No. 99-1750

In the Supreme Court of the United States

MANUEL MUNOZ, JR. AND JESSE G. MUNOZ,
PETITIONERS

v.

F. WHITTEN PETERS, SECRETARY OF
THE AIR FORCE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Whether the court of appeals properly affirmed the district court's grant of summary judgment on the ground that petitioners had failed to adduce sufficient admissible evidence to create a genuine issue of material fact respecting promotions at Kelly Air Force Base.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 200 F.3d 291. The opinion of the district court (Pet. App. 27a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered January 5, 2000. On March 15, 2000, Justice Scalia extended the time for filing a petition for a writ of certiorari to and including May 4, 2000. The petition was filed May 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are Mexican-American male civilian employees of Kelly Air Force Base (KAFB). They allege that they were denied promotions at KAFB in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* They filed a civil action claiming that the Air Force's automated Personnel Placement and Referral System (PPRS) has had a disparate impact on promotions for a certified class of 2742 Hispanic males. After extensive discovery, the district court granted summary judgment for the government pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. See Pet. App. 27a-48a. The court of appeals affirmed. *Id.* at 1a-26a.

1. The court of appeals' decision describes the KAFB's civilian hiring and promotion practices. Pet. App. 2a-4a. KAFB employs a Merit Promotion Plan that utilizes an automated system, the PPRS, to generate a pool of candidates for promotion. When positions become available, the PPRS automatically identifies all eligible employees, narrows the pool by successively more detailed requirements, and produces a ranked list of candidates. The list is hand-checked and then forwarded to the selecting official, who chooses one of the candidates for promotion. See *ibid.*

2. Petitioners filed this action in 1985 and asserted that the PPRS had a disparate impact on the promotion prospects of Hispanic males at KAFB. Pet. App. 4a-5a. The case was ultimately certified as a class action, discovery proceeded, experts for both sides filed reports, and affidavits were filed. *Id.* at 5a-6a. At the close of discovery, the government moved for summary judgment, and the district court granted that motion. See *id.* at 6a. Petitioners appealed, and the court of appeals

ordered a limited remand directing the district court to explain its reasoning. See *ibid.* The district court then issued an extensive opinion explaining the basis for its grant of summary judgment. *Id.* at 27a-48a.

3. The court of appeals affirmed the district court's judgment and specifically rejected petitioners' objections to various rulings on the admissibility of petitioners' evidence and on other matters. Pet. App. 1a-26a. The court of appeals concluded that the district court did not abuse its discretion in concluding that petitioner's expert testimony was unreliable and should be excluded. See *id.* at 10a-14a. The court of appeals also agreed with the district court that petitioners' other evidence was not sufficient to survive a motion for summary judgment. See *id.* at 14a-18a. The court specifically found that petitioners "have failed to adduce sufficient evidence to create a genuine issue of material fact as to disparate impact or treatment." *Id.* at 20a. The court of appeals next concluded that the district court had not abused its discretion in limiting discovery. *Id.* at 20a-21a. The court of appeals further ruled, in upholding summary judgment as against the class action, that "any individual claims would also fail to survive summary judgment." *Id.* at 22a; see *id.* at 22a-25a.

ARGUMENT

Petitioners contend that the court of appeals erred in affirming the district court's entry of summary judgment. They argue that the district court (1) failed to give petitioners the benefit of reasonable inferences from the evidence (Pet. 6-10); (2) entered inappropriate discovery orders (Pet. 10-14); (3) wrongly rejected the sufficiency of petitioners' lay evidence (Pet. 19-21); and (4) erred in rejecting petitioners' expert testimony on

the basis that it was unreliable (Pet. 21-23). The court of appeals properly rejected each of those arguments. The legal issues presented here have generated no conflict among the courts of appeals. Instead, they simply involve the application of settled law to the facts of this case. We address petitioners' arguments in the order followed by the court of appeals.

1. Title VII plaintiffs frequently rely heavily on statistics to show disparate treatment or impact. See *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Petitioners in this case sought to show, through statistical evidence, that the KAFB's procedure for promoting employees disadvantaged Hispanic males. The government argued, in the course of moving for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, that petitioners' evidence was not credible. The court of appeals correctly concluded that the district court properly excluded petitioners' expert testimony because it was unreliable. Pet. App. 10a-14a.

As the court of appeals noted, a district court may exclude from consideration, at the summary judgment stage, expert testimony that is unreliable. Pet. App. 11a. See *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993). The court of appeals reviews a district court's determinations respecting the reliability of expert evidence for abuse of discretion. See *Kuhmo Tire Co.* v. *Carmichael*, 526 U.S. 137, 152 (1999); *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141-143 (1997). The court of appeals had ample reason to conclude that the district court here did not abuse its discretion in concluding that petitioner's expert testimony lacked sufficient reliability to create a genuine issue of material fact. See Pet. App. 12a-14a.

As the court of appeals and district court both explained, the expert testimony contained flaws ranging from "particular miscalculations" to errors in the "general approach to the analysis." Pet. App. 12a. For example, petitioners' statistical expert made obvious mathematical errors, he employed methodology that was "not in accord with those of experts in his field," and his analysis rested on an assumption—namely, that the KAFB promotion system was discriminatory—that indicated he "lacked the necessary objectivity to make his analysis credible." *Id.* at 12a-13a. See also *id.* at 37a-43a.

Even if petitioners could overcome the court of appeals' persuasive explanation of why the district court did not abuse its discretion in rejecting, as unreliable, petitioners' expert testimony, the matter would not warrant this Court's review. The Court does not grant a petition for a writ of certiorari merely to examine whether the lower courts have misapplied a properly stated rule of law to the facts of a particular case. See Sup. Ct. R. 10.

2. The court of appeals also properly affirmed the district court's determination that petitioners' other evidence was insufficient to overcome the government's motion for summary judgment. See Fed. R. Civ. P. 56(c). To avoid summary judgment, petitioners had to come forward with sufficient evidence to support each essential element of their claims on which they would bear the burden of proof at trial. See, *e.g.*, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Petitioners failed to carry that burden.

The court of appeals explained that, once petitioners' unreliable expert testimony was excluded, petitioners had "little else to rely on in attempting to overcome

summary judgment on either disparate impact or disparate treatment claims." Pet. App. 15a. Petitioners contended that the government's expert reports contained data suggesting disparate impact, but the court of appeals explained, "[t]he data points which could suggest such disparate impact are isolated in the record and do not support the [petitioners'] allegations of systemic discrimination." *Ibid.* See *id.* at 44a-46a; see generally *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 875-876 (1984). Furthermore, when the government's expert reports are considered as a whole, they refute petitioners' unsupported factual allegations. See Pet. App. 44a-46a. Contrary to petitioners' assertions (Pet. 6), they do not support a reasonable inference of discrimination or create a genuine issue of material fact warranting a trial. See *Anderson*, 477 U.S. at 248. Moreover, like the ruling on petitioners' expert testimony, the ruling on the government's expert reports simply involves the application of settled law respecting summary judgment to the particular facts of this case. It does not warrant this Court's review.

3. Petitioners also rely on two affidavits that the district court properly refused to consider on the grounds that each was untimely. Pet. App. 15a; see *id.* at 47a. A district court has broad discretion to refuse to consider untimely submissions, and the court of appeals properly concluded that there was no reason to set aside the district court's decisions here. *Id.* at 16a. Cf. *Arizona* v. *California*, No. 8, Original (June 19, 2000), slip op. 11-17 (concluding that the state parties' failure to raise a preclusion argument in a timely manner foreclosed that argument in later proceedings). In any event, as the court of appeals explained, those non-expert affidavits, which purport to reach statistical conclusions, are unreliable. Pet. App. 16a-18a. They do not give rise to

a genuine issue of material fact warranting a trial. See *Anderson*, 477 U.S. at 248.

4. The court of appeals also properly rejected petitioners' challenge to the various discovery orders. Pet. App. 20a. Petitioners assert (Pet. 10) that the restrictions on discovery "violated *Hickman v. Taylor*," 329 U.S. 495 (1947). Petitioners provide no explanation, however, of why *Hickman* supports their argument beyond noting that *Hickman* endorses "liberal" discovery. See Pet. 19.

Petitioners primarily object to the district court's sealing of the PPRS algorithm after the court concluded, through in camera inspection, that the algorithm did not contain any evidence of discrimination. Pet. App. 20a-21a. As the court of appeals noted, petitioners failed to raise a timely objection to the district court's action, and the court's action is therefore reviewable only on the basis of plain error. *Id.* at 20a-21a. The court of appeals further concluded that "[i]t is unlikely that denial of access to the algorithm unduly prejudiced any of [petitioners'] claims." *Id.* at 21a. The court made a "thorough and careful review of the record" and found no reversible error in any of the other discovery orders. *Ibid.* Those fact-specific determinations, which are subject to the abuse-of-discretion standard, raise no issues warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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