No. 08-974

IN THE

Supreme Court of the United States

ARTHUR L. LEWIS, JR.; GREGORY S. FOSTER, JR.; ARTHUR C. CHARLESTON, III; PAMELA B. ADAMS; WILLIAM R. MUZZALL; PHILIPPE H. VICTOR; CRAWFORD M. SMITH; ALDRON R. REED; and AFRICAN AMERICAN FIRE FIGHTERS LEAGUE OF CHICAGO, INC., individually, and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the limitations period on a Title VII claim for disparate impact from an examination and eligibility list created based on the examination results starts to run only when the list is adopted and announced, or also later, upon each use of the same list.

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STATEMENT

A. Factual Background

The City of Chicago follows a multi-step process to hire firefighters. The first step is a written examination, and applicants become eligible for further processing based on their examination scores. Supp. R. 436, Ex. 1. Thereafter, as the needs of the Chicago

Fire Department ("CFD") dictate, candidates are called for a physical abilities test, background check, medical evaluation, and drug test; those who pass each step receive fire academy training; and graduates go into the field for a probationary period. *Ibid.* The City hired consultants, including Dr. James Outtz, an expert on reducing disparate impact in testing, to analyze the firefighter position and create a new written examination. *Ibid.* Developing the examination took years, and it was administered for the first, and only, time in July 1995 to some 26,000 applicants. *Id.* at Aff. ¶4. The City scored the tests, listed applicants from highest to lowest score, and divided the list into three categories. *Id.* at Aff. ¶5. The first category included those scoring 89 or above; the second included those scoring 88 to 65; the third included those scoring 64 or below; and the categories were deemed "well qualified," "qualified," and "not qualified," respectively. *Ibid.*

On January 26, 1996, after the hiring eligibility list was adopted, the City mailed notices informing each applicant of their score and category, and what would happen for that category. Supp. R. 436, Aff. ¶¶5-8, Ex. 1. Those "well qualified" were told they passed and would be called in random order to continue the hiring process, based on CFD's needs. *Id.* at Aff. ¶5. Those "qualified" were told they passed but would "not likely" be called due to the "large number of candidates who received higher scores." *Ibid.* They were also told they would remain "on the eligible list" for "as long as that list is used" because it was "not possible to predict how many" would be hired from the "well qualified" category over the "next few years." *Ibid.* Those "not qualified" were told they failed and would not be called. *Ibid.*

That same day, the City's Mayor publicly announced the examination results in a news release. Supp. R. 436, Ex. 1. He noted that 1,782, or 6.8%, of applicants were deemed "well qualified"; and of those, 75.8% were white and 11.5% African-American. *Id.* at 2. He stated that those "well qualified" would be called in random order to continue the hiring process and the City expected to hire about 600 from that category over the next three years. *Ibid.* He added that "[a]fter all our efforts to improve diversity, these test results are disappointing" (*id.* at 1), and although he "was not satisfied with the results, in fairness to" those who scored higher, the eligibility list would be used while the City studied "new procedures" for hiring (*id.* at 2). For weeks, major Chicago newspapers – the *Chicago Sun-Times*, *Chicago Tribune*, and *Chicago Defender* (popular in the African-American community) – regularly reported on the examination's impact on minorities, and the reactions of applicants, firefighters, and minority leaders. *Id.* at Ex. 2.

Months later, in April 1996, the African American Fire Fighters League of Chicago, Inc. ("AAFFLC"), along with some petitioners, met with an attorney to discuss whether they "had a possible lawsuit" based on the examination. R. 74, Ex. K ¶1. They mentioned the score notices and "[r]ecent newspaper articles" about the examination's "adverse impact" on African-Americans. *Ibid.* Counsel told them they had a possible "adverse impact" claim but he wanted to explore potential defenses the City could raise. *Id.* at ¶2. In the following months, counsel gathered information he believed was needed; once he had satisfied himself, he advised them about the "possible adverse impact" claim. *Id.* at Exs. A-B, K ¶¶3-9, L; R. 83, Aff. ¶¶3-8, Ex. 1. With counsel's assistance (R.

74, Ex. K ¶10), the earliest charge was filed with the EEOC by a named petitioner on March 31, 1997 (Supp. R. 436, Ex. 3). The charge claimed that the "hiring procedures, including" the examination, "discriminated against African Americans," and that the "most recent" violation had occurred in March 1997 and was "continuing." *Ibid.* Nearly 16 months later, the EEOC issued a right-to-sue letter. *Id.* at Ex. 4.

Meanwhile, based on CFD's hiring needs, the City used the eligibility list for the first time in May 1996; the second time in October 1996; and eight more times until November 2001, each time calling from the "well qualified" category in random order. R. 163 at 9; R. 233, Ex. A at 5; Supp. R. 436, Exs. 1-2.[1]

B. District Court Proceedings

Within 90 days of the right-to-sue letter, the eight named petitioners and the AAFFLC filed suit against the City, claiming that the examination and decision to call only "well qualified" applicants had disparate impact under Title VII. Supp. R. 432. The district court certified a class of about 6,000 African-Americans in the "qualified" category who would "not likely" be called, or at least not for many years. R. 58-59. Answering the complaint, the City admitted adverse impact but raised defenses, including the statute of limitations. R. 11, 163, 171-74, 188.

The City sought summary judgment, arguing that the claim was untimely because no EEOC charge was

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[1] Ultimately, the City used this list longer than expected because new hiring procedures had not been finalized. The "well qualified" category was exhausted in November 2001, after which the City began drawing from the "qualified" category in random order. The City stopped using the list altogether in 2007, after new procedures were adopted.

filed within 300 days after the alleged unlawful employment practice occurred, which was when the list was adopted and announced. R. 83; Supp. R. 433, 436. Petitioners defended the claim's timeliness under multiple theories, including that the continuing violation doctrine applied; that they did not receive definite notice of their injury; and that the limitations period should be equitably tolled. R. 74. Framing the question as whether "the City's ongoing reliance on a discriminatory examination's results in making hiring decisions constitute[s] a continuing violation of Title VII" (Pet. App. 45a), the district court answered in the affirmative and denied the City's motion (*id.* at 44a-70a). A bifurcated bench trial was held; because the City had admitted adverse impact, the liability trial focused on the defenses that the examination was job related and its use was consistent with business necessity; the court rejected the defenses and found the City liable under Title VII. *Id.* at 12a-43a.[2] Two years later, the court granted relief and entered judgment. R. 390-91, 404-06.

Throughout the proceedings, the City continued to argue that the claim was time barred (R. 233, 244, 258, 260, 268, 301-02, 304-05, 308, 310), but the district court declined to alter its ruling (R. 259, 269, 273-74). The City appealed (R. 407), and the district court stayed the judgment pending appeal (R. 424-

[2] Petitioners highlight some of the district court's liability findings (Pet. 8 n.3) but omit that Dr. Outtz issued a report after the examination was scored finding that it was valid and job related (R. 189, Ex. B). They also fail to mention the City's determination that calling only those in the "well qualified" category was justified by business necessity (Tr. Vols. 15-16) and that there were operational and administrative reasons for using the cut-off score of 89 (R. 274 at 9, 19-20).

25), specifically noting that this Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), made its decision on this question "less clear" (R. 425 at 3).

C. Seventh Circuit Proceedings

The sole issue the City raised on appeal was whether petitioners' claim was untimely. As we explained, no EEOC charge was filed within 300 days after the unlawful employment practice occurred, which was when the hiring eligibility list was adopted and announced; and neither the continuing violation doctrine nor equitable tolling applied. Petitioners modified their response, arguing that a new violation occurred each time the list was used, making the EEOC charge timely to challenge the list's second use; that it was timely even as to the first use under the continuing violation doctrine; and that equitable tolling applied. Moreover, for the first time in the decade-long litigation, petitioners offered a disparate-treatment theory and urged application of equitable estoppel. The City replied to petitioners' arguments, including the newly-raised ones.

The Seventh Circuit, in an opinion authored by Judge Posner and joined by Chief Judge Easterbrook and Judge Bauer, reversed. Pet. App. 1a-11a. The court reviewed the relevant precedents of this Court and noted some disharmony in the courts of appeals. *Id.* at 3a-9a. The court held that petitioners' claim was time barred because they failed to file an EEOC charge within 300 days after the unlawful practice occurred, which was when the list was adopted and announced. *Id.* at 3a-9a. That is when petitioners were injured – indeed, they "were injured, and their claim accrued, when they were placed in the 'qualified' category of the hiring list on the basis of their

score in the firefighters' test; for that categorization delayed indefinitely their being hired." *Id.* at 9a. There was "only one wrongful act" – the "classification" of petitioners "as merely 'qualified' on the basis of a test that they contend was discriminatory." *Id.* at 7a (quotation omitted). Each use of the list after that was nothing more than an "automatic consequence" of the examination and list, not a "fresh act of discrimination." *Id.* at 4a; see *id.* at 6a, 7a.

As the court explained, this is the "acknowledge[d]" rule "in a 'disparate treatment' case" – where a claim accrues when the "discriminatory decision is made" and communicated "rather than when it is executed." Pet. App. 3a. The court saw no basis for applying a different rule "to a disparate-impact case," particularly because these are simply methods of proving a discrimination claim. *Id.* at 5a-6a. And because this case did not involve a facially-discriminatory policy, the court put the unique accrual rule that applies in those cases – where each act taken pursuant to such a policy is a fresh violation – to the side. *Id.* at 4a-5a. The court also rejected petitioners' bids under the continuing violation (*id.* at 7a-9a) and equitable tolling (*id.* at 7a, 9a-11a) doctrines, and gave no moment to their waived arguments.

Petitioners sought rehearing *en banc*, but there were no votes for that. Pet. App. 71a.

REASONS FOR DENYING THE PETITION

After administering and scoring a written examination, the City adopted an eligibility list that limited the pool of applicants who would be called to continue the hiring process. The City would call only those in the "well qualified" category in random order for the next several years, as CFD's needs required.

That decision was communicated to all applicants, including petitioners, but no EEOC charge was filed for 420 days, despite Title VII's applicable 300-day limitations period. Nor did petitioners file within 300 days of the first use of the list. Petitioners finally filed about five months after the list's second use. The Seventh Circuit held that the claim accrued when the list was adopted and announced, rendering their filing untimely. After all, the list was adopted only once, in a single, discrete act, and no discriminatory act occurred after that. The subsequent uses of the list were merely the inevitable effects of its adoption.

Review of that decision is unnecessary. The Seventh Circuit faithfully applied the entire line of this Court's relevant precedents, and reached the correct result. Not only that, but the conflict in the courts of appeals is shallow and stale – on the precise question presented, the split is only two to two, and the two favoring petitioners have not been rethought for nearly three decades. Since then, this Court has decided at least six relevant cases. Given the developments in the law, particularly the trend toward the Seventh Circuit's view, the conflict will likely resolve itself.

I. The Seventh Circuit Faithfully Applied This Court's Entire Line Of Relevant Precedents To The Particular Facts Of This Case.

The paramount reason review is unnecessary is that the Seventh Circuit's decision on the question presented is correct. The question is whether, to preserve a Title VII claim that a hiring examination, and eligibility list created from the examination results and intended to be used as needed for several

years, had disparate impact, a plaintiff must file an EEOC charge within 300 days after the list was adopted and announced, or whether a plaintiff may wait and file a charge after any subsequent use of the list. The Seventh Circuit faithfully considered the entire line of this Court's precedents related to this question. That long line began with *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); included *Delaware State College v. Ricks*, 449 U.S. 250 (1980), *Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam), *Bazemore v. Friday*, 478 U.S. 385 (1986), *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); and culminated last term in *Ledbetter*. In doing so, the Seventh Circuit ruled that petitioners' claim was time barred because it accrued only upon the list's adoption and announcement, for no unlawful practice occurred after that. Pet. App. 1a-11a. As we now explain, the court applied these cases correctly to this context.

Among other things, it is an "unlawful employment practice" for an employer to discriminate against any individual in making hiring decisions "because of" the person's "race." 42 U.S.C. § 2000e-2(a). Relevant here, anyone seeking to challenge a hiring decision under Title VII must first file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred." *Id.* § 2000e-5(e)(1). If no timely charge is filed, then a plaintiff "may not challenge the practice in court" and the claim must be dismissed. *Ledbetter*, 550 U.S. at 624.

As the Court's precedents teach, to determine when a Title VII claim accrues, and thus when the 300-day filing period starts running, the "specific employment practice that is at issue" must be identified "with

care" (*Ledbetter*, 550 U.S. at 624; accord *Morgan*, 536 U.S. at 110-11; *Lorance*, 490 U.S. at 904; *Ricks*, 449 U.S. at 257), and then it must be determined when that practice "occurred" (42 U.S.C. § 2000e-5(e)(1)), which simply means when it "happened" (*Morgan*, 536 U.S. at 109-10 & n.5), and was "communicated" (*Ricks*, 449 U.S. at 258). Such practices have been characterized in the Court's cases as either a "discrete act" that "occurs at a particular point in time" (*Ledbetter*, 550 U.S. at 621), like "termination, failure to promote, denial of transfer, or refusal to hire" (*Morgan*, 536 U.S. at 114); a series of acts for which the violation is not known until the acts are repeated over time, like a hostile work environment (*id.* at 115); or an act taken pursuant to a facially-discriminatory policy (*Ledbetter*, 550 U.S. at 634-36 & n.5 (discussing *Bazemore*, 478 U.S. at 389-91)).

These classifications are illustrated by the Court's cases. For starters, in *Evans*, a newlywed was forced to resign due to her employer's policy of excluding married female flight attendants. 431 U.S. at 554-55. She was rehired after the policy was changed, but her seniority was calculated based on her rehiring, rather than her original hiring, date. *Id.* at 554-55. Only after that did she file an EEOC charge and a lawsuit claiming sex discrimination. *Id.* at 554-56. While recognizing that using the rehiring date perpetuated the prior discriminatory act, the Court ruled the claim was untimely because there was no "present" violation; there were merely "continuing" and "neutral" effects of a past act. *Id.* at 557-58. The key inquiry is "whether any present *violation* exists." *Id.* at 558 (emphasis in original). After no timely charge was filed, the employer was "entitled to treat that past act as lawful" because a "discriminatory act which is not made the basis for a timely charge is the legal equiv-

alent of a discriminatory act which occurred before [Title VII] was passed. It . . . is merely an unfortunate event in history which has no present legal consequences." *Ibid.* The Court concluded, "such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." *Id.* at 560.

Similarly, in *Ricks*, a college denied an African-American professor tenure and gave him a non-renewable one-year contract. 449 U.S. at 252-56. After the contract expired, he filed an EEOC charge and a lawsuit, but the Court held the claim was untimely – any discriminatory act occurred, and thus the claim accrued, when he was denied tenure. *Id.* at 256-58. No discriminatory act "continued until, or occurred at the time of, [his] actual termination"; rather, his termination was merely "one of the *effects* of," and "a delayed, but inevitable, consequence of," the denial of tenure. *Id.* at 257-58 (emphasis in original). As in *Evans*, the Court instructed that the "proper focus" is on whether a present violation exists, not on when the "consequences" of a prior unlawful act become "most painful." *Id.* at 258 (quotation omitted).

Chardon applied this analysis to a First Amendment claim. There, school administrators received letters stating they would be terminated in the next few months, and filed suit after being terminated. 454 U.S. at 6-7. The Court, citing *Ricks*, concluded that the claim was untimely because it accrued when the letters were received, as the decision to terminate was the allegedly discriminatory act and the later

termination was merely an effect of that decision. *Id.* at 7-8.

On the other hand, in *Bazemore*, African-American employees filed an EEOC charge and a lawsuit claiming intentional discrimination because they were being paid less than whites. 478 U.S. at 389-91. Before Title VII's enactment, the employer segregated employees and paid African-Americans less; and although the employer had since stopped segregating, pay disparities remained. *Id.* at 390-91. Finding a present violation, the Court wrote: "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." *Id.* at 395-96. As *Ledbetter* later explained, "the focus [in *Bazemore*] was on a current violation, not the carrying forward of a past act of discrimination." 550 U.S. at 635 n.5. If an employer "adopts and intentionally retains" a "facially discriminatory pay structure," it "engages in intentional discrimination whenever it issues a check." *Id.* at 634. By contrast, no fresh violation occurs if the employer simply fails to remedy the "present effects" of prior discrimination. *Id.* at 635 n.5 (quotation omitted). For this reason, each paycheck issued under a facially-discriminatory pay structure is a new violation, although that is not the case under "a system that is 'facially nondiscriminatory and neutrally applied.'" *Id.* at 637 (quoting *Lorance*, 490 U.S. at 911).

Next, in *Lorance*, female employees alleged that their employer adopted an intentionally discriminatory seniority system but filed no EEOC charge until they were laid off based on seniority. 490 U.S. at 904-06. Discussing *Evans*, *Ricks*, and *Chardon*, the

Court rejected their argument that the unlawful practice occurred when the system was adopted and when each effect of its adoption was felt. *Id.* at 906.[3] That is because this was a "facially neutral system," albeit allegedly adopted with discriminatory intent, and so the discrimination occurred "*only* at the time of [its] adoption"; without another discriminatory act, "each application" of the system was "nondiscriminatory." *Id.* at 912 n.5 (emphasis in original). Significantly, the Court explained that, in theory, the claim could be timely based on a "continuing violation which 'occurred'" not only when the system was adopted "but also when each of the concrete effects" of its adoption was felt, but that approach had been flatly rejected in *Evans*, *Ricks*, and *Chardon*. *Id.* at 906. Nor was the case like *Bazemore*, under which every act taken under a "facially discriminatory" policy is actionable, because such a policy "by definition" intentionally discriminates "each time it is applied." *Id.* at 912 n.5. That rule rightly does not apply to facially-neutral policies: "[A]llowing a facial-

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[3] After *Lorance*, Congress enacted 42 U.S.C. § 2000e-5(e)(2), so that claims of intentional discrimination involving seniority systems accrue when the system is adopted or applied. As *Ledbetter* explained, 550 U.S. at 627 n.2, while *Lorance*'s specific holding regarding seniority systems was abrogated, its reasoning otherwise remains persuasive since it follows directly from *Evans* and *Ricks*. This case does not involve a seniority system, so *Lorance*'s reasoning applies. The same is true of *Ledbetter*, which we discuss below. Months ago, in response to *Ledbetter*, Congress enacted 42 U.S.C. § 2000e-5(e)(3)(A), so that claims "with respect to discrimination in compensation" accrue when someone "becomes subject to" or "is affected by application of" a "discriminatory compensation decision or other practice." Because this case does not fall under this amendment, it, too, has no impact on this case. Like *Lorance*, then, *Ledbetter*'s reasoning is fully applicable here.

ly neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that [the limitations period] was meant to protect." *Id.* at 912.

In *Morgan*, the Court identified a category of continuing violations for Title VII claims. Such claims "will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." 536 U.S. at 122. But, as we mention above, the Court effectively limited this doctrine to claims where the violation is not known until acts have been repeated over time, like a hostile work environment. *Id.* at 110-22.

Ledbetter is the latest in this line. The employee in *Ledbetter* filed an EEOC charge and a lawsuit challenging the denial of pay raises over 19 years based on performance evaluations she claimed were discriminatory. 550 U.S. at 621-22. The Court held that the claim was "squarely foreclosed by our precedents" (*id.* at 625), discussing *Evans*, *Ricks*, *Lorance*, and *Morgan* (*id.* at 624-29). The Court reiterated that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 628. The claims of plaintiff, however, accrued only when she received a poor evaluation and no raise. *Ibid.* The Court duly noted that the prior evaluations had ongoing effects – she received less each payday – but the "intent associated with" those acts could not be shifted "to a later act that was not performed with bias or discriminatory motive," because that would "impose liability in the absence of the requisite intent," and would "effectively eliminate

the defining element of her disparate-treatment claim." *Id.* at 629. The Court also recognized the importance of filing intentional discrimination claims quickly, because the "passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." *Id.* at 631.

From these cases, the Seventh Circuit concluded that petitioners' claim accrued when the eligibility list was adopted and announced. That straightforward application of law to the specific facts of this case is unassailable. The court first identified "with care" (*Ledbetter*, 550 U.S. at 624) the unlawful employment practice claimed. Petitioners complained that the examination and decision to limit hiring to those "well qualified" had a disparate impact on African-Americans. Pet. App. 2a, 4a, 7a. The court determined when the injury occurred – when petitioners were placed in the "qualified" category, because that decision delayed their hiring "indefinitely." *Id.* at 9a. In turn, everything petitioners challenged was traceable to that single decision – made in early 1996 and not revisited before late 2001 – and that decision alone. From that, the court correctly determined that "only one wrongful act" occurred. *Id.* at 7a (quotation omitted). And under the Court's cases, when a claim based on a discrete act accrues is clear: the claim here accrued when the decision was made and communicated, which was substantially more than 300 days before the EEOC filing.

The Seventh Circuit also correctly characterized each use of the list between May 1996 and November 2001 as an "automatic consequence" of the examination and list, and not its own "fresh act of discrimination." Pet. App. 4a; see *id.* at 6a, 7a. Use of

the list reflected no adverse impact that the list itself did not have. The list was neutral on its face and was used in a neutral manner, for those in the "well qualified" category were called in random order. This Court has repeatedly stated that the neutral application of a facially-neutral employment practice is not itself a discriminatory act and the inevitable consequences of a past unlawful act are not themselves actionable. Moreover, as the Seventh Circuit aptly explained (*id.* at 4a-5a), if the practice here had been facially discriminatory, each application would have given rise to a new claim. But, in this disparate-impact challenge to the examination and list, once the testing was done and applicants were sorted into facially-neutral categories, there was no further unlawful action in using the list. Petitioners' theory that subsequent uses of the list are themselves actionable discrimination improperly equates the present effects of a prior unlawful act with repeated illegal conduct. Nor was the City's failure to stop using the list sooner a fresh violation. Like the present effects of prior discrimination, the failure to undo prior discrimination does not give rise to a new claim. *Ledbetter*, 550 U.S. at 634-36 n.5; *Morgan*, 536 U.S. at 112-13. All told, there was only one, discrete act of discrimination here, albeit one with ongoing effects.

In addition, petitioners knew of their injury from the start, as the Seventh Circuit noted. Pet. App. 1a-3a, 11a. From around January 26, 1996, petitioners were aware they were not deemed "well qualified" and that this meant their hiring would at least be delayed. They received notice of this from the City, the Mayor's news release, and media reports. Supp. R. 436, Aff. ¶¶5-8, Exs. 1-2. Petitioners reported their knowledge to the attorney they met with in

April 1996, and he knew right away they had a "possible" disparate-impact claim. R. 74, Ex. K ¶¶1-2. As the Seventh Circuit therefore concluded, petitioners' delay in filing charges was inexcusable and "fatal." Pet. App. 11a.

Petitioners' contention that the Seventh Circuit's decision "results in different claim-accrual rules for disparate treatment and disparate impact cases" (Pet. 26) is ironic and demonstrably incorrect. As the court noted, it was petitioners who urged a different accrual rule for disparate-impact claims. Pet. App. 5a. The court rejected their invitation because it saw no basis in Title VII's plain language for applying a different rule, especially since "disparate treatment" and "disparate impact" are simply methods of proving discrimination claims, not types of discriminatory acts in and of themselves. *Id.* at 5a-6a. In fact, as the court pointed out, it had already rejected a similar argument in *Davidson v. Board of Governors*, 920 F.2d 441 (7th Cir. 1990). Pet. App. 6a. That is because, while a discrimination claim ultimately may be proved under two theories – disparate treatment and disparate impact (see 42 U.S.C. § 2000e-2(k); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971)) – as petitioners indicate (Pet. 26-27), a plaintiff may present the same facts under both theories. It would make no sense to apply different accrual rules to the same type of claim simply depending on how the plaintiff chooses to go about proving it. Moreover, if there should be a difference between these theories, the greater moral culpability of disparate treatment should prolong the accrual of those claims, not disparate-impact claims like petitioners'.

Regardless, there is no basis for creating such a distinction. Certainly nothing in Title VII indicates

that different accrual rules should apply. Relevant here, the language merely demands that a charge be filed within 300 days after the "unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). And, when Congress has disagreed with the Court's reading of Title VII's accrual rules, it has taken prompt action to make that clear. As we note above, after *Lorance* and *Ledbetter*, Congress amended the statute to provide different rules. See 42 U.S.C. §§ 2000e-5(e)(2), 2000e-5(e)(3)(A). But, the general rule emerging from the Court's cases for discrete acts applies here.

Petitioners also seek review on the basis that the decision below "threatens to undermine Congress's broad remedial purpose in enacting Title VII" (Pet. 23), because under Title VII's "short" limitations period (*id.* at 10, 24), an unlawful employment practice may be "immunize[d]" (*id.* at 23, 24) "indefinitely" (*id.* at 10) and "permanently" (*id.* at 11). Those concerns are wholly unfounded here. The Seventh Circuit honored not only the statute's terms but the equally important interest in repose. As it acknowledged, Title VII purposefully provides a "short" time for filing an EEOC charge. Pet. App. 10a. As this Court is well aware, Title VII was the product of legislative compromises, which included the "short" filing period. *Ledbetter*, 550 U.S. at 629-30. Indeed, by "choosing what are obviously quite short deadlines, Congress clearly intended to encourage prompt processing of all charges of employment discrimination." *Morgan*, 536 U.S. at 109 (quotation omitted). And, "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Ledbetter*, 550 U.S. at 632.

This delicate balance should not be skewed. The limitations period both "guarantee[s] the protection of the civil rights laws to those who promptly assert their rights" and "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57. While Title VII's remedial purpose should be realized when valid claims are diligently pursued, the statute reflects that "it is unjust to fail to put the adversary on notice to defend within a specific period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Ledbetter*, 550 U.S. at 630 (quotation omitted). See also *Mohasco Corp. v. Silver*, 447 U.S. 807, 820 (1980) ("[I]t seems clear that the [limitations] provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination."); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("[T]he length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."). For these reasons, once the limitations period passes with no EEOC charge, an employer is "entitled to treat [a] past act as lawful"; it becomes the "legal equivalent of a discriminatory act which occurred before [Title VII] was passed" and "merely an unfortunate event in history which has no present legal consequences." *Evans*, 431 U.S. at 558.

Interests in repose and reliance are equally important in a disparate-impact case like this one. While

Ledbetter recognized that prompt filing of disparate-treatment claims helps protect evidence of intent (550 U.S. at 631), challenges to eligibility lists years after adoption and announcement present their own problems. They "expose employers to a virtually open-ended period of liability"; "create substantial uncertainty" about "important staffing decisions based upon the list"; and call "into question an organizational structure" in place for years, upsetting reliance interests. *Cox v. City of Memphis*, 230 F.3d 199, 205 (6th Cir. 2000) (quotation omitted). As this Court put it, "allowing a facially neutral" practice "to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that" the limitations period "was meant to protect." *Lorance*, 490 U.S. at 912. With a theory that has no stopping point until the list is taken down, petitioners ignore the rights and expectations of others on the list. On petitioners' view, vast numbers of potential plaintiffs – 6,000 in this case – may stand idly by as eligibility lists are created and applicants are called from the list, and file charges years down the road. Adopting that view would upset reasonable reliance interests and impose back-pay liability on employers, despite Title VII's intentionally brief filing period. Nor does the limitations period forever "immunize" an employer (Pet. 24; see *id.* at 10, 11, 23), as petitioners fear. Eligibility lists are not used indefinitely, but only until the next examination is administered. And, while a list is up, any actual discrimination will give rise to another claim. Regardless, every petitioner here was well aware of a potential claim in the time to meet the limitations period. Petitioners' inexplicable delay should not prejudice others.

Citing various authority, petitioners also contend that the question here is "important" because examination results are commonly used to make hiring decisions and disparate-impact suits are regularly filed. Pet. 10, 19-24. Even if that is so, there is no indication that plaintiffs in those cases, or in most cases for that matter, were unable to file EEOC charges on time. But petitioners here were late, filing no charge within 300 days of the list's adoption and announcement, or even 300 days after the list's first use. Thus, they lost the opportunity to avail themselves of Title VII's protections.

At bottom, since there is no dispute what the relevant case law is, petitioners seek to have this Court apply those precedents differently than the Seventh Circuit did. Of course, this Court's review is not granted just to fix misapplications of law by the courts of appeals. Moreover, no error correction is needed here, for no error was made. The Seventh Circuit reached the correct result under the law and facts.

II. The Circuit Split On The Question Presented Is Shallow And Stale, And Will Likely Resolve Itself.

In the courts below, petitioners acknowledged no circuit split on the question presented (R. 74 at 4-9; Brief of Plaintiffs-Appellees 10, 30-35, No. 07-2052 (7th Cir.)), a fact they only quietly note to this Court (Pet. 17 n.9). Petitioners now advance a position that debuted in their request for rehearing *en banc* (Plaintiffs-Appellees' Petition for Rehearing *En Banc* 2, 9, No. 07-2052 (7th Cir.)) – that the division requires further review. While, as petitioners state *ad nauseam*, the City and the courts below recognized the split, there are at least three reasons their

new-found acknowledgment does not support review. First, petitioners get the math wrong: the disunity in the courts of appeals is far shallower than they submit. Second, the split that does exist is stale and, at this point, tolerable. Third, while petitioners see "nothing to suggest" that the split "will resolve itself without this Court's intervention" (Pet. 18), this ignores a wealth of this Court's cases. With future opportunity, the circuits are likely to align. But, if the tension persists, the Court may step in later, once the lower courts have fully considered the issue in light of more recent precedents.

To begin, the split is thinner than petitioners claim. Their tally is five to three, with the Second, Fifth, Ninth, Eleventh, and D.C. Circuits on their side, and the Third, Sixth, and now Seventh on ours. Pet. 3, 11-18. They add that, although the City acknowledged the split in the courts below, we failed to recognize its "full depth." *Id.* at 12. Just the opposite is true. Not only did petitioners disavow the split below, but they overstate it now. Only the Second and Fifth Circuits side with petitioners, while the Third, Sixth, and now Seventh Circuits agree with us. The other cases petitioners rely on do not decide the specific question here.

Firmly aligned with the Seventh Circuit is the Third, as petitioners now admit. Pet. 16 & n.8. In *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), a police department administered a promotion examination, created an eligibility list based on the results, and announced its decision to use the list for three years. *Id.* at 1077. EEOC charges claiming disparate impact were filed more than 300 days after the list was adopted and announced but before it was used. *Id.*

at 1078-80. Citing *Evans* and *Ricks*, the Third Circuit held that the claim accrued when the list was adopted; each use of the list was merely an effect of that, not a fresh violation. *Id.* at 1082-84. In so concluding (*id.* at 1083 & n.21), the court declined to follow any case decided before *Evans* and *Ricks*, including the Second Circuit's decision in *Guardians Association v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980), which we discuss below. The court explained that the employer did not "continue[ ] to discriminate against [plaintiffs] by its use of the eligibility roster," adding that "even if [the employer] had used the list," there was no suggestion that it "would have followed anything but a neutral, non-discriminatory procedure in hiring from the list," as its "policy was simply to hire in order from the list." 667 F.2d at 1083. The "non-discriminatory policy as to the use of the roster is similar to" the policy in *Ricks* to discharge "all faculty denied tenure." *Id.* at 1084. The list's use was "'a delayed, but inevitable consequence' of the allegedly discriminatory employment procedure – here a specific, identifiable act, the promulgation of the hiring roster." *Ibid.* (quoting *Ricks*, 449 U.S. at 257-58). "It is unlike, therefore, a continuing practice[.]" *Ibid.* The Third Circuit returned to the issue in *Hood v. New Jersey Department of Civil Service*, 680 F.2d 955 (3d Cir. 1982). There, a plaintiff claimed that an examination, and hiring and promotions lists based on the test scores, had disparate impact. *Id.* at 956. The court applied *Bronze Shields* to hold untimely an EEOC charge filed 300 days past the "list's promulgation." *Id.* at 959. The claim accrued "[a]t that time" because that is when plaintiff "knew that he would not be promoted during the next three years." *Ibid.*

Cox from the Sixth Circuit is the same. There, a police department gave an examination to determine promotions; created an eligibility list from the results; announced the list it planned to use for the next two years; and used the list twice. 230 F.3d at 201. Several women at the bottom of the list were not promoted and filed EEOC charges after the list's second use. *Ibid.* The parties agreed that an unlawful employment practice "occurred" when the list was announced (*id.* at 202), but plaintiffs insisted their claim was timely because "each promotion from the eligibility list constituted a separate act of discrimination" (*id.* at 201). The department countered that the claim was untimely because each use was merely "an effect of the original discriminatory act." *Id.* at 202. Relying on *Evans*, *Ricks*, and *Lorance*, as well as the Third Circuit's decisions in *Bronze Shields* and *Hood*, while rejecting the Second Circuit's *Guardians* decision, the Sixth Circuit settled on the "better view" that "promotion or hiring from an allegedly tainted promotions roster is not a 'continuing act' but is merely the effect of previous discrimination. It is at the point of promulgation of the roster that a potential plaintiff is aware that alleged discrimination is likely to play a pivotal role in her future advancement." *Id.* at 204. The "list was neutral on its face," and promotions "operated in a neutral manner after the list was compiled"; "any discrimination" that occurred was "in the compilation of the list." *Ibid.*

To be sure, the Second and Fifth Circuits track petitioners' view that each use of an eligibility list created from an examination with disparate impact is a new unlawful practice for statute of limitations purposes. In *Guardians*, a police department cited *Evans* (the only one of this Court's relevant cases then decided) to argue that the "'operative' event"

was the "promulgation of the eligibility lists reflecting the applicants' scores on the challenged exams," because the lists "determined the order in which all appointments were made"; uses of the list were "merely the non-actionable perpetuation of the effects of past, non-actionable discrimination." 633 F.2d at 248-49. The Second Circuit disagreed, stating that by repeatedly using the "tainted test results," defendants "continued a course of discriminatory conduct that . . . did not cease until defendants abandoned the practice of making hiring decisions in this manner." *Id.* at 249. A year later, despite the intervening decision in *Ricks*, the Second Circuit followed *Guardians* in *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 274-75 (2d Cir. 1981).

The Fifth Circuit has joined this approach. In *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980), the employer used examinations to make promotions and plaintiff was not promoted based on his test scores. *Id.* at 243-44. The district court found his EEOC charge was untimely, but, offering virtually no analysis, the Fifth Circuit reversed and remanded for a determination whether the employer "continued to base its selection of employees to receive job opportunities upon scores from an unvalidated battery of tests." *Id.* at 249. If so, the court said, the violation would be viewed as "continuing," rendering his claim timely. *Ibid.*

Like the Second Circuit's decision in *Guardians*, *Gonzalez* precedes all but *Evans*. While *City of Bridgeport* post-dates *Ricks*, the Second and Fifth Circuit decisions plainly do not reflect the full line of this Court's precedents, as the decisions of the Sixth and Seventh Circuits do. And, while the Second and

Fifth Circuits are in tension with the Third, Sixth, and Seventh, the conflict first appeared 30 years ago. There is no reason to address it now, especially when the trend in the Sixth and Seventh Circuits, not to mention the numerous decisions of this Court, may cause the Second and Fifth Circuits to reevaluate their position. While petitioners contend that the circuit split "will [not] resolve itself without this Court's intervention" (Pet. 18), they do not explain this and there is no reason to think it is correct.

In fact, petitioners mistakenly rely on the more recent Second Circuit decisions in *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996); *Harris v. City of New York*, 186 F.3d 243 (2d Cir. 1999); and *Connolly v. McCall*, 254 F.3d 36 (2d Cir. 2001). Pet. 18 n.10. For starters, *Van Zant* concerned a hostile work environment claim, where it was more settled that the continuing violation doctrine applied. *Van Zant* did not involve an eligibility list with disparate impact, so the court's inclusion of "the use of discriminatory seniority lists or employment tests" (80 F.3d at 713) in the category of continuing violations is *dicta* (see *Cox*, 230 F.3d at 204). As such, *Van Zant* presented no occasion for the Second Circuit to reassess its position on the issue here.

More significantly, *Harris* and *Connolly* reveal that the Second Circuit may be aligning with the Sixth and Seventh Circuits. In *Harris*, an employee was denied a promotion based on an eligibility list, and the court concluded that, as petitioners note (Pet. 18 n.10), one of the claims was timely because the employer had "engaged in a continuing violation by not promoting him" while the list was up (186 F.3d at 248). What petitioners fail to mention is that,

regarding another claim, the court said that the continuing violation doctrine "does not apply when a plaintiff challenges a facially neutral policy" and "offers no evidence that the policy has a discriminatory motive." *Id.* at 249 (citation omitted). "Instead, to advance a continuing violation claim a plaintiff must point to his disparate treatment stemming from a continuous practice of intentional discrimination" (*ibid.*), and "a continuing violation cannot be established merely because the claimant continues to feel the effects of a time-barred discriminatory act" (*id.* at 250).

Like *Van Zant*, *Connolly* did not involve disparate impact of an examination and eligibility list. Rather, it concerned a constitutional challenge to a statute that suspended pension benefits for any retired government worker who took another government job, unless a waiver was obtained every two years. 254 F.3d at 39-41. Defendants argued the claim was untimely because it accrued when plaintiff took the second job; but the Second Circuit held it was timely because a claim accrued each time he applied for a waiver. *Id.* at 41-42. While the court analogized the case to *Guardians*, as the "repeated application of a discriminatory policy" (*id.* at 41), in fact, the policy in *Connolly* was facially discriminatory, while in *Guardians*, and here, the practice was facially neutral. As such, despite the reference to *Guardians*, *Connolly* may be read as correct under *Bazemore*, and the Seventh Circuit recognized that rule under such facts. Pet. App. 4a-5a.

Moreover, the Second Circuit may soon be poised to reconsider its position. A few months ago, a district court in the Second Circuit issued a decision in a case presenting a Title VII claim regarding an examina-

tion and a hiring eligibility list with disparate impact on African-Americans. *United States v. New York*, No. 07-2067, 2009 WL 212154, at *1-2 (E.D.N.Y. Jan. 28, 2009). New York sought summary judgment, arguing this claim was untimely because no EEOC charge was filed within 300 days after applicants were informed of the test results. *Id.* at *2. Plaintiffs countered that a charge could be filed up until 300 days after the "last date on which the [c]ity used the eligibility lists to hire new firefighters." *Ibid.* Based on circuit precedent, it denied the city's motion. *Id.* at *3-7. In doing so, the court wrote: "Underlying this dispute about the proper accrual date for the charge filing period is the parties' disagreement about the effect of the Supreme Court's decision in *Ledbetter*" on prior Second Circuit cases. *Id.* at *3. "At issue is whether *Guardians* and *City of Bridgeport* survive recent Supreme Court rulings" in *Ledbetter* and *Morgan*. *Id.* at *4. The court concluded that the Second Circuit's decisions were not "overruled by recent Supreme Court precedent," adding that it was "aware of the [c]ity's position that recent Title VII precedent may have eroded the basis for those thirty-year-old decisions. The court is also aware that other circuits have reached a different conclusion about whe[n] employment practices similar to the one here" accrue, citing the Seventh Circuit's decision in this case and the Sixth Circuit's *Cox* decision. *Id.* at *7.

In short order, then, the Second Circuit may have the opportunity to squarely reassess *Guardians* and *City of Bridgeport*. And, given that court's more nuanced decisions in *Harris* and *Connolly*, it may well reach a different result, bringing the law of that circuit in line with the Sixth and Seventh. If it does not, then it is quite possible that this Court will be presented again with this question. If so, the issue

will have benefitted from further percolation based on more recent precedents. Indeed, if the Second Circuit maintains its position, that decision will merit review for the additional reason that it will be incorrect. Similarly, since there is little fanfare in *Gonzalez*, the Fifth Circuit may take advantage of another case at least to explain its analysis more thoroughly. And, if that opportunity arises, the Fifth Circuit may reach a different result, especially if the Second Circuit has modernized its position by then.

Petitioners attempt to expand the split with Eleventh and D.C. Circuit cases, but even they recognize that the precise issue in those cases was "adoption and repeated application of employment benefit policies." Pet. 14. In other words, they did not involve an examination and eligibility list with disparate impact. For this reason alone, *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), and *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999), do not directly conflict with the decision below. Beyond that, if the issue were the same, the Eleventh Circuit was bound to follow the Fifth Circuit's decision in *Gonzalez* (975 F.2d at 796 & n.2), and so, *Beavers* hardly counts in the split. Finally, the Seventh Circuit addressed *Beavers* and accommodated its holding (while questioning whether it was even correct). Pet. App. 5a.[4]

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[4] *Beavers* involved a disparate-impact challenge to an employer's "policy of denying medical and dental insurance coverage to the children" of employees "if those children [did] not reside full time with their employee-parent." 975 F.2d at 794. Plaintiffs sued long after the policy was adopted but within 180 days (the applicable limitations period) of the denial of their claims for dependent coverage. *Id.* at 794-96. The court held the claims timely because the denial was pursuant to the policy,

As for *Anderson*, it involved allegations that the employer paid employees differently based on race. 180 F.3d at 332. The D.C. Circuit, citing *Bazemore*, concluded that the employer was presently paying similarly-situated employees differently, and thus a new violation occurred with every paycheck, rejecting the employer's argument under *Evans*, *Ricks*, and *Lorance*. *Id.* at 335-36. But, after *Morgan*, the court decided *Law v. Continental Airlines Corp.*, 399 F.3d 330 (D.C. Cir. 2005). There, pilots allegedly were not promoted due to age discrimination, and this time, the court relied on *Evans*, *Ricks*, and *Lorance*, and distinguished *Bazemore* and *Anderson*. *Id.* at 332-34. Like the Seventh Circuit, the D.C. Circuit held that while a facially-discriminatory policy may be challenged any time, the same is not so for a facially-neutral policy, where plaintiff "offered no evidence of discriminatory purpose other than (at most) the discrete time-barred decision." *Id.* at 333-34. "To decide otherwise would completely undo" *Morgan* and *Lorance*. *Id.* at 334. So, while neither *Anderson* nor *Law* concerns examinations and eligibility lists, to the extent they bear on the issue here, *Law* signals that the D.C. Circuit would join the Third, Sixth, and Seventh, not the Second and Fifth.

Finally, petitioners submit that the Ninth Circuit's decision in *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991), deepens the conflict. Pet. 12-13. It does not. *Bouman* at least involved a Title VII challenge to an examination and list used for promotions. 940 F.2d at 1217-18. As here, the employer argued that the EEOC charge was untimely because it was not filed within the applicable limitations period after the

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and thus was part of a continuing violation. *Id.* at 796-800. This pre-*Morgan* decision is incorrect.

list's promulgation. *Id.* at 1221. The Ninth Circuit disagreed, distinguishing *Bronze Shields* on the basis that the claim did not accrue until the list expired because not until then was it certain she would not be promoted. *Ibid.* As the Seventh Circuit indicated (Pet. App. 6a-7a), the Ninth Circuit's approach has been resoundingly rejected, including by this Court (see *Lorance*, 490 U.S. at 907 n.3; *Chardon*, 454 U.S. at 8; *Ricks*, 449 U.S. at 260-61; *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 234 (1976); see also *Cox*, 230 F.3d at 205; *Kennedy v. Chemical Waste Management, Inc.*, 79 F.3d 49, 50 (7th Cir. 1996)). Indeed, the possibility of being promoted down the road does not mean no injury occurred upon the list's adoption. The delay in being promoted, with its attendant loss of pay and seniority, is itself an injury. It is of no matter, then, that the Ninth Circuit again relied on this mistaken premise in a recent unpublished decision, as petitioners indicate. Pet. 18.

Moreover, in *Hulteen v. AT&T Corp.*, 498 F.3d 1001 (9th Cir. 2007), on which this Court granted certiorari and recently heard oral argument (see *AT&T Corp. v. Hulteen*, No. 07-543), the Ninth Circuit noted that *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), decided a month after *Bouman*, "distinguished facially neutral from facially discriminatory" practices (*Hulteen*, 498 F.3d at 1010 n.7). According to *Pallas*, *Evans*, *Lorance*, and *Bazemore* stand for the proposition that disparate impact "resulting from a bona fide seniority system that is facially neutral must be challenged within the statute of limitations from the time the system is adopted; with a facially neutral system, the discriminatory act occurs at the time of adoption and subsequent applications do not constitute continuing violations." 940 F.2d at 1326. For what it is worth, it

seems that, if the Ninth Circuit faced the issue here again, it would join the Seventh Circuit as well.

In the end, given this Court's recent decision in *Ledbetter*, along with the Seventh Circuit's decision here and the Sixth Circuit's decision in *Cox* eight years ago, there is no reason to be concerned about decisions in the Second and Fifth Circuits, which have not been reevaluated in 30 years. As we explain above, only *Evans* was decided before *Guardians* and *Gonzalez*, so those cases did not take account of *Ricks*, *Chardon*, *Bazemore*, *Lorance*, *Morgan*, or *Ledbetter*, let alone current circuit decisions. At this point, this shallow and stale conflict provides no basis for review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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