No. 07-270

IN THE
Supreme Court of the United States

BOARD OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Petitioner,

v.

ELSA GULINO, MAYLING RALPH AND PETER WILDS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When Congress enacted Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, it expressly provided that Section 2000h-4 of Title VII trumps inconsistent state laws. New York State imposed a testing requirement for individuals seeking employment as teachers in public--but not private--schools. The Second Circuit found that the state-mandated certification test has an actionable disparate impact on African-American and Latino test takers, was not properly validated under the law, and therefore violates Title VII. May New York City be relieved of liability for using the results of that test in violation of Title VII to make employment decisions by claiming that as a state requirement, it is somehow immune from Title VII's strictures?

PARTIES TO THE PROCEEDING

Elsa Gulino, Mayling Ralph, and Peter Wilds appear in this matter on behalf of themselves and a class of all other similarly situated African-American and Latino New York City Public School Teachers, and are the Respondents before this Court. The Board of Education of the New York City School District of the City of New York is the Petitioner before this Court.[1] The New York State Education Department, a defendant in all proceedings and the trial below, was dismissed from the case by the Second Circuit Court of Appeals.

[1] The case before the district court was entitled *Gulino, et al. v. Board of Educ.*, 96 Civ. 8414 (S.D.N.Y.). During the trial, the New York City Board of Education was renamed the New York City Department of Education. For ease of reference the original nomenclature has been used in this brief.

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The United States Court of Appeals for the Second Circuit issued its decision finding for Plaintiffs Elsa Gulino, Peter Wilds, and Mayling Ralph on behalf of themselves and the Plaintiff class (collectively "Respondents") on August 17, 2006. The decision is reported at *Gulino v. Bd. of Educ.*, 460 F.3d 361 (2d Cir. 2006), 2006 U.S. App. LEXIS 21297, and can be found in Petitioner's Appendix at page 1a. The Second Circuit denied Petitioner's petition for rehearing en banc on May 30, 2007. That decision can be found in Petitioner's Appendix at page 123a.

The United States District Court for the Southern District of New York (Motley, J.), entered judgment for Petitioner New York City Board of Education on September 18, 2003. That opinion is reported at 2003 U.S. Dist. LEXIS 27325, and can be found in Petitioner's Appendix at page 57a. The district court had jurisdiction over this action, a disparate racial impact challenge, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), and 28 U.S.C. § 1331. Appellate jurisdiction arose under 28 U.S.C. § 1291. On October 14, 2003, Respondents timely filed a notice of appeal from the lower court judgment.

JURISDICTION

This Court has jurisdiction to review the judgment of the Second Circuit Court of Appeals under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

The Board of Education for the School District of the City of New York (the "City"), filed a Petition for Certiorari seeking review of a unanimous decision of a panel of the Second Circuit Court of Appeals. The New York State Education Department (the "State"), was dismissed from the case by the Second Circuit and did not petition for review before this Court.

A. Statement of Facts

In 1996, Respondents filed their complaint on behalf of a class of African-American and Latino public school teachers employed by the City, alleging discrimination in employment on the basis of race and ethnicity in violation of Title VII and New York State and City anti-discrimination laws.[2]

Respondents are experienced teachers who have completed all of the rigorous requirements for their positions other than passing one of the two sequentially offered liberal-arts-based "certification" tests. Passage of either of these "certification" tests—either the first test, the National Teachers' Examination Core Battery (the "NTE") or its replacement, the Liberal Arts & Sciences Test (the "LAST")—has been a requirement for eligibility to teach in New York City's public schools since September 2, 1984.[3] This requirement was not enforced by the City, however, until late 1994.[4]

For many years, the City had the authority to set its own credentialing requirements for its public school teachers, with the sole limitation that City teachers had to meet minimum State qualifications.[5] In accordance with State and City law and regulations, Respondents were required to: (1) possess a bachelor's degree from a four-year college accredited by the State; (2) possess a masters degree from a similarly accredited institution; (3) have earned at least thirty credits in child-abuse prevention at a State-approved school; (4) have earned a passing score on the State-

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[2] On July 13, 2001, the court certified the following class:

> All African-American and Latino individuals employed as New York City public school teachers by Defendants, on or after June 29, 1995, who failed to achieve a qualifying score on either the NTE or the LAST, and as a result either lost or were denied a permanent teaching appointment.

Gulino v. Bd. of Educ., Aug. 2, 2001 Order.

[3] N.Y. Educ. Law § 2590-j(2); City Chancellor's Regulation C-332.

[4] *Gulino v. Bd. of Educ.* trial transcript "Tr." 872:8-873:6; 881:2-884:13.

[5] *Gulino III*, 460 F.3d at 366-67.

mandated Assessment of Teaching Skills – Written, or have a received a special exemption from that requirement; (5) have earned a passing score on the State-mandated content specialty tests for the subjects they teach; and (6) have satisfactorily completed a three-year probationary period of teaching in the City's public schools.[6]

In 1984, when the State began requiring all public school teachers to pass the NTE, with the exception of those teachers working in New York City and Buffalo, passage of the NTE nevertheless also became a requirement for City teachers because State Education law required the City to adopt credentialing regulations that were "substantially equivalent or not less than those required by the state."[7] Consequently, in 1984, the City Chancellor adopted a regulation requiring that public school teachers applying for a City license pass the NTE to satisfy the substantial equivalence requirement.[8] However, one year later, on September 11, 1985, the City requested that the State Education Department permit it to defer implementation of the new requirement, so that City public school teachers would not have to obtain a passing score on the NTE *prior* to receiving a City license, but instead could fulfill the test requirement by no later than the end of a five-year period following initial City licensure.[9] The State approved the City's request.[10] In October 1985, City Chancellor's Regulations were adopted formalizing the City's approved plan permitting teachers to acquire a City credential and establishing a five-year period for passage of the NTE.[11] Both the City and the State understood that pursuant to the City's approved plan, if a teacher lost her City credential, the City would lower her status to that of a substitute teacher, substantially reduce her salary, and reduce or eliminate other benefits provided to permanent teachers under their collective bargaining agreement with

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[6] Tr. 834:4-835:2; 884:17-887:8.

[7] *Gulino III*, 460 F.3d at 366-67; *see* N.Y. Educ. Law § 2590-j (2).

[8] City Chancellor's Regulation C-332.

[9] This agreement was confirmed in an exchange of letters between the Board of Education and the State in 1985. Pl. Exs. 30, 31, 32, 33

[10] *Id.*

[11] City Chancellor's Regulation C-238.

the City.

In 1990, the New York State Legislature amended the Education Law to abolish the City's Board of Examiners (the City's own testing agency) and eliminate the requirement that City teacher applicants take two tests, one developed and administered by the City and one approved by the State.[12] The Act, which became effective in 1991, also mandated that City teachers have State Education Department certification as a predicate for a New York City Public School System teaching credential.[13] New applicants for City credentials were to obtain provisional State certification in order to be eligible for a teaching position in the City's public schools.[14] Accordingly, the City Chancellor enacted a new regulation requiring City teaching applicants to fulfill the State's testing requirement by the time they submitted their application for a City credential, rather than within five years of the date of issuance of their City credential.[15] This new regulation had the effect of requiring City teaching applicants to pass the State's certification test as part of the application process for a City credential. Concomitant with these changes, the State began phasing in the LAST as a replacement for the NTE. The State's new requirements included the LAST as part of a series of five tests, designed to be taken at various junctures in a teacher's career.

Throughout the changes over the years, the City retained control over the employment effects of the testing program either by granting extensions of time for teachers to comply with the new state testing requirement, or by using a "grandfather" clause that permitted public schools to continue employing teachers who had applied for or received their City credential prior to January 1, 1991, but

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[12] *See* 1990 N.Y. Laws, c. 650 (the "1990 Act").

[13] Thus, for the period from 1984 through 1991, the State Education law requirement of passage of one of the State certification examinations was not legally binding on the City; because of the City's independent licensing authority, its teachers were exempt from the specific State certification requirements.

[14] Educ. Law § 2590-j (as amended).

[15] City Chancellor's Regulation C-265.3.

had not yet met the testing requirement. The City, exercising its discretion under this provision, retained many hundreds of teachers as full-time classroom teachers after it demoted them to substitute status and cut their salaries and benefits when they did not timely pass the State's certification test.[16]

Accordingly, even though they never achieved a passing score on the LAST, many teachers continued teaching full-time in the City's schools for many years, albeit at salaries well below that of their certified colleagues. And those teachers who ultimately achieved a passing score, remained at a salary step level far below that of their colleagues with equivalent seniority in the City school system. In practice then, the City and State used the LAST not to determine whether teachers should be allowed to teach, but rather to determine their level of compensation and benefits. For example, many teachers who did not satisfy the certification testing requirement continued to teach in the City schools, but were demoted to substitute status; suffered significant reductions in compensation; were placed in a different pension system which resulted in reduced benefits; and had their seniority and retention rights revoked.[17]

Moreover, the Tests are not—and were never intended to be—licensing tests. Gerald Nolan, the former State Deputy Commissioner for Higher and Professional Education, that was responsible for the licensing programs for the professions in New York State, testified that although there are thirty-eight licensed professions in New York—teaching is not one of them:

> There are 38 such [licensed] professions, including, for example, law, medicine, architecture, and real estate. A "profession" is defined by the legislature

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[16] *Gulino I,* 236 F. Supp. 2d at 334.

[17] Tr. 199:17 - 200:8; 881:2-883:1; 1222:7-10; 61:18-20; 628:21-629:3; Pl. Ex. 270; BOE Ex. L; Tr. 207:25-208:12; 215:23-216:9; 1020:16-22; 1023:14-15; Pl. Ex. 3; Tr. 59:23-61:17; Pl. Ex. 1; Tr. 628:17-20; Pl. Ex. 4.

> as an occupation which requires the passage of a licensing test and obtaining a license in order to "empower[ ] the individual so licensed . . . [to] practice the profession." Teaching is not a "profession" and does not require passage of a license test.[18]

New York's legislature never intended teaching to be a licensed profession. Consequently, in New York, if teachers want to teach in the public schools, they must obtain certifications, not licenses.[19]

When teachers are permitted to continue teaching in the City's public schools for years despite their failure to achieve a passing score on the LAST portion of the State's certification examination process, and teachers who wish to teach in the New York private school system need not take the State's certification examinations, there can be no conclusion other than that teaching is not a licensed profession in New York and the LAST is not a licensing test.

B. District Court's Opinion

Following discovery, all parties moved for full or partial summary judgment. In denying the City's and the State's respective motions for summary judgment, the district court found that both agencies were "employers",[20] and that New York's teacher certification tests, the NTE and the LAST, are covered by Title VII.[21]

After a lengthy bench trial, the district court issued its factual findings and legal conclusions on September 4,

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[18] Pl. Ex. 35, at 13, 17-19. The City's statement in its Petition that there is no dispute that the LAST is a licensing test is simply wrong and for support cites only to the testimony of the State's testing expert Dr. William Mehrens.

[19] Pl. Ex. 35, at 27-28.

[20] *Gulino v. Bd. of Educ.*, 236 F. Supp. 2d 314, 328-35 (S.D.N.Y. 2002) ("*Gulino I*"), *modified*, 2002 U.S. Dist. LEXIS 24965, 2002 WL 31887733 (S.D.N.Y. Dec. 23, 2002).

[21] *Gulino I*, 236 F. Supp. 2d at 328-35.

2003. On September 18, 2003, the court entered its final judgment and order, concluding that the tests had a significant adverse impact on African American and Latino teachers working in the City's schools.[22] The significance of the disparities in passing rates between teachers of color and white teachers ranges (during the evaluated years) from nineteen to seventy-five standard deviations with respect to the LAST, depending on which populations were compared.[23]

The court devoted over fifty paragraphs of findings to the issues of validity, job relatedness, and business necessity of the LAST,[24] and concluded that the City and State were unable to demonstrate that the LAST had been validated under the standards articulated by the Second Circuit in *Guardians Ass'n of N. Y. City Police Dep't, Inc. v. Civil Servants Comm'n*, 630 F.2d 79 (2d Cir. 1980), the United States Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures (the "Guidelines"), 29 C.F.R. §§ 1607 *et seq.*, and the professional standards for test development issued by the American Psychological Association (the "APA Standards").[25] The court also found that if the *Guardians* decision applied to this case, the teachers "would emerge triumphant" with respect to their claims regarding the LAST.[26]

Failing to apply the standards delineated in the 1991 Amendments to Title VII,[27] however, the district court relied on an erroneous standard and entered judgment for Defendants solely because twenty percent of the LAST contained an essay section, and the court intuitively believed that it was important for teachers to be able to

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[22] *Gulino v. Bd. of Educ.*, 96 Civ. 8414, 2003 U.S. Dist. LEXIS 27325, slip op. at ¶¶ 45-65 (S.D.N.Y. Sept. 4, 2003) ("*Gulino II*").
[23] *Id.*
[24] *Id.* ¶¶ 104-153.
[25] *Id.*
[26] *Id.* ¶ 161.
[27] *Id.* ¶ 162.

write an essay.[28] No other reason was given for the court's decision in favor of Defendants with respect to the LAST.

C. Circuit Court's Decision

The Court of Appeals reversed the district court, holding that, in addition to the use of an incorrect legal standard, the court also made a number of factual errors, necessitating a remand for further proceedings.[29] Specifically, the Second Circuit found that the district court erroneously concluded that all Plaintiffs in the class would have passed the LAST had they not failed the essay portion of the test. The district court failed to take into account the evidence showing that there were Plaintiffs who had passed the essay portion and yet failed to achieve a passing grade on the test, as well as the fact that the LAST's compensatory scoring scheme meant that no single test section could be isolated as the sole factor causing a specific group to fail the test.[30]

The Second Circuit also noted that the decisional authority made clear that the City was an "employer" of Respondent teachers for the purposes of Title VII because it was the agency that "hired, promoted, demoted and fired teachers in New York City." The Court of Appeals did, however, dismiss the State, finding that it should not have been considered a joint-employer of Respondents.

REASONS FOR DENYING THE WRIT

I. BECAUSE THE RECORD IN THIS CASE IS INCOMPLETE AND UNCLEAR, IT IS NOT PROPERLY BEFORE THE COURT FOR REVIEW

The Second Circuit vacated the judgment of the district court and remanded the case for further proceedings

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[28] *Id.* ¶¶ 163-64.

[29] *Gulino v. Bd. of Educ.*, 460 F.3d 361, 382-88 (2d Cir. 2006) ("*Gulino III*").

[30] *Gulino III*, 460 F.3d at 387-88.

consistent with its opinion. Because the district court's erroneous factual conclusions formed the foundation of its Title VII liability ruling, the Second Circuit's opinion requires that the proceedings on remand involve both a review of these factual errors and the application of the proper legal standard to the new factual findings. Given the incomplete state of the record and the lack of finality in the judgment below, this matter is not properly before this Court for review. This Court has long stressed that the lack of finality "alone" provides "sufficient ground for the denial of the application [for a writ of certiorari]." *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). If the City were to have its way, the Court would be in the position of reviewing a question on which the writ were granted—*i.e.*, whether the City should be liable under Title VII for implementing a State law requirement with a significant disparate racial impact—despite the fact that the issue had never been the subject of an actual court judgment. *See Cal. v. Rooney*, 483 U.S. 307 (1987) (writ dismissed as improvidently granted).

Moreover, as the Second Circuit observed, the record before that court was unclear because the City had not put together a complete record of the proceedings below for review on appeal. The Second Circuit made plain that it was unable to determine whether the City's argument below—which is the same argument advanced to the Court—had been revised for the first time on appeal.

> We would be able to say with certainty whether [the City] had (or had not) raised this below if [the City] had included in the record on appeal the memorandum in support of its summary judgment motion. Regrettably, the several thousand page appendix contains no trace of the arguments made by [the City] below. This omission arguably violates federal appellate and local court rules, certainly wastes judicial resources, and is ill-advised in a record-intensive case raising numerous important issues on appeal.[31]

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[31] *Gulino III,* at 380 (citations omitted)

The City's failure to provide the courts with a complete record militates against certiorari at this juncture.

In the absence of a novel and important question of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, judicial efficiency would be best served by deferring review until rendition of the final judgment should the matter be deemed to present a basis for granted certiorari.[32]

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON ANY ISSUE IN THE CASE

This Petition is Petitioner's third effort to convince a court that it cannot be held liable as an employer under Title VII for the disparate impact of the LAST because it was merely following the dictates of state law, Petition ("Pet.") at 12, or because the Test is a state-mandated *licensing* examination unrelated to the City's exercise of its employment authority. *id.* These arguments, however, are no more compelling now than they were in the proceedings below. The Second Circuit's conclusions regarding Title VII's coverage of the circumstances at issue fall squarely within the parameters of this Court's decisional authority and are not in conflict with the findings of any other circuit.

A. The Second Circuit's Holding That Title VII Trumps Inconsistent State Law Is Consistent With That Of Every Court That Has Considered The Issue

As both the district court and the Second Circuit concluded, there is no room for doubt as to the City's status as Respondents' Title VII employer. Accordingly, the City does not now contest—nor did it contest below[33]—that it is

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[32] *See, e.g., Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964) (Court first denied certiorari after court of appeals set aside jury verdict and permitted a new trial only after a showing of additional evidence, and then granted certiorari after the lower courts subsequently declared the proffered evidence insufficient to warrant a new trial).

[33] *Gulino I,* 236 F. Supp. 2d at 334 & n.25.

Respondents' employer, rather it claims that it cannot be held responsible for its use of the Test or the Test's disparate impact because it was following the mandates of state law. Pet. at 11-12. This argument fails on both the law and the facts.

The City's argument that because the challenged Test is or was a State requirement, it cannot be liable for any harm flowing from its use is wholly undermined by the language of Title VII and settled decisional authority. Section 2000h-4 of Title VII states:

> Nothing contained in any title of this act shall be construed as . . . invalidating any provision of State law unless such provision is inconsistent with any of the purposes of the Act, or any provision thereof.

The Court has interpreted this provision as meaning that the strictures of Title VII trump conflicting state laws.[34] The statute simply does not shield the City from liability by virtue of the fact that the test it used was created by the State or even, ultimately by 1994, mandated to be used by the State. The principle is well established in preemption theory that where compliance with both the state and federal laws is impossible, or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" conflict preemption applies.[35]

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[34] See, e.g., *Cal. Fed. Sav's. and Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987) (Sections 2000e-7 and 2000h-4 of Title VII establish Congress's intent that state laws in conflict with Title VII regulation of employment practices be preempted).

[35] *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See, e.g., Guardians Ass'n*, 630 F.2d at 104-105 ("Title VII explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice"); *Kirkland v. N. Y. State Dep't of Correc. Serv.*, 552 F. Supp. 667, 675-76 (S.D.N.Y. 1982) ("[i]t is clear that state law must yield to federal law in a Title VII case"); *Hill v. Berkman*, 635 F. Supp. 1228, 1239 (E.D.N.Y. 1986) ("It is clear that state legislation in conflict with Title VII is void under the Supremacy Clause"), *overruled on other grounds, Roper v. Dep't of the*

B. The Second Circuit's Conclusion That As a Title VII Employer, The City Is Responsible For Its Use Of Discriminatory Tests Is

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Navy, 832 F.2d 247 (2d Cir. 1987); *U. S. v. Buffalo*, 457 F. Supp. 612, 630-31 n.20 (W.D.N.Y. 1978) (defense by City of Buffalo that State law mandated sex discrimination was not permitted under Title VII); *Williams v. Gen. Food Corp.*, 492 F.2d 399, 404 (7th Cir. 1974) ("It would have been incongruous for Congress to have intended a defense resulting in the perpetuation of discriminatory employment practices (even if based on state law) in a federal law designed to achieve equality of opportunity."). *Gulino III*, 460 F.3d at 380 (quoting Guardians IV, 630 F.2d at 105 (quoting 42 U.S.C. § 2000e-7)); *accord Guardians Ass'n of the N. Y. City Police Dep't, Inc. v. Civil Servants Comm'n of the City of N.Y.*, 630 F.2d 79, 105 (2d Cir. 1980), cert. denied, (452 U.S. 940 (1981) (state law requirement of rank order selection from scores on police hiring tests found to have disparate impact); *Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240, 246 (3d Cir. 1973) (state law requiring denial of certain jobs to women); *Newark Branch, NAACP v. City of Bayonne*, 134 F.3d 113 (3d Cir. 1998) (state residency requirement); *EEOC v. Allegheny County*, 705 F.2d 679, 682 (3d Cir. 1983) (rejecting state law which required an ADA violation); *Le Blanc v. S. Bell Tel. and Tel. Co.,* 333 F. Supp. 602, 608-09 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972), cert. denied 409 U.S. 990 (1972) (state law prohibiting employment of women in certain jobs); *EEOC v. Monarch Mach., Tool Co.*, 737 F.2d 1444, 1451-52 (6th Cir. 1984) (state law prohibiting paying women the same rate as men and denying women the right to work certain jobs); *Manning v. Int'l Union*, 466 F.2d 812, 815 (6th Cir. 1972), cert. denied, 466 U.S. 812 (1973) (state law prohibiting females from working at certain jobs); *Brown v. City of Chicago*, 8 F. Supp. 2d 1095, 1112 (N.D. Ill. 1998), affd. 200 F.3d 1092 (7th Cir. 2000) cert. denied, 531 U.S. 821 (2000) (state law requiring rank order selection from test scores on police promotional tests given by the employer); *Grann v. City of Madison*, 738 F.2d 786, 792 (7th Cir. 1984), cert. denied, 469 U.S. 918 (1984) (state law setting rates of female salaries in comparison to those of men); *Hays v. Potlach Forests, Inc.*, 465 F.2d 1081, 1082 (8th Cir. 1972) (sex discrimination case challenging employer's following state requirement setting overtime pay for women); *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971), 519 F.2d 527, 529 (9th Cir. 1975) (state law denying women the right to be hired into certain jobs involving physical skills and limiting the hours of work for women)

Consistent With Every Court That Has Considered The Issue

The City's second theory, that the testing program is a "licensing activity conducted outside of an employment context," Pet. at 11, is similarly unavailing. The decisions cited by the City as conflicting with that rendered by the Second Circuit here do not support the City's position. Rather, they stand solely for the proposition that a licensing agency having no employment relationship whatsoever with Title VII plaintiffs is not an employer within the meaning of the statute.[36]

The Tests at issue here were used as *de facto* civil-service examinations for public school personnel—not licensing tests—and courts routinely apply Title VII to civil service or state exams, the passage of which—like the Test here—is required exclusively for public employment.[37] Indeed, in other jurisdictions, where individual school districts have used teacher test scores like local civil service

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[36] *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1020 (5th Cir. 1990), cert denied, 498 U.S. 1026 (1991) (teacher licensing board not liable under Title VII because not an employer); *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975), cert denied, 426 U.S. 940 (1976) (rejects suit against licensing board because "Title VII does not apply by its terms, of course, because the Georgia Board of Bar Examiners is neither an 'employer,' an 'employment agency,' nor a 'labor organization' within the meaning of the statute"); *Woodward v. Va. Bd. of Bar Exam'rs*, 598 F.2d 1345, 1346 (4th Cir. 1979) ("The Board of Bar Examiners is neither an 'employer,' an 'employment agency' nor a 'labor organization' within the meaning of the Act"); *George v. N.J. Bd. of Veterinary Med. Exam'rs*, 794 F.2d 113 (3d Cir. 1986) (same); *Haddock v. Bd. of Dental Exam'rs of Cal.*, 777 F.2d 462, 463-64 (9th Cir. 1985) ("Title VII, by its own terms, does not apply to the Board of Dental Examiners...[because it] is neither an 'employer,' an 'employment agency,' nor a 'labor organization' within the meaning of the Act"); *Camacho v. P. R. Ports Auth.*, 369 F.3d 570, 578 (1st Cir. 2004) (Ports Authority not liable under Title VII was merely a licensing agency and not an employer).

[37] *See, e.g., Conn. v. Teal*, 457 U.S. 440 (1982); *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670, 696-97 (D. Md. 1979); *U.S. v. City of Yonkers*, 592 F. Supp. 570, 589-92 (S.D.N.Y. 1984).

exams to distinguish among individuals in hiring and compensation decisions—as the City has done here, the courts have not hesitated to apply Title VII.[38] There is no reason why the City's use of New York's flawed civil service exam should not likewise subject the City to Title VII liability. Consistent with this, despite the City's protestations to the contrary, other courts have routinely held that government agencies are subject to Title VII by virtue of their imposition of a discriminatory certification examination requirement upon teachers, and this principle has been applied to hold both state[39] and local[40] government agencies liable for the civil rights violation.

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[38] *See U.S. v. State of S.C.*, 445 F. Supp. 1094, 1097 (D.S.C. 1977), *aff'd sub nom. Nat'l Educ. Ass'n v. S.C.*, 434 U.S. 1026 (1978); *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240 (11th Cir. 1991); *Allen v. Ala. State Bd. of Educ.*, 976 F. Supp. 1410 (M.D. Ala. 1997), 983 F. Supp. 1084 (M.D. Ala. 1997), *aff'd.*, 164 F. 3d 1347 (11th Cir. 1999) (local school liable under Title VII for refusing to hire a teacher applicant on the basis of her failure to obtain a state license unlawful under a disparate impact theory); *Boston Chapter, NAACP, Inc. v. Beecher*, 371 F. Supp. 507 (D. Mass. 1974), *aff'd.*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (local fire department liable under Title VII for relying on state created civil service exam which had a disparate impact); *Bronze Shields, Inc., v. N.J. Dep't of Civil Servants*, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982) (same).

[39] *See, e.g., York v. Ala. State Bd. of Educ.*, 581 F. Supp. 779 (M.D. Ala. 1983) (certifying Title VII class action and issuing a preliminary injunction prohibiting the enforcement of a test requirement that had an adverse racial impact upon African American teachers); *Allen v. Ala. State Bd. of Educ.*, 190 F.R.D. 602 (M.D. Ala. 2000) (approving settlement of Title VII suit challenging Alabama's public school teacher certification process); *U.S. v. State of N.C.*, 400 F. Supp. 343 (E.D.N.C. 1975) (issuing injunction to preclude use of NTE as test used in violation of the Equal Protection Clause), *vacated*, 425 F. Supp. 789 (E.D.N.C. 1977); *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974) (desegregation suit successfully challenging Massachusetts' misuse of the NTE and its adverse impact), *aff'd*, 509 F.2d 580 (1st Cir. 1974); *Ga. Ass'n of Educators, Inc. v. Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976) (successful civil rights action against Georgia challenging examination requirement for teacher certification).

The City's argument fares no better upon review of the facts. In New York, teacher tests have never been licensing tests—they have simply never been used as a means to regulate an entire profession.[41] New York State Constitutional provisions, statutory enactments, and regulatory promulgations pertaining to the operation of the public school system do not apply to New York's *private* kindergarten, *private* elementary, and *private* secondary schools.[42] In particular, none of the provisions of the Education Law or the State Commissioner's regulations relating to the employment of teachers applies to private school teachers. Most notably, private school employees are not required by the State to possess credentials of any kind.[43] Passing the Test and obtaining State certification, are requirements *only* for employment in the public school system, not for private employment.[44] None of these facts have been—nor could be—challenged by the City. Moreover, as the record in this case makes undisputedly plain, hundreds (if not thousands) of teachers taught in City public schools during the period at issue despite having

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[40] *See, e.g., Fickling v. N.Y. Dep't of Civil Servants*, 1997 U.S. App LEXIS 5443 (2d Cir. 1997) (affirming judgment that found defendant county and defendant New York State Department of Civil Service jointly and severally liable for violating the Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, and N.Y. Exec. Law § 296); *Molnar v. Booth*, 229 F.3d 593, 605 (7th Cir. 2000) (affirming the imposition of attorneys' fees jointly and severally in a Title VII and § 1983 case, explaining that where defendants actively participate in a constitutional violation, they can be held jointly and severally responsible for indivisible attorneys' fees). *See also Stanley v. Darlington County Sch. Dist.*, 879 F. Supp. 1341 (D.S.C. 1995) (In a Title VI case, the court held that because the State actively participated in creating, maintaining, and perpetuating a dual school system, the District and its taxpayers should not alone be obligated to bear the entire burden of remedying the effects of state imposed segregation. The State is jointly responsible for the problem, and is jointly liable for the remedy), *reversed, in part, Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707 (4th Cir.1996).

[41] *See AMAE II*, 231 F.3d at 583-84.

[42] *See, e.g.*, Educ. Law § 3001 (requiring only public school teachers to meet the State's requirements for certification).

[43] *See* Educ. Law §§ 2569; 3001.

[44] Educ. Law §§ 3001; 3009; 3010.

never passed the Tests. For those teachers, the Test was used only to make employment decisions concerning the amount of their salary, their pensions, their seniority, and their other benefits.

As the Second Circuit's recounting of the history of teacher credentialing in New York shows, for many years the New York City Board of Education had the authority to set its own credentialing requirements for City public school teachers, with the sole limitation that City teachers had to meet minimum State qualifications.[45] In sum, the City's claims that it was rigidly constrained to follow the State's dictates, and that the testing program and its effects operated "outside of an employment context," Pet. at 11, simply are not supported by the facts. The City unequivocally maintained control over the use of the Tests as well as the employment consequences of teachers' failure to achieve a passing score.

III. THE STATE IS NO LONGER A PARTY AND CANNOT APPEAR BEFORE THE COURT AS SUCH

The principle is well established that an actual live controversy must be extant at all stages of certiorari review in order for the matter to meet the Court's Article III "case and controversy" requirements.[46] Where there is no longer a dispute between initially contesting parties—as is the situation here with regard to the New York State Education Department and the Plaintiff class in the wake of the Second Circuit's dismissal of the State from the case—Article III limits the power of the courts to entertain that aspect of the matter further.[47] For the same reason, Article III standing rules presumably would preclude the State's

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[45] *Gulino III*, 460 F.3d at 366-67.

[46] *See Preiser v. Newkirk*, 422 U.S.395, 401 (1975); *Defunis v. Odegaard*, 416 U.S. 312, 319 (1974).

[47] As a general proposition, this Court has steadfastly refused to divert from the principle that "the successful party below has no standing to appeal" from a judgment in that party's favor. *Pub. Serv. Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939).

participation in the proceeding before this Court because it lacks a present stake in the outcome.[48]

Finally, Rule 12 of the Rules of this Court indicates that only parties may participate in the party briefing for review on certiorari. The language of Rule 12.4 providing that "[a]ll *parties* other than petitioners shall be respondents," does not appear to contemplate the participation as respondents of litigants dismissed out of the case. For these reasons, the Court should refuse the State's submission in this matter.

CONCLUSION

For all of the foregoing reasons, Respondents urge the Court to deny the petition.

Respectfully submitted,

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[48] *See Josiah Bunting, III v. Mellen*, 541 U.S. 1019 (2004) (denying petition for a writ of certiorari).