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 OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, ASIAN AMERICAN INSTITUTE, ASIAN LAW CAUCUS, ET AL., IN SUPPORT OF RESPONDENTS

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The National Council of Asian-American Business Associations

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Asian American Justice Center (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. The Asian American Justice Center is one of the nation's leading experts on issues of importance to the Asian American community. AAJC and its Affiliates have a long-standing interest in this case because government actors should have the right to not certify employment test results that have a disparate impact on a racial minority, including Asian Americans. This interest has resulted in AAJC's participation in a number of administrative rulemaking comments and *amicus* briefs before the courts.

Joining AAJC as *amici curiae* in this brief are other public interest legal and civil rights organizations that are also dedicated to advancing

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[1] In accordance with Supreme Court Rule 37.3(a), Amici Curiae have filed with the Clerk of the Court letters from Petitioners and Respondents consenting to the filing of this brief. No person or entity other than Amici Curiae, their members, or their counsel made a monetary contribution to the preparations or submission of the brief, and no counsel for Petitioners or Respondents had any role in authoring this brief.

the interests and protecting the rights of all Americans, including Asian Americans (collectively, "*Amici*"). *Amici* represent a broad range of Asian American ethnicities as well as non-Asian American groups, including some of the largest and oldest Asian American organizations in this country that are involved in challenging racial discrimination, safeguarding civil rights, and ensuring equal opportunity for all. Amici thus have an important and substantial interest in this case, which raises crucial questions concerning freedom of government actors to voluntarily comply with Title VII's and this Court's prohibition against using employment tests that have a disparate impact on a protected class.

INTRODUCTION AND SUMMARY OF ARGUMENT

Asian Americans bring a unique perspective to this case. The history of pervasive discrimination against this group supports Respondents' decision to not certify the test results. *Amici* submit this brief to demonstrate that the forced certification of test results that are non-compliant with federal guidelines will severely undermine Asian Americans' protection from discrimination and the ability of employers to take fair, lawful and commonsense measures to ensure equal opportunity for all workers.

Asian Americans have been subject to a historical pattern of discrimination that has led to structural disparities in employment, including in firefighting. This discrimination is often rooted in unfair and inaccurate stereotypes, such as the view of Asian

Americans as perpetual foreigners that cannot be trusted or assimilated, or as model minorities that require no assistance in overcoming societal prejudice. These stereotypes have led to overt expressions of state-sponsored discrimination, such as laws against owning land, and the Japanese American internment. But these stereotypes also manifest themselves in more subtle, although no less insidious, ways. Rooting out this less overt discrimination lies at the heart of this case.

Today, there are far fewer Asian American firefighters nationwide than their overall population numbers would suggest. There is only one Asian American in the entire City of New Haven Fire Department, and, notably, not a single Asian American took the promotional exams in question. The near-total absence of Asian American firefighters in the entire department supports an effort by the city to ensure that its employment tests are fair, lawful and promote equal opportunity. The historical legacy of discrimination against Asian Americans and other minorities makes it incumbent on government actors to avoid employment practices that will perpetuate racial disparities. If a test proves to be discriminatory, the city has a responsibility to seek better, lawful alternatives.

Petitioners' position would undermine decades of efforts by Congress and this Court to ameliorate structural inequities. Respondents' employment tests yielded results that, under federal employment guidelines, indicated an adverse racial impact. They correctly chose not to certify these results.

For all of these reasons, *Amici* support Respondents' reasonable and well thought-out decision not to certify the test results. Accordingly, *Amici* respectfully request that this Court affirm the judgment of the Second Circuit.

ARGUMENT

I. THE HISTORY AND PERSISTENCE OF DISCRIMINATION AGAINST ASIAN AMERICANS SUPPORTS ALLOWING A GOVERNMENT ACTOR'S DECISION TO NOT CERTIFY TEST RESULTS THAT HAVE A DISPARATE IMPACT.

In the face of the historical legacy of discrimination against Asian Americans, as well as other racial minority groups, the Court should encourage, not restrain, the ability of government actors to comply with the letter and spirit of anti-discrimination laws. For this reason, *Amici* support Respondents' decision to not certify the results of a firefighters' promotion exam and, in the process, abandon an advancement process which perpetuates entrenched discrimination.

For Title VII and Equal Protection jurisprudence to fulfill their intended purpose of combating discrimination, government actors must have the freedom to take steps to address problems in job sectors with structural racial inequality. The firefighting forces, in particular, have a history of segregation against minority ethnic groups, including Asian Americans. In fact, the absence of Asian Americans in *Ricci v. DeStefano*, 554 F. Supp.

2d 142 (D. Conn. 2006) ("*Ricci*"), highlights a broader lack of Asian Americans in the firefighting forces nationally that is rooted in a legacy of discrimination against Asian Americans. Petitioners' position would undermine decades of programs meant to ameliorate these structural problems and would undercut the anti-discrimination statutory scheme.

A. Asian Americans have a history of exclusion from public sector jobs, including firefighter positions.

Historically, Asian Americans have suffered discrimination and were denied jobs in firefighting and other protective services. The case of the San Francisco Fire Department is illustrative of the discriminatory exclusion suffered by Asian Americans. During the mid-1960s, there were only six Asian Americans (and one African American) among approximately 1,600 firefighters in the department.[2] *See* Paul M. Ong, *The Affirmative Action Divide*, *in Transforming Race Relations* 377 (Paul M. Ong ed., 2000), *reprinted in* Don Nakanishi & James S. Lai, *Asian American Politics: Law, Participation, and Policy* 393-94 (2003) ("During the mid-1960s, when community leaders first raised the issue of under representation, only six [Asian

[2] During this time period, Asian Americans comprised about 13.3 percent of the population of San Francisco. *See* U.S. Dep't of Commerce, Bureau of the Census, *Race of the Population by County: 1970 Supplementary Report* (1975), *available at* http://www2.census.gov/prod2/decennial/documents/31679801n104-107.pdf (last visited Mar. 24, 2009).

Americans] (and one [African American]) were among approximately 1,600 firefighters, and that number remained essentially the same for a decade."). By 1974, there were only four Asian Americans in the San Francisco Fire Department. Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice,* 4 Asian Pac. Am. L.J. 129, 155 (1996).

Under a 1974 court order, the department was expected to increase the number of Asian American firefighters. *See* Nakanishi & Lai, *supra* p.7, at 394; *see also* Asian American Justice Center, *Equal Access: Unlocking Government Doors for Asian American Businesses* 20 (2008). Despite the order, discrimination and disparity persisted. In 1978, a written test for promotion to the Lieutenant position in the San Francisco Fire Department had a pass rate ratio of Asian American firefighters to non-Hispanic white firefighters of only 13 percent. *United States v. City & County of San Francisco*, 696 F. Supp. 1287, 1294 (N.D. Cal. 1988), *aff'd sub nom. Davis v. City & County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, *sub nom. San Francisco Fire Fighters Local 798 & Int'l Ass'n of Fire Fighters, AFL-CIO v. City & County of San Francisco*, 498 U.S. 897 (1990).

The situation did not improve in the ensuing years. In 1988, not one Asian American held any of the 352 permanent supervisory positions in the San Francisco Fire Department. *Id.* At the same time, only four positions (1%) were held by African Americans and sixteen positions (5%) were held by Hispanic Americans, and only one member of a

minority group held a rank above Captain. *Id.* Moreover, the San Francisco Fire Department, by its own admission, had not committed any resources to investigate claims of racial harassment. *Id.* The department was, and is, emblematic of the gross disparity that Asian Americans face in public sector positions.[3] To this day, San Francisco has relatively few Asian Americans in the firefighting forces, including appointed positions. *See* Angela Pang, *Asian Americans Who Run the City*, Asian Week, Feb. 22, 2008 (discussing the low number of Asian Americans in the city's appointed positions, including within the fire department).

The disparities in San Francisco are reflected nationwide in firefighting and other protective service positions. *See* Nakanishi & Lai, *supra* p.6, at 393. Asian Americans represent less than 1.5 percent of all firefighters nationwide, far lower than their overall population numbers would suggest.[4] U.S. Equal Employment Opportunity Commission, Job Patterns For Minorities And Women In Private

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[3] A 1992 study of city employment in San Francisco revealed that fewer than half of the municipality's departments met the 1990 census workforce parity figure of 2.9 percent. Chin, *supra* p.6, at 154. The same study showed that parity rates for Asian Americans in city hall and the police department were 50 percent or less. *Id.* Periodic studies indicated that parity rates were declining during the 1990s. *See id.*

[4] Asian Americans comprise about 4.4 percent of the American population. U.S. Census Bureau, State & County QuickFacts, USA, *available at* http://quickfacts.census.gov/qfd/states/00000.html (last visited Mar. 24, 2009),

Industry, State and Local Government Information (EEO-4), National Employment Summary 39 (2005), *available at* http://www.eeoc.gov/stats/jobpat_eeo4/2005/jobs.pdf (last visited Mar. 24, 2009).[5]

Of the more than 118 test takers in *Ricci*, not one was identified by the District Court as Asian American. *See Ricci*, 554 F. Supp. 2d at 145 (discussing the ethnic breakdown of the test takers). It is notable that not a single Asian American took the written exam.[6] In fact, of the 366 firefighters in the City of New Haven, there is only one Asian American. [7] In light of the Asian American experience with the firefighting and protective service professions, this gap illustrates how "[t]he application process itself might not adequately reflect the actual potential applicant pool, since *otherwise qualified people* might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being

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[5] Similarly, Asian Americans also represent less than 1.5 percent of those with protective service jobs. U.S. Equal Employment Opportunity Commission, *supra* p.8, at 7.

[6] This is despite the fact that Asian Americans constitute approximately 4 percent of the City of New Haven, roughly commensurate with its proportion of the overall U.S. population. U.S. Census Bureau, State & County QuickFacts, New Haven, Connecticut, *available at* http://quickfacts.census.gov/qfd/states/09/0952000.html (last visited Mar. 24, 2009).

[7] *See* City of New Haven, *State & Local Gov't Info. Report EEO-4* (2007).

discriminatory." *Dothard v. Rolinson*, 433 U.S. 321, 330 (1977) (emphasis added) (holding that the statutory height and weight standards had a discriminatory impact on women applicants and would discourage women from applying for the job). In any event, these numbers are stark. The "glaring absence" of Asian American firefighters is indicative of what appears to be serious racial disparities within the City of New Haven's Fire Department. *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977). [8]

B. Asian Americans continue to face discrimination, damaging stereotypes and a glass ceiling on achievement.

Discrimination against Asian Americans continues to be reflected in many aspects of society beyond firefighting and protective services. "Like African Americans and Hispanic Americans, [Asian Americans] are victims of both past and present discrimination." Harvey Gee, *Changing Landscapes: The Need for Asian Americans To Be Included in the Affirmative Action Debate*, 32 Gonz. L. Rev. 621, 625 (1996-97) (citation omitted). Asian Americans have

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[8] Justice O'Connor remarked in a concurring opinion that, when large numbers are involved, the "inexorable zero" is all the justification needed for some kind of response. *Johnson v. Transp. Agency*, 480 U.S. 616, 656-67 (1987) ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers. . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from the inexorable zero." (citation and internal quotation marks omitted)).

faced anti-Asian sentiment that has prolonged ethnic salience and contributed to a structural racial disparity.[9] Because of this history and persistent discrimination, government actors must be able to seek alternative methodologies for hiring and promoting when current methodologies appear flawed.

1. The stereotyping of Asian Americans as perpetual foreigners has contributed to structural racial inequality in many areas, including employment.

The stereotype of Asian Americans as perpetual foreigners contributes to deep-rooted discrimination against this group, especially regarding workplace advancement.[10] Too often, Asian Americans are complimented on their English-speaking abilities and asked where they are "really" from, implying that Asian Americans are not truly American,

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[9] As with other racial minority groups, these disparities are often rooted in broader social and cultural views that are difficult to pinpoint and even more difficult to modify or extinguish. *See, e.g.*, Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261 (1997) (discussing the identification of Asian Americans as intrinsically "foreign").

[10] *See generally* Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (1994) (cataloguing the history framework and pattern of treatment of Asian Americans based upon a "perpetual foreigner" stereotype); William Petersen, *Success Story, Japanese-American Style*, N.Y. Times Mag., Jan. 9, 1966 (attributing success of Japanese Americans to their foreign roots and non-American culture).

regardless of how long they or their ancestors have been living in the United States. *See* William Wei, *The Asian American Movement* 44 (1994). When Asian Americans are indiscriminately painted with the broad brush of "foreigner," notwithstanding the actual backgrounds of individual Asian Americans, this implicates an array of possible negative inferences such as disloyalty and lack of patriotism. *See* Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in Asian Americans and the Supreme Court: A Documentary History* 1098-99 (Hyung-Chan Kim ed., 1992).[11] It is not difficult to imagine how prejudice rooted in the notion of the perpetual foreigner could play a role in the hiring and promoting of Asian Americans in the firefighting forces, a public sector position, along with the police

[11] Asian American studies scholars point to the Dr. Wen Ho Lee case as perhaps the most prominent, modern-day example of the perpetual foreigner stereotype. This case involved the U.S. Justice Department's harsh detention and investigation of Dr. Wen Ho Lee, a Chinese American scientist with the U.S. Energy Department, regarding the sharing of classified government information about nuclear weapons with China. Many Asian American activists believed that Dr. Lee's ethnicity was a significant, if not primary, impetus behind the investigation. *See* Miranda Oshige McGowan & James Lindgren, *Testing the "Model Minority Myth"*, 100 Nw. U.L. Rev. 311, 344 (2006). Dr. Lee's motion to grant bail was blocked at the last minute and the U.S. Attorney argued that keeping Dr. Lee in arguably inhumane confinement conditions was fully justified. *See* James Steingold, *Accused Scientist Has Bail Blocked at Last Minute*, N.Y. Times, Sept. 2, 2000, at A1.

force, that is strongly associated with patriotic sentiment.[12]

The prejudice behind the perpetual foreigner stereotype has had negative manifestations throughout the United States. A range of city ordinances, state and federal legislation, and court rulings have prevented Asian Americans from employment with public agencies or corporations,[13] subjected Asian Americans to the special imposition of taxes based on race,[14] restricted Asian Americans

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[12] *See generally* Thomas Ambrosio, *Ethnic Identity Groups and U.S. Foreign Policy* 133-36 (2002) (discussing the history of how Asian Americans came to be viewed as "permanent foreigners," precluding Asian Americans from becoming "real Americans"); Keith Aoki, *"Foreignness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 Asian Pac. Am. L.J. 1 (1996); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian L.J. 71 (1997).

[13] Robert C. Berring, Review Essay, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* by Charles J. McClain (1995), 2 Asian Am. L.J. 87, 94 (describing how Article XIX of the California Constitution banned Asian Americans from employment by corporations and public agencies).

[14] *See* Hyunh-Chan Kim, *A Legal History of Asian Americans, 1790-1990* 48-49 (1994) (listing a series of taxes passed from 1850 to 1862 that targeted Chinese Americans in California, such as the Foreign Miners' Tax (taxing miners ineligible for citizenship), the Foreign Miners' License Tax (requiring all foreigners ineligible for citizenship to purchase a miner's license regardless of occupation), and the Chinese Police Tax (imposing a head tax on all adult Chinese Americans)).

from entrepreneurial ventures,[15] and prevented Asian Americans from owning land,[16] which in turn led to restrictions in their agricultural endeavors.[17] These discriminatory laws permeated nearly all aspects of Asian American life and were upheld by the Supreme Court.[18] The last of these discriminatory laws were not repealed or struck down until the early 1950's.[19] Nonetheless, the

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[15] *See Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (striking down ordinances that restricted the economic growth and advancement of Chinese laundries as a violation of equal protection because of the discriminatory manner in which they were enforced); *see also* Kim, *supra* n.14, at 94 (documenting the harassment Chinese importers and laundrymen experienced).

[16] *See* Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Cal. L. Rev. 7 (1947) (detailing the history of preclusion of Japanese Americans from land-ownership in eleven states).

[17] *See* Angelo N. Ancheta, *Race, Rights and the Asian American Experience* 29 (1998) (discussing how California's Alien Land Law of 1913 prevented Japanese from establishing agricultural businesses by prohibiting Japanese persons ineligible for citizenship from purchasing land in the state and by limiting lease terms to three years or less).

[18] *See, e.g.*, *Porterfield v. Webb*, 263 U.S. 225 (1923) (upholding the Alien Land Act of California); *Terrace v. Thompson*, 263 U.S. 197 (1923) (affirming similar Washington state discriminatory land law).

[19] *See, e.g.*, *Fujii v. State*, 242 P.2d 617 (Cal. 1952) (holding that the Alien Land Act of California violated the Fourteenth Amendment of the Constitution).

discrimination continues to impact nearly all aspects of Asian American life.[20]

The Japanese American internment was perhaps the most tragic, and insidious, manifestation of the perpetual foreigner stereotype. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215 n.* (1995); *see also* Pub. L. No. 100-383, § 2(a), 102 Stat. 903 (1988) ("The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II."). The internment experience shows that the perpetual foreigner stereotype contributes, in a real way, to active discrimination and a structural racial disparity.[21]

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[20] *See, e.g.*, Ancheta, *supra* n.17, at 30 (discussing Asian American discrimination in their pursuit of marriage, noting that laws prohibiting intermarriage with Asians were "common in Western states, and many laws remained on the books until the United States Supreme Court ruled them to be unconstitutional in [*Loving v. Virginia*, 388 U.S. 1 (1967)]"); Ronald Takaki, *A History of Asian Americans: Strangers From A Different Shore* 201 (1998) (discussing Asian American discrimination in their pursuit of education, stating that "the San Francisco Board of Education directed principals to send all Chinese, Japanese and Korean children to the Oriental School") (citations and internal quotations omitted); *see also Lum v. Rice*, 275 U.S. 78, 86-87 (1927) (applying separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to Chinese citizens).

[21] *See* Natsu Taylor Saito, *Beyond Reparations: Accommodating Wrongs or Honoring Resistance?*, 1 Hastings Race & Poverty L.J. 27, 35 (2003) (discussing the "well-entrenched pattern of discrimination rooted in a racialized identification of Asian Americans as perpetually 'foreign'" and *(cont'd)*

This xenophobic and inaccurate perception of Asian Americans helps explain the long-standing history of discrimination against Asian Americans and clarifies why Asian Americans are underrepresented in public sector jobs.

2. The perception of Asian Americans as the model minority has had damaging effects on the ability of Asian Americans to obtain promotions.

At the same time Asian Americans have been subject to the perpetual foreigner stereotype, they have also had to deal with the burden of being perceived as the "model minority." Commonly referred to as the "model minority myth," this stereotype also plays a major role in suppressing Asian American advancement in the workplace.[22] It assumes that all Asian Americans are extremely hard working, intelligent, highly educated and

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providing a litany of laws exemplifying that much of what led to "internment persists not just in popular culture, but in the structures of law as well").

[22] The popular media created the model minority myth in 1966 through two articles in The New York Times Magazine and U.S. News & World Report. Petersen, *supra* n.10, at 20; *Success Story of One Minority Group in the U.S.*, U.S. News & World Rep., Dec 26, 1966, at 73, *reprinted in Roots: An Asian American Reader* 6, 6 (Amy Tachiki et al. eds., 1971). Both articles delivered Asian Americans the backhanded compliment of working hard at any job, valuing education, insisting that their children excel in school, combining resources to help each other get ahead and moving to the suburbs as they amass more wealth.

economically successful. *See* Miranda Oshige McGowan & James Lindgren, *Testing the "Model Minority Myth,"* 100 Nw. U.L. Rev. 311, 335 (2006). While the stereotype may seem to implicate positive attributes, most scholars agree that the stereotype itself has negative effects. *See generally* Frank Wu, *Yellow: Race in America Beyond Black and White* (2003) (positing that widespread stereotyping of Asian Americans is inherently damaging); *see also* Pat K. Chow, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 24 (1994) (summarizing the model minority myth that "Asian Americans, through their hard work, intelligence, and emphasis on education and achievement, have been successful in American society"). Lumping this large, diverse community into one stereotype ignores the poverty and low levels of education that many Asian Americans face, such as those from Cambodia, Vietnam and Laos.

In addition to overlooking significant Asian American populations, the model minority myth causes further damage by "persuad[ing] people that Asians need no help in attaining economic and educational success." *See, e.g.,* Chow*, supra* p.16; *see also McGowan & Lindgren, supra* n.11, at 336. The phrase "model minority" inherently pits one minority group against others; after all, if one ethnic group is the "model," then other ethnic groups must be less than ideal. Perhaps even more troubling, and blatantly untrue, is the logical endpoint of the model minority myth: that all Asian Americans are

"successful" so that therefore they must not be subject to societal discrimination.[23]

This myth—and the false conclusions that are derived from it—hinders an honest assessment of the real obstacles that Asian Americans face in the workplace. Critical analysis of the underlying reasons for the severe disparities in public sector employment that Asian Americans face cannot occur when articles in the media glibly declare that "Asian Americans are smarter than the rest of us." Anthony Ramirez, *America's Super Minority*, Fortune, Nov. 24, 1986, at 148, 149. These types of inaccurate and misleading stories create the impression that Asian Americans can independently overcome any obstacles they encounter in reaching the highest ranks of corporate America – they simply need to adapt to American management culture. *Id*. This type of reasoning, itself rooted in stereotype, casually ignores the real history of discrimination and segregation suffered by the Asian American community, which continues to grapple with the after-effects to this day. It implies that Asian

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[23] Researchers at Northwestern University School of Law used data from the General Social Survey to determine the degree to which non-Hispanic whites, Hispanic Americans and African Americans hold positive views of Asian Americans while simultaneously believing Asian Americans to be unpatriotic, foreign, or inassimilable. McGowan & Lindgren, *supra* n.11, at 332. The results of their study showed that "[t]hose who hold positive views of Asians as hard working or intelligent are indeed more likely to believe that there is little or no discrimination against Asian Americans in jobs and housing." *Id*. at 333.

Americans' ability to adapt to corporate culture is their problem alone and they alone can provide a solution.[24]

3. The stereotypes have manifested themselves into a "glass ceiling" on Asian American progress in the workplace.

Both the perpetual foreigner stereotype and the model minority myth have played key roles in erecting barriers to Asian American workplace advancement. Asian Americans face a "glass ceiling," which refers to a set of often informal barriers preventing many minorities and women from moving into higher management positions.[25]

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[24] Today, the myth persists – earlier this year Forbes magazine ran an article (authored by Jason Richwine of the American Enterprise Institute) declaring that Indian Americans are the new model minority. A critique of the Forbes article echoed what academic critics have been arguing for decades: that the term "model minority" is not a compliment but "an attempt to fit a diverse community into an oversimplified box" and that "being called a "model minority" is an unwelcome characterization that is damaging and tough to overcome. "[This is why] the 'old' model minorities – East Asian Americans – have struggled to shed the label since they were first saddled with it in the 1960s because of 'their advanced educations and high earnings.'" Shiwani Srivastava, *Nobody's Model Minority*, The Root (March 16, 2009), *available at* http://www.theroot.com/views/nobodys-model-minority (last visited Mar. 24, 2009).

[25] *See generally* Wu, *supra* p.16, at 163 (discussing the glass ceiling faced by Asian Americans in the workforce and for government contracts); *see also* Deborah Woo, The Glass Ceiling and Asian Americans: A Research Monograph 42 (July, 1994) (unpublished manuscript), *available at*

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Studies by various federal agencies, including the United States Commission on Civil Rights, the Equal Employment Opportunity Commission, and the Federal Glass Ceiling Commission, have all found that despite achieving higher levels of education than other groups, Asian Americans have not experienced corresponding upward mobility—either in terms of higher incomes or promotions.[26] Asian American men born in the United States are 7-11 percent less likely to be in managerial occupations than non-Hispanic white men with the same education, work experience, marital status, and English ability.[27] The disparity is just as stark for Asian American women.[28] Similar patterns of disparity are apparent in 2005 data for firms with at least 100 employees, where only 8.6 percent of Asian

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http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1130&context=key_workplace (last visited Mar. 24, 2009).

[26] For a summary of these findings, *see* Asian American Institute, *Asian Americans and Public Contracting: Equal Opportunities, Laws, and Policies* 19-20 (2008), *available at* http://www.advancingequality.org/attachments/files/220/Equal_Opportunity_Laws.pdf (last visited Mar. 24, 2009).

[27] U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990's* (1992); *see also* Asian American Institute, *supra* n.26, at 19-20 (discussing research that evidences an approximate 10% income disparity between Asian Americans and Non-Hispanic white Americans (citing LEAP Asian Pacific American Pub. Policy Inst. & UCLA Asian Americans Studies Ctr., *The State of Asian Pacific America: Policy Issues to the Year* (2000))).

[28] *Id.*

Americans are in management positions compared to 13.2 percent of whites. *See* U.S. Equal Employment Opportunity Commission, *supra* at 8. The same holds true for promotion into the highest career levels in the federal government, even after controlling for a number of personal characteristics, revealing an unexplained racial residual effect.[29] In 1994, the United States Commission on Civil Rights found that being of "Asian descent" had a "negative effect" on an employee's chance to move upward into management. *See* Woo, *supra* n.25, at 42 (citing to the U.S. Commission on Civil Rights, *Economic Status of Americans of Asian Descent: An Exploratory Investigation* (1988)). Employer biases and stereotypes play a major role in crafting the glass ceiling.[30]

If the Court follows Petitioners' position, it will undermine decades of programs and laws meant to combat historical and pervasive discrimination in society. Subtle, institutionalized prejudice is often

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[29] *See generally* Jeremy S. Wu and Carson K. Eoyang, *Asian Pacific American Senior Executives in the Federal Government*, AAPI Nexus, Vol. 4, No. 1, Winter/Spring 2006, 39-50 (calling attention to the lack of workforce diversity in promoting Asian Americans to the highest career levels in the federal government).

[30] *See* Vu H. Pham, Lauren Emiko Hokoyama, & J.D. Hokoyama, *Become Visible: Let Your Voice Be Heard*, AAPI Nexus, Vol. 4, No. 1, Winter/Spring 2006 Essay, 1-11 (arguing that under-representation is not due to a lack of skills or interest but because Asian Americans lack role models and mentors as they are not perceived as "leadership material").

persistent, but difficult to expose.[31] Stereotypes such as the model minority myth and the perpetual foreigner stereotype may very well explain why Asian Americans continue to earn less money than their less-educated non-Hispanic white counterparts.[32] Asian Americans face a glass ceiling, constructed by decades of damaging stereotypes, that has been dented slowly over time, thanks in part to the principle of equal protection and Title VII.. In the face of this stark historical record, the Court should not restrain the ability of government actors to foster equal opportunity in the workplace.

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[31] For example, a San Francisco employment study revealed that Asian Americans are over-parity on a city-wide basis, but a breakdown of the numbers reveals that Asian Americans are under-parity as police officers, firefighters, or attorneys even though they are over-parity as engineers, accountants, analysts, and technicians. *See* Chin, *supra* p.6, at 155-56. (discussing how statistics "evidencing parity" are in fact misleading and obscures discrimination against Asian Americans by failing to take into account qualitative differences in treatment afforded Asian Americans and obscuring areas where Asian Americans are woefully under represented).

[32] Asian American Institute, *supra* n.26, at 19-20 (discussing research that evidences an approximate 10% income disparity between Asian Americans and Non-Hispanic whites Americans (citing LEAP Asian Pacific American Pub. Policy Inst. & UCLA Asian Americans Studies Ctr., *The State of Asian Pacific America: Policy Issues to the Year* (2000))).

II. AVOIDING EMPLOYEE ADVANCEMENT PROCEDURES THAT PERPETUATE RACIAL DISPARITY IS A REASONABLE METHOD OF PREVENTING WORKPLACE DISCRIMINATION.

Asian Americans are keenly aware of the need for government actors to address structural racial inequalities, often rooted in a historical legacy of discrimination and prejudice, through voluntary compliance with Title VII. Given the continuing gross disparities in the numbers and advancement potential of Asian Americans firefighters and other protective service personnel, as discussed *supra*, Title VII is as important as ever.

In light of a record of past discrimination that continues to affect minorities today, government actors are obligated to avoid employee advancement methodologies that needlessly perpetuate racial disparity. This history should inform the Court's examination of the City of New Haven's efforts to use non-biased selection procedures, and whether this should trigger strict scrutiny review. Forcing a government actor to use a test that is not compliant with federal guidelines and evidences an adverse racial impact is clearly contrary to the purpose of Title VII itself: freedom from discrimination.[33]

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[33] In broad terms, the desire to combat discrimination was the reason Congress enacted the Civil Rights Act of 1964, of which Title VII is a part, as the title of the Act makes clear. *See* Pub. L. No. 88-352, 78 Stat. 241 (1964) (1964 Civil Rights Act was to address "discrimination in public accommodations," *(cont'd)*

Petitioners put forth two principal arguments for why strict scrutiny should apply: (1) race was the "predominant factor" in Respondents' decision to not certify the test results, Pet'r Br. *Ricci*, at 24; and (2) Respondents acted with a racial purpose. *Id*. at 24-25.

Both arguments fail because they wholly mischaracterize Respondents' actions. The City of New Haven reacted in a race-neutral way to a test that, under federal guidelines, had a disparate racial impact.[34] For the anti-discrimination framework to succeed, government actors must be free to make reasonable decisions to avoid a disparate impact on a protected class, and ensure that all employees are treated equally.[35] Such compliance avoids unlawful discrimination and furthers judicial economy.

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"prevent discrimination in federally assisted programs," and "for other purposes"). Congress has further clarified its view of the anti-discriminatory purposes underlying Title VII through various amendments. *See, e.g.*, Pub. L. No. 111-2, § 2, 123 Stat. 5 (Lilly Ledbetter Fair Pay Act of 2009 expands time period in which "victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices"); Pub. L. No. 111-1, § 3, 105 Stat. 1071 (1991 Civil Rights Act was designed "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

[34] *See* Part II.A., *infra*.

[35] *See* 42 U.S.C. § 2000e-2(h) (Title VII permits employment tests as long as they are "not designed, intended or used to discriminate because of race, color, religion, sex or national *(cont'd)*

Accordingly, *Amici* encourage the Court to find that strict scrutiny does not apply because the City of New Haven did not use a racial classification and did not have a discriminatory purpose.[36]

A. Respondents' attempts to implement fair and legal advancement methodologies do not amount to racial classification and do not trigger strict scrutiny.

Petitioners and their supporters argue that they were subject to improper racial classification. Pet'r Br. *Ricci*, at 23.[37] They assert that Respondents

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origin"); *see also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that internal transfer and promotion methodologies which relied on high school education requirements and threshold scores on broad aptitude tests had a disparate impact on minority ethnic groups).

[36] *Amici* incorporate Respondents' arguments that Respondents had a compelling interest in complying with Title VII's disparate impact provisions. Resp't Br. *Ricci*, at 49-55. Amici also incorporate by reference Respondents' arguments that the non-certification of the test results was, by definition, narrowly tailored to achieve the compelling interest in avoiding a potential violation of Title VII. Resp't Br. *Ricci*, at 55-57.

[37] *See also* Brief for Joe Oakley et al. as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 2 ("In canceling a content-valid civil service promotions process solely because the test results indicated that not enough minority applicants qualified for promotions, the City of New Haven acted in a manner that the Equal Protection Clause, and this Court, simply cannot countenance."); Brief for the Eagle Forum Education & Legal Defense Fund as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 6 ("Respondents used individual racial classifications to distribute burdens and cause each Petitioner to be
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disliked the racial breakdown of the test results and acted accordingly. *Id.* [38] Relying in part on *Adarand*,[39] Petitioners and their supporters argue

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disadvantaged because of his or her race." (citation and internal quotations omitted)); Brief for the Anti-Defamation League as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 5 ("New Haven's conduct in rejecting the exam results because it was dissatisfied with the racial makeup of the resulting candidate pool undoubtedly constituted a race based distinction."); Brief for the National Association of Police Organizations as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 6 ("Whether the Board engaged in race-based decisionmaking is not in dispute here. The lower court found as a matter of fact that it did. . . ."); Brief for the Concerned American Firefighters Association as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 3 ("In this case, the District Court and the United States Court of Appeals for the Second Circuit declined to confront the fact that a racial classification was used by the CSB, and therefore its failure to apply strict scrutiny was manifestly in error.").

[38] "Using race-coded lists to determine whether to certify, the city and its officials acted on raw racial labels and distributions ... Petitioners were treated unequally because of their race: they were refused promotions only because they were white." Pet'r Br. Ricci, at 23.

[39] In *Adarand*, the Court concluded that strict scrutiny applies to a federal set-aside program that on its face provides financial incentives to hire minority subcontractors. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The law at issue in that case gave general contractors on government projects a financial incentive to hire subcontractors operated by individuals historically subjected to racial or ethnic prejudice. *Id.* at 206. This was not a facially neutral law. It treated parties differently based on race; minority-owned businesses were preferred over non-minority owned businesses. *Id.* (applying strict scrutiny where the contract at issue stated that

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that Respondents' decision to not certify the test results should be construed as a facial classification which expressly distinguishes between applicants on the basis of race.

Adarand is simply not applicable here. [40] Respondents had no incentive to hire a minority candidate over a non-minority one.[41] Instead, this case deals with a facially neutral decision where all parties were treated exactly the same. Whereas the law in question in *Adarand* conferred an explicit advantage on minority-owned businesses, Respondents' attempts to ensure that the promotion process was fair, unbiased and compliant with relevant federal guidelines did not give minority candidates an advantage over non-minority candidates. By disregarding *all* of the test scores, Respondents treated all applicants equally and avoided a potential violation of Title VII. *Id*. This case is therefore not one where the "racial classification" was on the face of the statute or

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the contractor would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals").

[40] *Amici* incorporate by reference Respondents' discussion of how this is not a case of racial classification, unlike the law in *Adarand*. Resp't Br. *Ricci*, at 41-42.

[41] *Amici* also incorporate by reference Respondents' arguments that declining to certify the test results did not entail racial classifications triggering strict scrutiny. Resp't Br. *Ricci*, at 41-44.

policy, and which distinguished between people on the basis of race.[42]

Petitioners' position—that Respondents engaged in racial classification—would turn the anti-discrimination statutory scheme on its head. Government actors, seeking to effect Title VII-compliant remedies to potentially discriminatory hiring and promotion methods, would instead have their hands tied in the name of anti-discrimination. Yet, often the clearest evidence of actual discrimination is in the pass ratio of an employment test. *See, e.g.*, *United States v. City & County of San Francisco*, 696 F. Supp. 1287, 1294 (N.D. Cal. 1988) (finding a pass rate ratio of Asian American firefighters to Non-Hispanic whites firefighters of only 13 percent evidences discrimination), *aff'd sub nom. Davis v. City & County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, *sub nom. San Francisco Fire Fighters Local 798 & Int'l Ass'n of Fire Fighters, AFL-CIO v. City & County of San Francisco*, 498 U.S. 897 (1990). Petitioners' argument would only serve to undercut the ability of Title VII to address structural racial inequality.

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[42] *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (invalidating a miscegenation statute which, on its face, prohibited interracial marriages); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-84 (1986) (invalidating a school board plan which expressly utilized race-based preferences in teacher lay-offs).

B. It is critical to the functioning of Title VII that government actors not be liable for reasonable efforts to address promotion methodologies that would (1) perpetuate racial disparity and (2) not comply with federal guidelines.

Petitioners' brief contends that the City of New Haven *intended* to treat candidates differently on the basis of their race or ethnicity by not certifying the promotion exams. Pet'r Br. *Ricci*, at 25.[43] This

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[43] *See also* Brief for Joe Oakley et al. as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 5 ("[Petioners' efforts] were ultimately futile because a municipal government believed it could make an intentional, race-based determination to cancel a content-valid promotions process using the EEOC guidelines as a shield."); Brief for the National Association of Police Organizations as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 11 ("Thus, when the Board acted from its concern that 'too many whites . . . would be promoted were the lists to be certified' it discriminated against those 'whites' that passed the exam but were ordered returned to square one." (citing *Ricci v. Destafano*, 554 F. Supp. 2d 142, 152 (D. Conn 2006))); Brief for the Center for Individual Rights, et al. as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 8 ("Here, defendants' motivations were racial. Defendants were concerned that hiring plaintiffs would undermine the goal of diversity in the Fire Department; would fail to develop managerial role models for aspiring firefighters; and would subject the City to public criticism. Each of these concerns is directly related to most of the plaintiffs' race, and thus constitute racial considerations that would support a finding of intentional race discrimination." (quotations omitted)); Brief for the Pacific Legal Foundation et al. as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 15 ("Such a blatantly race-conscious decision, made to lower the likelihood of a potential disparate impact claim, constitutes the precise type of discrimination that Title VII was designed to prohibit."); Brief for the Cato *(cont'd)*

decision, they argue, amounts to intentional discrimination. *Id.*

In fact, rather than practicing intentional discrimination, Respondents were actually complying with their affirmative obligation to *avoid* racial discrimination. *See Johnson v. Transp. Agency*, 480 U.S. 616, 630 (1987). Government actors are encouraged to devise measures to address racial discrimination in a general way without engaging in race-based treatment of individuals. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *see also Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (affirming the "plus" treatment of diversity in the

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Institute as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 12 ("Similarly, the more employers heed the incentive to throw out test results based merely on race-based statistical disparity, the more unintentional discrimination will be replaced by intentional discrimination."); Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 32 ("The [district] court did not, however, adequately consider whether, . . . respondents' claimed concern about Title VII liability was a pretext for intentional racial discrimination."); Brief for the Claremont Institute as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 12 ("[T]he use of race to determine government promotions on a preferential basis (or deny them to others) is not remedial, but rank racial discrimination."); Brief for the Mountain States Legal Foundation as *Amicus Curiae* Supporting Petitioner, *Ricci*, at 3 ("The decision to void the test and make no promotions is blatant race-based decision making, which is designed to achieve racial balance in the fire department.").

admissions process for post-graduate education as a flexible and non-mechanical way of treating race).

Here, Respondents decided to not certify the test results for *anyone*, regardless of their race. An across-the-board non-certification does not amount to race-conscious decision-making, and certainly not race-based decision-making. *See id.* And, in any event, Title VII does not mandate that Respondents "act in a wholly 'color blind' fashion."[44] The Court has held that voluntarily adopted race-conscious remedies for past discrimination are justified by public agencies under Title VII by a showing only of the existence of a "manifest imbalance" of minorities or women in "traditionally segregated job categories." [45] To determine whether such an imbalance has occurred, the Court may compare the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population. [46] Contrary to Petitioners' argument, the statutory standard under Title VII does not require evidence of past

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[44] *Fullilove v. Klutznick*, 448 U.S. 448, 482 (1980); *see also Adarand*, 515 U.S. at 200.

[45] *Johnson v. Transp. Agency*, 480 U.S. at 631 (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979)).

[46] *Id.* at 637. In the case of Asian Americans, there is generally a gross disparity between the percentage of Asian Americans in the firefighting forces and the percentage of Asian Americans in the general population. *See* Part I.A., *supra*. It is this type of disparity, rooted in a historical legacy of discrimination, that government actors should be encouraged to remedy through compliance with Title VII.

discrimination by a specific employer to justify that employer's voluntarily adopted practices to comply with Title VII.[47]

Petitioners' position binds the hands of cities trying to voluntarily comply with the letter and spirit of Title VII.[48] There are several reasons why employers should be encouraged to take action before a Title VII violation. In addition to judicial economy and the cost savings from obviated litigation, voluntary action may produce more favorable results because it is less likely than a court order to engender opposition and resentment. *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d at 1128 n.14. Further, "the value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and

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[47] *See id.* at 631; *see also Hayden v. County of Nassay*, 180 F.3d 42, 51 (2d Cir. 1999) ("[E]ven in the absence of specific and identified discrimination, nothing in our jurisprudence precludes the use of race-neutral means to improve racial and gender representation." (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

[48] There is an affirmative obligation to comply with Title VII, as voluntary compliance is a preferred means of achieving Title VII's goal of eliminating employment discrimination. *See Johnson v. Transp. Agency*, 480 U.S. at 630; *see also Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982); *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1128 (2d Cir. 1983) ("[V]oluntary compromises of Title VII actions enjoy a presumption of validity."), *cert. denied sub nom. Althiser v. N.Y. State Dep't of Corr. Servs.*, 465 U.S. 1005 (1984).

because the remediation of governmental discrimination is of unique importance." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring).

Respondents' actions were grounded in the jurisprudence of the Court and the principles behind Title VII. Efforts to comply with EEOC Guidelines and Title VII standards should be encouraged, not used as a basis for legal liability. It is critical to the function of Title VII that the Court not constrain the hands of government actors to ensure that all people have equal opportunity regardless of their race.

This is all the more important because structural racial disparities, rooted in a historical legacy of discrimination, continue to persist. The stereotypes that Asian Americans are perpetual foreigners or a model minority are key workplace issues for the Asian American community. *See* Part I.B. and C. Studies have demonstrated that a glass ceiling prevents Asian Americans from progressing as quickly as their non-Hispanic white colleagues progress. *See* Part I.C. In order to ensure that Asian Americans, and other racial minorities, have an equal opportunity in the workplace, cities should be free to address workplace discrimination before a Title VII violation occurs. Any attempts to limit the reach of Title VII should be prevented.

CONCLUSION

For the foregoing reasons, as well as those outlined by Respondents, *Amici* respectfully requests that the Court affirm the judgment of the Second Circuit.

Date: March 25, 2009

Respectfully submitted,

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APPENDIX

APPENDIX

List of Amici Curiae

Asian Law Alliance (ALA)
ALA, founded in 1977, is a nonprofit public interest legal organization with the mission of providing equal access to the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. In the area of fair employment practices, ALA has advocated for affirmative action programs for Asian and Pacific Islanders.

Asian American Institute (AAI)
AAI is a pan-Asian, non-partisan, not for profit organization located in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, by utilizing coalition building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. Because AAI recognizes the importance of including Asian Americans in public sector jobs, and the importance of using fair and legal methodologies to advance public sector employees, AAI has a strong interest in the outcome of this case.

Asian Law Caucus (ALC)
The ALC is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian Pacific

Islander communities. Founded in 1972, the ALC is the nation's oldest Asian Pacific Islander civil rights legal organization. The ALC has provided legal services and community education on discrimination, represented individuals in discrimination suits, and conducted local and regional policy advocacy on the importance of diversity programs. The ALC has an interest in this case because governments should have the right to not certify employment tests results that have a disparate impact on a protected class. The ALC is affiliated with AAJC.

Boat People SOS (BPSOS)

BPSOS is a national immigrant services organization serving primarily Vietnamese refugees and immigrants with thirteen branch offices nationwide. BPSOS' domestic operation includes a large array of human and immigration services for Vietnamese refugees and immigrants. Harboring a strong mistrust of governmental agencies and personnel due to political persecution in Vietnam, this population does not access services often. When they do, they are often discouraged by the lack of culturally and linguistically competent service providers. It is important that all ethnicities are represented in government especially in the area of first responders to provide this competency. It is because of this interest BPSOS participates in the brief.

The Japanese American Citizens League (JACL)

JACL, founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan civil

rights organization with 113 chapters throughout the continental United States, Hawai'i, and Japan. The mission of the JACL is to uphold the civil and human rights of Americans of Japanese Ancestry and of all people. The JACL played a prominent role in obtaining redress for Japanese Americans who were interned during World War II. The JACL has also worked to educate against and combat discrimination on the basis of race, national origin, age, ethnicity, gender, or disability, and to protect the right of all persons to equal participation in the political process.

The Fred T. Korematsu Center for Law and Equality (Korematsu Center)

Korematsu Center is a nonprofit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in safeguarding access to opportunities for all groups in all walks of life. We note that the Korematsu Center does not, in this brief or

otherwise, represent the official views of Seattle University.

The Minority Business Round Table (MBRT)
MBRT is a national nonprofit 501(c)(3) membership organization for chief executive officers ("CEOs") of the nation's largest and leading minority-owned Asian American, African American, Hispanic American, Native American and Women owned companies. It functions as the vehicle for its members to analyze and help formulate effective public policies that impact these minority-owned businesses. Members hold positions equivalent to CEO or chairperson in their respective businesses. MBRT supports the Asian American community as an amicus/friend to ensure equal opportunity and access and inclusion for minorities and women. This is an important national priority and policy of the United States of America, its States, and its local governments that must be preserved and maintained.

The National Council of Asian-American Business Associations (NCAABA)
NCAABA is a 501(c)-3 organization that serves as the national voice for the Asian American business community. We support the AAJC brief because we believe Asian Americans are disproportionately underrepresented in service areas such as firefighting and other positions, in part due to a history of exclusion from public sector positions, and we sincerely believe that Asian Americans benefit when local governments utilize promotion and advancement methodologies that do not have a disparate impact on minorities. Therefore, we are

supportive of AAJC's initiatives that address these disparities.

Organization of Chinese Americans, Inc. (OCA)
OCA is a 501(c)(3) national nonprofit, nonpartisan organization dedicated to advancing the social, political, and economic well-being of Asian Pacific Americans in the United States. With over 80 chapters and affiliates across the nation, OCA's aims are to advocate for social justice, to promote civic participation, to advance coalitions and community building, and to foster cultural heritage. OCA monitors issues and policies that affect the Asian Pacific American community. Accordingly, OCA supports AAJC's positions in the current case and has a strong vested interest in its outcome as Asian Pacific Americans have faced a long history of employment discrimination. In the current case, the decisions of the District Court and Court of Appeals would affect not only the program at issue and other similar programs at fire departments throughout the Second Circuit, but also similar programs across the United States. The potentially very broad impact of this case provides Amici a substantial interest in its outcome.

The Sikh American Legal Defense and Education Fund (SALDEF)
SALDEF is the oldest Sikh American civil rights and advocacy organization in the United States. Founded as the Sikh Mediawatch and Resource Task Force (SMART) in 1996, SALDEF empowers Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF has over a decade of experience in working

with other Sikh and minority organizations in providing public policy, advocacy, and community education on discrimination issues. SALDEF has a strong interest in this case as Asian Americans, like all Americans, must not be treated unequally by employers because of their race. As such, we support AAJC's position that it is reasonable for government actors to decline certification of test results that have a disparate impact on any minority group in order to achieve employment equality for all. This case raises crucial questions concerning the freedom of government actors to voluntarily comply with Title VII's prohibition against using employment tests that have a disparate impact on a protected class. Such compliance avoids unlawful discrimination and helps to prevent litigation from the protected class. Forcing a government actor to use a test that potentially runs afoul of federal employment guidelines is clearly contrary to the very purpose for which Title VII was conceived: freedom from discrimination.