"The Need to Restore Title VII's Protection from Pay Discrimination to Our Nation's Workers"

Testimony of

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Chairman Miller, Ranking Member McKeon, and members of the Committee, I appreciate the opportunity to come before you today to discuss the problems recently created for working women by the Supreme Court's decision this Term in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*[1] As you know, that decision rejected the so-called pay-check accrual rule that has been applied in the lower courts for many years and replaced it with a rule requiring an employee to challenge each and every discriminatory pay decision within Title VII's short statutory limitations period (typically 180 days, or a modestly longer 300 days in states with fair employment agencies), or lose forever the ability to challenge ongoing pay discrimination that is traceable to an earlier decision. The Court's rule is untenable for many reasons and can only exacerbate the gender wage gap. My reasons for urging Congress to act to overturn this decision and fix the gap it created in our civil rights laws are detailed below.

1. Pay Discrimination is Carried Forward and Compounded Over Time; It is Anything But "Discrete"

By categorizing discriminatory pay decisions as "discrete," the Court's ruling is blind to the realities of how pay discrimination is implemented. Discriminatory pay decisions are not separate and distinct from the paychecks that follow them. A

discriminatory pay decision is likely to create a permanent sex-based disparity in pay because annual reviews and salary adjustments typically carry forward the prior salary as a baseline. Worse still, a discriminatory pay deficit is likely to be magnified by future salary adjustments, which typically take the form of percentage-based raises. As a result, left uncorrected, even a relatively minor initial pay disparity will expand exponentially over the course of an employee's career, even if subsequent raises are determined in a nondiscriminatory fashion.

A study by researchers at Carnegie Mellon University shows how a discriminatory pay decision can continue to produce an ever-widening pay disparity throughout an employee's career.[2] This study found that male students who graduated with a master's degree earned starting salaries 7.6% higher than their female counterparts, for an average annual salary difference of almost $4,000. To illustrate the long-term consequences of gender-based wage disparities that start out at modest levels, the study authors give an example of a 22-year old man who earns a starting salary of $30,000 and an equally qualified 22-year old woman with a starting salary of $25,000. Assuming each receives identical 3% annual raises, this pay gap would widen to $15,000 by the time these workers reached age 60, with a sum total difference of $361,171 over their employment lives. Assuming the man earned 3% annual interest on the difference, the disparity would total an even more staggering $568, 834.[3] Such a substantial difference in pay could make a tremendous difference in a person's life, amounting to the ability to purchase a second home, secure financial stability in retirement, or pay for a college education for multiple children. The implications of such a pay gap extend into

retirement, affecting employer pension plans, percentage-based employer contributions to retirement savings plans, and even social security.

Under the rule announced in *Ledbetter*, the young woman in this example must bring any Title VII pay discrimination claim within 180 days of when the initial discriminatory salary decision was made and communicated. Failing that, Title VII will provide no legal recourse for the salary discrimination that persists and compounds throughout her career. The effect of the Court's decision is, as Justice Ginsburg recognized, to render discriminatory pay decisions left unchallenged for 180 days "grandfathered, a *fait accompli* beyond the province of Title VII ever to repair."[4]

The implications of the *Ledbetter* ruling for the gender wage gap are stark.[5] Because of the tremendous difficulties employees face in quickly recognizing and challenging pay discrimination, detailed below, the Court's decision renders Title VII little more than hollow rhetoric when it comes to the law's promise of nondiscrimination in compensation. The realities of the workplace and employee compensation make it exceedingly unlikely that any discriminatory pay decision will be challenged within Title VII's extremely short statutory limitations period.

2. The Unrealistic Burden on Employees to Quickly Perceive and Challenge Discriminatory Pay Decisions

By requiring employees to quickly challenge each and every pay decision they suspect is discriminatory, the *Ledbetter* ruling imposes an untenable burden on employees. The Court's decision could not be more at odds with the realities of how employees perceive and respond to pay discrimination. The Court apparently assumes that employees have little difficulty discerning discriminatory pay decisions. In actuality,

there are many obstacles to perceiving and challenging pay discrimination within the short window of time allowed employees by the *Ledbetter* decision.

Under real-world conditions, it is very difficult for women and people of color to recognize when they have experienced discrimination.[6] Various social-psychological hurdles create a resistance to seeing oneself as a victim of discrimination, and limited access to information and the limits of how people process information combine to make it very difficult for employees to quickly perceive discrimination.

While perceiving discrimination is difficult in general, the problems are greatly exacerbated for pay discrimination. Employees are highly unlikely to have access to the kind of information necessary to raise a suspicion of pay discrimination. Employers rarely disclose company-wide salary information and workplace norms often discourage frank and open conversations among employees about salaries.[7] As a result, employees rarely know what their colleagues earn, much less what raises and adjustments are given out to other employees at each and every salary review. An employee who learns that she will receive a 5% raise, for example, will have no reason to suspect pay discrimination without knowing at the very least the percentile raises others receive and the reasons for any disparities. Indeed, a discriminatory pay gap may begin with no change in a female employee's pay, but with a decision to increase the pay of a male colleague while leaving her pay unchanged for a discriminatory reason.

As these examples illustrate, unlike discriminatory actions such as hiring, firing, promotion or demotion decisions, there is no clearly "adverse" employment event that occurs with a discriminatory pay decision. Unless it implements a pay cut, a pay-setting decision is unlikely to be experienced as adverse at all, much less suggestive of

discrimination. Pay discrimination is particularly difficult to perceive because it is rarely accompanied by circumstances suggestive of bias. At least with discriminatory hiring, firing, promotion or demotion decisions, the affected employee immediately knows that she has experienced an adverse employment action. She can search out an explanation from the employer, evaluate it for pretext, and note any comments suggestive of stereotyping or bias. In making sense of the employer's explanation, she will have less difficulty identifying comparators (the person who got the promotion, the colleagues who were not fired, etc.). Pay decisions, in contrast, are rarely accompanied by any explanation from the employer comparing other employees' salaries or any discernible signs of prejudice. And unlike job decisions with respect to hiring, firing, promotion, transfer and demotion, where an employee can usually get some picture of how women generally fare in such decisions, an employee typically has no way of knowing how women overall are paid compared to men. Without aggregate data showing comparisons between men and women as a group, it is very difficult to perceive discrimination on an individual basis. For all of these reasons, pay discrimination is especially difficult to detect.[8]

Working women whose pay gradually and imperceptibly declines in relation to their male colleagues, so as to produce an ever-widening gender wage gap over time, are likely to find their Title VII claims foreclosed by the *Ledbetter* rule. Each pay decision typically builds on the prior one, and unless corrected, discriminatory pay decisions are perpetuated and magnified by subsequent percentage-based adjustments. In this way, even if an employee is aware of a modest disparity between her pay and that of her colleagues, relatively minor disparities are likely to go unquestioned for some time, until

the disparity becomes too large to ignore. By that time, however, under the Court's ruling, the employee will have lost long ago the right to complain under Title VII.

Women who are subjected to pay discrimination in their starting salary at the time they are first hired face their own set of problems under the Court's ruling.[9] An employee is especially unlikely to be in a position to perceive and challenge pay discrimination soon after she is hired. As Justice Ginsburg recognized in her dissent, case law demonstrates that it is not unusual for employees to work for an employer for quite some time before learning of a gender disparity in pay.[10] New employees are unlikely to have the kinds of informal networks and connections necessary to find out information that would lead them to suspect pay discrimination. And even if they suspect pay discrimination, new employees are in a particularly precarious position when it comes to challenging it. A new employee is especially vulnerable to retaliation, the foremost concern of any employee who is considering whether to challenge perceived discrimination, and the number one reason for choosing not to do so.[11] Without the benefit of an established work record, a recently hired employee will have little to fall back on if called upon to prove that an adverse action resulted from retaliation as opposed to job performance.[12] And with less of an opportunity to develop strong connections and support from colleagues and supervisors in the workplace, a new employee may be less willing to risk retaliation by challenging a discriminatory pay decision.[13] Yet, as illustrated in the example of the male and female workers discussed in the first section, pay discrimination that begins in a starting salary may follow a woman throughout her career, adding up to a tremendous discrimination-deficit over the course of her working life and even following her into retirement.

In light of these realities, the Court's rule seems calculated to immunize employers from Title VII liability for any discrimination in pay.

3. The Catch 22 of When to Complain: Complain Immediately – But Not Too Soon!

One of the more troublesome aspects of the Court's ruling in *Ledbetter* is the dilemma it creates for employees who face pressures at both ends of the clock in timing a Title VII challenge to suspected pay discrimination. Under the Court's ruling, an employee must quickly complain of suspected pay discrimination within 180 days of when the discriminatory decision was made and communicated, or lose forever the right to challenge the resulting pay discrimination. However, in a cruel Catch-22, an employee who complains to her employer too soon, without an adequate factual and legal foundation for doing so, could find herself in an even worse position. If the employee quickly brings the suspected pay discrimination to the attention of her employer, and in the unfortunate event that the employer responds with retaliation, the employee could find herself out of a job and with no legal recourse.

Under prior Supreme Court precedent, an employee who opposes what she believes to be unlawful discrimination is protected from retaliation only if she had a "reasonable belief" that the practice she opposed in fact violates Title VII. The Court adopted this standard in a 2001 decision, *Clark County School District v. Breeden*.[14] In that case, the plaintiff, a female employee, was present in a meeting when her male coworker and male supervisor exchanged a laugh over a sexual reference. Soon after the meeting, the plaintiff complained to a supervisor that the sexual remark was offensive and sexually harassing. She was subsequently assigned to less desirable job duties and relieved of her supervisory responsibilities.

The plaintiff in *Breeden* sued under Title VII, alleging that she was retaliated against for opposing sexually offensive conduct that contributed to a hostile environment. The Supreme Court rejected her retaliation claim, ruling that even if she had experienced retaliation in response to her complaint, no reasonable employee could have believed that the brief and isolated sexual dialogue that occurred would in itself, without more, create a hostile environment in violation of Title VII. In effect, she complained too soon, well before enough sexually offensive incidents had accumulated so as to lead a reasonable person to perceive a hostile environment. This standard leaves employees unprotected from retaliation if they oppose an employment practice too soon, without a *reasonable* basis for believing that the challenged conduct actually violates Title VII. Lower courts have applied this standard harshly, leaving plaintiffs unprotected for acting on their subjective beliefs that certain employer conduct is discriminatory without sufficient factual and legal support for proving an actual violation of Title VII under existing case law.[15]

The dilemma for pay discrimination claimants is poignant: it may take a pattern of substantial pay disparities and time to investigate the relevant facts in order to establish a legally sufficient inference that the gap in pay is attributable to gender bias, rather than to some legitimate nondiscriminatory reason such as performance or experience.[16] An employee who complains to her employer at the first sign of a pay gap may lack an adequate foundation for a "reasonable belief" that the gap is attributable to gender discrimination, thus leaving her vulnerable to and unprotected from any retaliation she might experience in response to her complaint. The *Breeden* standard thus creates serious legal risks for an employee who complains too soon. But on the other hand, if the

employee waits more than 180 days after she first suspects an initial discriminatory pay decision, so as to be sure that she has an adequate legal and factual basis for alleging pay discrimination, she loses her ability to challenge the continuing discrimination in pay under Title VII, even if the discriminatory pay gap continues to suppress her pay and increases over time. Thus, *Ledbetter* punishes an employee for waiting too long to challenge pay discrimination.

The only way out of this dilemma is for the employee to immediately file a formal Title VII charge at her very first suspicion of pay discrimination, without saying a word to her employer or anyone else in the workplace. This would solve the gap in Title VII's protection from retaliation because *Breeden*'s reasonable belief standard applies only to forms of employee "opposition" to discrimination that fall short of participating in the formal EEOC charge-filing process.[17] Filing a formal EEOC charge triggers full protection from retaliation without regard to the reasonableness of the employee's belief in an underlying Title VII violation.

Of course, most employees would prefer to informally challenge or question suspected discrimination—such as, by complaining to management about a pay disparity or filing an internal grievance—well before resorting to the filing an official EEOC charge. And for good reason: it is not in anyone's best interests, employees or employers, for employees to jump the gun too quickly and invoke the formal machinery of Title VII if the perceived problems result from a misunderstanding or could be resolved informally and in a conciliatory fashion. Nor is such a trigger-happy response good for the EEOC, which already faces a severe backlog of claims. One of the stranger results of the *Ledbetter-Breeden* dilemma is to encourage employees to avoid precisely

the kind of informal, conciliatory resolution of disputes that the majority in *Ledbetter* insists that Title VII promotes.

4. Employers Do Not Need the Protection of the *Ledbetter* Rule and Are Not Well-Served by the Court's Decision

The Court's opinion reflects an emphasis on protecting "innocent" employers—that is, employers who unknowingly continue to give effect to biased salary recommendations from long ago—from stale claims. The Court's concerns are overblown and misplaced. Employers who comply with Title VII are not well-served by the *Ledbetter* rule.

The concern that an employee will consciously wait to bring a pay discrimination claim until witnesses leave and memories fade ignores the strong disincentives on Title VII plaintiffs *not* to delay in filing. First and foremost, it is the employee, not the employer, who is likely to be disadvantaged by excessive delay in suing. Title VII places the burden of proof on the plaintiff to demonstrate intentional discrimination by proving that the pay disparity was motivated by the plaintiff's gender. This is a difficult standard to meet under the best of circumstances.[18] Delay that renders evidence "stale" and the facts difficult to uncover works to the disadvantage of the plaintiff, who bears the burden of convincing the jury that her account of what happened is the more likely one. If the jury is not convinced that an ongoing disparity in pay is traceable to intentional discrimination, the plaintiff loses.

Second, the ability of courts to apply equitable principles to bar plaintiffs from suing if they have engaged in unreasonable delay strongly encourages plaintiffs to file Title VII claims promptly. As the Supreme Court has recognized, plaintiffs who unreasonably delay filing a Title VII claim may be barred from ever doing so by the

defense of laches.[19] Lower courts have applied the defense of laches to cut off plaintiffs' right to sue where the employee has delayed unreasonably in filing her claim, with prejudice to the employer, even if the employee has met the filing requirements for Title VII.[20]

A third reason why plaintiffs are best-served by filing as soon as they know they have a claim is that the statute includes an explicit two year limitation on back pay. Title VII limits employees to a maximum of two years' back pay from the date the charge was filed.[21] This provision encourages employees to file an EEOC charge as soon as they find out that they have been subjected to pay discrimination that has gone on for more than two years, since the employer can keep any discrepancy in back pay that falls outside of that two-year limit. The two year back pay limitation also protects employers from excess liability by setting a two year cap on back pay, regardless of how long the pay discrimination has gone on.

In fact, the two-year back pay limit itself suggests that when it enacted Title VII, Congress intended to allow employees to challenge pay discrimination resulting from discriminatory decisions older than 180 days. Under the Court's interpretation in *Ledbetter*, the two-year back pay limit makes no sense because the plaintiff can only recover back pay under that decision for the 180 days prior to filing the charge. Under this rule, it is difficult to imagine how the two-year back pay limit would ever come into play. Unfortunately, some lower courts, in addition to the majority in *Ledbetter*, seem to have forgotten that the two-year back provision exists, and have effectively read it out of existence. That is why it is important for Congress to reiterate that pay discrimination

claimants can recover up to two years' back pay for pay discrimination that began before and extends into the limitations period

Finally, the concern with employer "innocence" in cases where an employee continues to receive a truncated paycheck because of her sex is itself misplaced. Only the employer is in a position to know and evaluate the fairness of salaries across the workforce. Employers, much more so than employees, can identify gender gaps in pay and evaluate whether they are justified. An employer who continues to pay a woman less for her work is not "innocent" even if the discriminatory decision that started the pay gap was made long ago. In Lilly Ledbetter's case, for instance, Goodyear had plenty of reason to be concerned about its potential Title VII liability, given that the only female manager in the plant earned substantially less than each and every one of the fifteen male managers.

Unfortunately, the Court's ruling offers absolutely no encouragement to employers to proactively evaluate employee wages and ensure pay equity in the workplace. Instead, the rule adopted by the Court leaves victims of pay discrimination out in the cold, while employers—who are in the best position to find out about and correct pay discrimination—get an effective license to continue any pay discrimination that is more than 180 days old. Far from being "innocent," such employers are enriched at the employee's expense.

Employers would be hard-pressed to complain that overturning the *Ledbetter* ruling would place excessive burdens on employers, since employers have lived with the paycheck accrual rule until this very decision. Until the *Ledbetter* case, lower courts across the country had allowed plaintiffs to challenge discriminatory paychecks received

within the limitations period, regardless of when the discriminatory pay decision was first made.[22] Likewise, the EEOC, the federal agency charged with enforcing Title VII, has interpreted and applied Title VII to permit an employee to challenge continuing pay discrimination as long as one paycheck that pays the employee less because of sex falls within the limitations period.[23] Overturning the Court's ruling in *Ledbetter* would simply restore the paycheck accrual rule that was widely understood to be the correct interpretation of Title VII until the Supreme Court decided to take a different course.

Even though the Court's opinion is "employer-friendly" to the extreme, it is not clear that in the long run employers are well-served by the rule adopted in *Ledbetter*. As explained above, the Court's ruling creates a strong incentive for employees to file charges with the EEOC at the very first suspicion of a discriminatory pay decision, and not wait for further clarification or subsequent explanations that might dispel such suspicion. The incentive is for hyper-vigilance on the part of employees and a formal, adversarial approach to the slightest pay discrepancy or disappointment. There is also an incentive on employees to ferret out whatever information they can about their colleagues' pay, in order to make sure they do not lose their right to challenge pay discrimination in the future. These incentives are not likely to promote a collegial workplace, nor a high level of trust and conciliatory relations between management and employees.[24] Enlightened employers who care about employee morale and management-employee relations should not be too quick to celebrate the Court's decision.

5. The Implications of the Decision for Victims of Pay Discrimination

Women who are affected by pay discrimination that is more than 180 days old can take some comfort in the existence of the Equal Pay Act of 1963,[25] which may enable

them to challenge some forms of pay discrimination under a different tolling rule than the Court adopted in *Ledbetter* for Title VII claims. The Equal Pay Act requires employers to pay men and women equally if they do substantially the same job, with possible defenses for pay disparities resulting from merit-based systems, seniority systems or any factor other than sex. The Equal Pay Act is not governed by the tolling rule adopted for Title VII pay claims in *Ledbetter*. A plaintiff may challenge an ongoing violation of the Equal Pay Act at any time and seek recovery for the prior two years of discrimination—three years, if the violation is "willful."

However, the existence of an alternative statutory remedy for some instances of gender inequality in pay does not begin to solve the problems created by the *Ledbetter* ruling. First, as Justice Ginsburg observed in her dissent, the Equal Pay Act offers no help to other protected classes covered by Title VII. The Equal Pay Act covers only certain specified instances of pay inequality between men and women. Victims of pay discrimination on the basis of race, color, national origin and religion are left with Title VII, and they are stuck with the Court's untenable filing rule for their pay discrimination claims. The inequity is apparent: in workplaces where there is a man in a similar job performing similar work, a woman can challenge ongoing pay discrimination under the Equal Pay Act at any time, and recover for the prior two (and possibly three) years of discrimination. However, victims of other forms of pay discrimination covered by Title VII have no recourse if their claims are more than 180 days old. It is hard to conceive of a rational explanation for this kind of inequity.

Women of color, in particular, who already have considerable difficulty carving up their claims to sort out the "race" elements from the "sex" elements, will have a

particularly tough road to navigate, given the very different approach to filing now taken by Title VII and the Equal Pay Act. For example, an African American woman might bring a timely Equal Pay Act claim based on the higher salary of a male colleague who does similar work. However, if the difference in pay turns out to be attributable to her race rather than her sex, and the discriminatory decision behind the disparity was older than 180 days, any Title VII claim she might have would be time-barred. Our civil rights laws should not leave such gaps in protecting all workers from the pay discrimination that Congress has sought to prohibit.

Second, the existence of the Equal Pay Act does not even solve the problems *Ledbetter* creates for women who are harmed by pay discrimination on the basis of sex. Not all sex discrimination in pay that violates Title VII also violates the Equal Pay Act.[26] The Equal Pay Act is limited to cases where the plaintiff can point to a comparator of the opposite sex who does the same work in the same job for more money. That standard has been construed harshly, in ways that make it difficult for plaintiffs to identify comparators.[27] Title VII is broader than the Equal Pay Act because it reaches all claims of intentional pay discrimination, regardless of whether there is an opposite-sex comparator in the workplace who earns more money than the plaintiff for doing the same job. For example, a woman who holds a unique job, or a job that is not equivalent to any job performed in that workplace by a higher-earning man, will have no claim under the Equal Pay Act. However, such an employee might nevertheless prove that her salary is negatively affected by gender bias—perhaps, for example, because it is based on discriminatory and biased evaluations of her work performance. Hence, some instances of pay discrimination will violate Title VII but not the Equal Pay Act. In addition, the

Equal Pay Act offers more limited remedies for pay discrimination than Title VII, permitting liquidated (fixed and limited) damages and back pay, but not compensatory or punitive damages.

The unfortunate consequence of the Court's ruling in *Ledbetter* is to effectively nullify Title VII's broader reach by imposing a harsh and unrealistic filing deadline, leaving women who experience sex discrimination in compensation only the protection of the narrower Equal Pay Act. This is an odd result, given that Title VII was enacted one year after the Equal Pay Act and was intended to broaden the protection from sex discrimination then available under existing law.

6. *Lorance* Revisited

In 1991, Congress enacted legislation to overturn and correct a spate of Supreme Court decisions that had adopted stingy readings and narrow interpretations of Title VII and other civil rights statutes. One of the decisions overturned by the 1991 Act, *Lorance v. AT&T Technologies, Inc.*,[28] took a near-identical approach to *Ledbetter* in construing Title VII's filing requirements to bar challenges to the application of an intentionally discriminatory seniority system within the limitations period when the seniority system was first adopted outside the limitations period.

In that case, the Court required employees to challenge a discriminatory seniority system soon after it was first adopted, and ruled that employees could not wait to file a discrimination charge until the seniority system was applied to them. In reasoning virtually identical to that used by the majority in *Ledbetter*, the Court in *Lorance* reasoned that the unlawful employment practice occurs, for purposes of triggering Title

VII's timely filing requirements, when the discriminatory decision was first made and not when its effects are felt by employees.[29]

Overturning *Lorance* in the Civil Rights Act of 1991, Congress railed against the injustice of barring employees from challenging discrimination that was perpetuated and given effect within the limitations period each time the previously adopted system was applied and implemented to disadvantage a female employee. In response to the *Lorance* ruling, Congress passed an amendment to Title VII clarifying that:

> For purposes of [Title VII's timely filing requirements], an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.[30]

Although the specific language overturning *Lorance* was directed to the filing requirements for challenging seniority systems, Congress expressed its disapproval of the Court's decision in more general terms. In enacting this provision, Congress clearly stated its intention to ensure that the reasoning of *Lorance* would never again bar employees from challenging ongoing practices that perpetuate discrimination.[31] Indeed, in explaining this provision, Congress even explicitly endorsed the very paycheck accrual rule rejected by the Court in *Ledbetter*. As the Senate Report accompanying the proposed Civil Rights Act of 1990, the precursor to the 1991 Act, carefully explained:

> [T]he provision concerns employer rules and decisions of on-going application which were adopted with an invidious motive. Where, as alleged in *Lorance*, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In *Bazemore*…, for example,…the Supreme Court properly held that each application of that racially motivated salary structure, i.e., each new paycheck, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in *Bazemore*.[32]

Remarkably, the Court in *Ledbetter* not only flouted Congress' intention to reject the kind of reasoning relied on in *Lorance*, but it even cited *Lorance* with approval in support of its decision in *Ledbetter*. As Justice Ginsburg pointed out in her dissent in *Ledbetter*, until now, the Court has "not once relied upon *Lorance*" in the "more than 15 years" since Congress passed the 1991 Act, and "[i]t is mistaken to do so now."[33] The *Ledbetter* majority's failure to learn the lessons of the 1991 Act suggests a need for Congress to revisit the teachings of the 1991 Act and restore the paycheck accrual rule, permitting employees to challenge pay discrimination that extends into the filing period regardless of when it first began.

Congress should correct this stingy decision and give employees a fair chance at challenging unlawful pay discrimination. As Congress previously recognized in passing the 1991 Act, the paramount goals of Title VII are to prevent discrimination and provide make-whole relief to the individuals harmed by it—not to protect employers from "stale" challenges to *ongoing* discrimination.

7. Congress Should Act to End the Inequity in our Civil Rights Laws that Bars Women from Fully Recovering Damages for Intentional Discrimination

In her dissenting opinion in *Ledbetter*, Justice Ginsburg noted the problem that arises from the non-uniformity of our civil rights laws in providing different coverage for sex discrimination in pay for women under the Equal Pay Act than for other kinds of pay discrimination covered by Title VII.[34] As she explained, although women may be able to seek redress under the Equal Pay Act for sex discrimination in pay, and avoid the Court's harsh rule in *Ledbetter*, victims of other forms of pay discrimination covered by Title VII will not.

There is another kind of inequity resulting from the non-uniformity of our Nation's civil rights laws that is blatantly apparent from the *Ledbetter* case. Because the discrimination in *Ledbetter* involved a claim for sex discrimination under Title VII, the plaintiff's recovery of damages was capped by the statutory limit of $300,000 for combined compensatory and punitive damages, applicable to large employers such as Goodyear.[35] As a result, the plaintiff's jury award of over $3.5 million, reflecting the jury's decision to award punitive damages to punish Goodyear for its gross misconduct, was reduced to $360,000, the maximum allowable combined compensatory and punitive damages plus an award of $60,000 back pay.

As a case challenging sex discrimination in pay, no federal employment statute would have allowed the plaintiff in this case full recovery. As noted above, the Equal Pay Act does not permit compensatory or punitive damages at all. In contrast, claims for pay discrimination on the basis of race might fall within Section 1981's prohibition on race discrimination in the making of contracts (including employment contracts), which does not have a statutory cap on damages. This inequity in remedies for the kinds of employment discrimination Congress has judged to be intolerable is not justified by any principle of fairness or justice.

Congress should lift the statutory cap on damages in Title VII so as to permit plaintiffs full recovery for intentional employment discrimination and impose sufficient incentives on employers to deter discrimination in the first place.

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[1] Slip Opinion, No. 05-1074 (May 29, 2007).
[2] *See* Linda Babcock & Sara Laschever, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1(2003).

[3] *Id.* at 1-5. *See also* Virginia Valian, WHY SO SLOW?: THE ADVANCEMENT OF WOMEN 3 (1998) ("Very small differences in treatment can, as they pile up, result in large disparities in salary, promotion, and prestige.").

[4] Slip Opinion at 2 (Ginsburg, J., dissenting).

[5] Although researchers disagree about the size and causes of the gender-wage gap in the United States, there is broad agreement that a significant gender wage gap exists. *See, e.g.*, Bureau of Labor Statistics, U.S. Dep't of Labor, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2003, at 29 tbl. 12, 31 tbl. 14 (Sept. 2004) (reporting that women's median weekly earnings were 79.5% of men's in 2003, but only 73.6% for college graduates); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. Rev. 707, 715 (2000) (explaining that, although the gender wage gap today is narrower than it was in the 1970s, the bulk of the change occurred during the 1980s, with little additional progress since 1990); Daniel H. Weinberg, U.S. Dep't of Commerce, Census 2000 Special Reports, EVIDENCE FROM CENSUS 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN 7 (May 2004) (documenting a gender wage gap at every level of earnings); Francine D. Blau et al., THE ECONOMICS OF WOMEN, MEN, AND WORK 150 (5th ed. 2006) (explaining that "women earn less than men in all age categories," and the ratio of women's earnings to men's decreases as they age). Although there is no consensus about the cause of this gap, wage discrimination is at least partly to blame. *See* Selmi, *supra*, at 719-43 (reviewing data showing that nondiscriminatory reasons, even in the aggregate, do not explain the gender wage gap); U.S. Gen. Acct. Office, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS, GAO-04-35 at 2 (Oct. 2003) (women in 2000 earned only 80% of what men earned even after accounting for differing work patterns and other "key factors"); Council of Econ. Advisers, EXPLAINING TRENDS IN THE GENDER WAGE GAP 11 (1998) (concluding that women do not earn equal pay even when controlling for occupation, age, experience, and education); Michelle J. Budig, *Male Advantage and the Gender Composition of Jobs: Who Rides the Glass Escalator*, 49 Soc. Prob. 258, 269-70 (2002) (explaining that men are advantaged, net of control factors, in both pay levels and wage growth regardless of the gender composition of jobs).

[6] *See* Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 Columbia J. of Gender & Law (forthcoming 2007) (on file with author) (summarizing social psychology research documenting the extensive barriers women and people of color face in perceiving discrimination). *See also* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 25-28 (2005) (discussing social science research documenting a "minimization bias" in which targets of discrimination resist perceiving and acknowledging it as such, even when they experience behavior that objectively qualifies as discrimination).

[7] *See* Leonard Bierman & Rafael Gely, *Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167, 168, 171 (2004) (noting that one-third of U.S. private sector employers have policies prohibiting employees from discussing salaries and that many more communicate informally an expectation of confidentiality with respect to employee salaries).

[8] *See* Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, *in* THE HANDBOOK OF RESEARCH ON EMPLOYMENT DISCRIMINATION: RIGHTS AND REALITIES

279, 289-90 (Laura Beth Nielsen & Robert L. Nelson, eds., 2005) (discussing research showing that people are better able to perceive discrimination when it is accompanied by overt indicators of prejudice); Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Social Inquiry 801, 805 (2006) (discussing the difficulty of perceiving discrimination on a individual, case-by-case basis).

[9] The time of hiring is a common departure point for salary discrimination. *See, e.g.*, Barry Gerhart, *Gender Discrimination in Current and Starting Salaries: The Role of Performance, College Major and Job Title*, 43 Indus. & Lab. Rel. Rev. 418, 427 (1990) ("even with a comprehensive group of control variables, the analysis shows that women had significantly lower starting and current salaries than men"); Kostas G. Mavromaras & Helmut Rudolph, *Wage Discrimination in the Reemployment Process*, 32 J. of Hum. Resources 812, 813-14 (1997) (explaining that supervisors often have more discretion in setting a starting salary than they do in later salary reviews). The use of an employee's prior salary to set entry level salary with a new employer can also usher in pay discrimination at the time of hiring. *Cf.* Jeanne M. Hamburg, Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 Colum. L. Rev. 1085, 1108 (1989) (contending that employers should have the burden of justifying use of prior salary when it results in unequal pay).

[10] Slip Opinion at 8 (Ginsburg, J., dissenting); *see also* Mavromaras & Rudolph, *supra* note 9, at 813-14 (explaining that job announcements typically indicate a broad salary range rather than a specific salary, so that new employees are unlikely to know if they are paid less than other entry-level hires).

[11] *See* Brake, *Retaliation*, *supra* note 6, at 28-37; Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. Women's L. J. 3, 25-26 (2003) (discussing research showing that, even in the harassment context, where discrimination is more obvious and blatant, filing a complaint is a last resort, after other strategies have failed).

[12] *Cf.* 2 Arthur Larson, *Employment Discrimination* § 35.01, at 35-3 (2d ed. 2006) (explaining that a defendant may rebut a *prima facie* case of retaliation by offering a nondiscriminatory reason for its action, shifting the burden back to the plaintiff to prove that the proffered reason was pretextual).

[13] *See* Major & Kaiser, *supra* note 8, at 295-96 (discussing the importance of social support as a factor influencing the decision to report discrimination); *see also* Brake, *Retaliation*, *supra* note 6, at 39-40 (citing research showing that persons relatively lower in an organizational hierarchy are particularly vulnerable to retaliation).

[14] 532 U.S. 268 (2001).

[15] For a sampling and critique of some of the lower court rulings applying this standard, see Brake, *Retaliation*, *supra* note 6, at 82-102.

[16] *See* Slip Opinion at 8 (Ginsburg., J., dissenting) ("Even if an employee suspects that the reason for a comparatively low raise is not performance, but sex (or another protected ground), the amount involved may seem too small, or the employer's intent too ambiguous, to make the issue immediately actionable—or winnable."); *see also* Bierman

& Gely, *supra* note 7, at 178 ("Employees observe wage differentials without the full information necessary to evaluate the justifications for differing wages.").

[17] Two distinct clauses in Title VII extend protection from retaliation to persons who complain of discrimination, depending on what form their challenge takes. Retaliation against an employee for filing a charge with the EEOC or a complaint in court falls under Title VII's "participation clause," which protects against retaliation because an employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a) (2000). A different clause, known as the "opposition clause," makes it unlawful to retaliate against an employee "because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]." *Id.* This clause extends protection to employees who complain of discrimination informally, short of invoking the formal legal machinery of Title VII. Protection under the opposition clause is essential to promote Title VII's policies favoring the early and informal resolution of dispute, and because charges of discrimination rarely reach the EEOC or a court without some higher level person first learning of the employee's grievance. However, only the participation clause offers full protection from retaliation regardless of the merits of the underlying discrimination charge. The opposition clause protects employees from retaliation for challenging discrimination only if they have a reasonable belief that the employment practice they opposed actually violated Title VII. For a more thorough discussion of the interaction of these two clauses, see Brake, *Retaliation*, *supra* note 6, at 76-82.

[18] *See, e.g.*, Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555 (2001) (examining lower court decisions in employment discrimination cases and insurance cases and finding that plaintiffs fare much worse in employment discrimination cases).

[19] *See* National RR Pass. Corp. v. Morgan, 536 U.S. 101, 121 (2002) ("In addition to other equitable defenses, therefore, an employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant.").

[20] *See, e.g.*, Smith v. Caterpillar, Inc., 338 F.3d 730 (7th Cir. 2003) (applying defense of laches to bar plaintiff's Title VII claim where plaintiff engaged in inexcusable delay in pursuing state employment process for eight and a half years before terminating state process and filing with the EEOC).

[21] 42 U.S.C. § 2000e-5(g)(1) (2000) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.").

[22] *See, e.g.*, Forsythe v. Fed'n Empl. & Guidance Serv., 409 F.3d 565 (2d Cir. 2005); Cardenas v. Massey, 269 F.3d 251 (3d Cir. 2001); Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336 (4th Cir. 1994); Merrill v. S. Methodist Univ., 806 F.2d 600 (5th Cir. 1986); Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164 (8th Cir. 1995) (en banc); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396 (9th Cir. 1986); Goodwin v. GMC, 275 F.3d 1005 (10th Cir. 2002); Shea v. Rice, 409 F.3d 448 (D.C. Cir. 2005); Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999).

[23] 2 EEOC Compliance Manual §2-IV-C(1)(a), p. 605:0024, and n. 183 (2006). *See also* Slip Opinion at 14-15 (Ginsburg, J., dissenting) (citing EEOC administrative rulings and

litigation positions permitting employees to challenge any discriminatory paychecks received within the limitations period).

[24] *See, e.g.*, Bierman & Gely, *supra* note 7, at 177-78 (noting that employee efforts to find out their colleagues' salaries tend to generate conflict among employees and undermine workplace morale).

[25] 29 U.S.C. § 206(d)(1).

[26] *See* County of Washington v. Gunther, 452 U.S. 161 (1981) (in Title VII suit by women hired to guard female prisoners, challenging county's practice of paying them less than men hired to guard male prisoners, plaintiffs could proceed with their suit even though differences in jobs foreclosed a violation of the Equal Pay Act since they alleged intentional discrimination in the setting of salaries).

[27] *See* Katharine T. Bartlett & Deborah L. Rhode, GENDER AND LAW: THEORY, DOCTRINE, AND COMMENTARY 50 (4th ed. 2006) ("Successful Equal Pay Act cases, however, are relatively rare, particularly in cases involving upper-level employees. The main problem with administrative and executive positions is the difficulty of finding a close enough comparison employee.").

[28] 490 U.S. 900 (1989).

[29] *Id.* at 908-09.

[30] 42 U.S.C. § 2000e-5(e)(2) (2000).

[31] *See* 137 Cong. Rec. S15483, S15485 (daily ed. Oct. 30, 1991) (interpretive memorandum of Sen. Danforth) ("This legislation should be interpreted as disapproving the extension of this decision rule [in *Lorance*] to contexts outside of seniority systems.").

[32] Civil Rights Act of 1990, S. Rep. No. 101-315, at 54 (1990).

[33] Slip Opinion at 12 (Ginsburg, J., dissenting).

[34] *Id.* at 16-17.

[35] The limit for smaller employers is even lower, set at $50,000 for employers with 15-100 employees, $100,000 for employers with 101-200 employees, $200,000 for employers with between 200 and 500 employees, and $300,000 for all employers with more than 500 employees.