Nos. 07-1428 and 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, *et al.*,
Petitioners,
v.
JOHN DESTEFANO, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

RAE T. VANN
JEFFREY A. NORRIS
LORENCE L. KESSLER
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council, a non-profit association comprised of the Nation's largest private sector corporations, respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Respondents before this Court in favor of affirmance.

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[1] The parties have consented to the filing of this brief. No counsel for a 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.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the legal and practical considerations relevant to interpreting and complying with workforce nondiscrimination requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and other federal employment-related laws and regulations. As employers, and as potential defendants to claims asserted under these laws, EEAC members have a substantial interest in the issue presented in this case regarding the discretion afforded to employers to consider and act upon the results of legally required statistical analyses of their selection procedures in ensuring a nondiscriminatory workplace. Specifically, EEAC has a direct and ongoing interest in ensuring that employers may voluntarily discontinue a selection process that reasonably appears to be having a statistically significant adverse impact on the basis of race, ethnicity, or gender. This latitude is fundamental to affording employers the discretion they need to comply with their responsibilities under Title VII.

EEAC seeks to assist this Court by highlighting the impact its decision may have beyond the imme-

diate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioners are firefighters for the City of New Haven, Connecticut, who in November and December of 2003 took civil service examinations for promotion to the supervisory ranks of Captain and Lieutenant within the Fire Department. Pet. App. 6a-7a. Pursuant to the collective bargaining agreement between the City and the firefighters' union, the written portion of the examinations comprised 60%, and the oral examinations 40%, of the applicants' overall scores. Pet. App. 7a. A total of 118 applicants, including 68 white, 27 African-American, and 23 Hispanic test takers, sat for the exams. Pet. App. 7a-8a. Candidates' names were placed on promotion lists in descending order based on their test scores. Once certified by the City's Civil Service Board, the promotion lists would remain valid for two years. Pet. App. 8a.

As many employers do, the City had invested significant time and expense in developing the promotion exams. When the exams were administered for the first time, however, the results revealed that the success rate for African-American and Hispanic test takers was significantly lower than the success rate for white test takers, indeed much more so than in prior years when different tests were used. Pet. App. 7a-8a.

Specifically, of the 118 individuals who took the written test and proceeded on to the oral test, 56 achieved a passing score, resulting in an overall pass rate of approximately 47%. The *actual* pass rate of African-Americans and Hispanics was less than the overall pass rate, and significantly lower than that of whites, however: while 41 (or approximately 60%) of the white test takers achieved a passing score, only 9 (or approximately 33%) African-Americans and 6 (or approximately 26%) Hispanics achieved a passing score. *Id.*

The City's then—Corporation Counsel, Thomas Ude, expressed concern that the test results appeared to have a significant adverse impact on African-Americans and Hispanics and thus could give rise to potential disparate impact liability under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. Br. of Respondents, at 7 ("[A] significant adverse impact … triggers a much closer examination, because it's like setting off a warning bell that there may be something wrong"). Consequently, five public hearings were held by the Civil Service Board regarding whether or not to certify the test results. Pet. App. 8a.

A number of individuals testified at the hearings, including representatives of an African-American firefighters association, who recommended that the Board, prior to certifying the lists, benchmark with nearby City of Bridgeport officials regarding their success in producing promotion lists having less adverse impact. Pet. App. 10a-11a. In contrast, representatives of white firefighters, including sev-

eral Petitioners, urged the Board to certify the results.[2] Pet. App. 9a.

The Board also later heard from the test developer, who defended the tests as "facially neutral." Pet. App. 11a-13a. Another testing expert subsequently testified, however, that the results revealed "relatively high adverse impact," "significantly and dramatically" more so than the tests he developed in the past. Pet. App. 14a. He also suggested that there might be alternative procedures that could be used in place of the written and oral tests, such as situational judgment tests, which have been shown to have less adverse impact. Pet. App. 15a-16a. Ude ultimately advised against certifying the test results because, among other things, doing so could amount to unlawful Title VII disparate impact discrimination. Pet. App. 18a. The Civil Service Board eventually voted against certifying the promotion lists. Pet. App. 19a.

One Hispanic and several white test takers sued the City and a number of its officials, claiming that the Board's failure to certify the promotion lists violated Title VII and the Equal Protection Clause. Pet. App. 5a. They contended, among other things, that the real motivation in rejecting the promotion lists (from which no selections were made) was to promote racial diversity within the Fire Department at the expense of whites and Hispanics. Pet. App. 19a-20a. For their part, Respondents claimed that the City was justified in not certifying the results based on its good faith belief that doing so could violate Title VII, given the significant adverse impact

[2] Stakeholders on both sides of the debate threatened to sue the City depending on how it resolved the issue.

on African-Americans and Hispanics and the possibility that other alternative selection procedures having less adverse impact existed, but were not considered. Pet. App. 20a-21a.

The district court agreed, and granted the City's motion for summary judgment, which the Second Circuit, in a per curiam opinion, affirmed. Petitioners' motion for rehearing *en banc* was denied, with six judges joining a dissenting opinion. This Court granted certiorari on January 9, 2009.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., prohibits employers not only from engaging in intentional race discrimination, but also from engaging in employment practices that have an unintentional discriminatory impact on protected groups. Although Petitioners characterize it far differently, this case is about the right of an employer under Title VII to refuse to utilize the results of a test that has produced statistically significant adverse impact against minority test-takers where other, equally effective selection procedures having less adverse impact may exist but were not considered.

This issue is of great importance to the many private sector employers that routinely utilize employment tests as part of their employment selection processes. Those employers continually strive to ensure that their selection practices fully comply with Title VII's proscription against disparate impact discrimination. To accomplish that aim, they must be afforded the flexibility that is inherent in Title VII to perform diagnostic, statistical analyses to determine whether or not an employment test is functioning as intended, that is, as a race-neutral evaluation tool. An employer's decision not to apply

test results that are so statistically flawed that they give rise to an inference of unlawful discrimination against protected minority groups simply cannot be considered actionable under Title VII.

Petitioners urge the Court to find that Respondents' decision not to certify the results of two exams that had statistically significant adverse impact against African-Americans and Hispanics was based on impermissible, race-based considerations—rather than on legitimate concerns about actually committing a discriminatory employment practice. Such a view, if adopted by the Court, would place employers subject to Title VII in an untenable position of having to choose between potential liability for disparate impact discrimination for failing to consider alternative selection procedures where a test has adverse impact, and potential liability for "reverse" race discrimination against the statistically "favored" group. Such a result would run counter to the purpose and intent of Title VII, and would contravene this Court's longstanding interpretation of an employer's obligation under the Act to avoid discrimination that is "fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

ARGUMENT

I. AN EMPLOYER'S DECISION SIMPLY NOT TO UTILIZE THE RESULTS OF AN EMPLOYMENT TEST THAT HAS PRODUCED SIGNIFICANT ADVERSE IMPACT AGAINST PROTECTED GROUPS, WITHOUT MORE, IS NOT ACTIONABLE UNDER TITLE VII

Despite Petitioners' attempt to characterize it as one involving nothing more than racial preferences

and misplaced notions about workplace "diversity," at its core, this case is about whether—and to what extent—an employer lawfully may refuse to utilize the results of a test that has significant adverse impact against minorities where other, equally effective selection procedures having less adverse impact may exist but were not considered. The simple and straightforward answer is that an employer's conscious decision *not* to discriminate by continuing to use a questionably valid selection procedure in light of significant adverse impact cannot give rise to a cause of action under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, for "reverse" disparate treatment discrimination against the statistically "favored" group. In other words, an employer's good faith effort to comply with Title VII is not evidence of discriminatory animus and thus does not, in itself, violate the Act. Any other result would contravene the plain text, meaning and purposes of Title VII, and would unsettle nearly four decades of federal court precedent, beginning with this Court's seminal ruling in *Griggs v. Duke Power Co.*, regarding an employer's obligation to avoid discrimination that is "fair in form, but discriminatory in operation." 401 U.S. 424, 431 (1971).

A. Title VII Expressly Bars Application of a Test Having Adverse Impact, Unless the Employer Can Demonstrate That Its Continued Use of the Test Is Job-Related and Consistent with Business Necessity

In addition to barring intentional discrimination on the basis of race, color, religion, sex or national origin, Title VII also expressly prohibits application of any policy, practice or procedure that has a

statistically significant adverse impact on a protected group, unless the employer can demonstrate that the procedure is job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A). The Act also permits employers to utilize professionally designed tests as part of their employment selection procedures, as long as the test is not "designed, intended or used to" discriminate on the basis of an individual's membership in a protected class. 42 U.S.C. § 2000e-2(h).

The Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines), 29 C.F.R. pt. 1607, provide the framework for conducting statistical analyses to determine whether tests and other selection practices have an adverse impact on women or minorities. Like Title VII, under the Uniform Guidelines, which have been codified by the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) in their administrative regulations, *see* 29 C.F.R. pt. 1607 (2008); 41 C.F.R. § 60-3 (2008), the use of any selection procedure that has adverse impact is considered discriminatory, unless the employer has a legitimate business justification for its use. 42 U.S.C. § 2000e-2(k)(1)(A).[3]

A substantial number of employers subject to Title VII are also federal government contractors subject to

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[3] The "Questions and Answers" accompanying the Uniform Guidelines provide that employers also "have the option of choosing alternative techniques which eliminate adverse impact." Questions and Answers to Clarify and Provide Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,001 (Mar. 2, 1979) (Question 31).

Executive Order 11,246, 3 C.F.R. 339 (1964-65 Comp.), and OFCCP's implementing regulations. Both the EEOC and OFCCP rely heavily on the Uniform Guidelines in evaluating employers' compliance with Title VII and Executive Order 11,246. Those employers thus are acutely aware of and concerned with performing the types of statistical analyses identified in the Uniform Guidelines that may signal potentially problematic employment practices.

Under the Uniform Guidelines, employers must conduct, at least annually, statistical analyses to determine whether their selection procedures have an adverse impact on women or minority groups comprising at least 2% of the labor force in the relevant labor market area or the applicable workforce. The Uniform Guidelines' so-called "four-fifths rule" is designed to assess whether an employment test or other selection procedure is operating in a nondiscriminatory manner. The calculation involves a comparison of the relative success rates for the different race/sex/ethnic groups that took the test. A selection procedure generally will be considered to have adverse impact under the Uniform Guidelines if the selection rate for women or minorities "is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate . . . while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. § 1607.4(D).

The EEOC strongly advises employers subject to Title VII and the Uniform Guidelines to ensure that their use of employment tests and other selection procedures fully comply with the law. Where a statistical disparity is found, for instance, the agency urges companies to, among other things, explore the

existence of other, equally effective selection procedures having less adverse impact. *See EEOC Fact Sheet on Employment Tests and Selection Procedures* (Feb. 2008).[4] Any employer that has doubts regarding whether or not a test that has produced significant adverse impact is valid (in the sense that it is an accurate predictor of on-the-job success) therefore is well-advised, in *every* case, to step back and suspend the selection process so as to further investigate. Doing so promotes, rather than contravenes, Title VII's discrimination prohibitions, by ensuring that a potentially discriminatory practice is not permitted to poison an otherwise legitimate employment selection process.

B. Diagnostic Statistical Analyses Conducted by Employers Seeking To Evaluate Whether or Not an Employment Test Is Functioning as a Race-Neutral Evaluation Tool Are Not "Race-Based" Decisions

The analysis Respondents sought to undertake in this case is similar to that which is required of every employer subject to Title VII and the Uniform Guidelines, and is an essential tool in ensuring compliance with Title VII's prohibition against disparate impact discrimination. Petitioners have mischaracterized the assessment as one that necessarily involves race-based decision making. Indeed, at various points in their brief, Petitioners have referred to this diagnostic process as amounting to nothing more than "racial balancing," "race coding," "intentional racial classifications," "explicit racial classifications,"

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[4] *available at* http://www.eeoc.gov/policy/docs/factemployment_procedures.html

"soft quotas," and "quotas." While such terms are highly charged, they simply are inaccurate characterizations of the process set forth in the Uniform Guidelines and required by Title VII.

In reality, the qualitative and quantitative analyses Respondents relied upon in deciding whether or not the test results at issue should be certified were designed to assess the *tests,* not the relative qualifications or characteristics of the candidates themselves. Here, the success rate for African-American test takers and the success rate for Hispanic test takers was significantly less than the success rate for white test takers. This was true for the combined totals for the two tests as well as for each test individually (that is, the Captain's test and the Lieutenant's test). In practical terms, this result means that the tests were not functioning as race-neutral evaluation tools. In legal terms, this result means that use of the test as a selection device for promotions would be considered to "be discriminatory and inconsistent with" the Uniform Guidelines. 29 C.F.R. § 1607.3(A).

Contrary to Petitioners characterizations, the problem was not that "too many whites passed the test." The actual flaw was that a test—designed as a neutral tool for evaluating candidates—had produced results in which African-American test takers (as a group) and Hispanic test takers (as a group) were significantly less successful on the test than white test takers (as a group), which raised serious questions about the effectiveness of the test. When a selection practice that is intended to be a neutral evaluation tool produces results that show statistical disparity along racial lines, there is cause for concern. That concern flows from essentially the same rationale that has prompted this Court to closely

review any governmental action based on race. That is, a group classification based on race is in most all circumstances irrelevant. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 127 S. Ct. 2738, 2765 (2007) ("[G]overnmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry . . .") (citation omitted).

Here, the employer's scrutiny of the test results was appropriate, not because of the race of the person who received the highest score, but because there was no apparent reason why a neutral process should deliver results with such a statistically significant disparity on the basis of race or ethnicity. Under such circumstances, it is incumbent upon the employer to scrutinize the disparity giving rise to an inference of race discrimination so as to avoid a violation of Title VII. No employer will accomplish that aim if review of the offending test itself is considered "race-based" decision making that could subject it to liability for the very conduct it seeks to avoid.

II. EMPLOYERS FACED WITH A SIGNIFICANT RACIAL DISPARITY IN THE RESULTS OF AN EMPLOYMENT TEST MUST BE PERMITTED TO EXERCISE THE DISCRETION REQUIRED TO ENSURE COMPLIANCE WITH TITLE VII

When presented with results indicating that an employment selection test has a statistically significant adverse impact on the basis of race, ethnicity, or gender, an employer has several options, including making selections on the basis of the deficient instru-

ment and inviting a disparate-impact lawsuit from the disadvantaged individuals. Or, the employer can simply suspend using the test and make the selections on some other basis entirely.

Petitioners in this case contend that once a test is given and the results are known only the first option is consistent with the proscriptions of Title VII. Their argument is that suspending the test in order to avoid the resulting statistically significant selection disparities necessarily constitutes unlawful disparate treatment under the statute. Such an interpretation of Title VII is at odds with Congress's preference for voluntary compliance by employers—and would seriously erode employers' ability to monitor their employment practices proactively to ensure they are nondiscriminatory.

Addressing statistically significant disparities in tests or other employment selection procedures is similar to a variety of other proactive measures progressive companies undertake to ensure nondiscriminatory work environments. Such proactive measures may be race- or gender-*conscious* but do not involve race- or gender-*based* decision making. Examples of such measures include:

- Monitoring outreach and recruiting practices to ensure that all individuals may apply for employment, regardless of race, ethnicity or gender. Such practices might include targeted outreach efforts at historically Black or women's colleges, and advertising in media and niche electronic databases likely to reach minorities and women as a supplement to the company's broader recruitment practices;

- Seeking to expand future applicant pools through early-intervention programs in schools and community organizations;
- Reviewing and modifying corporate policies and programs that are facially discriminatory or discriminatory in their application;
- Providing services such as child care, flexible schedules, and education support that are made available to all employees, but that may serve to overcome barriers to employment that often fall more harshly on women and minorities; and
- Monitoring workforce demographic patterns (including the impact of HR practices) for indications that the company's equal opportunity policies are perhaps not being followed.

Such measures are undertaken in the interest of ensuring to the maximum extent possible that the employer remains at all times in compliance with Title VII. The measures often are race- and gender-*conscious* in the sense that they are intended to eliminate artificial barriers to employment based on one's race or gender, but they do not involve race- or gender-based decision making.

Suspending use of an employment test that has statistically significant adverse impact against minorities is no different than the measures described above. Here, for instance, the decision not to certify the tests arguably may have been race-conscious (in the sense that the City understandably was concerned with disparate impact against African-American and Hispanic test takers), but the action was taken specifically to ensure that there were no artificial barriers to employment erected as a result

of the test. Furthermore, no race-based promotion decisions were predicated upon the test results.

Voluntary measures such as these are precisely what Congress intended in passing Title VII, and what the EEOC and this Court have encouraged. Congress intended voluntary compliance to be the "preferred means of achieving the objectives of Title VII." *See, e.g., Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland,* 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-18 (1975)). The EEOC's regulations provide that in enacting Title VII Congress "strongly encouraged employers … to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action." 29 C.F.R. § 1608.1(b).

With this delegated responsibility comes a corresponding obligation on the part of the enforcement agencies and the courts to afford employers a degree of latitude in adapting their employment practices to Title VII requirements. The EEOC's regulations explicitly recognize this need in stating that "persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII." 29 C.F.R. 1608.1(c) (cited in *Johnson* v. *Transportation Agency,* 480 U.S. 616, 626, 630 n.8 (1987); *Local No. 93,* 478 U.S. at 519).

In provisions that speak directly to proactive evaluations of tests and other selection procedures, the EEOC's regulations contemplate that employers will undertake "[r]easonable, self analys[es] . . . to determine whether employment practices do, or tend

to, exclude, disadvantage, restrict or result in adverse impact . . . ." 29 C.F.R. § 1608.4(a). The regulations also specifically reference the Uniform Guidelines in stating that "[w]hen an employer has reason to believe that its selection procedures have exclusionary effect . . . , it should initiate affirmative steps to remedy the situation," 29 C.F.R. § 1608.4(c)(1), which may include, but are not limited to "[r]evamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications." *Id.* If employers are afforded the latitude to "revamp" unvalidated selection instruments in the interest of reducing or eliminating adverse impact, then it follows that employers would also have latitude under the EEOC's regulations to suspend use of an instrument altogether and rely upon other unrelated selection criteria.

This Court also has afforded employers latitude under Title VII to address statistical disparities in the workplace through race- and gender-conscious measures. In *United Steelworkers* v. *Weber,* 443 U.S. 193, 208 (1979) a private employer's adoption of an affirmative action plan was justified on the basis of a "manifest racial imbalance" in its workforce. Similarly, in *Johnson v. Transportation Agency,* 480 U.S. 616, 626 (1987), a public employer's promotion of a qualified woman over a qualified man to address a manifest imbalance in the workforce was deemed to be "a nondiscriminatory rationale for [the promotion] decision."

Both cases involved explicit race or gender classifications that were viewed by the Court as being reasonable employer actions undertaken to address

statistical disparities that could give rise to potential Title VII liability. The "triggers" for the employers' actions in both cases were statistical imbalances in the workforces deemed by the Court to be "manifest." The race- and gender-conscious steps that were taken to address those imbalances were deemed to be reasonable because their impact on non-preferred individuals was limited and they were "narrowly tailored" to address the identified imbalances.

In assessing the degree of discretion an employer has to act in a particular case, it is useful to look not just at whether there is a statistical disparity, but also at how significant is that disparity. While the Uniform Guidelines' "four-fifths" rule often is described as a rule of thumb, there are more sophisticated statistical analyses that have been used in discrimination cases. *See Watson v. Fort Worth Bank*, 487 U.S. 977, 995 (1988). Among these are the so-called standard deviation analyses used in both jury selections cases, *see, e.g., Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977), and in employment cases, *see, e.g., Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977).

Here, the statistical disparities in the test results not only exceeded the Uniform Guideline's four-fifths "rule of thumb," but amounted to approximately 3.5 standard deviations, a level clearly recognized by this Court as sufficient to create an inference of discrimination under Title VII.[5] *See Hazelwood*, 433 U.S. at 311 and n.17. Moreover, deviation of this degree

[5] EEAC performed an internal analysis of the data applying the "test of two proportions," a standard test used by enforcement agencies (particularly the OFCCP) to evaluate statistically significant adverse impact in employment selection procedures.

means it is almost impossible for the racial disparity observed in the test results to have occurred randomly. Surely a disparity of this significance must give the employer discretion to discontinue the flawed selection process.

Another consideration in examining the extent of an employer's discretion is the type of jobs or job categories involved. In *Weber* and in *Johnson*, one of the factors identified in approving the employers' actions was that the positions involved were in traditionally segregated job categories. *See Weber*, 443 U.S. at 209; *Johnson* 480 U.S. at 635. In this case, Petitioners asserted that previous exams given for these jobs in the Fire Department had reflected adverse impact, but the employer had nonetheless gone forward with promotions.

Petitioners argue that the employer's decision to now act because of the adverse impact in the current exam results should be viewed with suspicion. Contrary to their assertions, however, where the adverse impact is in an area in which there traditionally has been an imbalance, the employer must be given more discretion to act to prevent current discrimination. By declining today to use a selection practice that is reflecting adverse impact, the employer may be able to avoid a need in the future to take the types of action approved in *Weber* and *Johnson* because of an overall manifest imbalance in the job category.

Even as many barriers to equal opportunity have been removed, there remain challenges that may be complex and longstanding. Having reviewed all of the testimony by testing experts and others at the Civil Service Board hearing, the district court below observed, "[i]t appears that the reasons for testing

disparities remain elusive. . . . [E]xperts on standardized testing nationwide have been unable to satisfactorily fully explain the reasons for the disparity in performance observed on many tests." Pet. App. 34a. The law provides employers the latitude to rely on selection procedures that have adverse impact where certain actions have been taken and express conditions met. It follows, then, that employers who choose not to proceed in the face of adverse impact where there is uncertainty as to, for instance, the validity of the selection procedure or existence of less discriminatory alternative procedures, should be shielded from claims such as those raised by Petitioners.

This case does not involve an affirmative action plan, nor does it involve explicit racial classifications, but the rationale underlying the Court's decisions in *Weber* and *Johnson* to permit employers to use race- and gender-conscious measures in limited circumstances to address potential Title VII liability is instructive. In response to a manifest disparity, Respondents simply discontinued reliance upon a test in which they lacked confidence and which they felt could not be defended. This measure did not entail any racial preferences nor did it have a direct impact on any of the firefighters who took the test—it simply meant that all of them, regardless of race, would have their eligibility for promotion evaluated by other means.

EEAC member companies are committed to compliance with Title VII and other employment nondiscrimination laws. They also believe that Congress appropriately established voluntary compliance as the preferred route to enforcing those laws. Voluntary compliance cannot be accomplished, however, if

employers are placed in the untenable position of having to choose between maintaining selection practices that generate race-based statistical disparities sufficient to sustain a disparate impact claim, or addressing those disparities at the risk of encouraging a disparate treatment claim.

EEAC member companies strive to identify and eliminate all practices that operate to artificially limit employment opportunities on the basis of race, ethnicity or gender. Employment tests and other selection practices can serve as such barriers. Eliminating these practices is consistent with and encouraged by Title VII. Voluntary compliance will be impossible to achieve if steps undertaken in good faith to eliminate race-based statistical disparities are deemed to constitute unlawful disparate treatment.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

RAE T. VANN
JEFFREY A. NORRIS
LORENCE L. KESSLER
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

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