

No. 08-974

In the Supreme Court of the United States

ARTHUR L. LEWIS, JR., ET AL., PETITIONERS

v.

CITY OF CHICAGO, ILLINOIS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that an employer's use of an employment examination has an unlawful disparate racial impact, when the employer uses the results of the examination to hire employees during the statutory limitations period, but scores the examination and announces the results outside the limitations period.

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INTEREST OF THE UNITED STATES

This case presents the question whether a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that an employer's use of an employment examination has an unlawful disparate racial impact, when the employer uses the results of the examination to hire employees during the statutory limitations period, but scores the examination and announces the results outside the limitations period. The United States has a significant interest in the resolution of that question. The Attorney General enforces Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. In addition, Title VII applies to the federal government as an

employer. See 42 U.S.C. 2000e-16. The United States, as the principal enforcer of the civil rights laws and the Nation's largest employer, has a strong interest in the proper enforcement of Title VII. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. a. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a). The statute proscribes both "overt discrimination" (known as "disparate treatment") and "practices that are fair in form, but discriminatory in operation" (known as "disparate impact"). *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); accord *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672-2673 (2009). This case concerns Title VII's prohibition on disparate-impact discrimination.

Under Title VII, an "unlawful employment practice based on disparate impact is established" if the plaintiff shows that "a particular employment practice * * * causes a disparate impact on the basis of race, color, religion, sex, or national origin," and the employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i). If the employer satisfies that burden, a plaintiff may nevertheless establish a disparate-impact violation "by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs." *Ricci*, 129 S. Ct. at 2673 (citing 42 U.S.C. 2000e-2(k)(1)(A)(ii) and (C)). A plaintiff who establishes

that an employer has engaged in a practice with an unlawful disparate impact is not entitled to damages, 42 U.S.C. 1981a(a)(1), but may be awarded appropriate equitable relief, 42 U.S.C. 2000e-5(g)(1).

b. To file suit under Title VII, a plaintiff must first file a timely charge with the EEOC. A charge is generally timely if it is filed within 180 days “after the alleged unlawful employment practice occurred.” 42 U.S.C. 2000e-5(e)(1). But in States that have an administrative agency with authority to remedy practices prohibited by Title VII, a plaintiff who initially proceeds before that agency must file a charge with the EEOC within 300 days “after the alleged unlawful employment practice occurred” or within 30 days of receiving notification that the state agency proceedings have been terminated, whichever is earlier. *Ibid.* Because the events at issue in this case took place in Illinois, which has such an administrative agency, the applicable limitations period under Section 2000e-5(e)(1) is 300 days. See Pet. App. 51a.¹

2. In July 1995, respondent administered a written examination to more than 26,000 applicants as part of its hiring process for entry-level firefighters. After scoring the test, respondent grouped the scores into three categories: applicants who scored 89 or above were deemed “well qualified,” applicants who scored between 65 and

¹ Illinois, like many States, has entered into a worksharing agreement with the EEOC under which filing a charge with the EEOC also initiates a state proceeding that is subject to immediate termination if the State waives its right of initial processing over the claim. See, e.g., *Hong v. Children’s Mem. Hosp.*, 936 F.2d 967, 968-969 (7th Cir. 1991); see also 29 C.F.R. 1601.13(a)(4)(ii)(A); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 112 (1988).

88 were “qualified,” and the remaining applicants failed the examination. Pet. App. 1a-2a, 45a.

On January 26, 1996, respondent sent all applicants written notifications of their test scores. Pet. App. 2a, 46a. The “well qualified” applicants “would be eligible to proceed to the next phase of the hiring process, a physical abilities test,” followed by a background investigation, medical examination, and drug test. *Id.* at 14a-15a. An applicant who passed each of those additional tests would be “hired as a candidate firefighter.” *Id.* at 15a. Applicants who failed the examination were told that they would no longer be considered for employment. *Id.* at 47a. The notice for applicants in the “qualified” class stated:

Due to the large number of candidates who received higher scores and were rated as “Well Qualified,” and based on the operational needs of the Chicago Fire Department, it is not likely that you will be called for further processing. However, because it is not possible at this time to predict how many applicants will be hired in the next few years, your name will be kept on the eligible list maintained by the Department of Personnel for as long as that list is used.

E.g., J.A. 35; see Pet. App. 2a, 46a-47a.

On the same day that respondent sent the notices to the applicants, the mayor issued a press release concerning the test results. J.A. 51-54; see Pet. App. 46a-47a. The release stated that 1782 of the applicants who took the written examination were considered “well qualified” and would be contacted in random order to continue in the hiring process. J.A. 54; see Pet. App. 47a. The release further stated that, in the “well qualified” group, 75.8% were white and 11.5% were African-

American. *Ibid.* By contrast, white applicants represented 45% of all applicants, while African-Americans represented 37%. Pet. App. 15a. Finally, the release stated that the mayor was dissatisfied with the lack of diversity among the “well qualified” applicants. J.A. 51-52; see Pet. App. 47a. Local media subsequently reported the racial breakdown of the test results. *Id.* at 48a; see J.A. 55-56, 59-60.

In May 1996, respondent hired applicants from the “well qualified” group. It did so for a second time in October 1996, and ultimately engaged in a total of 11 rounds of hiring from that group. Pet. App. 49a, 68a; Pet. 6; Br. in Opp. 4; Dist. Ct. Injunctive Order of Relief 4 (Apr. 17, 2007) (Injunctive Order).

In 2001, when the list of “well qualified” applicants was exhausted, respondent decided to begin calling applicants from the “qualified” group for further processing for hire. Pet. App. 16a. It hired applicants from the “qualified” group from 2002 until 2007. Br. in Opp. 4 n.1.

3. Petitioners represent a class of African-American firefighter applicants who were placed in the “qualified” category based on their scores on the July 1995 examination. Pet. App. 1a-2a. On March 31, 1997, petitioner Crawford M. Smith filed a charge of racial discrimination with the EEOC based on respondent’s use of the July 1995 examination; other petitioners subsequently filed additional charges. *Id.* at 49a; Def. Mot. for Summ. J. Attach 2, Pt. 2, Exh. 3 (Feb. 18, 2000). Smith’s charge was filed within 300 days of October 1, 1996, the date on which respondent hired its second class of firefighter candidates from the list of individuals ranked as “well qualified” based on the results of the July 1995 examination. The charge was, however, filed

more than 300 days after respondent administered the examination, scored the results, and notified the plaintiff-applicants that they were “qualified.” Pet. App. 3a, 49a; Injunctive Order 4.

The EEOC issued right-to-sue letters on July 28, 1998. Pet. App. 49a. On September 9, 1998, petitioners filed suit in the United States District Court for the Northern District of Illinois, alleging that respondent’s use of the July 1995 test as the first step in the firefighter hiring process had an impermissible disparate impact on African-American candidates, in violation of Title VII. *Ibid.*; see *id.* at 2a, 49a; J.A. 1-14.

Respondent moved for summary judgment, arguing that petitioners’ suit was time-barred because petitioners’ first EEOC charge was filed more than 300 days after petitioners were notified that they had been ranked as “qualified” based on the results of the July 1995 examination. Pet. App. 52a. The district court denied the motion. *Id.* at 44a-70a. The court distinguished this case from *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in which this Court held that allegations of intentional national origin discrimination were untimely where the alleged discriminatory act—the denial of tenure—occurred outside the limitations period, even though the plaintiff felt the effects of that act, the termination of his employment, within the limitations period. Pet. App. 54a-55a (citing *Ricks*, 449 U.S. at 257-258). In this case, the district court noted, petitioners “allege[d] that the 1995 examination had a disparate impact on African-American firefighter candidates, and that [respondent’s] reliance on the examination’s results continues to have a disparate impact on African-American candidates.” *Id.* at 60a. The court concluded that, “if [petitioners] establish that the 1995 written examination

used in [respondent's] firefighter selection process had an unlawful disparate impact on African-American candidates, then [respondent's] ongoing reliance on those results constitutes a continuing violation of Title VII." *Id.* at 69a.

After an eight-day bench trial, the district court ruled that respondent's use of the July 1995 examination violated the disparate-impact provisions of Title VII. Pet. App. 12a-43a. The parties had stipulated that the July 1995 test "had a severe disparate impact on African-American firefighter candidates." *Id.* at 28a. The court found that respondent had failed to discharge its statutory burden of showing that its use of the test was "job related for the position in question" and "consistent with business necessity," 42 U.S.C. 2000e-2(k)(1)(A)(i). Pet. App. 28a-42a. Specifically, the court found that the test "was skewed towards one of the least important aspects of the firefighter position"—namely, "the candidate's ability to take notes"—"at the expense of more important abilities," *id.* at 31a-32a; that "the cut-off score of 89 is statistically meaningless in that it fails to distinguish between candidates based on their relative abilities," *id.* at 30a; and that respondent "failed to prove that test results could be used to predict firefighter performance," *ibid.* See *id.* at 28a-41a. The court further found that "the evidence clearly shows that an equally valid and less discriminatory alternative was available"—specifically, "randomly select[ing] candidates who passed the exam for further evaluation." *Id.* at 41a-42a (citing 42 U.S.C. 2000e-2(k)(1)(A)(ii)). The court entered judgment in favor of petitioners and ordered injunctive relief. *Id.* at 2a.

4. On appeal, respondent did not contest that its use of the July 1995 examination violated Title VII's dis-

parate-impact provisions. It instead challenged only the district court's holding that petitioners had timely filed a charge with the EEOC. Resp. C.A. Br. 16-47. Agreeing with respondent's submission, the court of appeals reversed. Pet. App. 1a-11a.

The court of appeals concluded that the discrimination at issue "was complete when the tests were scored and, especially in light of the mayor's public comment about them, was discovered when the applicants learned the results." Pet. App. 4a. Analogizing this case to *Ricks*, the court further concluded that "[t]he hiring only of applicants classified 'well qualified' was the automatic consequence of the test scores rather than the product of a fresh act of discrimination." *Ibid.* The court accordingly held that petitioners' claim accrued in January 1996, when respondent placed petitioners in the "qualified" category and "delayed indefinitely their being hired." *Id.* at 9a. Because petitioners had not filed a charge within 300 days of that date, the court of appeals instructed the district court to enter judgment for respondent. *Id.* at 11a.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that petitioners' EEOC charge was untimely.

A. The period for filing a charge of employment discrimination with the EEOC commences on the date on which "the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). Under Title VII, it is an "unlawful employment practice" "to limit, segregate, or classify" employees or job applicants "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's

race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(a)(2). An employer engages in an “unlawful employment practice based on disparate impact” when it “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(k)(1)(A)(i). Where, as here, an employer administers an employment examination that has an impermissible disparate racial impact, the employer violates Title VII each time it “uses” the results of the test, 42 U.S.C. 2000e-2(k)(1)(A)(i), to select employees in a manner that would “adversely affect” individuals based on race, 42 U.S.C. 2000e-2(a)(2).

B. Nothing in this Court’s Title VII statute of limitations jurisprudence compels a different result. In a line of cases culminating with the recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), this Court held that an EEOC charge alleging intentional discrimination is untimely where no intentionally discriminatory act occurred within the limitations period, even though the plaintiff may claim to presently feel the effects of that past intentionally discriminatory act. Those cases do not stand for the broad proposition that a violation of Title VII is never separately chargeable when the violation is related to, or even the consequence of, a prior discriminatory act. Their holdings instead reflect the point at which a violation occurs in a disparate-treatment case: because discriminatory intent is a necessary element of a claim of intentional discrimination, a plaintiff who does not allege any discriminatory intent occurring within the limitations period does not describe a violation of Title VII based on disparate treatment.

A disparate-impact claim, by contrast, focuses on the consequences of an employment practice, rather than the intent underlying it. For that reason, this Court has previously acknowledged that a disparate-impact claim, in contrast to a disparate-treatment claim, accrues “from the time that impact is felt.” *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 908 (1989); cf. *Ledbetter*, 550 U.S. at 640. Here, each time respondent passed petitioners over for entry-level firefighter positions based on their performance on an invalid test, it used an unlawful selection device that had an impermissible disparate racial impact. Petitioners were entitled to challenge any such use that occurred within the limitations period.

C. A rule that permits a claimant to challenge each use of an employment practice with an unlawful disparate impact is consistent with the policy objectives underlying Title VII’s charge filing provision. Because plaintiffs may prosecute only those uses that occur within the limitations period, such a rule upsets no legitimate interests in repose. Plaintiffs have no incentive to delay unreasonably in filing charges. And the evidence typically used in disparate-impact cases, which focuses on statistical impact and validity, is unlikely to fade over time, especially as compared with inquiries into decisionmakers’ intent.

A contrary rule would allow an employer to continue using an unlawful selection device indefinitely, so long as no applicant filed an EEOC discrimination charge within 180 or 300 days of the announcement of the results. It would also require applicants to file discrimination charges even before they know whether and how the employer will use the examination results to make hiring decisions. Such a rule would merely encourage prema-

ture and unnecessary litigation that would burden employers, the EEOC, and courts alike. Neither Title VII nor this Court's cases command that result.

ARGUMENT

PETITIONERS' CHARGE WAS TIMELY BECAUSE IT CHALLENGED AN UNLAWFUL EMPLOYMENT PRACTICE THAT OCCURRED WITHIN THE LIMITATIONS PERIOD

A. A Title VII Violation Occurs, And A Claim Accrues, When An Employer Uses The Results Of A Test That Has An Impermissible Disparate Impact To Make Hiring Decisions

The period for filing a charge of employment discrimination with the EEOC commences on the date on which “the alleged unlawful employment practice occurred.” 42 U.S.C. 2000e-5(e)(1). Under Title VII, it is an “unlawful employment practice” “to limit, segregate, or classify” employees or job applicants “in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(a)(2). An employer engages in an “unlawful employment practice based on disparate impact” when, without adequate justification, it “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin,” 42 U.S.C. 2000e-2(k)(1)(A)(i), thereby limiting, segregating, or classifying job applicants or employees in a manner that adversely affects members of a protected group, 42 U.S.C. 2000e-2(a)(2).

Respondent in this case “used” such an employment practice each time it hired entry-level firefighters from a group of applicants deemed “well qualified” based on

the results of the July 1995 examination—an examination that undisputedly had a disproportionate adverse racial impact and “was not a valid test of aptitude for firefighting.” Pet. App. 2a. Each time respondent used its score-based rankings to hire new classes of firefighters, it disproportionately excluded qualified African-American applicants in violation of Title VII’s disparate-impact provisions. Because petitioners filed their first charge of discrimination with the EEOC within 300 days of such a hiring decision, petitioners were entitled to challenge that decision in court and to seek appropriate equitable relief.

1. In considering the timeliness of charges under Title VII, this Court has emphasized that the “most salient source for guidance is the statutory text.” *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109-110 (2002). As relevant here, Title VII provides that a “charge under this section shall be filed” within 180 or 300 days (depending on the State) “after the alleged unlawful employment practice occurred.” 42 U.S.C. 2000e-5(e)(1). The answer to the question of when the practice occurred “varies with the practice.” *Morgan*, 536 U.S. at 110.

2. Under Title VII, an employer engages in an “unlawful employment practice based on disparate impact” whenever it “uses” the results of an employment test with an impermissible disparate racial impact in making hiring decisions, thereby limiting or classifying job applicants in a manner that adversely affects members of a protected group. 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A).

a. This Court first discussed Title VII’s prohibition on disparate-impact discrimination in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, the Court held that an employer violated Title VII by using a stan-

standardized general intelligence test as a condition of employment when the test had not been shown to be “significantly related to successful job performance” and disqualified African-American candidates “at a substantially higher rate” than white candidates. *Id.* at 425-426. The Court accepted the premise that the testing requirement was not intended to discriminate on the basis of race. *Id.* at 432. But Title VII, the Court made clear, “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” *Id.* at 431; see also *ibid.* (explaining that Title VII mandates “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification”). The Court explained that “Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.” *Id.* at 432.

At the time *Griggs* was decided, Title VII “did not include an express prohibition on policies or practices that produce a disparate impact.” *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009). *Griggs* rested on an interpretation of Section 2000e-2(a)(2), which makes it an “unlawful employment practice” for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race.” 42 U.S.C. 2000e-2(a)(2); *Griggs*, 401 U.S. 426 n.1; see, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988); *Connecticut v. Teal*, 457 U.S. 440, 448 (1982); see also *Smith v. City of Jackson*, 544 U.S. 228, 235-236 (2005). The decision also rested in part on an interpretation of

Section 2000e-2(h), which provides that it “shall not be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that 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.” 42 U.S.C. 2000e-2(h) (emphases added); see *Griggs*, 401 U.S. at 426 n.1, 433-436.

Twenty years after *Griggs*, Congress “codif[ie]d the prohibition on disparate-impact discrimination” in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. *Ricci*, 129 S. Ct. at 2673. The “disparate-impact statute,” *ibid.*, states that “[a]n unlawful employment practice based on disparate impact is established” when the plaintiff “demonstrates that [an employer] *uses* a particular employment practice that *causes* a disparate impact on the basis of race, color, religion, sex, or national origin,” and the employer “fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity,” or the plaintiff demonstrates that the employer refuses to adopt an alternative employment practice with less disparate impact that would satisfy the employer’s legitimate business needs. 42 U.S.C. 2000e-2(k)(1)(A) and (C) (emphases added); see *Ricci*, 129 S. Ct. at 2673.

b. In ordinary parlance, an employer “uses” a particular employment practice whenever it selects employees on the basis of that practice. See *Watson v. United States*, 552 U.S. 74, 79 (2007) (“With no statutory definition or definitive clue, the meaning of the verb ‘uses’ has to turn on the language as we normally speak it.”); see also, *e.g.*, *Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting) (explaining that “New Haven must *use* competitive

examinations to fill vacancies in fire officer and other civil-service positions”) (emphasis added); *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 585 (1983) (opinion of White, J.) (noting that, when the New York City Police Department selected employees based on their scores on several written examinations, the examinations “were *used* to make entry-level appointments”) (emphasis added).

Where, as here, an employer hires employees on the basis of an invalid test with a disproportionate adverse impact on members of a racial group, the employer “uses” an impermissible practice that “limit[s]” qualified applicants in a manner that adversely affects them because of race. 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A). That conclusion is consistent with Title VII’s testing provision, which permits “an employer to give and to act upon the results of any professionally developed ability test” only if “action upon the results is not * * * used to discriminate because of race.” 42 U.S.C. 2000e-2(h). Each time an employer hires employees based on the results of an invalid test with a disparate racial impact, it “act[s] upon the results” of the test, *ibid.*, in a manner that excludes members of a protected group from job opportunities for reasons unrelated to job performance, see *Griggs*, 401 U.S. at 433-436.

3. Respondent does not appear to quarrel with the proposition that basing hiring decisions on the results of a test with an impermissible disparate impact is ordinarily a violation of Title VII. Respondent submits (Supp. Br. in Opp. 8-9), however, that its hiring decisions are not actionable in this case because those decisions followed an initial classification of test-takers as “qualified” or “well qualified.” According to respondent, that initial classification was a discriminatory act. But once

the test-takers had been sorted into their respective categories on its hiring eligibility list, respondent claims, “[u]se of the list to call ‘well qualified’ candidates in random order for further processing did not segregate or classify anyone, nor limit employment opportunities,” and had no “further disparate impact.” *Id.* at 8.

Respondent’s efforts (Supp. Br. in Opp. 8) to distinguish between its “use of the test results” (discriminatory) and “[u]se of the list” (not discriminatory) are unavailing. It is undisputed that the test results formed the entire basis of the eligibility list. “Use of the list” thus *was* “use of the test results” for purposes of discerning whether the practice had an impermissible disparate impact. Respondent acknowledged as much in its November 1998 answer to petitioners’ complaint, which was filed well after the initial compilation of the eligibility list and announcement of the test results in January 1996. See J.A. 16 (“Defendant admits that it *has used and continues to use results* of the 1995 fire fighter entrance examination as part of its fire fighter hiring process.”) (emphasis added); J.A. 22 (“Defendant states that since 1996 and continuing to the present time, it has *used the results* of the 1995 fire fighter entrance examination as part of its process for hiring probationary fire fighters in the Chicago Fire Department.”) (emphasis added). And contrary to respondent’s suggestion (Supp. Br. in Opp. 8), its use of the list in hiring entry-level firefighters in this case “limit[ed]” the employment opportunities of qualified African-American applicants in the exact same way it would have done if respondent had used the raw test results instead. 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A). In the former case no less than the latter, as the district court concluded, respondent’s “decision to select only those applicants who

scored 89 and above meant that white applicants were five times more likely than African-Americans to advance,” even though “there is no difference between whites and African-Americans in firefighter performance.” Pet. App. 15a-16a.

It may be, as respondent says, that once the hiring list was compiled, the “subsequent random calling of applicants on the list” did not have “any *further* disparate impact”—that is, an adverse racial impact exceeding the impact of the test and its use to create a hiring eligibility list. Supp. Br. in Opp. 8 (emphasis added). But nothing in Title VII requires a demonstration of “*further* disparate impact,” or impact exceeding the adverse impact of a previous unlawful act. What Title VII forbids is simply the “use[]” of “a particular employment practice that causes a disparate impact.” 42 U.S.C. 2000e-2(k)(1)(A). When respondent hired firefighter candidates from the list of applicants who scored in the “well qualified” range on the July 1995 examination, it engaged in such a practice. Because petitioners filed an EEOC charge within 300 days after that practice occurred, they were entitled to challenge the practice in federal court and to seek appropriate equitable relief.²

² Because petitioners’ charge was filed within 300 days of an independently unlawful act—namely, respondent’s use of the July 1995 test results to hire entry-level firefighters in a manner that disproportionately excluded qualified African-American candidates—the Court need not decide whether the “continuing violation” theory applies in this case. See Pet. App. 7a-9a (comparing “repetitive” with “continuing” violations). For the same reason, petitioners’ charge was timely even if, as respondent argues (Supp. Br. in Opp. 6-7, 9), petitioners could earlier have brought an EEOC charge based on the compilation of the eligibility list alone.

B. A Title VII Violation Is Actionable Even Though It Follows From Previous Violations

In concluding that petitioners' claim was untimely, the court of appeals did not consider the language of either Title VII's disparate-impact provisions or its charge filing provision. The court instead relied on a line of cases including *Delaware State College v. Ricks*, 449 U.S. 250 (1980), *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held that, to sustain a claim of intentional discrimination, a plaintiff must identify an act of intentional discrimination occurring within the statutory limitations period, and may not simply point to the effects of a past intentionally discriminatory act.

Insofar as the *Ricks-Lorance-Ledbetter* line of cases is relevant in this disparate-impact case, the cases merely reaffirm the basic principle that the time for filing an EEOC charge commences when the alleged unlawful act occurs. They do not, as the court of appeals appeared to reason, stand for the broad, textually unsupported position that a discriminatory act is immune from challenge if can be said to be an "automatic consequence" of an earlier Title VII violation that occurred outside the limitations period.

1. In *Ricks*, the plaintiff, a college professor, claimed that his employer intentionally discriminated against him on the basis of national origin when it denied him tenure and instead offered him a one-year "terminal" contract. 449 U.S. at 252-253. The plaintiff filed a charge with the EEOC shortly before the contract expired. *Id.* at 254. The Court held that the limitations period began to run when the tenure decision had been made and communicated to the plaintiff, "even though

one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later.” *Id.* at 258. The Court explained that the “emphasis is not upon the effects of earlier employment decisions; rather, it ‘is [upon] whether any present *violation* exists.’” *Ibid.* (brackets in original) (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)). Because the only claimed violation concerned the denial of tenure, and the plaintiff had not identified any “discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment,” the Court concluded that the plaintiff’s EEOC charge was untimely. *Id.* at 257-258.

Similarly, in *Lorance*, the plaintiffs alleged that a contractual modification in the seniority system for testers at an electronics plant was the product of intentional sex discrimination, but did not file an EEOC charge until years later, when they were selected for demotion under the new seniority system. 490 U.S. at 901-902. The Court held that the charge was filed too late. It specifically noted that, if the “claim asserted [were] one of discriminatory impact under § 703(a)(2),” the “statute of limitations [would] run from the time that impact is felt.” *Id.* at 908. But because the claim asserted was instead one of intentional discrimination, and “[b]ecause the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent on the alleged illegality of signing the underlying agreement,” the Court concluded that “it is the date of that signing which governs the limitations period.” *Id.* at 911.³

³ In response to *Lorance*, Congress amended Title VII to provide that an “unlawful employment practice occurs, with respect to a sen-

Finally, in *Ledbetter*, the Court concluded that the plaintiff’s claim of intentional pay discrimination was time-barred because the alleged discrimination occurred outside the statutory limitations period, rejecting the plaintiff’s argument that the discrimination had been carried forward in the form of reduced pay and the denial of a raise. 550 U.S. at 624. The Court emphasized that the petitioner “ma[de] no claim that intentionally discriminatory conduct occurred during the charging period.” *Id.* at 628; accord *id.* at 624. The Court concluded that accepting the petitioner’s argument that an “unlawful employment practice” nevertheless occurred during the limitations period, as Section 2000e-5(e)(1) demands, would “require us in effect to jettison the defining element of the legal claim on which her Title VII recovery was based”—namely, “discriminatory intent.” *Ibid.*⁴

iority system that has been adopted for an intentionally discriminatory purpose * * * when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.” 42 U.S.C. 2000e-5(e)(2); see *Ledbetter*, 550 U.S. at 627 n.2.

⁴ In response to *Ledbetter*, Congress amended Title VII to provide that an “unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.” Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5-6 (to be codified at 42 U.S.C. 2000e-5(e)(3)(A)); see *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1973 (2009).

2. Specifically analogizing this case to *Ricks*, the court of appeals held that petitioners' EEOC charge was untimely because respondent's discrimination "was complete when the tests were scored" and petitioners were informed that it was "not likely" that they would be hired. Pet. App. 4a, 46a (citation omitted). In the court's view, respondent's subsequent hiring practices were the "automatic consequence" of the earlier testing, and thus could not qualify as a "fresh act of discrimination" that was separately chargeable within its own limitations period. *Id.* at 6a.

Title VII's disparate-impact provisions do not, however, speak of "automatic consequences." They speak of "uses" of employment practices that cause a disparate impact. 42 U.S.C. 2000e-2(k)(1)(A). And the *Ricks-Lorraine-Ledbetter* line of cases does not stand for the broad proposition that any employment practice following from an earlier act of discrimination is not actionable under Title VII. On the contrary, the Court made clear in *Ledbetter* that "a freestanding violation may always be charged within its own charging period regardless of its connection to other violations." 550 U.S. at 636. When a plaintiff alleges a series of related discriminatory acts, "[e]ach discrete discriminatory act starts a new clock," and a charge is timely if "filed within the 180- or 300-day time period after the discrete discriminatory act occurred." *Morgan*, 536 U.S. at 113. Nor is it relevant whether the employee had knowledge of prior similar acts or the course of illegal conduct of which they were a part: "The existence of past acts and the employee's prior knowledge of their occurrence * * * does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are

themselves timely filed.” *Ibid.*; accord *Ledbetter*, 550 U.S. at 636.

The claims in *Ricks*, *Lorance*, *Ledbetter*, and other similar cases failed not because they alleged acts that followed from earlier violations, but because they failed to allege that a violation occurred at any point during the limitations period: the claims rested on allegations of intentional discrimination, but their description of the events occurring within the limitations period omitted the “defining element of [that] legal claim,” namely, “discriminatory intent.” *Ledbetter*, 550 U.S. at 624.

Unlike the intentional discrimination claims at issue in those cases, the “defining element” of a disparate-impact claim is the effect of an employment practice on members of a protected group, rather than the employer’s intent in adopting the practice. Compare *Ledbetter*, 550 U.S. at 624, with *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977) (“Proof of discriminatory motive * * * is not required under a disparate-impact theory.”). That difference necessarily affects the evaluation of the timeliness of an EEOC charge. While the Court held in *Ricks* and similar cases that “the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt,” *Ledbetter*, 550 U.S. at 627, the Court has acknowledged that a claim of discriminatory impact “caus[es] the statute of limitations to run from the time that impact is felt,” *Lorance*, 490 U.S. at 908.

In *Lorance*, for example, this Court acknowledged that, had the plaintiffs been statutorily entitled to bring a disparate-impact challenge to the allegedly discriminatory seniority system at issue, that challenge would have

been timely, even though their disparate-treatment challenge was not. 490 U.S. at 904-906. Similarly, in *Ledbetter*, the Court acknowledged that, had the plaintiff pursued a claim under the Equal Pay Act of 1963 (EPA), 29 U.S.C. 206(d), her challenge to the pay disparity at issue would have been timely, although her Title VII disparate-treatment claim was not. *Ledbetter*, 550 U.S. at 640. The Court explained that the EPA, unlike Title VII's disparate-treatment provisions, does not require "proof of intentional discrimination." *Ibid.*; see also *id.* at 641 (distinguishing the accrual rules governing a claim under the minimum wage and overtime provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, on the ground that such a claim "does not require proof of a specific intent to discriminate").

3. The analysis is not altered by respondent's practice of preceding hiring decisions by sorting test-takers into groups of "qualified" and "well qualified" applicants. See Pet. App. 4a.

It is true, as the court of appeals noted, that petitioners were injured when they were told that they had been classified as "qualified" rather than "well qualified" based on the results of the July 1995 examination, thereby "delay[ing] indefinitely their being hired," *id.* at 9a. But petitioners were also injured when they were in fact passed over because of those results: Each time respondent used the results of an invalid test to hire employees in a manner that disproportionately excluded African-Americans, petitioners "felt" anew the "impact" of respondent's practices. *Lorance*, 490 U.S. at 908.

Although the promulgation of the eligibility list may have made the adverse impact of respondent's hiring decisions somewhat more "predictable," Supp. Br. in

Opp. 10, Title VII's disparate-impact provisions are not limited to unforeseen or unforeseeable acts of discrimination. Title VII does not prohibit only the first in a line of related unlawful actions, or only those employment actions whose adverse impact somehow differs from or exceeds the impact of a prior unlawful act. Rather, Title VII forbids every employment action, including every decision to hire, that has an unjustified disparate impact on a prohibited basis. See 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A); pp. 11-17, *supra*.

Finally, to the extent that the court of appeals suggested that the compilation of the eligibility list was an "intervening neutral act" that rendered respondent's later hiring decisions nondiscriminatory, that suggestion finds no support in Title VII. Pet. App. 5a. Although the "hiring only of applicants classified as 'well qualified'" based on the test scores, like the "policy of basing hiring on test scores," *id.* at 4a, is a facially neutral practice, the very point of Title VII's disparate-impact provisions (in contrast to its disparate-treatment provisions) is to identify those "facially neutral practices that, in fact, are 'discriminatory in operation.'" *Ricci*, 129 S. Ct. at 2672-2673 (quoting *Griggs*, 401 U.S. at 431).

In short, an employer who would be prohibited from using the raw results of an unlawful test is not immunized from liability merely because it took the intermediate step of labeling candidates "qualified" or "well qualified" based on those test results. Petitioners in this case alleged a violation of Title VII's disparate-impact provisions that occurred within the applicable limitations period. That violation is factually related to earlier acts that might have formed the basis for a suit, but itself constitutes a freestanding legal harm under Title

VII's disparate-impact provisions. Petitioners' EEOC charge was therefore timely under Section 2000e-5(e)(1).

4. Although the court of appeals acknowledged the differences between a claim of disparate treatment and one of disparate impact, it concluded those differences were “not fundamental,” Pet. App. 5a, and therefore should not “change the date on which the statute of limitations begins to run,” *id.* at 6a. The court reasoned that disparate-impact theory “involves the use of circumstantial evidence to create an inference of discrimination.” *Id.* at 5a. It further explained that if a test or other selection device proves to have an adverse impact on a protected group, and the employer cannot show that “the method is a rational method of selecting employees,” then the employer’s “continuing to use the test suggests that his purpose in doing so may be discriminatory, although that need not be shown.” *Id.* at 6a.

As an initial matter, this Court has not held that the sole purpose of Title VII's disparate-impact provisions is to smoke out covert intentional discrimination. As the court of appeals itself explained, “[t]he concept of disparate impact was developed for the purpose of identifying discriminatory situations where, through inertia or insensitivity, companies were following policies that gratuitously—needlessly—*although not necessarily deliberately*, excluded black or female workers from equal employment opportunities.” Pet. App. 5a (emphasis added) (quoting *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992)).

Moreover, as the court of appeals suggested, there may be additional reason to question an employer’s conduct when it hires employees based on the results of an invalid employment test than when it initially administers and scores the test (or compiles an eligibility list

based on the scores). An employer may not know immediately after the test is scored whether it has chosen “a rational method of selecting employees.” Pet. App. 6a. In this case, for example, the validation study for the July 1995 examination was not completed until October 1996, approximately nine months after the test results were first announced, and five months after respondent first used the examination results to hire a class of firefighter candidates. See Resp. C.A. Reply 22; Def. Reply to Pl. Response to Def. Mot. for Summ. J. Attach. 2, at 2 (Apr. 14, 2000) (Aff. of Patrick J. Rocks). The court of appeals’ decision thus has the curious effect of immunizing the likely more troublesome conduct. It would insulate from charge an employer’s subsequent hiring decisions based on the test results, even though those decisions are more likely to have been made with full knowledge that the consequence would be the disproportionate—and unjustified—exclusion of certain job applicants on a protected basis.

In any event, to say that Title VII’s disparate-impact and disparate-treatment provisions aim at the same goal is not to say that they have the same elements. See *Teamsters*, 431 U.S. at 335 n.15. The “use[]” of an unlawful selection device is a violation of Title VII’s disparate-impact provisions, regardless of proof of the employer’s intent. 42 U.S.C. 2000e-2(k)(1)(A). And an employer “continu[es] to use [a] test” with an unlawful disparate impact, Pet. App. 6a, each time it “uses” the results of the test to classify applicants and to select employees. If the employer uses the test on one occasion to select employees, it will commit one violation; if the employer uses the test on subsequent occasions to select employees, it will commit subsequent violations. The court of appeals’ decision identifies no reason why sub-

sequent uses of an unlawful selection device are not independently actionable under Title VII.

5. Respondent argues (Supp. Br. in Opp. 8) that it would be “perverse” to create a more generous rule for filing disparate-impact charges than for filing disparate-treatment charges. But to resolve this case, this Court need only acknowledge that all charges under Title VII are governed by a single and uniform rule: that the charge is timely if it is filed within 180 or 300 days after the allegedly unlawful practice occurred. See *Morgan*, 536 U.S. at 113.

That rule produces neither a more generous nor a less generous limitations period for disparate-impact cases than for disparate-treatment cases. The rule instead produces, for both, the limitations period that corresponds to the violation alleged. Exactly when the limitations period begins to run will depend in any case on the particular claims at issue. Had petitioners here, for example, alleged that a particular hiring decision resulted from both disparate-impact and disparate-treatment discrimination, the two claims would have accrued at the same time. In any event, that evenhanded application of Title VII’s charge filing provision may result in different accrual dates, depending on the nature of the plaintiff’s claim, is itself unremarkable, as this Court has recognized. See *Lorance*, 490 U.S. at 904-906; cf. *Ledbetter*, 550 U.S. at 640. Different claims alleging different acts to prove different elements naturally may accrue at different times. That simple and inevitable fact provides no reason to read Title VII in a manner contrary to its plain language.

**C. Policy Concerns Do Not Justify The Court Of Appeals’
Misreading Of Title VII**

Respondent argues (Supp. Br. in Opp. 10-11) that the decision below is consistent with Congress’s “clear policy choices” in imposing a short limitations period under Title VII. But those very same policy choices support reading the statute, in accordance with its text, to mean that an EEOC charge is timely filed if it challenges a hiring decision based on the results of an invalid test that occurred within the limitations period, regardless of that decision’s connection to prior violations.

1. The purpose of Title VII’s limitations period is to ensure “the protection of the civil rights laws to those who promptly assert their rights,” while protecting employers “from the burden of defending claims arising from employment decisions that are long past.” *Ricks*, 449 U.S. at 256-257.

The court of appeals (Pet. App. 9a) reasoned that its rule was necessary to avoid the prospect that a plaintiff might wait several years to file a Title VII charge after an employer administers and scores an invalid examination. The question in this case, however, is whether a plaintiff may wait 300 days (or, in some States, 180 days) after an employer uses such examination results to select employees for hire. The selection constitutes a violation of Title VII that sets the clock running, regardless of how much time has elapsed since the administration of the examination.

When a violation has occurred within the statutory limitations period, permitting a plaintiff to prosecute that violation upsets no legitimate “interests in repose and reliance.” Supp. Br. in Opp. 11. Staleness concerns generally disappear when suit is brought on a violation within the limitations period. And the usual rule is that

a claimant who challenges a single violation within a related series may not seek remedies for injuries that occurred outside the limitations period. Cf. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (explaining that, in an antitrust case, although “each overt act that is part of the violation and that injures the plaintiff”—for example, each sale in the case of a price-fixing conspiracy—“starts the statutory [limitations] period running again, regardless of the plaintiff’s knowledge of the alleged illegality at much earlier times,” “the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by the old overt acts outside the limitations period”) (internal quotation marks and citation omitted).

As a practical matter, candidates for employment or promotion have little incentive to delay filing EEOC charges, and indeed every incentive to bring them promptly. Delay in filing charges would postpone any possibility of attaining the employment opportunities they claim were unlawfully denied them. And this Court explained in *Morgan* that allowing employees to challenge Title VII discrimination “that extend[s] over long periods of time” into the charge-filing period, “does not leave employers defenseless” in the face of “unreasonable and prejudicial delay.” 536 U.S. at 121, 122; see *id.* at 121 (noting that “an employer may raise a laches defense” against “employees who bring hostile work environment claims that extend over long periods of time”).⁵

⁵ As this Court explained in *Ledbetter*, the short limitations period in Section 2000e-5(e)(1) demonstrates that Congress did not consider laches sufficient to guard against the prosecution of claims of discriminatory acts that occurred outside the limitations period. 550 U.S. at 632. But where discrimination occurs over a long period of time and extends into the charge-filing period, the Court in *Morgan* explained

The possibility of a laches defense not only incentivizes plaintiffs to bring their claims promptly, but also protects defendants who have been disadvantaged by unreasonable delay.

Finally, the passage of time in the context of disparate-impact cases does not raise the same concerns that it does in the disparate-treatment context. While delay may make it more difficult to discern an employer's discriminatory intent in a disparate-treatment case, the pertinent evidence in disparate-impact cases is far less likely to "fade quickly with time." *Ledbetter*, 550 U.S. at 631. Because the employer's motives are not at issue in disparate-impact cases, the "memories of those who made decisions concerning the examination and the eligibility list," Supp. Br. in Opp. 11, are not typically essential to the resolution of the issues. Rather, the evidence in disparate-impact cases "usually focuses on statistical disparities, rather than specific incidents," *Watson*, 487 U.S. at 987, and on the validity of an employment practice that produces such disparities, *id.* at 997-998. Such evidence is likely to be preserved over time. See 29 C.F.R. 1607.4, 1607.5(D), 1607.15 (requiring that employers maintain records concerning the impact and validity of any employment examination that has an adverse impact on the employment opportunities of members of a protected group). Notably, respondent has not suggested that the timing of petitioners' charges in any way affected the resolution of the merits issues in this case. Cf. *Ledbetter*, 550 U.S. 631-632 & n.4 (noting that the plaintiff's disparate-treatment claims "turned

that laches offers the employer "recourse when a plaintiff unreasonably delays filing a charge." 536 U.S. at 121.

principally on the misconduct” of a supervisor who had died by the time of trial).

2. On the other hand, the court of appeals’ rule would permit an employer to continue indefinitely to make hiring decisions based on a concededly unlawful selection device, provided that no plaintiff has filed an EEOC charge within 180 or 300 days of the announcement of the results. That result would severely undermine the purpose of Title VII’s disparate-impact provisions, which mandate “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” *Griggs*, 401 U.S. at 431.

Such a rule would also undermine Congress’s preference for voluntary compliance. See *Ricci*, 129 S. Ct. at 2674 (noting that Congress regarded voluntary compliance to be the “preferred means of achieving the objectives of Title VII”) (quoting *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986)). An employer already immunized from disparate-impact liability for its use of an invalid test with an impermissible disparate impact would have little incentive to develop a new selection device with less of an adverse impact. The safe choice for any employer, under the court of appeals’ rule, is to continue to use the test—no matter how stale or skewed the test may be—so long as more than 180 or 300 days have elapsed since the test results have been announced.

The court of appeals’ decision, moreover, encourages—indeed, requires—plaintiffs to file charges before facts have crystallized. Determining whether an employment examination has an impermissible disparate impact—that is, whether it both has a disproportionate

adverse impact on a protected basis and is not “job related for the position in question and consistent with business necessity,” 42 U.S.C. 2000e-2(k)(1)(A)(i)—often takes some time. This case itself illustrates the point: even the test developer’s own validation study was not completed until October 1996—approximately nine months after respondent announced the test results and five months after respondent hired its first class of firefighter candidates. See p. 26, *supra*. Under the decision below, however, a plaintiff may not wait to learn more about the lawfulness of the examination before filing EEOC charges; he must call on the EEOC to investigate at the first available opportunity. See Pet. App. 10a.

Finally, the court of appeals’ rule encourages plaintiffs to file charges before they can be sure that an employer’s administration of an invalid test will have any practical consequences. An employer that gives an employment examination may never in fact use the results to select employees for hire or promotion.⁶ Or the employer may decide, as respondent eventually did in this very case, to hire as well from among the ranks of those adversely affected by the examination. See Pet. App. 9a, 16a. But under the decision below, a Title VII plaintiff cannot afford to wait to evaluate the practical conse-

⁶ Respondent contends that this Court’s decision in *Ricci* “sharply limits” an employer’s discretion not to use the results of an employment or promotional examination. Supp. Br. in Opp. 7 n.2. *Ricci*, however, concerns only “race-based” decisions not to use examination results. 129 S. Ct. at 2673-2674. There are any number of other reasons an employer might decide not to use the results of an employment or promotional test. *Ricci* would be irrelevant if, for example, the employer no longer has sufficient resources to hire additional personnel or has concerns that the test was improperly administered.

quences of an employment examination before filing a charge with the EEOC.

There is no reason why a potential plaintiff in a disparate-impact case—which by its nature focuses on consequences—should not be able to see, before deciding to file charges, whether and how an employment practice is used to make hiring or promotion decisions. A rule that permits plaintiffs to file within a few months after an employment practice is so used—in accordance with Title VII’s language—reduces the chances that plaintiffs will burden employers, the EEOC, and courts with potentially divisive complaints that later prove unnecessary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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