No. 02-1384

In the Supreme Court of the United States

JOE'S STONE CRAB, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld a finding of intentional sex discrimination based upon evidence that petitioner maintained an implicit policy of hiring only male food servers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 296 F.3d 1265. The opinion of the district court (Pet. App. 19a-22a) is reported at 136 F. Supp. 2d 1311. The prior opinion of the court of appeals (Pet. App. 28a-96a) is reported at 220 F.3d 1263. The prior opinions of the district court (Pet. App. 102a-137a, 180a-209a) are reported at 15 F. Supp. 2d 1364 and 969 F. Supp. 727.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2002. The petitions for rehearing and rehearing en banc were denied on December 19, 2002 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on March 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns and operates Joe's Stone Crab Restaurant in Miami, Florida and employs roughly 80 individuals to work as food servers. From the time of the restaurant's founding in 1913 until 1991, virtually every person hired to be a member of its wait staff was male, except for a brief period during World War II. Pet. App. 183a. In the five-year period before 1991, for example, petitioner hired 108 male servers and no female servers. *Id.* at 187a. The applicants for server positions likewise were predominantly male. *Ibid.* By contrast, comparable Miami area restaurants were employing female servers in percentages ranging from 29.5% to 42.1%. *Id.* at 190a-191a.

On June 25, 1991, a Commissioner of the Equal Employment Opportunity Commission (EEOC) filed a discrimination charge alleging that petitioner violated Title VII by failing to recruit and hire women as servers.[1] Pet. App. 188a. Several months later, at the 1991 "roll call"—petitioner's annual hiring event—the number of women who applied to and were hired by petitioner jumped. Twenty-one applicants in 1991 were female; three of 15 servers hired were female. *Id.* at 190a. In the ensuing years, the percentage of women hired did not reach the 29.5% to 42.1% range, but women consistently began applying to petitioner and new hires were approximately 21.7% female. *Ibid.*

2. The EEOC brought suit against petitioner under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that petitioner engaged in sex

[1] The charge originally alleged a pattern or practice of discrimination. Although the EEOC did not pursue that liability theory at trial, the EEOC did allege and, as the district court found, prove that petitioner had a policy of excluding women.

discrimination in hiring and recruitment. The district court bifurcated the trial. At the liability stage, petitioner's managers testified that they viewed the restaurant as "traditionally a male place." Pet. App. 185a. For example, the dinner maitre d' and supervisor of petitioner's wait staff testified that very few women ever applied to the restaurant before 1991 because there was "always [a] tradition * * * that it was a male server type of job." *Ibid.* Witnesses from the Miami server community testified that petitioner had a reputation in the community for hiring only men to be members of its wait staff. *Id.* at 188a. As one witness put it, her understanding was that women "need not apply" to petitioner. *Ibid.* Female witnesses also testified that they would have applied for a server job with petitioner, which was generally acknowledged to be one of the most highly sought-after restaurant jobs in the Miami area, but did not because they believed "it would be a waste of time" for a woman to apply. R17-530; see R15-220, R16-327, R17- 584; see also Pet. App. 189a.

There was also testimony that the sudden increase in female applicants and hires in 1991 was directly related to the filing of the EEOC charge. Pet. App. 191a. Management officials at the restaurant testified that, beginning in 1991, petitioner "became more cognizant of having to hire more females." R21-1485. Female witnesses testified to hearing that petitioner "need[ed] to hire women" because "the EEOC or labor board * * * wants to see women servers." R15-222; see R17-531, R17-585, R18-876, R21-1376.

At the close of the bench trial on liability, the district court found that "Joe's uses employment practices that have an illegal disproportionate impact on women." Pet. App. 180a. The court also stated, without any explanation, that it found there was no intentional

discrimination. *Ibid.* Notwithstanding its summary conclusion on disparate treatment, the district court found that "Joe's management acquiesced in and gave silent approbation to the notion that male food servers were preferable to female food servers." *Id.* at 183a-184a. The court found that "[c]learly, what prevailed at Joe's, albeit not mandated by written policy or verbal direction, was the ethos that female food servers were not to be hired." *Id.* at 185a. The court observed that "Joe's sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu." *Id.* at 186a.

After a trial on remedies, the district court awarded monetary relief to four claimants who testified that they had planned on applying for a server job with petitioner, but decided there was no point in doing so after hearing that petitioner did not hire women. Pet. App. 102a-137a. The district court awarded relief to two claimants beginning with the 1989 roll call; relief to one claimant beginning with the 1990 roll call; and relief to the fourth claimant beginning in the Fall of 1991. *Id.* at 108a-118a.

3. Petitioner appealed. In a 2-1 decision, the Eleventh Circuit reversed and remanded for further findings by the district court. Pet. App. 28a-96a. The majority rejected the district court's finding of discrimination under the disparate impact theory, concluding that there was no specific facially-neutral employment practice of petitioner's that caused the disparity in its food server population. *Id.* at 62a-64a. However, the majority held that there was evidence in the record and findings by the district court that petitioner *intentionally* excluded women from food serving positions in order to provide its customers with an "'Old World,' fine-dining ambience." *Id.* at 60a. According to the

Eleventh Circuit, the district court's findings "suggest the conclusion that in fact Joe's had a desired preference for male servers and that this preference influenced the hiring decisions of Joe's decisionmakers, resulting in the deliberate and systematic exclusion of women as food servers." *Id.* at 61a. The majority remanded the case for the district court to determine whether petitioner engaged in intentional discrimination. *Id.* at 70a. The third judge would simply have affirmed the judgment based on her view that the district court's factual findings established intentional discrimination by petitioner. *Id.* at 88a-96a.

4. At the outset of its opinion on remand, the district court acknowledged that it may have been "labor[ing] under an erroneous view of Title VII case law," and the court emphasized the appellate court's instruction that "[t]o prove the discriminatory intent necessary for a disparate treatment . . . claim, a plaintiff need not prove that a defendant harbored some special 'animus' or 'malice' towards the protected group." Pet. App. 19a (citation omitted). The district court then held that the EEOC had "established by a preponderance of the evidence that defendant Joe's * * * engaged in intentional disparate treatment sex discrimination." *Id.* at 22a. The court reiterated its finding that "what prevailed at Joe's * * * was the ethos that female food servers were not to be hired. And, in fact, they were not." *Id.* at 20a (citations omitted). Before the EEOC's intervention, "female applicants for food server positions at Joe's had no reasonable likelihood of being hired." *Ibid.* (citations omitted). The court found that petitioner's hiring officials "deliberately and systematically excluded women from food server positions based on a sexual stereotype which simply associated 'fine-dining ambience' with all-male food service." *Id.* at 21a.

Thus the hiring officials sought to create "an ambience in which tuxedo-clad men served its distinctive menu." *Ibid.* (citation omitted). The court found that petitioner's owners, "through their silence, consented to the deliberate and systematic exclusion of women from the serving staff." *Ibid.* Finally, the court found that petitioner's "*implicit* policy of hiring only male food servers gave rise to a deserved, well-known reputation that Joe's discriminated against female food servers. This reputation, in turn, caused many qualified females not to apply at Joe's for food server positions." *Ibid.*

5. Petitioner again appealed, and a different panel of the court of appeals affirmed in part and reversed in part. Pet. App. 1a-18a. The court first considered the "appropriate temporal reach of the EEOC's disparate treatment claims" in light of *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002). Pet. App. 7a. The court read *Morgan* to require that the Commission show acts of intentional discrimination injuring each of the four claimants that occurred between August 29, 1990, and the filing of the charge on June 25, 1991. *Id.* at 7a-8a.

The court of appeals next considered whether the district court clearly erred in finding that petitioner discriminated against each of the four claimants. The court noted that although none of the four claimants actually applied to petitioner during the actionable time period, Eleventh Circuit precedent permits "a non-applicant [to] * * * establish a prima facie case by showing that she refrained from applying due to a justifiable belief that the employer's discriminatory practices made application a futile gesture." Pet. App. 12a (citations omitted). In particular, the court stated, the EEOC had to show, for each claimant: (1) that the claimant had a real and present interest in the job for

which the employer was seeking applications, and (2) that the claimant would have applied but was deterred by the employer's discriminatory practices. *Id.* at 12a-13a.

On the first prong, the court of appeals held that two of the four claimants did not possess "real and present interests in food server positions" with petitioner during the actionable period—namely, August 29, 1990, to June 25, 1991. Pet. App. 13a. As to the two remaining claimants, the court held that the EEOC satisfied its burden of showing that they had an interest in applying to petitioner during the applicable period. *Id.* at 14a.

On the second prong of the court of appeals' test, the court held that the evidence supported a finding that the two remaining claimants were deterred by petitioner's reputation for discriminating against women, and that petitioner caused its reputation for discrimination. Pet. App. 14a-17a. The court highlighted the finding that Joe's maintained an implicit policy of "exclud[ing] women from food server positions based on a sexual stereotype which simply associated 'fine-dining ambience' with all-male food service." *Id.* at 15a (citation omitted). This finding of discriminatory hiring practices by petitioner, the court of appeals concluded, is "supported adequately by the record." *Ibid.*

The court of appeals subsequently denied both parties' petitions for rehearing and rehearing en banc.

ARGUMENT

All of the questions presented in the petition for certiorari stem from the mistaken premise that the lower courts in this case applied the "pattern or practice" framework in holding petitioner liable for intentional sex discrimination. Petitioner contends (Pet. 12-

24) that applying the pattern or practice framework was incorrect in the context of this case. Petitioner's premise is incorrect, however, because neither the district court nor the court of appeals applied the "pattern or practice" method of proof. Indeed, both courts expressly acknowledged that the EEOC was not relying on the pattern or practice theory to prove discriminatory intent. Rather, both lower courts held that the EEOC proved that petitioner long maintained a policy—albeit an implicit one—of preferring to hire only men to work as food servers. That well-supported, fact-bound holding does not warrant this Court's review. Nor does it somehow convert the case into one relying on the pattern or practice standard of proof. Accordingly, *none* of the four questions raised in the petition for certiorari, each of which turns on petitioner's assumption that the lower courts relied on the pattern or practice standard, is properly presented in this case.

1. In a so-called "pattern or practice" case, a plaintiff seeks to prove unlawful disparate treatment using the method of proof set out by this Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).[2] As the *Teamsters* Court explained, a plaintiff seeking to prove a pattern or practice of dis-

[2] A "pattern or practice" case does not involve a qualitatively different cause of action than is present in any other intentional discrimination case, as petitioner asserts. Pet. 12-13. In both cases, the underlying theory of discrimination is disadvantageous treatment on the basis of a protected trait, in violation of Section 703 of Title VII, 42 U.S.C. 2000e-2. See *Teamsters*, 431 U.S. at 335 & nn.14, 15 (Government's theory in pattern or practice case was disparate treatment in violation of Section 703(a)). The difference between the two cases lies in the methods of proof, as discussed, *infra*.

parate treatment must show "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.* at 336. A plaintiff must make an enhanced showing that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Ibid.* If the plaintiff establishes a pattern of discrimination by a preponderance of the evidence, see *id.* at 336, 360, then at the remedy stage the burden shifts to the defendant to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 362 (citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 773 n.32 (1976)).

Here, the EEOC did not seek to establish a statutory violation using the pattern or practice method of proof, and it so indicated to the district court and to the court of appeals. Pet. App 3a n.1 ("the EEOC expressly stated before both the district court and [the court of appeals] that this was not a pattern and practice case"). The EEOC did demonstrate that petitioner maintained an implicit policy of regularly and consistently discriminating on the basis of sex in hiring food-servers—a showing that is consistent with traditional application of the disparate treatment standard. But the Commission did not seek to place on petitioner the burden of proving that each individual claimant was denied an employment opportunity for lawful reasons.

Nothing in the record indicates that the district court applied the enhanced burdens of proof described in *Teamsters* or otherwise ignored the EEOC's explicit statements that this was not a "pattern or practice" case. Petitioner asserts, incorrectly, that the district court required "[it] to prove that if the applicants had applied * * *, they still would have lost out to better-qualified applicants." Pet. 21. In fact, the district court

opinion on monetary damages indicates just the opposite. For example, in declining to award monetary relief to a fifth claimant, the court stated that she was not entitled to relief because "*she* failed to establish that she was fully qualified to perform the requirements of a food server at Joe's." Pet. App. 116a (emphasis added).[3]

Nor does the record support petitioner's assertion (Pet. 2) that the court of appeals' affirmance was based "solely on the EEOC's asserted demonstration that Joe's had engaged in a pattern or practice of intentional discrimination against women applicants for server positions." See Pet. 8 (court of appeals upheld judgment "on the ground that the EEOC had proved a pattern or practice of systemic discrimination"). The court of appeals expressly acknowledged that the Commission had not pursued this case under the "pattern or practice" method of proof. Pet. App. 3a n.1. Nothing in its opinion, or the opinion of the district court, suggests that either court below applied that method of proof. Petitioner's central premise that the court of appeals improperly treated this case as a pattern or practice case is therefore incorrect.[4]

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[3] Petitioner also argues that it always hired the best qualified applicants. Pet. 21 n.19. That argument, however, entirely ignores the EEOC's showing, credited by both courts below, that well-qualified, female servers were deterred from applying to petitioner, and therefore had no opportunity to have their qualifications considered, because of petitioner's well-known preference for male servers.

[4] Because the lower courts properly understood that the EEOC did not seek to prove its case under the *Teamsters* method of proof, petitioner's due process argument (Pet. 22-24) is also misplaced. In any event, petitioner's assertion that the court of appeals somehow decided a "claim" not pled by the EEOC is plainly

The district court found that petitioner's hiring officials "systematically excluded women from food server positions based on a sexual stereotype" and that it maintained an "*implicit* policy of hiring only male food servers." Pet. App. 21a. But that finding of systemic discrimination does not mean that the court treated the case as a pattern or practice case with its attendant burdens of proof. It is well-settled that evidence of pervasive, systemic discrimination is relevant to an individual intentional discrimination claim because a fact finder can infer from evidence of pervasive practices that a decision maker acted with unlawful intent. This Court so held in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973), observing that an employer's "general policy and practice with respect to minority employment" can be relevant to a showing that the employer was acting with discriminatory intent in an individual disparate treatment case. This principle is consistent with the more general principle that a fact finder can consider *any* evidence tending to show intentional discrimination. See, *e.g.*, *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 524 (1993) (courts should not "treat discrimination differently from other ultimate questions of fact") (quoting *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983)). "As in any lawsuit * * * [t]he trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." *Aikens*, 460 U.S. at 714 n.3.

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mistaken. The EEOC's complaint alleged, and the Commission proved, that petitioner discriminated in hiring against female food servers, in violation of Title VII; that is precisely what the court of appeals held.

The courts of appeals agree that "information concerning an employer's general employment practices is relevant even to a Title VII individual disparate treatment claim." *Scales* v. *J.C. Bradford & Co.*, 925 F.2d 901, 906 (6th Cir. 1991); see, *e.g.*, *Hollander* v. *American Cyanamid Co.*, 895 F.2d 80, 84 (2d Cir. 1990) ("well-settled" that an individual disparate treatment plaintiff may use evidence of company-wide practices to prove a statutory violation) (citing *McDonnell Douglas*, 411 U.S. at 804-805); *Burns* v. *Thiokol Chem. Corp.*, 483 F.2d 300, 306 (5th Cir. 1973) ("Even though a suit seeks only individual relief for an individual instance of discrimination, and is not a 'pattern or practice' suit," the past experiences of black employees "is surely relevant information."); *Bell* v. *EPA*, 232 F.3d 546, 553 (7th Cir. 2000) ("evidence of systemic disparate treatment is relevant to and probative of the issue of [individual disparate treatment] even when it is insufficient to support a pattern and practice disparate treatment case"); *Gomez* v. *Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995) ("It is well settled that in a Title VII suit, an employer's general practices are relevant even when a plaintiff is asserting an individual claim for disparate treatment."); *Harris* v. *Birmingham Bd. of Educ.*, 712 F.2d 1377, 1383 (11th Cir. 1983) (evidence of history of racial discrimination and supporting statistics are relevant in individual intentional discrimination case).

Each of the questions presented in the petition for certiorari rests on the unfounded premise that the lower courts improperly applied the "pattern or practice" method of proof. Because that premise is mistaken, and because the decisions below in fact rest on the well-supported and fact-bound conclusion that the evidence in this case established that petitioner main-

tained an implicit policy of discriminating against female food servers, this Court's review is unwarranted.

2. Petitioner also assumes that an individual deterred from applying to an employer by knowledge of the employer's discriminatory policies cannot establish a violation of Title VII outside the parameters of a "pattern or practice" case. Pet. 17-18. Relying on this Court's statement in *McDonnell Douglas* that generally a "claimant must prove that she applied for the job in question," 411 U.S. at 802, petitioner contends that the claimants' failure to apply to Joe's in the Fall of 1990 (300 days before the charge was filed) should have precluded a judgment on the EEOC's behalf. Pet. 16-18.

Petitioner's rigid reading of *McDonnell Douglas* is at odds with this Court's decision in that case and in subsequent decisions. *McDonnell Douglas* does not require that, in every case, a claimant must prove he or she applied for a job. See *McDonnell Douglas*, 411 U.S. at 802 (explaining one way prima facie case "may" be shown). To the contrary, the "*McDonnell Douglas* methodology was never intended to be rigid, mechanized, or ritualistic." *Hicks*, 509 U.S. at 519 (citations and internal quotation marks omitted); *Aikens*, 460 U.S. at 715 (same). Applying the flexible, prima facie standard first set out in *McDonnell Douglas*, the Court in *Teamsters* rejected the notion that *McDonnell Douglas* requires a showing of an application in every failure-to-hire case. 431 U.S. at 358. Instead, the Court held that "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." *Id.* at 365-366.

The fact that the Court's explanation of the "futile gesture" doctrine arose in the context of a pattern or practice case does not mean that it must be confined only to such cases. Nothing in the language or logic of this Court's *Teamsters* decision suggests such a narrow application of the principle, nor has petitioner explained why it should be so confined. Rather, the Court's reasoning in *Teamsters* would apply wherever an employer's policy of discrimination is sufficiently well known that it deters qualified applicants from applying, regardless of the method of proving discriminatory intent. As the Court explained:

> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques * * * , and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

Teamsters, 431 U.S. at 365.[5]

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[5] Conversely, in a pattern or practice case that does not present the "futile gesture" scenario, only individuals that applied for the job should be allowed to recover. Accordingly, whether a plaintiff must have "applied" in order to challenge a discriminatory failure to hire depends not on any particular theory of liability but instead on whether the employer's practices are such a deterrent as to make formal application futile.

The courts of appeals have been uniform in applying this principle in individual disparate treatment cases and have held that an individual need not go through the futile gesture of applying in order to state a claim under Title VII. See *Hailes* v. *United Air Lines*, 464 F.2d 1006, 1008-1009 (5th Cir. 1972) (individual plaintiff who did not formally apply for job must show real interest in job and that he was effectively deterred from seeking it by discriminatory conduct); *Babrocky* v. *Jewel Food Co. & Retail Meatcutters Union, Local 320*, 773 F.2d 857, 867 & n.7 (7th Cir. 1985) (holding, in case where plaintiffs brought individual, failure-to-hire claims, that district court applied prima facie requirement "too literally when it rejected * * * plaintiffs' claims because they had never formally applied" for the meat packer positions); *Banks* v. *Heun-Norwood*, 566 F.2d 1073, 1076 (8th Cir. 1977) (concluding, in individual case, that "[s]ound authority dictates that where a person seeking employment is effectively deterred by the discriminatory policy or conduct of the employer, the complaining party is not required to formally apply for the position in order to seek and obtain relief because of the discrimination"); *Easley* v. *Empire Inc.*, 757 F.2d 923, 930 n.7 (8th Cir. 1985) (individual plaintiff could establish a prima facie case without showing she made a "formal application"); *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1558-1560 (11th Cir.) (holding, in case in which 21 individual claims were tried in a series of mini-trials after class decertification, that plaintiffs did not have to show "they had in fact applied for the jobs or promotions in question," because a non-applicant, in an individual case, may recover under Title VII "where the employer's clear policy of exclusion would make an application a useless exercise"), cert. denied, 479 U.S. 883 (1986); *Garrett* v.

Okaloosa County, 734 F.2d 621, 625 (11th Cir. 1984) (individual who showed she was interested in position but reasonably believed applying for it would be futile was entitled to relief under Title VII); cf. *Newark Branch, NAACP* v. *Town of Harrison*, 907 F.2d 1408, 1414 (3d Cir. 1990) (futile gesture principle relied on in *Teamsters* "much broader" than specific facts of case); *Pinchback* v. *Armistead Homes Corp.*, 689 F. Supp. 541, 552-553 (D. Md. 1988) ("The 'futile gesture' theory enunciated in *Teamsters* has been * * * applied in individual as opposed to class actions, and it has been applied with regard to liability, rather than in the remedial context.") (citing cases).

Accordingly, the court of appeals' application of the "futile gesture" principle to the facts of this case does not show that the court was applying the pattern or practice theory. Nor does that fact-specific holding independently warrant this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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