

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARTHUR L. LEWIS, JR., ET AL., :

4 Petitioners : No. 08-974

5 v. :

6 CITY OF CHICAGO, ILLINOIS. :

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8 Washington, D.C.

9 Monday, February 22, 2010

10

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:05 a.m.

14 APPEARANCES:

15 JOHN A. PAYTON, ESQ., New York, New York; on behalf of  
16 Petitioners.

17 NEAL K. KATYAL, ESQ., Deputy Solicitor General,  
18 Department of Justice, Washington, D.C.; for United  
19 States, as amicus curiae, supporting Petitioners.

20 BENNA RUTH SOLOMON, ESQ., Deputy Corporation Counsel,  
21 Chicago, Illinois; on behalf of Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-974, Lewis v. The City of Chicago.

Mr. Payton.

ORAL ARGUMENT OF JOHN A. PAYTON

ON BEHALF OF PETITIONERS

MR. PAYTON: Mr. Chief Justice, and may it please the Court:

On 11 separate occasions, Chicago used an unlawful cutoff score to determine which applicants it would hire as firefighters. There is no dispute that the cutoff score had an adverse impact on qualified black applicants and was not job-related.

The only question presented is whether each use of the cutoff score in each of the hiring rounds was a separate violation of Title VII. An affirmative answer to that question is both the best reading of the statute and the soundest policy.

Section 703(k) of Title VII provides that in a disparate impact case, as this case, an unlawful employment practice is established -- those are the words -- "is established" when, quote, "a Respondent uses an employment practice that causes disparate impact on the basis of race," close quote.

1           Section 703(h) states that, quote, "a test,  
2 its application, and action upon the results," close  
3 quote, are each violations of Title VII if they are,  
4 quote, "used to discriminate."

5           Section 703(a)(2) prohibits racially  
6 discriminatory classifications.

7           CHIEF JUSTICE ROBERTS: So under your  
8 position, say the city adopts a discriminatory -- takes  
9 a -- issues a discriminatory test; people take it; they  
10 come out with the results; the city says these -- this  
11 is the test we are going to use, but, you know, we don't  
12 have any vacancies. Nobody can sue at that point.

13           MR. PAYTON: No, no. Our position is that  
14 in fact there was an additional violation when the  
15 classification occurred when the city announced what it  
16 intended to do in the future. That is also a violation.

17           But if I could make the contrast,  
18 Mr. Chief Justice, when the city -- suppose they didn't  
19 announce anything at all and what they did was in all  
20 those occasions, the 11 I just described, they used the  
21 unlawful cutoff score and made hiring decisions.

22           Title VII's disparate impact looks at the  
23 consequences of decisions like that. And those  
24 consequences, the results of that clearly occur in the  
25 future on those 11 hiring occasions, and then we would

1 clearly have a cause of action each of those 11 times.

2           And I'll come back and say that Chicago  
3 announces before it does any of that, that it intends to  
4 do that in the future. That announcement is an  
5 independent violation. But that announcement does not  
6 change the impact and the consequences that in fact  
7 still would happen in the future when they happen.

8           JUSTICE SCALIA: There is an independent  
9 violation without an impact? I mean, it's not the  
10 impact provision that you quoted which makes that a  
11 violation. It must be some other provision that makes  
12 it a violation. What other provision is it?

13           MR. PAYTON: Well, there is an impact. You  
14 mean when the announcement is made?

15           JUSTICE SCALIA: Right.

16           MR. PAYTON: When the announcement is  
17 made -- let me make two points. First of all, I believe  
18 we -- you could clearly seek to enjoin Chicago from  
19 doing something unlawful in the future.

20           JUSTICE SCALIA: Sure.

21           MR. PAYTON: Since you clearly have a cause  
22 of action at the announcement. We know that.

23           JUSTICE SCALIA: Because of an impending  
24 violation. But you say -- you say it is an actual  
25 violation.

1 MR. PAYTON: That's right. Yes. And the  
2 question is whether or not the announcement itself is in  
3 violation of the statute. I believe section 703(a)(2),  
4 and actually, all three provisions, make it unlawful to  
5 actually have a classification that has the effect I  
6 just said and the effects would simply be in how they  
7 were sorting the results.

8 So I think there is an impact. It's not the  
9 same impact that ripples through time. And the reason I  
10 said, If they had not made an announcement it is clear  
11 there are consequences that happen in the future each of  
12 those 11 times, there is an additional violation when  
13 they actually use the announcements to say what they  
14 intend to do. They say what they intend to do and then  
15 they do it. Those are two different violations.

16 JUSTICE SOTOMAYOR: Counsel, the language of  
17 the statute of 703 is to "limit, segregate, or  
18 classify."

19 MR. PAYTON: Yes.

20 JUSTICE SOTOMAYOR: So is it your position  
21 that the violation occurs at the classification that is  
22 announced and that every subsequent hiring has limited  
23 someone's opportunities so that they -- there is a  
24 violation subsequently under the limit clause as opposed  
25 to the classification clause, or it's -- each event is a

1 classification violation?

2 MR. PAYTON: It's our position that, in  
3 fact, all three of the sections I quoted from are  
4 implicated in the actions that Chicago took.

5 Clearly, there is a classification, but when  
6 they actually exclude from actual consideration for any  
7 of the jobs in the 11 occasions, that's a limitation.  
8 It's clearly a limitation. When they use the test  
9 results, that's an action upon the test results. When  
10 they use that to make decisions, that's clearly a  
11 violation of (k).

12 All three provisions are in fact implicated,  
13 sometimes in similar ways, sometimes in different ways.  
14 All of them have consequences.

15 And the way disparate-impact law works is,  
16 you have an employment practice -- it's always facially  
17 neutral -- that has an adverse impact on the basis of  
18 race that causes there to be a disparate impact on  
19 consequences. We look at consequences, and the elements  
20 of the disparate impact violation are not complete until  
21 we have all of those elements.

22 JUSTICE ALITO: Your position may follow  
23 from the language of Title VII, but you began by saying  
24 that it also represents the best policy. And I wonder  
25 if you could explain why that is so.

1           Here, the city of Chicago continued to use  
2 this test for quite a number of years after it was  
3 administered. So as you interpret the statute, I gather  
4 that someone could still file a disparate impact claim  
5 six or seven years after the test was first  
6 administered, and quite a few years after it was first  
7 used in making a hiring decision. And how can that be  
8 squared with Congress's evident desire in Title VII to  
9 require that an EEOC charge be filed rather promptly  
10 after the employment action is taken?

11           MR. PAYTON: I think the answer is that this  
12 is completely consistent with how the statute works, but  
13 I'm going to address the policy concern as well. But  
14 how the statute works is, there is a violation every  
15 time there is a use.

16           If we looked at disparate treatment, there  
17 is a violation every time there is an intention to  
18 discriminate. If there was a future intention to  
19 discriminate, there would be a new violation. So if  
20 there is a next use, there is a next violation. And  
21 that's how that ought to work.

22           But look at how this worked. Chicago used  
23 an unlawful cutoff score on those 11 occasions to make  
24 decisions. Chicago should have stopped using the  
25 discriminatory cutoff score and it should have looked at



1 all of the qualified applicants that it had judged  
2 qualified in making its decisions.

3 JUSTICE GINSBURG: But if it stopped using  
4 it, it might be vulnerable to a Rizzo-type suit from the  
5 people who were benefiting.

6 MR. PAYTON: I actually think that that  
7 conflict is not present. Chicago can always make a  
8 decision that responds to something that is unlawful.  
9 And I think this Court has always made it clear the  
10 standard may be in Ricci, but the law is clearly that if  
11 Chicago has reason to believe -- very good reason to  
12 believe that it is doing something that is unlawful, it  
13 can stop doing something unlawful. That is especially  
14 the case here.

15 JUSTICE GINSBURG: I thought in Ricci that  
16 was New Haven's position, that they thought that the  
17 test was unlawful because of the disparate impact.

18 MR. PAYTON: I understand. The standard  
19 that may apply to Chicago's decision may be different,  
20 but let me give you the example in this case.

21 Chicago used a cutoff score that the  
22 district court finds and that their expert who designed  
23 the test told them was problematic, to make decisions  
24 that has nothing job-related about it at all. It's  
25 arbitrary. The group that are qualified are as

1 qualified as the group that are well-qualified and  
2 visa-versa. They had available to them the option of  
3 picking randomly from that group, both groups combined,  
4 and making the decisions on a random draw. That is, in  
5 fact, how they made all of the decisions inside of the  
6 groups that they used. That is always available.  
7 Chicago could have done that at any time.

8           The policy point here, Justice Alito, is  
9 that I'd say the animating purpose behind Title VII is,  
10 as this Court has said, "the eradication of  
11 discrimination from our workplace." And you want it to  
12 be eradicated. Chicago should not have continued doing  
13 this. And the law ought to say, and I think it does  
14 say, that when they use something that is unlawful, they  
15 can be challenged every time they use something that is  
16 unlawful. If the --

17           JUSTICE GINSBURG: How long does the city's  
18 exposure persist? Let's say that the -- in the tenth  
19 round, someone is selected for the job from the  
20 qualified group. And then there's a cutback and there  
21 are going to be layoffs. So the last hired is the first  
22 fired. Could -- would there be a Title VII suit when  
23 that last hired is laid off, on the ground that if  
24 Chicago had done what it was supposed to do, this person  
25 would have had the job long ago and would be higher up

1 on the seniority list?

2 MR. PAYTON: Let me give you two responses  
3 to that.

4 The first answer is that the statute of  
5 limitations is 300 days after every use and it's no  
6 longer. So for whatever it is, if you violate  
7 Title VII, the statute of limitations is 300 days. If  
8 there is a use that goes into the future, it's 300 days  
9 after the last use. Right now, Chicago has stopped  
10 using that. The doors are closed. No one else can  
11 challenge this.

12 To your specific question about how would it  
13 work if there was a layoff arrangement, the proposed --  
14 the remedy order in this case -- it's not in effect  
15 because we are where we are -- but the remedy order in  
16 this case includes shutting down the use of this, but it  
17 also has provisions for seniority to in fact address, I  
18 believe, exactly the circumstances you just described,  
19 Justice Ginsburg. So I believe that is contemplated and  
20 handled in the remedial order.

21 The issue about the policy here, though, is  
22 that if you don't say that a use, in fact, can be  
23 challenged, a use of something unlawful can be  
24 challenged, what you could end up with here is that  
25 Chicago would then take the message that it's okay once

1 they are past the first 300 days, and they could just go  
2 on using the discriminatory cutoff score over and over  
3 and over again, and that is inconsistent with the  
4 overall policy of what Title VII is trying to root out  
5 of our economy and in our workplace.

6 JUSTICE STEVENS: Mr. Payton, can I ask this  
7 general question? Am I correct that each firefighter in  
8 the qualified group who did not make the well-qualified  
9 has a cause of action as though he had been refused  
10 employment when anyone else is hired? There were 11  
11 people hired, as I understand. Did each one of those  
12 hirings give everybody else in the class a cause of  
13 action?

14 MR. PAYTON: The group of the black  
15 qualified applicants that are in the qualified category,  
16 but the qualified category is qualified as the other  
17 category, every time the city made decisions about  
18 filling jobs in the fire department it excluded every  
19 single one of those applicants, even though they were  
20 qualified. So every single one was excluded.

21 So they all have a cause of action because  
22 they were excluded and that clearly fits very easily  
23 within how --

24 JUSTICE STEVENS: But surely they couldn't  
25 all recover it, because only one job was available.

1 MR. PAYTON: That's correct. That's about  
2 what the remedy would be. So the remedy, you know,  
3 obviously wouldn't be to give all of them jobs. That's  
4 not the remedy, and that's not the remedy that's  
5 sought -- was sought here. But they were all excluded  
6 from consideration and that's a violation of Title VII's  
7 disparate impact prohibition. So they all have a cause  
8 of action.

9 The way the remedy would work --

10 JUSTICE STEVENS: What is -- what is the  
11 remedy other than saying change your practice? What is  
12 the -- if one person sues and asks for damages, what  
13 would the remedy be for a single applicant who was not  
14 hired at the time somebody else was hired?

15 MR. PAYTON: It may be very little. So if  
16 it's a single applicant who sues and not a class -- this  
17 is a class. So if a single applicant sues, the remedy  
18 would be to stop using the unlawful cutoff score, okay,  
19 and then to figure out what would have happened if that  
20 unlawful cutoff score hadn't have occurred, and that  
21 would have created a very miniscule chance of ever  
22 becoming a firefighter and perhaps turning that into  
23 some sort of damage award, but it would be miniscule.

24 In the actual event, the award includes some  
25 actual jobs being allocated to the 6,000 members of the

1 class. It was 132, to be decided upon in some random  
2 way that they would be hired. But that's how it would  
3 work. But they are all clearly injured when they are  
4 all excluded from consideration in all 11 rounds, in  
5 violation of Title VII.

6 CHIEF JUSTICE ROBERTS: But that -- each --  
7 each qualified firefighter who did not get a job because  
8 the well-qualified one did has a new cause of action, I  
9 guess, every time somebody is hired from the -- the  
10 well-qualified pool?

11 MR. PAYTON: Every time --

12 CHIEF JUSTICE ROBERTS: In other words,  
13 somebody is hired, that constitutes discrimination  
14 against the qualified black firefighter who was not  
15 hired, and then another -- then somebody else is  
16 hired -- each time it's a new cause of action?

17 MR. PAYTON: They had 11 rounds of hiring  
18 that are relevant to this case, 11 rounds afterwards.  
19 They exhaust the first category. But in the 11 rounds  
20 of hiring, when in every one of those rounds the  
21 unlawful cutoff score is used, that is action upon the  
22 results, that is a limitation. You know, that is the  
23 use of something that causes an adverse impact on the  
24 basis of race -- and, yes --

25 CHIEF JUSTICE ROBERTS: Yes, so it would be

1 a new cause of action, sure. Now, but they -- if  
2 300 days go from the first round of hiring, they  
3 don't -- they cannot sort of piggyback that onto a later  
4 cause of action?

5 MR. PAYTON: Yes, if they sue -- in this  
6 case, the EEOC charge was filed after the second round  
7 of hiring, and in this case then, therefore, no remedy  
8 can take account of the first round of hiring. If they  
9 had sued only on the seventh round of hiring, no remedy  
10 could take account of those forgone opportunities. So,  
11 that would also play out in how the remedial order would  
12 work.

13 And I think I want to reserve the rest of my  
14 time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
16 Mr. Katyal.

17 ORAL ARGUMENT OF NEAL K. KATYAL  
18 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE,  
19 SUPPORTING PETITIONERS

20 MR. KATYAL: Thank you, Mr. Chief Justice,  
21 and may it please the Court:

22 As the questions I think reveal, I think the  
23 bottom line question in this case is whether or not  
24 under the text of Title VII there was a present  
25 violation in each of the 11 rounds of hiring when the

1 City of Chicago relied on its concededly discriminatory  
2 test to exclude the plaintiffs from consideration. And  
3 we think that Title VII has three mutually reinforcing  
4 provisions in it, each of which point to the same  
5 conclusion.

6 A violation of Title VII occurred in this  
7 case when Chicago, in each of those 11 rounds, used its  
8 hiring practice with -- and caused a disparate impact,  
9 thereby limiting the employment opportunities of certain  
10 applicants. Chicago gave an ability test and relied on  
11 that ability test in a way that Title VII forbids. It  
12 took action upon the results of that discriminatory test  
13 in a way that arbitrarily excluded qualified applicants  
14 from being hired.

15 Justice Alito, I think in response to your  
16 question, I think our position follows entirely from the  
17 text of the statute. We are not as concerned about the  
18 policy consequences, though we do think that if the  
19 Court were concerned about the policy consequences, we  
20 think that there is a good reason why Congress  
21 distinguished between disparate treatment and disparate  
22 impact litigation. But it's the language of Title VII  
23 itself, and in particular 703(h), which forbids action  
24 upon the results.

25 JUSTICE ALITO: Why would Congress have



1 wanted to allow a question like this to be left open for  
2 such an extended period of time? Why would it not have  
3 wanted everybody who is potentially affected by it to  
4 understand where things stand at a much earlier point,  
5 at some reasonable period of time after all of the  
6 information is in the -- in the possession of a  
7 potential plaintiff to determine whether there has been  
8 a disparate impact and whether that -- that person is  
9 going to be adversely affected by it, particularly if at  
10 a later point the affect of a remedial decree can be to  
11 upset the employment -- the employment status of other  
12 people who have been hired in the interim?

13 MR. KATYAL: I agree that there -- there  
14 might be policy arguments against it as well as for it,  
15 but here's the way I think we look at it. The United  
16 States is the nation's largest employer and we face  
17 similar concerns. We give certain tests.

18 But I think what might have been -- what was  
19 probably animating Congress was the fear that if the  
20 rule of the City of Chicago were adopted then an  
21 employer who made it 300 days without an EEOC charge  
22 being filed, 300 days after the announcement of the test  
23 results, would then be able to for all time use that  
24 discriminatory test and it would lock in that period,  
25 that test, for as long as 10, 20 years, and Congress

1 could have legitimately worried about if a test made it  
2 300 days, an employer essentially had a get-out-of-jail-  
3 free card to use for all time. And I would say that  
4 that precise thing appears to have happened in this very  
5 case.

6 An Joint Appendix page 54, when the city  
7 announced its test -- test results in January of 1996,  
8 it said it intended to use this test for only three  
9 years through 1999. Afterwards, 1999 came, the city, in  
10 the city's own briefs -- this is a court of appeals  
11 brief at page 12 -- they admit they made a new decision  
12 to continue using this test and the test results for  
13 subsequent hirings. That was a new decision, and indeed  
14 that's a decision, I think, many employers would  
15 logically make after three years, because then they  
16 don't have to worry about the possibility of a disparate  
17 impact lawsuit.

18 And since, as this Court said in Ricci, one  
19 of the goals of Title VII is really to encourage  
20 voluntary compliance on the part of employers, adopting  
21 a rule like the City of Chicago's is really antithetical  
22 to that, because then it will essentially lock in for  
23 all time that old discriminatory test.

24 I think another reason policy -- another  
25 policy reason Congress may have thought about is that a

1 rule that forced people to file within 300 days might be  
2 damaging to the EEOC and divisive to employers, because  
3 it would say you only have that 300-day period to file,  
4 even before all the consequences of the -- of the -- of  
5 the employment decision are fully understood.

6 JUSTICE KENNEDY: Well, actually in -- in  
7 this case, am I correct that 9 years has gone by, but  
8 that's because of the litigation? The suit was filed,  
9 what, 4 months after the 300-day period ran?

10 MR. KATYAL: The first charge was filed, I  
11 believe, 420 days after the January 26th announcement of  
12 the test results. And, yes, Justice Kennedy, then there  
13 was a period of discovery and litigation over business  
14 necessity and the like.

15 And in this case, the city admitted in other  
16 litigation that there was no basis for giving this 89  
17 cutoff score, that a person who scored 65 was just as  
18 likely to succeed as a firefighter as a person who  
19 was -- who had scored 89.

20 Justice Stevens, you had asked about the  
21 remedy in the case and here's how we understand the way  
22 remedies work in disparate impact litigation. It's  
23 largely injunctive in nature. It's mostly about  
24 preventing future problems.

25 There is a back pay claim that is available

1 that is statutorily capped at 2 years. Not everyone in  
2 this 6,000-person class could get that full amount of  
3 back pay obviously. Instead, what happened here, there  
4 was a remedial phase at trial and what they did was they  
5 decided that -- the experts on both sides admitted that  
6 132 people, approximately, would have been hired out of  
7 that class, and that provided the appropriate amount of  
8 back pay.

9 JUSTICE KENNEDY: So was it 132 named people  
10 or was it just 132 undifferentiated?

11 MR. KATYAL: I think it was 132  
12 undifferentiated people, and then I think there --  
13 Mr. Payton can, I think, fully explain how the  
14 randomization of awards was allocated.

15 CHIEF JUSTICE ROBERTS: So everybody gets  
16 132 over 6,000 times whatever the number of people who  
17 would have been hired?

18 MR. KATYAL: Right. And, Mr. Chief Justice,  
19 to respond to your concern before, that amount of money  
20 is not -- you couldn't go back and look to earlier  
21 periods of time outside of the statute of limitations,  
22 outside of the 300-day period, rather only any  
23 subsequent use. For example, in this case the remedy  
24 couldn't look to the first round of hiring because no  
25 lawsuit was brought within that first round of hiring.

1 It was brought at the -- it was brought after the second  
2 round of hiring.

3 JUSTICE GINSBURG: I think you had a  
4 footnote in your reply brief that said that if your  
5 position prevails there would need to be an adjustment  
6 in the relief granted by the district court.

7 MR. KATYAL: That is correct. And I think  
8 that the Petitioners agree with that as well. And  
9 that's I think a further limit on the way in which this  
10 present violation theory operates as a matter of  
11 practice. Now this Court has said in cases such as  
12 Ledbetter that -- that there must be a present  
13 violation, and disparate-impact litigation looks quite  
14 different than disparate-treatment litigation in  
15 practice, because disparate-impact litigation doesn't  
16 need that missing element that has been at issue in  
17 Ledbetter and Evans and Ricks, of discriminatory intent  
18 at that subsequent time of action.

19 Here in a disparate-impact case, all that  
20 need be shown by the plaintiff is adverse impact, and  
21 that adverse impact happens in each of those 11 rounds  
22 of hiring. Each of time -- each time the city used its  
23 test results and drew a line and said, you under 89, we  
24 are not looking at you, that was action upon the  
25 results, to use the language of (h) (2).

1 JUSTICE SCALIA: And that would be clear  
2 even though it had not been established much earlier  
3 that the test was invalid. So a city could go along  
4 using a test that was an invalid test, not declared  
5 such; ten years later, somebody comes up and says: This  
6 test that is being applied to me is an invalid test.

7 MR. KATYAL: That's exactly correct, Justice  
8 Scalia.

9 JUSTICE SCALIA: What -- of what use is a  
10 statute of limitations that -- that -- that operates  
11 that way?

12 MR. KATYAL: Let me say two things. First  
13 is I think (h) (2) refers to "action upon the results,"  
14 and that thing happening in ten years is itself action  
15 upon the results, and so I think as a statutory matter  
16 the language decides it.

17 Now, with respect to the policy reason, I  
18 think the reason is that otherwise Congress had to fear  
19 precisely what you are saying, that an employer ten  
20 years from now would use that discriminatory test,  
21 because they knew they had made it past the 300-day  
22 initial phase of time, and then could use it for all  
23 time. And so the statute of limitations and the  
24 concerns that I would pose work hand in hand with other  
25 concerns of Title VII, and in particular incentivizing

1 employers to ensure voluntary compliance with the law of  
2 Title VII, and which this Court said in Griggs, the goal  
3 of which is to eradicate discrimination from the United  
4 States' labor markets.

5 CHIEF JUSTICE ROBERTS: So I suppose the  
6 benefit is not that the city knows it's safe; it can  
7 rely on a test and all that, but knows that it only has  
8 to pay 300 days back.

9 MR. KATYAL: That is -- that is -- that is  
10 the benefit of that particular back pay limitation, yes.  
11 But in a case like this, where the city knows very well,  
12 this test is discriminatory, and indeed has said so in  
13 litigation, I think Congress wanted to incentivize and  
14 make sure there was an ability for people to sue at each  
15 time that discriminatory test was used.

16 If there are no further questions.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Ms. Solomon.

19 ORAL ARGUMENT OF BENNA RUTH SOLOMON

20 ON BEHALF OF RESPONDENT

21 MS. SOLOMON: Thank you, Mr. Chief Justice,  
22 and may it please the Court:

23 In January 1996 the city adopted and  
24 announced an eligibility list for hiring candidates who  
25 sat for the firefighters' examination. Petitioners were

1 told that a priority pool had been created, that based  
2 on their scores they were not classified in that pool,  
3 and that further consideration of candidates would be  
4 limited to those who were in the priority pool, at least  
5 until everyone in that pool had been called for  
6 processing.

7           The city also publicly admitted that this  
8 tiered eligibility list had adverse impact on  
9 African-Americans and Petitioners were aware of this.  
10 But Petitioners did not file charges challenging the  
11 exam and the cutoff score within 300 days after the  
12 tiered eligibility list was adopted and announced.

13           Now they contend that charges can be filed  
14 to challenge the same exam and the same cutoff score  
15 every time the city hired from the priority hiring pool.  
16 That position cannot be squared with the statute.  
17 Calling other applicants from a hiring pool from which  
18 Petitioners had already been excluded did not limit or  
19 classify Petitioners in any way.

20           JUSTICE GINSBURG: Suppose there were no  
21 lists, but each time there was a hiring round the city  
22 just took from the top -- from the top score down. So  
23 there is no list, but each time the city uses the test  
24 results, and hires the people with the top scores.

25           MS. SOLOMON: If I understand correctly,



1 that would be the same case as this, for this reason:  
2 list is used in a couple of different ways. A list  
3 might be used to describe the strict rank ordering that  
4 Your Honor is describing, and in that case, once there  
5 is that kind of a list, it's the same as this case.

6 What happened in this case after that kind  
7 of a list was made, we also drew another line which was  
8 the priority hiring pool.

9 JUSTICE GINSBURG: No, my -- my hypothetical  
10 is there was no list at all. Just go back to the raw  
11 scores and each time they picked the top people.

12 MS. SOLOMON: So that actually -- if we are  
13 going back to the scores but no announcement has been  
14 made ever that we are going to use the scores in a  
15 certain way, we agree that every time the city actually  
16 consulted the scores, there would be a new claim. But  
17 that's because --

18 JUSTICE GINSBURG: Well, what is the list,  
19 other than an administratively convenient way to use the  
20 scores?

21 MS. SOLOMON: The list was the device that  
22 limited and classified Petitioners in this case, and  
23 that's why it's so important. Because in order to have  
24 a present cause of action, section (a)(2) -- under  
25 section (a)(2), which is the disparate-impact provision,

1 Petitioners have to point to something in the charging  
2 period that actually limited and classified them. And  
3 that was the effect of the list, and including the  
4 priority hiring pool.

5 In a case where there is no general  
6 practice, no announcement, no decision, nothing, but  
7 rather every time the city makes hiring, the city  
8 undertakes a new decision with new criteria, then it is  
9 making a decision at that point; it is engaging in a  
10 practice that is then at that time limiting and  
11 classifying the Petitioners. What --

12 JUSTICE GINSBURG: So even though there is a  
13 clear case on the merits of disparate impact, unless the  
14 suit is commenced within 30 days of the announcement,  
15 then it's as though it were wrong. That's your  
16 position.

17 MS. SOLOMON: The statute (a) (2) requires an  
18 unlawful --

19 JUSTICE GINSBURG: Is -- is that -- there's  
20 a free pass; you don't sue within 30 days of the  
21 compilation of the list, the notice of the list, you sue  
22 420 days later; the discriminatory practice gets frozen,  
23 the status quo gets frozen forever. That's -- that is  
24 your position, is it not?

25 MS. SOLOMON: That is the function of the

1 operation of the statute of limitations, and of course  
2 it's not unique to Title VII.

3 JUSTICE GINSBURG: But this is not exactly a  
4 title -- a statute of limitations. It's a time you have  
5 to file your charge. It's a charge file. There is also  
6 a two-year statute of limitations in Title VII, you  
7 can't get back pay, I think, for more than two years.

8 MS. SOLOMON: The 300-day charging period  
9 under Title VII functions like a statute of limitations  
10 and when a timely charge is not filed, no recovery can  
11 be had for that claim. And the Court has said that over  
12 and over in a series of disparate-treatment cases.

13 Now the defining feature --

14 JUSTICE GINSBURG: You -- you don't have one  
15 case, I think, certainly not from this Court, of  
16 disparate impact. All the cases that you cite are  
17 disparate treatment cases.

18 MS. SOLOMON: The cases are disparate  
19 treatment cases, Justice Ginsburg, but the rule should  
20 be the same in this case for several different reasons.  
21 First, those cases reflect that the reason there is not  
22 a present violation when the consequences of a prior  
23 discriminatory act are felt is because the defining  
24 feature of the claim is absent within the charging  
25 period.

1           Now that is a perfectly good rule, no matter  
2 whether it's discriminatory treatment or discriminatory  
3 impact. And in this case the defining feature, namely  
4 disparate impact, in the sense defined by the statute,  
5 required by the statute to limit or classify in a way  
6 that denies people employment opportunities based on  
7 race -- that defining feature was absent within the  
8 charging period.

9           JUSTICE BREYER: How is it absent? Because  
10 the statute says that the established -- the -- it's  
11 established -- namely, the unlawful employment practice  
12 -- it's established only if -- certainly if the  
13 Respondent uses a particular employment practice that  
14 has a disparate impact. That refers back to (a)(2).

15           So in that period, on a certain date, he  
16 used that limiting practice, and therefore, on that  
17 particular date, he established the unlawful employment  
18 practice by using a test that limited, et cetera.

19           MS. SOLOMON: I have two responses,  
20 Justice Breyer, and the first is that section (k), which  
21 is what Your Honor is quoting from does not describe  
22 accrual and it does not define the underlying violation.  
23 It talks about when an -- excuse me, when a violation is  
24 established. And what's so interesting is that the  
25 reliance on those words "uses an employment practice,"

1 is a few words plucked out of the middle of section (k).

2 You actually can't apply section (k)  
3 literally to this case and have anything that approaches  
4 anything that makes sense. And that's because section  
5 (k) actually goes on after those words that get  
6 highlighted over and over, and it -- and it refers to  
7 the rest of what happens in a case when a claim of  
8 disparate impact is tried.

9 And so can reasonable --

10 JUSTICE SOTOMAYOR: So why don't we look at  
11 subsection (h) --

12 MS. SOLOMON: Subsection --

13 JUSTICE SOTOMAYOR: -- that says -- and it's  
14 an -- "it shall be an unlawful employment practice for  
15 an employer to give" -- "and," conjunctive -- "and act  
16 upon the results. "

17 MS. SOLOMON: Correct.

18 JUSTICE SOTOMAYOR: So when you hire, aren't  
19 you acting upon the results? And how are you acting  
20 upon -- you may be acting upon it, as Petitioner argues,  
21 when you classify, but why aren't you acting upon when  
22 you hire?

23 MS. SOLOMON: Because there is no act that  
24 limits and classifies. And what is interesting about  
25 section (h) -- it's not --

1 JUSTICE SOTOMAYOR: I -- I go back to  
2 Justice Breyer's point. Isn't it, in the very act of  
3 hiring, you are using the test results, and saying --  
4 each time you do it, you are saying, I'm going to cut  
5 off at this limit and I'm not going to consider someone  
6 outside of this limited period.

7 MS. SOLOMON: Well, that's what is actually  
8 missing in this case. The city did not go back to the  
9 test results and it did not create -- engage in a new  
10 decision or a new practice.

11 JUSTICE SOTOMAYOR: But isn't that what  
12 "practice and policy" means? Meaning that each time, as  
13 you continue forward, you are using a particular  
14 practice, a particular policy?

15 MS. SOLOMON: Petitioners continued to be  
16 ineligible for as long as the list was used in the way  
17 that we said at the outset it was going to be used;  
18 namely, that the well-qualified pool, the priority  
19 hiring pool, would be called first.

20 The reason they continued to be ineligible  
21 is because they had been limited and classified as  
22 ineligible until the priority pool was hired first.  
23 That was the only practice that had adverse impact  
24 within, as required by the statute, meaning limit and  
25 classify.

1                   Now, to complete my answer to  
2 Justice Breyer --

3                   JUSTICE STEVENS: May I ask this question,  
4 Ms. Solomon? Would your argument be the same if the  
5 practice in this case were -- required a high school  
6 diploma?

7                   Did you understand my question?

8                   MS. SOLOMON: I'm sorry, I didn't realize  
9 you were finished.

10                  JUSTICE STEVENS: Suppose the practice were  
11 high school diploma. Could that -- would you make the  
12 same argument there as you're making today?

13                  JUSTICE GINSBURG: And let's add to that,  
14 that it was adopted ten years ago and Duke Power  
15 announced to the world that it was going to use a high  
16 school diploma. Indeed, it listed in the county all of  
17 the high school graduates and said, This is the list.

18                  MS. SOLOMON: A case like that might present  
19 different accrual problems for this reason. There might  
20 be several appropriate times when a person affected by a  
21 policy like that could be said actually to have been  
22 limited and classified in their employment  
23 opportunities. And it could be when they enter grade  
24 school, but that is not an appropriate time, so if it's  
25 ten years before the act -- so that person is -- is

1 roughly eight years old.

2 It could be when they apply to the employer.  
3 It could be a variety of other times. But those cases,  
4 whatever difficult accrual problems and questions they  
5 present, they are not presented here, because this was a  
6 closed universe. Everybody affected by the city's  
7 eligibility list and the test and the cutoff score knew  
8 from the moment --

9 JUSTICE STEVENS: But in my example,  
10 everybody who was not a high school graduate would have  
11 been affected right away.

12 MS. SOLOMON: But if they are not interested  
13 in employment with that employer, then they are not --  
14 if it -- they are certainly affected in one sense of the  
15 word, but they are perhaps -- it would not be possible  
16 to say their employment opportunities had been affected.

17 We certainly agree that there should be one  
18 time to challenge every employment practice that has an  
19 unlawful disparate impact, but the question in this case  
20 is whether there is more than one to challenge exactly  
21 the same thing? Petitioners --

22 CHIEF JUSTICE ROBERTS: You force people to  
23 challenge the practice when they don't even know if it's  
24 going to affect them. In the hypothetical that has been  
25 discussed, somebody who didn't graduate from high



1 school, you know, wants to be something other than a  
2 firefighter.

3 Well, that doesn't work out, and he says,  
4 Well, now I want to be a firefighter. And they say,  
5 Well, you can't, because you didn't graduate from high  
6 school. And I think your position is that, well, he  
7 should have filed that suit earlier, no?

8 MS. SOLOMON: Our position is that the  
9 charging period runs from the unlawful practice. And  
10 the Court has stressed it is important to confirm --

11 CHIEF JUSTICE ROBERTS: What is the unlawful  
12 practice?

13 MS. SOLOMON: The unlawful practice here was  
14 limiting and classifying Petitioners in a way that  
15 deprived them of their employment opportunities. This  
16 is what -- this --

17 JUSTICE GINSBURG: Can you put that in  
18 concrete terms? It was the 89 percent cutoff, so that  
19 anybody who got below 89 percent of the test was never  
20 going to be considered until all the first people who  
21 got 89 to 98.

22 MS. SOLOMON: Correct. And after that  
23 decision was made, there was nothing else that Chicago  
24 did that affected Petitioners in the terms required by  
25 the statute. Hiring others did not adversely affect

1 Petitioners because they were --

2 JUSTICE SOTOMAYOR: So could you answer  
3 Justice Stevens' hypothetical? What is the difference  
4 between those people and each person who does not have a  
5 high school diploma, is not -- and is not hired? Does  
6 that mean that the moment that they announce the high  
7 school diploma requirement, that everybody who had  
8 already received one, whether they wanted to work at  
9 this job or not, had to sue, and it's only those people  
10 who just received the high school diploma who can sue  
11 ten years later?

12 MS. SOLOMON: The statute requires the --  
13 the complainant be limited and classified in their  
14 employment opportunities.

15 JUSTICE SOTOMAYOR: So what is the  
16 difference between the policy announcement that each  
17 time I hire, I'm not going to use a high school -- I'm  
18 not going to look at people who don't have a high school  
19 diploma and I'm not going to look at people who don't  
20 have a test score above 89. What's the difference  
21 between those?

22 MS. SOLOMON: The difference is that once  
23 Petitioners here were classified out of the eligible  
24 pool for priority hiring, they were out. They were  
25 simply out. They were not being considered any more at

1 all. We didn't go back to look at the test, we didn't  
2 consider Petitioners, we didn't reject them each time --

3 JUSTICE ALITO: Someone getting a letter  
4 that you sent to people who were qualified didn't know  
5 that. The only thing that I see that you sent to the  
6 people who fell into the qualified category was that it  
7 was unlikely, which I take it means less than  
8 50 percent, that they would be called for further  
9 processing, but it was possible they would be called for  
10 further processing. You didn't tell them anything  
11 about -- you didn't tell them that you were going to  
12 fill all of your available positions with people who  
13 were classified as well-qualified in that letter, did  
14 you?

15 MS. SOLOMON: With respect -- with respect,  
16 Justice Alito, the letter does say that because of the  
17 large number of people who were classified  
18 well-qualified, a step ahead of where Petitioners were  
19 classified, it was not likely that they were going to be  
20 hired.

21 JUSTICE ALITO: Right. That's right.

22 MS. SOLOMON: And for that reason, that's  
23 when the injury and the impact was felt. Whatever else  
24 later happened, whether Chicago hired a lot of people,  
25 Chicago hired no one, whether Chicago ever hired some of

1 the Petitioners, they had years' worth of delay. And at  
2 this point in the litigation it is undisputed. The city  
3 made 149 hires from the first use of the list. That's  
4 more than any other class --

5 CHIEF JUSTICE ROBERTS: Just to follow up on  
6 Justice Alito's question, what if it were different?  
7 What if the letter said, Look, we didn't get, you are  
8 not well-qualified but we really do expect to hire a lot  
9 more, so, you know, keep your fingers crossed. There is  
10 a good chance that you are going to be hired.

11 And you say those people should have sued  
12 right then?

13 MS. SOLOMON: Correct. Because the impact,  
14 at a minimum, is the delay in hiring. And the Court has  
15 made quite clear that you don't -- a complainant or  
16 Plaintiff does not have to feel all the consequences  
17 right at the outset.

18 CHIEF JUSTICE ROBERTS: Well, that's kind of  
19 a bad policy, isn't it, you are telling people who may  
20 probably not be injured at all, you are saying, Well,  
21 you still have to go to the federal court and sue.

22 MS. SOLOMON: With respect, Chief Justice  
23 Roberts, they are injured. Their hiring will be  
24 delayed, possibly substantially.

25 CHIEF JUSTICE ROBERTS: Oh, sure. Yeah, I

1 understand that.

2 MS. SOLOMON: But, you know, let's say we  
3 think we are going to hire -- if the budget plan go  
4 through, we think we are going to hire everybody else  
5 by -- in four months, and you are saying, Well, those  
6 people have to sue anyway because they are injured by  
7 the four-month delay.

8 CHIEF JUSTICE ROBERTS: Yeah.

9 MS. SOLOMON: They are injured by a  
10 four-month delay. But there may be circumstances in  
11 which information is not conveyed in a way that would  
12 put a reasonable person on notice that he or she had a  
13 claim right at the outset, and that relates also to the  
14 high school diploma hypothetical.

15 JUSTICE ALITO: Well, what didn't the city  
16 say that it was planning to give a new test in three  
17 years and then wait more than a decade before giving a  
18 new test? If I received one of these qualified letters,  
19 and I also -- and I knew in addition that the city was  
20 going to give the test in three years, that might well  
21 affect my incentive about bringing a lawsuit to  
22 challenge this.

23 MS. SOLOMON: But it wouldn't change the  
24 fact that there had been, at least if you wait for the  
25 next list, you still have been delayed at least three

1 years in your ability to be hired as a firefighter; and  
2 as far as the reason why we didn't follow through on the  
3 aspirational goal of giving another test within three  
4 years, the tests are very difficult and expensive to  
5 deliver, I think -- to develop, excuse me; the record in  
6 this case actually makes that clear.

7           Despite rather significant steps, including  
8 the use of a prominent African-American industrial  
9 psychologist to develop this test, it had severe adverse  
10 impact. The test actually compares rather favorably to  
11 the test that was given in the City of New Haven, but  
12 the district court invalidated it, and, you know, we did  
13 undertake to develop a new test. But surely the  
14 Court --

15           JUSTICE ALITO: But you don't challenge  
16 that. You don't challenge that. You now acknowledge  
17 that the Plaintiffs were treated unlawfully.

18           MS. SOLOMON: We have not pressed that  
19 claim, that is correct, Justice Alito.

20           JUSTICE ALITO: And were you prejudiced by  
21 the delay in the filing of the EEOC charge?

22           MS. SOLOMON: There was some testimony and  
23 we quoted in our brief about things that the person  
24 responsible for setting the cutoff score could not  
25 remember. But a statute of limitations actually doesn't

1 require prejudice, so we didn't undertake to try to  
2 prove that. The -- repose arises naturally at the end  
3 of the charging period. It's not something that -- that  
4 the defendant has to earn either by capitulating to the  
5 plaintiffs' demands or otherwise proving prejudice.

6 And in a case like this, it -- it wasn't  
7 possible simply to take the list down. The Court's  
8 opinion in Ricci makes that quite clear. Our expert  
9 told us all the way through the trial, he testified --

10 JUSTICE GINSBURG: He didn't have to take  
11 the list down. He simply could have said anyone who got  
12 a passing score, anyone who is qualified, we are not  
13 going to make the distinction between qualified and  
14 unqualified.

15 MS. SOLOMON: I -- I believe --

16 JUSTICE GINSBURG: You didn't have to throw  
17 out the list.

18 MS. SOLOMON: I believe --

19 JUSTICE GINSBURG: You didn't have to throw  
20 out the test.

21 MS. SOLOMON: The Court's opinion in Ricci  
22 addresses that as well. That that's a -- a misuse of  
23 the test scores. The expert was resolute even through  
24 the trial --

25 JUSTICE GINSBURG: I thought the expert

1 said -- the test devisor said he didn't make up that  
2 89 percent cutoff. That was Chicago that made that --  
3 that decision.

4 MS. SOLOMON: He -- his reason for  
5 suggesting the 65 cutoff score was because of the  
6 adverse impact. That was an attempt to deal with  
7 adverse impact, but his position was the test was valid  
8 to measure the cognitive aspects that it was attempting  
9 to measure, and that those related to the training  
10 firefighters had to undergo in the academy.

11 And he was clear as well, that a higher  
12 score created an inference that the person was more  
13 qualified to -- to perform in the way --

14 JUSTICE GINSBURG: But you -- you've lost --  
15 you've lost on that.

16 MS. SOLOMON: We have. But the reason that  
17 I am mentioning it is because it's not simply a matter  
18 of -- of why didn't you take the list down. At the time  
19 that the expert is telling us the test is valid and it  
20 can -- it gives rise to an inference that people closer  
21 to the top are better -- possess more of the cognitive  
22 abilities that the test was testing for, we would have  
23 at a minimum been courting disparate treatment liability  
24 to adjust the scores, to randomize them further or to  
25 take the list down. But to --



1 JUSTICE GINSBURG: No, but going to 65,  
2 opening up the classification, is not adjusting the  
3 scores; it's not taking the list down; it's just saying  
4 anyone who passes the test can proceed to the next step.

5 MS. SOLOMON: It seriously diminished the  
6 opportunities of the people who were at 89 and above.  
7 There were about 1,700 applicants at 89 or above, and  
8 there were 22,000 65 or above. So calling in random  
9 order --

10 CHIEF JUSTICE ROBERTS: You've got to -- I  
11 mean, you have just got to take your -- get as good  
12 legal advice as you can, and determine is it -- are we  
13 going to be in more trouble if we follow the test or  
14 more trouble if we -- if we take it down?

15 People have to do that all the time. You  
16 know, well, if I do this, I'm going to be in trouble; if  
17 I do this, I'm going to -- but I have got to decide what  
18 I should do.

19 MS. SOLOMON: Correct, but read in  
20 conjunction with the 300-day charging period. And I  
21 would like to follow up just briefly on answers to  
22 Justice Breyer and Justice Sotomayor.

23 CHIEF JUSTICE ROBERTS: Well, I'm sorry.  
24 But read in conjunction with the 300 -- you have got to  
25 finish that sentence at least, before --

1 MS. SOLOMON: All right, I'm sorry. That  
2 was the -- so, yes, at the point where the employer is  
3 assessing the options, the city was not sued within --  
4 excuse me, charges were not filed within 300 days after  
5 the tiered eligibility list was adopted and announced.  
6 Petitioners were aware that it had adverse impact. No  
7 charges were filed then; no charges were filed after the  
8 first use of the list.

9 So at some point when the employer is  
10 weighing the options the employer can also factor in,  
11 the time to challenge this has passed.

12 What Petitioners seek here is new  
13 opportunities -- 11, 10 opportunities to challenge  
14 exactly the same thing that they -- that they would have  
15 challenged if they had filed a charge promptly. They  
16 continue to emphasize that the eligibility pool when  
17 compared with the pool of applicants had a disparate  
18 impact. But that's not a new violation. That's not a  
19 new classification, and it doesn't limit anybody's  
20 opportunities in any way beyond what they were already  
21 limited. That's the old violation. That's the one they  
22 didn't charge.

23 Now Petitioners do claim that the shortfall  
24 evidence showed that they -- showed and the use of the  
25 list had disparate impact each time. But it actually

1 didn't, either. That also was the old violation. That  
2 shortfall was compiled by comparing the number of  
3 African-Americans who were hired using the 89 cutoff  
4 score and the number who would have been called for  
5 further processing if --

6 JUSTICE SCALIA: How do you -- the problem I  
7 have with all of this -- it makes entire sense, except  
8 when you read subpart (k), it says an unlawful  
9 employment practice based on disparate impact is  
10 established if a complaining party demonstrates that a  
11 respondent uses a particular employment practice that  
12 causes a disparate impact on the basis of race.

13 MS. SOLOMON: Correct. But you have --

14 JUSTICE SCALIA: Which is what happened  
15 here.

16 MS. SOLOMON: But the fact --

17 JUSTICE SCALIA: They used --

18 MS. SOLOMON: Excuse me, Justice Scalia.  
19 The statute goes on and it describes the later things  
20 that happened at trial. So in our view, read  
21 literally --

22 JUSTICE SCALIA: Where -- where -- where  
23 does it go on? To say what?

24 MS. SOLOMON: It goes on to say that the  
25 Respondent fails to demonstrate that the challenged

1 process is job-related, or subpart little (ii), there is  
2 an alternative practice with less disparate impact. So  
3 -- so (k), if (k) is going to be consulted at all, and  
4 we do not think that it should be, because section  
5 706(e) which has always been thought of as the charging  
6 period, talks about an alleged unlawful practice, and  
7 that's what the person knows at the outset.

8 Section (k) talks about the burden of proof  
9 and how you go about proving these at trial, and that's  
10 why it uses the word "established." But that's also why  
11 it describes the entirety of what happens at trial.  
12 Read literally, you can pluck a few words out of the --  
13 out of one of these provisions and say, aha, they used  
14 an employment practice. You have to read the whole  
15 thing together if you are going to read it at all, and  
16 when you read the whole thing together, you come up with  
17 the absurd result that the charging period doesn't run  
18 until the district court brings the gavel down and  
19 determines that an unlawful practice has been  
20 established.

21 In this case that would have meant that the  
22 people 65 and below could file charges within 300 days  
23 after the district court's decision, which is something  
24 like 11 years after the practice in this case. And  
25 that's because that was the moment at which it was

1 established, and that's why we think that (k) does not  
2 bear on this. And (h) --

3 JUSTICE BREYER: Is my impression -- is  
4 there anything else in that (k)? You see, it lists  
5 about ten things, let's say ten -- imagine. One of  
6 those things is that it was used. Now all the other  
7 things there will not have been -- are things that --  
8 that -- to do with the test, basically. So you have  
9 like six or seven that have to do with the test, and the  
10 criteria, and then you have one that it was used.

11 MS. SOLOMON: Right, and that's why --

12 JUSTICE BREYER: And -- and so I thought,  
13 looking at the list, it's quite right it's used for a  
14 different purpose but --

15 MS. SOLOMON: It's not --

16 JUSTICE BREYER: This (k) has to do with a  
17 different thing, but -- but the critical element of it  
18 was that the practice be used.

19 MS. SOLOMON: You -- but again, even if (k)  
20 is consulted and for the reasons I just outlined we  
21 don't think it should be; it doesn't bear on accrual.  
22 But even if (k) is consulted, it doesn't -- it doesn't  
23 say that any use of an employment practice is -- is a  
24 new unlawful act. It has to be an employment practice  
25 that actually has disparate impact.

1 JUSTICE BREYER: Well, you've got to then  
2 say that all the things that are there, the other nine  
3 and so forth -- all those nine things --

4 MS. SOLOMON: This is actually --

5 JUSTICE BREYER: Well --

6 MS. SOLOMON: Excuse me, Justice Breyer.  
7 This is actually a slightly different point. At the  
8 outset I indicated why section (k) does not bear on  
9 accrual at all; it describes what happens at trial and  
10 for that reason you really can't pluck a few words out  
11 of --

12 JUSTICE BREYER: No, well, that's true --  
13 it doesn't --

14 MS. SOLOMON: But even if one is going to  
15 consult it to determine accrual, what it says is that  
16 the use of an employment practice with adverse impact.  
17 And in this case there was only one, and that one was  
18 when Petitioners were limited and classified based on  
19 the test scores. Nothing that happened after that,  
20 including hiring others, was an unlawful practice with  
21 disparate impact in a way that affected the Petitioners.  
22 They had already been rejected.

23 When an employer says, I will not consider  
24 you for the position, or perhaps it says, I will not  
25 consider you for the position until I have considered a

1 lot of other people first, that is a rejection. Nothing  
2 that happens after that, whether the person hires  
3 somebody else, whether the person doesn't hire somebody  
4 else, whether they change their mind and later hire the  
5 person whom they had previously rejected. Ricks, after  
6 all had a grievance pending. It was certainly possible  
7 that would change the outcome in the case but the Court,  
8 nonetheless, says you cannot wait for the consequences  
9 to --

10 JUSTICE GINSBURG: That was a disparate  
11 treatment case.

12 MS. SOLOMON: Correct, but there's no --

13 JUSTICE GINSBURG: And the argument here is  
14 disparate impact is different because there is no need  
15 to show intent of disparate impact.

16 MS. SOLOMON: Correct. But the only  
17 practice in this case that had a disparate impact in the  
18 sense used by the statute was when the tiered  
19 eligibility list was made. After that, of course there  
20 was a consequence of that. Consequences can be felt in  
21 employment for a long time. The people in the  
22 well-qualified pool were hired before Petitioners, they  
23 were paid before Petitioners, they are going to get  
24 their pensions before Petitioners. Those things  
25 continue to have consequences.

1           But the Court has made clear that the  
2 consequences cannot be challenged by themselves unless  
3 there actually is a present violation. Now, there is  
4 not even an argument in the other side's briefs, neither  
5 of them, that explains why there was an adverse impact  
6 based on race under (a) (2) at any point when the city  
7 used the list. If one reads the briefs very carefully,  
8 one will see that those times when a claim is made in  
9 the briefs that we used an unlawful practice. It always  
10 goes back to the test and the list.

11           Simply keeping the list up after we announce  
12 it is not a new violation. It is quite clear in the  
13 cases that the employer does not have to change a  
14 decision in order to obtain repose.

15           And of course, the disparate treatment and  
16 disparate impact are simply different methods of proving  
17 a claim. They are not different claims by themselves.  
18 In this case, in addition to the statutory language,  
19 there are a number of policy reasons that while we don't  
20 rely on them heavily, we do rely on the statute. They  
21 should nonetheless be considered in deciding this.  
22 There was no sense in which a claim filed to challenge  
23 the list was premature. It was the one act that  
24 actually limited and classified Petitioners.

25           Everything else that happened after that



1 either didn't affect the Petitioners at all, as in  
2 hiring people who had made the cut, or it affected them  
3 only in the colloquial sense, that the consequences of  
4 the prior act continued.

5 Chicago did not have to revisit this in  
6 order to obtain repose. The statute makes that quite  
7 clear.

8 Mr. Payton emphasizes only the policy of  
9 righting employment wrongs but there are other policies  
10 in the statute. In addition to repose, the statute  
11 makes clear that claims should be brought to the EEOC at  
12 the earliest opportunity.

13 Excuse me. We ask that the judgment be  
14 affirmed.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Payton, you have five minutes remaining.

17 REBUTTAL ARGUMENT BY JOHN A. PAYTON

18 ON BEHALF OF PETITIONERS

19 MR. PAYTON: Thank you.

20 This is a case about jobs. And I want to  
21 read from the letter that Justice Alito was referring  
22 to. This is the letter that the qualifieds received.  
23 It's in our Joint Appendix at JA-35 and it's the last  
24 sentence of the first paragraph.

25 This is the letter that they all got. This

1 is the letter that Arthur Lewis, the named person in the  
2 case, got. However, it says: You are qualified; you  
3 are qualified; there are well-qualifieds. And it's  
4 unlikely that language is their nemesis.

5 "However, because it is not possible at this  
6 time to predict how many applicants will be hired the  
7 next few years, your name will be kept on the eligible  
8 list maintained by the department of personnel for as  
9 long as that list is used."

10 I did focus on the word "used." And it's  
11 not only in section (k). It's also in section (h),  
12 where it says, "used to discriminate." Because it's an  
13 ordinary word that the city used itself in advising  
14 Petitioners in this case.

15 In the answer to the complaint in this case,  
16 which is at Joint Appendix 19, the -- I'm sorry, Joint  
17 Appendix 16, the answer to -- actually, the first  
18 paragraph in the complaint of this case, the city says  
19 as follows -- this is the second sentence in the answer  
20 to the complaint: "Defendant, the city, admits that it  
21 has used and continues to use results of the 1995  
22 firefighter entrance examination as part of its  
23 firefighter hiring process. Using an unlawful cut off  
24 score and the eligibility list is nothing other than the  
25 functional equivalent of the cutoff score, using that to

1 make decisions on those 11 times is a violation of Title  
2 VII.

3           And the argument that there is no additional  
4 impact, it is the dramatic difference between being told  
5 what someone intends to do and then they do it. You are  
6 told that maybe your chances are going to be minimal in  
7 the future, or maybe 50/50, but then when it actually  
8 starts happening and you see other people start getting  
9 jobs, that's an impact. That's a consequence.

10           When I said the animating principle and  
11 disparate impact is results in consequences it's result  
12 in consequence. Those are additional impacts that go  
13 with the additional uses that clearly establish a  
14 violation of Title VII's disparate impact prohibition in  
15 this case.

16           I don't think the statutory language is  
17 actually. I think the best reading, as I said, of the  
18 statutory language is as I said. I think the policies  
19 behind how that works, it is 300 days after every use.  
20 There is a statute, but, in fact, the control over that  
21 is entirely within the city. If they stopped using this  
22 unlawful cutoff score after 300 days, they are  
23 completely done with any consensual liability.

24           And the point is you want that to be  
25 challenged, because we don't want unlawful employment

1 practices to continue to go forever, and ever and ever  
2 and ever out there. And we can see in this very case  
3 that if you don't allow the challenge, the practice goes  
4 on, and is inconsistent with what I would say the  
5 national policy to rid our workplace of discrimination.

6 Any other questions otherwise?

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 The case is submitted.

9 (Whereupon, at 12:04 p.m., the case in the  
10 above-entitled matter was submitted.)

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<hr/> <b>4</b> <hr/>				
<b>4</b> 19:9				
<b>420</b> 19:11 26:22				
<b>49</b> 2:11				
<hr/> <b>5</b> <hr/>				
<b>50</b> 35:8				