Nos. 07-1428, 08-328

In The Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, AND THE INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents the question whether Title VII and the Equal Protection Clause allow a government employer to reject the results of a civil-service selection process because it does not like the racial distribution of the results. Specifically:

1. When a content-valid civil-service examination and race-neutral selection process yield unintended, racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

2. Does an employer violate 42 U.S.C. § 2000e-2(*l*), which makes 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," when it rejects the results of such tests because of the race of the successful candidates?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

REGULATIONS:

OTHER AUTHORITIES:

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. This case is central to Cato because it implicates the Institute's strong belief that all citizens should be treated equally before the law and that the government should not create incentives for employers to discriminate based on race in their hiring and promotion practices.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as

[1] The parties have filed blanket written consents to the filing of *amicus* briefs in this case. This brief was not authored in whole or in part by a party or counsel for a party, and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

commentary on its website, reason.com, and on www.reason.tv, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues, to further Reason's avowed purpose to advance "Free Minds and Free Markets."

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting litigation involving free speech, associational rights, and civil rights issues, and its lawyers participate in educating the public about the importance of the Fourteenth Amendment's guarantee of equal protection of the law. To further its goals, IRF attorneys appear in litigation and file *amicus curiae* briefs in appellate cases involving Equal Protection and other constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine equality of rights, which is a fundamental component of individual rights in a free society.

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STATEMENT OF THE CASE

In 2003, the City of New Haven, Connecticut sought to fill captain and lieutenant vacancies in its fire department. New Haven's Charter and Civil Service Regulations mandated that hiring and promotions be based solely on merit as determined by a competitive examination. Pet.App. 74a-77a, 80a-82a, 85a-96a, 89a-113a. To develop its exam, New Haven hired an outside testing firm with experience in public safety. Through rigorous procedures, that firm developed an exam that tested the relevant knowledge, skills, and abilities necessary for minimally competent performance in the captain and lieutenant positions. Pet.App. 308a-328a. Because New Haven had seen racial disparities in the results of previous civil service exams, the firm did all it could to mitigate the impact of race while maintaining the integrity of the exams. *E.g.*, Pet.App. 150a-154a, 160a-161a, 262a-264a, 337a-343a.

The exam results revealed racial disparities among those seeking promotion, with non-Hispanic whites generally outperforming African-Americans and Hispanics. These results mirrored those of previous exams in New Haven. Pet.App. 423a-427a, 950a-957a. Given the limited number of vacancies and a civil service rule that required those promoted to a given position to be among the top three performers, the new lieutenants would all have been non-Hispanic and white, as would the new captains, except for one or possibly two, who could have been Hispanic. Pet.App. 439a-445a, 475a-476a.

After such an exam, the Civil Service Board normally would certify a list of those eligible for promotion, a ministerial task. Pet.App. 89a. That did not happen in this case. Before the Civil Service Board took up the matter, a local preacher and political power broker called the mayor and made it clear that he did not want the results of the exam certified because of the racial disparities. Pet.App. 812a-816a, 882a-883a. City officials initially tried to impugn the validity of the exams, but the firm that designed the exam refused to capitulate and offered to explain the exam's content and establish its validity. Pet.App. 331a-334a. Soon after, Respondent Thomas Ude, Jr., the city's counsel, sent a letter to the Board raising the specter of a Title VII violation if the promotion lists were certified. Pet.App. 428a-436a, 439a-445a.

The Board met four times to discuss whether to certify the lists. At the initial hearing, Ude stated that the exam results had a "very significant disparate impact" and that the City need not find that the exam was "indefensible" and not job-related – that it violated Title VII – for the city to "take action." Pet.App. 8a. At the final hearing, Ude stated that certifying the lists "would not be consistent with federal law" and noted that, if the city were sued under Title VII, "it is the employer's burden to justify the use of the examination. . . ." Pet.App. 18a. Two alderpersons present at the meeting urged the Board not to certify for the sake of "civil rights" requirements. Pet.App. 458a-459a, 575a-582a.

The Board deadlocked on whether to certify the lists, hence the lists were not certified and no one was promoted. Pet.App. 586a-589a. Some of the firefighters denied promotion sued the City and several individuals under Title VII and the Equal Protection Clause. The district court granted summary judgment for the defendants, holding that the City's desire to comply with "the letter and spirit of Title VII" by avoiding an adverse impact claim was a legitimate, nondiscriminatory reason under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1993), for its failure to certify the lists. Pet.App. 25a. Turning to the equal protection claim, the district court held that the City's refusal to certify the results was not intentional discrimination under the Equal Protection Clause because it had acted based on its concern that, *inter alia*, certifying the lists "would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend." Pet.App. 47a.

The Second Circuit affirmed, adopting the district court's opinion in its entirety and adding a coda. Supp.Pet.App. 4a-6a. In dissent from the denial of the petition for rehearing en banc, Judge Cabranes noted that, "[u]nder the District Court's rationale, it appears that any race-based employment decision undertaken to avoid a threatened or perceived Title VII lawsuit is immune from scrutiny under Title VII. This appears to be so, moreover, regardless of whether the employer has made any efforts to verify that a valid basis exists for the putative Title VII

suit." Supp.Pet.App. 28a-29a. Judge Cabranes expressed doubt about this "sanctioning [of] race-based employment decisions in the name of compliance with Title VII." Supp.Pet.App. 29a.

Petitioners and other *amici* address the constitutional and statutory errors contained in the decisions below. This brief focuses instead on the practical problems and skewed incentives that naturally follow a decision allowing employers to justify race-based discrimination merely because valid exams produce racially disparate results.

SUMMARY OF THE ARGUMENT

If allowed to stand, the lower courts' opinions would present employers with an easy choice whenever valid selection procedures produce racially disparate results: proceed in the face of those results and face the possibility of a Title VII lawsuit; or throw out the results and avoid that risk. In other words, employers will have every reason to "undo" race-based statistical disparity even if that disparity is entirely innocuous and would easily survive legal challenge, even if doing so may be detrimental to the employer or (as here) the public, and even though doing so requires racial discrimination against certain employees. Every employer in the City of New Haven's position – wanting to avoid litigation and the negative publicity accompanying race discrimination

suits – will throw out the results of objectively race-neutral exams.

Petitioners' reading of Title VII, by contrast, provides the proper incentives to employers and ensures that they treat all employees equally and fairly. Under that reading, the law does not suggest that employers should discriminate by race every time there is a racial disparity. Instead, employers must determine whether a test that produces a racial disparity poses a real risk of a Title VII violation.

ARGUMENT

Title VII makes it unlawful to "fail or refuse to hire . . . any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race[.]" 42 U.S.C. § 2000e-2(a)(1). Claims under this section are commonly called "disparate treatment" claims. Where the employee alleges that intentional discrimination caused a decision, a disparate treatment claim is analyzed under the burden-shifting framework of *McDonnell Douglas v. Green*: the employee must establish a prima facie case of discrimination, after which the burden shifts "to the employer to articulate some legitimate, nondiscriminatory reasons" for the decision, and finally the burden shifts back to the employee to prove that the reasons offered by the employer were "pretext." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1993).

Title VII also outlaws certain facially neutral employment practices that have adverse effects on members of one race as compared to members of another race. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Claims under this section are commonly called "adverse impact" claims. Like disparate treatment claims, adverse impact claims are analyzed under a burden-shifting framework: the employee must establish a prima facie case of discrimination, after which the burden shifts to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity," and finally the burden shifts back to the employee to demonstrate an alternative employment practice that is available, equally valid, and less discriminatory that the employer has refused to adopt. *Id.*; *see also Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Because the employment practice in an adverse impact claim is facially neutral, *see, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 355 n.15 (1977), the hallmark of a prima facie disparate impact claim is mere statistical disparity – that members of one race have done better than those of another. Indeed, strong evidence of a prima facie case is also what the EEOC guidelines consider to be evidence of adverse impact, which occurs when the selection or promotion rate for any race is less than 80 percent of the rate for the group with the highest rate. *Watson*, 487 U.S. at 994; *see* 29 C.F.R. pt. 1607 (2008). Consequently, a prima facie disparate impact claim is fairly easy to establish. It is in the second and third steps that the real work is done.

Petitioners' claim is one of disparate treatment under *McDonnell Douglas*. The district court, after assuming that Petitioners had established prima facie discrimination, concluded that Respondents had established a legitimate, nondiscriminatory reason for their decision not to certify the exam results: fear of a Title VII "adverse impact" claim. Pet.App. 25a-26a.[2] The district court concluded, and the Second Circuit affirmed, that this fear was a legitimate, nondiscriminatory reason because there was an undisputed statistical disparity that would have supported a prima facie adverse impact claim against Respondents. Pet.App. 25a; Supp.Pet.App. 4a-6a.[3]

The court did not find, however, that the exams were not job-related. In fact, the only evidence in the record suggests the opposite: Respondents commissioned a post-exam validation study and were aware that it would have validated the tests, but decided to block the study. Pet.App. 190a, 329a-339a. Nor did the court find that Respondents had shown an alternative, less-discriminatory test.

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[2] The district court arguably found additional motivations for Respondents' decision, *see* Pet.App. 47a, but fear of a Title VII adverse impact claim was the primary motivation, as the Second Circuit recognized, *see* Supp.Pet.App. 5a-6a ("[T]he Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact. . . .").

[3] The district court actually suggested that something less than a prima face adverse impact claim might justify Respondents' actions. *See* Pet.App. 38a.

In other words, the court held that statistical disparity, which might have led to a Title VII adverse impact suit, justified Respondents' decision to throw out the results. Even beyond the questionable legal basis for such a ruling, this new rule produces the perverse practical result that exams will always be discarded if they produce a disparity – regardless of the reason for that disparity and even if the exams are race-neutral. Petitioners' suggested framework makes much more sense because it ensures that exams that produce disparity will not be discarded unless there is a real risk that they violate Title VII.

I. THE LAW CREATED BY THE LOWER COURTS WILL ENCOURAGE EMPLOYERS TO THROW OUT RACE-NEUTRAL TESTS AND OTHER CRITERIA WHENEVER THEY PRODUCE RACIAL DISPARITIES.

If the decision below stands, employers making employment decisions based on race-neutral tests that produce racially disparate results will have every reason to throw out the results. If they do so, they will be immune from Title VII liability because the employees harmed by that act cannot overcome the employers' stated legitimate, nondiscriminatory reason. On the other hand, if they do not throw out the results, they may face a Title VII adverse impact claim by other employees. Between total immunity and possibly having to defend against a claim, rational employers will throw out the results.

The perils and perversity of this incentive are obvious. First, employers will be impelled to jettison tests that are entirely innocuous and would easily survive legal challenge. Second, many of those tests ensure efficiency and sometimes – as in this case – public safety. Third, the act of throwing out those tests itself constitutes racial discrimination. It is bad enough when misplaced fear of noncompliance with the law affects lawful behavior; it is worse when what is generated by that misplaced fear is not just inefficiency or danger, but racial discrimination as well.

Further, the more employers heed the incentive to throw out race-neutral tests that produce racially disparate results, the more Title VII is upended. After all, an employer who throws out the results of a test merely because "too many" employees of a certain race did well establishes a de facto quota. And *Watson* made clear that de facto quotas are anathema to Title VII:

> Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII." . . . If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic

> terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent. . . .

Watson, 487 U.S. at 991 (internal citations omitted).

Moreover, such an employer also contravenes the Title VII provision forbidding alteration of test results. S*ee* 42 U.S.C. § 2000e-(2)(*l*). Respondents' reading of Title VII not only fails to effect the aims of the statute, it defies them. Respondents' reading of the statute would have Title VII hoist by its own petard.

Similarly, the more employers heed the incentive to throw out test results based merely on race-based statistical disparity, the more unintentional discrimination will be replaced by intentional discrimination. As Petitioners explain, that tradeoff violates the Equal Protection Clause. Pet.Br. 21-42.

II. PETITIONERS' READING OF TITLE VII PROVIDES EMPLOYERS THE PROPER INCENTIVES.

Petitioners, by contrast, have suggested a sensible reading of Title VII that would provide employers with incentive to guard the rights of all employees and balance those rights against business requirements and public safety. Petitioners suggest that employers, when faced with race-based statistical disparity in a test, can jettison the results only if

there is a "strong basis in evidence" that the test violates Title VII. Pet.Br. 58-62.

Before administering a test, most employers will presumably have already ensured that the test is job-related (and possibly that they have not refused reasonable, less discriminatory alternatives). Such employers will not face a "strong basis in evidence" for an adverse impact claim against them. That is what happened in this case. For those employers who administer tests without knowledge of whether they comply with Title VII, the tests can be analyzed later for compliance. If an employer discovers a "strong basis in evidence" for an adverse impact claim stemming from a particular test, the employer can (and probably should) jettison it. The employer need not be certain that the test establishes an adverse impact claim.

This reading of Title VII ensures that employers can and will maintain tests that, although they generate race-based statistical disparity, are good for both business and the public interest generally, and are consistent with Title VII. It also ensures that employees who do well on such tests are protected, while allowing employers to prophylactically discard test results if there is a "strong basis in evidence" that the results violate Title VII.

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CONCLUSION

"It is a sordid business, this divvying us up by race." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting). Nowhere is that statement more true than in the through-the-looking-glass situation where a legal rule gives employers every reason to abandon job-related, race-neutral tests and instead discriminate by race, merely to eliminate a statistical disparity. This Court should reverse the Second Circuit's judgment.

Respectfully submitted,

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