No. 08-974

In the
Supreme Court of the United States

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

Petitioners,

v.

CITY OF CHICAGO, ILLINOIS,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the limitations period on a Title VII claim for disparate-impact from an examination and eligibility list created based on examination results starts to run only when the list is adopted and announced, or also later, upon each use of the same list.

2. Whether a plaintiff may bring a Title VII claim alleging that an employer's use of a race neutral written employment examination has an unlawful disparate-impact without a showing of intentional discrimination.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Respondent City of Chicago.[1]

For 35 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF participated as amicus curiae in nearly every major case involving racial classifications heard by this Court over the past three decades, including *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF also participated as amicus curiae in cases before this Court involving the scope and intent of Title VII of the Civil Rights Act of 1964, such as *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2001); and *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

This case raises important issues of constitutional law and statutory interpretation regarding the length of the limitations period for a disparate-impact lawsuit under Title VII of the Civil Rights Act of 1964. Amicus believes that its public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Less than a year after this Court's landmark decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), holding that an employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability before it can engage in intentional discrimination, this Court is presented with another case revolving around disparate-impact liability. Like in *Ricci*, the results of an objective written test are alleged to violate Title VII of the Civil Rights Act of 1964 (Title VII). Here, however, the issue centers on the length of the limitations period for bringing a disparate-impact lawsuit.

Public policy supports a steadfast limitations period which begins to run for all applicants at the same time. Employers use merit-based testing because it provides objective criteria for determining the best qualified applicants. Employers need to be able to rely on the results of these tests. A limitations period that starts anew each time an employer hires from the applicant pool, provides no security for employers.

Defending and avoiding disparate-impact lawsuits are extremely costly. With the prospect of costly litigation looming over the heads of employers throughout the life of a test, employers will turn to alternative methods to avoid liability, such as racial balancing and racial quotas. Moreover, some employers will choose not to hire minorities for fear of liability or, where possible, choose to move to less minority heavy locations altogether.

Congress has expressed a clear intent for a short filing requirement. A strict limitations period that places all applicants on the same clock encourages optimal enforcement of Title VII. All of the information a plaintiff needs to file a disparate-impact claim—her own results and the overall racial composition of the results—with the Equal Employment Opportunity Commission (EEOC) is known to a test taker at the time she receives the test results. Thus, this Court should affirm the decision of the court below finding that the limitations period on a Title VII disparate-impact claim begins to run from the date of receipt of the test results.

Given the frequency of constitutionally questionable practices and difficulty of implementing objective practices that easily withstand a disparate-impact challenge, this case also provides this Court with an opportunity to simplify the doctrine in this area of the law, consistent with constitutional values, and strike down disparate-impact liability as unconstitutional under the Equal Protection Clause. The congressional enactment of the disparate-impact provisions is fundamentally incompatible with the Constitution's guarantee of equal protection. The

provisions require both employers and the courts to make suspect racial classifications.

The disparate-impact provisions of Title VII also violate the Equal Protection Clause when employers use the statute to make suspect racial classifications. While statistical disparities are inevitable in the workforce, the specter of disparate-impact liability forces employers to use racial classifications, racial balancing, and racial quotas to combat these disparities in order to avoid potentially catastrophic lawsuits. So long as disparate-impact claims remain viable, individuals throughout the country are sure to have their right to equal protection violated again and again. In *Ricci*, Justice Scalia recognized that the Court "merely postpone[d]" the day when the constitutionality of the disparate-impact provisions would be decided. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring). This Court now has another opportunity to right the wrong recognized by Justice Scalia. This Court should strike down disparate-impact liability as a violation of the Equal Protection Clause.

ARGUMENT

I

THE LIMITATIONS PERIOD FOR A TITLE VII DISPARATE-IMPACT CLAIM SHOULD BEGIN TICKING FOR ALL APPLICANTS AT THE SAME TIME

Instead of risking disparate-impact liability, employers faced with a open-ended limitations period are more likely to inject race into their decision-making to arrive at a predetermined racially-balanced work force. Title VII would become incoherent if it consistently results in employers adopting employment

practices solely to create a racial balance. *See Ricci*, 129 S. Ct. at 2675; *see also* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 Cato Sup. Ct. Rev. 53, 83 (arguing that "Title VII's disparate-impact provision, as currently drafted, cannot survive a challenge based on the Equal Protection Clause").

Under Petitioners' argument, however, each selection of an applicant from the list of examination results would restart the limitations period, imposing open-ended liability on employers for their use of merit-based testing. As the Seventh Circuit observed below:

> The plaintiffs received notification of their "qualified" status in 1995; could they 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 qualified" part of the hiring list? The answer implied by the plaintiffs' argument is "yes."

Lewis v. City of Chicago, 528 F.3d 488, 493 (7th Cir. 2008). Petitioners' approach to Title VII's statute of limitations provides no principled limit to an employers' disparate-impact liability.

A. A Limitations Period That Begins Running for All Applicants Equally Would Bring Title VII's Disparate-Impact Provisions in Line with Its Disparate-Treatment Provisions

To maintain a Title VII lawsuit under a disparate-treatment theory, a plaintiff must file a charge of

discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) ("The charge . . . must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred."). This requirement is akin to a statute of limitations, and failure to file a timely charge of discrimination renders a claim time-barred. *See, e.g.*, *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987); *Borrero v. Am. Express Bank Ltd.*, 533 F. Supp. 2d 429, 435 (S.D.N.Y. 2008).

This Court has recognized that the ultimate legal issue in a disparate-impact case is the same as in a disparate-treatment case. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). That is, a plaintiff proceeding under either disparate-impact or disparate-treatment must ultimately establish *discrimination*. The *Watson* Court stated that a plaintiff challenging a particular employment practice must go beyond mere statistical disparities and show that the practice "has caused the exclusion of applicants for jobs or promotions *because of their membership in a protected group*." *Id.* at 994 (emphasis added).

Thus, in determining when the limitations period starts to run for disparate-treatment, "'[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful.'" *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (citation and emphasis omitted). "The emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present *violation* exists.'" *Id.* (quoting

United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).

The alleged racial discrimination in this case, if any, resulted from the test. Here, the City of Chicago (City) had ranked the test takers according to their scores on a written test. *Lewis*, 528 F.3d at 490. All of the test takers learned of their results and the likelihood that they would be allowed to continue with the hiring process based on a notice that the City mailed to each of them. *Id.* Furthermore, even those who received the highest marks on the test were aware that only a third of them would be hired in the next three years. *Id.* Thus, those who were not well-qualified were unlikely to be hired.

The City's ranking and notification of the test results was based solely on the applicants' scores—an applicant's race had no bearing on either the rankings or the mailed notification. Yet, all of the alleged discriminatory action by the City was known by the applicants at this point, namely, that a disproportionate number of black applicants did not receive the highest marks on the test. *Id.* It was also widely known that the selection of test takers for employment would be based on the results of the test on a rolling basis in the foreseeable future. The selection of an applicant, a race-neutral act, could, and was likely to, occur years after the test was administered.

Since the purpose of the disparate-impact provisions of Title VII is the same as the purpose behind its disparate-treatment provisions, the limitations period should begin to run in the same manner—when the alleged discriminatory act became known. When a disparate-impact claim is based on

objective, merit-based testing, the alleged discriminatory act is the statistical racial disparity in the test results. Thus, when the results of test are known by the applicants, the statute of limitations should begin to run.

B. A Limitations Period That Runs for All Applicants Equally Squares with Congressional Intent and Would Encourage Optimal Enforcement of Title VII

The limitations period should begin to run for all applicants equally—when they are notified of their test results. This Court should set clear limits on Title VII disparate-impact liability to avoid and reduce the problems resulting from uncertainty in this area of the law. "Even within the world of Title VII, the social goal should not be the *maximum* enforcement of the antidiscrimination laws but instead their *optimal* enforcement, given both the frequency and severity of errors of overenforcement and underenforcement." Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 225 (1992). Such a rule would encourage the prompt resolution of claims against allegedly discriminatory tests.

By selecting the short EEOC charging deadlines, "'Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.'" *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007) (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980)).[2] Further, "[t]his

[2] After *Ledbetter*, Congress enacted a statute so that claims (continued...)

short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation." *Id.* at 630-31. The short filing requirement forces prospective plaintiffs to file early, so that the EEOC can begin investigating any alleged discrimination. "[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit"; rather,

> [t]he function of a Title VII charge . . . is to place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination. Only if the Commission, on the basis of information collected during its investigation, determines that there is "reasonable cause" to believe that the employer has engaged in an unlawful employment practice, does the matter assume the form of an adversary proceeding.

EEOC v. Shell Oil Co., 466 U.S. 54, 68 (1984).

Employers can only rely on the results of merit-based testing if they know that the limitations period begins running from the time of notification. The act of selecting applicants from a list of testing results is a

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[2] (...continued)
with respect to discrimination in compensation accrue when someone "becomes subject to" or "is affected by application of" a "discriminatory compensation decision or other practice." 42 U.S.C. § 2000e-5(e)(3)(A).

facially race-neutral act. As the Sixth Circuit has recognized, where promotions were made from an eligibility list of test-results arranged in rank order, the eligibility list for promotions "was neutral on its face" and "any discrimination occurred in the compilation of the list." *Cox v. City of Memphis*, 230 F.3d 199, 204 (6th Cir. 2000); *cf. Evans*, 431 U.S. at 558 (finding that a seniority system was "neutral in its operation" because it did not discriminate against former employees or treat former employees discharged for a discriminatory reason differently than those who were not).

This Court has recognized that employers should be able to rely on race-neutral employment practices without fear of disparate-impact liability. This Court has held that, when a seniority system is nondiscriminatory facially and as applied, the allegedly discriminatory adoption of the system triggers the limitations period. *Lorance v. AT & T Techs., Inc.*, 490 U.S. 900, 911 (1989).[3] The *Lorance* Court reasoned that "allowing 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 § 703(h) [of Title VII,] was meant to protect." *Id.* at 912.

In any statute of limitations, "'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.'" *Ricks*, 449 U.S. at 259-60 (quoting *Johnson v. Ry. Express*

[3] After *Lorance*, Congress enacted a statute so that claims of intentional discrimination involving seniority systems accrue when the system is adopted or applied. 42 U.S.C. § 2000e-5(e)(2).

Agency, Inc., 421 U.S. 454, 463-64 (1975)). With Title VII, the 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*." *Id.* at 256-57 (emphasis added). Title VII's statute of limitations "'represent[s] a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time.'" *Ledbetter*, 550 U.S. at 630 (quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). Likewise, employers should not be exposed to open-ended liability for race-neutral acts based on unequal testing results. *See id.*; *Lorance*, 490 U.S. at 912; *Cox*, 230 F.3d at 204.

II

THE COURT SHOULD HOLD THE DISPARATE-IMPACT PROVISIONS OF TITLE VII UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE

Aside from the statute of limitations concerns in disparate-impact cases raised here, disparate-impact liability presents serious constitutional concerns. In *Ricci*, Justice Scalia recognized a significant conflict between "the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 [and] the Constitution's guarantee of equal protection." *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring). Now, less than a year since this Court's landmark decision in *Ricci*, this Court is again presented with an opportunity to invalidate the disparate-impact provisions of Title VII.

Classifications based on race are at the heart of what the Equal Protection Clause was designed to eradicate. *Parents Involved*, 551 U.S. at 730; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 504 (2003). Racial classifications, regardless of whether they are enacted to benefit or burden minority groups, are subjected to strict scrutiny. *Croson*, 488 U.S. at 494. Any watering down of equal protection review will "effectively assure[ ] that race will always be relevant in American life, and that the ultimate goal of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." *Croson*, 488 U.S. at 495 (citations & quotation marks omitted). Yet, the disparate-impact provisions of Title VII create or permit racial classifications in two distinct ways—first, "in the legislation itself, which would subject the congressional enactment to strict scrutiny; second, in actions taken by public employers to comply with the legislation." Marcus, *supra*, at 62.

A. The Enactment of the Disparate-Impact Provisions of Title VII Violates the Equal Protection Clause

The disparate-impact provisions of Title VII were codified in the Civil Rights Act of 1991. Title VII now reads, in pertinent part:

> An unlawful employment practice based on *disparate impact* is established under this subchapter only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a *disparate impact* on the basis of race, color, religion, sex, or national origin and the

> respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(A) (emphasis added).

While nothing in the disparate-impact provisions "make[s] use of express racial classifications, . . . [a] plaintiff cannot bring a disparate impact claim without a statistical showing that sorts employees or applicants into groups, and neither the EEOC nor a court can assess a disparate impact claim without deciding whether the classification system the plaintiff used is accurate." Primus, *supra*, at 508. Thus, the statute requires potential plaintiffs, as well as the EEOC and courts, to make explicit racial classifications in order to give the statute effect.

As a consequence of the enactment of the disparate-impact provisions of Title VII, employers and courts necessarily make explicit racial classifications. While the racial classifications are not inherent in the statute, they are a result of the enactment, and they are no more constitutional just because the statute forces third parties to make the classifications. Because the "Federal Government is [directly] prohibited from discriminating on the basis of race, . . . it is also prohibited from enacting laws mandating that third parties . . . discriminate on the basis of race." *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) (citations omitted). In other words, the enactment of the disparate-impact provisions of Title VII is the impetus of countless impermissible racial classifications, and it must be subjected to the commands of the Equal Protection Clause.

The congressional intent of the disparate-impact provisions also calls into question the constitutionality of those provisions. Congress clearly has the power to legislate to prevent and remedy intentional discrimination. *See* U.S. Const. amend. XIV, § 5; U.S. Const. amend. XIV, § 2. To this end, Title VII was initially enacted as a tool to eliminate intentional employment discrimination. *See Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 93-94 (1981); *Johnson*, 421 U.S. at 459. Yet, the disparate-impact provisions of Title VII do not "smoke out" intentional discrimination since they fail to provide a defense of "good faith" for the employer. *Ricci*, 129 S. Ct. at 2682-83 (Scalia, J. concurring); *see also* Primus, *supra*, at 521-22.

Laws that are enacted with a discriminatory purpose or intent "show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Because disparate-impact is not used as a tool to remedy intentional discrimination, the congressional motives for the enactment of the disparate-impact provisions of Title VII must be called into question.

This Court has consistently decried as "patently unconstitutional," governmental policies designed solely to achieve a racial balance. *See Grutter*, 539 U.S. at 330; *Parents Involved*, 551 U.S. at 723. Yet, "[f]ormer White House counsel Boyden Gray has disclosed that a 'principal motivation' for the Civil Rights Act of 1991, which codified the disparate-impact provision, was to achieve racial balancing." Marcus, *supra*, at 66; *see also* C. Boyden Gray, *The Civil Rights*

Act of 1991: A Symposium: Disparate Impact: History and Consequences, 54 La. L. Rev. 1487, 1491 (1994) ("There were private indications that a desire to codify a quota regime was the principal motivation behind the legislation."). Further, during the enactment debate, Congress recognized that disparate-impact would result in discriminatory mandates being placed on employers.

> Virtually all of the congressional debate that culminated in the Civil Rights Act of 1991 dealt with whether and to what extent the law of "disparate impact" under Title VII encouraged employers to implement quotas or other forms of discrimination in favor of minorities. In the end, Congress codified the judicially-created doctrine of disparate impact with minor modifications.

Nelson Lund, *The Law of Affirmative Action in and After the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 Geo. Mason L. Rev. 87, 88 (1997) (footnote omitted). Since the disparate-impact provisions were enacted with full discriminatory intent, with an eye towards achieving racial balancing in the workforce, they are violative of the Equal Protection Clause and "patently unconstitutional." Because there is no compelling interest in achieving a racially balanced workforce, the enactment of the disparate-impact provisions of Title VII violate the Equal Protection Clause.

B. The Disparate-Impact Provisions of Title VII Require Employers to Violate the Equal Protection Clause

In addition to being an unconstitutional enactment, the disparate-impact provisions of Title VII also violate the Equal Protection Clause by requiring employers to classify persons on the basis of race. Employers who use tests as a component of their hiring or promotion process must ensure that such tests are content-valid and job-related. 42 U.S.C. § 2000e-2(h) (stating 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 such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin"). Yet, disparate-impact liability has forced employers to resort to racial balancing policies to ensure compliance with Title VII's disparate-impact provisions. Moreover, the fear of liability from disparate-impact suits is causing employers to abandon objective testing altogether.

1. The Fear of Disparate-Impact Lawsuits Causes Employers to Resort to Racial Balancing and Racial Quotas

In trying to prevent an employer's illegal practice from being upheld, disparate-impact claims have led to Title VII liability for legitimate practices that merely have an unequal effect. *See generally* Epstein, *supra*, at 222-25 (discussing overenforcement of Title VII in terms of statistical error). Decades of disparate-impact challenges "have failed to produce tests without disparate impact, which was presumably the larger

original goal." Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 755 (2006).

The use of race-neutral, content-valid, and job-related tests benefits both employers and employees: the employers ascertain the best candidates for the position—those who can demonstrate the skills necessary to succeed in the job; while employees proceed with the application or promotional process confident that their selection or rejection is not based on prohibited factors such as race or sex—but on merit.

The benefits of objective testing are lost if mere statistical disparities in pass/fail rates are sufficient to establish discrimination and generate costly litigation. It is undeniable that disparities exist in the workforce. However, the tendency of certain people to gravitate towards certain jobs does not mean that employers are discriminating. *See Watson*, 487 U.S. at 992 (O'Connor, J., plurality) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."). Justice O'Connor observed further that, "It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Id.* (O'Connor, J. plurality).

Despite the inevitability of statistical disparities in certain workforces, disparate-impact liability requires employers to be on the lookout for any statistical disparity. Because of the prospect of a catastrophic disparate-impact lawsuit, employers must

take proactive means to remedy what are most likely chance disparities in their workforce. The "inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures." *Id.* (O'Connor, J., plurality).

Because of the threat of disparate-impact liability, "employers are now required to mount the extensive research and preclearance programs necessary to validate a test tailor-made to their own situation," and such "job testing requires heavy expenditures in verification." Epstein, *supra*, at 215. In *Ricci*, this Court noted that the City of New Haven hired a consultant to develop and administer examinations for its firefighter promotional process at a cost of $100,000. *Ricci*, 129 S. Ct. at 2665. But no matter how expensive or well-developed, professionally-developed tests do not protect an employer from a disparate-impact suit. *See Watson*, 487 U.S. at 987.

As a result, "Title VII makes it more costly to employ black workers; it also makes it more costly to fire them because the firm may have to incur the expense of defending a Title VII disparate-treatment suit when a black employee is discharged." Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. Pa. L. Rev. 513, 519 (1987). The threat of disparate-impact in particular "makes it more costly for a firm to operate in an area where the labor pool contains a high percentage of blacks, by enlarging the firm's legal exposure." *Id.* Consequently, Title VII may have the unintended effect of *discouraging* employers from hiring minorities. In *Terry Properties, Inc. v. Standard Oil Co. (Ind.)*, 799 F.2d 1523 (11th Cir. 1986), the defendant sought to build a plant in a location with fewer than 35 percent minority workers "because

it had previously experienced difficulty meeting affirmative action goals in communities with proportionately larger minority populations." *Id.* at 1527.

Worse yet, the excessive threat of disparate-impact claims encourages employers to select applicants based on racial quotas. "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted." *Watson*, 487 U.S. at 993 (plurality opinion). To avoid that result, this Court rejected the argument that race-based employment decisions could be justified by the employer's mere good-faith belief that its actions were necessary to avoid a Title VII disparate-impact lawsuit. *Ricci*, 129 S. Ct. at 2676. This Court recognized that employers would manipulate employment practices to create a "preferred racial balance." *Id.* at 2675 (citing *Watson*, 487 U.S. at 992).

As a consequence of the disparate-impact provisions of Title VII, employers engage in acts that blatantly violate the Equal Protection Clause. "An employer seeking to achieve a particular racial outcome need only identify a racial disparity, locate a selection mechanism that achieves the desired demographic mix, and identify whatever business necessities best justify the mechanism." Marcus, *supra*, at 64.

The focus on statistics is the natural, unconstitutional outgrowth of the disparate-impact provisions of Title VII. By placing the focus on statistics, the disparate-impact provisions of Title VII in turn require employers to adopt quota systems to

ensure compliance and to avoid liability. This Court in *Ricci* held:

> That would amount to a *de facto* quota system, in which a "focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures." Even worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance. That operational principle could not be justified.

Ricci, 129 S. Ct. at 2675 (citations omitted). This Court has consistently held that quota systems cannot be countenanced under the Equal Protection Clause. Racial quotas "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, 488 U.S. at 507. Under the Equal Protection Clause, racial quotas are an impermissible method of eliminating simple racial imbalance.

2. Continued Sanctioning of the Disparate-Impact Provisions of Title VII Will Lead to a Rejection of Merit-Based Testing

Originally adopted as a response to patronage, nepotism, and other non-merit based methods of choosing employees, merit-based testing has become essential for employers to hire the most qualified candidates for jobs. "For more than a half-century, employers, employment agencies, apprenticeship

committees, and others have used scored tests to assist in making selection decisions for employment opportunities, including hiring, job assignments, training, and promotion." Barbara L. Lindemann et al., 1 *Employment Discrimination Law* 161 (4th ed. 2007) (footnote omitted). As a result, private employers have increased their use of testing in recent years. "[O]verall employment testing, including personality tests, has been growing at a rate of 10% to 15% in each of the past three years" from 2001 to 2004. Rod Kurtz, *Testing, Testing* . . ., Inc., June 1, 2004.[4]

In thirty-four states, state and local government employers are required, *by law*, to use competitive examinations to select applicants for employment opportunities.[5] Indeed, Title VII recognizes that it is

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[4] *Available at* http://www.inc.com/magazine/20040601/managing.html (last visited Jan. 14, 2010). *See also* Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. Pa. J. Lab. & Emp. L. 279, 281 (2002) (noting an increase in personality tests since the federal ban on polygraph testing); Nancy Syverson, *Industrial Psychology at Work*, Indus. Maint. & Plant Operation, Apr. 10, 2001, *available at* http://www.impomag.com/scripts/ShowPR.asp?RID=1881&CommonCount=0 (last visited Jan. 14, 2010) (discussing the rise in personality testing).

[5] *See, e.g.*, Ala. Const. art. V, § 138.01(A); Ariz. Rev. Stat. Ann. § 38-1003(4); Ark. Code Ann. §§ 14-49-304(b)(2), 14-50-304(b)(2), 14-51-301(b)(2); Cal. Const. art. VII, § 1(b); Colo. Const. art. XII, § 13(1); Conn. Gen. Stat. §§ 5-195, 7-413; Haw. Rev. Stat. § 76-1; Idaho Code Ann. § 50-1604; 65 Ill. Comp. Stat. 5/10-1-7; Ind. Code §§ 4-15-2-12 to -15; Iowa Code Ann. §§ 341A.8, 400.8, 400.17; Kan. Stat. Ann. §§ 19-4311(a), 75-3746(h); Ky. Rev. Stat. Ann. §§ 67A.270, 90.160, 90.320, 90.350; La. Const. art. X, § 7; Mass. Gen. Laws ch. 31, § 6; Mich. Const. art. XI, § 5; Minn. Stat. §§ 44.06, 387.36(b)(2), 419.06(2), 420.07(2); Mont. Code Ann. §§ 7-

(continued...)

not an unlawful employment practice for an employer to give and act upon the results of any professionally-developed ability test so long as it "is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h).

The use of objective tests, however, does not insulate employers from a disparate-impact lawsuit. This Court has never given employers a "safe-harbor" from disparate-impact liability because they used a particular kind of test. *See Connecticut v. Teal*, 457 U.S. 440, 442 (1982) (rejecting "bottom-line" defense where an employer could avoid disparate-impact liability for a test if the "bottom-line" result of the promotional process was an appropriate racial balance). Nor can employers raise the affirmative defense of "good faith" in response to a disparate-impact claim. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975) (recognizing "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' ") (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)); *but see Ricci*, 129 S. Ct. at 2682-83 (noting that the lack of a good faith defense for disparate-impact liability calls into question the statute's constitutionality) (Scalia, J.

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[5] (...continued)
3-4258, 7-32-4108, 7-32-4111; Neb. Rev. Stat. §§ 19-1829, 23-2525(3), 23-2541(3); Nev. Rev. Stat. § 284.205; N.J. Const. art. VII, § 1, para. 2; N.M. Stat. § 10-9-13; N.Y. Const. art. V, § 6; Ohio Const. art. XV, § 10; 71 Pa. Stat. Ann. § 741.501(a); R.I. Gen. Laws § 36-4-17; S.C. Code Ann. §§ 5-19-20, 5-19-180; S.D. Codified Laws §§ 3-7-9, 3-7-11; Tenn. Code Ann. § 8-30-201(a); Tex. Loc. Gov't Code Ann. §§ 143.021, 143.025; Utah Code Ann. § 10-3-1007; Wash. Rev. Code §§ 41.08.050, 41.12.050(4); Wis. Stat. §§ 63.25(1)(a), 230.15(1); Wyo. Stat. Ann. § 15-5-106(b).

concurring). Rather, "the law, as outlined in the EEOC guidelines, requires an extensive validation of any test with a disproportionate impact." Epstein, *supra*, at 215. This includes showing that the results are applicable to the employer's special circumstances. *See* 29 C.F.R. § 1607.7A.

Under disparate-impact liability, an employer may be held liable for unequal results of testing, even if the employer had no discriminatory intent in selecting and administering the tests. *See Watson*, 487 U.S. at 987 ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."). Still, because of the utility of merit-based tests, employers continue to use them to select the best candidates for jobs. Moreover, Title VII recognizes the need for merit-based testing. 42 U.S.C. § 2000e-2(h).

The end result of requiring employers to focus on the statistical balance of their workforce is employers adopting racial quotas and engaging in racial balancing to avoid potential lawsuits. Even worse, employers are contemplating scrapping objective testing altogether. *See* Steve Bryant, *Police May Scrap Entrance Exam: Report*, NBC Chicago, Jan. 7, 2010.[6] Thus, merit-based testing, a tool recognized by Congress as vital to eliminating discrimination, and seen by businesses as vital to ensuring qualified employees, is threatened by disparate-impact liability. Because disparate-impact liability will continue to

[6] *Available at* http://www.nbcchicago.com/news/local-beat/chicago-police-scrap-entrance-exam-80790827.html (last visited Jan. 14, 2010).

weaken employers, this Court should take this opportunity to rule on its constitutionality.

Since Congress codified the disparate-impact provisions of Title VII, employers are forced to adopt racial quotas and racial balancing policies to avoid costly litigation. Because the disparate-impact provisions require unconstitutional racial quotas and racial balancing from employers, the disparate-impact provisions of Title VII violate the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, this Court should find the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 unconstitutional. In the alternative, the Court should hold that the statute of limitations for a disparate-impact lawsuit begins to run at the moment the test results are adopted and announced.

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Respectfully submitted,

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