

1 IN THE SUPREME COURT OF THE UNITED STATES

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

4 Petitioners : No. 08-974

5 v. :

6 CITY OF CHICAGO, ILLINOIS. :

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8 Washington, D.C.

9 Monday, February 22, 2010

10

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

14 APPEARANCES:

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

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

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

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P R O C E E D I N G S

(11:05 a.m.)

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

Mr. Payton.

ORAL ARGUMENT OF JOHN A. PAYTON

ON BEHALF OF THE PETITIONERS

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

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

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

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

1 on the basis of race," close quote.

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

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

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

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

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

23 Title VII's disparate impact looks at the
24 consequences of decisions like that. And those
25 consequences, the results of that clearly occur in the

1 future on those 11 hiring occasions, and then we would
2 clearly have a cause of action on each of those 11 times.

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

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

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

16 JUSTICE SCALIA: Right.

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

21 JUSTICE SCALIA: Sure.

22 MR. PAYTON: -- as you clearly have a cause
23 of action at the announcement. We know that.

24 JUSTICE SCALIA: Well, that's because of
25 an impending violation.

1 MR. PAYTON: Because an impending violation --

2 JUSTICE SCALIA: But you say -- you say it is
3 an actual violation.

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

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

19 JUSTICE SOTOMAYOR: Counsel, the language of
20 the statute of 703 is to "limit, segregate, or
21 classify."

22 MR. PAYTON: Yes.

23 JUSTICE SOTOMAYOR: So is it your position
24 that the violation occurs at the classification that's
25 announced and that every subsequent hiring has limited

1 someone's opportunity so that they -- there's a
2 violation subsequently under the limit clause as opposed
3 to the classification clause, or it's each event is a
4 classification violation?

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

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

15 All three provisions are in fact implicated,
16 sometimes in similar ways, sometimes in different ways.
17 All of them have consequences.

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

25 JUSTICE ALITO: Your position may -- may follow

1 from the language of Title VII, but you began by saying
2 that it also represents the best policy. And I wonder
3 if you could explain why that is so.

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

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

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

25 But look at how this worked. Chicago used

1 an unlawful cutoff score on those 11 occasions to make
2 decisions. Chicago should have stopped using the
3 discriminatory cutoff score, and it should have looked at
4 all of the qualified applicants that it had judged
5 qualified in making its decisions.

6 JUSTICE GINSBURG: If it -- if it stopped using
7 it, it might be vulnerable to a Rizzo-type suit from the
8 people who were benefiting.

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

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

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

24 Chicago used a cutoff score that the
25 district court finds and that their expert who designed

1 the test told them was problematic, to make decisions
2 that has nothing job-related about it at all. It's
3 arbitrary. The group that are qualified are as
4 qualified as the group that are well qualified and
5 vice versa. They had available to them the option of
6 picking randomly from that group, both groups combined,
7 and making the decisions on a random draw. That is, in
8 fact, how they made all of the decisions inside of the
9 groups that they used. That's always available.
10 Chicago could have done that at any time.

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

20 JUSTICE GINSBURG: How long does the City's
21 exposure persist? Let's say that the -- in the tenth
22 round, someone is selected for the job from the
23 qualified group. And then there's a cutback, and there
24 are going to be layoffs. So the last hired is the first
25 fired. Could -- would there be a Title VII suit when

1 that last hired is laid off, on the ground that if
2 Chicago had done what it was supposed to do, this person
3 would have had the job long ago and would be higher up
4 on the seniority list?

5 MR. PAYTON: Let me give you two responses
6 to that.

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

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

24 The issue about the policy here, though, is
25 that if you don't say that a use, in fact, can be

1 challenged, a use of something unlawful can be
2 challenged, what you could end up with here is that
3 Chicago would then take the message that it's okay once
4 they are past the first 300 days, and they could just go
5 on using the discriminatory cutoff score over and over
6 and over again, and that is inconsistent with the
7 overall policy of what Title VII is trying to root out
8 of our economy and in our workplace.

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

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

24 So they all have a cause of action because
25 they were excluded and that clearly fits very easily

1 within how --

2 JUSTICE STEVENS: But surely they couldn't
3 all recover, because there was only one job available.

4 MR. PAYTON: No. That's correct. That's about
5 what the remedy would be. So the remedy and -- you know,
6 obviously wouldn't be to give all of them jobs. That's
7 not the remedy, and that wasn't the remedy that's
8 sought -- was sought here. But they were all excluded
9 from consideration, and that's a violation of Title VII's
10 disparate impact prohibition. So they all have a cause
11 of action.

12 The way the remedy would work --

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

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

1 some sort of damage award, but it would be miniscule.

2 In the actual event, the award includes some
3 actual jobs being allocated to the 6,000 members of the
4 class -- it was 132 -- to be decided upon in some random
5 way that they would be hired. But that's how it would
6 work. But they are all clearly injured when they are
7 all excluded from consideration in all 11 rounds, in
8 violation of Title VII.

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

14 MR. PAYTON: Every time --

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

20 MR. PAYTON: They had 11 rounds of hiring --

21 CHIEF JUSTICE ROBERTS: Yes.

22 MR. PAYTON: -- that are relevant to this case.
23 There are other rounds afterwards. They exhaust the first
24 category. But in the 11 rounds of hiring, when in every one
25 of those rounds the unlawful cutoff score is used, that is

1 action upon the results. That is a limitation. You know,
2 that is the use of something that causes an adverse impact
3 on the basis of race -- and, yes --

4 CHIEF JUSTICE ROBERTS: Yes, so they would
5 have a new cause of action, sure.

6 MR. PAYTON: That's a cause of action.

7 CHIEF JUSTICE ROBERTS: Now, but they -- but
8 if 300 days go from the first round of hiring, they
9 don't -- they cannot sort of piggyback that onto a later
10 cause of action.

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

19 And I think I want to reserve the rest of my
20 time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Katyal.

23 ORAL ARGUMENT OF NEAL K. KATYAL

24 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING THE PETITIONERS

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

3 As the questions I think reveal, I think the
4 bottom line question in this case is whether or not
5 under the text of Title VII there was a present
6 violation in each of the 11 rounds of hiring when the
7 City of Chicago relied on its concededly discriminatory
8 test to exclude the plaintiffs from consideration. And
9 we think that Title VII has three mutually reinforcing
10 provisions in it, each of which point to the same
11 conclusion.

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

21 Justice Alito, I think -- in response to your
22 question, I think our position follows entirely from the
23 text of the statute. We're not as concerned about the
24 policy consequences, though we do think that if the
25 Court were concerned about the policy consequences, we

1 think that there's a good reason why Congress
2 distinguished between disparate treatment and disparate
3 impact litigation. But it's the language of Title VII
4 itself, and in particular 703(h), which forbids action
5 upon the results.

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

19 MR. KATYAL: I agree that there -- there
20 might be policy arguments against it as well as for it,
21 but here's the way I think we look at it -- and the
22 United States is the nation's largest employer, and we
23 face similar concerns. We give certain tests.

24 But I think what might have been -- what was
25 probably animating Congress was a fear that if the

1 rule of the City of Chicago were adopted, then an
2 employer who made it 300 days without an EEOC charge
3 being filed, 300 days after the announcement of the test
4 results, would then be able to for all time use that
5 discriminatory test, and it would lock in that period,
6 that test, for as long as 10, 20 years, and Congress
7 could have legitimately worried about if a test made it
8 300 days, an employer essentially had a get-out-of-jail-
9 free card to use for all time. And I would say that
10 that precise thing appears to have happened in this very
11 case.

12 At Joint Appendix page 54, when the City
13 announced its test results in January of 1996,
14 it said it intended to use this test for only 3
15 years through 1999. Afterwards, 1999 came, the City, in
16 the City's own briefs -- this is the court of appeals
17 brief at page 12 -- they admit they made a new decision
18 to continue using this test and the test results for
19 subsequent hiring rounds. That was a new decision, and
20 indeed that's a decision, I think, many employers would
21 logically make after 3 years, because then they
22 don't have to worry about the possibility of a disparate
23 impact lawsuit.

24 And since, as this Court said in Ricci, one
25 of the goals of Title VII is really to encourage

1 voluntary compliance on the part of employers, adopting
2 a rule like the City of Chicago's is really antithetical
3 to that, because then it will essentially lock in for
4 all time that old discriminatory test.

5 I think another reason policy -- another
6 policy reason Congress may have thought about is that a
7 rule that forced people to file within 300 days might be
8 damaging to the EEOC and divisive to employers, because
9 it would say you only have that 300-day period to file,
10 even before all the consequences of the -- of the -- of
11 the employment decision are fully understood.

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

16 MR. KATYAL: The first charge was filed, I
17 believe, 420 days after the January 26th announcement of
18 the test results. And, yes, Justice Kennedy, then there
19 was a period of discovery and litigation over business
20 necessity and the like.

21 And in this case, the City admitted in other
22 litigation that there was no basis for giving this 89
23 cutoff score, that a person who scored 65 was just as
24 likely to succeed as a firefighter as a person who
25 was -- who had scored 89.

1 Justice Stevens, you had asked about the
2 remedy in the case, and here's how we understand the way
3 remedies work in disparate impact litigation: It's
4 largely injunctive in nature. It's mostly about
5 preventing future problems.

6 There is a back pay claim that is available
7 that is statutorily capped at 2 years. Not everyone in
8 this 6,000-person class could get that full amount of
9 back pay obviously. Instead, what happened here, there
10 was a remedial phase at trial, and what they did was they
11 decided that -- the experts on both sides admitted that
12 132 people, approximately, would have been hired out of
13 that class, and that provided the appropriate amount of
14 back pay.

15 CHIEF JUSTICE ROBERTS: So you get --

16 JUSTICE KENNEDY: Was it -- was it 132 named
17 people or was it just 132 undifferentiated?

18 MR. KATYAL: I think it was 132
19 undifferentiated people, and then I think there --
20 and Mr. Payton can, I think, fully explain how the
21 randomization of awards was allocated.

22 CHIEF JUSTICE ROBERTS: So everybody gets
23 132 over 6,000 times whatever the number of people who
24 would have been hired?

25 MR. KATYAL: Right. And --

1 CHIEF JUSTICE ROBERTS: I mean the pay for
2 the number of people.

3 MR. KATYAL: Right. And, Mr. Chief Justice,
4 to respond to your concern before, that amount of money
5 is not -- you couldn't go back and look to earlier
6 periods of time outside of the statute of limitations,
7 outside of the 300-day period, rather only any
8 subsequent use. For example, in this case the remedy
9 couldn't look to the first round of hiring because no
10 lawsuit was brought within that first round of hiring.
11 It was brought at the -- it was brought after the second
12 round of hiring.

13 JUSTICE GINSBURG: I think you had a
14 footnote in your reply brief that said that if your
15 position prevails there would need to be an adjustment
16 in the relief granted by the district court --

17 MR. KATYAL: That is --

18 JUSTICE GINSBURG: -- wasn't it?

19 MR. KAYTAL: That is correct. And I think
20 that the Petitioners agree with that as well. And
21 that's I think a further limit on the way in which this
22 present violation theory operates as a matter of
23 practice. Now, this Court has said in cases such as
24 Ledbetter that -- that there must be a present
25 violation, and disparate impact litigation looks quite

1 different than disparate treatment litigation in
2 practice, because disparate impact litigation doesn't
3 need that missing element that has been at issue in
4 Ledbetter and Evans and Ricks, of discriminatory intent
5 at that subsequent time of action.

6 Here, in a disparate impact case, all that
7 need be shown by the plaintiff is adverse impact, and
8 that adverse impact happens in each of those 11 rounds
9 of hiring. Each of the time -- each time the City used
10 its test results and drew a line and said, you under 89,
11 we are not looking at you, that was action upon the
12 results, to use the language of (h)(2).

13 JUSTICE SCALIA: And that would be clear
14 even though it had not been established much earlier
15 that the test was invalid. So a city could go along
16 using a test that was an invalid test, not declared
17 such; 10 years later, somebody comes up and says: This
18 test that is being applied to me is an invalid test.

19 MR. KATYAL: That's exactly correct, Justice
20 Scalia.

21 JUSTICE SCALIA: What -- of what use is a
22 statute of limitations that -- that -- that operates
23 that way?

24 MR. KATYAL: Let me say two things: First
25 is I think (h)(2) refers to "action upon the results,"

1 and that thing happened in 10 years is itself action
2 upon the results, and so I think as a statutory matter
3 the language decides it.

4 Now, with respect to the policy reason, I
5 think the reason is that otherwise Congress had to fear
6 precisely what you're saying, that an employer 10
7 years from now would use that discriminatory test,
8 because they knew they had made it past the 300-day
9 initial phase of time, and then could use it for all
10 time. And so the statute of limitations and the
11 concerns about repose work hand in hand with other
12 concerns of Title VII, and in particular incentivizing
13 employers to ensure voluntary compliance with the law of
14 Title VII, and which this Court said in Griggs, the goal
15 of which is to eradicate discrimination from the United
16 States' labor markets.

17 CHIEF JUSTICE ROBERTS: So I suppose the
18 benefit is not that the City knows it's safe -- it can
19 rely on a test and all that -- but knows that it only has
20 to pay 300 days back.

21 MR. KATYAL: That is -- that is -- that is
22 the benefit of that particular back pay limitation, yes.
23 But in a case like this, where the City knows very well,
24 this test is discriminatory and, indeed, has said so in
25 litigation, I think Congress wanted to incentivize and

1 make sure there was an ability for people to sue at each
2 time that discriminatory test was used.

3 If there are no further questions.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Ms. Solomon.

6 ORAL ARGUMENT OF BENNA RUTH SOLOMON

7 ON BEHALF OF THE RESPONDENT

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

10 In January 1996, the City adopted and
11 announced an eligibility list for hiring candidates who
12 sat for the firefighters' examination. Petitioners were
13 told that a priority pool had been created, that based
14 on their scores they were not classified in that pool,
15 and that further consideration of candidates would be
16 limited to those who were in the priority pool, at least
17 until everyone in that pool had been called for
18 processing.

19 The City also publicly admitted that this
20 tiered eligibility list had adverse impact on
21 African-Americans, and Petitioners were aware of this.
22 But Petitioners did not file charges challenging the
23 exam and the cutoff score within 300 days after the
24 tiered eligibility list was adopted and announced.

25 Now they contend that charges can be filed

1 to challenge the same exam and the same cutoff score
2 every time the City hired from the priority hiring pool.
3 That position cannot be squared with the statute.
4 Calling other applicants from a hiring pool from which
5 Petitioners had already been excluded did not limit or
6 classify Petitioners in any way.

7 JUSTICE GINSBURG: Suppose there were no
8 list, but each time there was a hiring round the City
9 just took from the top -- from the top score down.
10 There's no list, but each time the City uses the test
11 results and hires the people with the top scores.

12 MS. SOLOMON: If I understand correctly,
13 that would be the same case as this, for this reason:
14 A list is used in a couple of different ways. A list
15 might be used to describe the strict rank ordering that
16 Your Honor is describing, and in that case, once there
17 is that kind of a list, it's the same as this case.

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

21 JUSTICE GINSBURG: No, my -- my hypothetical
22 was there's no list at all.

23 MS. SOLOMON: If --

24 JUSTICE GINSBURG: They just go back to the
25 raw scores, and each time they picked the top people.

1 MS. SOLOMON: So that actually -- if we're
2 going back to the scores but no announcement has been
3 made ever that we are going to use the scores in a
4 certain way, we agree that every time the city actually
5 consulted the scores, there would be a new claim. But
6 that's because --

7 JUSTICE GINSBURG: Well, what is -- what is
8 the list, other than an administratively convenient way
9 to use the scores?

10 MS. SOLOMON: The list was the device that
11 limited and classified Petitioners in this case, and
12 that's why it's so important. Because in order to have
13 a present cause of action, section (a)(2) -- under
14 section (a)(2), which is the disparate impact provision,
15 Petitioners have to point to something in the charging
16 period that actually limited and classified them. And
17 that was the effect of the list, and including the
18 priority hiring pool.

19 In a case where there is no general
20 practice, no announcement, no decision, nothing, but
21 rather every time the City makes hiring, the City
22 undertakes a new decision with new criteria, then it is
23 making a decision at that point; it is engaging in a
24 practice that is then at that time limiting and
25 classifying the Petitioners. What happened --

1 JUSTICE GINSBURG: So even though there is a
2 clear case on the merits of disparate impact, unless the
3 suit is commenced within 30 days of the announcement,
4 then it's as though it were lawful. That's your
5 position.

6 MS. SOLOMON: The statute, (a)(2), requires
7 an unlawful --

8 JUSTICE GINSBURG: Is that -- is that --
9 there's a free pass. You don't sue within 30 days of the
10 compilation of the list and the notice of the list; you sue
11 420 days later. The discriminatory practice gets frozen,
12 the status quo gets frozen forever. That's -- that is
13 your position, is it not?

14 MS. SOLOMON: That is the function of the
15 operation of the statute of limitations, and of course
16 it's not unique to Title VII.

17 JUSTICE GINSBURG: But this is not exactly a
18 title -- a statute of limitations. It's a time you have
19 to file your charge. It's a charge filing.

20 MS. SOLOMON: Correct. And --

21 JUSTICE GINSBURG: There's also a 2-year
22 statute of limitations in Title VII. You can't get back
23 pay, I think, for more than 2 years.

24 MS. SOLOMON: The 300-day charging period
25 under Title VII functions like a statute of limitations,

1 and when a timely charge is not filed, no recovery can
2 be had for that claim. And the Court has said that over
3 and over in a series of disparate treatment cases.

4 Now, the defining feature --

5 JUSTICE GINSBURG: You -- you don't have one
6 case, I think, certainly not from this Court, of
7 disparate impact. All the cases that you cite are
8 disparate treatment cases.

9 MS. SOLOMON: The cases are disparate
10 treatment cases, Justice Ginsburg, but the rule should
11 be the same in this case for several reasons: First,
12 those cases reflect that the reason there is not
13 a present violation when the consequences of a prior
14 discriminatory act are felt is because the defining
15 feature of the claim is absent within the charging
16 period.

17 Now, that is a perfectly good rule, no matter
18 whether it's discriminatory treatment or discriminatory
19 impact. And in this case, the defining feature, namely
20 disparate impact in the sense defined by the statute,
21 required by the statute, to limit or classify in a way
22 that denies people employment opportunities based on
23 race -- that defining feature was absent within the
24 charging period.

25 JUSTICE BREYER: How is it absent? Because

1 the statute says that the established -- the -- it's
2 established -- namely, the unlawful employment practice
3 -- it's established only if, and certainly if, the
4 respondent uses --

5 MS. SOLOMON: Right.

6 JUSTICE BREYER: -- a particular employment
7 practice that has a disparate impact. That refers back
8 to (a)(2).

9 So back in that period, on a certain date, he
10 used that limiting practice, and, therefore, on that
11 particular date, he established the unlawful employment
12 practice by using a test that limited, et cetera.

13 MS. SOLOMON: I -- I have two responses,
14 Justice Breyer, and the first is that section (k), which
15 is what Your Honor is quoting from, does not describe
16 accrual, and it does not define the underlying violation.
17 It talks about when an -- excuse me, when a violation is
18 established. And what's so interesting is that the
19 reliance on those words "uses an employment practice" --
20 it's a few words plucked out of the middle of section (k).

21 You actually can't apply section (k)
22 literally to this case and have anything that approaches
23 anything that makes sense. And that's because section
24 (k) actually goes on after those words that get
25 highlighted over and over, and it's -- and it refers to

1 the rest of what happens in a case when a claim of
2 disparate impact is tried.

3 And so if you --

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

6 MS. SOLOMON: Subsection --

7 JUSTICE SOTOMAYOR: -- that says -- and it's
8 an -- "it shall be an unlawful employment practice for
9 an employer to give and" -- conjunctive -- "and act
10 upon the results."

11 MS. SOLOMON: Correct.

12 JUSTICE SOTOMAYOR: So when you hire, aren't
13 you acting upon the results? And how are you acting
14 upon -- you may be acting upon it, as Petitioner argues,
15 when you classify, but why aren't you acting upon when
16 you hire?

17 MS. SOLOMON: Because there is no act that
18 limits and classifies. And what's interesting about
19 section (h), it's not --

20 JUSTICE SOTOMAYOR: I -- I go back to
21 Justice Breyer's point. Isn't it, in the very act of
22 hiring, you are using the test results and saying --
23 each time you do it, you're saying: I'm going to cut
24 off at this limit, and I'm not going to consider someone
25 outside of this limited tier.

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

5 JUSTICE SOTOMAYOR: But isn't that what
6 "practice and policy" means? Meaning that each time, as
7 you continue forward, you are using a particular
8 practice, a particular policy?

9 MS. SOLOMON: Petitioners continued to be
10 ineligible for as long as the list was used in the way
11 that we said at the outset it was going to be used;
12 namely, that the well-qualified pool, the priority
13 hiring pool, would be called first.

14 The reason they continued to be ineligible
15 is because they had been limited and classified as
16 ineligible until the priority pool was hired first.
17 That was the only practice that had adverse impact
18 within -- as required by the statute, meaning limit and
19 classify.

20 Now, to complete my answer to
21 Justice Breyer --

22 JUSTICE STEVENS: May I ask this question,
23 Ms. Solomon? Would your argument be the same if the
24 practice in this case were -- required a high school
25 diploma?

1 Did you understand my question?

2 MS. SOLOMON: I'm sorry. I didn't realize
3 you had finished. Excuse me.

4 JUSTICE STEVENS: Suppose the practice were
5 a high school diploma. Could that -- would you make
6 the same argument as you're making today?

7 JUSTICE GINSBURG: And let's add to that,
8 that it was adopted 10 years ago --

9 JUSTICE STEVENS: That's right.

10 JUSTICE GINSBURG: -- and Duke Power
11 announced to the world that it was going to use a high
12 school diploma. Indeed, it listed in the county all of
13 the high school graduates and said: This is the list.

14 MS. SOLOMON: A case like that might present
15 different accrual problems for this reason: There might
16 be several appropriate times when a person affected by a
17 policy like that could be said actually to have been
18 limited and classified in their employment
19 opportunities. And it could be when they enter grade
20 school, but that is not an appropriate time, so if it's
21 10 years before the act -- so that person is -- is
22 roughly 8 years old.

23 It could be when they apply to the employer.
24 It could be a variety of other times. But those cases,
25 whatever difficult accrual problems and questions they

1 present, they are not presented here, because this was a
2 closed universe. Everybody affected by the City's
3 eligibility list and the test and the cutoff score knew
4 from the moment --

5 JUSTICE STEVENS: No, but -- but in my
6 example, everybody who is not a high school graduate
7 would have been affected right away.

8 MS. SOLOMON: But if they are not interested
9 in employment with that employer, then they are not --
10 it -- you -- they are certainly affected in one sense of
11 the word, but they're perhaps -- it would not be possible
12 to say their employment opportunities had been affected.

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

18 CHIEF JUSTICE ROBERTS: You force people to
19 challenge the practice when they don't even know if it's
20 going to affect them. In the hypothetical that has been
21 discussed, somebody who didn't graduate from high
22 school, you know, wants to be something other than a
23 firefighter. But that doesn't work out, and then he says,
24 well, now I want to be a firefighter. And they say,
25 well, you can't, because you didn't graduate from high

1 school.

2 MS. SOLOMON: Right.

3 CHIEF JUSTICE ROBERTS: And I think your
4 position is that, well, he should have filed that
5 suit earlier, no?

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

9 CHIEF JUSTICE ROBERTS: Well, but what is
10 the unlawful practice?

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

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

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

25 JUSTICE SOTOMAYOR: So could you answer

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

10 MS. SOLOMON: The statute requires that the --
11 the complainant be limited and classified in their
12 employment opportunity. So --

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

20 MS. SOLOMON: The difference is that once
21 Petitioners here were classified out of the eligible
22 pool for priority hiring, they were out. They were
23 simply out. They were not being considered anymore at
24 all. We didn't go back to look at the test. We didn't
25 consider Petitioners. We didn't reject them each time.

1 There could be --

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

14 MS. SOLOMON: With respect --

15 JUSTICE ALITO: -- did you?

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

21 JUSTICE ALITO: Right. That's right.

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Oh, sure. No, I

1 understand that, but, you know, let's say we
2 think we are going to hire -- if the budget plan goes
3 through, we think we're going to hire everybody else
4 by -- in 4 months. And you're saying, well, those
5 people have to sue anyway because they are injured by
6 the 4-month delay.

7 MS. SOLOMON: They are injured by a
8 4-month delay.

9 CHIEF JUSTICE ROBERTS: Yes.

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

15 JUSTICE ALITO: Well, why did the City
16 say that it was planning to give a new test in 3
17 years and then wait more than a decade before giving a
18 new test? If I received one of these qualified letters,
19 and I also -- and I knew in addition that the City was
20 going to give a test in 3 years, that might well
21 affect my incentive about bringing a lawsuit to
22 challenge this.

23 MS. SOLOMON: But it wouldn't change the
24 fact that there had been, at least a -- if you wait for
25 the next list, you still have been delayed at least 3

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

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

14 JUSTICE ALITO: But you don't challenge
15 that.

16 MS. SOLOMON: -- surely the Court --

17 JUSTICE ALITO: You don't challenge that.
18 You now acknowledge that the Plaintiffs were treated
19 unlawfully.

20 MS. SOLOMON: We have not pressed that
21 claim. That is correct, Justice Alito, but --

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

24 MS. SOLOMON: There was some testimony -- and
25 we quote it in our brief -- about things that the person

1 responsible for setting the cutoff score could not
2 remember. But a statute of limitations actually doesn't
3 require prejudice, so we didn't undertake to try to
4 prove that. The -- repose arises naturally at the end
5 of the charging period. It's not something that -- that
6 the defendant has to earn either by capitulating to the
7 plaintiffs' demands or otherwise proving prejudice.

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

13 JUSTICE GINSBURG: You didn't have to take
14 the list down. You simply could have said: Anyone who
15 got a passing score, anyone who is qualified -- we're not
16 going to make the distinction between qualified and
17 unqualified.

18 MS. SOLOMON: I -- I believe --

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

21 MS. SOLOMON: I believe --

22 JUSTICE GINSBURG: You didn't have to throw
23 out the test.

24 MS. SOLOMON: I believe the Court's opinion
25 in Ricci addresses that as well. That that's a -- a

1 misuse of the test scores. The expert was resolute even
2 through the trial --

3 JUSTICE GINSBURG: I thought the expert
4 said -- the test devisor said he didn't make up that
5 89 percent cutoff. That was Chicago that made that --
6 that decision.

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

14 And he was clear as well, that a higher
15 score created an inference that the person was more
16 qualified to -- to perform in the way --

17 JUSTICE GINSBURG: But you -- you've lost --
18 you've lost on that.

19 MS. SOLOMON: We have. But the reason that
20 I'm mentioning it is because it's not simply a matter
21 of -- of why don't you take the list down. At the time
22 that the expert is telling us the test is valid and it
23 can -- it gives rise to an inference that people closer
24 to the top are better -- possess more of the cognitive
25 abilities that the test was testing for, we would have

1 at a minimum been courting disparate treatment liability
2 to adjust the scores, to randomize them further, or to
3 take the list down. But to return --

4 JUSTICE GINSBURG: No, but -- but going to
5 65, opening up the classification, is not adjusting the
6 scores; it's not taking the list down; it's just saying
7 anyone who passes the test can proceed to the next step.

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

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

18 People have to do that all the time. They
19 look -- well, if I do this, I'm going to be in trouble;
20 if I do this, I'm going to -- but I have got to decide
21 what I should do.

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

1 CHIEF JUSTICE ROBERTS: Well, I'm sorry.
2 Read in conjunction with the 300 -- you have got to
3 finish that sentence at least, before --

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

12 So at some point when the employer is
13 weighing the options, the employer can also factor in
14 the time to challenge this has passed.

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

1 Now, Petitioners do claim that the shortfall
2 evidence showed that they -- showed and the use of the
3 list had disparate impact each time. But it actually
4 didn't, either. That also was the old violation. That
5 shortfall was compiled by comparing the number of
6 African-Americans who were hired using the 89 cutoff
7 score and the number who would have been called for
8 further processing if --

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

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

17 JUSTICE SCALIA: Which is what happened
18 here.

19 MS. SOLOMON: But the fact --

20 JUSTICE SCALIA: They used --

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

25 JUSTICE SCALIA: Where -- where does it go

1 on? To say what?

2 MS. SOLOMON: It goes on to say that the
3 respondent fails to demonstrate that the challenged
4 process is job-related, or subpart (ii), there is
5 an alternative practice with less disparate impact. So
6 -- so (k), if (k) is going to be consulted at all, and
7 we do not think that it should be, because section
8 706(e), which has always been thought of as the charging
9 period, talks about an alleged unlawful practice, and
10 that's what the person knows at the outset.

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

24 In this case, that would have meant that the
25 people 65 and below could file charges within 300 days

1 after the district court's decision, which is something
2 like 11 years after the practice in this case. And
3 that's because that was the moment at which it was
4 established. And that's why we think that (k) does not
5 bear on this. And (h) --

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

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

15 JUSTICE BREYER: And -- and so I thought,
16 looking at the list, it's quite right that it's used for
17 a different purpose but --

18 MS. SOLOMON: It's not --

19 JUSTICE BREYER: But, I mean, this (k) has
20 to do with a different thing, but -- but -- and the
21 critical element of it was that the practice be used.

22 MS. SOLOMON: You -- but again, even if (k)
23 is consulted -- and for the reasons that I just outlined
24 we don't think that it should be. It doesn't bear on
25 accrual. But even if (k) is consulted, it doesn't --

1 it doesn't say that any use of an employment practice is
2 -- is a new unlawful act. It has to be an employment
3 practice that actually has disparate impact.

4 JUSTICE BREYER: Well, you'd have to then
5 say that all the things that are there, the other nine
6 and so forth -- all those nine things --

7 MS. SOLOMON: This is actually --

8 JUSTICE BREYER: Well --

9 MS. SOLOMON: Excuse me, Justice Breyer.
10 This is actually a slightly different point. At the
11 outset, I indicated why section (k) does not bear on
12 accrual at all; it describes what happens at trial, and
13 for that reason --

14 JUSTICE BREYER: Yes.

15 MS. SOLOMON: -- you really can't pluck a few
16 words out of the middle.

17 JUSTICE BREYER: No, well, that's true --
18 it does --

19 MS. SOLOMON: But even if one is going to
20 consult it to determine accrual, what it says is that
21 the use of an employment practice with adverse impact.
22 And in this case there was only one, and that one was
23 when Petitioners were limited and classified based on
24 the test scores. Nothing that happened after that,
25 including hiring others, was an unlawful practice with

1 disparate impact in a way that affected the Petitioners.
2 They had already been rejected.

3 When an employer says, I will not consider
4 you for the position, or perhaps it says, I will not
5 consider you for the position until I have considered a
6 lot of other people first, that is a rejection. Nothing
7 that happens after that, whether the person hires
8 somebody else, whether the person doesn't hire somebody
9 else, whether they change their mind and later hire the
10 person whom they had previously rejected -- Ricks, after
11 all had a grievance pending. It was certainly possible
12 that that would change the outcome in the case, but the
13 Court, nonetheless, says you cannot wait for the
14 consequences to be felt.

15 JUSTICE GINSBURG: That was a disparate
16 treatment case.

17 MS. SOLOMON: Correct, but there is no --

18 JUSTICE GINSBURG: And the -- the argument
19 here is disparate impact is different because there's
20 no need to show intent of disparate impact.

21 MS. SOLOMON: Correct. But the only
22 practice in this case that had a disparate impact in the
23 sense used by the statute was when the tiered
24 eligibility list was made. After that, of course there
25 was a consequence of that. Consequences can be felt in

1 employment for a long time. The people in the
2 well-qualified pool were hired before Petitioners, they
3 were paid before Petitioners, they are going to get
4 their pensions before Petitioners. Those things
5 continue to have consequences.

6 But the Court has made clear that the
7 consequences cannot be challenged by themselves unless
8 there actually is a present violation.

9 Now, there is not even an argument in the
10 other side's briefs, neither of them, that explains why
11 there was an adverse impact based on race under (a)(2)
12 at any point when the City used the list. If one reads
13 the briefs very carefully, one will see that those times
14 when a claim is made in the briefs that we used an
15 unlawful practice, it always goes back to the test and
16 the list.

17 Simply keeping the list up after we announce
18 it is not a new violation. It is quite clear in the
19 cases that the employer does not have to change a
20 decision in order to obtain repose.

21 And, of course, the disparate treatment and
22 disparate impact are simply different methods of proving
23 a claim. They are not different claims by themselves.
24 In this case, in addition to the statutory language,
25 there are a number of policy reasons that while we don't

1 rely on them heavily, we do rely on the statute. They
2 should nonetheless be considered in deciding this.
3 There was no sense in which a claim filed to challenge
4 the list was premature. It was the one act that
5 actually limited and classified Petitioners.

6 Everything else that happened after that
7 either didn't affect the Petitioners at all, as in
8 hiring people who had made the cut, or it affected them
9 only in the colloquial sense, that the consequences of
10 the prior act continued.

11 Chicago did not have to revisit this in
12 order to obtain repose. The statute makes that quite
13 clear.

14 Mr. Payton emphasizes only the policy of
15 righting employment wrongs, but there are other policies
16 in the statute. In addition to repose, the statute
17 makes clear that claims should be brought to the EEOC at
18 the earliest opportunity.

19 Excuse me. We ask that the judgment be
20 affirmed.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Payton, you have 5 minutes remaining.

23 REBUTTAL ARGUMENT OF JOHN A. PAYTON

24 ON BEHALF OF THE PETITIONERS

25 MR. PAYTON: Thank you.

1 This is a case about jobs. And I want to
2 read from the letter that Justice Alito was referring
3 to. This is the letter that the qualifieds received.
4 It's in our Joint Appendix at JA-35, and it's the last
5 sentence of the first paragraph.

6 This is the letter that they all got. This
7 is the letter that Arthur Lewis, the named person in the
8 case, got. However, it says: You are qualified; you
9 are qualified; there are well-qualifieds. And it's
10 unlikely -- that language is there.

11 And then it says: "However, because it
12 is not possible at this time to predict how many
13 applicants will be hired in the next few years,
14 your name will be kept on the eligible list
15 maintained by the department of personnel for as
16 long as that list is used."

17 I did focus on the word "used." And it's
18 not only in section (k). It's also in section (h),
19 where it says, "used to discriminate." Because it's an
20 ordinary word that the City used itself in advising
21 the Petitioners in this case.

22 In the answer to the complaint in this case,
23 which is at Joint Appendix 19, the -- I'm sorry, Joint
24 Appendix 16, the answer to -- actually, the first
25 paragraph in the complaint in this case, the City says

1 as follows -- this is the second sentence in the answer
2 to the complaint: "Defendant" -- the City -- "admits
3 that it has used and continues to use results of the 1995
4 firefighter entrance examination as part of its
5 firefighter hiring process." Using an unlawful cutoff
6 score -- and the eligibility list is nothing other than
7 the functional equivalent of the cutoff score -- using
8 that to make decisions on those 11 times is a violation
9 of Title VII.

10 And the argument that there is no additional
11 impact -- it is the dramatic difference between being told
12 what someone intends to do and then they do it. You are
13 told that maybe your chances are going to be minimal in
14 the future, or maybe 50/50, but then when it actually
15 starts happening and you see other people start getting
16 jobs, that's an impact. That's a consequence.

17 When I said the animating principle in
18 Title VII and disparate impact is result and
19 consequences, it's results and consequences. Those
20 are additional impacts that go with the additional
21 uses that clearly establish a violation of Title VII's
22 disparate impact prohibition in this case.

23 I don't think that the statutory language is
24 actually -- I think the best reading, as I said, of the
25 statutory language is as I said. I think the policies

1 behind how that works -- it is 300 days after every use.
2 There is a statute, but, in fact, the control over that
3 is entirely within the City. If they stopped using this
4 unlawful cutoff score after 300 days, they are
5 completely done with any potential liability.

6 And the point is you want that to be
7 challenged, because we don't want unlawful employment
8 practices to continue to go forever and ever and ever
9 and ever out there. And we can see, in this very case,
10 that if you don't allow the challenge, the practice goes
11 on and is inconsistent with the -- I'd say the
12 national policy to rid our workplace of discrimination.

13 Are there any other questions otherwise?

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

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

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A	<p>21:15 administered 8:6,8 administrativ... 26:8 admit 18:17 admits 52:2 admitted 19:21 20:11 24:19 adopted 18:1 24:10,24 32:8 43:8 adopting 19:1 adopts 4:9 adverse 3:14 7:20 15:2 22:7 22:8 24:20 31:17 39:9 41:9,10 43:9 47:21 49:11 adversely 17:15 34:23 advice 42:15 advising 51:20 affect 33:20 34:23 38:21 50:7 affirmative 3:18 affirmed 50:20 African-Amer... 39:8 African-Amer... 24:21 44:6 ago 11:3 32:8 agree 17:19 21:20 26:4 33:13 aha 45:16 ahead 36:18 AL 1:3 Alito 7:25 10:11 16:21 17:6 36:2,15,16,21 38:15 39:14,17 39:21,22 51:2 Alito's 37:6</p>	<p>alleged 45:9 allocated 14:3 20:21 allow 17:7 53:10 alternative 45:5 amicus 1:19 2:8 15:24 amount 20:8,13 21:4 animating 10:12 17:25 52:17 announce 4:20 35:4 49:17 announced 4:16 6:25 18:13 24:11,24 32:11 43:8 announcement 5:5,6,15,17,23 6:5,13,16 18:3 19:17 26:2,20 27:3 35:14 announces 5:4 answer 3:19 8:14 11:7 31:20 34:25 51:22,24 52:1 answers 42:24 antithetical 19:2 anybody 34:17 anybody's 43:22 anymore 35:23 anyway 38:5 appeals 18:16 APPEARAN... 1:14 appears 18:10 Appendix 18:12 51:4,23,24 applicant 13:16 13:19,20 applicants 3:12 3:15 9:4 12:18 12:22 16:16,19 25:4 42:10 43:20 51:13</p>	<p>application 4:3 applied 22:18 apply 9:22 29:21 32:23 approaches 29:22 appropriate 20:13 32:16,20 approximately 20:12 arbitrarily 16:19 arbitrary 10:3 argues 30:14 argument 1:12 2:3,11 3:4,7 15:23 24:6 31:23 32:6 48:18 49:9 50:23 52:10 arguments 17:20 arises 40:4 arrangement 11:16 Arthur 1:3 51:7 asked 20:1 asks 13:15 aspects 41:11 aspirational 39:3 assessing 43:6 attempt 41:9 attempting 41:11 available 10:5,9 13:3 20:6 36:11 award 14:1,2 awards 20:21 aware 24:21 43:9 a.m 1:13 3:3</p>	<p>23:20,22 25:24 26:2 27:22 29:7,9 30:20 31:2 35:24 49:15 bad 37:19 based 24:13 28:22 44:12 47:23 49:11 basically 46:11 basis 4:1 7:20 15:3 19:22 44:15 bear 46:5,24 47:11 becoming 13:25 began 8:1 behalf 1:15,18 1:22 2:5,7,10 2:13 3:8 15:24 24:7 50:24 believe 5:18 6:6 9:14,15 11:21 11:22 19:17 40:18,21,24 benefit 23:18,22 benefiting 9:8 BENNA 1:21 2:9 24:6 best 3:19 8:2 52:24 better 41:24 beyond 43:23 black 3:15 12:17 14:17 bottom 16:4 Breyer 28:25 29:6,14 31:21 42:25 46:6,15 46:19 47:4,8,9 47:14,17 Breyer's 30:21 brief 18:17 21:14 39:25 briefly 42:24 briefs 18:16</p>
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