No. 08-974

IN THE

Supreme Court of the United States

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

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF OFFICIAL HUMAN RIGHTS AGENCIES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[1]

The International Association of Official Human Rights Agencies (IAOHRA) is a private non-profit corporation headquartered in Washington, D.C, which seeks to promote equal opportunity and equal treatment, to provide assistance in the elimination of unlawful discrimination, and to educate the public and private sectors on human and civil rights issues. The IAOHRA's membership includes state and local Fair Employment Practices Agencies (FEPAs), which are responsible for enforcing anti-discrimination statutes in their respective jurisdictions. A list of our FEPA members is included as Appendix A to this brief.

In addressing Title VII claims, FEPAs work in conjunction with the Equal Employment Opportunity Commission (EEOC) field offices. For the benefit of these member agencies, the IAOHRA conducts civil rights compliance seminars, provides comprehensive training for civil rights enforcement, and serves as a clearinghouse for the exchange of civil rights information.

Amicus curiae is uniquely situated to discuss this case because of its intimate familiarity with the enforcement of Title VII and similar anti-

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[1] Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondent have filed a letter of consent with the Clerk of the Court.

discrimination statutes. It has a strong interest in the fair and efficient enforcement of Title VII.

SUMMARY OF ARGUMENT

The proper accrual date for discriminatory hiring claims is a question of great practical importance to both victims of discrimination and the agencies charged with processing and investigating Title VII charges. The International Association of Official Human Rights Agencies (IAOHRA) represents Fair Employment Practices Agencies (FEPAs) from across the nation (a list of whom is attached as an appendix to this brief). Our members share administrative responsibilities with the Equal Employment Opportunities Commission (EEOC) under Title VII and are required, as a result, to determine the timeliness of tens of thousands of charges of discrimination filed by workers every year. In light of our extensive experience, we believe that the accrual rule adopted by the court of appeals below will result in the unnecessary forfeiture of many meritorious claims of discrimination, in conflict with the basic purposes of Title VII, and will be unduly burdensome for our members to administer.

I. To serve their important purposes, statutes of limitations rules should be clear. This is particularly true under Title VII, where Congress anticipated that workers often would act without the assistance of counsel. In this case, the Court should adopt a straightforward rule for failure-to-hire claims: a claim that an employer has unlawfully refused to hire an applicant accrues when the employer makes its hiring decision.

This rule is easy to understand and simple to administer. It identifies the moment at which the core right protected by Title VII is infringed upon and the worker is on notice that she must act to preserve any claim that the decision was illegal. In this case, petitioners' failure-to-hire claim arose each time the City completed a round of hiring without offering petitioners a job because they were not classified as "well qualified" under the City's flawed classification regime.

The City's proposed rule, by contrast, would predictably lead to the under-enforcement of Title VII in some cases and the premature filing of claims in others. Under the court of appeals' rule, a lay applicant is expected to know that a Title VII violation has occurred – and that he is entitled to file a claim for relief – even before he has been denied the job he has applied for. This is especially troubling in the disparate impact context, where the overall impact of a hiring practice is often unclear until the hiring process is complete.

Our proposed rule would neither permit stale claims to proceed nor deny reasonable repose to employers. In most cases, there is little risk that allowing plaintiffs to await the results of a potentially discriminatory hiring process would routinely permit them to wait years before filing Title VII claims. And even in less common cases such as this, in which an employer relies on a discriminatory practice over the course of several rounds of hiring, the risk of stale evidence is limited because disparate impact claims do not rely on evidence regarding individuals' state of mind, a kind of evidence this

Court has recognized is uniquely susceptible to dissipation.

II. Our rule also is consistent with basic principles governing statutes of limitations in a variety of analogous contexts. A limitations period does not begin until a cause of action accrues, and a cause of action typically does not accrue until a plaintiff has suffered a concrete injury, here the denial of a job. The court of appeals suggested that the mere classification of workers constituted a sufficiently concrete injury to give rise to a Title VII claims. But even assuming petitioners could have brought a claim for illegal *classification* earlier, they suffered a new and distinct harm when the City acted on the basis of that classification to deny them employment. Under general statute of limitations principles, the fact that a present violation is related to a prior one does not prevent a new cause of action from accruing.

Nor does it matter that petitioners brought their claims after the second round of hiring, rather than the first. This Court has long recognized that repeated violations give rise to recurring causes of action, each with its own limitations period. As a result, each time the City refused to hire petitioners because they were not classified as "well qualified" constituted a new use of an unlawful employment practice and gave rise to a new failure-to-hire claim.

This Court's decisions in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), do not hold otherwise. None held, or suggested, that a failure-to-hire claim can accrue in the midst of the hiring

process. Moreover, those cases, unlike this one, involved claims for disparate treatment. In the context of disparate treatment, a new claim arises only with a new act of intentional discrimination; merely acting in reliance upon a prior intentionally discriminatory decision does not give rise to a new disparate treatment claim. The same, however, is not true of disparate impact claims. Every hiring decision in reliance upon the City's classification scheme had a disparate impact on protected workers. And that unjustified impact, in itself, was sufficient to establish a disparate impact violation of Title VII, regardless of intent. Moreover, the special concerns about dissipation of evidence of discriminatory intent do not arise in disparate impact cases, which focus on objective factors (primarily statistical evidence and expert testimony). As a result, even if the *creation* of the City's eligibility list had an actionable disparate effect on workers, the *use* of the test to make hiring decisions also had a disparate impact and resulted in the core injury Title VII was intended to prevent – the discriminatory denial of employment.

ARGUMENT

Title VII requires that every charge of discrimination be investigated by the Equal Employment Opportunity Commission (EEOC) or a state or local Fair Employment Practices Agency (FEPA).[2] The International Association of Official Human Rights Agencies (IAOHRA) represents FEPAs from across the country. *See infra*, Appendix A. Those agencies have extensive practical experience with the administration of Title VII's charge-filing limitations period. IAOHRA files this brief in support of petitioners because, in our view, the decision below will unnecessarily undermine the enforcement of Title VII and impose unwarranted burdens on FEPAs that are already struggling to fulfill their duties under that statute. Consistent with the rules governing limitations periods in analogous contexts, the Court should hold instead that a new disparate impact claim arose each time the City declined to hire petitioners in reliance upon a classification scheme that had an unlawful disparate impact on minority applicants.

I. The Court Should Adopt A Clear, Simple, And Easily Administrable Rule For The Accrual Of Failure-To-Hire Claims Under Title VII.

The court of appeals erred in holding that petitioners' failure-to-hire claim accrued before the City failed to hire them. Affirming that decision

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[2] *See* 42 U.S.C. §§ 2000e-5(b), 2000e-8(b); 29 C.F.R. § 1603.103.

would obliterate what ought to be a bright-line accrual rule that can be easily understood by employees, employers, and enforcement agencies alike.

A. Accrual Rules Should Be Clear.

Limitations periods serve important purposes, but at significant cost. While ensuring repose and avoiding stale claims, they also often cut off relief for valid charges of discrimination and prevent remedies for serious injuries. The costs of limitations periods are exacerbated when the rules governing them are unclear, leading unwary plaintiffs to forfeit meritorious claims not from any lack of diligence on their part, or because foreclosing their claims is necessary to protect the legitimate interests of defendants, but rather because the law has failed to provide adequate notice of when the limitations period begins. *See*, *e.g.*, *Wilson v. Garcia*, 471 U.S. 261, 272-75 & n.34 (1985). The need for clarity and simplicity is especially acute in the context of Title VII's time limits for filing administrative charges of discrimination because Congress anticipated that workers often would act without the assistance of counsel. *See, e.g., Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008); *EEOC v. Commercial Office Prods.*, 486 U.S. 107, 124 (1988); *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972). Moreover, clear rules benefit defendants as well, giving them confidence that employment decisions made outside the limitations period will no longer be subject to challenge. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) (noting that among the "basic policies of all limitations provisions" is the need for "certainty about . . . a defendant's potential liabilities").

In a series of cases, this Court has attempted to define the accrual rule for Title VII's limitations period in a way that distinguishes between recurring violations (which give rise to renewed opportunities to challenge discriminatory conduct) and cases in which a single violation has continuing adverse implications for the worker (which are not separately actionable). *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Lorance v. AT&T Techs., Inc.*, 490 U.S 900 (1989); *Bazemore v. Friday*, 478 U.S 385 (1986); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). In the course of those decisions, the Court has always established clear rules for particular kinds of Title VII claims. For example, in *Ledbetter*, the Court held that the limitations period for discriminatory pay claims begins to run when the pay decision is made, 550 U.S. at 621, an easy enough rule for employees to understand.[3] And in *Ricks*, the Court held that a discriminatory denial of tenure claim accrues when tenure is denied, not on the professor's last day of work. 449 U.S. at 258.

These decisions are consistent with the reasonable presumption that "Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation." *Wilson*,

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[3] Congress subsequently adopted a different rule in The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (Jan. 29, 2009).

471 U.S. at 275. The Court should adopt an equally bright-line rule here.

B. The Court Of Appeals Should Have Applied The Simple Rule That A Failure-To-Hire Claim Accrues Each Time An Employer Fails To Hire An Applicant In Violation Of Title VII.

In particular, this Court should adopt the intuitive rule that a failure-to-hire claim accrues when an employer fails to hire an applicant in violation of Title VII, whether the failure to hire arises out of intentional discrimination or a flaw in the hiring process that has a disparate impact on protected workers. Or, as applied particularly to a disparate impact claim, the claim accrues when an employer uses an employment practice with an unlawful disparate impact to deny an applicant a job. *See* Petr. Br. 20. The court of appeals' contrary rule will sow confusion and lead to the unnecessary forfeiture of meritorious claims.

1. This straightforward rule accords with the reasonable expectation that a failure-to-hire violation occurs when an employer actually fails to hire someone. Thus, in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), this Court identified "refusal to hire" as a quintessential example of a "[d]iscrete act" that is "easy to identify," *id*. at 114, and which gives rise to a claim on the day it "happen[s]," *id*. at 110. The Court has never suggested that plaintiffs are required to dissect the hiring process and bring their claims within 180 or 300 days of the moment at which unlawful considerations were allowed into the hiring process

(say, when the company established its hiring criteria, when it culled resumes, or when an interviewer took race into account during an interview). Instead, the Court has adopted a clear, easily administered rule under which the limitations period begins when the hiring decision is made and announced. *See id.* at 114; *see also Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (unlawful termination claim accrues when an employee is "notified . . . that a final decision ha[s] been made to terminate their appointments").

In this case, although petitioners were told at an early date that they were classified as "qualified," that classification did not render them ineligible for further consideration or otherwise notify them that they would not be hired. Quite to the contrary, the City informed petitioners that they continued to be eligible for consideration and that the actual hiring decisions would be made at a future date. *See* Pet. App. 2a. Thus, there can be no claim in this case that petitioners were notified of a "final decision," *see Chardon*, 454 U.S. at 8, when the City created its eligibility list. Although the City had told petitioners that it was "not likely" that those in the "qualified" category would be hired, Pet. App. 46a, the actual "final decision" did not occur until later, when the City made its hiring selections. To hold that a cause of action accrues as soon as an employer makes a pessimistic prediction about a future employment action would create a wholly unadministrable rule, laying a trap for unwary employees, burdening the EEOC and FEPAs, and inviting endless controversy in the courts.

In most cases, therefore, a failure-to-hire claim accrues when the employer makes a single, final hiring decision. This case is somewhat more complicated because the City went through several rounds of hiring, each time reviewing the same lists of candidates. But that simply means that the City considered, and failed to hire, petitioners on multiple occasions. Petitioners had a right under Title VII to be fairly considered in each round of hiring without the City relying on an employment practice that had an unlawful disparate impact on minority applicants. Consequently, under the proper accrual rule, a new failure-to-hire claim accrued each time the City made a hiring decision on that unlawful basis. *See infra* at 24-26.

2. The rule we propose is easy to understand and accords with ordinary expectations about when a discriminatory failure to hire "happen[s]." *Morgan*, 536 U.S. at 110. By contrast, adopting the court of appeals' rule would lead to confusion and underenforcement of Title VII, particularly in the context of disparate impact claims. Under the court of appeals' rule, a lay applicant is expected to know that he has a cause of action as soon as a test is given and its results announced, even though he may not know whether it will actually have a disparate impact on hiring generally, or will deprive him of a job in particular. In many cases, it is difficult to discern the impact of particular aspects of the hiring process until the hiring decisions are made. For example, if a city required firefighters to live within a certain distance from the firehouse, that practice may or may not have a disparate impact, depending on the racial composition of the neighborhoods and the

identity of the particular applicants for the job. Until the positions are filled, it will be difficult (perhaps even impossible) to tell whether the practice violates Title VII.

In other cases, it may be reasonably clear that a particular component of the hiring process has a disparate impact while it remains unclear whether the component will be sufficiently important to the ultimate hiring decision to have an actual impact on who is hired. For example, an employer may use an invalid test as part of its hiring process, but simply take the scores into account as one factor among many. Until the hiring decisions are made, it may be impossible to determine whether the use of the test has an actual disparate impact on employment opportunities.

And in some cases, even if it is clear that a practice will have a disparate impact in general, it will be unclear whether the impact will be felt by the particular plaintiff – that is, whether the effect will deprive any particular applicant of a job – until the hiring process is completed. In this case, for example, even if petitioners could have immediately discerned that the City's classification has a disparate impact on minority applicants *in general*, and that the City had no business justification for its practice, there was no way for petitioners to know for certain that the City's hiring practice would deprive *them* of a job. While the City had said that it was "not likely" that it would hire anyone in the "qualified" category, that was simply a prediction, not a decision, and one that turned out to be inaccurate in future years. *See* Pet. App. 16a.

Based on our experience, we believe that it is unrealistic to assume that lay (and often unsophisticated) workers will be able to understand and follow the fine lines drawn by the court of appeals. As a result, many meritorious claims will be lost simply because the rule is complex and unclear, even though workers would have gladly filed earlier if they had simply been able to understand what the law required of them.

C. Adopting The Court Of Appeals' Rule Would Impose Unwarranted Burdens On The Administrative Agencies That Process Title VII Charges.

The lack of clarity in the City's accrual rule would not only unnecessarily extinguish meritorious claims, but also would impose unwarranted burdens on the administrative agencies that must process Title VII charges.

First, the EEOC and FEPAs will have no easier time determining when a claim accrues under the court of appeals' rule than will workers. In processing charges of discrimination, both agencies are required to determine whether the charge is timely filed and states a claim. *See* 29 C.F.R. § 1601.18(a). Making the timeliness determinations under the court of appeals' rule will often be difficult, as the agency will be required to determine not simply when a hiring decision was made, but also at what point *during* the hiring process the disparate impact arose. Moreover, if the court of appeals' decision results in workers filing charges even before the hiring process has run its course, it may be difficult for the agencies to determine whether the

challenged practice has an actual disparate impact. *See supra* at 11-12.

Second, adopting the court of appeals' rule could well increase the volume of charges filed, burdening already overtaxed FEPAs and the EEOC. If petitioners' claim is held to have accrued when the City announced its hiring practice, or informed petitioners' of their classification, similarly situated workers in other cases will undoubtedly feel pressured to file early claims of discrimination even before they know whether the suspect hiring process has an actual disparate impact or will deprive them of a job. Based on our experience, however, there is every reason to believe that in many such cases, the charges could be avoided if the workers were allowed to wait for the hiring process to play itself out. In some instances, the workers will be hired, despite their initial fears. In others, experience with the process, or further investigation, may prove that a charge of discrimination would be unlikely to succeed.

Any unnecessary increase in Title VII charges or increase in the complexity of timeliness determinations would be a most unwelcome development for the agencies that must process the claims of discrimination. The EEOC is presently struggling with the largest caseload in its history.[4] In 2008, the Commission received approximately 95,000 charges (nearly 70,000 of which contained

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[4] *See* EEOC, *Charge Statistics: FY 1997 Through FY 2008*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

Title VII claims).[5] Private sector charges were up 15.2 percent from 2007 and 26 percent from 2006.[6] Yet, the staff of the EEOC has decreased from 2,852 in 2000 to 2,192 in 2009.[7] Unsurprisingly, the backlog of cases has increased as a result. Between 2007 and 2008, the number of unresolved claims at the end of the year increased by nearly 20,000, to 73,951.[8] At the same time, the length of time charges remain pending has increased. In 2007, the Commission set a goal of processing 72% of charges within 180 days.[9] But by the end of fiscal year 2009, its actual rate of completion within 180 days was down to less than 40%.[10] The Commission has now lowered its goals and hopes to achieve a rate of 54% by 2012.[11]

State and local FEPAs face similar challenges. In fiscal year 2008, FEPAs received more than 56,000

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[5] *See* EEOC, *Title VII of the Civil Rights Act of 1964 Charges (includes concurrent charges with ADEA, ADA and EPA): FY 1997 – FY 2008*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm.

[6] *See* EEOC, *Charge Statistics: FY 1997 Through FY 2008*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[7] *See* EEOC, *EEOC Budget and Staffing History 1980 to Present*, *available at* http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm.

[8] *See* EEOC, *FY 2008 Performance and Accountability Report* 6 , *available at* http://www.eeoc.gov/eeoc/plan/archives/annualreports/par/2008/par2008.pdf

[9] *See* EEOC, *FY 2009 Performance and Accountability Report* 17, *available at* http://www.eeoc.gov/eeoc/plan/upload/2009par.pdf

[10] *Id*.

[11] *Id*.

charges. *See* EEOC, *Trends for Major Charge Processing Activities (*presented at EEOC/FEPA 2009 Annual Training Conference) (excerpts reproduced at Appendix B). Like the EEOC, FEPAs have experienced extensive budget cuts and staff reductions in recent years. For example, this year the Pennsylvania Human Relations Commission lost 32 of its 178 staff positions. Local offices in North Carolina, Illinois, and Florida had their staffs drastically reduced or were closed altogether. As a result, FEPAs are unable to timely process the volume of charges they are already receiving. For example, in fiscal year 2008, FEPAs were able to process only 48,568 charges, while receiving more than 56,000. *See infra* App. B, at 6a. At the end of that year, FEPAs' dockets included more than 52,000 unresolved charges, a 9.3% increase from the prior year. *Infra* App. B, at 6a. Of the charges that were resolved, more than a quarter had been pending for more than 360 days. *Infra* App. B, at 7a. And of the charges still pending, more than a third had been pending for 360 days or more, and a quarter for more than 540 days. *Infra* App. B, at 7a.

Third, although the court of appeals may have thought that establishing an early accrual date would reduce the number of meritless claims, we fear that its rule will have the opposite effect. As noted above, allowing workers adequate time to see the practical results of a suspect employment practice, and to investigate the merits of a potential charge of discrimination, can often avoid ultimately meritless claims from ever being filed. In our view, the decision below risks short-circuiting that process and encouraging workers to file first and investigate

later, a practice that undermines the salutary claims-winnowing process Title VII's statute of limitations is intended to serve.

D. The Burdens Created By The Court Of Appeals' Rule Are Not Justified By Any Need To Avoid Stale Claims Or Encourage Repose.

This Court has sometimes rejected, as inconsistent with Title VII's protection against stale claims, accrual rules that could allow workers to wait for many years before challenging discriminatory conduct. *See, e.g., Ledbetter*, 550 U.S. at 639; *United Air Lines v. Evans* 431 U.S. 553, 560 (1977). We agree with those concerns as a general matter. However, in most cases, there is little risk of lengthy delays under our rule, which would simply allow workers to wait until a hiring process is finished before bringing a charge.

Of course, in this case, the City used the same unlawful practice in multiple rounds of hiring over several years. But it has been our experience that allowing employees to bring a disparate-impact challenge to each use of the test does not raise significant staleness concerns. As this Court has explained, "concerns regarding stale claims weigh more heavily with respect to proof of the intent associated with employment practices." *Ledbetter*, 550 U.S at 631. "In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial." *Id*. As a result, "the critical issue . . . will often be whether . . . a sufficient inference of discriminatory intent can be drawn." *Id.* This means "the passage of time may seriously diminish the

ability of the parties and the factfinder to reconstruct what actually happened." *Id* at 632. By contrast, this concern does not arise when a plaintiff charges disparate-impact discrimination, because proof of disparate impact is wholly objective (usually statistical evidence and expert testimony). *See e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-995 (1988). As a result, whether evidence of disparate impact is established the day a policy is announced or when that policy is used in practice does not substantially affect the type of evidence presented at trial, making disparate-impact claims much less susceptible to staleness.

Nor does an employer have any legitimate interest in repose so long as it continues to engage in a practice prohibited by Title VII. Petitioners are not asking this Court to adopt a "continuing violations" theory under which current violations subject the employer to liability for prior hiring decisions outside the limitations period. There is no question, for example, that petitioners may not seek compensation for the City's failure to hire them in the first round of hiring, as that decision was made outside the limitations period for their current claims. Instead, petitioners simply argue that each new hiring decision constitutes an independently actionable event for which employers are entitled to repose 300 days after the event takes place, but not sooner. That claim is consistent not only with the underlying purposes of Title VII's limitations period but also, as discussed next, with general statute of limitations principles as applied in other contexts.

II. Well-Established Principles Governing Statutes Of Limitations Confirm That Petitioners' Claims Were Timely Filed.

Congress enacted Title VII's limitations period against the backdrop of an established body of statute of limitations principles, which it presumably understood and intended to follow. *Cf. Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 551 n.5 (2002) (noting that general equitable tolling principles form a "background rule that informs our construction of federal statutes of limitations"). The court of appeals' rule is fundamentally inconsistent with those settled principles.

A. Limitations Periods Begin To Run When The Last Element Of The Plaintiff's Claim – Ordinarily, An Injury Caused By The Illegal Conduct – Is Established.

1. This Court has long recognized "the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (citing *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)); *see also Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (declining to countenance the "odd result" that a cause of action and statute of limitations arise at different times "absen[t] . . . any such indication in the statute").

A cause of action ordinarily is not complete until the plaintiff has suffered an injury from the illegal action. That is, "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff[] . . . ." *Zenith Radio Corp.*

v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971); *see also* 51 AM. JUR. 2D LIMITATIONS ON ACTIONS § 148 ("The test to determine when a cause of action arises or accrues is when the plaintiff has suffered a legal injury . . . .").

As relevant here, the elements of petitioners' disparate-impact claim were:

(i) The employer "use[d] a particular employment practice";

(ii) The practice had a "disparate impact" among applicants "on the basis of race"; and

(iii) The practice injured the applicants by "depriv[ing]" them "of employment opportunities."

42 U.S.C. §§ 2000e-2(a)(2), 2000e-2(k)(1)(A)(i).[12] All of these were established when the City made its hiring decision: at that point the City had (1) "used" the challenged employment practice (*i.e.,* the practice of hiring only those classified as "well qualified"), (2) which had a disparate impact on minority applicants, (3) to "deprive" petitioners "of employment opportunities" (namely, a job).

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[12] After the plaintiffs prove their case-in-chief by establishing these elements, the defendant may establish as an affirmative defense that its employment practice had "a manifest relationship to the employment in question, in order to avoid a finding of discrimination." *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982) (internal quotation omitted).

B. Even If A Cause Of Action Was Available Earlier, A New Cause Of Action Can Accrue From A Related Event.

The court of appeals nonetheless held that petitioners could have filed an action earlier, when the test was originally scored and the eligibility list announced, and therefore were barred from bringing an action later, when the list was used to deny them a job. *See* Pet. App. 4a. The hiring decision, the court concluded, was simply an "automatic consequence" of the prior unchallenged classification and, therefore, did not give rise to an independent claim. *Id*. That reasoning is inconsistent with established limitations principles that have been applied for years in analogous contexts.

1. A violation is not insulated from challenge simply because it is related to, or a consequence of, a prior unchallenged unlawful act. For example, the Copyright Act separately prohibits both copying and distributing copyrighted works without the author's permission. 17 U.S.C. § 106(1), (3). But an act of distribution gives rise to a new cause of action with its own limitations period, even if it is made possible only because of a prior unchallenged copying of the work. Thus, for example, in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), the plaintiff discovered that the defendant libraries had copied her copyrighted works. However, she delayed filing suit until after the limitations period had expired on her copying claim. *Id.* at 203. She was nonetheless permitted to maintain an action against the library for unlawfully *distributing* the previously copied work to the public.

Id. Although the time-barred act of copying the work was a necessary step toward the future distribution violations, that fact did not preclude the claim.

Indeed, it is not uncommon that the injury constituting the final element of a cause of action will be the "automatic consequence" of a prior unlawful act that occurred outside the limitations period. In the antitrust context, for example, this Court has held that a new claim with a new limitations period arises every time a customer is charged an unlawful price, even though the price is an automatic consequence of an antecedent price-fixing agreement that occurred outside the limitations period. *See*, *e.g.*, *Zenith Radio Corp. v. Hazeltine Research*, *Inc.*, 401 U.S. 321, 338 (1971) (explaining that "each time a plaintiff is injured by an act of the defendant[] a cause of action accrues to him to recover the damages caused by that act . . . and as to those damages, the statute of limitations runs from the commission of the act."); *see also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (same).

Likewise, this Court has recognized that a single unlawful decision can give rise to repeated causes of action under statutes governing certain periodic payments. This Court observed in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192 (1997), that "the standard rule for installment obligations" is that "a new cause of action, carrying its own limitations period, arises from the date each payment is missed." *Id.* at 208 (internal quotation marks omitted). Similarly, an employer's failure to pay minimum wage gives rise to a new claim under the Fair Labor Standards Act with each paycheck. *See*, *e.g.*, *Knight v. Columbus*, 19

F.3d 579, 581 (11th Cir. 1994) (collecting cases). In both instances, new violations recur even though the unlawful payment could be called an automatic consequence of a prior unlawful decision (*i.e.*, to stop making the installment payments or to set the worker's pay rate below the minimum wage) that occurred only once and outside the limitations period. *Id*.

The same is true under Title VII. For example, if an employer put a worker on a "black list" for having complained of discrimination to the EEOC, a new claim for retaliation would arise every time the employer relied upon that prior designation to punish the worker by filing false disciplinary charges against him, denying him training, or terminating his employment. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002). And this would be true even if it could be said that each of these actions was an "automatic consequence" of the black listing, and even if the black listing was itself independently actionable. So, too, in this case, the City's *reliance* on its eligibility list to deny employment constitutes a new disparate impact violation, even if the prior *creation* of the list was also independently actionable. To the extent classification of employees is sufficiently harmful in itself to violate Title VII, *see* 42 U.S.C. §§ 2000e-2(a)(2), the actual denial of employment constitutes a separate harm – indeed the core injury Title VII is

intended to prevent – that gives rise to its own cause of action.[13]

2. Nor are petitioners' claims untimely because they could have brought a failure-to-hire challenge after the first round of hiring.[14]

Generally, repetition of illegal conduct causing a new injury gives rise to a new cause of action with a new statute of limitations. This is true even if the plaintiff could have, but did not, sue to recover for the earlier injury. *See*, *e.g.*, 51 AM. JUR. 2D LIMITATIONS ON ACTIONS § 168 ("[I]f a wrongful act is continuous or repeated, the statute of limitations runs from the date of each wrong or from the end of the continuing wrongful conduct."); *id.* at § 23 ("[I]n a case involving two alleged acts of negligence occurring in rapid sequence committed by the same person on the same

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[13] Even if the classification decision was not an independently actionable adverse employment action in itself, there is no question that employees could seek to enjoin use of the eligibility list in order to prevent a *future* violation of Title VII (*i.e.*, to prevent the City from unlawfully refusing to hire them at a later date in reliance on the list). *See*, *e.g.*, *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 69-70 (1982). But that prior opportunity to seek prospective relief in no way precludes plaintiffs from seeking a retrospective remedy when the failure-to-hire violation actually occurs.

[14] Neither the court of appeals nor the City appears to take the position that petitioners' claim accrued upon completion of the first hiring round, urging instead that the cause of action arose even earlier, when the eligibility list was announced. But any suggestion that petitioners' claims were rendered untimely through the mere repetition of the unlawful practice through multiple hiring rounds is meritless, for the reasons set forth in this section.

person, where only one of the acts starts the statute of limitations running and a suit based on that act is time-barred, a suit based on the other act is not also time barred.").

Thus, for example, each act of copyright infringement gives rise to a new claim with its own three-year limitations period. So long as an instance of infringement "occurred within three years prior to filing, the action will not be barred even if prior infringements by the same party as to the same work are barred because they occurred more than three years previously." 1-12 NIMMER ON COPYRIGHT § 12.05[B][1][b] (2005) (collecting cases). Accordingly, in *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001), the defendant was liable for sales and rentals of infringing costumes that occurred within the charging period, even though he had started to sell and rent the costumes outside of the charging period.

Likewise, as noted above, this Court has applied the same principle in antitrust and periodic payment contexts, holding that each unlawful transaction constitutes a new violation with its own limitations period. *See supra* at 22-23.

This same principle applies to Title VII claims. This Court has explained that under Title VII, "[t]he 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." *Morgan*, 536 U.S. at 113. Thus, "a freestanding violation may always be charged within its own charging period regardless of

its connection to other violations." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 636 (2007).

There would thus be no question, for example, that an employer would be liable for sex discrimination every time he denied a job to a particular applicant because she was a woman, no matter how many rounds of hiring the woman went through before finally filing suit. And this would be true even if the denial were the result of a general policy, adopted years outside the limitations period, against hiring women. Even though the critical discriminatory decision was made outside the limitations period, and even though the plaintiff may have had multiple prior opportunities to challenge that decision, what Title VII prohibits is the denial of the job because of sex, and each time the employer enforces its policy to deny a woman a job it violates the statute. *Cf. Ledbetter*, 550 U.S. at 628 ("But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed."). This is not, as the court of appeals suggested, Pet. App. 4a-5a, because there is something special about facially discriminatory policies – the result would be the same if the employer had never articulated his bias in a formal policy, or even if the bias were subconscious and unknown even to him. It is because of the basic limitations principle that each episode in a series of recurring violations gives rise to a new opportunity to challenge the unlawful conduct.

3. This Court's decisions in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Ledbetter v.*

Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), are not to the contrary.

In these cases, this Court has held that acting in reliance upon a past discriminatory decision does not constitute a fresh act of intentional discrimination and, therefore, does not give rise to a new limitations period for a disparate treatment claim. The Court has reasoned that although acting on the basis of a past discriminatory decision may have a disparate *effect* on the plaintiff, a present action with a disparate impact does not give rise to a new claim of *intentional* discrimination unless undertaken for a present discriminatory purpose. *See Ledbetter*, 550 U.S. at 628-29; *Ricks*, 449 U.S. at 257-58; *Evans*, 431 U.S. at 558.

This Court did not suggest, much less hold, in any of these cases that a discriminatory failure-to-hire claim can accrue in the midst of the hiring process, or cast doubt on the Court's teaching in *Morgan* that "refusal to hire" constitutes a "[d]iscrete act" which gives rise to a claim on the day it "happen[s]." 536 U.S. at 110. For example, *Ricks* did not suggest that the plaintiff's claim accrued at the point during the tenure process when his national origin was taken into account. Instead, the Court held that his claim accrued "at the time the tenure decision was made and communicated to Ricks." 449 U.S. at 258. By the same token, petitioners' failure-to-hire claim arose when the City reached a hiring decision, not before.

Moreover, the Court has repeatedly made clear that disparate impact claims, like petitioners', do not fall within the rule of *Evans* and *Ricks*. In *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), for

example, this Court applied *Evans* to hold that a seniority system did not give rise to claim of intentional discrimination every time it was applied unless each application was accompanied by a concurrent intent to discriminate. *Id*. at 905-09. But at the same time, the Court explained that the rule would be different for a discriminatory impact claim, whose "statute of limitations [runs] from the time [the] impact is felt." *Id*. at 908.[15]

Likewise, in *Ledbetter*, this Court explained that the rule of *Evans* and *Ricks* applied to Ledbetter's Title VII intentional disparate pay claim, but does not apply to claims under the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1), because unlike the disparate treatment provisions of Title VII, the EPA does not require proof of discriminatory intent.[16] *See* 550 U.S. at 640-41. In *Ledbetter*, the Court held that reliance on a prior intentionally discriminatory pay-setting decision was not itself a fresh act of intentional discrimination. As a result, under *Evans*, no new disparate treatment claim could arise with each paycheck. *Id*. However, the Court did not dispute that relying on that past pay decision has a disparate

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[15] In *Lorance*, no such claim was available because Section 703(h) of Title VII precludes disparate impact challenges to a seniority system. 490 U.S. at 904-05.

[16] The EPA provides that "[n]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1).

impact, resulting in the plaintiff's receiving less money each week than her similarly situated male counterparts. And while that effect is not enough to establish a disparate *treatment* claim under Title VII, it *is* enough to establish a violation of the EPA, which has no intent element. *Id*. at 640. And for that reason, the Court saw no conflict between the rule of *Evans* and *Ricks* and the consensus in the lower courts that each disparate pay check constitutes a new violation of the EPA. *See id*.; *cf. also Corning Glassworks v. Brennan*, 417 U.S. 188, 209-210(1974) (finding present-day violation of Equal Pay Act where employer maintained facially neutral pay practices that "perpetuate[d] the effects of the company's prior illegal practice of paying women less than men for equal work").

So, too, in this case. Because discriminatory intent is not an element of a disparate impact claim, the fact that the City made its hiring decision on the basis of its prior classification decision does not render petitioners' disparate impact claims untimely. Each hiring decision constituted a fresh act (hiring exclusively off the "well qualified" list) that satisfied all the elements of a present-day disparate impact claim. And as a result, petitioners' claims were timely and should be reinstated by this Court.

CONCLUSION

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

Respectfully submitted,

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APPENDIX A

List of Members of the International Association of Official Human Rights Agencies That Are Fair Employment Practices Agencies Responsible For Processing Title VII Charges

Alaska Human Rights Commission

Alexandria Office of Human Rights

Anchorage Equal Rights Commission

Austin Human Rights Commission

Baltimore County Human Relations Commission

Broward County Office of Equal Opportunity

City of Springfield Department of Community Relations

City of Tampa, Department of Community Affairs, Office of Human Rights

Columbus Human Rights Commission

Connecticut Commission on Human Rights and Opportunities

Corpus Christi Human Relations Commission

D.C. Office of Human Rights

Delaware Department of Labor, Office of Anti-Discrimination

East Chicago Human Rights Commission

Evansville & Vanderburgh County Human Relations Commission

Fairfax County Human Rights Commission

Florida Commission on Human Relations

Fort Wayne Metropolitan Human Relations Commission

Fort Worth Community Relations Department

Gary Human Relations Commission

Hillsborough Equal Opportunity & Human Relations Department

Howard County Office of Human Rights

Illinois Department of Human Rights

Indiana Civil Rights Commission

Iowa Civil Rights Commission

Jacksonville Human Rights Commission

Kansas City Human Relations Department

Kansas Human Rights Commission

Kentucky Commission on Human Rights

King County Office of Civil Rights

Lawrence Human Relations Commission

Lincoln Commission on Human Rights

Louisiana Commission on Human Rights

Louisville and Jefferson County Metropolitan Human Relations Commission

Madison Equal Opportunities Division

Maine Human Rights Commission

Maryland Commission on Human Relations

Massachusetts Commission Against Discrimination

Michigan Department of Civil Rights

Minnesota Department of Human Rights

Montana Human Rights Bureau

Montgomery County Human Relations Commission

Nebraska Equal Opportunity Commission

New Jersey Division on Civil Rights

New Mexico Department of Workforce Solutions, Human Rights Division

New York City Commission on Human Rights

New York State Division of Human Rights

North Carolina Office of Administrative Hearings Division of Civil Rights

Ohio Civil Rights Commission

Oklahoma Human Rights Commission

Orlando Human Relations Commission

Palm Beach County Office of Equal Opportunity

Pennsylvania Human Relations Commission

Philadelphia Commission on Human Relations

Pinellas County Office of Human Rights

Pittsburgh Commission on Human Relations

Prince Georges County Human Relations Commission

Prince William County Human Rights Commission

Rhode Island Commission for Human Rights

Seattle Office of Civil Rights

South Bend Human Rights Commission

South Carolina Human Affairs Commission

South Dakota Division Human Rights

St. Louis Civil Rights Enforcement Agency

Tacoma Human Rightsand Human Services

Tennessee Human Rights Commission

Texas Workforce Commission, Commission on Human Rights

Utah Anti-Discrimination Division and Labor Division

Washington State Human Rights Commission

West Virginia Human Rights Commission

Wisconsin Department of Workforce Development,
Equal Rights Division

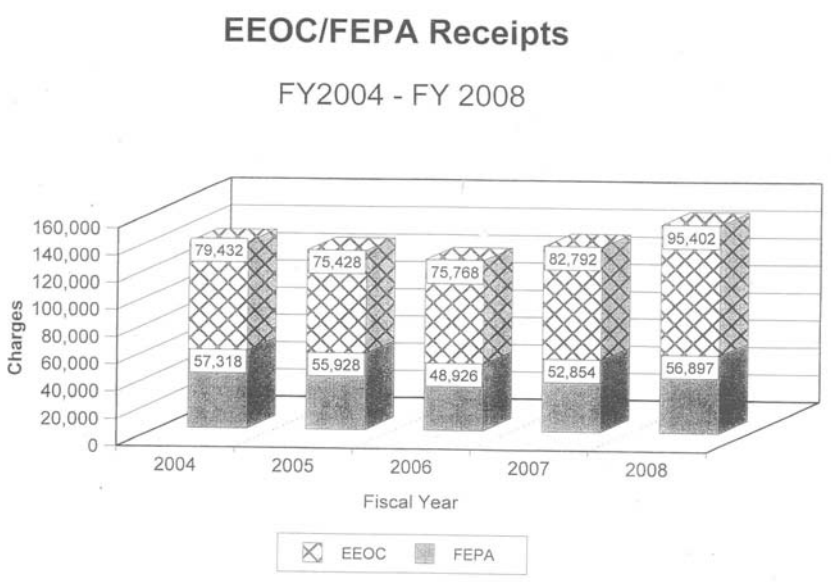
Wyoming Department of Employment, Labor Standards Division

St. Petersburg Human Relations Commission

APPENDIX B

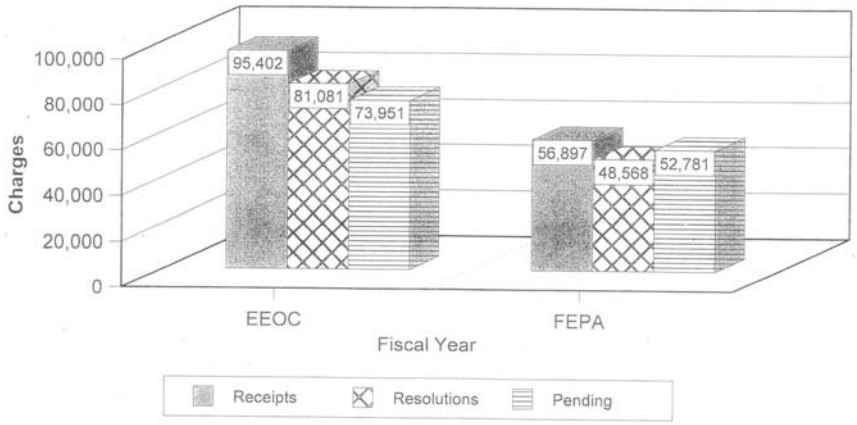
Excerpts from

Trends for Major Charge Processing Activities
(presented at EEOC/FEPA 2009 Annual Training Conference)



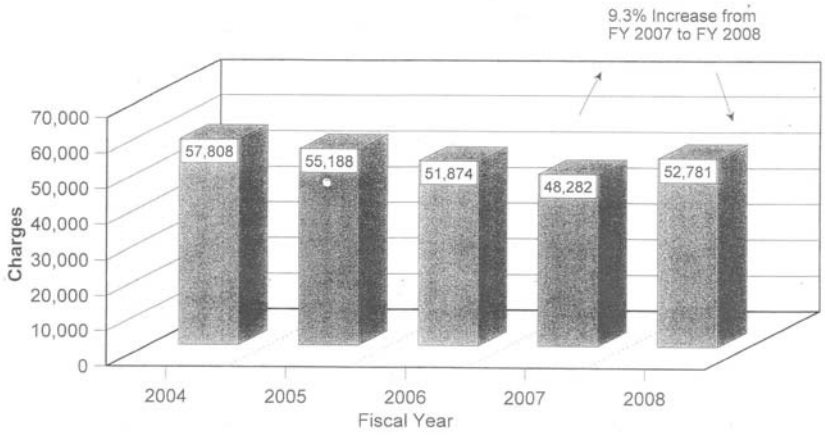
Receipts, Resolutions and Pending

FY 2008



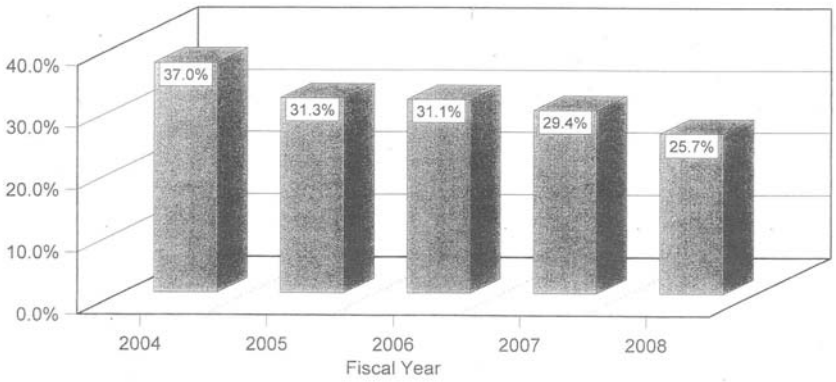
FEPA Pending Inventory

FY 2004 - FY 2008



FEPA 360 or More Day Resolutions as Percent of Total Resolutions

FY 2004 - FY 2008



FEPA Age Distribution of Pending Charges

FY 2008