No. 08-974

# In the Supreme Court of the United States

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

*v.*

CITY OF CHICAGO, ILLINOIS

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

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


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## QUESTION PRESENTED

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

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This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

## STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a). The statute proscribes both disparate-treatment discrimination and disparate-impact discrimination. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."); see also *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2672-2673 (2009).

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

2. In July 1995, respondent administered a written examination to more than 26,000 applicants as part of its hiring process for entry-level firefighters. After scoring the test, respondent grouped the scores into three categories: applicants who scored 89 or above were deemed "well qualified," applicants who scored between 65 and 88 were "qualified," and the remaining applicants failed the examination. Pet. App. 1a-2a, 45a.

In January 1996, respondent notified all applicants in writing of their test scores. The "well qualified" applicants "would be eligible to proceed to the next phase of the hiring process, a physical abilities test," followed by a background investigation, medical examination, and drug test. Pet. App. 14a-15a. An applicant who passed all of those "preliminary tests" would be "hired as a candidate firefighter." *Id.* at 15a. Applicants who failed the examination were told that they would no longer be con-

sidered for employment. The notice for applicants in the "qualified" class stated:

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

*Id.* at 46a (citation omitted); see *id.* at 2a, 46a-47a.

On January 26, 1996, the mayor issued a press release concerning the test results. The release stated that 1782 of the applicants who took the written examination were considered "well qualified" and would be contacted in random order to continue in the hiring process. Pet. App. 47a. The release further stated that, of those in the "well qualified" group, 75.8% were white, 24.2% were members of a minority group, and 11.5% were African-American. *Ibid.* By contrast, white applicants represented 45% of all applicants, while African Americans represented 37%. *Id.* at 15a. Finally, the release stated that the mayor was dissatisfied with the lack of diversity among the "well qualified" applicants. *Id.* at 47a. Local media subsequently reported the racial breakdown of the test results and the mayor's reaction to the scores. *Id.* at 48a.

In May 1996, respondent hired applicants from the "well qualified" group. It did so for a second time in October 1996, and ultimately engaged in a total of ten rounds of hiring from that group. Pet. App. 49a, 68a; Pet. 6; Br. in Opp. 4; Pls.' Mem. in Opp. to Def.'s Mot. to

Stay Enforcement of Judgments, Exh. A, at 4 (May 17, 2007). In 2001, when the list of "well qualified" applicants was exhausted, respondent began calling applicants from the "qualified" group for further processing for hire. Pet. App. 16a.

3. Petitioners represent a class of African-American firefighter applicants who were placed in the "qualified" category based on their scores on the July 1995 examination. Pet. App. 1a-2a. On March 31, 1997, petitioner Crawford M. Smith filed a charge of racial discrimination with the EEOC based on respondent's use of the July 1995 examination; other petitioners subsequently filed additional charges. *Id.* at 49a; Aff. of Daniel P. Broadhurst, Exh. 3 (Feb. 4, 2000). Smith's charge was filed within 300 days of respondent's calling "well qualified" applicants to be further processed for hire, but more than 300 days after respondent administered the examination, scored the results, and notified the applicants. Pet. App. 3a, 49a. The EEOC issued right to sue letters on July 28, 1998. *Id.* at 49a. On September 9, 1998, petitioners filed suit in the United States District Court for the Northern District of Illinois, alleging that respondent's use of the July 1995 test had an unlawful disparate impact on African-American candidates, in violation of Title VII. *Ibid.*; see *id.* at 2a.

Respondent moved for summary judgment, arguing that petitioners' suit was time-barred because petitioners' first EEOC charge was filed more than 300 days after petitioners were notified of the results of the July 1995 examination. Pet. App. 52a. The district court denied the motion. *Id.* at 44a-70a. The court distinguished this case from *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), in which this Court held that allegations of intentional national origin discrimination were un-

timely where the alleged discriminatory act—the denial of tenure—occurred outside the limitations period, even though the plaintiff would later feel the effects of that act when his employment was terminated. Pet. App. 54a-55a (citing *Ricks*, 449 U.S. at 257-258). In this case, the district court noted, petitioners "allege[d] that the 1995 examination had a disparate impact on African-American firefighter candidates, and that [respondent's] reliance on the examination's results continues to have a disparate impact on African-American candidates." *Id.* at 60a. The court concluded that, "if [petitioners] establish that the 1995 written examination used in [respondent's] firefighter selection process had an unlawful disparate impact on African-American candidates, then [respondent's] ongoing reliance on those results constitutes a continuing violation of Title VII." *Id.* at 69a.

After an eight-day bench trial, the district court ruled that respondent's use of the July 1995 examination violated the disparate-impact provisions of Title VII. Pet. App. 12a-43a. The parties had stipulated that the July 1995 test "had a severe disparate impact on African-American firefighter candidates." *Id.* at 28a. The court found that respondent had failed to discharge its statutory burden of showing that its use of the test was "job related for the position in question" and "consistent with business necessity," 42 U.S.C. 2000e-2(k)(1)(A)(i). Pet. App. 28a-42a. Specifically, the court found that the test "was skewed towards one of the least important aspects of the firefighter position at the expense of more important abilities," *id.* at 32a; that "the cut-off score of 89 is statistically meaningless in that it fails to distinguish between candidates based on their relative abilities," *id.* at 30a; and that respondent "failed to prove that test results could be used

to predict firefighter performance," *ibid.* See *id.* at 28a-41a. The court further found that "the evidence clearly shows that an equally valid and less discriminatory alternative was available." *Id.* at 41a (citing 42 U.S.C. 2000e-2(k)(1)(A)(ii)). The court entered judgment in favor of petitioners and ordered injunctive relief. *Id.* at 2a.

4. On appeal, respondent did not challenge the district court's finding that its use of the July 1995 examination violated Title VII's disparate-impact provisions. Instead, it challenged only the district court's holding that petitioners had timely filed a charge with the EEOC. Resp. C.A. Br. 16-47. Agreeing with respondent, the court of appeals reversed. Pet. App. 1a-11a.

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

**DISCUSSION**

The court of appeals in this case erred in concluding that a claim of disparate-impact discrimination based on

an employer's use of an invalid employment examination accrues only when the examination is scored and the results announced, and not when the employer later uses those results to hire or promote job applicants in a manner that adversely affects members of a protected group. The court's holding is inconsistent with the text of Title VII, unsupported by this Court's precedents, and in conflict with the decisions of other courts of appeals. This Court's review is warranted.

### A. The Court Of Appeals Erred In Holding That Petitioners' Charges Were Untimely

1. Under Title VII, petitioners were required to file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1); see p. 2, *supra*. Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." 42 U.S.C. 2000e-2(a)(2). Title VII further provides that "[a]n unlawful employment practice based on disparate impact is established" if, among other things, "a complaining party demonstrates that a respondent *uses* a particular employment practice that causes a disparate impact on the basis of race." 42 U.S.C. 2000e-2(k)(1)(A)(i) (emphasis added); cf. 42 U.S.C. 2000e-2(h) ("[I]t shall not be an unlawful employment practice for an employer * * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration *or action upon the results* is not designed, intended, *or*

*used* to discriminate because of race, color, religion, sex, or national origin.") (emphasis added).

Petitioners argued, and the district court found, that respondent violated Title VII by hiring entry-level firefighters based on the results of an employment examination that had an unlawful disparate impact on qualified African-American candidates. Pet. App. 28a-42a. In so doing, respondent "use[d]" an unlawful selection device, 42 U.S.C. 2000e-2(k)(1)(A), in a manner that "deprive[d]" qualified African-American applicants of "employment opportunities," 42 U.S.C. 2000e-2(a)(2). When respondent hired firefighter candidates from the list of applicants deemed "well qualified" based on the July 1995 examination results, it thus engaged in an unlawful employment practice that started the 300-day clock under Section 2000e-5(e)(1). Because petitioners filed an EEOC charge before that period elapsed, they were entitled to proceed in federal court to remedy respondent's unlawful employment practices.

2. In reaching a contrary conclusion, the court of appeals failed to consider the language of Title VII's disparate-impact provisions. The court instead relied on a line of cases including *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held that, to sustain a claim of intentional discrimination, a plaintiff must identify an act of intentional discrimination occurring within the statutory limitations period, and may not simply point to the effects of a past, discrete act of intentional discrimination. The court below erred in relying on that line of disparate-treatment cases to evaluate petitioners' disparate-impact claim, and failing to recognize

that that claim described a violation of Title VII within the statutory limitations period.

a. In *Ricks*, the plaintiff, a college professor, claimed that his employer intentionally discriminated against him on the basis of national origin when it denied him tenure and instead offered him a one-year "terminal" contract. 449 U.S. at 252-253. The plaintiff filed a charge with the EEOC shortly before the contract expired. *Id.* at 254. The Court held that the limitations period began to run when the tenure decision had been made and communicated to the plaintiff, "even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* at 258. The Court explained that the "emphasis is not upon the effects of earlier employment decisions; rather, it is [upon] whether any present *violation* exists." *Ibid.* (brackets in original) (quoting *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977)). Because the only claimed violation concerned the denial of tenure, and the plaintiff had not identified any "discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment," the Court concluded that the plaintiff's EEOC charge was untimely. *Id.* at 257-258.

Similarly, in *Lorance*, the plaintiffs alleged that a contractual modification in the seniority system for testers at an electronics plant was the product of intentional sex discrimination, but did not file an EEOC charge until years later, when they were selected for demotion under the new seniority system. 490 U.S. at 901-902. The Court held that the charge was filed too late. It noted that, if the "claim asserted [were] one of discriminatory impact under § 703(a)(2)," the "statute of limitations [would] run from the time that impact is felt." *Id.* at

908. But because the claim asserted was instead one of intentional discrimination, and "[b]ecause the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent on the alleged illegality of signing the underlying agreement," the Court concluded that "it is the date of that signing which governs the limitations period." *Id.* at 911.[1]

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

[1] In response to *Lorance*, Congress amended Title VII to provide that an "unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose * * * when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." 42 U.S.C. 2000e-5(e)(2); see *Ledbetter*, 550 U.S. at 627 n.2.

recovery was based"—namely, "discriminatory intent." *Ibid.*[2]

b. Specifically analogizing this case to *Ricks*, the court of appeals held that petitioners' EEOC charge was untimely because respondent's discrimination "was complete when the tests were scored" and petitioners were informed that it was "not likely" that they would be hired. Pet. App. 4a, 46a. In the court's view, respondent's subsequent hiring practices were merely the "automatic consequence" of the earlier testing, rather than a "fresh act of discrimination." *Id.* at 6a.

But the *Ricks-Lorance-Ledbetter* line of cases does not stand for the broad proposition that any employment practice following from an earlier act of discrimination is not actionable under Title VII. As the Court made clear in *Ledbetter*, "a freestanding violation may always be charged within its own charging period regardless of its connection to other violations." 550 U.S. at 636. The claims in *Ricks* and other similar cases failed not because they were in some way connected to earlier violations, but because the plaintiffs had failed to allege that a violation occurred at any point during the limitations period; their claims rested on allegations of intentional discrimination, but their description of the events occur-

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

ring within the limitations period omitted the "defining element of [that] legal claim," namely, "discriminatory intent." *Id.* at 624.

Unlike in the intentional discrimination claims at issue in those cases, the defining element of a disparate-impact claim is the effect of an employment practice on members of a protected group, rather than the employer's intent in adopting the practice. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive * * * is not required under a disparate-impact theory."). As this Court has acknowledged, that difference necessarily affects the evaluation of the timeliness of an EEOC charge. While the Court held in *Ricks* and similar cases that "the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt," *Ledbetter*, 550 U.S. at 627, the Court has acknowledged that a claim of discriminatory impact, in contrast, "caus[es] the statute of limitations to run from the time that impact is felt," *Lorance*, 490 U.S. at 908.

In this case, petitioners have described a present violation of Title VII's disparate-impact provisions, related factually to earlier acts that might have formed the basis for a suit but itself constituting a freestanding legal harm. They have argued that respondent used a challenged employment practice during the statutory limitations period when respondent employed the results of the July 1995 examination to hire a new class of firefighters in a manner that adversely affected petitioners' employment opportunities because of race. See 42 U.S.C. 2000e-2(a)(2) and (k)(1)(A). Their

EEOC charge was accordingly timely under Section 2000e-5(e)(1).

c. The analysis is not altered by respondent's practice of preceding hiring decisions by sorting test-takers into groups of "qualified" and "well qualified" applicants. See Pet. App. 4a. It is true, as the court of appeals noted, that petitioners were injured when they were told that they had been classified as "qualified" rather than "well qualified" based on the results of the July 1995 examination, thereby "delay[ing] indefinitely their being hired." *Id.* at 9a. But petitioners were also injured when they were in fact passed over because of those results. As the district court noted, if an examination used to sort applicants has an unlawful disparate impact, then an employer's use of the examination's results to hire employees "has the same disparate impact." *Id.* at 60a. An employer who would otherwise be prohibited from using the raw results of an unlawful test is not immunized from liability merely because it takes the intermediate step of labeling candidates "qualified" or "well qualified" based on those test results.

3. Although the court of appeals acknowledged the differences between a claim of disparate treatment and one of disparate impact, it concluded those differences were "not fundamental," Pet. App. 5a, and therefore should not "change the date on which the statute of limitations begins to run," *id.* at 6a. The court explained that disparate-impact theory "involves the use of circumstantial evidence to create an inference of discrimination." *Id.* at 5a. It further explained that if a test or other selection device proves to have an adverse impact on a protected group, and the employer cannot show that "the method is a rational method of selecting employees," then the employer's "continuing to use the test

suggests that his purpose in doing so may be discriminatory, although that need not be shown." *Id.* at 6a.

Even accepting the court of appeals' view of the connection between disparate-impact and disparate-treatment claims, its conclusion does not follow. An employer "continu[es] to use [a] test" with an unlawful disparate impact, Pet. App. 6a, each time it "uses" the results of the test to classify applicants and select employees. If the employer uses the test on one occasion to select employees, it will commit one violation; if the employer uses the test on subsequent occasions to select employees, it will commit subsequent violations. The court of appeals' decision identifies no reason why subsequent uses of an unlawful selection device are not independently actionable under Title VII.

4. Finally, the court of appeals suggested (Pet. App. 9a) that its holding was necessary to avoid the prospect that a plaintiff might wait as long as "ten years" before filing a Title VII charge based on an employer's use of an examination with an unlawful disparate impact. The question in this case, however, is whether a plaintiff may wait 300 days (or, in some States, 180 days) after an employer uses such examination results to select employees for hire. That use, once again, constitutes a violation of Title VII that sets the clock running, regardless how much time has elapsed since the administration of the examination. Moreover, as a practical matter, candidates for employment or promotion have little incentive to delay unreasonably in filing EEOC charges; such delay would postpone any possibility of attaining the employment opportunities they claim were unlawfully denied them. And the passage of time in the context of disparate-impact cases does not, in any event, raise the same concerns that it does in the disparate-treatment

context; while delay may make it more difficult to discern an employer's discriminatory intent in a disparate-treatment case, the pertinent evidence in disparate-impact cases is far less likely to "fade quickly with time." *Ledbetter*, 550 U.S. at 631; cf. 29 C.F.R. 1607.5(D), 1607.15 (requiring documentation of impact and validity evidence on employment practices with an adverse impact).

On the other hand, the court of appeals' decision could permit an employer to continue indefinitely to make employment decisions based on a concededly unlawful selection device, provided that no plaintiff has filed suit within 180 or 300 days of the announcement of the results. The lower court's decision, moreover, encourages—indeed, requires—plaintiffs to file lawsuits before they can be sure of the practical consequences of an employer's administration of an unlawful selection device—and may poison the workplace with anticipatory litigation before facts have crystallized. An employer that administers an employment examination may never in fact use the results to select employees for hire or promotion, or it may decide, as respondent eventually did in this very case, to hire from among the ranks of those adversely affected by the examination. See Pet. App. 9a, 16a. But under the decision below, a rational Title VII plaintiff will not wait to evaluate the practical consequences of an unlawful employment examination before filing. The decision creates incentives that are likely to lead to a proliferation of unnecessary litigation.

### B. The Courts Of Appeals Are Divided On The Question Presented

As both the court of appeals (Pet. App. 6a-7a) and respondent (Br. in Opp. 22-26) have acknowledged, the courts of appeals are divided on the question presented.

1. As all parties agree (Pet. 13-14; Br. in Opp. 24-25), the decision below conflicts with the decisions of the Second and Fifth Circuits. Both courts have concluded, in direct contrast with the court of appeals in this case, that a charge based on an employer's use of an employment examination with an unlawful disparate impact is timely if the employer used the results to make hiring or promotion decisions at any point during the limitations period. See *Guardians Ass'n of the New York City Police Dep't* v. *Civil Serv. Comm'n*, 633 F.2d 232, 247-251 (2d Cir. 1980) (holding that the plaintiffs' EEOC charge was timely because it was filed within 300 days of the employer's last hiring decision based on the results of employment tests with a disparate impact on African-American and Hispanic candidates), aff'd on other grounds, 463 U.S. 582 (1983); *Gonzalez* v. *Firestone Tire & Rubber Co.*, 610 F.2d 241, 249-250 (5th Cir. 1980) (remanding for the district court to consider whether the charge was filed within 180 days after the employer's last hiring or promotion decision based on the results of the challenged testing system).

The decision below, as the court of appeals in this case acknowledged (Pet. App. 6a-7a), also conflicts with the Ninth Circuit's decision in *Bouman* v. *Block*, 940 F.2d 1211, cert. denied, 502 U.S. 1005 (1991). In that case, the court held that the plaintiff's EEOC charge was timely because it was filed within 300 days of the expiration of an eligibility list based on the results of a challenged promotion examination, even though the eli-

gibility list had been promulgated outside the limitations period.[3]

Other courts of appeals, including the District of Columbia and Eleventh Circuits, have applied a similar analysis in other contexts; they have concluded that a charge that an employment benefit policy has an unlawful disparate impact is timely if the policy was applied at any point during the limitations period. See *Anderson* v. *Zubieta*, 180 F.3d 329, 335-337 (D.C. Cir. 1999) (concluding that the plaintiffs' charges were timely, even though the plaintiffs were first notified of the challenged wage and benefit policies outside the limitations period applicable to their promulgation, because plaintiffs had adequately alleged that the "continued application" of the allegedly discriminatory policies constituted a "present violation"); *Beavers* v. *American Cast Iron Pipe Co.*, 975 F.2d 792, 796-800 (11th Cir. 1992) (concluding that the plaintiffs' charges were timely, even though the plaintiffs first became subject to the challenged policy outside the limitations period).[4]

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[3] Respondent contends (Br. in Opp. 30-31) that *Bouman* does not "deepen[] the conflict" because the Ninth Circuit in that case erroneously distinguished cases like *Ricks* on the ground that the plaintiff could not have been certain she would not be promoted until the eligibility list expired. See *Bouman*, 940 F.2d at 1221; see Pet. App. 6a-7a (criticizing *Bouman* for confusing the question when the plaintiff's claim accrued with the question whether equitable tolling would be warranted). For present purposes, however, the relevant point is that the Ninth Circuit considered the plaintiff's "non-appointment from the eligible list" to be "a separate injury from the allegedly discriminatory examination itself" or from the posting of the list, *Bouman*, 940 F.2d at 1221, and thus reached a result "contrary" to the decision below, Pet. App. 6a.

[4] The court of appeals attempted to distinguish *Beavers* on the ground that the alleged discriminatory practice there at issue—a health

2. On the other hand, the decision below is consistent with *Bronze Shields, Inc.* v. *New Jersey Department of Civil Service*, 667 F.2d 1074 (1981), cert. denied, 458 U.S. 1122 (1982), in which the Third Circuit concluded that an EEOC charge that an employment examination had a disparate impact was untimely because it was filed more than 180 days after the employer had published an eligibility list based on the results (though before the employer ever used the list to make a hiring decision). *Id.* at 1083-1084. It is also consistent with *Cox* v. *City of Memphis*, 230 F.3d 199 (2000), in which the Sixth Circuit held that the plaintiffs' claim that the employer "deliberately set out to discriminate against white females in the promotional process," *id.* at 201, was time-barred because the list of individuals eligible for promotion had been promulgated outside the limitations period, *id.* at 204.[5]

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insurance policy that limited coverage of employees' children to those residing full-time with an employee parent, see *Beavers*, 975 F.2d at 784—was the "sole cause" of the denial of the plaintiffs' insurance claims, and "there was no intervening neutral act, as in this case," Pet. App. 5a. But as explained above, pp. 7-13, *supra*, the hiring of applicants deemed "well qualified" based on the results of the unlawful test in this case was not a "neutral act," but rather an independent violation of Title VII's disparate-impact provisions. In any event, the court of appeals itself recognized that the distinction it proposed "is a fine one (and it is arguable on which side of it the facts of *Beavers* fell)." Pet. App. 5a.

[5] Both *Bronze Shields* and *Cox* are, however, distinguishable from the instant case. The plaintiffs in *Bronze Shields* were definitively notified that they would not be hired when the eligibility list was promulgated, 667 F.2d at 1083, whereas the petitioners in this case were informed only that it was "not likely" that "qualified" applicants would be selected for further processing, Pet. App. 46a, and respondents did in fact ultimately select some "qualified" applicants beginning in 2001, *id.*

3. Contrary to respondent's suggestion (Br. in Opp. 22), there is little reason to think that "the circuits are likely to align" without this Court's intervention. Although *Gonzalez* and *Guardians* were decided shortly before *Ricks*, both cases were decided well after this Court first announced the principle that an EEOC charge is not timely unless a "present violation exists," regardless of whether the plaintiff presently feels the effects of a past violation. *Evans*, 431 U.S. at 558 (emphasis omitted); see *Ricks*, 449 U.S. at 257-258 (citing *Evans*). Respondent identifies no relevant change in the law that would cause the courts of appeals to reconsider their approaches to the question presented here.

**C. The Question Presented Warrants This Court's Review**

The question presented in this case is important and recurring. As petitioners correctly note, the use of employment tests similar to the examination at issue in this case is "widespread." Pet. 19. The conflict among the circuits creates uncertainty about when, and under what circumstances, a plaintiff may challenge such a test under Title VII's disparate-impact provisions, and undermines the uniform application of federal employment discrimination law.

Moreover, if left unreviewed, the court of appeals' decision could undermine enforcement of Title VII's disparate-impact provisions as they apply to such employment tests, as well as to other employment practices that have an unlawful adverse impact on members of protected groups. The decision below could also, as noted above, see p. 15, *supra*, create incentives for plain-

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at 16a. And in *Cox*, unlike this case, the plaintiffs alleged "deliberate[]" discrimination in the promotions process. 230 F.3d at 201.

tiffs to file premature charges, imposing substantial burdens on both the EEOC and the courts.

This case is an appropriate vehicle for resolution of the question presented. Because respondent has not challenged the district court's finding that it engaged in practices made unlawful by the disparate-impact provisions of Title VII, see Pet. App. 28a-42a, the question of timeliness is clearly delineated and outcome-determinative. This Court's review is warranted.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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