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 *AMICI CURIAE*, THE CITY OF NEW YORK YORK AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF RESPONDENT

MICHAEL A. CARDOZO,
Corporation Counsel of the City of New York,
100 Church Street
New York, New York 10007
(212) 788-1033 or 1010

LEONARD J. KOERNER*
GEORGIA M. PESTANA
ELIZABETH SUSAN NATRELLA
of Counsel.
**Counsel of Record*

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INC. (IMLA)
7910 Woodmont Ave.,
Suite 1440
Bethesda, Maryland 20814
(202) 466-5424, x. 112

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INTERESTS OF THE *AMICI CURIAE*

Pursuant to Rules 37.4 and 37.6, the City of New York ("the City") and the International Municipal Lawyers Association ("IMLA") submit this *amici curiae* brief in support of respondent seeking affirmance of the judgment of the United States Court of Appeals for the Seventh Circuit in *Lewis v. City of Chicago*, 528 F.3d 488 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 47 (2009) (Pet. App., 1a-11a).[1]

The City, a municipal corporation organized and existing under the laws of the State of New York, has the largest municipal workforce in the country. As of December 31, 2007, the City's workforce under the jurisdiction of the City's Department of Administrative Services ("DCAS") included 190,860 employees serving in competitive class titles. *See* City's Five-Year Plan, www.cs.state.ny.us/commission/EntirePlan.pdf ("*Five-Year Plan*") (last checked January 21, 2010).

IMLA is a non-profit, nonpartisan, professional organization consisting of more than 2,500 members comprised of local government entities, including cities and counties, and

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[1] "Pet. App." refers to the Appendix filed with the petition for a writ of certiorari. Pursuant to Rule 37.6, "no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of this brief." Petitioners and respondent have filed a letter of consent for all *amici* briefs with the Clerk of the Court.

subdivisions thereof. IMLA develops and advances solutions to important legal issues faced by local governments and represents their interests through *amicus* filings in this Court and other federal and state appellate courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

State and local governments are, together, the largest group of employers in the nation, providing some 19.3 million of the country's 151.6 million jobs as of 2006 -- nearly 13% of the work force. *See* Rose A. Woods & Eric B. Figueroa, *Industry Output and Employment Projections to 2016*, Monthly Lab. Rev. (Nov. 2007) at 53, 54. Local governments alone employ some 11 million full-time workers and an additional three million part-time workers. U.S. Census Bureau, 2008 Public Employment Data: Local Governments, *see* http://www2.census.gov/govs/apes/08locus.txt (last checked January 20, 2010).

According to the Bureau of Labor Statistics, there is considerable turnover each year. In 2008, local and state governments hired a total of 3.5 million workers, and all but 700,000 were replacements for employees who had departed. At the end of 2008, these state and local governments were faced with over 300,000 job openings to fill.[2]

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[2] *See* Bureau of Labor Statistics, Job Openings and Labor Turnover Survey, http://www.bls.gov/data/#employment (last checked January 21, 2010) (to retrieve data, select the "ones-screen data search" function within the Job Openings and Labor Turnover Survey Database).

On top of these hiring decisions, public employers make countless promotion decisions each year.

In New York, pursuant to the State Constitution, competitive titles must be filled by competitive exams, which are used to create lists of eligible candidates for competitive civil service jobs. In relevant part, Article V, § 6 provides that: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; . . .." N.Y. Const. Art. V, § 6. *See also* N.Y. Civ. Serv. Law § 50(1). Just as in New York, throughout this country, a variety of constitutional requirements and state and local civil service laws require governmental entities to fill millions of jobs each year based on competitive examinations, a constraint not faced by private employers.

Pursuant to New York State law and the N.Y.C. Charter, DCAS is the municipal civil service agency responsible for citywide personnel matters and has the powers and duties of a municipal civil service commission, including to "preserve and promote merit and fitness in city employment." *See* N.Y. Civ. Serv. Law, §§ 2(4), 15, 20, 22; N.Y.C. Charter §§ 810-812, 814(a)(2); *see generally Albano v. Kirby*, 36 N.Y.2d 526, 531, 330 N.E.2d 615, 619 (1975). This is similar to other state and local civil service laws, which typically provide for a local civil service board or commission to oversee the examination process. *See*, *e.g.*, Conn. Gen. Stat. § 7-410.

DCAS is charged with ensuring that all City agencies have the critical resources and support they need to provide the best possible services to the public. DCAS thus supports the City agencies' workforce needs including by ensuring a sufficient number of eligible job applicants through the timely formulation, administration and grading of civil service examinations. *Mayor's Management Report* (Sept. 2009) ("*Mayor's Management Rpt.*") http://www.nyc.gov/html/ops/downloads/pdf/2009_mmr/0909_mmr.pdf, p. 83 (last checked January 21, 2010).[3] Examinations for public safety titles (*e.g.*,

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[3] In addition to administering the civil service system for all City agencies, including the offices of City elected officials, at present, pursuant to statute or case law, DCAS administers the civil service system for several other entities, including the City Department of Education, the New York City Transit Authority, the New York City Triborough Bridge and Tunnel Authority, the New York City Housing Authority and the New York City Municipal Water Finance Authority. *Five-Year Plan*, p. 1. DCAS administers civil service examinations for open competitive, promotional (for current city employees only), licensing, and state titles, as well as notices of examination and applications. *Id.*. Within DCAS, the Division of Citywide Personnel Services has two major operating bureaus:

- The Bureau of Examinations, which is responsible for the classification of titles, and for all examination matters, including test development, test writing, test administration, and test rating;

- The Bureau of Civil Service Administration, which is responsible for the citywide administration of civil service eligible lists and manages the municipal civil service system, including the training of city employees through professional development programs. *Five-Year Plan*, p. 3.

titles in the police, fire and correction services) are the top priority in terms of the City's exam administration. *Five-Year Plan*, p. 6, n.4.

After establishing basic eligibility requirements, DCAS is charged with preparing position-specific examinations to assess each candidate's qualifications for the relevant position. N.Y. Civ. Serv. Law § 61. Thereafter, DCAS establishes an "eligible to hire" list, which consists of all candidates who pass the exam by rank order and is available to each City agency with open positions in the corresponding title. Candidates are contacted for interviews, as the needs of these agencies require. New York State Civil Service Law requires agencies to review the top three scorers remaining on the list for appointment to a vacant position, a procedure known as the One-in-Three rule. N.Y. Civ. Serv. Law § 61.[4]

With respect to promotional examinations, eligibility is limited to persons holding competitive class positions in a lower grade, as far as is practicable, provided these positions are in a direct line of promotion. N.Y. Civ. Serv. Law § 52. Aggrieved applicants typically may challenge the

[4] Other states have similar requirements. *See, e.g.,* Mich. Comp. Laws Ann. § 38.413 ("Whenever a position * * * is to be filled * * * the commission shall certify the names * * * of the 3 candidates standing highest on the eligible list * * *."); Conn. Gen. Stat. § 7-414 (following preparation of an eligible list, requiring submission of "not more than three applicants having the highest rating"). The appointing authority must then hire or promote applicants from the names provided by the commission. *See*, *e.g.*, Ohio Rev. Code Ann. § 124.27(B).

examinations before the commission certifies the results. These judicial challenges may involve the test's substance, procedures, or outcomes. *See generally Wood v. Irving*, 85 N.Y.2d 238, 647 N.E.2d 1332 (1995) (appeal in an Article 78 proceeding by police officer seeking appointment as a detective).

Under governing New York law, a list is active for four years. N.Y. Civ. Serv. Law § 56. Generally, a civil service applicant cannot be appointed from an expired list, as such appointment would be a legal impossibility, and may also violate the merit and fitness clauses, which appear in certain state constitutions, such as New York. *See* 15A Am Jur.2d, Civil Service, § 26. However, in New York City, under N.Y. Civ. Serv. Law § 56, a list may be extended by up to one year when there has been a restriction against filling vacancies during the effective period of the list. *Id*. Accordingly, it is conceivable that a list could remain active for as long as five years.

In Fiscal Year (FY) 2009, DCAS administered 143 civil service exams, 133 in FY 2008, 166 in 2007, and 118 in FYI 2006. In FY 2009, the number of applications for civil service exams increased 37.5 percent, due to a 7.5 percent increase in the number of exams administered and a larger than average pool of applicants for certain examines. *Mayor's Management Rpt.*, p. 83 (Bar Chart, "*Civil Service Exams Administered*"). In FY 2009, there were 214,689 applications received for open competitive civil service exams. *Id.*, p. 84 ("*Performance Statistics*" Chart).

The decision in this case will thus affect the hundreds of exams administered annually by DCAS, and the thousands of exams administered annually throughout the country by IMLA members. In addition, the decision will directly affect ongoing litigation in *United States v. The City of New York*, which involves challenges by the United States and the intervenor Vulcan Society to the use of two written examinations administered in February 1999 and December 2002 to establish a rank-order list of applicants eligible for entry-level firefighter positions in the City's Fire Department. *Id.*, 2009 U.S. Dist. LEXIS 5821 (E.D.N.Y. 2009) (Garaufis, D.J.) (*see* discussion, *post*, pp. 17-18).

The significance of this case to employers is beyond question. As in *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007) ("*Ledbetter*"), this Court should uphold the principles underlying the short statute of limitations period for Title VII disparate impact claims in order to provide needed finality, stability and repose for employers. *Ledbetter*, 550 U.S. at 630-31, citing numerous cases. This need is particularly important for public employers, who may be legally required under state Constitutions, or state and local laws, to use competitive examinations to assess merit and fitness, *see*, *e.g.*, N.Y. Const., Art. V, § 6, and when the resultant eligibility lists may last for years. *See*, *e.g.*, N.Y. Civ. Serv. Law § 56 (list last four years, with possible one year extension).

If, as petitioners propose, each hiring decision that is made from a list following competitive examination is subject to a new 300-day limitations period, that essentially results in

an open-ended period where employers are exposed to liability from tests or other employment practices that are nondiscriminatory on their face, but which may have a discriminatory impact. The Seventh Circuit properly applied this Court's precedent in rejecting such a continuing statute of limitations period.

In so doing, it properly looked to the principles articulated in *Ledbetter*, and properly rejected the Second Circuit's stale analysis in *Guardians Ass'n of the New York City Police Dep't v. Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980), *aff'd on Title VI issue*, 463 U.S. 562 (1983), *cert. denied*, 463 U.S. 1228 (1983) (denying *certiorari* on Title VII issue) (*see* discussion *post*, pp. 16-19). Indeed, both the Sixth Circuit and Third Circuit have previously rejected a continuing violation theory with respect to disparate impact claims arising from challenges to appointments from eligible lists. *See*, *e.g.*, *Cox v. City of Memphis*, 230 F.3d 199, 205 (6th Cir. 2000) ("To 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 considerations given that many rosters are intended to be used for several years after they are promulgated."); *Bronze Shields, Inc. v. New Jersey Dept. of Civil Service*, 667 F.2d 1074 (3d Cir. 1981).

In addition, the practical consequences of the legal standard proposed by petitioners would adversely affect safe and fully functioning municipal workforces. Under *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) ("*Ricci*"), public employers,

particularly cities which give competitive examinations for their uniformed police and firefighter services, will be forced, unless there is a strong basis in evidence, to use tests required by state Constitutions and laws, as well as this Court, yet be doomed to protracted litigation the moment they receive the test results. However, the operational needs of the municipal workforce require that there only be a limited period, as Congress enacted, for such challenges. In this regard, following this Court's lead in *Ledbetter*, the Seventh Circuit employed a reasoned analysis of the statute and this Court's precedent in holding that the City of Chicago should not be responsible for "continuing violations" or, in essence, an open-ended statutory limitations period.

In sum, *amici* public employers have a strong interest in the recognition of a legal standard that upholds the principle of timely filing of disparate impact challenges to civil service examinations from the date the list is established, or, solely in the alternative, the date of notice of the results. Such examinations and the resulting hiring therefrom are the lifeblood for the efficient functioning and operation of government, which needs the finality and the certainty and repose that finite statutes of limitations bring. This is especially important to ensuring a stable workforce to maintain the services, security and well being of cities in these difficult economic and troubled times. Contrary to petitioners' position, such challenges should not go on for protracted periods.

ARGUMENT

IN ACCORD WITH THIS COURT'S PRECEDENT, THE PRINCIPLES UNDERLYING CIVIL SERVICE MERIT AND FITNESS REQUIREMENTS AND THE PRINCIPLES UNDERLYING THE SHORT STATUTE OF LIMITATIONS PERIOD FOR TITLE VII ACTIONS, THERE SHOULD BE AN AFFIRMANCE.

A. Civil Service Merit and Fitness Requirements Prevail In Government Hiring.

A brief history of the civil service process shows origins stemming from China, by use of meritocratic examinations to select government officials in the Han dynasty. *See* Discovery Channel website, "Ancient China—Dynasties-Han Dynasty," http://www.yourdiscovery.com/ancient_china/dynasties/han/index.shtml (last checked January 15, 2010). The primary purpose then, as now, is to have a hiring system based on merit and fitness so that government can run efficiently and to deter corruption and systems based upon political or social influence or favoritism. *See generally* Vol. 3 McQuillan Mun. Corp., § 12.55 ("Civil service commission.") (3d ed.).

In this country, the development of the federal civil service and the federal Civil Service Commission substantially began with the enactment of the Pendleton Civil Service Reform Act in 1883. *See* Civil Service (Pendleton) Act, ch. 27, 22 Stat. 403 (1883); *see also Developments in the*

Law, Public Employment, 97 Harv. L. Rev 1611 (1984).[5] The law was passed after the assassination of President James Garfield, who was shot by a disgruntled seeker of a government job. *See Guiteau's Case*, 10 F. 161, 173 (D.D.C. 1882). The law replaced the former "spoils" system, with its abuses and corruption in government employment, with a system based on merit. *See, e.g.*, *State Government 14*, State of New York Temporary State Commission on the Constitutional Convention (1967), at 209.

In 1884, New York became the first of the states to adopt a constitutional provision, largely modeled on the Pendleton Act. *Id.* at 208-209, citing N.Y. Const., Art. V, § 6 (reproduced *ante*, p. 3). *See generally* Peter J. Galie, "*Ordered Liberty A Constitutional History of New York*," p. 165 (Fordham Univ. Press, 1996). *See also Seeley v. Stevens*, 190 N.Y. 158, 82 N.E. 1095 (1907) (the purpose of the civil service provision is to improve the standard of those holding subordinate positions in the public service and to terminate the vicious practice which had grown up of changing employees with every change in the appointing power); *Problems Relating to Executive Administration and Powers*, Report of the New York State Constitutional Convention Committee, 1938, pp. 170-79. Subsequently, Massachusetts became the

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[5] Following the Civil Service Reform Act of 1978, two agencies, the Office of Personnel Management and the Merit Systems Protection Board, replaced the Civil Service Commission. *See* 5 U.S.C. §§ 1101 & 1201 *et seq.*.

second state, followed by many other states and localities.[6]

Today, such provisions cover a majority of state and local government employees, whether constitutional, such as in New York, statutory or by local ordinance. *See* Osborne M. Reynolds, Jr., *Local Government Law* 303 (2d ed. 2001). By 1960, three-fourths of cities with populations over 10,000 had adopted a merit-based hiring and promotion system, including all cities with populations of at least a quarter million. *Id.*

Underlying these systems is the fact that governments provide a myriad of services, from maintenance of roads to sanitation to social services, and also security in the form of police and fire protection. As stated by one commentator, "… the quality of the services that any government provides is going to depend on the quality of the employees providing it . . . . There is no more important area of public administration than personnel and there may be no more important function of government than personnel administration." Jonathan Walters, Senior

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[6] *See* Massachusetts Civil Service Act, 1884 Mass. Acts 346, 1-2, cited in Note, Daniel D'Isidoro, "*The Massachusetts Civil Service Law: Is it Necessary to Destroy the Current System in Order to Save It?,*" 40 New Eng. L. Rev. 1103 (Summer 2006); *see also* N.J. Const. Art. VII, § I ("Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained * * * by examination, which * * * shall be competitive."); Ohio Const. Art. XV, § 10; Iowa Code Ann. §§ 400.1, 400.8-400.9; Conn. Gen. Stat. § 7-407 *et seq*.; New Haven, Conn., Code Art. XXX.

Correspondent, Governing Magazine, Address at a Pioneer Forum (Sept. 20, 2000), in Policy Dialogue, Nov. 2000, available at http://www.pioneerinstitute.org/pdf/pdialg_37.pdf (last checked January 17, 2010).[7]

B. Where Millions Of Hiring And Promotion Decisions Each Year Turn On Merit-Based Criteria, Principally Competitive Examinations, Principles of Finality and Repose Should Be Applied in Rejecting Untimely Disparate Impact Challenges.

While merit-based employment criteria may violate Title VII's disparate impact principles, *see*, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court has also recognized the importance of timely challenges under Title VII recognizing that statutes of limitations serve the important policies

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[7] In New York City alone, the scope of governmental services provided is enormous. To administer the City, with its over 8 million resident population, as well as an additional multi-million daily non-resident population, is a task of great magnitude. The City is approximately 320 square miles with approximately 6,000 miles of roads, which must be paved and constantly repaved, cleaned, lighted, policed and regulated with signs. Over 1.1 million children attend some 1600 schools, which are maintained and staffed by City personnel, while there are approximately 7894 uniformed sanitation workers and 2041 civil employees. The Fire Department employs 11,275 uniformed personnel, 3,071 Emergency Medical Services and 1,678 civilian personnel. A police force of over 38,000 is employed to protect the City. *See generally* Official New York City Website, http://www.nyc.gov/portal/site/nycgov/?front_door=true (website leads to specific agency sites, last checked January 21, 2010).

of finality and repose. *Ledbetter*, 550 U.S. at 630, citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-55 (1974). As this Court reiterated in *Ledbetter*, 550 U.S. at 630, they: ". . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Ledbetter*, 550 U.S. at 630, quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quotation omitted).

As this Court further held (550 U.S. at 630-31):

> The EEOC filing deadline "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks*, [449 U.S. 250, 256-257 (1980)]. Certainly, the 180-day EEOC charging deadline, 42 U.S.C. § 2000e-5(e)(1), is short by any measure, but "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation [citations omitted].

This Court also rejected the argument that employers would be protected by the equitable doctrine of laches. Instead, Congress had taken "a diametrically different approach, including in Title VII a provision allowing only a few months in most cases to file a charge with the EEOC. 42 U.S.C. § 2000e-5(e)(1)." *Ledbetter*, 550 U.S. at 632.

Ultimately, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco*, at 826. By operation of 42 U.S.C. §§ 2000e-5(e)(1) and 2000e-5(f)(1), a Title VII "claim is time barred if it is not filed within these time limits." *Ledbetter*, 550 U.S. at 632 (citations omitted). Accordingly, the *Ledbetter* Court "reject[ed] 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.*, 550 U.S. at 632. Rather, "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 of past discrimination." *Id.* at 632. *See also Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).[8]

[8] The specific holding in *Lorance* was superseded by statute in 1991, which expanded the scope of protection. *See* 42 U.S.C. § 2000e-5(e). Last year, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (codified as amended at 42 U.S.C. § 20000w-5(e)(3)), to expand, once again, the scope of protection.

See also Cox v. City of Memphis, 230 F.3d 199, 204 (6th Cir. 2000) (reviewing the few cases challenging appointments from eligible lists, including *Guardians*, and opining that the "better view is that promotion or hiring from an allegedly tainted promotions roster is not a "continuing act," but is merely the effect of previous discrimination"; "To 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 considerations given that many rosters are intended to be used for several years after they are promulgated"); *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 534 (5th Cir. 1986) (stressing policy consideration that "courts must be careful not to expose upon employers a virtually open ended period of liability" and that employers should not be faced with substantial uncertainty in making important staffing decisions, especially where lists may be used for a period of years); *see also Bronze Shields*, *supra*.

In contrast, in *United States v. City of New York*, the District Court denied the City's motion for partial dismissal of certain claims in the Vulcan intervenors' complaint on timeliness grounds by employing a continuing violation theory. *Id.*, 2009 U.S. Dist. LEXIS 5821.[9] Thus, despite this Court's

[9] The list resulting from the February 1999 examination, No. 7029, was used for the period from February 2001 until December 2004; subsequently, the list resulting from the December 20002 examination, No. 2043, was used from May 2004 through January 2009. After the January 2009 decision denying the motion to dismiss, in July 2009, the District Court denied the City's motion for partial summary judgment, (*footnote continues on next page*)

decision in *Ledbetter*, and the Seventh Circuit's decision in this case, the District Court looked back to the Second Circuit's 1980 decision in *Guardians*, wherein the Circuit rejected the City's position that the operative event in the hiring procedure was the promulgation of the eligibility list and that the Department's refusals to hire minorities were merely effects of earlier discriminatory conduct. *Id.*, 633 F.2d at 248, 251.

Based on Ledbetter and all of the above, *amici* urge that the filing period for challenging an examination based upon disparate impact begins to run upon the establishment of the eligibility list or, at a minimum, the date on which test-takers get notice of the examination results.

Indeed, the need for stability in municipal workforces and the ability to fill positions as quickly as possible is self-evident given the vast scope of ongoing services, particularly the critical needs in the uniformed services of police and fire

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and granted plaintiffs' motion for similar relief. *See United States v. The City of New York*, 637 F. Supp. 2d 77 (E.D.N.Y. 2009). The parties have recently briefed the scope of the remedial relief for the disparate impact claims and that issue is *sub judice* (*see* discussion, *post*, Sub. C). On January 13, 2010, the District Court issued a separate order granting a motion for summary judgment filed by the Vulcan Society on the four remaining claims, disparate treatment in violation of Title VII, intentional discrimination, in violation of the equal protection clause and 42 U.S.C. § 1981, and, separately, in violation of city and state human rights laws; and disparate impact in violation of the human rights laws. *See United States v. The City of New York*, 2010 U.S. Dist. LEXIS 2506 (E.D.N.Y. 2010).

protection. As noted above, *ante*, pp. 2-7, localities and states make millions of hiring decisions each year based on competitive examinations required to meet legally imposed merit and fitness requirements. Moreover, there are lengthy time frames involved in devising exams and establishing lists, particularly in large cities such as New York and Chicago.

Any extension to the time frame for a disparate impact challenge to the establishment of an eligible list would wreak havoc with efficient government operations and provision of services. It would also greatly increase the costs of such services at a time when state and local budgets are increasingly precarious.

As but one example, in 1986, N.Y. Civ. Serv. Law § 50-a, was passed, a portion of which is specifically geared to the City and its need for an effective in-place workforce, by limiting the time frame for individual challenges to the correctness of answers on examination. The supporting legislative memorandum urges the need for more efficient and effective personnel administration, resulting in more orderly promotions, thereby benefiting the City and the test takers (*see* L. 1986, c. 7830, Memorandum of Legislative Representative of the City of New York, 1986 McKinney's Session Laws of New York, p. 3000).

It states, in relevant part (*id.* at p. 3000):

> In recent years there has been a great deal of litigation arising out of civil service promotional examinations. This litigation cripples

> the administration of the civil service system and makes the orderly promotion of members within that system virtually impossible. In the City of New York, this is particularly true in the Police and Fire Departments, where almost every examination is subject to lengthy challenges. The litigation creates uncertainty about who is entitled to promotion. It often drags on for years with lower courts often reversing the personnel director's decisions and higher courts reversing the lower courts. Hanging over this litigation is the constant threat that appointments to jobs, including public safety jobs, will be enjoined.

In this regard, DCAS devises and administers hundreds of competitive examinations each year in a vast array of titles. The sheer numbers of exams to be designed, administered, and graded, and the time frames involved in this process and resultant legal challenges threaten to undermine the ability of government to perform the vast array of services needed.

Moreover, for certain tests, in major cities, there are thousands and thousands of applicants. For example, in this case, for the challenged, City of Chicago firefighter test, there were 26,000 applicants and, for the most recent 2007 New York City firefighter exam, there were 30,000 applicants. At the same time, this Court is acutely aware that police and fire protection are paramount goals in

today's climate of enormous concern about security and the need to be fully staffed for exigencies.

It is beyond question that the City and other municipalities are eager to comply with their anti-discrimination obligations under the law as well as to comply with the legally required merit hiring processes. However, corresponding to a government employer's need for finality and stability in its workforce, is the unfortunate reality that there is a growing belief that employers may not be able to devise any competitive written examination that will withstand scrutiny for disparate impact challenges, whether they employ outside consultants or not. The dissenting opinion in *Ricci* starkly recognizes this fact. *Ricci*, 129 S.Ct at 2703-4 (Ginsburg, J., dissenting) (opining that reliance on written tests for the position of fire officer is "questionable to say the least" and further opining that "the qualities required for such position are not well measured by written tests").

Even in 1967, when the New York State Constitution was revised, the Temporary State Commission recognized that the use of competitive written examinations had been particularly detrimental at professional and managerial levels. The Commission emphasized: "It is difficult to devise written examinations which measure the skills, judgment and character required for higher positions." *See* State of New York Temporary State Commission on the Constitutional Convention (1967), *State Government 14*, at 213.

Furthermore, while some commentators have suggested that there are alternative preferable tests, such as assessment centers, that

type of test is impossible for large employers who may have thousands and thousands of applicants for positions such as entry-level firefighters. For example, for the most recent firefighter test given by the City in 2007, there were close to 30,000 applicants and the written test was administered to over 22,000 candidates. Moreover, such alternative type tests have other drawbacks, which make them impossible for use for large numbers, including issues of maintaining the integrity of the test and the time involved for personal administration.

Faced with the *Ricci* decision, moreover, employers are faced with a difficult situation of being in a no-win situation with regard to hiring from established civil service lists following competitive examinations. The reality is that municipalities will bear the burden of litigation in virtually every case in which there is a dispute, with such disputes running over many years even if employers may eventually prevail. *See*, *e.g.*, *Lewis*, 528 F.3d 488 (involving over eleven years of litigation over the fire department's hiring plan).

In this regard, the sheer number of exams that must be given compounds the enormous rising litigation costs, which are magnified in light of State and local budget shortfalls due to ongoing recent economic downturns and budget pressures. As IMLA previously described in its *amicus* brief in *Ricci*, "States face a budget shortfall of billions of dollars –as much as 17% of their ordinary budgets—now, a shortfall projected to get worse in the next two fiscal years." Brief of *Amicus* IMLA in *Ricci v. DeStefano*, dated March 25, 2009, 2009 U.S. S. Ct. Briefs LEXIS 267. *See also* Elizabeth

McNichol & Nicholas Johnson, Ctr. On Budget & Policy Priorities, *Recession Continues to Batter State Budgets; State Responses Could Slow Recovery* at 1 (updated Dec. 18, 2009), http://www.cbpp.org/files/9-8-08sfp.pdf (last checked January 15, 2010) ("The worst recession since the 1930s has caused the steepest decline in state tax receipts on record. As a result, even after making very deep cuts, states continue to face large budget gaps").

The aggregate state budget shortfall is estimated to be at least $350 billion through fiscal year 2011. *Id.* In response to these extreme budget pressures, 83% of cities have cut expenditures and services; 69% have already laid off employees. Chris Hoene, Nat'l League of Cities, Research Brief on America's Cities, Issue 2009-1, *Fiscal Outlook for Cities Worsens in 2009* at 1 (Feb. 2009).[10]

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[10] In New York City, there is a projected $4 billion deficit gap and economic conditions continue to worsen, with tax revenues continuing to decline sharply. *See* Press Release (PR) 051-09, "*Mayor Bloomberg presented his Fiscal Year 2010 Preliminary Budget*" (January 30, 2009), http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2009a%2Fpr051-09.html&cc=unused1978&rc=1194&ndi=1. More recently, Governor Paterson has taken such measures as withholding a portion of the budget to localities, including the City, and predicting more deficits ahead. *See* State of the State Address 2010, Governor David A. Paterson, *and* Press Release, http://www.state.ny.us/governor/keydocs/speech_0106101.html;http://www.budget.state.ny.us/pubs/press/2010/pressRelease10_eBudget01.html (summarizing the Executive 2010-11 Budget including proposals as to the $7.4 billion budget gap).

Furthermore, while the lawsuits proceed, a local government may be precluded from filling the affected positions, which has significant adverse effects on the delivery of important public services. In any event, as this Court is well aware, it is simply not a viable solution to stop filling vacancies while the use of a list is being litigated. Moreover, the protracted periods of confusion that ensue for government employers and employees when ongoing hiring and promotion decisions are being challenged impairs effective management and provision of services.

For all of the above, reasons, therefore, the Seventh Circuit's recognition that the statute of limitations cannot be reopened with every single hiring or promotion decision from an eligible list is correct. It promotes the effective provision of public services and efficient government operations.

C. There Are Many Difficult Remedial Relief Issues Arising From An Open-Ended Statute of Limitations.

Aside from the uncertainty and disruption which is caused by employing a continuing violation theory and the consequent open-ended liability for employers, another important problem is that the remedial relief process is increasingly difficult. In the relief phase, putting aside the relatively discrete act of quantifying money damages, a court must engage in an extremely detailed fact-intensive inquiry to identify victims of the discriminatory practice for the purpose of making appointments and awarding competitive seniority. Such an individualized inquiry must be cognizant of the innocent non-victims, who will

inevitably be affected by any change in their competitive seniority, and therefore any injunctive relief must be narrowly tailored to minimize the impact on such innocent non-victims.

As this Court explained in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-72 (1977):

> The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, "recreate the conditions and relationships that would have been had there been no" unlawful discrimination. *Franks*, 424 U.S., at 769. This process of recreating the past will necessarily involve a degree of approximation and imprecision. Because the class of victims may include some who did not apply for line-driver jobs as well as those who did, and because more than one minority employee may have been denied each line-driver vacancy, the court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were

discriminatorily refused to class members.

> Moreover, *after the victims have been identified and their rightful place determined, the District Court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrong doing* (emphasis added).[11]

Indeed, in the case the City is now litigating, *United States v. The City of New York*, following its decision on Title VII liability against the City, the District Court is considering the scope of the

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[11] *See also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 578-79 (1984) (citations omitted) ("mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him. Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a nonminority employee laid off to make room for him. He may have to wait until a vacancy occurs, and if there are non minority employees on layoff, the court must balance the equities in determining who is entitled to the job; *Evans v. Evanston*, 881 F.2d 382, 385-86 (7th Cir. 1989), *cert. denied*, 505 U.S. 1219 (1992) ("While there is much talk in the cases about 'make whole' relief, this talk has reference to cases where it is reasonably clear that, had it not been for the discriminatory behavior, the plaintiff would have got (or retained) the job or other employment benefit in issue, and where making the plaintiff whole would not unduly injure innocent third parties.") (citations omitted); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976).

appropriate remedial relief. In so doing, it has again denied a motion by the union, the Uniformed Firefighters' Association ("UFA"), to intervene, unless the UFA provides a further explanation as to why it should be permitted to take a position which favors one group of members over the others. *United States v. The City of New York*, 2009 U.S. Dist. LEXIS 88467 (E.D.N.Y. 2009).

Specifically, the UFA claimed an interest in relation to retroactive competitive seniority that may be implicated in the remedial order. The UFA asserted that: "If successful, persons granted the retroactive seniority could, in effect, leap-frog over incumbents who have actually served as firefighters for the full term of their seniority claim. Such incumbents could, therefore, be denied promotion or suffer a significant delay in moving to a higher rank. Similarly, the ability of incumbents to transfer to more desirable fire companies or to obtain higher paying special assignments could be adversely affected"; it also asserted that it has "an interest relating to issues of safety and firefighter age that might be implicated by a remedial order" as well as issues of safety and firefighter age. *Id.*

By recognizing the need for a concrete short statute of limitations from the time an eligibility list is established, this Court will help ensure a stable workforce and minimize the difficulties in shaping remedial relief which is fair to all concerned.

CONCLUSION

For all of the above reasons, and those stated in the City of Chicago respondent's brief, employers need finality with respect to disparate impact challenges to competitive examinations required by law, and the certainty and repose that the short statute of limitations brings. This is especially important to ensuring a stable efficient workforce to maintain the security and well being of cities in these difficult economic and troubled times. Accordingly, the City and IMLA urge affirmance of the Seventh Circuit's judgment dismissing the action on grounds of untimeliness.

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the City of New York,
100 Church Street
New York, New York 10007
(212) 788-1033 or 1010

LEONARD J. KOERNER*
GEORGIA M. PESTANA
ELIZABETH SUSAN NATRELLA
of Counsel.

*Counsel of Record

INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION, INC. (IMLA)
7910 Woodmont Ave.,
Suite 1440
Bethesda, Maryland 20814
(202) 466-5424, x. 112