No. 08-____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals for the
Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Title VII, a plaintiff seeking to bring suit for employment discrimination must first file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice occurred. Where an employer adopts an employment practice that discriminates against African Americans in violation of Title VII's disparate impact provision, must a plaintiff file an EEOC charge within 300 days after the announcement of the practice, or may a plaintiff file a charge within 300 days after the employer's use of the discriminatory practice?

PARTIES TO THE PROCEEDINGS

The petitioners are Arthur L. Lewis, Jr., Gregory S. Foster, Jr., Arthur C. Charleston III, Pamela B. Adams, William R. Muzzall, Philippe H. Victor, Crawford M. Smith, Aldron R. Reed, and the African American Fire Fighters League of Chicago, Inc., all of whom were plaintiffs and appellees in the courts below. The African American Fire Fighters League of Chicago, Inc., is a not-for-profit corporation which has not issued stock and has no corporate parent.

The respondent is the City of Chicago, which was the defendant and appellant in the courts below.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. The Statutory Framework 4

B. Proceedings in the District Court 5

C. Proceedings in the Court of Appeals 8

REASONS FOR GRANTING THE WRIT 9

I. There is an Acknowledged Division Among the Courts of Appeals Regarding the Question Presented 10

II. The Question Presented is of Significant Importance to the Administration of Title VII Claims 19

III. The Court Below Erred 24

CONCLUSION 27

APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit, reported at 528 F.3d 488 (7th Cir. 2008) 1a

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, entered March 24, 2005 .... 12a

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, entered May 26, 2000 .... 44a

Order of the United States Court of Appeals for the Seventh Circuit denying petition for rehearing *en banc*, filed August 21, 2008 .... 71a

TABLE OF AUTHORITIES

Cases

Adams v. City of Chicago, 469 F.3d 609 (7th Cir. 2006) 20

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 24

Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999) 11, 15

Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981) 18

Bazile v. City of Houston, No. 08-cv-02404 (S.D. Tex. filed Aug. 4, 2008) 21

Beavers v. American Cast Iron Pipe Co., 975 F.2d 792 (11th Cir. 1992) 11, 15

Bishop v. New Jersey, 144 F. App'x 236 (3d Cir. 2005) (unpublished) 14, 16

Bishop v. New Jersey, 84 F. App'x 220 (3d Cir. 2004) (unpublished) 16

Bouman v. Block, 940 F.2d 1211 (9th Cir. 1991) 9, 11-13, 18

Bradley v. City of Lynn, 443 F. Supp. 2d 145 (D. Mass. 2006) 21

Bronze Shields, Inc. v. New Jersey Department of Civil Service, 667 F.2d 1074 (3d Cir. 1981) 7, 9, 11, 14, 16, 18

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993) 21

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 23

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 24

Connolly v. McCall, 254 F.3d 36 (2d Cir. 2001)... 18

Cox v. City of Memphis, 230 F.3d 199 (6th Cir. 2000) 9, 11, 14, 16, 18

Davis v. City of San Francisco, 976 F.2d 1536 (9th Cir. 1992), *vacated in part*, 984 F.2d 345 (9th Cir. 1993).. 21

Delaware State College v. Ricks, 449 U.S. 250 (1980) 25

Dothard v. Rawlinson, 433 U.S. 321 (1977).......... 22

EEOC v. Westinghouse, 725 F.2d 211 (3d Cir. 1983)... 16

Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir. 1980) 7, 11, 14, 17-18

Green v. Missouri Pacific Railroad, 523 F.2d 1290 (8th Cir. 1975).. 22

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 4, 21, 24

Guardians Association v. Civil Service Commission, 633 F.2d 232 (2d Cir. 1980)... 7, 11, 13-14, 17-18

Harris v. City of New York, 186 F.3d 243 (2d Cir. 1999) 18

Hood v. New Jersey Department of Civil Service, 680 F.2d 955 (3d Cir. 1982) 16

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).............. 26-27

Johnson v. City of Memphis, No. 00-2608, 2006 WL 3827481 (W.D. Tenn. Dec. 28, 2006) 21

Lanning v. Southeastern Pennsylvania Transportation Authority, 308 F.3d 286 (3d Cir. 2002) 22

Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) 25-26

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) 26

Mems v. City of St. Paul, 224 F.3d 735 (8th Cir. 2000) 20-21

Morton v. Mancari, 417 U.S. 535 (1974) 23

Nash v. Consolidated City of Jacksonville, 905 F.2d 355 (11th Cir. 1990) 21

National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 25-26

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 24

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 22

Tatreau v. City of Los Angeles, No. 03-56638, 138 F. App'x 959 (9th Cir. 2005) (unpublished) 18

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 25

United States v. City of New York, No. 07-cv-2067 (E.D.N.Y. filed Sept. 25, 2007) 21

Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708 (2d Cir. 1996) 18

Walls v. Mississippi State Department of Public Welfare, 730 F.2d 306 (5th Cir. 1984) 14

Federal Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 7

28 U.S.C. § 1343(a)(3) 7

42 U.S.C. § 2000e-2(a) 2, 4

42 U.S.C. § 2000e-2(k) 2, 4-5, 26

42 U.S.C. § 2000e-5(e)(1) 3, 5

42 U.S.C. § 2000e-5(f)(1) 5

State Constitutions and Statutes

Ala. Const. art. V, § 138.01(A) 20

Ariz. Rev. Stat. Ann. § 38-1003(3) to (4) 20

Ark. Code Ann. §§ 14-49-304(b)(2), 14-50-304(b)(2), 14-51-301(b)(2) 20

Cal. Const. art. VII, § 1(b) 20

Colo. Const. art. XII, § 13(1) 20

Conn. Gen. Stat. §§ 5-195, 7-413 20

Haw. Rev. Stat. §§ 76-1, -18 20

Idaho Code Ann. § 50-1604 20

65 Ill. Comp. Stat. 5/10-1-7 20

Ind. Code §§ 4-15-2-12 to -15 20

Iowa Code §§ 341A.8, 400.8, 400.17 20

Kan. Stat. Ann. §§ 19-4311(a), 75-3746(h) 20

Ky. Rev. Stat. Ann. §§ 67A.270, 90.160, 90.320, 90.350 20

La. Const. art. X, § 7 20
Mass. Gen. Laws ch. 31, § 6 20
Mich. Const. art. XI, § 5 20
Minn. Stat. §§ 44.06, 387.36(b)(2), 419.06(2), 420.07(2) 20
Mont. Code Ann. §§ 7-3-4258, 7-32-4108, 7-32-4111 20
Neb. Rev. Stat. §§ 19-1829, 23-2525(3), 23-2541(3) 20
Nev. Rev. Stat. § 284.205 20
N.J. Const. art. VII, § I, para. 2 20
N.M. Stat. § 10-9-13(C) 20
N.Y. Const. art. V, § 6 20
Ohio Const. art. XV, § 10 20
71 Pa. Stat. Ann. § 741.501(a) 20
R.I. Gen. Laws §§ 36-4-17 to -18 20
S.C. Code Ann. §§ 5-19-20, -180 20
S.D. Codified Laws § 3-7-9, -11 20
Tenn. Code Ann. § 8-30-201(a) 20
Tex. Loc. Gov't Code Ann. §§ 143.021, 143.025 20
Utah Code Ann. § 10-3-1007 20
Wash. Rev. Code §§ 41.08.050, 41.12.05(4) 20
Wis. Stat. §§ 63.25(1)(a), 230.15(1) 20
Wyo. Stat. Ann. § 15-5-106(b) 20

Other Authorities

Lex K. Larson, 4 *Employment Discrimination* (2d ed. 1994 & Supp. 2008) 18

Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* (4th ed. 2007) 17-20

Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* (Supp. 2008) 27

H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391 23

H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137 23

Sup. Ct. R. 30.1 1

Petitioners Arthur L. Lewis, Jr., *et al.* respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing the judgment of the district court, is reported at 528 F.3d 488 (7th Cir. 2008), and is reproduced at App. 1a-11a. The opinion of the United States District Court for the Northern District of Illinois, finding liability under Title VII against respondent City of Chicago, is unreported and is reproduced at App. 12a-43a. The opinion of the district court finding that petitioners' EEOC charges were timely is unreported and is reproduced at App. 44a-70a.

JURISDICTION

The court of appeals entered its judgment on June 4, 2008. Petitioners filed a timely petition for rehearing *en banc* on July 3, 2008, which the court of appeals denied on August 21, 2008. *See* App. 71a. On November 5, 2008, this Court extended the time for filing a petition for a writ of certiorari by sixty days. Order on Application No. 08A404; *see also* Sup. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides:

> (a) It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Section 703(k)(1)(A) of Title VII provides:

> (k) Burden of proof in disparate impact cases
>
> (1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

42 U.S.C. § 2000e-2(k).

Section 706(e)(1) of Title VII provides in pertinent part: "A charge under this section shall be filed . . . within three hundred days after the alleged

unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).

STATEMENT OF THE CASE

The district court found that respondent City of Chicago discriminated against petitioners, who were African American applicants for entry-level firefighter positions, by using a hiring practice that had a disparate impact on African American applicants and bore no demonstrable relationship to determining firefighter performance. The court of appeals, however, reversed on timeliness grounds, holding – contrary to the law of five circuits – that an EEOC charge for disparate impact discrimination must be filed within 300 days of the announcement of the practice. Under this rule, any subsequent challenge to an employer's use of the practice as the basis for employment decisions is time-barred.

In the opinion below, the Seventh Circuit asserted that two other circuits (the Third and Sixth Circuits) agree with this approach. By contrast, at least five circuits (the Second, Fifth, Ninth, Eleventh, and D.C. Circuits) disagree; under their precedents, making employment-related decisions from a tainted system is an act of discrimination distinct from the original implementation of the system, such that new claims accrue each time the tainted system is used to make those decisions. The split in the circuits is clear and well-established, and not only was acknowledged by the Seventh Circuit in this case, but also has been recognized by other federal courts, leading commentators, and the respondent itself.

This Court should grant this petition for a writ of certiorari to resolve the well-established split in the

circuit courts, and to establish uniformity among the lower courts on this important question affecting millions of employees and employers nationwide.

A. The Statutory Framework.

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" for an employer:

> (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Both "disparate treatment" claims (which challenge intentionally discriminatory employment practices) and "disparate impact" claims (which challenge employment practices that have an adverse effect on protected classes regardless of intent) are cognizable under Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."); *see also* 42 U.S.C. § 2000e-2(k).

Disparate impact discrimination is established if a "complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is job related . . . and consistent

with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A). Any person subject to such a practice must file a charge of discrimination with the EEOC "within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).[1] If after investigating the charge, the EEOC cannot secure voluntary compliance from the employer and the EEOC elects not to file suit on behalf of the employee,[2] the employee can receive a "right-to-sue" letter and institute a civil action against the employer. 42 U.S.C. § 2000e-5(f)(1). The employee has ninety days from receipt of a right-to-sue letter to file suit. *Id.*

B. Proceedings in the District Court.

In 1995, the City of Chicago administered a scored test to over 26,000 applicants as the first step in its hiring process for entry-level firefighters. After the test was scored, the City divided the applicants into three categories based on whether their scores fell above or below specified minimums, and labeled these categories "well qualified," "qualified," and "not qualified." The City's use of the test scores to rank applicants in this manner had a severe disparate impact upon African American applicants: white test-takers were five times more

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[1] In certain circumstances not present here, the limitations period is 180 days. *See* 42 U.S.C. § 2000e-5(e)(1).

[2] With respect to charges that involve private employers, the EEOC has the authority to initiate civil litigation, and with respect to charges that involve a government, governmental agency, or political subdivision as the employer, the EEOC refers the case to the Attorney General who then has discretion to initiate civil litigation. *See* 42 U.S.C. § 2000e-5(f)(1).

likely than African American test-takers to be ranked "well qualified." Petitioners are a class of approximately 6,000 African Americans who took the 1995 test and were rated "qualified."

In January 1996, the City mailed notices of the test results to all applicants, advising them of the creation of the three categories and of the City's plan to advance only those in the "well qualified" category to the next steps of the hiring process. In May 1996, five months after announcing its plan to make hiring selections from the disproportionately white pool of test-takers in the "well qualified" group, the City began using that method to hire its first class of firefighters from the pool of applicants who took the 1995 test. During the next five years (with limited exceptions not relevant here), the City used this method nine more times to fill subsequent firefighter classes, each time selecting a new class at random from the "well qualified" group. The result was that between 1996 and 2001, the City's entry-level firefighter hires were 77% white and 9% black (compared to an applicant pool that was 45% white and 36% black). In each of these ten rounds of hiring, applicants in the pool of test-takers ranked "qualified," including petitioners, were denied consideration for hire.

Petitioners filed EEOC charges of race discrimination in March 1997, within 300 days after the City's hiring of a new class for which petitioners and others in the "qualified" group were denied consideration, but more than 300 days after the City's initial announcement of the test results in January 1996. After receiving right-to-sue letters from the EEOC, petitioners filed this lawsuit in

1998. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

In the district court, the City moved for summary judgment on the ground that petitioners' EEOC charges were untimely. The City argued that the only alleged act of discrimination occurred in January 1996, when petitioners were notified that they were placed in the "qualified" category rather than the "well qualified" category. The district court denied the motion, holding that an employer's use of a discriminatory hiring practice is an actionable Title VII violation that starts its own charge-filing period. App. 69a-70a. Because petitioners' EEOC charges were filed within 300 days of the City's use of the test results to make hiring decisions, the district court held that those charges were timely. The district court recognized that the circuits were split on this question, and agreed with the reasoning of the Second and Fifth Circuits while declining to follow the Third Circuit. App. 61a-62a, 67a-69a (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980); and *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980); and declining to follow *Bronze Shields, Inc. v. N.J. Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981)).

The case proceeded to a bench trial, at which the City admitted that the hiring practice in question had a severe disparate impact on African American candidates, but argued that the practice did not violate Title VII because it was job related and consistent with business necessity. The district court rejected this defense, holding in March 2005 that the City's firefighter hiring practice unlawfully discriminated against African American applicants in viola-

tion of Title VII.[3] The court later resolved remedial issues and entered final judgment.

C. Proceedings in the Court of Appeals.

On appeal, the City did not challenge the district court's finding of unlawful race discrimination, and instead argued only that petitioners had not timely filed their EEOC charges. Br. of Def.-Appellant at 4, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Oct. 5, 2007). The Seventh Circuit agreed and, in an opinion by Judge Richard Posner, reversed the district court's judgment.

The Seventh Circuit held that discrimination against petitioners "was complete when the tests were scored and . . . was discovered when the applicants learned the results." App. 4a. Because petitioners had filed EEOC charges within 300 days of the City's use of the hiring list, but more than 300 days after initial notification of the test results, the court of appeals concluded that the EEOC charges were untimely.

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[3] Specifically, the district court held that the test was skewed toward the "least important aspects of the firefighter position at the expense of more important abilities," App. 32a, and that the cut-off score selected by the City for dividing the "well qualified" from the "qualified" pool was a "statistically meaningless benchmark." App. 34a. The court found that there was no evidence that those in the disproportionately white "well qualified" pool "are the most qualified candidates for the job or that they are better qualified than individuals" in the "qualified" pool. App. 36a. The district court further found that the City set the cut-off score for dividing among the "well qualified" and "qualified" pools not for business necessity but for administrative convenience, against the advice of the test developer. App. 34a-35a.

The court of appeals acknowledged that if the City's hiring practice had been discriminatory on its face, each use of the practice after adoption would have been unlawful, because such use would have been intentional discrimination. App. 4a-5a. But the court concluded that in a disparate impact case, once testing is done and applicants are sorted into facially neutral categories such as "well qualified" and "qualified," no further discrimination occurs by giving preference in actual hiring decisions to those in one category rather than another. App. 4a-7a.

The Seventh Circuit acknowledged the split of authority among the courts of appeals, and cited the Third and Sixth Circuits favorably while disagreeing with the Ninth Circuit. App. 6a-7a (citing *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000); and *Bronze Shields*; and disagreeing with *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991)).

Petitioners filed a petition for rehearing *en banc* on July 3, 2008, noting the Seventh Circuit's departure from the rule applied in other courts of appeals. The Seventh Circuit denied rehearing on August 21, 2008. App. 71a. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

The courts of appeals are intractably divided over the proper analysis and resolution of claim-accrual questions in disparate impact cases. Some courts hold that a challenge to an employment practice with a discriminatory adverse impact is timely if filed within the charge-filing period after any use of the practice that adversely affects the charging party. Other decisions hold that a challenge is timely *only* if charges are filed within the charge-

filing period after the charging party learns of the adoption of the employment practice in question, even if the practice is not immediately used to make employment decisions and is then used repeatedly for this purpose over a lengthy period of time.

This legal distinction is of enormous practical importance, effectively determining whether an employer may indefinitely follow a discriminatory employment practice if affected employees or applicants fail to object to the initial promulgation of the procedure within the brief Title VII limitations period. The use of employment practices such as the hiring procedure at issue here is widespread – and is in fact required by state or local law for many public employers across the country – making the need for a nationally uniform claim-accrual rule paramount.

I. There is an Acknowledged Division Among the Courts of Appeals Regarding the Question Presented.

This Court should grant the petition for a writ of certiorari to resolve an important question that has long divided the courts of appeals. The division of authority on the question presented – whether an EEOC charge for disparate impact discrimination must be filed within the charge-filing period after the adverse impact of an employment practice is first announced, or whether charges are timely if filed within the time period after any subsequent use of that practice – was acknowledged by the Seventh Circuit and district court below. App. 6a-7a, 61a-62a, 67a-69a. This division of authority has previously been noted by the Third, Fifth, and Sixth Cir-

cuits, and leading commentators likewise agree that the courts of appeals are in conflict.

Five circuits – the Second, Fifth, Ninth, Eleventh, and D.C. Circuits – have held that each instance of a repeated refusal to hire, promote, or provide employment benefits, based on a facially neutral policy that has a disparate impact on a protected group and that is not job related and consistent with business necessity, constitutes an independent violation of Title VII. *See Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232, 248-50 (2d Cir. 1980), *aff'd on other grounds*, 463 U.S. 582 (1983); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980); *Bouman v. Block*, 940 F.2d 1211, 1220-21 (9th Cir. 1991); *Beavers v. Am. Cast Iron Pipe Co.*, 975 F.2d 792, 797-800 (11th Cir. 1992); *Anderson v. Zubieta*, 180 F.3d 329, 335-37 (D.C. Cir. 1999). This rule provides plaintiffs with a new limitations period that commences with each subsequent refusal to hire (or other adverse employment action) caused by the application of the policy.

Contrary to the holdings of these five circuits, the Seventh Circuit held in this case that petitioners' disparate impact claims accrued only when they were told the results of the City's discriminatory hiring practice. App. 4a-5a. The Seventh Circuit cited the decisions of the Third and Sixth Circuits as being in accord. App. 6a (citing *Bronze Shields, Inc. v. N.J. Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981) and *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000)). The rule in these courts requires plaintiffs to file EEOC charges within the short limitations period after the adverse impact of an employment practice is first announced, or else lose permanently

the ability to challenge employment decisions resulting from the subsequent use of that practice.

The respondent "readily acknowledged" this split of authority in its briefs below and at oral argument, albeit without recognizing the full depth of the split. Reply Br. of Def.-Appellant at 12, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Jan. 25, 2008). ("While we readily acknowledge that the Second and Fifth Circuits have applied the continuing violation doctrine to the ongoing use of facially neutral lists with disparate impact, the Sixth Circuit, like the Third, has refused." (citations omitted)).[4]

1. The majority position in the courts of appeals is to treat EEOC charges regarding disparate impact discrimination in an employer's selection, pay, or benefits practices as timely if filed within the limitations period after any use of that practice.

In *Bouman*, the Ninth Circuit considered a Title VII challenge to a promotional exam that allegedly had a disparate impact on women. *Bouman*, 940 F.2d at 1217-18. Much like the instant case, the plaintiff was told when the eligibility list was created that she was not likely to be reached for promo-

[4] *See also* Br. of Def.-Appellant at 36, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Oct. 5, 2007) ("Other Circuits have split in cases with similar facts to those here. The Third and Sixth Circuits refuse to extend the accrual of claims based on the ongoing use of eligibility lists, while the Second and Fifth Circuits regard it as a continuing violation." (citations omitted)); Transcript of Oral Argument at 1, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Feb. 22, 2008) ("While this Court has not addressed this precise issue, the time to challenge a tainted eligibility list has been litigated in four other circuits, which have split two to two.").

tion. *See id.* at 1217. Noting that "[t]he crucial issue in this case is whether [the plaintiff's] non-appointment from the eligible list was a separate injury from the allegedly discriminatory examination itself," the Ninth Circuit concluded that it was, and that the plaintiff's EEOC charge – filed within 300 days of the expiration of the eligibility list – was timely. *Id.* at 1220-21. The Seventh Circuit below recognized that "[t]he Ninth Circuit reached a contrary result in *Bouman v. Block*," but declared *Bouman*'s rationale mistaken. App. 6a-7a.

The Second Circuit is in agreement with the position of the Ninth Circuit. In *Guardians*, the Second Circuit addressed the timeliness of the plaintiffs' charges alleging that an exam for police hiring had a disparate impact on black and Hispanic applicants. *Guardians*, 633 F.2d at 235-36. The plaintiffs filed EEOC charges several years after creation of the eligibility list but within 300 days of the defendant's last use of that list.[5] *See id.* The Second Circuit held that the charges were timely because "the results of the test were in effect being 'used to discriminate'" in violation of Title VII "each time a member of the plaintiff class was denied a chance to fill a vacancy." *Id.* at 249; *see also id.* at 250 ("[A]n unjustified refusal to hire is in itself a violation which cannot be dismissed as a mere effect of an earlier wrong."). The Sixth and Third Circuits (which the Seventh Circuit viewed as being in accord with it) themselves recognize a conflict between their po-

[5] Although the plaintiffs in *Guardians* alleged a discriminatory refusal to hire minority applicants, the case arose as a challenge to the defendant's last-hired, first-fired layoff policy. *See Guardians*, 633 F.2d at 235-36.

sitions and the Second Circuit's holding in *Guardians*. *See Cox*, 230 F.3d at 204 ("In contrast to the Third Circuit, the Second Circuit treats hiring from an allegedly tainted roster as an act of discrimination distinct from the original acts of discrimination."); *see also Bishop v. New Jersey*, 144 F. App'x 236, 239 (3d Cir. 2005) (unpublished) (relying on *Bronze Shields* and *Cox*, and noting that the Second Circuit's decision in *Guardians* is to the contrary).

The Fifth Circuit has also addressed the same question and has reached the same conclusion as the Ninth and Second Circuits. In *Gonzalez*, the court held that the plaintiff's disparate impact challenge would be timely filed if the plaintiff could show that the defendant "denied him a promotion or transfer within the 180-day period on the basis of the prior testing."[6] *Gonzalez*, 610 F.2d at 249. The court remanded for determination of the fact question whether the defendant "continued to base its selection of employees to receive job opportunities upon scores from an unvalidated battery of tests." *Id.*

Two other circuits have addressed the same question in the context of disparate impact claims arising from the adoption and repeated application of employment benefit policies. The Eleventh and D.C. Circuits have each held that every instance of a repeated refusal to provide employment benefits, based on a facially neutral policy that violates Title VII, constitutes an independent act of discrimination

[6] The Fifth Circuit subsequently noted the apparent split in authority on this point. *See Walls v. Miss. State Dep't of Pub. Welfare*, 730 F.2d 306, 319 (5th Cir. 1984) (noting the conflict between *Guardians* and *Bronze Shields*).

and restarts the clock for filing an EEOC charge. *See Beavers*, 975 F.2d at 794, 797-800 (upholding the timeliness of a plaintiff's challenge to his employer's policy of refusing health care coverage for children who did not reside with the parent-employee, where the plaintiff filed his EEOC charge eight years after his children's benefits were first denied, because the employer had continued to apply the policy within the filing period preceding the plaintiff's EEOC charge)[7]; *Anderson*, 180 F.3d at 333, 335-37 (holding that the plaintiffs' discrimination challenge to the adverse impact of their employer's pay and benefits policies was timely, even though the plaintiffs did not file EEOC charges within the charge-filing period after notice that the policies would apply to them, because each application of the benefits policies was an actionable Title VII violation).

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[7] The Seventh Circuit sought to distinguish *Beavers* by asserting that the discriminatory practice at issue – affording benefits to an employee's children only if the employee was their custodial parent – was the "sole cause of the denial" of benefits to the plaintiff's children, while in this case there was an "intervening neutral act"– the City's decision to hire only those whose scores placed them in the group labeled "well qualified." App. 5a. In fact, however, what the Seventh Circuit characterized as an "intervening neutral act" was an integral part of the practice as originally adopted by the City: filling firefighter vacancies by classifying the test scores into groups and preferentially hiring from the purportedly "higher" group. Hence, in both *Beavers* and this case, a single practice was originally adopted that would have a predictable disparate impact on a protected group, and that practice was subsequently *used* over a lengthy period to make decisions that disparately affected that group. In *Beavers,* the Eleventh Circuit held that the continuing use of such a practice started new charge-filing periods; in the present case, the Seventh Circuit held that it did not.

2. The Seventh Circuit departed from the rule applied in the five courts of appeals cited above, holding here that disparate impact charges must be filed within the limitations period after the initial announcement of the challenged practice. App. 4a-7a. The court recognized the split of authority on this point, citing the Third Circuit's decision in *Bronze Shields* and the Sixth Circuit's decision in *Cox* in support of its holding. App. 6a.

In *Bronze Shields*, a disparate impact challenge to a civil service test, the Third Circuit indicated that only the initial administration of the test, and not its subsequent use to refuse to hire minority applicants, could be a disparate impact violation.[8] *See Bronze Shields*, 667 F.2d at 1081-84. Similarly, in *Cox*, the Sixth Circuit held that EEOC charges alleging intentional racial discrimination associated with the use of a police department promotional exam were not timely because they were filed outside the charge-filing period after the promulgation of the eligibility list. *See Cox*, 230 F.3d at 201-04.

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[8] *Bronze Shields* arguably left open the question whether an applicant who does not fail an employment test, but remains on a ranked list throughout the time the list is in use, can challenge each use of the list as a new violation. *See Hood v. N.J. Dep't of Civil Serv.*, 680 F.2d 955, 958-59 (3d Cir. 1982); *cf. EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 219 (3d Cir. 1983). However, two recent unpublished decisions in the Third Circuit have applied *Bronze Shields* to hold that "otherwise neutral use of an allegedly tainted exam is not itself a discriminatory act under Title VII, but rather is merely an effect of the prior act of discrimination." *Bishop*, 144 F. App'x at 239; *see also Bishop v. New Jersey*, 84 F. App'x 220, 224-25 (3d Cir. 2004) (unpublished).

In sum, eight courts of appeals have weighed in on the question presented. Five have held that EEOC charges regarding disparate impact discrimination in an employer's selection, pay, or benefits practices are timely if filed within the limitations period after any use of that practice. Three have disagreed, holding that EEOC charges must be filed within the limitations period after the challenged practice is initially adopted and results showing an adverse impact first become known.[9]

Leading employment discrimination commentators have noted the long-established split in the circuits on this point. A prominent treatise notes:

> [W]hen an employer uses the results of a discriminatory test over a period of time as the basis for employment decisions, . . . [m]ust an aggrieved party file a charge within the statutory period running from the date of administration of the test, or is a charge timely if filed while the results are still being used as a basis for employment decisions? The courts are divided on this issue.

Barbara T. Lindemann & Paul Grossman, 2 *Employment Discrimination Law* 1775 & n.134 (4th ed. 2007) (comparing *Guardians* and *Gonzalez* with

[9] Petitioners argued below that all of the courts of appeals to address this question supported petitioners' position on timeliness, and that the rulings of the Third and Sixth Circuits could be distinguished based on the specific facts of those cases. *See* Br. of Pls.-Appellees at 33-35, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Dec. 14, 2007). Regardless how the decisions of the Third and Sixth Circuits are counted, the Seventh Circuit's decision below is in conflict with the holdings of at least five other courts of appeals.

Bronze Shields); *see also* Lex K. Larson, 4 *Employment Discrimination* § 72.07[7][c] & nn.109-11 (2d ed. 1994 & Supp. 2008) ("If an employee chooses not to bring a timely challenge to the methods used in compiling [an allegedly tainted] eligibility list, should that employee subsequently be able to challenge the failure to grant him or her a promotion? The courts are not of one mind on this question." (citing *Cox*, *Bronze Shields*, *Guardians*, *Gonzalez*, and *Bouman*)).

3. There is nothing to suggest that this widely-recognized split among the circuits will resolve itself without this Court's intervention. The Second Circuit, for example, has maintained its position since the *Guardians* decision in 1980, and has reaffirmed its holding repeatedly since then.[10] The Ninth Circuit, likewise, has recently reaffirmed its *Bouman* ruling. *See Tatreau v. City of Los Angeles*, No. 03-56638, 138 F. App'x 959, 961 (9th Cir. 2005) (unpublished). And the Seventh Circuit was aware of, and explicitly acknowledged, contrary and long-standing

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[10] *See, e.g.*, *Connolly v. McCall*, 254 F.3d 36, 41-42 (2d Cir. 2001) (relying on *Guardians* to hold that the plaintiff's challenge to the New York public pension system was timely); *Harris v. City of New York*, 186 F.3d 243, 248 (2d Cir. 1999) (holding that the plaintiff's failure-to-promote claim did not accrue until the allegedly discriminatory eligibility list expired); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996) (stating that a claim accrues when "there is evidence of an ongoing discriminatory policy or practice, such as use of discriminatory seniority lists or employment tests"); *Ass'n Against Discrimination in Emp't v. City of Bridgeport*, 647 F.2d 256, 274-75 (2d Cir. 1981) (holding that a firefighter test was discriminatory and that employee selections based on that test were independent acts of discrimination).

authority from other circuits in concluding that petitioners' claims were time-barred. App. 6a-7a.

This case presents an ideal vehicle for this Court to resolve the entrenched circuit split. The question presented is a pure question of law unencumbered by any factual disagreement between the parties. The legal question was outcome-determinative in this case, was extensively briefed by the parties,[11] and was clearly decided by the Seventh Circuit.

II. The Question Presented is of Significant Importance to the Administration of Title VII Claims.

This conflict requires resolution by this Court not only because of the intractable split among the courts of appeals, but also because clarity and uniformity regarding the charge-filing deadline are of significant importance to the administration of Title VII claims in the lower courts.

The use of employment tests like the one at issue in this case to make hiring, promotion, or other employment decisions is widespread: "For more than a half-century, employers, employment agencies, apprenticeship committees, and others have used scored tests to assist in making selection decisions for employment opportunities, including hiring, job assignments, training, and promotion." Barbara T. Lindemann & Paul Grossman, 1 *Employment Dis-*

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[11] *See* Br. of Def.-Appellant at 16-41, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Oct. 5, 2007); Br. of Pls.-Appellees at 8-38, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Dec. 14, 2007); Reply Br. of Def.-Appellant at 3-16, *Lewis v. City of Chicago*, No. 07-2052 (7th Cir. Jan. 25, 2008).

crimination Law 161 (4th ed. 2007). Many public employers and civil service departments, in particular, are required by state law to use scored tests to select among candidates for hiring, promotion, and other job benefits.[12]

As a result, adverse impact lawsuits that challenge alleged disparities caused by these employment practices have been regularly filed for decades.[13] This is an ongoing feature of Title VII litiga-

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[12] At least thirty-four states have constitutional or statutory provisions requiring state agencies or localities to use competitive examinations in making employment decisions for public employees. *See* Ala. Const. art. V, § 138.01(A); Ariz. Rev. Stat. Ann. § 38-1003(3) to (4); Ark. Code Ann. §§ 14-49-304(b)(2), 14-50-304(b)(2), § 14-51-301(b)(2); Cal. Const. art. VII, § 1(b); Colo. Const. art. XII, § 13(1); Conn. Gen. Stat. §§ 5-195, 7-413; Haw. Rev. Stat. §§ 76-1, -18; Idaho Code Ann. § 50-1604; 65 Ill. Comp. Stat. 5/10-1-7; Ind. Code §§ 4-15-2-12 to -15; Iowa Code §§ 341A.8, 400.8, 400.17; Kan. Stat. Ann. §§ 19-4311(a), 75-3746(h); Ky. Rev. Stat. Ann. §§ 67A.270, 90.160, 90.320, 90.350; La. Const. art. X, § 7; Mass. Gen. Laws ch. 31, § 6; Mich. Const. art. XI, § 5; Minn. Stat. §§ 44.06, 387.36(b)(2), 419.06(2), 420.07(2); Mont. Code Ann. §§ 7-3-4258, 7-32-4108, 7-32-4111; Neb. Rev. Stat. §§ 19-1829, 23-2525(3), 23-2541(3); Nev. Rev. Stat. § 284.205; N.J. Const. art. VII, § I, para. 2; N.M. Stat. § 10-9-13(C); N.Y. Const. art. V, § 6; Ohio Const. art. XV, § 10; 71 Pa. Stat. Ann. § 741.501(a); R.I. Gen. Laws §§ 36-4-17 to -18; S.C. Code Ann. §§ 5-19-20, -180; S.D. Codified Laws § 3-7-9, -11; Tenn. Code Ann. § 8-30-201(a); Tex. Loc. Gov't Code Ann. §§ 143.021, 143.025; Utah Code Ann. § 10-3-1007; Wash. Rev. Code §§ 41.08.050, 41.12.05(4); Wis. Stat. §§ 63.25(1)(a), 230.15(1); Wyo. Stat. Ann. § 15-5-106(b).

[13] *See, e.g.*, *Adams v. City of Chicago*, 469 F.3d 609, 610 & n.1 (7th Cir. 2006) (noting that "Chicago's methods for promoting [police] officers . . . has proven to be a contentious issue that has spawned litigation over the past several decades," and citing challenges to police promotions from 1971 to 1998 in eight other lawsuits); *Mems v. City of St. Paul*, 224 F.3d 735, 739-41

tion. In the last several years alone, new disparate impact challenges have been filed to civil service exams used for municipal hiring and promotion in Houston, Texas; New York City; and Lynn, Massachusetts, to give just a few examples.[14]

Nor is the use of scored tests the only form of employment practice that is affected by the circuit split at issue here. Other employment criteria – including, for example, education requirements,[15] physical

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(8th Cir. 2000) (reviewing a disparate impact challenge to St. Paul fire department's promotional exam); *Brunet v. City of Columbus*, 1 F.3d 390, 393-94 (6th Cir. 1993) (describing gender-based disparate impact challenges to entry-level firefighter exams for the Columbus fire department); *Davis v. City of San Francisco*, 976 F.2d 1536, 1539 (9th Cir. 1992) (describing disparate impact challenges to San Francisco fire department's hiring and promotion exams between 1970 and 1984), *vacated in part*, 984 F.2d 345 (9th Cir. 1993); *Nash v. Consol. City of Jacksonville*, 905 F.2d 355, 356 (11th Cir. 1990) (reviewing disparate impact challenge to Jacksonville fire department's promotional exam); *Johnson v. City of Memphis*, No. 00-2608, 2006 WL 3827481, at *1-6 (W.D. Tenn. Dec. 28, 2006) ("Since the early seventies the employment practices of the City of Memphis have frequently been challenged in court as discriminatory against African Americans and women.").

[14] *E.g.*, Complaint, *Bazile v. City of Houston*, No. 08-cv-02404 (S.D. Tex. filed Aug. 4, 2008) (alleging race discrimination in firefighter promotional exams); Intervenor Complaint, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. filed Sept. 25, 2007) (alleging race discrimination in firefighter hiring exam); *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 148 (D. Mass. 2006) (alleging race discrimination in firefighter hiring and promotional exams).

[15] *See, e.g.*, *Griggs*, 401 U.S. at 426, 436 (invalidating an employer's high school diploma requirement for hiring and job transfers on the ground that it disproportionately disqualified black employees and was not justified by business necessity);

standards,[16] and no-conviction policies[17] – are in common use and are frequently challenged because of alleged adverse impact on protected groups, including racial and ethnic minorities, women, and older employees.

The disarray among the courts of appeals in adjudicating the timeliness of these frequent disparate impact challenges is contrary to Congress's determination to establish nationally uniform protection against employment discrimination. As the House Judiciary Committee report on the Civil Rights Act of 1964 explained, Title VII was enacted to provide a uniform, national solution to a national problem: "[N]ational legislation is required to meet a national need which becomes ever more obvious. . . . [The Act] is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope."

Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 236-39 (5th Cir. 1974) (invalidating a diploma requirement for admission into an apprenticeship program).

[16] *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 328-32 (1977) (invalidating Alabama's height/weight minimums for employment as a prison guard on the ground that the requirement had a disparate impact on female applicants and was not job related); *Lanning v. Se. Pa. Transp. Auth.*, 308 F.3d 286, 291-93 (3d Cir. 2002) (upholding employer's use of a physical test for employment as a transit police officer despite adverse impact against women on the ground that the test was sufficiently job related).

[17] *See, e.g.*, *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1298-1300 (8th Cir. 1975) (invalidating, because it had a racially disparate impact and was not job related, an employer's policy of refusing employment consideration to any applicant convicted of a crime).

H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393. Indeed, this Court has long recognized that in passing legislation to eliminate pervasive discrimination in employment, Congress sought to ensure "the effective application of uniform, fair and strongly enforced policies." *Morton v. Mancari*, 417 U.S. 535, 547 (1974) (discussing the legislative history of the 1972 amendments to Title VII) (quoting H.R. Rep. No. 92-238, at 24-25 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2159); *cf. Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (noting that Title VII requires a "uniform and predictable standard").

The split among the courts of appeals also threatens to undermine Congress's broad remedial purpose in enacting Title VII. The Seventh Circuit's ruling in this case immunized a discriminatory hiring system that was in place for more than half a decade, and that both caused and perpetuated severe racial disparities in the Chicago firefighting workforce. But Congress enacted Title VII to eliminate systems that perpetuate workplace discrimination:

> The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Griggs, 401 U.S. at 429-30.

Under the Seventh Circuit's rule, a discriminatory employment practice that is not challenged within the short charge-filing period after its initial adoption may be immunized from subsequent challenge by applicants or employees. This outcome would undermine Congress's intent to authorize civil actions by private litigants as an important means of eradicating employment discrimination: "Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority.'" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978)); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) ("Congress gave private individuals a significant role in the enforcement process of Title VII. . . . [T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." (citations omitted)).

The entrenched split in the circuits on so central a question as when Title VII disparate impact claims accrue is untenable, especially in light of the frequency with which disparate impact challenges to employment practices arise and the clear Congressional mandate for nationally uniform application of the law.

III. The Court Below Erred.

The clear and acknowledged conflict among the circuits on this important question of employment law is sufficient, without more, to justify this Court's review. Certiorari is also warranted, however, be-

cause the Seventh Circuit's decision departs from this Court's precedents on the timeliness of employment discrimination claims and is inconsistent with the language of Title VII.

Although this Court has not had occasion to decide the claim-accrual question in a disparate impact case, the Court has established two clear principles governing claim accrual in Title VII disparate treatment cases. First, a Title VII violation exists, and a new charge-filing period consequently begins, each time an employer's actions satisfy – at the time of those actions – all elements of a violation. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2167-68 (2007) (emphasizing that the "critical question" in determining timeliness is "whether any present *violation* exist[ed]" within 300 days of the filing of the charge (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977))); *see also Del. State Coll. v. Ricks*, 449 U.S. 250, 252-54, 258 (1980).

Second, where there *are* recurring present violations of the statute, that those violations may be related to an earlier act of discrimination does not prevent new claims from accruing (and a new charge-filing period from commencing) with each subsequent act that satisfies all elements of a Title VII violation. This Court explained in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), that:

> [e]ach discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The exis-

> tence of past acts and the employee's prior knowledge of their occurrence, however, 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.

Id. at 113; *see also Ledbetter*, 127 S. Ct. at 2174 ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations.").

Applying these principles to claims of disparate impact discrimination, an EEOC charge should be considered timely if filed within the charge-filing period after any use or application of a selection process that adversely affects protected groups. *Cf. Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 908 (1989) (noting that a claim for disparate impact discrimination would accrue at the time the adverse effect of an employment practice is felt by an individual plaintiff); *see also* 42 U.S.C. § 2000e-2(k)(1)(A) (providing that a disparate impact violation is established when an employer "uses a particular employment practice that causes a disparate impact on the basis of race" and "fails to demonstrate that the challenged practice is job related . . . and consistent with business necessity").

The Seventh Circuit's holding to the contrary results in different claim-accrual rules for disparate treatment and disparate impact cases, despite this Court's recognition that the same set of facts can be the subject of both disparate treatment and disparate impact analysis. *See Int'l Bhd. of Teamsters v.*

United States, 431 U.S. 324, 335-36 n.15 (1977) (describing the disparate treatment and disparate impact theories, and noting that "[e]ither theory may, of course, be applied to a particular set of facts"); *see also* Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* 3-2 (Supp. 2008) ("Courts . . . permit plaintiffs to assert both disparate treatment and disparate impact theories in a single case . . . .").

Accordingly, the Seventh Circuit's holding that petitioners' right to challenge the City's discriminatory hiring practice expired 300 days after the classification was first made and announced – no matter that the City subsequently used its discriminatory classification to hire firefighters for years – is wrongly decided under this Court's precedents, and should be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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