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Testimony of

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before the

House Education and Labor Committee

on

"Justice Denied? The Implications of the Supreme Court's Ledbetter Employment Discrimination Decision"

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Good Afternoon. My name is Wade Henderson and I am the President of the Leadership Conference on Civil Rights. The Leadership Conference is the nation's premier civil and human rights coalition, and has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957. The Leadership Conference's nearly 200 member organizations represent persons of color, women, children, organized labor, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. It's a privilege to represent the civil rights community in addressing the Committee today.

Distinguished members of the Committee, I am here this afternoon to call on Congress to act. To right a wrong perpetrated by our nation's highest court that will have a tremendous impact on the working lives, and livelihoods, of Americans across the county.

Two weeks ago, the Supreme Court issued an opinion in *Ledbetter v. Goodyear Tire & Rubber*[1], which severely limits the ability of victims of pay discrimination to successfully sue under Title VII. In this case, the plaintiff, Lilly Ledbetter, a supervisor at Goodyear in Gadsden, Alabama, sued her employer for paying her less than its male supervisors and a jury found that Goodyear violated her rights under Title VII of the Civil Rights Act of 1964.

Goodyear argued that Ms. Ledbetter filed her complaint too late and, by a 5-4 margin, the Supreme Court agreed. Title VII requires employees to file within 180 days of "the alleged unlawful employment practice."[2] The court calculated the deadline from the day Goodyear first started to pay Ms. Ledbetter differently, rather than – as many

[1] Slip op. No. 05-1074 (U.S. Supreme Court)
[2] 42 U.S.C. 2000e et seq.

courts had previously held -- from the day she received her last discriminatory paycheck. As a result, Ms. Ledbetter was unable to challenge or receive compensation for any of Goodyear's salary discrimination, even though the discrimination continued unabated for more than 15 years.

In this decision, the Court got it wrong. A narrow majority, led by Justice Alito, set aside the clear intent of Congress in favor of its own policy preferences.

The outcome in *Ledbetter* is fundamentally unfair to victims of pay discrimination. By immunizing employers from accountability for their discrimination once 180 days have passed from the initial pay decision, the Supreme Court has taken away victims' recourse against continuing discrimination.

Moreover, the Court's decision in *Ledbetter* ignores the realities of the workplace. Employees typically don't know much about what their co-workers earn, or how pay decisions are made, making it difficult to satisfy the Court's new rule.

As Justice Ginsberg pointedly emphasized in her dissent, pay discrimination is a hidden discrimination that is particularly dangerous due to the silence surrounding salary information in the United States. It is common practice for many employers to withhold comparative pay information from employees. One-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers, and a significant number of other employers have more informal expectations that employees do not discuss their salaries. Only one in ten employers has adopted a pay openness policy.[3]

Workers know immediately when they are fired, refused employment, or denied a

[3] Bierman & Gely, "Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law, 25 Berkeley J. Emp. & Lab. L. 167, 168, 171 (2004).

promotion or transfer, but norms of secrecy and confidentiality prevent employees from obtaining compensation information. As Justice Ginsberg's dissent points out, it is not unusual for businesses to decline to publish employee pay levels, or for employees to keep private their own salaries.

The reality is that every time an employee receives a paycheck that is lessened by discrimination, it is an act of discrimination by the employer. The harm is ongoing; the remedy should be too.

The impact of the Court's decision in *Ledbetter* will be widespread, affecting pay discrimination cases under Title VII affecting women and racial and ethnic minorities, as well as cases under the Age Discrimination in Employment Act[4] involving discrimination based on age and under the Americans with Disabilities Act[5] involving discrimination against individuals with disabilities.

Here is an example. Imagine you have worked for a company for 30 years. You are a good worker. You do a good job. Unknown to you, the company puts workers who are 50 or older on a different salary track ; lower than the younger workers who do the same work. At 60, you learn that for the last 10 years, you have been earning less – tens of thousands of dollars less than colleagues doing comparable work.

How do you feel?

Imagine you are this worker. How do you feel?

Even more, how do you feel when you learn that 180 days after you turned 50 – six months after you started getting paid less – you also lost your right to redress for the hundreds of discriminatory paychecks.

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[4] 29 U.S.C. 621 et seq.
[5] 42 U.S.C. 12101 et seq.

The decision in *Ledbetter* will have a broad real world impact. The following are just two examples of recent pay discrimination cases that would have come out very differently if the Court's new rule had been in effect.

In *Reese v. Ice Cream Specialties, Inc.*[6] the plaintiff, an African-American man, never received the raise he was promised after six months of work. He did not realize his raise had never been awarded until three and a half years later, when he requested a copy of his payroll records for an unrelated investigation.[7] The employee filed a charge of race discrimination with the EEOC, and the court initially granted summary judgment to the employer. On appeal, the employee argued that his claim was timely under the continuing violation theory, and the court concluded that the relevant precedents compelled the conclusion that each paycheck constituted a fresh act of discrimination, and thus his suit was timely.[8] If the rule in *Ledbetter* had been in effect, the plaintiff would not have been able to seek relief.

In *Goodwin v. General Motors Corp.*[9], an African-American woman was promoted to a labor representative position, with a salary that was between $300 and $500 less than other similarly-situated white employees.[10] Over time, Goodwin's salary disparity grew larger until she was being paid $547 less per month than the next lowest paid representative, while at the same time pay disparities among the other three labor representatives shrank from over $200 per month to only $82.[11] Due to GM's confidentiality policy, Goodwin did not discover the disparity until a printout of the 1997

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[6] 347 F.3d 1007 (7th Cir. 2003)
[7] *Id.* at 1007
[8] *Id.* at 1013
[9] 275 F.3d 1005 (10th Cir. 2002)
[10] *Id.* at 1008
[11] *Id.*

salaries "somehow appeared on Goodwin's desk."[12] She then brought a race discrimination action against her employer under Title VII. The district court dismissed the action, but the Tenth Circuit reversed and remanded, holding that discriminatory salary payments constituted fresh violations of Title VII, and each action of pay-based discrimination was independent for purposes of statutory time limitations. Again, if the rule in *Ledbetter* had been in effect, the plaintiff would not have been able to obtain relief.

Pay discrimination is a type of hidden discrimination that continues to be an important issue in the United States. In the fiscal year 2006, individuals filed over 800 charges of unlawful, sex-based pay discrimination with the EEOC. Unfortunately, under the *Ledbetter* rationale, many meritorious claims will never be adjudicated.

While today we are focused on the immediate problem of the *Ledbetter* decision, it is also important to understand that this decision is part of the Court's recent pattern of limiting both access to the courts and remedies available to victims of discrimination. The Court's decisions have weakened the basic protections in ways that Congress never intended by Congress.

Under the Supreme Court's recent rulings, older workers can no longer recover money damages for employment discrimination based on age if they are employed by the state[13], state workers can no longer recover money damages if their employers violate minimum wage and overtime laws[14]; there is no private right of action to enforce the disparate impact regulations of Title VI of the Civil Rights Act of 1964[15]; and workers

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[12] *Id.* at 1008
[13] Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)
[14] Alden v. Maine, 527 U.S. 706 (1999)
[15] Alexander v. Sandoval, 532 U.S. 275 (2001)

can now be *required* to give up their right to sue in court for discrimination as a condition of employment.[16] In many of these cases, as in *Ledbetter*, the Court is acting as a legislature, making its own policy while acting directly contrary to Congress's intent.

For opponents of civil rights, there is no need to repeal Title VII. Instead you can substantially weaken its protections by chipping away at bedrock interpretations. Or, you can instead make it difficult or impossible for plaintiffs to bring and win employment discrimination cases. Or if you make the remedies meaningless.

For years, we in the civil rights community have watched as the Supreme Court has rolled back the ability of victims of discrimination to obtain meaningful remedies. But the watching is over. It is time – past time – to take action.

As Justice Ginsburg pointed out in her dissent, Congress has stepped in on other occasions to correct the Court's "cramped" interpretation of Title VII. The Civil Rights Act of 1991 overturned several Supreme Court decisions that eroded the power of Title VII, including *Wards Cove Packing Co. v. Atonio*[17], which made it more difficult for employees to prove that an employer's personnel practices, neutral on their face, had an unlawful disparate impact on them, and *Price Waterhouse v. Hopkins*[18], which held that once an employee had proved that an unlawful consideration had played a part in the employer's personnel decision, the burden shifted to the employer to prove that it would have made the same decision if it had not been motivated by that unlawful factor, but that such proof by the employer would constitute a complete defense. As Justice Ginsburg sees it, "[o]nce again, the ball is in Congress' court."

We agree.

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[16] Circuit City Stores v. Adams, 532 U.S. 105 (2001)
[17] 490 U.S. 642 (1989)
[18] 490 U.S. 228 (1989)

The issues in this case are not academic. The fallout will have a real impact on the lives of people across America.

People like Lily Ledbetter.

Members of the Committee, today you begin the process of responding to Justice Ginsburg's call. A process that will reaffirm that civil rights have legally enforceable remedies. And that it is for Congress, not the courts, to decide the rules of the game.

Thank you.