No. 071428 MAY 14 2008

In The

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO AND CITY OF NEW HAVEN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents recurring issues regarding proper application of Title VII and the Equal Protection Clause to the civil service. Petitioners, New Haven firefighters and lieutenants, qualified for promotion to command positions pursuant to job-related examinations and merit selection rules mandated by local law. Citing the race of the successful candidates and Title VII's "disparate impact" provision, city officials refused to promote the petitioners.

1. When an otherwise valid civil service selection process yields unintended racially disproportionate results, may municipalities reject the results and the successful candidates for reasons of race absent the demonstration required by 42 U.S.C. §2000e-2(k)?

2. Does 42 U.S.C. §2000e-2(l) which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race . . . ," permit employers to refuse to act on the results of such tests for reasons of race?

3. If, citing the public interest in eradicating political patronage, racism and corruption in civil service, a state's highest court mandates strict compliance with local laws requiring race-blind competitive merit selection procedures, does 42 U.S.C. §2000e-7 permit federal courts to relieve municipalities from compliance with such laws?

PARTIES TO THE PROCEEDINGS

The additional petitioners are:

Michael Blatchley, Greg Boivin, Gary Carbone, Michael Christoforo, Ryan DiVito, Steven Durand, William Gambardella, Brian Jooss, James Kottage, Matthew Marcarelli, Thomas J. Michaels, Sean Patton, Christopher Parker, Edward Riordan, Kevin Roxbee, Timothy Scanlon, Benjamin Vargas, John Vendetto and Mark Vendetto.

James Kottage and Kevin Roxbee were plaintiffs/appellants below with respect to claims which are not a subject of this petition. They have an interest in this proceeding only to the extent of their interest in those claims. The term "petitioners" as used throughout this petition denotes the other eighteen individuals.

All respondents are listed in the caption. At all times relevant to this action, John DeStefano* was Mayor of the City of New Haven, Thomas Ude, Jr. was Corporation Counsel, Karen Dubois-Walton was Chief Administrative Officer, Tina Burgett was Director of Personnel and Boise Kimber was a member of the Board of Fire Commissioners. These individuals are collectively referred to herein as "respondents" or the "administration." Respondents Zelma Tirado and Malcolm Weber were members of the City's Civil Service Board.

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* Correctly John DeStefano, Jr.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit.

OPINION AND JUDGMENT BELOW

The District Court's opinion, unofficially reported at 2006 WL 2828419, is reprinted in the Appendix ("Pet. App.") at 5a-51a. The Court of Appeals' unpublished order is unofficially reported at 2008 WL 410436 and reprinted at Pet. App. 1a-4a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §1331. The Court of Appeals issued its judgment on February 15, 2008. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 are lengthy and reprinted at Pet. App. 54a-58a. A related provision, 42 U.S.C. §2000e-7, provides:

> "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty or punishment provided by any present or future law of any State or political subdivision of a State, other than

> any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall...deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Introduction

In 2003 the City of New Haven sought to fill vacancies in the command ranks of its fire department. Petitioners, lieutenants and firefighters possessed of impressive educational and other credentials, expended significant sums, studied intensely and sacrificed mightily to qualify for promotions to Captain and Lieutenant pursuant to a professionally developed examination process. Their efforts paid off as they passed and, based on their performance, stood immediately to be promoted. Citing petitioners' race,[1] respondents refused to promote them and left the positions vacant in response to the exams' racially disproportionate results, asserting such action constituted "voluntary compliance with Title VII" of the sort encouraged by federal courts.

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[1] Petitioner Benjamin Vargas is Hispanic; the others are white.

Petitioners brought suit alleging a violation of their own rights under Title VII and the Equal Protection Clause. They sought summary judgment based upon the undisputed validity of the exams, the conceded absence of proof of an equally valid alternative with less racially disparate impact and the failure of respondents' action to meet the strictures of the Equal Protection Clause.

Respondents acted neither to remedy the effects of prior unlawful discrimination against minorities nor to achieve "diversity." Insisting the exams' validity and absence of alternatives were irrelevant matters respondents rested their cross-motion for judgment on a professed "good faith" belief that promoting petitioners in accordance with local law would violate Title VII. The correctness of that belief, they asserted, was immaterial.

Finding that respondents wished to avoid "public criticism" for a perceived lack of "diversity" and the "political consequences" of a potential disparate impact suit by minorities, the District Court granted them summary judgment, notwithstanding what it described as evidentiary "shortcomings" respecting an available, equally valid alternative examination process with less racially adverse impact.

Departing from other Courts of Appeals, the Second Circuit holds that under Title VII, a promotional examination's unintended disproportionate racial results alone permits municipalities to reject the successful candidates based on their ethnicity and

race, a judgment which finds no support in the statute or this Court's Title VII decisions.

The Second Circuit further considers the Equal Protection Clause inapplicable to such actions and thus refused to apply strict scrutiny.

The Record Below[2]

New Haven's Charter and Civil Service Regulations mandate hiring and promotions based strictly on merit as determined by competitive examination. After each examination, the Civil Service Board ("CSB") must establish an eligible list of those who passed. A "rule-of-three," designed to curtail political patronage and other improper favoritism and ensure selection of the most knowledgeable, requires each vacancy to be filled from among the top three scorers who stand highest on the list. App.,74a-86a.[3]

Citing the public interest in the most able workforce free of the corruption and ills of the spoils

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[2] The facts are set forth in greater detail in Plaintiffs' Amended [Local] Rule 56(a)(1) Statement of Undisputed Material Facts. Respondents' admissions contained in their responses are consistent with their position that nearly all of these facts are irrelevant and their "good faith" beliefs were all that mattered. They did not, as required, submit a counter-statement of disputed material facts. App.,116a-307a.

[3] The Appendix consists of three volumes with sequential page numbering. Citations to it are hereinafter made as "App., ___." The subject exams are submitted separately under seal as Volume IV.

system, the Connecticut Supreme Court has consistently mandated strict compliance with civil service laws and brooks no departures of any kind. *See infra* at p. 39.

By 2004, the DeStefano administration had drawn multiple, stern rebukes from state judges for flagrant violations of these laws. Respondents employed various "charades" and "subterfuges" to subvert merit selection rules, and stood accused repeatedly of political patronage, intentional discrimination against whites, and manipulation of promotional testing results to achieve these aims. One court condemned respondents' "blatant lawlessness." Other judges followed suit in dismissing their excuses for it as "absurd."[4] Respondent Ude, citing his disagreement with these judges, dismissed their opinions as unbinding and authorized city officials to continue the illegal practices. App.,935a-937a.

Respondents engaged Industrial/Organizational Solutions, Inc. ("IOS"), a professional testing firm

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[4] *See Henry v. Civil Service Commission*, 2001 WL 862658 (Conn. Super.); *Bombalicki v. Pastore*, 2001 WL 267617 (Conn. Super.), *aff'd*, 71 Conn. App. 835 (2002); *Hurley v. City of New Haven*, 2006 WL 1609974 (Conn. Super.). Of the more outlandish was respondents' hiring of firefighters and police officers under fake job titles which moved selections out of the charter's reach. Petitioner Frank Ricci, rejected for hire despite impressive credentials and extensive fire service experience, sued the City alleging reverse discrimination and was hired upon a settlement. App.,375a,386a-387a.

with experience in public safety, to develop the 2003 exams. They were designed to screen out those who did not possess that level of knowledge, skills and abilities ("KSAs") deemed necessary for minimally competent performance in the positions. Since New Haven routinely experiences racially adverse impact in such tests, IOS went to great lengths to mitigate such impact to the greatest extent without compromising the integrity of the exams. An elaborate and painstaking process of job analyses and test validation was undertaken in accordance with EEOC-recommended practices. *See* 29 C.F.R. §§1607.5, 1607.14, 1607.16 (stating content validity is established by thorough job analyses and identification of essential KSAs.); App.,61a-65a.

A written job knowledge examination was followed by a comprehensive structured oral assessment of applicants' skills and abilities to command others in emergency response. Although whites comprised the majority of examinees, IOS assembled a minority-dominated group of thirty fire service professionals from around the country to serve as assessors. Applicants were permitted to proceed to the second phase irrespective of their performance on the written exam. The cutoff composite score was calibrated to equate with minimal competence. Applicants were afforded highly particularized syllabi and afforded an extended three-month study period. Heeding respondents' recommendations, petitioners expended considerable sums and gave up the entire three months to intensive daily study. They also participated in

tutoring, study groups and mock exams to maximize their KSAs. Some forewent second jobs and/or had their spouses take leave from their jobs to assume parenting responsibilities during these months. They skipped children's school and sports events and other family pleasures in the effort.[5]

Candidates were race-coded. Results again revealed race-based disparities in pass rates and levels of KSAs for those who did pass, mirroring adverse impact ratios in previous exams.[6] In 1999, however, a far greater number of Lieutenant vacancies permitted respondents to reach and promote lower ranked and some marginally passing candidates. The limited vacancies in 2003, respondents would later assert, would mean new lieutenants who "will all be white..." and only one Hispanic captain, implicating the

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[5] The development process was described in great detail in petitioners' Rule 56 statement and the corresponding record. App.,147a-166a,260a-270a,340a-345a,593a-650a. Petitioners detailed their qualifications, and their efforts and expenses incurred in connection with the three-month study period and exam process, in affidavits to the District Court, several of which are found at App.,375a-419a.

[6] Fire Union President Patrick Egan offered an analysis demonstrating the 2003 results were not the race-statistical anomaly respondents claimed but mirrored prior test results and showed remarkably consistent measures of the relative KSAs of the very same cohort of applicants in multiple testing. App.,384a-385a,423a-427a,950a-957a.

EEOC's "four-fifths" guideline for selection.[7] App.,439a-445a,465a-476a.

Figuring prominently in these events was respondent Boise Kimber, a local preacher, political activist and valuable vote-getter for Mayor DeStefano. A self-described "kingmaker," Kimber is a controversial figure whom DeStefano installed as chairman of the Board of Fire Commissioners despite his felonious history.[8] Kimber contacted the Mayor's office and made it known he wanted the promotions scuttled. In an early email among others reflecting their strategizing, *see* App.,446a-459a, respondents agreed to adopt an air of neutrality while privately collaborating toward this result. In advance of meeting with local legislators and presenting a case to the CSB, a mayoral aide cautioned the others:

> "[L]et's remember, that these folks are not against certification yet. So we can't go in and tell them that is our position; we have to

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[7] 29 C.F.R. 1607.4(D) advises "[a] selection rate for any race, sex or ethnic group which is less than four-fifths...of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact...".

[8] Kimber embezzled the funeral trust money of an elderly African-American woman and was also convicted of perjury. Kimber's derogatory remarks about Italian-American firefighters and his fraternizing with leaders of the Firebirds, an interest group dedicated to advancing minorities in the NHFD, added to the mix of other incidents which made him a divisive figure. App.,772a-775a,812a-816a,867a-882a,903a-934a.

> deliberate and arrive there as the fairest and most cogent outcome."

App.,449a.

An initial effort to impugn the validity of the examinations failed upon IOS' refusal to concede non-existent flaws in the tests. According to IOS Vice-President Chad Legal, respondents rebuffed his attempts to discuss validity and focused instead on the "racial" and "political" overtones of the situation. Standard protocol called for issuance of a technical report which elaborates in detail on the exams' content validity and scoring methodology. It serves to establish lawful use of test results for selection notwithstanding adverse impact. Respondents previously accepted such reports and proceeded with selections.[9] In accordance with its contract, IOS stood ready to issue this report but respondents cut off its delivery. App.,329a-335a. Respondents next sought to substantiate allegations, circulated by several unsuccessful candidates, that whites cheated on the exams, but were forced to concede the charges were baseless. App.,836a-837a.

What would have been a routine certification of both lists by the CSB was interrupted by a letter from Mr. Ude raising the specter of a Title VII violation and the transmittal by Ms. Burgett, for the first time in city history, of name-redacted eligibility lists.

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[9] An example of one such validity report accepted by respondents is reprinted at App.,958a-1011a.

Neither advised the CSB that both exams were validated. Despite IOS' explicit request that she do so, Burgett did not share with the CSB IOS' February 2, 2004 letter noting its confidence in the exams' validity and respondents' decision to abort production of the validity report. App.,190a-191a,287a,336a-339a,429a-445a.

The CSB met on four occasions. Kimber disrupted the proceedings, was repeatedly called out of order and later warned CSB members that a "political ramification" may "come back upon [them]." App.,467a-468a. Attempting to establish the availability of equally valid alternative tests with less adverse impact, respondents solicited three professionals to offer opinions to the CSB, among them Christopher Hornick, IOS' fiercest business competitor. Hornick alternately characterized the statistical impact as "somewhat worse" and "fairly typical." Hornick did not confer with IOS, knew nothing of the tests' development and validation process and had no time to study the exams if "he looked [at them] at all." App.,1030a. By telephone, he offered amorphous suggestions of alternatives, mentioned the "assessment center" approach to testing, and suggested his firm for the city's future needs.

Janet Helms, a professor of race and culture with no expertise in public safety, voiced generalizations regarding societal/racial disparities, confirmed they manifest in occupational and other spheres of testing and offered various speculations, none applicable to the NHFD or the exams, as Helms never saw them

and knew nothing of their development. The third consultant, and the only one to actually study the exams, was Vincent Lewis, a highly credentialed expert in fire and homeland security services. Lewis, who is African-American, thought well of the exams, believed they measured KSAs which commanders must possess and added he underwent similar exams and could pass the subject tests. App.,545a-574a.

Before the CSB's final meeting, respondents settled on a strategy deemed the last and "only" means to "get to a decision not to certify." Accordingly they urged abandonment of the lists in favor of unspecified alternatives. Ude exalted Hornick's remarks and dismissed Vincent Lewis' opinion on the ground that he was not a "psychologist." Two alderpersons urged the CSB not to certify for the sake of "diversity" and "civil rights" requirements. Earlier, leaders of an outside interest group threatened to sue New Haven, speculating the exams' component weights disadvantaged minorities, a baseless conjecture belied by the scoring data. App.,458a-459a,484a-489a,575a-582a.[10]

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[10] The Ruling is replete with references to a "Mr. Day" and a host of other un-sworn, out-of-court statements of spectators and speakers at CSB meetings, which the District Court characterized as "testimony." Respondents later conceded this hearsay (including Hornick's) was inadmissible for the truth of the matters asserted and offered it only to establish their "good faith." The District Court did not elaborate on the role this hearsay played in its determination of issues of law but the ruling suggests it embraced this state-of-mind defense.

Kept under wraps were the views of the NHFD's Chief and African-American Assistant Chief although both led IOS in selecting the exams' syllabi. Both thought the exams were fair and valid and the results should be respected. Respondents withheld their views from the CSB. Although they disclaimed any improper motive in excluding the NHFD's top two officials, and justified it on the ground that Ude was the administration's "spokesperson," Fire Commissioner Kimber was allowed to voice his views to the CSB, and couple them with threats of political reprisals. App.,389a-390a,817a-818a,833a,846a-852a.

The CSB deadlocked and the promotions were scuttled.[11] Unbeknownst to all but his inner circle, if the CSB certified the lists, Mayor DeStefano, purportedly on Ude's advice, intended to nullify the vote by executive order although the charter denies him voting power on the CSB. An announcement would be handed immediately to the media. Although Ude was counsel to the CSB members, he never disclosed this to them. DeStefano later appeared before a media-publicized gathering of NAACP members and took credit and applause for this result. App.,884a-887a,903a-905a.

Subsequently, additional vacancies arose which would have allowed respondents to promote three

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[11] Only four members voted. The fifth member was the sister of one of the unsuccessful minority candidates who met with Dubois-Walton to influence the city's position. App.,830a.

African-Americans to Lieutenant and an additional Hispanic to Captain, non-party Lieutenant Luis Rivera, who scored well despite foregoing his own study time to tutor subordinates preparing for the Lieutenant's exam. These individuals were not among those associated with Kimber and his efforts. Respondents resisted disclosing their identities. App.,375a-384a,390a,420a,437a,861a-864a.

The District Court Proceedings

Respondents conceded their actions were not taken to remedy the effects of any prior discrimination against minorities or to achieve diversity in the subject ranks. The decision, they repeatedly insisted, stemmed solely from their "good faith" belief that promoting the petitioners would violate Title VII. App.,938a-947a,1013a-1037a (*passim*).

Petitioners countered with evidence indicating the Mayor was driven to favor his known supporters as well as indulge Kimber's desire to promote several of his friends who failed or fared poorly on the tests and who met privately with Dubois-Walton to influence the administration's position. App.,835a-837a. Respondents' professed concern over ineligibility of minorities was pointedly undercut by their refusal to change course when four other minorities became reachable for promotion. Neither court below addressed, or even acknowledged, this undisputed fact. Judge Arterton confined her analysis to "what appeared" to be the facts "at the time" the score

results issued. Respondents dismissed this fact as irrelevant on the ground that they could have invoked the rule-of-three to pass over these minorities in favor of lower ranked whites. App.,235a-236a,305a-306a.[12]

Petitioners also cited respondents' judicial record indicating they were so determined to evade the law that strongly worded censures from state judges were brazenly ignored. Respondents later resorted to the ballot box to escape these rulings which they derided as judicial "handcuffs." They sought voter approval of a proposed charter amendment which would greatly expand their discretion in promotions and permit the very practices declared illegal. Voters rejected the measure.[13] With a unanimous state supreme court invalidating respondents' device of manipulating test results and insisting they comply strictly with civil service rules, the only means left for respondents to salvage their patronage system, petitioners asserted, was to seek a federal trump of the state courts and local laws.

Dubois-Walton testified that it was never respondents' position that the exams were invalid. She understood IOS validated the tests. The city's chief civil service examiner could discern no flaws in the written exams. The oral assessment ratings, within

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[12] Respondents elsewhere admitted they customarily forego the rule-of-three in the NHFD and promote straight down the list. R. Docket Doc. #88 at p.51.

[13] *See Kelly v. City of New Haven*, 275 Conn. 580, 617 n.41 (2005).

and across panels, demonstrated a high level of consistency and reliability. What Dubois-Walton understood from Hornick was that alternatives, such as the "assessment center" approach might exist which "may have" less adverse impact. Petitioners introduced Hornick's own website publications which directly contradict this suggestion. App.,390a,592a, 746a-804a,848a,853a-856a.[14]

With this, at oral argument, respondents conceded they had no basis to contest evidence of the exams' validity. As to "alternatives," they advised Judge Arterton that they wished to "conduct studies" and "explore" for one, and otherwise considered the question as one "for another day." App.,1022a, 1027a,1016a-1038a, *passim*. Upon this record, the District Court held:

> Notwithstanding the shortcomings in the evidence on existing, effective alternatives, it is not the case that defendants *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method.[15]

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[14] Mr. Legal later explained that the "assessment center" approach is but a more interactive version of an oral assessment of skills and abilities. It is not a substitute for a *job knowledge* exam. App.,709a-716a.

[15] The city's regulations define "certify" to mean "[t]he process of supplying an appointing authority with the names of eligibles for appointment." App.,89a.

Resolving contested motivational issues, the District Court found:

> [Respondents] acted based on the following concerns: that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off 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 that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend.

Elsewhere, the Court observed the tests' "undesirable outcome" could "subject the City to Title VII litigation by minorit[ies] and the City's leadership to political consequences." Addressing petitioners' assertion that respondents' professed fidelity to Title VII was a pretext for intentional race discrimination against them and patronage benefits for the Mayor's and Kimber's political allies, the court disagreed the "political context" should alter its analysis. Even if "political favoritism or motivations" were "intertwined with the race concern," the Court added, such "does not suffice" to establish a violation of petitioners' rights. App.,24a,43a,47a. Relying principally on holdings which predate the 1991 amendments to Title VII and this Court's modern equal protection jurisprudence, the District Court found no racial classification occurred.

The Second Circuit, after summarily adopting this ruling, concluded:

> [T]he [CSB] found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.

App.,3a-4a.

REASONS FOR GRANTING THE PETITION

This case presents occasion to settle issues which continue to plague state and municipal civil service, spark competing claims and hamper the efficient delivery of vital public safety services. The Second Circuit adopts a radical disparate impact theory which effectively nullifies important exemptions and other provisions in Title VII and emboldens those who view Title VII as a guarantee not of equal opportunity but equal results.

Neither Congress nor this Court authorized public officials and lower federal courts to usurp state

and local laws and unsettle long-established civil service merit systems as a politically expedient response to no-fault racial disparity.

I. THE SECOND CIRCUIT INTERPRETS TITLE VII IN A WAY THAT CONTRAVENES THE DECISIONS OF THIS COURT AND THE VERY TEXT OF THE STATUTE

Section 703(a) of the 1964 Civil Rights Act of 1964 makes it unlawful for employers "to fail or refuse to hire" or otherwise discriminate against an individual "with respect to...terms, conditions, or privileges of employment because of such individual's race...." 42 U.S.C. §2000e-2(a)(1). The "disparate impact" theory originated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where this Court interpreted the Act to reach a situation not presented here: employer use of job-irrelevant intelligence tests and high-school diploma requirements which operated greatly to disqualify Blacks from hire and transfers.

The "alternatives" doctrine, first introduced in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and later codified in the Act as part of the 1991 amendments, *see* 42 U.S.C. §2000e-2(k), requires one challenging a job-related test on disparate impact grounds to demonstrate that an equally valid alternative with less such impact exists which the employer *refuses to adopt*. It is that refusal which permits the inferential leap from lawful to unlawful, consistent

with this Court's rationale that such showing might indicate the employer was using its tests merely as a *pretext* for discrimination. *Albemarle* at 425.

A. The Second Circuit Equates Adverse Impact With A Title VII Violation.

The Court of Appeals plainly considers mere statistical adverse impact or a *prima facie* case sufficient to permit voluntary race-based measures by a *government* employer. The District Court based its conclusion on Second Circuit precedents which themselves remarkably suggest that something less than a *prima facie* case might do:

> [A] showing of a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for employer-initiated, voluntary race-conscious remedies. *** In other words, a *prima facie* case is one way that a race-conscious remedy is justified, but it is not required: all that is required is a sufficiently serious claim of discrimination to warrant such a remedy.

App.,37a, citing and quoting *Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 228 (2d Cir. 1984); *Kirkland v. New York State Department of Correctional Services*, 771 [sic] F.2d 1117, 1130 (2d Cir. 1983).

This not only contravenes this Court's holding in *Furnco v. Waters,* 438 U.S. 567, 576-579 (1978)(*prima facie* case does not equate with a finding of discrimination and "courts may not impose...a remedy [for racial imbalance] on an employer at least until a violation has been proved...") but *Albemarle's* very definition of adverse impact as but a first step in the discrimination analysis. 422 U.S. at 425. The incongruity is glaring when one considers the District Court understood petitioners established a *prima facie* case of *intentional* race discrimination under Title VII yet declared a competing *prima facie* case of *unintentional* "discrimination" the summary winner.[16]

Judge Arterton characterized the exams as "presumptively flawed" based *solely* on their demographic results without regard for whether the exams actually served their *purpose* that is, accurately screened out the unqualified and distinguished among the qualified. *Cf. McCosh v. City of Grand Forks,* 628 F.2d 1058, 1063 (8th Cir. 1980)(declining to second-guess reasonable job criteria for promotion to police sergeant given the risk to public safety of hiring the unqualified); *Griggs*, 401 U.S. at 430

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[16] The Center for Individual Rights, in an amicus brief to the Circuit below, noted the District Court erroneously squeezed this case into the familiar *McDonnell Douglas* framework, *see* 411 U.S. 792 (1973), a construct for cases with no direct evidence of employer use of race and which allows such factor to be inferred circumstantially. Since race was an undisputed factor in respondents' decision-making, petitioners agree that use of *McDonnell Douglas* made for an awkward exercise.

("Congress did not intend Title VII...to guarantee a job to every person regardless of qualifications."). The Second Circuit referred to the exams as "invalidated." No such thing occurred. Respondents conceded they discerned *no flaws* in the exams, were *not* contesting their validity and were instead resting their entire defense on a "good faith" belief that *alternatives* to these valid tests might be discovered.

The court's choice of descriptive terms does not obscure the obvious: both consider all civil service tests or merit selection criteria with racially disproportionate results unlawful. Taking things a step further, the Second Circuit suggests that even if this is not the law, employers should be "protected" for having acted like it.

B. The Second Circuit's Construction Of Title VII Vitiates The Disparate Impact Framework And Evidentiary Standards Established By This Court.

Although proof that an employer was presented with *but refused to adopt* an equally valid alternative test with less adverse impact is the *sine qua non* of Title VII liability, no such demonstration was made here. The only thing respondents "refused" to do was promote the petitioners. Years after the CSB vote, they advised the District Court that they wished to "conduct studies" and "explore" for alternatives yet the Court remarkably held these evidentiary "shortcomings" did not preclude summary judgment for

respondents. To hold that such failure of proof is pardonable not only contravenes this Court's holdings but flies in the face of the opening text of §2000e-2(k) which states that *unlawful* disparate impact is established *only if* such demonstration is made.[17]

In rejecting petitioners' Title VII claims the Court of Appeals cited its own view that respondents "had no good alternatives" to test results with racially disproportionate results, without evidently considering the obvious question that statement begs: If there are no "good alternatives" to concededly job-related tests, how is it that Title VII is violated by promotions in accordance with their results? *Cf. Afro-American Patrolmen's League v. City of Atlanta,* 817 F.2d 719, 723-725 (11th Cir. 1987)(city had no right to abandon test results with racially disparate impact if in fact they were content-valid and free of bias).

The Second Circuit improperly equates adverse impact with intentional discrimination, hence permitting municipalities to leapfrog from racial disparity to racial remedy. Given the ubiquitous nature of racial disparities in occupational testing, the judgment ineluctably approves *de facto* racial quotas.[18] Twenty

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[17] The term "demonstrates" is defined to mean "meets the burdens of production and persuasion," 42 U.S.C. § 2000e(m).

[18] *See* M. Selmi, *Was Disparate Impact A Mistake?*, 53 UCLA L. REV. 701, 742, 757-765 (2006)(noting most written examinations today still have substantial disparate impact and suggesting some cities appeared to welcome disparate impact claims as

(Continued on following page)

years ago, this Court addressed concerns that disparate impact theory would lead to such "perverse results": employer resort to disguised quotas and preferential treatment as a preferred alternative to litigation and took particular note that in enacting §2000e-2(j) Congress "so clearly and emphatically expressed its intent that Title VII not lead to this result...." Thus, evidentiary standards were necessary to "serve as adequate safeguards" against it. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-993 (1988). The *Watson* plurality denied any license to employers "to adopt inappropriate prophylactic measures" to avoid disparate impact suits:

> "Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today."

Id. at 993 (opinion of O'Connor, J.).

Safeguards in the public sector are even more crucial. "Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution...and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" *Watson* at 993 (quoting

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a means to achieve "desired political goals" or respond to pressure for "diversity").

in part *Albemarle Paper Co.* 422 U.S. at 449 (Blackmun, J., concurring in judgment)).

The Second Circuit adopted just such a rule by declaring that New Haven, with "no good alternatives" to a concededly valid promotional process, had no choice but to adopt the most drastic and injurious measure, sanctioned neither by Title VII nor the Constitution: depriving unquestionably qualified officers of coveted career advancement and leaving the command structure of a first responder agency gutted until a greater number of minorities qualify for the positions. Worse yet, the Second Circuit expressed no discomfort with the District Court's suggestion that a mayor may elect such course as a political expedient.

C. Lack Of Circuit Uniformity In Applying The Framework To Civil Service Testing Merits Review.

In stark contrast, the Seventh Circuit not only recognizes the "alternatives" demonstration as an essential element of the framework, but consistently holds that conjecture, vague proposals and *ipse dixit* assertions regarding alternatives will not suffice and would "frustrate [the] statutory scheme." *Allen v. City of Chicago,* 351 F.3d 306, 313 (7th Cir. 2003); *Gillespie v. Wisconsin,* 771 F.2d 1035, 1044-1046 (7th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986)(bare assertions regarding alternatives insufficient). In another district beset by such claims, the court likewise held

those challenging job-related exams with disparate impact must meet this statutory burden in all respects. *See Stewart v. City of St. Louis*, 2007 WL 1557414 (E.D. Mo.). With civil service exams remaining a magnet for disparate impact claims, lack of uniformity among circuit courts of appeals in applying the framework merits review.

II. REVIEW IS WARRANTED GIVEN THE SECOND CIRCUIT'S SUBSTANTIAL DEPARTURE FROM THIS COURT'S EQUAL PROTECTION HOLDINGS

A. The Refusal To Apply Strict Scrutiny Was Plainly Erroneous.

The Second Circuit approved of respondents' "attempt to fulfill [their] obligations under Title VII" but did not address petitioners' constitutional claims. Despite the assessment that respondents reacted to the "racial distribution of the results," were concerned that "too many whites and not enough minorities would be promoted," and, *but for* these concerns, "[petitioners] would have had an opportunity to be promoted," App.,24a-25a, the Court of Appeals refused to subject this race-based deprivation to strict scrutiny. The District Court reasoned that since "no one" was promoted, "everyone was treated the same," hence there was no racial classification. The logical flaw is apparent given those who fail exams have no right to be promoted; to the contrary, under local law they are to be *excluded* from consideration. Those who achieve lower or marginal scores have no right to

consideration ahead of the higher ranked. Applicants were not supposed to be "treated the same" but treated differently based on whether and how well they met the job criteria.[19]

Moreover, missing from the court's syllogism is the fact that petitioners' *race* drove the decision to "promote no one." "Racial and ethnic distinctions of any sort are inherently suspect and *** call for the most exacting judicial examination." *Wygant v. Jackson Bd. Of Educ.,* 476 U.S. 267, 273 (1986)(plurality opinion)(quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978)(opinion of Powell, J.)). For Title VII purposes, the District Court assumed petitioners suffered a race-based adverse employment action, yet incongruously held no racial classification occurred for equal protection purposes. The Second Circuit's conclusion that respondents were "protected" for "attempting" to satisfy a Title VII obligation underscores its adoption of the District Court's reasoning that race-based decisions under the rubric of Title VII and EEOC Guidelines automatically satisfy the Constitution, a *non sequitur* rejected by the Seventh Circuit:

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[19] In characterizing this as but a lost "opportunity" the court ignored the fact that respondents acted precisely because petitioners would otherwise be *promoted* and the very text of Title VII which prohibits discrimination in "conditions" or "privileges" of employment and actions which would deprive or "tend to deprive" an employee of *opportunities* or otherwise *adversely affect his status* because of his race. §2000e-2(a)(1),(2).

> How can that be? Then Congress or any federal agency could direct employers to adopt racial quotas, and the direction would be self-justifying: the need to comply with the law (or regulation) would be the compelling interest. Such a circular process would drain the equal protection clause of meaning.

Biondo v. City of Chicago, 382 F.3d 680, 684 (7th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005).

Both courts below held petitioners' injuries amounted to nothing beyond "frustration" and "uncertainty" about their futures, App.,3a,42a,n.11, a woefully wanting characterization upon which the District Court rested its conclusion that no race-based "injury" or "disadvantage" occurred to trigger constitutional scrutiny.[20] Petitioners were deprived of the salary increases attendant to promotion, losses which continue to accrue, compound and exponentially depress their pensions. Apart from overlooking these very real and significant injuries, the courts further ignored the fact that petitioners, their careers stalled in 2004, were *and remain* ineligible for further advancement, as incumbency in the subject ranks is a prerequisite for promotion to still higher

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[20] Behind the Second Circuit's reference to petitioner Ricci's "dyslexia" was evidence that Ricci, to overcome his disability, spent considerable sums to hire an individual to dictate the content of all the fire science and other textbooks on the syllabi on to audiotape. Ricci then studied an average of 8-13 hours a day, even listening to the tapes while driving his car. App.,376a-377a.

ranks. *U.S. v. City of Chicago,* 870 F.2d 1256, 1262 (7th Cir. 1989)(delay of promotion due to racially altered tests impedes future advancement). To be promoted, petitioners must demonstrate their competence not once but twice (or more) and repeat a grueling and expensive process.

This Court's holdings instruct that "[r]ace-based government decision-making is categorically prohibited unless narrowly tailored to serve a compelling interest." *Parents Involved In Community Schools v. Seattle School Dist. No.1,* 127 S.Ct. 2738, 2770 (2006)(Thomas, J., concurring) and have thus confined it to narrowly tailored remedies for a prior constitutional violation and holistic admissions policies in professional education. *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995); *Grutter v. Bollinger,* 539 U.S. 306 (2003). Otherwise, "[t]his exacting scrutiny has proven automatically fatal in most cases." *Parents Involved* at 2770 (Thomas, J., concurring)(internal quote marks and citation omitted). Moreover, "a 'strong basis in evidence for its conclusion that remedial action was necessary'" is required before government may resort to use of race. *Croson* at 500 (quoting *Wygant,* 476 U.S. at 277 (plurality opinion)).

Other circuits applying these principles to civil service testing cases have put the proper focus on the Constitution, not Title VII. In *Biondo,* the Seventh Circuit held that neither Title VII nor the Equal Protection Clause permit a city to respond to a promotional

examination's disparate impact by employing dual eligibility lists but suggests it would permit other means to mitigate such impact. *See Heading IV infra.* Other courts of appeals have invalidated similar race-based preferences. *See, e.g., Dean v. The City of Shreveport,* 438 F.3d 448 (5th Cir. 2006)(reversing dismissal of white firefighter applicants' equal protection claims where the record, beyond statistical evidence of racial disparities, did not establish a constitutionally permissible basis for denying them hire); *Quinn v. City of Boston,* 325 F.3d 18 (1st Cir. 2003)(reassessing an aged consent decree and holding city officials violated the Clause in refusing hire to top-scoring whites on entry-level firefighter exam); *Dallas Firefighters Assoc. v. City of Dallas,* 150 F.3d 438 (5th Cir. 1998), *cert. denied,* 526 U.S. 1038 (1999)(finding promotion of women and minorities over higher-ranked white males violated the Clause and no need to address its validity under Title VII); *Maryland Troopers Assoc. v. Evans,* 993 F.2d 1072 (4th Cir. 1993)(the Clause forbids the state from classifying promotional candidates by race except as a narrowly tailored and last-resort remedy for intentional discrimination).

Respondents' admitted aim was not to remedy the effects of prior intentional race discrimination but the mere failure of valid promotional exams to yield proportional demographic results. Government employment practices having racially disparate impact do not violate the Constitution. *Washington v. Davis,* 426 U.S. 229, 242 (1976)("We have never held that a

law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."); *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 494 (D.C. Cir. 1998)("If discrimination under Title VII were defined as non-proportionality, much of the Supreme Court's recent equal protection cases would make little sense."). The Second Circuit not only falsely equates adverse impact with a statutory violation but conflates such violation with a constitutional basis for remedial measures, another notion discarded by the Seventh Circuit:

> [G]iven the holding in *Washington v. Davis*...that disparate impact...does not violate the equal protection clause, it is hard to see how such an argument could be constructed. If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm, and as a practical matter *Washington v. Davis* would be undone. Congress did not attempt this; to the contrary, it provided in 42 U.S.C. §2000e-2(j) that an employer's desire to mitigate or avoid disparate impact does *not* justify preferential treatment for any group.

Biondo, 382 F.3d at 684.

B. The Second Circuit Endorsed A Means Of Outright Racial Balancing.

This Court has repeatedly admonished that "outright racial balancing" is unconstitutional. *Croson*, 488 U.S. at 507; *Grutter v. Bollinger,* 539 U.S. at 330. The District Court couched such action in terms of respondents' refusal to "validate" exams, "certify" eligible lists, or act on the results of "presumptively flawed" tests. To these euphemisms for racial balancing, the Court of Appeals added another: a city "simply trying to fulfill its obligations under Title VII."

"The principle that racial balancing is not permitted is one of substance, not semantics." *Parents Involved,* 127 S.Ct. at 2758 (opinion of Roberts, C.J.) Just as "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity,'" *id.,* neither does it mutate when styled as "voluntary compliance" with Title VII, or a city's response to the "unfortunate position" of "having no alternatives" to racially disproportionate test results. Among the many purposes of strict scrutiny is to "smoke out" instances of "racial politics" masquerading as remedial action, *Croson* at 469. Unchecked, racial classifications "can lead to corrosive discourse" and use of race "as a bargaining chip in the political process." *Parents Involved,* 127 S.Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, in *Parents Involved,* this Court noted that the very rationale offered by officials in that case to

justify racial balancing in public schools could logically extend to many other government arenas, including the civil service.

In *Williams v. Consolidated City Of Jacksonville,* 341 F.3d 1261 (11th Cir. 2003) the Eleventh Circuit squarely held that the Equal Protection Clause does not permit city officials to refuse to fill existing vacancies because of the race of those in line for them on a civil service eligibility list. Judge Arterton found *Williams* unpersuasive given respondents did not "certify" the lists, a distinction without a difference. App.,40a,n.10. It should not matter what mechanical means are employed to accomplish the same prohibited end. Respondents recommended petitioners "study" and "strive" for three months. App.,346a-347a. They did, at significant cost to themselves and their families, only to be made the cost-bearers of racial disparities for which neither they nor respondents are responsible. Enshrouding petitioners' ordeal in the nomenclature of Title VII does not change the fact that respondents reacted to racial disparity by denying them earned promotions and setting aside the vacancies for the benefit of those of a different race until they can devise a means to award some of them the positions. That is outright racial balancing and it is patently unconstitutional.

The court's expression of sympathy for the psychological toll of these events on petitioners remains an inadequate substitute for adherence to Congress'

and this Court's directions. The judgment merits review if not summary reversal.

C. Neither Title VII Nor Equal Protection Jurisprudence Permits Courts To Consider, Much Less Indulge, The Political Interests of Elected Officials.

As this case well illustrates, relaxing established evidentiary standards for municipalities' "voluntary compliance" with Title VII invites mischief and lawlessness as it frees elected officials to yield to the demands of organized ethnic and racial lobbies, with Title VII as a convenient pretext. The city's unprecedented act of refusing to fill promotional vacancies as required by its charter took place in a politically and racially charged context. CSB members, themselves mayoral appointees, faced not only organized pressure from the administration and the urgings of local legislators, but brazen threats of "political ramifications" from a local power-broker who happened also to be one of the fire commissioners charged with filling the vacancies from the eligible lists.

Petitioners submitted uncontested evidence of the extents to which the city's mayor had previously gone to avoid alienating this key ally, demonstrating further that a small group of minority applicants who failed or fared poorly on the exams were the personal cronies of Rev. Kimber. That respondents were not motivated by altruistic concerns over exclusion of minorities was pointedly illustrated by their lack of

candor in the wake of disclosure that three African-Americans and an additional Hispanic candidate were in fact eligible for promotion due to unexpected vacancies in both ranks.[21]

This is a classic example of the very sort of "race politics" this Court warned might lurk behind any racial classification not held to the exacting strictures of the Clause. The District Court cast the crude politics in this case in frankly approving terms. Its ruling endorses a means by which elected officials and others with shared hostility to the 1991 amendments and this Court's equal protection holdings may accomplish their group rights and equal results agenda *sub rosa*. The ruling and judgment on appeal combine to give a powerful nod to that strategy. These events occurred in a media-covered, public manner and attracted to New Haven leaders of outside organizations with an interest in a judicial outcome which supports that agenda. Thus, the Second Circuit's decision to dispose of these issues by summary order does not diminish the necessity of this Court's review.

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[21] At oral argument, respondents' counsel warned the District Court that certifying the lists would mean "African-Americans would be completely excluded from promotions." Given undisputed evidence that at least three African-Americans were in fact ranked ##14-16 on the lieutenant list with open vacancies and the submission to the District Court of an affidavit from one of them expressing displeasure at being denied a hard-earned promotion, this statement was inaccurate. App.,420a-422a,1032a.

III. THE DENIAL OF CERTIORARI IN *BUSHEY* BY A DIVIDED COURT MILITATES IN FAVOR OF REVIEW

The Second Circuit's holding in *Bushey* drove respondents' conduct and the outcome of this litigation. *See* App.,37a-39a,439a-445a. A divided court denied certiorari in *Bushey*. Then Justice Rehnquist, joined by Chief Justice Burger and Justice White, considered *Bushey* constitutionally suspect and its rationale "unpersuasive." In their view, the Second Circuit "reache[d] questionable conclusions on difficult and important questions." Expressing concern that *Bushey* would permit public agencies to "claim that their actions [are] shielded under Title VII even if the actions would violate the Fourteenth Amendment," the very premise of the judgment in this case, they preferred to address the "difficult questions" posed by the Circuit's approval of race-based measures to alter the outcome of a civil service examination. 469 U.S. 1117, 1119-1121. These questions persist and this Court should resolve them finally.

IV. LOWER COURTS CLEARLY NEED GUIDANCE RESPECTING THE PROPER APPLICATION OF 42 U.S.C. §2000e-2(l)

As part of the 1991 amendments, Congress, in plain terms, declared:

> It shall be an unlawful employment practice for a respondent, in connection with the selection...of...candidates for...promotion, to adjust the scores of, use different cutoff scores for,

> or otherwise alter the results of, employment related tests on the basis of race...

42 U.S.C. §2000e-2(l).

Respondents consider this amendment to have eliminated their options and, interpreting several circuit holdings cited by petitioners, *see supra* p.29, argued:

> These cases establish that the courts do not look fondly upon cities' attempts to alter eligibility lists or alter the manner in which the lists are used. Taken together, the holdings of these cases suggest that employers that find adverse impact in their tests should not certify the results.

App.,947a.

The ramifications of this untenable proposition are obvious – countless civil service exams, professionally developed at significant public expense, may be declared a waste of time and money. Judge Arterton held §2000e-2(l) is not implicated in the absence of actual score adjustment or use of different cutoffs, and the Second Circuit echoed the above argument in stating respondents had "no good alternatives," thus framing the question for this Court: In further prohibiting employers from "*otherwise alter[ing] the results*" of tests for reasons of race, did Congress intend to permit them simply to ignore or refuse to act on the results for the same reason?

The court's constriction of this amendment sanctions the anomaly here: a remedy for race-based scoring disparities far more drastic and injurious to those who do not benefit from it than "race-norming" of test results would occasion.[22] It is counterintuitive to suggest Congress intended by this amendment to swell the ranks of those harmed by race-based measures. Equally implausible is the suggestion that public employers may so easily end run around it.[23] The courts ignored the amendment's third and much broader proscription, as if it were verbiage. Far from an aimless appendage, the catch-all provision has a self-evident Congressional purpose: to account for the myriad other means by which employers might accomplish the same prohibited ends.

The Fifth Circuit addressed this provision in *Dean v. The City of Shreveport* and held its plain language applies to a practice of separating applicants' scores which in *effect* results in different cutoff scores based on race. Construing the provision to

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[22] In the pre-1991 holdings invoked by the District Court, the Second Circuit approved race-norming of test results because it viewed resulting harm to non-minorities as tolerable since none were actually *displaced* from eligibility lists. *See, e.g., Bushey,* 733 F.2d at 223.

[23] As a practical matter, one might fairly argue that respondents did alter scores and use different cut-offs for they effectively reduced petitioners' scores to zero and, by holding the vacancies open for the benefit of unsuccessful candidates, relieved such individuals from the consequences of failing to meet the cut-off score.

forbid all means which have the practical effect of prohibited acts, the Court added that it would invalidate any such measures under Title VII even if they passed muster under the Clause as a permissible form of affirmative action. 438 F.3d at 462-463. The Seventh Circuit also confronted this provision but does not appear to adopt a literal interpretation. In *Biondo*, Judge Easterbrook suggested dispensing with rank-ordered promotions in favor of score "banding" and pooling candidates within a defined score spread as a means to lessen disparate impact caused (or worsened) by rank order promotions. This, he posits, would "respect[] the limits of the exam's accuracy while avoiding any resort to race or ethnicity." 382 F.3d at 684.

Adopting score banding for the very *purpose* of remedying an exam's disparate impact, it seems, would flout all three proscriptions of 2000e-2(l). As a practical matter, it would require race-conscious selections if for any reason to give effect to that decision. Even if such methods were settled upon before an exam is given – and not in response to the results of one already administered – it remains that New Haven's charter mandates rank-ordered selection. While Judge Easterbrook aptly observes that score differences of a few points may not denote an appreciable difference in qualifications, it makes little legal or practical sense to indulge the Guidelines' reflexive distaste for strict rank-ordered selections in the case of a public employer with a demonstrated history of abusing any increase in discretion to

engage in intentional "reverse" discrimination and political horse-trading. Indeed it was a similar device which respondents were accused of adopting in order to both discriminate against whites and favor the politically connected. Finding that New Haven's rounding of scores and banding of candidates into score groups, thus vitiating the rule-of-three, violated "the spirit and the letter" of the law, a unanimous Connecticut Supreme Court refused to allow it. The Court well understood that permitting officials to select from among a large group greatly enhances the risk that it "may become a subterfuge for discrimination and favoritism, in contravention of the purpose of the civil service rules." *Kelly v. City of New Haven*, 275 Conn. 580, 616-621 (2005). The record before it, the *Kelly* court noted, included ample evidence "of exactly the abuse of discretion based upon nepotism and racism that the civil service system is meant to prevent." *Id.*, 617,n.40.

The courts below construed this amendment in a manner inconsistent with its text and self-evident purpose. The Seventh Circuit construes it as flexible enough to permit a practice which the Connecticut courts condemn as contrary to state interests and which, notably, New Haven voters rejected at the polls. Given the significance of this provision to the many civil service tests which come under challenge, this Court should grant review.

V. REVIEW WILL PROVIDE NEEDED CLARITY FOR LOCAL OFFICIALS AND SERVE THE PUBLIC INTEREST IN EFFICIENT AND COMPETENT DELIVERY OF VITAL SERVICES

The judgment below casually usurps state laws and unsettles established merit selection systems. On the weakest foundation, the Second Circuit undermined the mandates of a state's highest court, and opened a door to chaos and corruption in the administration of civil service in Connecticut and beyond, in contravention of Congress' clearly expressed intent. *See* 42 U.S.C. §2000e-7; *California Federal Savings and Loan Assoc. v. Guerra,* 479 U.S. 272, 285 (1987) (Scalia, J., concurring) (§2000e-7 is more precisely an *antipre-emption* provision.). Review is also warranted as the Court of Appeals' flawed construction of Title VII and the Equal Protection Clause has serious ramifications for homeland security. At unconscionable risk to public and firefighter safety, the command structure of a first responder agency remained gutted while officials purported to "conduct studies" and continue "exploring" for alternatives to perfectly legitimate civil service tests.

Petitioner Matthew Marcarelli scored first on the Captain exam. This should hardly have surprised anyone. He has consistently scored at the top of the pack in every civil service exam he has taken, not because he is white, as many whites failed the 2003 exams, but because he has extraordinary credentials,

education and experience. App.,392a-401a. Not only was he denied a justly earned promotion to Captain, the public was and remains denied the benefit of his service in that leadership position. The courts below agreed with respondents' assertion that the issue of alternatives is "for another day." Government's primary duty is the protection of the citizenry. That cannot wait for another day.

The field of emergency response has been taken to new technical and scientific heights. This case did not involve entry-level jobs or aptitude tests. As the job analyses, test syllabi and the actual exams reveal, a considerable amount of scientific and tactical knowledge, skills and abilities is needed to lead first responders whose own safety and that of many others depends on it. If the District Court were to focus on any policy considerations, petitioners submit it should have been public and firefighter safety, not the base political interests of elected officials.

The Seventh Circuit for example has observed that for thirty years the City of Chicago has been largely unable to administer civil service examinations for its public safety agencies without protracted litigation commenced either by the unsuccessful alleging disparate impact or the successful alleging their own rights were trammeled. *See Adams v. City of Chicago*, 469 F.3d 609, 610 (7th Cir. 2006), *cert. denied*, 127 S.Ct. 2141 (2007).

The Second Circuit decided these important issues in a manner which guarantees states and municipalities must brace for litigation every time they administer a job-related examination, at great cost to the public and those who invested and sacrificed much in reliance on the promise of a merit-based system of rewards, only to be told it was all for naught because they are of the wrong ethnicity or skin color.

Title VII's various provisions themselves bear internal tension as illustrated by the need in this case to reconcile subsections (j) (prohibiting racial balancing) and (h) (endorsing the use of professionally developed tests and otherwise providing an exemption for merit selection systems) with (k) (the disparate impact framework). The District and Circuit Courts resolved this, erroneously petitioners assert, by importing (k) into the other two, effectively nullifying both.

That conflicts persist over proper application of Title VII's competing guarantees and prohibitions to a civil service context governed by the Constitution illustrates the need for this Court's review. This case affords an opportunity to settle these questions, afford clarity to officials charged with enforcing civil

service laws and provide much needed stability in the delivery of vital protective services to the public.

Respectfully submitted,

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