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

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant
Corporation Counsel
NADINE JEAN WICHERN *
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-0468

* Counsel of Record

Attorneys for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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ARGUMENT

The Solicitor General's submission that review should be granted disregards three crucial points. First, the circuit split on which petitioners and the

Solicitor General rely is unusually stale, and the issue very rarely arises. Br. in Opp. 21-32. Second, the circuits with old decisions in conflict with the decision below will have the opportunity, in any future cases, to consult the Court's consistent and recent guidance on the issue and harmonize themselves with the majority and modern view; potential plaintiffs, too, are on notice to calculate their EEOC-filing date under the more recent decisions. *Id.* at 25-31. Third, although the Solicitor General urges a different accrual rule in disparate-impact cases, the rule that a fresh violation must occur to trigger a new claim has nothing to do with the plaintiff's method of proof. Certainly, the limitations period for disparate-impact claims should not be longer than for disparate-treatment claims. *Id.* at 17-21. Further review is not needed just so this Court can again reaffirm that a new statutory wrong – not the present consequences of a past wrong – is necessary to start a new limitations period under Title VII.

1. The conflict on the question here – whether a disparate-impact claim based on a facially race-neutral examination and eligibility list created from the examination results accrues only when the list is adopted and announced, or also again thereafter, each time there is hiring from the same list – is extraordinarily stale. It surfaced almost 30 years ago, in 1981, when the Third Circuit in *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), cert. denied, 458 U.S. 1122 (1982), declined to follow the Second Circuit's 1980 decision in *Guardians Association v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980), cert. denied, 463 U.S. 1228 (1983). Tellingly,

even at that time, this Court denied certiorari in both *Bronze Shields* and *Guardians*.

Nothing since then supports a different result here. While the Solicitor General asserts that the issue is "recurring" (SG Br. 19), in fact it rarely arises. In nearly three decades, only five cases have decided the precise issue. Three of the cases – *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980), *Bronze Shields,* and *Guardians* – were decided in 1980 and 1981. After that, the issue did not emerge again for 19 years, in *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000), and then not for most of another decade, until the 2008 decision below.

Of those five cases, the two under which petitioners would prevail are the oldest, decided after *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), but before the other six relevant decisions from this Court. Since 1980, no circuit has accepted the position of petitioners and the Solicitor General. That is unsurprising, for the Court in the intervening years has repeatedly rejected all attempts by late-filing plaintiffs to date accrual not from when a statutory wrong occurred, but from when the consequences of a prior discriminatory practice were felt. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). See also *Bazemore v. Friday*, 478 U.S. 385 (1986) (discriminatory pay pursuant to facially discriminatory pay structure is current violation each time check is issued, not merely carrying forward of a past act of discrimination).

The Solicitor General contends the decision below also conflicts with *Bouman v. Block*, 940 F.2d 1211 (9th Cir.), cert. denied, 502 U.S. 1005 (1991). SG Br. 16-17 & n.3.[1] There, the court ruled that a claim directed to an eligibility list did not accrue until the list was taken down. See 940 F.2d at 1221. The court did not decide the issue here – whether each use of the list is a fresh violation. Moreover, the Solicitor General does not address the Ninth Circuit's decisions moving away from *Bouman*. Br. in Opp. 31-32. This Court also denied review in *Bouman*, when the conflict arguably had greater currency. *Bouman* thus provides no basis for further review.

2. The Solicitor General summarily states there is "little reason" to think the circuits will align without

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[1] The Solicitor General rightly does not endorse petitioners' view that the decision below conflicts with *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999), and *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), recognizing that those cases arose "in other contexts." SG Br. 17. As we explain (Br. in Opp. 30), *Anderson* involved a policy of pay and benefits discrimination based on race for which the limitations period ran anew with each paycheck or benefits decision. See *Ledbetter*, 550 U.S. at 633-47 (explaining *Bazemore*). *Beavers* involved a policy of denying health coverage to dependents who did not reside full time with the employee, which was also, at least arguably (Pet. App. 5a), a facially discriminatory policy (Br. in Opp. 29 & n.4). Application of an employment policy to both current and future employees, as in those cases, is far different from maintenance of an eligibility list. While new employees are hired (or their positions change), and they become subject to an employment policy on an ongoing basis, an eligibility list applies to everyone to whom it will ever apply at the outset; no one is newly affected only after the filing period has passed. Whatever the correct approach in cases like *Anderson* and *Beavers*, those cases do not bear on whether to grant review in this case.

this Court's immediate intervention, and that there has been "no relevant change in the law" since the 1980 Second and Fifth Circuit decisions. SG Br. 19. But after those decisions, the Court elaborated on *Evans*, and from *Ricks* to *Ledbetter* just two Terms ago, has developed a consistent body of case law governing the Title VII limitations period. For that reason, the more current decisions of the Third, Sixth, and Seventh Circuits, which have had the benefit of that entire line of cases, have been in harmony. If future cases arise, the Second and Fifth Circuits would also have the benefit of the intervening decisions of this Court and other circuits, and would likely reverse their earlier, incorrect positions.

The Solicitor General ignores that this process may already be underway. The district court in *United States v. New York*, No. 07-2067, 2009 WL 212154 (E.D.N.Y. Jan. 28, 2009), rejected a limitations defense. That issue may soon make its way to the Second Circuit, which could will surely evaluate *Guardians* against more modern decisions. Br. in Opp. 27-29. The Fifth Circuit never offered any analysis supporting its disposition. *Id.* at 25-26, 28-29. If the issue arose there again, the same wealth of well-reasoned, consistent decisions would reveal the 1980 ruling should not survive.

Morever, if (at worst) the early circuit decisions create some "uncertainty" (SG Br. 19) about the limitations period in a case like this, the three later decisions unquestionably alert a careful plaintiff that he should file an EEOC charge within 180 or 300 days of notice that he has been injured by an eligibility examination and list. As petitioners admitted, they knew of their injury from the start and could have filed sooner, but did not think they

had to. Pet. App. 11a. Until the conflict resolves itself, prudent plaintiffs even in the Second and Fifth Circuits would likely file on time, since the rule there is old, in the minority, and out of touch with this Court's consistent line of cases.

The paucity of cases involving the issue here, the consistent case law from both this Court and the three later circuits, and the ability of plaintiffs to protect themselves, avoid the Solicitor General's concern that denying review would "undermin[e] the uniform application of federal employment discrimination law." SG Br. 19. That concern, moreover, rings hollow when the law has not been uniform since 1981 – except that every case decided since then has uniformly rejected arguments like those petitioners and the Solicitor General advance here.

3. On the merits, this Court, from *Evans* to *Ledbetter*, has made clear that Title VII claims accrue when the unlawful act occurs, and that a new statutory wrong – not merely the present consequences of a prior act – is needed to trigger a new claim. The plaintiff must file a charge (in States with enforcement agencies) within 300 days of when the unlawful employment practice occurred. See 42 U.S.C. § 2000e-5(e)(1). As the Solicitor General agrees (SG Br. 13), petitioners were injured when they were informed that the City would hire from a group that did not include them. That "impact [was] felt" (*Lorance,* 490 U.S. at 908) from the outset. That started the limitations period. Petitioners' ineligibility to be hired when the City subsequently called candidates from the list was merely the "delayed, but inevitable, consequence of" (*Ricks*, 449 U.S. at 257-58) their not being on the eligibility list – an "adverse effect[ ] resulting from the past discrimi-

nation" (*Ledbetter*, 550 U.S. at 628). It was not a fresh statutory wrong; by using the list, the City committed no further act of discrimination (in treatment or in impact), and petitioners suffered no additional injury. If anything, petitioners stood a greater chance of being hired as the "well qualified" pool was exhausted, and ultimately the City did call applicants from the "qualified" pool.[2] Thus, the later rounds of hiring did not start the limitations clock anew. Pet. App. 4a, 6a-7a. Further review to once again reaffirm these governing principles is unwarranted.

a. The Solicitor General adds that disparate-impact claims have a different, and more liberal filing period than disparate-treatment claims because "the defining element of a disparate-impact claim is the effect of an employment practice on members of a protected group, rather than the employer's intent in adopting the practice." SG Br. 12. But even in disparate-treatment cases, an employer's intent alone will not support a claim. Rather, in both types of cases, the claim accrues when the employer engages in an employment practice that discriminates – whether in treatment or in impact. In neither case may the plaintiff wait for additional consequences of the practice to be felt before filing a claim. Indeed, disparate treatment and disparate impact are merely

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[2] That does not mean accrual is postponed to see whether the employer eventually "hire[s] from among the ranks of those adversely affected by the examination." SG Br. 15. Issues of damages calculation do not delay accrual. See, *e.g.*, *Wallace v. Kato*, 549 U.S. 384, 390-91 (2007). As for the possibility the employer may never "use the results to select employees for hire or promotion" (SG Br. 15), *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), sharply limits this option.

alternative methods of proving a Title VII claim, and plaintiffs may pursue both claims. It would "creat[e] uncertainty" (SG Br. 19) if the two claims accrued at different times. And it would be perverse to extend the filing period for disparate-impact claims, where the proof "involves the use of circumstantial evidence to create an inference of discrimination" (Pet. App. 5a), while continuing to enforce the tighter deadline for disparate-treatment claims, for which there is direct evidence of discrimination.

b. The Solicitor General further contends that the statutory text forbidding an employer "to limit, segregate, or classify . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race . . ." supports extending the limitations period. SG Br. 7-8 (citing 42 U.S.C. § 2000e-2(a)(2)). Here, the City's eligibility list was the limitation or classification. Use of the list to call "well qualified" candidates in random order for further processing did not segregate or classify anyone, nor limit employment opportunities, based on race. The burden of proof in disparate-impact cases (*id.* at 7) does not fill this hole. That provision allows a plaintiff to prevail if, among other things, "a respondent uses a particular employment practice that causes a disparate impact on the basis of race." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Petitioners here demonstrated that use of the test results to create the eligibility list was such a practice but not that the subsequent random calling of applicants on the list had any further disparate impact.

c. The Solicitor General variously characterizes the Seventh Circuit as having held that "an employer's use of an invalid employment examination

accrues only when the examination is scored and the results announced" (SG Br. 7); that the analysis is "altered by [the City's] practice of preceding the hiring decisions by sorting test-takers into groups of 'qualified' and 'well qualified' applicants" (*id.* at 13); and that an employer is "immunized from liability merely because" it takes that "intermediate step" (*ibid.*). These arguments describe neither the decision below nor our submission. Rather, as the court held, the City used an unlawful employment practice when it created a hiring eligibility list of "well qualified" applicants from a test with disparate impact, and gave notice to every applicant in the "qualified" pool, including petitioners, that this list would govern hiring over the next several years. That is when "the discriminatory act occur[red]" (*Ledbetter*, 550 U.S. at 621), and thus when petitioners' claim accrued. There was no further "use" of the test "to hire" (SG Br. 7) after that.

In addition, to the extent the Solicitor General uses "immunity" to describe the statute of limitations, the assertion that the City was "not immunized" by the "intermediate step" of classifying applicants cannot be squared with this Court's cases. (SG Br. 13) Where the "intermediate step" is the actionable wrong, and the belated claim merely another challenge to that "raw resul[t]" (*ibid.*), the employer certainly is "immunized" – or, more properly, the claim is time barred. For example, the college in *Ricks* was "immunized" by the "intermediate step" of denying the plaintiff tenure; the employer in *Lorance* by the "intermediate step" of adopting a discriminatory seniority system; and the employer in *Ledbetter* by the "intermediate step" of providing discriminatory evaluations. These claims, like petitioners' here, were all untimely because, as this

Court has consistently ruled, the occurrence of predictable consequences of a prior discriminatory act does not restart the limitations period.[3]

d. The Solicitor General urges that the decision below would encourage "premature charges" that would "impos[e] substantial burdens on both the EEOC and the courts" (SG Br. 20), and "could undermine enforcement of Title VII's disparate-impact provisions" (*id.* at 19). The circuits first disagreed on this issue in 1981. The Solicitor General points to no adverse effects on the EEOC, or enforcement of Title VII, to date. Because the careful plaintiff pursues claims in a timely fashion, and as the Solicitor General urges, "candidates for employment or promotion have little incentive to delay unreasonably in filing EEOC charges" (*id.* at 14), likely no such effects have occurred.

Ultimately, the Solicitor General's arguments for a longer limitations period in disparate-impact cases, simply disagree with Congress's clear policy choices. Congress obviously could have opted for a longer or more flexible limitations period, emphasizing the need for strict enforcement and compensation for all injuries. But, as this Court has repeatedly recognized, Congress made a purposeful judgment that a short limitations period would encourage victims of employment discrimination to file their claims quickly, allowing agencies (and, if necessary,

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[3] Petitioners' problem is not that they challenge a practice "in some way connected to earlier violations." SG Br. 11. It is, rather, the nature of the "connection." Where the later event is the consequence of an earlier one, and no further act of discrimination has occurred, the later event is not actionable. Petitioners' claim is untimely because no new statutory wrong was committed after the list was adopted and announced.

the courts) to resolve such claims promptly. This ensures that memories are clear; the harm is limited; and reliance interests of employers and other employees have not yet crystallized. Br. in Opp. 18-20. Even if "the passage of time . . . does not . . . raise the same concerns" as in disparate-treatment cases, the most that can be said is that evidence in disparate-impact cases may be "less likely to 'fade quickly with time.'" SG Br. 14-15 (quoting *Ledbetter*, 550 U.S. at 631). Still, the memories of those who made decisions concerning the examination and the eligibility list will fade, risking loss of that evidence over time. A short and firm filing period protects the interests in repose and reliance, which are especially important in cases involving eligibility lists, which can be used for several years.

More puzzling is the Solicitor General's further submission that the decision below "encourages – indeed, requires – plaintiffs to file lawsuits before they can be sure of the practical consequences of an employer's administration of an unlawful selection device – and may poison the workplace with anticipatory litigation before facts have crystallized." SG Br. 15. Those concerns, again, ignore Congress's choice of a short filing period, which necessarily pressures plaintiffs to file earlier. Beyond that, if anything should be clear from this Court's cases (see, *e.g.*, *Lorance*, 490 U.S. at 907 n.3; *Chardon*, 454 U.S. at 8; *Ricks*, 449 U.S. at 260-61), it is that a Title VII plaintiff cannot wait to be absolutely certain about the consequences of an employment action. Rather, the time to file runs from the unlawful act, even if that is before all the consequences are known with certainty or have taken effect.

CONCLUSION

The petition should be denied.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant
Corporation Counsel
NADINE JEAN WICHERN *
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-0468

* Counsel of Record

Attorneys for Respondent

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