No. 08-974

IN THE
Supreme Court of the United States

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

v.

CITY OF CHICAGO,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CLYDE MURPHY
CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
100 N. LaSalle St.
Chicago, IL 60602
(312) 630-9744

JOHN PAYTON
MATTHEW COLANGELO
Counsel of Record
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200

JOSHUA CIVIN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I St., NW, 10th Floor
Washington, DC 20005

Additional counsel listed inside cover

JUDSON H. MINER
GEORGE F. GALLAND, JR.
MINER, BARNHILL &
GALLAND, P.C.
14 W. Erie Street
Chicago, IL 60610
(312) 751-1170

MATTHEW J. PIERS
JOSHUA KARSH
HUGHES, SOCOL, PIERS,
RESNICK & DYM LTD.
70 W. Madison Street
Chicago, IL 60602
(312) 580-0100

PATRICK O. PATTERSON, JR.
LAW OFFICE OF PATRICK O.
PATTERSON, S.C.
7841 N. Beach Drive
Fox Point, WI 53217
(414) 351-4497

FAY CLAYTON
CYNTHIA H. HYNDMAN
ROBINSON, CURLEY &
CLAYTON, P.C.
300 S. Wacker Drive
Chicago, IL 60606
(312) 663-3100

BRIDGET ARIMOND
357 E. Chicago Avenue
Chicago, IL 60611
(312) 503-5280

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I. The acknowledged split is entrenched, not "shallow," and will likely not resolve itself without this Court's intervention.

The City concedes an entrenched circuit split, but contends that this Court should not intervene because the split is "shallow" and "will likely resolve itself" when various circuits change their positions in the future. BIO 8. Both assertions are mistaken.

1. The City acknowledges, as it must, that the courts of appeals are divided on the question presented. Yet the City contends that the split is only two (Second and Fifth Circuits) to three (Third, Sixth, and Seventh Circuits), and is thus too "shallow" to warrant review. BIO 8, 22. Even if the City were correct that the split is two-three, instead of five-three as petitioners maintain, *see* Pet. 10-19, this Court has recently granted certiorari to address smaller splits on questions related to the timeliness of EEOC charges under Title VII. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2166 (2007) (noting that the Court intervened to resolve a two-one split); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 107-08 & n.3 (2002) (same).

In fact, however, the split is deeper than the City acknowledges. The City mischaracterizes the positions of the Ninth, Eleventh, and D.C. Circuits:

Ninth Circuit. Although the City argues that *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991), does not "deepen[ ]" the conflict on the question presented, BIO 30, the Seventh Circuit—which otherwise was at pains to distinguish conflicting author-

ity—acknowledged the conflict with *Bouman*. App. 6a-7a.

Eleventh Circuit. The City is correct that the Seventh Circuit sought to distinguish *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), BIO 29, but the Seventh Circuit thought it "arguable" which way *Beavers* should have come out, and its distinction of *Beavers* was, by the Seventh Circuit's own admission, a "fine one." App. 5a. As pointed out in petitioners' opening brief, the distinction is in fact non-existent. Pet. 15 n.7.

D.C. Circuit. The City contends that *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999), should not count toward the split because it did not involve civil service examinations, as many of the other cases do. BIO 29-30. But that is a distinction without a difference. In all the cases cited by the parties and by the Seventh Circuit, the legal issue is the same: whether each use of an employment practice that causes a disparate impact for a protected group is a violation that starts the charge-filing period. *See* Pet. 14-15.

The City also asserts that *Anderson* is undermined by *Law v. Continental Airlines Corp.*, 399 F.3d 330 (D.C. Cir. 2005). BIO 30. But *Law* disclaimed any conflict with *Anderson*, noting that "[t]he present case is . . . quite distinct from . . . our own decision in *Anderson* . . . ." *Law*, 399 F.3d at 334. In any event, an intra-circuit conflict within the D.C. Circuit would only strengthen the case for certiorari.

2. The City concedes that the Seventh Circuit's holding is contrary to *Guardians Association v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980),

and *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980). Nevertheless, the City characterizes *Guardians* and *Gonzalez* as "stale" because they predate this Court's most recent decisions addressing Title VII's charge-filing periods. BIO 8, 25-27, 32. As the City acknowledges, however, both *Guardians* and *Gonzalez* post-date *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). BIO 25. In addition, the Second Circuit's decision in *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 273-75 (2d Cir. 1981) (applying *Guardians*), post-dates *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The Seventh Circuit relied mainly on *Ricks* and did not claim that any of this Court's post-*Ricks* cases changed the legal landscape. App. 4a. Moreover, this Court's subsequent Title VII timeliness decisions note that they are strictly following *Evans* and *Ricks*. *See, e.g.*, *Ledbetter*, 127 S. Ct. at 2167-69.

The continuing vitality of *Guardians* is apparent in *United States v. City of New York*, No. 07-cv-2067, 2009 WL 212154 (E.D.N.Y. Jan. 28, 2009). The district court held—in circumstances nearly identical to those presented here—that the EEOC charges of black firefighter candidates in New York were timely. *See id.* at *2-*7. In so doing, the district court adopted the position advocated by the United States Department of Justice, and specifically rejected both (a) the argument that *Guardians* had been overruled by intervening decisions of this Court, and (b) the Seventh Circuit's reasoning in this case. *See id.*; *see also* U.S. Resp. to Mot. to Dismiss 8-13, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. June 4, 2008) (rejecting the defendant's argument

that *Ledbetter* and *Morgan* overruled *Guardians*); U.S. Supp. Letter Br. 3, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y. June 19, 2008) ("*Lewis v. City of Chicago* . . . is not binding law in this Circuit, and . . . is contrary to existing Second Circuit law." (citing *Guardians*)).

The City speculates that, if appealed, *City of New York* could provide the occasion for the Second Circuit to reconsider and reverse *Guardians*. BIO 8, 27-29. However, no interlocutory appeal of the district court's decision was requested or certified under 28 U.S.C. § 1292(b), and the litigation is still proceeding toward trial in the district court. *See* Docket, *United States v. City of New York*, No. 07-cv-2067 (E.D.N.Y.). Accordingly—assuming the case does not settle as most lawsuits do—any appeal is years away.[1] Nor is there any basis for the City's assumption that the Second Circuit would change course, given the United States's support for the Second Circuit position and the persuasive arguments, discussed *infra* Part II, for upholding that position.

3. The City also labels the acknowledged circuit split "tolerable," BIO 22, but cannot explain why different charge-filing rules in different circuits should be tolerated. This Court has consistently viewed non-uniformity of Title VII charge-filing rules as intolerable and therefore has intervened numerous

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[1] The City also predicts that the Ninth Circuit would change its ruling in *Bouman* if given the opportunity (after arguing that *Bouman* is not, in fact, on point). BIO 30-32. This speculation is belied by the Ninth Circuit's application of its *Bouman* holding in *Tatreau v. City of Los Angeles*, No. 03-56638, 138 F. App'x 959, 961 (9th Cir. 2005) (unpublished).

times to eliminate circuit conflicts in this area. *See infra* Part II. This is understandable given the predicament that multi-circuit employers confront when different charge-filing rules apply to different employees in different jurisdictions.

II. The Seventh Circuit's decision contradicts the text of Title VII and misapplies this Court's precedents.

In light of the acknowledged circuit split on the question presented, the City devotes most of its opposition to arguing that the Seventh Circuit was correct and the five contrary circuits are wrong. BIO 8-21. Of course, "the fact a case may have been rightly decided" is not "in itself enough to preclude certiorari." Stern & Gressman, Supreme Court Practice 227 (8th ed. 2002) (quoting Justice John Marshall Harlan II, *Manning the Dikes*, 13 Record of N.Y. City Bar Ass'n 541, 551 (1958)).

Even on its own terms, however, the City's defense of the Seventh Circuit's decision is unpersuasive. First, the Seventh Circuit's decision is unmoored from the text of Title VII. Second, it misinterprets this Court's prior Title VII charge-filing cases. Third, it unjustifiably creates two different charge-filing rules—one for practices that discriminate on their face and are challenged under Title VII's disparate treatment provisions and another for practices that discriminate in operation and are challenged under the statute's disparate impact provisions. Fourth, these errors cannot be excused, as the City argues, on the ground that the Seventh Circuit's rule provides employers with "repose" when

they adopt and then repeatedly use a discriminatory practice. BIO 19.

1. Title VII provides in pertinent part: "A charge . . . shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Where, as here, "the alleged unlawful employment practice" at issue is the subject of a disparate impact claim, the plaintiff must prove that the employer "*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). By the plain language of the statute, each *use* of an employment practice that causes a disparate impact is *prima facie* unlawful. If such *use* is proved, the employer is liable unless it "demonstrate[s] that the challenged practice is job related for the position in question and consistent with business necessity" and less discriminatory alternatives are unavailable. 42 U.S.C. § 2000e-2(k)(1)(A)(i)-(ii).

In this case, each time the City used the eligibility list created from the challenged hiring exam to fill each of ten separate hiring classes, it "use[d] a particular employment practice"; that particular practice by its use disparately excluded African American candidates; and, as the district court found, the practice was not job related and other less discriminatory alternatives were available. *Id.*; App. 13a-14a. Thus, *every* time the City excluded petitioners from a round of hiring, a full-blown Title VII violation—with all the elements required for a disparate impact claim—occurred. Charges were therefore timely if filed within 300 days of a hiring decision, as the charges in this case were. Pet. 6.

The Seventh Circuit did not acknowledge, much less address, the statutory text. Its holding—that the trigger for the charge-filing period is the employer's "adoption" of a particular employment practice, and that the subsequent *use* of the practice is not actionable if that use can be called the "automatic consequence" of the practice's original adoption—creates an exception that overrides the clear text. App. 4a, 6a. Title VII makes *use* of a practice with a disparate impact a *prima facie* violation; it provides no exception for uses that are characterized as the "automatic consequence" of the earlier "adoption" of the practice. The plain meaning of the statute thus provides no support for the idea that only the *first* "use" of the practice is unlawful, or that the illegality of subsequent uses depends on their being causally independent from the first "use." *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").[2]

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[2] The Seventh Circuit's failure to adhere to the ordinary meaning of the word "*use*" is apparent in its imprecision with respect to the event that triggers the charge-filing period. *Compare* App. 6a (referring to "the adoption of the standard"), *with* App. 4a (charge period starts "when the tests were scored and . . . the applicants learned the results"). The City attempts to elide this imprecision with a different, but also textually ungrounded, standard. *See* BIO 8 ("[T]he claim accrued when the [eligibility] list was adopted and announced.").

2. The Seventh Circuit's decision also misinterprets this Court's holdings on the timeliness of EEOC charges.

The rule of this Court's decisions is simple: if, and only if, an employer's actions satisfy all elements of a Title VII violation, then the charge-filing period begins. *See Ledbetter*, 127 S. Ct. at 2167-68; *Ricks*, 449 U.S. at 258; *Evans*, 431 U.S. at 558. This rule applies no matter how closely the violation at issue is related to earlier violations. *See Morgan*, 536 U.S. at 113 ("The existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.")[3]; *see also Ledbetter*, 127 S. Ct. at 2174 ("[A] freestanding violation may always be charged within its own charging period regardless of its connection to other violations."); *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986).

Conversely, if the employer's actions do not satisfy all elements of a violation at the time of those actions, then they are not a violation, even if they can be characterized as the "consequence" of earlier actions that were a violation. This rule explains *Evans, Ricks,* and *Ledbetter,* all of which were disparate treatment cases where an employer carried out

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[3] In reaching this conclusion, this Court rejected the Seventh Circuit's contrary approach in *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996) (Posner, J.). *See Morgan*, 536 U.S. at 106, 117 n.11 (disapproving *Galloway*). In the present case, the Seventh Circuit nonetheless relied on *Galloway*. App. 8a.

two employment actions: a first action that was allegedly motivated by discriminatory intent (and hence a disparate treatment violation) and a later action that did *not* satisfy, at the time of the later action, the required element of discriminatory intent.

Only one of this Court's charge-filing cases, *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), has discussed the accrual of both disparate treatment and disparate impact claims. In *Lorance*, the plaintiffs alleged they had been laid off in 1982 by application of a seniority rule adopted (without timely challenge) in 1979. *Id.* at 901-02. They lost their disparate treatment claim because they could not prove their employer harbored discriminatory intent at the time of their layoffs; the employer had simply applied a facially-neutral rule adopted years earlier, making the case identical to *Evans* and *Ricks*. *See Lorance*, 490 U.S. at 905-12.

The *Lorance* plaintiffs also alleged unlawful disparate impact discrimination. This Court held that claim precluded by Title VII's special provision protecting seniority systems from disparate impact challenges. *Id.* at 904-07. But the Court acknowledged that viewing the claim "as one of discriminatory impact" would have produced a different result, because in a disparate impact case the statute of limitations "run[s] from the time that impact is felt." *Id.* at 908. If the *Lorance* plaintiffs had not been prohibited from bringing a disparate impact claim by the seniority provisions of Title VII, they could have proved all elements of a disparate impact violation at the time of their layoffs, just as petitioners here proved all elements of a disparate impact claim each

time the City applied its practice to deny them consideration for specific firefighter vacancies.

3. The Seventh Circuit's reasoning clashes with this Court's rule that a facially discriminatory policy can be challenged any time it is used, since such a system "by definition discriminates each time it is applied." *Lorance*, 490 U.S. at 912 n.5; *see also Ledbetter*, 127 S. Ct. at 2173-74.

To see this conflict, suppose the City had adopted a facially discriminatory policy, announcing that in filling future firefighter vacancies, all whites on the eligible list would be hired before any African Americans. Using such a rule to exclude petitioners from consideration for vacancies would have been no less the "automatic consequence" of the adoption of the eligibility list than the City's exclusion of them in the present case. Yet, under *Ledbetter* and *Lorance*, petitioners could have challenged that facially discriminatory policy any time vacancies were filled. The Seventh Circuit's "automatic consequence" rule thus cannot be reconciled with this Court's established rule for facially discriminatory policies.

The Seventh Circuit itself acknowledged that Title VII charge-filing rules should be the same for disparate impact and disparate treatment cases. App. 5a. Yet the Seventh Circuit's opinion creates different rules, allowing charges to be filed within 300 days of any use of a practice when disparate treatment is alleged but solely within 300 days of the initial adoption of the practice when disparate impact is claimed. This dichotomy is indefensible, as the undisputed facts of this case demonstrate. As the district court found, the City was told by its con-

sultant at the outset that an 89 cut-off score did not validly distinguish between "well-qualified" and "qualified" test-passers. App. 21a-22a. Yet the City, without any supporting expert evidence, overrode its consultant's opinion, publicly defended the validity of the 89 cut-off score, and proceeded to use the test to hire nearly all-white firefighter classes for the next five years, knowing each time that the result of using the same practice over and over would be nearly all-white hiring. App. 16a, 22a-23a.

4. The City asserts that the interest in "repose" requires plaintiffs to spring into action at their first knowledge of a potential claim. BIO 19-20. This argument is also contrary to this Court's rule that a facially discriminatory policy may be challenged at any time. *See Lorance*, 490 U.S. at 912 n.5. An employer has no more claim to "repose" when it adopts and repeatedly uses a facially discriminatory policy that is illegal under Title VII's disparate treatment provisions than when it adopts and repeatedly uses a discriminatory-in-operation policy that is illegal under Title VII's disparate impact provisions.

Moreover, the Seventh Circuit's rule forces employees to institute litigation against their employer at a time when they have the least incentive to do so—when the policy is adopted on paper and before it has been used to deny any employee a concrete benefit. Employers can take advantage of that lack of incentive by adopting a foreseeably discriminatory practice, waiting 300 days, instituting actual use of the practice if no charge is filed, and then continuing to use the practice to discriminate for years. Judicial and administrative economy are not served by a rule that requires employees to initiate litigation upon

the adoption of practices that may never be applied to cause them serious harm.

CONCLUSION

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

Respectfully submitted,

JOHN PAYTON
MATTHEW COLANGELO
Counsel of Record
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200

JOSHUA CIVIN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I St., NW, 10th Floor
Washington, DC 20005

CLYDE MURPHY
CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
100 N. LaSalle St.
Chicago, IL 60602

JUDSON H. MINER
GEORGE F. GALLAND, JR.
MINER, BARNHILL &

GALLAND, P.C.
14 W. Erie St.
Chicago, IL 60610

MATTHEW J. PIERS
JOSHUA KARSH
HUGHES, SOCOL, PIERS,
RESNICK & DYM LTD.
70 W. Madison St.
Chicago, IL 60602

PATRICK O. PATTERSON, JR.
LAW OFFICE OF PATRICK O.
PATTERSON, S.C.
7841 N. Beach Dr.
Fox Point, WI 53217

FAY CLAYTON
CYNTHIA H. HYNDMAN
ROBINSON, CURLEY &
CLAYTON, P.C.
300 S. Wacker Dr.
Chicago, IL 60606

BRIDGET ARIMOND
357 E. Chicago Ave.
Chicago, IL 60611