Nos. 07-1428, 08-328

# 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**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## INTRODUCTION

This case presents a well-defined and crucially important issue dividing lower courts: should employers be immunized for engaging in intentional discrimination by abandoning a valid, race-neutral promotion process because they claim to be voluntarily complying with Title VII, when that claim is supported only by statistical disparity. The Second Circuit has rejected the approach of other circuits, creating regionally conflicting constitutional and Title VII standards.

In asserting that there is insufficient lower-court guidance on the "indisputably complex" questions this case presents, respondents ignore that these issues have been brewing in the courts of appeals for three decades; indeed, many of them have addressed similar questions in the specific context of firefighter promotions. Moreover, the Second Circuit's decision has already begun to disrupt and deform employment-discrimination jurisprudence in the short time since it came down. Respondents' claim that petitioners' issues rarely arise ignores a weeks-old Sixth Circuit decision that considered the same questions and reached the same erroneous conclusions by specifically relying on the Second Circuit's decision.

This issue needs no further development in the lower courts. Lower courts need guidance, now, on whether purported Title VII compliance really is a free pass to throw out the results of race-neutral, content-valid tests. Governmental employers need guidance, too, on how to implement neutral promotion

processes to avoid both discrimination and "reverse" discrimination under Title VII and the Equal Protection Clause. The Court should grant certiorari.

## ARGUMENT

### I. The Court Should Decide Whether Racially Motivated Abandonment of a Valid, Race-Neutral Selection Process Violates Equal Protection.

Petitioners ask whether a government employer's refusal to follow a content-valid, race-neutral selection process violates the Equal Protection Clause when the cancellation is motivated by the race of the candidates selected for promotion.[1] Necessarily included in that question is whether that refusal is subject to strict scrutiny under the Equal Protection Clause. Respondents are wrong to pretend the two questions are radically separate. Indeed, it is well known strict scrutiny is virtually "automatically fatal," *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2770 (2006) (Thomas, J., concurring), so the question of the appropriate analytical frame will be usually outcome-determinative.

[1] Respondents seek to bury this question by omitting it from their rewritten questions presented and refusing to address it until their response's twenty-second page. They then feign confusion about its scope. BIO 22.

Nor is it merely error correction for this Court to consider whether race-motivated rejection of a merit-based race-neutral hiring process should be strictly scrutinized. BIO 23. The question is not simply whether the Second Circuit erred in applying an indisputably applicable analytical framework; it is whether its use of the wrong analytical lens resulted in an erroneous conclusion about liability.

The question about the proper legal standard to be applied is also important, well-defined, and well-prepared for review. The Second Circuit held strict scrutiny was not triggered when respondents refused to follow an already-established race-neutral promotion process because of the successful candidates' race, on the erroneous premise that the race-motivated refusal itself was race-neutral. That conclusion and reasoning conflict with a number of opinions holding that decisions just like New Haven's are racial classifications warranting strict scrutiny and that avoiding phantom Title VII liability is not a compelling interest justifying race-based governmental employment action. See First Pet. 32; Second Pet. 16-18.

*Williams* v. *Consolidated City of Jacksonville*, 341 F.3d 1261, 1269 (CA11 2003), like this case, involved a race-based decision not to promote based on the race of those who would have been promoted. See also *Afro-American Patrolmen's League* v. *City of Atlanta*, 817 F.2d 719, 724, n.5 (CA11 1989). Respondents' claimed difference between not creating the new positions in *Williams* and not filling existing positions in

this case has no analytical or constitutional relevance. As in *Williams*, respondents decided to abandon a race-neutral, content-valid promotion process, not because it was challenged, see BIO 27, but because they were concerned about the racial composition of the successful candidates. *Williams, supra,* at 1269. Moreover, *Williams* specifically pointed out that a "refus[al] to promote . . . to *preexisting* positions," would even *more* clearly violate equal protection. *Williams*, *supra*, at 1270-1271 (noting qualified immunity would have been denied on such facts). *Ricci* and *Williams* thus squarely conflict.

More generally, the Second Circuit's decision conflicts with multiple decisions holding that purported fear of Title VII liability cannot immunize discriminatory actions from constitutional strict scrutiny. *Dean* v. *City of Shreveport*, 438 F.3d 448, 454 (CA5 2006); *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (CA7 2004); *Quinn* v. *City of Boston*, 325 F.3d 18, 28 (CA1 2003); *Dallas Fire Fighters Assn.* v. *City of Dallas*, 150 F.3d 438, 440-441 (CA5 1998); *Md. Troopers Assn., Inc.* v. *Evans*, 993 F.2d 1072, 1076-1077 (CA4 1993). The First, Fourth, Fifth, and Seventh Circuits each strictly scrutinize race-based actions taken in purported compliance with Title VII and have regularly determined that such actions violate equal protection. Respondents' attempt to distinguish these decisions on irrelevant factual differences disregards the common legal framework in which each was decided, a framework the Second Circuit has rejected. It is not tolerable for similar practices to

be permitted, even lauded, in New Haven and New York while being constitutionally outlawed in Boston, Miami, and Chicago, and only this Court can resolve this tension and declare the uniform law of the land.

Respondents' ancillary arguments, such as the fact that some of the cases involved consent decrees, BIO 27, n.22, raise additional distinctions without a difference. The cases petitioners cite, like this case, are about remedial responses, under whatever rubric, to statistical adverse impact. These cases have regularly held that, when implementing a purportedly remedial response to racial imbalances in civil-service hiring processes, the desire to mitigate mere adverse impact against one group, without additional evidence of present discrimination, cannot justify intentional discrimination against another. *E.g.*, *Biondo, supra*, at 684; *Dallas Fire Fighters Assn., supra*, at 441; *Md. Troopers Assn., supra*, at 1076. The Second Circuit has held to the contrary.

Finally, respondents are mistaken in their odd contention that the avoidance canon somehow counsels against review. BIO 28 & n.23. Respondents pervert that canon into an argument that the Court should not take up the equal protection question because it may *find for the petitioners* on the Title VII question. Constitutional avoidance might counsel deciding the Title VII question before the equal protection question if the Court takes both, but it says nothing about whether the equal protection question is worth taking up in the first place.

Moreover, respondents miss the crucial point that this case is specifically and fundamentally about the interaction between Title VII and the Equal Protection Clause. The numerous cases addressing the interplay between purported desires to avoid adverse racial effects and the impermissibility of engaging in racial discrimination to do so indicate that this case presents a well-developed dispute that continues to vex local authorities. The Court should clarify how the statute and the Constitution interact.

## II. The Court Should Grant Certiorari to Consider Petitioners' Title VII Question.

### A. Petitioners Raise Well-Developed and Pervasively Recurring Title VII Issues.

The decision of the court of appeals short-circuits this Court's framework for Title VII disparate-impact analysis and endorses intentional racial discrimination as a purportedly remedial response to mere statistical evidence of adverse impact. Respondents strain unsuccessfully to obscure the widening divide separating the Second Circuit from other circuits considering factually similar scenarios, but this issue continues to arise with increasing regularity.

Multiple cases from at least three different circuits illustrate that the Second Circuit has departed from established Title VII analysis. In *Afro-American Patrolmen's League*, the Eleventh Circuit held that a civil-service employer must demonstrate unlawful discrimination beyond simple statistical

evidence of adverse impact before it can legitimately choose to discriminate against nonminority applicants or employees to avoid the impact of disparate exam results. 817 F.2d, at 724. Numerous decisions recognize that disparate-impact discrimination is established only by showing equally valid but less discriminatory exam alternatives, not by mere conjecture about their possible existence. See *Allen* v. *City of Chicago*, 351 F.3d 306, 313 (CA7 2003); *Gillespie* v. *Wisconsin*, 771 F.2d 1035, 1044-1046 (CA7 1985); see also *Stewart* v. *City of St. Louis*, No. 04-cv-885, 2007 WL 1557414 (ED Mo. May 25, 2007), aff'd *per curiam*, 532 F.3d 939 (CA8 2008).

Respondents unconvincingly claim that *Afro-American Patrolmen's League* is inapposite because it "did not construe Title VII" directly. BIO 15-16. They fail to acknowledge either that the consent decree in that case was entered to enforce Title VII guarantees or that its requirements were fully congruent with Title VII. *Afro-American Patrolmen's League, supra*, at 721. The case's central point, which flatly contradicts *Ricci*, is that without demonstrating racial bias beyond mere statistical evidence of adverse impact, the city could not "know which alternative—abandonment of the results or promotions based on the results—would be the racially neutral option." *Id.*, at 724.

Respondents are no more convincing with their question-begging distinction of *Allen*, *Gillespie*, and *Stewart* as "not even reverse discrimination cases." BIO 15. The Court has never said Title VII applies

differently depending on the plaintiffs' race. That is the very question presented, and the circuits' division cannot be obscured by merely assuming the answer.

Respondents are similarly mistaken in straining to paint petitioners' Title VII question as unique and rare. BIO 13-14. Most amazingly, they ignore that the Sixth Circuit, mere months after *Ricci*, relied extensively on *Ricci* as "factually analogous and persuasive authority" in upholding against Title VII challenge the cancellation of a merit-based selection process based on perceived disparate impact in promotional exam results. *Oakley* v. *City of Memphis*, No. 07-6274, 2008 WL 4144820, at *5 (CA6 Sept. 8, 2008) (unpublished).

*Oakley*, following *Ricci*, immunizes employers against claims of discrimination for abandoning a merit-based selection process, so long as the refusal is purportedly to avoid disparate impact—even when their fear of Title VII liability is potentially unwarranted and based solely on the EEOC's "four-fifths" guideline. See *id.*, at *4-*5. This conclusion erroneously ignores that disparate impact correctly only exists when there is adverse impact *and* no business-need justification. See 42 U.S.C. §2000e-2(k)(B)(ii); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). Thus *Oakley*, following *Ricci*, wrongly allows employers to reject race- and gender-neutral merit-selection processes whenever they do not achieve quotas.

*Oakley*, moreover, specifically endorses *Ricci*'s mistaken conclusion that there could be no discrimination because no one was promoted and the action

was thus supposedly neutral. *Oakley, supra*, at *4-*5. *Oakley*'s adoption of *Ricci*'s worst features and implications shows *Ricci* is and will continue to be misleading to other courts of appeals, causing disruption in the law. This is the proper case to end the disturbance.

### B. The Court Should Decide Whether Intentional Discrimination Is Allowed to Remedy Unintended Disparate Impact.

The Second Circuit's (and respondents') broad definition of voluntary compliance with Title VII allows intentional racial discrimination for entirely prophylactic, nonremedial purposes to forestall perceived (and likely unprovable) future disparate impact. Respondents emphasize that Title VII encourages voluntary remedial measures. BIO 16-18. But Congress never authorized intentional racial discrimination as a voluntary remedial measure unless there is a compelling governmental interest for doing so. "[T]o 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, supra*, at 684.

Further, the Court has severely restricted the circumstances that can justify intentional discrimination like that undertaken by respondents in this case. The Court has never suggested that intentional discrimination can be justified by mere concern or good-faith belief, based only on statistical disparity,

that an employment practice has disparate impact. See, *e.g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 992-993 (1988) (plurality op.) (forbidding "inappropriate prophylactic measures" to avoid disparate impact suits). Instead, "[t]he Court has noted the danger that relying solely on statistical disparities as proof of discrimination under Title VII could result in the imposition of de facto quotas." *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 487, 494 (CADC 1998) (citing *Watson, supra*, at 991-997).

Yet the Second Circuit declared that statistically disparate results on concededly valid selection exams[2] allowed New Haven to abandon the promotional process specifically because of the successful candidates' race. The Second Circuit's improperly equating adverse impact with prohibited discrimination lets

[2] Respondents conceded below that they discerned no flaws in the exams, were *not* contesting their validity, and were instead resting their defense on a "good faith" belief they *might* someday discover equally valid alternatives. App. 1016a-1037a. Respondents' new suggestion that they acted from validity concerns is disingenuous. Particularly so is their reliance on the equivocal comments of Dr. Hornick, a competitor to the exam developer, on a brief conference call with New Haven's civil service board about possible alternative exams. Hornick's comments were not based on a thorough review of the tests, App. 1030a, were not entitled to weight under relevant EEOC Guidelines, 29 CFR §1607.9(a) ("testimonial statements" from commercial providers are "[u]nacceptable substitutes for evidence of validity"), and in any event not entitled to be credited, since this case was resolved by summary judgment against petitioners and petitioners introduced ample contrary evidence of the tests' validity.

employers leapfrog from unintended disparity to intentionally discriminatory "remedy," shortcutting the proper analysis and violating Title VII (and the Equal Protection Clause).

Nor is petitioners' challenge to this erroneous analysis troubling, impractical, or unduly dualistic. BIO 17-18. Petitioners' position merely requires employers to look beyond purported good-faith[3] fear of Title VII liability and inquire specifically whether their employment tests are justified by business need. This is something every employer should be doing (and indeed New Haven did) before giving the tests in the first place.[4]

Voluntary employer action is important to further Title VII's purpose, but it does not permit employers to intentionally discriminate against nonminority employees simply because an employment test has racially disproportionate results. Rather, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, *supra*,

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[3] Petitioners do not concede that respondents acted or that the district court found they had acted in good faith, either in their claimed fear of potential Title VII liability or in their asserted belief that intentional discrimination could be justified as voluntary Title VII compliance. There was ample contrary evidence, and this case was resolved on summary judgment against petitioners. App. 11a-14a, 16a-17a, 19a-20a, 51a.

[4] Moreover, New Haven commissioned a post-exam validation study and was aware that it would have validated the tests, but decided to block the study and scrap the promotions. App. 190a-191a, 329a-339a.

at 2768. The Second Circuit's endorsement of intentional racial discrimination based on mere statistical disparity contradicts this Court's cases, conflicts with other circuits' decisions, and confuses the jurisprudence of Title VII.

### C. No Analytical-Framework Issue Impedes the Court's Review.

Respondents mistakenly suggest that the lack of lower-court "mixed-motive" analysis under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), makes this an imperfect vehicle. BIO 18-20. They rely heavily on Judge Calabresi's labors to shield this obviously suspect decision from review, but never actually explain why petitioners' questions cannot be reached. *Ibid.*

This is not a mixed-motives case. "The very premise of a mixed-motives case is that a legitimate reason was present." *Price Waterhouse, supra*, at 252. Respondents acknowledge they abandoned the promotion process because the successful candidates were largely white but equate this race-conscious act with legitimate, permissible voluntary compliance with Title VII. App. 24a-25a, 465a-476a; BIO 6-7, 16-17. But petitioners' core assertion is that this claimed excuse for respondents' discrimination against petitioners is not a legitimate one at all. *E.g.*, Supp. Br. 9, n.7. The issue is not choosing between legitimate and illegitimate justifications, but simply whether the justification offered by respondents is permissible

under Title VII and the Equal Protection Clause. The respondents' contention that this case is a poor vehicle is actually a disguised argument that the Court can *never* consider the petitioners' actual question.

## III. Petitioners' 42 U.S.C. §2000e-2(*l*) Argument Was Properly Preserved and Deserves Review.

Respondents wrongly assert that petitioners "did not argue in the district court" that the City violated 42 U.S.C. §2000e-2(*l*). BIO 20-21 & n.16. But petitioners not only argued in their brief that the 1991 Title VII amendment invalidated *Bushey* v. *N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (CA2 1984), which respondents claimed to have followed, see Pls. Opp. to Mot. for S.J. 55, 59-60, but orally argued to the district court that Congress did not intend to allow employers to "end-run" the amendment's proscription against employer's racially motivated alteration of exam results by simply ignoring them. App. 1055a-1056a.

In suggesting the lower courts reached no holding on the issue, respondents also ignore their invocation of §2000e-2(*l*) in both lower courts as requiring their course of action. See Defs.' Opp. to Mot. for S.J. 12 (arguing based on the provision that "an employer's only choice when faced with an exam that results in adverse impact is to either accept or not accept the results."); Appellees' Br. 25 (similar). Petitioners squarely challenged this illogical construction

of the provision before the Circuit. See Appellants' Br. 66-68.

That both lower courts chose to reject petitioners' arguments by conflating them with respondents' self-favoring construction of §2000e-2(*l*) hardly sustains respondents' assertion that lower courts need no guidance on the issue.

## CONCLUSION

The Court should grant certiorari.

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