No. 08-328

In The

SUPREME COURT OF THE UNITED STATES

FRANK RICCI, *et al.*

Petitioners,

v.

JOHN DeSTEFANO, *et al.*,

Respondents.

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

AMICUS BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS, THE CENTER FOR EQUAL OPPORTUNITY, AND THE AMERICAN CIVIL RIGHTS INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

For the purposes of Title VII and the Equal Protection Clause, does a state employer's refusal to take a required step for the hiring of a person because of that person's race constitute intentional racial discrimination if the refusal was based upon the employer's various concerns about the racial balance in the employer's work force?

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INTEREST OF AMICI CURIAE[1]

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in this Court. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government. *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The Center for Equal Opportunity and the American Civil Rights Institute are nonprofit research, education, and public advocacy organizations. These *amici* devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society, and publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. These *amici* also have participated as

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[1] This brief is filed with written statements from all parties that they either consent to, or do not oppose, the filing of this brief. Counsel of record for all parties received notice prior to the due date of these *amici curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case.

CIR filed an *amicus* brief in the Second Circuit. One of the arguments in that *amicus* brief – *viz.*, whether the district court erred by analyzing the evidence through the prism of the burden-shifting mechanism of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), rather than the mixed-motives analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1973) – was mentioned by a number of the Second Circuit judges after judgment was issued, in various decisions concurring with, and dissenting from, the decision to deny *en banc* rehearing. *Ricci v. DeStefano*, 530 F.3d 88, 91 (2d Cir. 2008) (Parker, J., concurring) ("As the dissent is well aware, the plaintiffs did not argue the mixed-motive theory; a non-party raised it in an amicus brief."); *id.* at 89 (Calabresi, J., concurring) (Judge Cabranes "would be precisely right [in arguing that the district court and the circuit panel should have considered whether defendants were influenced by mixed motives] . . . except for the fact that that type of analysis is not available to us in this case . . . [because] [t]he parties did not present a mixed motive argument.") (brackets and second ellipsis added); *id.* at 92 n.2 (Jacobs, J., dissenting) (rejecting the proposition that the court cannot consider matters not presented by the parties as "unsound"); *id.* at 100 (Cabranes, J., dissenting).

As shown below, while *amici* here believe that *Price Waterhouse* presents the correct paradigm for analyzing the facts here, it makes much less difference than the back-and-forth by the judges in the court below over the propriety of considering that argument might suggest.

STATEMENT

Amici adopt the recitation of facts in the petition. We add only this about the proceedings in the courts below.

Despite the brevity of its opinion, and its assertion that it was basing its conclusion on the rationale provided by the district court, the per curiam opinion of the circuit panel implied a rationale for affirming the judgment of the district court quite distinct from the one given by the district court itself. Specifically, the panel asserted that "the [New Haven Civil Service] Board . . . was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact." *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008); *see also Ricci v. DeStefano*, 530 F.3d at 90 (Parker, J., concurring) (stating that Second Circuit authorities stand for the proposition that "a public employer, faced with a *prima facie* case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions *to avoid such liability*") (emphasis added).

The panel's suggestion that compliance with Title VII was the *only* rationale (or even the primary one) for the decision of the New Haven Civil Service Board (the "Board") to refuse certification of the exam test results is simply not supported by the district court's opinion. That opinion freely admitted the existence of evidence of *other* motivations. *E.g.*, *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008):

> Plaintiffs' evidence -- and defendants' own arguments -- show that the City's reasons for advocating non-certification were related to the racial distribution of the results. As the transcripts show, a number of witnesses at the CSB hearings, including Kimber, mentioned "diversity" as a compelling goal of the promotional process. Ude, Marcano, and Burgett specifically urged the CSB not to certify the results because, given the number of vacancies at that time, no African-Americans would be eligible for promotion to either Lieutenant or Captain, and no Latinos would be eligible for promotion to Captain. They believed this to be an undesirable outcome that could subject the City to Title VII litigation by minority firefighters, and the City's leadership to political consequences.

> Had the tests not yielded what defendants perceived as racially disparate results, defendants would not have advocated rejecting the tests, and plaintiffs would have had an opportunity to be promoted.

Id. at 162:

> [Defendants] acted based on the following concerns: that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend.

As petitioners' brief shows, these are somewhat euphemistic descriptions of defendants' concerns – especially on summary judgment, when the evidence is considered with all disputes and inferences favoring plaintiffs. But even accepting the district court's descriptions at face value, it did *not* suggest that the Board's *only* purpose was to avoid Title VII liability. *Ricci v. DeStefano*, 554 F.

Supp. 2d at 152 ("A jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted were the lists to be certified."). Rather, the district court held that these other motivations were irrelevant as a matter of law. *Id.* at 160 ("Defendants' motivation to avoid making promotions based on a test with a racially disparate impact, *even in a political context*, does not, *as a matter of law*, constitute discriminatory intent, and therefore such evidence is insufficient for plaintiffs to prevail on their Title VII claim"); *id.* at 162 (rejecting Equal Protection Clause claim because "[n]one of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took the . . . exams").

The gist of the district court's opinion, then, was that plaintiffs' evidence of defendants' desire to avoid a substantially white promotion cadre for political or other reasons simply did not prove intentional discrimination in violation of either Title VII or the Equal Protection Clause. In affirming the district court's judgment based upon "the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below," *Ricci v. DeStefano*, 530 F.3d at 87, the circuit court adopted that reasoning. Any different reasoning suggested by the circuit court in its very short per curiam affirmance must be deemed *dicta*.

REASONS FOR GRANTING THE PETITION

The questions raised by fact patterns where employers are confronted with selection devices with disparate impacts are difficult ones. Under Title VII, a selection device that has disparate impact against any racial group could conceivably lead to liability if it is not justified by business necessity. On the other hand, permitting employers to refuse to hire applicants who were successful on the selection device because of their race when the employers have no real fear of any liability – that is, using the disparate impact of the selection device as a pretext to engage in a race-motivated refusal to hire – is the kind of discrimination that both Title VII and (for state employers) the Equal Protection Clause are meant to forbid.

The rule adopted by the courts below avoids all of the difficulties. It holds that an employer is *never* liable in this situation provided it does not use explicit racial classifications. That is, even where the employer has no real fear of any liability, it may engage in flagrantly race-motivated conduct to "remedy" any disparate impact, provided it does not use explicit racial classifications. None of it supposedly constitutes "intentional discrimination." This remarkable interpretation of both Title VII and the Equal Protection Clause creates a circuit split and deserves this Court's attention.

I. THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO CLARIFY WHAT REASONS FOR AN EMPLOYMENT DECISION CONSTITUTE "INTENTIONAL DISCRIMINATION" AND WHICH CONSTITUTE "LEGITIMATE" AND "NON-DISCRIMINATORY" REASONS

As the district court's own opinion demonstrates, there was evidence from which a reasonable juror could conclude that defendants were motivated by concerns other than potential compliance with, or liability under, Title VII. Thus, assuming that concern with Title VII liability was a legitimate and non-discriminatory reason for the action taken, this was a mixed-motives case, as in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Cf.* 42 U.S.C. § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice").

But although the district court should have used the *Price Waterhouse* burden-shifting mechanism, because race was a motivating factor in defendants' decision, the district court's ultimate determination was that *none* of the reasons proffered by plaintiff – all of which had nothing to do with avoiding Title VII liability – was sufficient to show intentional discrimination. Proving intentional discrimination is the ultimate

burden that a plaintiff must show under the *McDonnell Douglas* burden-shifting paradigm. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 508 (1993) (plaintiff retains ultimate burden of showing "that race was" the reason for the employment action). That is, had the court actually used the *Price Waterhouse* mechanism, it most likely would have (erroneously, in *amici*'s view) held that plaintiffs had not met their initial burden of showing that race was a motivating factor.

The ultimate question raised by the judgments of the court below, then, is whether the reasons attributed to defendants are sufficient to show that race was a motivating factor (as in *Price Waterhouse* or § 703(m)) and/or the reason (as in *St. Mary's Honor Center v. Hicks*) for defendants' actions. Conversely, one might ask whether the reasons attributed to defendants were "legitimate" and "non-discriminatory."

This Court has never defined in great detail what is needed for a reason to constitute "intentional discrimination," or, conversely, for a reason to be "legitimate" and/or "non-discriminatory." The plurality in *Price Waterhouse* stated that disparate treatment (*i.e.*, intentional discrimination) had been shown if a prohibited factor was made relevant to an employment decision. *Price Waterhouse*, 490 U.S. at 239 (plurality op.) ("In passing Title VII, Congress made the simple but momentous announcement

that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees"); *id.* at 240 (plurality op.) ("We take these words to mean that gender must be irrelevant to employment decisions"); *id.* at 242 ("We conclude . . . that Congress meant to obligate [a Title VII plaintiff] to prove that the employer relied upon sex-based considerations in coming to its decision"). The statute's use of the phrase "motivating factor" (in Section 703(m)) requires a similar conclusion.

A consideration does not avoid falling under the rubric of being "race-based" simply because there are non-racial consequences that would flow from hiring persons of a particular race – the loss of business from racists, co-employee dissatisfaction or departures, political consequences, etc. One analogy can be provided by the circuit courts' having generally rejected claims that "customer preference" constitutes legitimate business justifications, perhaps most famously in cases in which airlines tried to justify a preference for female flight attendants by claiming that their customers preferred them. *E.g.*, *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971) (sex was not a bona fide occupational qualification for flight attendant notwithstanding lower court's finding that passengers "overwhelmingly preferred to be served

by female stewardesses").[2]

Of course, in some sense, "customer preference" is a non-discriminatory rationale for an employer's action, since failing to adhere to "customer preferences" will lead to a decline in business. The loss of money – a substantial part of the motivation for avoiding a lawsuit under Title VII as well – surely can be seen as a legitimate and non-discriminatory business concern. But when the "customer preference" is for discrimination, an employer cannot rely on it as a legitimate and non-discriminatory business justification, regardless of the economic consequences.

Here, moreover, the district court found several reasons *aside* from concerns about liability under Title VII: defendants were concerned that hiring plaintiffs would "undermine their goal of diversity in the Fire Department"; "would fail to develop managerial role models for aspiring firefighters"; and "would subject the City to public criticism." *Ricci v. DeStefano*, 554 F. Supp. 2d at 162. But each of these concerns is directly related

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[2] *Diaz* actually considered whether sex was a bona fide occupational qualification. But that only demonstrates that there could be no dispute that "customer preference" was not a "non-discriminatory" reason for the defendants' policies of making employment decisions influenced by an employee's sex. The BFOQ inquiry is made only after a determination that the defendant has engaged in intentional discrimination.

to plaintiffs' race, and thus constitute racial considerations that would support a finding of intentional race discrimination.

Indeed, the first two of these rationales have been considered as possible compelling governmental interests (albeit in the educational context only). *Grutter v. Bollinger*, 539 U.S. 306 (2003) (diversity in higher education was a compelling governmental interest); *Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 276 (1986) (plurality opinion) (rejecting role model theory as compelling governmental interest for race-conscious school teacher layoffs). The important point here is that questions like "strict scrutiny" and "compelling governmental interest" are only reached *as a justification for intentional discrimination*. *E.g.*, *Wisconsin v. City of New York*, 517 U.S. 1, 18 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government"). And the third rationale (avoiding "public criticism") is nearly indistinguishable from the "customer preference" rationale discussed above.

II. THE RULE SET DOWN BY THE COURTS BELOW – THAT ALL "FACIALLY NEUTRAL" ACTION TO REMEDY A DISPARATE IMPACT IS NOT INTENTIONAL DISCRIMINATION – IS INCONSISTENT WITH THIS COURT'S JURISPRUDENCE, CREATES A CIRCUIT SPLIT, AND MAKES VERY LITTLE SENSE

The courts below avoided this problem – and the difficult problem of sifting through defendants' disparate motivations, which surely should have been addressed by the trier of fact at a trial – by declaring *all* of defendants' motivations legitimate and non-discriminatory. Specifically, they applied the following rule: "'nothing . . . precludes the use of race-neutral means to improve racial and gender representation . . . . [T]he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.'" *Ricci*, 554 F. Supp. 2d at 158-59 (*quoting Hayden v. County of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999)). *Id.* at 160 (avoiding promotions from a test with disparate impact "does not, as a matter of law, constitute discriminatory intent").

By "race neutral," the courts below mean *only* actions that do not create explicit racial classifications. (Race must obviously be a motivation if one is trying to remedy a racially disparate impact.) *E.g.*, *Ricci v. DeStefano*, 530

F.3d at 90 (Parker, J., concurring) (referring to "facially neutral, albeit race-conscious" actions). But, if taken seriously, this means that defendants could have decided to only consider applicants with "even" list numbers (2, 4, 6, etc.) on the certification list if they concluded that that would increase the proportion of minorities in the pool of eligible applicants.

Similarly, were the Second Circuit's rule the law, colleges and professional schools would need worry no longer about inconvenient precedents like *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Instead of adding points for minority applicants (as in *Gratz*) or creating a special admissions program for them (as in *Bakke*), those institutions could simply add an irrelevant admissions criterion that they believed minorities would do well in – say the 50-yard backstroke. Since that would be a "facially neutral" albeit racially-motivated criteria, and it would improve the disparate impact resulting from the use of standardized admission tests (*see* 28 C.F.R. § 42.104(b)(2)), it would not even constitute "intentional discrimination." Most counterintuitively, then, the Second Circuit's rule would lead to the conclusion that such conduct could not possibly violate the Equal Protection Clause, since it requires intent. *Washington v. Davis*, 426 U.S. 229 (1976).

In analyzing this rule, it deserves emphasis

that most of the conduct prohibited under Title VII – firing, hiring, or promoting decisions motivated by race (or other prohibited factors) but without an explicit racial (or other) classification – falls under the Second Circuit's classification of "facially neutral." It is most odd, then, that what would obviously be "intentional discrimination" in most contexts, falls, in the context of ameliorating the disparate impact of selection devices, completely outside the rubric of "intentional discrimination."[3]

To put the point another way, the peculiar definition of "intentional discrimination" adopted by the courts below only applies if there is a selection device with disparate impact. If an employer takes "facially neutral" acts to manipulate the racial results of an employment process in *any other context* -- if, for example, the selection device does not have disparate impact but the employer is still dissatisfied with the racial results for reasons of public relations -- then those "facially neutral" acts are deemed a form of intentional discrimination.

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[3] In this regard, the courts below seemed to take comfort from the fact that "all applicants took the same test, and the result was the same for all because the test results were disregarded and nobody was promoted." *Ricci*, 554 F. Supp. 2d at 161. True enough – just as it is true that if two candidates are not hired, one because of her race and the other because she is not qualified, they are, in some sense, being treated the "same." But the first has been subjected to racial discrimination, and the second has not.

Further, the distinction between "explicit racial classifications" and "facially neutral but race motivated" decisions is one that may depend upon how the employer chooses to characterize its actions, rather than any important difference in substance. If the employer announces that it will hire those with list numbers divisible by five, and the reason it is doing so is to have three whites and two non-whites hired, that is a "facially neutral but race-motivated" remedy to disparate impact. If it announces that it will hire the top three scoring whites and the top two scoring non-whites, then it presumably has created an explicit racial classification.

The courts below misconstrued the "intent" requirement of the Equal Protection Clause and Title VII because they equated it with either (a) an express racial classification or (b) some kind of malevolent motivation against whites. Just after listing the defendants' various motives – including the goal of "diversity in the Fire Department" and avoiding "public criticism" – the district court held that "*[n]one* of the defendants' expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took the Lieutenant and Captain exams." *Ricci*, 554 F. Supp. 2d at 162 (emphasis added). This interpretation of "animus" is contrary to the interpretation this Court has given that word in Title VII and other civil rights laws. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-70 (1993):

> We do not think that the "animus" requirement [in Section 1985(3)] can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex* – for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women *because they are women* from a combative, aggressive profession such as the practice of law. (emphasis in original)

Cf. Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers Of America v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (policy of excluding women capable of becoming pregnant from jobs involving exposure to lead violated Title VII; "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668 (1987) (Section 1981 liability found against unions for failing to pursue claims of racial discrimination on the part of their members even though "there was no suggestion

below that the [u]nions held any racial animus against or denigrated blacks generally"); *id.* at 669 (affirming lower court finding that a union is liable under Section 1981 "regardless of whether . . . its leaders were favorably disposed toward minorities"). *Cf. Bakke*, 438 U.S. at 307 (opinion of Powell, J.):

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

The Second Circuit's requirement that the Equal Protection Clause requires this kind of "animus" also creates a circuit split with the Tenth Circuit. *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (McConnell, J.) (holding that scholarship program for students attending any accredited college in the state, where state refused to give scholarships to students attending certain schools deemed "pervasively sectarian," violated the Equal Protection Clause):

> Finally, the state defendants argue

> that they may discriminate in favor of some religions and against others so long as their discrimination is not based on "animus" against religion – by which they mean religious "bigotry" . . . There is no support for this in any Supreme Court decision, or any of the historical materials bearing on our heritage of religious liberty. Even in the context of race, where the nondiscrimination norm is most vigilantly enforced, the Court has never required proof of discriminatory animus, hatred, or bigotry. The "intent to discriminate" forbidden under the Equal Protection Clause is merely the intent to treat differently.

By requiring either an explicit racial classification or a malevolent motive as a prerequisite to a finding of "intentional discrimination," the Second Circuit created an aberrational rule out of step with this Court's and other circuits' case law. It deserves the review of this Court.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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