Nos. 22-16507, 22-16712

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS LIU,
Plaintiff-Appellant,

v.

UBER TECHNOLOGIES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF REHEARING EN BANC

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

GEORGINA C. YEOMANS
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
202-921-2748
georgina.yeomans@eeoc.gov

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RULE 35(b) STATEMENT

This case meets the requirements of Federal Rule of Appellate Procedure 35 because the panel's decision undermines the uniformity of the Court's decisions and because the case involves a question of exceptional importance.

1. The panel decision undermines uniformity of this Court's decisions because it conflicts with Title VII's text, 42 U.S.C. § 2000e-2(k)(1)(A)(i), and Supreme Court precedent, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), in requiring a disparate-impact plaintiff to plead a "significant" disparate impact. It also conflicts with this Court's precedent in *Bolden-Hardge v. Office of California State Controller*, 63 F.4th 1215 (9th Cir. 2023), and *Hung Ping Wang v. Hoffman*, 694 F.2d 1146 (9th Cir. 1982), in that it requires a disparate-impact plaintiff to plead "data" concerning "actual conditions" to plausibly allege a disparate-impact claim.

2. The panel decision involves a question of exceptional importance regarding how a plaintiff may successfully plead a disparate-impact claim: Does a disparate-impact plaintiff, pre-discovery, have to provide evidence, by way of "data concerning relevant actual conditions" in the employer's

workforce, to plausibly allege a disparate impact claim, or can the plaintiff rely on inferences reasonably drawn from his well-pled factual allegations to plausibly plead that the employer's challenged practice causes a disparate impact? The panel's opinion demands evidence, answering the question in a manner that conflicts with this Court's precedent, *Bolden-Hardge v. Office of Cal. State Controller*, 63 F.4th 1215 (9th Cir. 2023); *Hung Ping Wang v. Hoffman*, 694 F.2d 1146 (9th Cir. 1982), and with published Fourth Circuit precedent and unpublished decisions from the Second, Eighth, and D.C. Circuits. *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415 (4th Cir. 2018); *Meyer v. Bear Rd. Assocs.*, 124 F. App'x 686 (2d Cir. 2005); *Carson v. Lacy*, 856 F. App'x 53 (8th Cir. 2021); *Boykin v. Fenty*, 650 F. App'x 42 (D.C. Cir. 2016).

STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* As such, the EEOC has a substantial interest in the proper interpretation of Title VII, including what suffices to plead a plausible violation of the statute. In the EEOC's view, the district court and a panel of this Court applied an unnecessarily and erroneously

high pleading standard to Plaintiff Thomas Liu's complaints. Accordingly, the EEOC files this amicus brief pursuant to Federal Rule of Appellate Procedure 29(b)(2) and Circuit Rule 29-2(a).

INTRODUCTION

The panel decision correctly recited the disparate-impact pleading standard and acknowledged the uncontroversial premise that a plaintiff need only allege facts from which the court can reasonably infer the defendant's liability to survive a motion to dismiss. The panel then sharply departed from that standard in its analysis of Liu's allegations. The court required that Liu plead a "significant racial disparity" by way of "data" regarding "actual conditions" to plausibly allege that Uber's use of passenger star-ratings to terminate drivers disparately impacts non-white drivers. Ex. A to Petition for Rehearing En Banc, Panel Op. at 4-5. But as this Court and other courts of appeals have recognized, disparate-impact plaintiffs are not required to plead evidence of a significant disparate impact. That is a requirement suited to summary judgment, after the plaintiff has had the benefit of discovery. All Federal Rule of Civil Procedure 8 asks of a disparate-impact plaintiff is that he allege facts supporting a reasonable inference that the practice he challenges caused a

disparate impact. He can do so by pleading impact evidence if it is available, but he can also do so by pleading real-world facts from which the court can reasonably infer a disparate impact. Because the panel's opinion conflicts with the language of Title VII, Supreme Court precedent, precedent of this Court, and precedent of other courts of appeals, and because it risks undermining Title VII's antidiscrimination mandate, we urge the Court to rehear the case.

BACKGROUND

Liu's lawsuit challenges Uber's practice of terminating its drivers when their aggregate passenger rating falls below a certain threshold. ER-40-41 ¶¶ 11-14. In addition to alleging that his termination was disparate treatment based on race, Liu alleged that Uber's practice has a disparate impact on non-white drivers. ER-41 ¶ 17. In support of this claim, Liu cited social-science research that specifically used Uber as a "case study to explore how bias may creep into evaluations of drivers through consumer-sourced rating systems." ER-42 ¶ 21.[1] According to that research, such

[1] As the panel recognized, Liu included other allegations in support of his disparate-impact claim. Because the EEOC views the allegations discussed in this paragraph as sufficient to state a disparate-impact claim on their own, we do not address Liu's other allegations.

systems are "highly likely to be influenced by bias on the basis of factors like race or ethnicity." ER-43 ¶ 21. Liu also cited an article discussing driver concerns about bias in the rating system. ER-42 ¶ 19. And Liu alleged that Uber itself relied on social-science research documenting customer bias to decline to adopt app-based tipping. ER-41 ¶ 18, ER-44 ¶ 23.

The district court dismissed Liu's complaint four times, ultimately holding that Liu had "plausibly alleged that racial discrimination could affect customer ratings, including in the rideshare industry," but that he failed to "adequately allege that this legitimate concern about racial discrimination actually manifested itself in driver terminations at Uber." ER-3. The court went on, "it is hardly fanciful to suspect that Uber's practice of terminating drivers based on customer ratings negatively affects minority drivers," but "Liu must include non-conclusory allegations about the impact of the challenged practice at the actual company he is suing." ER-5.

Liu argued before a panel of this Court that the district court imposed a heightened pleading standard on his complaints. The EEOC concurred in an amicus brief. R.14. In our brief, we explained that the district court's insistence that Liu plead the actual impact of Uber's policy on non-white

drivers improperly imported summary judgment standards into the pleading stage. We began with the Supreme Court's premise that a discrimination complaint need not plead a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because *McDonnell Douglas* is an evidentiary standard, not a pleading standard. EEOC Br. at 9-10 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002); *Austin v. Univ. of Or.*, 925 F.3d 1133, 1136-37 (9th Cir. 2019)). A disparate-impact plaintiff therefore need only allege facts supporting a reasonable inference that the practice he challenges caused a disparate impact. EEOC Br. at 11-12 (citing *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1054 (10th Cir. 2020); *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 208-09 (2d Cir. 2020); *Wu v. Special Couns.*, No. 14-7159, 2015 WL 10761295, at *1 (D.C. Cir. Dec. 22, 2015)).

We then explained that faithful application of the pleading standard to a disparate-impact complaint means the plaintiff does not have to plead the actual impact of the employment policy he challenges. Instead, a plaintiff who lacks pre-discovery access to evidence of the impact could identify the challenged practice and point to real-world conditions making it likely the practice would result in a disparity. We discussed cases from

the Second, Fourth, Eighth, and D.C. Circuits applying that principle. EEOC Br. at 13-20.

We later filed a Federal Rule of Appellate Procedure 28(j) letter in which we cited *Bolden-Hardge v. Office of California State Controller*, 63 F.4th 1215 (9th Cir. 2023), published the day we filed our amicus brief, which held that "statistics are not strictly necessary" to successfully plead a Title VII disparate-impact claim. *Id*. at 1227. In that case, this Court explained, allegations about real-world conditions made the disparate impact not only reasonably inferable, but "obvious." *Id*.

ARGUMENT

The panel opinion acknowledged the correct pleading standard applicable to disparate-impact claims, but did not apply that standard to Liu's allegations, thereby departing from Title VII's text, Supreme Court precedent, this Court's precedent, and other circuits' case law.

The panel opinion began by correctly recognizing that no particular framework, including *McDonnell Douglas*, "is mandatory at the pleading stage" of a discrimination lawsuit. Panel Op. at 3 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002)). The court also correctly recognized that at the complaint stage the plaintiff is entitled to the benefit of a

presumption that his allegations are true, and to the benefit of reasonable, favorable inferences drawn from those allegations. *Id*. at 2-3 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

But after correctly articulating the analytical lens through which to assess a discrimination complaint, the panel applied a notably higher standard to Liu's allegations. The heightened standard is evident in two aspects of the panel opinion: (1) in the court's insistence that Liu plead a "significant" disparate impact; and (2) in the court's requirement that Liu recite "data concerning relevant actual conditions." *Id*. at 4-5. The court's reasoning leaves scant room for a disparate-impact plaintiff to survive a motion to dismiss without pleading evidence of the challenged policy's actual impact—a hurdle that few disparate-impact plaintiffs will be able to clear.

1. The panel conflated the pleading standard with an evidentiary standard when it insisted that Liu plausibly allege a "*significant* disparate impact on a protected class or group." *Id*. at 4 (emphasis added) (quoting *Bolden-Hardge v. Office of Cal. State Controller*, 63 F.4th 1215, 1227 (9th Cir. 2023)).

Title VII forbids employment practices that cause "a disparate impact on the basis of" a protected category. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Nowhere does the statute include the panel's "significant" modifier. As the Supreme Court explained in *Lewis v. City of Chicago*, 560 U.S. 205 (2010), "the essential ingredients of a disparate-impact claim [are that] a claim 'is established' if an employer 'uses' an 'employment practice' that 'causes a disparate impact' on one of the enumerated bases." *Id*. at 213.

"Significance" arises as part of the plaintiff's prima facie case; it is an evidentiary, not pleading, standard. *See Ricci v. DeStefano*, 557 U.S. 557, 587 (2009) (describing the "prima facie case of disparate-impact liability" as "essentially, a threshold showing of a significant statistical disparity"); *see also Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (as part of prima facie case, plaintiff "must show that the facially neutral employment practice had a significantly discriminatory impact").

During the evidentiary phase of a disparate-impact case, courts require evidence of a "significant" impact as part of the plaintiff's proof to ensure that the impact the plaintiff complains of is probative of discrimination. As a plurality of the Supreme Court explained in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), to make out a prima facie case

using statistics, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id*. at 994. Courts often use "significant" as a shorthand for that standard. *See id*. at 995 (listing cases that use "significant" or "substantial" to describe the "discriminatory pattern" plaintiffs are required to prove); *see also id*. at 995 n.3 (courts use this somewhat malleable shorthand in place of a particular mathematical threshold); 29 C.F.R. § 1607.4(D) (EEOC Guidelines on assessing whether certain selection rates constitute evidence of adverse impact).

The panel's insistence that Liu plead a "significant" disparate impact demonstrates the panel's failure to disentangle the complaint's sufficiency from questions of proof. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely."(quotation marks omitted)).

To be sure, the panel quoted *Bolden-Hardge*, a pleading case. But *Bolden-Hardge* was itself quoting a case assessing the sufficiency of the plaintiff's evidence *after trial* for the claim that a plaintiff must "show a

significant disparate impact" to prevail. 63 F.4th at 1227 (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1190 (9th Cir. 2002)). *Bolden-Hardge* presumably assessed the plaintiff's complaint under a prima-facie-case analysis and invoked *Hemmings* because the plaintiff relied on that standard and case in her briefing. *See id*. 1227; *see also* Appellant Br. at *45, No. 21-15660 (9th Cir. Nov. 15, 2201), 2021 WL 5513551 (also citing *Hemmings*, 285 F.3d at 1190, and reciting its "significant discriminatory impact" standard). But in a case like this one, in which Liu has not invited the court to measure his complaint against the summary judgment standard, requiring "significance" is inappropriate and conflicts with Title VII's text and Supreme Court precedent.

2. The panel's treatment of Liu's social-science research allegations also lays bare its failure to separate questions of proof from allegations. Its analysis conflicts with Circuit precedent and cases from other circuits, and threatens to undermine Title VII's antidiscrimination mandate.

The panel "assum[ed] that, in an appropriate case, reliance on publicly available reports and studies providing relevant evidence of real-world conditions may provide a basis for plausibly inferring a statistical disparity with respect to a particular defendant." Panel Op. at 5. But it

quickly abandoned that assumption when it faulted Liu's complaint for "lack[ing] sufficient data concerning relevant actual conditions." *Id*. The panel opinion does not explain what that "data" could be short of statistical evidence regarding driver terminations known only to Uber.

a. The panel's reasoning conflicts with this Court's precedent in *Bolden-Hardge*, 63 F.4th 1215, and *Hung Ping Wang v. Hoffman*, 694 F.2d 1146 (9th Cir. 1982), both of which inferred from real-world conditions that the employer's challenged practice would have a disparate impact, without requiring that the plaintiff plead the impact itself.

In *Bolden-Hardge*, this Court inferred from the allegation that Jehovah's Witnesses are forbidden from swearing allegiance to government over God that a government-employment oath requirement would "impact 'all or substantially all' Jehovah's Witnesses." 63 F.4th at 1228. This Court unequivocally rejected the argument that a disparate-impact complaint must include evidence, including statistical evidence, of impact. *Id*. at 1227-28.

In *Hoffman*, 694 F.2d 1146, on which *Bolden-Hardge* relied, this Court held a plaintiff successfully pled that his employer's language-skills requirement caused a disparate impact without pleading any facts

regarding data or the impact itself. The court held that "a language skills requirement seems on its face to have a disparate impact on minority applicants." *Id*. at 1149.

In each opinion, this Court relied on real-world facts to create a plausible inference that a disparate impact would arise from the employer's challenged practice. The panel's disregard of Liu's real-world facts, by way of social-science research allegations, and its insistence that Liu plead "data," cannot be reconciled with this precedent.

b. The panel opinion also conflicts with decisions of other circuits that have held that a plaintiff who lacks pre-discovery access to information about the actual impact of the challenged policy may nonetheless plead a plausible disparate-impact claim by identifying the challenged practice and pointing to real-world conditions from which the court can reasonably infer that the practice will result in a disparity.

Most notably, in *Reyes v. Waples Mobile Home Park Ltd. Partnership*, 903 F.3d 415 (4th Cir. 2018), the Fourth Circuit held the plaintiffs plausibly alleged a disparate impact on Latino families arising from the defendant mobile-home park's insistence on documentation of legal status. *Id*. at 428. It reached that conclusion based on allegations that Latinos are

disproportionately likely to be undocumented. *Id*. Notably, the *Reyes* court did not require the plaintiffs to plead any information about the number of Latino families who were actually affected by the policy's implementation, even though the suit was filed approximately one year after the policy was implemented. *Id*.

Other courts have similarly relied on real-world conditions, which, taken as true for pleading purposes, reasonably lead to the inference that the challenged policy would cause a disparate impact. *See Carson v. Lacy*, 856 F. App'x 53, 54 (8th Cir. 2021) (district court should not have required disparate-impact plaintiff to "allege [the defendant employer] had disproportionately fewer black custodians as a result of using felony background checks"); *Boykin v. Fenty*, 650 F. App'x 42, 44 (D.C. Cir. 2016) (faulting disparate-impact complaint for failing to "*suggest*[] that the closure affected a greater proportion of disabled individuals . . . as it did not, for instance, include an allegation that disabled homeless individuals are more likely to rely on low-barrier shelters than non-disabled homeless individuals" (emphasis added)); *Meyer v. Bear Rd. Assocs.*, 124 F. App'x 686, 688 (2d Cir. 2005) (holding plaintiffs plausibly alleged that challenged policy "actually or predictably leads to" disparate impact).

The panel here claimed to assume that "reliance on publicly available reports and studies providing relevant evidence of real-world conditions may provide a basis for plausibly inferring" a disparate impact. Panel Op. at 5. But had it done so, it would have accepted as true the social-science research that analyzed Uber's consumer-sourced rating system—the very system Liu challenges—and concluded that "[c]onsumer-sourced ratings like those used by Uber are highly likely to be influenced by bias on the basis of factors like race or ethnicity." ER-42-44 ¶ 21. It would have credited Uber's own judgment that "passengers discriminate against racial minorities" and that "allowing [app-based] tipping would therefore discriminate against minority drivers in the wages they would receive." ER-41 ¶ 18. And from these real-world conditions, it would have reasonably inferred that Uber's challenged practice causes a disparate impact.

c. The panel's decision also involves a question of exceptional importance in that it risks closing the door to a wide array of disparate-impact challenges to discriminatory employment practices. Without discovery, a private plaintiff will seldom, if ever, have access to "data" concerning "actual conditions" at the place of employment. *See Schmitt v.*

Kaiser Found. Health Plan of Wash., 965 F.3d 945, 959 n.8 (9th Cir. 2020) (recognizing, in Affordable Care Act case, that plaintiffs may be unable to plead numeric impact of policy pre-discovery and could rely instead on showing that policy is "likely to predominately affect disabled persons"); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 250 (9th Cir. 1997) (rejecting requirement that plaintiff plead a prima facie case in FHA context because it "would require plaintiffs to plead facts they may have no way of knowing"); *Mandala*, 975 F.3d at 210 (acknowledging that racial composition of workforce in certain jobs is "not always available, particularly before discovery"); *Id*. at 217 (Chin, J., dissenting) (same); *cf*. *Chaidez v. Ford Motor Co.*, 937 F.3d 998, 1007 (7th Cir. 2019) (plaintiffs will "need to utilize the discovery process to support their allegations with statistical and comparative evidence" and defendant can "present contrary evidence at the summary judgment stage or at trial").

Requiring a plaintiff to plead information he cannot obtain will thwart Title VII's enforcement and directly undermine the disparate-impact theory of liability that Congress expressly embraced in the 1991 Act. *See* Civil Rights Act of 1991, Pub L. No. 102–166, § 3, 105 Stat. 1071. As we explained in our brief before the panel, Title VII was enacted to "achieve

equality of employment opportunities." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971). Title VII's mandate cannot be fulfilled by focusing solely on intentional discrimination. *See, e.g.*, *id*. at 432 ("[A]bsence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for" protected groups.). The law's prohibition of employment practices that cause an unjustified disparate impact is an essential component of eradicating discrimination in employment.

CONCLUSION

For the foregoing reasons, we urge the Court to rehear this case en banc.

Respectfully submitted,

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

s/*Georgina C. Yeomans*
GEORGINA C. YEOMANS
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
202-921-2748
georgina.yeomans@eeoc.gov

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s/*Georgina C. Yeomans*
GEORGINA C. YEOMANS
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
202-921-2748
georgina.yeomans@eeoc.gov