No. 08-974

In the Supreme Court of the United States

ARTHUR L. LEWIS, ET AL., Petitioners,
v.
CITY OF CHICAGO, Respondent.

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

BRIEF OF THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES AND THE NATIONAL WOMEN'S LAW CENTER ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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?

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INTEREST OF *AMICI CURIAE*

The *National Partnership for Women & Families* (The National Partnership) is a non-profit, non-partisan advocacy group dedicated to promoting fairness in the workplace, access to quality health care and policies that help women and men meet the dual demands of work and family. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeals to advance the opportunities of protected individuals in employment.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including in fields that are nontraditional for women, and has promoted voluntary compliance by employers with federal and state civil rights laws. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in cases involving Title VII in this Court and in federal circuit courts of appeals.

The National Partnership and the NWLC are joined in filing this brief by 34 other organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans. The individual organizations are described in the attached appendix.

SUMMARY OF ARGUMENT*

Title VII provides that:

> An unlawful employment practice based on disparate impact is established [and thus triggers the limitations period] under this subchapter only if * * * 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)(1)(A) (2006). Among the "uses" of such a practice within the statute's plain meaning is an employer's implementation of hiring or promotion practices that cause an unjustified disparate impact.

A Seventh Circuit panel, however, announced a contrary rule that requires plaintiffs to file an EEOC charge within 300 days of the adoption of an eligibility list that sorts candidates based on their test scores. This rule makes no mention of – much less any effort to interpret – the controlling statutory language. It also ignores this Court's precedent making clear that the point at which an unlawful employment practice occurs

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* The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity – other than the *amici curiae,* their members, and their counsel – made a monetary contribution to the preparation or submission of this brief.

depends on the type of claim raised by the plaintiff, and that the defining element of a disparate impact claim occurs when its discriminatory impact is actually "felt."

Furthermore, the Seventh Circuit's rule would lead to a wide range of irrational results. For example, it fails to address the reality that the consequences of an employer's creation of an eligibility list based on rank-order or cut-off scores are often far from clear at the time of its adoption. Although applicants for employment would greatly prefer to be hired or promoted without resorting to costly and time-consuming litigation that may also impair their eventual employment relationships, the Seventh Circuit's rule perversely requires applicants to file a charge immediately upon the creation of such a list or forever lose their right to do so. Protecting employers' interest in repose at all costs – as the Seventh Circuit's rules does – thus irrationally encourages employees to file suit before they can be sure of the practical consequences of an employer's administration of a particular practice.

The irrationality of the Seventh Circuit's rule is further highlighted when one considers selection devices other than tests (or lay-offs or other practices that rely on rank-ordered lists or cut-off scores) that cause a disparate impact. Indeed, employers frequently announce practices that have predictable disparate impacts on protected groups, and then use those practices over a long period of time to take actions that disadvantage members of those groups. In that context, courts uniformly hold or clearly accept that each implementation of the practice with respect to particular individuals is an unlawful employment practice that triggers the limitations period anew,

regardless of its relationship to a prior violation such as the initial decision to adopt such a practice.

Applying the same rule in the testing context best comports with a pragmatic understanding of how and when employers actually use facially neutral practices to make employment decisions. The Seventh Circuit's rule, in contrast, privileges in perpetuity an employer's ability to engage in repetitive uses of employment practices that bear no demonstrable relationship to job performance while causing, as in this case, severe disparate impact.

Indeed, the Seventh Circuit's rule frustrates the statutory purposes underlying the disparate impact provision because it enshrines, rather than ends, those practices that deny job opportunities without any meaningful tether to successful job performance. By immunizing practices that cause unjustified disparate impact from subsequent challenge if plaintiffs fail to object to their initial promulgation within the Title VII limitations period, the Seventh Circuit's rule encourages employers to continue to rely on invalid tests that entrench longstanding patterns of racial and gender hierarchy at the expense of actual merit.

ARGUMENT

I. TITLE VII'S PLAIN LANGUAGE MAKES CLEAR THAT AN UNLAWFUL EMPLOYMENT PRACTICE OCCURS EACH TIME AN EMPLOYER EXECUTES AN EMPLOYMENT PRACTICE THAT CAUSES A DISPARATE IMPACT

Title VII requires that "[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) (2006).[1] Section 703(k)(1)(A) of Title VII then provides:

> *An unlawful employment practice based on disparate impact is established* under this subchapter only if * * * 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)(1)(A) (2006) (emphasis added).

Among the "uses" of such a practice within the plain meaning of that statutory phrase is an employer's implementation of hiring or promotion practices that cause an unjustified disparate impact. The case currently before this Court illustrates one such use: the City's hiring of some applicants and not others to fill vacancies on eleven different occasions based on the applicants' comparative scores on a test that caused a disparate impact based on race while bearing no demonstrable relationship to job performance. See Pet. App. 16a.

This Court supported such an understanding of the statute's plain language in its only discussion to date of the limitations period for Title VII disparate impact claims. See *Lorance* v. *AT&T Technologies, Inc.*,

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[1] Under certain circumstances not at issue in this case, the limitations period is 180 days. See 42 U.S.C. § 2000e-5(e)(1) (2006).

490 U.S. 900, 904-10 (1989). *Lorance* involved a claim that an employer had engaged in intentional sex discrimination when it altered its rules governing employee seniority in a way that disadvantaged women. *Id.* at 903. While noting that it had previously interpreted Title VII's section 703(h) to preclude disparate impact challenges to seniority plans,[2] the Court commented on the limitations period for those situations in which disparate impact challenges are permitted. *Id.* at 908. There it observed that when "the claim asserted is one of discriminatory impact," the limitations period would "run from the time that impact is felt." *Id.* In this case, for example, the discriminatory impact is felt when the employer offers or declines employment to individuals based on a practice that imposes a disparate impact against African-American applicants.

II. THE SEVENTH CIRCUIT'S CONTRARY RULE IGNORES NOT ONLY TITLE VII'S PLAIN LANGUAGE, BUT ALSO THIS COURT'S PRECEDENT MAKING CLEAR THAT THE POINT AT WHICH AN UNLAWFUL EMPLOYMENT PRACTICE OCCURS DEPENDS ON THE TYPE OF CLAIM, AND THAT THE DEFINING ELEMENT OF A DISPARATE IMPACT CLAIM IS THE PRACTICE'S EFFECT.

In a decision that makes no mention of – much less any effort to interpret – the controlling statutory

[2] Neither the facts in this case nor in any of the other cases discussed in this brief involve attempts to challenge a seniority plan under a disparate impact theory.

language, the Seventh Circuit announced a contrary rule that requires a plaintiff to file an EEOC charge within 300 days of the adoption of an eligibility list that sorts applicants based on their test scores, regardless of when (or whether) that list is actually used to hire applicants or when its discriminatory impact is actually felt. See Pet. App. 3a-4a. Under this extremely narrow rule, the initial adoption of a practice that causes disparate impact is the *only* event that triggers the limitations period, and all subsequent challenges to the practice's use are time-barred.

In so holding, the Seventh Circuit cited this Court's precedent addressing the limitations period for disparate treatment claims. *Id.* at 490-91. But as this Court observed when calculating Title VII limitations periods in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 (2002), "[t]he critical questions, then, are: What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" As the Court then explained in *Morgan*, "[t]he answer varies with the practice." *Id.* Indeed, Title VII makes unlawful a range of employment practices, with varying requisite elements. Not surprisingly, the point at which all of the elements are present – and thus at which the unlawful employment practice occurs, triggering the start of the limitations period – depends on the type of claim raised by the plaintiff.

In *Morgan,* for example, the Court applied this principle to hold that the limitations period is triggered at different points for a hostile environment claim as opposed to a garden-variety disparate treatment claim. See *id.* at 110-20. In particular, the Court described the cumulative requirement that a hostile environment

be sufficiently severe or pervasive to alter the terms and conditions of employment before it becomes unlawful (an element not present in a garden-variety disparate treatment case), *id.* at 116-17, as critical to its holding that a hostile environment claim is not time barred "so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Id.* at 122.

As yet another example of how the time at which an unlawful employment practice occurs varies with the differing elements required by different types of Title VII claims, consider the religious accommodation context. A plaintiff establishes a prima facie claim under a religious accommodation theory by proving that her bona fide religious belief or practice conflicted with a job duty, that she informed her employer of the conflict, and that the employer threatened or subjected her to discriminatory treatment because of her inability to fulfill the job duty due to the conflict. See, *e.g.*, *Heller* v. *Ebb Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). Under such a claim, the unlawful employment practice occurs – and the limitations period begins – *not* at the time that a facially neutral practice (*e.g.*, a requirement that all employees work on the weekend) is announced, but instead at the time the employer takes adverse employment action against the plaintiff (*e.g.*, the time at which the employer denies the plaintiff's request for a shift swap and threatens to fire her for refusing to work on her Sabbath).

For disparate treatment purposes, as an additional illustration, the statute provides that "[i]t shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual * * * because of such individual's race,

color, religion, sex, or national origin * * *." 42 U.S.C. § 2000e-2(a) (2006). The requisite elements of an unlawful employment practice under a disparate treatment theory, unlike a disparate impact claim, thus include the respondent's culpable mental state – i.e., its intent to discriminate on the basis of a protected characteristic. For this reason, this Court has held that the limitations period for a disparate treatment claim begins to run when the employment decision is made with the requisite culpable mental state – because that is the point when an employer's actions satisfy, at the time of those actions, all the elements of a violation. Because a disparate treatment claim requires a showing of discriminatory intent, the Court reasoned that later execution of that decision or other adverse decisions that are unaccompanied by the defendant's intent to discriminate on the basis of a protected characteristic do not trigger the disparate treatment limitations period anew. See, *e.g.*, *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624, 629-31 (2007) (concluding that because "the central element" in a disparate treatment claim is discriminatory intent, the limitations period begins to run from the date that such intent accompanies a particular employment decision).[3]

In contrast, an employer's intent to discriminate is not an element of a disparate impact claim under Title VII. Instead, as the Court has repeatedly observed, the defining element of a disparate impact

[3] Note that the Lilly Ledbetter Fair Pay Act of 2009 now requires that, in discriminatory compensation cases, the statute of limitations begins to run not only when the discriminatory practice is adopted, but also when the employee "becomes subject to" or is "affected by application of" a discriminatory compensation scheme. 42 U.S.C. § 2000e-5(e)(3)(A).

claim is the (non-job-related) practice's effect or consequences in disproportionately excluding protected class members from job opportunities. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422-23 (1975) ("Congress directed the thrust of [Title VII] * * * to the consequences of employment practices, not simply the motivation.") (quoting *Griggs* v. *Duke Power*, 401 U.S. 424, 432 (1971))(internal quotation marks omitted).

Indeed, the statute defines an unlawful employment practice for disparate impact purposes as an employer's "*use*[] [of] a particular employment practice *that causes a disparate impact* on the basis" of a protected characteristic. 42 U.S.C. § 2000e-2(k)(1)(A) (2006) (emphasis added). An employer "uses" such a practice within the plain meaning of that statutory phrase each time it executes an employment practice that causes a disparate impact.

III. THE SEVENTH CIRCUIT'S RULE FRUSTRATES THE PURPOSES UNDERLYING TITLE VII'S DISPARATE IMPACT PROVISION AND LEADS TO IRRATIONAL RESULTS

A. The Seventh Circuit's Rule Would Lead to a Wide Range of Irrational Results

The Seventh Circuit required the plaintiffs to file an EEOC charge within 300 days of the adoption of an eligibility list that sorted candidates based on their test scores, regardless of when those scores were actually used or when their discriminatory impact was actually felt. See Pet. App. 4a, 11a. It characterized the City's later failure (on eleven different occasions) to hire

applicants based on their scores on a test that caused an unjustified disparate impact *not* as an unlawful employment practice that triggered the limitations period anew but instead as simply the "automatic consequence" of the scoring itself. *Id.* at 4a; see also *id.* at 6a ("An applicant who fails to meet the employer's standard is hurt not by a fresh act of discrimination, but as the automatic consequence of an earlier one – the adoption of the standard."). Not only is this "automatic consequences" rule entirely unmoored from the statutory text, but it would also lead to a wide range of irrational results in disparate impact challenges to tests and related employment practices that rely on candidates' rank-order score or score relative to a cut-off standard.

Indeed, the Seventh Circuit's rule fails to address the reality that the consequences of an employer's adoption of an eligibility list based on rank-order or cut-off scores are often far from clear at the time of its creation. In the testing context, for example, employers frequently use various rankings based on test performance to make employment decisions over time – with individuals often unable to predict when, if ever, they might be provided or denied job opportunities based on those rankings. See, *e.g.*, *United States* v. *City of New York,* 637 F. Supp. 2d 77, 91-92 (E.D.N.Y. 2009) (describing circumstances where African-American and Latino candidates with passing scores on a firefighters' exam could not know whether their scores would permit their rank-order hiring until the City decided to stop hiring from the list); *Bradley* v. *City of Lynn,* 443 F. Supp. 2d 145, 151-52 (D. Mass. 2006) (describing circumstances where African-American and Latino candidates with passing scores on civil service examination used by all Massachusetts municipalities

could not know whether or when their scores would permit their rank-order hiring).

Consider the facts of this case. Those applicants who were rated as "Qualified" after taking the test received a notice that included the following:

> 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.*

Pet. App. 46a (emphasis added). Indeed, the City used the list for hiring purposes until 2007, a much longer period than originally anticipated. See *id.* at 16a. For the first ten rounds of hiring over five years, the City pulled only from those in the "well qualified" category. *Id.* Starting in 2001 and continuing until 2007 (when new hiring procedures were adopted), the City hired from those in the "qualified" category. *Id.* So for those in the qualified category, the "consequences" of their ranking was far from automatic.

Candidates for job opportunities would greatly prefer to be hired or promoted without resorting to costly and time-consuming litigation that may also impair their eventual employment relationships. Indeed, such an outcome is vastly preferable for employers as well as employees. Yet the Seventh

Circuit's rule perversely requires applicants to file a charge immediately or forever lose their right to do so.

The facts in *Bouman* v. *Block*, 940 F.2d 1211 (9th Cir. 1991), illustrate this scenario, where the consequences of an employer's adoption of a practice that imposed a disparate impact remained uncertain at the time of its adoption. There the sheriff's department administered and scored a promotional examination in 1975, and created an eligibility list based on the rankings. *Id.* at 1217. At the time of the list's expiration in 1977 (after which it was no longer used to make promotional decisions), "Bouman was at the top of the list and would have received the next appointment," *id.* at 1217, and "not until the list expired was it certain that she would not be promoted." *Id.* at 1221. The Ninth Circuit held that the plaintiff's charge was timely filed within 300 days of the list's expiration – even though the charge was filed more than 300 days after the list's creation. *Id.* Yet the Seventh Circuit's rule would have required Deputy Bouman to have filed her charge immediately upon the list's release, rather than wait and see whether she would be promoted from the list.

Bridgeport Guardians, Inc. v. *City of Bridgeport*, 933 F.2d 1140 (2nd Cir. 1991), provides another example. In August 1989, the city intended to promote only 19 candidates in rank order from an eligibility list based on applicants' performance on a test administered in April 1989, with whites making up the first 19 candidates on the list, the first African-American ranked 20th, and the first Latino ranked 22nd. *Id.* at 1144-45. The city's plans later changed such that it planned to promote at least the first 25 on the list and perhaps considerably more. *Id.* Yet the Seventh Circuit's rule would have required the African-

American and Latino candidates to file a charge within 300 days of the list's initial creation, rather than wait to see whether they would be promoted from the list without litigation.

Other testing scenarios further illustrate the irrational implications of the Seventh Circuit's rule. For example, consider the situation where a city creates a list similar to that in this case (that limits hiring to those on a "well qualified" list that has a clear disparate impact) but also announces at the same time that economic conditions leave it unable to begin hiring from the list for an indefinite period of time. Similarly, consider a city that administers a test, notifies applicants of their scores (and the test's disparate impact), and announces that hiring will be done in rank order but that the number and timing of hires remains uncertain – perhaps due to changing budgetary conditions. Under the Seventh Circuit's rule, potential plaintiffs must file within 300 days of the list's creation or forever lose the ability to challenge what may be a deeply flawed test – even though the test may not be used to make hiring decisions for quite some time, if ever.

Reductions-in-force raise similar concerns, where an employer may create a rank order list from which an indefinite number of lay-offs and other employment decisions may later be made. See, *e.g.*, *EEOC* v. *Schott N. Am., Inc.*, 2008 U.S. Dist. LEXIS 75225, at *8-16 (M.D. Pa. Sept. 29, 2008) (describing circumstances where decisions about future job opportunities were based on an employee's grade on a matrix – which, according to the plaintiff had a disparate impact against women because it heavily weighted the types of tasks done by men). Reductions-in-force are often implemented in a series, with the number of lay-offs

contingent on future economic conditions and/or voluntary attrition. See, *e.g.*, *Gibson* v. *AT&T Info. Sys., Inc.*, 1991 U.S. Dist. LEXIS 19264, at *7-13 (M.D.N.C. Sept. 16, 1991) (describing circumstances where employer created a rank-order list of employees to be selected for lay-off based on supervisors' rankings, but where the number of individuals actually laid off would be reduced by the number of employees who accepted a buy-out or otherwise left voluntarily). Again, at the time of the list's creation, an individual employee may well have no idea whether or when her rank will lead to her later lay-off. Yet the Seventh Circuit's rule would require her to file the charge at the time of the list's creation rather than see how the list is actually used.

Indeed, the Seventh Circuit's rule fails to address the reality that the consequences of an employer's creation of an eligibility or similar list that imposes a disparate impact are frequently quite uncertain. Protecting employers' interest in repose at all costs – as the Seventh Circuit's rules do – thus irrationally encourages employees to file suit before they can be sure of the practical consequences of an employer's administration of a particular practice.

Moreover, the Seventh Circuit's rule is unnecessary to protect employers' legitimate interests in repose. As this Court observed in addressing this concern in the hostile work environment area, see *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 121 (2002), defendants always have equitable defenses, including estoppel, laches, and equitable tolling. In *Morgan*, Justice Thomas responded specifically to employers' fears that they would be left defenseless as to stale claims: "the [EEOC] filing period is not a jurisdictional prerequisite to filing a Title VII

suit. Rather, it is a requirement subject to waiver, estoppel, and equitable tolling 'when equity so requires.'" *Id.* (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)). Statutory limitations on the remedies available under Title VII, moreover, provide further incentive to file promptly, as backpay is allowed only for the two years immediately prior to the filing of a charge. 42 U.S.C. § 2000e-5(g)(1) (2006). The appropriate rule of law would thus permit an employee to attack an employment selection device that has a disparate impact whenever it is used, subject to the equitable defenses recognized in *Morgan*.[4]

B. The Seventh Circuit's Rule Is Inconsistent With the Rule Uniformly Applied to Disparate Impact Challenges In Non-Testing Contexts, Further Illustrating its Impracticability

The irrationality of the Seventh Circuit's rule is further highlighted when one considers practices that create a disparate impact outside of the context of eligibility or lay-off lists based on rank-order or cut-off scores. Indeed, it is not uncommon for an employer to announce its adoption of a practice that causes a predictable disparate impact on a protected group, and then repeatedly use that practice over a long period of time to take actions that disadvantage members of that

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[4] The *Ledbetter* Court was also concerned about stale claims and that "evidence relating to intent may fade quickly with time." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 631 (2007). However, these concerns do not apply to disparate impact claims. Where a city is actively hiring using certain test results, data and witnesses are readily available, and there is no concern about fading memories. To the extent that an employer continues to use a selection device which has a disparate impact, employers can reasonably be expected to demonstrate the job relatedness of their test.

group. In these cases, courts uniformly hold or clearly accept that each "use" of an unlawful employment practice triggers the limitations period anew, regardless of its relationship to a prior violation such as the initial adoption of such a practice.

To be sure, some plaintiffs in these contexts would not have standing to challenge a practice at the time of its initial adoption (*e.g.*, because they would not yet be adversely affected by application of the policy[5] or because they do not yet work for or seek employment from that particular employer). But courts have not insisted on the Seventh Circuit's cramped understanding of the limitations period even when the practice's adverse impact on the plaintiff and other protected class members is immediately apparent. Instead, courts focus on when the practice's impact is felt by the employee, rather than when it was adopted. Each "use" of an unlawful employment practice triggers the limitations period anew, regardless of its relationship to an earlier violation such as the initial adoption of such a practice. [6]

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[5] Consider, for example, an African-American who lives in a jurisdiction at the time that it announces a residency requirement, only later to apply for employment after moving to the neighboring community. Or an employee who has a strong credit score at the time that his employer announces its new policy that promotions to leadership positions will be contingent on a certain credit score – only to be denied the promotion when he later applies for promotion when his score has worsened due to illness, divorce, or other factors.

[6] The Seventh Circuit appeared to recognize the practicality of this approach in another context. See *Heiar* v. *Crawford County*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). In an ADEA disparate treatment challenge to an employer's mandatory retirement policy, the Seventh Circuit rejected the idea that the limitations period ran from the time that the employee

Consider, for example, residency requirements that impose a significant disparate impact on the basis of race and/or national origin in jurisdictions with small minority populations. The Title VII limitations period runs each time the employer uses such a practice to deny employment to an individual person of color, not simply at the time of the requirement's adoption even though its disparate impact may be immediately apparent. Indeed, the Sixth Circuit specifically so held in *Cleveland Branch, NAACP* v. *City of Parma*, 263

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received notice of the employer's policy when she first started on the job, rather than from the time that the policy was applied to her. *Id.* at 1194. As Judge Posner wrote:

> Admittedly there is a paradox in applying a notice standard to a case challenging a mandatory retirement age. The defendants in such cases could argue that the statute of limitations began to run on the day the employee started work; for, as long as he is told then what the terms of his employment are, that is the day on which he receives "notice" that he will be unlawfully terminated. And maybe, on this view, if the employee learned of those terms before he signed on, the statute of limitations would begin to run *before* he began to work. Such arguments, if accepted, would unduly constrict employees' ability to enforce their rights under the Act. People do not want to begin their employment by suing their employer over a mandatory retirement age that is 30 years in the future for them; and in those few cases that were brought, the courts would be deciding disputes prematurely. And yet the argument is a plausible corollary to the idea that notice sets the statute of limitations running. But no court has pressed the logic of the notice approach so relentlessly, or is likely to do so; and we merely want to emphasize that, merely because a specific notice of termination, such as the plaintiffs in this case received, starts the 180-day statute of limitations running, it does not follow that the notice an employee receives when he is first hired would also set the statute to run; it surely would not.

Id.

F.3d 513, 536 (6th Cir. 2001), where the City argued that the NAACP's challenge was not timely filed because it was not within 300 days of the City's 1988 adoption of the policy. The Court held that "[t]he NAACP was not required to file an EEOC charge within 300 days of the enactment of the 1988 ordinance, as the NAACP argues, in part, that Parma is still according an unfair preference to its residents." *Id.* In other words, the plaintiffs satisfied the limitations period because the City continued to use the residency requirement that caused a disparate impact to execute hiring decisions about individual applicants. See also *Newark Branch, NAACP* v. *Town of Harrison*, 940 F.2d 792, 796 (3rd Cir. 1991) (invalidating, on disparate impact grounds, the residency requirement adopted in 1981 that was used to deny plaintiffs' job applications in 1989).

Height and weight requirements, as another example, almost always cause a significant disparate impact on the basis of gender, excluding women from a wide range of public safety jobs without any demonstrable connection to successful job performance. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 (1977) (striking down Alabama's height and weight requirements for correctional counselors because they disproportionately excluded women without any showing of job-relatedness); *Costa* v. *Markey*, 706 F.2d 1, 6 (1st Cir. 1982) (police department's height requirement imposed unjustified disparate impact on women in violation of Title VII); *United States* v. *Virginia*, 620 F.2d 1018, 1024 (4th Cir. 1980) (Virginia State Patrol's height and weight requirement disproportionately excluded women without basis in business necessity in violation of Title VII); *Horace* v.

City of Pontiac, 624 F.2d 765, 768-69 (6th Cir. 1980) (police department's height requirement imposed unjustified disparate impact in violation of Title VII). Courts have consistently allowed employees to attack these requirements whenever they are used to deny employment to a woman, even if this use is years after the requirement's initial adoption and announcement.

As an illustration, in *Dothard* v. *Rawlinson*, 433 U.S. 321, 323-24 (1977), the Supreme Court heard a challenge to an Alabama statute that required corrections officers to weigh more than 120 pounds and stand at least 5 feet 2 inches. Although the statute was more than 20 years old,[7] the Supreme Court addressed the plaintiff's claims without discussing the timeliness of the claim. The Court noted that the plaintiff "filed a charge with the [EEOC] * * * and ultimately received a right to sue letter. She then filed a complaint in the District Court * * *." *Id.* at 324. Thus, *Dothard* provides a clear example of the Court allowing a plaintiff to challenge a policy that causes disparate impact at the time it is *used*, rather than when the selection device producing the disparate impact was initially adopted.

Other courts that have addressed height and weight standards have been similarly unconcerned with when the standards were initially created. These courts simply permitted the standards to be challenged at the time they were used to deny employment to individual applicants. See, *e.g.*, *LeBoeuf* v. *Ramsey*, 503

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[7] The statute at issue had originally been enacted in 1940. See Brief of Appellants at *3, *Dothard* v. *Mieth*, 1977 WL 189472 (U.S. 1977) (No. 76-422) (citing Ala. Code tit. 55, § 373(109) (1940) (Recomp. 1958)).

F. Supp. 747. 751 (D. Mass. 1980) (allowing a Title VII challenge to a height requirement for police officers that was promulgated in 1972), *rev'd in part sub nom. Costa* v. *Markey*, 677 F.2d 158 (1st Cir. 1982), *rev'd on reh'g*, 706 F.2d 1 (1st Cir. 1982), *reh'g en banc granted and rev'd*, 706 F.2d 1, 10 (1st Cir. 1982) (en banc); *Frank* v. *United Airlines, Inc.*, 216 F.3d 845, 847 (9th Cir. 2000) ("From 1980 to 1994, defendant * * * required flight attendants to comply with maximum weight requirements based on sex, height, and age* * * . In 1992, plaintiffs filed this action * * * to challenge these weight requirements.").[8]

Similarly, employer "no-beard" rules cause a significant disparate impact on African-American men, who suffer disproportionately from a skin condition that makes shaving difficult. See *Bradley* v. *Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 796 (8th Cir. 1993); *EEOC* v. *Greyhound Lines, Inc.*, 635 F.2d 188, 190 (3rd Cir. 1980); *Richardson* v. *Quik Trip Corp.*, 591 F. Supp. 1151, 1154 (S.D. Iowa 1984). Again, when these types of requirements have a disparate impact, courts uniformly treat them as actionable whenever they are used to hire or fire employees.

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[8] In *LeBoeuf*, the New Bedford City Police Department originally instituted height requirements for police officers in 1972, and again on July 24, 1973. *LeBoeuf* v. *Ramsey*, 503 F. Supp. 747, 750-751 (D. Mass. 1980). The plaintiff was denied employment because of the height requirement in August 1974. *Id.* at 752. She filed her complaints with the state on September 9, 1974, and with the EEOC on Sept. 16, 1974. *Id.* at 753. Similarly, in *Gerdom* v. *Continental Airlines, Inc.*, 692 F.2d 602, 603-04 (9th Cir. 1982), Continental Airlines had a height and weight requirement for flight attendants from the early 1960s until 1973. The case was not filed in district court until 1972. *Id.*

Consider too the example of employers that provide no (or unsanitary) bathroom facilities despite that decision's disparate impact against women. See *Lynch* v. *Freeman*, 817 F.2d 380, 388 (6th Cir. 1987); *Johnson* v. *AK Steel Corp.*, 2008 U.S. Dist. LEXIS 41573, at *16-17 (S.D. Ohio May 23, 2008); *James* v. *National R.R. Passenger Corp.*, 2005 U.S. Dist. LEXIS 5401, at *12-14 (S.D.N.Y. Mar. 30, 2005). This too involves a practice that is used on an ongoing basis to cause disparate impact against women and thus is treated as subject to challenge until the practice is abandoned.

For the same reasons, experience requirements that impose a disparate impact trigger the limitations period when they are used to deny employment or promotion to applicants or employees, and not just at the time of their adoption. See *Stagi* v. *National R.R. Passenger Corp.*, 407 F. Supp. 2d 671, 673 (E.D. Pa. 2005) (describing circumstances where employer adopted a policy that made promotion contingent on at least one year's tenure in current union position that was not challenged until it was used several years later to deny promotions disproportionately to women).

Similarly, employer policies that deny employment based on arrest or conviction records often impose a significant disparate impact on the basis of race. See, *e.g.*, *Green* v. *Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975) (employer's policy of refusing to hire any person convicted of a crime other than a minor traffic offense violates Title VII because the practice had a disparate impact on African-American candidates and was not job-related); *Gregory* v. *Litton Sys., Inc.*, 472 F.2d 631, 632 (9th Cir. 1972) (questionnaire asking potential employees for their arrest records had a disparate impact on African-

American employees, and employer failed to demonstrate need for its policy). Again, the limitations period is triggered each time that an employer actually hires or fires employees on the basis of information contained in arrest or conviction records in a manner that results in a disparate impact.

Outside of the testing context, courts thus routinely understand the Title VII limitations period as running anew each time a practice that causes a disparate impact is used to execute employment decisions about employees. Applying the same rule in the testing context best comports with a pragmatic understanding of how and when employers actually use facially neutral practices to implement employment decisions. The Seventh Circuit's rule, in contrast, privileges in perpetuity an employer's ability to engage in repetitive uses of employment practices that cause an unjustified disparate impact.

C. The Seventh Circuit's Rule Frustrates the Important Purposes to be Served by Title VII's Disparate Impact Standard by Permitting Employers to Enshrine, Rather than End, Those Practices that Deny Job Opportunities on the Basis of Race, Gender, and National Origin Without any Meaningful Tether to Successful Job Performance.

Non-job-related employment practices that disproportionately exclude protected class members from job opportunities frustrate Title VII's antidiscrimination objectives in at least two ways. First, employment practices that disproportionately disadvantage women and people of color without any meaningful relationship to successful job performance

may institutionalize longstanding patterns of discrimination. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 426-30 (1971) (observing that employer's non-job-related tests disproportionately excluded African-Americans from jobs that "formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites" and thus operated "to 'freeze' the status quo of prior discriminatory employment practices").

Second, employment practices that impose a disparate impact often reflect unexamined and inaccurate assumptions and stereotypes about the skills and capabilities that predict successful job performance. See *id.* at 431-32 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification * * *. [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

For these reasons, this Court has long held that Title VII prohibits unjustified disparate impact as a critically important component of the Civil Rights Act's commitment to equal opportunity in the workplace. See *id.* at 431-32 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation * * *. Congress directed the thrust of the Act to the *consequence*s of employment practices, not simply the motivation.") (emphasis in original); see also *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasizing that Title VII "prohibit[s] all practices in whatever form which create

inequality in employment opportunity due to discrimination") (citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429-430 (1971)).

Congress confirmed its intent to target disparate impact discrimination as an unlawful barrier to equal employment opportunity when it codified the disparate impact standard in the Civil Rights Act of 1991. See Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (codified as amended at 42 U.S.C. § 2000e-2(k) (2006)). Congress there made clear its determination to restore a robust understanding of the disparate impact standard and its requirement of job-relatedness for practices that disproportionately exclude members of protected groups. Finding that "the decision of the Supreme Court in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections," Congress specifically identified the Act's purposes to include "codify[ing] the concepts of `business necessity' and `job related' enunciated by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989)." §§ 2(2), 3(2), 105 Stat. at 1071.

By requiring careful examination of employment practices that impose a disparate impact on protected class members, Title VII thus enhances not only equal access to job opportunities, but also a commitment to true merit selection. As this Court has observed, "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and

mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." *Griggs*, 401 U.S. at 436.

Title VII's disparate impact provision has played a powerful role in expanding opportunities for women and people of color on the job. As just one example, disparate impact challenges are greatly responsible for women's entry into the paid firefighting corps. No woman had ever served as a paid firefighter in the United States before Congress extended Title VII's reach to include state and local government employers in 1972. Denise M. Hulett, Marc Bendick, Jr., Sheila Y. Thomas, & Francine Moccio, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 INT'L J. OF DIVERSITY IN ORGANIZATIONS, COMMUNITIES, AND NATIONS 189, 191 (2008). Nor did public safety agencies hire women as firefighters in any significant numbers until the 1980s. *Id.*

But attention to disparate impact thereafter led to the elimination of agencies' height and weight requirements, certain physical ability tests, and other selection practices that disproportionately excluded women from a wide range of public safety jobs without any demonstrable connection to successful job performance. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 (1977) (striking down Alabama's height and weight requirements for correctional counselors because they disproportionately excluded women without any showing of job-relatedness); *Pietras* v. *Bd. of Fire Comm'rs of Farmingville Fire Dist.*, 180 F.3d 468, 475 (2nd Cir. 1999) (fire department's timed physical agility test that disproportionately excluded women violated Title VII because City failed to prove that the passing score was job-related); *Costa* v.

Markey, 706 F.2d 1, 6 (1st Cir. 1982) (police department's height requirement imposed unjustified disparate impact on women in violation of Title VII); *United States* v. *Virginia*, 620 F.2d 1018, 1024 (4th Cir. 1980) (Virginia State Patrol's height and weight requirement disproportionately excluded women without basis in business necessity in violation of Title VII); *Horace* v. *City of Pontiac*, 624 F.2d 765, 768-69 (6th Cir. 1980) (police department's height requirement imposed unjustified disparate impact in violation of Title VII); *Harless* v. *Duck*, 619 F.2d 611, 616 (6th Cir. 1980) (police department's physical ability test violated Title VII because it disparately impacted women and the City failed to prove that the tested exercises and passing scores were related to the physical requirements of the job)*; United States* v. *City of Erie,* 411 F. Supp. 2d 524, 568-70 (W.D. Pa. 2005) (invalidating police department's physical agility test that disproportionately excluded women as neither job-related nor justified by business necessity); *Thomas* v. *City of Evanston*, 610 F. Supp. 422, 432 (N.D. Ill. 1985) (holding that police department had failed to justify its physical agility test that imposed a disparate impact against women); *Berkman* v. *City of New York*, 536 F. Supp. 177, 179 (E.D.N.Y. 1982) (fire department's physical ability test that disparately impacted women violated Title VII because it was not sufficiently job-related).

Disparate impact challenges have played a similarly powerful role in expanding employment opportunities for African-American and Latino male and female firefighters. When Congress amended Title VII in 1972 to include state and local governments as covered employers, it identified race discrimination by fire departments as among the most pressing problems

to be addressed. 118 CONG. REC. 1817 (1972) (describing a series of discriminatory barriers to African-Americans' entry into the firefighting corps). Disparate impact challenges thereafter addressed the elimination of agencies' reliance on certain tests, subjective assignment processes, and other practices that disproportionately excluded African-American and Latino men and women from public safety jobs without any meaningful tether to successful job performance. See, *e.g.*, *Wilmore* v. *City of Wilmington*, 699 F.2d 667, 668 (3rd Cir. 1983) (invalidating assignment and promotional practices that imposed a disparate impact on the basis of race); *Ensley Branch of NAACP* v. *Seibels,* 616 F.2d 812, 822 (5th Cir. 1980) (invalidating examinations for police and firefighter positions that imposed a disparate impact on the basis of race); *United States* v. *City of New York,* 637 F. Supp. 2d 77, 131-132 (E.D.N.Y. 2009) (invalidating fire department's written examinations that had an unjustified disparate impact against African-American and Latino applicants); *Bradley* v. *City of Lynn,* 443 F. Supp. 2d 145, 149 (D. Mass. 2006) (invalidating written civil service examination used by all Massachusetts municipalities that imposed disparate impact against African-Americans and Latinos and was not job related and consistent with business necessity).

This Court and Congress have thus long recognized the important role disparate impact claims play not only in ferreting out subterfuges for an employer's intentional discrimination, but also in ending unjustified practices that deny individuals access to important job opportunities on the basis of race, gender, and national origin without attention to actual merit. Yet the Seventh Circuit's rule frustrates the statutory purposes underlying the disparate impact

provision because it enshrines, rather than ends, those practices that deny job opportunities without any meaningful tether to successful job performance. It instead permits an employer to use a discriminatory non-job-related practice in perpetuity so long as no plaintiff files a charge within 300 days of its adoption.

In this case, for example, the district court concluded that the City had not proven that the test predicted firefighter performance, and that it "was skewed towards one of the least important aspects of the firefighter position at the expense of more important abilities." Pet. App. 30a, 32a. The court also found that the cut-off score distinguishing the "qualified" from "well qualified" pools was "statistically meaningless." *Id.* at 34a. The court further found that less discriminatory yet "equally convenient" alternatives were available. *Id.* at 35a. The City did not appeal the court's findings that its test was discriminatory.

The Seventh Circuit's rule thus immunizes a non-job-related practice – like the City's – that causes disparate impact on the basis of protected class status from subsequent challenge if employees or applicants fail to object to the initial promulgation of the procedure within the brief Title VII limitations period. It thus encourages employers to continue to rely on invalid tests and other practices that entrench longstanding patterns of racial and gender hierarchy at the expense of actual merit.

CONCLUSION

For these reasons, the judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by pay disparities, sex discrimination, the long-term negative effects on economic well-being of these disparities and discrimination, and the difficulties of seeking and achieving redress for all these issues. Our toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and, therefore, our work to promote policies that aid women in their efforts to achieve economic self-sufficiency. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

Founded in 1915, the *American Association of University Professors* ("AAUP") is a non-profit association of over 45,000 faculty members and other academic professionals in all academic disciplines. The AAUP has taken a strong stand against discrimination by institutions of higher education. See, *e.g.*, On Discrimination, POLICY DOCUMENTS & REPORTS 299 (10th ed. 2006). The AAUP has joined amicus briefs in several recent Supreme Court cases addressing the interpretation of anti-discrimination legislation, including *Fitzgerald* v. *Barnstable School Committee* (2009); *Meacham* v. *Knolls Atomic Power*

Lab. (2008); and *Crawford* v. *Metro. Gov't of Nashville & Davidson County* (2008).

The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty, equality and justice embodied in this nation's Constitution and civil rights laws. The ACLU Women's Rights Project (WRP) was founded in 1972 and since that time has fought to ensure women's full equality in American society, including in the workforce. WRP is dedicated to the advancement of the rights and interests of women, with a particular emphasis on issues affecting low-income women of color and women in non-traditional occupations, such as firefighting. The ACLU Racial Justice Program (RJP) aims to preserve and extend constitutionally guaranteed rights to people who have historically been denied their rights on the basis of race. RJP is committed to addressing the broad spectrum of issues, including employment discrimination, that disproportionately and negatively impact people of color.

The *Anti-Defamation League* ("ADL") was organized more than 96 years ago to advance good will and mutual understanding among Americans of all creeds and races, and to combat anti-Semitism and bigotry of all kinds. To that end, ADL promotes workplaces free of discriminatory intimidation, ridicule, and insult through legal and public advocacy, and also by providing anti-bias training for employers and employees. The League remains vitally interested in ensuring that an employee with a legitimate workplace discrimination claim is afforded the protections long

established under Title VII of the Civil Rights Act of 1964.

The *Asian American Justice Center* (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. The Asian American Justice Center is one of the nation's leading experts on issues of importance to the Asian American community. AAJC and its Affiliates have a longstanding interest in this case to ensure that Title VII protections afford protections to all Americans. This interest has resulted in AAJC's participation in a number of *amicus* briefs before the courts.

The *Asian American Legal Defense and Education Fund* (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The decision below misinterprets the law and undermines the enforcement of Title VII of the Civil Rights Act of 1964.

The *Center for Constitutional Rights* is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in

1966, the Center has litigated numerous civil and human rights cases which have focused on ensuring equal employment and other economic opportunities for people of color and other disadvantaged groups. We currently serve as plaintiffs' counsel in *Gulino* v. *New York City Bd. of Educ.*, 96 Civ. 8414 (S.D.N.Y.), and *Vulcan Society, Inc.* v. *City of New York*, 07-CV-2067 (E.D.N.Y.), two Title VII class action lawsuits which challenge, respectively, racially discriminatory hiring practices for New York City schoolteachers and firefighters.

As a national spokesman and advocate for fathers and stepfathers, *Dads and Daughters* knows how passionately these men want their daughters treated fairly in the workplace, education and the larger society. We recognize how essential is the strong enforcement of Title VII's disparate impact provisions—which have been critical in opening employment opportunities to women and people of color. We know that our daughters will be harmed by the appellate court ruling, because its practical effect is to allow employment discrimination to continue. Such discrimination is not acceptable to any man who imagines his daughter or stepdaughter in the position of being denied opportunity simply because she is female.

The mission of the *D.C. Employment Justice Center* is to secure, protect, and promote workplace justice for low income workers in the Washington D.C. metropolitan area. To that end, EJC provides legal services to over 1500 workers each year through its weekly Workers' Rights Clinics. EJC's clients come to the legal clinic because they do not know their legal

rights in an employment context and/or they do not know how to exercise these rights. Many of EJC's clients are limited English speakers and do not fully understand their employers' policies, much less the employment laws which these policies may violate. Almost a third of the clients who receive services at the clinic report that they have experienced discrimination in the workplace; however, usually this awareness is triggered by direct actions that have been taken against them. A resolution of this case in favor of the plaintiffs would ensure that an EJC client who has suffered discrimination would have an opportunity to seek recourse even if s/he is not aware of the employers' discriminatory policy until it has been exercised against him/her.

Equal Justice Society is a national organization of scholars, advocates and citizens that seek to promote equality and enduring social change, with a primary mission of combating the continuing scourge of racial discrimination and inequality in America. Equal Justice Society has a strong interest in protecting equal employment opportunities, and supports efforts to remove unjust obstacles to achieving this goal. Therefore, Equal Justice Society supports an expansive interpretation of statute of limitation laws in order to ensure that victims of discrimination are afforded adequate time to remedy their wrong.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country, assisting in employment discrimination and other civil rights cases. It offers training programs, advice and counseling, and amicus representation regarding class

actions and related issues. The Impact Fund is lead counsel in *Dukes* v. *Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2002), and other major civil rights and employment discrimination class action lawsuits.

LatinoJustice PRLDEF is an independent national not-for-profit civil rights organization which has advocated for and defended the constitutional rights and the equal protection of all Latinos under law. Founded in 1972, the organization's mission has been to promote the civic participation of the pan-Latino community, to cultivate Latino community leaders, and to bring impact litigation addressing voting rights, employment opportunity, fair housing, language rights, educational access, immigrants' and migrants' rights. During its 37 year history, LatinoJustice PRLDEF has litigated a number of employment discrimination cases on behalf of Latino and Latina employees.

The *Lawyers' Committee for Civil Rights Under Law* ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been involved in cases before the Court involving the disparate impact claims and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination.

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for nearly forty years. One priority for Legal Momentum is assuring equal employment opportunity for women in historically male-dominated jobs, such as firefighting, law enforcement, and the construction trades. Legal Momentum advocates in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote women's access to these jobs by combating sex discrimination. Many policies and practices in male-dominated jobs fall more heavily on women – from outdated physical entrance exams that do not correlate with job duties, to lack of adequate restroom facilities, to light-duty policies that do not accommodate pregnancy. Legal Momentum is fully aware that discrimination against women remains pervasive, and is deeply concerned with ensuring that women may continue to challenge unlawful employment practices under Title VII.

Legal Voice (formerly the Northwest Women's Law Center) is a non-profit organization that works to advance the legal rights of women in the Pacific Northwest through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has been dedicated to protecting and securing equal rights for women and their families, including in the workplace, in educational institutions, and elsewhere. Toward that end, the Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country, including numerous cases establishing women's rights to work free from sex discrimination and sexual harassment. Legal Voice continues to serve as a regional expert and

leading advocate in litigation and in legislative efforts to protect equal opportunity in the workplace.

The *Mexican American Legal Defense and Educational Fund* (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF's mission includes a commitment to ensure equal employment opportunities for Latinos. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. During its 40-year history, MALDEF has litigated numerous employment discrimination cases on behalf of Latino and other minority groups.

The principal objectives of the *National Association for the Advancement of Colored People* (hereinafter "NAACP") are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights and to inform the public of the adverse effects of racial discrimination. The NAACP, founded in 1909, believes that every individual has a fundamental right to secure a job for which she is qualified without discrimination because of race, color, religion, sex, or national origin. To this end, the NAACP works to ensure the proper judicial construction of civil rights laws, including Title VII.

Established in 1955, the *National Association of Social Workers* (NASW) is the largest association of

professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the NASW Code of Ethics, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. The NASW Code of Ethics directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" * * * and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of race, ethnicity, national origin, color * * *." NASW policies support "workforce policies that prohibit the negative impact on employees of marginalized racial and ethnic groups." National Association of Social Workers, Racism, Social Work Speaks, 281, 287 (2009).

The *National Campaign to Restore Civil Rights* (NCRCR) is a non-partisan movement working to ensure that our courts protect and preserve equal justice, fairness, and opportunity. We achieve these goals through raising awareness, outreach, and building alliances. NCRCR is comprised of lawyers,

academics, students, and community activists who joined together in response to a series of Supreme Court decisions that raise concerns about civil rights protections. NCRCR draws upon the experience of a cross-cutting range of organizational partners, including many with significant experience working on behalf of people who have faced discrimination on the basis of race, national origin, sex, disability or age, among other characteristics, by employers. NCRCR is interested in ensuring the continued vitality of protections against employment discrimination and in maintaining the ability of employees to challenge employment tests and other employment-related policies that have an unjustified disparate impact.

The *National Education Association* (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to opposing employment discrimination and firmly supports the vigorous enforcement of Title VII.

The *National Employment Lawyers Association* advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the country's largest professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 68 state and local affiliates have more than 3,000 members around the

country. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of Title VII and other anti-discrimination statutes, to ensure that the goals of those statutes are fully realized. Some of the more recent cases before the U.S. Supreme Court in which NELA has participated as *amicus curiae* include: *Gross* v. *FBL Financial Services, Inc.,* 129 S.Ct. 2343 (2009); *Crawford* v. *Metropolitan Gov't of Nashville & Davidson County*, 129 S.Ct. 846 (2009)*; Sprint/United Management Co.* v. *Mendelsohn*, 128 S.Ct. 1140 (2008); *CBOCS West, Inc.* v. *Humphries*, 128 S.Ct. 1951 (2008); *Kentucky River Retirement Systems* v. *EEOC*, 128 S.Ct. 2361 (2008); *Meacham* v. *Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008); and *Ledbetter* v. *Goodyear Tire Co.*, 127 S. Ct. 2162 (2007).

The *National Immigration Law Center* ("NILC") is a non-profit legal advocacy organization whose mission is to promote and advance the rights of low-income immigrants and their family members. NILC has a national reputation for its expertise in the complex intersection of immigration and employment laws. Since 1990, NILC has litigated key employment discrimination cases, conducted trainings for advocates, attorneys, and government officials on employment discrimination affecting immigrants, and provided technical assistance to hundreds of non-profit agencies representing low-wage immigrant workers. NILC's interest in this case arises out of a concern that

low-wage immigrant workers have access to effective remedies for discrimination in employment.

The *National Organization for Women Foundation* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 550,000 contributing members in more than 450 chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included supporting robust interpretation and enforcement of Title VII so that employment discrimination will truly become a thing of the past.

The *National Senior Citizens Law Center* ("NSCLC") is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys in legal aid programs. NSCLC's Herbert Semmel Federal Rights Project works to ensure access to the federal courts to enforce safety net and civil rights statutes. As advocates for the elderly and disabled, the equal opportunity protected by anti-discrimination law is critical to our mandate, and NSCLC has participated as counsel in numerous lawsuits on behalf of these populations. NSCLC is profoundly concerned about the impact that the Court's decision may have on its clients' ability to vindicate their equal rights in federal court.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination and is particularly concerned that our nation's anti-discrimination laws be properly interpreted and vigorously enforced. PFAWF joins this brief because the Seventh Circuit's ruling, if not reversed, would seriously undermine the rights of all Americans to a workplace free of unlawful discrimination.

The *Public Justice Center* (PJC) is a non-profit civil rights and anti-poverty legal services organization that seeks to represent the interests of indigent and disadvantaged persons before state and federal appellate courts. Towards that end, the PJC has submitted numerous briefs in the Maryland Court of Appeals and the Court of Appeals for the Fourth Circuit, as well as in other courts, defending the rights of employees to be free from workplace discrimination. See, *e.g.*, *Prince of Peace et al* v. *Linklater*, Sept. Term 2009, No. 66, (Md. filed Aug. 17, 2009); *Haas* v. *Lockheed Martin*, 396 Md. 469 (2007); *Ocheltree* v. *Scollon Productions, Inc.*, 335 F.3d 325 (4th Cir. 2003). The PJC has an interest in this case because its outcome will impact the ability of workers throughout the nation to remedy discriminatory behavior by their employers.

The *Sargent Shriver National Center on Poverty Law* (Shriver Center) champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. The Shriver Center works on issues related to employment and economic security. Women and minorities make up the majority of low-income people, so discriminatory workplace policies and practices have an especially negative impact on their immediate and long-term economic security. Non-discrimination in employment is the surest path out of poverty and toward economic well-being. Obtaining and maintaining employment in high-wage occupations, particularly in those occupations with a history of discrimination against women and minorities, is of vital importance. The Shriver Center has a strong interest in the eradication of unfair and unjust employment policies and practices, including those that serve as barriers to access to and advancement within family-sustaining employment and economic equity.

Sociologists for Women in Society is an organization of professional sociologists committed to establishing that gender inequality exists in our society and identifying the key mechanisms reproducing this inequality. Many of our members have done research exposing formal and informal practices creating inequality in the workplace, including the degree to which these mechanisms are hidden from the view of most workers.

The Southwest Women's Law Center is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws and constitutional prohibitions on sex discrimination.

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The *Union for Reform Judaism* ("Union") is the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews. Inspired by the biblical teaching that "[y]ou shall not abuse a needy and destitute laborer, whether a fellow Israelite or a stranger in one of the communities of your land"

(Deuteronomy 24:14-15), Reform Judaism has a profound commitment to the principle of equality of opportunity for all persons, including workers. Every working person and the families of workers and society as a whole suffer from discriminatory employment practices. Workers must not be unduly limited in their ability to challenge such discrimination, including through onerous time limits on when such suits may be brought.

The *Vulcan Society, Inc*, is a fraternal, social, and charitable organization of roughly 250 current and former New York City firefighters. For the past forty years, the Vulcan Society has worked to increase the representation of African-Americans and other historically-disadvantaged groups in the New York City Fire Department (FDNY) and the firefighter profession nationwide, through recruitment, training and tutoring of potential minority firefighter candidates and by challenging New York City's longstanding use of racially discriminatory entry-level examinations for the firefighter job. In the early 1970's, the Vulcan Society won a federal civil rights lawsuit challenging the FDNY's entry-level firefighter exam, which resulted in a finding, upheld by the United States Court of Appeals for the Second Circuit, that the FDNY's test violated the Equal Protection Clause of the Fourteenth Amendment. The Court ordered an increase in hiring of minority firefighter candidates for a four-year period. See *Vulcan Society of the New York City Fire Dep't, Inc.* v. *Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973). Earlier this year, the Vulcan Society, acting as a Title VII class action plaintiff, won another liability finding against New York City when the District Court found that the

City's 1999 and 2002 entry-level firefighter exams were racially discriminatory. See *Vulcan Society, Inc.* v. *City of New York*, 07-CV-2067 (E.D.N.Y.)

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly supports Title VII's provision against employment practices that have a disparate impact on the basis of protected class status and that the statute of limitations for this provision is triggered each time an employer applies a practice that causes a disparate impact, instead of an interpretation that would allow employers to indefinitely follow a discriminatory employment practice if they are not stopped within 300 days of the policy's adoption.

The *Women's Law Center of Maryland, Inc.* is a nonprofit membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services, including an Employment Law Hotline, and advocacy, the Women's Law Center seeks to protect women's legal rights and insure gender equality in the workplace.

The *Women's Law Project* (WLP) is a nonprofit public interest legal advocacy organization located in Pennsylvania dedicated to advancing the legal, social, and economic status of women and their families. Since its founding in 1974, the WLP has worked to eliminate sex discrimination in our laws and institutions through litigation, public policy advocacy and individual counseling. WLP has a strong interest in the proper application of civil rights laws protecting women from employment discrimination.