S. HRG. 110–825

THE FAIR PAY RESTORATION ACT: ENSURING REASONABLE RULES IN PAY DISCRIMINATION CASES

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

EXAMINING S. 1843, TO AMEND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 TO CLARIFY THAT AN UNLAWFUL PRACTICE OCCURS EACH TIME COMPENSATION IS PAID PURSUANT TO A DISCRIMINATORY COMPENSATION DECISION OR OTHER PRACTICE

JANUARY 24, 2008

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STATEMENTS

THURSDAY, JANUARY 24, 2008

ADDITIONAL MATERIAL

THE FAIR PAY RESTORATION ACT: ENSURING REASONABLE RULES IN PAY DISCRIMINATION CASES

THURSDAY, JANUARY 24, 2008

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m. in room SD–430, Dirksen Senate Office Building, Hon. Edward M. Kennedy, chairman of the committee, presiding.

Present: Senator Kennedy, Harkin, Mikulski, Murray, and Isakson.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. Come to order. Good morning. Equal pay for equal work is a fundamental civil right in our society. All workers should have the right to fair pay, regardless of their race, gender, national origin, religion, age, sexual orientation, or disability. Unfortunately, reality has too often failed to live up to this ideal. Prejudice and discrimination too often deny some employees their fair pay that they deserve for the work that they do.

Civil rights is still the Nation's unfinished business. Over the years, Congress has stood up for justice and fairness by passing strong bipartisan laws against pay discrimination. The Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, the Americans With Disability Act, the Civil Rights Act of 1991, all protect workers from pay discrimination, and these laws have made our Nation a stronger, better, fairer land.

The U.S. Supreme Court's 5–4 decision last May in *Ledbetter* v. *Goodyear Tire & Rubber Company* undermined the fundamental protections against pay discrimination by imposing serious obstacles in the path of workers seeking to enforce their rights. Ledbetter was a textbook case of pay discrimination.

Lilly Ledbetter, who is here today, was one of the few women supervisors at a Goodyear Tire & Rubber Company plant in Gadsden, AL. She worked at the plant for almost two decades, constantly demonstrating that a woman could do a job traditionally done by men.

She endured the frequent scorn of her male co-workers, but she persevered and constantly gave the company a fair day's work for what she thought was a fair day's pay. What she didn't know, however, was that Goodyear wasn't living up to its part of the bargain. For almost two decades, the company used discriminatory evalua-

tions to pay her less than her male colleagues who performed the same work.

The jury saw the injustice in Goodyear's treatment of Ms. Ledbetter, and it awarded her full damages. But five members of the U.S. Supreme Court ignored that injustice and held that Ms. Ledbetter was entitled to nothing at all because she was too late in filing the claim. The court imposed the unreasonable rule that she should have filed her claim within 6 months from the day Goodyear first decided to discriminate against her.

Never mind that Ms. Ledbetter didn't know about the discrimination when it first began. Never mind that she had no way to obtain this information because Goodyear kept such salaries confidential. Never mind that Goodyear continued to discriminate each and every time it gave Ms. Ledbetter a smaller paycheck than it gave her male co-workers.

The court's decision gives employers free rein to continue such discrimination, and it leaves workers powerless to stop it. That result defies both justice and common sense.

The bipartisan Fair Pay Restoration Act will restore the clear intent of Congress when we pass these important laws. It provides a reasonable rule that reflects how pay discrimination actually occurs in the workplace. It recognizes that workers may not know immediately that they are being underpaid because of discrimination. It specifies that the time for filing a pay discrimination claim begins on the date the worker receives a discriminatory paycheck. It gives workers a realistic opportunity to stop ongoing discrimination, and it holds firms accountable for violating the law.

We know this legislation is fair and workable. It was the law in most of the land and had the support of the EEOC under both Democratic and Republican administrations until the U.S. Supreme Court upended the rules last year.

As Justice Ginsburg wrote in her stirring dissent in the case, "Once again, the ball is in Congress's court." We must act to correct this misreading of the law and must do so as soon as possible.

I thank the witnesses for appearing today and look forward to their testimony and meeting our own responsibility to guarantee that our civil rights laws provide the full protection that America deserves.

I would just mention here, if they would be kind enough, staff put this chart up. This is the chart of the various circuit courts. If you tip it over here, where do you think my eyes are?

[Laughter.]

If you would just look at this, we have got the Second Circuit, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth Circuit, and the DC Circuits.

I am not going to take more time in my opening statement. But for those with wonderful eyes, or they may come up afterwards, they will note that in each of these, they have referred to the cases where these decisions were made. And each and every one of these cases notes that each discriminatory paycheck is a discrete act.

And as the count in *Forsyth* v. *Federation* said, any paycheck given within the statute of limitations period therefore would be actionable, even if based on a discriminatory pay scale set up outside the statutory limitations period. These were the court decisions

and, basically, the EEOC's position prior to a 5–4 decision that needs to be changed.

Senator.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Mr. Chairman. Thanks for calling this hearing. I would like to welcome and thank all of the witnesses for taking their time and being here today.

The legislation before us today would purportedly overturn the U.S. Supreme Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber* in which the court determined that Ms. Ledbetter waited too long to file her claim against Goodyear.

Certainly, all of us in this room agree that employment discrimination cannot be tolerated. But as even the editors of The Washington Post have noted, this legislation goes overboard in favor of trial lawyers. And in fact, this bill repeals any and all time limitations for employment discrimination claims, allowing employees to wait many years to file a claim and making it much more difficult for the employer to disprove an allegation that may be made.

In *Ledbetter*, the court found that Ms. Ledbetter's lawsuit against her employer was barred because it was not filed in a fashion consistent with the time periods Congress set out in title VII, 180 days. In enacting title VII, Congress mandated that lawsuits must be filed no more than 180 days after the alleged employment practice occurred. That is not my opinion. That is the plain language of the law that has been in place for 40 years.

The court's decision was not only consistent with plain language in title VII, but also with four previous U.S. Supreme Court decisions whereby the court held that title VII statute of limitations prohibits the filing of claims based on employment practices that occurred outside the 180-day window, even if those employment practices continued to affect the plaintiff's pay.

Proponents of the legislation will allow every paycheck to restart the 180-day clock and reopen the possibility of an employment discrimination allegation on the presumption that the discrimination victim is on a lower-paid track than his or her colleagues.

Under this bill, losses could even be filed if the alleged discrimination occurred decades earlier and the offending supervisor is no longer with the company or, as in the *Ledbetter* case, the alleged offending supervisor is deceased. Indeed, by her admission, Ms. Ledbetter knew in 1992 that she was earning less than most of her male colleagues, but she waited until 1998 to sue after the alleged harasser had died.

Proponents of the bill argue the *Ledbetter* decision leaves alleged victims with no adequate remedy for pay discrimination because they may be unaware what their peers are paid until after the 180-day period. That argument ignores the discovery rule. This rule, which is on the books today, allows plaintiffs to file an EEOC suit, case allegations up to 180 days after discovering the difference in pay.

In summary, the legislation does not just allow, but rather encourages employees to wait many years to allege pay discrimination. The longer they wait, the more difficult it is for the employer to disprove the allegation. As such, the bill is ripe for abuse and

amounts to nothing more than a gift to trial lawyers eager for a frivolous lawsuit.

Again, I want to thank the Chairman for calling the hearing today, and thank all the witnesses for taking their valuable time to come.

The CHAIRMAN. Thank you very much. Senator Murray is chairman of the Employment Subcommittee. If she wants to say a word, we would welcome it.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. Mr. Chairman, I can have Senator Mikulski go first. She was ahead of me. Thank you very much, and I thank Senator Mikulski as well.

I really appreciate your calling this important hearing to talk about the need to restore workplace pay equity, and I want to thank all of our witnesses who are here today, particularly Lilly Ledbetter. She has turned the discrimination she suffered into a battle cry for justice, and we all really admire your courage. Thank you very much.

Mr. Chairman, I will submit my full statement for the record.

This is an important topic, and I want to just make a couple of points. Too many workers today have turned to their government for help recently and have found silence or injustice within this Administration.

And now the highest court in our country has made it almost impossible for workers who suffer unfair pay discrimination to seek swift justice. The *Ledbetter* decision has become a roadblock to the workplace equality that Congress intended to achieve with the Civil Rights Act more than 40 years ago.

In most of our workplaces, talking about your salary or raise or performance evaluation with your co-workers is taboo. So it can take a worker months before they realize, much less prove, that they are being paid less than their colleagues of a different gender, skin color, or who are born in another country.

But now the U.S. Supreme Court has effectively said that workers have to figure that out within 6 months of their employer making that pay decision. Mr. Chairman, that sounds to me like we are asking our workers to be mind readers. It is unfair, and it may lead to unintended consequences down the road, and I think it is time for a change.

So I hope all of our colleagues will join us in supporting this important bill and ensure that congressional intent is honored by our courts. I look forward to hearing from today's witnesses, and I really, again, want to thank you for calling this important hearing.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF SENATOR MURRAY

Thank you, Mr. Chairman, for calling this important hearing to discuss the need to restore workplace pay equality.

I'd also like to thank our witnesses for joining us today, particularly Lilly Ledbetter, who's turned the discrimination she suffered into a battle cry for justice; we admire your courage.

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Unfortunately, the Supreme Court's Ledbetter decision does not stand out as an exception to the treatment workers have received from those meant to protect their rights. In fact, when workers have turned to their government for help, they've found silence or injustice over and over again. Too many workers who need skills training have been left high and dry by the President's budget cuts. Workplace safety seems to be an afterthought for this Administration, which has issued just one new standard in the last 8 years—and that one only by court order. And now the highest court in our country has made it almost impossible for workers who suffer unfair pay discrimination to seek swift justice.

Title VII of the Civil Rights Act of 1964 was a major step forward for equality in our country. It leveled the playing field for tens of thousands of workers and opened the door to new opportunities.

Unfortunately, the Ledbetter decision has become a roadblock to the workplace equality that Congress intended to achieve with the Civil Rights Act more than 40 years ago.

In effect, the decision may create a catch-22 for workers who believe they've been discriminated against. If they file a claim too early, they run the risk of alienating their employer before they know all of the facts. If they file too late, they'll miss the narrow time frame established by the Ledbetter decision and forego their rights under the law. And this decision doesn't just affect workers who've been discriminated against because of their gender. It changes the rules for the countless number of workers who may experience employment discrimination based on their race, national origin, or religion.

Mr. Chairman, we all know that pay discrimination is real, and it occurs in today's workforce. Last year, research showed that women still make only 77 cents for every dollar that their male counterparts make.

That's real money taken from the pockets of single mothers trying to provide for their children, and from women who are trying to build their savings for retirement and make themselves less dependent on government services.

In most workplaces, discussing salaries, raises and performance evaluations with co-workers is taboo.

And it may take a worker months before they realize, much less prove, they're being paid less than their colleagues who may have been a different gender, have a different skin color, or who were born in another country.

But the Supreme Court has effectively said that workers should figure this out within six months of their employer making the decision to pay them less. Mr. Chairman, that sounds a lot like we're asking workers to be mind readers. It's unfair and may lead to unintended consequences down the road.

Mr. Chairman, this is just another example of how the deck's been stacked against working families in America, and it's time for a change.

I hope my colleagues will join me in supporting this important bill and ensure that congressional intent is honored by our courts. And I look forward to hearing from our witnesses.

The CHAIRMAN. Thank you very much.

Senator Mikulski.

STATEMENT OF SENATOR MIKULSKI

Senator MIKULSKI. Thank you very much, Senator Kennedy. I know we want to get quickly to our witnesses, distinguished witness table. But first, Senator Kennedy, I want to thank you for your swift response to the U.S. Supreme Court decision regarding Ms. Ledbetter, the fact that you helped act so promptly and worked with us.

When I say "us," I know that Senator Clinton and I were working to put together a bill, and we thank you for taking the leadership. That is why we call these good guys that support us the "Galahads of the Senate." Senator Clinton also feels very strongly about this legislation and wanted me to convey to you her gratitude, though she is a little tied up today.

But to our witnesses and to everyone, I think this is one of the most important hearings and pieces of legislation we can have. Right now, everybody is jazzed and needs to talk about a stimulus package. Well, I will tell you, if you want to get the economy going, let us start paying women what they are worth. Let us start paying women equal pay for equal work or comparable work.

What we saw in the U.S. Supreme Court decision was a dangerous message. So dangerous that it took Ruth Ginsburg speaking from the bench to object to it. It said that someone cannot sue their employer over unequal pay if the person doesn't file suit within 180 days after the pay was established.

It ignores the reality of pay discrimination. How many people know the salary of their co-workers, especially in the first 6 months on the job? If you are hired at an equal rate, when do you know that someone, the guy next to you gets a raise? And I quote Justice Ginsburg, "In our view, the court does not comprehend or is indifferent to the insidious way in which women can be victims of pay discrimination."

Well, I think we are here to right a wrong and to write a remedy that is sound, achievable, and affordable. So I thank you for the leadership on the legislation. And Ms. Ledbetter, I thank you on behalf of all the women who sometimes are just too scared to speak up and for the courage of your convictions. You know, each and every one of us can make a difference. But let us work together, and we will make change.

The CHAIRMAN. Thank you very much, both of you, for your comments.

We will have a very good panel this morning. We will start off with Lilly Ledbetter, who worked for Goodyear Tire & Rubber Company 19 years as a manager of the Goodyear Gadsden, AL, tire production plant. After learning she had been paid less than her male counterparts most of her career, Ms. Ledbetter fought back, filed a pay discrimination claim against Goodyear.

In 2003, a jury agreed with Ms. Ledbetter, and awarded her more than $3 million in damages. The U.S. Supreme Court reversed that decision last year. Since the U.S. Supreme Court's decision, Ms. Ledbetter has become a strong public advocate in support of fair pay for all workers.

After Ms. Ledbetter, we will hear from Margot Dorfman, who is the chief executive officer of the U.S. Women's Chamber of Com-

merce. In that position, she advocates across the country greater opportunities for women in business. Previously an executive, for General Mills, she has a Bachelor of Science degree from Northeastern University and a Master's degree in Education from Lesley College, in Massachusetts. Wonderful universities.

And we will hear from Professor Samuel Bagenstos. He is the Associate Dean for Research and Faculty Development, Washington University School of Law, St. Louis. He teaches civil rights, disability rights, and employment discrimination law. Prior to coming to Washington University, the professor taught civil rights at Harvard Law School. He is also a former clerk to Justice Ruth Bader Ginsburg and a former attorney in the appellate section of the Civil Rights Division at the Department of Justice. We are glad to welcome you.

Eric Dreiband is a partner of the law firm of Akin Gump Strauss Hauer & Feld. And Mr. Dreiband previously served as general counsel of the Equal Employment Opportunity Commission and as deputy administrator of the Department of Labor, Wage and Hour Division. He is a graduate of Princeton University and Northwestern University School of Law.

Ms. Ledbetter, we will look forward to hearing from you. Thank you very much for being here. We know it is never easy to talk about your own personal kinds of challenges that impact you. So we are very appreciative and grateful for your willingness to share this life experience that you have had and caused a good deal of anxiety to you and your family. And to share it with us in public, we know this always takes special courage. And so, we are very grateful to you for joining us.

STATEMENT OF LILLY LEDBETTER, RESIDENT, JACKSONVILLE, AL

Ms. LEDBETTER. Good morning. Thank you, Mr. Chairman and members of the committee, for the opportunity to testify before you. My name is Lilly Ledbetter. It is an honor to be here today to talk about my experience trying to enforce my right to equal pay for equal work.

I wish my story had a happy ending, but it doesn't. I hope that this committee, and the Congress as a whole, can do whatever is necessary to make sure that in the future what happened to me does not happen to other people who suffer discrimination like I did.

My story begins in 1979, when Goodyear hired me to work as a supervisor in their tire plant in Gadsden, AL. I worked hard at Goodyear, and I was good at my job. But it wasn't easy. I was one of only a handful of female supervisors, and I was subject to challenges the men didn't have to face.

I faced flat-out discrimination by those who didn't want women in the workforce, as well as sexual harassment. I also, unbeknownst to me, faced pay discrimination for virtually my entire career at Goodyear. Toward the end of my career, I began to suspect that I wasn't getting paid as much as the men doing the similar jobs. Of course, it was hard to be sure, since Goodyear instructed us that we were not supposed to talk about our wages with our coworkers.

All I knew before 1998 was that some of the men were bragging about how much overtime they got. It was more than me, but I didn't know the rate at which they were being paid, much less that it was the result of discrimination. I only got some real evidence when, in 1998, someone left an anonymous note in my mailbox at work, showing me how much less I got paid than the other three male managers.

On my next day off after that, I filed a complaint with EEOC to challenge the pay gap. It was only after that, that I filed that complaint, that I was finally able to get the whole picture on my pay compared to the men's. It turned out that while at the end of my career I was earning $3,727 per month, the lowest-paid male was getting $4,286 per month, and the highest-paid male was making $5,236 for the same work.

This happened because, time and again, I got smaller raises than the men, and over the years, those little differences added up and multiplied. So I was actually earning 20 percent less than the lowest-paid male supervisor in the same position. There were lots of men with less seniority than me who were paid much more than I was.

At trial, the jury found that Goodyear had discriminated against me in violation of title VII. The jury awarded me back pay as well as more than $3 million in compensatory and punitive damages. And I can tell you that that was a good moment. It showed that the jury took my civil rights seriously and wasn't going to stand for a national employer like Goodyear paying me less than others just because I was a woman. And it seemed like a large enough award that the company like Goodyear might feel the sting and think better before discriminating like that again.

I was very disappointed, however, when the trial judge was forced to reduce the award to $300,000 statutory cap. It felt like the law was sending a message that what Goodyear did was only 10 percent as serious as the jury and I thought it was.

I am not a lawyer, but I am told that most of the time the law doesn't put an arbitrary cap like that on the amount a defendant has to pay in damages. I don't see why a company like Goodyear should get better treatment just because it broke a law protecting workers against discrimination instead of some other kind of law.

But the worst was yet to come. By a single vote, the U.S. Supreme Court took it all away, even the back pay. They said I should have complained after the first time I was paid less than the men, even though I didn't know what the men were making, and I had no way to prove that that decision was discriminatory. But the court said that once 180 days passes after the pay decision is made, the worker is stuck with unequal pay for the rest of her career.

Justice Ginsburg hit the nail on the head when she said that the majority's rule just doesn't make sense in the real world. You can't expect people to go around asking their co-workers how much money they are making. At a lot of places, that could get you fired.

Plus, even if you know some people are getting paid a little more than you, that is no reason to suspect discrimination right away. Pay can go up and down, and you want to believe that your employer is doing the right thing, and it will even out down the road.

Especially where you are one of the only women in a male-dominated factory, you don't want to make waves unnecessarily. And any way, it is hard to fight over the small amount of money at issue early on and hard to prove discrimination unless you have proof that the pay disparity continues.

What happened to me is not only an insult to my dignity; it also had real consequences for my ability to care for my family. While every paycheck I received I got less than what I was entitled to under the law, the U.S. Supreme Court said this didn't count as illegal discrimination. But it sure feels like discrimination when you are on the receiving end of that smaller paycheck and trying to support your family on less money than what the men are getting for the same job.

It doesn't feel any less like discrimination because it started a long time ago. Quite the opposite, in fact. But according to the court, if you don't figure things out right away, the company can treat you like a second-class citizen for the rest of your career, and that is not right.

The truth is Goodyear continues to treat me like a second-class worker to this day because my pension and my Social Security is based on the amount I earned while working there. Goodyear gets to keep my extra pension as a reward for breaking the law.

My case is over, and it is too bad that the U.S. Supreme Court decided the way that it did. But by enacting the Fair Pay Restoration Act, you can make sure that people will be able to challenge discriminatory paychecks as long as they continue to get them. The House has already passed this bill, which would protect workers like me and give employers the incentive to fix continuing pay problems.

I urge the Senate to pass the bill as well so that our civil rights laws can once again offer effective protection against discrimination. Goodyear may never have to pay me what it cheated me out of, but if this bill passes, I will have an even richer reward because I will know that our daughters, our granddaughters, and all workers will get a better deal.

That is what this fight is worth fighting for, and it makes this a fight that we must win. Thank you very much. I do appreciate this so much.

[The prepared statement of Ms. Ledbetter follows:]

PREPARED STATEMENT OF LILLY LEDBETTER

Good morning. Thank you, Mr. Chairman and members of the committee, for the opportunity to testify before you. My name is Lilly Ledbetter. It is an honor to be here today to talk about my experience trying to enforce my right to equal pay for equal work. I wish my story had a happy ending. But it doesn't. I hope that this committee, and the Congress as a whole, can do whatever is necessary to make sure that in the future, what happened to me does not happen to other people who suffer discrimination like I did.

My story begins in 1979, when Goodyear hired me to work as a supervisor in their tire plant in Gadsden, AL. I worked hard at Goodyear, and I was good at my job. For example, Goodyear gave me a "Top Performance Award" in 1996.

But it wasn't easy. Of the approximately 80 people who held the same position that I did during the 19 years I worked at Goodyear, only a handful were women. And I was subject to challenges the men didn't have to face. For example, the plant manager flat out said that women shouldn't be working in a tire factory because women just made trouble. Also, one of my supervisors asked me to go to a local hotel with him. He promised that if I did, I would get good evaluations; if I didn't,

he would put me at the bottom of the list. I didn't say anything about it at first because I wanted to try to work it out and fit in without making waves. But it got so bad that I finally complained to the company. The manager I complained to refused to do anything to protect me and just told me I was being a troublemaker. So I filed a charge with the EEOC, and they worked out a deal with the company to make sure the supervisor would no longer manage me. But the company continued to treat me badly, trying to isolate me, leaving me out of important management meetings, having employees refuse to talk to me. I got a taste of what happens when you complain about discrimination.

Despite these problems with my supervisor, for virtually all of the time I worked at Goodyear, I did not know that I was also being subjected to discrimination in pay. When I first started at Goodyear, all the managers got the same pay, so I knew I was getting as much as the men. But then Goodyear switched to a new pay system based on performance. After that, people doing the same jobs could get paid differently. Goodyear kept what everyone got paid strictly confidential. No one was supposed to know. Over the following years, sometimes I got raises, sometimes I didn't. Some of the raises seemed pretty good, percentage-wise, but I didn't know if they were as good as the raises other people were getting.

I only started to get some hard evidence of what men were making when someone anonymously left a piece of paper in my mailbox at work, showing what I got paid and what three other male managers were getting paid. I thought about just moving on, but in the end, I could not let Goodyear get away with their discrimination. So, I filed another complaint with the EEOC in 1998.

After I filed my EEOC complaint and then filed a lawsuit, I was finally able to get the whole picture on my pay compared to the men's. It turned out that I ended up getting paid what I did because of the accumulated effect of pay raise decisions over the years.

In any given year, the difference wasn't that big, nothing to make a huge fuss about all by itself. Some years I got no raise when others got a raise. Some years I got a raise that seemed OK at the time, but it turned out that the men got bigger percentage raises. And sometimes, I got a pretty big percentage raise, but because my pay was already low, that amounted to a smaller dollar raise than the men were getting.

For example, in 1993, I got a 5.28 percent raise, which sounds pretty decent. But it was the lowest raise in dollars that year because it was 5.28 percent of a salary that was already a lot less than the men's because of discrimination. So the gap in my pay grew wider that year. Without knowing what the men were getting paid, I had no way of knowing whether that raise was potentially discriminatory or not. All I knew was that I got a raise.

The result was that at the end of my career, I was earning $3,727 per month. The lowest paid male was getting $4,286 per month for the same work. The highest paid male was making $5,236. So I was actually earning 20 percent less than the lowest paid male supervisor in the same position. There were lots of men with less seniority than me who were paid much more than I was.

When we went to court, Goodyear acknowledged that it was paying me a lot less than the men doing the same work. But they said that it was because I was a poor performer and consequently got smaller raises than all the men who did better. That wasn't true, and the jury didn't believe it. At the trial, two other women managers took the stand and explained how they were also subject to discrimination. One of them was a secretary who got promoted to manager but was only paid a secretary's salary. The company kept telling her they would give her a raise, but they never did and she got fed up with that and went back to being a secretary. The other woman was also paid less than Goodyear's mandatory minimum wages.

At the end of the trial, the jury found that Goodyear had discriminated against me in violation of title VII. The jury awarded me backpay as well as more than $3 million in compensatory and punitive damages.

I can tell you that that was a good moment. It showed that the jury took my civil rights seriously and wasn't going to stand for a national employer like Goodyear paying me less than others just because I was a woman. And it seemed like a large enough award that a big company like Goodyear might feel the sting and think better of it before discriminating like that again.

I was very disappointed, however, when the trial judge was forced to reduce that award to the $300,000 statutory cap. It felt like the law was sending a message that what Goodyear did was only 10 percent as serious as the jury and I thought it was. I'm not a lawyer, but I am told that most of the time, the law doesn't put an arbitrary cap like that on the amount a defendant has to pay for mental anguish or punitive damages. I don't see why a company like Goodyear should get better treat-

ment just because it broke a law protecting workers against discrimination instead of some other kind of law.

But the worst was yet to come. By a single vote, the Supreme Court took it all away, even the backpay. They said I should have complained after the first time I was paid less than the men, seemingly ignoring the fact that I didn't know what the men were getting paid and had no way to prove that the decision was discriminatory in any event. But the Court said that once 180 days passes after the pay decision is made, the worker is stuck with unequal pay for equal work for the rest of her career and there is nothing illegal about that under the statute.

Justice Ginsburg hit the nail on the head when she said that the majority's rule just doesn't make sense in the real world. You can't expect people to go around asking their co-workers how much money they're making. At a lot of places, that could get you fired. And nobody wants to be asked those kinds of questions anyway.

Plus, even if you know some people are getting paid a little more than you, that's no reason to suspect discrimination right away. Pay can go up and down, and you want to believe that your employer is doing the right thing and that it will all even out down the road. Especially when you work at a place like I did, where you are one of the only women in a male-dominated factory, you don't want to make waves unnecessarily. You want to try to fit in and get along. As I found out all too well, calling something "discrimination" isn't appreciated—I suffered the consequences when I went to the EEOC with proof of sexual harassment.

Anyway, the small amount of money at issue early on isn't worth fighting over at first. No lawyer is going to take a case to fight over an extra $100 a month, and most people can't afford to pay a lawyer out of their own pockets. It would have been hard to demonstrate to the EEOC or a jury that the first $100 pay difference was discrimination. It was only after I got paid less than men again and again, without any good excuse, that I had a case that I could realistically bring to the EEOC or to court.

What happened to me is not only an insult to my dignity, but it had real consequences for my ability to care for my family. With every paycheck I received, I got less than what I was entitled to under the law. The Supreme Court said that this didn't count as illegal discrimination, but it sure feels like discrimination when you are on the receiving end of that smaller paycheck and trying to support your family with less money than the men are getting for doing the same job. It doesn't feel any less like discrimination because it started a long time ago. Quite the opposite, in fact. But according to the Court, if you don't figure things out right away, the company can treat you like a second-class citizen for the rest of your career. That just isn't right.

The truth is, Goodyear continues to treat me like a second-class worker to this day because my pension and social security is based on the amount I earned while working there. Goodyear gets to keep my extra pension as a reward for breaking the law.

As you may know, making ends meet during retirement is not easy for a lot of seniors like me, even under the best of circumstances. It shouldn't be harder just because you are a woman who was discriminated against during your career.

My case is over and it is too bad that the Supreme Court decided the way that it did. But this committee and the Senate have the chance to make sure that no one else will suffer the same injury that I have. Senator Kennedy and numerous others have introduced the Fair Pay Restoration Act, which would make sure that people can challenge discriminatory paychecks as long as they continue to receive them. The House has already passed this bill, which would protect workers like me and give employers the incentive to fix pay problems even after 180 days has passed from the time of their original decision. I urge the Senate to pass the bill as well so that our civil rights laws can once again offer effective protection against discrimination.

Goodyear may never have to pay me what it cheated me out of. But if this bill passes, I'll have an even richer reward because I'll know that my daughters and granddaughters, and all workers, will get a better deal. That's what makes this fight worth fighting and it's what makes this fight one we have to win.

Thank you.

The CHAIRMAN. Thank you very much, Ms. Ledbetter.

Ms. Dorfman.

STATEMENT OF MARGOT DORFMAN, CHIEF EXECUTIVE OFFICER, U.S. WOMEN'S CHAMBER OF COMMERCE

Ms. DORFMAN. Chairman Kennedy, Senator Isakson, and members of the committee, I thank you for the opportunity to testify on behalf of millions of American women business owners who seek your urgent action.

The U.S. Women's Chamber of Commerce was founded to support the continued economic advancement for women in America. In essence, we are both a product as well as part of the great civil rights movement. The Women's Chamber has over 500,000 members, and we reach into every State, young and old, students and retirees, employees and business owners, and all ethnicities.

Our members understand that the fight for equal pay is part of the battle that all women face for economic independence. The economic successes and struggles of American women echo the story of our Nation as a whole. To gain our independence, establish economic fairness, and create new opportunities, women have moved from their homes to the factories, into the workforces and, finally, into business ownership.

Just as America fought for her independence at each step of the road and to equality, women have been forced to fight for our own economic freedom. While the Civil Rights Act of 1964 provided individuals with ground-breaking legal protection against discrimination, it has done much more in the intervening years.

By assuring our civil rights and by putting the force of our legal system behind these rights, it has allowed America to ignite a generation of growth and prosperity. This sense of economic empowerment propelled an incredible surge of women into higher education, management, business ownership, and home ownership.

But in spite of our long and dedicated struggle, women continue to earn less than their male counterparts. Women work full-time, earn on an average only 77 cents for every dollar men make. The figures are even worse for women of color.

This persistent wage gap can be addressed and the promise of our civil rights advanced only if women are armed with the tools necessary to challenge sex discrimination against them. We can no longer blindly paint the fight for equal pay as a struggle between business owners and the labor force. The commitment to protect equal pay is important to America, period.

The Fair Pay Restoration Act offers an opportunity to right a fundamental wrong that arose from the U.S. Supreme Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Company*. The Women's Chamber was deeply disappointed in the court's willingness to overturn decades of legal precedence and EEOC practice. We believe this misguided decision must be addressed with this timely legislative fix.

With its short-sighted decision, the court ignores the realities of the 21st century workplace. For example, the confidential nature of employees' salary information complicates workers' abilities to recognize and report discriminatory treatment. And the *Ledbetter* decision turns a blind eye to the long-term effects of pay discrimination on individuals, their families, and our communities.

Nearly 14 million American households are headed by women, who are entering their retirement years with fewer financial assets

than men. Studies show that millions of women will run out of retirement savings. And even today, a woman is 41 percent more likely to end up in poverty than a man.

The 180-day time limit also creates incentives for business practices that will be detrimental to both business owners and workers. Rather than take the time necessary to evaluate their situation and confirm they have been subject to discrimination before filing a claim, the new deadline puts pressure on employees to file complaints as quickly as possible. This will prompt workers to act more hastily than they would have in the past.

And while the previous system promoted voluntary employer compliance, this new interpretation provides an entirely different incentive. When each new paycheck triggered a new claim-filing period, employers had a strong motivation to eliminate discriminatory compensation practices. Under this decision, employers instead have a reason to be less vigilant about pay discrimination, knowing that after 180 days, they will be insulated from future challenges.

There is a special concern to the Women's Chamber and its members. Why? As women have moved from employees to business owners, we have brought perspective to America's business leadership. Women now own over 30 percent of all firms in the United States and are exercising the decisionmaking authority that comes with the role to effect positive changes in the workplace.

Studies have shown that women business owners frequently provide stronger employee benefits than their male counterparts. And our members tell us that even as business owners, they understand and respect the ongoing struggle against wage discrimination that women face. The Fair Pay Restoration Act rewards those who play fair, including women business owners, unlike the U.S. Supreme Court's decision, which seems to give an unfair advantage to those who skirt the rules.

As Americans, we are privileged to live in a country that has taken the extraordinary step of clearly committing to the protection of individual rights. We believe the question is simple. Does the impact of our failure to protect a worker's civil rights end 180 days after the individual was first discriminated against? The Women's Chamber believes the answer is clearly no.

I understand—I urge you now to keep the flame of economic independence alive and ask you to move quickly to pass the Ledbetter Fair Pay Restoration Act. I thank you for this time.

[The prepared statement of Ms. Dorfman follows:]

PREPARED STATEMENT OF MARGOT DORFMAN

Chairman Kennedy, Ranking Member Enzi, and members of the Senate Committee on Health, Education, Labor, and Pensions, my name is Margot Dorfman. I am the CEO of the U.S. Women's Chamber of Commerce. I appreciate the opportunity to testify today, and am here representing American women business owners who seek your urgent action.

The U.S. Women's Chamber of Commerce was founded to support the continued economic advancement of women in America. In essence, we are both a product as well as a part of the great Civil Rights Movement. The Women's Chamber has over 500,000 members—young and old, students and retirees, employees and business owners. We have members in every State, and these members understand that the fight for equal pay is part of the battle that all women face for economic independence.

While the Civil Rights Act of 1964 provided individuals with ground-breaking legal protection against discrimination, it has done much more in the intervening

years. By assuring our civil rights, and by putting the force of our legal system behind these rights, it has allowed America to ignite a generation of growth and prosperity. This sense of economic empowerment propelled an incredible surge of women into higher education, management, business ownership, and home ownership.

Consequently, the struggle for equal pay can no longer be blindly painted as a struggle between business owners and the labor force. The struggle for equal pay is important to America—period. In truth, the Civil Rights Act of 1964 gave legal authority to what we already knew in our hearts: we not only deserve the right to question inequality whenever and wherever it occurs—we *must* question it. We must question it if we are to keep the flame of economic opportunity and advancement alive in America.

The Fair Pay Restoration Act (S. 1843) offers an opportunity to right a fundamental wrong that arose from the Supreme Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Co*. This decision severely limits the ability of victims of pay discrimination to seek a remedy under Title VII of the Civil Rights Act of 1964. The Women's Chamber was deeply disappointed in the Court's willingness to overturn decades of legal precedents and EEOC practice, and believes this misguided decision must be addressed with this timely legislative fix so that the flame of economic opportunity is not extinguished.

The economic successes and struggles of American women echo the story of our Nation as a whole. To gain our independence, establish economic fairness, and create new opportunities, women moved from their homes to the factories, into the workforce, and finally into business ownership. Just as America fought for her independence, at each step in the road to equality, women have been forced to fight for our economic independence.

In spite of this long and dedicated struggle, and more than four decades after Congress outlawed wage discrimination based on sex, women continue to earn less than their male counterparts. According to the U.S. Census Bureau, women who work full-time earn, on average, only 77 cents for every dollar men earn. The figures are even worse for women of color. And while women are going to college in record numbers, that hasn't been the panacea we'd hoped it would be. According to the American Association of University Women's recent report, *Behind the Pay Gap*, just 1 year out of college, women working full-time are already earning less than their male colleagues—even when they work in the same field. Ten years after graduation, the pay gap widens. A gap remains even after controlling for hours, occupation, parenthood, and other factors known to affect earnings—and this unexplained gap is likely due to sex discrimination. This persistent wage gap can be addressed—and the promise of our civil rights advanced—only if women are armed with the tools necessary to challenge sex discrimination against them. As employees and business owners, women understand the profound need to actively advance and protect our civil rights. And, as one of our members said in a recent letter to Congress calling for passage of the Fair Pay Restoration Act, "We deserve to question inequality at anytime it is occurring."

The *Ledbetter* decision represents a step backwards on this road to economic equality. Previously, title VII's requirement that employees file complaints within 180 days of "the alleged unlawful employment practice" was interpreted to include a worker's last paycheck tainted by discrimination. Despite their own precedent and congressional intent, the Supreme Court has narrowly re-defined the timeframe for discrimination claims, leading to the dismissal of Ms. Ledbetter's case on the grounds that she failed to file her complaint in a timely manner. As a result, Ms. Ledbetter was left with no recourse against discrimination that continued unabated for years. Now, potentially millions of other people maybe as well.

With this misguided decision, the Court ignores the realities of the 21st century workplace. The confidential nature of employee salary information complicates workers' abilities to recognize and report discriminatory treatment. Employees generally do not know enough about what their co-workers earn, or how pay decisions are made, to file a complaint as quickly as required by the Court's reasoning. Justice Ruth Bader Ginsburg's dissenting opinion distinguishes pay disparities from other types of adverse employment actions, such as refusal to hire, failure to promote, or termination. Whereas these actions are clear to both the affected employee and others in her workplace, pay discrimination is rarely so obvious. In fact, special efforts are often undertaken to ensure that compensation details are not made public. Such was the case at Goodyear.

According to Justice Ginsburg, "The Court's insistence on immediate contest overlooks common characteristics of pay discrimination." She points out, and rightly so, that pay disparities tend to be incremental, making it difficult to detect discrimination until a significant amount of time has passed—easily more than the 180 days that the Court's new standard now requires for most workers. The Women's Cham-

ber wholeheartedly agrees with Justice Ginsburg's assertion that, "This initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then-current and continuing payment of a wage depressed on account of her sex." With time, these small differences can expand exponentially over the course of a worker's career, affecting future raises, pension contributions, and other earnings—related benefits in dramatic ways. Thus, the *Ledbetter* decision turns a blind eye to the long-term effects of pay discrimination on individuals, their families and our communities. Research shows that nearly 14 million American households are headed by women,[1] who enter their retirement years with fewer financial assets than men. Millions of women run out of retirement savings, leaving a woman 41 percent more likely to end up in poverty than a man.[2] Being paid less than men and taking time off work to raise our families already reduces the amount of retirement income we receive and limits the savings available to us. Who pays for that sad state of affairs—the company that paid these women unfairly or America as a whole?

Not only does the 180 day time limit have the potential to prevent legitimate discrimination claims from being addressed, but the Women's Chamber is also concerned it creates incentives for practices that will be detrimental to both business owners and workers. Rather than take the time necessary to evaluate their situation and confirm that they have been subject to discrimination before filing a claim, the new deadline puts pressure on employees to file complaints as quickly as possible, which will prompt workers to act more hastily than they would have in the past. This change creates a potentially greater burden than the previous system, which provided our members with a well-established, reasonable method for resolving discrimination complaints that protected the worker, recognized the demands on business owners, and balanced these factors in the context of the modern workplace.

Good business practices are also at risk as a result of the *Ledbetter* decision. Whereas, the previous system promoted voluntary employer compliance, this new interpretation provides an entirely different incentive. When each new paycheck triggered a new claim filing period, employers had a strong motivation to eliminate discriminatory compensation practices. Under this decision, employers instead have reason to be less vigilant about pay discrimination, knowing that after 180 days they will be insulated from future challenges. This is of special concern to the Women's Chamber and its members. Why? As women have moved from employees to business owners, we have brought a new perspective to America's business leadership. Women now own over 30 percent of all firms in the United States[3] and are exercising the decisionmaking authority that comes with that role to effect positive changes in the workplace. Studies have shown that women business owners frequently provide stronger employee benefits than their male counterparts. And our members tell us that—even as business owners—they understand and respect the ongoing struggle against wage discrimination that women continue to face, and they recognize the need to support workers as they seek fair treatment in the workplace. The Fair Pay Restoration Act rewards those who play fair—including women business owners—unlike the Supreme Court's decision, which seems to give an unfair advantage to those who skirt the rules.

To effectively address the Court's detrimental decision in *Ledbetter*, the Women's Chamber urges Congress to move quickly to enact a legislative fix for *Ledbetter*. Rights must have enforceable remedies, and remedies must be adequate to deter discriminatory conduct. To ensure that effective remedies are available to women like Lilly Ledbetter who are victims of pay discrimination, Congress must pass the Fair Pay Restoration Act, which would amend Title VII of the Civil Rights Act of 1964 to make it clear that a pay discrimination claim accrues when a pay decision is made, when an employee is subject to that decision, or at anytime they are injured by it.

A woman business owner's will to succeed, her will to offer meaningful opportunity to her employees, demands that you act now to guard this flame of economic opportunity that ensures that every citizen has the right and the ability to question inequality that stands in the way of that progress. As Americans, we are privileged to live in a country that has taken the extraordinary step of clearly committing to the protection of our individual civil rights. We do not value a person's civil rights

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[1] U.S. Census Bureau. "Selected Social Characteristics in the United States: 2006." *http://factfinder.census.gov/servlet/ADPTable?__bm=y&geo__id=01000US&-qr__name=ACS__2006__EST__G00__DP2&ds__name=ACS__2006__EST__G00__&__lang=en&redoLog=false&-__sse=on.*

[2] Legal Momentum. "Reading Between the Lines: Women's Poverty in the United States: 2006." *http://www.legalmomentum.org/site/DocServer/lm__povertyreport2006.pdf?docID=721.*

[3] Center for Women's Business Women Research, "Women's Owned Businesses in the United States 2006." *http://www.cfwbr.org/national/index.php.*

for one day, one year, or one decade. In America, we value the civil rights of the individual every single day, whether you are female or male, black or white, from cradle to grave.

In conclusion, the Women's Chamber would ask the committee to consider this simple question: does the impact of our failure to protect the worker's civil rights end 180 days after the individual was first discriminated against? We believe the answer is clear—absolutely not.

We hope you agree, and urge you to move quickly to pass the Ledbetter Fair Pay Restoration Act. Thank you for the opportunity to testify today, and I look forward to taking any questions you might have.

The CHAIRMAN. Thank you very much.

Mr. Bagenstos.

STATEMENT OF SAMUEL R. BAGENSTOS, PROFESSOR OF LAW AND ASSOCIATE DEAN, WASHINGTON UNIVERSITY IN ST. LOUIS SCHOOL OF LAW, ST. LOUIS, MO

Mr. BAGENSTOS. Yes, Mr. Chairman and members of the committee, Senator Isakson, I am pleased to testify before you today. My name is Samuel Bagenstos. I currently serve as Professor of Law and Associate Dean at the Washington University School of Law in St. Louis. And for the past 15 years, I have spent my time litigating, studying, researching, writing about civil rights litigation in Federal courts.

I have been invited by the committee to discuss the U.S. Supreme Court's recent decision in the *Ledbetter* v. *Goodyear Tire* case and the bill currently pending to overturn that decision, the Fair Pay Restoration Act. The Fair Pay Restoration Act would adopt a very simple and common-sense straightforward rule for governing the timeliness of pay discrimination claims.

The rule would be each paycheck that is infected with an employer's discrimination is a separate violation of the employment discrimination laws, and the victim of pay discrimination may recover back pay for up to 2 years prior to the last discriminatory paycheck he or she has received.

In these remarks, I want to make three essential points. First, the *Ledbetter* decision makes it exceptionally difficult, as we have heard a little bit about, to enforce the legal prohibitions on discrimination in pay.

Second, the paycheck accrual rule that the Fair Pay Restoration Act adopts is not at all new or a change in the law. In fact, it was the law in most of the Nation before the court's decision last summer in *Ledbetter*, and there is simply no evidence, none, that it imposed significant burdens on employers.

Third, the paycheck accrual rule is far preferable to the alternatives that have been most prominently suggested by opponents of the bill. So *Ledbetter*, as the committee has heard, requires an employee who is the victim of pay discrimination to file a charge with the EEOC within 180 days of the employer's original discriminatory pay decision, even if that initial decision continues to be reflected in the victim's paychecks many years later. That rule substantially undermines the enforcement of the prohibitions on pay discrimination.

As I describe in my written testimony, as we have heard today, employees are unlikely to know that they have gotten paid less than their co-workers. They are unlikely to attribute differences in pay to discrimination, and they are unlikely to bring a lawsuit

after the initial discriminatory pay decision even if they do know they have been the victims of discrimination because of the small stakes of any incremental pay discrimination decision.

I should emphasize these problems aren't limited to sex discrimination cases and, in fact, may be especially significant outside of sex discrimination because the Equal Pay Act is available for sex discrimination cases, but not for race discrimination cases, national origin discrimination cases, disability discrimination cases, age discrimination cases. The paycheck accrual rule would solve the problem that *Ledbetter* created by permitting an employee to challenge any paycheck that continues to be infected by prior discriminatory decisions, and it would recognize the workplace realities that the *Ledbetter* court ignored.

Now some opponents of the legislation adopting this rule contend that such legislation would make it very hard or impossible for employers to defend themselves against charges of pay discrimination. But there is just no evidence for this, and we actually had a good test of this because for many years, 10 Federal circuit courts of appeals—actually the Eleventh Circuit, in addition to the circuits on the chart presented before, before the *Ledbetter* case, actually adopted the paycheck accrual rule.

And yet there is no evidence that there was any difficulty, any particular difficulty for employers. No systematic studies, no significant anecdotal evidence. There is just no evidence employers had difficulty in defending pay discrimination claims. And that makes sense because the law gives employers substantial protections against late claims. The most important protection is the burden of proof.

So it is not the case that the employer has to disprove an allegation of discrimination. The employee, the plaintiff, has to prove it, and the absence of evidence will inure to the detriment of the plaintiff. If it doesn't, right, then we still have the laches defense, which gives an employer the right to defend if the employee has slipped on her rights and the employer is prejudiced. And even absent that, this bill would incorporate a 2-year back pay cap, which would protect employers against open-ended liability.

Now, opponents of the bill have suggested that equitable tolling principles or a discovery rule would mitigate the unfairness of this decision, but they are wrong. Equitable estoppel and the discovery rule—and equitable tolling as well—would give employers less certainty and repose than would the Fair Pay Restoration Act, right? An employer is never going to know when liability ends, unlike with the Fair Pay Restoration Act, where each paycheck starts the accrual of a claim. So the employer knows, has certainty as to when the claim runs.

The doctrines would also promote wasteful satellite litigation over the employer's and the victim's conduct after the discrimination, moving the litigation away from what should be the issue in the litigation, which is whether the employer, in fact, discriminated. And it wouldn't solve the basic problem that it is so difficult to bring a lawsuit challenging pay discrimination initially, right?

Experience with standards like the discovery rule and equitable tolling in lower courts suggest that it will not be sufficient, for reasons that I discuss in my written testimony. Now the question be-

fore the committee, I want to emphasize, is not whether the *Ledbetter* decision is consistent with the U.S. Supreme Court's earlier precedents. I think Justice Ginsburg makes a very strong case, persuasive case, that it was not consistent with the U.S. Supreme Court's earlier precedents.

But the question before this committee is whether the *Ledbetter* decision is consistent with the policy that underlies the legal prohibitions on pay discrimination. And for the reasons I have explained here and in my written testimony, it is not.

By adopting the paycheck accrual rule, which was the law in most of the country for many years before *Ledbetter*, the Fair Pay Restoration Act would properly balance the interest in employer repose against the imperative to enforce the laws that prohibit pay discrimination.

Thank you very much.

[The prepared statement of Mr. Bagenstos follows:]

PREPARED STATEMENT OF SAMUEL R. BAGENSTOS

Mr. Chairman and members of the committee, I am pleased to testify before you today. My name is Samuel Bagenstos. I currently serve as Professor of Law and Associate Dean for Research and Faculty Development at the Washington University in St. Louis School of Law. For the past 15 years, I have been working on and writing about civil rights litigation. I served as an attorney in the Civil Rights Division of the U.S. Department of Justice in the mid-1990s. Since entering academia in 1999, I have focused my research and teaching on civil rights litigation and antidiscrimination law, and I have continued to serve as counsel for individuals and organizations in civil rights cases in the Federal Courts of Appeals and the Supreme Court.

I have been invited to discuss the Supreme Court's recent decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*,[1] and the bill currently pending before this committee to overturn that decision, the Fair Pay Restoration Act. The Fair Pay Restoration Act would adopt a simple and common sense rule to govern the timeliness of pay discrimination claims: Each paycheck that is infected with an employer's discrimination is a separate violation of the employment discrimination laws—lawyers call this the paycheck accrual rule—and the victim of pay discrimination may recover back pay for up to 2 years prior to the last discriminatory paycheck he or she has received.

In these remarks, I will make three essential points. First, the *Ledbetter* decision makes it exceptionally difficult to enforce the legal prohibitions on discrimination in pay—not just discrimination on the basis of sex, but also discrimination on the basis of race, religion, age, or disability. Second, the paycheck accrual rule that the Fair Pay Restoration Act adopts is not at all new; to the contrary, it was the law in most of the Nation before the Court's decision last summer in *Ledbetter*, and there is simply no evidence that it led to an avalanche of stale claims. Third, the paycheck accrual rule is far preferable to the alternatives that have been most prominently suggested: equitable tolling or a discovery rule.

THE LEDBETTER DECISION UNDERMINES ENFORCEMENT OF PAY DISCRIMINATION LAWS

Ledbetter requires an employee who is the victim of pay discrimination to file a charge with the Equal Employment Opportunity Commission within 180 or 300 days of his or her employer's discriminatory pay-setting decision.[2] For a number of reasons, that rule substantially undermines the enforcement of the prohibitions on pay discrimination in Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

First, pay discrimination sneaks up on its victims. When an employer discriminates against an individual in hiring, promotion, or discharge, that individual will know at least that he has been disadvantaged—that he did not get the job or promotion he desired, or that he was discharged from his job. The individual may not know that the employer's action resulted from discrimination, but the employer's readily identifiable act of rejecting his application for a job or a promotion, or of fir-

[1] 127 S. Ct. 2162 (2007).
[2] *See id.* at 2166–2177.

ing him, puts him on notice of the adverse treatment that might form the basis for an antidiscrimination claim.

Pay discrimination is very different. Although the practice is itself of dubious legality, many employers prohibit their employees from discussing how much they are paid with their co-workers.[3] And even in the absence of an employer policy, many employees are unwilling to discuss their wages with their co-workers.[4] As a result, a victim of pay discrimination is unlikely to know right away that other employees were paid more than she was. She might know, for example, that she received a raise, but she is unlikely to know that other employees received *higher* raises. As Justice Ginsburg explained in her dissent in *Ledbetter*, the victim of pay discrimination in such circumstances is especially unlikely to know that she has been treated less well than her colleagues: "Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision."[5]

Even if an employee knows he has experienced an adverse employment decision, there is another hurdle: He has to understand that the adverse decision is based on *discrimination*. An extensive body of work by social psychologists shows that victims of discrimination "often fail to notice discrimination, underestimate it, or deny being the target of discrimination, even when they objectively are."[6] Individuals find discrimination "difficult to detect on a case-by-case basis where each individual's outcomes can be attributed to multiple causes"—which will be true in nearly every pay discrimination case.[7]

And even if an employee knows that she was paid less than her co-workers and believes that the difference was the result of discrimination, she is still unlikely to file an EEOC charge immediately. Although it is not true of every victim of discrimination, psychological and sociological studies show that many "underreport" perceived discrimination due to a sense of shame or their rejection of victimhood, because friends, family, and co-workers discourage them from thinking they were victims of discrimination, or due to the interpersonal costs associated with making a discrimination claim."[8] Those interpersonal costs can be severe. Workers who make discrimination claims "report that they often are targeted by retaliation," and a body of psychological experiments demonstrates that people who claim discrimination are often viewed as troublemakers or complainers.[9]

These problems are exacerbated by the small stakes in any challenge to a single, incremental act of pay discrimination—a point Justice Ginsburg noted in her *Ledbetter* dissent.[10] As Lilly Ledbetter's case demonstrates, discriminatory pay decisions can accumulate into big money over a series of years—in her case, over the course of 20 years her pay fell 15 to 40 percent behind that of her similarly situated co-workers.[11] But in any given year, the difference will be quite small in absolute terms. Imagine two co-workers who start out receiving the same salary of $50,000.00 per year. In the first year, one gets a raise of 5 percent, and, for discriminatory reasons, the other gets a raise of 3 percent. If that pattern continues for 20 years, the victim of discrimination will be earning less than 70 percent of what her co-worker earns—a difference of over $40,000.00 in annual salary. But after the first

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[3] *See* Adrienne Collella *et al., Exposing Pay Secrecy*, 32 Acad. of Mgt. Rev. 55, 57 (2007) (36 percent of surveyed employers "prohibited discussion of pay").

[4] *See* Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Lab. L. 167, 176–181 (2004) (discussing strong social norms that keep employees from discussing pay with co-workers).

[5] *Ledbetter*, 127 S. Ct. at 2182 (Ginsburg, J., dissenting).

[6] Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Social Inq. 801, 804 (2006); *see also id.* at 805 ("Results of several studies are consistent with the idea th[at] people often err on the side of minimizing, or not seeing, discrimination when it is directed at the self."); Faye J. Crosby & Stacy A. Ropp, *Awakening to Discrimination, in* The Justice Motive in Everyday Life 382 (Michael Ross & Dale T. Miller, eds., 2002).

[7] Kaiser & Major, *supra* note 6, at 805.

[8] Laura Beth Nielsen & Robert L. Nelson, Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System, 2005 Wis. L. Rev. 663, 683 (footnotes omitted); see also Charles Stangor et al., Reporting Discrimination in Public and Private Contexts, 82 J. Personal & Social Psychol. 69, 73 (2002) (concluding that "because they are (or at least they are concerned about being) discriminated against, stigmatized individuals are particularly aware of the costs of claiming discrimination" and that "the costs of reporting discrimination are particularly salient when the social context includes members of another social category").

[9] Kaiser & Major, *supra* note 6, at 818–819.

[10] See *Ledbetter*, 127 S. Ct. at 2182 (Ginsburg, J., dissenting) ("[T]he amount involved may seem too small, or the employer's intent too ambiguous, to make the issue immediately actionable or winnable.").

[11] *See id.* at 2178.

set of discriminatory raises, the gap will be much smaller: The victim of discrimination will still earn more than 98 percent of what her co-worker earns, and the difference in annual salary will be only $1,000.00.

Few attorneys will be willing to take an employment discrimination suit where only $1,000.00 is at stake. The costs of bringing a suit are too high, and the potential recovery too low.[12] A wise attorney might well counsel her client *not* to bring such a suit, because the risks for an employee are much higher than for a lawyer. An employee who files a claim of pay discrimination, as I have shown, subjects himself to retaliation. Although the Federal employment discrimination laws prohibit retaliation, that prohibition is often illusory in practice.[13] With the prospect of only a very small recovery even if a claim of pay discrimination succeeds, even a small risk that the employer will retaliate will be enough to deter many employees from filing a claim in the first place.

I should emphasize that these problems are not limited to sex discrimination cases. The statute of limitations provision that the Court interpreted in *Ledbetter* applies not just to sex discrimination, but also to discrimination on the basis of race, color, national origin, and religion.[14] Title VII's statute of limitations provision is incorporated by reference in the Americans with Disabilities Act and the Rehabilitation Act, and the Age Discrimination in Employment Act contains a substantively identical provision.[15] Indeed, there is good reason to believe that the *Ledbetter* decision will have more far-reaching consequences in the race, color, national origin, religion, age, and disability contexts than in the sex context. Even after *Ledbetter*, many employees who challenge sex discrimination in pay can continue to sue under the Equal Pay Act, which incorporates a paycheck accrual rule in its statute of limitations.[16] But the Equal Pay Act does not apply to race, color, national origin, religion, age, or disability discrimination.

The paycheck accrual rule incorporated in the Fair Pay Restoration Act avoids these problems. By permitting an employee to challenge any paycheck that continues to be infected by prior discriminatory decisions, that rule recognizes the workplace realities that the *Ledbetter* Court ignored. Absent such a rule, it will be extremely difficult to enforce the legal prohibitions on pay discrimination.

THE PAYCHECK ACCRUAL RULE HAS BEEN APPLIED ACROSS THE NATION FOR YEARS, WITH NO DIRE CONSEQUENCES

Some opponents of legislation adopting the paycheck accrual rule contend that such legislation would make it well nigh impossible for employers to defend themselves against charges of pay discrimination:

> An employer's ability to tell its story dissipates sharply as time passes. Memories fade; managers quit, retire, or die, business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or abandoned altogether. Unless an employer receives prompt notice that it will be called upon to defend a specific decision or describe a series of events, it will have no opportunity to gather and preserve the evidence with which to sustain itself. . . . [W]hen an employee of even moderate tenure delays in bringing a claim, the employer is unlikely to have the necessary witnesses at its disposal to defend itself.[17]

What is notable about this contention is its entirely theoretical nature. Although 10 Federal Circuit Courts of Appeals had adopted the paycheck accrual rule before the *Ledbetter* case,[18] the opponents of that rule have not pointed to *any* systematic

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[12] *See* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401, 1452–1454 (1998) (explaining that statutory attorneys' fee recovery provides an "insufficient" incentive for private attorneys to bring civil rights suits, and that the prospect of significant damages recovery is therefore frequently necessary to encourage an attorney to bring such a suit); *cf.* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 1031–1032 (1991) (explaining that few incumbent employees sue their employers for on-the-job discrimination, because the "meager benefits" are not worth the costs of bringing suit).

[13] *See* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18 (2005).

[14] *See* 42 U.S.C. § 2000e–2(a)(1) (prohibiting discrimination in terms and conditions of employment based on "race, color, religion, sex, or national origin").

[15] *See* 29 U.S.C. § 626(d) (Age Discrimination in Employment Act); *id.* § 794(d) (Rehabilitation Act); 42 U.S.C. § 12117(a) (Americans with Disabilities Act).

[16] *See Ledbetter,* 127 S. Ct. at 2176 ("If Ledbetter had pursued her EPA claim, she would not face the title VII obstacles that she now confronts.").

[17] Statement of the U.S. Chamber of Commerce Before the House Committee on Education and Labor 5–6 (June 12, 2007) (internal quotation marks and alterations omitted).

[18] *See, e.g., Forsyth* v. *Federation Employment & Guidance Service*, 409 F.3d 565, 572–573 (2d Cir. 2005); *Reese* v. *Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013–1014 (7th Cir. 2003); *Goodwin* v. *General Motors Corp.*, 275 F.3d 1005, 1009–1011 (10th Cir. 2002); *Cardenas* v. *Massey*,

evidence (or even any significant anecdotal evidence) that the rule caused employers to be unable to defend themselves against pay discrimination claims.

That should not be surprising, for the law provides employers a number of protections against stale claims, even when those claims are not barred by a statute of limitations. The most fundamental of those protections is the burden of proof. It is the plaintiff who must show that her wages were discriminatory.[19] If, because of the passage of time, relevant evidence becomes unavailable, it is the plaintiff who will suffer the consequences. And in the rare case in which an employee sleeps on her rights, and the burden of proof is not sufficient to protect the employer from prejudice, the employer has another protection. If the employer can show that the plaintiff's lack of diligence in bringing her employment discrimination claim has caused "unreasonable and prejudicial delay," the action may be barred by the defense of laches.[20]

The Fair Pay Restoration Act, in any event, protects employers against open-ended liability. The bill would reaffirm the law's current 2-year cap on back pay awards.[21] Under the bill, victims of pay discrimination would have no incentive to sleep on their rights. Because a plaintiff can recover back pay for only the 2 years preceding his filing of the charge with the EEOC, an employee who waits to file for more than 2 years after the initial discrimination will lose the chance to obtain full compensation. Given the complete lack of evidence that the paycheck accrual rule led to harmful results in the 10 circuits that adopted it before the *Ledbetter* case, and given the substantial protections against stale claims that employers would retain under the Fair Pay Restoration Act, there is no basis for concluding that the bill will unfairly burden employers.

NEITHER EQUITABLE TOLLING NOR A DISCOVERY RULE SOLVES THE PROBLEMS CREATED BY THE COURT'S DECISION IN LEDBETTER

Opponents of the Fair Pay Restoration Act contend that the bill is unnecessary. In their view, existing principles of equitable tolling and estoppel are sufficient to mitigate any unfairness that might result from the *Ledbetter* decision.[22] At most, they argue, Congress should pass legislation that makes clear that a discovery rule applies to pay discrimination cases—a rule that starts the statute of limitations at the time—"a 'reasonable person' could or should have been aware of the discrimination."[23] These contentions are profoundly misguided.

Opponents of the bill before this committee place great emphasis on the employer's interest in certainty and repose.[24] But the Fair Pay Restoration Act serves that interest far better than do the proffered alternatives of equitable tolling or the discovery rule. Under the Fair Pay Restoration Act's paycheck accrual rule, an employer knows that it has an obligation to avoid discrimination with every paycheck, and it knows that its back pay liability will not extend back more than 2 years. Reliance on the principle of equitable tolling or the discovery rule, by contrast, will mean that an employer can never be certain that the limitations period has run until *after* a court makes a factual determination about when the employee knew or should have known of the discrimination, and whether the employer took any action to mislead the employee about the discrimination. Although equitable tolling and the discovery rule would likely ensure that employers would *win* statute of limi-

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269 F.3d 251, 257–258 (3d Cir. 2001); *Anderson* v. *Zubieta*, 180 F.3d 329, 335–336 (D.C. Cir. 1999); *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (*en banc*); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 346–347 (4th Cir. 1994); *Calloway* v. *Partners Nat. Health Plans*, 986 F.2d 446, 448–449 (11th Cir. 1993); *Gibbs* v. *Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399–1400 (9th Cir. 1986); *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir. 1982); *see also Lamphere* v. *Brown University*, 685 F.2d 743, 747 (1st Cir. 1982) ("a decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights").

[19] *See, e.g., Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000).

[20] *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 121–122 (2002).

[21] *See* 42 U.S.C. § 2000e–5(g)(1) ("Back pay liability shall not accrue from a date more than 2 years prior to the filing of a charge with the Commission."); *see also* S. 1843, 110th Cong., 1st Sess. § 3 (2007) (reaffirming that principle).

[22] *See* Statement of U.S. Chamber of Commerce, *supra* note 17, at 9.

[23] *Fair Pay, The Right Way: The House Overcorrects a Supreme Court Decision,* Wash. Posts, Aug. 14, 2007, at A12. The Supreme Court has never resolved whether a discovery rule applies to employment discrimination cases, see *Ledbetter*, 127 S. Ct. at 2177 n.10, but four justices in *Morgan, supra*, endorsed such a rule. *See Morgan*, 536 U.S. at 124 (O'Connor, J., concurring in part and dissenting in part) ("In my view, therefore, the charge-filing period precludes recovery based on discrete actions that occurred more than 180 or 300 days after the employee had, or should have had, notice of the discriminatory act.").

[24] *See* Statement of U.S. Chamber of Commerce, *supra* note 17, at 5 ("The interest in repose is particularly compelling in the employment setting.").

tations arguments more often than they would under the Fair Pay Restoration Act, those principles would give employers *less* certainty and repose, because an employer could never be sure *which* claims would be time-barred. They would also promote wasteful satellite litigation over both the employer's and the victim's conduct *after* the alleged discrimination.

More important, neither equitable tolling nor the discovery rule would solve the basic problem: Because of all of the barriers that keep an employee from discovering pay disparities, attributing those disparities to discrimination, and pursuing an antidiscrimination claim, it will be the rare case in which the victim of pay discrimination can file a claim within 180 or 300 days of the first discriminatory pay decision.

Just last Term, the Supreme Court emphasized that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs."[25] In the employment discrimination context specifically, the Court has declared that the principle of equitable tolling is "to be applied sparingly."[26] A litigant seeking equitable tolling must show both "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."[27] As I have explained, though, the barriers to pursuing pay discrimination claims are the *ordinary* circumstance, not an extraordinary one. The Fair Pay Restoration Act takes account of that fact by restoring the paycheck accrual rule for pay discrimination cases.

The discovery rule is insufficient for similar reasons. Under a discovery rule, the statute of limitations typically begins to run on the date the plaintiff knows of her *injury*, even if that is before the plaintiff knows the other elements of a legal claim exist.[28] As I have explained, however, the victim of pay discrimination may know that she is paid less than co-workers long before she knows or can prove that the disparity is the result of *discrimination*. The typical discovery rule will accordingly bar a large percentage of meritorious pay discrimination claims. Moreover, by asking when the plaintiff reasonably should have known of her injury, the discovery rule essentially places the victim's conduct on trial and detracts attention from the central issue in the case—whether the employer discriminated. Experience with workplace harassment doctrine suggests that courts are quite unreliable in determining whether an employee acted "reasonably" in responding to discrimination.[29]

The Fair Pay Restoration Act avoids these problems. In place of the uncertainties and limitations of the equitable tolling doctrine and the discovery rule, the bill adopts a very simple principle: Each and every paycheck that is infected by an employer's discriminatory pay decision is a new violation of title VII. That is the rule that the overwhelming majority of circuits applied before the Supreme Court's decision in *Ledbetter*, and it is a rule that takes account of the dynamics of pay discrimination. The alternatives proposed by opponents of the bill would bar many meritorious pay discrimination claims, and they would do so without meaningfully advancing the employer's interest in repose.

It bears emphasis that there is nothing in the Supreme Court's *Ledbetter* decision that even purports to address the policy questions that are before the committee. In his majority opinion, Justice Alito expressly refused to consider whether it makes sense, as a matter of policy, to apply a paycheck accrual rule to claims of pay discrimination. He explained that the Court was "not in a position to evaluate Ledbetter's policy arguments" but instead must "apply the statute as written."[30] As Justice Ginsburg's dissent demonstrated, there is ample reason to believe that the Court was wrong in its interpretation of what "the statute as written" said.[31] But that is not the question before this committee. The question before this committee is whether the *Ledbetter* decision is consistent with the policy that underlies the legal prohibitions on pay discrimination. For the reasons I have explained, it is not.

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[25] *Wallace* v. *Kato*, 127 S. Ct. 1091, 1100 (2007).

[26] *Morgan,* 536 U.S. at 113.

[27] *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005).

[28] *See Rotella* v. *Wood*, 528 U.S. 549, 555 (2000) ("[I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock.").

[29] *See* David Sherwyn, *et al., Don't Train Your Employees and Cancel Your "1–800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 Fordham L. Rev. 1265, 1266–1267 (2001) (finding that "courts often find that the complaining employee acted 'unreasonably' as a matter of law, even when such a determination may merit a more thorough review of the facts of the case"); *see also* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Cal. L. Rev. 1, 14 n.67 (2006) (collecting studies reaching the same conclusion).

[30] *Ledbetter*, 127 S. Ct. at 2177.

[31] *See id.* at 2178–2188 (Ginsburg, J., dissenting).

The *Ledbetter* decision makes the prohibitions on pay discrimination exceedingly hard to enforce—not just in the sex discrimination context, but also in the contexts of race, religion, age, and disability discrimination—and its holding is unnecessary to protect employers against stale claims. By adopting the paycheck accrual rule, which was the law in most of the country for many years before *Ledbetter*, the Fair Pay Restoration Act properly balances the interest in employer repose against the imperative to enforce the laws that prohibit pay discrimination.

Thank you.

The CHAIRMAN. Thank you very much, Professor.

Mr. Dreiband.

STATEMENT OF ERIC S. DREIBAND, AKIN GUMP STRAUSS HAUER & FELD LLP

Mr. DREIBAND. Good morning, Chairman Kennedy——

The CHAIRMAN. Good morning.

Mr. DREIBAND [continuing]. Senator Isakson, and members of the committee. I thank you and the entire committee for affording me the privilege of testifying today. My name is Eric Dreiband, and I am a partner at the law firm of Akin Gump Strauss Hauer & Feld here in Washington, DC.

I am here today at your invitation, of course, to speak about the Fair Pay Restoration Act. I do not believe the bill would advance the public interest. Since 1964, when Congress created the Equal Employment Opportunity Commission and established the requirement that alleged victims file a charge of discrimination within precisely defined time limits, millions of Americans have participated in the EEOC's process and obtained redress for their grievances.

The charge-filing periods and other similar requirements have made it possible for the EEOC to conduct timely investigations and for State and local governments, unions, employers, and others to take prompt action to investigate and respond to charges. The Fair Pay Restoration Act would alter this process apparently because the perception that the U.S. Supreme Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Company* departed from long-established legal standards. It did not.

The U.S. Supreme Court first articulated the doctrine that led to the *Ledbetter* decision in 1977, when it decided *United Airlines* v. *Evans*. In that case, the court explained that a discriminatory act which is not made the basis for a timely charge has no present legal consequences. The court reaffirmed the Evans decision in 1980, 1986, 1989, 2002 and, more recently, in 2007, when it decided the *Ledbetter* case.

Furthermore, the Fair Pay Restoration Act appears premised on the notion that the law sanctions hidden discrimination or that somehow the decision in *Ledbetter* does so. This premise is not correct. The law currently provides a remedy for any such hidden or concealed discrimination, and the *Ledbetter* case did not change this at all.

Both the U.S. Supreme Court and the EEOC recognize that the statutory time limits may be extended or tolled when a person who alleges unlawful discrimination was unaware of the EEO process or of important facts that should have led him or her to suspect discrimination. This is known as equitable tolling.

The doctrine of equitable estoppel also permits the charge-filing period to be extended when, for example, an employer conceals or misrepresents facts that would support a charge of discrimination. The Congress could codify these standards and in so doing would preserve the EEOC's enforcement process and establish a clear, congressionally mandated rule for when the EEOC's charge-filing period ought to be extended.

Of course, the court in the *Ledbetter* case did not extend the charge-filing period, and the record in that case establishes why. According to the record in the case, in 1982, Ms. Ledbetter filed a charge in which she alleged that her supervisor had sexually harassed her. Goodyear and Ms. Ledbetter promptly settled the dispute.

More than 15 years later, during the litigation, Ms. Ledbetter testified that, "Different people that I worked for along the way had always told me that my pay was extremely low." She explained that she knew by 1992 that her pay was lower than her peers and that she learned about the amount of difference about 1994 and 1995.

She testified that she spoke with her supervisor about this in 1995. "I told him at that time that I knew definitely that they were all making $1,000 at least more per month than I was and that I would like to get in line."

Ms. Ledbetter, however, did not file a charge in 1992, 1993, 1994, 1995, 1996, or 1997. Instead, she waited until July 21, 1998, to file a charge. A timely charge would have enabled the EEOC and Goodyear to investigate the allegations and to resolve the matter promptly. The delay had real consequences. Ms. Ledbetter's case dragged on for nearly 10 years, and one of the defendant's most important witnesses died before the trial.

The Fair Pay Restoration Act would also sweep away the EEOC's time-tested enforcement scheme because it would remove completely any requirement that alleged discrimination be dealt with swiftly. By eviscerating the charge-filing period, the Fair Pay Restoration Act would require the EEOC to conduct investigations into events that happened decades before anyone filed a charge despite the absence of records. Witnesses' memories will be faded. Some witnesses will be missing. Others, as in the *Ledbetter* case, may be dead.

The Fair Pay Restoration Act would also require anyone accused of discrimination to make a dreadful choice—preserve records in perpetuity or lose the ability to mount a defense to a charge that challenges decades-old employment decisions. The cost of perpetual recordkeeping would be enormous and, in the case of public employers, would add to the taxpayers' burden.

Furthermore, the bill repeatedly invokes the phrase discriminatory compensation decision or other practice" and would define an unlawful employment practice to occur any time an individual is affected by application of such practice. The bill is, therefore, not limited to compensation or anything else. It also contains no time limit for any award of compensatory and punitive damages.

The bill likewise contains no time limit for back pay and liquidated damages that may be recovered under the Age Discrimination in Employment Act. If enacted, then the Fair Pay Restoration

Act would subject State and local governments, unions, employers, and others to potentially unlimited compensatory and punitive damages, back pay, and liquidated damages.

Finally, the Fair Pay Restoration Act mentions pension benefits, but it does not, however, exclude or exempt pension benefits. If enacted, therefore, it may be construed to apply to pension benefits, and this may have the effect of exposing pension funds to unanticipated and potentially staggering liability that could risk the retirement security of many Americans.

I look forward to your questions. Thank you.

[The prepared statement of Mr. Dreiband follows:]

PREPARED STATEMENT OF ERIC S. DREIBAND

Good morning Chairman Kennedy, Ranking Member Enzi, and members of the committee. I thank you and the entire committee for affording me the privilege of testifying today. My name is Eric Dreiband, and I am a partner at the law firm of Akin Gump Strauss Hauer & Feld LLP here in Washington, DC.

Prior to joining Akin Gump in September 2005, I served as the General Counsel of the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission"). As EEOC General Counsel, I directed the Federal Government's litigation of the Federal employment discrimination laws. I also managed approximately 300 attorneys and a national litigation docket of approximately 500 cases.

Title VII of the Civil Rights Act of 1964 created the EEOC. Title VII also made unlawful discrimination in employment on the basis of race, color, religion, sex, and national origin. EEOC enforcement authority over title VII is plenary, with the exception of litigation against public employers. The employment protections of the Americans with Disabilities Act incorporate title VII's enforcement scheme, and so the EEOC also enforces that act. The EEOC enforces two other statutes: the Equal Pay Act, which prohibits sex-based wage discrimination, and the Age Discrimination in Employment Act. Collectively, then, Congress has vested the EEOC with enforcement authority over a broad array of employment discrimination laws, including laws that protect American workers against discrimination on the basis of race, color, religion, sex, national origin, disability, and age.

During my tenure at the EEOC, the Commission continued its tradition of aggressive enforcement. We obtained relief for thousands of victims of discrimination, and the EEOC's litigation program recovered more money for victims of discrimination than at any other time in the Commission's history. The Commission settled thousands of charges of discrimination, filed hundreds of lawsuits every year, and recovered, literally, hundreds of millions of dollars for victims of discrimination.

I am here today, at your invitation, to speak about the proposed Fair Pay Restoration Act. I do not believe that the bill would advance the public interest. The bill assumes that the decision by the Supreme Court of the United States in *Ledbetter* v. *Goodyear Tire & Rubber Company* "impairs statutory protections" that "have been bedrock principles of American law for decades."[1] This assumption is not correct. The *Ledbetter* decision is entirely consistent with more than three decades of Supreme Court decisions. Furthermore, the bill appears inspired by the mistaken notion that, after *Ledbetter*, the law currently provides no remedy for concealed discrimination—what the bill describes as "the reality of wage discrimination."[2] Finally, the bill is not limited to compensation and, if enacted in its present form, will create unanticipated and potentially ruinous liability for State and local governments, unions, employers, and others covered by the Federal antidiscrimination laws. The bill may also subject pension funds to unanticipated liability that may jeopardize the integrity of those funds and risk the retirement security of pension fund beneficiaries.

As an alternative to the Fair Pay Restoration Act, Congress could codify the EEOC's Compliance Manual standard for equitable tolling and equitable estoppel. This would preserve the EEOC's enforcement process and establish a clear, congressionally mandated rule for when the EEOC's charge-filing period ought to be extended.

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[1] Fair Pay Restoration Act, S. 1843, 110th Cong. § 2 (2007).
[2] *Id.*

I. HISTORY AND PURPOSE OF THE CHARGE-FILING PERIOD

When Congress enacted title VII in 1964, it determined that cooperation and voluntary compliance were the preferred means for achieving equal employment opportunities and eliminating unlawful discrimination.[3] To accomplish this legislative goal, Congress created the EEOC and established an administrative procedure that required the EEOC to settle disputes through conference, conciliation, and persuasion. Congress also required that a charge of discrimination be filed within a precisely-defined charge-filing period as a prerequisite to the EEOC's administrative process and any subsequent lawsuit.[4]

In 1972, Congress amended title VII to strengthen the EEOC's ability to enforce the law. Congress retained the charge-filing requirement and the charge-filing period and added a new requirement: Congress required the EEOC to provide those accused of discrimination with prompt notice of the charges against them.[5] Congress authorized the EEOC to sue private employers in Federal court, but the Commission could do so *only* if it failed to resolve disputes through informal methods of conference, conciliation, and persuasion.[6]

Title VII thus established the multi-step, integrated enforcement procedure that survives to present day. In 1967, Congress enacted the Age Discrimination in Employment Act, and that law contains the same charge-filing period and substantially the same investigation and conciliation process as title VII. In 1990, Congress incorporated title VII's enforcement scheme into the employment protections of the Americans with Disabilities Act.[7] Accordingly, then, the EEOC administers the following four-step process.

1. *The Charge.* The EEOC receives charges of discrimination from aggrieved individuals, from persons who file charges on behalf of aggrieved individuals, and from EEOC Commissioners.[8] In a State that has an agency with the authority to grant or seek relief for an alleged unlawful practice, an individual who initially files a charge with that agency must file the charge with the EEOC within 300 days of the employment practice. In all other States, the charge must be filed within 180 days.[9] A charge places the EEOC on notice that a named respondent may have violated the Federal antidiscrimination laws.[10]

2. *Notice Requirement.* The Commission must "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on [the accused] . . . within 10 days" of the filing of the charge.[11]

> "[T]he principal objective of [this] provision seems to have been to provide employers fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation by the EEOC." [12]

The 10-day notice provision, like the charge-filing period, fosters "the importance that the concept of due process plays in the American ideal of justice" and "insure[s] that fairness and due process are part of the enforcement scheme." [13]

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[3] *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 77–78 (1984); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367–68 (1977) (quoting *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36, 44 (1974)).

[4] The legislative history of title VII explains: "The purpose of [this legislation] is to achieve a peaceful and voluntary settlement of the persistent problems of racial and religious discrimination or segregation[.] . . . In brief, the measure speaks on the problem solving level with primary reliance placed on voluntary and local solutions. Only when these efforts break down would the residual right of enforcement come into play." S. Rep. No. 88–872, *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2355–56.

[5] 42 U.S.C. § 2000e–5(b).

[6] *Id.; EEOC* v. *Shell Oil Co.*, 466 U.S. at 78 (citing *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982)).

[7] Title VII's "powers, remedies, and procedures" apply to the employment protections of the Americans with Disabilities Act. 42 U.S.C. § 12117(a). The Age Discrimination in Employment Act similarly adopts the charge-filing requirement, contains the same 180- and 300-day charge-filing periods as title VII, obligates the EEOC to "make investigations and require the keeping of records," to eliminate discriminatory practices through "informal methods of conciliation, conference, and persuasion," requires prompt notice to persons named in charges, and authorizes the Commission to conduct litigation. 29 U.S.C. § 626(a)–(d).

[8] 42 U.S.C. § 2000e–5(b); 29 U.S.C. § 626(d).

[9] 42 U.S.C. § 2000e–5(e)(1); 29 U.S.C. § 626(d); *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 109 (2002).

[10] *EEOC* v. *Shell Oil Co.*, 466 U.S. at 68 (1984).

[11] 42 U.S.C. § 2000e–5(b).

[12] *EEOC* v. *Shell Oil Co.*, 466 U.S. at 74.

[13] S. Rep. No. 92–415, at 25 (1971), quoted in *EEOC* v. *Shell Oil Co.*, 466 U.S. at 75 n.31. *See also id.* at 75 n.30 ("Thus, the section-by-section analysis of S. 2515, from which the notice of requirement was derived, explained the provision as follows: 'In order to accord respondents fair notice that charges are pending against them, this subsection provides that the Commission

3. *EEOC Investigation.* After the EEOC receives a charge, and provides notice to the accused, the EEOC undertakes an investigation into the allegations contained in the charge. The Commission may inspect and copy "any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [title VII] and is relevant to the charge under investigation."[14] The Commission may also issue administrative subpoenas and seek judicial enforcement of those subpoenas.[15]

4. *Disposition of a Charge.* If the Commission determines that there is "reasonable cause" to believe that a respondent violated an EEOC-enforced law, the EEOC may issue a "probable cause" finding. The Commission then must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[16] The EEOC may file suit only if these efforts fail.[17]

If the EEOC finds that no "reasonable cause" exists, it must promptly inform the accused and the person, if any, who claims to be aggrieved. The aggrieved person may then file a private action in Federal court against the accused.[18]

The EEOC's enforcement scheme has served the Nation well. Since 1964, millions of American workers have participated in the EEOC's process and obtained redress for their grievances. The charge-filing requirement, charge-filing periods, and notification requirements have made it possible for the EEOC to conduct timely investigations, and for State and local governments, unions, employers, and others to take prompt action to investigate and respond to charges.

II. LEDBETTER V. GOODYEAR TIRE & RUBBER COMPANY IS CONSISTENT WITH THREE DECADES OF SUPREME COURT DECISIONS

The Supreme Court first articulated the doctrine that led to *Ledbetter* in 1977, when it decided *United Air Lines, Inc.* v. *Evans*.[19] In that case, flight attendant Carolyn Evans married in 1968 and lost her job because her employer, United Air Lines, did not permit married women to work as flight attendants. United later abandoned its no-marriage rule and, in February 1972, rehired Ms. Evans. Ms. Evans filed a charge discrimination and alleged that United violated title VII because it refused to credit her with seniority for any period prior to February 1972. The Court acknowledged that the seniority system gave "present effect to a past act of discrimination[,]" but determined that there was no discriminatory intent within the charging period.[20] The Court explained:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.[21]

The Court re-affirmed Evans 3 years later, in 1980, when it decided *Delaware State College* v. *Ricks*.[22] In that case, Professor Columbus Ricks alleged that his employer, Delaware State College, discriminated against him because of his national origin when it denied him tenure, offered him a 1-year "terminal" contract, and terminated his employment at the end of that contract. The Court observed that "termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure," and held that the alleged discrimination occurred when the college denied Mr. Ricks tenure.[23] Because Mr. Ricks waited to file his charge until after the charge-filing period expired—as measured by the time that lapsed between the decision to deny Mr. Ricks tenure and the date of his charge—Mr. Ricks's claim was time-barred. The Court rejected his argument that the loss of his job should transform his last day of work into a discriminatory act.[24] The Court reasoned:

> [T]he only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and commu-

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must serve a notice of the charge on the respondent within 10 days. . . . '" (quoting 118 Cong. Rec. 4941 (1972))).

[14] 42 U.S.C. § 2000e–8(a).
[15] *Id.* § 2000e–9.
[16] *Id.* § 2000e–5(b).
[17] *Id.* § 2000e–5(f)(1).
[18] *Id.*
[19] 431 U.S. 553 (1977).
[20] *Id.* at 558.
[21] *Id.*
[22] 449 U.S. 250 (1980).
[23] *Id.* at 257–58.
[24] *Id. at 258.*

> nicated to Ricks. That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later[,]. . . . "The proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful."[25]

The Court in *Ricks* noted that "limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past."[26]

The Court re-affirmed the *Evans* line of cases in 1986 when it decided *Bazemore* v. *Friday*.[27] In that case, an employer maintained a segregated work force and a discriminatory pay structure that pre-dated title VII. The defendant did not eliminate the discriminatory pay structure after it became covered by title VII. Instead, the defendant merged the two race-based "branches" of workers, then continued to utilize its racist pay structure—that is, it continued intentionally to pay black employees less than white employees.[28] The Court concluded that the defendant violated title VII:

> A pattern or practice that would have constituted a violation of title VII, but for the fact that the statute had not yet become effective, became a violation upon title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.[29]

The Court explained that its decision was entirely consistent with *Evans* and its progeny. The Court reasoned that *Evans* "support[ed] the result" in *Bazemore* because Ms. Evans, unlike the *Bazemore* plaintiffs, "made no allegation that [United's] seniority system itself was intentionally designed to discriminate."[30]

More recently, in 2002, the Court decided *National Railroad Passenger Corporation* v. *Morgan*.[31] In that case, Abner Morgan, Jr., a black male, alleged that his employer subjected him to discrete discriminatory and retaliatory acts and a racially hostile work environment throughout his employment.

The Court in *Morgan* determined that discrete acts that fell outside the charging period were time-barred. So-called "discrete acts," the Court said, include "termination, failure to promote, denial of transfer, [and] refusal to hire."[32] The Court explained that a discrete discriminatory act within the charge-filing period does not make timely "related" discriminatory acts that fall outside the time period.[33]

The Court distinguished Mr. Morgan's hostile environment claims from his "discrete act" claims. The Court concluded that if "an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."[34]

Evans, Ricks, Bazemore, and *Morgan* are entirely consistent with the Court's decision in *Ledbetter*.

In *Ledbetter*, the plaintiff, Lilly Ledbetter, worked for Goodyear from 1979 until she retired in 1998. Ms. Ledbetter claimed that throughout this period, her supervisors gave her poor evaluations because of her sex, and that, as a result, her pay did not increase as much as it would have if she had been evaluated fairly.[35]

Ms. Ledbetter sued Goodyear after she retired, and the U.S. Court of Appeals for the Eleventh Circuit reversed a jury verdict in her favor.[36] Ms. Ledbetter appealed and raised the following issue:

> Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.[37]

Ms. Ledbetter did not claim that the relevant Goodyear decisionmakers acted with discriminatory intent during the charge-filing period. Instead, she asserted "that the

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[25] *Id.* (quoting *Abramson* v. *Univ. of Haw.*, 594 F.2d 202, 209 (1979)).
[26] *Id.* at 256–57.
[27] 478 U.S. 385 (1986).
[28] *Id.* at 397.
[29] *Id.* at 395.
[30] *Id.* at 396 n.6.
[31] 536 U.S. 101 (2002).
[32] *Id.* at 114.
[33] *Id.* at 113.
[34] *Id.* at 117.
[35] *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2165–66 (2007).
[36] *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 421 F.3d 1169 (11th Cir. 2005).
[37] *Ledbetter*, 127 S. Ct. at 2166.

paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner *prior to* the EEOC charging period."[38]

The Court applied *Evans* and its progeny and concluded that Ms. Ledbetter's challenge to pay decisions that pre-dated the charge-filing period was time-barred. The Court explained that in discrimination cases, "the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time."[39] The Court observed that "*Bazemore* stands for the proposition that an employer violates title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure."[40] Because Goodyear's pay system was facially nondiscriminatory and neutrally applied, a new title VII violation did not occur every time a paycheck issued.[41]

III. DISCRIMINATION VICTIMS MAY ASSERT CLAIMS THAT PRE-DATE THE CHARGE-FILING PERIOD

The proposed Fair Pay Restoration Act appears premised on the notion that *Ledbetter* was wrongly decided and that existing law sanctions hidden discrimination. This notion apparently finds its inspiration in Justice Ruth Bader Ginsburg's dissent in *Ledbetter*. According to the dissent, wage discrimination is often "concealed," and so EEOC charge-filing periods should not apply.[42]

But, existing law provides a remedy for any such hidden or concealed discrimination. In fact, for decades, both the Supreme Court of the United States and the EEOC have recognized that EEOC charge-filing periods can be extended or "tolled" in such circumstances.

Twenty-five years before *Ledbetter*, in 1982, the Court decided *Zipes* v. *Trans World Airlines, Inc*.[43] In that case, the Court explained that "filing a timely charge of discrimination is not a jurisdictional prerequisite to suit in Federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."[44] The Court also explained that "equitable modification for failing to file within the time period will be available to plaintiffs under [title VII]."[45] Twenty years later, in *Morgan*, the Court reaffirmed *Zipes* and held that "[t]he application of equitable doctrines . . . may either limit or toll the time period within which an employee must file a charge."[46] *Ledbetter* did not change any of this.

Like *Zipes* and *Morgan*, the EEOC maintains that the charge-filing period "is subject to equitable tolling, equitable estoppel, and waiver. Thus, there are circumstances under which the charge should be accepted as timely even though the alleged violation transpired outside the limitations period."[47]

According to the EEOC's Compliance Manual, and consistent with *Zipes* and *Morgan*, the statutory time limits may be extended, or "tolled," for equitable reasons when a person who alleges unlawful discrimination "was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination."[48]

Grounds for equitable tolling include: (1) no reason to suspect discrimination at the time of the disputed event; (2) mental incapacity; (3) misleading information or mishandling of a charge by the EEOC or State fair employment practices agency; and (4) timely filing in the wrong forum. The EEOC explains:

> Sometimes, a charging party will be unaware of a possible EEO claim at the time of the alleged violation. Under such circumstances, the filing period should be tolled until the individual has, or should have, enough information to support a reasonable suspicion of discrimination.[49]

The EEOC Compliance Manual provides the following examples:

Example 1.—On March 15, 1997, CP, an African-American man, was notified by Respondent that he was not hired for an entry-level accountant position. In Feb-

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[38] *Id.* at 2167 (citing Brief for Petitioner at 22).
[39] *Id.* at 2171.
[40] *Id.* at 2174.
[41] *Id.*
[42] *Id.* at 2179, 2182.
[43] 455 U.S. 385 (1982).
[44] *Id.* at 393.
[45] *Id.* at 395 n.11 (citing legislative history to the 1978 amendments to the Age Discrimination in Employment Act, H.R. REP. NO. 95–950, at 12 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 504, 534).
[46] *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 105 (2002).
[47] EEOC Compliance Manual §2 Threshold Issues, Number 915.003 (May 12, 2000) *available at http://www.eeoc.gov/policy/docs/threshold.html*.
[48] *Id.*
[49] *Id.*

ruary 1998, more than 300 days later, CP learned that the selectee, a white woman, was substantially less qualified for the position than CP. CP filed a charge of race and sex discrimination on March 15, 1998. The charge would be treated as timely because he filed promptly after acquiring information that led him to suspect discrimination.

Example 2.—On March 1, 1997, CP, a 55-year-old woman, learned that she was denied a promotion in the Office of Research and Development, and that the position was awarded to a 50-year-old man with similar qualifications. She subsequently applied for another promotion opportunity in the same office, and was notified in January 1998 that the position was awarded to a 35-year-old woman with similar qualifications. The second rejection prompted CP to suspect that she was being discriminated against because she was an older woman, and she filed a charge 5 weeks later, in February 1998. Tolling should apply, and she can challenge both promotion denials.[50]

Like the doctrine of equitable tolling, the doctrine of equitable estoppel also permits the charge-filing period to be extended. This doctrine applies when any delay associated with the filing of a charge is attributable to active misconduct by an employer, union, or other respondent that is intended to prevent timely filing. For example, the charge-filing period can be extended when an employer or union conceals or misrepresents facts that would support a charge of discrimination. The charge-filing period may also be tolled or extended when an employer or union lulls the alleged victim "into not filing a charge by giving assurances that relief would be provided through internal procedures."[51]

Additionally, the Federal antidiscrimination laws and EEOC regulations require employers to post notices about Federal antidiscrimination protections, including the timeframes for filing a charge.[52] According to the EEOC, when an employer fails to post notices that explain these protections and processes, and an individual who alleges unlawful discrimination was not otherwise aware of his or her rights, the charge-filing period can be extended or tolled. The EEOC provides the following example:

Example 3.—CP was sexually harassed by her supervisor, leading to her resignation on March 1, 1997. CP contacted Respondent's human resources department regarding the alleged violations, and was told that Respondent would conduct an internal review. Respondent said that appropriate relief would be provided after the completion of the investigation and told CP that she did not have to file an EEOC charge until the internal investigation was complete. On February 1, 1998, Respondent notified CP that the investigation was complete and that it had concluded that CP was not sexually harassed. CP was dissatisfied with the results of the investigation and filed a charge on March 1, 1998. Under these circumstances, the timeframe should be extended, and CP's charge accepted as timely.[53]

The Federal courts routinely follow the EEOC's approach.[54]

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[50] *Id.*

[51] *Id.*

[52] 42 U.S.C. § 2000e–10; 29 U.S.C. § 627; 29 CFR § 1601.30; 29 CFR § 1627.10.

[53] EEOC Compliance Manual, § 2.

[54] *See, e.g., Frazier* v. *Delco Electronics Corp.*, 263 F.3d 663, 666 (7th Cir. 2001) ("[w]hen . . . the victim of harassment is reasonably induced by the defendant or others to believe that the situation has been or is in reasonable course of being resolved, the statute of limitations is tolled"); *Currier* v. *Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998) ("an employer's affirmatively misleading statements that a grievance will be resolved *in the employee's favor* can establish an equitable estoppel" (emphasis in original)); *EEOC* v. *Ky. State Police Dep't*, 80 F.3d 1086, 1096 (6th Cir. 1996) (equitable tolling proper where employer failed to post required ADEA notices and employee was unaware of his rights); *Dring* v. *McDonnell Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995) (equitable estoppel appropriate where employer lulls or tricks plaintiff into letting the EEOC discrimination filing deadline pass); *Anderson* v. *Unisys Corp.*, 47 F.3d 302, 307 (8th Cir. 1995) (misleading letter from Minnesota Department of Human Resources justified equitable tolling); *Oshiver* v. *Levin, Fishbein, Sedran, & Berman*, 38 F.3d 1380, 1387, 1392 (3d Cir. 1994) (automatic extension of length of tolling period justified where employer's deceptive conduct caused untimeliness); *Rhodes* v. *Guiberson Oil Tools Div.*, 927 F.2d 876, 880–81 (5th Cir. 1991) (timeframe should be extended under equitable estoppel theory because employer misrepresented facts about discharge by indicating that employee was being terminated due to reduction in force and would potentially be rehired, and failed to disclose that it was replacing him with younger individual at lower salary); *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450–51 (7th Cir. 1990) (terminated older worker who had no reason to suspect discrimination until younger worker replaced him given a reasonable period of time to file charge); *Felty* v. *Graves-Humphreys Co.*, 785 F.2d 516, 520 (4th Cir. 1986) (limitations period may be extended because employer's misconduct caused employee to delay filing a discrimination complaint); *Leake* v. *Univ. of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979) (filing period should be extended because plaintiff and defendant agreed not to use time

IV. TOLLING DID NOT APPLY IN LEDBETTER

The Court in *Ledbetter* did not consider whether Ms. Ledbetter's charge-filing period should be extended, nor did Ms. Ledbetter argue that the Court should extend the charge-filing period. The record in the case establishes why.

In 1982, Ms. Ledbetter filed a charge of discrimination in which she alleged that her supervisor had sexually harassed her.[55] Goodyear and Ms. Ledbetter settled the dispute without litigation shortly after Ms. Ledbetter filed her charge.[56]

Years later, during litigation, Ms. Ledbetter testified that "[d]ifferent people that I worked for along the way had always told me that my pay was extremely low."[57] She explained that she knew by 1992 that her pay was lower than her peers and that she learned about the amount of the difference "probably about 1994 and 1995."[58] In 1995, she spoke with her supervisor about her pay: "I told him at that time that I knew definitely that they were all making a thousand at least more per month than I was and that I would like to get in line."[59]

Ms. Ledbetter did not file a charge in 1992, 1993, 1994, 1995, 1996, or 1997. Instead, she waited until July 21, 1998 to file the charge that gave rise to the Supreme Court's decision. Her 1998 charge sought to challenge each pay decision that occurred during her 19 years of employment at Goodyear.

Because Ms. Ledbetter "knew definitely" that her pay was lower than her peers several years before she filed a charge, she could not and did not assert that the charge-filing period should be extended. The Court therefore declined to consider whether to extend the charge-filing period.[60]

A timely charge would have enabled the EEOC and Goodyear to investigate the allegations and, as occurred when Ms. Ledbetter filed her 1982 charge, to resolve the matter promptly. The delay had real consequences: Ms. Ledbetter's case dragged on for nearly 10 years, and the supervisor accused of sexual harassment in 1982, and who later evaluated Ms. Ledbetter's work and affected her pay, was dead by the time the case went to trial.[61]

V. THE PROPOSED FAIR PAY RESTORATION ACT WOULD NOT BE IN THE BEST INTEREST OF THE AMERICAN PEOPLE

The Fair Pay Restoration Act would require the EEOC to investigate events that happened years or decades before anyone files a charge, would force respondents to implement incredibly costly recordkeeping or lose the ability to mount a defense, and would create unanticipated and potentially limitless monetary penalties for State and local governments, unions, employers, and others covered by the Federal antidiscrimination laws. The bill may also create unforeseen and unanticipated liability for pension funds.

1. *EEOC Process.* For more than four decades, the EEOC has used its authority to receive and investigate charges of discrimination, and to settle disputes through conference, conciliation, and persuasion. The EEOC's ability to do so has come about because the charge-filing period and notice requirements mandate prompt investigations, prompt responses, and prompt resolutions of charges. The Fair Pay Restoration Act would sweep away this time-tested enforcement scheme because it would

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spent to investigate complaint to prejudice complainant with respect to time limitations); *Jones* v. *Bernanke*, 493 F. Supp. 2d 18, 25–26 (D.D.C. 2007) (employee's claims not time-barred where employer allegedly misled and dissuaded him from contacting the EEOC by falsely promising future promotions); *Duhart* v. *Fry*, 957 F.Supp. 1478, 1486 (N.D. Ill. 1997) (African-American employee did not "discover his injury" for filing period purposes until he learned of promotions of allegedly less qualified white employees); *Bracey* v. *Helene Curtis, Inc.*, 780 F. Supp. 568, 570 (N.D. Ill. 1992) (equitable tolling appropriate where EEOC letter misstated filing deadline); *Sarsha* v. *Sears, Roebuck & Co.*, 747 F. Supp. 454, 456 (N.D. Ill. 1990) (tolling appropriate where State agency improperly rejected charge on jurisdictional grounds).

[55] *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007), Joint Appendix at 103–09 [hereinafter "J.A. at____"].

[56] J.A. at 42–43.

[57] J.A. at 233.

[58] J.A. at 233.

[59] J.A. at 231–32.

[60] *Ledbetter*, 127 S. Ct. at 2177 n.10.

[61] *See Ledbetter*, 127 S. Ct. at 2171 n.4 ("Ledbetter's claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor, who, Ledbetter testified, retaliated against her when she rejected his sexual advances during the early 1980's, and did so again in the mid-1990's when he falsified deficiency reports about her work. His misconduct, Ledbetter argues, was 'a principal basis for [her] performance evaluation in 1997.' Brief for Petitioner 6; see also *id.*, at 5–6, 8, 11 (stressing the same supervisor's misconduct). Yet, by the time of trial, this supervisor had died and therefore could not testify. A timely charge might have permitted his evidence to be weighed contemporaneously."). *Accord* J.A. at 39–46, 77–82.

remove, completely, any requirement that alleged discrimination be dealt with swiftly. By eviscerating the charge-filing period, the Fair Pay Restoration Act would require the EEOC to conduct investigations into events that happened decades before anyone filed a charge, despite the absence of records. Witnesses' memories will be faded. Some witnesses may be missing. Others, as in *Ledbetter*, may be dead.

2. *Recordkeeping.* EEOC regulations require State and local governments, unions, employers, and others to preserve records for up to 2 years "from the date of the making of the record or the personnel action involved, whichever occurs later."[62] The Fair Pay Restoration Act would require any entity accused of discrimination to make a dreadful choice: preserve records in perpetuity or lose the ability to defend against a charge that challenges decades-old employment decisions. The cost of perpetual recordkeeping would be enormous, and, in the case of public employers, would add to the taxpayers' burden. The alternative is not better: a decision to forego such recordkeeping would render respondents incapable of responding. And, even if such records exist, the problem of faded memories and missing witnesses would invariably accompany any challenge to long-ago personnel decisions.

3. *Limitless monetary penalties.* The Fair Pay Restoration Act is not limited to pay. Rather, it repeatedly invokes the phrase "discriminatory compensation decision or other practice" and would define an "unlawful employment practice" to occur anytime an "individual is affected by application of" such a practice.[63] The bill contains no time limit for any award of compensatory and punitive damages. The bill likewise contains no time limit for back pay and liquidated damages that may be recovered under the Age Discrimination in Employment Act.[64] If enacted, then, the Fair Pay Restoration Act would subject State and local governments, unions, employers, and others to potentially unlimited compensatory and punitive damages, back pay, and liquidated damages.

4. *Pension benefits.* The Fair Pay Restoration Act contains a provision about pension benefits: "Nothing in this Act is intended to change the law in effect as of May 28, 2007, concerning the treatment of when pension benefits are considered paid."[65] May 28, 2007 is the day before the Supreme Court announced its decision in *Ledbetter*. By citing this date, the bill seems to assume that *Ledbetter* changed existing law about pension benefits. But, *Ledbetter* did not even mention pension benefits, and it did not change the law about pension benefits or anything else. Furthermore, the remaining sections of the bill do not exclude or exempt pension benefits, so the bill may be construed to apply to pension benefits. This may have the affect of exposing pension funds to unanticipated and potentially staggering liability.

I look forward to your questions. Thank you.

The CHAIRMAN. Thank you very much. Let me start off with Mr. Bagenstos. What is your reaction to this perpetual bookkeeping, witnesses losing their memories and dying, all of the burdens that this is going to place on companies? What is your response to that?

Mr. BAGENSTOS. I think there are a couple of points there. I mean, No. 1, is the point that there are all sorts of reasons why even under the discovery rule, which the opponents of this bill are suggesting are equitable tolling, equitable estoppel, employers would be, as a practical matter, required to keep records for a very long time anyway. Because they don't know under discovery rule when a claim is going to be brought against them. Their recordkeeping requirements under the existing decision in *Amtrak* v. *Morgan*, the U.S. Supreme Court decided in 2002, right, there are various kinds of discrimination that form a continuing violation and can sweep in earlier acts, which have to be proven. And so, I think that the claim is overstated.

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[62] 29 CFR § 1602.14. Title VII and Americans with Disabilities Act regulations require personnel records to be maintained for 1 to 2 years. *See* 29 CFR §§ 1602.21 (apprenticeship programs); 1602.28 (labor organizations); 1602.31 (State and local governments); 1602.40 (schools); 1602.49 (institutions of higher learning). Other statutes enforced by EEOC contain similar recordkeeping and record-preservation requirements. *See, e.g.*, 29 CFR §§ 1620.32(c) (Equal Pay Act); 29 CFR §§ 1627.3 to 1627.5 (Age Discrimination in Employment Act).

[63] Fair Pay Restoration Act, S. 1843, 110th Cong. § 3(a) (2007).

[64] *Id.* § 3(b); 42 U.S.C. § 1981a (compensatory and punitive damages); 29 U.S.C. § 626(b) (back pay and liquidated damages).

[65] Fair Pay Restoration Act, S. 1843, 110th Cong. § 2(4) (2007).

It is also true that if there really is a problem for employers here, then in an individual case, they can go to a court and say because we were prejudiced by the delay and it was the employee's fault in waiting to bring the suit, we can get the case dismissed against us. That is the laches defense, which has been recognized by the U.S. Supreme Court many times.

So I think given the absence of any evidence that there was a problem for employers under the very, very broad agreement in the circuits that the paycheck accrual rule applied before *Ledbetter*, I don't think it is a significant issue.

The CHAIRMAN. Well, my own sense, it is in the interest of the person that has been aggrieved to bring the case quickly because they don't want to lose all the evidence as well. I mean, common sense would seem to me that rather than waiting and waiting and waiting to try and see that they may be able to recover, common sense would say if they find out that they have been aggrieved, they would like to get some resolution of it and get it done in a timely way. But I might be wrong.

Ms. Ledbetter, let me ask you why you have devoted so much time and effort and energy to working to pass this legislation. Why do you think it is so important?

Ms. LEDBETTER. I believe it is so important to the people out there. I first thought that this was just a southern problem because I was born and reared in Alabama and never lived anywhere else. But I have heard from women and minorities from all over the country. And since I have received so much publicity about the case, and my picture has been in different publications, I have been recognized. And people will reach out to me in department stores, grocery stores or wherever I might be, begging me to keep after this to try to help get it through.

And as you know, being the Chairman of this committee, this will not do me any good. I will not get anything from this. My time is over. But it is important for the minorities that are out there being treated like this in the workplace today.

If I might, could I clarify a couple of things that I have heard from——

The CHAIRMAN. Sure.

Ms. LEDBETTER. One thing, he referred to the 1982 case. That is exactly right. I had to file a case, a charge in 1982 because I was told by my direct supervisor that if I didn't sleep with him, I would not work at Goodyear. Well, at that time, I had two children in college. I filed—I called EEOC. I got a charge filed, protected my job. The agreement was that when I received the right to sue, I didn't want to sue. All I wanted was a job and be treated fair. So I took my old job back. They separated the two of us, and I went on with my career and that was it.

Then in late 1990s, at the end of my career, the same man became the auditor, not a supervisor. He was not my immediate supervisor, but he was an auditor in my department, where he persistently gave me and my department bad ratings, which were not true. And then I retired in 1998, after this case was filed with EEOC, and I had started on the way with it.

Then he retired much later, and he didn't die until about just prior to us going to trial. So if Goodyear had been interested in get-

ting his information, they knew that I had filed a charge in 1998, and they had a copy. They could have pursued that at that time. The man dying had nothing to do with them not being prepared.

The CHAIRMAN. Let me just—it has been claimed you raised the possibility of discrimination early as 1992. Did Goodyear stop discriminating against you 1992, 1993, 1994, 1995, 1996, 1997, or 1998?

Ms. LEDBETTER. No, sir. No, sir, it did not. In fact, and how this suspicion came about, we first-line supervisors were paid time and a half, double time, triple time. And in a factory like the tire plant in Gadsden, AL, we worked 12-hour shifts. There were four crews. And if my counterpart had a heart attack, that meant that I had to work my shift and his, too, or at least half of it. So that meant that I was working 12 hours, plus 6 hours of his.

And there were often many, many, many months that I worked 12-hour shifts, which I was required to be there an hour before shift and stay 2 hours or longer afterwards, and work his. And there was not much time left. But that is what I did.

So, when I heard some of my male peers bragging, that was splitting a shift of overtime with me, that they made something like $20,000, and I am looking at mine and mine is $4,000, I know there is something wrong. But I don't have any proof. I don't even know if what they are saying is true or not.

So what the gentleman on the end referred to, the suspicions in the early 1990s all the way up, and when I was evaluated, I continued to talk to my bosses. "What do I need to do?" I need to get my pay up because I know that my retirement, which is coming in a few years, is based on what I earn, as well as the Social Security. "What do I need to do? Where can I improve?" And I never received a response.

The last person that I worked for—I have lost my way in saying that I felt like I knew the men were making at least $1,000. But you can see how far out of the ballpark I was because when we started preparing for trial, I learned that most of them were making $5,000 a month. And you can imagine how much overtime—when it gets involved, and you are making that time and a half, double time, and triple time—how much money a person can lose.

The Goodyear retirement is based on what I earned. The contributory that I had signed up for was based on what I earned. The 401(k), I could put in 10 percent of what I earned and they would match it with 6 percent stock. Well, you can see how much money I could lose with that. And then when I signed up for retirement, Social Security is less.

But there is no way that I would have ever, ever waited. I would have wanted that time and a half and that overtime. And I would like to say to this committee, and I am sure these ladies recognize this, and many in the room, there is no way anybody wants to go through a trial and filing a charge. That is the last thing you want.

The CHAIRMAN. Senator Isakson.

Senator ISAKSON. Well, thank you, Mr. Chairman. As I said in my opening remarks, none of us, especially me, tolerates discrimination of any type. And I have great empathy for the testimony and the circumstances and the events through which Ms. Ledbetter has gone.

I do think, however, there are important issues in her case that ought to be a part of the record. And just in the interest of what you are trying to do here, and that is full discovery, I would ask unanimous consent that the record of that case and its appendices be entered in the record with this testimony.

The CHAIRMAN. So ordered.

[Editor's Note: Due to the high cost of printing, previously published material is not reprinted in the record. It can be found at: http://www.supremecourtus.gov/opinions/06pdf/05–1074.pdf. The joint appendix can be found at: http://suprem.lp.findlaw. com/supreme__court/briefs/05–1074/05–1074.mer.joint.app.pdf].

Senator ISAKSON. I don't want to get into re-debating that, but I have to ask the two attorneys a question. I just love it when two attorneys side by side are there. Both of you, by the way, did 5 minutes on the spot, just like you had internal clocks. I couldn't believe it.

But let me ask on the discovery rule, equitable tolling, or the estoppel—I am not an attorney, but I heard those three interchangeable phrases. I will start with you, Mr. Bagenstos. Why would that not have applied in the case of Ms. Ledbetter?

Mr. BAGENSTOS. Well, there are a couple of reasons why any of them might not be an effective way of prosecuting. I am sorry. Might not be an effective way of prosecuting pay discrimination claims. And so, the different rules have different requirements.

The discovery rule says when you knew or should have known of your injury, you had to file a lawsuit. A couple of problems with that. One problem with that is, of course, someone might know of their injury, but not know that they are being paid differently. It might be hard. But they might know they are being paid differently, but not know that it is because of discrimination. And there are lots of reasons why, with such little at stake, you wouldn't want to file a charge against your employer if you didn't know it was discriminatory.

Also if you look—and in my written testimony I have some, I cite some studies of this. If you look at the way lower courts have dealt with the question of what an employee knew or reasonably should have known or did or reasonably should have done, there is a great deal of emphasis in the cases on really trying the victim and working very hard to see did the victim pursue her rights in a very fast way?

As we see, though, it is just the normal practice. It is the normal case in pay discrimination cases that it is hard to know. It is hard to pursue quickly. It is hard to know it is discrimination. So I don't think that works very well.

Equitable estoppel, equitable tolling, the basic problems there are very similar, right? You have this long discussion of the employer's conduct after the alleged discrimination. That is taking time. That is taking money. That is taking resources away from trying the discrimination claim.

And I guess the ultimate thing I would say is I understand why employers might want a discovery rule or equitable estoppel or equitable tolling as opposed to the paycheck accrual rule because they might be able to knock out more cases. But it seems to me that the employers' legitimate interest here is an interest in repose. It is not

an interest in knocking out meritorious cases, and repose is better served by the predictable rule of paycheck accrual.

Senator ISAKSON. Mr. Dreiband.

Mr. DREIBAND. Well, I respectfully disagree with Professor Bagenstos.

Senator ISAKSON. Do it in about a minute, if you can.

[Laughter.]

Mr. DREIBAND. I will. The reason, if I understood, Senator, your question, that equitable tolling or any other discovery rule, theory, or anything like that did not apply in Ms. Ledbetter's case was because her lawyer said it wouldn't change the outcome of the case because the record in the case and the record as presented to the U.S. Supreme Court of the United States indicated that Ms. Ledbetter knew about the pay disparities several years before she filed the charge. And, in fact, the way they framed the question presented in the case, they assumed that all of the discriminatory decisions were made outside of the charge-filing period.

Senator ISAKSON. On that point, and this is the question I want to ask. And let us remove Ms. Ledbetter's case for a second and assume it was a case with the same circumstances except that there wasn't a record of prior notice. Would the discovery, equitable tolling, or the estoppel rule allow you to go beyond the 180 days and file the case?

Mr. DREIBAND. Potentially, yes. The EEOC standard, for example, says that any time a person who alleges unlawful discrimination "was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination, the charge-filing period can be extended." That is the standard EEOC has endorsed. It is the standard that several Federal courts have endorsed that I have cited in my written testimony.

Senator ISAKSON. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Mikulski.

Senator MIKULSKI. Thank you, Mr. Chairman. Ms. Ledbetter, and then Ms. Dorfman, the same question. Ms. Ledbetter, you have talked about the chronology from filing a case in 1982, 3 years after you went to work at Goodyear on a sexual harassment case at EEOC. And then later on, of course, the now-famous pay discrimination.

Could you tell me what you faced in doing this, just as a woman? Here you are, you are married. As you said, you had two kids in college. You had gone to work for a national, and even a global company. I bet it seemed pretty good in Alabama to have a job with Goodyear?

Ms. LEDBETTER. Yes, ma'am.

Senator MIKULSKI. There maybe weren't a lot of jobs in your area. But when you embarked upon this, what did it take to do that? And what did it cost you not only financially, but what were the consequences?

Were you ostracized by your employees? Were you further blacklisted? What happened? Because I think when we talk about frivolous lawsuits and the like that everybody is going to run to do this, could you tell us the cost, including the financial one? You were obviously a lady of modest means. You had significant family responsibilities. Could you share that with us?

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Ms. LEDBETTER. Yes, ma'am. I would be grateful to, and I do appreciate that opportunity. Because in 1982, the reason I filed that charge, and I had—from day one walking into that factory, there were lots of sexual discrimination remarks, treatment, and I was separated from the peers that I had. But in 1982, the boss that I had continually discussed my underwear, whether or not I had worn a bra to work that day or if we were going down to the motel that afternoon and that I would be his next woman.

Well, I tolerated all of that until he got sort of put out with me. And he said, "When our boss gets back"—he was on a trip—"I will get your job."

Senator MIKULSKI. Tell me then, obviously, you were subjected to very vulgar——

Ms. LEDBETTER. Oh, yes. Oh, yes.

Senator MIKULSKI. And in these situations, I think people don't realize when a woman is subjected to this, this is verbal violence. This is an assault. It is designed to humiliate and degrade.

Ms. LEDBETTER. Right.

Senator MIKULSKI. Now having said that, though, you went to EEOC. Did you have to hire a lawyer?

Ms. LEDBETTER. Yes, I did. Yes, I did.

Senator MIKULSKI. What was the financial cost to you in undertaking the claim?

Ms. LEDBETTER. Yes, ma'am, I did. I had to hire an attorney. It cost me $6,000 just for the day to go. He went with me to EEOC, to the hearing, and Goodyear got found that they were in violation of several of the title VII regulations during that.

Senator MIKULSKI. OK. So it cost you $6,000 to do that?

Ms. LEDBETTER. Yes, ma'am.

Senator MIKULSKI. And that came out of your own pocket?

Ms. LEDBETTER. Yes, ma'am.

Senator MIKULSKI. So you didn't have a big corporation, a legal defense fund, a union——

Ms. LEDBETTER. No. No.

Senator MIKULSKI [continuing]. To help you with this. You took out of your savings $6,000 because it was so important to you.

Ms. LEDBETTER. That's right.

Senator MIKULSKI. Six-thousand dollars. And what were you making at the time?

Ms. LEDBETTER. At that time, I was making about $1,800 per month.

Senator MIKULSKI. So how much was that a year?

Ms. LEDBETTER. Well, it depended on the overtime, probably roughly in any good year——

Senator MIKULSKI. It was under $24,000?

Ms. LEDBETTER. Yes, ma'am. Yes, ma'am.

Senator MIKULSKI. So you took 25 percent of your pay to go protect your dignity and seek redress under the law. Now when you did that, was it then common knowledge at Goodyear that you did that?

Ms. LEDBETTER. Absolutely. In fact, the union people that I was supervising turned against me because the word had been passed on the floor that I had sued Goodyear, which filing a charge and suing is two different things. But then what happened was the sal-

ary people in every area, in quality control or scheduling or whatever, they were told do not speak to Ledbetter. Do not talk to Ledbetter, and we're going to get rid of her as soon as we can.

And also they were promised—in some instances, some of the women were promised promotions to go testify against me when the company did the investigation.

Senator MIKULSKI. Now is this on pay discrimination or sexual harassment?

Ms. LEDBETTER. That was the sexual harassment. That was when I was trying to protect my job.

Senator MIKULSKI. And did you continue to be subjected to these violent, vulgar——

Ms. LEDBETTER. Oh, yes. Yes, yes, the men would cuss——

Senator MIKULSKI. Did anybody in that environment essentially offer any support to you?

Ms. LEDBETTER. Not very many. Not very many.

Senator MIKULSKI. What about other women?

Ms. LEDBETTER. No. No, they were afraid to associate themselves with me because it would in some way harm their careers. In fact, I had one shift foreman that when he would—I worked night shift. When he came in in the morning, he said, "Goddamn, Lilly, your department looks like a whorehouse." Well, what my response was, "I have never been in one. I don't know what one looks like. And what do I need to do to improve it?" Now those are the kind of things that I had to deal with day in and day out.

Senator MIKULSKI. My gosh.

Ms. LEDBETTER. And I tolerated it.

Senator MIKULSKI. I am sure everybody is just going to run down and file these lawsuits. Second, so now you have won this case. When did you file your pay discrimination case?

Ms. LEDBETTER. Three days after someone left me a note in my box.

Senator MIKULSKI. What year? What year?

Ms. LEDBETTER. 1998.

Senator MIKULSKI. So you survived at Goodyear for 19 years. Did you feel blacklisted in terms of promotion and did you continue to be punished?

Ms. LEDBETTER. Oh, yes. Yes.

Senator MIKULSKI. Then in 1998—may I ask how old you are and were then?

Ms. LEDBETTER. Then? I was 60. Sixty-years-old. I'm 69, will be 70 in March—excuse me, April. I don't even remember my birthday.

Senator MIKULSKI. No, believe me, I can appreciate it. Why? Because we are both women of a certain age, and we have come out of this generation in the workplace. And we have modernized our technology, but we have not modernized our thinking. And we sure in heck have not modernized our laws. And I think we need to be as modern as our technology.

So having said that, when you filed your case in 1998, again, and all the way up to the U.S. Supreme Court, this was a pretty expensive undertaking?

Ms. LEDBETTER. Yes, ma'am.

Senator MIKULSKI. And you lost it all?

Ms. LEDBETTER. I lost it all.

Senator MIKULSKI. So you were awarded $3 million. Then the statutory cap against this because, God knows, frivolous lawsuits, capped it at $300,000.

Ms. LEDBETTER. That is right.

Senator MIKULSKI. Kind of in the same way we have caps on medical malpractice.

Ms. LEDBETTER. Right.

Senator MIKULSKI. Now again I am going to ask you, do you belong to a union?

Ms. LEDBETTER. No, ma'am. I was salaried. We did not have a union.

Senator MIKULSKI. OK, I understand. Because sometimes women who belong to a union get legal advice to be able to move along the lawsuit. So you paid this out of your own pocket?

Ms. LEDBETTER. Yes, ma'am. But in this case, I did not have any money. So what I did, I found an attorney that would accept my case with a——

Senator MIKULSKI. Contingent?

Ms. LEDBETTER. That is right. And then, but his firm and I both, we have a lot of money out of our pocket, traveling to and from, printing costs, a lot of costs. I have had enormous cost in this, and I have a cost of being here today. Even though I have support from organizations to help me travel, I still have money out of my pocket. This is not a freebie for me.

Senator MIKULSKI. So Goodyear had their firm. Goodyear had their expenses. Goodyear had their lawyers. Goodyear had everything, including the U.S. Supreme Court, on their side. Now when the Goodyear lawyers come, they charge it as an expense account, etc.

Ms. LEDBETTER. That is right.

Senator MIKULSKI. So, really, the odds are stacked against filing a suit.

Ms. LEDBETTER. Yes. Yes.

Senator MIKULSKI. Well, I think that is very, very telling, and I know my time is up. But I think when we look at this; we have to look at it from what it takes to do this—the financial cost, first of all. The second, the psychological cost.

And I'm sure this affected your family——

Ms. LEDBETTER. Yes.

Senator MIKULSKI [continuing]. Your children, and so on?

Ms. LEDBETTER. Yes.

Senator MIKULSKI. Were they subjected to harassment when they went to school, or were they older?

Ms. LEDBETTER. They are older. But my daughter was harassed when she was a senior in high school. Her guidance counselor told her that she shouldn't be taking pre-med because women couldn't make doctors.

Senator MIKULSKI. But was she harassed because of what you did?

Ms. LEDBETTER. No, I don't think so.

Senator MIKULSKI. Because you were in a company town, weren't you?

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Ms. LEDBETTER. That is right. I was in a different town. And she went to school in Jacksonville, AL, and I was in Gadsden, 25 miles separate.

Senator MIKULSKI. Well, I don't want to probe any more into your personal matters. But again, I just want to thank you for what you have done. This is not just about helping you.

Ms. LEDBETTER. Right.

Senator MIKULSKI. It is about helping the many. And I just wanted to outline not only the difficulty in knowing what wages and all are, which Ms. Dorfman and our fine dean has done, but what it takes to do this. And obviously, you are a woman of great grit, and I just want to thank you for being so willing to share these details. And we are going to do something about this.

Ms. LEDBETTER. Thank you. Thank you. It took a lot of grit to go into that factory and work, too. But it was a good job. I liked it. I was good at it. And I had hoped to make a really good career, and I always believed that like the old westerns, that if you continued to do what you were supposed to do, that you would be recognized.

Senator MIKULSKI. And I appreciate that. We had Goodyear in the western part of my State that is very close to Appalachia. It was a great place to work.

Ms. LEDBETTER. Oh, it is. It is. A great company.

Senator MIKULSKI. You know, in our State, that offered an alternative to going down into the coal mine, which was quite dangerous. But, you know, you should not have to swallow your pride or face ugly discrimination in our country in order to have a job. And I want to thank you and look forward to passing this bill.

Ms. LEDBETTER. Thank you. I would like to say that I made the choice to go to Goodyear because I did a lot of research and interviewed with them. But when I went to Goodyear, I was a district manager for H&R Block, Inc. in the Anniston area, managing 14 locations for them. So it wasn't like, you know, this was my only choice. It was a choice that I made based on researching the company and going, you know, to the two companies and making the decision. And I felt like the future was better and brighter going to work for them.

Senator MIKULSKI. Thank you.

The CHAIRMAN. Thank you. Senator Harkin. We have been joined by Senator Harkin. You have had a great interest in this issue and question, and we are glad to have you here.

Senator HARKIN. Thank you, Mr. Chairman. I apologize for being here a little late and not getting the testimony, although I read them all.

Well, Ms. Ledbetter, I like you. You appear to me to be a person of real grit.

Ms. LEDBETTER. Thank you. Thank you.

Senator HARKIN. And I like that. I think what happened to you and this testimony today and the whole case, what it really brings back to us is that discrimination based on sex is still deeply embedded within the American society, and anyone that thinks it is not has got their head in the clouds. It is like Justice Ginsburg said, this decision doesn't recognize the real world that is happening out there to so many people.

Now I really only have one question, but it is going to lead me into something else. Ms. Ledbetter, let me ask you this, would it have made any difference in your case if the pay levels of various job categories—not attaching personal data, not what everybody makes, but if Goodyear had published, here are the job categories for managers in this level, managers in that level, and here are the pay levels—if that had been provided to you in an open format, would that had made any difference? In other words, do you think that the existence of such information might have discouraged your employer from paying you a vast different salary than your male counterparts?

Ms. LEDBETTER. Yes, sir. It would have made a tremendous difference because through the years, when the cost of living went up, they would adjust the bottom and the middle and the maximum amount. And I continually, in trying to pursue to get my income raised before retirement and asking about the money, how I stood, where I rated, they never told me. I could not even find out what the bottom and the top figures were, or the middle. And when my attorney and I were preparing for trial is when I saw the shocking news of where I stood.

Senator HARKIN. Mr. Chairman, I just ask that my opening statement be made a part of the record.

But I am going to read just a portion of it, and this is why I was getting to this question.

As Justice Ginsburg said, this decision is totally out of touch with the real world and the workplace. In the real world, pay scales are kept secret. Employees are in the dark about their coworkers' salaries. So lacking such information, it is difficult to determine when pay discrimination begins.

Furthermore, a small pay gap that may not seem significant tends to widen over time, as you pointed out, because of cost of living adjustments and things like that. They can widen. And they only become noticeable when there is a systemic discrimination over a long period of years.

So what this means is that once the 180-day window for bringing a lawsuit is past, the discrimination gets grandfathered in. This creates, I think, a free harbor for employers who have paid female workers less than men over a long period of time. Basically, it gives the worst offenders a free pass to continue their gender discrimination.

Ledbetter v. *Goodyear* was a bad decision. I am pleased we are moving forward with this legislation to establish that the unlawful employment practice under the Civil Rights Act is the payment, not just the setting of a pay level.

Now, with all deference to my Chairman, this is a good start. But I think it is still not enough. As long as pay scales are still kept secret, if there is not transparency, how can women know if they are being discriminated against? That is why we also need to pass the Fair Pay Act, which I re-introduced last April for the 10th year in a row. Now this is not the Paycheck Fairness Act. I am not talking about that. I am talking about the Fair Pay Act, which would require that employers would provide equal pay for equivalent jobs.

It also requires disclosure of pay scales and rates for all job categories at a given company without disclosing individual pay levels.

That way, women would have the information they need to identify discriminatory pay practices and negotiate better for themselves. Which in the end, obviously, would reduce the need for litigation.

So, again, unless and until we make it unlawful to keep this secret—now again, I am not saying that you have to tell what every single person makes. But categories, every company has categories. All we are asking, just publish those out there. Then people know where they fit and whether or not they are being discriminated against. So, again, I think this has been 10 years now we have been trying. We have had a lot of support for the Fair Pay Act from a lot of sectors. But people get it confused with the Paycheck Fairness Act, quite frankly. Those are two separate issues. Two separate issues. The Fair Pay Act is just what I said. It is to provide that kind of information and disclose those pay things and to require equal pay for equivalent jobs.

I had one example here. I thought I had. Yes. I guess, Ms. Dorfman, you have testified either before my committee or someplace down here before. But for all of you, here is an example that Dr. Philip Cohen, in front of a hearing that I co-chaired last spring, Dr. Philip Cohen from UNC—I guess that is the University of North Carolina—raised the following example.

There are 1.1 million nurse aides in this country, 2.5 million truck drivers. The nurse aides have more education on average, with 38 percent having at least some college training compared with 19 percent of truck drivers. Both groups' average age is 43. Both do work that requires "medium" amounts of strength, and nursing aides require more on-the-job training to perform their duties. And yet those nurse aides, 89 percent of whom are women, have median earnings of only $20,000 per year. That's 57 percent of the median earnings of truck drivers, 97 percent of whom happen to be male. That is what we are talking about.

This is deeply embedded in our society, very deeply, and it is time—through the progress of civil rights and equal rights, it is time that we put this one to bed and get over it. Segregation, promoting wage inequality, that is what it is. And it is time to end it. And I think that your case, Ms. Ledbetter, really brought it home to everybody and the decision by this wayward court, I think, brought home that fact that we have got this kind of discrimination.

So, again, I think this legislation is necessary. I hope we can move it, Mr. Chairman. I hope we can pass it as fast as possible. But unless and until women know what those pay categories are out there, how are they going to know? And they shouldn't have to wait 10 years, 15 years to go back and try to recoup something. It ought to be done right away.

I thank you, Ms. Ledbetter, for your courage, your grit, for doing what you did and bringing it home to all Americans just what is happening in the real world of the workplace.

Thank you, Mr. Chairman.

[The prepared statement of Senator Harkin follows:]

PREPARED STATEMENT OF SENATOR HARKIN

It is astounding to me that, in the 21st century, women are paid only 77 cents for every dollar their male counterparts are paid. A

Government Accountability Office study found that 20 percent of that wage gap could not be explained by factors other than discrimination.

Of course, the Civil Rights Act outlaws such gender discrimination. But, the Supreme Court's 5–4 verdict in the case of *Ledbetter* v. *Goodyear Tire & Rubber Co.*, made it extremely difficult for women to go to court to pursue these pay discrimination claims—even in cases where the discrimination is flagrant.

I would especially like to thank Ms. Ledbetter for being here today. Opponents of fair pay didn't know what they were getting into by fighting Lilly Ledbetter. She has become a tireless advocate for equal pay since she sued her employer for paying her $6,000 less than her lowest-paid male counterpart. As we all know, the Supreme Court held that a person who has been discriminated against must file a claim within 180 days of their pay being set, even if they were not aware at the time that their pay was significantly lower than their male counterparts. However, Ms. Ledbetter hasn't given up. She's determined to make sure that we change the law so no one else has to endure what she has.

As Justice Ginsburg said in her forceful dissent, this is totally out of touch with the real world of the workplace. In the real world, pay scales are often kept secret, and employees are in the dark about their co-workers' salaries. Lacking such information, it is difficult to determine when pay discrimination begins. Furthermore, a small pay gap tends to widen over time, only becoming noticeable when there is systemic discrimination over a period of years.

So what this means is that, once the 180-day window for bringing a lawsuit has passed, the discrimination gets grandfathered-in. This creates a free harbor for employers who have paid female workers less than men over a long period of time. Basically, it gives the worst offenders a free pass to continue their gender discrimination.

Ledbetter v. *Goodyear* was a bad decision, and I am pleased we are moving forward on this legislative solution—to establish that the "unlawful employment practice" under the Civil Rights Act is the *payment* of a discriminatory salary, not the setting of the pay level. This is a good start, but it's not enough. If pay scales are still kept secret—if there's not transparency—how can women know if they are being discriminated against?

That's why we also need to pass my Fair Pay Act, which I reintroduced last April. In addition to requiring that employers provide equal pay for equivalent jobs, my bill also requires disclosure of pay scales and rates for all job categories at a given company without disclosing individual pay levels. This will give women the information they need to identify discriminatory pay practices and negotiate better for themselves—which, in the end, could reduce the need for costly litigation in the first place.

I applaud Justice Ginsburg for her powerful dissent in the *Ledbetter* case. But there is a broader issue, here. Justice Samuel Alito, who wrote the majority opinion, and Chief Justice John Roberts, who sided with him, are taking the court in a direction that cramps and limits the interpretation of our civil rights laws. This is just what I predicted when I voted against these two new members of the Court.

Moreover, there is something unseemly when narrow majorities of five male Supreme Court justices are taking away women's reproductive rights and narrowly interpreting women's civil rights. This is exactly why we need more diversity on the Court—and why we need more justices like Ruth Bader Ginsburg, who wrote the dissent, and Justices Stevens, Souter and Breyer who also sided with Ms. Ledbetter. They need more colleagues who have a genuine passion for justice and fairness, especially for those in the shadows of American life.

The CHAIRMAN. Thanks very much, Senator Harkin. I think we can certainly tell from your passion about this issue where you stand on this question, and I am proud to be a co-sponsor of that legislation. I admire you for your perseverance, and we will certainly do what we can to try and deal with that issue.

Let me get back to some, just a few final questions from my point of view. I would like to ask Ms. Dorfman. You are here as a representative of business owners. We usually think about the people hurt most by *Ledbetter* as workers who are victims of pay discrimination. You have talked about how workers aren't the only ones hurt by pay discrimination. Can you explain to the committee how pay discrimination can harm business owners who play by the rules?

Ms. DORFMAN. Absolutely. We do see it as a challenge for women business owners and a challenge for women, this U.S. Supreme Court ruling. Women like Ms. Ledbetter, who has had to go through the processes that she has gone through. And then from a woman's business owner perspective, we are those women. We left corporate America because of those issues. We started off with our own businesses, and when we did that, I noted that we were more likely to provide employee benefits than our male counterparts. Well, why is that? Because we have been a victim at some point, and we believe in fair practice.

So what has happened is that as we move forward, when you look from a competitive nature, we are providing the compensation fairly, fair pay, and we are playing fair as well. And yet, our competitors who are getting away without paying fairly will be able to provide goods and services at a lower cost. And so, that will be a challenge for our competitive strength.

Additionally, what we see is that if we don't remedy this with legislation, we will end up in courts doing battle more often. I believe that the first 6 months people aren't thinking about, "gee, am I being discriminated against?" But now that is going to be at the top of everybody's mind. I better do something now because otherwise it won't count. Regardless of whether they have done their research or not, they will file their claim and they will be doing the follow-up research afterwards. And that will also cost the employers or the business owners money as well.

The CHAIRMAN. We have heard testimony from the Chamber of Commerce that the Fair Pay Restoration Act will increase the number of pay discrimination cases. So, in your testimony, you shared a different opinion. Can you explain to the committee why you believe that this legislation won't increase the number of pay discrimination cases and why failing to pass the legislation would actually increase the number of cases?

Ms. DORFMAN. Correct. I really see this act as actually bringing us back to the day before the U.S. Supreme Court ruling. And that was, you know, of course, we don't want to get into litigation, and we want to be able to continue business and be making money. But we know that there has to be some sort of compromise for dealing with these issues. There has to be a remedy out there for women, and this will open the doors, to minorities, whether it be ageism, or a number of other issues. But we have to have a remedy so that we can go in and make the claims and make sure that there is fairness in the pay.

And the original process that we were subject to was very fair and a very good compromise. And I think, you know, I go back, and Mr. Dreiband, I wonder if we continue without this, and you listed a whole number of other issues that we would have to continue to address through legislation and that sort of thing. And that sounds like it would be more taxpayers' money rather than just saying let us go back to the way it was working. It was working fine for decades. Everybody was in agreement. There was no challenge to this prior to this court ruling.

The CHAIRMAN. Just on that point, let me ask Mr. Dreiband, from 2003 to 2005, you served as the general counsel for the Equal Employment Opportunity Commission, the Federal agency that deals with workplace discrimination. When you were at the commission, the agency calculated the deadline for filing pay discrimination claims from the date of the victim's most recent discriminatory paycheck. I believe that was the cornerstone of the policy for many years even before you joined the agency.

Of course, that is precisely what this bill would do. So why do you now oppose returning to this rule for filing pay discrimination claims when the EEOC found it worked so well for so many years?

Mr. DREIBAND. Well, Mr. Chairman, I don't oppose returning to a rule. I think that there has not been a correct interpretation in this hearing of the way the law stood before the *Ledbetter* decision.

Let us not forget in the *Ledbetter* case, the U.S. Court of Appeals for the Eleventh Circuit ruled the exact same way in a unanimous opinion, as did the U.S. Supreme Court of the United States. And there seems to be this notion that the decision in the *Ledbetter* case is some radical departure from both the EEOC's standards and from pre-existing U.S. Supreme Court decisions. It is not. There is a consistent line of cases, beginning in the 1970s with the Evans decision and repeatedly reaffirmed by the U.S. Supreme Court of the United States up as most recently as 2002, before the *Ledbetter* case, and again in 2007, when that decision was issued.

So it is not that I am opposing some pre-existing rule. Rather, what I would say to you and I do say is that the decision is entirely consistent with the way the law was before the court announced this decision in 2007.

The CHAIRMAN. Well, I just want to point out, as I understand that when the *Ledbetter* case was actually appealed to the U.S. Supreme Court, the agency declined to join the Justice Department's brief asking the court to overturn the old rule.

Mr. Bagenstos, what is your understanding of what the old rule was and what our legislation is?

Mr. BAGENSTOS. I think, with respect, I will disagree with Mr. Dreiband about what the rule was. The only pay discrimination case the U.S. Supreme Court ever decided before *Ledbetter* was *Bazemore* v. *Friday*, which explicitly said every paycheck that incorporates the past discrimination is a violation of title VII. All the other cases which involve different settings, not pay discrimination, you know, you can make an argument—I think Justice Ginsburg makes a persuasive argument that Bazemore is the case that is on point, the only pay discrimination case.

It is also true that the EEOC, we have heard about the EEOC's position here, we should adopt the EEOC's view of equitable tolling. And Senator Kennedy, you point out the EEOC's position, at least prior to the *Ledbetter* case, had two halves. Equitable tolling was part of it, but also the paycheck accrual rule, right? And that is the position that the EEOC took internally, that the EEOC promulgated, and that the EEOC took in litigation prior to the *Ledbetter* case.

So, I think if you look at what the U.S. Supreme Court in the case on point, what the lower courts did up until *Ledbetter* in the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and DC Circuits, right, the rule prior to *Ledbetter* was the paycheck accrual rule.

The CHAIRMAN. Finally, Professor Bagenstos, isn't it true that as long as an employer issues someone like Ms. Ledbetter a smaller paycheck, that employer is continuing to break the law, and shouldn't those new violations be actionable regardless of who knew what, when?

Mr. BAGENSTOS. Oh, absolutely. I think so. Every time the employer pays an employee less, a paycheck today that is less than it would be without discrimination, that is an act of discrimination. That should form the basis for a cause of action today.

The CHAIRMAN. Senator Isakson.

Senator ISAKSON. Thank you, Mr. Chairman. I want to repeat what I have said before. Nobody in this room, certainly not myself, is in favor of any discrimination. I do want to make a point with regard to the Chairman and Mr. Harkin's comments. And I guess I will refer to that great—I ran a business for 22 years, and the law of unintended consequences is the most difficult law we deal with in life, and sometimes there are unintended consequences. And I will just make two points if I can. And this is not criticisms of you or the law or anything else, but the reality of the real world.

No. 1, liability in perpetuity or an open-ended potential liability does cause tremendous burdens. I mean, people should be held liable. But if the opportunity to make the allegation is in perpetuity or extended beyond a reasonable term, it does cause—because you practice business defensively, it does cause you to practice defensively.

The second thing, with regard to publishing parameters of pay without acknowledging there may be conditions of performance tends to have a downward suppressant on the pay brackets in which you publish because you, again, are defensive as a business in terms of what you are doing. This has nothing to do with discrimination, nothing to do with giving you the wiggle room to dis-

criminate. But it does have everything to do with how you react to the way you run your business.

Now that is not a reason not to have a law against discrimination. It is not a reason not to see that somebody isn't treated fairly. But it is a reason to see that there is a balance. And when you put the laws in place, that the law of unintended consequences doesn't actually, in the end, have a suppressing effect either on pay parameters that might be published or some other benefit that might be there. That is just the only point I wanted to make.

I do have a question, though, of Ms. Dorfman. You referred to the statute in this case. Is that a Federal—the $300,000 cap, the statutory cap? Is that in all cases? Is that——

The CHAIRMAN. That is the 1991 civil rights bill. That was put on as a condition. The caps were put on as a condition in order to get that legislation passed, and they are wrong. We had to include that in order to get that legislation passed. They have been on since that time.

Ms. DORFMAN. And I would just also say that one of the things that hasn't been hit on here, but that I have worked in corporate America, and those who are working to play fairly and pay fairly periodically run reviews on their pay equity to see where things are out of kilter and make adjustments accordingly. So had Goodyear done something like that along the way, they would have discovered these issues. They could have changed them, and maybe this never would have gotten to trial.

The CHAIRMAN. That is right. I would point out, I was just talking with the staff. I remember the debate on this, actually, quite clearly. Senator Mitchell was very much involved in it, as a very good both lawyer and majority leader. With the ceiling and the capping, it primarily worked against women on this, the way it was an amendment to title VII. You had similar kind of discrimination for men. There are other provisions in the civil rights laws that permit men to get damages at higher levels. That was really the consequence of that. And that is basically, fundamentally wrong. We have had some hearings to try and deal with that at other times. And at some time down the road, we should.

But it is interesting, Ms. Ledbetter, I was listening. When I heard you mention the cap, it just struck, and I said, that was 1991. I remember when it was put in, and it just reminded me that we have additional work to do, Tom Harkin's remark that we have got additional work. There is a lot of work to do around here. But the hearing this morning has been enormously helpful to me in sort of understanding the parameters and the challenges that we face, in this underlying issue of fairness, that is out there that we do have to address.

Tom, is there anything further?

Senator HARKIN. Mr. Chairman, the only thing I would just add, precedent, all of us who are trained as lawyers, you know, we adhere to precedent. But if the precedent is based upon discriminatory practices, then it is time to do away with the precedent. How many years did we labor under *Plessy* v. *Ferguson*? That is precedent. But it was based upon inherent discrimination. So that is when you do away with precedent.

And so, to say that somehow we are—either to the professor or the attorney over there—that we are somehow changing, there is just a little bit of difference there on that, whether the EEOC did one thing, that doesn't faze me.

The fact is the real world out there is just as we know it, just as you portrayed it. That is the real world out there. It is happening. The U.S. Supreme Court decision was a wake-up call to say, "wait a minute, this precedent, whatever they are talking about, is based on inherent discrimination." And whenever you have precedents like that, it is time to overturn it. And that is what this legislation is trying to do. It is time to move on.

Thank you, Mr. Chairman.

The CHAIRMAN. I want to thank all of you. Thank all of our witnesses. Thank all of those who have attended the hearing.

The committee stands in recess.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR ENZI

Good morning. I want to thank Senator Kennedy for holding this hearing on employment discrimination; and the important procedural issue of filing limitations. The title VII statute of limitations serves an important purpose, and that is fairness. The Fair Pay Restoration Act isn't really about fairness. It effectively undermines the title VII statute of limitations, and congressional intent to fairly and expeditiously resolve employment discrimination claims.

Discrimination in the workplace, or elsewhere, is simply not acceptable in a free society. The work of the Congress in combating employment discrimination is one of the most notable chapters in the long history of this body.

Among the most important of our workplace discrimination statutes is Title VII of the Civil Rights Act of 1964. Title VII outlaws employment discrimination based on a number of factors, including gender. Since its enactment, Title VII has played a vital role in the effort to eradicate gender-based discrimination. Over the last 5 years the intake of gender discrimination cases at the Equal Employment Opportunity Commission has averaged around 25,000 per year. Given this volume it should come as little surprise that title VII generates a significant volume of litigation every year. Such cases invariably entail strongly held views and emotionally charged issues. Thus, regardless of their outcome, it is not uncommon that they create controversy. The case which has prompted this hearing is no exception.

Last year the U.S. Supreme Court handed down its decision in the case of *Ledbetter* v. *Goodyear*. The principal issue in the case involved the application of title VII's limitations period for the filing of claims. Title VII requires that claims of employment discrimination be initiated within either 180 or 300 days, depending upon the State in which the claim arises.

Virtually all statutes that contemplate the possibility of court litigation contain a statute of limitations provision. Such provisions serve a variety of very important purposes. First, a statute of limitations encourages the prompt and vigorous pursuit of important protected rights. This is particularly true in the instance of employment discrimination. None of us today; and, certainly none of the drafters of title VII, wanted discrimination in the workplace to go unaddressed one day longer than necessary. Accordingly, the drafters adopted a relatively short limitations period to ensure the quick eradication of discriminatory workplace practices. Statutes of limitation are designed to encourage the prompt resolution of contested claims; and, this is particularly important in the context of employment discrimination claims. An unresolved allegation or suspicion of discrimination is particularly corrosive in the workplace where the parties to a potential claim are in daily contact, and where the potential claim has effect, both direct and indirect, on everyone in the workforce. The drafters wisely determined that such matters cannot be allowed to fester, and should be addressed promptly and resolved as quickly as possible.

By ensuring that claims are promptly raised, a statute of limitations, serves to enhance the likelihood of voluntary resolution of claim. Claims that remain unaddressed for substantial periods of time can build significant financial liabilities that make voluntary resolution of a claim much more difficult and in some cases virtually impossible. Title VII was carefully crafted to encourage the voluntary resolution of discrimination claims and its statute of limitations is an integral part of that statutory framework. Further still, a statute of limitations serves the vital purpose of preserving a fair process for those claims that cannot be resolved, but must be adjudicated. If a claim is filed that is based on disputed facts that are 10 or 20 years old, the likelihood of finding witnesses with clear memories, or even finding witnesses or documentary evidence at all, is remote. The undeniable reality is that all evidence fades over time, this is particularly true in the context of an extremely mobile workforce.

The decision and drafting of a limitations provision in any statute always requires the weighing of often competing considerations. The reasons I have just noted favor the imposition of short limitation periods. However, that must be balanced against the fact that any limitations period also has the effect of closing the courthouse door to a claimant that may have a meritorious case. There is no question that the drafters of title VII carefully considered these and many other competing factors in eventually arriving at the 180–300 day formulation in the statute.

Whenever we re-visit legislation enacted by a prior Congress, and contemplate changing that legislation because of a subsequent court decision, we need to proceed with considerable caution. If we are to have stability in our laws; and, if our laws are to reflect sound policy and not political happenstance, the bar for changing such laws must understandably be high. We should be very careful about doing so unless we conclude that the enacting Congress was wrong, the interpreting court was wrong, or that external circumstances have changed in such a way that a change in law is warranted. I would hope that today's hearing will focus on whether or not these operative criteria have been met.

Whenever we as a committee hold a hearing with respect to the technical aspects of a statute, or the circumstances of a particular case, I also believe it is essential that we exercise extreme care in accurately representing the important facts of such case, and the actual status of the law. Exaggeration, hyperbole, and plain old falsity may serve to advance political agendas, but it is an inexcusable departure from the fundamental responsibilities of this committee. Our first responsibility is to get the facts right. Accuracy and candor should never be sacrificed to make political hay. There are, quite frankly, a number of misconceptions regarding the limitations period in title VII and the essential facts of the *Ledbetter* case. I think two are worth noting up front.

First, proponents of the legislation before us claim that the limitations period under title VII is totally inflexible. That simply isn't true. For example, we have been told that this legislation is necessary because the facts that would cause an employee to suspect discrimination, particularly regarding pay issues, may be unknown or even hidden from an employee. Yet, once the 180 days runs, that

employee would lose his or her rights. This is a seemingly compelling argument except for one thing. It is not an accurate characterization of the way the law actually works right now. Under current law, the 180-day limitation period is not iron clad. To the contrary it is completely flexible, and is frequently, waived, tolled or suspended where fairness and circumstances require. It would certainly be suspended in the circumstances the proponents of the legislation so often cite. To those that continue to argue differently, I'd respectfully direct their attention to the Equal Employment Opportunity Commission's own Compliance Manual regarding the timeliness of claim filing under such circumstances. It reads, in relevant part, as follows:

> "Sometimes, a charging party will be unaware of a possible EEO claim at the time of the alleged violation. Under such circumstances, the filing period should be tolled until the individual has, or should have, enough information to support a reasonable suspicion of discrimination.
>
> • Example 1.—On March 15, 1997, CP, an African-American man, was notified by Respondent that he was not hired for an entry-level accountant position. In February 1998, more than 300 days later, CP learned that the selectee, a white woman, was substantially less qualified for the position than CP. CP filed a charge of race and sex discrimination on March 15, 1998. The charge would be treated as timely because he filed promptly after acquiring information that led him to suspect discrimination.
>
> • Example 2.—On March 1, 1997, CP, a 55-year-old woman, learned that she was denied a promotion in the Office of Research and Development, and that the position was awarded to a 50-year-old man with similar qualifications. She subsequently applied for another promotion opportunity in the same office, and was notified in January 1998 that the position was awarded to a 35-year-old woman with similar qualifications. The second rejection prompted CP to suspect that she was being discriminated against because she was an older woman, and she filed a charge 5 weeks later, in February 1998. Tolling should apply, and she can challenge both promotion denials.
>
> Because an individual's ignorance must be excusable, the failure to act with "due diligence" in attempting to obtain vital information will preclude equitable tolling. The filing period is tolled until the individual has enough information to reasonably suspect that s/he has a valid EEO claim. In other words, the filing period begins to run when the individual realizes that s/he may have a claim even if s/he is not certain about the claim."

The supposed inflexibility of title VII's limitations period is a myth. You don't need legislation to address the situations of fairness raised by this bill's proponents since it is already the law.

In the case we are reviewing today, it should be noted that the Plaintiff did have access to remedies. She could have pursued the claim she initially filed under the Equal Pay Act of 1963, which does not apply any statue of limitations. Yet this cause of action was inexplicably dropped during District court proceedings. The Plaintiff or any other individual who was subjected to discriminatory pay on the basis of sex can file an EPA claim years after the discrimination occurred.

Since we are being asked to take the case at hand as justification for sweeping changes in the law, I want to urge my colleagues who have not had the chance to read the decision in full to do so. They will see that part of the court's consideration was the Plaintiff's own admission that she did know of the pay discrepancy 6 years before she filed a complaint with the EEOC. Therefore, the court had no cause to suspend the statute of limitations for delayed discovery of the effect of discrimination. In fact, this case would have come out far better for all involved if the EEOC action had been

filed promptly, within the statutory deadline. First, if discrimination was confirmed, the Plaintiff would have suffered far less harm in the way of lost wages. Also, the employer would have had a fuller opportunity to investigate the validity of the claim and make any necessary workplace changes to ensure no other employees suffered discrimination. Finally, the manager in question, who died before Ms. Ledbetter finally did file her claim, would have had an opportunity to defend himself.

In the case at hand, all parties would have been more fairly treated by the courts had it been honored. If the discrimination was not an isolated incident, other Goodyear employees would have been better protected, as well. The public policy consequences that would come of a wholesale elimination of the statute of limitations do not serve goals of employees or employers, though it will keep America's trial lawyers and employment bar busy. I urge my colleagues to review this legislation with all of these factors in mind.

PREPARED STATEMENT OF SENATOR CLINTON

Thank you to Chairman Kennedy and Ranking Member Enzi for holding this hearing, and to the four witnesses who have come here today to share their perspectives on equal pay with the committee.

In particular, I would like to extend my gratitude to Lilly Ledbetter on her courage and perseverance in taking her fight all the way to the Supreme Court, and then to the Congress. I have had the great pleasure of meeting Lilly Ledbetter and hearing her story first-hand. Lilly is but one of countless hard-working people across our country who have played by the rules and deserve equal treatment from their employers.

While I regret that I cannot be here today, I am proud to have joined Chairman Kennedy and a bipartisan coalition of Senators in introducing the *Fair Pay Restoration Act* legislation that would overturn the Supreme Court's recent decision in *Ledbetter* v. *Goodyear Tire & Rubber Company*. The ruling in *Ledbetter* created obstacles that have made it far more difficult for women such as Lilly Ledbetter and all of the other Americans protected by title VII to receive equal pay for equal work. Along with our colleagues in the House, we are working to remove these obstacles, so that we can fully safeguard the rights of employees who have suffered pay discrimination based on their race, sex, religion or national origin.

All Americans deserve equal pay for equal work, and it is our responsibility to get this right. The *Fair Pay Restoration Act* is a critical step towards this goal. So too is the *Paycheck Fairness Act*, legislation I have introduced that would take concrete steps forward to empower women to negotiate for equal pay, create better incentives for employers to follow existing law, and strengthen Federal outreach and enforcement efforts. Senators Kennedy and Harkin have also joined me in calling for the Government Accountability Office to investigate the role the Federal Government has and can play to remedy pay inequities in the workplace.

I am also pleased to be a cosponsor to the *Civil Rights Act of 2008*, legislation introduced today by Senator Kennedy and Representative John Lewis that will reverse a number of other judicial decisions that have walked back key civil rights protections in recent years. As is true of the legislation under consideration at the

hearing today, the *Civil Rights Act of 2008* is a reflection of the historic and fundamental role that Congress has and must continue to play as a bulwark of individual rights. I urge my colleagues to support this important legislation.

I look forward to continuing to work together to protect the civil rights of all employees across America. Thank you.

AMERICAN BENEFITS COUNCIL,
February 1, 2008.

Hon. EDWARD KENNEDY, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
644 Dirksen Senate Office Building,
Washington, DC 20510.

Hon. MICHAEL ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
835 Dirksen Senate Office Building,
Washington, DC 20510.

Re: The Fair Pay Restoration Act: Ensuring Reasonable Rules in Pay Discrimination Cases

DEAR CHAIRMAN KENNEDY AND RANKING MEMBER ENZI: The American Benefits Council submits this statement in connection with the hearing of the Senate Committee on Health, Education, Labor, and Pensions on "The Fair Pay Restoration Act: Ensuring Reasonable Rules in Pay Discrimination Cases." We respectfully request that this statement be included in the record of this hearing.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We wish to express our continued concern regarding proposed legislation (S. 1843, The Fair Pay Restoration Act) to overrule the Supreme Court's *Ledbetter* v. *Goodyear Tire and Rubber Co.* decision. The Council's area of expertise is in the employee benefit area, and accordingly we limit our letter to the possible effect of the proposed legislation on benefit programs.

We are writing with regard to S. 1843, as we previously wrote to the House Education and Labor Committee with regard to H.R. 2831, because the proposed legislation could possibly raise serious retirement plan issues. Under both bills, each payment of compensation or benefits that is lower because of past discrimination is arguably a new act of discrimination and thus an employee could file a charge or sue many years after the discrimination actually occurred. We appreciate that the findings sections of the House and Senate legislation—which does not affect the actual statutory provisions—each include a finding that the bill is not intended to change the current law treatment of when pension distributions are considered paid. As we understand it, this finding was intended to clarify that, for purposes of the legislation, pension payments are treated as paid at an employee's retirement, not as each actual payment is made. Such a clarification would help address an important concern, i.e., that an individual who has been retired for many years could file a charge or sue based on acts that occurred during his or her active service.

However, in order to be effective, we believe that the finding must be reflected in the actual bill language; as currently drafted, the finding and bill language appear to conflict.

Moreover, the underlying significant concern as to how a judgment in favor of a plaintiff would affect an employer-sponsored retirement plan still remains unaddressed. For example, if a company maintains a defined benefit plan that calculates benefits based on an employee's final average pay, would the plan need to recalculate the plaintiff's benefit based on the revised pay? What if the lawsuit is a class action, so that large numbers of plan participants could be making the same claim for much higher benefits? What if this caused the plan to be woefully underfunded or resulted in the employer being forced to terminate the plan? The retirement security of other participants could be severely undermined as a result of a claim now being made for discrimination that occurred many years before.

We continue to be concerned about the possible effect of the proposed legislation on 401(k) plans, 403(b) plans (those maintained by schools and charities generally),

and 457 plans maintained by State and local governments. To what extent would such plans have to recalculate benefits payable to the plaintiffs? If the employer needs to fund enormous additional benefits for the plaintiffs, would the employer effectively have to reduce or eliminate contributions for others?

We urge that this legislation not be considered by the full Senate until the possible ramifications of the bill are fully understood. We are very mindful of the concerns that led to the drafting of this proposed legislation, but we continue to have concerns about its application to employer-sponsored retirement plans in its current form. It would be very unfortunate to risk the retirement security of large numbers of plans participants as a result of failing to address the question of how a judgment in favor of a plaintiff affects the employer's retirement plans.

Thank you for the opportunity to share our views.

Respectfully submitted,

JAMES A. KLEIN,
President, American Benefits Council.

[Whereupon, at 11:35 p.m. the hearing was adjourned.]

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