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IN THE SUPREME COURT OF THE UNITED STATES

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MARVIN GREEN, :

Petitioner : No. 14-613

v. :

MEGAN J. BRENNAN, :

POSTMASTER GENERAL. :

- - - - - x

Washington, D.C.

Monday, November 30, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

BRIAN WOLFMAN, ESQ., Stanford, Cal.; on behalf of Petitioner.

CURTIS E. GANNON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

CATHERINE M.A. CARROLL, ESQ., Washington, D.C.; for Court-appointed amicus curiae in support of the judgment below.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 14-613, Green v. Brennan.

Mr. Wolfman.

ORAL ARGUMENT OF BRIAN WOLFMAN

ON BEHALF OF THE PETITIONER

MR. WOLFMAN: Mr. Chief Justice, and may it please the Court:

The basic principle of this Court's timeliness cases, Title VII and otherwise, is that the clock starts when the cause of action is complete. Because a constructive discharge claim is complete only after the employee resigns, this Court should reverse.

The court has indicated that limitations principles should be as simple as possible. The Tenth Circuit's rule, however, injects unnecessary complexity. Identifying the last discriminatory act in an alleged hostile work environment can be difficult.

And as this Court said in early --

JUSTICE SCALIA: What does the statute say? Can we look at the statute? What's it -- what does the statute say?

MR. WOLFMAN: The statute says matter -- aggrieved party has to bring within 45 days the matter

1 alleged to be discriminatory.

2 JUSTICE SCALIA: The matter alleged to be
3 discriminatory. And is the resignation of -- of the
4 employee a matter alleged to be discriminatory?

5 MR. WOLFMAN: Absolutely, Your Honor. The
6 matter --

7 JUSTICE SCALIA: The employee discriminated
8 against himself?

9 MR. WOLFMAN: No. The matter -- the matter
10 alleged is the whole of the claim. As the dictionaries
11 say, and as most of the lower courts say, the matter is
12 just a shorthanded way of referring to the cause of
13 action that the -- the person is bringing.

14 Here, the matter -- and this is
15 undisputed -- is a constructive discharge which, as this
16 Court said in *Suders*, has two elements, both the
17 precipitating conduct and the resignation. Without
18 both, there is no constructive discharge claim.

19 JUSTICE KENNEDY: But for a constructive
20 discharge claim to succeed you have to point to a
21 discriminatory or an unlawful act.

22 MR. WOLFMAN: It is true that --

23 JUSTICE KENNEDY: And so we have to find
24 this anyway.

25 MR. WOLFMAN: It is true that that is one

1 component. There is no question that there are going to
2 be -- again, Suders said there would be both
3 precipitating conduct and the resignation; both elements
4 must be present for there to be constructive discharge.

5 But -- but let's assume for a second that
6 the -- that the -- the matter alleged to be
7 discriminatory is ambiguous in some sense. Then the
8 court should just go to its time-honored default rule.
9 Default rule is that the cause of action must be fully
10 formed before the limitations period is triggered.

11 JUSTICE SCALIA: Of course. That's -- that
12 rule is adopted for statutes that do not have a
13 conciliation provision. What use is the conciliation
14 provision once the employee has quit?

15 MR. WOLFMAN: I -- I think not, Your Honor.
16 The conciliation process always anticipates that the
17 claim will have occurred; that the acts giving rise to
18 the claim, including all the elements, have occurred
19 before conciliation --

20 JUSTICE SCALIA: That's fine, but the
21 employer can make it up, you know. It's -- they try to
22 bring the employer and the employee together.

23 MR. WOLFMAN: That is true.

24 JUSTICE SCALIA: Right?

25 MR. WOLFMAN: But only --

1 JUSTICE SCALIA: But he's quit. He's gone.
2 He's no longer an employee. What conciliation can there
3 be?

4 MR. WOLFMAN: Your Honor, that is true for
5 any of the acts that could be brought prior to the
6 45-day trigger. For instance, a termination would fit
7 exactly the scenario you're suggesting, a termination
8 which, after all, is the analogue to the constructive
9 discharge. That claim cannot be brought into the
10 conciliation process until it exists.

11 So it's just the first component of the
12 process -- what you're referring to, Your Honor, as
13 conciliation -- moves quickly into a more adversarial
14 stages, and all of those stages presuppose that there is
15 a cause of action that exists, or a claim that exists.

16 And again, that's quite consistent with this
17 Court's default rule that -- that the limitations period
18 is -- is not triggered until the claim is fully formed.
19 And that's perfectly consistent with all of this Court's
20 Title VII timeliness cases.

21 If you look at, for instance, Evans, if you
22 look at Ricks. At Ricks there was a fully formed cause
23 of action, and that's why the limitations period was
24 triggered, because the limitations period was triggered
25 by the denial of tenure.

1 JUSTICE SOTOMAYOR: I -- I somehow feel
2 you've given up too much. You can charge a
3 discriminatory termination, correct? And that's the
4 employer making a decision that he is going to fire you
5 for reasons that are not legitimate; they're
6 discriminatory.

7 Isn't a constructive discharge that the
8 moment that the environment has gotten so hostile that
9 you feel overwhelmed and have to leave, isn't that the
10 discriminatory act as well?

11 MR. WOLFMAN: Yes. I think --

12 JUSTICE SOTOMAYOR: So that that discharge
13 itself is discriminatory because it -- the employer has
14 proceeded in a pattern that has led you to that
15 decision?

16 MR. WOLFMAN: That's exactly right. And I
17 did not mean to be retreating from that position at all.
18 That's the two elements of the claim. So the
19 resignation is part and parcel of the claim. You have
20 the precipitating conduct, and you have the resignation.

21 JUSTICE SOTOMAYOR: That's what I'm saying.
22 I don't think -- I think it's --

23 JUSTICE SCALIA: Well --

24 JUSTICE SOTOMAYOR: You keep talking about
25 it as two separate elements.

1 MR. WOLFMAN: Well, there are separate
2 elements but when the resignation occurs, the -- the
3 claim is imputed to the employer.

4 JUSTICE SOTOMAYOR: That's the
5 precipitating --

6 MR. WOLFMAN: It's imputed to the employer.

7 JUSTICE SCALIA: They're -- they're not
8 always the same at the same point. The employer could
9 have been discriminating against this employee for
10 years, and -- and there's no additional discrimination
11 for an entire year. But the employee has finally gotten
12 fed up with it, and after a year, during which the
13 employer has done nothing else discriminatory, he
14 decides I'm going to quit. Now he'd still have a claim
15 for, you know, discriminatory provoking of -- of the
16 quitting, but the -- but the time period for the
17 discrimination and the time period for the quitting are
18 a year apart.

19 MR. WOLFMAN: Well, that's certainly
20 possible, but again, that would -- that would be the
21 case in many situations.

22 So, for instance, let's assume for a second
23 that there had been a discriminatory demotion on day
24 one, and then a year later there has been a
25 discriminatory termination with perhaps the exact same

1 motive. No one disputes that both of those claims are
2 independently actionable, and no one disputes that their
3 limitations periods have a different trigger date.

4 JUSTICE SCALIA: It is an act of the
5 employer, and quitting is not an act of the employer.
6 The act of the employer -- the unlawful act of the
7 employer is coercing the quitting. So you have to find
8 an act on his part that coerces the quitting. That's
9 quite different from the employer discharging the
10 person --

11 MR. WOLFMAN: There are --

12 JUSTICE SCALIA: -- for discriminatory --

13 MR. WOLFMAN: -- are some differences, but
14 the point is that the resignation, at the point of
15 resignation, when the cause of action accrues -- and no
16 one here disputes that's when the cause of action
17 accrues -- that conduct is imputed to the employer.

18 And it's not simply in the that's not --
19 that's what this Court said in *Suders*, but it's not
20 simply --

21 JUSTICE SCALIA: For purpose of remedy, yes,
22 it is. It's --

23 MR. WOLFMAN: Not simply for purposes of
24 remedy. A cause of action for constructive discharge
25 will be dismissed if the person is still on the job and

1 has not resigned.

2 JUSTICE KAGAN: Mr. Wolfman --

3 MR. WOLFMAN: This is part of the
4 affirmative case.

5 JUSTICE KAGAN: If -- you might be pulled in
6 two different directions here but you don't have to
7 accept what Justice Sotomayor is saying to win this
8 case; isn't that right?

9 In other words, one could say, yes, if you
10 had discriminatory acts language, that might point to
11 the last predicate discriminatory act as opposed to the
12 resignation, it might or it might not, but here that
13 language doesn't exist. Here the language is
14 discriminatory matter. That refers to the entire claim.
15 And when you refer to the entire claim, it's clear that
16 the resignation is part and parcel of that.

17 MR. WOLFMAN: That is right. I mean, we --

18 JUSTICE KAGAN: And it at least creates
19 ambiguity, such that the default rule would operate.

20 MR. WOLFMAN: That -- that --

21 JUSTICE KAGAN: So you don't have not to go
22 to that --

23 MR. WOLFMAN: I think that is true, that we
24 have argued this in two alternative ways. One is simply
25 that the cause of action is not complete until there's a

1 resignation. And we think the regulation is clear, but
2 even if it were not clear, the default rule kicks in and
3 we win.

4 But there's no question also that one of the
5 premises of the constructive discharge, constructive
6 eviction, constructive termination as in the Mac's Shell
7 case, there is no question that there is this idea that
8 when the relationship is ended, that is imputed to the
9 employer. Some courts have focused more on that
10 rationale, and others have focused more on our principal
11 rationale, which is simply that the cause of action is
12 not complete until the resignation occurs.

13 JUSTICE GINSBURG: Why doesn't that mean
14 that it's within the employee's ability to stretch out
15 the time that he has? Plus there could have been all
16 this discrimination and the employee stays on the job,
17 and then sometime down the road decides to quit.

18 MR. WOLFMAN: Well, I think -- I think that
19 is a concern in theory but not in practice. In -- in
20 reality, there are no such claims. The claims would be
21 so weak that those constructive discharge claims are not
22 brought, and amicus cites no claims of that nature.

23 And let me just say that in this case --
24 Court's decision in Bay Area Laundry, which applied the
25 default rule, the same -- the same concern was raised

1 that the limitations period, the trigger, would be
2 within the hands of the plaintiff. And the Court said,
3 well, that may be so, but that's the way the statute was
4 written, the limitations period was written, and so be
5 it.

6 And the Court also added that the plaintiff
7 would have incentives to bring the claim as soon as
8 possible, and that would, of course, be true here.
9 It -- if in fact the person could no longer take it,
10 they would want to leave. They certainly wouldn't want
11 to bring a weak claim that came years after the
12 precipitating conduct. That --

13 CHIEF JUSTICE ROBERTS: Well, not -- not
14 years but maybe several months. I mean, you know, yes,
15 you can't take it anymore, but maybe you also need a
16 paycheck or -- or, you know, you're going to be eligible
17 for the bonus in six weeks, you may as well at least
18 wait until then.

19 MR. WOLFMAN: That is possible. There
20 are -- most cases, most of the constructive discharge
21 cases are brought -- brought promptly. Again, no one has
22 suggested here -- and there are many constructive
23 discharge cases in the courts that there have been any
24 significant delay.

25 JUSTICE ALITO: May I follow up on

1 Justice Kagan's question? You were discussing the
2 possibility of deciding this case based on the
3 particular language of the regulation that applies here,
4 but your question presented is phrased much more
5 broadly.

6 You say under Federal employment
7 discrimination law, so I took that to mean that the rule
8 that you're advocating would be the same for public and
9 private sector employment.

10 MR. WOLFMAN: I think it would be, Your
11 Honor, and I think so. I think this -- this Court's
12 decision would apply there, or at least give significant
13 guidance. The private sector --

14 JUSTICE ALITO: But there is -- this matter
15 alleged to be discriminatory applies only to Federal
16 employment.

17 MR. WOLFMAN: That is correct, but if I
18 might -- if I might extend my answer. The -- the
19 private sector statute talks about an unlawful
20 employment of practice occurring. And again, in light
21 of the default rule, even if there's ambiguity in -- in
22 that phraseology, in light of the default rule, I think
23 it's very likely that you're going to have the same rule
24 apply in both situations.

25 Both of them seem to be describing the

1 claim, the cause of action, what it is that the employee
2 is complaining about.

3 JUSTICE ALITO: Isn't it true that outside
4 of the area of constructive discharge -- and maybe
5 constructive discharge is different, and I think that's
6 really the thrust of your argument. But outside of that
7 situation there must be an act of intentional
8 discrimination within the limitations period.

9 MR. WOLFMAN: Well, that is likely correct,
10 if by that you are rejecting the notion -- again, in my
11 discussion with Justice Sotomayor -- that the
12 resignation is imputed to the employer. And that is --
13 that is the case, Your Honor --

14 JUSTICE ALITO: Yeah, but you're arguing
15 that there's -- because there's this imputation, it's
16 different for constructive discharge.

17 MR. WOLFMAN: Right.

18 JUSTICE ALITO: But my -- my question is
19 outside of that context, under Evans and Ricks and
20 Morgan and Ledbetter, there must be an act of
21 intentional discrimination within the limitations
22 period.

23 MR. WOLFMAN: Yes, Your Honor. But let's be
24 clear about what those cases stand for. Those cases do
25 reflect the facts as you just stated them. But in each

1 of those cases, the trigger date was when the claim
2 first became actionable, and that's the exact same rule
3 we're asking for here.

4 And let me again extend my answer to you,
5 Justice Alito, which it is true that constructive
6 discharge could be unique in the sense you're suggesting
7 in the Title VII case, in the Title VII area. But let's
8 remember that constructive eviction, constructive
9 business termination are treated the exact same way.

10 Your Honor, I -- I do want to go back to
11 some of the practical implications. As I -- as I began
12 saying, the Tenth Circuit rule would inject unnecessary
13 complexity. By contrast, the date of resignation is
14 easy to identify. Most administrative claimants are
15 laypeople and are unlikely to be cognizant of the
16 last-act rule posited by the Tenth Circuit.

17 Reasonable intuition; that is, common sense,
18 will tell an employee that I cannot and certainly need
19 not bring my claim that I was forced out before I was
20 actually forced out.

21 CHIEF JUSTICE ROBERTS: Well, but I think
22 the government suggests that this is exactly a case
23 where it's not so easy to figure out when the
24 constructive termination was.

25 MR. WOLFMAN: Well, when the resignation

1 occurred?

2 CHIEF JUSTICE ROBERTS: When the resignation
3 occurred.

4 MR. WOLFMAN: Well, let me just say, Your
5 Honor, on that score, no one disputed that issue below,
6 and --

7 CHIEF JUSTICE ROBERTS: Well, that doesn't
8 mean it was easy or -- or hard.

9 MR. WOLFMAN: No, Your Honor, I think it
10 does mean it was easy. Every -- the -- all the parties
11 below, the administrative decisionmaker below, and the
12 Tenth Circuit below all held that -- that -- all
13 indicated that my client resigned on -- on February --

14 CHIEF JUSTICE ROBERTS: Well, you know that
15 the case -- you know, someone says this is ridiculous, I
16 can't take it anymore, I will resign in three months. I
17 mean, what is the date of constructive termination then?

18 MR. WOLFMAN: Well, our rule is that
19 definitive notice of resignation. I think the
20 government agrees with that. And so if you hand in a
21 letter or you state I am going to resign on Friday or
22 next Monday, that the trigger date would be the date --

23 JUSTICE KENNEDY: No. He says -- I -- I
24 interpreted the Chief Justice's question, maybe wrongly,
25 suppose he says in his own mind I can't take it anymore,

1 three months from now I'm going to resign.

2 MR. WOLFMAN: I think the trigger date would
3 be that date. If he --

4 JUSTICE KENNEDY: When he resigns?

5 MR. WOLFMAN: If he give notice --

6 JUSTICE KENNEDY: When he resigns?

7 MR. WOLFMAN: His resignation is the -- the
8 date that he says that because that's the date he gave
9 definitive notice --

10 JUSTICE KENNEDY: No, no. The date that he
11 says it to himself or the date that he does resign?

12 MR. WOLFMAN: Oh. Was the Chief Justice
13 positing something going on in the mind of the -- of the
14 plaintiff?

15 CHIEF JUSTICE ROBERTS: No, no. It's --
16 it's, you know, I think it's fairly common for people to
17 set a resignation date at some point in the future. You
18 know, a schoolteacher will say as soon as this school
19 year is over, I'm out of here.

20 MR. WOLFMAN: I think the date of
21 resignation is the date the teacher says that.

22 JUSTICE GINSBURG: Then no --

23 JUSTICE SCALIA: There's no cause of action
24 yet.

25 JUSTICE GINSBURG: You mean --

1 JUSTICE SCALIA: There's no cause -- you've
2 been -- you've been arguing to us you can't have the
3 statute running until there's a cause of action.

4 MR. WOLFMAN: There is a cause of action
5 because there's been a resignation, definitive notice of
6 resignation. It's true that the person is still on the
7 job --

8 JUSTICE SCALIA: He's still getting paid.

9 MR. WOLFMAN: That is correct, but -- but
10 the person has resigned. And the lower courts --

11 JUSTICE SCALIA: He hasn't resigned. He's
12 given notice of his intention to resign three months
13 from now.

14 MR. WOLFMAN: I don't believe -- if the --
15 if the Court wishes to adopt a -- a last-day-of-work
16 rule, that obviously would benefit --

17 JUSTICE SCALIA: No --

18 MR. WOLFMAN: -- I'm fine.

19 JUSTICE SCALIA: -- I'm just adopting the
20 rule of what he says. If he says I resign, he's
21 resigned. If he says I will resign in three months, he
22 doesn't resign until three months.

23 MR. WOLFMAN: We believe that when someone,
24 for instance, hands in a letter and said, my last day of
25 work -- I resign, my last day of work will be Friday,

1 that that constitutes a resignation, and that our rule
2 is definitive date of resignation.

3 If the Court wishes, again, to adopt the
4 last-date-of -- of-work rule, that would obviously
5 benefit my client but it is not necessary.

6 I would like to reserve the balance of my
7 time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Gannon.

10 ORAL ARGUMENT OF CURTIS E. GANNON

11 ON BEHALF OF RESPONDENT

12 MR. GANNON: Mr. Chief Justice, and may it
13 please the Court:

14 We agree with petitioner that the period for
15 initiating administrative consideration of a
16 constructive-discharge claim should begin when the
17 employee gives notice of resignation and not when the
18 employer commits the last act which might or might not
19 lead to that resignation.

20 And if I can turn to the colloquy that the
21 Chief Justice and Justice Scalia were just having with
22 my friend, we think that one of the virtues of this rule
23 is that it -- it leads to the same result in both cases
24 of actual termination and cases of constructive
25 termination.

1 JUSTICE ALITO: Why don't you change -- why
2 don't you just amend the regulation?

3 MR. GANNON: Well, we think --

4 JUSTICE ALITO: We're interpreting the
5 language -- it's not even a statute. It's a regulation.
6 It's your regulation.

7 MR. GANNON: It is --

8 JUSTICE ALITO: Why don't you just amend it
9 to make it clear? You think this is a sensible rule, it
10 is a very clear rule. And it's probably a sensible rule
11 when you've got a 45-day period.

12 Why don't you just change the regulation?
13 Why --

14 MR. GANNON: The EEOC --

15 JUSTICE ALITO: -- this elaborate
16 litigation.

17 MR. GANNON: The EEOC may well do that,
18 Justice Alito. The same question is going to present
19 itself with respect to -- we think materially the same
20 question presents itself in the non-Federal sector where
21 the statute, as has already been discussed, refers to
22 when the allegedly unlawful employment practice
23 occurred. And the EEOC has construed this portion of
24 the regulation as being effectively the same as the rule
25 in the non-Federal sector.

1 And the rule that we're asking for is this
2 Court's rule from Ricks. It's the exact same rule.
3 This rule about being when definitive notice has --
4 is -- is given for a termination, Justice Scalia, you
5 were saying that when somebody says I quit, my last day
6 of work is three months from now, therefore, he hasn't
7 actually quit, that's Ricks.

8 The Court concluded that when the employer
9 there said you have been denied tenure, here is your
10 terminal contract, you will be working here for only one
11 more year, that the relevant date was the date on which
12 the operative decision had been made and it had been
13 communicated to the employee. And so we think that the
14 rule should be the same for cases of actual discharge --

15 JUSTICE KENNEDY: But Ricks --

16 MR. GANNON: -- and constructive discharge.

17 JUSTICE KENNEDY: Ricks alleged only
18 discrimination, not discriminatory -- not constructive
19 discharge.

20 MR. GANNON: That's true. There is a
21 difference here.

22 JUSTICE KENNEDY: That's why I have a
23 problem with Ricks.

24 MR. GANNON: Well --

25 JUSTICE KENNEDY: I mean, I don't think

1 Ricks reads directly on what you're saying. You -- you
2 want to have an extension.

3 MR. GANNON: We're trying to say that we
4 think that the same rule should apply to actual and
5 constructive discharges, and -- and it is a rule that is
6 date of notification rather than date of separation.
7 And that's the rule that everybody applies on the
8 termination side; it's the rule that most of the courts
9 of appeals have applied in the -- in the discharge side.

10 In the context of terminations, only
11 Justice Stevens suggested we should be using the actual
12 date of separation --

13 JUSTICE KENNEDY: But again, as Justice
14 Scalia points out, there's a difference between the
15 employee taking the action and the -- and the employer
16 taking the action --

17 MR. GANNON: We agree that that --

18 JUSTICE KENNEDY: -- and that distinguishes
19 Ricks.

20 MR. GANNON: That does -- that does make
21 this case different. That's why this isn't on all fours
22 with Ricks. And we do think that you would have to make
23 the decision that you want to apply the same rule across
24 to the constructive discharge context. But we think the
25 reason you would do that is precisely because, as the

1 Court acknowledged in *Suders*, a constructive discharge
2 requires both an employee's decision to resign and the
3 precipitating conduct. And until both of those things
4 have happened, there is no constructive discharge.
5 Nobody can say I have been constructively discharged
6 until both of those things --

7 JUSTICE SCALIA: It seems to me you're --
8 you're loading the dice when -- when you say it requires
9 both a decision to resign.

10 MR. GANNON: Well, the --

11 JUSTICE SCALIA: It -- it requires a
12 resignation.

13 MR. GANNON: Well, I would just --

14 JUSTICE SCALIA: I mean, that's -- that's
15 the problem.

16 MR. GANNON: I was just quoting the Court's
17 decision in *Suders*, Justice Scalia.

18 JUSTICE SCALIA: No, we weren't discussing
19 this very issue.

20 MR. GANNON: Well, we were discussing -- the
21 Court was discussing when a constructive discharge was
22 actionable, and that until -- and so we do think it's
23 not just the decision in the employee's head. We think
24 that the decision has to actually be communicated.

25 And so we -- this is one reason why actually

1 this isn't -- this wouldn't interfere as much with the
2 concern for counseling and conciliation that you were
3 discussing with my friend, which is that, as in cases of
4 termination, it could be that everybody knows that the
5 discharge has happened -- it's a constructive discharge
6 or an actual discharge.

7 Everybody knows when the employer says,
8 you're fired, your last day of work is 14 days from
9 today, same thing when the employee says I'm giving my
10 notice, I quit, my last day is 14 days from today. At
11 that point, whichever one has happened, the employee can
12 go and initiate counseling. He may not be out the door
13 yet. There may be a resolution that happens. If he
14 does end up going out the door, counseling can happen
15 afterwards. But he doesn't have to initiate counseling
16 before this happens. There's a 45-day --

17 JUSTICE SCALIA: He doesn't even have to
18 tell the employer why he's resigning.

19 MR. GANNON: That's -- that's --

20 JUSTICE SCALIA: I mean, all the employer
21 knows is you're -- you're leaving at the end of this
22 term of -- of school.

23 MR. GANNON: And --

24 JUSTICE SCALIA: Or you're leaving in three
25 months. That's all the employer knows.

1 MR. GANNON: And in our view, when -- when
2 -- once he's given notice, I'm leaving in three months,
3 he then has 45 days to initiate the counseling with --
4 with the agency counselor.

5 JUSTICE SCALIA: He doesn't even have to
6 specify in his notice of quitting that he is quitting
7 because of discriminatory action. He doesn't even have
8 to specify that.

9 MR. GANNON: That -- that is generally true
10 in the rest of the doctrine. That has nothing to do
11 with the statute of limitations. The EEOC will ask did
12 you tell your employer this is why you were resigning.
13 It will be something that will make it more difficult to
14 prove his case. But we --

15 JUSTICE SCALIA: I think whether he has to
16 say that or not has a lot to do with -- with when the
17 effective date ought to be, it seems to me.

18 MR. GANNON: Well, we think that the reason
19 that this counts as being an act that should be imputed
20 to the employer is because it is forced by the
21 circumstances.

22 And we think that the doctrine itself is
23 self-limiting. It limits the time period between when
24 the employee is able to suffer the consequence of what
25 the employer does to him, and then actually say I can't

1 take this anymore, because as the Court held in Suders,
2 the employee is going to have to prove that the
3 situation was intolerable, but he can --

4 JUSTICE SCALIA: But he doesn't have to say
5 that.

6 MR. GANNON: He doesn't have to say that --

7 JUSTICE SCALIA: He doesn't have to say I
8 can't take this anymore --

9 MR. GANNON: -- on the day --

10 JUSTICE SCALIA: He just has to quit or say
11 I'm quitting at the end of this term of school, and then
12 later say, oh, the reason I quit was it was I just
13 couldn't take it anymore.

14 MR. GANNON: And he has to do that within
15 45 days.

16 JUSTICE SCALIA: Within 45 days after --
17 after when?

18 MR. GANNON: After the date --

19 JUSTICE SCALIA: After his giving the
20 notice.

21 MR. GANNON: After the date of notification.
22 Just as, like -- as I was saying before, just as if it
23 were when the employer said, you're fired, your last day
24 of work is two weeks from today. The clock is ticking.
25 That's the rule from Ricks. We think it should be the

1 same rule here, and we think that the reason why this is
2 called a constructive discharge is -- is right there in
3 the phrase is -- is pregnant with the idea that this is
4 an action that is being imputed to the employer.

5 And so although it is true that, unlike the
6 regular -- the other claim of discrimination that
7 Justice Kennedy was mentioning before in Ricks, although
8 the employer has not actually done something necessarily
9 during the limitations period, the new act of
10 discrimination that we think is relevant here is the act
11 of the employee, and it's one that it's called a
12 constructive discharge precisely because it is not
13 actually a discharge. It is instead an act of the
14 employee that is a resignation, but it is treated in law
15 as a legal fiction as if it is a discharge. And we
16 think that that's -- that squares the circle here. And
17 we --

18 JUSTICE SCALIA: Of course, I would -- I
19 would take the term constructive discharge to refer not
20 to the notice of quitting, but rather to the acts of the
21 employer that forced the quitting. Even though the
22 person hasn't been discharged, you have constructively
23 discharged him because you've made his life miserable.

24 MR. GANNON: I -- I take the point,
25 Justice Scalia, but that's not enough to allege a

1 constructive discharge. Until the employee actually
2 says I'm quitting, there has not been a constructive
3 discharge. And so just because an -- and this may be
4 what Justice Sotomayor was asking about before, but
5 we --

6 JUSTICE GINSBURG: And that -- that works
7 the same way with eviction and other cases where you
8 have constructive, that the person has to act --

9 MR. GANNON: That -- that's correct. And we
10 think the constructive eviction case is a very close
11 parallel. And it shows that it's unusual but not
12 unprecedented that the plaintiff might be the one that
13 actually controls when the clock starts on the statute
14 of limitations.

15 And take the case of a constructive
16 eviction. If somebody wants to bring a claim for the
17 breach of the covenant of warranty, that's a claim that
18 doesn't start until the tenant has been evicted, either
19 actually or constructively. And so there's some choice
20 there of when -- when --

21 JUSTICE SCALIA: What do you mean,
22 constructively? I don't understand. Constructive of --
23 can't you bring a claim of constructive eviction while
24 you're still occupying the premises?

25 MR. GANNON: The -- it -- that's -- that's

1 one version of constructive eviction. Under the --
2 under the more classical version of constructive
3 eviction that came up in cases involving breach of the
4 covenant of warranty, the eviction would be constructive
5 because no one actually came and forced you out.
6 Instead, you just yielded to a superior claim of
7 paramount title, and that was your choice of when you
8 decided you weren't going to fight this anymore.

9 JUSTICE SCALIA: But in fact you don't have
10 to get out. I think --

11 MR. GANNON: In fact you had not yet --

12 JUSTICE SCALIA: You can bring -- you can
13 bring a claim against your landlord for constructive
14 eviction while you're still occupying the premises.

15 MR. GANNON: Well, the Court recognized in
16 the Mac's Shell decision that's more of an innovation
17 that -- that it wasn't the way this was classically
18 handled. And -- and in Mac's Shell said that it thought
19 that there wasn't a constructive termination of a
20 franchise until the franchise had actually -- until
21 somebody had actually walked out and allegized it to
22 both the classical cases of constructive eviction, and
23 this case of constructive discharge.

24 We think that it's clear that if the
25 employee says this would be bad enough for me to resign

1 but I'm not going to resign, I want to bring a claim for
2 constructive discharge, he couldn't do that. He
3 could -- he could say I've been discriminated against,
4 he could say there's been a hostile work environment,
5 but we do think, in disagreement with -- with my friend,
6 the court-appointed amicus, we do think that these are
7 two different claims.

8 And the Court's opinion in Suders indicated
9 that there's a distinction between, for instance, the
10 underlying claim for hostile work environment and then
11 the more aggravated claim of a constructive discharge
12 for hostile work environment.

13 JUSTICE KAGAN: Do the predicate acts have
14 to be independently actionable or not?

15 MR. GANNON: I don't think that they have to
16 be. In most cases they will be. We -- we take that
17 point as probably going to be an unusual case where you
18 can bring a constructive discharge and nothing else.

19 The paradigmatic case is the one that the
20 Court was hypothesizing in Suders where you have a
21 hostile work environment where there are lots of things
22 that would have been actionable as discrimination, but
23 they wouldn't have necessarily have warranted quitting.

24 And then the employee says this is too much,
25 it's crossed the line, I'm quitting. That second claim

1 we think is a new claim. That's why the Court described
2 it as a second -- as an additional -- as a graver claim.

3 And in the discussion of amending the
4 complaints that -- that the amicus invokes in the EEOC's
5 management directive, the reason why the court of
6 appeals and the amicus can say that the employee could
7 always just amend a timely complaint about the
8 underlying discrimination and add a claim for
9 constructive discharge is because the EEOC considers
10 this to be a new incident of discrimination. But you
11 can actually amend a pending complaint because it's
12 related to what went before.

13 But the reason why you have to amend the
14 complaint is because it's a new claim. It's not just
15 evidence that's relevant to damages for the underlying
16 discrimination. There's -- there's -- the employee is
17 going to have to prove that he's made a decision to
18 resign, and also that the reason he did so was because
19 the situation was so intolerable that he -- he was left
20 with no other choice. But that --

21 JUSTICE GINSBURG: Can you explain the
22 difference between your position and the Petitioner's?
23 Why do you date the constructive discharge from, what is
24 it, December 16th?

25 MR. GANNON: Yes. And so I take it you're

1 -- you're talking about the factual question. I don't
2 understand us as have a disagreement about the legal
3 question. But with respect to applying the rule to this
4 case, the difference is that we think that the
5 settlement agreement that Petitioner signed on December
6 16th -- which is the relevant clauses are reprinted at
7 pages 60 and 61 of the Joint Appendix -- manifested his
8 unequivocal notice of his intention to resign. We think
9 that satisfies the rule that both of us are talking
10 about here.

11 JUSTICE GINSBURG: But he was given a
12 choice.

13 MR. GANNON: We don't think --

14 JUSTICE GINSBURG: He was given a choice of
15 the --

16 MR. GANNON: That's -- that is not the way
17 we think the agreement reads, Justice Ginsburg. The
18 first two sentences of the clause that crosses the page
19 from 60 to 61 say Mr. Green agrees to retire from the
20 Postal Service no later than March 31st, and Mr. Green
21 agrees to take all necessary steps to effect his
22 retirement --

23 JUSTICE GINSBURG: But then read on.

24 MR. GANNON: And the next sentence says --
25 it doesn't say Mr. Green has an option of not retiring

1 if he decides to change his mind and then report to --
2 for duty. It says if retirement from the Postal Service
3 does not occur, that he will report for duty in a
4 station to which he already --

5 JUSTICE ALITO: Well, suppose he showed up
6 in -- in Wyoming? What would you have done?

7 MR. GANNON: Do you mean --

8 JUSTICE ALITO: Wouldn't you have allowed
9 him to take that job at the lower pay?

10 MR. GANNON: You mean if he had -- he had
11 not taken all steps necessary to effect his resignation
12 by March 31st? Then we think --

13 JUSTICE ALITO: No. No. You said --

14 MR. GANNON: We think he would have been in
15 breach of the agreement. I'm not sure what would have
16 happened then, but the reason this sentence is in the
17 agreement is to take account of -- of circumstances that
18 are no fault of his. If the Postal Service, or in
19 particular the OPM, takes --

20 JUSTICE SOTOMAYOR: It's not a breach.

21 MR. GANNON: Pardon?

22 JUSTICE SOTOMAYOR: The agreement says if he
23 hasn't taken all the steps, if it does not occur,
24 Mr. Green will report for duty.

25 MR. GANNON: Yes, it does --

1 JUSTICE SOTOMAYOR: In Wyoming.

2 MR. GANNON: And it doesn't say that he has
3 a choice of doing that. He will have already breached
4 the second sentence if he decides not to retire.

5 JUSTICE SOTOMAYOR: Why not have the second
6 sentence there?

7 MR. GANNON: Pardon?

8 JUSTICE SOTOMAYOR: Why have the second
9 sentence there at all? Why are you giving him an option
10 if he's -- if he hasn't retired?

11 MR. GANNON: We do not read this as giving
12 him an option. We read this as responding --

13 JUSTICE SOTOMAYOR: There was not reached by
14 the court below, correct?

15 MR. GANNON: This was reached by the
16 district court. It was an alternative holding by the
17 district court. The Petitioner did not appeal that
18 alternative holding. And so in the court of appeals,
19 the court was just considering the antecedent question
20 of whether we should only look to the act of the
21 employer or also the act of the employee.

22 And so this factual question didn't actually
23 come up before the court of appeals. We noted in the
24 statement of facts in our court of appeals brief that
25 the agreement included his -- the settlement agreement

1 included his agreement to retire, but otherwise we did
2 take the case on his premise, and the court of appeals
3 did not address this.

4 So we do think that it would be appropriate
5 for the Court here, if it agrees with us, if this
6 agreement is sufficiently clear, to say that Petitioner
7 will lose on the facts of this case.

8 If you want to remand and have the court of
9 appeals consider whether the district court was correct
10 in reaching that, that would also be appropriate. But
11 we think that this wouldn't be that different from what
12 the Court did in Irwin where in Irwin the Court said,
13 well, the court of appeals was wrong about finding that
14 there was no possibility of equitable tolling;
15 nevertheless, there is no way he will ever satisfy
16 equitable tolling on the facts of this case, so he
17 loses.

18 And I do think that one final thing I would
19 like to say is that the Court should be able to take
20 some comfort from the real-world evidence that we have.
21 It's not much. We don't have evidence of cases from the
22 five circuits that have adopted a version of the notice
23 of resignation rule between 1987 and 2000 that indicates
24 that employers are being besieged with stale
25 discrimination claims that are being revived by

1 employees' attempts to quit some months or years after
2 the fact. And so we think that it's doesn't present
3 those concerns.

4 JUSTICE SOTOMAYOR: Frankly, I'm a little
5 less moved by that because, from my personal experience,
6 those stale claims generally don't make it past a motion
7 to dismiss.

8 MR. GANNON: Well, that -- that --

9 JUSTICE SOTOMAYOR: Very few of them are
10 appealed because if they're really that stale, those
11 constructive discharge claims are usually thrown out.

12 MR. GANNON: Well, I --

13 JUSTICE SOTOMAYOR: The case is litigated on
14 other grounds.

15 MR. GANNON: Well, I think that's right, but
16 -- and I think that -- but it's also the case that in
17 many cases, in fact in most cases, there isn't going to
18 be very much time between these two dates, and therefore
19 it usually isn't going to be that dispositive.

20 In this case, we think that the things
21 happened on the same day. Even under Petitioner's
22 approach, he had some weeks to make his decision. But
23 the reason why he wasn't prejudiced by being able to
24 take some weeks to make his decision is precisely
25 because he was using annual leave, he wasn't suffering

1 the consequences of a hostile work environment, he
2 hadn't taken the pay cut, he hadn't had to move 400
3 miles away, and so this was an unusual case where he
4 would have been able to take that much time.

5 And so it looks like, as in -- in
6 practicality's sake, that -- that it hasn't made a big
7 difference. And that's why we think it would be useful
8 for the Court to say this is effectively the Ricks rule.
9 It should apply to both cases of actual and cases of
10 constructive termination.

11 If there are no further questions, we would
12 urge the Court to affirm.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Ms. Carroll.

15 ORAL ARGUMENT OF CATHERINE M.A. CARROLL

16 AS COURT-APPOINTED AMICUS CURIAE

17 IN SUPPORT OF THE JUDGMENT BELOW

18 MS. CARROLL: Mr. Chief Justice, and may it
19 please the Court:

20 We agree that the Ricks rule should apply
21 here as it does to any other kind of claim under Title
22 VII, and like any other kind of claim under Title VII, a
23 constructive discharge claim has to challenge actionable
24 conduct by the employer.

25 In applying the EEOC's regulation here, we

1 have to ask, what was that actionable conduct, that
2 matter alleged to be discriminatory, and when did it
3 occur.

4 JUSTICE KAGAN: Well, you just sort of made
5 those two synonymous. But they don't have to be
6 synonymous. A matter might mean the claim, not the
7 particular discriminatory conduct that's the predicate
8 for the claim.

9 MS. CARROLL: Justice Kagan, I think that
10 the EEOC has, by equating the Federal sector provision
11 with the private sector provision, has suggested that
12 both of these provisions do focus on the alleged
13 unlawful employment practice. In addition when the EEOC
14 promulgated this rule in its current form, it explained
15 that this rule, quote, continued the rule that had
16 applied under the prior version which used the language
17 alleged discriminatory event.

18 So I don't think the inclusion of the word
19 "matter" by itself makes a difference. After all, it
20 doesn't just say matter. It says matter alleged to be
21 discriminatory, and we think that has to be read as a
22 whole to clearly focus on what is it that is the target
23 of the claim.

24 And that language is -- it does not become
25 ambiguous just because it might be challenging to apply

1 it in a particular fact pattern. I think this Court's
2 decision in Morgan is an excellent example of that where
3 the Court said we have a clear rule that requires us to
4 identify what was the alleged unlawful employment
5 practice and when did it occur, and that's the analysis
6 here.

7 JUSTICE KAGAN: I mean, this is an unusual
8 kind of claim, and it's an unusual kind of claim because
9 there are predicate acts and then there is also a
10 resignation which clearly has to occur before the suit
11 can be brought. And when there is this, you know, this
12 composite set of things that has to go on before a suit,
13 it seems to me that it's at least approaching the kind
14 of possible ambiguous -- ambiguous stage to say, yeah,
15 that's a matter, that's a practice that both of those
16 things have to be part of it.

17 MS. CARROLL: I think that that's difficult
18 to reconcile with how Morgan treated the word
19 "practice." Always bearing in mind, as the Court has
20 explained in a case like Graham County, for instance,
21 the kind of ambiguity that triggers resort to a default
22 accrual rule is ambiguity in the literal text of the
23 provision. There it was unclear whether a particular
24 limitations period even applied and the Court said,
25 literal text is ambiguous, there are clues that point in

1 one direction, we think this default rule points in the
2 same direction.

3 But the Court hasn't applied that background
4 rule to override language that's -- that otherwise
5 clearly calls for an analysis of, in this case, what is
6 it that the plaintiff alleged to be discriminatory.

7 Here, Mr. Green alleged a discrete act of
8 retaliation that he says occurred in December of 2009.
9 He alleges no repeated or cumulative acts of
10 discrimination subsequent to that date and so --

11 JUSTICE GINSBURG: What about that he hasn't
12 got a claim? He can't even -- you can't come to court
13 with a claim for constructive discharge until you've
14 said I'm discharged. So he -- you're suggesting that
15 the time runs from a time when he does not yet have a
16 ripe claim.

17 MS. CARROLL: Well, we does not have a ripe
18 claim for constructive discharge. He would have a ripe
19 claim for discrimination or retaliation to challenge the
20 underlying predicate acts, and in this position --

21 JUSTICE KENNEDY: But then are you saying
22 that constructive discharge will -- will lead to a cause
23 of action only when it is so close to the precipitating
24 event that they are almost contemporaneous?

25 MS. CARROLL: I'm not 100 percent sure I

1 followed the question, but let me --

2 JUSTICE KENNEDY: When, under your view,
3 when is there a constructive discharge that itself leads
4 to triggering the statute of limitations?

5 MS. CARROLL: I think in a constructive
6 discharge case -- and to be clear, that label can be
7 applied to a range of different fact patterns -- it will
8 often be the case that the predicate conduct that
9 precipitates the resignation is itself alleged to be
10 discriminatory. Take the facts of *Suders*, for instance,
11 where there was an ongoing pattern of harassing
12 behavior. Individual acts contributing to that hostile
13 work environment had occurred leading up to and indeed
14 on I believe the very day of the resignation. There, I
15 think it is, as Your Honor suggests, not going to matter
16 at all which rule the Court were to adopt in this case.

17 JUSTICE KENNEDY: They're almost
18 contemporaneous.

19 MS. CARROLL: They would be contemporaneous.
20 But in a case like this, it's much clearer to see the
21 conceptual distinction between Mr. Green's own
22 individual independent decision to resign and his
23 employer's predicate discriminatory conduct. And in
24 *Suders*, the Court made very clear that those were two
25 distinct components of a constructive-discharge claim.

1 And I think, you know, the Petitioner and
2 the government's position asks the Court to extend the
3 legal fiction that equates constructive discharge.

4 JUSTICE BREYER: Well, the matter complained
5 of here is a constructive discharge. In a tort suit or
6 many the matter complained of is negligent behavior
7 leading to an injury. I take it in the tort suit the
8 statute of limitations doesn't begin to run until there
9 is harm.

10 MS. CARROLL: I think that's generally true
11 of tort suits --

12 JUSTICE BREYER: All right. If that's
13 generally true in a tort suit, and my guess is in a
14 contract suit for breach of contract, if the contracting
15 party sent the ships out and you knew that it wouldn't
16 be delivered, it's not actionable until it isn't
17 delivered and I guess there are ways around that, but my
18 point is generally in the law where the matter
19 complained of is a certain kind of incident in the
20 world, negligence leading to harm, action of a
21 discriminatory, et cetera, nature that leads to a
22 discharge, normally the statute of limitations begins to
23 run when the harm occurs.

24 Now why should it be any different here?

25 MS. CARROLL: In this case, the

1 discrimination, the retaliation I should say, that was
2 challenged was the forcing -- forcing of Mr. Green into
3 the settlement agreement in December. He alleges that
4 that was retaliatory and he was harmed by that at that
5 time, and he could have promptly initiated counseling on
6 that complaint.

7 Now, it is true that, as a consequence of
8 that discriminatory retaliatory conduct, the stakes got
9 higher for him at a later point when he decided --

10 JUSTICE BREYER: Of course, he could have,
11 but we're talking about only the constructive discharge
12 part. I mean, sometimes defendants do seven bad things
13 at once, or at least allegedly bad.

14 MS. CARROLL: That's correct, but --

15 JUSTICE BREYER: And we're only talking
16 about one of them, the one that we're talking about is
17 the constructive-discharge claim.

18 So I go back to my question about
19 negligence, because that was the first course I took in
20 law school so I remember that, but the -- the fact is
21 why should we treat this any differently?

22 MS. CARROLL: So, in general, we don't this
23 should be analyzed any differently than any other kind
24 of claim, which is that we have to identify what is the
25 alleged unlawful practice and when did it occur. Why is

1 that? Because --

2 JUSTICE BREYER: Because you have to, as you
3 said, in the a tort case it's not just that the person
4 behaved negligently, but that negligence had to result
5 in a harm.

6 MS. CARROLL: And --

7 JUSTICE BREYER: So I'm just -- that's the
8 only simpleminded analogy I'm drawing and I wonder why
9 it doesn't work.

10 MS. CARROLL: I think it does work because
11 in this case there was retaliation alleged in December
12 that harmed Mr. Green at that time. He later suffered a
13 more painful consequence, which under Ricks does not
14 trigger a new construct -- a new statute of limitations.

15 But I want to go back --

16 JUSTICE ALITO: Suppose there was evidence
17 that the employer had a continuing intent to force
18 Mr. Green's resignation. So you've got emails that say,
19 Mr. Green is causing trouble for us by charging us with
20 discrimination, we're going to do A, B, C, D and E to
21 force him to retire. And then on the day when he quits
22 there is another email that says, Hallelujah, we've
23 achieved our objective, he's retired.

24 Now when would it run in that situation?

25 MS. CARROLL: I think if --

1 JUSTICE BREYER: Wouldn't it run from the
2 date of discharge because there would be an intent at --
3 as of that date?

4 MS. CARROLL: But if I'm understanding the
5 hypothetical correctly, that sounds to me like a case
6 that would be analyzed under the Court's decision in
7 Morgan, where you have an environment of hostility that
8 is composed of many individual acts, some of which might
9 not be independently actionable in and of themselves,
10 joined with a discriminatory --

11 JUSTICE ALITO: Let me clarify it. So
12 nothing more is done. There are all these acts up to a
13 certain point, and then 45 days, 50 days pass and the
14 employee resigns, but the employer has all along had the
15 intention of forcing the resignation. So on the date of
16 the resignation the employer intends to cause a
17 discharge for discriminatory reason.

18 MS. CARROLL: I still think Morgan answers
19 that question because Morgan says there has to be an act
20 contributing to the hostile work environment that occurs
21 within the 40 -- within the charging period. And that's
22 the exact same analysis whether on the 46th day the
23 employee decides that's it, I quit, or if he simply
24 decides that's it, I'm finally going to speak up about
25 this hostile work environment that's being been going

1 on. It has nothing to do with constructive discharge.

2 JUSTICE BREYER: That's the -- now, I'm
3 getting this more clearly because your response to my
4 question, which is now relevant to this too, is, look,
5 the plaintiff was hurt on the very day that last act was
6 performed, indeed he suffered because he saw the act
7 being performed, and that was one of the things that led
8 him later to quit.

9 So let's count that as the injury. And
10 let's count the whole thing complete as of that time.
11 That's basically the argument for your side, I think.

12 And now the argument against you is that's
13 going to be a nightmare. Because there will be in fact
14 a whole range of acts, a whole series in many cases and
15 will then, in order to run the statute of limitations,
16 have to get into the question of which of those acts --
17 maybe there were some he didn't know about -- which of
18 those acts actually did produce harm and which did not.
19 And he just really won't know when to bring his lawsuit
20 as compared with the comparatively simple thing: He
21 quits.

22 MS. CARROLL: Right, I understand that
23 contention, but I think that the so-called difficulty is
24 no different than the difficulty, so-called, that would
25 arise in a hostile work environment case where there was

1 no resignation. You would still have to --

2 JUSTICE BREYER: Yes, that's true.

3 MS. CARROLL: -- figure out what -- were
4 there acts within the 45-day period that contributed to
5 the environment. Maybe that's going to be difficult on
6 some facts, but that's a result of this Court's decision
7 in Morgan, again, nothing to do with constructive
8 discharge.

9 Now, with respect to --

10 JUSTICE KAGAN: There's something more than
11 just simplicity, which is, you know, suppose you had a
12 case where somebody is first demoted and then somebody
13 is fired. You would never say, oh, he was demoted. He
14 suffered the injury then, it just raised the stakes.
15 You would say, no, there's two independent things and
16 now he can bring a termination claim.

17 MS. CARROLL: That's right.

18 JUSTICE KAGAN: And the power of the
19 constructive-discharge claim is to say the exact same
20 thing really has happened here, that once you lose the
21 job, it's more than the stakes have been raised. It's
22 that there is a separate injury that then becomes
23 legally actionable.

24 MS. CARROLL: Well, the analysis when there
25 is a demotion followed by a termination is not simply

1 that there's been a second separate injury, but that
2 there's been a second separate violation of Title VII by
3 the employer. That's why it is a discrete unlawful
4 employment action triggering a fresh limitations period.

5 In constructive discharge, you know, the
6 analysis that the second separate event, the employee's
7 decision to resign is itself the actionable thing, that
8 is the analysis that the court of appeals had applied in
9 *Suders*. In *Suders* the question was: Do we treat
10 constructive discharge as a tangible employment action
11 for purposes of determining vicarious liability. The
12 Third Circuit said, well, yes, we treat these as
13 equivalents for all intents and purposes, so naturally,
14 when there's a constructive discharge, that means
15 there's been a tangible employment action.

16 This Court rejected that analysis and said,
17 no, the legal fiction does not extend that far. To be
18 sure, the Court says, we treat those two the same for
19 remedial purposes in the sense that an employee who has
20 been constructively discharged can recover for that to
21 the same degree and for the same extent as if he or she
22 had been actually discharged.

23 That makes sense because you have this
24 background duty to mitigate and, in the circumstance of
25 a constructive discharge, we don't think the employee

1 should be tagged with the consequences of having, you
2 know, so-called failed to mitigate damages. But
3 that's -- that's the purpose of the legal fiction --

4 JUSTICE KAGAN: But if we're going to say,
5 yes, these are different and for some purposes we're
6 going to look to the fiction and for other purposes
7 we're not going to look to the fiction, it seems to me
8 as though here it makes sense to take account of the
9 fiction in the sense that the person cannot bring a
10 claim until the resignation has happened.

11 So that's the kind of paradigmatic case in
12 which, boy, there is something really powerful pushing
13 that, yes, you can -- you should recognize the
14 constructive discharge as a discharge in this case.

15 MS. CARROLL: But the limitations period
16 here does not run from the accrual of the claim, it runs
17 from the time of the matter alleged to be
18 discriminatory, the unlawful employment action. And as
19 this Court explained in *Suders*, the constructive
20 discharge entails both predicate discrimination -- and
21 we do think it has to be independently actionable. We
22 think the Court recognized that when it said in *Suders*
23 that for Ms. *Suders* to prove her hostile work
24 environment claim was quoting necessary predicate to her
25 constructive discharge claim, and that's also the

1 uniform holding in the courts of appeals. There has to
2 be predicate, unlawful conduct by the employer and a
3 subsequent decision by the employee to resign.

4 When you have a provision that singles out
5 as the start of the limitations period one of those two
6 components, then the fact that the claim hasn't accrued
7 yet is not something that the Court can rely on to
8 override that clear language. I think this Court's
9 decision in Pillsbury is a really excellent example of
10 that, where under the Longshoremen's Act, there was a
11 provision that ran from the time of injury. And the
12 plaintiffs pointed out, well, that we can't actually
13 recover compensation for our injury until a disability
14 has manifested, so we should say that we should
15 interpret injury to mean disability. And the Court
16 said, well, no. I mean, it's true that that will run
17 the limitation period before the claim can accrue, but
18 the language says what it says.

19 For what it's worth here, I don't think that
20 this reading is actually going to cut off claims except
21 in cases of, you know, real lack of diligence, because
22 here, it's not the case that there's no claim available
23 after the initial act of discrimination by the employer,
24 there is a claim available, the employee can initiate
25 counseling on that, and as a matter of the conciliation

1 policy, he or she ought to do that promptly in order to
2 bring about the best chance of a prompt and informal
3 reconciliation.

4 JUSTICE SCALIA: The language we're focusing
5 on here is the language of a regulation. What statutory
6 language does that regulation implement?

7 MS. CARROLL: The cause of action for
8 Federal employees in 2000e-16(c), if I have that right,
9 requires that, it extends a cause of action to Federal
10 employees who have been aggrieved by the final decision
11 of an agency that has been produced through this
12 administrative process that is all a design of -- of
13 EEOC regulations.

14 So there, the -- unlike in the private
15 sector provision, the charging period here is purely a
16 creature of the regulation. The time limit that exists
17 in the statute on the Federal sector side is only the
18 time limit for bringing the lawsuit once you have been
19 aggrieved by the final agency decision.

20 CHIEF JUSTICE ROBERTS: You say this isn't
21 going to be a problem much. I think it's going to be a
22 problem a lot of times. People are in jobs and they're,
23 you know, suffering this particular type of adverse work
24 environment or discrimination, but quitting your job is
25 a very big deal. I think you have to plan out when

1 that's going to be, and just because you can't take it
2 anymore doesn't mean that you could quit work right
3 away.

4 MS. CARROLL: But this rule doesn't require
5 you to quit in order to be able to raise and seek
6 resolution.

7 CHIEF JUSTICE ROBERTS: Oh, sure, it doesn't
8 require you to quit, it just requires you to tell your
9 boss, you know, I can't take this anymore. And now I've
10 got to conciliate with you, but, you know, it creates
11 complications in the workforce if you raise that type of
12 issue.

13 MS. CARROLL: It can. I mean, to be clear,
14 the EEOC regulations require that this must be all done
15 anonymously until the complaining employee says
16 actually, please go ahead and tell my employer so that
17 we can try to pursue alternative --

18 CHIEF JUSTICE ROBERTS: I suspect most
19 employers could figure out who is complaining in these
20 types of situations.

21 MS. CARROLL: Well, be that as it may, I
22 think the policy underlying this provision is the
23 recognition that the purpose of all of this is to try to
24 prevent discrimination and to correct it as soon as it
25 has occurred. It is unquestionably a very short

1 provision, and the Court recognized in Morgan that this
2 very short provision exists because of the recognition
3 that we want these sorts of alleged discriminatory,
4 retaliatory circumstances to be addressed right away.
5 There are safeguards built in. This provision, I think
6 probably unique among statutes of limitations that I
7 know of, actually mandates that it be extended if, for
8 example, the employee didn't know about the time limit
9 or didn't know -- didn't have a reasonable basis to
10 suspect discrimination.

11 CHIEF JUSTICE ROBERTS: What -- what is your
12 position on the government's stance?

13 MS. CARROLL: On the legal question or the
14 factual --

15 CHIEF JUSTICE ROBERTS: Factual question.

16 MS. CARROLL: We haven't taken a position on
17 that because the court of appeals didn't -- didn't find
18 it necessary to do so. You know, we --

19 CHIEF JUSTICE ROBERTS: I think it's an
20 example of the difficulty of trying to figure out when
21 the discrimination occurred if you have this last-act
22 kind of thing.

23 MS. CARROLL: Well, to the contrary, I think
24 their dispute has a risen because they're trying to
25 apply the date-of-resignation rule and are finding it

1 difficult to agree on when that resignation occurred.

2 As I -- as I said earlier, I think in our --
3 under the rule that the court of appeals adopted in this
4 case, we think it asks the Court or the agency to engage
5 in precisely the same inquiry that it would have to do
6 whether -- even if there had not been a constructive
7 discharge. It's still, in every case, about identifying
8 what is the alleged violation of the statute.

9 JUSTICE GINSBURG: What do you do with
10 Suders that seemed to distinguish two things; one was
11 the hostile environment, and the second was the
12 constructive discharge. And the Court said that that --
13 that the hostile environment is a lesser included
14 component of the more serious constructive-discharge
15 claim.

16 MS. CARROLL: May I respond?

17 I think Suders recognized that Ms. Suders
18 had to prove up both pieces. She had to prove unlawful
19 conduct by the employer, namely, a severe and pervasive
20 change in the terms and conditions of her employment
21 amounting to a hostile work environment, and she had to
22 meet the constructive discharge standard. And if the
23 Court's intent in saying so had been to equate
24 constructive discharge with actual discharge for all
25 intents and purposes, then I don't see how the Court

1 could have come to the conclusion that the affirmative
2 defense is -- is ever available.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Wolfman, four minutes.

5 REBUTTAL ARGUMENT OF BRIAN WOLFMAN

6 ON BEHALF OF THE PETITIONER

7 MR. WOLFMAN: Your Honor, if I might, I
8 would like to begin where we ended. Suders considered
9 and then recognized a claim for constructive discharge,
10 what we would call in the old days a cause of action.
11 At pages 142 and 143, the Court said it was considering
12 whether a claim for constructive discharge lies under
13 Title VII.

14 And then it -- it holds, we agree with the
15 lower courts and the EEOC that Title VII encompasses
16 employer liability for constructive discharge. Not
17 simply damage enhancing, but liability for constructive
18 discharge.

19 I do want to turn to, Mr. Chief Justice,
20 your question about the government's position on the
21 date of resignation. It is not entirely correct that
22 the Tenth Circuit did not address this. At Petition
23 Appendix 2A, here's what the Tenth Circuit said: That
24 shortly after being put on leave he signed a settlement
25 agreement under which he would choose either to retire

1 or to work in a position that paid much less and was
2 about 300 miles away. That was the premise on which
3 the --

4 JUSTICE SOTOMAYOR: I'm sorry. That's true,
5 and that's why I thought --

6 MR. WOLFMAN: Yes.

7 JUSTICE SOTOMAYOR: -- that was an open
8 question. But the government, Mr. Gannon says that in
9 fact the district court said that you chose to retire
10 on -- in December, and you didn't appeal that finding by
11 the district court.

12 MR. WOLFMAN: That is not correct. The
13 district court was of two minds on the question. At one
14 point it -- it indicated that his -- his agreement was a
15 resignation. At another point -- and this is in other
16 reply brief -- the district court said the exact
17 opposite. It said what the Tenth Circuit said. And the
18 district court opinion, its legal ruling is not premised
19 on that -- what the government is saying is a finding.

20 Now, let me also say that the EEO decision
21 in this case, that is the Postal Service itself said --
22 this is at the Joint Appendix 23 -- a fair reading of
23 the agreement reveals that he was given the choice to
24 retire or to report to a new job, and was allowed to
25 continue his career.

1 Unless the Court has anything further.

2 JUSTICE BREYER: What is your response to
3 her -- I think she's saying in most of these cases there
4 is a hostile work environment. Where there is a hostile
5 work environment you have 45 days from the last act, and
6 so what we should do is look at this injury as simply
7 one more injury caused by a hostile work environment.
8 And just as you don't look at the date of injury there,
9 you look to the environment, et cetera, we so do the
10 same thing here. It's simpler, et cetera.

11 MR. WOLFMAN: Right. There are two answers
12 to that, Justice Breyer. First of all, I do want to
13 challenge the premise of the seven illustrative cases
14 cited in *Suders*, illustrative for constructive
15 discharge. Three of them were standalone constructive
16 discharges, untethered to any other claim; that's
17 number 1.

18 Number 2, even if you have what this Court
19 in *Suders* called a subset of constructive discharge
20 cases, that is one arising out of a hostile work
21 environment, they are still distinct claims. That's
22 really the point of *Suders*. They're distinct claims,
23 they're separately actionable, and we know they're
24 separately actionable because the constructive-discharge
25 claim is not actionable until resignation.

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Unless the Court has anything further.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Carroll, this Court appointed you to brief and argue this case as an amicus curiae in support of the judgment below. You have ably discharged that responsibility, for which the Court is grateful.

The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

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