No. 08-974

IN THE

Supreme Court of the United States

ARTHUR L. LEWIS, JR., *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Small Business Legal Center

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

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

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

FEDERAL CASES Page

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES

IN THE

Supreme Court of the United States

No. 08-974

ARTHUR L. LEWIS, JR., *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae*.[1] The brief supports the position of Respondent before this Court in favor of affirmance.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the legal and practical considerations relevant to interpreting and complying with workforce nondiscrimination requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Small Business Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business advocacy association, representing members in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. As the legal arm of NFIB, the Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting

---

fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

All of EEAC's, and many of NFIB's, members are employers subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. (Title VII), and other federal employment-related laws and regulations. As employers, and as potential defendants to claims asserted under these laws, *amici* have a substantial interest in the issue presented in this case regarding the applicable timeframe for filing an administrative charge alleging disparate impact discrimination under Title VII.

EEAC and NFIB seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of their experience in these matters, *amici* are well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

In July 1995, the City of Chicago administered a newly-developed written test to approximately 26,000 applicants for the position of firefighter. Pet. App. 14a-16a. After the test was scored, applicants were placed into one of three categories. Those scoring 89 or above were placed in the "well-qualified" category, and those with scores between 88 and 65 were ranked "qualified." All others were ranked "not qualified." Pet. App. 19a-22a.

On January 26, 1996, the City informed each test-taker individually of his or her score and category.

Pet. App. 22a-23a. Applicants who fell within the "well-qualified" category were told that they would be selected for employment in random order, depending on the City's hiring needs. Pet. App. 22a. Those on the "qualified" list were notified that although their names would remain on the eligibility list, they were not likely to be hired because of the large number of test-takers who achieved a "well qualified" designation. Pet. App. 22a-23a. Test-takers falling onto the "not qualified" list were informed that they had failed the test and would not receive further consideration. Pet. App. 22a.

That same day, the City "issued a press release detailing the results of the exam, including its disparate impact on minority applicants." Pet. App. 23a. The City's mayor publicly expressed regret that the new selection procedure had produced "disappointing" results in the City's efforts to improve diversity, noting that roughly 75% of the 1,782 test-takers deemed "well qualified" were white, compared to only 11.5% who were African-American—even though whites only represented 45%, and blacks represented 37%, of the applicant pool. Pet. App. 2a; J.A. at 54. The test results and impact on African-American test-takers were examined in the local media for several weeks. J.A. at 55-96.

In April 1996, several Petitioners and a group representing black Chicago firefighters met with an attorney regarding possible litigation against the City based on the test results. Pet. App. 48a-49a. Counsel for the group spent the following year reviewing "technical information from the City regarding the test's development and validation," Pet. App. 23a, and on March 31, 1997—approximately 420 days from the date on which the City notified the

test-takers of their individual scores and selection prospects—filed the first of several EEOC charges alleging disparate impact discrimination in violation of Title VII. Pet. App. 49a. On September 9, 1998, after receiving right-to-sue notices from the EEOC, Petitioners filed suit in the U.S. District Court for the Northern District of Illinois alleging Title VII disparate impact discrimination. *Id*. The suit later was certified as a class comprised of the approximately 6,000 African-American test-takers who were included in the "qualified" category. *Id*.

The City moved for summary judgment, arguing that Petitioners failed to file an EEOC charge within 300 days of being notified of their placement in the "qualified" category of the eligibility list. Pet. App. 45a, 52a. In response, Petitioners claimed that the City's "ongoing refusal to process [their] firefighter applications" amounted to a continuing violation "'because 'it is rooted in a discriminatory policy or practice.'" Pet. App. 52a. The district court accepted Petitioners' characterization of the case as one involving a continuing violation, and thus denied the City's summary judgment motion. It said:

> [P]laintiffs are not alleging any individualized adverse treatment by the City. Rather, they allege that the *1995 examination* had a disparate impact on African-American firefighter candidates, and that the City's reliance on the examination's results continues to have a disparate impact on African-American candidates. The City cannot simply explain away the disparate impact of the hiring process as 'the present consequences of a one-time past violation.' If plaintiffs establish that the City's examination had a disparate impact on African-American

> candidates, then the City's ongoing use of the examination's results—rather than some other, non-discriminatory criteria for candidate selection—has the same disparate impact.

Pet. App. 60a (emphasis added) (citation omitted).

The case proceeded to a bench trial, which resulted in a finding of liability against the City for unlawful disparate impact discrimination. The district court rejected the City's proffered business necessity defense—which included evidence that its test validation expert, Dr. James Outtz, issued a report after the test was administered confirming that the test was valid. Pet. App. 12a-43a.

The City appealed the timeliness issue to the Seventh Circuit, which reversed. It held that the Petitioners' claim was untimely because they failed to file an EEOC charge within 300 days of having received notice of their test scores and placement on the "qualified" hiring list. Pet. App. 11a. Relying on this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), which recently was reaffirmed in *Ledbetter v. Goodyear*, 550 U.S. 618 (2007), *superseded by statute*, Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009), the Seventh Circuit concluded that the City's eventual selections of "well-qualified" applicants "was the automatic consequence of the test scores rather than the product of a fresh act of discrimination." Pet. App. 3a-4a.

Although *Ricks* and *Ledbetter* both addressed the filing limitations period applicable to disparate *treatment* discrimination claims, the Seventh Circuit found that the difference between the disparate treatment and disparate impact theories of liability under Title VII "is not fundamental." Pet. App. 5a.

It thus declined to join those circuits that have applied a different charge filing limitations rule to disparate impact cases.

Furthermore, the Seventh Circuit found, the City's actions did not involve a continuing violation, that is, "a series of acts by a prospective defendant [that] blossoms into a wrongful injury on which a suit can be based." Pet. App. 8a. Rather, the plaintiffs "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 [sic] the firefighters' test; for that categorization delayed indefinitely their being hired." Pet. App. 9a. Applying the "continuing violation" theory to this case "would have ludicrous consequences," the Seventh Circuit said, including permitting claims to be brought years after the challenged employment action occurs. *Id*.

The Petitioners filed a petition for writ of certiorari, which this Court granted on September 30, 2009.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*., (Title VII), makes it unlawful for an employer to discriminate in the terms, privileges or conditions of employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1). The statute prohibits intentional discrimination, as well as unintentional discrimination having an impermissible adverse impact on a statutorily-protected group. *Ricci v. DeStefano*, 557 U.S. ___, 129 S. Ct. 2658, 2672 (2009); 42 U.S.C. § 2000e-2(k)(1)(A); *see also Griggs v. Duke Power Co*., 401 U.S. 424 (1971).

The Petitioners are African-Americans who took an employment test administered by Respondent City of Chicago for the position of firefighter. They claim that the test had an adverse impact on African-Americans and that Respondent's use of the test results to categorize test-takers as "well qualified," "qualified," or "not qualified" violated the disparate impact provision of Title VII. Yet it is undisputed that they failed to file a charge of discrimination with the EEOC within 300 days, as required by the statute, of being informed of their test scores and placement in the "qualified" category of the hiring eligibility list—which rendered their employment prospects unlikely, given the large number of applicants falling within the "well qualified" category. Accordingly, Petitioners are jurisdictionally barred from pursuing their action in court and the Seventh Circuit below thus properly remanded the case for entry of judgment for the Respondent.

Although Petitioners urge this Court to do so, Title VII's statutory charge filing limitations provision simply does not draw any distinction between claims of discrimination brought under a disparate treatment theory and those asserting unlawful disparate impact. Rather, Section 42 U.S.C. § 2000e-5(e) merely states that a charge "shall be filed within one hundred and eighty days after the alleged unlawful employment practice . . . ." 42 U.S.C. § 2000e-5(e)(1). Because there is no support in the text of Title VII for applying a different, more generous charge filing period to disparate impact claims than exists for disparate treatment claims, this Court should decline the Petitioners' invitation judicially to do so.

Furthermore, the decision below comports with well established Title VII principles that this Court

has reaffirmed time and again, beginning with *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), and ending most recently with *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Specifically, the Court consistently has held that the lingering consequences of unchallenged past acts have no legal effect under Title VII. While Petitioners contend that their delay in filing administrative charges was permissible, as this Court has made clear, discrete acts of discrimination must be filed within 300 days of when they occurred. Since the use of an employment test having adverse impact is a discrete act, not one of a continuing nature subject to *Morgan*'s expanded Title VII charge filing periods, Petitioners' failure to file within 300 days of learning of the test results proves fatal to their lawsuit. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Finally, expanding the statutory timeframe within which Title VII disparate impact charges must be filed with the EEOC would undermine important policy aims and principles of Title VII and would impose substantial burdens on employers required to defend stale claims. In addition, it would create unnecessary inconsistency in how the statute is enforced by the EEOC and the courts.

ARGUMENT

I. BECAUSE PETITIONERS FAILED TO FILE A CHARGE WITHIN 300 DAYS OF OBTAINING THEIR TEST SCORES AND HIRING ELIGIBILITY RANKINGS, THEY ARE JURISDICTIONALLY BARRED FROM PURSUING THEIR TITLE VII DISPARATE IMPACT CLAIM IN COURT

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. (Title VII), makes it an unlawful employment practice to "limit, segregate or classify" applicants for employment in a manner that would "deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(2). The statute prohibits not only intentional discrimination, but also "in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci v. DeStefano*, 557 U.S. ___, 129 S. Ct. 2658, 2672 (2009); 42 U.S.C. § 2000e-2(k)(1)(A); *see also Griggs v. Duke Power Co*., 401 U.S. 424 (1971).

Title VII is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), which is authorized to receive and investigate written charges alleging violations of the Act. 42 U.S.C. § 2000e-5. As this Court has observed, the statute "sets forth 'an integrated, multistep enforcement procedure' that . . . begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co*., 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)) (footnote omitted). The filing of an administrative charge of

discrimination with the EEOC thus is a "jurisdictional prerequisite[ ] that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 47 (1974), *abrogated by 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

A. The Plain Text Of Title VII Requires That A Charge Of Discrimination Be Filed Within 180 Or 300 Days Of The Alleged Unlawful Discriminatory Practice

Title VII requires that any aggrieved person alleging a violation of the Act file an EEOC charge of discrimination within one hundred and eighty days after the alleged discriminatory act occurred, 42 U.S.C. § 2000e-5(e)(1), except where the individual has filed a discrimination charge with a state or local enforcement agency with authority to grant or seek relief, in which case he or she has "three hundred days after the alleged unlawful employment practice occurred" to file an EEOC charge. *Id*. The statutory charge filing limitations period for Title VII claims accrues from the date of the "alleged unlawful employment practice," *id.*, which in the case of a "discrete" act (such as, for instance, a refusal to hire) is the date on which the act "occurred" or "happened."[2] *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 113 (2002).

---

[2] *Morgan* distinguished hostile work environment claims from claims involving "discrete" acts, explaining that a hostile work environment generally involves repeated conduct that occurs over a period of time—perhaps even years. *Morgan* at 115. While a single act may not be sufficient to support a claim of hostile environment discrimination under Title VII, so may, the Court said, the cumulative total. *Id.* Therefore, it interpreted

B. Title VII's Statutory Limitations Provision Draws No Distinction Between Claims Of Discrimination Brought Under A Disparate Treatment Theory And Those Based On Alleged Disparate Impact

Section 2000e-5 of Title VII provides that the EEOC is "empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section [2000e-2 or 2000e-3] of this title." 42 U.S.C. § 2000e-5(a). Disparate impact discrimination under Title VII, while first recognized by this Court in *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), was not expressly included in the statute until it was amended by the Civil Rights Act of 1991. Section 2000e-2 now specifies:

> An unlawful employment practice based on disparate impact is established under this title only 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). As this Court observed in *Ricci*, "[t]hat provision is now in force *along with the disparate-treatment section* already noted." *Ricci*

Title VII as giving individuals 180 or 300 days from *any* act that forms part of the hostile environment claim to file an EEOC charge of harassment. *Id.* at 117-18.

v. DeStefano, 557 U.S. ___, 129 S. Ct. 2658, 2673 (2009) (emphasis added).

Title VII does not differentiate between disparate treatment and disparate impact claims with regard to the manner and timing for submission to the EEOC of a discrimination charge. Rather, Section 42 U.S.C. § 2000e-5(e) merely states:

> A charge *under this section* shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge . . . shall be served upon the person against whom such charge is made within ten days thereafter . . . .

42 U.S.C. § 2000e-5(e)(1) (emphasis added). Because both the disparate impact and disparate treatment provisions appear in Section 2000e-2, which as noted above is expressly incorporated by reference into Section 2000e-5, charges of discrimination asserting either theory plainly must be filed with the EEOC within 180 days (or 300 days, as the case may be) of the date on which the alleged unlawful employment practice occurred. Any suggestion to the contrary is completely unfounded.

In 2009, Congress amended Title VII to extend the time period for bringing a claim of unlawful compensation discrimination under the Act. The Ledbetter Fair Pay Act (Fair Pay Act) provides:

> For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, *or when*

> *an individual is affected by application* of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

42 U.S.C. § 2000e-5(e)(3)(A) (emphasis added). The Fair Pay Act also extends the time period for bringing a compensation discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. § 626(d), Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111 *et seq*., and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 *et seq*. The Fair Pay Act thus permits those alleging compensation discrimination to file an EEOC charge within 300 days of receipt of a paycheck or other form of compensation that carries forward the effects of past discriminatory compensation practices, whether or not the discrimination actually occurred within the statutory charge filing limitations period.

The fact that Congress specifically amended Title VII to provide compensation discrimination plaintiffs with an expanded window for filing timely EEOC charges based on the "effects" of past, otherwise untimely acts, further undermines Petitioners' contention that a disparate impact discrimination claim subject to Section 2000e-5(e)(1) "accrues from the time the impact is felt," Brief for the United States as *Amicus Curiae* Supporting Petitioner at 10, rather than from the date the injury occurred. Furthermore, since they allege unlawful disparate impact of an employment test that precluded them from being included on the "well-qualified" list of applicants—not intentional compensation discrimination—the Petitioners cannot claim the

benefit of the Fair Pay Act's expanded limitations periods in any event.

Since Congress in the Fair Pay Act created a special rule applicable only to intentional compensation discrimination plaintiffs, *Ledbetter*'s immediate accrual rule necessarily applies to all non-compensation based discrimination claims, including that being advanced by the Petitioners in this case. *Accord Gross v. FBL Fin. Svcs., Inc.*, ____U.S. ____, 129 S. Ct. 2343 (2009). As the Seventh Circuit pointed out, the 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." Pet. App. 9a. Because the Petitioners failed to file an EEOC charge within 300 days of that injury, the Seventh Circuit correctly reversed the district court decision below and remanded for entry of judgment for the Respondent.

II. THE DECISION BELOW COMPORTS WITH WELL ESTABLISHED TITLE VII PRINCIPLES THAT HAVE BEEN REAFFIRMED TIME AND AGAIN BY THIS COURT

A. From *United Air Lines v. Evans* To *Ledbetter v. Goodyear*, This Court Consistently Has Held That The Lingering Consequences Of Past Acts Have No Legal Effect Under Title VII

Once again, this Court has been called upon "to apply established precedent in a slightly different context." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), *superseded by statute*,

Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009). From its 1977 decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), to its ruling more recently in *Ledbetter*, this Court consistently has held that the lingering consequences of past acts, even past discriminatory acts, have no present legal effect and thus are not actionable under Title VII. *See also Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), *abrogated by*, 42 U.S.C. § 2000e-5(e)(2); *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Ledbetter*, 550 U.S. 618.

The plaintiff in *Evans* worked as a flight attendant from 1966 to 1968. When she married in 1968, she was required to resign her employment pursuant to a company policy in place at the time that barred married women from working as flight attendants. In 1972, United rehired Evans as a new employee. She was not given any seniority credit for her prior service, and "for seniority purposes, she [was] treated as though she had no prior service with United." 431 U.S. at 555 (footnote omitted).

Evans claimed that United was guilty of a present violation of Title VII because it did not give her credit after her rehire for service prior to her forced resignation in 1968. The Court explained that assuming her 1968 separation violated Title VII, "the question now presented is whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972 [when she was rehired]." *Id.* at 554. As the district court there noted, Evans was "'seeking to have this court merely reinstate her November, 1966

seniority date which was lost solely by reason of her February, 1968 resignation.'" *Id*. at 556 n.8.

This Court held that Evans had failed to file a timely charge of discrimination. 431 U.S. at 558. An alleged discriminatory act that has not been made the subject of a timely charge, the Court held, "is the legal equivalent of a discriminatory act which occurred before the statute was passed." *Id.* Thus, the act was "merely an unfortunate event in history which has no present legal consequences." *Id*. (emphasis added).

Subsequent decisions of this Court have followed this principle. In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court declined to allow an employee to challenge his denial of tenure (and eventual termination) at the time his employment was to be terminated—after the limitations period for filing a charge had expired—even though he did not feel the effects of the decision until his termination. Applying *Evans*, this Court explained that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id*. at 257 (citation omitted). It found that "'[the] proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful.'" *Id*. at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir.1979)) (emphasis added in *Ricks*).

Similarly, in *Lorance v. AT&T Technologies, Inc*., this Court concluded that "[l]ike Evans, petitioners in the present case have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation." 490 U.S. 900,

908 (1989), *abrogated by*, 42 U.S.C. § 2000e-5(e)(2). Relying again on *Evans* and *Ricks*, the Court restated this principle in *National Railroad Passenger Corp. v. Morgan*, concluding that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 536 U.S. 101, 113 (2002).

This Court recently reaffirmed *Evans*, *Ricks*, *Lorance*, and *Morgan* in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). There, the Petitioner, Lilly Ledbetter, sought to challenge pay decisions made throughout her nearly twenty-year career on the theory that the sum total led to her being paid substantially less than her male colleagues. Concluding that Ledbetter failed to timely file a Title VII discrimination charge with the EEOC, thus depriving the federal courts of jurisdiction over the matter, the Court pointed out:

> The instruction provided in *Evans*, *Ricks*, *Lorance*, and *Morgan* is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

550 U.S. at 628. It thus expressly rejected "the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some

effect to an intentional discriminatory act that occurred outside the charging period." *Id.* at 632.

B. The Use Of An Employment Test That Later Is Challenged As Having Unlawful Adverse Impact Is Not A Continuing Act Subject To *Morgan*'s Expanded Title VII Charge Filing Periods

This Court has said, "[i]n addressing the issue whether an EEOC charge was filed on time, we have stressed the need to identify with care the specific employment practice that is at issue." *Ledbetter* at 624 (citing Morgan); *see also Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 904 (1989) (assessing the timeliness of a Title VII charge "requires us to identify precisely the unlawful employment practice of which petitioners complain"), *abrogated by*, 42 U.S.C. § 2000e-5(e)(2). Once that is done, the reviewing court then must decide when the challenged employment practice "occurred." *See Ledbetter* at 621 ("the time for filing a charge of employment discrimination with the [EEOC] begins when the discriminatory act occurs"). "We have explained that this rule applies to any discrete act of discrimination, including discrimination in termination, failure to promote, denial of transfer, [and] refusal to hire." *Id*. (citation and internal quotation omitted).

In the case of a discrete act, the unlawful employment practice "occurred on the day that it happened." *Morgan*, 536 U.S. at 110. A continuing violation, such as workplace harassment, however, "typically comprises a succession of harassing acts, each of which may not be actionable on its own," *Ledbetter* at 638 (quoting *Morgan*), and thus "cannot be said to occur on any particular day." *Id*. As long as one act "contributing to the claim occurs within the filing

period, the entire time period of the hostile environment may be considered by a court." *Morgan*, 536 U.S. at 117.

In this case, a test having adverse impact—the results of which were used to rank-order applicants and place them in either the "well qualified," "qualified," or "not qualified" categories on the hiring eligibility list—is the unlawful employment practice at issue, which is an incontrovertibly discrete act that "occurred" on January 26, 1996, the date on which the results were announced and the Petitioners were informed of the statistical adverse impact on African-Americans. Pet. App. 2a. While the Petitioners assert that Respondent's use of the test results was a continuing violation subject to *Morgan*'s expanded limitations periods for such claims, the Seventh Circuit below, relying on this Court's *Evans- Ricks-Lorance- Ledbetter* line of reasoning, soundly rejected that contention.[3] Pet. App. 1a-11a.

Writing for the unanimous panel, Circuit Judge Posner correctly concluded that the 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." Pet. App. 9a. He reasoned that "[e]xtension of the 'continuing violation' doctrine in the manner

---

[3] Petitioners' argument, if adopted, also ostensibly would allow even those who were placed on the "not qualified" list—who may believe that the test had an unlawful adverse impact—to sit on their hands until the very last selection was made, even though they were told, in no uncertain terms, that they would not be selected. Such an approach would undermine, Title VII's policy aim of uncovering and resolving discrimination in a speedy manner. *See* III, *supra*.

urged by the plaintiffs would have ludicrous consequences." *Id*. He queried:

> Could [Petitioners] ten years later ask to be hired as firefighters and when turned down sue the City for violating Title VII because the reason for not hiring them was that [they] were not in the 'well qualfied' part of the hiring list? The answer implied by the plaintiffs' argument is 'yes.'

Id.

The Seventh Circuit is not alone in concluding, logically, that alleged discrimination stemming from application of an employment test having adverse impact is a discrete act subject to Title VII's 180/300 day charge filing period. In *Cox v. City of Memphis*, for instance, the Sixth Circuit found that the "promotion or hiring from an allegedly tainted promotions roster is not a 'continuing act' but merely the effect of previous discrimination." 230 F.3d 199, 204 (6th Cir. 2000). It reasoned:

> It is at the point of promulgation of the roster that a potential plaintiff is aware that alleged discrimination is likely to play a pivotal role in her future advancement. Hence, the promulgation of an allegedly tainted roster is an event that 'should . . . alert the average lay person to protect his rights.'

Id. (citation omitted). As the Sixth Circuit did in *Cox*, the Seventh Circuit below concluded that the unlawful employment practice at issue was a discrete act, and that the Petitioners were required under Title VII to file an EEOC charge within 300 days of the date they were injured by the practice—in this case, January 26, 1996.

The Petitioners ultimately did not do so, however, and instead waited some 400 days to file a charge challenging the Respondent's use of the test results and eligibility list on disparate impact grounds. In fact, not only did they fail to file an EEOC charge within 300 days of January 26, 1996, but they also failed to file a charge within 300 days of the Respondent's first selection of a "well qualified" candidate from the eligibility list, evidently because their attorney "didn't think it necessary."[4] Pet. App. 11a.

Because Petitioner's claim does not constitute a continuing violation, their failure to file an EEOC charge within 300 days of injury renders their lawsuit untimely.

III. EXPANDING THE STATUTORY TIMEFRAME WITHIN WHICH TITLE VII DISPARATE IMPACT CHARGES MUST BE FILED WOULD UNDERMINE IMPORTANT TITLE VII PRINCIPLES, IMPOSE SUBSTANTIAL BURDENS ON EMPLOYERS, AND CREATE UNNCESSESARY INCONSISTENCY IN HOW THE STATUTE IS ENFORCED

As this Court has observed, a principal objective of Title VII is to promote prompt and efficient resolution of discrimination claims. Congress deliberately

---

[4] The Petitioners also seem to claim that the eventual selection of a "well qualified" candidate (and consequentially the non-selection of one or more of them) was itself a discriminatory employment practice, whether or not considered as part of a continuing course of conduct. Yet, they do not and cannot claim that the selection was based on race, or otherwise had a discriminatory adverse impact on African-Americans, and therefore they cannot establish a prima facie case of discrimination under either a disparate impact or a disparate treatment theory.

restricted the rights of individuals to raise Title VII claims when it set the relatively short period within which charges must be filed. As this Court has cautioned:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination . . . [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days—rather than months or years—we may not simply interject an additional . . . period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980) (footnote omitted); *see also International Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976) ("Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation and footnote omitted).[5]

The Court in *Mohasco* also recognized that in choosing Title VII's charge filing limitations period,

---

[5] 1972 amendments to Title VII enlarged the limitations period to 180 days. 42 U.S.C. § 2000e-5(e).

Congress intentionally risked leaving some victims of discrimination without a remedy in order to avoid litigation of stale claims, reasoning that the choice "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." 447 U.S. at 820. Thus, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id*. at 826.

Employers must be permitted to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims. Indeed, they "serve a policy of repose," *Ledbetter*, 550 U.S. at 630, "designed to assure fairness to defendants" and to "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Burnett v. New York Cent. R.R. Co*., 380 U.S. 424, 428 (1965) (citation omitted).

The interest of an individual who fails to undertake the "minimal" step of filing a charge to preserve his Title VII claim must, therefore, give way to the interest of avoiding stale claims. *See Ricks*, 449 U.S. at 256-57 ("[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers

from the burden of defending claims arising from employment decisions that are long past") (citations omitted); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"). This is especially true in the context of employment tests, the results of which may be used "for several years after they are promulgated." *Cox*, 230 F.3d at 205. Therefore, "[t]o allow employees to challenge an eligibility roster during the entire time it is used would be to create substantial uncertainty for employers who have to make important staffing decisions based upon the list." *Id*.

While Petitioners suggest that statistical evidence in disparate impact cases is less likely to become stale over time, thus justifying expanded limitations periods, they fail to account for the importance of non-statistical evidence that often plays a critical role in such cases. While raw statistical data may always be available in disparate impact cases, the individuals called upon to perform the analyses or interpret their results may not be available over time. Or even if available, individuals involved in the process may be less likely as time passes to recall specific conclusions and determinations that informed decisions as to how to use the data. Fading memories of individuals involved in employment practices alleged to have adverse impact is even more a concern post-*Ricci*, in which this Court categorically declared that "statistical disparity alone" is insufficient to establish a prima facie case of unlawful discrimination under Title VII. *Ricci*, 129 S. Ct. at 2702.

In addition to triggering the EEOC's investigation process, a charge also serves the important purpose of providing employers with "fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation from the EEOC." *Shell Oil*, 466 U.S. at 74. This early notice provides the employer's first warning of a potential workplace problem, and often serves as the impetus for conducting an internal investigation into the matter. Where at the conclusion of such an investigation potential violations are uncovered, responsible employers make every effort to correct the problem and take steps to ensure it does not recur. Such efforts serve to advance Congress's desire that voluntary compliance be the "preferred means of achieving the objectives of Title VII." *See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975)).

An employer's earnest attempt to voluntarily comply with Title VII is severely hampered whenever an employee waits months or, as in this case, years, to challenge an existing employment practice as being unlawfully discriminatory. This Court's observation in *Ricks* to that point equally applies here. It said, "[W]e recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes. But, for the reasons we have stated, there can be no claim here that Ricks was not abundantly forewarned." 449 U.S. at 262 n.16 (citations omitted).

In this case, the results of the discriminatory disparate impact were felt when the Petitioners were informed that they did not score well enough to receive further consideration. They were left with no reasonable expectation of being hired. Thus, the eventual selection of a "well qualified" candidate—who was informed on day one that he or she was among those who would be hired—did not injure Petitioners any more than did their classification, on day one, as merely "qualified" for the job.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Small Business Legal Center

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council