No. 12-113

In the
Supreme Court of the United States

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC., *et al.*,

Petitioners,

v.

GEORGE McREYNOLDS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), this Court ruled that plaintiffs challenging a company's hiring and promotion practice—which left such decisions to the discretion of individual managers at local stores, subject only to a companywide policy against discrimination—did not satisfy the commonality requirement of Federal Rule of Civil Procedure 23(a)(2). Instead, the plaintiffs were required to show that "the entire company operate[s] under a general policy of discrimination," *id.* at 2556 (citation and quotation marks omitted), which was not the case where the company delegated such decisions to local managers. Merrill Lynch allows, but does not require, brokers at its local branches to form teams to pursue brokerage accounts. It then allocates accounts and promotes brokers based on their productivity, without regard to whether they have chosen to join a team or not, although joining a team can make an employee more productive. Does the Respondents' allegation that this combination of factors constitutes a form of "disparate impact discrimination" satisfy the commonality requirement?

2. Because a plaintiff suing under the disparate impact theory is not required to prove that a defendant has committed any specific act of intentional discrimination, the threat of disparate impact liability for the existence of statistical disparities in outcomes essentially forces employers to make preemptive race-conscious classifications. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988). Do the disparate impact provisions of Title VII, 42 U.S.C. § 2000e-2(a), (k)(1)(A), by forcing or pressuring employers to discriminate on the basis of race, violate

the Equal Protection components of the Fifth and Fourteenth Amendments?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

United States Constitution

United States Statutes

State Regulation

Rules of Court

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner.[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuses of civil rights law and class action procedures which harm businesses, stifling entrepreneurialism and job creation. *See*, *e.g.*, *Barber v. American Airlines, Inc.*, 948 N.E.2d 1042 (Ill. 2011); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009); *Harris v. Mexican Specialty Foods*, 564 F.3d 1301 (11th Cir. 2009). In addition, PLF staff have published extensively on the effects of tort liability on the

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

business community. *See*, *e.g.*, Timothy Sandefur, *The Right to Earn a Living* 239-55 (2010); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003). Through its Equality Under The Law Project, PLF has become one of the nation's leading opponents of race-based government policies, and has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF addressed the unjustified application of disparate impact theory in cases like *Ricci v. DeStefano*, 557 U.S. 557 (2009), and *Alexander v. Sandoval*, 532 U.S. 275 (2001), and is amicus curiae in *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. filed Sept. 15, 2011). PLF believes its public policy experience will assist this Court in considering whether to grant the petition for writ of certiorari.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below created an exception to this Court's decision in *Dukes*, 131 S. Ct. 2541, that threatens to swallow the rule. The Court of Appeals concluded that *Dukes* did not bar certification here because Merrill Lynch (1) allows teaming, (2) bases account distribution on a broker's past success, and then (3) rewards brokers based on their productivity,

thereby "increas[ing] the amount of discrimination," if any, that might have occurred when brokers first formed their teams. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490 (7th Cir. 2012). This attempted distinction, however, cuts the legs out from under *Dukes* and would allow courts to certify classes in which hiring and promotion decisions are so decentralized and subject to managers' individual discretion as to make it unreasonable to describe those decisions as a single source of common injury. Certiorari is necessary here to make clear that *Dukes* bars *all* lawsuits in which plaintiffs abuse the class action procedure to consolidate the aggregate effects of individual decisions into a single discriminatory "policy" under the civil rights laws. That question is of critical importance to the future of class action lawsuits, and it will determine whether *Dukes* stands as a meaningful limit or an anomalous outlier among decisions in this area.

This lawsuit is the latest step in a movement to litigate general social grievances about demographic differences as though they are a form of discrimination. As Professor Nagareda explained, class action cases like this seek "to alter the meaning of discrimination under Title VII to accord with an emerging body of research that draws on statistical analysis informed by sociology." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 134 (2009). *Dukes* rejected that effort, and this Court should take this case to make clear that a plaintiff cannot show a "common issue" merely by showing that the end result of a chain of specific, non-discriminatory decisions by local managers is not "in accord with the laws of chance." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (plurality opinion). There are

a "myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces," *id.*, and such imbalances should not raise the specter of civil liability.

The Due Process requirements established in *Dukes* create a tension with the "disparate impact" provisions of 42 U.S.C. § 2000e-2(k) that only this Court can resolve. Those provisions allow a plaintiff to sue a business whenever its policies have the consequence of "perpetuat[ing] the effects of pre-Act intentional discrimination," *Watson*, 487 U.S. at 988 (opinion of the Court), or are allegedly infected by "subconscious stereotypes and prejudices." *Id.* at 990. When combined with the class certification procedure, the disparate impact theory exposes businesses to civil liability even for innocent acts (or inaction) that result in anything other than an outcome that statistically mirrors the local workforce. The plurality recognized in *Watson*, that such an interpretation of the civil rights laws is "completely unrealistic" and unsustainable. *Watson*, 487 U.S. at 992 (plurality opinion). Yet under the disparate impact theory, a business runs the risk of being sued whenever a plaintiff demonstrates the existence of "a common mode of exercising discretion that pervades the entire company." *Dukes*, 131 S. Ct. at 2554-55. In consequence, the "disparate impact" theory essentially forces businesses to implement race-conscious policies to equalize outcomes in order to avoid liability. But that is itself unconstitutional. The Constitution forbids the government from forcing private parties to discriminate on the basis of race. The petition for writ of certiorari should be granted.

ARGUMENT

I

CERTIORARI IS NECESSARY TO EXPLAIN HOW *DUKES* MUST BE IMPLEMENTED

A. *Dukes* Rightly Barred the Transformation of Class Action Lawsuits into a Vehicle for Litigating Broad Sociological Claims

The line this Court drew in *Dukes* was essential to reining in abuse of the class action procedure. Before that case was decided, plaintiffs' attorneys sought to transform the class action lawsuit from a procedural device for efficiently disposing of a large group of essentially identical cases without duplicative court hearings, into a tool for vindicating broad "social justice" concerns that do not belong in the courtroom.

As Professor Richard Nagareda observed, the *Dukes* case arose from an effort to "reconceptualiz[e] . . . the meaning of discrimination under Title VII to encompass accounts in the nature of 'structural discrimination.' " Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 167 (2010). This effort aims to empower plaintiffs to sue over "systemic disparate treatment," Noah D. Zatz, *Working Group on the Future of Systemic Disparate Treatment Law*, 32 Berkeley J. Emp. & Lab. L. 387, 388 (2011), which means, to treat the statistical disparities in the workforce as though they were a form of prohibited discrimination. The goal of the "system disparate treatment" theory is to enable plaintiffs to sue businesses whenever their workforce is not a statistical

mirror of the local population. *See*, *e.g.*, Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 688 (2003) (lawsuits like this case "seek . . . organizational change" to eliminate "subtle, often unconscious bias in individuals"). Under this doctrine, "employers [w]ould be held strictly liable for structuring workplaces in a way that produces widespread individual disparate treatment." Zatz, *supra*, at 392.

This effort is "inevitably in tension with the class requirements of commonality and predominance," Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. 367, 377 (2008), but its advocates hope that it will enable plaintiffs to "alter the specific organizational structures or institutional practices that may continue to enable ongoing discrimination," instead of focusing on the legal redress of concrete and particular injuries. Green, *supra*, at 711. Professor Tristin Green, one of the leading advocates of this effort, argues that such a step is needed to combat the effects of "cultural and structural variables that may vary from institution to institution," *id.* at 714—in other words, the aggregated social consequences of ordinary economic life in which outcomes are not determined by any single decision-maker but result from the interplay of countless unpredictable factors. In Green's view, this "complexity" demands "an equally complex, contextual remedial process," *id.* at 713-14, which would be overseen by the courts.

This alteration of the class action procedure would "permit[] sweeping challenges to company-wide practices and make[] class lawsuits more likely."

Levit, *supra*, at 377. Such lawsuits can be "virtually impossible to defend against" because trial lawyers typically "argue the case to a jury using broad generalities in order to get some sweeping condemnation of the 'atmosphere' of the employer." Sarah Kirk, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 Tex. Rev. Law & Pol. 163, 166 (2009).

Worse, these efforts would, if successful, swamp the principle of *specificity* in the law, eliminating any requirement for proof of *actual instances* of discrimination. As the Second Circuit Court of Appeals recently observed, "statistical evidence that purports to show discrimination at an entity and naming as defendants all of the individuals who could possibly be responsible for such discrimination" *might* "support an inference that one or more of the named individual defendants committed acts of intentional discrimination," but it would provide "little or no basis for discerning *which* individual defendants are responsible for the statistical disparities." *Reynolds v. Barrett*, Nos. 10-4208-pr & 10-4235-pr, 2012 U.S. App. LEXIS 14201, at *27 (2d Cir. July 11, 2012). And, indeed, such statistical disparities may result from no actual discrimination at all.

This is a critical point because the law currently requires a plaintiff in a disparate impact case to "establish that a particular employment practice causes a disparate impact." *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 717 (7th Cir. 2012). Without this specificity, employers could be "held liable for 'the myriad of innocent causes that may lead to statistical imbalances.'" *Id.* (quoting *Watson*, 487 U.S. at 994). Efforts to erode the commonality requirement, as in

Dukes, by defining the *absence* of a policy as *itself* a kind of discriminatory policy, represent attempts to evade this specificity requirement. This would enable plaintiffs to argue, not that any particular employment policy is discriminatory, but that a company without a race-conscious program for equalizing outcomes is *allowing* ambient "discriminatory social attitudes" to infect its decisions in a manner not attributable to any particular wrongdoing—and that this is a form of prohibited discrimination. *See* Zatz, *supra*, at 391-92.

Dukes v. Wal-Mart blocked this effort because the purpose of class action litigation is to combine identical or nearly identical claims for more efficient administration of justice—not to paper over the differences between diverse injuries in order to enable judicial rearrangement of broad social trends. As the Court recognized, 131 S. Ct. at 2555-56, there will always be *some* disparity in the outcome of any sequence of individual transactions not controlled by a single, top-down authority. Philosopher Robert Nozick put this point in a famous analogy: if everyone in a city were made exactly equal in monetary terms on one day, and the next day, half of the people chose to pay a dollar to see Wilt Chamberlain play basketball, Chamberlain would end up with far more money than any one of them, and yet no person was subjected to any unjust act; the resulting inequality cannot be described as "unjust," let alone as discriminatory. Robert Nozick, *Anarchy, State and Utopia* 160-64 (1974). Quite to the contrary, using coercion against individuals who have agreed to a transaction—to take Chamberlain's earnings away from him, in that example—would be to commit an injustice against an innocent person in the service of some allegedly higher good. Anthony de Jasay, *Justice and Its Surroundings*

157 (2000) ("Unless it can be successfully argued that the involuntary, coerced obligors are in fact responsible for the basic needs of others being unmet . . . it is an injustice to coerce them to provide redress and serve these putative rights.").

Thus the statistical fact that Wal-Mart employed fewer women than men in management positions could not demonstrate the existence of any common injury. *Dukes*, 131 S. Ct. at 2556. This is not only because there may be any number of nondiscriminatory explanations for this disparity, but also because the noncoerced choices of individual managers and employees with regard to their pay and promotions result from their own cost-benefit analyses in the same way as the audience at Nozick's hypothetical basketball game. Those choices may lead to disparate outcomes, but those results did *not* demonstrate disparate treatment.

In *Dukes*, this Court rejected the plaintiffs' effort to label the statistical disparities that result from the aggregate of ordinary transactions as a form of illegal discrimination. "Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters," this Court observed, "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action," because it is "a policy *against* having uniform employment practices," and being a "reasonable" and "[v]ery common" practice, it could not give rise to an inference of discrimination. 131 S. Ct. at 2554. In short, whatever merit there may be in sociological arguments about the disparate consequences of millions of independent transactions, they are not a proper subject for judicial determination. The very complexity and abstraction

involved indicates that these concerns do not constitute "a particular injury caused by the action challenged as unlawful." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). Federal courts exist to remedy concrete, particularized, individual injuries, not to settle social debates. *Id.* at 218-19.

B. The Decision Below Would Undermine *Dukes* by Allowing Class Action Disparate Impact Cases Whenever a Business Fails to Adopt Race-Conscious Policies for Equalizing Outcomes

The decision below would erase the line that *Dukes* drew to limit the abuse of class action lawsuits. The court of appeals attempted to distinguish *Dukes* on the grounds that while Wal-Mart did not have a centralized personnel policy, Merrill Lynch *as an entity* does "permit brokers to form their own teams and prescrib[e] criteria for account distributions that favor [employees] . . . who may owe their success to having been invited to join a successful or promising team." *McReynolds*, 672 F.3d at 490. While that conclusion is not explicitly barred by this Court's decision in *Dukes*, it ignores the broader point that *Dukes* made, and establishes a "distinction" which would apply in practically all cases. Thus it reinvigorates the broader effort to undermine the specificity requirement and transform the class action mechanism into a device for improper judicial resolution of broad social issues.

The plaintiffs in *Dukes* argued that the company's deference to local managers allowed their private, subconscious sexist attitudes to infiltrate the corporate structure, resulting in disparities between men and

women. The argument in this case adds a second layer: while the decision of brokers to form teams and admit other brokers into their teams is not a discriminatory policy, *id.* at 489, Merrill Lynch's decision to reward successful brokers for productivity that may depend on membership in a team is allegedly a discriminatory policy because that decision incorporates the potential discrimination that exists when teams are formed. *Id.* at 490. Under this reasoning, if Wal-Mart gave an "employee of the year" award to its most productive associate, that would constitute a form of discrimination because an associate's productivity is in part determined by the decisions of managers and fellow employees who are infected with presumed ambient, subconscious discriminatory attitudes.

The court of appeals' effort to distinguish *Dukes* in fact robs that precedent of its intended effect. Any action by a corporate entity could be alleged to incorporate the subconscious discriminatory attitudes of employees, since any act by the corporation will be based on facts or circumstances that could have been influenced by the subconscious stereotypical views or thoughtless habits of employees or the public. Under the theory adopted below, a plaintiff will always be able to place his or her case on the preferred side of "the line that separates a company-wide practice from an exercise of discretion by local managers." *Id.* at 490. For example, Wal-Mart's workforce is statistically disparate, possibly as a result of the discriminatory attitudes of local managers. According to *Dukes*, this is not a common source of injury, because it results from the choices of the managers themselves, not the company as a whole. But the Wal-Mart corporation gives its employees a discount when

shopping at Wal-Mart stores.[2] And that decision to extend a discount to employees like Merrill Lynch's decision to allocate accounts or base promotion decisions on productivity, *is* a company-wide policy. Thus, if Wal-Mart's workforce is statistically out of balance, Wal-Mart's discount would have an "incremental causal effect" on the "amount of discrimination," *id.*, or would give rise to a cause of action.

While the distinction adopted below may have some superficial plausibility as a matter of socio-economic theory, it actually vitiates *Dukes*, and encourages plaintiffs to misuse the class action procedure as a device for sweeping together as a common injury disparities in the general population that are not fairly attributable to a particular act by a single entity. This Court should grant certiorari to ensure implementation of the Due Process requirements for class action lawsuits described in *Dukes*.

II

CERTIORARI SHOULD BE GRANTED TO ENSURE TITLE VII'S DISPARATE IMPACT PROVISIONS DO NOT DEPRIVE INDIVIDUALS OF EQUAL PROTECTION OF THE LAWS

This case perfectly demonstrates how disparate impact doctrine has run amok. Merrill Lynch made two commonplace and innocent corporate decisions—decisions identical to choices made every day in every

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[2] *See* Wal-Mart Employment Benefits, *available at* http://careers.walmart.com/company-benefits/ (last visited Aug. 24, 2012).

school in the United States, from elementary to law school. The optional "teaming" policy allows individual brokers from the same office to form teams—just as students can form study groups if they choose—and the "account distribution policy" rewards brokers who perform their jobs well (even those who work independently), just as a school may have an honor roll for students who excel academically.[3] Such policies, are "very common and presumptively reasonable." *Dukes*, 131 S. Ct. at 2554. Yet under the decision below, a business that mimics the innocuous practices of the classroom would be subject to disparate impact liability under Title VII whenever a plaintiff makes a prima facie showing that the outcomes of such a process do not reflect a preconceived ideal of statistical balance.

The statute that allows such lawsuits to go forward, 42 U.S.C. § 2000e-2(a), (k)(1)(A), has lost all connection to the original purpose of Title VII, which was to prohibit intentional racial discrimination. The civil rights laws were written to prohibit disparate *treatment*—to bar acts of discrimination on the basis of race. But disparate *impact* does not arise from acts of discrimination; it arises from the often vague realms of

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[3] Unfortunately, the school analogy is all too apt. The Maryland State Board of Education recently proposed a rule that would require schools to tie discipline to disparate impact theory. Reducing and Eliminating Disproportionate/Discrepant Impact, Md. Code Regs. 13A.08.01.21 (proposed July 2012), *in* Report of the Maryland Board of Education, *School Discipline and Academic Success: Related Parts of Maryland's Education Reform* (July, 2012). The Obama Administration also issued an Executive Order requiring the Department of Education to "undertake efforts" to ensure that discipline does not result in a racially disparate impact in schools throughout the country. *See* 77 Fed. Reg. 45471 (July 26, 2012), § 2(b)(3)(vi).

statistical regression analysis. As a result, Title VII's disparate impact provisions lead government entities and private employers to do exactly what the Constitution forbids: classify and treat individuals differently on account of their race in an effort to avoid liability for disparate outcomes that may *not* result from discriminatory acts. Merrill Lynch and countless other employers should not be forced to abandon legitimate, common sense business decisions merely because they may result in statistical disparities. So long as the disparate impact provisions of Title VII permit such lawsuits, thereby forcing private actors to make racial classifications or risk liability that drains valuable resources, the disparate impact provisions of Title VII must be subjected to strict scrutiny. The Court should grant review to ensure that the government does not force private parties to discriminate based on race.

A. Elevating Disparate Impact to the Level of Intentional Discrimination Violates Title VII's Fundamental Purpose

Title VII is intended to root out disparate treatment—*i.e.* specific acts of intentional discrimination—based on race. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate *treatment* was the most obvious evil Congress had in mind when it enacted Title VII.") (emphasis added). To that end, the disparate treatment canons of Title VII, which prohibit an employer from taking adverse action *because of* a person's race, directly reflect Title VII's goals. *See* Joseph A. Seiner & Benjamin N. Gutman, *Does Ricci Herald a New Disparate Impact?*, 90 B. U. L. Rev.

2181, 2185 (2010) (citing 42 U.S.C. § 2000e-2(a)(1)). Indeed, for years, Title VII did not expressly include disparate impact provisions. Its "nondiscrimination provision held employers liable only for disparate treatment." *Ricci*, 557 U.S. at 577. As one scholar notes:

> The focus of a [Title VII] suit ought to be on whether people of different races are treated differently *because* of their race. That is the commonsense and dictionary meaning of "discrimination," and that is what the 1964 act clearly said and meant. The question of intent, rather than incidental effect, ought to be at the heart of every lawsuit.

Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, Briefly, Vol. 5, No. 12, at 10 (Dec. 2001).[4]

While disparate impact may be proper as an "evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment," *Ricci*, 557 U.S. at 595 (Scalia, J., concurring), regarding it as an end in itself perverts a law against racial discrimination into a law essentially *requiring* racial discrimination. That is precisely what happened in *Ricci*, where the threat of disparate impact liability resulted in "a *de facto* quota system, in which a 'focus on statistics . . . put undue pressure on employers to adopt inappropriate prophylactic measures.' " *Id.* (quoting *Watson*, 487 U.S. at 992). There, a statistical imbalance led "employers to discard the results of lawful and beneficial promotional

[4] *Available at* http://aei.org/files/2001/12/01/Briefly-Disparate-Impact.pdf (last visited Aug. 24, 2012).

examinations even where there [was] little if any evidence of disparate-impact discrimination." *Id.* at 581.

Disparate impact claims often lead to Title VII liability for legitimate practices that merely have an unequal effect. *See generally* Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 222-25 (1992) (discussing over enforcement of Title VII in terms of statistical error). The fact that people of one race, sex, or class sometimes choose to practice a specific trade, or are statistically more likely to succeed at those jobs, does not mean employers are discriminating, since it "is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." *Watson*, 487 U.S. at 993. Yet the current disparate impact doctrine imposes liability on precisely this unrealistic basis. Considering the ubiquity of statistical disparities in the workforce, the prospect of a catastrophic disparate impact lawsuit requires employers to search out—and to take whatever steps are necessary to quash—any such disparity. Employers have "little choice" but to adopt race-conscious measures—even though this Court has recognized that such is "far from the intent of Title VII." *Watson*, 487 U.S. at 993 (plurality opinion). Disparate impact is not being used as a tool to smoke out intentional discrimination; instead it is being used as a mechanism to justify intentional discrimination in pursuit of an unrealistic goal of absolute statistical equality of result.

This Court recognizes the injustice of imposing on innocent persons the cost of remedying the long-term

effects of racial discrimination for which those persons were in no way responsible. *See*, *e.g.*, *Wygant*, 476 U.S. at 276; *Croson*, 488 U.S. at 505. But the racial balancing that results from disparate impact theory also imposes costs on minorities who purportedly benefit from the disparate impact approach. The threat of such liability "makes it more costly for a firm to operate in an area where the labor pool contains a high percentage of blacks, by enlarging the firm's legal exposure." Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. Pa. L. Rev. 513, 519 (1987). It also makes it more expensive to employ minority workers because the firm runs an increased risk of being sued in a disparate impact lawsuit if it discharges such employees. *Id.* Title VII may therefore have the perverse effect of discouraging employers from hiring minorities. For example, in *Terry Props., Inc. v. Standard Oil Co. (Ind.)*, 799 F.2d 1523 (11th Cir. 1986), the defendant chose to build a plant in a location with fewer than 35% minority workers "because it had previously experienced difficulty meeting affirmative action goals in communities with proportionately larger minority populations." *Id.* at 1527. And in *Frank v. Xerox Corp.*, 347 F.3d 130, 133 (5th Cir. 2003), the company instituted a "Balanced Workforce Initiative" to ensure that "all racial and gender groups were proportionally represented." This policy led to favoring white employees in Houston where the black employees were "over-represented." *Id.*

So long as disparate impact remains a stand-alone doctrine—instead of a means of proving intentional discrimination—it will continue to force governments and private actors to engage in blatant, and blatantly unconstitutional, racial discrimination.

B. As Currently Interpreted and Enforced, Disparate Impact Doctrine Violates the Equal Protection Clause

This Court should grant certiorari in order to subject the disparate impact provisions of Title VII to strict scrutiny. Under existing law, employers hoping to avoid claims of disparate impact must intentionally design hiring, promotion, employment, and other practices to achieve a predetermined racial balance. Such action violates the equal protection components of the Fifth and Fourteenth Amendments, because it is unconstitutional for the government to force—or to pressure—employers to consider race in their employment policies.

The federal government is not only prohibited from discriminating on the basis of race, it is also prohibited from enacting laws mandating that citizens discriminate on the basis of race. *See Ricci*, 557 U.S. at 594 (Scalia, J., concurring); *Buchanan v. Warley*, 245 U.S. 60, 78-82 (1917) (holding unconstitutional a Kentucky law that forbade individuals from selling certain property to persons of color). To avoid lawsuits brought by disgruntled employees, Title VII's disparate impact provisions press employers to use racial classifications that "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Like any governmental act that classifies on the basis of race, Title VII's disparate impact provisions should be "narrowly tailored measures that further compelling governmental interests.'" *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand*, 515 U.S. at 227). But because the disparate

impact theory compels employers to adopt race-conscious policies without identifying any specific instance of past discrimination that must be remedied, the use of race-based classifications by employers seeking to avoid disparate impact liability could never satisfy strict scrutiny. *Cf. Croson*, 488 U.S. at 500, 504 (government must identify discrimination with specificity before resorting to race-conscious remedial action).

Outside the context of Title VII, courts have recognized that disparate impact theory can force employers to engage in unconstitutional race-conscious decision making. In *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998), the D.C. Circuit rejected the government's claim that government actions that pressure or induce private parties to enact race-conscious hiring practices are immunized from strict scrutiny. The Court invalidated the FCC's decision requiring private parties to make race-conscious hiring decisions to achieve "proper" diversity. *See id.* at 492. "[T]he purpose of statistical evidence," the court ruled, "is to expose possible discriminatory intent, not to establish a workforce that mirrors the racial breakdown of the [city]." *Id.* at 494. Lower courts have applied strict scrutiny to invalidate similar race-conscious schemes that pressured employers or contractors to use race, even when they did not require strict quotas. *See*, *e.g.*, *Walker v. City of Mesquite*, 169 F.3d 973, 981-82 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000) (race-conscious requirement that public housing units be developed in predominantly nonminority residential areas triggered strict scrutiny; remanding to lower court to determine whether requirement was constitutional); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 710-11 (9th Cir. 1997)

(requirement that contractor make race-conscious efforts triggered strict scrutiny and was unconstitutional).

This Court has long recognized the risk to equal protection posed by the disparate impact approach. *See*, *e.g.*, *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652 (1989) ("The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof."). *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 435-36 (1975), held that a private employer's pre-employment tests did not comply with guidelines of the Equal Employment Opportunity Commission, and that the employer had failed to satisfy its burden of showing that its pre-employment tests were job related. Concurring in the judgment, Justice Blackmun warned that a "too-rigid" enforcement of the guidelines would force the employer to either commission "an impossibly expensive and complex validation study," or "engage in a subjective quota system of employment selection," which would be "of course . . . far from the intent of Title VII." *Id.* at 449 (Blackmun, J., concurring). Echoing Justice Blackmun's concerns, Justice Scalia more recently noted that disparate impact "not only permits but affirmatively requires" race-conscious decision making when a disparate impact violation would "otherwise result." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). The danger is that "disparate-impact provisions place a racial thumb on the scales, often requiring" businesses "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.*

As a consequence of the disparate impact provisions of Title VII, employers engage in acts of racial discrimination. Doing so is a simple, and insidious, form of government-encouraged racial discrimination. "An employer seeking to achieve a particular racial outcome need only identify a racial disparity, locate a selection mechanism that achieves the desired demographic mix, and identify whatever business necessities best justify the mechanism." Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 53, 64 (2009). If "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *Parents Involved*, 551 U.S. at 748 (plurality op.), then government has no business enacting laws that pressure employers to discriminate.

The time for subjecting disparate impact provisions of Title VII to strict scrutiny is long overdue.

CONCLUSION

The petition for certiorari should be *granted*.

DATED: August, 2012.

Respectfully submitted,

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