No. 07-

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 other similarly situated,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the Courts have heretofore been unanimous in holding that licensing activity conducted outside the scope of an employer/employee relationship does not incur liability under Title VII, and where the Petitioner school district complies with State law by honoring state licensing examination requirements that Petitioner neither devises, implements, nor administers, and as to which Petitioner has no discretion, and where the challenged licensing test does not measure attributes appropriate to hiring decisions, did the Second Circuit err and create a split with other Circuits by holding that because Petitioner otherwise functions as the employer of New York City public school teachers, its compliance with challenged State licensing requirements subjects it to liability under Title VII?

PARTIES TO THE PROCEEDING

New York State Education Department, a party below, is being served as a respondent.

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The judgment of the United States Court of Appeals for the Second Circuit from which Petitioner seeks certiorari was decided on August 17, 2006. The opinion is reported at 460 F.3d 361 (2nd Cir. 2006), 2006 U.S. App. LEXIS 21297, and appears in the appendix at page 1a. Petitioner filed a petition for rehearing en banc. The Second Circuit denied that petition, which denial was entered on May 30, 2007. It appears in the Appendix to this Petition ("Appendix") at page 123a.

On September 4, 2004, following trial, the United States District Court for the Southern District of New York (Motley, U.S.D.J.) found for petitioners. That opinion is reported at 2003 U.S. Dist. LEXIS 27325. It appears in the Appendix at page 57a.

JURISDICTION

The Second Circuit issued its decree on August 17, 2006 (1a).[1] The Second Circuit then issued an order denying rehearing en banc on May 30, 2007 (123a). This Court has jurisdiction to review this judgment under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A. Nature of Case

On November 8, 1996, plaintiffs brought a class action against Petitioner New York City Board of Education

[1] Parenthesized numbers followed by the letter "a" refer to pages of the Appendix of this Petition for a Writ of Certiorari,

("Petitioner" or "BOE") challenging the New York State law requirement that BOE was required to hire public school teachers from a pool of State licensed applicants who had passed certain statewide licensing examinations created, validated, and administered by the New York State Department of Education ("SED"). Plaintiffs asserted that statistical evidence showed an unintentional disparate impact in test pass rates for African-American and Latino teachers taking the tests, alleged that SED was liable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, for establishing and administering these statewide licensing requirements, and that BOE was liable under Title VII for complying with State law requiring that local school districts hire teachers solely from pools of state licensed applicants. The District Court subsequently certified a plaintiff class consisting of African-American or Latino New York City public school teachers who either: (1) allegedly lost their New York City teacher's license and appointment as a regular teacher because of their failure to pass either of the two tests at issue, depending on the time frame, namely the NTE Core Battery Test ("NTE") or the Liberal Arts and Science Test ("LAST"); or (2) allegedly were unable to obtain or were delayed in obtaining a New York City license and regular appointment because they failed to pass either test.

B. Statement of Relevant Facts

There are 696 local school districts in New York State, of which the New York City district is one. Public school teachers in New York State are employed by these individual local school districts (5a-7a). The State, through the SED, exercises a licensing function by establishing minimum professional standards for public school teachers, thus

certifying that persons applying for jobs with local districts have attained at least the minimum degree of competency necessary to protect the public welfare (4a). These certification requirements apply to persons seeking to become or remain public school teachers anywhere in New York State. As regards New York City teachers, BOE is required to follow State law and to select from and hire only State-licensed applicants. N.Y. Education Law § 3001. Upon being hired, a BOE teacher may then be issued a City license, which is distinct from the State certification/licensing process.

Many members of the plaintiff class began working for BOE in the 1980s, at a time when the now-defunct Board of Examiners was BOE's licensing arm. At that time, a qualified applicant for teaching positions in New York City was given a conditional license by the Board of Examiners, provided he or she met "minimum requirements," and the individual then had five years to meet "maximum requirements." The license itself indicated that it was conditional and that it was subject to the holder's meeting minimum and maximum requirements by a date certain. Tr. at 230, 238, 868; Plaintiffs' Exhibit 1 at 5.[2]

At the end of the five-year period, if the maximum requirements had not been met, the license would terminate, although the individual could continue teaching under a valid substitute teachers' license, which had less stringent maximum requirements. Because of severe staffing shortages, particularly in certain subject areas and certain districts within New York City, substitute teachers may work as many hours

[2] Citations that are not followed by "a" refer to the record that was before the Second Circuit on appeal. "Tr." refers to the transcript of the trial in the District Court.

as regular teachers who have met all licensing requirements, including maximum requirements and certification requirements. Tr. at 239, 247-48, 926, 956, 1667

In 1984, the State began requiring that an individual pass the NTE as a condition for State certification. Because the City had separate licensing authority, City teachers were not required to be state certified, but BOE adopted the NTE to meet its substantial equivalency requirement. BOE and the State subsequently agreed that, because of staffing shortages in the City, BOE teachers would be given up to five years to achieve a passing score on this test. In addition, persons who had obtained a conditional New York City license, or a substitute's license, but did not obtain a full license because they had not passed the NTE could work as substitute teachers. SED Exhibit 17; BOE Exhibit N; Tr. at 1732.

In 1993, the SED began phasing out the NTE as a certification exam, and began phasing in the LAST in its stead. Since September 1996, the SED no longer uses NTE, and employs the LAST exclusively. Tr. at 2316.

During the 1980's, there were essentially two methods to obtain a valid New York City conditional teachers' license. First, a candidate could take an "open" examination, for which anyone who met the minimum requirements was eligible, and which consisted of a written English examination, multiple choice questions, and an oral interview. The alternative method to be a licensed teacher in New York City was to take and pass the "closed" examination, which consisted only of an oral interview, and which was open only to those who had given two or more years of satisfactory service as a substitute teacher. The closed examination was a creation of the State legislature in 1986,

and has since been repealed. Tr. 917-18, 1653-54. Chapter 572 of the Laws of New York, 1986, N.Y. Education Law § 2569-f.

Under the closed exam law, teachers who failed to attain maximum requirements in the five-year period, but who had initially obtained the City license via the open examination, were eligible to have their license restored. The statute, however, provided that persons who obtained the initial license through the closed examination were not eligible to have that license restored if it took them more than five years to attain maximum requirements. Tr. at 235-40, 918-19, 922-25.

The Board of Examiners was abolished by statute, effective January 1, 1991. At that point, BOE created a unit known as the Office of Professional Recruitment Assessment and Licensing to oversee City licensing issues. Tr. at 980, 1997.

The 1991 law also mandated that persons who were hired to perform services as a teacher in New York City had to have both State certification and a valid City license. Prior to the 1991 law, a person could teach in New York City with only a City license; State certification was not required. Even after 1991, however, it remained that a person who had a City license but lacked State certification could be maintained as a full-time substitute. Although substitutes may work the same hours as regular teachers, the contract between the United Federation of Teachers and BOE limits the salaries a substitute can receive. Tr. at 214-15, 242, 925 SED Exhibit 58(c)

Some of the plaintiffs aver that they had received regular New York City teaching licenses, but, because they failed to pass the NTE and/or the LAST those licenses were terminated and they were essentially "demoted" to the substitute position. Additionally, some plaintiffs allege that, although they were permitted to work as substitutes in New York City, they were precluded from obtaining regular teaching positions because they were unable to pass either the NTE or the LAST.

Neither the SED nor BOE placed any limits on the number of times a candidate or teacher could take the NTE or the LAST. Tr. at 1736-37; Tr. at 952. The NTE was available to be taken at least three times a year, and the LAST was available four times a year at first, then up to six times a year. Tr. at 1756. Neither the SED nor BOE would know if a reported score on the NTE was the teacher's first time taking the test, or from a subsequent time. Tr. at 1738. At the same time, candidates taking the NTE were given score sheets that gave them an indication of their strengths and weaknesses on the test, so they could prepare better for the next time they took the test. Tr. at 1955; SED Exhibit 36.

The SED set the passing score on both the NTE and the LAST. Tr. at 1965; Tr. at 949-50; Tr., at 1008, 1009. With respect to the NTE, the SED set the passing score lower than had been recommended in the validation study performed by Educational Testing Service, the test developer, specifically for use of tests in New York State. Tr. at 2306-07.

The LAST has been given by SED and National Evaluation Systems ("NES"), a contract test developer, since 1993. The test is administered and scored under the

supervision of SED, without any involvement by BOE. Tr. at 2674-75, 2697, 2777-78, 2800-01, 2824, 2852, SED Exhibits 496-503, 630-678, 8000. It consists of 80 multiple choice questions, 64 of which are scored, and one essay question designed to assess reading comprehension, writing skill, and analytical ability in the areas of mathematics, science and the liberal arts. SED Exhibit 485; SED Exhibits 606-629.[3] The essay portion of the test counts for 20 percent of the candidate's final score. Tr. at 2766. The SED and NES review scores after every administration of the LAST for purposes of doing an item review so that potentially inappropriate items can be removed from the test. Tr. at 2866-67.

C. Federal Jurisdiction of District Court

The District Court had jurisdiction of the original action herein pursuant to 42 U.S.C. §§ 2000e-2000e-17.

D. District Court's Opinion

Following a bench trial that extended over five months and resulted in 3,600 pages of trial transcript and the introduction of approximately 800 exhibits, many of which were in excess of 50 or even 100 pages in length, the United States District Court for the Southern District of New York, by order dated September 4, 2003, found in favor of the defendants (57a).

Although the District Court concluded that the tests in question have a disparate impact, the Court held that although defendants had demonstrated the formal validity of the NTE

[3] SED Exs. 606-629 were sealed by order of the District Court.

and had "shown that the LAST is manifestly related to the legitimate educational goals enunciated by SED" (120a).

With regard to the LAST, the District Court opined that "under the disparate impact standard enunciated by the Second Circuit in the 1970s and 1980s in relation to challenges to standardized testing – namely, formal validity," defendants would have failed to meet their burden of showing that the test is job-related. However, applying the standard enunciated in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) — which states that "employers are not required, even when defending standardized or objective tests, to introduce formal 'validation studies' showing that particular criteria predict actual on-the–job performance," — the District Court held that the LAST is manifestly related to the job of a New York City teacher (119a-120a).

The District Court also held that plaintiffs had failed to meet their burden of "offer[ing] a cost effective, practical alternative to the tests used by defendants in certifying teachers" (121a).

E. The Opinion of the United States Court of Appeals for the Second Circuit

By opinion and order (one paper) dated August 17, 2006, the U.S. Court of Appeals for the Second Circuit vacated the District Court's judgment and remanded the case for further proceedings (1a). The Second Circuit also dismissed the case as to SED on the ground that the State body is not the plaintiffs' employer and, consequently, cannot be liable under Title VII.

The opinion held, however, that BOE remains potentially liable in this action under Title VII. In the Second Circuit's opinion, cases holding that licensing activity, conducted outside of an employment context, does not fall within the ambit of Title VII do not apply to BOE because that body functions as plaintiffs' employer. The Second Circuit's analysis does not explain why BOE should be liable under Title VII for compliance with State law requiring a licensing test that BOE does not control or administer and that exists completely outside the scope of BOE's employment authority (39a-41a.).

The Second Circuit also considered the question of whether the LAST is job-related, in which case it would not violate Title VII. Without making any reference to the fact that the LAST is undisputedly a licensing rather than an employment test, the Second Circuit, citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 432 (1975), held to be applicable the rule that "employers have been given explicit permission to use job related tests that have a disparate impact, but those tests must be 'demonstrably a reasonable measure of job performance'" (44a-45a). The Second Circuit further looked to the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedure" ("EEOC Guidelines"), finding it to be "the most important source of guidance" (45a-47a). The EEOC Guidelines posit a distinction between tests that measure "content" (the "knowledges, skills, or abilities" required by a job) and those that measure "constructs" ("mental processes or traits, such as 'intelligence, aptitude, personality, commonsense, judgment, leadership and spatial ability.'"[4])

[4] The EEOC Guidelines quote from 29 C.F.R. § 1607.

Having set forth these separate areas of inquiry, the Second Circuit stated: "Consistent with a practical approach to test validation, one should not draw too bright a line between content and construct" (47a). The Second Circuit opined further: "Common experience tells us that jobs require, and employers should be able to test, a range of abilities, and we must adapt our inquiry to the realities of the testing process" (48a). Based on these considerations, the Second Circuit found the appropriate standard to be the five-part test for employment set forth in *Guardians Assoc. of New York City Police Dept. v. Civil Service Commission of City of New York*, 630 F.2d 79 (2nd Cir.1980), which employs the following criteria, *id.* at 95:

> (1) The test-makers must have conducted a suitable job analysis[;] (2) they must have used reasonable competence in constructing the test itself[;] (3) the content of the test must be related to the content of the job . . . [;] (4) the content of the test must be representative of the content of the job[;] and there must be) (5) a scoring system that usefully selects from among the applicants those who can better perform the job.

The Second Circuit further held that the District Court committed legal error by employing instead the standard articulated in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988), under which it is not necessary that the test predict actual on-the-job performance (49a-51a).

The Second Circuit also cited factual errors purportedly committed by the District Court but not relevant to the instant Petition (52a-54a).

It concluded its opinion by holding out the possibility that, despite the "pervasive lack of documentation" cited by the District Court, BOE might be able to meet the *Guardians* standard by means of "first-hand accounts of those involved in the validation process, as well as the studied opinions of certified experts" (55a), Accordingly, the Second Circuit vacated the judgment of the District Court and remanded for further proceedings consistent with the opinion.

F. BOE Petition for Rehearing En Banc.

Following the Second Circuit decision, the BOE filed a petition for rehearing en banc, dated August 31, 2006. The petition noted that the LAST is undisputedly a licensing examination rather than an employment test and argued that BOE's compliance with the State's licensing requirements has no connection with BOE's role as an employer. The petition further pointed to the conflict between the Second Circuit decision and the otherwise unanimous judicial consensus holding that licensing activity conducted outside of an employment context does not support a claim under Title VII.

By amended order entered on May 30, 2007, the Second Circuit denied the petition for rehearing (123a).

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case shatters a consensus among the Circuits, which have heretofore unanimously held that licensing activity conducted outside of an employment context does not give rise to a cause of action under Title VII. The decision, moreover, stands in conflict with this Court's holding that it is not appropriate to

apply Title VII's validation standards to other contexts. Finally, a broad reading of the Second Circuit's unwarranted application of Title VII to licensing procedures for teachers potentially sets the stage for challenges under Title VII to all sorts of licensing tests to which that federal statute was never meant to apply.

The Second Circuit's holdings with regard to BOE's potential liability in this case and the standard to be employed with regard to licensing all flow from the undue weight given by the Second Circuit to the fact the BOE, separate and apart from its obligation to comply with State licensing requirements, serves as the employer of all New York City public school teachers. From that fact, the Second Circuit seems to have concluded that because BOE is required to hire from a pool of State-licensed teachers who have passed the LAST, the examination is an employment test rather than a licensing test and that BOE, in its capacity as the teachers' employer, is subject to Title VII liability in this case.

By failing to address the fact that the BOE's obligation to comply with State licensing requirements is separate from its status as employer, the Court's opinion stands at odds with the substantial body of case law holding that state-mandated licensing activity, when separate from employment authority, does not support a claim under Title VII. We have found no case in which Title VII's validation standards have been held applicable to a state-mandated licensing test when the state itself was not deemed the plaintiff's employer. To the contrary, federal case law is unanimous in holding that licensing activity, when not part of some broader control exerted by the licenser over licensees, does not give rise to a cause of action under Title VII. *See Fields v. Hallsville Independent School District*, 906 F.2d 1017 (5th Cir. 1990)

(Title VII does not apply to State certification exam administered to Texas teachers); *George v. New Jersey Bd. Of Veterinary Medical Examiners*, 794 F.2d 113 (3d Cir. 1986) (Title VII does not apply to New Jersey veterinary license); *Haddock v. Bd. Of Dental Examiners of California*, 777 F.2d 462, 464 (9th Cir. 1985) (Title VII "is not intended to apply to the kind of licensing activity in which the Board [of Dental Examiners] engages"; "history [of bill deleting from Title VII exemption for state government employers] is barren of any reference to state licensing agencies or the many persons licensed by them"); *Woodard v. Virginia Bd. Of Bar Examiners*, 598 F.2d 1345 (4th Cir. 1979) (Title VII does not apply to bar examination); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975) (Title VII does not apply to the Georgia bar examination); *see also Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570, 578 (1st Cir. 2004) ("under . . . Title VII, . . . state licensing and regulatory agencies generally are not regarded as employers vis-à-vis those whom they license and regulate"). Challenges to state licensing tests arise solely under 42 U.S.C. § 1983 and the Fourteenth Amendment. *See, e.g., Haddock, supra*, 777 F.2d 462 (9th Cir. 1985).

The Second Circuit, however, held that BOE is distinguishable from agencies, such as those with licensing power in the cases just cited, "that were *merely* licensing entities, unlike BOE which acts as plaintiffs' 'employer' in the word's ordinary meaning" [italics in original] (40a). The flaw in this reasoning is that BOE does not administer the LAST. The cases indicate that in order to be subject to Title VII, the agencies involved would have to possess a dual authority both as a licenser and as an employer. The administering of LAST by the State is neither a reflection nor an extension of the power exercised by BOE as an

employer. It is a function over which BOE has no power or discretion.

It is instructive to contrast BOE with the California Commission on Teacher Credentialing ("CCTC"), a state body found by the Ninth Circuit to be subject to Title VII liability with regard to a teacher certification test on the ground that the test was part of a broader pattern of authority exercised over the teachers by the CCTC. *AMAE v. California*, 231 F.3d 572 (9th Cir. 2000). The Ninth Circuit relied on the test for Title VII liability articulated by the D.C. Circuit in *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (DC Cir. 1973), *i.e.,* whether the entity in question exercises actual "control over access to the job market." *AMAE*, 213 F.3d at 581. Based on this test, the Ninth Circuit found that by "requiring, implementing, and administering the" the certification test, CCTC exercised the level of control that served as a predicate for Title VII liability. BOE, by contrast, neither requires, implements, nor administers the LAST. Those functions are exercised by the State. They never become incorporated into BOE's power or authority as an employer. To the contrary, because BOE does not administer the LAST and has no say as to its content, the test is a function over which BOE has no discretion or power whatever, The Second Circuit decision destroys the unanimous judicial consensus according to which licensing tests given outside the context of an employer-employee relationship do not give rise to a cause of action under Title VII.

Moreover, because the Second Circuit decision imposes a Title VII analysis on a context other than employment, it stands in contradiction to the jurisprudence of this Court, which, in rejecting the argument that disparate impact analysis should apply under the Fourteenth Amendment,

noted the undesirability of applying validation standards under Title VII to other contexts, including licensing. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

The difference in context is further highlighted by the nature of the LAST itself. It is undisputed that the LAST is a licensing test (Tr. 3012), subject to the standards adopted by three independent organizations working jointly to establish standards for the measurement profession. These organization are American Educational Research Association ("AERA"), the American Psychological Association ("APA"), and the National Council for Measurement and Evaluation (NCME") (SED Exhibits. 120-22, 800, 801; Tr. 1310, 3010-15, 1905-09, 1911, 2104, 2213).

Candidates for licensure are not applying for a particular job; they seek qualification to practice within a particular field (SED Exhibit 800, pp. 21-27). Unlike employment tests, which are designed to predict performance to assist prospective employer in selecting from applicants for a specific job opening, licensure tests do not seek to predict performance. Instead, they establish whether a candidate possesses the competencies for minimal qualification within the broader profession (*Id.*; SED Exhibit 123, pp.34-35; Tr. 3011-20). The joint AERA/APA/NCME standards state (SED Exhibit 121, p. 64):

> Where employment tests may measure appropriately an individual's aptitude to learn a specific job, people who take licensure or certification tests have usually completed training and are seeking to be deemed qualified for a broad field, rather than for a specific job. The distinction has important implications for the content to be covered in licensing or certification tests.

Accordingly, action taken pursuant to State licensing requirements is a function completely different from hiring teachers to fill particular job slots. State certification is a threshold requirement applicable to all potential employees. The decision to hire or promote an employee is therefore based on factors not challenged in this lawsuit.

Failing to recognize that the LAST is exclusively a licensing test, the Second Circuit, in assigning Title VII liability to BOE, inaptly relied on *Guardians Association of New York City Police Dept. v. Civil Service Commission of the City of New York*, 630 F.2d 79, 105 (2nd Cir. 1980) (quoting 42 U.S.C. § 2000e-7)), for the proposition that "Title VII explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice'" (39a). Because the LAST is a test related exclusively to licensing, not the selection of an applicant for a particular job, it follows that the requirement that prospective licensees must pass it is not a "hiring provision.' Nor is the requirement an "employment practice," discriminatory or otherwise. Thus, adherence to State licensing requirements does not fall within the rule stated in *Guardians*, and BOE cannot be found liable for engaging in a discriminatory employment practice under Title VII.

BOE is sued here for adherence to State-mandated licensing requirements that do not flow from its status as an employer. In this respect, BOE is indistinguishable from the various agencies found to have no Title VII liability because the licensing activity for which they were sued was not that of an employer. The underlying principle of these cases is that licensing activity, when conducted outside the scope of an employer's broader authority, does not give rise to a cause

of action under Title VII. By holding BOE to be potentially liable in this case, the Second Circuit had placed itself at odds with that body of case law and created a split in the Circuits.

The net effect of this Second Circuit determination is that BOE has been found to be potentially liable under an employment statute for following licensing requirements unrelated to the hiring and promotion of employees and mandated by State law. Because the SED has been dismissed from this case, BOE does not even have the option of impleading SED for the purpose of indemnification. Moreover, upon remand, BOE will find itself in the awkward position of being on its own to defend a licensing examination that it neither designs, administers, grades, nor validates, under a standard that was never intended to apply to licensing tests. While the Second Circuit has expressed a certain sympathy for the quandary in which BOE finds itself ("[W]e acknowledge the difficult situation that this creates for BOE" [41a]), it has failed to recognize that such a circumstance is not only absurd in itself but the result of legal error.

Finally, the Second Circuit's decision creates a dangerous precedent. A broad reading of the opinion potentially lays the groundwork for challenges to any number of licensing procedures for various professions. *See, e.g.,* N.Y. Education Law § 6524 (medical doctors); N.Y. Judiciary Law § 53(3) (lawyers); N.Y. Real Property Law § 441(1)(b) (real estate brokers). It is not plausible that the drafters of Title VII contemplated creating wholesale havoc in the area of licensing procedure. In the wake of the Second Circuit's decision, however, that prospect becomes a real danger.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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