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

BRIEF FOR RESPONDENT

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) 744-7764

*Counsel of Record

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

QUESTION PRESENTED

Whether a Title VII claim that a hiring eligibility list created from the results of a written examination had unlawful disparate impact accrues only when the list is adopted and announced, or also later, upon each use of the same list.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 08-974

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

BRIEF FOR RESPONDENT

STATEMENT

Background

Chicago has long followed a multi-step process to hire entry-level firefighters. Applicants must be at least 18 years old; hold a high-school diploma or equivalent; present a valid identification card; and demonstrate Chicago residency upon hiring. Pet. App. 14a. Applicants take a written examination, and further eligibility is based on the results. *Ibid*. Depending on the operational needs of the Chicago

Fire Department ("CFD"), applicants are called for a physical abilities test, background check, medical evaluation, and drug test. *Id.* at 15a. Successful applicants are offered employment; those hired receive academy training, which includes classroom instruction and quizzes, and must pass a state-certification test; graduates serve a probationary period in the field. *Ibid*. This process takes well over a year.

The written examinations administered in 1974, 1978, and 1985 were created by Chicago's Department of Personnel ("DOP"). Tr. Vol. 16 at 325-36. In the early 1990s, Chicago resolved to give examinations more frequently, ideally every three years. *Id*. at 345-50; J.A. 54. Given testing's increasing complexity, Chicago hired Dr. James Outtz, an African-American industrial-organizational psychologist with expertise in reducing adverse impact in testing, to analyze the firefighter position and develop an examination. Pet. App. 16a-17a; Tr. Vol. 15 at 71-84.

To identify the job's essential knowledges, skills, and abilities ("KSAs"), Dr. Outtz and his team observed firefighters in training and on duty; interviewed firefighters, supervisors, and academy instructors; reviewed training materials, job descriptions, and prior job analyses and examinations; and had hundreds of firefighters complete questionnaires. Pet. App. 17a. Dr. Outtz identified 46 KSAs, 18 of which were needed the first day on the job. *Id*. at 18a. Eight were physical; three were intangible and therefore untestable; seven were cognitive and thus appropriate for written testing. *Ibid*. Dr. Outtz focused on four cognitive KSAs: comprehending written information, understanding oral instructions, taking notes, and learning from demonstration. *Ibid*.

Dr. Outtz developed the examination at the 12th-grade reading level needed to understand academy training materials and CFD policies. Pet. App. 18a. The examination had two parts: multiple-choice questions; and watching video segments, taking notes, and answering questions. *Id*. at 18a-19a. Dr. Outtz believed the video would reduce adverse impact since it did not depend on reading comprehension. Tr. Vol. 15 at 148-49, 164-67. To further lessen adverse impact, Dr. Outtz created study materials, which were distributed to 35,000 registrants weeks before the examination and could be referred to during the examination. Pet. App. 19a; R. 223 at 26-27.

After years of development and a cost of $5 million, the examination was administered for the first, and only, time in July 1995 to 26,046 applicants. J.A. 52, 59; Pet. App. 14a-16a. Of those, 11,649 (45%) were white and 9,497 (37%) African-American. Pet. App. 15a. The examination was scored; the scores were corrected, weighted, and converted to a 100-point scale; and applicants were listed from highest (98) to lowest (12) score; the average was 75, and 65 was passing. *Id*. at 19a.

DOP's Deputy Commissioner, Robert Joyce ("Joyce"), projected a need to hire 600-800 firefighters over the next three to five years. Pet. App. 20a; Tr. Vol. 16 at 366. Given attrition, Joyce calculated 2,000 candidates were needed; that pool was created with an examination cut-off score of 89. Pet. App. 19a-20a; Tr. Vol. 16 at 362-72. By contrast, a cut-off score of 65 yielded 22,000 candidates, which Joyce determined would unrealistically raise expectations of thousands who would never be called during the list's anticipated life. Pet. App. 20a-22a; Tr. Vol. 16 at

366-67. Moreover, Joyce believed the examination was valid, making higher scores more predictive of success and giving 89 a psychometric basis. Pet. App. 20a; Tr. Vol. 16 at 362-77. While Dr. Outtz recommended 85, this was to reduce adverse impact, not based on concerns about the examination's validity. Tr. Vol. 16 at 196-98, 250-55. Joyce rejected this because 85 did not meaningfully reduce adverse impact yet significantly increased the candidate pool. Pet. App. 20a; Tr. Vol. 16 at 362-88. Instead, Joyce addressed adverse impact by calling from the pool in random rather than rank order. Tr. Vol. 16 at 362-88.

Chicago classified applicants as "well qualified" (89-98); "qualified" (65-88); and "not qualified" (12-64). Pet. App. 22a-23a. "Qualified" paramedics became "well qualified" through collective bargaining rights; veterans scoring 84-88 were awarded five points. *Id*. at 14a-16a. Chicago adopted this hiring eligibility list. R. 74, Exs. D-E; S.R. 436, Aff. ¶5, Ex. 1.

On January 26, 1996, Chicago sent notices informing each applicant of his score and category, and the consequences. J.A. 35-50; Pet. App. 22a-23a. "Well qualified" applicants were told they passed and would be randomly called to continue the hiring process, as CFD needed. J.A. 55, 59; Pet. App. 22a. Those "qualified" were told they passed but would "not likely" be called given the "large number of candidates who received higher scores." J.A. 35-50; Pet. App. 22a-23a. They were also told they would remain on the list because it was "not possible . . . to predict how many" would be hired from the "well qualified" category over the "next few years." J.A. 35-50; Pet. App. 22a-23a. Those "not qualified" were

told they failed and would not be called. Pet. App. 22a.

That same day, Mayor Richard M. Daley publicly announced the results in a news release. J.A. 51-54; Pet. App. 23a. He noted that 1,782 (6.8%) of test-takers were deemed "well qualified"; of those, 75.8% were white and 11.5% African-American. J.A. 54. Mayor Daley indicated "well qualified" applicants would be randomly called for further processing, with 600 hired over the next three years. *Ibid*. He added that "[a]fter all our efforts to improve diversity, these test results are disappointing" (*id*. at 51), and "while he was not satisfied with the results, in fairness to" those who took the examination, they would stand while Chicago studied new hiring procedures (*id.* at 52). For weeks, major Chicago newspapers reported the examination's impact on minorities, and the reactions of applicants, firefighters, and minority leaders. J.A. 55-96.

Petitioners – African-American applicants classified "qualified" – began "pursuing the possibility of filing a Title VII disparate impact claim" after receiving their notices. R. 74 at 3. Months later, in April 1996, some petitioners, along with the African American Fire Fighters League of Chicago, Inc. ("AAFFLC"), met with an attorney – "among America's most experienced plaintiffs' lawyers in complex employment discrimination class litigation" (R. 83, Ex. 5 at 2) – about "a possible lawsuit" (R. 74, Ex. K ¶1; Pet. App. 23a, 48a-49a). They discussed the notices, "[r]ecent newspaper articles" concerning the examination's "adverse impact" on African-Americans, and "quotes from" City officials that the examination was "valid." R. 74, Ex. K ¶1. Counsel concluded they had a possible "'adverse impact' lawsuit" but wanted to explore

potential defenses, including the "'job-relatedness' or 'validity' of the examination." *Id*. ¶2. Over the next few months, counsel called a City attorney and filed an Illinois FOIA request, seeking information he believed was needed, including Dr. Outtz's 500-page validity report, completed in October 1996. *Id*. ¶¶3-9, Exs. A-B; R. 83, Aff. ¶¶2-8, Ex. 1; R. 189, Ex. B. Counsel hired an expert to analyze this information; the expert's report, dated March 15, 1997, said the examination was invalid. R. 74, Ex. K ¶¶7-9. Counsel further advised those with whom he had previously met about the "possible adverse impact" claim. *Id*. ¶10; R. 74 at 3-4, 12-15.

With counsel's assistance (R. 74, Ex. K ¶10), the first charge was filed by a named petitioner on March 31, 1997 (S.R. 436, Ex. 3). The charge alleged that Chicago's "hiring procedures, including" the examination, "discriminated against African Americans"; and the "most recent" violation occurred in March 1997 and was "continuing." *Ibid*. The EEOC issued a right-to-sue notice on July 28, 1998. *Id.* Ex. 4.

Meanwhile, Chicago called randomly from the "well qualified" category on May 16, 1996, October 1, 1996, and nine more times through November 2002. R. 223 at 5. This was longer than expected, but new procedures had not been finalized. The last time, "qualified" applicants were also called randomly because the 40 "well qualified" applicants remaining did not fill CFD's needs. Pet. App. 16a; R. 223 at 5-6. Once in the academy, "qualified" hires required remedial assistance. R. 243 at 37-41; Tr. Vols. 17-18. Chicago retired this list after adopting one from the 2006 examination. R. 416 at 2.

District Court Proceedings

The eight named petitioners and the AAFFLC filed a complaint claiming the examination and Chicago's decision to call only "well qualified" applicants for further processing had continuing unlawful disparate impact against African-Americans under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. J.A. 1-14. The district court certified a class of 6,000 "qualified" African-Americans who would "not likely" be called. R. 58-59. Answering the complaint, Chicago admitted the examination and list had adverse impact but raised defenses, including no timely EEOC charge. J.A. 15-34; R. 163, 171-74, 188.

Chicago sought summary judgment, arguing petitioners' claim was untimely because no charge was filed within 300 days after the alleged unlawful employment practice occurred, which was only when the list was adopted and announced. S.R. 433, 436. Petitioners had multiple responses: this was a "systemic continuing violation" for which the filing period would continue until after Chicago retired the list (R. 74 at 4-9); the period had not started since the score notices did not provide definite notice of injury (*id*. at 9-11); and if the period had begun, it should be equitably tolled during the months their counsel investigated the examination's job-relatedness and validity and awaited their expert's report (*id*. at 11-15). Petitioners disavowed the recurring present-violation theory they now press, under which each use of the list constituted a new violation. *Id*. at 7-8. The district court denied the motion (Pet. App. 44a-70a), ruling that Chicago's "ongoing reliance on a discriminatory examination's results in making

hiring decisions constituted a continuing violation" (*id*. at 45a).

Since Chicago had admitted petitioners' prima facie case – that the examination and list had adverse impact – the January 2004 liability trial focused on Chicago's defenses of job-relatedness, validity, and business necessity; and on petitioners' rebuttal that less discriminatory alternatives were available but not adopted. R. 237; Tr. Vols. 15-22. In March 2005, the district court rejected the defenses and held Chicago liable. Pet. App. 12a-43a.

Throughout the proceedings, Chicago argued the EEOC charge was untimely (R. 223, 244, 258, 260, 263, 268, 270), but the district court maintained its ruling (R. 259, 269, 273-74). Two years after the liability trial, the district court proposed an interlocutory appeal on timeliness. R. 301-02, 304-05, 310. For the first time, petitioners asserted their current recurring present-violation theory and the discovery rule. R. 302 at 1-2. Ultimately, the district court declined to certify an appeal because too much time had passed since summary judgment. R. 308.

Relief was tried in December 2006 (R. 385; Supp. Tr. Vol. 3), and the district court entered judgment in April 2007 (R. 390-91, 394, 396, 398-99, 402, 404-06). Chicago appealed and sought a stay pending appeal (R. 410-11, 416-18, 420), which the district court granted, noting *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), made its timeliness ruling "less clear" (R. 425 at 3).

Court Of Appeals Proceedings

Chicago's sole submission on appeal was that petitioners' EEOC charge was untimely. No charge was filed within 300 days after the alleged unlawful

practice occurred, which was when the hiring eligibility list created from the examination results was adopted and announced. Resp. C.A. Opening Br. 16-19. Petitioners received definite notice of injury (*id*. at 20 n.3), and the continuing-violation doctrine (*id*. at 20-41), discovery rule (*id*. at 47 n.6), and equitable tolling (*id*. at 42-47) did not apply. Petitioners argued that, under their recurring present-violation theory, a fresh violation occurred each time applicants were called from the "well qualified" category, making their March 31, 1997 charge timely to challenge the list's second use in October 1996. Petrs. C.A. Br. 1, 7-27. Petitioners alternatively argued that the charge was timely to challenge the list's adoption under the continuing-violation doctrine (*id*. at 1, 7-12, 27-38); and that the period should be equitably tolled while they investigated potential defenses and awaited the expert report (*id*. at 1, 44-53). Petitioners also advanced a new hybrid disparate-impact/treatment theory (*id*. at 3-9, 15, 22-23, 39-42, 45, 48-49) and equitable estoppel (*id.* at 1, 38-43).

The court of appeals reversed (Pet. App. 1a-11a), holding petitioners' Title VII claim time barred because no EEOC charge was filed within 300 days after the alleged unlawful practice occurred, which was only when the list was adopted and announced. *Id*. at 3a-9a. 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. There was "only one wrongful act" here – the "classification of [petitioners] as merely 'qualified' on the basis of a test that they contend was discriminatory." *Id*. at 7a. The "discrimination was complete when the tests were scored" and they "learned the results."

Id. at 4a. Each time applicants were called from the list after that was merely the "automatic consequence" of the examination and list, not the "product of a fresh act of discrimination." *Ibid*. This is the "acknowledge[d]" rule in disparate-treatment cases, where the "charging period begins when the discriminatory decision is made" and communicated, "rather than when it is executed." *Id*. at 3a. There was no basis for a different rule in disparate-impact cases, particularly since these are simply alternate methods of proving a Title VII claim. *Id*. at 5a-6a.

Moreover, because there was no facially discriminatory policy, the accrual rule applicable to such claims – that each act under the policy is a fresh violation – did not apply. Pet. App. 4a-6a. The court also rejected petitioners' arguments based on continuing violation (*id*. at 7a-9a), discovery rule (*id*. at 3a, 8a), and equitable tolling (*id*. at 7a, 9a-11a). While Title VII's filing period is "short," the "charging party is not required to conduct a precomplaint investigation . . . as he would have to do if he were filing a suit"; "such a requirement would frustrate a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Id*. at 10a (citations omitted). Even to file suit, "the investigation need not inquire into possible defenses." *Ibid.* Information bearing on defenses "is likely to be in the defendant's possession" and investigating them would be a waste of time since a plaintiff "cannot be certain which defenses the defendant will plead." *Ibid*.

SUMMARY OF ARGUMENT

Petitioners' EEOC charge was untimely. Chicago notified all petitioners that they had not met the cut-off score for the "well qualified" group and therefore

would not be hired for the indefinite future. Petitioners filed no charge within 300 days. Subsequent events that did not involve petitioners – Chicago's hiring from the "well qualified" group – did not restart the limitations period.

Title VII's disparate-impact provision prohibits acts that "limit, segregate, or classify" applicants in ways that limit their employment opportunities. Only Chicago's decision to restrict hiring to "well qualified" applicants limited petitioners' employment opportunities. Petitioners were not injured, much less newly injured, when Chicago later brought some of the "well qualified" applicants on the payroll. An employer's discriminatory rejection of an applicant violates Title VII. A later decision to hire a different applicant does not affect whether, or when, that violation has occurred.

Petitioners knew from the results of the examination that it had adverse impact. Chicago admitted this, and petitioners consulted with an attorney. They delayed filing charges while they investigated whether Chicago had defenses to an adverse-impact claim. The court of appeals correctly ruled "[t]hat was a fatal mistake." Pet. App. 11a. Information bearing on Chicago's defenses was not needed to file EEOC charges. It is not even needed to file a lawsuit, and the administrative process is considerably more user-friendly. Attempts to detract from the importance of the list – that it was preliminary, that it might not be used, that petitioners might have been hired later – should be rejected. The list alone determined hiring eligibility.

Petitioners now contend that each use of the list was a present disparate-impact violation. But at trial, petitioners argued, and the district court ruled,

that the disparate impact of the examination, used with the 89 cut-off score, was a continuing violation, a theory they have abandoned. No attention was paid to the use of the list, likely because petitioners did not seize upon an accrual theory in which it mattered until two years after the liability trial. Under the analogous NLRA, the Court has squarely rejected charges based on conduct that is unlawful only because of a prior act that can no longer be challenged.

Even assuming that the charging period for disparate-impact claims runs from the "time that impact is felt," petitioners felt the impact of the list created from the examination results when the list was adopted and they were told they would not be considered for years, if at all. No one identifies any impact that was not felt immediately.

The rule that consequences of disparate treatment are not independently actionable should apply to disparate-impact claims as well. Although intent is not required for disparate-impact claims, proof of a practice that actually caused the disparate impact is. Here, the practice was an examination and list with disparate impact. While the consequence was that petitioners were not considered for hiring, that did not, itself, have a disparate impact based on race and thus did not violate the statute.

Statutory arguments, never made below, are no basis for reversal. Section 2000e-2(k) defines the burden of proof for disparate-impact claims, not when those claims accrue. Besides, the use of all practices is not prohibited, only practices that cause disparate impact based on race. "Well qualified" is a neutral classification, and using the list to call those applicants was done in a neutral manner; standing alone,

that did not violate the statute. For the same reason, use of the list was not a prohibited action upon the results of the examination within the meaning of section 2000e-2(h).

Numerous policy considerations support applying the accrual rule for discrete acts to this case and rejecting petitioners' recurring present-violation theory. A rule that applicants must file charges when they are personally informed they are unlikely to be hired is as clear as any rule can be. Stale claims, even for disparate impact, risk loss of evidence; and laches is not a sufficient substitute for a firm statute of limitations. Delay in challenging employment decisions creates open-ended liability, disrupts staffing, and upsets valid reliance interests. And there is no reason why requiring a charge to be filed sooner than petitioners filed here will increase agencies' workload. At worst, this rule simply requires a charge to be filed sooner rather than later; at best, it allows charges to be filed only once instead of on twelve separate occasions. A charge complaining about the ultimate injury is not premature. And while applicants for hiring or promotion are said to have little incentive to delay filing charges, petitioners here did delay. It is unfair to suggest that Chicago seeks immunity; timely charges by petitioners would have entitled them to relief. Beyond that, all statutes of limitations provide repose to a defendant not sued in time.

ARGUMENT

BECAUSE NO EEOC CHARGE WAS FILED WITHIN 300 DAYS OF THE UNLAWFUL EMPLOYMENT PRACTICE HERE, PETITIONERS' TITLE VII CLAIM WAS TIME BARRED.

Title VII makes it an "unlawful employment practice" for an employer "to fail or refuse to hire" an individual, or "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 race. 42 U.S.C. § 2000e-2(a)(1)-(2). In Illinois, an EEOC charge must be filed within 300 days "after the alleged unlawful employment practice occurred." *Id.* § 2000e-5(e)(1); see 29 C.F.R. §§ 1601.13, 1601.80.

This charge-filing period operates "like a statute of limitations." *Zipes v. TWA, Inc.*, 455 U.S. 385, 393 (1982). With no timely charge, the complainant "may not challenge the practice in court"; and a Title VII suit must be dismissed as time barred. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007). Indeed, once the time passes with no charge, an employer is "entitled to treat [a] past act as lawful." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). It is the "legal equivalent of a discriminatory act which occurred before [Title VII] was passed" and "merely an unfortunate event in history which has no present legal consequences" (*ibid.*); the complainant "lose[s] the ability to recover" for any harm the practice caused (*National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002)). Petitioners' is just such a belated claim.

A. Title VII Imposes A Purposefully Short Charge-Filing Period.

Congress designed "an integrated, multistep enforcement procedure" for Title VII claims. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 359 (1977). It begins with an administrative charge, which "laypersons, rather than lawyers, are expected to initiate." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 123-24 (1988). Accord *Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002). All a charge must include is the complainant's and employer's name and contact information, and a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a). The EEOC must inform the employer within 10 days. See 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.14. This "prompt notice" allows the employer "to gather and preserve evidence." *Occidental*, 432 U.S. at 372.

The EEOC "investigate[s] the charge and determine[s] whether there is reasonable cause to believe that it is true." *Occidental*, 432 U.S. at 359. See also *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984); 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1601.15, 1601.16, 1601.17, 1601.21. The EEOC may attempt settlement. See 29 C.F.R. § 1601.20. But if none is reached and reasonable cause is found, the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Occidental*, 432 U.S. at 359 (citation omitted). See also 29 C.F.R. §§ 1601.24, 1601.25. If that fails, the EEOC may file suit against the employer or issue a right-to-sue notice, allowing the complainant to sue within 90 days. See 42 U.S.C. §§ 2000e-5(b), (e)(1), (f)(1); 29

C.F.R. § 1601.28. This process constitutes a "federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in federal court." *Occidental*, 432 U.S. at 368.

The short charge-filing period "reflects Congress' strong preference for the prompt resolution of employment discrimination allegations," ideally by "voluntary conciliation and cooperation." *Ledbetter*, 550 U.S. at 630-31. Accord *Morgan*, 536 U.S. at 109. Prompt filing helps ensure "a reliable result" and "a speedy end to any illegal practice." *Edelman*, 535 U.S. at 112-13. Title VII's "primary objective" is "a prophylactic one," which "aims, chiefly, not to provide redress but to avoid harm." *Kolstad v. ADA*, 527 U.S. 526, 545 (1999) (citations omitted).

The short time-frame also reflects that Title VII was the product of "legislative compromises." *Ledbetter*, 550 U.S. at 629-30. The limitations period was meant both to "guarante[e] the protection of the civil rights laws to those who promptly assert their rights" and "protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980). Although valid claims should be remedied when diligently pursued, "the right to be free from stale claims in time comes to prevail over the right to prosecute them." *Ledbetter*, 550 U.S. at 630 (citations omitted). Accord *Mohasco Corp. v. Silver*, 447 U.S. 807, 820 (1980) ("[I]t seems clear that [Title VII's limitations] provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest

in guaranteeing a remedy to every victim of discrimination[.]"); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) (same).

Repose is not unique to Title VII. Statutes of limitations "are found and approved in all systems of enlightened jurisprudence" and "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). They also protect reliance interests of defendants and third parties. See *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 (1989). And because statutes of limitations are "necessarily arbitrary" (*Johnson*, 421 U.S. at 463), it "goes without saying that [they] often make it impossible to enforce what were otherwise perfectly valid claims" (*Kubrick*, 444 U.S. at 125). "But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable." *Ibid.*

B. Determining Accrual Of A Title VII Claim Begins With Identifying The Unlawful Practice.

This Court has addressed Title VII's charge-filing period many times. As those cases teach, the period commences when the "alleged unlawful employment practice occurred." *Ledbetter*, 550 U.S. at 624 (citation omitted). To pinpoint that, the "specific employment practice" must be identified "with care" (*ibid.*; accord *Morgan*, 536 U.S. at 110-11; *Lorance*, 490 U.S. at 904; *Ricks*, 449 U.S. at 257), and it is necessary to identify when that practice "occurred" (*Morgan*, 536

U.S. at 109-10 & n.5) and was "communicated" to the individual (*Ricks*, 449 U.S. at 258).

Title VII prohibits both disparate treatment (see 42 U.S.C. § 2000e-2(a)(1)) and disparate impact (see *id.* § 2000e-2(a)(2)). The former challenges a practice with intent to discriminate; the latter a practice not intended to discriminate but with a disproportionate adverse effect. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009). This Court held in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), that section 2000e-2(a)(2) includes disparate-impact claims. See *Ricci*, 129 S. Ct. at 2676; *Lorance*, 490 U.S. at 904; *Griggs*, 401 U.S. at 426 & n.1, 433-34. Following *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), Congress amended Title VII to restore *Griggs*' three-part burden-shifting test, codifying the "[b]urden of proof": "[a]n unlawful employment practice based on disparate impact is established" if

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

42 U.S.C. § 2000e-2(k)(1)(A)(i).

Disparate treatment and disparate impact are alternative methods of proving discrimination; "[e]ither theory may, of course, be applied to a particular set of facts." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Determining when the alleged unlawful practice occurred, and the charge-filing period starts, "varies

with the practice." *Morgan*, 536 U.S. at 110. For disparate-impact claims, the practice is what caused and was "responsible for any observed statistical disparities." *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 2405 (2008) (citations omitted). See also *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (plurality opinion).

This Court has identified accrual for three types of practices. The first, a "discrete act or single 'occurrence'" (*Morgan*, 536 U.S. at 111), is "easy to identify" (*id*. at 114) and "takes place at a particular point in time" (*Ledbetter*, 550 U.S. at 628). Examples include "termination, failure to promote, denial of transfer, or refusal to hire." *Morgan*, 536 U.S. at 114. A claim based on a discrete act accrues when it occurred, and "[e]ach discrete discriminatory act starts a new clock for filing charges." *Id*. at 113. The second is a violation not known until after a series of acts, like a hostile work environment; a charge is timely if one act occurs within the filing period. See *id*. at 115-18. The third is an act taken under a facially discriminatory policy; each such act is actionable. See *Ledbetter*, 550 U.S. at 634-36 & n.5 (discussing *Bazemore v. Friday*, 478 U.S. 385, 386-88, 395 (1986)).

This Court's cases illustrate the differences. In *Evans*, a newlywed was forced to resign because her employer refused to employ married female flight attendants. See 431 U.S. at 554-55. She was rehired after the policy was changed, but her seniority ran from her rehiring. See *id*. at 554-56. The Court held the challenge to the reduced seniority untimely. The rehiring date perpetuated the prior act, but there was no "present" violation, merely "continuing" and "neutral" effects of the prior act. *Id.* at 558. A

"challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." *Id*. at 560.

In *Ricks*, a college denied tenure and gave the professor a non-renewable one-year contract. See 449 U.S. at 252-56. His charge, filed as the contract expired, also was untimely. Any discriminatory act occurred when he was denied tenure and that decision was communicated. See *id*. at 255-58. No discrimination "continued until, or occurred at the time of, [his] actual termination" (*id*. at 257); his termination was "one of the *effects* of," and "a delayed, but inevitable, consequence of," the denial of tenure (*id*. at 257-58) (emphasis in original). As in *Evans*, the "proper focus" was on any present violation, not the consequences of a prior unchallenged act. *Id*. at 258.

Chardon v. Fernandez, 454 U.S. 6 (1981) (per curiam), applied these principles to a First Amendment claim. There, school administrators received letters stating they would be terminated sometime in the next few months, and filed suit after being terminated. See *id.* at 6-7. Citing *Ricks*, the Court held the claim untimely because the decision to terminate was the alleged wrong and the later termination just the consequence. See *id*. at 7-8.

In *Bazemore*, African-American employees claimed discrimination because they were paid less than whites. See 478 U.S. at 388-91. The employer's workforce was segregated before that became unlawful; but even after the employer merged its employees, pay disparities remained. See *id*. at 390-91.

Distinguishing *Evans* (see *id*. at 396 n.6) and finding a present violation after Title VII's application to the States, the Court wrote: "Each week's paycheck that delivers less to a black than a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII" (*id*. at 395-96). As *Ledbetter* later explained, "the focus in *Bazemore* was on a current violation, not the carrying forward of a past act of discrimination." 550 U.S. at 635 n.5. If an employer "adopts and intentionally retains" a "facially discriminatory pay structure," it "engages in intentional discrimination whenever it issues a check." *Id*. at 634. By contrast, no new violation occurs if an employer merely fails "to remedy present effects" of a prior act. *Id*. at 635 n.5. Thus, each paycheck under a facially discriminatory structure is a new violation, but not under "a system that is 'facially nondiscriminatory and neutrally applied.'" *Id*. at 637 (quoting *Lorance*, 490 U.S. at 911). See also *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1972 (2009) (discussing *Bazemore*).

In *Lorance*, female employees claimed their employer intentionally adopted a discriminatory seniority system, but they filed no charges until they were laid off based on seniority. See 490 U.S. at 901-03.[1] The Court rejected their theory that an unlawful

---

[1] After *Lorance*, Congress enacted 42 U.S.C. § 2000e-5(e)(2), under which claims of intentional discrimination involving seniority systems accrue when the system is "adopted or applied." After *Ledbetter*, which we discuss below, Congress enacted 42 U.S.C. § 2000e-5(e)(3)(A), under which claims of "discrimination in compensation" accrue when an individual "becomes subject to" or "is affected by application of" a "discriminatory compensation decision or other practice." As *Ledbetter* explained, although the amendment abrogated

practice occurred both when the system was adopted and when the effect of its adoption was felt. See *id.* at 906-07. The challenge was to a "facially neutral system," albeit allegedly adopted with unlawful intent, and so the practice occurred "only at the time of adoption"; "each application" of the system was "nondiscriminatory." *Id*. at 913 n.5. This was unlike *Bazemore*, where each act under a "facially discriminatory" policy was actionable because, "by definition," it intentionally discriminated "each time it [was] applied." *Id*. at 912 & n.5. That rule is inapplicable to facially neutral policies: "[A]llowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that [the limitations period] was meant to protect." *Id*. at 912; accord *id*. at 906-08, 912-13.

In *Morgan*, as we indicate above, the Court distinguished between "discrete acts"; practices that are cumulative, like a hostile work environment; and repeated application of a facially discriminatory policy. 536 U.S. at 110, 113-15. The Court also rejected arguments that the term "practice" is broad and that it "connotes an ongoing violation that can endure or recur over a period of time." *Id*. at 110.

Most recently, in *Ledbetter*, the employee claimed she was denied pay raises over nineteen years based on allegedly discriminatory performance evaluations. See 550 U.S. at 621-22. That claim was squarely foreclosed by *Evans*, *Ricks*, *Lorance*, and *Morgan*. See *id.* at 624-29. "A new violation does not occur, and a

---

Lorance's specific holding, its reasoning remains persuasive since it directly follows from *Evans* and *Ricks*, which Congress "left in place." 550 U.S. at 627 n.2. The same is true of *Ledbetter*. This case does not involve these amendments.

new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id*. at 628. Any claim accrued when Ledbetter received a poor evaluation and no raise. See *ibid*. The prior evaluations had ongoing effects – she received less each payday – but the "intent associated with" a prior act cannot be shifted "to a later act that was not performed with bias or discriminatory motive"; that would "impose liability in the absence of the requisite intent" and "effectively eliminate the defining element of her disparate-treatment claim." *Id*. at 629. The Court also noted the importance of filing intentional discrimination claims quickly; the "passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened." *Id*. at 631.

Under these settled rules, petitioners' claim accrued when Chicago used the examination results to create the hiring eligibility list, limited hiring to the "well qualified" classification, and notified petitioners. That the consequences of this decision lingered when Chicago called "well qualified" applicants to continue the hiring process did not trigger a new claim. Nor does it matter that these cases involved disparate-treatment claims. The Court's observation in *dictum* in *Lorance* that the limitations period for disparate-impact claims "run[s] from the time that impact is felt" (490 U.S. at 908) leads to the same result.[2] Petitioners felt the impact of the examination

---

[2] The Brief for *Amicus Curiae* International Association of Official Human Rights Agencies in Support of Petitioners 27 ("Agencies Br.") says the Court has "repeatedly made clear that disparate impact claims, like petitioners', do not fall within the rule of *Evans* and *Ricks*." But the Agencies cite no cases;

and cut-off score when they were excluded from further consideration for at least several years based on their classification as "qualified."

C. The Unlawful Practice Here Was The Eligibility List Created From The Examination Results.

We begin by identifying the specific practice challenged here. Title VII prohibits acts that "limit, segregate, or classify" applicants to deny employment opportunities based on race. 42 U.S.C. § 2000e-2(a)(2). That section provides the basis for petitioners' disparate-impact claim and exactly describes Chicago's adoption of the eligibility list based on the examination results.

1. After administering and scoring the examination, Chicago created the list and set the cut-off score at 89 to generate the necessary candidate pool. Those classified "well-qualified" would be randomly called to continue the hiring process during the next three to five years. Based on their scores, petitioners were classified "qualified" and told they would "not likely" be called but would remain eligible as long as the list was used. *E.g.*, J.A. 35. Chicago's decision to call only "well qualified" candidates "classif[ied]" petitioners to their detriment by excluding them, at least for several years, from eligibility for further processing. With its attendant loss of pay and seniority, this delay was an immediate and complete injury. See generally *Regents of University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (university's "decision not to permit Bakke to compete for all 100 places in the class, simply because of his

---

petitioners and their other amici do not make this claim; and it is wrong.

race," was injury) (principal opinion); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 141 (1977) ("Even if [respondent] had ultimately been able to regain a permanent position[,] she would have felt the effects of a lower seniority level, with its attendant relegation to less desirable and lower paying jobs, for the remainder of her career[.]"); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 240 n.28 (1982) (seniority determines promotions, transfers, demotions, layoffs, days off, shift assignments, training, overtime, and other privileges).

The hiring eligibility list was also the practice that caused adverse impact. Indeed, the liability trial focused only on the examination and "well qualified" eligibility pool. Hence, "the discriminatory act was the testing itself." *Dickerson v. U.S. Steel Corp.*, 23 FEP Cases 1088, 1091 (E.D. Pa. 1980). Accord *Cox v. City of Memphis*, 230 F.3d 199, 204 (6th Cir. 2000); *Hood v. New Jersey Department of Civil Service*, 680 F.2d 955, 959 (3d Cir. 1982); *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074, 1082-84 (3d Cir. 1981). See generally *Connecticut v. Teal*, 457 U.S. 440, 449 (1982) ("The examination given . . . surely constituted . . . a practice" under Title VII). And petitioners were well informed that they would "not likely" be hired. *E.g.*, J.A. 35.[3] This, then, was the practice that started the limitations clock.

---

[3] Whether the discovery rule applies to Title VII is unsettled. See *Ledbetter*, 550 U.S. at 642 n.10; *Morgan*, 536 U.S. at 115 n.7. Regardless, the notice was not too tentative to make petitioners' injury clear. Agencies Br. 10-12; Brief of the National Partnership for Women & Families, *et al.*, as *Amici Curiae* in Support of Petitioners 12 ("Partnership Br."). Petitioners no longer press this issue.

2. Since nobody was assured of being hired, not even those "well qualified," the unlawful practice is not properly characterized as the failure to hire petitioners. Pet. Br. 27; Agencies Br. 2-4, 6, 9, 11, 27. Nor is it hiring from the "well qualified" pool. Pet. Br. 19-20, 26-27; U.S. Br. 14-15, 17, 23-24; Agencies Br. 5, 10-11. A Title VII claim does not depend on whether an employer hires others but whether it "limit[s], segregate[s], or classif[ies]" applicants to deny employment opportunities. While limiting, segregating, or classifying an applicant frequently coincides with hiring someone else, the actionable injury is nonetheless the treatment of the complainant, not others; an applicant allegedly rejected for employment based on race has a claim, even if the employer never fills the position for other reasons (see, *e.g.*, Pet. Br. 49 n.25)

3. Petitioners label the examination and list mere "preliminary steps." Br. 15-18, 26 n.13, 27-30, 40-43; see U.S. Br. 15-16, 23-24. While those steps were the foundation for later hiring eligibility, they were the actionable wrong. The denial of tenure in *Ricks*, the seniority system's adoption in *Lorance*, and the evaluations in *Ledbetter* similarly could be called "preliminary steps"; still, they were the statutory wrongs. Attempts to challenge later events when a charge was too late to challenge the one that caused injury have not persuaded before (see, *e.g.*, *Ricks*, 449 U.S. at 257 (claim of challenge to termination of contract rather than earlier denial of tenure); *Evans*, 431 U.S. at 558 (claim of challenge to seniority rather than earlier forced resignation)), and should not now.

4. Petitioners express concern that Chicago might have never used the list. Br. 42-43, 49-50 & n.25; see U.S. Br. 10, 32-33; Partnership Br. 7, 14. But again,

petitioners' classification limited their employment opportunities regardless whether anyone else was ever hired. If Chicago took the list down before using it, petitioners might have incurred only nominal damages; but uncertainty about damages does not delay accrual. See *Wallace v. Kato*, 549 U.S. 384, 393-97 (2007); *Morgan*, 536 U.S. at 119. Moreover, petitioners could have sought injunctive relief before the list was used (Agencies Br. 24 n.13). So, while non-use could affect relief, it does not affect accrual.

5. That petitioners might be or were hired later (Pet. Br. 45 n.24, 48-49; U.S. Br. 10-11, 32-33; Agencies Br. 3, 10, 12-14, 17; Partnership Br. 3, 11, 13-14) likewise does not affect accrual. Indeed, later consideration or hiring actually ameliorated the injury petitioners suffered when they were excluded from consideration for years. Beyond that, a complainant cannot wait for absolute certainty about the consequences of a practice before filing charges. See *Lorance*, 490 U.S. at 907 n.3; *Chardon*, 454 U.S. at 8; *Ricks*, 449 U.S. at 260-61; *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 234-35 (1976). The clock starts when the unlawful practice occurs, even if some consequences might not be felt until later. Were it otherwise, a claim would accrue only when the complainant decided the consequences had become unacceptable, placing repose entirely in the complainant's hands.

Ricks illustrates this. The college could have altered its tenure decision in Ricks' grievance process; yet, the claim accrued when the tenure decision was communicated to him. See 449 U.S. at 260-61. Ricks could not wait to know whether he would actually lose his job before filing a charge.

Lorance is more dramatic. The women adversely affected by the changed seniority system felt nothing at the time. As the dissent emphasized, "there was no reason to believe" they "would *ever* be demoted," making their injury "speculative." 490 U.S. at 914. The Court rejected this, finding the change "concrete harm." *Id*. at 907 n.3.

6. Once the examination was scored, results announced, and petitioners classified "qualified," they had all they needed to file charges. Indeed, they had more than most complainants – an admitted prima facie case of adverse impact.

Petitioners muddle the information needed for a charge, for a prima facie case, and to defeat a defense in court. Br. 7-8, 49; see U.S. Br. 26, 32. They acknowledge they met with counsel, sought Dr. Outtz's validity study, and conferred with an expert, all before filing charges. They also say counsel concluded "[t]hereafter" that "reasonable grounds existed" to challenge Chicago's practice. Br. 8. But petitioners previously admitted that they began "pursuing" a possible "disparate impact claim" after receiving the notices in January 1996 (R. 74 at 3), and that their counsel knew in April 1996 of the possible "'adverse impact' lawsuit" (*id*. Ex. K ¶2). Counsel then spent months investigating defenses of job-relatedness and validity. *Id*. ¶¶2-9, Exs. A-B; R. 83, Aff. ¶¶2-8, Ex. 1.

That information was not necessary for charges. A charge "is not the equivalent of a complaint initiating a lawsuit"; rather, it starts the EEOC's investigation. *Shell Oil*, 466 U.S. at 68. Thus, the idea that our rule requires complainants "to file first and investigate later" (Agencies Br. 16-17) is correct, but it is not our rule; it is the process Congress crafted. Petitioners

immediately knew they were injured by a decision that might be unlawful. Even a federal lawsuit can be filed with that information. Pet. Br. 35 n.16; Agencies Br. 19. A process "in which laypersons rather than lawyers, are expected" to file administrative charges (*Edelman*, 535 U.S. at 115 (citations omitted)) requires no more.

In particular, pre-charge investigation need not consider possible defenses. Affirmative defenses do not affect accrual. See *Lorance*, 490 U.S. at 908. And an administrative charge, again, is less demanding than a federal complaint, which does not have to plead the nonapplicability of defenses. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). If petitioners wanted to investigate before suing, they should have filed charges and investigated along with the EEOC and, depending on their investigation, did not have to file suit, despite receiving right-to-sue notices. And, by filing charges, petitioners would have had more than informal means to obtain information from Chicago. Telephone calls and FOIA requests may be unproductive, or at least slow to produce results, while a charge would have invoked the EEOC's compulsory process. See 42 U.S.C. §§ 2000e-8 (access to employer's records), 2000e-9 (subpoenas).

Petitioners were injured when they were excluded from hiring. That was an easily identifiable discrete act that occurred when the list based on the examination was adopted and announced. Petitioners' challenge to their classification as "qualified" accrued then. Despite the 300-day charging period, petitioners filed no charge for more than 420 days. The first charge, albeit within 300 days of the list's second use, was not timely to challenge the examination and list.

D. Each Use Of The List Was Not A New Unlawful Practice With Its Own Charge-Filing Period.

Petitioners are reticent to admit the list's adop tion violated Title VII (Br. 15, 18, 26 n.13, 27-28), but their amici admit petitioners could have challenged it (U.S. Br. 23-25; Agencies Br. 4-5, 24-25).[4] Yet petitioners did not do so; nor did they challenge the list's first use. The earliest charge happened to be timely to challenge the second use. Petitioners therefore contend that each use of the list constituted a fresh violation of Title VII with its own charge-filing period. Br. 14-43; see U.S. Br. 8-27; Agencies Br. 3-5, 11, 18, 20, 23, 29; Partnership Br. 2, 4-6, 10.[5] That argument is not supported by Title VII's language, this Court's cases, or common sense.

1. Petitioners correctly state that each new Title VII violation starts a new charge-filing period, even if it is related to a prior act, and even if the complainant knew the prior act was discriminatory and did not challenge it. See *Ledbetter*, 550 U.S. at 636; *Morgan*, 536 U.S. at 113; Pet. Br. 15, 28, 48; U.S. Br. 9, 17 n.2, 21-22; Agencies Br. 4, 25-26; Partnership Br. 17. But petitioners err in claiming a new violation occurred each time Chicago used the list because the examination and cut-off score were "unlawful" (U.S.

---

[4] Nonetheless, petitioners cite cases challenging cut-off scores. Br. 23 n.11. Timeliness was not at issue in those cases.

[5] Petitioners' current theory does not reach the list's adoption or even first use. Br. 8 & n.3, 23; see U.S. Br. 5; Agencies Br. 4. The district court's judgment included those, based on the continuing-violation doctrine. Pet. App. 7a-9a, 45a, 52a-70a; R. 74 at 4-9, 308, 390, 405. If petitioners were to prevail on their new theory, a remand would be necessary to modify that judgment. Agencies Br. 18; U.S. Br. 28-29.

Br. 10, 17, 24, 26-27, 31; Agencies Br. 21), "invalid" (U.S. Br. 10, 15, 23, 28, 31-32; Partnership Br. 4, 29), or a "violation" (U.S. Br. 18). Disparate impact of the examination and list is not a new violation; it is the one that is time barred. Indeed, at this point, it is not even fairly called a violation. Once petitioners (admittedly) did not timely challenge the list, it is "treat[ed] . . . as lawful" (*Evans*, 431 U.S. at 558). Thereafter, hiring those previously deemed "well qualified" did not itself "limit, segregate, or classify" applicants because of race. The classification of "well qualified" is facially neutral, and the list was used in a neutral manner.

Machinists v. NLRB, 362 U.S. 411 (1960), precludes an argument that, with charges timely only to challenge use of the list, petitioners can rest on proof that the examination and 89 cut-off score had disparate impact.[6] There, at a time the union lacked majority status, the contract contained a union-security clause. See *id*. at 412-14. Employees filed charges outside the six-month filing period (29 U.S.C. § 160(b)), claiming the contract and its continued enforcement were unlawful (see 362 U.S. at 412-14). This Court held the charges untimely because their "entire foundation" was "the Union's time-barred lack of majority status when the [contract] was signed." *Id*. at 417. "In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign." *Ibid*. "In any real sense, then, the

[6] Title VII was modeled on the NLRA, and consideration of cases under that statute is appropriate. See *Zipes*, 455 U.S. at 395 n.11. Both statutes share the "highly unusual feature of requiring an administrative complaint before a civil action can be filed." *Lorance*, 490 U.S. at 909; accord *Ledbetter*, 550 U.S. at 641.

complaints in this case are 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution." *Id.* at 423. Permitting that would undermine the purpose of the limitations period, repose, stability in labor relations, and Congress's intent. See *id*. at 425-29. See also *NLRB v. Triple C Maintenance, Inc*., 219 F.3d 1147, 1157-59 (10th Cir. 2000) (claim against contract based on lack of majority status untimely even though contract was enforced within limitations period); *General Marine Transport Corp. v. NLRB*, 619 F.2d 180, 188 (2d Cir. 1980) (repudiations of contract were merely repetition of earlier conduct, not separate unfair labor practices); *NLRB v. Pennwoven, Inc*., 194 F.2d 521, 524-26 (3d Cir. 1952) (employer refused to reinstate employees allegedly laid off for union activities; later refusal was not new practice, just adherence to prior unchallenged decision).

2. The unchallenged ruling on liability (Pet. Br. 3-4, 12-13 & n.7; U.S. Br. 7-8) does not establish a disparate-impact violation every time Chicago used the list (Pet. Br. 21-22, 41; U.S. Br. 10-12, 17, 24; Agencies Br. 5, 29), for the simple reason that petitioners never proved, or even attempted to prove, that use of the list had disparate impact. Likely that is because their accrual theory at that time was a continuing violation; petitioners did not assert their recurring present-violation theory until two years after the liability trial (R. 302 at 1-2).[7] They have

[7] This omission may also reflect the difficulty of proving that use of the list had adverse impact on petitioners since, once they failed to challenge the examination results, they could not rely on the disparity between the racial composition of the pool of

now abandoned reliance on a continuing violation (Br. 13 n.8), but the district court's timeliness ruling rested on that (Pet. App. 45a) (denying summary judgment under continuing-violation doctrine; each use of the list would have same adverse impact as examination and list). The liability ruling, therefore, does not support a new or repeated violation.

To be clear, we do not argue that use of the list can never be charged as a new violation simply because it is related to the examination petitioners failed to challenge. Pet. Br. 15, 28, 48; U.S. Br. 21, 24. Our submission is that petitioners did not prove that use of the list was a new violation.

3. Nor does it matter whether classifying applicants "well qualified" was an "intervening" act (Pet. Br. 40-41; U.S. Br. 24) or "intermediate step" (Pet. Br. 16; U.S. Br. 24), or that use of the list "followed" the classification of petitioners as "qualified" (Pet. Br. 40; U.S. Br. 15) or "followed" other violations (U.S. Br. 22; see *id*. at 18, 21). Arguments about causation miss the mark because they ignore that there was no present violation when Chicago used the list for hiring.[8]

---

test-takers and the pool of applicants called for further processing. Whatever the reason petitioners did not attempt to prove adverse impact from any use of the list, the fact remains they did not.

[8] *Gratz v. Bollinger*, 539 U.S. 244 (2003), is different. There the "selection index" was used when the university considered applicants (see Pet. Br. 42); that is why there was no issue of untimeliness. By contrast, the practice that excluded petitioners here was used only to make the list, and their challenge to the list was untimely. This does not mean statutory prohibitions can be "evaded." *Id.* n.22. It just means charges must be timely.

In this light, petitioners' recurring present-violation theory is just their abandoned continuing-violation theory clothed in new terms. Pet. Br. 29; U.S. Br. 26. See also Pet. Br. 9; U.S. Br. 6 (district court's continuing-violation findings). They challenge Chicago's continued reliance on the list and the "well qualified" category because of its disparate impact on African-Americans, but support the claim that this was a present violation only with the finding that the examination had disparate impact, especially when used with an 89 cut-off score. This conduct needed no repetition to be unlawful (Pet. Br. 30) and did not injure petitioners except when the list was made. The notion that disparate impact resulting from one act can be made the subject of a later charge merely because the impact continues (U.S. Br. 17) is wrong. If there is no "*further*" impact (*ibid*.), the charge is directed at a stale violation. The same is true of the idea that the charge properly challenged the examination's "raw results" (*id.* at 24; see *id*. at 16), when it was filed too late to challenge the examination.

4. Nor did Chicago revisit the decision to call only "well qualified" applicants until that pool was depleted. Petitioners state that "[e]ven 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." Br. 38 n.19. Their amici add that Chicago "went through several rounds of hiring, each time reviewing the same lists of candidates." Agencies Br. 11. There is no support for these assertions. Chicago made one decision that injured petitioners, which was announced in January 1996 and followed through 2001. While Chicago calculated the number of "well qualified" candidates to call for each round of

hiring, that caused petitioners no injury. Those were not decisions about how to use the examination results; that decision already had been made. Ten times, when the list was used, those "qualified" applicants were excluded based on the prior decision. In 2001, when only 40 "well qualified" applicants remained and no new list had been adopted, Chicago started calling from the "qualified" category. While that was a new decision, it too did not injure petitioners; petitioners filed no charges over it; and its only effect was to ameliorate petitioners' injury.

5. Petitioners rely (Br. 15; see *id*. at 31-34; U.S. Br. 10, 19, 22-23; Partnership Br. 6, 10, 17) on the statement in *Lorance* that the charging period for disparate-impact claims under section 2000e-2(a)(2) would "run from the time that impact is felt" (490 U.S. at 908). That statement is *dictum*, since *Lorance* did not (and could not, see 42 U.S.C. § 2000e-2(h)) involve a disparate-impact claim. In any event, petitioners felt the impact at the adoption of the list, which limited hiring to "well qualified" applicants. That decision excluded petitioners from hiring eligibility for several years; it did not make Chicago's hiring decisions merely "somewhat" more predictable (U.S. Br. 23). As we explain, the entire impact of that decision was felt immediately; subsequent uses of the list did not affect petitioners. Tellingly, no one identifies any impact that was not felt right away, although it is repeatedly claimed. *E.g*., Pet. Br. 34; U.S. Br. 23. Indeed, precisely because using the list limited petitioners' employment opportunities "in the exact same way" as "us[ing] the raw test results" (U.S. Br. 16), later use of the list had no disparate impact at all. If anything, the odds of petitioners' being hired increased the more the list was used.

6. The intimation that the employer's failure to remedy known disparate impact is tantamount to disparate treatment (U.S. Br. 25-26) should be put aside. Petitioners never properly advanced or proved a disparate treatment claim. Beyond that, as we explain, once the time passed to challenge the examination and list, Chicago was entitled to treat them as lawful. Lawful decisions do not have to be changed, regardless of their present effects. This rule is settled for disparate-treatment claims – an employer that knows of but does not remedy the present effects of prior discriminatory treatment does not commit a present violation. See *Ledbetter*, 550 U.S. at 634-36 & n.5 (discussing *Bazemore*); *Morgan*, 536 U.S. at 112-13; *Ricks*, 449 U.S. at 261 n.15.

Petitioners urge a different rule for disparate-impact claims because they require no proof of intent. Thus, although the consequences of discriminatory treatment do not create a present violation (*e.g.*, *Ledbetter*, 550 U.S. at 629), the consequences of disparate impact are said to be forever actionable (Pet. Br. 15-16, 30-36, 38, 43; U.S. Br. 9-10, 22, 33; Partnership Br. 8-10).[9] But consequences do not violate Title VII's disparate-impact prohibition, any more than they violate its disparate-treatment provision. Petitioners were required to file charges within 300 days of a practice that actually caused disparate impact. They should not be permitted to circumvent

[9] The Solicitor General notes the Court "has not held that the sole purpose of Title VII's disparate-impact provision is to smoke out covert intentional discrimination." Br. 25. Nonetheless, construing it as something other than an evidentiary tool raises constitutional problems (see *Ricci*, 129 S. Ct. at 2681-83 (Scalia, J., concurring)), which the Court prefers to avoid.

that omission on the ground that every consequence of a practice with disparate impact is a separate violation.

The same accrual rules should apply to disparate-impact and disparate-treatment claims. While Congress has decided that a different rule is appropriate in some contexts – like seniority systems or compensation (see 42 U.S.C. §§ 2000e-5(e)(2), (3)(A)) – it has made no distinction based on the manner in which the complainant proves an unlawful practice. None should be imposed on the statute. See *Gross v. FBL Financial Services, Inc*., 129 S. Ct. 2343, 2349 (2009); *Edelman*, 535 U.S. at 117-18; *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7 (1987). Nor would such a distinction make sense, and it would be difficult to apply. The facts might bear both theories, and the complainant might not know at the charge-filing stage which to pursue. And if there is any difference in when the two claims accrue, the greater moral culpability of disparate treatment should prolong the life of those, not disparate-impact, claims.

7. Petitioners' new-found statutory construction argument, based on sections 2000e-2(h) and (k), fails as well.[10] To start, petitioners' assertion that the court of appeals "ignored the statutory text of Title VII's disparate-impact prohibition" (Br. 37; see *id*. at 16; U.S. Br. 18; Partnership Br. 2, 6-7) is unfair. Petitioners never cited section 2000e-2(k) to that court, nor relied on it for timeliness in the district court; and cited section 2000e-2(h) only to explain why *Lorance* did not present a disparate-impact

[10] In relevant part, section 2000e-2(h) is set forth *infra* at 40-41, and section 2000e-2(k) *supra* at 18.

claim. Petrs. C.A. Br. 18, 20. Petitioners did not even make this statutory argument in their petition for certiorari. It debuted in their reply brief, and in the Solicitor General's amicus brief, at the certiorari stage.

Now, having become enamored of sections 2000e-2(h) and (k), petitioners mistakenly rely on them to argue that each use of the list was an independent wrong. Br. 14-16, 18-24, 29, 31, 33-34, 40, 44-45; see U.S. Br. 9, 11, 15; Partnership Br. 2, 5, 10. Neither of these sections addresses accrual or identifies the elements of a disparate-impact claim. Moreover, they cannot be picked apart or read in isolation from the rest of the statute.

Section 2000e-2(k) does not speak to accrual. It sets forth the "[b]urden of proof in disparate impact cases." 42 U.S.C. § 2000e-2(k). The "unlawful employment practice" challenged here is defined by section 2000e-2(a)(2); and when that practice is identified, the accrual provision, section 2000e-5(e)(1), provides that the charge-filing period begins when the "alleged unlawful employment practice occurred." Petitioners confuse what is needed to trigger the limitations period – section 2000e-2(a)(2) – with what is needed to prove the case – section 2000e-2(k). This may explain the heavy reliance by petitioners and their amici on the district court's liability findings when the case now concerns when the limitations period commenced.[11]

---

[11] Some of the highlighted facts are incomplete or misleading. The steps Chicago followed compare favorably to the process determined in *Ricci* to produce a valid examination. See 129 S. Ct. at 2678. And Joyce set the cut-off score at a time that Dr. Outtz defended the examination's validity. R. 189, Ex. B. As Joyce explained, with a valid test, a higher score is meaningful.

Beyond that, petitioners read too much into section 2000e-2(k)'s reference to "uses." Br. 20-21; see U.S. Br. 14-15. A statute's language "cannot be interpreted apart from context"; and words should not be viewed in isolation but read in light of the statutory scheme. *Smith v. United States*, 508 U.S. 223, 229 (1993). Section 2000e-2(k) was added after *Wards Cove* to restore *Griggs*' burden-shifting test. That amendment did not address or alter accrual under section 2000e-5(e)(1). In fact, it would be surprising if it did, when neither *Griggs* nor *Wards Cove* involved accrual. And petitioners' contention that the present tense in section 2000e-2(k) is significant for accrual purposes does not fit with the language of the accrual provision itself. Section 2000e-5(e)(1) uses the past tense ("occurred"). See *Morgan*, 536 U.S. at 109 ("occurred" means "the practice took place or happened in the past," so a charge must be filed "*after* the unlawful practice happened").

Pet. App. 20a; Tr. Vol. 16 at 362-77. Joyce rejected Dr. Outtz's lower cut-off score not "arbitrarily" (Pet. Br. 4) but to yield the appropriate size pool. Pet. App. 19a-20a; Tr. Vol. 16 at 362-72. This is what is labeled "administrative convenience." Pet. Br. 11; Pet. App. 34a-35a. But with a valid test, the EEOC approves this. See 29 C.F.R. § 1607.5(H). While the district court later found the cut-off score was not useful (Pet. Br. 3-4), that was in hindsight. As for skewing the test to a minor aspect of the job (*id.* at 11 n.6), ironically Dr. Outtz designed the video to lessen adverse impact. Tr. Vol. 15 at 148-49, 164-67. As we pointed out below (Resp. C.A. Reply Br. 5-6), the district court's ultimate findings do not show that Chicago knew "from the outset" the 89 cut-off score "was statistically meaningless" (Pet. Br. 11 (citing Pet. App. 30a)). Instead, that was "[t]he evidence at trial." Pet. App. 30a. And since the district court's judgment, *Ricci* has limited the ability of an employer that believes a test is valid to refuse to use the results because of disparate impact.

So petitioners and their amici must rewrite section 2000e-2(k). According to petitioners, "'[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.'" Br. 14 (emphasis omitted). This ignores critical words like "[b]urden of proof" and "established," which make clear that this section describes what is needed to prove a disparate-impact claim, not to file an administrative charge. And it casually inserts the words "occurs each time," when this section has nothing to do with accrual. Petitioners' amici do the same thing. U.S. Br. 9; Partnership Br. 2.

Even assuming section 2000e-2(k) is relevant to accrual, Chicago's only "use" of a practice with disparate impact was the use of the examination results to create the eligibility list. After that, Chicago used the list, not the examination results, to call from the "well qualified" category. There is no evidence, much less a finding, that anyone considered the examination results again.[12] As we explain, petitioners did not prove that use of the list had disparate impact.

As for section 2000e-2(h) (Pet. Br. 15, 23-26, 29-30; U.S. Br. 14-15), that section provides that "it shall not be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that

---

[12] Petitioners emphasize (Br. 20-21; see U.S. Br. 16) that our answer admitted Chicago "has used and continues to use results" of the examination in hiring (J.A. 16; see J.A. 22). This is meaningless standing alone. We did not admit that use of the results limited petitioners' employment opportunities within the statutory prohibition. While we used them to hire others, section 2000e-2(a)(2) does not prohibit hiring per se, as we explain above.

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)). This is "a definitional provision" that "delineates which employment practices are illegal and thereby prohibited and which are not." *Franks v. Bowman Transportation Co*., 424 U.S. 747, 758 (1976). Thus, it too is irrelevant to accrual. If relevant, it too does not help petitioners. They claim that use of the list was "action upon the results" of the examination. Br. 15, 25-26, 30; see U.S. Br. 15. But "action upon the results" was taken only once here, when Chicago used the results to make the list. Thereafter, eligibility was limited to "well qualified" applicants, pursuant to that "action." Once the list was created, there was no other "action upon the results" of the examination – only use of the list, as Chicago previously determined it would be used.

E. Because Accrual Of Title VII Claims Varies With The Practice, Practices Other Than Discrete Acts, Including Some With Disparate Impact, May Warrant Different Rules.

While accrual should not depend on the method of proof, accrual does "var[y] with the practice." *Morgan*, 536 U.S. at 110. Petitioners and their amici recite this principle (Br. 17; U.S. Br. 12, 27; Partnership Br. 2-4, 6-8, 16-23 & nn. 5, 8), but then ignore it. Indeed, their examples reveal that petitioners' question presented may sweep too broadly.

1. The analogies to other statutes, under which repeated violations trigger a new limitations period, are unnecessary and unilluminating. As we explain, this rule applies under Title VII as well; it simply does not apply here.

Under the FLSA and its amendment, the Equal Pay Act of 1963 (Pet. Br. 16, 33; U.S. Br. 23; Agencies Br. 22-23, 25, 28), a violation occurs anytime an employer fails to "pay" an employee minimum wage for hours worked (29 U.S.C. § 206(a)); an employee fails to "receiv[e]" proper overtime compensation from an employer (*id.* § 207(a)(1)); or an employer "pay[s] wages" to a female employee at a lower rate than a male doing the same work (*id*. § 206(d)(1)). By their terms, these statutes create installment obligations. Each time payment is due but not made, there is a breach and a new limitations period. See *County of Washington v. Gunther*, 452 U.S. 161, 167-81 (1981); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp*., 522 U.S. 192, 208 (1977); *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

The antitrust and copyright examples (Agencies Br. 21-22, 25) are the same. Every sale under an ongoing price-fixing agreement is a violation (see *Klehr v. A.O. Smith Corp*., 521 U.S. 179, 189 (1997); *Zenith Radio Corp. v. Hazeltine Research, Inc*., 401 U.S. 321, 338 (1971)), as is each infringement of "any of the exclusive rights of the copyright owner" (17 U.S.C. § 501(a)) by each copy distributed (see *id*. § 106(4)). Each violation has its own limitations period. These examples stand in contrast to the Title VII claim in this case, now based on subsequent use of a (lawful) list. There was no separate statutory wrong triggering a new charge-filing period in this case.

2. Petitioners' amici also worry about those who may not know immediately that a practice has disparate impact. U.S. Br. 10, 25-26, 31-32; Agencies Br. 3, 11. Assuming that disparate impact (the prima facie case) must be known before filing EEOC

charges, this case – where Chicago admitted and petitioners knew right away that the examination and list had disparate impact – does not raise that concern. Nor do we urge a one-size-fits-all accrual rule for disparate-impact claims. Such claims, like disparate-treatment claims, come in different shapes and sizes, and thus may accrue at different times.

For example, adverse impact may not be immediately manifest. In *Davidson v. Board of Governors*, 920 F.2d 441 (7th Cir. 1990), a professor claimed that a university's salary scheme, which required negotiation before hiring and granted raises only upon presentment of formal offers by other employers – had unlawful adverse impact based on age (a claim available at the time), although that was not apparent when he was hired. See *id*. at 442-44. The court noted "[t]here are two ways to handle this problem" – postpone accrual until the disparate impact occurs or "hold that although the claim arises when the [challenged] practice . . . is first made applicable to" the complainant, "the statute of limitations will be tolled until he has had a reasonable opportunity to determine whether he has a claim." *Id*. at 445. The court concluded that the second option, "which tolls the statute of limitations in appropriate cases but does not postpone the accrual of the plaintiff's cause of action is superior" for cases in which the plaintiff cannot determine, even with due diligence, whether the practice is unlawful. *Ibid*. See also Merrick T. Rossein, *Employment Discrimination Law & Litigation* § 11:10 (2008) (example that fire department requires applicants with children to demonstrate adequate childcare arrangements; claim by women rejected at higher rate than men not statistically significant at first because few women apply); Agencies Br. 11-12. But, when the adverse impact "is

known from the start," the claim accrues right away. *Davidson*, 920 F.2d at 444.

3. When the disparate impact is caused by a policy, rather than a list, it may be difficult to tell when the impact of a policy is felt – because employees do not fall within the policy at that time, do not yet work for the employer, or other reasons. *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), may be such a case. There, the employer provided insurance benefits to children only if they lived with their employee-parent; plaintiffs claimed this policy adversely affected men, who, if divorced, are less likely to have full-time custody. See *id*. at 794-800. Beavers sued long after the policy was adopted but at a time when his children "continued to be ineligible" for coverage (*id*. at 794); the court held this timely as "the direct result of [an] on-going policy actively maintained by" the employer (*id*. at 799). The rationale (pre-*Morgan*, as a continuing violation) is wrong, and it is "arguable" (Pet. App. 5a) whether the result is. Nonetheless, it may be possible to identify different times at which the unlawful practice in such cases occurs – when the employee is hired, has children, separates from his partner, or loses custody – or equitable tolling may be warranted. The same may be true of various other hypotheticals. Pet. Br. 45 n.24; Partnership Br. 17-18 n.6. But under petitioners' rule, Beavers could challenge the policy more than 300 days after it was applied to him to deny a claim for medical expenses, so long as the employer had not changed the policy. There is no justification for that accrual rule. Moreover, the impact of an eligibility list is different from the impact of an open-ended employment policy. All applicants who will ever be affected by such a list feel the impact, and the full impact, the moment the list

is adopted and they are notified that it adversely affects them. It does not matter whether the limitations period expires before vacancies are filled. Pet. Br. 17, 42-43. As we explain, hiring is not the statutory violation here; and anyone who wanted to challenge the list could have, and should have, done so upon its adoption. Petitioners cannot challenge use of the list, for no impact occurred then.

4. Another hypothetical involves a facially discriminatory policy (Agencies Br. 26); as we explain above, that accrual rule does not apply here.[13] If an employer adopted a policy against hiring women, the *Bazemore* rule may apply each time it denies a woman a job.

In short, while these examples demonstrate that on different facts, a claim, even a disparate-impact claim, may occur at different times, they do not obscure that only one discrete act occurred here, when Chicago used the results of the examination to create a hiring pool that excluded petitioners.

F. Policy Concerns Support Finding Only One Discrete Act Here, Not A Recurring Present Violation.

The policies underlying accrual and repose support applying the accrual rule for discrete acts here, and rejecting petitioners' recurring present-violation theory.

---

[13] Rather cryptically, petitioners contend that "the court of appeals' analysis is inconsistent with the premise that a facially discriminatory practice can be challenged at any time." Br. 40 n.20 (citation omitted). No such practice was alleged or proved in this case, and the eligibility list is not facially discriminatory in any event.

1. Petitioners (Br. 44, 45-46) and their amici (Agencies Br. 2, 6-9, 13) urge a "clear" accrual rule, particularly because the process Congress created is designed to be initiated without assistance of counsel. We could not agree more. Under our rule, applicants who are informed they would "not likely" be called because of their ranking on an eligibility list (*e.g.*, J.A. 35) should file charges if they believe the ranking may be unlawful. That is as clear as rules get. And courts considering the consequences of disparate-treatment have had no trouble determining that these do not trigger another claim.

Petitioners' theory would require applicants considering a challenge to their placement on an eligibility list to inquire continuously whether others are being called. Unlike the list's adoption, applicants were not personally informed when the list was used to hire others; nor was there a public announcement about each use. Moreover, when an employer decides to stop using a list, an applicant who had been waiting to challenge it (whether to be certain he was not going to be hired or just because he could) might miss that charging period, unless he somehow found out what would be the last use. All this makes petitioners' rule harder to apply, especially for laypersons.

2. While disparate-impact claims require no proof of intent, that does not mean there should be no concern for loss of evidence over time. Pet. Br. 47-48; U.S. Br. 10, 30-31; Agencies Br. 3-5, 17; Partnership Br. 16 n.4. The plantiff's prima facie case is typically statistical (see generally *Meacham*, 128 S. Ct. at 2405; *Griggs*, 401 U.S. at 431-32), but not all the relevant evidence is "wholly objective" (Agencies Br. 18). If the plaintiff establishes a prima facie case – or, as here, the employer admits it – the employer must

prove the practice was job-related, valid, and consistent with business necessity. See 42 U.S.C. § 2000e-2(k)(1)(A)(i). That may depend on testimony by those who made decisions about the practice. Thereafter, the plaintiff must prove that less discriminatory alternatives exist (see 42 U.S.C. § 2000e-2(k)(1)(A)(ii)) and can rely on testimony of the defendant's decisionmakers about any alternatives that were considered. Memories on these issues, as on intent, can fade; and decisionmakers may be unavailable to testify for a variety of reasons.

This case demonstrates such concerns. The 2004 liability trial largely focused on Chicago's defenses. Joyce – DOP's Deputy Commissioner when the 1995 test was developed and scored, and applicants classified into three categories – testified these were job-related and consistent with business necessity. Tr. Vol. 16 at 325-91. At least twice in response to questions by petitioners' counsel, Joyce could not recall his calculations from nine years earlier. *Id*. at 375, 383-84.[14] Dr. Outtz testified about creating the

[14] Joyce testified:

> Q. You are aware, sir, that the manner in which you did decide to use it; that is, by setting a cut score of 89, caused severe adverse impact, are you not?
>
> A. It has adverse impact, but less than had we used it in straight rank order.
>
> Q. Did you ever calculate statistically how much less?
>
> A. As I sit here today, nine years later, I don't recall. I believe I would have.
>
> Tr. Vol. 16 at 375.
>
> Q. Did you ever calculate what difference in adverse impact there would be from choosing at random between 89 and 98 and choosing in strict rank order?
>
> * * * *

examination and his recommendations to Chicago (Tr. Vol. 15 at 71-190; Vol. 16 at 189-322), and other City employees testified (Tr. Vols. 15-22).

Even assuming that disparate-impact claims "typically" do not turn on the "testimony of fact witnesses" (Pet. Br. 47), and so memories of decisionmakers "are not typically essential to the[ir] resolution" (U.S. Br. 30), that was not so here. The district court's liability decision reveals that the testimony of Joyce and Dr. Outtz was critical to evaluating Chicago's defenses. Pet. App. 16a-23a. And petitioners relied on testimony from Chicago officials in rebuttal. *Id*. at 41a-42a.

Moreover, records about an examination's impact and validity (Pet. Br. 48; U.S. Br. 30) are no substitute for prompt filing. First, EEOC regulations counsel that this information "should" be kept on hand (29 C.F.R. §§ 1607.4, 1607.5, 1607.15), but do not mandate it. Beyond that, recordkeeping does not mean records are never lost or destroyed through inadvertence or natural disaster. Second, evidence besides records, like testimony, is needed, particularly for defenses. As for the observation that we have not claimed petitioners' delay affected this case (U.S. Br. 30), the limitations defense operates whenever no timely charge is filed, regardless of actual prejudice to the defendant.

> A. I computed what adverse impact there would be using it in straight rank order, and I computed what adverse impact figure would be at 89. So while I didn't do it in the way you characterized it, I did do those two steps.
>
> Q. And what was the difference?
>
> A. I don't remember as I sit here nine years later.
>
> *Id*. at 383-84.

3. Laches (U.S. Br. 29-30; Partnership Br. 15-16) does not adequately curb petitioners' theory.[15] Although it is a defense under Title VII (see *Morgan*, 536 U.S. at 121), "Congress plainly did not think that laches was sufficient," for it took a "diametrically different approach" by creating a short EEOC charge-filing period (*Ledbetter*, 550 U.S. at 632). The short period is intended to promote certainty in the workplace and eliminate stale claims, not merely ensure that employers will not be prejudiced in presenting defenses. Plus, a fact-intensive laches defense poses the same problems as litigating stale claims.[16]

4. Challenges to eligibility lists anytime between their adoption and retirement present other problems as well. They "expose employers to a virtually open-ended period of liability"; "create substantial uncertainty" about "important staffing decisions based upon the list"; and call "into question an organizational structure" in place for years, upsetting reliance interests of third parties. *Cox*, 230 F.3d at 205 (citations omitted). See Brief of *Amici Curiae* the City of New York, *et al*., in Support of Respondent. Hiring and promotional tests "create legitimate expectations on the part of" test-takers. *Ricci*, 129 S. Ct. at 2676. "[A]llowing a facially neutral" practice, like the list here, "to be challenged, and entitlements under it to be altered, many years after its adoption would

---

[15] Petitioners' amici refer to other "equitable defenses, including estoppel . . . and equitable tolling." Partnership Br. 15. Unlike laches, these are not affirmative defenses; they are doctrines a plaintiff may invoke against a statute of limitations defense.

[16] The Solicitor General recognized as much in an amicus brief in *Ledbetter*. *Ledbetter* U.S. Br. 21-22.

disrupt those valid reliance interests that" the limitations period "was meant to protect." *Lorance*, 490 U.S. at 912. On petitioners' theory, vast numbers of plaintiffs (6,000 here) may stand idly by as others are called, and file charges years later. If they seek hiring as a remedy, that will frequently require firing the person who was hired.

5. Petitioners' amici posit that our rule could "increase the volume of charges filed, burdening already overtaxed" agencies. Agencies Br. 14; see *id*. at 2, 6, 13-16; U.S. Br. 11, 33. This gets the matter exactly backwards. Under our rule, petitioners' claim accrued, and charges should have been filed, after the list's adoption and announcement, and only then. On petitioners' theory, charges also could be filed every time "well qualified" applicants were called – or twelve times total. If any rule would be burdensome, it is petitioners'.

6. There is no sense in which a charge filed to challenge adoption of a list that immediately excludes applicants from competing to be hired is premature. Pet. Br. 43 n.23, 48-49; U.S. Br. 10-11, 32-22; Agencies Br. 3. Those applicants have suffered "practical harm." Pet. Br. 49, 50. Although some premature charges might be filed, our rule would not encourage them. Moreover, premature charges should be expected in a procedure designed for laypersons and are preferable to tardy ones. If a complainant files too early, at least the EEOC is aware of the charge and can advise on the best course. This serves the purposes of getting the EEOC involved and resolving as many claims as possible before they reach the courts.

7. Petitioners contend "little incentive" exists to file a charge until a list has been "used" (Br. 46), but never explain why. Nor do they explain why this is a

reason to delay accrual past the list's first use. It therefore does not reach this case, where petitioners did not file charges until five months after the second use. And, as we explain above, whether an employer ever uses a list does not affect accrual, because an applicant can be unlawfully excluded even if nobody else is hired. That might mean an applicant has no real damages but does not delay accrual; and injunctive relief may be available. Title VII has a "prophylactic" objective (*Kolstad*, 527 U.S. at 545), intended to "bring employment discrimination to an end" (*Ford*, 458 U.S. at 228).

8. In the next breath, petitioners (Br. 47) and their amici (U.S. Br. 10, 29; Partnership Br. 16) contend that applicants for employment have little "incentive" to delay filing charges. Those who delay may lose backpay or evidence, or face a laches defense. Worse still, delay is inconsistent with Title VII's objective. Those discriminated against "want jobs, not lawsuits." *Ford*, 458 U.S. at 230. Here, Chicago called from the "well qualified" category for five years. If individuals can wait five years plus 300 days to file a charge, there may be little chance of being hired, especially for strenuous jobs, by the time the case is resolved. Even here, where petitioners did not wait five years, petitioners (R. 416 at 3) and the district court (R. 425 at 5) acknowledged that the hiring relief might never be realized.

Delay also hinders the multi-step enforcement procedure Congress created for Title VII. Waiting to initiate the EEOC's investigation and conciliation efforts makes it less likely they will bear fruit. The investigation could be hindered for the same reasons as a lawsuit – time erodes evidence, even on disparate-impact claims. So while "filing a lawsuit might

tend to deter efforts at conciliation" (*Ricks*, 449 U.S. at 260 n.11 (citation omitted)) or voluntary compliance (Pet. Br. 46; U.S. Br. 31), or may poison the employer-employee relationship (U.S. Br. 32-33; Partnership Br. 3, 12-15), delay is not the superior option. Prompt action is the "'natural effec[t] of the choice Congress has made'" under Title VII by "explicitly requiring that the limitations period commence with the date of the alleged unlawful employment practice." *Ricks*, 449 U.S. at 260 n.11 (quoting *Johnson*, 421 U.S. at 461).

And regardless of incentives, petitioners did delay; and under their rule, a claimant could delay much longer. Incentives are no substitute for a firm statute of limitations, which puts complainants on notice exactly when charges must be filed, and gives employers repose after that.

9. Petitioners and their amici impugn this repose as an "immunity." Br. 45-46; see *id.* at 30; U.S. Br. 10, 18, 31; Partnership Br. 4, 23-29. But the balance between enforcement and repose is not unique to Title VII; all limitations periods operate that way, and anyone who fails to file timely forgos his claim. At some point, even the most meritorious of claims must be put to bed. There is nothing "odd" (Pet. Br. 43), "absurd" (*id*. at 41), or "irrational" (Partnership Br. 3) about that. Moreover, the repose extends only to that time-barred challenge. "[A]n employer [has no] legitimate interest in repose so long as it continues to engage in a practice prohibited by Title VII." Agencies Br. 18.

Less dramatically, our rule is said to allow employers to adopt but not use a practice for 300 days, hoping no timely challenge will come. Pet. Br. 41-42, 46; Partnership Br. 3. When an employer needs to

hire, and expends time and resources to create and administer a test, such games cannot be played. And they would be irresponsible for public safety jobs. So is using a stale list to avoid another claim. Pet. Br. 46; U.S. Br. 31. Regardless, those who believe themselves affected by an unlawful practice can and should file charges upon its adoption. That will serve everybody's interests.

10. Finally, *Ricci* supports bringing and resolving challenges to eligibility examinations as early as possible. There, the Court limited a public employer's ability to stop making decisions based on a test with disparate impact. Test results can be abandoned only if there is a "strong basis in evidence." 129 S. Ct. at 2676. Thus, the complaint that our rule "allow[s] an employer to continue using an unlawful selection device indefinitely" (U.S. Br. 10) is not properly laid on us. Had petitioners promptly filed charges, the examination's lawfulness could have been resolved earlier; and even under *Ricci*, findings like the district court's would have allowed (indeed, required) Chicago to take the list down.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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) 744-7764

*Counsel of Record

January 15, 2010