Supreme Court Petitioned to Hear Testing Case Involving Title VII "Alternatives" and the Constitution's Equal Protection Clause

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Important Questions as Seen by Second Circuit Dissenters

The *Ricci v. DeStefano*[2] testing case was reported recently in *TIP*[3] ("Slippery Slope of Alternatives") and has now a petition for *certiorari* before the U.S. Supreme Court. The essential issue as seen by the dissenting Circuit judges:[4]

> 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?

New Haven Press Headlined Developments and Urged Supreme Court to Take Case

As reported by the *New Haven Register* in June:

> In what observers describe as a highly unusual development, six judges from a polarized 2nd U.S. Circuit Court of Appeals have urged the U.S. Supreme Court to hear a reverse discrimination lawsuit filed by 20 firefighters, calling the uncharted legal questions it raises of potential national significance. The case involves….two promotional exams (which) were thrown out because too few minorities scored high enough to get promoted.[5]
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> U.S. District Judge Janet Bond Arterton ruled in a summary judgment that no discrimination happened since no one was promoted as a result of the examination. In a two-paragraph summary order, a three-judge panel of the U.S. 2nd Circuit Court of Appeals refused to hear an appeal of the suit's dismissal. That decision, however, did not sit well with all the 2nd Circuit judges. One asked that its members be polled on whether the full court should hear the appeal. The full-court hearing was denied, but six judges, including (the) Chief Judge…dissented. The dissenting opinion…essentially accuses the majority of the appeals court of intellectual laziness for failing to examine issues it had conceded were "difficult," but on which there is no settled law. The dissent lists a number of Constitutional questions. But it identifies the main issue as how much authority a city has to

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[2] Ricci v. Destefano, Civil No. 3:04cv1109 (JBA).

[3] Sharf, J. (October 2007). Slippery slope of "alternatives" altering the topography of employment testing? *The Industrial-Organizational Psychologist, 45*(2), 13–19.

[4] Dissenting Opinion (June 12, 2008): *Ricci v. DeStefano*. United States Court of Appeals for the Second Circuit Docket No. 06-4996-cv.

[5] Kaempffer, W. (June 16, 2008). http://www.nhregister.com. (See also Hamblett, M. [June 13, 2008]. Divided 2nd Circuit denies hearing by full court in bias case. *New York Law Journal* http://www.law.com).

disregard promotion examination results solely because of the race of the top scorers. Neither the 2nd Circuit nor the Supreme Court has ruled on the questions. …The firefighters' claims got a fair hearing from the dissenting judges of the 2nd Circuit. The Supreme Court should hear their appeal.[6]

Firefighters' Petition for Certiorari to Supreme Court[7]

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, 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.

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.

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.

Dissenting 2nd Circuit Judges Urge U.S. Supreme Court to Hear Case[8]

This appeal raises important questions of first impression in our Circuit—and indeed, in the nation—regarding the application of the Fourteenth

[6] *New Haven Register* Editorial (June 30, 2008). http://www.nhregister.com.

[7] Torre, K. (May 14, 2008). In The Supreme Court of the United States.
PETITION FOR WRIT OF CERTIORARI in the matter of *Ricci v. DeStefano*. P2–3.

[8] Jose A. Cabranes, Circuit Judge, with whom Chief Judge Jacobs, Judge Raggi, Judge Wesley, Judge Hall, and Judge Livingston join, dissenting. *Ricci v. DeStefano*. United States Court of Appeals for the Second Circuit (Order issued June 12, 2008), Docket No. 06-4996-cv.

Amendment's Equal Protection Clause[9] and Title VII's prohibition on discriminatory employment practices. At its core, this case presents a straight-forward question: May a municipal employer disregard the results of a qualifying examination, which was carefully constructed to ensure race-neutrality, on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another? In a path-breaking opinion, which is nevertheless unpublished, the District Court answered this question in the affirmative, dismissing the case on summary judgment. A panel of this Court affirmed in a summary order containing a single substantive paragraph. Three days prior to the filing of this opinion, the panel withdrew its summary order and filed a *per curiam* opinion adopting *in toto* the reasoning of the District Court, thereby making the District Court's opinion the law of the Circuit.

The use of *per curiam* opinions of this sort, adopting in full the reasoning of a district court without further elaboration, is normally reserved for cases that present straight-forward questions that do not require explanation or elaboration by the Court of Appeals. The questions raised in this appeal cannot be classified as such, as they are indisputably complex and far from well-settled. These questions include:

- 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?

Presented with an opportunity to address *en banc* questions of such "exceptional importance,"[10] a majority of this Court voted to avoid doing so. I respectfully dissent from that decision, without expressing a view on the merits of the questions presented by this appeal, in the hope that the Supreme Court will resolve the issues of great significance raised by this case.

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[9] Fourteenth Amendment to U.S. Constitution: Section. 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall* make or *enforce any law which shall* abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor *deny to any person within its jurisdiction the equal protection of the laws*" (emphasis added).

[10] Fed.R.App.P.35(a)(2).

Discussion

The facts in this case well illustrate how activist judges make Title VII law instead of interpreting it. As noted by *National Review*'s Ed Whelan, it appeared that Judge Arterton and the three panelists on the Second Circuit attempted to bury the firefighters' claims. "A remarkable opinion last week by highly regarded Second Circuit judge …exposes some apparent shenanigans by three members of a Second Circuit panel and a district judge."[11] Notwithstanding the Civil Rights Act of 1991's clear allocation of the burden of "production and persuasion" for equally valid less adverse alternatives after job relatedness is established at trial[12] (the city having conceded at trial that the exams were valid), Judge Arterton acknowledged that the city came up short on this proof requirement but granted the city summary judgment anyway. Furthermore, she chose to ignore the language in the Civil Rights Act of 1991 that stipulates that the employer would not be liable on the "equally valid less adverse alternative" basis unless, after the plaintiff meets its burden at trial, the employer "refuses to adopt" the equally valid less adverse alternative. Judge Arterton's reasoning was as follows:

> Plaintiffs' argument boils down to the assertion that if defendants cannot prove that the disparities on the Lieutenant and Captain exams were due to a particular flaw inherent in those exams, then they should have certified the results because there was no other alternative in place. 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.[13]
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> (T)he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants.[14]

This collusion of activist judges in favoring the group rights of minorities over the U.S. Constitution's Equal Protection clause of the Fourteenth Amendment (fn 9) is indeed of national consequence. Whether or not the Supreme Court grants *certiorari* in *Ricci*, the "shenanigans" (fn 11) of activist judges, the legal burden of "production and persuasion" respecting "equally valid less adverse alternatives" at trial, and the equal protection guarantee to every individual have all been framed in both the firefighters' petition and the 2nd Circuit judges' dissent.

Stay tuned.

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[11] Whelan, E. (June 16, 2008). Second Circuit shenanigans. http://bench.nationalreview.com/post/?q=YzUwOGM3YWMxZTk2NzIwZjliNDBkZDUzMzhlOTc5ZDc=

[12] Civil Rights Act of 1991, Sec. 105. Burden of Proof in Disparate Impact Cases; 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[13] Case 3:04-cv-01109-JBA, p.31.

[14] Case 3:04-cv-01109-JBA, p.33, 28 June 2008.