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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

This case presents a narrowly focused dispute. In petitioners' view, when an employer repeatedly uses a non-job-related hiring practice that disproportionately excludes African Americans, each use violates Title VII's disparate-impact prohibition and therefore triggers a new deadline to file charges with the EEOC. In the City's view, if an employer first adopts an eligibility list and announces that it intends to use that list for subsequent hiring, the only actionable liability arises at the point of the list's adoption and announcement.

There are many complex questions about the operation of Title VII, but this is not one of them. The plain text of Title VII's disparate-impact provisions resolves this dispute in petitioners' favor. The City "use[d]" its practice of hiring only applicants who scored 89 or above on a 1995 exam to fill ten entry-level firefighter classes, and a portion of an eleventh class, over a six-year period. 42 U.S.C. § 2000e-2(k)(1)(A); *see also id.* § 2000e-2(a)(2), (h). Each of those uses "cause[d] a disparate impact" on petitioners, a class of African Americans who passed the test but scored below the 89 cut-off score. *Id.* § 2000e-2(k)(1)(A). And as the district court found (and no one now challenges), the cut-off score was not job-related. Petitioners were as qualified for firefighter jobs as those with scores of 89 or above. Each use of the City's hiring practice therefore independently violated Title VII's disparate-impact prohibition and triggered a new charge-filing period.

The City's contrary arguments are unconvincing. First, the City misconstrues the statutory text. The

City claims that the disproportionate exclusion of African Americans from each firefighter class was merely the "neutral" consequence of the adoption and announcement of the eligibility list. Petitioners agree that the initial adoption of the list violated Title VII. But an independent violation also occurred each time the City used its non-job-related practice to select applicants from a disproportionately white pool to fill firefighter vacancies. Each such use was a discriminatory denial of jobs to qualified applicants on account of race—one of the core injuries that Congress intended Title VII to prohibit.

Second, the City objects that the accrual rule for disparate-impact cases should not be more generous than the rule this Court has applied in disparate-treatment cases. But the rule compelled by Title VII's text is not more or less generous in either type of case. Rather, in both contexts, timeliness is governed by application of this Court's general Title VII accrual principle: A Title VII claim accrues each time an employer's actions meet all the required elements of a particular type of violation. Here, that occurred each time the City used its unlawful cut-off score to hire entry-level firefighter candidates.

The City relies on *United Air Lines, Inc. v. Evans* to argue that its discriminatory cut-off score was "merely an unfortunate event in history which has no present legal consequences." 431 U.S. 553, 558 (1977). But *Evans* was a disparate-treatment case. Although the adoption of an eligibility list based on an unlawful cut-off score was indeed an "unfortunate event," the City's use of this cut-off score in multiple rounds of hiring directly and repeatedly violated the disparate-*impact* provisions of Title VII. Like the

high school diploma requirement in *Griggs v. Duke Power Co.*, which was adopted almost ten years before Title VII was enacted, the City's non-job-related hiring practice was subject to challenge each time the City used it in a manner that caused a disparate impact. *See* 401 U.S. 424, 427 (1971).

Third, the City argues that the accrual rule compelled by Title VII's text will expose employers to open-ended liability. But the City could have achieved repose here simply by dropping its admittedly discriminatory cut-off score, instead of using it on multiple occasions. Moreover, employees have every incentive to file prompt charges because they may challenge only those uses that occur within the limitations period. The City's rule, by contrast, compels individuals to file charges before they can determine whether an employment practice has caused or will cause any practical harm. This would burden employees, employers, government enforcement agencies, and the courts with unnecessary proceedings.

ARGUMENT

I. The City's arguments are contrary to the plain meaning of Title VII.

Section 706(e) of Title VII operates as a statute of limitations. 42 U.S.C. § 2000e-5(e)(1). It requires that a lawsuit challenging employment discrimination be preceded by a charge timely filed with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." *Id.*

Where the challenged practice violates Title VII's disparate-impact prohibition, the violation occurs, and thus a new charge-filing period begins, each

time the requirements of § 703(k) are met—that is, each time an employer "uses a particular employment practice that causes a disparate impact," and the employer is unable to demonstrate that the practice is job-related. *Id.* § 2000e-2(k)(1)(A); Pet. Br. 18-19. This plain-meaning interpretation of § 703(k) is supported by other provisions of Title VII, including § 703(a)(2) and § 703(h). 42 U.S.C. § 2000e-2(a)(2), (h); Pet. Br. 23-27.

Applying Title VII's disparate-impact provisions to this case, a new charge-filing period commenced each time the City filled firefighter vacancies by using its practice of hiring only applicants whose exam results exceeded a statistically meaningless cut-off score that disproportionately excluded African Americans and bore no relationship to job performance. Pet. Br. 23-27; Pet. App. 31a-35a.[1]

The City raises a series of objections to petitioners' statutory analysis. These arguments all collapse under scrutiny.

A. Section 703(k) is the principal disparate-impact provision and is directly relevant to the timeliness of claims.

The City acknowledges that § 703(k) "describes what is needed to prove a disparate-impact claim," Resp. Br. 40, but contends nevertheless that this

[1] Although the City hired paramedics and military veterans with scores below the 89 cut-off score, petitioners follow the convention used by the parties and courts below and refer to the City's practice as hiring "only" applicants with scores of 89 or above to fill ten classes of firefighter candidates, and a portion of an eleventh class, from May 1996 through November 2002. Pet. Br. 6 n.1.

provision is irrelevant to "what is needed to trigger the limitations period." *Id.* at 38. The City is mistaken.

A Title VII charge must be filed "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). What constitutes an "alleged unlawful employment practice" and when it "occurred" can only be determined by reference to the substantive provisions defining the elements of a Title VII violation. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624, 628-29 (2007); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-13 (2002); Pet. Br. 17-19.

One of the principal substantive provisions defining the elements of a disparate-impact violation is § 703(k), which this Court has recognized as "the disparate-impact statute." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009). In enacting § 703(k) as part of the Civil Rights Act of 1991, Congress stated that the purposes of this subsection are "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits." Pub. L. No. 102-166, § 3(3), 105 Stat. 1071, 1071; *see also Ricci*, 129 S. Ct. at 2673. It is therefore both appropriate and necessary to look to the text of § 703(k) to determine when Title VII's charge-filing period begins to run in a disparate-impact case.[2]

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[2] Section 703(k) is titled "Burden of proof in disparate impact cases." 42 U.S.C. § 2000e-2(k). Far from undercutting the significance of § 703(k) for claim accrual, as the City claims, Resp. Br. 38, the title highlights the importance of this provision. It is well settled that "the burden of proof is an essential

When § 703(k) is properly interpreted and the statute is read as a whole, the City's argument that § 703(a)(2) is the sole pertinent provision for determining disparate-impact claim accrual, Resp. Br. 38, falls apart. Sections 703(k) and 703(a)(2)—as well as § 703(h), which forbids "action upon the results" of an employment test that is "used to discriminate"—are all complementary. 42 U.S.C. § 2000e-2(h); Pet. Br. 23-26; U.S. Br. 13-15.[3] When an employer "uses" a hiring practice with a disparate racial impact and thus commits a violation under § 703(k), or when it takes "action upon the results" of an employment test contrary to § 703(h), its actions also violate § 703(a)(2). Such uses "limit applicants for employment" in a manner that "deprive[s] or tend[s] to deprive" them of specific "employment opportunities." 42 U.S.C. § 2000e-2(a)(2).

Prior to the enactment of § 703(k) in 1991, § 703(a)(2) and § 703(h) provided the statutory basis

element of the claim itself . . . ." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 21 (2000); *see also Am. Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994) (stating that the burden of proof is "a part of the very substance of [the plaintiff's] claim and cannot be considered a mere incident of a form of procedure" (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942))). In any event, "the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947); *accord Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004).

[3] The City's concession that § 703(h) "is 'a definitional provision' that 'delineates which employment practices are illegal and thereby prohibited and which are not,'" Resp. Br. 41 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758 (1976)), is fatal to its argument that this provision, like § 703(k), is "irrelevant to accrual." *Id.*

for disparate-impact liability. *See, e.g.*, *Griggs*, 401 U.S. at 426 n.1, 433-36. But, as this Court has observed, § 703(k) "codif[ied]" an "express prohibition on policies or practices that produce a disparate impact." *Ricci*, 129 S. Ct. at 2672. The City's attempt to ignore a recent, express statutory text—and its consequent failure to harmonize all of Title VII's operative disparate-impact provisions—would nullify congressional intent and should be rejected. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 143-44 (2000).[4]

B. The City repeatedly *used* an unlawful hiring practice, and each use triggered a new claim under § 703(k).

1. The City alternatively argues that, even if § 703(k) is relevant, petitioners' EEOC charges were untimely because the City "use[d]" a practice that "cause[d] a disparate impact" only once: when it

[4] Contrary to the City's contention, Resp. Br. 12, 37-38, petitioners have relied on the plain meaning of Title VII throughout this litigation. The petition for certiorari invoked § 703(k), Pet. 26, and the City responded without claiming that it did not have fair notice, Supp. BIO 8-10. In the district court and court of appeals, petitioners argued—consistent with the statutory interpretation advanced in this Court—that each use of the City's hiring practice was a "fresh violation [of Title VII] for purposes of the statute of limitations." R. 74 at 7 (Pls.' Mem. Opp. Summ. J.); *see also, e.g.*, R. 302 at 2 (Pls.' Mem. Regarding Proposed Questions for Interlocutory Appeal); Pet. C.A. Br. 22 ("[E]very employment action taken pursuant to a *Griggs*-prohibited policy is a fresh violation of Title VII . . . ."). Even if petitioners' reasoning is more "pellucidly articulate[d]" in this Court, however, "parties are not limited to the precise arguments they made below." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)).

adopted an eligibility list that employed a non-job-related cut-off score to sort applicants who passed the 1995 exam into "well qualified" and "qualified" categories, and then announced that it would use this list for future hiring. 42 U.S.C. § 2000e-2(k)(1)(A); Resp. Br. 8-9, 11, 23-25, 40. After that, the City claims that it simply "used the list . . . to call from the 'well qualified' category." Resp. Br. 40. According to the City, that category was "facially neutral, and the list was used in a neutral manner." *Id.* at 31.[5]

Under the statute's disparate-impact provisions, however, employers are liable for "practices, procedures, or tests neutral on their face, and even neutral in terms of intent." *Griggs*, 401 U.S. at 430; *see also Ricci*, 129 S. Ct. 2672-73; *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). Section 703(k) prohibits employers from "us[ing]" a non-job-related hiring practice that has a disparate racial impact, regardless of whether such a use is a consequence—neutral or otherwise—of earlier violations. 42 U.S.C. § 2000e-2(k)(1)(A). Contrary to the City's contention, Resp. Br. 36-37, consequences are the very touchstone of a disparate-impact violation. *Griggs*, 401 U.S. at 432.

Moreover, the City did not use its eligibility list in "a neutral manner." Resp. Br. 31. It is entirely beside the point that the City applied the label "well

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[5] The City disavows, Resp. Br. 33, the court of appeals' reasoning that the City's adoption of its eligibility list was an "intervening neutral act." Pet. App. 4a-5a. As discussed in petitioners' opening brief, the court of appeals' analysis is just as flawed as the City's alternative formulation. Pet. Br. 40-43.

qualified" to the category of applicants who scored 89 or above. That category was nothing more than a direct translation of the discriminatory cut-off score. The accurate label would have been the "no more qualified" group. The City's attempt, Resp. Br. 11-12, to distinguish between use of this cut-off score to create an eligibility list, on the one hand, and the actual use of the list, on the other hand, is mere semantics. U.S. Br. 16; Pet. Br. 40-43.

If the City had simply used the discriminatory cut-off score eleven times, without announcing that it had adopted an "eligibility list," each hiring round plainly would have violated Title VII's disparate-impact provisions. On each occasion, the City would have had to consult raw test scores for all 22,000 applicants who passed the 1995 exam—each time selecting at random a sufficient number of applicants with scores of 89 or above to fill entry-level firefighter jobs. Thus, each of those hiring rounds necessarily would have involved the "use[ ]" of a cut-off score that, based on the district court's unappealed findings, "cause[d]" an unjustified "disparate impact" on African American applicants. 42 U.S.C. § 2000e-2(k)(1)(A); Pet. App. 15a, 42a-43a.

The City did not change the result in any way, or drastically reduce its liability, by adopting and announcing an eligibility list. The difference between a hiring process that relies on an eligibility list and one that does not is one of form, not substance. By using the discriminatory cut-off score to create an eligibility list, the City avoided using the entire pool of applicants to select at random, in each round of hiring, a sufficient number of applicants to fill a firefighter class.

Whether it used an eligibility list or not, the City relied, in each round of hiring, on a non-job-related cut-off score that it knew had a disparate impact on African American applicants. Either way, the end result was the same. In each round of hiring, the City filled positions by randomly selecting from a pool of disproportionately white applicants and thus disproportionately excluded African Americans who were no less qualified. *See* Pet. App. 60a.[6] And either way, the City rejected the readily available alternative of random selection from the entire pool of test-passers—an alternative that would have avoided all harm to petitioners caused by the discriminatory cut-off score. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).[7]

2. According to the City, it is "precisely because using the list limited petitioners' employment opportunities 'in the exact same way' as 'us[ing] the raw test results'" that "later use of the list had no disparate impact at all." Resp. Br. 35 (quoting U.S. Br.

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[6] Notwithstanding its concession that the ruling on liability is "unchallenged," Resp. Br. 32, the City tries to undercut the district court's finding that the cut-off score bore no relationship to job performance. Pet. App. 30a. But the City's assertion that applicants eventually hired from the "qualified" category "required remedial assistance," Resp. Br. 6, was expressly rejected by the district court. It found that the anecdotal evidence presented by the City on this point was "not convincing." Pet. App. 38a-40a & n.7.

[7] In fact, the City subsequently used this alternative from 2002 to 2007 to hire numerous applicants with scores between 65 and 88, after it had exhausted the pool of applicants with scores at or above 89. BIO 1 & n.1. There was no evidence that firefighters who scored between 65 and 88 performed worse on the job than those who scored 89 or above. Pet. App. 36a-37a.

16). But the plain language of the statutory text forecloses the City's argument. Section 703(k) does not exempt "uses" of a non-job-related practice that cause a disparate impact if they limit employment opportunities in the "same way" as prior Title VII violations. 42 U.S.C. § 2000e-2(k)(1)(A); Pet. Br. 29-30; U.S. Br. 24. Moreover, § 703(h) expressly states that a discriminatory "test," "its administration," and "action upon the results" can each be violations of Title VII, even though such violations necessarily will be related and may yield the same disparate impact. 42 U.S.C. § 2000e-2(h).

There is also a larger point here. Even the City acknowledges that its adoption and announcement of the list were merely "the foundation for later hiring eligibility." Resp. Br. 26. But when the eligibility list was announced, no hiring decisions had been made. The adverse impact on petitioners caused by the City's announcement that it would use the unlawful cut-off score, and the list that embodied that score, was dwarfed by the new and distinct harm caused when the City actually put its hiring practice into operation. It was the City's repeated uses of a non-job-related cut-off score—whether or not it was in list form—that resulted in the award of jobs to a group of applicants that disproportionately excluded African Americans.

To be clear, petitioners agree with the City and the United States that the City's adoption and announcement of the list independently violated Title VII, and therefore petitioners' charges would have been timely if filed within 300 days of those actions. *See* Resp. Br. 24, 30; U.S. Br. 23. But the remedy in such an action would have been an order preventing

the City from using the cut-off score and eligibility list. *See, e.g.*, *Vulcan Pioneers v. N.J. Dep't of Civil Serv.*, 832 F.2d 811, 816-17 (3d Cir. 1987). In fact, the claim would have been that any future uses would be unlawful. As the district court found, those uses were unlawful, and every time the City filled firefighter vacancies on that basis, it violated Title VII and started a new charge-filing period.

3. The City argues that the only disparate impact on petitioners was caused when it announced the eligibility list, because petitioners knew at that point what the future consequences were likely to be. Resp. Br. 10-11, 13, 27-29, 46. However, a disparate-impact claim is not triggered by the mere fact that an employer places job applicants or employees on notice of a discriminatory policy and its potential future impact on them. Section 703(k) does not make notice an element—let alone the defining element—of a disparate-impact violation. 42 U.S.C. § 2000e-2(k)(1)(A). This Court has stated that notice is insufficient by itself to trigger accrual of Title VII claims. *See Morgan*, 536 U.S. at 113; *see also Ledbetter*, 550 U.S. at 636.[8] Regardless of when they were notified, petitioners were entitled to take the full limitations period after each use of the City's discriminatory hiring practice to develop and file their EEOC charges.

The City attempts to bolster its analysis by arguing, without citation, that a job applicant's Title VII claim accrues when he or she is "rejected for em-

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[8] Lack of knowledge could toll a statute of limitations after a claim accrues; but petitioners do not assert in this Court that the charge-filing period should be tolled. Pet. Br. 13 n.8.

ployment" and "does not depend on whether an employer hires others." Resp. Br. 26; *see also id.* at 11. This assertion is incorrect. First, petitioners were rejected for employment each time the City passed them over by filling entry-level firefighter positions from a pool of disproportionately white applicants with no greater qualifications. Pet. Br. 20. Second, a disparate-impact violation is not established solely by reference to the impact on job applicants or employees who claim to have been injured. Determining whether a practice "causes a disparate impact," 42 U.S.C. § 2000e-2(k)(1)(A), obviously requires comparison to similarly situated individuals who benefit from the practice. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988); Pet. Br. 21-22.

C. The City's hiring practice caused a disparate impact in each round of hiring.

After arguing that its eleven rounds of hiring were not independently actionable, the City switches gears. Even if each round could "be charged as a new violation" of Title VII, Resp. Br. 33, the City claims that petitioners "never proved, or even attempted to prove," that each of these uses caused a disparate impact. *Id.* at 32; *see also id.* at 40.

This argument is factually incorrect. Testimony from one of petitioners' experts demonstrated that in each of the eleven rounds of hiring, the City's use of the discriminatory cut-off score resulted in the selection of African American applicants at rates far lower than the percentage they represented in the pool of test-passers—that is, the pool of applicants who scored 65 or above and thus proved themselves

fully qualified for the job. R. 366 at 1-4 & attach. B; Pet. Br. 22; Pet. App. 15a-16a.

This evidence was uncontested. The City's expert agreed with and "adopted" the calculations by petitioners' expert of the shortfall number of African American applicants who would have been hired in each class but for the City's use of its discriminatory hiring practice. R. 371 at 6.[9]

II. The City misconstrues this Court's precedents.

Notwithstanding the City's contentions, this Court's prior decisions addressing the timeliness of Title VII claims neither hold nor suggest anything inconsistent with the plain meaning of the statute's disparate-impact provisions. All the cases are consistent with the conclusion that each use of a non-job-related practice that causes a disparate impact violates the statute and triggers a new charge-filing period.

A. Each new Title VII violation begins a new charge-filing period.

The Court's precedents establish a simple accrual principle applicable to all Title VII cases: A claim accrues, and thus a new charge-filing period starts, each time an employer's actions satisfy the required

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[9] In any event, petitioners were not required to demonstrate that the City's hiring practice had an adverse impact in each particular hiring round that differed in kind or degree from the adverse impact of a prior violation. *Cf. Dothard*, 433 U.S. at 329. Section 703(k) prohibits an employer from using "a particular employment practice that causes a disparate impact," 42 U.S.C. § 2000e-2(k)(1)(A), and this is what the City did. *See* U.S. Br. 12.

elements of a particular type of Title VII violation. *See, e.g.*, *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1997) (holding that timeliness turns on "whether any present *violation* exist[ed]" within the charge-filing period (quoting *Evans*, 431 U.S. at 558)); Pet. Br. 34-35.

Applying this principle does not require an assessment of whether disparate-treatment violations involve "greater moral culpability" than disparate-impact violations, as the City contends. Resp. Br. 37. Rather, in both disparate-treatment and disparate-impact cases, the charge-filing period corresponds to the statutorily-defined elements of the particular violation. U.S. Br. 27; Pet. Br. 34-37.[10]

In a disparate-treatment case—where the defining element is intent—the charge-filing period runs from the date of each intentionally discriminatory practice. Pet. Br. 34-40. This is true of both one-time employment transactions and repeated uses of general policies. As to the latter, if the policy is repeatedly implemented under circumstances that demonstrate present discriminatory intent, then each use is a new violation. *See Ledbetter*, 550 U.S. at 634; *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 912 n.5 (1989); *Bazemore v. Friday*, 478 U.S. 385, 386-87 (1986) (per curiam); *id.* at 394-96 (Brennan, J., concurring). But if the practice is later used under circumstances where no discriminatory motive is

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[10] Because the same principle determines the timeliness of all Title VII claims, there is no need for the Court to depart from the plain meaning of the statute's disparate-impact provisions in order to "avoid" purported "constitutional problems" that the City asserts but never explains. Resp. Br. 36 n.9.

involved, there is no new violation. *See Ledbetter*, 550 U.S. at 625-26.

The same principle governs disparate-impact cases. In such cases—where discriminatory intent is not a required element—a claim accrues whenever the employer uses a non-job-related employment practice that causes a disparate impact. *See* 42 U.S.C. § 2000e-2(k)(1)(A); *Lorance*, 490 U.S. at 908; Pet. Br. 31, 36-37. If a plaintiff proves that an employer repeatedly used an employment practice that caused a disparate impact on a protected group, then he or she is in the same position as a plaintiff in a disparate-treatment case who proves that a subsequent use of a policy was motivated by present discriminatory intent. In both cases, the charge-filing period starts running again with each use. *See Ledbetter*, 550 U.S. at 636 ("[A] freestanding violation may always be charged within its own charge-filing period regardless of its connection to other violations.").

Thus, the City's response that no facially discriminatory practice was alleged or proved here, Resp. Br. 45 n.13, misses the point. The critical issue is whether the employer's conduct satisfied, within the charge-filing period, the elements of the particular type of Title VII violation alleged by the plaintiffs. A facially discriminatory system can consequently be challenged each time it is applied because the element of discriminatory intent is satisfied on each occasion. *See Ledbetter*, 550 U.S. at 634. Similarly, a practice that has an unjustified disparate impact can be challenged each time it is used—as long as the elements of a disparate-impact violation are satisfied on each occasion, as they were here

each time the City used its discriminatory hiring practice.

Proper application of the Court's basic accrual principle undermines the City's reliance on *Ricks*, 250 U.S. 449 (1980), and *Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam). In both cases, employees challenged their termination as intentionally discriminatory. But the actual end of employment, which was the only event within the charge-filing period, was merely a consequence of an earlier decision outside the charge-filing period; the later event did not involve a new use of a practice with the required element of discriminatory intent on the employer's part. *Chardon*, 454 U.S. at 8; *Ricks*, 250 U.S. at 258. These disparate-treatment cases do not purport to decide claim accrual where, as here, each subsequent use of an employment practice satisfies all elements of a disparate-impact violation. Pet. Br. 38-40.

B. This Court's cases do not permit the City to treat repeated post-adoption use of its eligibility list as lawful.

The City relies on *United Air Lines v. Evans* to claim that a discriminatory practice may be treated "as lawful" once the deadline for a challenge passes without a charge being filed. Resp. Br. 31 (quoting *Evans*, 431 U.S. at 558). The City's position is that its eligibility list became the "legal equivalent of a discriminatory act which occurred before [Title VII] was passed," and therefore "has no present legal consequences." *Id*. at 14 (quoting *Evans*, 431 U.S. at 558).

Evans does not insulate the City's eleven rounds of hiring from legal challenge for a simple reason. *Evans* was a disparate-treatment case in which the only alleged act of intentional discrimination was the plaintiff's one-time termination under the airline's policy prohibiting female flight attendants from marrying. 431 U.S. at 554-55. After the airline ended its no-marriage policy, Evans was rehired. *Id.* This Court held that her subsequent EEOC charge regarding the denial of seniority credit, due to the airline's "past act of [intentional] discrimination," was not timely because there was no subsequent application of a discriminatory policy. *Id.* at 558-60. Here, by contrast, petitioners challenged repeated uses of an employment practice that violated Title VII's disparate-impact prohibition. The City's multiple rounds of hiring directly involved—and the outcome each time was determined by—a hiring practice that met all elements of a disparate-impact violation.

The problem with the City's *Evans*-based analogy to pre-Act discrimination, Resp. Br. 14, 31, is demonstrated by an example drawn from *Griggs*. One of the challenged employment practices in *Griggs* was a high school diploma requirement for new hires and promotions. Duke Power had adopted this requirement almost ten years before Title VII was enacted. 401 U.S. at 427. The Court unanimously recognized that a failure to hire or promote African Americans—even when that failure was based on older, pre-Title VII criteria—violated the statute at the time those individuals were passed over and others were selected for jobs after the statute's effective date. *Id.* at 431-33. There was no discussion in

Griggs of limiting Duke Power's liability for the "neutral consequences" of past acts. *Cf.* Resp. Br. 31, 36-37.

Assume that, before the enactment of Title VII, Duke Power had adopted and announced a list of employees who had earned high school diplomas and thus were eligible for future promotions. Pre-Title VII, an African American employee passed over for a promotion because his name did not appear on the list would not have had a claim; but the same employee would have had a claim if, for the same reason, Duke Power failed to select him for a subsequent promotion after the effective date of Title VII. This reasoning is a straightforward application of the plain meaning of Title VII's disparate-impact provisions. The employer would have used a non-job-related practice to deny the promotion, that use would have caused a disparate impact, and therefore a present violation of the statute would have existed at the time of the use. *See* 42 U.S.C. § 2000e-2(a)(2), (h), (k)(1)(A); *Griggs*, 401 U.S. at 431-33. The same reasoning, applied to this case, explains why petitioners' charges were timely.

C. The Court should apply its disparate-impact accrual analysis from *Lorance*.

In *Lorance*, the Court articulated precisely how its Title VII accrual principle applies to disparate-impact claims. The Court recognized that, had the plaintiffs in *Lorance* been able to pursue a disparate-impact claim,[11] Title VII's "statute of limitations

[11] Section 703(h) protects bona fide seniority systems from challenge on disparate-impact grounds. *Lorance*, 490 U.S. at 904-05.

[would have] run from the time that impact is felt." 490 U.S. at 908; *see also* Pet. Br. 31-32.

The City argues that assuming *Lorance*'s reasoning applies, petitioners felt the "entire impact" upon the adoption of the eligibility list. Resp. Br. 35; *see also id.* at 23-24. That view is inconsistent with *Lorance* itself. The Court in *Lorance* acknowledged that the plaintiffs felt the impact of the seniority system not just at the time it was adopted, but also upon their demotions several years later. 490 U.S. at 905-06, 908. Similarly, petitioners in this case felt the impact of the discriminatory cut-off score not only upon the adoption and announcement of the eligibility list, but each time the City used its hiring practice to exclude them from consideration when it filled firefighter positions. *See supra* Part I.B.

Ultimately, this is a case about jobs, not eligibility lists. When petitioners received notification that the City had adopted and announced an eligibility list, the full impact of the City's discriminatory hiring practice was still in the future. That full impact was not felt until the City actually used its hiring practice to fill jobs with applicants from a pool that discriminatorily excluded petitioners.[12]

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[12] Relying primarily on *Machinists v. NLRB*, 362 U.S. 411 (1960), the City also urges that cases addressing timeliness under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, support its argument. Resp. Br. 31-32. The NLRA, however, does not contain the plain text found in § 703(k), nor does it contain anything like a disparate-impact prohibition. Furthermore, in *Machinists*, the plaintiffs' challenge was based on a single, earlier event, which could not be the subject of an unfair labor practice complaint due to the statute of limitations. 362 U.S. at 416-17. Here, by contrast,

III. The City's policy arguments are inapposite and do not override Title VII's text.

The City's concerns about repose, prompt filing, and preservation of evidence are unpersuasive. The City also fails to address convincingly the risk that the accrual rule it proposes could flood government enforcement agencies with premature charges.

First, the City is incorrect that a plain-meaning interpretation of Title VII would subject employers to "open-ended liability." Resp. Br. 13. If an employer is concerned about being exposed to liability after each use of a discriminatory practice, it need only stop using the practice, which would have been easy for the City to do here. Pet. Br. 48. Moreover, job applicants or employees can recover only for injuries resulting from the particular uses of an unlawful employment practice that they timely challenge. *Cf. Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189-90 (1997).[13]

Second, notwithstanding the City's contrary arguments, Resp. Br. 49-51, a plain-meaning interpretation of Title VII encourages victims to file prompt charges in order to preserve the possibility of com-

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the City committed a fresh violation of Title VII each time it used its practice of hiring only applicants who scored 89 or above.

[13] For this reason, if petitioners prevail, they do not oppose a remand for the district court to consider a modification to the portion of its judgment pertaining to the City's first round of hiring. *See* Resp. Br. 30 n.5. Petitioners here contend that their EEOC charges were timely only with respect to the City's second and subsequent uses of its hiring practice. Pet. Br. 8 n.3; U.S. Br. 5-6.

prehensive relief. It is simply not the case that Title VII "frequently require[s] firing the person who was hired" pursuant to a discriminatory practice. *Id*. at 50. "Lower courts have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579 n.11 (1984); *see also* Barbara T. Lindemann & Paul Grossman, 2 *Employment Discrimination Law* 2722, 2724-25 (4th ed. 2007); Pet. Br. 47.

Third, the City overstates the risk of memory lapses in disparate-impact cases as a justification for its narrow accrual rule. Resp. Br. 46-48. The City never explains how it was disadvantaged in this case by the four-month difference between November 1996, when petitioners' EEOC charges would have been timely under the City's proposed rule, and March 1997, when petitioners actually filed their charges. In fact, well before November 1996, the City was on notice of petitioners' claims, Pet. App. 48a, and therefore had ample opportunity to preserve whatever evidence it wished for a trial that did not occur until several years later.[14]

As the only example of evidence that was lost due to the passage of time, the City points to the failure of its deputy personnel commissioner to recall at trial whether he ever calculated the difference in

[14] This case took more than ten years to proceed from the filing of EEOC charges in March 1997 to the district court's entry of final judgment in April 2007. *See* Pet. App. 12a-13a, 49a; R. 404-05. It strains credulity for the City to argue that the case would have been resolved substantially sooner if the EEOC charges had been filed four months earlier. *See* Resp. Br. 28-29, 53.

adverse impact that would have resulted from selecting applicants in strict rank order rather than through random selection. *See* Resp. Br. 47-48 & n.14. But the district court did not rely on this evidence in deciding any issue, and the City does not attempt to explain how it could have helped prove job-relatedness. Nor does the City explain why, if it believed that such evidence could have been relevant or helpful, it did not take steps to preserve it after petitioners filed EEOC charges in March 1997.[15]

Finally, the City acknowledges that its proposed accrual rule may yield "some premature charges," Resp. Br. 50, but it fails to recognize that it is in the interest of neither employers nor employees to require potential plaintiffs to file charges before they can be sure that an employment practice will have any practical consequences. *See* Pet. Br. 48-50; U.S. Br. 32-33.

For instance, there may be little practical harm to minority applicants who receive the lowest qualifying scores on a test and are placed at the bottom of an eligibility list, if the employer ultimately decides to make offers to everyone on the list. Even if the test is

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[15] In general, pertinent evidence in disparate-impact cases is unlikely to erode over time in light of the record maintenance obligations in the *Uniform Guidelines on Employee Selection Procedures*. Pet. Br. 48. The City claims that the *Uniform Guidelines* merely "counsel that this information 'should' be kept on hand . . . but do not mandate it." Resp. Br. 48. As this Court has observed, however, employers "are required to maintain" such records under the *Uniform Guidelines*. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657-58 (1989) (quoting 29 C.F.R. § 1607.4(A)), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 3(2), 105 Stat. at 1071.

clearly not job-related, the newly hired minority employees may have little reason to challenge it and risk antagonizing their new employer. Under the City's approach, however, the job applicants might be forced to bring challenges to a practice that does not later turn out to cause them any practical harm. In addition to fostering workplace strife, such an approach would impose unnecessary obligations on the EEOC as well as state and local enforcement agencies that are already struggling to manage increasing caseloads with shrinking budgets. *See* Br. of *Amicus Curiae* International Association of Official Human Rights Agencies 14-16; U.S. Br. 31-33.

CONCLUSION

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

Respectfully submitted,

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