No. 07-1428

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

PETITIONERS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Pursuant to Supreme Court Rule 15.8, petitioners submit this supplemental brief to address significant post-petition developments in this case. After the pending petition for writ of certiorari was filed, orders and opinions issued from the three-judge panel of the Second Circuit Court of Appeals that disposed of petitioners' appeal below and the active judges of the Circuit divided 7-6 in denying rehearing *en banc*. The dissenting judges agreed that this case presents questions of exceptional importance worthy of review by the United States Supreme Court – and expressed their hope that this Court will agree to resolve them.

II. PROCEDURAL BACKGROUND

Petitioners, firefighters and lieutenants denied promotions to command positions in the New Haven Fire Department for reasons of race, brought suit alleging city officials violated their civil and constitutional rights to be free from discrimination in employment and to enjoy the equal protection of the laws. The District Court granted summary judgment to respondents. Pet.App.,5a-51a. By summary order entered February 15, 2008, a panel composed of Judges Sack, Sotomayor, and Pooler adopted the opinion and affirmed the judgment of the District Court. *Id.*,1a-4a. On May 14, 2008, plaintiffs-appellants timely petitioned this Court for a writ of certiorari.

III. THE POST-PETITION EVENTS

After the panel's entry of judgment, and with no motion from petitioners, an active judge of the Court of Appeals requested a poll on whether to rehear this case *en banc*. On June 9, 2008, after a poll was concluded but before the Circuit Court had announced the poll or its result, the panel at once withdrew its summary order and issued a *per curiam* opinion virtually identical to the summary order.[1] *See* Petitioners' Supplemental Appendix at 2a-3a (submitted herewith). Despite the identical operative text shared by the order and the subsequent panel opinion, the panel's move prompted the Clerk of the Court of Appeals to enter a new judgment on June 9, 2008.[2]

Three days later, on June 12, 2008, the Second Circuit announced it had voted 7-6 to deny rehearing *en banc*. The panel apparently acted to convert its summary order to a binding precedential opinion while the opinions dissenting from denial of rehearing *en banc* were in production. Supp.App.,17a.

Joining the original panel members in denying rehearing *en banc* were Judges Calabresi, Straub,

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[1] The *per curiam* opinion deleted one word – "substantially" – from the first sentence of the summary order's operative text.

[2] The implications of the panel's action for this Court's appellate jurisdiction over the instant petition in these unusual circumstances are unclear. For the sole purpose of foreclosing any suggestion that the pending petition seeks review of a superseded judgment, petitioners anticipate filing another petition directed to the June 9 judgment.

Katzmann and Parker. Judges Katzmann, Parker and Calabresi filed opinions concurring in the denial of rehearing *en banc*. Chief Judge Jacobs and Judge Cabranes issued opinions dissenting. Since Judge Cabranes expressed the collective view of "almost half of the members of [the] court," Chief Judge Jacobs wrote separately to answer certain contentions of Judges Calabresi and Katzmann.[3]

IV. SUMMARY OF THE OPINIONS

Although he acknowledges this case "presents difficult issues," Judge Katzmann voted to deny rehearing *en banc* "consistent with [the Second] Circuit's longstanding tradition of general deference to panel adjudication," a tradition he contends should hold "whether or not the judges of the Court agree with the panel's disposition...." Judge Katzmann nonetheless believes the judges' divergent opinions will aid this Court in deciding whether to grant certiorari. Supp.App.,6a.

Judge Parker's concurrence argued the panel's judgment comports with the Circuit's prior holdings, including *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S.

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[3] The panel's order and opinion are reported at 530 F.3d 87. The *en banc* order and opinions are reported at 530 F.3d 88. The various opinions issued sporadically during the period June 9-17, 2008. Several errata notices have issued, the most recent on August 14, 2008.

1117 (1985). These precedents, he added, authorized New Haven's response to civil service examinations with racially disparate results, motivated as it was (in Judge Parker's view) by a "desire to comply with, and avoid liability under, Title VII and its implementing regulations" and thus does not amount to discrimination on the basis of race.[4] Supp.App.,7a-10a.

Writing for all six dissenting judges, *see* Supp.App.,11a-30a, Judge Cabranes observed that this case "raises important questions of first impression in [the] Circuit – and indeed, in the nation – regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices." Given the questions "of exceptional importance" and "weighty issues" in this case, the dissenters thought full review was appropriate and expressed deep concern with the panel's conversion of a district court opinion, "grappling with significant constitutional

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[4] Judge Parker suggested an open question of whether the tests were job-related and consistent with business necessity. Pet.Supp.App.,9a-10a. That is not the case. Respondents emphasized that it was *not* their position that the exams were invalid. *See* Pet.App.,848a (testimony of respondent Dubois-Walton); 1023a-1024a (statements of respondents' counsel). In moving to strike all evidence of the exam development process and petitioners' intensive study efforts, respondents insisted that the "merits" and "the actual validity of the test [are] not at issue." Defendants' March 10, 2006 Memorandum, District Court Doc. # 88 at 38 and *passim*.

and statutory claims of first impression, into the law of the Circuit."

Judge Cabranes questioned the majority's evident view that "any race-based employment decision undertaken to avoid a threatened or perceived Title VII lawsuit is immune from scrutiny under Title VII." Permitting officials to make employment decisions for "political reasons" – based solely on the racial demographics of otherwise valid employment test results – raises constitutional questions of "immense importance," Supp.App.,21a, among them:

> Does the Equal Protection Clause prohibit a municipal employer from discarding examination results on the ground that too many applicants of one race received high scores and in the hope that a future test would yield more high-scoring applicants of other races? Does such a practice constitute an unconstitutional racial quota or set-aside? Should the burden-shifting framework applicable to claims of pretextual discrimination ever apply to a claim of explicit race-based discrimination in violation of Title VII? If a municipal employer claims that a race-based action was undertaken in order to comply with Title VII, what showing must the employer make to substantiate that claim?

Id.,13a.

Chief Judge Jacobs's dissent criticized the majority's reasons for denying *en banc* review and Judge Calabresi's contention that the panel's interpretation

of Title VII was insulated from review because the parties did not "present a mixed motive argument to the district court or to the panel."[5] Observing that Judge Calabresi provided no authority for his proposition, for "the good reason that it is unsound," Chief Judge Jacobs cited multiple holdings of the Second Circuit and this Court that reject it. Supp.App.,34a n.2. Judge Calabresi's concurrence does not otherwise address the constitutional issues that bear on this petition.

The dissenting judges expressed "the hope that the Supreme Court will resolve the issues of great significance raised by this case." Noting that the panel's means of disposal and the majority's refusal to rehear this case *en banc* arguably served to insulate these important questions from further judicial review, Judge Cabranes concluded:

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[5] Petitioners did address this issue in both their briefing and oral argument to the panel. *See* Reply Br. at 20 n.17. Responding to Judge Sotomayor, petitioners' counsel suggested a workable application of mixed motive analysis in this case is problematic because respondents never placed into the mix a non-*race*-based reason for their actions. As the Circuit has acknowledged, mixed motives is an *affirmative defense* that permits employers to assert, and persuade a fact-finder, that they would have made the same decision in the absence of a prohibited factor. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir. 1992), *cert. denied*, 506 U.S. 826 (1992). Whether one credits respondents' espoused motive (a belief that given petitioners' race, promoting them would violate Title VII) or the competing assertion (their use of petitioners' race for political gain), this amounted to a dispute over what motivated respondents' use of a statutorily prohibited factor.

> What is not arguable, however, is the fact that this Court has failed to grapple with the questions of exceptional importance raised in this appeal. If the *Ricci* plaintiffs are to obtain such an opinion from a reviewing court, they must now look to the Supreme Court. Their claims are worthy of that review.

Id.,29a-30a.

V. THE SIGNIFICANCE OF THE *EN BANC* PROCEEDING

A. The Sharp Divisions Among The Circuit Judges Illustrate The Need For This Court's Guidance

The narrow vote to deny rehearing *en banc* and the discord over it underscores the need for this Court to settle the important statutory and constitutional issues in this case. Nearly half the active judges of the Circuit expressed their desire that this Court grant review, and Judge Katzmann in essence invited Supreme Court review while resting his vote to deny rehearing solely on a perceived custom of panel deference. The unusually disputatious opinions expose fundamental and deep divides over the question of when, if ever, a government may tell its citizen that he would have enjoyed earned career advancement if only he were of different ethnicity or skin color. The intra-circuit divisions mirror disputes in civil service (and society) over explicitly race-based deprivations and sharpen the inter-circuit conflict over governmental race preferences as a remedy for

those whose failure to meet legitimate job criteria or succeed in a valid competitive process cannot be traced to a constitutional violation.

The post-petition proceedings illustrate the conflicting interpretations of Title VII that perpetuate disparate impact litigation in the public sector. The District Court and the Circuit majority embrace a statistical definition of employment "discrimination" that permits unilaterally imposed remedies for numerical imbalance, unhinged from the Equal Protection Clause.[6] The contrary view, most cogently expressed by the Seventh Circuit, holds that a desire to reduce or eliminate disparate impact on one racial group does not justify discrimination against another, and further rejects the notion that Title VII is independent of the Clause. *See* Petition at pp. 26-30 (discussing *Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005)). The Seventh Circuit's approach is more consistent with the bedrock principles applicable to this case: 1) that any governmental use of race is presumptively invalid and must meet the exacting criteria of strict scrutiny; 2) that the Constitution does not proscribe race-neutral employment criteria

[6] Along with the District Court, Judge Parker detected "no racial classification" here. Pet.Supp.App.,7a-8a. Given that city officials attached a crude race code to each candidate ("1" for Black, "2" for Hispanic, and "3" for White), Pet.App.,428a-436a, and admittedly acted based on those demographics, the inability to discern a racial classification is perplexing.

with racially disparate impact – *see Washington v. Davis*, 426 U.S. 229, 241-42 (1976); and, 3) that Title VII does not "guarantee a job to every person regardless of qualifications." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).[7]

The Second Circuit transformed a statute that explicitly prohibits consideration of employees' race into one that mandates proportional representation in the workplace, in contravention of Congress's expressed intent to steer employers to focus not on race but on qualifications and its explicit prohibition of such racial balancing. *See* 42 U.S.C. §2000e-2(j). Worse still, the Circuit adopted the District Court's view that any qualifying examination that does not yield proportional ethnic/racial results is a "deficient" test, and government should in each case "formulate[ ] a better selection method." Pet.App.,34a. This

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[7] Judge Calabresi wrongly intimates that by challenging respondents' asserted motive as pretextual, petitioners conceded that a good faith, albeit misguided, desire to comply with Title VII constitutes a legitimate, "non-discriminatory" motive for race discrimination. Petitioners have insisted throughout that respondents violated Title VII and the Constitution whether their reason for using race was sanitary or "less salubrious" as Judge Calabresi put it. While Judge Calabresi suggests the question whether an employer's good faith desire to comply with Title VII relieves it from liability for a mistaken decision is an "interesting one," he answered that question in a prior case. "It is ... no defense to liability in a discrimination action to hold a good-faith but erroneous belief that the law permits taking an adverse job action on the basis of a prohibited factor." *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 112 (2d Cir. 2000) (Calabresi, J.).

unsupportable proposition applies even where, as here, one could not show any "particular flaw" in the exams or "pinpoint" their "deficiency." *Id.* In this case, such non-existent defects were conjured into being despite respondents' concessions to the contrary. The "deficiency" in this case relates not to selection method, but to a politically undesirable competitive *outcome*. Indeed, the *per curiam* opinion frankly endorses political expediency as a relevant consideration in the adjudication of Title VII and equal protection claims. The implications are sweeping, logically extending not only to state and federal civil service, but to other legitimate qualifying tests, including the bar exam, nursing and medical boards, accounting, insurance, banking, securities, and a host of other occupational examinations.

B. The Recurrence Of Similar Controversies Counsels Granting The Petition To Settle With Finality The Question Whether Race-Based Civil Service Employment Decisions Are Permitted

In 1984, the Second Circuit sanctioned race-based hiring and promotions in the civil service predicated merely on a statistical showing of disproportionate racial impact, even where there is no evidence that the job criteria and qualifying examination were a pretext for race discrimination. *See* Petition at 19, 35 (discussing *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984)). This Court denied certiorari in *Bushey* over the vigorous

dissent of then Justice Rehnquist, joined by Chief Justice Burger and Justice White. 469 U.S. 1117, 1117-1121. The "difficult and important questions" which the dissenting Justices thought merited review in *Bushey,* 469 U.S. at 1119, are the very ones which sharply divided the Second Circuit in this case.

Bushey permits public officials "unilaterally to decide to use race-based criteria to favor minorities in employment decisions." *Id.,*1120. Justice Rehnquist questioned the Second Circuit's "unexplained extension" of voluntary affirmative action to the public sector given that "[t]his Court has never taken the position that, consistent with the restraints of the Fourteenth Amendment, a state agency may establish preferential classifications on the basis of race in the absence of rulings by an appropriate body that constitutional or statutory violations have occurred." *Id.* (citations omitted.) The concerns expressed by the *Bushey* dissenters match those of the dissenters in this case – and arose from nearly indistinguishable facts, including an admittedly political response to professionally developed and entirely legitimate job-related exams:

> Nor is there even a hint ... that the [State] has violated the Fourteenth Amendment, either in utilizing this particular test or otherwise, by purposefully discriminating against minority employees. The test itself has been deemed irrelevant to this litigation. All that has happened here is that the State has perceived a statistical disparity in the

> test results of minority and nonminority applicants, and, at least in part because it fears a lawsuit by minority applicants, it has chosen to do away with that disparity by discriminating against similarly situated nonminority applicants.

Id.,1120.

Since even lawful affirmative action plans "must be policed to prevent the practice of discrimination for discrimination's sake ... and to protect the interests of innocent third parties ..." the dissenting Justices noted such interests are not protected if public agencies are allowed to "cave in" to allegations of discrimination "based only upon disparate impact" and engage in "arguably discriminatory conduct" under shield of Title VII. *Id.*,1120-22. These important issues remain unsettled. As Judge Cabranes noted, " ... there can be little doubt that a decision of this Court thus sanctioning race-based employment decisions in the name of compliance with Title VII raises novel questions that are indisputably of 'exceptional importance.'" Supp.App.,29a.[8]

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[8] What Justice Rehnquist considered a constitutionally suspect doctrine was arguably worsened by the Second Circuit's decision to hold to *Bushey* notwithstanding the 1991 congressional enactment explicitly banning the alteration of employment test results based on race. *See* Petition at 35-39 (discussing 42 U.S.C. §2000e-2(l).

C. The Panel's Published Opinion Heightens The Necessity Of Review

The panel's conversion of its summary order to an opinion with full precedential force further imperils local laws mandating merit-based systems of hiring and promotions in civil service, laws which Congress did not intend to displace. *See* 42 U.S.C. §2000e-7. The Circuit's Title VII doctrine exalts ill-defined concepts of "diversity" and group entitlements over the constitutional right of the individual not to be crudely race-coded by his own government. It also treads on the right of "[t]he citizens of New Haven ... to be protected by uniformed personnel chosen on the basis of merit" and that of first responders "to be backed up in their difficult and dangerous work by [others] chosen on the basis of merit." *Henry v. Civil Serv. Comm'n, City of New Haven*, 2001 WL 862658, at *4 (Conn. Super. July 3, 2001).

As the petition reveals, qualifications were discounted and first responder safety ignored in the lower courts' focus on race and politics. The judgment reflects a failure to appreciate what the New Haven Superior Court well understood: "[New Haven's] wholesale evasion of the civil service laws in this area comes at a high price, and the price is paid by all." *Id.*

As the dissenting judges recognized, these interests transcend petitioners' ordeal. Accordingly, this case presents "vital questions of exceptional importance ... that warrant further review, both for the proper resolution of this case and for the guidance of

other courts and municipalities in future cases." Supp.App.,24a (quotation and alteration omitted).

CONCLUSION

The *en banc* proceeding and the opinions it produced demonstrate that, in Judge Cabranes's words, petitioners' claims "are worthy of [the Supreme Court's] review."

Respectfully submitted,

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