No. 15-1489

In the Supreme Court of the United States

JAY J. BAUER, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Individuals enrolled in the Federal Bureau of Investigation's training program for new Special Agents are required to pass a physical-fitness test. The test uses "gender-normed" standards that have been calibrated and validated to ensure that it requires equal levels of physical fitness in male and female trainees. The questions presented are as follows:

1. Whether the use of gender-normed standards that measure equal levels of physical fitness in men and women violates the prohibition against discrimination on the basis of sex by federal employers in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(a).

2. Whether the use of gender-normed standards that measure equal levels of physical fitness in men and women violates a separate provision of Title VII prohibiting the use of "different cutoff scores for * * * employment related tests on the basis of * * * sex," 42 U.S.C. 2000e–2(*l*).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 812 F.3d 340. The opinion of the district court (Pet. App. 28-72) is reported at 25 F. Supp. 3d 842.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27) was entered on January 11, 2016. A petition for rehearing was denied on March 8, 2016 (Pet. App. 75). The petition for a writ of certiorari was filed on June 6, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, the Federal Bureau of Investigation (FBI) has administered a comprehensive, multi-week training program—the New Agent Training Program (NATP)—at the FBI Academy to ensure that

individuals seeking to become Special Agents obtain the knowledge, skills, and abilities required to perform the rigorous and unpredictable duties of that position and that they are sufficiently fit to participate in training. Pet. App. 3. In 2009, the NATP was a 22-week program in which trainees had to satisfy specific requirements in four basic areas: academics; firearms training; practical applications and skills; and defensive tactics and physical fitness. *Ibid.* Physical fitness is essential because (1) "a basic level of physical fitness and conditioning leads to strong and injury-free performance at the Academy," and (2) "physical fitness supports effective training and application of the elements taught within the defensive tactics program, which include self-defense, combat, and restraining techniques." *Ibid.* As a result, the FBI has developed a Physical Fitness Test (PFT) "to ensure that those aims would be satisfied and to identify the [t]rainees who possess the initiative and perseverance required of a Special Agent." *Id.* at 3-4.

The PFT differs from other physical tests because its purpose is "to determine an overall level of fitness," not to measure trainees' performance on discrete, job-related tasks. C.A. App. 498 (¶ 117); see Pet. App. 4-5. In developing the test, the FBI considered more than 200 "essential tasks" for the Special Agent position, recommendations made by Supervisory Special Agents in its Training Division about which events would best measure the components of overall fitness needed to safely train for and perform those tasks, and standards in the exercise-physiology industry. Pet. App. 4-5. "Those deliberations led to the selection of four events, to be completed in a single test in the following sequence: one minute of sit-ups; a 300-meter

sprint; push-ups to exhaustion; and a 1.5 mile run." *Id.* at 5. "The events required [t]rainees to demonstrate baseline levels of fitness in core muscle strength and endurance, short-term physical power and speed, upper body strength and endurance, and aerobic capacity and endurance, respectively." *Ibid.*

The FBI went to considerable lengths to ensure that the minimum pass points for the PFT require equal levels of fitness for men and women in light of their innate physiological differences. Pet. App. 5. In 2003, the FBI conducted a pilot study with 322 subjects (258 men and 64 women) from seven NATP classes. *Ibid.*; see C.A. App. 196-220 (2003 Report by Amy Grubb, Ph.D.). The results of that study were "subjected to thorough statistical analyses and standardized so that the FBI could compare [t]rainees both within and across the four events." Pet. App. 5. Recognizing that "*equally fit* men and women would perform differently in the same events," the FBI adopted a "gender-normed" framework with different minimum pass points for men and women. *Id.* at 5-6 (emphasis added).

Based upon the results of the pilot study, the FBI developed a point system to score the PFT. Pet. App. 6. To give trainees the benefit of the doubt while still providing a useful measure of fitness, the FBI set the minimum pass point for each event at one standard deviation below the mean performance for each gender, which was at about the 15th percentile of the trainees in the pilot study (*i.e.*, the level at which 85% would have passed). *Id.* at 7. That yielded the following minimum pass points:

Event	Men	Women
Sit-ups	38	35
300-meter sprint	52.4″	64.9″
Push-ups	30	14
1.5-mile run	12′ 42″	13′ 59″

Ibid.

In early 2005, the FBI conducted a follow-up study of 282 subjects (224 male and 58 female) from six NATP classes, which "showed that male and female [t]rainees continued to pass the PFT at equivalent rates," although the passing rates had risen to approximately 90%. Pet. App. 7-8; see C.A. App. 221-257 (2005 Report by Amy Grubb, Ph.D.).

2. In 2008, petitioner applied to become an FBI Special Agent. Pet. App. 8. He satisfied most of the initial screening requirements in the application process, but he had difficulty with the push-up component of the PFT. *Id.* at 8-9. In October 2008, he took a screening PFT in the FBI's Milwaukee Field Office and failed after completing only 25 push-ups. *Id.* at 9. In January 2009, the FBI allowed petitioner to take the PFT again, and he passed after completing 32 push-ups. *Ibid.* With his initial fitness screening completed, petitioner enrolled in the NATP and reported to the FBI Academy in Quantico, Virginia, on March 1, 2009. *Ibid.* Like all new trainees, petitioner signed a document acknowledging that he had to pass the PFT again in order to graduate from the NATP. C.A. App. 258-285.

Petitioner was given five opportunities to pass the PFT—during the first, seventh, fourteenth, eighteenth, and twenty-second weeks of his training—but he failed to do 30 push-ups on every occasion. Pet.

App. 9-10 (listing totals ranging from 25 and 29). After his final failure to pass, petitioner was given three options: (1) resign with the possibility of future employment with the FBI; (2) resign permanently; or (3) be fired. *Id.* at 11. Petitioner chose the first option and resigned. *Ibid.* Two weeks later, the FBI offered him a position as an Intelligence Analyst in its Chicago Field Office, which he accepted. *Ibid.*

3. In 2012, petitioner filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that the FBI had discriminated against him on the basis of his sex by using gender-normed fitness standards in the PFT. Pet. App. 11. Petitioner alleged that the use of such standards violated Title VII's general prohibition against discrimination on the basis of sex and another provision prohibiting the use of "different cutoff scores" in employment tests "on the basis of race, color, religion, sex, or national origin," 42 U.S.C. 2000e–2(*l*). See Pet. App. 11 & n.3. Petitioner sought "reinstatement" as a Special Agent, even though he had never actually held that position. *Id.* at 38.

The parties filed cross-motions for summary judgment. Pet. App. 12. Petitioner contended that the FBI's use of gender-normed fitness standards was facially discriminatory and could not be justified under Title VII. *Id.* at 13. The government contended that the gender-normed standards in the PFT do not discriminate or use different cutoff scores within the meaning of Title VII because they are designed to, and do in fact, require equal levels of fitness between male and female trainees, and they thus "impose equal burdens of compliance on both sexes." *Ibid.*

The district court granted petitioner's motion for summary judgment. Pet. App. 28-73. The court first held that the PFT's gender-normed standards are prohibited by the "plain language" of 42 U.S.C. 2000e–2(a)(1) making it unlawful to "discriminate" on the basis of sex. Pet. App. 49.[1] While conceding that the government's argument that the PFT treats men and women equally has "a measure of intuitive appeal and common sense," *id.* at 48, the court held that *any* differential treatment of men and women is "discrimination" under dictionary definitions of that term, *id.* at 49 & n.20. The court emphasized that Congress was aware of "innate physiological differences between the sexes," but made no express reference to, or accommodation for, such differences in Title VII. *Id.* at 49. The court concluded that Title VII's general prohibition against sex discrimination "reaches and captures the PFT's differential treatment based on sex regardless of the average physiological differences between men and women and regardless of whether the burden placed on the sexes is equal." *Id.* at 50. For the same reason, the court held that the PFT also violated 42 U.S.C. 2000e–2(*l*), which prohibits the use of "different cutoff scores" in employment tests. Pet. App. 58-62.

Having found that the PFT was facially discriminatory, the district court *sua sponte* considered, and rejected, two defenses to liability that the government had never raised. Pet. App. 61-71. First, despite ac-

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[1] As the court of appeals explained, although the district court analyzed petitioner's claim under the provision of Title VII prohibiting discrimination against private-sector and non-federal public employees, 42 U.S.C. 2000e–2(a)(1), the provision applicable to federal employers, 42 U.S.C. 2000e–16(a), imposes similar requirements. Pet. App. 11 & n.5.

knowledging that "physical fitness tests holding males and females to a singular standard could well have a disparate impact on females," the court held that the government had not attempted to establish—and could not establish under *Ricci* v. *DeStefano*, 557 U.S. 557 (2009)—that gender-normed standards were necessary to avoid an unlawful disparate impact on women. Pet. App. 61. Second, the court held that the FBI's use of gender-normed fitness standards was not justified under Title VII's bona-fide-occupational-qualification (BFOQ) defense, 42 U.S.C. 2000e–2(e). Pet. App. 62-71. The court concluded that the PFT satisfies the first prong of the BFOQ defense, because there is "sufficient evidence * * * to demonstrate that [the PFT] provides an objective, verifiable measure of physical fitness," *id.* at 65, but the court found that the test is not adequately linked to "job-related" functions to satisfy the defense's second prong, *id.* at 67.

4. The court of appeals vacated and remanded for further proceedings. Pet. App. 1-26.

Describing the legality of gender-normed physical-fitness standards as "a relatively novel issue," the court of appeals surveyed the "pertinent legal authorities." Pet. App. 16. The court acknowledged that the district court and petitioner relied on a "simple test" for sex-discrimination articulated in *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), under which they concluded that the FBI's test is discriminatory because petitioner "would have been held to a lower minimum number of push-ups had he been a woman." Pet. App. 17. The court of appeals recognized, however, that the government contends that the PFT does not "treat the sexes differently," because it "assesses an overall level of phys-

ical fitness" and its "gender-normed standards actually require the same level of fitness for all [t]rainees." *Ibid.*

The court of appeals observed that none of the prior decisions involving Title VII challenges to gender-normed physical-fitness standards "has deemed such standards to be unlawful." Pet. App. 17-18. In particular, it took note of a district court decision and an administrative decision that had "specifically addressed and approved of the FBI's use of gender-normed standards at the Academy." *Id.* at 18 (discussing *Powell* v. *Reno*, No. 96-2743, 1997 U.S. Dist. LEXIS 24169 (D.D.C. July 24, 1997), and *Hale* v. *Holder*, EEOC Decision No. 570-2007-00423X (Sept. 20, 2010)[2]). Those decisions, in turn, relied on the proposition, from Ninth Circuit cases, that an employer does not violate Title VII by adopting "physiologically based policies" with different limits for men than women as long as they do not impose a "significantly greater burden of compliance * * * on either sex." *Id.* at 19 (quoting *Gerdom* v. *Continental Airlines, Inc.*, 692 F.2d 602, 606 (9th Cir. 1982) (en banc), cert. denied, 460 U.S. 1074 (1983)); see also *Jespersen* v. *Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1109-1110 (9th Cir. 2006) (en banc) (also applying the no-greater-burden framework).

The court of appeals described other cases that the government had cited to show that there are circumstances "when an employer can consider the physiological differences between the sexes." Pet. App. 20. In *United States* v. *Virginia*, 518 U.S. 515 (1996), this Court recognized that the admission of women to a

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[2] A copy of the EEOC decision in *Hale* appears in the district court record in this case as Doc. 103-3.

State's all-male military college would require some alterations and accommodations, including to the "physical training programs for female cadets." *Id.* at 540. The Court specifically noted that Congress has provided that the standards for men and women at federal service academies shall be the same "except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals." *Id.* at 550 n.19 (quoting 10 U.S.C. 4342 note). And, in *Lanning* v. *Southeastern Pennsylvania Transportation Authority,* 181 F.3d 478 (1999), cert. denied, 528 U.S. 1131 (2000), the Third Circuit considered Title VII claims brought by female applicants for transit-authority law-enforcement positions. They alleged that a state agency's use of a screening test (a 1.5-mile run) with a single cutoff score for both sexes (12 minutes) had an unlawful disparate impact on women. *Id.* at 484. In vacating the district court's judgment in favor of the transit authority, the Third Circuit explained that more rigorous application of the "business necessity" doctrine was necessary to justify cutoff scores that discriminate against women, requiring employers to establish "the minimum qualifications that are necessary to perform the job in question." *Id.* at 490. But the court also noted that one way the transit agency could "achieve its stated goal of increasing aerobic capacity without running afoul of Title VII" would be to "institute a non-discriminatory test * * * such as a test that would exclude 80% of men as well as 80% of women through separate aerobic capacity cutoffs for the different sexes." *Id.* at 490 n.15.

After summarizing the foregoing authorities, the court of appeals disagreed with the district court's

conclusion that the PFT's gender-normed standards are facially discriminatory simply because petitioner was required to complete more push-ups than female trainees. Pet. App. 23. The court of appeals explained that, "for the purposes of physical fitness programs," "[m]en and women simply are not physiologically the same." *Ibid.* It explained that this Court "recognized as much in its discussion of the physical training programs addressed in [*Virginia*]." *Ibid.* While acknowledging that *Virginia* arose in "the context of a different legal claim" and "does not control the outcome of this appeal," the court said its analysis of petitioner's claims was informed by *Virginia*'s observation about "possible alterations to the physical training programs of the service academies." *Ibid.* (discussing 518 U.S. at 550 n.19). The court also stated that *Powell* and *Hale* had properly recognized that "the physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness." *Id.* at 24. As a result, the court explained that petitioner's focus on "the numbers of push-ups [that] men and women must complete" is mistaken because it "skirts the fundamental issue of whether those normalized requirements treat men in a different manner than women." *Ibid.* "Whether physical fitness standards discriminate based on sex * * * depends on whether they require men and women to demonstrate different levels of fitness." *Ibid.*

"Put succinctly," the court of appeals summarized, "an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of fit-

ness of each." Pet. App. 24. The court found that that "rule applies to [petitioner's] Title VII claims," "[b]ecause the FBI purports to assess physical fitness by imposing the same burden on both men and women." *Ibid.* As a result, the district court had erred in failing to apply that rule at summary judgment. *Ibid.*

The court of appeals next considered whether petitioner could nevertheless prevail under that rule, or whether the government is entitled to summary judgment under that rule. Pet. App. 25. Noting that the district court had addressed none of those questions—including, for example, whether the PFT is in fact predicated on "physiological differences between the sexes" or actually imposes "an undue burden of compliance" on men—the court of appeals declined to address them "in the first instance." *Id.* at 25 & n.11. Even apart from its "usual[]" practice of remanding for application of a corrected legal standard, the court found such a course to be especially "prudent" here, because the summary-judgment record is complicated by the parties' failure to agree on the scope of the undisputed facts, which would necessitate "multiple analyses that the district court is better suited to undertake in the first instance." *Id.* at 26. Accordingly, the court of appeals vacated the summary judgment in petitioner's favor and remanded "for such other and further proceedings as may be appropriate." *Ibid.*

ARGUMENT

The court of appeals correctly held that, if the FBI's test uses standards that require the same levels of physical fitness in men and women, it does not violate Title VII. The court properly recognized that, in determining whether a general physical-fitness test (*i.e.*, one concerned with fitness rather than the ability to

perform particular physical tasks) unlawfully discriminates on the basis of sex, the relevant question is whether the test requires men and women to demonstrate different levels of fitness, not whether it requires different pass points for specific events. The court of appeals vacated the district court's decision holding that *any* difference in the pass points required of men and women renders a physical-fitness test facially discriminatory under Title VII and remanded for further proceedings to determine whether the FBI's test satisfies the correct standard. That interlocutory decision does not conflict with any decision by this Court or any other court. Further review is not warranted.

1. With respect to the first question presented, petitioner contends (Pet. 11-18) that the decision below conflicts with this Court's decisions applying Title VII's general prohibitions on discrimination on the basis of sex. See 42 U.S.C. 2000e–2(a), 2000e–16(a); Pet. App. 11 n.3. There is, however, no conflict.

a. Petitioner relies entirely on decisions that applied Title VII in contexts that have nothing to do with physical-fitness testing, and that presented no analysis relevant to determining what constitutes discriminatory treatment in that area. Pet. 12-16 (discussing *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW* v. *Johnson Controls*, 499 U.S. 187 (1991); *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073 (1983) (per curiam); and *City of L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978)). None of those cases suggests that requiring men and women to demonstrate the same level of

fitness on a physical-fitness test constitutes discrimination on the basis of sex in violation of Title VII.

In *Johnson Controls*, the Court considered an employer's "fetal-protection" policy, which prohibited fertile women, but not fertile men, from working in a battery-manufacturing plant, despite the risks that lead exposure presented to the reproductive tracts of both sexes. See 499 U.S. at 197-198. The Court found the policy to be discriminatory under Title VII because, although men and women were similarly situated (*i.e.*, both were harmed by lead exposure), only women were excluded from the positions in question. *Id.* at 198. In contrast, if a physical-fitness test requires equal levels of fitness for men and women, men and women who are similarly situated are treated the same.

In *Manhart*, the Court invalidated a policy requiring female employees to pay about 15% more into a pension fund than men because, on average, they live a few years longer—a policy that effectively reduced the salaries of female employees in comparison to similarly situated male employees. See 435 U.S. at 705. Here, the district court read *Manhart* as holding that even a "generalization that [is] unquestionably true" does not justify the "differential treatment of male and female employees." Pet. App. 50-51 (quoting *Manhart*, 435 U.S. at 707).[3] As the court of appeals recognized, how-

[3] Although *Manhart* accepted the proposition that women, on average, live longer than men, it expressed doubt that innate physiological differences were the sole cause and emphasized the sociological factors that bear on longevity. For example, the Court noted, "a significant part of the longevity differential may be explained by the social fact that men are heavier smokers than women." 485 U.S. at 709-710; see *id.* at 710 n.18 (discussing the

ever, *Manhart* does not suggest that gender-normed physical-fitness tests are unlawful under Title VII, because the use of tests that require equivalent levels of fitness for men and women is not "differential treatment" with respect to the relevant metric: fitness. As the court explained, *Manhart's* "simple test" for sex discrimination "offers the obvious conclusion that the numbers of push-ups men and women must complete are not the same, but skirts the fundamental issue of whether those normalized requirements treat men in a different manner than women." *Id.* at 24.[4]

Ultimately, petitioner never responds to the court of appeals' basic premise and therefore never attempts to explain how a test that requires "the same level of physical fitness" from both men and women, Pet. App. 24, can be said to constitute "discrimination based on * * * sex" for purposes of Section 2000e–16(a). Nor does he identify any decision by any tribunal (other than the district court opinion in this case) that has agreed with his approach and found that such a fitness test flouts *Manhart* or any other decision of this Court. Indeed, petitioner disregards the court of appeals' ob-

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effects of marital status on longevity). Because the employer's policy had taken none of these other factors into account and focused exclusively on sex, the Court concluded that it was no more defensible than a policy "permit[ting] a take-home-pay differential based on a racial classification." *Id.* at 709 & nn.15-16.

[4] Petitioner also invokes (Pet. 13-14) this Court's decision in *Arizona Governing Committee*. But that decision simply applied *Manhart* to optional pension plans offered by private insurers selected by an employer. In her concurring opinion, which provided the decisive fifth vote, Justice O'Connor stated that "the result in *Manhart* is not distinguishable from the present situation." 463 U.S. at 1108. That decision thus provides no support for petitioner's arguments beyond *Manhart* itself.

servation that all of the prior decisions about gender-normed physical-fitness tests have concluded that such tests (if properly calibrated) will not violate Title VII. Pet. App. 17-18. The general agreement that those decisions reflect belies petitioner's belief that the decision below is at odds with Title VII or this Court's decisions interpreting it.[5]

b. Petitioner also suggests that the court of appeals erroneously based its analysis on whether the FBI "intend[ed] to treat the sexes differently," when this Court has explained that the "'absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy.'" Pet. 15 (quoting *Johnson Controls*, 499 U.S. at 199). But the court of appeals fo-

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[5] See *Powell* v. *Reno*, No. 96-2743, 1997 U.S. Dist. LEXIS 24169 (D.D.C. July 24, 1997) (rejecting challenge to earlier version of FBI's gender-normed test); *Hale* v. *Holder*, EEOC Decision No. 570-2007-00423X (Sept. 20, 2010) (administrative judge's decision rejecting challenge to same FBI test challenged by petitioner); see also *Lanning* v. *Southeastern Pa. Transp. Auth.*, No. Civ. A 97-0593, 1998 WL 341605, at *70 (E.D. Pa. June 25, 1998) (concluding that an expert's proposed gender-normed physical-fitness test "does not apply different cutoff scores on the basis of gender" for purposes of Section 2000e–2(*l*)), rev'd on other grounds, 181 F.3d 478 (3d Cir. 1999), cert. denied, 528 U.S. 1131 (2000); *In re Scott*, 779 A.2d 655, 661 (Vt. 2001) (rejecting, under state anti-discrimination law, state trooper's challenge to physical-fitness test using gender-normed standards set at the same percentile for men and women); *Alspaugh* v. *Commission on Law Enforcement Standards*, 634 N.W.2d 161, 165, 169 (Mich. Ct. App. 2001) (sustaining, under state anti-discrimination law, state police's use of gender-normed test designed to identify men and women with "the same levels of general physical fitness"); cf. *Lanning* v. *Southeastern Pa. Transp. Auth.*, 181 F.3d 478, 490 n.15 (3d Cir. 1999) (noting that agency could satisfy Title VII by instituting a "non-discriminatory test" that "would exclude 80% of men as well as 80% of women"), cert. denied, 528 U.S. 1131 (2000).

cused on what the test *actually does*, rather than the FBI's motives. As the court explained, "an employer does not contravene Title VII" when it uses "standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women." Pet. App. 24. That legal rule does not rely on the employer's motive. Nor does the next sentence in the court's opinion, which explained the applicability of that rule to this case: "Because the FBI purports to assess physical fitness by imposing the same burden on both men and women, this rule applies to [petitioner's] Title VII claims." *Ibid.*

Petitioner infers a concern for motive from the court of appeals' reference to what the FBI "*purports to*" do. Pet. 15 (quoting and adding emphasis to Pet. App. 24). But that misreads the court's point, which was only to reverse the grant of summary judgment on the basis of the wrong legal standard, without making its own finding about whether the FBI's test actually does impose "the same burden on both men and women," as the FBI contends. Pet. App. 24. In the next three paragraphs of its opinion, the court declined to address "in the first instance" whether the "undisputed" facts show that the FBI's test satisfies the equal-burden rule. *Id.* at 25-26. In doing so, the court did not suggest that the FBI could satisfy that rule simply by proving that its intentions are good.

c. Finally, petitioner criticizes (Pet. 16-18) the court of appeals' reliance on this Court's decision in *United States* v. *Virginia*, 518 U.S. 515 (1996). In his view, that decision is irrelevant because the constitutional challenge to the Virginia Military Institute's male-only status "had nothing to do with an employment prac-

tice" and did not implicate "the prohibitions of Title VII." Pet. 17. But the court of appeals recognized that this Court's decision in *Virginia* arose "in the context of a different legal claim" and that it "does not control the outcome of this appeal." Pet. App. 23. It relied on *Virginia* only for its recognition that, even in the context of a legal standard that generally requires equal treatment of men and women (there, the Fourteenth Amendment's Equal Protection Clause), some "aspects" of "physical training programs" could be "adjust[ed]" to account for the admission of women to a formerly-all-male school. 518 U.S. at 550 n.19. In particular, the decision below cited this Court's "observation" about the "service academies," Pet. App. 23, which had quoted a federal statute providing that the standards for women admitted to those academies "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals," *Virginia*, 518 U.S. at 550 n.19 (quoting 10 U.S.C. 4342 note). From that example, the court of appeals concluded only that "accommodations addressing physiological differences between the sexes are not necessarily unlawful." Pet. App. 23. That premise, which petitioner cannot question, does not impugn the court of appeals' Title VII reasoning.

2. With respect to the second question presented, petitioner contends (Pet. 19-26) that the decision below conflicts with the provision of Title VII making it unlawful for employers to "adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex or national origin." 42 U.S.C. 2000e–2(*l*).

The court of appeals noted petitioner's allegations that the PFT violates Section 2000e–2(*l*), Pet. App. 11, and recognized that the provision applies to federal employers, *id.* at 12 n.4. As petitioner notes (Pet. 19), the court did not otherwise address that provision directly. Nevertheless, the court's reasoning makes clear that gender-normed physical-fitness tests do not use "different cutoff scores" of the kind that Congress sought to prohibit in Section 2000e–2(*l*).

a. The court of appeals held that "an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the *same level of physical fitness* of each." Pet. App. 24 (emphasis added). That holding applies not just to Title VII's general prohibitions against sex discrimination but also to Section 2000e–2(*l*). Just as fitness tests that require the same level of fitness for both men and women do not "discriminate" under 42 U.S.C. 2000e–16(a), such tests do not violate Section 2000e–2(*l*)'s prohibition on the use of "different cutoff scores."

Petitioner's contrary argument again rests on the premise that the relevant cutoff scores for purposes of Section 2000e–2(*l*)'s prohibition are the raw numbers of push-ups required for men and women. But the proper metric for evaluating whether a test of physical fitness uses "different cutoff scores" is not the pass points, but the level of physical fitness represented by the pass points. Because "physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness," petitioner's focus on the "the numbers of push-ups

men and women must complete" is misplaced. Pet. App. 24. In the court of appeals' phrase, that focus "skirts the fundamental issue of whether those normalized requirements treat men in a different manner than women." *Ibid.* The critical issue—to be resolved on remand—remains whether the PFT in fact imposes an "equal burden of compliance on both men and women, requiring the *same level* of physical fitness of each." *Ibid.* (emphasis added). If so, then the test uses the *same* cutoff scores for men and women, and does not violate the prohibition on "different cutoff scores" in Section 2000e–2(*l*).

b. Petitioner's discussion (Pet. 19-23) of the language and legislative history of Section 2000e–2(*l*) fails to acknowledge the fundamental difference between measuring fitness levels and the ability to do a specific number of push-ups. In any event, both the language and legislative history of the provision confirm that gender-normed physical-fitness tests do not use "different cutoff scores" of the kind that Congress sought to prohibit. For example, the title of Section 2000e–2(*l*) is "Prohibition of discriminatory use of test scores." As discussed above, however, it is not "discriminatory" to require men and women to satisfy fitness benchmarks that measure equal levels of fitness.

The legislative history of Section 2000e–2(*l*) likewise indicates that it was designed to prevent the *arbitrary* alteration of test scores, or the *post hoc* adjustment of scores based on nothing more than poor performance by a particular group on a specific employment test. See 137 Cong. Rec. 30,682 (1991) (statement of Rep. Hyde) ("race-norming or any other discriminatory adjustment of scores or cutoff points of

any employment related test is illegal"); *id.* at 29,038 (statement of Sen. Dole) (same). Thus, petitioner quotes (Pet. 22-23) a 1991 statement by a Vice Chairman of the EEOC that criticized gender-norming of employment tests that would require employers to hire women who had shown themselves to be "less qualified" and "less productive" by taking longer than men "to complete the test." Such criticism, however, is inapposite here, because the court of appeals did not approve gender-norming that would permit less-qualified women to pass at rates equal to men. Instead, it held that prospective requirements that ensure equal levels of fitness between men and women do not violate Title VII.[6]

c. For the same reason, petitioner's invocation (Pet. 25-26) of *Dean* v. *City of Shreveport*, 438 F.3d 448 (5th Cir. 2006), is unavailing. Petitioner accuses the court of appeals of "ignoring" that decision, which he characterizes (in the district court's words) as "'the only circuit decision directly addressing the applicability of §2000e-2(*l*) to differential cut-off scores based on sex.'" Pet. 25 (quoting and omitting emphasis from Pet. App. 60). But *Dean* has no bearing on the use of

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[6] Petitioner contends (Pet. 25) that, after *Ricci* v. *DeStefano*, 557 U.S. 557 (2009), "the FBI cannot violate section (*l*) out of fear of disparate impact liability except in certain, narrow circumstances." As the court of appeals recognized, however, the FBI has not sought to mount a *Ricci* defense predicated upon fears of disparate-impact liability, because it does not "concede that the PFT standards treated male and female [t]rainees unequally." Pet. App. 14 n.7. In the absence of differential treatment with respect to the attribute being measured (fitness), *Ricci* does not bolster petitioner's contention that Section 2000e–2(*l*) categorically prohibits gender-normed physical-fitness tests.

gender-normed fitness tests that require the *same* level of fitness in men and women.

In *Dean*, a city selected applicants for firefighter jobs by separating their scores on a written civil-service exam by race and sex, and then selecting "the same number of blacks and whites to proceed, starting with the highest exam score on each [racially] segregated list" of men, and generally including all women who attained a minimum passing score. 438 F.3d at 453, 463. The Fifth Circuit held that the city's practice violated Section 2000e–2(*l*). *Id.* at 463. In that case, however, the city used different cutoff scores to advance the employment opportunities of minorities who scored lower on the written test than white males. Here, by contrast, the court of appeals approved only requirements that ensure equal levels of fitness between men and women. *Dean* simply did not speak to that entirely different issue.

Accordingly, petitioner identifies no federal court of appeals decision (and we are aware of none) that has directly addressed whether gender-normed tests requiring equal levels of fitness violate Section 2000e–2(*l*)'s prohibition on the use of "different cutoff scores."[7] In the absence of any conflict in the lower courts, review by this Court of the interlocutory decision below, which itself did not directly address Section 2000e–2(*l*), would be particularly unwarranted.

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[7] The district court in *Lanning* expressly concluded that an expert's proposed gender-normed physical-fitness test "does not apply different cutoff scores on the basis of gender" for purposes of Section 2000e–2(*l*). 1998 WL 341605, at *70. Because the Third Circuit reversed on other grounds, see *Lanning*, 181 F.3d at 494, it did not address the issue.

3. More broadly, petitioner contends (Pet. 26-27) that the "novel question" presented by this case provides the Court with a "unique opportunity" to provide clarity for "[p]ublic safety organizations" about "the legal boundaries set by Title VII." To that end, petitioner recapitulates (Pet. 27-31) the ways in which he thinks the decision below departs from certain aspects of Title VII law. But there is no confusion in the lower courts about the use of gender-normed physical-fitness tests. To the contrary, as the court of appeals explained, the handful of decisions that have addressed such tests are all in accord. Pet. App. 17-18; see note 5, *supra*. Although such decisions date back nearly two decades, petitioner cites nothing to support his belief that they have unsettled other aspects of Title VII law.

Petitioner also contends (Pet. 31) that the decision below portends bad policy consequences because the court of appeals' test erroneously lacks any "job-relatedness component," which could, he suggests, inspire accounting firms to adopt gender-normed physical-fitness tests. But there has never been any question in this case that a minimum level of physical fitness is necessary for the job, and for training for the job, of an FBI Special Agent. As the district court observed, it is "obvious that law enforcement positions, such as that of an FBI Special Agent, include physical demands, and thus some types of physical tests may be closely related to a person's ability to perform the various duties of an FBI Special Agent." Pet. App. 70. And the court of appeals noted potential alternative grounds on which petitioner claims he could still prevail, including questions about whether the FBI's fitness standards are "consistent with the minimum

performance requirements for Special Agents." *Id.* at 25 n.11. As a result, the decision below does not encourage employers to adopt needless physical-fitness tests.

Nor is there any basis for petitioner's contention (Pet. 32) that the FBI itself uses "contradictory approaches" when it tests physical fitness. As petitioner notes (*ibid.*), the FBI uses a single-standard test for members of its Hostage Rescue Team (HRT). Petitioner asserts (*ibid.*) that, under the decision below, "the FBI's single standard for HRT trainees constitutes prima facie sex discrimination against females under Title VII" because it holds women to a higher level of fitness than men, "likely imposing an unequal burden of compliance on each, due to the physiological differences that exist, on average, between males and females."

Petitioner erroneously conflates general physical-fitness tests, like the PFT, with job-simulation tests, like the comprehensive performance requirements for HRT trainees. See Pet. App. 80 (enumerating seven minimum performance standards). The FBI's tests for HRT and SWAT trainees are designed to assess the ability to perform specific, job-related tasks, see C.A. App. 478-480, such as pulling oneself into an attic while wearing typical SWAT gear, *id.* at 364. Such tests are fundamentally different from the PFT, serve a different purpose, and in no way undermine the validity of the PFT as a basic measure of physical fitness. The court of appeals plainly understood that it was addressing only the standard applicable to tests that evaluate "an overall level of physical fitness." Pet. App. 17. As a result, its decision does not cast doubt

on single-standard tests that evaluate applicants' ability to perform particular tasks.

4. Even if the questions presented otherwise warranted this Court's review, this case would be a poor vehicle for their consideration because the decision below is interlocutory. The court of appeals noted that petitioner has advanced several reasons why he might prevail even under that court's rule. Pet. App. 25 & n.11. But the court observed that those alternative arguments had not been addressed by the district court, and it declined to resolve them "in the first instance," explaining that questions remain about which facts are no longer in dispute for summary-judgment purposes. *Id.* at 25-26.

Under this Court's usual practice, that interlocutory posture "alone furnishe[s] sufficient ground for the denial of" the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Mount Soledad Mem'l Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., respecting the denial of the petitions for writs of certiorari); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). Of course, if petitioner were ultimately to lose on all of the questions that must be addressed on remand, he would still have the opportunity to reiterate his current contentions, together with any others he may raise in light of the proceedings on remand. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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