IN THE SUPREME COURT OF THE UNITED STATES

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LILLY M. LEDBETTER, :

Petitioner :

v. : No. 05-1074

THE GOODYEAR TIRE & :

RUBBER COMPANY, INC. :

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Washington, D.C.

Monday, November 27, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

KEVIN K. RUSSELL, ESQ., Washington, D.C.; on behalf of the Petitioner.

GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of the Respondent.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Ledbetter versus Goodyear Tire & Rubber Company.

Mr. Russell.

ORAL ARGUMENT OF KEVIN K. RUSSELL,

ON BEHALF OF PETITIONER

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

A jury found that at the time petitioner filed for charge of discrimination with the EEOC, respondent was paying her less for each week's work than it paid similarly situated male employees and that it did so because of her sex. The question for the Court is whether that present act of disparate treatment because of sex constituted a present violation of Title VII. This Court has already answered that question.

Consistent with the law's traditional treatment of pay as arising from recurring transactions and giving rise to recurring causes of action, and consistent with the paycheck accrual rule everyone agrees Congress adopted for the Equal Pay Act, this Court in Bazemore versus Friday held under

Title VII, each week's paycheck that offers less to an employee because of her race or sex --

JUSTICE KENNEDY: But are you saying that the rule for paycheck decisions is different than the rule for other sorts of decisions?

MR. RUSSELL: It -- it is. For example, the respondents give the example of promotion decisions but we think that there are analytical and well as practical and historical distinctions that Congress, that led Congress to treat pay differently. As a practical matter, while it's always the case or almost always the case that somebody knows they have been subject to disparate treatment in a promotion case -- they know that they didn't get the promotion and somebody else did -- -it is frequently possible for an employee to be subject to disparate pay without ever knowing that she has been treated differently than anybody else. And certainly --

JUSTICE KENNEDY: That seems to me to work the other way around, just like the case we've just heard argued in the last hour. It's a question of specificity here. If the, if the employee, he alleges that promotions were based on experience and the employee didn't have the experience because of past discrimination, why is that different than the

paycheck rule? I take it indicates that you would not allow the, a cause of action unless the discrimination was within the statute of limitations period?

MR. RUSSELL: Yes. Yes. A promotion -- discrimination in promotion is different analytically than with discrimination with respect to pay decisions themselves. Because in a promotion decision the employee is deprived of the opportunity to take on added responsibilities and therefore earn more pay, but in, but the pay itself is not discriminatory in the sense of treating people doing the same work differently.

JUSTICE SCALIA: I don't really see a vast difference between a promotion and being elevated to a higher pay grade. I mean, there may be no different responsibilities but it's a single act of discrimination: "No, you're not going to move up to the next pay level." I don't see why that's different from "no, you're not going to move up to the next job."

MR. RUSSELL: Because, I think the difference is that when somebody is denied a promotion for discriminatory reasons the paychecks themselves are not discriminatory. They treat

similarly situated workers differently.

JUSTICE GINSBURG: Mr. Russell, I thought that your argument was that yes, you know that you haven't got the promotion, you know you haven't got the transfer, but the spread in the pay is an incremental thing. You may think the first year you didn't get a raise, "well, so be it." But you have, you have no reason to think that there is going to be this inequality. I mean she started out getting the same pay, right?

MR. RUSSELL: Yes, and that practical distinction I think does support Congress's decision under the Equal Pay Act as well as under Title VII to choose a paycheck accrual rule because it's frequently that even if an employee knows she has been subject to disparate pay, it's frequently very difficult for her to have a good faith belief that that pay is intentionally discriminatory without more information.

So for example, if you look at that chart on page 174 of the joint appendix, which summarizes the pay decisions for one of the years at issue here, if petitioner knew only the pay raise that she got that year, she would know that she got a 5.28 percent raise which is not - which is not suspicious. If she

knew what Mr. Conte had gotten, she would know that in fact that pay raise decision decreased the disparity between her pay and Mr. Conte's pay. If she knew what also happened with respect to Mr. Bice she would see he got a higher absolute raise than he did, but she got a bigger one than Todd. It's only if petitioner had all of the information in this chart, that she would know that that pay raise decision increased the overall disparity between her wages and the average wages of men doing the same job. And even then the amount of that disparity, standing alone wouldn't provide a sufficient reason to go claim intentional discrimination to the EEOC.

JUSTICE SCALIA: How does, how does time solve that difficulty?

MR. RUSSELL: It's only after -- one would expect in a merit system that there would be some level of variation in the area and that would work out over time. It's only when it doesn't, when the disparity persists, when the different treatment accrues again and again and the overall disparity in the wages increases, that the employee has some reasonable basis to think that it's not natural variation in the pay decisions but actually intentional discrimination.

In the paycheck accrual rule that's been applied by the lower courts for more than 20 years without incident, adequately balances the interest of employees and being able to come forward once they find out that there is a reason to suspect discrimination, with an employer's reasonable interest in avoiding having to defend stale claims.

I think it's important to note that the Equal Pay Act, which everybody agrees has a paycheck accrual rule, imposes all of the same burdens on employers that respondents allege would have led Congress to never impose a paycheck accrual under Title VII.

JUSTICE GINSBURG: What happened to the Equal Pay Act claim? You started out with a Title VII claim and an equal pay claim and somewhere along the way the equal pay claim dropped out.

MR. RUSSELL: It did. The magistrate judge initially recommended dismissing both the Title VII and equal pay claims on the grounds that there was a nondiscriminatory reason for the disparity. The District Courts held that there were fact disputes that precluded that conclusion, but for some reason only reinstated the Title VII claim.

JUSTICE GINSBURG: Why didn't you ask for

the equal pay claim? As I understand the magistrate judge he said, yes, you had made it across the first hurdle, you had a prima facie case. You showed that you're a woman, and you're getting this and all the men are getting much higher. But the employer has come forward with any other factor other than sex and the other factor is that, your inadequate performance.

MR. RUSSELL: We should have objected to the failure to reinstate the Equal Pay Act claim. We didn't; we didn't think it was that important and the time because we still had the Title VII claim.

JUSTICE GINSBURG: Because in the Title VII case assuming you're right, that you get across the same threshold, you're faced with the same defense. Right?

MR. RUSSELL: Yes. It's essentially the same case kind of case in each instance. Although the jury has to find intentional discrimination in the Title VII case; under the Equal Pay Act the jury has to determine whether the employer has shown that the present disparity is the result of some factor other than sex. And so in both cases, the jury always has to consider the basis of prior decisions that are the cause of the present disparity.

JUSTICE ALITO: Do you have to show that at the time when a particular paycheck in question is issued, there was an intent to discriminate?

MR. RUSSELL: No. The execution of a prior discriminatory decision constitutes a present violation of Title VII. It's frequently --

JUSTICE ALITO: What if the situation is that when the particular paycheck is cut, the company, the employer, whoever it is, has no intent whatsoever to discriminate? They think that they are issuing this pay on a totally nondiscriminatory basis?

MR. RUSSELL: It still constitutes a violation because they are executing a present disparity that is because of sex within the meaning of the statute.

CHIEF JUSTICE ROBERTS: So if 15 years earlier a discriminatory decision was made to give a pay raise of 4 percent rather than 5 percent, and that over the 15 years became the basis with other raises, you think you can challenge the discrimination 15 years later and say well, this was discriminatory because 15 years ago I didn't get a raise and that, carried forward, had a ripple effect into the current 180-day period.

MR. RUSSELL: Yes. That kind of claim would be timely under Section 706. The employer would have an awfully good laches defense.

JUSTICE KENNEDY: Would that be true if there were a change in ownership of the company, so the discrimination originally occurred under owner A, then the company is purchased by owner B, completely unrelated, and the, the disparity is used for bonuses, etcetera?

MR. RUSSELL: That would depend on the general rules for attributing a liability from a successful --

JUSTICE KENNEDY: Well, under the, under the answer that you gave to the Chief Justice and the rule you propose, what of the case of differing ownership?

MR. RUSSELL: I would think that they are still responsible in the same way that they are responsible for other actions that the prior company took.

JUSTICE SCALIA: But that, but that would not be the result if the reason for the disparity between 4 percent and 5 percent was not a, a denial of a pay increase to a higher pay level, but rather denial of a promotion to another job.

MR. RICHARDS: That's correct.
JUSTICE SCALIA: If that were the case, then it washes out and you have to challenge it right away.
MR. RUSSELL: That is correct. And we think --
JUSTICE SCALIA: Does that make any sense?
MR. RUSSELL: Well, I think that it does for the reason that I said before, that that kind of consequence is a secondary effect of the prior unlawful employment practice, but under Evans, which that kind of problem goes to --
JUSTICE SCALIA: Well, you could call it a secondary effect but the only reason you want to get promoted to another job is to get more money. I think it's a primary effect.
MR. RUSSELL: Well even if the Court didn't think that this is a completely satisfactory analytical line to draw, as I said before there are good practical reasons for drawing it, and every reason to think that Congress did draw it, because Congress enacted this statute against the background legal principle that pay, that the pay aspects of the employment relationship arise out of recurring transactions and give rise to recurring causes of

action. And that's the rule that everybody acknowledges Congress adopted under the Equal Pay Act. And to hold that there is a different rule under Title VII would for example lead to the anomalous proposition that Congress intended to permit women, a white woman in 1967 to challenge the present disparity in her pay, but not a black man under Title VII because the discrimination there was racial. We don't think that Congress intended the two acts to perform in such dramatically different ways. In fact --

CHIEF JUSTICE ROBERTS: Well, Congress could have specifically provided for the Equal Pay Act rule under Title VII, but it didn't do that.

MR. RUSSELL: No, it didn't have the same elements, but there's no reason to think that the difference in the elements --

JUSTICE GINSBURG: It didn't have the same defenses because the Bennett amendment makes the defenses under the Equal Pay Act applicable under Title VII, right?

MR. RUSSELL: That's right. And as a result the claims and the process of adjudicating both kinds of claims are not significantly different.

JUSTICE BREYER: Suppose you go back to

the 15 year old action which led to disparity that continues up to today, and suppose at the beginning or in July of 2006 the woman discovers it and brings her claim and suppose she wins. Now, is it the case -- and here I'm uncertain. I thought there was some rule in respect to getting damages that you could only go back 2 years?

MR. RUSSELL: There is a provision of Title VII that limits back pay to at most 2 years.

JUSTICE BREYER: And in that case would it mean that in this case where it happened 15 years ago and she won, but she didn't bring her act until August of 2006, that she could only then collect the extra money for the preceding 2 years?

MR. RUSSELL: That's correct.

JUSTICE BREYER: So it isn't going to open up tremendous liability for 15 or 20 years ago.

MR. RUSSELL: That's absolutely right, and in fact there's no reason to think that such claims are particularly common. This has been the rule in effect for 20 years in the lower courts and respondent is unable to show any actual evidence that these kinds of claims are common. But much more common are instances in which an employee has no reasonable basis for filing a charge of

discrimination within 180 days of the disparity.

CHIEF JUSTICE ROBERTS: I suppose all they'd have to do is allege that sometime over the past -- I mean, it doesn't have to be 15 years. It could be 40 years, right -- that there was a discriminatory act, in one of the semi-annual pay reviews I was denied this, a raise that I should have gotten. It may have been 20 years ago. It may have been 40 years ago.

MR. RUSSELL: They can certainly make that allegation, but the employer is left open to avail itself of the equitable defenses and they'll have a very easy time of showing that there's been undue delay.

JUSTICE GINSBURG: Where does it say --

CHIEF JUSTICE ROBERTS: Why is that if they just discovered it? I just learned about what happened 30 years ago at this company and it's -- I filed right away. There's no laches.

MR. RUSSELL: In that case --

CHIEF JUSTICE ROBERTS: But then they have to go back and litigate what happened 30 years ago.

MR. RUSSELL: I do acknowledge that a traditional laches defense would be more difficult than those --

JUSTICE GINSBURG: I thought your answer before was that this is not -- if she's going to bring a case I got a 2 percent raise, he got a 3 percent raise, her chances are very slim, but if this builds up year by year to the point where see is saying, I'm being denied equal pay, it's a requirement of the anti-discrimination law that I get equal pay, so today I'm not getting equal pay, I thought -- I mean, the chance that she could win when she gets a salary review and she gets a little less than the other person are nil.

MR. RUSSELL: Yes, and it's only after that same kind of decision has been repeated over a number of years that you actually have a case that you can bring to the EEOC. But under respondent's view by that time it's too late.

CHIEF JUSTICE ROBERTS: That's not your theory. I mean, if it happened once 20 years ago you have a case that you can bring, isn't it?

MR. RUSSELL: That's true, but the practical --

CHIEF JUSTICE ROBERTS: You've got a memo that says we're going to pay, 20 years ago, we're going to pay males this much and we're going to pay females this much, and she says that obviously

affected my pay over the ensuing 15, 20 years.

MR. RUSSELL: That's true, but the paycheck accrual rule also serves the function of the much more common case in which somebody doesn't derive notice of the potential discrimination until the discrimination has been repeated over time.

JUSTICE ALITO: But isn't your position that an employer violates Title VII unless the employer periodically reviews the entire pay record of every employee to make sure that there has never been an uncomplained of act of discrimination at any point in the past that would have a continuing present effect on the amount of money that the employee is paid?

MR. RUSSELL: No. They certainly have an incentive to do that under both the Equal Pay Act, which everybody acknowledges puts the employer subject to liability for any present disparity based on any prior decision that can't be justified as based on some factor other than sex, and that incentive has been around for a very long time and respondents aren't able to show that that's been an unmanageable burden. But employers as a matter of basic agency law know from the very beginning whether or not they've been paying the plaintiff less because

of her sex.

JUSTICE SOUTER: How do they know that? 10 years ago the employee got a particular, got a particular job evaluation and that dictated the amount of pay that that employee was going to get for that period and all, all subsequent pay built on that base, and then it turns out many years later that there was discrimination in the way the employee was evaluated way back when, even though there was no complaint about it; then under your theory that would be a present Title VII violation, to cut a paycheck that built, that was based on pay that was built on this act of discrimination that occurred long ago?

MR. RUSSELL: Because this Court made clear as recently Faragher that when an employer delegates pay-setting authority to a supervisor the discrimination undertaken by that supervisor is imputed to the employer as a matter of agency law principles.

JUSTICE SOUTER: Oh, yeah, but that assumed a present discrimination, and it seems to me the problem that we've got is the problem of connecting a past discrimination with what may in fact be an apparently neutral act 15 or 20 years later.

MR. RUSSELL: Well, I don't think that the proof that the act is discriminatory is any more difficult or any more difficult in concept when it happened several years ago than when it happened 180 days ago. It's still the employer -- the employee still has to show that the present disparity is because of sex. And the fact that it may be more difficult as a practical matter is something that the court can take into account under a laches defense.

JUSTICE KENNEDY: Does he have to know that the present decision to continue the pay structure is discriminatory?

MR. RUSSELL: No. It's enough that the employer knows as a matter of basic agency law that the petitioner is being paid less because of her sex, because of prior discriminatory decisions.

JUSTICE GINSBURG: The -- as I remember the facts of this case, wasn't it in 1995 that she got a substantial raise and the reason, according to her supervisor, was that he noticed that her pay was below the minimum of the appropriate range for her job?

MR. RUSSELL: That's true. She did get a higher raise that year and that was his testimony. He also testified that he had told her differently,

that she had done a very good job that year and that's why she had gotten it, and the jury was entitled to believe that.

JUSTICE STEVENS: I didn't understand one of your answers. Supposing that today the management does not know of the prior discrimination. Just, records that have been lost, it happened a long time ago. But there was evidence that there was a firm policy that women get 20 percent less than men forever and it's still -- that policy has continued up to date, but that these people making the decision today did not know that. Would there be liability or not?

MR. RUSSELL: There would.

JUSTICE STEVENS: I thought you said the other. That's why I was --

MR. RUSSELL: I apologize if I was unclear about that. There would be liability, and basic agency law principles impute to the employer those prior decisions. So it's not possible for Goodyear as a matter of law to claim that it did not know about those decisions when they occurred, and I'm not aware of any principle of agency law --

JUSTICE KENNEDY: Well, the question is whether or not there was a discriminatory act and if

the employer, let's say it's an employer that has just purchased a business, thinks that it's a neutral criterion to base wages or bonuses or increase on a prior pay scale and he doesn't know about the prior discrimination, why isn't that a defense?

MR. RUSSELL: It may be a defense. I'm not quite certain how agency law principles apply in that circumstance when there's been a change of ownership. But certainly when there hasn't been it's not unfair to the employer to say that so long as you base present pay on long past decisions it's your responsibility to make sure that that present pay is not discriminatory.

CHIEF JUSTICE ROBERTS: And it's not enough presumably for somebody to come in and even up everybody? I mean, if you see that the women are making 20 percent less than the men you don't escape liability by paying everybody the same going forward, because perhaps if nondiscriminatory decisions had been made the women would have making 20 percent more than the men. You have to go back and revisit every pay decision or you're exposed to liability for current pay.

MR. RUSSELL: That's true, that they have an incentive to do so. They also have that incentive

concededly under the Equal Pay Act and nothing in this Court's decision in this case is going to remove that incentive or that burden. And the fact that Congress didn't find that burden inappropriate under the Equal Pay Act is good reason to think that Congress wouldn't have thought it was inappropriate here.

JUSTICE SOUTER: Well, what is your burden to prove? You've talked about their burden to go back when -- do I understand it that your view is that the only thing you have to prove is that in this case a woman was being paid at a rate which is different from the rate of a man doing a comparable job?

MR. RUSSELL: No, that's not our position. We have to prove in addition that that disparity is because of sex, which necessarily --

JUSTICE SCALIA: So you too then have to go, unless you can find a present policy to discriminate on sex, you too in your proof have to go back whatever it may be, you know, the 15 or 20 years?

MR. RUSSELL: Yes, and the longer that an employee waits the longer it is for her to sustain her burden of proof on that score. And in fact --

CHIEF JUSTICE ROBERTS: Why is that true? I mean, it depends. I suppose it may be harder for the company to mount a defense over time, so it may be to her advantage to wait.

MR. RUSSELL: But if the employer can show in fact that there is a disadvantage, that there is prejudice, it can ask the court to limit the scope of the claim or eliminate it entirely under an equitable defense such as laches.

I think it's important to keep in mind that this is not the first time that this Court has struggled with this question when does the unlawful employment practice occur in a disparate pay case. This Court confronted precisely that question in Bazemore and held that -- and rejected the Fourth Circuit's interpretation in that case that the present payment of a disparate wage was simply a consequence and not in itself a present violation of Title VII?

JUSTICE SOUTER: What do you say of the explanation that was given in Bazemore? I forget the subsequent case. It was in footnote 6. You know what I mean. Which referred to Bazemore as a case that involved a present discrimination which, which is inconsistent with your theory. What do you say

about footnote 6?

MR. RUSSELL: I don't think it's inconsistent. There was present discrimination. There was, people were being paid less and it was because of their race. It just so happened that the because of their race was based on a decision that was made before the effective date of the act. I don't think --

JUSTICE SOUTER: Well, the policy -- I thought the assumption was that the policy was in fact a policy which, which was sort of currently honored and intended to be honored by the company, whereas the case that we're concerned about is the case in which there was a discriminatory act, you know, 5, 10, 15 years ago. Nobody remembers the discrimination now. It's just that it continues to have these ripple effect consequences. I would have thought that the subsequent explanation in Bazemore would have been inconsistent with your position with respect to the current ripple effect.

MR. RUSSELL: No, I don't think that's an accurate description of what was going on in Bazemore. Recall, for example, that there were plaintiffs in Bazemore --

JUSTICE SOUTER: Well, do you take -- I'm

sorry, I can't think of the name of the case. You know the case that I'm talking about with the footnote?

CHIEF JUSTICE ROBERTS: Lorance?

JUSTICE SOUTER: I guess. Do you think that the Court in the footnote misstated Bazemore and that therefore we should trust to Bazemore and not the subsequent explanation?

MR. RUSSELL: No. I thought -- I'd take the footnote in Lorance, if that's what you're referring to, to simply say that, like a facially discriminatory pay policy which discriminates every time it's implemented, a facially discriminatory seniority policy that discriminates every time it's implemented, the Court was -- considered in Bazemore a similar kind of recurring violation because, just like a facially discriminatory policy, a discriminatory pay structure or pay decision treats differently -- similarly situated people differently every time it's implemented.

JUSTICE SOUTER: But that assumes that the company in effect says, we have a pay structure and our pay structure as it is now treats people differently depending on sex, race, or whatever. And that's not the kind -- that's something very

different from the ripple effect argument.

MR. RUSSELL: I don't think that it is. For example, remember that in Bazemore there were plaintiffs, workers who were hired after the merger, after 1965, and when they were hired they were paid the same rate as the white employees, and the disparity in their wages in 1972 arose solely because of the discriminatory application of a merit-based pay raise decision, system, which is exactly the same kind of claim that we're making in this case. But this Court nonetheless held that continuing to pay workers, those workers, less than similarly situated whites because of that discrimination that occurred before the effective date of the act was still a present violation of Title VII.

JUSTICE STEVENS: Let me ask this question. Supposing in the annual review before a promotion is concerned the officer making the recommendation was instructed not only to decide what increase would be appropriate but also to review past history and decide whether or not the employee was being paid fairly in a nondiscriminatory basis and that was part of the assignment. Would you have a case if that were the case?

MR. RUSSELL: The plaintiff would be

required to show that that de novo decision was intentionally discriminatory.

JUSTICE STEVENS: You couldn't rely on the past history in that situation?

MR. RUSSELL: That's right.

JUSTICE STEVENS: Because I think that's sort of what Justice -- Judge Jofla thought was going on here.

MR. RUSSELL: I don't think that he -- he couldn't have thought that because the facts are absolutely clear and Goodyear acknowledges in this Court that the pay system that they had in place simply made an annual decision whether to make a marginal increase into the raise and took the prior salary as given.

If I could, before I sit down, I'd like to make the point that to the extent the Court doesn't think Bazemore decides this case, and doesn't think that the statute is clear on this question, it should defer to the expert opinion of the EEOC on this question in which they have particular expertise because they see thousands of these claims every year. They know better than anybody else whether the paycheck accrual rule is unworkable in practice, or that the pay decision accrual rule will lead to the

elimination of many claims that Congress would have intended to preserve. If I could reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you counsel. Mr. Nager, we'll hear now from you.

ORAL ARGUMENT OF GLEN D. NAGER

ON BEHALF OF RESPONDENT

MR. NAGER: Thank you, Mr. Chief Justice, and may it please the Court:

This Court has repeatedly said that a claim of intentional discrimination is timely and actionable only if it concerns intentionally discriminatory acts taken during Title VII's charge filing period.

And the question presented in this case asks the Court to hold that a disparity in pay states a timely actionable claim for intentional discrimination if it is merely the result of allegedly discriminatory actions taken outside of the charge filing period. The question presented is inconsistent with holding after holding of this Court. When Goodyear issued paychecks during the charge filing period, it did not commit intentionally discriminatory acts. No one at Goodyear took Miss Ledbetter's sex into account during the charge

filing period in deciding what to pay her.

JUSTICE STEVENS: Mr. Nager, can I test your theory with a hypothetical question? Supposing 20 years ago, there was an actual written policy statement, we pay women 20 percent less than men. And that was written up and everybody knew it. And then nothing changed for the next 20 years, and the person then sued today. Would she be -- and there was no intent to do anything, this is just the way it's always been. Would she have a cause of action?

MR. NAGER: The answer to that, I think, is no, if I understand your hypothetical, if the employer was not intending to classify on the basis of gender.

JUSTICE STEVENS: If present intent was merely to do what we have always done, you have to go back 20 years to find out that what we have always done is the result of a policy decision made 20 years ago that we can hire women at a less expense than men so we will continue to pay the same rate. Would the per paycheck rule apply to that case?

MR. NAGER: I think the answer is it clearly would be untimely insofar as the allegation is that there is discrimination today merely because there was discrimination yesterday. Whether or not

there is discrimination going on during the charge filing period, whether or not women are intentionally being treated differently than men, I think the answer, based upon your hypothetical, is no, given what you've said.

JUSTICE ALITO: If the employer had a policy of paying women, all women, 20 percent less than men, and it continued that policy, surely it would know in the present day when it issued those paychecks that it was paying women less than men. So it would be intentionally discriminating at this time, wouldn't it?

MR. NAGER: Justice Alito, that's why I qualified my answer to Justice Stevens, because I think that the question his hypothetical raises, like your question, goes to the sufficiency of evidence necessary to prove intent during the charge filing period. And I don't want in any way to be heard that there is anything in our position in this case that tries to answer that question.

The reason I'm not trying to answer that question in this case is because that question is not before the Court except with one small respect. If the only thing that the plaintiff is relying upon is discrimination outside of the charge filing period,

that is legally insufficient under this Court's cases in Evans, Ricks, Lorance and Machinists before it.

What Bazemore dealt with was a case very much like your hypothetical, Justice Alito, of an allegation of an ongoing racial classification during the actionable time period. And it was because of that allegation of ongoing actionable racial classification and pay that there was both a timely claim, and according to Justice Brennan's opinion for all nine members of the Court of that -- in that case, a very serious potential error by the district court in that case as to whether or not it had been clearly erroneous in holding that the United States had failed its proof of proving an ongoing intentional race discrimination case --

JUSTICE SCALIA: Mr. Nager, why did it make any sense to treat this area any different from the Equal Pay Act.

MR. NAGER: Because they are two different statutes and the elements of the plaintiff's claims are fundamentally different. That's the fundamental flaw in the petitioner's claim in this case. Let me explain, if I may, Justice Scalia.

In a Title VII case, in an intentional discrimination case, the question is whether or not

there is an act that is motivated by gender during the charge filing period. That is not an element of the plaintiff's cause of action in an Equal Pay Act case.

In an Equal Pay Act case, all the plaintiff has to do is allege they are performing equal work to a male, and that they are paid differently. And it's that cause of action that triggers the statute of limitations in an Equal Pay Act case. That's fundamentally different. As Chief Justice Roberts said --

JUSTICE GINSBURG: Why is it different if the one further statement was made. And the employer knew that every woman is being paid less than every man. Why isn't that sufficient under Title VII, and if you want evidence, your own supervisor said, oh, we saw one year that she was outside the range appropriate for this job.

MR. NAGER: Well, knowledge is a necessary condition, but it's not a sufficient condition, Justice Ginsburg. In Evans, the employer knew it previously had a sexual -- a gender-based discriminatory policy about whether or not female flight attendants could work after they got married. But that prior knowledge of prior discrimination by

the employer wasn't sufficient to make the neutral action taken --

JUSTICE GINSBURG: Evans involved a factor that simply is not present here. I mean, Evans involved a seniority system. And if this person who had been off the job were to come back two years later, and bump people who had been there every day, well, certainly that's a different case than this one, where she is saying, I should have been paid equally. I wasn't. And I know I can go back only two years. That's quite a bit different than the Evans situation.

MR. NAGER: Justice Ginsburg, Title VII allows proof of dissimilar treatment as evidence of present intentional discrimination, but it's not the elements of the claim. As Chief Justice Roberts was pointing out, Title VII would prohibit paying a woman the same amount as a male if the employer would have paid the female more because she had a -- more degrees or other criteria that the employer ordinarily took into account.

The elements of those two claims are fundamentally different. What makes this case untimely and unactionable is that there is no claim and there can be no claim because it's the law of the

case that Goodyear took Miss Ledbetter's sex into account during the charge filing period.

What Goodyear did was the same kind of neutral rule as in Evans. What Goodyear did was it said, we are looking at the pay rate contained in our payroll system, and applying those rates as they are mandated for all of our employees, male or female. And what Goodyear did at the beginning of each evaluation period was say, we are starting this payroll period with the pay rates that were paid in the last period for all of our employees, male or female, no matter what their prior causes.

JUSTICE GINSBURG: If only the 180 day period counts, and she can complain only about discrimination in that period, then how do you account for her being able to go back not 180 days, but two years for her remedy?

MR. NAGER: The two-year rule is only a damages rule that applies only in Title VII cases. And it's triggered in cases such as where there has been equitable tolling or equitable estoppel, because the employer -- it was a promotion case or a pay case --

JUSTICE GINSBURG: I thought it was the lid on the amount of compensation you could get in

Title VII cases. You can't go back more than two years for damages. But it would seem that doesn't fit at all whether you can go back only 180 days.

MR. NAGER: No. What the 180 days is for is determining the time period during which the allegedly illegal act must occur. That period can be tolled using a tolling rule. It can tolled for three years possibly. The back pay rule says, even if you tolled the statute of limitations for more than the two-year back pay period, you can only get back pay for two years. What is going on, of course, in this case, is they are trying to use allegedly discriminatory acts that occurred 10, 15, 20 years ago, both to make neutral acts actionable, and to get compensatory and punitive damages.

JUSTICE GINSBURG: Why is she claiming that in 1995, a supervisor recognized that my pay was way out of line. Isn't that what the supervisor testified?

MR. NAGER: He did. And he said he raised her pay up the maximum amount he was entitled to that year. And she didn't file a charge of discrimination in 1995.

JUSTICE GINSBURG: Maybe she thought that, well, they are on the right track. Next year, they

are going to raise me up to the equal pay level.

MR. NAGER: And what the purpose of the charge filing requirement under Title VII, as this Court has repeatedly said, is to require that employee to come forward promptly within 180 days of the date that the alleged unlawful employment action is communicated to her, and bring that claim or lose it, that the purpose of Section 706 was to create repose.

JUSTICE GINSBURG: The question that I asked Mr. Nager that I think is really important, and that is, where do you put these pay cases? Do you put it in the box with the hostile environment that builds up over time, and as long as the environment is hostile at the time you bring your complaint, then it doesn't matter that it started 20 years ago. This notion of one year, it's 2 percent, and the other person got 3 percent, you really don't have an effective claim unless it builds up to the point where there is a noticeable disparity.

MR. NAGER: Justice Ginsburg, the petitioner in this case has agreed with us that this is the kind of discrete employment action that triggers the 180-day period. It is not like a sexual harassment claim.

JUSTICE GINSBURG: Where is that agreement?

MR. NAGER: It's in their brief. They repeatedly quote the portion of Morgan which described pay claims as discrete acts subject to the discrete trigger rule in the Morgan opinion. And that, of course, is an obvious concession that they had to make in this case, because Mr. Russell would not concede when Justice Scalia asked that that first pay rate decision was not an identifiable act, that it wasn't an actionable -- immediately actionable claim.

JUSTICE GINSBURG: I thought that the Morgan decision quotes Bazemore for saying, under Title VII, each week's paycheck that delivered less to a black than to a similarly situated white is a wrong, actionable under Title VII.

MR. NAGER: And that's in the portion of the opinion that's dealing with discrete employment action. It's not in the portion of the opinion dealing with sexual harassment claims. I'm trying to answer your question about which portion of Morgan pay claims fall into.

JUSTICE GINSBURG: Whatever portion it's in, it says each week's paycheck that delivered less

to a black than to a similarly situated white is a wrong, actionable --

MR. NAGER: Because Justice Thomas' opinion was accurately describing the holding in Bazemore on the facts of Bazemore, because in Bazemore there was a claim, in contrast to this case, of ongoing intentional race discrimination in classifying employees on the basis of their race and paying the black employees less than the whites. If the Court would look at the remand order in the Bazemore case, they'll see that the Court did not remand with instructions that judgment be entered for the United States merely because there was a disparity in salaries.

JUSTICE BREYER: Justice Brennan's opinion sounds to me, part one, as if he is saying what the mistake was that the company made here is that they didn't really eradicate the effects of the past bad act, and they were trying to eradicate it.

MR. NAGER: Well, actually, the United States' allegations in the case were trying --

JUSTICE BREYER: That's another part of the case that's part two and part three about the evidence that came in. In fact, there are about six other parts. I'm just talking about part one.

MR. NAGER: That's part one.

JUSTICE BREYER: Yes. All right. So I read that. Now, this is my this is my cost/benefit analysis here. If we follow the other side's rule, it's very simple, we just said Bazemore applies, whether there's a practice or whether it was a discrete thing, or whatever, so it's simple. But we do have to distinguish pay from the other kinds of things. And we have heard them explain why there is a distinction. I'd rather get to your side and then you can attack both, or whatever.

Your side of it, it seems to me, if I agree to you, I now have to create in the law some kind of thing that sounds very complicated about whether that old bad thing was somehow a pattern or a practice that, as a pattern or a practice, didn't get eradicated within the last few years, or was a totally discrete act, and therefore, had no implication as a pattern or practice that didn't get eradicated. That sounds hard.

And the second thing I guess I'd have to do is to create a lot of tolling law because there will be probably a significant number of circumstances where a woman is being paid less, and all she does is for the last six months get her

paychecks and she doesn't really know it because pay is a complicated thing, and through no fault of her own, it takes about eight or nine months or even a year for her to find out. And we are going to have to toll, aren't we?

So I have, legally speaking, a complicated tolling system that I have to graft on to this, your case. I also have to start distinguishing Bazemore which is pretty hard to do. But on the other side, they are just saying, go with the flow. Nobody is really hurt, because the employer has to worry about all this stuff anyway under the Equal Pay Act. I'm giving you that summary so you can just shoot it down.

MR. NAGER: Well, it was a compound question, but I'll try to answer each of its parts.

The first point I would make is that Bazemore came after Evans and Hazelwood and Ricks, and it did not distinguish Evans or Hazelwood or Ricks on the grounds that Bazemore is a pay case and Hazelwood and Evans were not pay cases. It distinguished them on the grounds of whether or not the alleged discrimination was taking place in the charge filing period. So this notion that Bazemore stands as a proposition that Evans and Lorance and

that line of cases doesn't apply because they don't apply to pay cases was not the opinion of the Court in Bazemore.

Secondly, we are not asking you, and I don't think it takes any difficulty to apply the rule that we are proposing in this case. We are proposing the same rule that's set forth in Justice Stevens' opinion for the Court in Evans, the same rule that's set forth in Justice Powell's opinion in Ricks, the same rule that's set forward in Justice Scalia's opinion for the Court in Lorance.

JUSTICE STEVENS: But there is a slight difference in that you're focused on whether discrimination occurred within the 180-day period. And if I understand you correctly, discrimination would have occurred during the 180-day period if the employer knew of the policy that I described, because then he would be knowingly paying less.

MR. NAGER: No. Not if he had knowledge of --

JUSTICE STEVENS: I thought your answer to Justice Alito made that point.

MR. NAGER: Well, what I said to Justice Alito was, if the employer knew that it previously had a policy and if it knew and intended that its

present pay would be done for gender-related reasons or racially-related reasons, it would constitute --

JUSTICE STEVENS: But the question of whether just knowing that that's a source of the policy would be a gender-related reason.

MR. NAGER: Well, the question is whether there was a present policy. That's the point the Solicitor General makes in its brief and the point we make in our brief.

JUSTICE STEVENS: Well, in my hypothetical there was a policy established 20 years ago, a 20 percent differential, never been changed. And the only question that would differ, in some cases the employer knows about it and in some others he doesn't.

MR. NAGER: And if the employer is presently applying, and knowingly and intentionally doing so, a 20 percent differential for male and female employees for no reason other than the gender of the employees, that's a present violation.

JUSTICE STEVENS: Well, what his reason is, this is always the way we did it. That's his reason.

MR. NAGER: Well, if what he's saying is, the way we have always done it is engage in gender

discrimination, then doing it in the present time period would state a present claim.

JUSTICE KENNEDY: But suppose he has no intent to discriminate as a present matter, but he also knows that his decision is necessarily based on a policy that was discriminatory some years ago. What result?

MR. NAGER: I think if I understood the question, Justice Kennedy, I think no present claim, because the only thing you said that he knew is that they previously engaged in discriminatory actions.

JUSTICE KENNEDY: He knows it, but his present decision is necessarily based on some prior decision that was discriminatory.

MR. NAGER: That in and of itself is not sufficient. That's the point that, the seniority system in Lorance was necessarily based upon an earlier decision that the employer --

JUSTICE KENNEDY: How is that -- how is that consistent with the statement in Bazemore that the employer has a duty to eradicate past discrimination?

MR. NAGER: Well, the duty was to eradicate the alleged ongoing facially discriminatory pay practices that preceded the enactment of Title

VII and were alleged to have been maintained for racially purposeful reasons after Title VII became effective to a public employer. There is no contemplation in that case that that duty would require an employer to investigate discrete employment decisions made in years gone by that weren't made the subject of a timely charge. What this Court has said repeatedly is when the charge filing period passes and no charge is brought, the employer is entitled to treat that past act as if it was a lawful act. That's what Justice Thomas' opinion in Morgan says. That's what, the opinion that Justice Stevens wrote for the Court in Evans.

JUSTICE SOUTER: Is that so even if they know it was in fact originally an unlawful act?

MR. NAGER: Yes.

JUSTICE SOUTER: You draw a line between present purposeful discrimination and present knowledge of past discrimination which is knowingly carried forward.

MR. NAGER: That's correct. Because the purpose of Section 706(e) is to give repose for those past decisions.

JUSTICE GINSBURG: How do you describe dealing with a case like Manhart where they were

complaining about a pension plan that had been instituted, oh, way longer than 180 days, years and years before?

MR. NAGER: That plan was facially discriminatory. It included on the face of the plan gender-based mortality tables. And as Justice Scalia's opinion for the Court in Lorance and the footnote that Justice Souter pointed out to, a facially discriminatory policy necessarily evidences present intent each time it is applied, and that is the important distinction. On the one hand you have cases that are both timely and as a matter of law show present intent because they are facially discriminatory. On the other end of the continuum you have cases that are only about past discrimination and do not involve any present actionable claim of intentional discrimination, and they are both untimely and legally insufficient. And then you have the cases in the middle which concern present allegations of discriminatory practices so obnoxious, as alleged in Bazemore, that the Court held that district court may have been clearly erroneous in its conclusion that there was no present intentional discrimination.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Nager. Mr. Gornstein?

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE RESPONDENT

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

Title VII gives employees like petitioner 180 days to challenge an individual pay decision such as a denial of a pay raise. Employees who allow the 180-day period to pass may not years later and even at the end of their careers challenge their current paychecks on the grounds that they are the result of a number of discrete individually discriminatory pay decisions that occurred long ago.

JUSTICE GINSBURG: This would be a good Equal Pay Act case, wouldn't it?

MR. NAGER: If it met the requirements of the Equal Pay Act, which is that it has to be the same knowledge, skills and responsibilities and effort for the job, then every time that you have a failure to deliver equal pay for equal work there is a violation of the act. But Title VII is not an equal pay for equal work statute, it is a nondiscrimination statute, and so that you have to show intentional discrimination in pay, not just the absence of equal pay.

JUSTICE GINSBURG: Why doesn't it become intentional, at least after 1995, when the supervisor recognizes that he's got an employee that is out of the appropriate range for her job, whether she does it badly or well?

MR. GORNSTEIN: Justice Ginsburg, if an employee brought a claim within 180 days of the decision made then, that is to not, to not equalize the pay further --

JUSTICE GINSBURG: Why would she bring it then? They gave her a big raise that year.

MR. GORNSTEIN: Well, because I think what you're suggesting is they didn't give her a big enough raise, because there was still intentional discrimination from prior years that were not, that were unchallenged.

JUSTICE GINSBURG: Didn't she have every reason to expect, well, they finally noticed it, so next year I'm going to get that same size raise, but that it doesn't happen the next year?

MR. GORNSTEIN: And if it doesn't happen that next year, then that employee has 180 days to challenge that pay decision on the ground that it's intentionally discriminatory. If she does not do that, she cannot come back 15 years later and say

that a decision that was made 15 years ago and 14 years ago were based on my gender, and they --

JUSTICE GINSBURG: She is not talking about a decision made 15 or 14 in this case. She starts out even, and it builds up over time.

MR. GORNSTEIN: Well, I think in some, in some cases that, pay cases, it will build up over time. In some cases it will happen immediately. But in either case, what Title VII says is that you have 180 days to challenge a discrete pay decision. If you do not do that, you cannot come back later, years later, four years later, six years later, or here at the end of her career, and challenge every pay decision that's been made up until then on the grounds that intent, it was intentionally discriminatory and continues to have ongoing effects.

JUSTICE STEVENS: But you could if the person making the decision was aware of the discriminatory policy.

MR. GORNSTEIN: Knowledge of prior unlawful acts is relevant evidence in deciding whether it's present day intentional discrimination. But just as in a case where there's a promotion and I'm aware that there was a prior discrimination in a promotion and that was not timely challenged, and the

person comes to me today and says I want my promotion now. If I'm aware that she was denied that promotion for discriminatory reason but she did not timely challenge it, my decision not to give her that promotion is not automatically discriminatory.

JUSTICE STEVENS: But you're changing the hypothetical. My hypothetical was simply a pay case.

MR. GORNSTEIN: I understand that, and I'm saying the same rule applies in a pay case that applies in a promotion case.

JUSTICE STEVENS: You're saying, I think contrary to your colleague if I remember correctly, that even if the employer knew of the 20 percent differential policy established 20 years ago, it could still carry it into effect today.

MR. GORNSTEIN: What I'm saying with respect to a policy is if you have an ongoing policy that is still being applied in the limitations period, and that your current policy is to pay less to women than to men, then of course you can sue.

CHIEF JUSTICE ROBERTS: Let's say it's the same person who made the decision. You know, five years ago he said I'm giving a 6 percent raise to men, I'm giving a 3 percent raise to women, and then he decides that's illegal, and so from now on

everybody is going to get a 4 percent raise every year if you meet certain standards. Is that ongoing discrimination or is that a neutral thing, that he doesn't have to take into account the past discrimination?

MR. GORNSTEIN: That's a neutral discrete act that was made at the time. It was not challenged.

CHIEF JUSTICE ROBERTS: Even though he knows that it carries forward the illegal discrimination?

MR. GORNSTEIN: Even when the employer -- you can have an inference from knowledge of past illegal conduct that your present intent is to carry forward that differential based on the person's sex, but it is not an automatic inference. You can also, the employer could say look, that was a decision that occurred a while ago. A lot of people did this. There were decisions made that affected a lot of other people --

JUSTICE GINSBURG: But you're talking about --

MR. GORNSTEIN: -- and I didn't correct those either, and that's a neutral policy.

JUSTICE GINSBURG: But that's a defense.

And you're talking about, yes, you might draw that inference but that inference would be wrong because I have a defense. The defense is poor performance explains it, not sex discrimination.

MR. GORNSTEIN: But under Title VII, poor performance isn't a defense. It is negating intentional discrimination. It's the employer's employee's burden --

JUSTICE GINSBURG: I thought at least in this area, the defenses were the same as under the Equal Pay Act.

MR. RUSSELL: Well, there are -- there is an additional layer of defense, but still the employee has to prove an additional element in a Title VII claim, not just the absence of equal pay for equal work, it has to --

JUSTICE SCALIA: Mr. Gornstein, why should we listen to the Solicitor General rather than the EEOC? I mean, they have taken a different position from the one that you're urging upon us.

MR. GORNSTEIN: The EEOC has taken a different position but that decision that the EEOC has taken has been based on its reading of this Court's decision in Bazemore, and this Court does not give deference to the EEOC under Skidmore or under

any other standard.

JUSTICE GINSBURG: So why don't we at least hear from the EEOC? That has happened in other cases where the Department of Justice and the EEOC take different positions, at least the EEOC filed a brief even though it wasn't the Government's brief.

MR. GORNSTEIN: That has occasionally happened in the past. It has not happened as a regular matter, or to my knowledge it does not ordinarily occur. The EEOC --

JUSTICE SOUTER: If the EEOC is upheld in the Court of Appeals and review is sought here, will the Government confess error?

MR. GORNSTEIN: I'm sorry, Justice Souter?

JUSTICE SOUTER: If the EEOC decision is upheld by one of the Courts of Appeals and there is an attempt to bring the case here on cert, will the Government confess error?

MR. GORNSTEIN: If the Court rules in the Government's favor in this case, then that case would have to be vacated and remanded for reconsideration in light of this Court's decision today. The EEOC's --

JUSTICE SOUTER: Well, I'm asking a simpler question. Let's assume that somehow we fudge

it. If -- if there is a clear cut case in which the EEOC takes a position different from the one the Government is now espousing, and a Court of Appeals upholds it, and cert is sought here, will the Solicitor General say please remand, or simply confess judgment?

MR. GORNSTEIN: Justice Souter, I would like to answer that question today but of course if the Court doesn't resolve the question today that's been decided today, but issues a new decision, anything we would have to do would have to look at that new decision and make a judgment about what the law is at that time. And so my -- my point is --

JUSTICE SOUTER: I think I got your point.

JUSTICE SCALIA: Touche.

MR. GORNSTEIN: To go on, there are three decisions of this Court that control the result here, Evans, Ricks and Lorance, each of which says that the employee cannot circumvent the limitations period by challenging conduct within the limitations period on the grounds that it is the result of a prior act of intentional discrimination that was not timely challenged.

A second reason to reject petitioner's rule is that petitioner's rule, as petitioner admits,

creates a special rule for pay cases when there is nothing in the language of Title VII that would justify a special rule. Title VII has the same mandate of nondiscrimination for pay as for any other practice. It has the same 180-day period for pay claims as any other claim.

And the third reason to reject petitioner's view is that it would undo the statute of limitations in pay cases, because the result would be, what you have here is that an employee could wait until the end of their career, or at least a very substantial number of years, and then challenge current pay on the basis of past acts that took place a long time ago. And Justice Breyer, you talked about it being limited to just back pay during the two-year period. The courts that have looked at this have not decided whether it's the 180-day period or the two-year period if you buy petitioner's theory, I don't think he has either. But the important additional point of order is you're still hinging liability on past acts long ago and you're adding the possibility of compensatory relief and punitive damages, so it's not the limited damage award that you're contemplating necessarily.

JUSTICE BREYER: What would you do on the

other side of this? It if you win on this, then don't you have to have a fairly relaxed standard of allowing the woman, tolling or something, when she just gets some paychecks that would take her a while to figure out that these are really reflecting some old discrimination and she doesn't know. It's different in that respect from the promotion itself.

MR. GORNSTEIN: Well in some -- if she's denied a pay raise and she's aware that other people are getting substantial pay raises -- I don't think it's that much different than somebody else getting the promotion and me not getting that promotion.

JUSTICE BREYER: Well, she knows this. She knows that, all these boxes on her paychecks and she's not quite sure what they mean. All right, your answer is not much different.

MR. GORNSTEIN: Well, to the extent that you want to address equitable tolling. That's the question, should there be equitable tolling until such time as she's aware of the disparity. But what petitioner's theory does is says even after the employee is aware of the disparity she can wait 15 more years and then sue.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Russell, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF KEVIN K. RUSSELL

ON BEHALF OF THE PETITIONER

MR. RUSSELL: I think the fundamental disagreement in this case comes down to what is the unlawful employment practice Congress was referring to when it prohibited discrimination with respect to compensation. If it is under our view, in our view, the payment of an intentionally disparate wage, then there's no question that under Bazemore the violation occurred during the limitations period. The fact that the intent was formed outside the limitations period doesn't make the present payment of a disparate wage because of sex any less intentionally discriminatory. But the difference in the conceptions, which frankly isn't answered by the plain text of this statute itself, should be resolved in light of the practical consequences of the differences in the rules.

The Solicitor General acknowledges that a paycheck accrual rule applies at least in a case of a policy of discrimination, but that's a very difficult rule to administer for the EEOC, which must make a determination of timeliness before it even has authority to investigate a claim. It shouldn't be

left to the EEOC to figure out whether there's an unwritten practice or an unwritten policy which would require an extensive investigation not only of the petitioner's pay but of everybody else's. You recall that in Bazemore they had to conduct a multiple regression analysis to establish a pattern of discrimination there.

Our rule is simple to administer and has been administered for decades in the lower courts and it's the rule that the EEOC itself has chosen in construing this ambiguous aspect of the statute.

JUSTICE SCALIA: Do you agree that their action is just based on Bazemore or their reading of Bazemore?

MR. RUSSELL: No, that's incorrect. I mean, the EEOC has taken this position that you can challenge present pay disparities even before the Court's decision in Bazemore and it continued to adhere to it afterward. The fact that they cited to Bazemore shouldn't disentitle them to the kind of deference that they're ordinarily entitled to when they construe a statute that's given to them, and this is precisely the kind of question Congress would have entitled them to exercise their expertise on.

Finally, I would like to raise the point

that under respondent's rule the Extension Service would have been permitted to pay blacks less than white in perpetuity in Bazemore so long as it did so because of cost and not because it wanted to continue to discriminate on the basis of race. And similarly, under the Solicitor General's view an employer who had intentionally discriminated through discrete decisions against some of its employees prior to the act would be allowed to continue to do so after the act because the decision would have been the potentially unlawful act in that case and that wouldn't have been actionable.

We respectfully suggest that Congress intended nothing than a complete --

JUSTICE ALITO: How could cost justify a dual pay scale?

MR. RUSSELL: It could -- the Extension Service --

JUSTICE ALITO: You'd have to have another factor in the decision, which was that you didn't want to change pay. But cost alone couldn't justify that.

MR. RUSSELL: It would be a nondiscriminatory reason. They would -- they would say that, the reason we didn't immediately equalize

salaries is because it cost too much, it would have required -- we'd be required to cut down on our programs. And under respondent's view that is not intentionally pay-maintaining discrimination.

JUSTICE ALITO: No, you'd have to say, we don't want to spend any more and we also don't want to equalize pay. You have to say the second too.

MR. RUSSELL: They would say, we don't want to equalize pay because it costs too much, and that's not a discriminatory reason for maintaining the prior disparity. But ultimately --

JUSTICE ALITO: If you say you're not going to equalize pay, you're saying you're going to discriminate on the basis of race.

MR. RUSSELL: Which is what happened here. Goodyear continued to discriminate on the basis of sex, knowing as a matter of agency law that it had done, it had set her pay for discriminatory reasons in the past.

CHIEF JUSTICE ROBERTS: You can equalize pay by lowering others. You don't -- raising the discriminated-against class is not the only way to equalize pay. So I don't see how cost is a justification for continuing the disparity.

JUSTICE GINSBURG: Not under the Equal Pay

Act. You can only equalize up, not down.

MR. RUSSELL: That's true.

CHIEF JUSTICE ROBERTS: Under Title VII you can equalize either way, right?

MR. RUSSELL: It would, but if they chose not to equalize at all because they don't want to spend the money the money that would be a nondiscriminatory reason.

JUSTICE ALITO: You'd certainly have a very happy work force if you equalized one way.

MR. RUSSELL: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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