Nos. 07-1428 & 08-328

IN THE
Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DeSTEFANO, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of neither party in these cases.[1]

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. It is today one of the world's leading civil and human rights organizations. ADL's nearly 100-year history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority group or of a non-minority group, and to assuring that each person receives equal treatment under the law. ADL believes that each person in our country has a constitutional right to be treated as an individual, rather than as simply part of a racial, ethnic, religious, or gender-defined group. In this connection, ADL has often filed briefs *amicus curiae* in this Court in cases arising under the Equal Protection Clause of the Fourteenth Amendment to the Constitution or the Nation's civil rights laws.[2]

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

2. *See*, *e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968);

(Cont'd)

In this brief, we suggest a mode of analyzing the "compelling state interest" aspect of strict scrutiny not as a means of supporting either party, but rather to assist the Court in resolving an issue left unaddressed by the lower courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

ADL consistently has sought to reconcile its core mission – "to secure justice and fair treatment to all citizens alike . . . [and] put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens" – with the use of racial preferences in access to social opportunity such as employment and education. Anti-Defamation League 1913 Charter (1913). While ADL has endorsed limited racial preferences in order to remedy specific discrimination, it has repeatedly opposed the non-remedial use of race-based criteria, except under highly limited circumstances in the educational context where the government can identify a compelling interest to justify them, and has narrowly tailored their use to meet those legitimate interests.

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DeFunis v. Odegaard, 416 U.S. 312 (1974); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

We believe that the eradication of discrimination from our society is best achieved through strict assurance of equal treatment to all. Thus, while strongly supportive of municipal employers' voluntary compliance with Title VII, ADL maintains that New Haven's non-remedial use of raced-based criteria – its refusal to certify the promotional test results merely because "too many" members of one race did well on the test and were among those immediately eligible for promotion – must be subjected to strict scrutiny. Diversity in all facets – race, gender, religion, thought, life experiences, socioeconomic status – remains a key ingredient in America's continuing evolution toward a fully integrated society that honors inclusiveness, and is free of racial and ethnic hatred and the discrimination that flows from them. Unfortunately, the means chosen by New Haven to promote within its fire department threatens to reverse, not advance, that process, and in the end may exacerbate hostilities between racial and ethnic groups and foster resentment – exactly contrary to what Title VII is meant to promote.

Dissenting from the Second Circuit's refusal to rehear this case *en banc*, Judge Cabranes posited a list of "indisputably complex and far from well-settled" questions that this case raises. Op at 1-2 (Cabranes, J., dissenting). Supp. App. 13a. Among them is the question of what showing a municipal employer must make to substantiate its claim that it undertook a race-based action in order to comply with Title VII.

ADL submits that the municipality's action in a case such as this must be subjected to strict scrutiny. We further submit that where the municipality claims a compelling interest in avoiding Title VII liability or litigation, the standard for what it should be required to show should be fashioned from this Court's Equal-Protection jurisprudence under the Voting Rights Act – specifically, *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*). Under that standard, a municipality cannot meet the compelling state interest test merely by arguing that it wishes to avoid the expense and inconvenience of litigation, regardless of its merit or lack thereof. Rather, the municipality must show a "strong basis in evidence" that it would have faced liability in likely Title VII litigation, absent the challenged action. *Id* at 908 & n.4. Such a requirement will minimize the risk of an illegitimate racial classification.

New Haven thus far has not been put to its proofs as to whether it has a compelling interest in scrapping the test results – that is, whether, under the facts of this case, there was a "strong basis in evidence" that it would have been subject to Title VII liability. The record as it now exists leaves unresolved questions that require resolution by the district court.

ARGUMENT

I. Where a municipal employer admits making a race-conscious decision, even for the stated purpose of Title VII compliance or avoiding liability, its action must be subjected to strict scrutiny.

"It is well-established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751-52 (2007), citing *Johnson v. California*, 543 U.S. 499, 505-506 (2005), *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). *All* government-imposed racial classifications are subject to the exacting review of strict scrutiny. *Johnson*, 543 U.S. at 505 (emphasis in original), citing *Adarand,* 515 U.S. at 227. "[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (internal quotation marks omitted); *see also Parents Involved*, 127 S.Ct. at 2767 (Roberts, C.J., concurring).

New Haven's conduct in rejecting the exam results because it was dissatisfied with the racial makeup of the resulting candidate pool undoubtedly constitutes a race-based distinction. As Ricci details, Pet. Br. 6-10, New Haven officials went to great lengths pre-examination to determine that the captain and lieutenant tests were fair and truly job-related. Had a sufficient number of African-American examinees scored well enough to meet

whatever level city officials had in mind, the exam results undoubtedly would not have been rejected, but rather would have been certified by the Board of Fire Commissioners and used as the promotion list (subject to the rule-of-three). There is but one reason why that did not happen: race. Not enough African-Americans did well enough on the exam to qualify for immediate promotion, and so, New Haven asserts, it feared potential liability under Title VII.

Strict scrutiny of the City's decision is required despite its claim of a valid motive. This Court long has recognized that so-called "benign" reasons for classifying Americans by race are just as problematic as those arising from sinister aims, and has refused to exempt them from searching review. *Johnson*, 543 U.S. at 505 (Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"). The suspect nature of racial classifications in our society is such that "simple legislative assurances of good intention cannot suffice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

When government uses race as a *decisive factor* in allocating opportunity or benefits, and ignores merit and classifies people based on immutable characteristics, it violates core values of Equal Protection. Even in higher education, one of the few areas in which this Court has been willing to permit *some limited* use of race, the means by which it may permissibly be considered is far more nuanced than the approach New Haven used here. Thus, in *Grutter*, the University of Michigan's law school was allowed to take race into account in its admissions

as one component of a "highly individualized, holistic review" that focused on each applicant's talents, abilities and background. *Grutter*, 539 U.S. at 337. The process did not run afoul of Equal Protection because it used race as just one factor; the individualized nature of that inquiry being deemed of "paramount" importance. (In contrast, Michigan's undergraduate admissions system, which essentially awarded "bonus points" to minority applicants, was struck down for doing just that, in the companion case of *Gratz v. Bollinger*, 539 U.S. 244 (2003)).

In contrast to the law school's highly individualized, holistic review, New Haven here appears to have simply used race in an effort to achieve racial balance – a use that *Grutter* held would be "patently unconstitutional." 539 U.S. at 330. Firefighters were told that a promotional exam would be given, and they adjusted their lives accordingly to improve their chances for advancement. Some quit or took leave from second jobs so they could study. The dyslexic among them paid to have study texts converted to audio; the expectant among them (hopefully with his wife's approval) studied in the labor and delivery room. Pet. Br. 8 & n. 4. All took the test and did well – and then all watched as New Haven decided their skin was the wrong color and threw out the results.

The decision to scrap the test results must be subjected to strict scrutiny as a racial classification.[3]

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3. Indeed, in its current posture this matter is not an employment case so much as a racial-classification case. Although the issue arises here against the backdrop of the promotional exam for New Haven's firefighters, it could just as easily happen in the context of educational admissions, distribution of government benefits or any of countless other situations.

II. Where a municipality asserts a fear of Title VII liability as a compelling interest, it should be required to establish a "strong evidentiary basis" for its assessment.

As even the City acknowledges, the lower courts simply accepted at face value its claim to have acted in part for fear of Title VII litigation. Brief in Opposition 23; *see also* Pet. App. 47a; Pet. Supp. App. 4a-6a. As Ricci suggests, that acceptance "essentially authorizes outright race balancing," which this Court never has done. Pet. Br. 34-35. We submit that this Court's precedents from the voting-rights arena can provide helpful guidance as to how strict scrutiny should apply to New Haven's claimed interest in avoiding Title VII litigation.

In *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*), the Court invalidated as a violation of Equal Protection North Carolina's creation of a majority African-American congressional district. Both the Court and Justice Stevens in dissent agreed that the mere threat of any litigation could not serve as a compelling interest for strict-scrutiny purposes. *Id* at 908-909 & n.4; 943 & n.18 (Stevens, J., dissenting). As the Court held, "a State must also have a 'strong basis in evidence' for believing that it is violating the Act. It has no such interest in avoiding meritless lawsuits." *Id* at 908-909 & n.4, citing *Shaw v. Reno*, 506 U.S. 630, 636 (1993) (*Shaw I*) and *Croson*, 488 U.S. at 500. New Haven's claimed justification should be evaluated against this "strong basis in evidence" threshold to determine whether its interest in avoiding litigation is a compelling one on these facts.

Another Equal Protection case involving public-safety promotions, *Cotter v. City of Boston*, 193 F.Supp.2d 323 (D.Mass. 2002), *aff'd. in relevant part*, 323 F.3d 160, 172 & n.10 (1st Cir. 2003), illuminates what that inquiry might look like. In *Cotter*, eight white Boston police officers challenged the promotion of three African-American officers who received lower scores on the promotional exam for sergeant. Boston cited three interests it claimed were sufficiently compelling to justify its move: the operational impact of having a racially diverse police force, the need to remedy past discrimination within the Department, and the desire to stave off litigation it claimed would have been filed by a minority-officers' association or the officers themselves. 193 F. Supp. 2d at 338. In analyzing the City's claimed desire to avoid litigation, the district court looked to *Shaw II* for guidance. 193 F. Supp. 2d 351, citing *Shaw II*, 517 U.S. at 908 n.4. [4]

A "strong basis in evidence" could be established, the court held, by "either 'a contemporaneous or antecedent finding of past discrimination by a court or other competent body,' or evidence 'approaching a prima facie case of a constitutional or statutory violation.'" *Id* at 344-345, citing *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 20 (1st Cir. 1998), *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 289 (1986), and *Croson*, 488 U.S. at 500. Thus, *Cotter* viewed *Shaw II*'s "strong basis in evidence" standard as lying somewhere between the City merely articulating

4. The court analyzed Boston's purported compelling interest in remedying past discrimination within its police department using the same standard. 193 F. Supp. 2d at 350-351.

the claimed fear and "garnering enough evidence to make out a winning case against itself." That middle ground recognizes that the public employer frequently is in a "delicate position" and "trapped" between potential liability to competing groups. *Id.* at 345, citing *Wygant*, 476 U.S. at 290-291 (O'Connor, J., concurring).

Cotter provides similar guidance in determining whether New Haven's fear of Title VII liability constitutes a sufficiently compelling interest to meet the first half of the strict-scrutiny analysis. Nor would *Shaw*'s application necessarily compel a finding that New Haven's decision to disregard the test results violated Equal Protection – in other words, strict scrutiny here need not be "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237, citing *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment). In *Cotter*, after all, the district court found sufficiently compelling both Boston's fear of threatened litigation and the need to remedy past discrimination. Note, however, that in *Cotter* the record presented two significant factors in support of the City's determination that this record lacks: 1) a documented history of past discrimination within the department and 2) expert reports showing that, under two different measures of statistical significance, the exam had a disparate impact on African-American candidates. 193 F. Supp. 2d at 346-351. The record here contains no such evidence on New Haven's behalf; indeed the City specifically declined petitioners' request to have the test results validated.[5]

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5. ADL finds *Cotter*'s reliance on a third factor somewhat more problematic. In addition to the documented history of

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This Court's precedents teach that the lower courts erred in simply accepting New Haven's assertions as to its motives, and granting the City summary judgment. Rather, the courts should have undertaken the sort of analysis discussed above in the course of conducting a searching inquiry. Such probing review gives strict scrutiny its full force, and maximizes its role of ferreting out whether government in using race is acting permissibly, or insidiously:

> Absent *searching judicial inquiry* into the justification for such race-based measures, we have no way to determine what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. We apply strict scrutiny to all racial classifications to "smoke out"

(Cont'd)

discrimination and expert statistical analyses supporting a finding of disparate impact, the court cited the "close watch" kept over all hiring and firing decision by the minority police officers' association as elevating the City's fear of litigation from a mere "bald assertion" to a credible threat that a lawsuit was "likely." 193 F. Supp. 2d at 351. ADL does not endorse that part of *Cotter*'s application of *Shaw*, inasmuch as it would appear to make Equal Protection rights hinge upon the degree to which another racial group "bird-dogs" the public entity's employment practices. Stated otherwise, there appears no sound basis for denying an Equal Protection claim to a police officer or firefighter in a department whose hiring and firing is closely monitored by a minority officers' group, yet affording such a claim to members of a different first-responder agency that lacks such active outside oversight.

> illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool.

Grutter, 539 U.S. at 326 (emphasis added; brackets and some internal quotation marks deleted), quoting *Croson*, 488 U.S. at 493 (plurality opinion); *see also Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

Post-*Grutter*, courts have been far more thorough in conducting this "searching judicial inquiry" than was the district court. *See, e.g.*, *Kohlbeck v. Omaha*, 447 F.3d 552, 555-56 (8th Cir. 2006) (fire-department affirmative-action program in which two lower-scoring African-American candidates were promoted over a higher scoring white was invalidated as not narrowly tailored, after court considered 1) efficacy of alternative remedies, 2) the flexibility and duration of the race-conscious remedy, 3) the relationship of the numerical goals to the relevant labor market and 4) the impact of the remedy on third parties).

On these facts, as the record exists to date, New Haven would seem to have little chance of showing that its fear of Title VII liability provided it a compelling interest for purposes of strict scrutiny. *See* Pet. Br. 35-36 and its discussion of evidence. However, given the erroneous approach of the lower courts, proper strict scrutiny review has yet to take place. (Moreover, New Haven may have additional evidence relevant to that inquiry). ADL submits that *Shaw II* provides a helpful framework for that analysis.

CONCLUSION

New Haven's decision to reject the promotional test results was a racial classification that should be subject to strict scrutiny. The Court therefore should remand this case and direct the district court to assess whether New Haven can in fact demonstrate a compelling governmental interest that would satisfy the "strong evidentiary basis" requirement of *Shaw II*.

Respectfully submitted,

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