No. 08-974

IN THE
Supreme Court of the United States

ARTHUR L. LEWIS, JR., *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

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

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Under Title VII, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred. Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file a charge within 300 days after the employer's use of the discriminatory practice?

PARTIES TO THE PROCEEDINGS

The petitioners are Arthur L. Lewis, Jr., Gregory S. Foster, Jr., Arthur C. Charleston III, Pamela B. Adams, William R. Muzzall, Philippe H. Victor, Crawford M. Smith, and Aldron R. Reed, on behalf of a class of approximately 6,000 unsuccessful applicants for entry-level Chicago firefighter jobs, along with the African American Fire Fighters League of Chicago, Inc., all of whom were plaintiffs and appellees in the courts below. The African American Fire Fighters League of Chicago, Inc. is a not-for-profit corporation which has not issued stock and has no corporate parent.

The respondent is the City of Chicago, which was the defendant and appellant in the courts below.

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JURISDICTION

The court of appeals entered its judgment on June 4, 2008. Petitioners filed a timely petition for rehearing *en banc*, which the court of appeals denied on August 21, 2008. Pet. App. 71a. On November 5, 2008, this Court extended the time for filing a petition for a writ of certiorari by sixty days. Order on Application No. 08A404. Petitioners filed a timely petition for certiorari. S. Ct. R. 30.1. This Court granted certiorari on September 30, 2009, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

> (a) It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Section 703(k)(1)(A) of Title VII, 42 U.S.C. § 2000e-2(k)(1)(A), provides:

> (k) Burden of proof in disparate impact cases
>
> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job re-

> lated for the position in question and consistent with business necessity.

Section 706(e)(1) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides in pertinent part: "A charge under this section shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred."

STATEMENT OF THE CASE

On eleven separate occasions from 1996 to 2002, the City of Chicago hired firefighter candidates—more than a thousand in total—based on the results of its 1995 entry-level firefighter test. Although all applicants who scored 65 or higher passed the test and were fully qualified to perform as firefighters, the City hired only those applicants who scored 89 or above for ten full classes of firefighter candidates, and a portion of an eleventh class, during this period. There was never any dispute that the City's practice of hiring only applicants who scored 89 or above had a severe disparate impact on African Americans. In 2005, the trial court found that this conceded adverse impact was not justified by business necessity because the cut-off score of 89 provided no useful information regarding the relative abilities of test-passers and bore no demonstrable relationship to job performance. The court accordingly held that the City's hiring practice discriminated against African American applicants in violation of Title VII's disparate-impact prohibition.

On appeal, the City did not contest the merits of those findings. Rather, the City challenged only the timeliness of the charges of discrimination that petitioners filed with the Equal Employment Opportunity

Commission (EEOC). The Court of Appeals for the Seventh Circuit found petitioners' charges untimely and reversed. The only question before this Court is whether petitioners were entitled to file charges within 300 days after each of the City's eleven separate uses of its hiring practice to fill firefighter vacancies, or whether petitioners were instead required to file charges within 300 days after the City informed them of their test scores and announced its plan to base its hiring practice on those test results.

1. The City's firefighter hiring practice. In 1995, the City administered a new examination for entry-level firefighter positions to more than 26,000 applicants. Pet. App. 14a. After scoring the test, the City declared that applicants who scored 64 or below (out of a possible 100 points) were "not qualified" to be firefighters, a determination not challenged in this litigation. *Id.* at 1a-2a, 45a. The City also concluded that every applicant scoring 65 or above had passed the test and possessed the cognitive ability to perform successfully as a firefighter. *Id.* at 19a.

Then, against the advice of the test developer, the City arbitrarily divided the pool of qualified persons who passed the test into two groups: applicants who scored 89 or above (whom the City called "well qualified") and those who scored between 65 and 88 (whom the City called "qualified"). *Id.* at 34a, 45a. The City did not divide the pool of qualified applicants into two because it had any factual basis to believe that individuals who scored 89 or above were the best qualified for the job of firefighter—or even that they were better qualified than individuals who scored between 65 and 88. *Id.* at 34a-35a. Rather, as the district court subsequently found, the 89 cut-

off score was a "statistically meaningless benchmark." *Id.* at 34a.

On January 26, 1996, the City sent letters to all applicants notifying them of their test scores and the City's plan for using the test results to hire firefighters. JA 35-36; Pet. App. 46a. The City's letter to applicants with scores between 65 and 88 indicated that their prospects for being hired were uncertain. The letter stated: "[I]t is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list . . . for as long as that list is used." JA 35; Pet. App. 46a. Applicants with scores below 65 were told that they were not eligible and would no longer be considered. Pet. App. 47a.

Also on January 26, 1996, the City issued a press release announcing the general results of the test and its plan to select those who would proceed to the next stages in the hiring process by using a random lottery to choose only from among applicants who scored at or above the 89 cut-off score. *Id.*; JA 51-54. The subsequent stages included a physical abilities test, a background investigation, a medical examination, and a drug test. Pet. App. 14a-15a. Applicants who passed these stages would be hired as firefighter candidates. *Id.* at 15a. Firefighter candidates would become full-fledged firefighters after completing the Chicago Fire Department's training program and passing a state certification exam. *Id.*

The City's press release also described the racial makeup of the group that the City labeled "well qualified" and stated that the City was disappointed

with those statistics. *Id.* at 47a; JA 51, 54. Nonetheless, the City asserted that the test had been "fair." JA 54. Over the next several weeks, articles in the press reported on the disparate racial impact that the City's hiring practice would have. *Id.* at 55-56, 59-60. These articles also quoted City officials who defended the fairness of the test. *Id.* at 74-75, 77.

The City subsequently conceded that the 89 cut-off score had a disparate impact on African American applicants. Pet. App. 12a-13a, 15a, 42a-43a; BIO 4. The City's practice of hiring only applicants who scored 89 or above on the test "meant that white applicants were five times more likely than African-Americans to advance to the next stage of the hiring process." Pet. App. 15a-16a.

2. The City's uses of its hiring practice. Between May 1996 and October 2001, the City hired ten classes of firefighter candidates from the disproportionately white pool of applicants who scored 89 or above on the 1995 test. *Id.* at 16a; R. 405 at 4. The City made exceptions for certain paramedics and military veterans who had scores below 89. Pet. App. 16a.[1]

While filling its eleventh class of firefighter candidates, which was hired in November 2002, the City exhausted the pool of applicants with scores of 89 or

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[1] Although the City hired paramedics and military veterans with scores below 89, both the court of appeals and the district court referred for convenience to the City's practice of hiring "only" applicants with scores of 89 or above for the ten classes of firefighter candidates hired from May 1996 through October 2001. Pet. App. 4a, 12a-13a. Petitioners follow the same convention here.

above. *Id.*; R. 405 at 4. To fill the remaining spaces in that class, and thereafter until 2007, the City selected at random from among applicants with scores between 65 and 88, even though the City had previously told those applicants that it was "not likely" that they would be selected. Pet. App. 16a, 46a; BIO 4 n.1; JA 35. There was no evidence of any difference between the job performance of firefighters hired with scores at or above 89 and those hired with scores below 89. Pet. App. 33a-37a.

3. Petitioners' EEOC charges and lawsuit. Petitioners are a class of approximately 6,000 African Americans who scored between 65 and 88 and therefore possessed the cognitive ability to perform successfully as firefighters but were not hired by the City between May 1996 and November 2002 because they scored below the 89 cut-off score. R. 58; R. 59.

After the City announced its hiring practice, several of the petitioners met with counsel to discuss their legal options. Pet. App. 48a. Lacking information to challenge the City's public assertions that its new firefighter hiring practice was "fair" under Title VII's standards, counsel requested information from the City regarding the development of the 1995 test and the validation, if any, of the City's practice of hiring only applicants who scored 89 or above. *Id*. at 48a-49a. A series of delays ensued, in part because the test developer still had not completed a validation report documenting the examination and the 89 cut-off score as of July 1996, which was six months after the City announced its hiring practice and declared it was "fair," and two months after it hired the first class of firefighter candidates in May 1996. R. 74, Ex. K ¶¶ 4-6; JA 51-54, 74-75, 77; BIO 4. The

City produced the last of the requested information in January 1997. Pet. App. 48a-49a. Thereafter, on the advice of an expert consultant, counsel concluded that reasonable grounds existed to challenge the City's hiring practice under Title VII. *Id.* at 49a.

To initiate Title VII litigation, petitioners were required to file charges of discrimination with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).[2] The first charge of discrimination by a petitioner was filed by Crawford M. Smith on March 31, 1997. Pet. App. 49a. That date was 430 days after January 26, 1996, the date that the City first announced its hiring practice, but only 181 days after October 1, 1996, the date that the City used its hiring practice to fill its second class of firefighter candidates.[3] Mr. Smith's charge was filed before the City hired nine more classes of firefighter candidates between March 1997 and November 2002, in full or partial reliance on its practice of hiring only applicants who scored 89 or above on the test.[4]

After receiving right-to-sue letters from the EEOC, *see* 42 U.S.C. § 2000e-5(f)(1), petitioners filed

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[2] In certain circumstances not present here, the limitations period is 180 days. *See* 42 U.S.C. § 2000e-5(e)(1).

[3] On May 16, 1996, 319 days before Smith's charge, the City had hired one earlier class of firefighters from among the applicants who scored 89 or above on the test. R. 405 at 4. Petitioners do not contend in this Court that their charges were timely with respect to hires made for that class.

[4] The eleven hiring dates at issue are May 16, 1996; October 1, 1996; March 4, 1997; October 1, 1997; February 2, 1998; February 16, 1999; December 1, 1999; July 17, 2000; February 20, 2001; October 16, 2001; and November 1, 2002. R. 405 at 4.

this lawsuit in 1998, alleging that "[t]he City of Chicago has used and continues to use as its threshold hiring criterion the results of" the 1995 test to hire only applicants who scored 89 or above, in violation of Title VII's disparate-impact prohibition. JA 1-2.

4. The district court's timeliness ruling. In February 2000, the City moved for summary judgment on the ground that petitioners' charges of discrimination were untimely. R. 64. The City contended that the only potential Title VII violation occurred in January 1996, when the City notified petitioners that they had scored below the 89 cut-off score and announced its practice of hiring only applicants who scored 89 or above on the test. Pet. App. 52a. Because petitioners failed to file charges within 300 days after that date, the City contended that the suit was time-barred. *Id.*

The district court denied the City's motion. The court concluded that if "the City's examination had a disparate impact on African-American candidates, then the City's ongoing use of the examination's results—rather than some other, non-discriminatory criteria for candidate selection—has the same disparate impact," *id.* at 60a; and thus the City's "ongoing reliance on those results" would violate Title VII. *Id.* at 69a. Because petitioners' charges were filed within 300 days of the second date on which the City used its practice of hiring only applicants who scored 89 or above on the test, the district court held that the suit was not time-barred. *Id.* at 69a-70a.

5. The district court's liability finding. The district court certified a class in 1999, R. 59,[5] and held a trial on the merits of petitioners' disparate-impact claims in January 2004. Under § 703(k) of Title VII, when an employer "uses a particular employment practice that causes a disparate impact on the basis of race," it violates Title VII's disparate-impact prohibition unless (i) the employer demonstrates that the practice is job-related and consistent with business necessity *and* (ii) there are no equally valid, less-discriminatory alternatives. 42 U.S.C. § 2000e-2(k)(1)(A), (C); *see also id.* § 2000e-2(a)(2), (h).

At trial, the City conceded that the 89 cut-off score had a disparate impact on African American applicants, but defended its practice of hiring only applicants who scored 89 or above as job-related. Pet. App. 12a-13a, 15a, 28a, 42a-43a; BIO 4. After the trial concluded, the district court rejected this defense, holding that the City had unlawfully discriminated against African Americans in violation of Title VII by repeatedly using its hiring practice to fill ten full classes (and a portion of an eleventh class) of firefighter candidates. Pet. App. 28a-43a.

The district court held that "the City failed to prove that test results could be used to predict firefighter performance, *i.e.*, that those who scored 89 or

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[5] The class consists of "all African American firefighter applicants who took and passed the 1995 written firefighter examination given by the City of Chicago who received a score of 65 or greater but less than 89, but who, as a result of their test scores, have been and continue to be denied the opportunity to take the physical performance test and to be hired as firefighters." R. 58 at 1.

higher on the 1995 Test were more qualified for the job than those who scored between 65 and 89."[6] *Id.* at 30a. The court found the City had known from the outset that the 89 cut-off score was "statistically meaningless" because, as the test developer had communicated to City officials, the cut-off score "fail[ed] to distinguish between candidates based on their relative abilities." *Id.*; *see also id.* at 20a-22a, 35a.

As the court also noted, the City had already acknowledged in the course of defending another lawsuit that the "cut score was not set by the City because it believed that individuals who scored 89 or higher were the best qualified candidates for the job of firefighter," or "that they were better qualified than individuals who obtained a score between 88 and 65." *Id.* at 34a-36a (internal quotation marks omitted). Rather, the City selected the 89 cut-off score over its test developer's objection and for reasons of "administrative convenience"—namely, "simply to limit the number of candidates selected for further processing." *Id.* at 34a-35a; *see also id.* at 22a.

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[6] The district court also found that the test "was skewed towards one of the least important aspects of the firefighter position at the expense of more important abilities." Pet. App. 32a. The test had a heavily weighted component that required applicants to answer multiple-choice questions after watching a video demonstration about the operation of a fictitious device. Performance on this video component hinged, as the district court found, "almost entirely on a *single* skill—the candidate's ability to take notes" during the video demonstration, which was "not [a] particularly important" skill for the firefighter position. *Id.* at 31a-32a. Among the 46 identified abilities required for the job, note-taking ranked "dead last." *Id.* at 32a.

The district court rejected the City's assertion that its hiring practice was justified by "administrative convenience," finding that any legitimate administrative interest could have been satisfied by the equally valid and less-discriminatory alternative of selecting applicants "at random from the pool of candidates who passed the 1995 Test" by scoring 65 or above. *Id.* at 35a; *see also id.* at 41a. The City, in fact, subsequently used this alternative from 2002 through 2007 to hire numerous applicants with scores between 65 and 88 after it exhausted the pool of applicants with scores at or above 89. *Id.* at 16a; BIO 4 n.1. The court noted that despite this on-the-job experience with applicants from both pools of test-passers, the City presented no evidence that firefighters who scored between 65 and 88 performed worse on the job than those who scored 89 or above. Pet. App. 36a-37a.

Based on its holding, the district court entered judgment for petitioners and ordered injunctive relief. *Id.* at 43a; R. 405.

6. The court of appeals' ruling. On appeal, the City did not defend its use of the 89 cut-off score to distinguish among applicants with passing scores. Nor did it challenge the merits of the district court's finding of a Title VII disparate-impact violation.[7] Instead, the City argued only that petitioners' EEOC

[7] Accordingly, as this case comes to the Court, there is an unchallenged finding that the employment practice in question had a disparate impact and was neither job-related nor consistent with business necessity—in contrast to *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), where the Court found "no genuine dispute that the examinations were job-related and consistent with business necessity." *Id.* at 2678.

charges were time-barred. *See* Pet. App. 2a; BIO 6. The United States Court of Appeals for the Seventh Circuit agreed and reversed. Pet. App. 1a-11a.

The court held that petitioners "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. In the court's view, the City's subsequent hiring only of "well qualified" applicants "was the automatic consequence of the test scores rather than the product of a fresh act of discrimination." *Id.* at 4a. Hence, the 300-day period started running no later than the date petitioners were informed that they had been sorted into the lower-scored group of test-passers and the City announced its plan to hire only applicants who scored 89 or above. *Id.* Because the earliest charge was filed more than 300 days after that date, the court held that petitioners' suit was time-barred. *Id.* at 3a-7a.[8]

The court remanded with instructions to the district court to enter judgment for the City. *Id.* at 11a. After the court of appeals denied a petition for rehearing en banc, *id.* at 71a, this Court granted certiorari on September 30, 2009.

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[8] The court of appeals resolved two further questions not at issue in this Court. First, it held that the "continuing violation doctrine" did not apply to petitioners' charges. Pet. App. 7a-9a. Second, the court held that the time for filing charges had not been equitably tolled by the City's actions, including its delay in producing information about the development of its hiring practice. *Id.* at 9a-11a.

SUMMARY OF THE ARGUMENT

Petitioners alleged—and ultimately proved—that the City's practice of hiring as entry-level firefighters only applicants who scored 89 or above on the 1995 test violated Title VII's prohibition against disparate-impact discrimination. The City used this practice in a manner that selected whites at five times the rate of African Americans, even though the 89 cut-off score did not provide any information regarding the relative abilities of test-takers and bore no demonstrable relationship to expected job performance. The text of Title VII compels the conclusion that petitioners timely filed their EEOC charges challenging the City's repeated uses of this practice and thus requires reversal of the court of appeals' holding to the contrary.

I. Section 703(k) provides that where an employer fails to establish the requisite business necessity defense, "[a]n unlawful employment practice based on disparate impact" occurs each time the employer "uses a particular employment practice that causes a disparate impact on the basis of race." 42 U.S.C. § 2000e-2(k)(1)(A). Here, on each occasion that the City filled firefighter vacancies, it "use[d]" the "particular employment practice" of hiring only applicants who scored 89 or above on its 1995 test. This practice had a severe disparate impact on African Americans, and the City failed to meet its burden of demonstrating that the practice was job-related. Accordingly, under the plain language of § 703(k), each time the City hired firefighter candidates, a Title VII disparate-impact violation occurred and a new charge-filing period began.

This plain meaning of § 703(k) is supported by other provisions of Title VII, including § 703(h), which provides that the utilization of a professionally developed test is unlawful if "such test, its administration or action upon the results is . . . used to discriminate." 42 U.S.C. § 2000e-2(h). Actual hiring decisions are the quintessential "action upon the results" of a hiring test. Moreover, under the plain meaning of the statute, the City violated Title VII every time it used its hiring practice to fill firefighter vacancies, even if it also violated the statute when it took such preliminary steps as sorting test-takers based on their scores and creating an eligibility list. The fact that a Title VII violation may be related to earlier acts of discrimination does not prevent a new claim from accruing, and a new charge-filing period from commencing, with the occurrence of subsequent acts that independently violate the statute.

II. The Court has long held that a claim accrues when all elements of a Title VII violation are present. Thus, in a disparate-*treatment* case—where the defining element is intent—the charge-filing period runs from the date of the employer's adoption of an intentionally discriminatory practice, and does not begin to run again merely because the plaintiff later suffers the consequences of the original intentional discrimination, absent a subsequent intentionally discriminatory act. By contrast, in a disparate-*impact* case, where discriminatory intent is not a required element, the Court has recognized that the charge-filing period "run[s] from the time that impact is felt." *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 908 (1989). The Court confirmed this principle in *Ledbetter v. Goodyear Tire & Rubber Co.*,

550 U.S. 618 (2007). While holding that the plaintiff could not challenge her current salary under Title VII's disparate-treatment prohibition because she had not filed a charge within the charge-filing period after her employer's intentionally discriminatory pay-setting decision years earlier, the Court noted that she would not face the same "obstacles" if she challenged her current salary under the Equal Pay Act, because "the EPA does not require . . . proof of intentional discrimination." *Id.* at 640.

III. The court of appeals ignored the statutory text and misread this Court's decisions. The text of Title VII contains no exception for what the court of appeals characterized as the "automatic consequence" of the City's initial decision to sort test-passers into groups who scored above and below the 89 cut-off score. To the contrary, § 703(k) prohibits employers from "us[ing]" a non-job-related hiring practice that causes a disparate impact, and § 703(h) forbids "action upon the results" of a discriminatory hiring test, regardless of whether those violations were consequences—automatic or otherwise—of earlier violations. Unlike the Title VII prohibition against disparate treatment, which forbids only acts taken with an unlawful motive but not the subsequent effects of those acts, consequences are the very touchstone of a disparate-impact violation.

There is, likewise, no basis in Title VII or this Court's decisions for a rule limiting the City's disparate-impact liability merely because it took the intermediate step of putting applicants' names and test scores on an eligibility list for convenience, and then relied on the list in making hiring decisions. It is not uncommon for employers to use test results, as

the City did here, to make hiring or promotion decisions for a number of years after a test is administered. If Title VII prohibited only the creation of a test-based list, but not the City's uses of its hiring practice to fill firefighter vacancies, the limitations period in this case would have expired long before the vast majority of those vacancies were ever filled. Title VII should not be construed to require such an odd result absent a clear and express statutory command. Here, the text of Title VII and this Court's cases require the opposite result.

IV. The result in this case not only is compelled by the text of Title VII, but also achieves the purposes of the statute. It promotes certainty, appropriately balances the interests of employees and employers, and avoids unnecessary charge-filing.

ARGUMENT

I. The text of Title VII establishes that a disparate-impact violation occurred, and a new charge-filing period started, every time the City filled firefighter vacancies.

Section 706(e) of Title VII requires that an individual seeking to challenge employment discrimination must first file a charge with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). In applying this provision, the "critical questions" are: "What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002). The "answer [to these questions] varies with the practice." *Id.*; *see also id.* at 110-17 (recognizing different accrual rules for dis-

crete acts of intentional discrimination and hostile work environment claims).

Where, as here, the unlawful employment practice at issue violates Title VII's disparate-impact prohibition, the answer to the Court's timeliness questions is found in the text of § 703(k). 42 U.S.C. § 2000e-2(k)(1)(A)(i). Under § 703(k), a violation of the statute occurred each of the eleven times the City filled firefighter classes "using" its unlawful employment practice of hiring only those applicants who scored 89 or above on the 1995 test—because, as the district court found, that cut-off score caused a disparate impact on African Americans and was a "statistically useless method of evaluating candidates" that "provided no information regarding the relative abilities of the test-takers." Pet. App. 34a-35a; *see also id.* at 42a-43a. This plain statutory meaning is confirmed by other pertinent provisions of Title VII, and holds true even if the statute also was violated by preliminary actions that the City took prior to hiring.

A. Under the plain meaning of § 703(k), the City violated Title VII each time it used its practice of hiring only applicants who scored 89 or above on the 1995 test.

1. Section 703(k), enacted as part of the Civil Rights Act of 1991, is "the disparate-impact [portion of the] statute." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75.[9] It

[9] Section 703(k) was enacted to codify aspects of the disparate-impact theory of Title VII liability "enunciated by the Supreme Court in *Griggs* . . . and in the other Supreme Court

provides that "[a]n unlawful employment practice based on disparate impact is established" when an employer "uses a particular employment practice that causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(A). If a plaintiff establishes this prima facie showing of a disparate-impact violation, the employer is liable unless it successfully defends the practice as job-related and consistent with business necessity. *Id.*[10]

In determining when disparate-impact claims accrue under § 703(k), the key statutory terms are "employment practice," "uses," and "causes a disparate impact." *Id.* A disparate-impact violation occurs, and therefore the charge-filing period starts running, whenever an employer "uses" a "particular employment practice" that "causes a disparate impact" and as to which the employer is unable to demonstrate job-relatedness. *Id.*

2. The Court has "stressed the need to identify with care the specific employment practice that is at issue." *Ledbetter*, 550 U.S. at 624 (citing *Morgan*, 536 U.S. at 110-11). The particular employment practice that petitioners challenged—and that the district court concluded was unlawful—was the City's practice of hiring as firefighter candidates only those applicants who scored 89 or above on the 1995 test. Pet. App. 13a, 29a, 35a, 42a-43a. It is well

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decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." Civil Rights Act of 1991, § 3(2), 105 Stat. at 1071.

[10] An employer who successfully demonstrates that an employment practice is justified by business necessity may still be liable if there are less-discriminatory alternatives that it refused to adopt. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

settled that hiring constitutes an employment practice that can be challenged as a disparate-impact violation. *See Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (holding that a prima facie disparate-impact case is established by showing "that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern").

3. Title VII does not define the word "uses." In the absence of a statutory definition, "the meaning of the verb 'uses' has to turn on the language as we normally speak it." *Watson v. United States*, 552 U.S. 74, 79 (2007). The Court has explained that "the word 'use,' in legislation as in conversation, ordinarily signifies 'active employment,'" *Jones v. United States*, 529 U.S. 848, 855 (2000) (quoting *Bailey v. United States*, 516 U.S. 137, 143 (1995)), which denotes "action and implementation." *Bailey*, 516 U.S. at 145 (citing dictionary definitions).

Under this ordinary meaning, whenever an employer implements a hiring practice to fill specific job positions, it "uses" that practice. *See, e.g.*, *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 585 (1983) (describing a Title VII disparate-impact challenge to several written examinations "that were used to make entry-level appointments"). Applied here, the City actively employed and implemented—it *used*—its hiring practice on each of the eleven occasions that it selected certain test-passers (those who scored 89 or above) and not others (petitioners and others who scored between 65 and 88) to fill spots in a class of firefighter candidates.

From the outset of this litigation, the City's own characterization of its hiring practice has relied on

the same plain-meaning understanding of the word "use." In its answer to the complaint, the City stated that "since 1996 and continuing to the present time, it has used the results of the 1995 fire fighter entrance examination as part of its process for hiring probationary firefighters in the Chicago Fire Department." R. 163 (Am. Answer ¶ 10); JA 22 (Answer ¶ 10) (same); *see also* R. 163 (Am. Answer ¶ 1) ("Defendant admits that it *has used and continues to use* results of the 1995 fire fighter entrance examination as part of its fire fighter hiring process." (emphasis added)); JA 16 (Answer ¶ 1) (same). In other words, as the City conducted each new round of hiring from 1996 to 2002, it "use[d] a particular employment practice" for hiring that was based on the test results. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

4. The City's hiring practice "cause[d] a disparate impact," *id.*, each time it filled a class of firefighter candidates, because each use disproportionately excluded qualified African American applicants from its ongoing firefighter hiring.

Disparate impact is caused if the employment practice "in question select[s] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *accord Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). In Title VII cases, the relevant pool of applicants encompasses those who are qualified for the position in question. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 3(2), 105 Stat. at 1071; *see also N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 585-86 (1979).

Here, each of the City's repeated uses of its practice of hiring only applicants who scored 89 or above "cause[d] a disparate impact" under the terms of § 703(k), based on a comparison of the racial makeup of those who were actually hired as firefighter candidates with the racial makeup of the pool of qualified applicants. *See Albemarle*, 422 U.S. at 425; *Wards Cove*, 490 U.S. at 650-51. The pool of qualified applicants in this case was the pool of individuals, including petitioners, who took the test and received a passing score of 65 or above. By passing the test, petitioners demonstrated that they were fully qualified to advance to the next stages of the hiring process. Pet. App. 19a. As the City conceded at trial, applicants who scored 89 or above were not more qualified than those who passed the exam but fell short of the 89 cut-off score. *Id*. at 36a-37a, 42a. But as a result of the City's cut-off score, in each class of firefighter candidates, African American applicants were selected at rates far lower than the percentage that they represented in the pool of qualified applicants. R. 366 at 1-4 & attach. B (shortfall analysis for the hire date of each class of firefighter candidates); Pet. App. 15a-16a.

In addition, although it was not petitioners' burden to establish the lack of job-relatedness, it is an adjudicated fact that the City's repeated uses of this hiring practice were neither "job related" nor "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Under the district court's unappealed findings, the City's 89 cut-off score was "statistically meaningless" and revealed nothing about whether an applicant who scored 89 or above was more quali-

fied to be a firefighter than an applicant who scored between 65 and 88. Pet. App. 30a, 34a-35a.

5. Thus, under the plain text of § 703(k), each time the City used its practice of hiring only applicants who scored 89 or above on the 1995 test, it committed an "unlawful employment practice based on disparate impact." 42 U.S.C. § 2000e-2(k)(1)(A).[11] Under the charge-filing requirement of § 706(e), a charge filed within 300 days of any such use was therefore timely. *Id.* § 2000e-5(e)(1). Petitioners met this requirement by filing charges within 300 days of the City's use of its practice to hire a second class of firefighter candidates.

B. Sections 703(h) and 703(a)(2) confirm that a new act of disparate-impact discrimination occurred each time the City used its hiring practice.

Sections 703(h) and 703(a)(2) of Title VII confirm that a new act of discrimination occurred under § 703(k)—and a new charge-filing period started—

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[11] The unappealed findings of the district court are in accord with numerous other decisions holding that the use of a non-job-related cut-off score that causes a disparate impact in employment decisions constitutes a violation of Title VII. *See, e.g.*, *Isabel v. City of Memphis*, 404 F.3d 404, 413-14 (6th Cir. 2005); *Guardians Ass'n of the N.Y. City Police Dep't v. Civil Serv. Comm'n*, 633 F.2d 79, 105-06 (2d Cir. 1980), *aff'd on other grounds*, 463 U.S. 582 (1983). The *Uniform Guidelines on Employee Selection Procedures*, which establish a federal standard for employment testing, *see* 29 C.F.R. § 1607.1(A), similarly provide that "[w]here cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force." 29 C.F.R. § 1607.5(H); *see also* 29 C.F.R. § 1607.14(B)(6).

each time the City used its practice of hiring only applicants who scored 89 or above on the test. Section 703(k) is Congress's most recent and comprehensive provision prohibiting disparate-impact discrimination; but the Court recognized long before the enactment of § 703(k) that § 703(h) and § 703(a)(2) prohibit employment practices that operate to discriminate on the basis of race, even if they are not motivated by discriminatory intent. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1, 433-36 (1971); *accord Connecticut v. Teal*, 457 U.S. 440, 450-52 (1982). Both § 703(h) and § 703(a)(2) were enacted as part of the Civil Rights Act of 1964, and were not modified when Congress enacted § 703(k) as part of the Civil Rights Act of 1991. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(2), (h), 78 Stat. 241, 255, 257.[12] These provisions support the conclusion that a new act of disparate-impact discrimination occurs each time an employer fills specific job vacancies by using a hiring practice that causes a non-job-related racially adverse impact.

1. The "ability test" provision of § 703(h) provides that it shall not "be an unlawful employment practice for an employer to give and to act upon the

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[12] As enacted in 1964, Title VII exempted state and local employers such as the City. *See* Civil Rights Act of 1964, § 701(b), 78 Stat. at 253. Congress amended Title VII in 1972 to include state and local governments as covered employers. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 103. The Equal Employment Opportunity Act of 1972 also amended § 703(a)(2) to provide that "applicants for employment" are protected by this section. Equal Employment Opportunity Act of 1972, § 8(a), 86 Stat. at 109.

results of any professionally developed ability test provided that such test, its administration *or action upon the results* is not designed, intended or *used* to discriminate because of race." 42 U.S.C. § 2000e-2(h) (emphases added). The Court has described § 703(h) as "defining what is and what is not an illegal discriminatory practice." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 69 (1982) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 761 (1976)). Section 703(h) thus provides, in certain cases, a defense to an employer's "action upon the results" of a professionally developed employment test. 42 U.S.C. § 2000e-2(h). Employers may act upon the results of such a test unless that action (or the test or its administration) is "designed, intended or used to discriminate." *Id.*

This provision in § 703(h) makes sense only if "action upon the results" of a discriminatory, non-job-related test is included among the unlawful employment practices that the statute generally forbids—which it clearly is. In *Griggs*, this Court relied on § 703(h) to invalidate an employer's use of general intelligence tests to make job assignment and promotion decisions, because those selection devices had an adverse effect on African American employees and were not job-related. *Griggs*, 401 U.S. at 425-28, 433-36; *see also id.* at 436 ("What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."); *Teal*, 457 U.S. at 451-52; *Albemarle*, 422 U.S. at 425 & n.21.

The proscription contained in § 703(h) plainly encompasses the City's practice of hiring only applicants who scored 89 or above on the test. Each use

of that hiring practice constituted "action upon the results" of a test in a manner that was "used to discriminate" against petitioners, contrary to § 703(h). *See Guardians Ass'n of the N.Y. City Police Dep't v. Civil Serv. Comm'n*, 633 F.2d 232, 249 (2d Cir. 1980) (holding that "the results of the [unlawful employment] tests were in effect being 'used to discriminate,' in direct contravention of § 703(h) of Title VII, each time a member of the plaintiff class was denied a chance to fill a vacancy"), *aff'd on other grounds*, 463 U.S. 582 (1983).

2. This conclusion is further confirmed by § 703(a)(2), which provides that it is an "unlawful employment practice . . . to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." 42 U.S.C. § 2000e-2(a)(2).

The plain text of § 703(a)(2), which embraces all employment practices that "limit" "applicants for employment" and thereby "deprive . . . any individual of employment opportunities," *id.*, encompasses each of the City's rounds of hiring only applicants who scored 89 or above on the 1995 test.[13] Each use of this practice "limit[ed]" the "applicants for employment" that the City considered, and consequently "deprive[d]" petitioners of specific "employment opportunities" for which they had previously applied and

[13] As discussed *infra* Part I.C, this is so even if the statute *also* would prohibit earlier steps in the City's hiring process, including the sorting of candidates into groups based on their test scores.

proved themselves qualified by passing the test. *Id.* The City therefore violated § 703(a)(2) each time it failed to hire petitioners and instead filled vacancies from the disproportionately white pool of applicants with scores of 89 or above.

This conclusion is bolstered by the Court's recognition that "a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981) (quoting S. Rep. No. 88-867, at 12 (1964)). Section 703(a)(2) "manifests [Congress's] . . . intention to define discrimination in the broadest possible terms." George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1612 (1969).

Sections 703(h) and 703(a)(2) thus confirm that a Title VII disparate-impact claim accrues each time an employer deprives African Americans of employment opportunities by using a practice that does not validly distinguish between the qualifications of the disproportionately white group that are hired and the African Americans who are not.

C. Title VII was violated each time the City used its hiring practice to fill firefighter vacancies, even if the statute also was violated when the City scored and sorted applicants' test results.

The outcome of the foregoing statutory analysis is not altered by the fact that before using its hiring practice to fill multiple classes of firefighter candidates, the City took a number of preliminary steps: it

developed, administered, and scored the test; it made the decision to apply an 89 cut-off score to sort test-passers into "well qualified" and "qualified" groups; it created an eligibility list based on that sorting; and it notified applicants of their scores and announced its plan to hire, for an indefinite period of time, only applicants who scored 89 or above on the test. Pet. App. 45a-48a. Even if one or more of these preliminary steps independently violated Title VII, the City also violated the statute each time it used its hiring practice to fill positions in a class of firefighter candidates.

1. Where there are recurring violations of Title VII, the fact that the later violations may be related to earlier acts of discrimination does not prevent a new claim from accruing (and a new charge-filing period from commencing) with the occurrence of each subsequent act that independently violates the statute. This is so even where the aggrieved individuals had knowledge of the earlier acts of discrimination at the time those earlier acts occurred.

As the Court explained in *National Railroad Passenger Corp. v. Morgan*, "[t]he existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." 536 U.S. at 113; *see also Ledbetter*, 550 U.S. at 636 ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations.").

The City's preliminary steps in this case did not prevent new Title VII disparate-impact claims from accruing each time the City used its hiring practice to fill vacancies in a manner that disproportionately rejected qualified African American candidates. As the district court succinctly stated, if an examination used to sort applicants has an unlawful disparate impact, then an employer's use of the test scores to hire applicants "has the same disparate impact." Pet. App. 60a.

2. Sections 703(k) and 703(h) confirm that free-standing disparate-impact violations are separately actionable even if related to prior violations. Section 703(k) provides that a disparate-impact violation is established if an employer "uses" a practice that "causes a disparate impact"; nothing in the text limits the scope of this prohibition to the sorting of test results to create an eligibility list, to the adoption or announcement of such a practice, or to its first use. 42 U.S.C. § 2000e-2(k)(1)(A). Section 703(h) similarly prohibits the "use[ ]" of a test to discriminate, with no language to suggest that when one use of a test is related to subsequent uses, only the initial use of the test is prohibited. *Id.* § 2000e-2(h); *see CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9, 19 (2007) (rejecting a statutory interpretation that "depends upon the addition of words to a statutory provision which is complete as it stands" (quoting *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 463 (1987))).

In addition, § 703(h) provides that a discriminatory "test," "its administration," and "action upon the results" can each be violations of Title VII, notwithstanding that these violations are necessarily related

to one another. 42 U.S.C. § 2000e-2(h). Otherwise, the statute would lead to the illogical conclusion that the City's use of the test results to hire firefighters was not "action upon the results" of the test.

A contrary reading would also be inconsistent with the purposes of Title VII's disparate-impact prohibition. Congress was not simply concerned with the opportunity to receive a grade on a test or to be placed on an eligibility list. "Passing a test, or being put on an eligibility list, is only a means to the ultimate end of hiring, promotion, or other selection." Barbara T. Lindemann & Paul Grossman, 1 *Employment Discrimination Law* 138 (4th ed. 2007). Rather, a core concern of Congress was to eliminate employment practices that are discriminatory in operation—namely, policies that repeatedly deny jobs or other opportunities to members of a particular group. It is the repeated use of such practices, and their cumulative effect over time, that "operate to 'freeze' the status quo" of racial inequality. *Griggs*, 401 U.S. at 430.

II. Applying the plain meaning of Title VII's disparate-impact prohibition accords with this Court's prior decisions.

Consistent with the plain meaning of Title VII's disparate-impact prohibition, the Court has acknowledged that where discriminatory intent is *not* a required element of a cause of action, a claim accrues when an employer uses a non-job-related employment practice and employees or applicants consequently experience its adverse effect. The Court's decisions regarding claim accrual in the context of Title VII's separate prohibition on disparate-

treatment discrimination—where intent is the defining element of the cause of action—do not require a contrary result.

A. Where discriminatory intent is not a required element of a cause of action, a claim accrues when the impact of an employment practice is felt.

Although this Court has not decided when a Title VII disparate-impact claim accrues, its prior decisions strongly point to the result required by the text of § 703(k). The Court has noted that a violation occurs and a claim accrues whenever the employer uses a non-job-related employment practice and employees or applicants consequently experience its disparate impact.

In *Lorance v. AT&T Technologies, Inc.*, the plaintiffs were demoted through the operation of a seniority system in a collective bargaining agreement. 490 U.S. at 901-02. The Court held that the plaintiffs had no claim that the demotions violated Title VII's prohibition on disparate-treatment discrimination, because the demotions were the neutral result of applying a seniority system adopted by the employer long before the charge-filing period commenced; hence, the post-demotion charges were not timely filed within 300 days of any disparate-treatment violation. *Id.* at 905-06.[14]

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[14] In response to this holding in *Lorance*, Congress amended Title VII to provide that discrimination based on an intentionally discriminatory seniority system occurs "when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system." Civil Rights

The Court contrasted its conclusion, however, with the result that would have been reached in a disparate-impact case. The Court noted that the plaintiffs' allegations "would ordinarily suffice to state a claim" for disparate-impact discrimination, except that § 703(h) protects bona fide seniority systems from challenge on disparate-impact grounds. *Lorance*, 490 U.S. at 904-05. The Court then explained that if the special seniority-system provision in § 703(h) had not applied and the "claim asserted [had been] one of discriminatory impact," the "statute of limitations [would] run from the time that impact is felt." *Lorance*, 490 U.S. at 908; *see also id.* at 906 (stating that under this scenario, "suits [could be brought] against the later effects of the system on disparate-impact grounds" (emphasis omitted)). The plaintiffs in *Lorance* "felt" the disparate impact of the seniority system (and experienced its "later effects") at the time of their demotions. *Id.* at 906, 908.

Similarly, in other contexts where intent is not a defining element of the claim, the Court has also suggested that the limitations period is triggered by each use of a challenged employment practice that causes particular employees to suffer an adverse impact. In *Ledbetter*, for example, the plaintiff alleged that, as early as 1979, she had begun receiving intentionally discriminatory performance evaluations; but she did not file an EEOC charge until 1998, when she contended only that the disparity between her salary and that of similarly-situated

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Act of 1991, § 112, 105 Stat. at 1078-79 (codified at 42 U.S.C. § 2000e-5(e)(2)).

men was the result of intentional discrimination because her employer based its salary decisions on her prior allegedly discriminatory performance evaluations. 550 U.S. at 621-22, 624, 628. The Court held that the plaintiff's charge was not timely because she "ma[de] no claim that intentionally discriminatory conduct occurred during the charging period." *Id.* at 628.[15]

At the same time, the Court carefully distinguished the plaintiff's Title VII disparate-treatment claim from other possible claims that would not have required a showing of discriminatory intent. The Court explained that the plaintiff "would not face the Title VII obstacles that she now confronts" under the Equal Pay Act (EPA) because "the EPA does not require . . . proof of intentional discrimination." *Id.* at 640 (citing 29 U.S.C. § 206(d)(1)). The Court also distinguished statute-of-limitations rules for violations of the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA)—which would again have rendered the plaintiff's claims timely—because those provisions of the FLSA "do[ ] not require proof of a specific intent to discriminate." *Id.* at 641 (citing 29 U.S.C. §§ 207, 255(a)).

Lorance and *Ledbetter* therefore strongly support the conclusion that follows from the text of § 703(k)—that a new claim of disparate-impact dis-

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[15] In response to *Ledbetter*, Congress amended Title VII to provide that discrimination in compensation occurs "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (codified at 42 U.S.C. § 2000e-5(e)(3)(A)).

crimination accrued in this case each time the City used its practice of hiring only applicants who scored 89 or above on the test. Petitioners suffered—or "felt," as *Lorance* put it—a non-job-related disparate impact from that hiring practice on each occasion when the City passed over them and filled a class of firefighter candidates with white applicants who possessed no greater qualifications.

B. This Court's precedents establish that a charge-filing period begins each time a present violation of Title VII exists.

Notwithstanding the discussion of Title VII disparate-impact claims in *Lorance*, the holdings in all of this Court's prior cases involving the accrual of Title VII claims have addressed challenges to intentional discrimination under Title VII's disparate-treatment prohibition. *See, e.g.*, *Ledbetter*, 550 U.S. at 624; *Morgan,* 536 U.S. at 105-06*; Lorance*, 490 U.S. at 905-09; *Del. State Coll. v. Ricks*, 449 U.S. 250, 257-58 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557-60 (1977). As a result, these cases do not control accrual of claims under the distinct statutory text of Title VII's disparate-impact prohibition. 42 U.S.C. § 2000e-2(a), (h), (k)(1)(A).

Nevertheless, the Court's disparate-treatment cases have applied a basic principle that is fully consistent with the disparate-impact claim-accrual rule that results from the plain meaning of § 703(k). The Court has held that a Title VII cause of action accrues, and thus a new charge-filing period starts, when and only when an employer's actions satisfy—at the time of those actions—each of the required elements of a particular type of Title VII violation.

See, e.g., *Ricks*, 449 U.S. at 258 (holding that the timeliness of an EEOC charge turns on "whether any present *violation* exist[ed]" within the charge-filing period (quoting *Evans*, 431 U.S. at 558)); *see also Ledbetter*, 550 U.S. at 624-25; *Morgan,* 536 U.S. at 112-13*; Lorance*, 490 U.S. at 905-08. Conversely, if the employer's actions do not satisfy the required elements at the time of those actions, then those actions do not constitute a Title VII violation.[16]

This analysis explains the Court's holdings in *Ledbetter*, *Lorance*, *Ricks*, and *Evans*. In each of those cases, the Court held that a plaintiff had not established discriminatory intent—"the defining element" of a Title VII disparate-treatment violation, *Ledbetter*, 550 U.S. at 624—within the EEOC charge-filing period. In each case, the fact patterns were similar. An employer carried out two employment actions: the first was allegedly motivated by discriminatory intent, but the second was not. Thus, the employer's second action was not a Title VII disparate-treatment violation at all, because it lacked the element of discriminatory intent required to establish a "present violation" in its own right. *Evans*, 431 U.S. at 558 (emphasis omitted). The Court held in each case that a violation occurred, and a charge-filing period started, only when the intentionally discriminatory action (the first action) was taken—and not later, when its consequences

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[16] This rule is consistent with "the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)).

were felt.[17] *See, e.g.*, *Ledbetter,* 550 U.S. at 637; *Lorance*, 490 U.S. at 905-09; *Ricks*, 449 U.S. at 258; *Evans*, 431 U.S. at 558. These disparate-treatment cases establish that intent associated with prior acts cannot be "shift[ed]" to later acts; in a disparate-treatment case, a violation requires present discriminatory intent. *Ledbetter,* 550 U.S. at 629.

In contrast to these disparate-treatment cases, the required elements in a Title VII disparate-impact case do not include discriminatory intent but rather the use of an employment practice that causes an unjustified disparate impact on the basis of race. 42 U.S.C. § 2000e-2(k)(1)(A); *Lorance*, 490 U.S. at 908; *see also* Lindemann & Grossman, 1 *Employment Discrimination Law* 110 ("[D]isparate treatment focuses on discriminatory *intent*, while adverse impact focuses on discriminatory *consequences*."). As this Court has explained, "good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432; *accord Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) ("Proof of discriminatory motive . . . is not required under a disparate-impact theory."). Just as the *Lorance* plaintiffs could have proved all the elements of a disparate-impact violation at the time of their demotions (but for the special protection that Title VII provides for seniority systems), *see* 490 U.S. at 904, 908, the required ele-

[17] None of these cases involved a disparate-treatment pattern-or-practice claim. The Court has expressly left open the timely filing question with respect to such claims, *Morgan*, 536 U.S. at 115 n.9, and need not resolve that issue in this case.

ments of a disparate-impact claim were established here each time the City used its hiring practice to deny petitioners specific firefighter positions.[18]

III. The court of appeals ignored the statutory text and misread this Court's cases.

The court of appeals ignored the statutory text of Title VII's disparate-impact prohibition. The court instead provided two rationales for concluding that petitioners' charges were untimely filed—both of which are unmoored from the statutory text and inconsistent with congressional intent and this Court's prior cases.

A. There is no exception to liability for uses of a practice that may be the consequence of other violations.

1. The court of appeals concluded that the City's discrimination against petitioners was "complete," and their claims thus accrued, no later than the date that

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[18] The Court's treatment of challenges to facially discriminatory policies further demonstrates that the accrual of Title VII claims depends on the required elements of the particular type of violation at issue. The Court has explained that where an employer adopts a practice that discriminates on its face and repeatedly uses that practice to make employment decisions, each use of the practice evidences discriminatory intent and is therefore a separate Title VII violation. Thus, in *Ledbetter*, the Court explained that when an employer maintains a pay structure that facially discriminates on the basis of race, it "can surely be regarded as intending to discriminate on the basis of race as long as the structure is used." 550 U.S. at 634; *see also Lorance*, 490 U.S. at 912 n.5 ("[A] facially discriminatory system . . . by definition discriminates each time it is applied."); *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam); *id.* at 394-96 (Brennan, J., concurring).

the City announced its plan for hiring only applicants who scored 89 or above on the test. Pet. App. 4a, 6a. In the court of appeals' view, the City's later uses of its hiring practice to fill vacancies were the "automatic consequence" of its prior decision to sort test-passers into groups of applicants who scored above and below the 89 cut-off score and, for that reason, did not independently violate Title VII's disparate-impact prohibition. *Id.* at 4a.

But that characterization does not render the City's reliance on the 89 cut-off score for repeated rounds of hiring anything other than a statutorily proscribed "use." There is no statutory exception in either § 703(k) or § 703(h) for "uses" that are the "automatic consequence" of other uses. 42 U.S.C. § 2000e-2(h), (k)(1)(A); *see supra* Part I.C. In disparate-impact analysis, a discriminatory consequence is precisely what Title VII forbids: "Congress directed the thrust of the Act to the *consequences* of employment practices." *Griggs*, 401 U.S. at 432.[19]

2. The court of appeals justified its reasoning by reference to this Court's decision in *Ricks*. Pet. App. 4a (citing *Ricks*, 449 U.S. at 257-58). But *Ricks* was a Title VII disparate-treatment case that did not purport to decide when a claim accrues in a disparate-impact case.

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[19] In any event, on the facts of this case, the City's repeated uses of its unlawful hiring practice were *not* the automatic consequence of its decision to sort applicants based on an 89 cut-off score. Even after the City announced its hiring practice, it had to make other decisions each time it filled firefighter classes. For instance, it needed to determine the number of job openings and to decide whether this hiring practice still controlled. Pet. App. 16a; BIO 4 n.1.

Moreover, the court of appeals misread *Ricks*. In *Ricks*, a college professor alleged that his denial of tenure had been the result of intentional discrimination on the basis of national origin, but he did not file an EEOC charge within the charge-filing period after his employer notified him of the tenure denial. 449 U.S. at 252-54. Rather, he filed more than a year later, shortly before the expiration of the additional one-year terminal contract that professors denied tenure customarily received. *Id.* This Court concluded that "the only alleged discrimination occurred . . . at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* at 258.

The court of appeals erroneously inferred that *Ricks* established an "automatic consequence" exception to disparate-impact liability based on this Court's comment that the expiration of the professor's one-year terminal contract was not a distinct disparate-treatment violation because it was "a delayed, but inevitable, consequence of the denial of tenure." *Id.* at 257-58. But that comment merely explained why the termination of the professor's one-year contract was not intentionally discriminatory, and therefore did not satisfy at the time of termination the defining element of a disparate-treatment claim. *See id.* at 258, 262. The Court did not purport to create any sort of broader rule.

The court of appeals' analysis also is contrary to this Court's statements that "a freestanding violation may always be charged within its own charging period regardless of its connection to other viola-

tions." *Ledbetter*, 550 U.S. at 636; *see also Morgan*, 536 U.S. at 113.[20] Here, unlike in *Ricks*, each round of hiring only applicants who scored 89 or above on the test constituted a freestanding, present violation of Title VII's disparate-impact prohibition that started a new and distinct charge-filing period. *See supra* Part I.C.

B. The creation of an eligibility list is not an intervening act that immunizes an illegal hiring practice.

The court of appeals also separately suggested that the City's employment practice was in fact three practices: the City's decision to start hiring from only those applicants who scored 89 or above (labeled "well qualified"), followed by the creation of an eligibility list consisting solely of "well qualified" applicants, followed by hiring in reliance on that eligibility list. Pet. App. 4a-5a. The court reasoned that only the first practice was a violation of Title VII, that the second was an "intervening neutral act," and that the third was not a violation of Title VII "because 'well qualified' is not a racial category, though its racial composition may have been influenced by a discriminatory decision taken earlier." *Id.* at 5a. This approach cannot be reconciled with Title VII's text or this Court's decisions.

The court of appeals' reasoning ignores the plain meaning of § 703(k) and § 703(h). Under that plain meaning, it is evident that when the City selected

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[20] In addition, the court of appeals' analysis is inconsistent with the premise that a facially discriminatory practice can be challenged at any time. *See Ledbetter*, 550 U.S. at 634; *see also supra* p.37 n.18.

applicants on the eligibility list—that is, applicants who scored 89 or above—it necessarily used the results of the test and cut-off score in a manner that caused an unlawful disparate impact. Courts, including this Court, routinely refer to the "use" of a test to make employment decisions—even in circumstances where the employer sorts the results of the test and creates an eligibility list for administrative purposes. *See, e.g.*, *Guardians Ass'n*, 463 U.S. at 585-86 & n.5 (characterizing written examinations as being "used to make entry-level appointments," even though the appointments were in practice based on a ranked list generated from the exam results).[21]

The court of appeals' approach would lead to absurd results. An employer could avoid liability under Title VII for later uses of an unlawful employment practice simply by sorting the results of the practice and creating an eligibility list more than 300 days prior to using the practice to hire. Title VII liability would then turn on whether an employer had taken the intervening step of creating a list before making hiring decisions—indeed, it could turn on arbitrary distinctions as to whether a particular manner of processing test results sufficiently transformed those

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[21] *See also, e.g.*, *Adams v. City of Chicago*, 469 F.3d 609, 610-11 (7th Cir. 2006) (describing an "examination used to promote officers," even though the examination was utilized to generate a ranked promotional list, which was then used to make promotions); *Guardians*, 633 F.2d at 249 (holding that test results "were in effect being 'used to discriminate' . . . each time a member of the plaintiff class was denied a chance to fill a vacancy," even though the test results had first been compiled into lists (quoting 42 U.S.C. § 2000e-2(h))).

results into a "list." *Cf. Watson*, 487 U.S. at 990 ("If we announced a rule that allowed employers so easily to insulate themselves from liability under *Griggs*, disparate impact analysis might effectively be abolished.").[22]

In an analogous context, this Court addressed a university admissions process that first converted raw applicant data into a "selection index" and then made decisions based on that index. *See Gratz v. Bollinger*, 539 U.S. 244, 255 (2003). In the university's system, each applicant could receive up to a maximum of 150 points based on a host of factors, including 20 points based on membership in an underrepresented racial group. *Id.* Notwithstanding the university's prior creation of a selection index, the Court held that the university's admissions decisions constituted an impermissible "use of race." *Id.* at 275.

Attaching legal significance to the mere creation of an eligibility list, in between setting a cut-off score and relying on it for actual hiring decisions, also could result in a largely prospective charging period—one that might expire before the results of a test are used in hiring at all. Applied in this case, it would mean that challenges to the vast majority of

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[22] Moreover, if the court of appeals' analysis were extended to other federal statutes, any law forbidding the use of particular information could be evaded by first compiling the information into a list. For instance, an investment brokerage firm could obtain insider information and put that information onto a list of securities to be sold. Under the court of appeals' approach, the firm would be entitled to argue that it did not use the insider information, only the neutral list, when it sold the securities. *See* 15 U.S.C. § 78p(b) (preventing the "unfair use" of insider information).

the City's illegal hires were time-barred before any hiring took place. The Court should not read a statute to require such odd results unless the text expressly requires it, which in this instance it does not. *See Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) ("[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." (quoting *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925))).

Even if the City's repeated hiring decisions based on the results of the 1995 test *were* "neutral" acts, that characterization would not avoid liability. Title VII's disparate-impact prohibition was enacted specifically to address "practices, procedures, or tests neutral on their face, and even neutral in terms of intent." *Griggs*, 401 U.S. at 430; *see also Dothard*, 433 U.S. at 329 ("[A] plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.").[23]

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[23] The court of appeals' opinion might also be read to suggest that the charge-filing period runs from the adoption and announcement of an employment practice. Pet. App. 4a, 6a. But it is untenable to hold that *only* the adoption and announcement of a policy can be a disparate-impact violation. In many circumstances, an employer's adoption and announcement of a hiring practice—without more—only amounts to a declaration of its intention to use that practice at some future date. *Cf. Am. Tobacco*, 456 U.S. at 69-70 (explaining that "[t]he adoption of a seniority system which has not been applied would not give rise to a cause of action. A discriminatory effect would arise only when the system is put into operation and the employer 'applies' the system.").

IV. An accrual rule that follows the statutory text achieves the purposes of Title VII.

The result in this case is controlled by the plain language of Title VII. In such cases, the Court's duty is to execute the statute as written, not to ground its decision on policies that are not based in the text. *See Am. Tobacco*, 456 U.S. at 75. In fact, however, this is a case where the proper result "finds support not only in the text of the statute but also in the basic policies underlying the statutory scheme." *Pfaff v. Wells Elecs., Inc.,* 525 U.S. 55, 68 (1998).

A. Clear rules promote certainty.

A "basic polic[y]" of any limitations provision is the promotion of "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood,* 528 U.S. 549, 555 (2000). In the Title VII context, this policy requires clear, easily applied rules for determining when claims accrue.

Under the correct rule for disparate-impact claims, which is based on the statutory text of § 703(k) as discussed in Part I *supra*, a claim accrues when an employer uses a practice that disparately and unjustifiably impacts employment opportunities for employees or job applicants. 42 U.S.C. § 2000e-2(k)(1)(A)(i). At that time, all elements of a Title VII disparate-impact violation are present. This rule is predictable in application and will promote certainty for plaintiffs and employers alike. By contrast, the court of appeals' approach does not provide certainty for any party in determining when a disparate-impact claim accrues. An inquiry that would depend on whether a particular use of a practice was the

"automatic consequence" of an earlier act, Pet. App. 4a, would promote litigation about causation that is best avoided.[24]

B. A text-based approach balances the interests of employees and employers.

An accrual and charge-filing rule that respects the statutory text of Title VII's disparate-impact prohibition also properly "balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination,' and the interest in repose." *Ledbetter*, 550 U.S. at 642 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980)).

1. The accrual rule required by the text of § 703(k) fulfills Congress's intent by assuring that victims of discrimination are not denied redress simply because they do not file an EEOC charge when an unlawful practice is first announced or used. *See Gunther*, 452 U.S. at 178 (emphasizing the need to "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate"); *cf. Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008) ("Title VII . . . sets up a 'remedial scheme in which laypersons, rather than lawyers, are expected to initiate the

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[24] For example, an employer may change some aspects of the practice after its original announcement, leading to disputes over whether a particular use is the "automatic consequence" of the original practice. Indeed, in this case, there was a mid-course change in the City's hiring practice. After the City exhausted the pool of applicants with scores of 89 or above, it decided to continue to use the 1995 test results to fill firefighter candidate classes by selecting from among applicants who scored between 65 and 88. Pet. App. 16a; BIO 4 n.1.

process.'" (quoting *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988))).

By contrast, the court of appeals' rule will generally start the only charge-filing period for a disparate-impact challenge running upon the initial announcement of the employment practice at issue. Yet until the practice is actually used to make employment decisions, affected employees or applicants will have limited incentive to institute a legal confrontation with an employer by filing EEOC charges.

An employer could take advantage of this reality by adopting and announcing a practice with a foreseeable disparate impact, but delaying its implementation until 300 days after its promulgation; if no one files an EEOC charge during the intervening period, the court of appeals' rule would provide license for the employer to continue using the practice indefinitely. Indeed, an employer could be better off leaving in place a potentially discriminatory test rather than developing a new one and thus opening itself to new allegations of discrimination. The court of appeals' rule would thus deter employers from voluntarily complying with Title VII, contrary to congressional intent. *See Ricci*, 129 S. Ct. at 2674 (recognizing "Congress's intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII'" (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986))).

2. The court of appeals suggested that its holding might be necessary to avoid allowing plaintiffs to initiate suit challenging an examination "ten years" after they received notification of their scores. Pet.

App. 9a. This overstates the risk of delay. Employees and job applicants have every incentive to file promptly once they are concretely affected by an employer's unlawful practice.

An aggrieved employee or applicant presumably needs the employment opportunity that has been denied. That need encourages prompt assertion of the claim. In addition, delay in instituting EEOC proceedings affects the scope of the remedy. Back-pay, for example, is allowed only for the two years immediately prior to the filing of a charge. 42 U.S.C. § 2000e-5(g)(1). And the passage of time can make it more difficult to hire or reinstate a successful Title VII plaintiff into the position that he or she was denied. *See* Lindemann & Grossman, 2 *Employment Discrimination Law* 2721-22 & nn.73-78.

3. The accrual rule required by § 703(k) also respects employers' legitimate interest in repose. Title VII's charge-filing deadlines are motivated in part by concerns that an employer's ability to defend itself may be impaired due to fading memories or the unavailability of evidence. In *Ledbetter*, the Court noted that "concerns regarding stale claims weigh more heavily with respect to proof of the intent associated with employment practices than with the practices themselves" because "evidence relating to intent may fade quickly with time." 550 U.S. at 631.

These concerns have little force in Title VII disparate-impact cases because the employer's subjective intent is not an element of the cause of action. 42 U.S.C. § 2000e-2(k)(1)(A), (C); *Griggs*, 401 U.S. at 432. Rather, liability typically turns not on the testimony of fact witnesses but on objective evidence

and expert testimony regarding disparate impact, test validation, business necessity, and less-discriminatory alternatives. *See* 42 U.S.C. § 2000e-2(k)(1)(A), (C). Such evidence is unlikely to erode over time. And the EEOC's *Uniform Guidelines on Employee Selection Procedures* already require employers to maintain records documenting impact and validity evidence for a practice that has a racially disparate impact. 29 C.F.R. §§ 1607.5(D), 1607.15.

Moreover, employers have no legitimate interest in repose from challenges to *repeated* Title VII violations caused by their multiple uses of the same practice, simply because the first such violation was not challenged. A freestanding Title VII violation that is related to an earlier violation may be made the subject of a timely charge even if the earlier violation was not. *See supra* Part I.C; *Ledbetter*, 550 U.S. at 636; *Morgan,* 536 U.S. at 113. In short, an employer that uses a non-job-related selection practice, as the City did here, is the master of its own repose—it can end its exposure to suit by ceasing use of the discriminatory practice.

C. The court of appeals' alternative encourages unnecessary charge-filing.

Any consideration of the costs of delayed EEOC charges challenging practices on disparate-impact grounds must consider the opposite side of the coin: the costs of encouraging plaintiffs to file premature and unnecessary charges.

Under the court of appeals' rule, any time an employer adopts a practice that has a disparate impact against a protected group, the only prudent course of action is for affected individuals to file an immediate

EEOC charge, even if they have not yet suffered any practical harm, and even if they lack information as to whether the practice might be job-related. In the present case, for example, when the City first announced its hiring practice and admitted to its disparate impact, petitioners had insufficient facts to contest the City's assertion that the test was "fair." Pet. App. 48a-49a; JA 54, 74-75, 77.

Thus, the court of appeals' approach provides an undesirable incentive to file EEOC charges based only on "raw racial statistics," notwithstanding this Court's recent discouragement of such a course of action. *Ricci*, 129 S. Ct. at 2681. Employees or job applicants should not be compelled as a matter of law to initiate legal confrontations with an employer before they can determine the actual consequences of the practice for them.

Nor should this Court embrace an accrual rule that encourages the filing of charges that may prove unnecessary. In this case, the court of appeals held that the only charge-filing period began to run upon announcement of an employment practice that had an unjustified disparate impact. But there could well have been no practical injury if shortly after the City scored the test and announced its planned hiring practice, it had decided to cancel or to indefinitely delay the hiring of new employees for financial or other reasons.[25] Judicial and administrative

[25] In recent months, many cities and states have faced financial difficulties that have compelled hiring freezes or layoffs. *See, e.g.*, Gregory Beyer, *The Barred Door*, N.Y. Times, Feb. 13, 2009, at CY1 (detailing the New York Fire Department's announcement that it would indefinitely defer entry-level firefighter hiring).

economy are not well served by a rule that requires employees to initiate litigation upon the adoption or announcement of practices that may never be applied to cause them practical harm.

CONCLUSION

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

Respectfully submitted,

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NOVEMBER 23, 2009