No. _____

In the
Supreme Court of the United States

DR. MITAL SUMAN KUMAR PATEL,
Petitioner,

v.

DENIS MCDONOUGH, SECRETARY UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At the time of Petitioner's application for employment with the defendant institution, it was the policy of Veterans Affairs to require the following before granting clinical privileges to practice orthopaedic surgery: (1) current certification or active participation in the examination process leading to certification in orthopaedic surgery by the American Board of Orthopaedic Surgery, or (2) successful completion of an Accreditation Council for Graduate Medical Education or American Osteopathic Association accredited post graduate training program in orthopaedic surgery. Defendant denied Petitioner employment because he did not possess either of those requirements. Did this violate Title VII of the Civil Rights Act of 1964 by disparately impacting Dr. Patel and other like applicants on the basis of their national origin?

PARTIES TO THE PROCEEDINGS

Petitioner, Dr. Mital Suman Kumar Patel, was the plaintiff in the District Court and the appellant in the Court of Appeals. Respondent, Denis McDonough, Secretary United States Department of Veterans Affairs, was the defendant in the District Court, and the appellee in the Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Dr. Mital Suman Kumar Patel petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The August 15, 2023 Opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and appears at Appendix A. The October 27, 2022 Order of the United States District Court for the Northern District of West Virginia is unpublished and appears at Appendix B. The October 27, 2022 Judgment of the United States District Court for the Northern District of West Virginia appears at Appendix C. The October 13, 2023 Order denying Petition for Panel Rehearing and Rehearing *En Banc* of the United States Court of Appeals for the Fourth Circuit appears at Appendix D.

JURISDICTION

The Order denying appellant's Petition for Rehearing was entered by the Court of Appeals on October 13, 2023 (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254 (West).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1) (West).

STATEMENT OF THE CASE

Plaintiff is a physician. He was born in India and educated there, attending medical school at Baroda Medical College in Vadodara, India, and completing his orthopedic surgery residency there as well. Following completion of his residency, Dr. Patel received certification from the Educational Commission for Foreign Medical Graduates.

This case arises from Dr. Patel's application for employment, as a physician and orthopaedic surgeon, with Clarksburg Louis A. Johnson Veterans Affairs Medical Center ("the Clarksburg VAMC") in 2015.

At the time of Dr. Patel's application to the Clarksburg VAMC, it was the policy of the VA to require the following (as applicable to this case) before granting clinical privileges to practice orthopaedic surgery (and thus, to be hired): (1) current certification or active participation in the examination process leading to certification in orthopaedic surgery by the American Board of Orthopaedic Surgery ("ABOS"), or (2) successful completion of an Accreditation Council for Graduate Medical Education ("ACGME") or AOA accredited post graduate training program in orthopaedic surgery. At the time of his application, Dr. Patel was not Board Certified by ABOS in Orthopaedic Surgery; had not completed an ACOME accredited post graduate training program (residency) in orthopaedic surgery; but had completed a one-year fellowship with

Lenox Hill Hospital in New York City in Adult Hip Orthopaedic Reconstruction, which was accredited by the ACGME.

According to Defendant, Plaintiff was denied employment because he did not meet the credentialing requirements, as he had not completed an ACGME or AOA accredited post graduate program in orthopaedic surgery (residency). Defendant maintained that in order to obtain board certification in orthopaedic surgery, a physician was required to complete 60 months of accredited residency -- no more than 6 months of which can be obtained in a residency program outside of the United States. No exception could be made for Dr. Patel's fellowship with Lenox Hill Hospital or any comparable training he might have received abroad.

So Dr. Patel sued defendant in the United States District Court, charging violation of his rights under Title VII of the Civil Rights Act of 1964, alleging that he was disparately treated based on his national origin. Plaintiff charged that the hospital's policy that its physicians either be Board Certified or have conducted a residency at a facility/program accredited by the ACGME resulted in disparate treatment of Dr. Patel and all other physicians who completed their medical residency outside of the United States, and thus disparately impacted people on the basis of their national origin.

The District Court granted summary judgment for defendant on the ground that plaintiff had failed to establish a prima facie case under the fourth prong of the *McDonnell Douglas* test – that he was denied

employment "under circumstances giving rise to an inference of discrimination, *i.e.*, that, after the rejection, the position remained open, and the employer continued to seek applications from persons of complainant's qualifications [outside the protected class]." (Appx. B). With regard to plaintiff's charge of an unlawful disparate impact on him and other physicians of foreign national origin, the court acknowledged that Title VII was enacted in part to redress workplace rules and practices that are "fair in form, but discriminatory in operation." The court acknowledged that plaintiff had offered statistical evidence to support his claim. "Proof of disparate impact requires reliable and accurate statistical analysis performed by a qualified expert," however, the court said (*citing* EEOC v. Freeman, 961 F. Supp. 2d 783, 786 (D. Md. 2013), aff'd in part sub nom. E.E.O.C. v. Freeman, 778 F.3d 463 (4th Cir. 2015)). "More particularly, a plaintiff in a disparate impact case 'bears the burden of supplying reliable expert testimony and statistical analysis that demonstrates disparate impact stemming from a specific employment practice before such a violation can be found.'" The court concluded,

> Here, Plaintiff has not designated an expert to explain and/or present these statistics and their import. See ECF No. 85. Without such expert evidence and/or testimony, Plaintiff cannot support a prima facie case for disparate impact discrimination. Plaintiff's lack of an expert is therefore fatal to Plaintiff's case.

Even if the Court could or would be inclined to consider the reports Plaintiff has offered in his Memorandum in Opposition (ECF No. 82), the Court would nevertheless conclude that Plaintiff has failed to make a prima facie case of disparate impact discrimination. To support such a claim, again, Plaintiff may rely upon statistical evidence. See Anderson, 406 F.3d at 265. According to EEOC v. Freeman, 961 F.Supp.2d at 786-787, the evidence must demonstrate a disparate impact which stems from a specific employment practice. The employment practice Plaintiff highlights in the instant case is Clarksburg VAMC's (expired) requirement that physicians be board certified or have completed an ACGME accredited post graduate training program in orthopaedic surgery. The statistical reports submitted by Plaintiff, however, do not relate to this specific employment practice. Rather, the reports, articles, and papers Plaintiff cites appear to discuss diversity in orthopaedic surgery as a general matter, and the plight of international medical students vis-à-vis orthopaedic residency programs. See ECF No. 82, pgs. 19-21. This is not a specific enough association to support a prima facie case for disparate impact discrimination. The case law requires evidence to support a finding that Defendant's specific business practice had a disparate impact upon a class of persons of non-U.S. national origin. See Freeman, 961 F.Supp.2d at 786-87 ("[m]erely pointing to 'statistical disparities in the employer's work force' is not sufficient; the

> plaintiff must provide 'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs . . . because of their membership in a protected group") (quoting Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 992 (1988)). Plaintiff therefore cannot make a prima facie case of disparate impact discrimination. [Appx. B]

Dr. Patel appealed, but the Court of Appeals affirmed. The court agreed that it was error for the District Court to have dismissed plaintiff's case for lack of "expert statistical evidence," stating, "we do not require statistical evidence, let alone expert statistical evidence, to prove a disparate impact claim" (*citing* Thomas v. Washington Cnty. Sch. Bd., 915 F.2d 922, 926 (4th Cir. 1990) ("[A]lthough disparate impact cases usually focus on statistics, they are neither the exclusive nor a necessary means of proof")). But the court affirmed "on the alternative basis that, considering the evidence put forth by Patel as a whole, he has failed to set forth a prima facie case of disparate impact discrimination." (Appx. A)

REASONS FOR GRANTING THE PETITION

The Court should grant Certiorari to review the important area of disparate impact claims under Title VII, as illustrated by this case. The denial of employment to Dr. Patel reflects the ever growing problem of disparate impact on highly intellectual and educated doctors who are discriminated against because of their national origin. People attend medical school, typically, in the country where they were born.

It is not easy for a foreign born person to attend medical school in the United States because of the high cost and lack of access. An international medical school graduate (IMG), trained in orthopaedic surgery as Dr. Patel is, can teach and supervise residents in the United States yet not qualify himself for the very jobs that these residents will obtain thereafter –because of the board certification requirements and similar mandates of the Accreditation Council for Graduate Medical Education (ACGME, which sets and monitors voluntary professional educational standards). Defendant denied employment to Dr. Patel because he had not completed an ACGME or AOA accredited post graduate program in orthopaedic surgery, making no exception for Dr. Patel's ACFME accredited fellowship with Lenox Hill Hospital or any of the other comparable training he received outside the United States.

The Court should clarify the application of disparate impact analysis to such claims – in this matter, whether Dr. Patel and the multitude of other physicians like him suffered disparate treatment based on their national origin in violation of Title VII. As Dr. Patel charged in his lawsuit below, the defendant hospital's policy that its physicians be Board Certified or have conducted a residency at a facility or program accredited by the ACGME violates Title VII because it disproportionately impacts all such physicians who have completed their medical residency outside of the United States -- disparately impacting persons on the basis of their national origin, cf. Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, N.Y., 316 F.3d 357, 366 (2d Cir. 2003) (to make out prima

facie case based on disparate impact, plaintiff must demonstrate that outwardly neutral practice actually or predictably has discriminatory effect -- a significantly adverse or disproportionate impact on a protected class); Orange Lake Assocs., Inc. v. Kirkpatrick, 21 F.3d 1214, 1228 (2d Cir. 1994).

There are hundreds of orthopaedic surgeons who have completed their residency training in orthopedics in their country of origin and fellowship in the United States and are being disproportionately impacted by such accreditation policies. These physicians are not permitted to take American Board of Orthopaedic Surgery (ABOS) examinations unless they are an associate professor in an academic institution. A majority of health care institutions in the United States use board certification by ABOS OR American Osteopathic Association (AOA, for osteopathic physicians) as the de facto requirement for all credentialing and hiring. This leads to unequal opportunity and exploitation of these doctors, like Dr. Patel, of foreign national origin. The Court should address the few lower court decisions that have addressed disparate impact claims in this area, see, e.g., W.A. Foote Mem'l Hosp., 70 F.3d 422 (6th Cir. 1995) (Mexican-American doctor failed to establish that requiring doctors who wished to obtain invasive cardiology privileges provide films and charts of prior cardiac catheterizations had disparate impact on doctors of Mexican heritage); Pouyeh v. Bascom Palmer Eye Inst., 613 F. App'x 802 (11th Cir. 2015) (Iranian applicant to medical school's residency program brought action against school and certain school officials, alleging that he was not selected for residency

program because of his national origin; court held applicant failed to allege with sufficient factual support that his exclusion from medical conference was motivated by his national origin).

The disparate impact extends beyond the foreign-born doctors, moreover, and impacts so many patients who are in need of such doctors across our country. A multitude of patients at Veteran's Affairs hospitals and hospitals in rural areas of our country suffer from a lack of orthopaedic services. Yet these board certification requirements continue to prevent such facilities from hiring otherwise highly qualified and available physicians and surgeons. Reviewing this area of law is critical, therefore, for both the impacted foreign-born physicians and the multitude of patients throughout the United States in need of their care.

The Court should clarify the burden of proof as well. Some precedent such as Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 520, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015) provides that the burden is on the plaintiff – "a court must determine that a plaintiff has shown that there is 'an available alternative ... practice that has less disparate impact and serves the [entity's] legitimate needs.'" (citing Ricci v. DeStefano, 557 U.S. 557, 578, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009)). We submit that where, as in Dr. Patel's case here, the defendant's policy has a disparate impact on those born outside of the United States, the burden should shift to the defendant to demonstrate that its policy furthers a legitimate interest *and* that no alternative would serve the interest with less discriminatory effect on the

protected class, see Ricci, 557 U.S. at 587–589 (examining practice of discarding results of promotional exams due to concerns over disparate impact on minority candidates and noting business necessity *defense* to disparate-impact liability). This is in accordance with the premise of Title VII -- that employers may not create workplace-wide rules that unfairly cause a negative impact on a particular national origin group even if the rules on their face apply to all workers. As this Court has stressed, disparate impact claims under Title VII of the Civil Rights Act serve to ameliorate rules in the workplace and business practices that are "fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). Disparate impact discrimination exists where a facially neutral policy has a disproportionally adverse impact upon a protected class. Id.; see also 28 C.F.R. § 42.104(b)(2) (recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin).

The Court should clarify, also, the role of statistical evidence in such cases, see, e.g., Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 265 (4th Cir. 2005)("In establishing a prima facie violation of Title VII, a plaintiff may use statistical evidence.") To demonstrate a disparity and establish a causal link between the employment rule or practice and the discrepancy, statistical evidence is commonly used to show this disparity and to establish that it is not merely a result of chance. Statistical evidence is often employed to show national origin discrimination through disparate impact.

The Court should clarify that an expert witness is not required for the use of statistical evidence to prove disparate impact – as the district court in Dr. Patel's case erroneously ruled. See Anderson, 406 F.3d at 265 (citing New York City Transit Auth. v. Beazer, 440 U.S. 568, 584, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979)) (noting proper use of statistical evidence to establish prima facie violation of Title VII). The Court should clarify that a plaintiff need not prove discrimination against a particular protected group with "scientific [statistical] certainty" but only by a preponderance of the evidence, see Bazemore v. Friday, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986) (Brennan, J., concurring in part) ("Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff

is entitled to prevail"); Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511, 519 (9th Cir. 2011) (explaining that appropriate statistical evidence can provide a "reliable indicator of a disparate impact").

The Court should clarify that, at the same time, statistical evidence is not always required to prove a disparate impact claim, see Thomas, 915 F.2d at 926 ("although disparate impact cases usually focus on statistics, they are neither the exclusive nor a necessary means of proof"). The requisite unfair share of harm can also be shown by evidence of impact on specific individuals – as in this case with regard to the India-born Dr. Patel, see, e.g., McCoy v. Canterbury, No. CIV.A. 3:10-0368, 2010 WL 5343298, at *5 (S.D.W. Va. Dec. 20, 2010) (a "series of discrete episodes" of the challenged practice can "raise a plausible inference that it has a discriminatory impact on minorities"), aff'd, 428 F. App'x 247 (4th Cir. 2011); Mitchell v. Bd. of Trustees of Pickens Cnty. Sch. Dist. A, 599 F.2d 582, 585–86 (4th Cir. 1979) (affirming district court's finding of disparate impact "on the basis of the few specific applications of the policy proven, such inferences of likely other applications as these instances could rationally support, and judicial notice of the world as it is and as it is known in common experience to be").

In Dr. Patel's case below, the defendant relied on caselaw from the Fourth Circuit (EEOC, 961 F. Supp. 2d at 786), which this Court should clarify is erroneous; proof of disparate impact does not, the Court should stress, require "reliable and accurate statistical analysis performed by a qualified expert." The

disparate effect of a recipient's policy or practice is sometimes so obvious or predictable that comparative statistics are unnecessary to draw the requisite connection between the policy and harm to a Title VI protected group, cf. Lau v. Nichols, 414 U.S. 563, 568, 94 S. Ct. 786, 39 L. Ed. 2d 1 (1974) (finding national origin discrimination without reliance on statistical evidence because instruction takes place only in English and therefore "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority"); Mitchell, 599 F.2d at 585 (upholding district court finding that "a policy that arguably would not renew the contract of any teacher who for any reason could not commit at contract renewal time to a full year's uninterrupted service, but that singled out pregnancy alone for compelled disclosure, would necessarily impact disproportionately upon women").

Again, this is an important area of law for the Court to address because of the impact on both the foreign-born physicians and the patients in need of them. This type of discrimination has been recognized in the medical field itself, see Desbiens NA, Vidaillet HJ Jr., Discrimination against international medical graduates in the United States residency program selection process, BMC Med Educ. 2010 Jan 25 ("Two studies provide strong evidence that psychiatry and family practice programs respond to identical requests for applications at least 80% more often for U.S. medical graduates than for international graduates. In a third study, a survey of surgical program directors, over 70% perceived that there was discrimination against international graduates in the selection

process…. There is sufficient evidence to support action against discrimination in the selection process. Medical organizations should publish explicit proscriptions of discrimination against international medical graduates (as the American Psychiatric Association has done) and promote them in diversity statements. They should develop uniform and transparent policies for program directors to use to select applicants that minimize the possibility of non-academic discrimination, and the accreditation organization should monitor whether it is occurring. Whether there should be protectionism for U.S. graduates or whether post-graduate medical education should be an unfettered meritocracy needs to be openly discussed by medicine and society.")

The United States is a nation of immigrants that has always been dependent on those from other countries to make it an economic and intellectual powerhouse. The DePaul Journal of Health Care law has noted that in the medical field, however, "America has a long history of discrimination against IMG physicians" – a problem even greater under managed care, where the market power to discriminate against IMG physicians is concentrated in the hands of the MCO executives responsible for recruiting physicians, noting the resulting problems,

> The inappropriate elimination of talented IMG physicians by MCOs could decrease the quality of medicine practiced in managed care settings." As explained above, the algorithms used by many MCOs to assess physician practice styles are based on cost-effective decision-making which most often do not properly adjust for the

> health status of a physician's patient population. These flawed selection methods may, therefore, lead MCO executives to overlook skilled, efficient physicians who serve poor and underprivileged communities which are more likely to have members in poor health. Instead, they select less skilled, less efficient doctors who serve a higher percentage of healthy patients and, thus, incur lower costs. The natural and unfortunate result of such a biased process would be a decline in the quality of care given to the poor and an underserved patient population. Inner-city patients would have difficulty obtaining health care services even if they were able to enroll in a pre-paid health plan. Those patients who do not subscribe to a managed care plan would be inconvenienced because there would be fewer providers in their city to treat them.

The recent focus on diversity, equity, and inclusion (DEI) further supports review by this Court here. DEI has emerged as a core principle in medical education, with numerous institutions and training programs investing heavily into efforts to create a more diverse physician workforce. Typically, such efforts are aimed at demographic groups deemed by the National Institutes of Health (NIH) to be individuals who are underrepresented in medicine, including racial and ethnic minorities often of foreign origin. Many IMGs hail from underdeveloped nations and experience numerous economic, political, and social hardships in their paths that eventually lead them to the United States. IMGs have a greater proportion of physicians

of color than non-IMGs. IMGs of color often face prejudices on the basis of their racial or ethnic backgrounds, with European and White IMGs being more easily accepted than non-White IMGs. There is no business necessity of excluding good but foreign trained doctors -- a policy that continues to operate at many different VA hospitals around the Country and in most health care institutes.

All of this further shows it's important for the Court to review this important area of disparate impact against physicians like Dr. Patel – a physician with two fellowships in the United States, following completion of successful residency in orthopedics at the Medical Council of India, a fully accredited college and excellent institution. Dr. Patel had excellent training for the job he applied for with the defendant hospital. He taught and supervised from time to time the residents of The Accreditation Council for Graduate Medical Education residency during his fellowship in Seattle, Washington, yet this was precluded from being used as a surrogate for board certification or residency that the defendant required. As Dr. Cassim Riaz affirmed under oath in Dr. Patel's litigation below,

> Q … you said, you spoke with people and you determined how intelligent they are. Did he come across to you as an intelligent individual?
>
> A Yes.
>
> Q And did you think that he would actually be a very good hire for the institution?
>
> A I thought he would be a very good fit for the Clarksburg VA and the Veterans.

> Q Why is that?
>
> A He had done fellowship training in the United States. And after I spoke to him about all the procedures that he did and that he had learned, that he would be a good fit for the Veterans and our institution.
>
> Q And did you ask him about what he had done -- before he had done a fellowship, did you ask him about his residency?
>
> A Yes, I did.
>
> Q And what did he tell you about the residency?
>
> A He told me that it was a very good residency and the kind of cases that he had done in his residency training.

Dr. Riaz himself affirmed that the subsequent change in policy for the credentialing requirement that previously kept out good applicants like Dr. Patel was beneficial "[b]ecause it gave us a much broader pool of applicants for the subspecialities that we were recruiting for, which are difficult subspecialties to recruit into." It broadened the qualified physician applicants by accepting what foreign born physicians who "had received comparable education to an ACGME education or an ACGME residency…" This is supported by the Equal Employment Opportunity Commission's own position, stressing that guidelines on employee selection procedures (*e.g.*, 29 CFR § 1607, 35 Fed. Reg. 12333 (Aug. 1, 1970)) demand that employers using tests have available "data

demonstrating 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" (§ 1607A (c)).

Requirements like those imposed on foreign-born doctors such as Dr. Patel do not accurately or reasonably predict quality of care and lead only to discrimination by disparately impacting those with foreign residency. The claim that institutions such as the defendant in this case rely on ACGME residency in orthopedics that any physician of national origin can obtain is belied by the real world facts showing that there are more than 200 ACGME accredited orthopaedic residency programs in the United States yet only 5 ACGME accredited orthopaedic residency programs outside of the United States with few spots in each one -- none in India from where Dr. Patel hails. The bottom line: unless you were born in the United States, it is difficult to get into medical college in the United States; without medical college in the United States, you cannot get into an orthopaedic residency in the United States; and without a residency in the United States, it is nearly impossible to receive the required board certification in orthopedics – all of which disparately impacts physicians in our Country who are of foreign national origin.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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