserts (Br. 25-31) that the Court's explanation of its holding and rationale in *Bazemore* was incomplete, and that the Court really relied on an additional fact never explicitly mentioned in the opinion itself: that the Extension Service made a conscious decision, at some point after the effective date of the Act, to maintain the prior disparate pay levels for the purpose of discriminating against its black employees. No court has ever adopted this view of *Bazemore*, and for good reason.

First, the opinion in *Bazemore* says hardly a word about the Extension Service's reasons for allowing its prior discriminatory pay levels to carry forward after the effective date of Title VII, other than to observe that the disparities "linger[ed] on" after 1965 and past 1972, and that the Service "made some adjustments to try to get rid of the salary disparity resulting on account of pre-Act discrimination." *Bazemore*, 478 U.S. at 394-95 (quotation marks omitted).

This is hardly a finding of a present intent to maintain the disparities for discriminatory purposes.

Second, the employer's reasons for not eradicating the prior disparity were irrelevant to the legal theory advanced by the petitioners and accepted by this Court. The employees' "claim on appeal [was] that 'the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not." *Id.* at 395 (citation omitted). In accepting this argument, the Court explained that its "holding * * * focuses on the present salary structure, which is illegal *if it is a mere continuation* of the pre-1965 discriminatory pay structure." *Id.* at 396 n.6 (emphasis added). The Court did not say that the present salary structure was illegal if "maintain[ed] * * * for a discriminatory purpose," Resp. Br. 30; "mere continuation" was sufficient. Thus, the Court explained, without qualification, that "[i]f the acknowledged pre-1965 disparities continued for employees employed prior to 1965, then respondents violated the law." *Bazemore*, 478 U.S. at 397 n.8.

Third, respondent's interpretation leads to the untenable conclusion that the Extension Service would have been allowed to continue to pay black employees less than whites for the same work, so long as it decided to maintain its prior pay structure for a non-discriminatory reason (say, because it lacked the funds to equalize black and white workers' salaries without impairing its programs).

Respondent nonetheless insists that the Court *must* have relied on some new post-Act discriminatory decision because the Court characterized the petitioners' pay claims as involving a "present violation." Br. 27 (quoting *Bazemore*, 478 U.S. at 396 n.6). In Goodyear's view, the implementation of a discriminatory pay decision can never, in itself, be intentionally discriminatory because a payroll system "mechanically implements the salary determinations made" by the employer at a prior time. Br. 21. Respondent simply misconstrues the Court's conception of a present

intentionally discriminatory act. *Bazemore* recognized that the execution of a discriminatory decision necessarily constitutes a present act of intentional discrimination. The essence of "discrimination" is "differential treatment." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citation omitted). Intentional discrimination thus occurs when the differential treatment takes place, even if the intent to engage in that conduct for a discriminatory purpose was made previously. That is why, for example, a student excluded from a school because of his race may challenge the discriminatory treatment as long as it continues, even though the exclusion on any given day is simply the result of the mechanical implementation of the school board's prior discriminatory decision. *Palmer* v. *Bd. of Educ.*, 46 F.3d 682, 683 (CA7 1995). And it is why respondent is correct (albeit for the wrong reasons) in saying that the "claim of present, continuing, intentional discrimination was the key to *Bazemore*." Br. 28.[1]

2. The Solicitor General is willing to accept that under *Bazemore* each paycheck that offers a woman less money than a man for the same work because of her sex constitutes a present act of intentional discrimination in violation of Title VII, but only when the discrimination is undertaken pursuant to a "facially discriminatory policy," Br. 13, or an "unwritten intentionally discriminatory pay structure," *id.* at 14 (which apparently is the same thing as an "unwritten policy," *id.* at 15). He acknowledges that "an ongoing policy of

[1] Respondent's other attempts to distinguish *Bazemore* also fail. Respondent notes (Br. 27-28) that the plaintiffs in *Bazemore* could not have challenged their discriminatory pay before 1972, but nothing in Title VII or this Court's decision established a special timely filing requirement or accrual rule for claims relating to pay decisions made before the effective date of the Act. Nor did *Bazemore* craft a rule applicable only to suits brought by the United States, as the Court's decision applied to the private plaintiffs' Title VII claims in that case as well. See 478 U.S. at 391.

intentionally paying women less than men because of their sex 'by definition discriminates each time it is applied.'" Br. 15 (quoting *Lorance*, 490 U.S. at 912 n.5). But he nonetheless insists that persistently paying an *individual* woman less than men because of her sex in accordance with a discriminatory pay decision does not constitute a present violation of Title VII, even though it too treats that woman differently than similarly situated workers because of her sex every time a paycheck is issued. This assertion is unfounded.

Bazemore made no distinction between individualized and policy-based discrimination. It is true that *some* of the *Bazemore* plaintiffs' claims arose from the "institutionally segregated base salaries created by the facially discriminatory, pre-1965 salary practices." Resp. Br. 25. But those hired after 1965 were given equal starting salaries. 751 F.2d at 671. The disparity in their pay, like petitioner's, arose solely "as a result of a series of discrete intentionally discriminatory pay raise decisions." SG Br. 16; see 478 U.S. at 397 n.8 (noting these "two distinct types of salary claims"). There was no allegation that those individual pay raise decisions were made pursuant to some "unwritten policy" of discrimination. SG Br. 15.[2] Yet the Court made no distinction between the pre- and post-1965 hires, but rather made clear that the Extension Service was liable for any "salary disparities based on race that began prior to the effective date of Title VII," 478 U.S. at 397, even if those "disparities were created or begun *after* the merger [and] continued past 1972," *id.* at 397 n.8 (emphasis in original).

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[2] To the contrary, there was "no uniform procedure for pay increases," 751 F.2d at 666, which were made by each individual county board, 478 U.S. at 389, and in reliance on performance rankings made by one of twelve different District Extension Chairmen, 751 F.2d at 665, 671. Indeed, this Court affirmed the denial of certification for a class of county defendants precisely because there was no proof of "either a statewide rule or practice." 478 U.S. at 406.

To be sure, there were more victims of discrimination in *Bazemore* than in this case, but the Court gave no indication that this had any bearing on its decision, or that its references to "structures" and "patterns" referred to the systematic discrimination against many, as opposed to the recurring discrimination against an individual. To the contrary, the only "pattern" of significance to the Court's decision was the recurring nature of the discriminatory paychecks. Accordingly, when the Court stated its basic holding, it spoke in terms of discrimination against an individual: "Each week's paycheck that delivers less to *a* black than to *a* similarly situated white is a wrong actionable under Title VII, regardless of the fact that *this* pattern was begun prior to the effective date of Title VII." 478 U.S. at 395 (emphasis added).

Indeed, the Solicitor General cannot seriously maintain that *Bazemore* construed Title VII to permit intentionally discriminatory pay disparities to persist after the effective date of the statute, so long as the employer only discriminated against some, but not all, of its black workers prior to 1972. Yet under the Solicitor General's interpretation, if a public employer hired a single minority to its workforce in 1971 and conceded that it kept her salary twenty percent lower than her colleagues' because of her race, the employer could have maintained that pay disparity in perpetuity because the discrimination was "discrete" and not the result of an "ongoing intentionally discriminatory pay policy." Br. 16.[3]

Nor does anything in *Lorance* support the Solicitor General's distinction. There, the Court distinguished between two different kinds of seniority policies, not between general policies and discrimination with respect to an individual. 490 U.S. at 911-12. It held that a seniority plan that is

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[3] If the Solicitor General believes that this example illustrates the operation of a discriminatory "pay structure" or "unwritten policy," it is difficult to see why petitioner's case does not fall within his proposed rule.

"nondiscriminatory in form and application" yet adopted for a discriminatory purpose violates Title VII upon its adoption, but that a facially discriminatory policy "can be challenged at any time" because "by definition [it] discriminates each time it is applied." *Id.* at 912 & n.5. Crucially, the Court explained that a facially discriminatory policy discriminates each time it is applied not because the discrimination is self-evident or because it is policy-based, but rather because it "treats similarly situated employees differently." *Id*. at 912. The same is true of a discriminatory pay decision: every time it is implemented, it treats similarly situated workers differently by offering the victim less money for the same work performed by others during the same pay period. Which is why, the Court explained in *Lorance*, the rule adopted in that case was consistent with the holding of *Bazemore*. *Id.* at 912 n.5.

Nor is there any basis in the text of Title VII to hold that a disparate pay violation occurs at the time of the pay decision if the employer discriminates against only one employee, but occurs at the time the paycheck is delivered if the discrimination is more widespread. When Congress intended to distinguish between individual and pattern-or-practice claims in Title VII, it did so explicitly. See 42 U.S.C. 2000e-6(a) (authorizing the Attorney General to bring "pattern-or-practice" but not individual claims). But in defining unlawful employment practices and in establishing the charge-filing deadlines, Congress made no such distinction. 42 U.S.C. 2000e-2, 2000e-5(e).

In addition, applying different accrual rules depending on whether the employer has engaged in individual or policy-based violations would lead to substantial administrative problems. In order for an employee to know when her EEOC charge is due, she would have to determine not only whether she was being paid less than others (and whether that disparity was likely to be a result of sex discrimination) but also whether other women were also being paid disparate wages (and, if so, whether those disparities were because of

sex). She would then have to determine whether the discrimination was sufficiently widespread to be considered the result of an "unwritten policy." That question would not be simple to determine as a matter of fact (multiple regression analysis was required to establish the pattern in *Bazemore*) or as a matter of law. For example, is there an "unwritten policy" when an employer discriminates against the sole woman in a particular position? Is the fair treatment of five women out of a hundred sufficient to rebut the assertion of an "unwritten policy"? If not, what is the threshold? The EEOC would then have to make the same determinations – essentially requiring a full-scale investigation – just to decide the threshold question of whether the charge was timely filed.

II. Respondent's Objections To The Traditional Paycheck Accrual Rule Are Unfounded.

A. There Are Substantial Differences Between Pay And Promotion Decisions.

Respondent and the Solicitor General argue that construing pay discrimination as a recurring violation is inconsistent with Title VII's treatment of other unlawful employment practices, especially promotions, which occur at the time a discriminatory decision is made. This assertion is somewhat odd, given their acknowledgment that a paycheck accrual rule applies to at least *some* disparate pay claims (*e.g.*, those involving an unwritten policy). In any case, there are substantial historical and practical distinctions between pay and promotion decisions that plainly led Congress to treat the two practices differently under Title VII.

1. As described in our opening brief (Br. 34-36), the law has long treated pay-related aspects of an employment relationship as a series of distinct, recurring transactions that give rise to recurring claims and limitations periods. The employment contract is treated as if it were periodically renewed, presenting a distinct question whether the employee

received the wages she was due for that period's work under her contract and applicable statutory law. *Ibid*.

Respondent (Br. 45) and the Solicitor General (Br. 26-27) acknowledge that Congress adopted that basic background principle under the Equal Pay Act, which gives rise to recurring violations with each payment of an unlawfully disparate wage. That Congress chose the traditional paycheck accrual rule for EPA claims is strong evidence that it intended for the same rule to apply under Title VII as well. The EPA was passed by the same Congress that enacted Title VII, and imposes the same basic prohibition in pay discrimination cases under Title VII. See generally *County of Washington* v. *Gunther*, 452 U.S. 161, 171-75 (1981). Indeed, responding to concerns about possible inconsistencies between the two statutes, Senator Clark, the principal spokesman for Title VII in the Senate, stated that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII." *Id*. at 172 n.12 (citation omitted). Lest the courts nonetheless construe the statutes differently, Congress adopted the "Bennett Amendment" to Title VII, extending the affirmative defenses of the EPA to claims of sex-based pay discrimination under Title VII. *Id*. at 167; 42 U.S.C. 2000e-2(h).

Respondent implies there is a relevant difference between the EPA and Title VII because the EPA "focuses on the question of equal pay for 'equal work,' rather than on stale questions of intent in past decisions in years gone by." Br. 39 (citation omitted). This is misleading. It is true that Title VII requires a finding of discriminatory intent, while the EPA imposes liability if the employer is unable to show that a wage disparity is the result of "any other factor other than sex." 29 U.S.C. 206(d)(1). But in the vast majority of cases, this distinction makes no difference at all – the employer's failure to establish an EPA defense leads to the nearly inescapable inference of intentional discrimination. More to the point, the distinction makes no practical difference that

could be relevant to an accrual rule. Although intent is not an EPA element, juries must still consider the basis of past pay decisions in order to determine whether the employer has shown that the pay disparity is the result of the nondiscriminatory application of a merit system or "any other factor other than sex." 29 U.S.C. 206(d)(1). See, *e.g.*, *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 191, 204-05 (1974) (examining basis of pay policy enacted more than 25 years earlier); *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 827-28 (CA6 2000) (examining individual pay raise decisions over fifteen-year period).

Both statutes thus pose an equal risk of stale claims arising from "past decisions in years gone by." Respondent acknowledges that Congress did not respond to this risk by rejecting the traditional paycheck accrual rule for EPA claims. There is no reason to think Congress viewed the problem differently a year later when it enacted Title VII.

2. In addition to historical practice, there are sound theoretical and practical reasons for treating pay and promotion decisions differently.

First, although a promotion denial deprives an employee of an opportunity to take on added responsibilities for additional pay, it does not leave the worker in a position of continually being paid less because of her sex for the work she actually does perform. Her pay remains commensurate with her duties and equal to that paid to similarly situated coworkers doing the same job. A discriminatory pay decision, on the other hand, results in the recurring unequal treatment of similarly situated workers performing the same duties every time a disparate paycheck is issued.

Second, an employer is not necessarily enriched as a result of promotion discrimination – it must still pay the higher wage to whomever it promoted. But an employer obtains a new financial benefit each time it executes a discriminatory pay decision by issuing a disparate paycheck.

Third, promotion decisions necessarily implicate the interests of innocent third parties in a way that pay decisions do not. Remedying the unlawful denial of a promotion often requires revoking the promotion already given to another, or effectively eliminating the next promotion opportunity for all other workers if the position is reserved for the victim. There is, therefore, a special need for quick resolution of a claim that may disrupt the legitimate and settled expectations of other employees. Disparate pay, on the other hand, can be remedied at any time solely at the expense of the lawbreaking employer.

Fourth, and most importantly, there are real practical differences between promotions and pay that are of central relevance to the accrual rule. Practices such as discriminatory "termination, failure to promote, denial of transfer, or refusal to hire are easy to identify," *Morgan*, 536 U.S. at 114, because the victim always knows that they have happened and can discover whether she has been treated differently than other similarly situated workers with relative ease. In contrast, because employers frequently keep individual salary levels secret, an employee often does not know whether a particular pay decision has given rise to disparate treatment at all, particularly when the disparity arises from decisions about her colleague's pay rather than her own. See Pet. Br. 26.

Moreover, even when an employee is aware of some level of disparity, that fact alone is not enough to warrant the immediate filing of an EEOC charge. Because employers rarely make the discriminatory basis of their pay decisions known, the principal evidence of discriminatory intent often is a pattern of disparate pay decisions whose allegedly neutral explanations appear increasingly less plausible over time. And while other evidence of discriminatory intent *may* arise during the limitations period (SG Br. 23), often it does not, but comes to light over an extended period of time, as happened in this case.

The Solicitor General and respondent suggest that employees may often, and that petitioner did,[4] have a reasonable basis for bringing charges before the charges are actually filed. But neither suggests that this Court should adopt a discovery rule for Title VII. Instead, both argue that claims based on pay decisions outside the limitations period should be barred whether the employee had a basis for a charge during that time period or not, and whether she waited nineteen years or one day beyond the limitations period. Under this rule, many employees will be subject to perpetual unremedied pay discrimination through no legitimate fault of their own.[5]

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[4] Respondent asserts that petitioner "testified" that she was aware of the disparity in her pay as early as 1992. Br. 37. Although Goodyear gives the impression that it is relying on record evidence admitted at trial, it instead cites solely to petitioner's inadmissible deposition testimony. *Ibid*. When petitioner testified at trial, Goodyear never explored with her when she may have developed a basis for suspecting illegal pay discrimination, undoubtedly because respondent had advanced no laches defense. For the same reason, petitioner was never given an opportunity to address any assertion that her delay in filing a charge was undue or prejudicial.

[5] For example, of the 40 cases listed in a recent survey of disparate pay cases and decided between 1996 and 2006, see *Wage Differentials as Violative of Those Provisions of Title VII of the Civil Rights Act of 1964*, 62 A.L.R. Fed. 33 (2006), petitioner is able to identify only two in which the entire alleged pay disparity would have been timely challenged under respondent's accrual rule, App. A (listing cases). In nineteen, a challenge to all or substantially all of the alleged disparity would be precluded (most often because the present disparity is largely a result of decisions made about starting salaries outside the statutory period). App. B. In one case, the claim would have been precluded under either party's rule, App. C, and the rest of the cases lacked sufficient detail to allow application of the rules, App. D.

Respondent's attempts to suggest otherwise (Br. 37-39) are meritless. The Court has instructed that estoppel and equitable tolling "are to be applied sparingly." *Morgan*, 536 U.S. at 113. Indeed, equitable estoppel only "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations." *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (CA7 1990). Similarly, "[e]quitable tolling is only appropriate in rare and exceptional circumstances in which a party is prevented in some extraordinary way from exercising his or her rights * * * ." 54 C.J.S. LIMITATIONS OF ACTIONS §115 (2006). And while the EEOC is not subject to a statute of limitations, *Occidental Life Ins. Co*. v. *EEOC*, 432 U.S. 355, 366 (1977), it can only act in response to a timely charge filed by the employee. See 42 U.S.C. 2000e-5(f)(1). The Attorney General has no jurisdiction over private employers at all, and may sue public employers on behalf of individuals only upon referral of a timely charge from the EEOC. *Ibid.* Finally, the Equal Pay Act does not apply to discrimination based on race, color, religion, or national origin. 29 U.S.C. 206(d)(1). And even in the context of sex discrimination, an EPA claim is unavailable when the plaintiff can identify no comparator in her establishment performing the same work. See *ibid.*

B. The Traditional Rule Adequately Protects Against Stale Claims.

The traditional paycheck accrual rule accommodates the need for continuing access to a remedy for continuing pay discrimination, while eliminating the need for a discovery rule and balancing employers' legitimate interests in avoiding unfair prejudice from unwarranted delay.

Goodyear acknowledges that the doctrine of laches independently precludes suits in which an employer is actually prejudiced by undue delay. It nonetheless asserts that laches does "not adequately protect employers' interests in avoiding stale claims," but then never says why that is, other

than to observe the truism that "laches is not a substitute for a statute of limitations." Br. 39 (emphasis and citation omitted). Petitioner does not claim otherwise; her point is simply that there is no need for a narrow construction of the statute of limitations in order to avoid stale claims that would be eliminated by laches. In fact, although the paycheck accrual rule has been in place in the circuits for more than twenty years, respondent is unable to show that it has, in fact, substantially burdened employers with stale pay claims.

Respondent's and the Solicitor General's arguments regarding stale claims and employer prejudice ring particularly hollow in light of their concessions that the paycheck accrual rule – with all its assertedly unacceptable consequences – applies to claims brought under the Equal Pay Act and to Title VII suits challenging pay disparities arising from written and unwritten employer policies. Juries also must consider long-past incidents in Title VII hostile work environment cases, see *Morgan*, 536 U.S. at 115-22, or whenever an employer attempts to justify a promotion or other decision on the basis of an employee's prior performance record, see, *e.g.*, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 233-37 (1989). It is thus simply not the case that Congress generally intended to protect employers from having to justify decisions made more than 180 or 300 days before an EEOC charge was filed.

III. The EEOC's Interpretation Is Entitled To *Chevron* Deference.

If there were any ambiguity over the application of Title VII's filing requirement to disparate pay claims, the Court should resolve it by deferring to the expert views of the agency Congress directed to receive, investigate, and, in some cases, adjudicate charges of discrimination under the statute.

Contrary to respondent's assertion (Br. 41), petitioner does indeed argue that the EEOC's position is entitled to *Chevron*-style deference under this Court's decisions in *United States* v. *Mead Corp*., 533 U.S. 218 (2001), and *EEOC*

v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988). See Pet. Br. 34. Although it did not delegate to the EEOC authority to issue substantive regulations, see *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976), Congress did authorize the EEOC to issue procedural regulations governing the filing and investigation of EEOC charges, see *id*. at 141 n.20 (citing 42 U.S.C. 2000e-12(a)); see also 29 C.F.R. Pt. 1601 (procedural regulations).[6]

Accordingly, in *Commercial Office Products*, 486 U.S. 107, this Court gave *Chevron*-style deference to the EEOC's interpretation of Section 706 – the provision at issue in this case – holding that it was

> axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference.

Id. at 115.

It is true that the EEOC's position in *Commercial Office Products* was expressed through a regulation, but "deference under *Chevron* * * * does not necessarily require an agency's exercise of express notice-and-comment rulemaking power." *Edelman* v. *Lynchburg College*, 535 U.S. 106, 114 (2002). While this Court has held that an interpretation embodied in the EEOC's Compliance Manual is insufficient to establish the agency's authoritative position for *Chevron* purposes,[7] the EEOC has expressed the same view of the statute through

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[6] Even absent this express authorization, the delegation of interpretative authority over timeliness questions would be implicit in the requirement that the EEOC accept, process, and investigate timely charges. See *Mead*, 533 U.S. at 229.

[7] See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); but see *id*. at 591 (Scalia, J., concurring in part and in judgment).

formal adjudications of federal sector complaints.[8] See Pet. Br. 32-33 & n.18; *Mead Corp.*, 533 U.S. at 230-231 & n.12 (formal adjudications qualify for *Chevron* deference). The Commission's amicus briefs and the Manual remove any doubt about the Commission's authoritative interpretation of the statute. See Pet. Br. 32; cf. *Auer* v. *Robbins*, 519 U.S. 452, 461-62 (1997).

Neither respondent nor the Solicitor General attempts to explain why *Chevron* deference is unavailable for interpretations set forth in the EEOC's formal adjudications. Instead, respondent argues the position expressed in the Compliance Manual should not be given *Skidmore* deference because "prior to 2001, the EEOC had justified its position on a different ground – by reference to 'continuing violations'

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[8] When Congress extended Title VII's protections to federal employees in 1972, it delegated to the EEOC authority to implement the extension through procedural and substantive regulations. 42 U.S.C. 2000e-16(b). Pursuant to that authority, the EEOC promulgated regulations adopting Title VII's definition of "discrimination," 29 C.F.R. 1614.102(b), and establishing a process for filing and resolving complaints. See 29 C.F.R. Pt. 1614. Under that process, the employee must file a timely allegation of discrimination. See 29 C.F.R. 1614.105(a)(1) ("An aggrieved person must initiate contact with [an Equal Employment Opportunity] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."); 29 C.F.R. 1614.107(a)(2) (untimely complaint must be dismissed). The regulations provide a number of avenues for resolving complaints formally and informally, generally culminating in a right to a hearing before an administrative law judge, 29 C.F.R. 1614.109, subject to eventual review by the Commission itself, *id.* at § 1614.401. The Commission is required to dismiss appeals raising untimely charges, *id.* at § 1614.405(a), and is therefore required to determine when, exactly, the relevant unlawful employment practice occurred – precisely the same question at issue in this case under the parallel requirement of Section 706(e).

doctrine." Br. 42. That is no basis for denying *Chevron* deference to the separate formal adjudications; when applicable, *Chevron* deference is due even if the agency has changed not only its rationale, but also its interpretation. See, *e.g.*, *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2710 (2005).

Nor is it ground for denying *Skidmore* deference in any event. While the EEOC did refer to pay discrimination as a "continuing violation" in the past, the choice of that label was not substantively inconsistent with this Court's decision in *Morgan*, which recognized that recurring violations (whether labeled "continuing" or something else) can be challenged at any time so long as they are repeated during the limitations period. 536 U.S. at 113. More importantly, regardless of the precise manner in which the Commission related its interpretation to the extant case law over the years, there can be no reasonable dispute that the agency has consistently found that allowing employees to challenge ongoing intentionally discriminatory pay disparities is necessary in light of the language and purposes of Title VII.

"[D]eference is particularly appropriate on this type of technical issue of agency procedure." *Commercial Office Prods.*, 486 U.S. at 125 (O'Connor, J., concurring). Having reviewed tens of thousands of discrimination complaints over many decades, the Commission is particularly well-situated to evaluate the practical consequences of the proposed accrual rules (*e.g.*, whether a paycheck accrual rule leads to many stale claims to the prejudice of employers, and whether a decision accrual rule would pervasively exclude meritorious challenges to ongoing discrimination) in light of the core congressional purposes animating the timely filing rule.

IV. Petitioner's Claim Was Timely.

Petitioner's claim thus was timely for two related reasons. First, petitioner received intentionally discriminatory paychecks during the limitations period, each of which

constituted a new unlawful employment practice. *Bazemore*, 478 U.S. at 395-96.

Alternately, even if the Court held that the unlawful employment practice must be a pay-setting decision, the 1998 decision (which occurred during the limitations period) was itself unlawful because it carried forward intentionally discriminatory disparities from prior years in violation of Goodyear's "obligation to eradicate salary disparities based on" sex even when those disparities arose from past decisions. *Id*. at 397. That obligation is not, as respondent claims (Br. 34), some additional "requirement of affirmative conduct by employers." Instead, it is simply another way of describing the basic prohibition against paying similarly situated workers differently because of their sex, and of recognizing that the present implementation of past discriminatory pay decisions constitutes present discrimination. It is true that this creates an incentive for employers to ensure that past decisions given present application are nondiscriminatory. Respondent points to no evidence that this incentive has been unduly burdensome during the decades it has been in effect under the lower courts' interpretation of Title VII or under the EPA. An employer can obviously mitigate that risk by taking steps to ensure that each year's pay decision is nondiscriminatory when it is made, and by monitoring pay disparities as they arise within its workforce. And, as a practical matter, laches places an outer limit on the scope of the obligation to eradicate pay disparities arising from old pay decisions. But within those limitations, so long as an employer bases present pay on past decisions, it remains legally responsible for any resulting ongoing discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 14, 2006

APPENDIX A

Entire claim survives under both respondent's and petitioner's rule (2): *Pospicil* v. *Buying Office, Inc.*, 71 F. Supp. 2d 1346 (N.D. Ga. 1999); *Kindred* v. *Northome/Indus Sch. Dist. No. 363*, 983 F. Supp. 835 (D. Minn. 1997) .

APPENDIX B

Claims substantially precluded under respondent's rule, but not petitioner's rule (19): *EEOC* v. *TXI Operations, L.P.*, 394 F. Supp. 2d 868 (N.D. Tex. 2005); *Tenkku* v. *Normandy Bank*, 348 F.3d 737 (CA8 2003); *Butler* v. *Albany Int'l*, 273 F. Supp. 2d 1278 (M.D. Ala. 2003); *Conti* v. *Universal Enterprs., Inc.*, 50 Fed. Appx. 690 (CA6 2002); *Becker* v. *Gannett Satellite Information Network, Inc.*, 10 Fed. Appx. 135 (CA4 2001); *Sowell* v. *Alumina Ceramics, Inc.*, 251 F.3d 678 (CA8 2001); *Simmons* v. *New Public Sch. Dist. No. Eight*, 251 F.3d 1210 (CA8 2001); *Morris* v. *Wallace Community College-Selma*, 125 F. Supp. 2d 1315 (S.D. Ala. 2001); *Rodriguez* v. *Smithkline Beecham*, 224 F.3d 1 (CA1 2000); *Stanziale* v. *Jargowsky*, 200 F.3d 101 (CA3 2000); *Land* v. *Midwest Office Technology, Inc.*, 114 F. Supp. 2d 1121 (D. Kan. 2000); *Belfi* v. *Prendergast*, 191 F.3d 129 (CA2 1999); *Meckenberg* v. *New York City Off-Track Betting*, 42 F. Supp. 2d 359 (S.D.N.Y. 1999); *Snellgrove* v. *Teledyne Abbeville*, 117 F. Supp. 2d 1218 (M.D. Ala. 1999); *Baltazor* v. *Holmes*, 162 F.3d 368 (CA5 1998); *Lenihan* v. *Boeing Co.*, 994 F. Supp. 776 (S.D. Tex. 1998); *Burns* v. *Republic Savings Bank*, 25 F. Supp. 2d 809 (N.D. Ohio 1998); *Travis* v. *Board of Regents of the Univ. of Texas Sys.*, 122 F.3d 259 (CA5 1997); *Sprague* v. *Thorn Americas, Inc.*, 129 F.3d 1355 (CA10 1997).

APPENDIX C

Claim precluded under either party's rule (1): *Rallins* v. *Ohio State Univ.*, 191 F. Supp. 2d 920 (S.D. Ohio 2002).

APPENDIX D

Indeterminate (18): *Kess* v. *Municipal Employees Credit Union of Baltimore, Inc.*, 319 F. Supp. 2d 637 (D. Md. 2004); *Wachter-Young* v. *Ohio Cas. Group*, 236 F. Supp. 2d 1157 (D. Or. 2002); *Riggs* v. *County of Banner*, 159 F. Supp. 2d 1158 (D. Neb. 2001); *Alfieri* v. *SYSCO Food Services–Syracuse*, 192 F. Supp. 2d 14 (W.D.N.Y. 2001); *Glunt* v. *GES Exposition Servs., Inc.*, 123 F. Supp. 2d 847 (D. Md. 2000); *Rosa* v. *Brink's Inc.*, 103 F. Supp. 2d 287 (S.D.N.Y. 2000); *Sobba* v. *Pratt Cmty. College & Area Vocational Sch.*, 117 F. Supp. 2d 1043 (D. Kan. 2000); *Farrell* v. *Planters Lifesavers Co.*, 22 F. Supp. 2d 372 (D. N.J. 1998); *Bayles* v. *Fidelity Bank*, 44 F. Supp. 2d 753 (M.D.N.C. 1998); *Jordan* v. *CSX Intermodal, Inc.*, 991 F. Supp. 754 (D. Md. 1998); *Toth* v. *Gates Rubber Co.*, 31 F. Supp. 2d 1249 (D. Col. 1998); *Gearhart* v. *Sears, Roebuck & Co., Inc.*, 27 F. Supp. 2d 1263 (D. Kan. 1998); *Cochrane* v. *Houston Light & Power Co.*, 996 F. Supp. 657 (S.D. Tex. 1998); *Messer* v. *Meno*, 130 F.3d 130 (CA5 1997); *Hernandez* v. *McDonald's Corp.*, 975 F. Supp. 1418 (D. Kan. 1997); *Glover* v. *Kindercare Learning Ctrs., Inc.*, 980 F. Supp. 437 (M.D. Ala. 1997); *Passmore* v. *Kindercare Learning Ctrs., Inc.*, 979 F. Supp. 1413 (M.D. Ala. 1997); *Bakewell* v. *Stephen F. Austin State Univ.*, 975 F. Supp. 858 (E.D. Tex. 1996).