No. 07-270

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

ELSA GULINO, MAYLING RALPH and PETER WILDS, on behalf of themselves and all other similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT NEW YORK STATE EDUCATION DEPARTMENT IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

The State of New York requires public school teachers, like other professionals, to pass a licensing examination. The State does not employ those teachers, however; they work for local school districts.

The questions presented are:

1. Is an employer, such as local school district, liable under Title VII of the Civil Rights Act of 1964 for the disparate impact of a state-mandated licensing examination that the employer neither created nor administered?

2. If so, must the employer demonstrate that the licensing examination has been formally validated as an employment test for every position for which state law requires a professional license?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Cited Authorities

Page

STATE CONSTITUTION

STATE STATUTES

Cited Authorities

Page

MISCELLANEOUS

PRELIMINARY STATEMENT

Respondent New York State Education Department supports the petition for a writ of certiorari filed by the New York City Board of Education. Although the State Education Department is not listed in the petition's caption, it was a party to the proceedings below, *see* Pet. at ii, and it therefore is a respondent in this Court. *See* S. Ct. R. 12(6).

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 460 F.3d 361. The order of the court of appeals denying rehearing or rehearing en banc (Pet. App. 123a-124a) is not reported in the *Federal Reporter.*

The opinion of the district court rendered after trial (Pet. App. 57a-122a) is not published in the *Federal Supplement.* A prior opinion of the district court denying defendants' motions for summary judgment is reported at 236 F. Supp. 2d 314 (S.D.N.Y. 2002).

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2006 (Pet. App. 1a). The petition for rehearing was denied on May 30, 2007 (Pet. App. 123a). The petition for certiorari was timely filed on August 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The State of New York exercises its police powers to protect the public from unqualified teachers by requiring that public school teachers pass a licensing examination. Plaintiffs

are a class of African-American and Latino teachers who failed the state licensing examination and therefore could not obtain permanent jobs with the New York City Board of Education (Pet. App. 58a). They allege that the licensing examination has a disparate impact on minority candidates (Pet. App. 58a). Because of this, they claim that the City Board of Education — which has no control over the state licensure process — violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when it refused to hire them. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (recognizing that Title VII prohibits employment practices that, while facially neutral and not intended to discriminate, have an unjustified disparate impact on a protected class of employees or applicants).

1. New York's Constitution requires the State to "provide for the maintenance and support of a system of free common schools, wherein all children of this state may be educated." N.Y. Const. art. XI, § 1. The Board of Regents of the State of New York, through the Commissioner of Education and the State Education Deaprtment, has broad oversight of the public school system in the State. *Id.* art. XI, § 2; art. V, §4; N.Y. Education Law §§ 201, 202, 301, 302, 305. Among other things, the Commissioner has the power to promulgate regulations governing the examination and certification of teachers employed in all public schools in the State. N.Y. Education Law §§ 3001, 3004(1).

The State of New York, however, does not employ teachers or otherwise operate the thousands of public schools in New York State. New York's Constitution provides that local school boards make the basic decisions regarding the operation of their own schools. *See Paynter v. State*, 100 N.Y.2d 434, 442 (2003). Among other things, the school boards of the nearly seven hundred local school districts in

New York establish their own operating budgets, provide equipment and supplies, build and maintain public school facilities, and hire and assign personnel. In particular, local school boards are vested with the authority to "employ . . . as many legally qualified teachers as the schools of the district require" and "to determine the rate of compensation of each teacher." N.Y. Education Law § 1604(8); *see also* N.Y. Education Law § 3011(1) (granting local school boards the authority to negotiate labor agreements with teachers' unions over details such as the length of the terms of employment, the amount of compensation, and when such compensation is due).

Since 1991, New York State has required all regular public school teachers to be licensed under a single statewide standard (Pet. App. 11a). Persons seeking permanent full-time employment as classroom teachers must pass New York State Teacher Certification Examinations, which include separate assessments of pedagogy, specific content tests, and basic familiarity with the liberal arts and sciences. *See* 8 N.Y.C.R.R. § 80-1.5. Only one component of the certification examinations is at issue, the Liberal Arts and Sciences Test ("LAST") (Pet. App. 12a n.7).

The LAST was developed jointly by the State Education Department and National Evaluation Systems, a private company with national experience in developing statewide teacher licensing tests, to test basic knowledge of the liberal arts and sciences (Pet. App. 12a). It is a pass-fail examination that covers topics such as mathematics, history, the humanities, basic communication skills, and written analysis and expression (Pet. App. 13a). To pass the examination, a candidate must correctly answer about two-thirds of the scored multiple-choice questions and receive three out of five points on the essay section (Pet. App. 13a). The LAST is scored in such a way that a candidate can receive low scores

on one section and still pass by receiving sufficiently high scores on other sections (Pet. App. 13a). There is no limit to the number of times that a candidate may take the LAST.

National Evaluation Systems administers the test for the State of New York at many locations and times throughout the State each year. After each administration, the State Education Department and the testing company evaluate the scores item by item to determine whether the questions are appropriate for continued use.

New York City and its Board of Education played no role in the development of the LAST, and they do not participate in its administration or scoring.

2. Plaintiffs sued both the City Board of Education and the State Education Department, claiming that the LAST has a disparate impact on minority candidates in violation of Title VII (Pet. App. 14a). The State Education Department moved for summary judgment, arguing that it was not liable under Title VII because Title VII covers only activities by an "employer" (Pet. App. 14a). Because public school teachers are employees of the City Board of Education rather than the State Education Department, the Department argued that its licensing activities — which fall under the State's police powers — are not subject to challenge under Title VII (Pet. App. 14a). The district court denied the State Education Department's motion (Pet. App. 14a). The court also rejected the City Board of Education's argument that it was not liable under Title VII because it merely complied with state law when it declined to retain or hire teachers who had failed the state-mandated licensing exam (Pet. App. 14a). The district court denied permission to take an interlocutory appeal from this decision.

The district court then proceeded to trial on the merits of plaintiffs' claim. To prevail on a Title VII disparate-impact claim, a plaintiff must first show that as a statistical matter, a particular employment practice disproportionately disadvantages members of a protected class, such as a racial or ethnic minority. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the plaintiff meets this burden, the employer must establish that the challenged employment practice is "job related for the position in question and consistent with business necessity." *Id.* Employers often demonstrate the job-relatedness of employment tests through validation studies formally proving that the test is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). A plurality of this Court has indicated, however, that "employers are not *required*, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance." *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (emphasis added).

After a lengthy trial, the district court found that the LAST had a prima facie disparate impact on African-American and Latino candidates for licensure (Pet. App. 118a). And while the State Education Department introduced voluminous documentary and expert evidence to support the validity of the LAST, the district court found that this was not adequate to validate the test formally under the standards for employment tests (Pet. App. 119a). Based on the plurality opinion in *Watson*, however, the court concluded that even without a formal validation study, the defendants had demonstrated that the LAST was job related because basic knowledge of liberal arts and sciences was manifestly relevant to public school teachers' jobs, and that plaintiffs

had not proffered a less discriminatory alternative that adequately measured the base level of knowledge required for teacher licensure (Pet. App. 119a-121a). Accordingly, the district court entered judgment in defendants' favor.

3. The court of appeals reversed in part and remanded (Pet. App. 3a). The court held that the State Education Department cannot be sued under Title VII because it is not the plaintiffs' employer within the meaning of the statute (Pet. App. 22a). The court also acknowledged that the State Education Department was exercising core state police powers — regulating the quality of public school teachers — when it developed and implemented the LAST as a licensing exam (Pet. App. 29a). Nevertheless, the court held that the City Board of Education could be held liable for the disparate impact of state licensing requirements on the Board's actual and prospective employees (Pet. App. 41a).

On the merits, the court of appeals agreed with the district court's factual finding that the plaintiffs had demonstrated a prima facie case that the LAST has a disparate impact on racial minorities, but it held that the district court had applied the wrong legal standard in assessing whether the LAST was job related under Title VII (Pet. App. 44a, 49a). Although it acknowledged the *Watson* plurality's contrary statement, the court applied earlier circuit precedent requiring that employment tests be formally validated to satisfy a defendant's burden of demonstrating that a test is job related (Pet. App. 50a-51a). The court of appeals remanded for further proceedings in the district court as to the City Board of Education only (Pet. App. 55a-56a).

The court of appeals denied the City's petition for rehearing (Pet. App. 124a). On the City's motion, however, it stayed issuance of the mandate pending this Court's decision whether to grant the petition.

REASONS FOR GRANTING THE PETITION

The City Board of Education's petition presents at least two questions that deserve this Court's attention: Are state licensing examinations subject to challenge in a suit against local employers under Title VII's disparate-impact provisions? And if so, must they be formally validated as employment examinations?

A. This Court should resolve when, if ever, a licensing examination can be challenged under Title VII's disparate-impact provisions.

The decision below contributes to ongoing confusion in the lower courts over whether state-mandated licensing examinations are subject to challenge under Title VII. That question is significant because a federal claim that licensing examinations have a disparate impact would be available only if such examinations are covered by Title VII. If instead they can be challenged only under 42 U.S.C. § 1983, then they are unlawful only if they intentionally discriminate on the basis of race or another suspect classification, as the Constitution does not prohibit a State from engaging in practices that merely have a disparate impact. *See Washington v. Davis*, 426 U.S. 229 (1976). In rejecting the argument that disparate-impact analysis should apply under the Constitution, this Court explained that it would not be appropriate to import Title VII's employment-related validation standards to other contexts, including licensing requirements. *Id.* at 248.

1. Several federal appellate courts have held that a State cannot be sued under Title VII for its licensing activities. The Fifth Circuit, for example, has held that Texas could not be sued under Title VII for its teacher-certification test, recognizing that the State's role in administering the test is

"analogous to that of state bar administrators and other state licensing or certification agencies" that are not susceptible to Title VII lawsuits. *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1020 (5th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Similarly, the Third, Fourth, and Ninth Circuits have held that Title VII does not cover the licensing activities of the state agencies that regulate veterinarians, lawyers, and dentists, respectively. *George v. N.J. Bd. of Veterinary Med. Exam'rs*, 794 F.2d 113, 114 (3d Cir. 1986); *Woodard v. Va. Bd. of Bar Exam'rs*, 598 F.2d 1345, 1346 (4th Cir. 1979) (per curiam); *Haddock v. Bd. of Dental Exam'rs*, 777 F.2d 462, 464 (9th Cir. 1985). And the First Circuit has applied the same analysis under the Age Discrimination in Employment Act to an agency that licensed harbor pilots. *Camacho v. Puerto Rico Ports Auth.*, 369 F.3d 570, 578 (1st Cir. 2004).

Before this case, courts of appeals had applied Title VII's disparate-impact analysis to state licensing requirements only in narrow circumstances not found here. First, the Ninth Circuit subjected a teacher licensing exam to disparate-impact scrutiny — although it ultimately concluded that the exam passed that scrutiny — because it concluded that the State was in fact the employer of the teachers and thus subject to suit under Title VII. *See AMAE v. California*, 231 F.3d 572 (9th Cir. 2000) (en banc); *see also id.* at 602 (Kleinfeld, J., concurring in part and dissenting in part) (calling the majority's opinion "cert bait" because it subjected state licensing boards to Title VII). The Second Circuit expressly found that the unusual circumstances that led the Ninth Circuit to conclude that the State was the employer in *AMAE* do not exist here (Pet. App. 30a-31a). Second, the Eleventh Circuit held that a local school district was liable for the disparate impact of a state licensing exam, but in that case (1) the State no longer used the exam because it had entered a consent decree in response to separate disparate-impact

litigation and (2) the school district had not sought a waiver of licensing requirements even thought the State had granted such waivers in the past. *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1246 (11th Cir. 1991). The school district thus was at least on notice that the exam had an unjustified disparate impact and had a means under state law to avoid that impact. Nothing of the sort is true here.

The decision below goes farther than any other appellate ruling has, because it allows plaintiffs to challenge the disparate impact of a state-mandated licensing exam in a suit against their employer — not the State, which is the real party in interest — and even where the employer would have no reason to question the validity of the exam. That ruling is in substantial tension with the rulings of the First, Third, Fourth, and Fifth Circuits, which hold that a State's licensing activities are not subject to challenge under Title VII. While the earlier cases may be theoretically distinguishable because they involved suits against the State rather than the employer, a ruling that the State cannot be subject to suit for its licensing requirements implies that the licensing requirements themselves are beyond challenge. It makes considerably less sense to subject an employer to liability merely for complying with state licensing requirements that it cannot control than to subject the State to a direct lawsuit challenging those requirements.

The Second Circuit's ruling leaves both the State and the employer in untenable positions. The State is left in an untenable position because, while it cannot be sued directly under Title VII for the disparate impact of its licensure tests, the tests' validity nonetheless will be decided in the State's absence. There is no guarantee that the employer will defend the test adequately, particularly because often — as here — the State's contract with the outside test designer will prohibit it from sharing with other parties the highly confidential test-

development material that might be crucial to establishing job-relatedness. Some employers who are sued might even welcome a court order striking down the licensing test because it would expand their pool of potential employees. The State, of course, would not be bound by any finding of invalidity in a case solely against the employer, and it thus could continue to insist that its licensing rules be followed.

To guard against that sort of chaos, the State might have no choice but to seek to intervene in all cases involving a disparate impact challenge to a licensing exam, assuming the State somehow knew about those cases. If the State felt compelled to intervene, however, it would in practice render a dead letter the holdings of cases like *Fields*, *George*, *Woodard*, and *Haddock* that state licensing bodies are not subject to suit under Title VII.

The Second Circuit's decision places employers — public and private alike — in an equally untenable position. Employers do not design, administer, or validate state-mandated tests. They are in no position to judge whether the State's licensing examinations have a disparate impact on minorities and, if so, whether the tests are valid or job-related. They are in no position to demonstrate the validity of the state-mandated examinations in Title VII litigation. Yet the decision below subjects such employers to liability for damages and injunctive relief in Title VII disparate-impact lawsuits for tests as to which they have no input and over which they have no control.

2. While the Second Circuit recognized that it was placing the City Board of Education in a "difficult situation" (Pet. App. 41a), it apparently felt compelled to do so by 42 U.S.C. § 2000e-7, which preempts state laws that "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII

(Pet. App. 39a). But that statute does not apply here. There is no question that § 2000e-7 preempts facially discriminatory state labor laws, such as laws that limit how many hours women (but not men) work or how much weight they are allowed to lift. *See, e.g.*, *Williams v. Gen. Foods Corp.*, 492 F.2d 399, 402 (7th Cir. 1974) (state law providing that women may not work more than forty-eight hours per week nor more than nine hours on one day per week); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-26 (9th Cir. 1971) (state law providing that woman may not lift more than fifty pounds). The statute also may apply when an employer relies on a state-mandated practice that, while facially neutral, already has been found to be unlawfully discriminatory. *Cf. Richardson*, 935 F.2d at 1246 (holding that an employer was liable for a state licensing test when the State no longer used the test because of a consent decree).

But the statute should not apply when the employer has no reason to know that the practice is discriminatory. The court of appeals' decision to the contrary presents employers with the Hobson's choice of either (1) flouting a facially valid licensing regime and subjecting themselves to liability to the State or (2) complying with the regime and subjecting themselves to liability to employees if the licensing examination ultimately is shown to have a disparate impact. Nothing in § 2000e-7 suggests that employers must guess the correct answer to this dilemma at their own peril.

This reading of § 2000e-7 is supported by standard canons of statutory construction. The Second Circuit's broad interpretation of the provision effectively reads Title VII as preempting state laws establishing minimum qualifications for licensure. But when a federal statute like Title VII alters the balance of federal and state powers, the courts will apply it only in contexts where it is "unmistakably clear" that Congress intended to do so. *Gregory v. Ashcroft*, 501 U.S.

452, 460-61 (1991); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (warning that preemption of "areas that have been traditionally occupied by the States" is inappropriate absent a "clear and manifest" congressional intent to supersede state law). As the Second Circuit recognized, allowing plaintiffs to sue the State under Title VII for implementing a licensing test would alter the federal balance in a manner that Congress did not clearly intend (Pet. App. 28a). Allowing the same suit against the City Board of Education or any other employer, however, intrudes just as much on core state police powers, because the net result — federal limitations on state licensing regimes — is the same. That reading of Title VII thus would alter the federal-state balance, and Congress has not made it unmistakably clear that it intended to do so. *See Haddock*, 777 F.2d at 464 (legislative history "is barren of any reference to state licensing agencies or the many persons licensed by them").

3. The effects of the Second Circuit's decision in this case extend far beyond the LAST, and far beyond New York State.[1] New York, like other States, requires licensing tests for a wide array of professions. *See, e.g.*, N.Y. Education Law § 6524(4) (doctors); *id.* § 6604(4) (dentists); *id.* § 7206(4) (professional engineers); *id.* § 7304(4) (architects); *id.* § 7404(4) (certified public accountants); *id.* § 8305(1)(d) (interior designers); N.Y. Judiciary Law § 53(3) (lawyers); N.Y. Real Property Law § 441(1)(b) (real estate brokers). Those tests and myriad other licensing

1. Even if the decision were limited to the LAST, it could affect 695 other school districts in New York State, ranging from the large and urban to the small and rural, which together employ more than 200,000 teachers. *See* N.Y. State Educ. Dep't, *Number of Public School Districts by Type, available at* http://www.emsc.nysed .gov/irts/educationstats/edstats-07/table2.pdf; N.Y. State Educ. Dep't, *Professional Staff in Public Elementary and Secondary Schools, available at* http://www.emsc.nysed.gov/irts/educationstats /edstats-07/table6.pdf.

examinations now are subject to challenge under Title VII as well, in New York and elsewhere.

For example, the decision below would permit a lawyer who failed the state bar exam to sue a private law firm because the bar exam has a disparate impact. In New York, as elsewhere, there are gaps between the pass rates for different ethnic groups on the bar exam. *See* Michael Kane *et al., Impact of the Increase in the Passing Score on the New York Bar Examination* 6 (2006), *available at* http://www.nybarexam.org/ncberep.pdf. Under the court of appeals' ruling here, an applicant for an attorney position who had been unable to pass the bar exam may sue the firm, asserting that the exam does not accurately measure the job skills needed for attorneys and that Title VII therefore prohibits law firms from refusing to hire someone as an attorney merely because he failed the bar exam.

The same situation could occur for the dozens of other professions that are subject to licensing requirements, which are meant to protect the public from unqualified practitioners. The prospect of such litigation, regardless of its ultimate outcome, would expose private defendants to substantial litigation costs to defend decisions they could not control and did not make. Those employers would bear the nearly insurmountable burden of validating a test that they did not create, design, or administer. Although they cannot be sued directly under Title VII, States would face the choice of seeking to intervene to protect their licensing regimes or risking the prospect of a court order that an employer must hire unlicensed professionals.

4. Although the Constitution does not require it to do so, New York takes seriously the disparate impact of licensing examinations like the LAST and looks for ways to narrow the performance gap. But it is well recognized that minorities

have achieved lower scores on most standardized tests and that the most important factor explaining this discrepancy is that minority groups have historically had less access to high-quality education. *See* Karen J. Mitchell et al., Nat'l Research Council, *Testing Teacher Candidates: The Role of Licensure Tests in Improving Teacher Quality* 99-111 (2001) (included in the record as the State's Exhibit 123). The disparate pass rates for teacher licensing tests are comparable to those for licensing tests for lawyers, physicians, and other licensed professions. *Id.*

As the testimony in the trial court indicated, New York found distressing correlations between low student performance and high numbers of uncertified teachers — particularly in schools with poor and minority student populations, where children were often trapped in a cycle of being poorly educated by underqualified teachers (Tr. 1582, 1586). A core rationale for demanding uniform minimum teacher licensing qualifications is to break this cycle. Subjecting those licensing qualifications to disparate-impact analysis makes it harder, if not impossible as a practical matter, for the State to serve the educational needs of its most vulnerable children. The importance of this question is reason enough to grant the petition.

B. This Court should resolve whether licensing examinations must be formally validated as employment tests.

If state licensing exams are now going to be subject to disparate-impact challenges, this Court should address the standard under which those exams are shown to be "job related." In *Watson*, a plurality of this Court stated that standardized exams need not necessarily be formally validated when their job-relatedness is evident on their face. 487 U.S. at 998. The Second Circuit rejected the plurality's

views, however, because it felt bound by pre-*Watson* circuit precedent requiring formal validation studies in all cases involving a standardized test (Pet. App. 51a). The Second Circuit gave no weight to the district court's common-sense observation that the LAST's essay portion has a "manifest relationship to teaching" because "[i]t should go without saying that New York City teachers should be able to communicate effectively in ... written English" (Pet. App. 120a-121a). This case thus may turn on the question left open by *Watson*, and addressed only by the plurality — whether employers are always required to introduce formal validation studies to establish job-relatedness. That question merits this Court's consideration.

The Second Circuit exacerbated the consequences of demanding formal validation by suggesting that a licensing exam might have to be validated under the standards that apply to employment exams (Pet. App. 48a-51a). Licensing exams involve different development and validation methodologies from employment exams. Licensing exams, unlike employment exams, are not designed to rank candidates or predict their performance in particular jobs. Rather, licensing exams establish that candidates meet minimum qualifications to engage in a particular profession. *See generally* Am. Educ. Research Ass'n, *Standards for Educational and Psychological Testing* 64 (1999) (included in the record as the State's Exhibit 121); Mitchell et al., *supra*, at 34-35.

Applying employment-test validation standards would require professional licensing regimes to meet goals, such as predicting on-the-job performance, that they were never intended to fulfill. And because employment tests generally must be validated with respect to the "job or jobs for which candidates are being evaluated," *Albemarle*, 422 U.S. at 431 (quotation marks omitted), plaintiffs challenging licensing

tests could plausibly argue that whatever the validity of a particular licensing regime as a general matter, it is not valid with respect to their particular positions. *See AMAE*, 231 F.3d at 596 (Reinhardt, J., concurring in part and dissenting in part) ("Teachers' jobs are too diverse to be lumped into one or two categories for validation purposes."). To ward off such challenges, the State would be forced to conduct scores of expensive validation studies for every conceivable job as to which a licensing test might apply. Even if that were possible — and even though the licensing tests ultimately might withstand such challenges — the burden on test developers, employers, the State, and the courts would be enormous.

C. This Court should grant the petition now before any proceedings on remand.

This Court frequently grants certiorari to resolve important threshold questions when, as here, a federal court of appeals has reversed the district court's entry of judgment for the defendants and has remanded the case for further proceedings. *See, e.g., Hein v. Freedom From Religion Found., Inc.*, 127 S.Ct. 2552 (2007); *Morse v. Frederick*, 127 S.Ct. 2618 (2007); *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007); *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727 (2007). This Court is particularly willing to do so when the lower court's decision will have immediate adverse consequences. *See generally* Robert L. Stern et al., *Supreme Court Practice* 259-60 (8th ed. 2002) (detailing cases). Here, this Court should grant certiorari now, because otherwise the chief harms that this petition seeks to prevent will come to pass no matter what happens on remand.

First, if the LAST must be defended on remand under the professional-validation standard imposed by the Second Circuit, the City will not be in a position to make that defense.

The State thus may be forced to seek to intervene in this action on remand — thereby subjecting itself to a claim that is not authorized by Title VII and thus barred by the Eleventh Amendment. This Court should not countenance such an end run around the carefully crafted constitutional and statutory limitations on suits against States. Moreover, even if the City prevails with the State's assistance, future Title VII challenges — both to new versions of the LAST and to other state-mandated professional licensing requirements — are likely to follow. And unless this Court grants certiorari now and reverses the decision, licensing requirements in the Second Circuit may be subject to burdensome Title VII disparate-impact litigation for some time, because defendants will not have an opportunity to seek this Court's review on the issue until they actually lose a case. *See Mathias v. Worldcom Techs.*, 535 U.S. 682, 683-84 (2002) ("As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous."). In *AMAE*, for example, the State could not seek certiorari — notwithstanding the Ninth Circuit's creation of an apparent circuit split — because the majority also concluded that the licensing test at issue was lawful under Title VII. Certiorari is thus warranted to spare parties and the States costly litigation under a dubious legal theory for an indefinite period of time.

Second, during the proceedings on remand — which are likely to be prolonged — the State's teaching-licensing system, designed to protect the quality of education provided to New York's children, will be thrown into disarray. Employers facing disparate-impact challenges to a state licensing test may well decide not to comply with the state licensing requirement while the litigation is ongoing. *Cf. EEOC v. Illinois*, 69 F.3d 167, 170 (7th Cir. 1995) (noting that upon the revision of the federal Age Discrimination in Employment Act to ban mandatory

retirement, "a competently counseled school district" presented with a state-law mandatory retirement requirement "would have told the state to go fly a kite"). Since it will be possible in many cases, as it was here, for the plaintiffs to establish a prima facie disparate impact, the litigation may be protracted; this case, for example, has already lasted eleven years. And faced with years of legal uncertainty, the States themselves may themselves feel compelled to suspend their licensing requirements until the issue is finally resolved. The State of Alabama, for example, entered into a consent decree in a Title VII lawsuit that for over ten years effectively prevented it from requiring a teacher certification examination. *See Allen v. Ala. State Bd. of Educ.*, 190 F.R.D. 602, 605 (M.D. Ala. 2000). Thus, without early resolution of the questions presented here, state licensing requirements may be disrupted for years, regardless of whether they are ultimately proven lawful under Title VII standards.

Third, the Second Circuit's decision creates uncertainty for the developers of professional licensing examinations. The court's application of employment-test standards to professional licensing makes it difficult to discern how licensing tests are to be validated, given that up until now professional norms and practical realities have dictated that licensing and employments tests be validated differently. Licensing-test developers may feel compelled in the interim to try to meet the Second Circuit's inappropriate standards, which — if the Second Circuit's standard ultimately proves to be incorrect — means unnecessary delay and expense.

Because the States and employers within the Second Circuit face immediate consequences regardless of who prevails on remand, this Court should grant certiorari now to resolve the threshold question of whether this lawsuit can proceed at all. There is no need for further factual development on the questions presented, and a remand thus is not needed to ensure an adequate record for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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