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Court of Appeals of the State of New York

EUGENE MARGERUM, ANTHONY HYNES, JOSEPH FAHEY, TIMOTHY HAZELET, PETER KERTZIE, PETER LOTOCKI, SCOTT SKINNER, THOMAS REDINGTON, TIMOTHY CASSEL, MATTHEW S. OSINSKI, MARK ABAD, BRAD ARNONE and DAVID DENZ,

Appellants-Respondents,

- against -

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF FIRE and LEONARD MATARESE, Individually and as Commissioner of Human Resources for the City of Buffalo,

Respondents-Appellants.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION; THE CENTER FOR EQUAL OPPORTUNITY; PROJECT 21; THE INDIVIDUAL RIGHTS FOUNDATION; REASON FOUNDATION; AND THE CATO INSTITUTE IN SUPPORT OF APPELLANTS-RESPONDENTS

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Project 21 is a program of the National Center For Public Policy Research, Inc., a nonprofit corporation organized under the laws of Delaware. Neither Project 21 nor the National Center For Public Policy Research have any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PRELIMINARY STATEMENT

The City of Buffalo, the City of Buffalo Department of Fire, and Leonard Matarese (City) allowed the fire department's promotional eligibility lists to expire, because the next applicants in line for promotions were all Caucasian and the City sought to avoid disparate impact litigation. Margerum, *et al.*, Reply Brief at 11. One of the questions raised in this case is whether that race-based decision to discriminate against Caucasian firefighters is permitted under the law. *See* City's Opening Brief at 8; Margerum, *et al.*, Reply Brief at 1. Following the U.S. Supreme Court's decision in *Ricci v. DeStefano*, 557 U.S. 557 (2009), the lower court held that the City of Buffalo could not refuse to promote qualified Caucasian firefighters in order to avoid a potential disparate impact lawsuit by African-American firefighters. *Margerum v. City of Buffalo*, 83 A.D. 3d 1575, 921 N.Y.S. 2d 457 (4th Dep't 2011).

Disparate impact theory under Title VII—and in other contexts—is controversial[1] because disparate impact plaintiffs need not allege, nor prove, that individuals were treated differently because of their race. Instead, plaintiffs need only show that a race-neutral practice has a disparate impact—a disproportionate

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[1] *See e.g., Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, 2014 WL 5802283 (D.C., Dist. of Columbia 2014) (disparate impact claims not available under the Fair Housing Act, Title VIII of the Civil Rights Act of 1958); and *Tex. Dep't of Hous. & Cmty. Affairs v. The Inclusive Communities Project, Inc., cert. granted*, 135 S. Ct. 46 (2014) (presenting the question of whether a disparate impact provision is cognizable under the Fair Housing Act).

effect—on some racial group. *Ricci*, 557 U.S. at 577. The Supreme Court has yet to decide whether disparate impact conflicts with the Equal Protection Clause, which requires equal treatment under the law. *See* U.S. Const. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). But that day will come. *See Ricci*, 557 U.S. at 595 (Scalia, J., concurring) (identifying a "war between disparate impact and equal protection").

Amici understand that the relationship between the disparate impact theory of Title VII and the Federal Equal Protection Clause is not before this Court. Nor was it before the Supreme Court in *Ricci v. DeStefano*. *See Ricci*, 557 U.S. at 582. But the Equal Protection Clause casts its shadow over all disparate impact claims, including those raised in *Ricci* and in this case.

In only one circumstance does *Ricci* allow race-conscious, intentional discrimination: An employer must have believed that action was necessary to avoid disparate impact liability, and demonstrate that belief by a "strong basis in evidence." *Ricci*, 557 U.S. at 585. Neither racial disparities, nor fear of litigation are alone sufficient to meet this test. *Id.* at 592. This Court should avoid construing state law to allow broad disparate impact liability, because to do so would raise serious constitutional problems.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation, Center for Equal Opportunity, Project 21, Individual Rights Foundation, Reason Foundation, and Cato Institute respectfully submit this brief amicus curiae in support of Appellants-Respondents Eugene Margerum, *et al.*

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF challenges programs covering public contracting, public education, and public employment that grant special preferences to a select few on the basis of race and gender. PLF litigates to achieve a color-blind society, and against attempts to undermine the Constitution's guarantee of equal protection under the law.

The Center for Equal Opportunity (CEO), is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting.

Project 21 is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment.

The Individual Rights Foundation (IRF), was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file amicus curiae briefs in cases involving fundamental constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited

government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

All Amici have participated in the filing of numerous amicus briefs in major disparate impact and equal protection cases from *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), to *Tex. Dep't of Hous. & Cmty. Affairs v. The Inclusive Communities Project, Inc.*, 747 F.3d 275, 276 (5th Cir. 2014), *cert. granted in part*, 135 S. Ct. 46 (2014). For example, PLF, joined by various Amici listed above, filed amicus briefs in *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (equal protection); *Township of Mount Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013), *cert. dismissed* (disparate impact); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (equal protection); *Briscoe v. City of New Haven*, 132 S. Ct. 2741 (2012), *cert. denied* (disparate impact); *Magner v. Gallagher*, 132 S. Ct. 1306 (2012), *cert. dismissed* (disparate impact); *Ricci v. DeStefano*, 557 U.S. 557 (2009) (disparate impact); and *Alexander v. Sandoval*, 532 U.S. 275 (2001) (disparate impact).

Amici believe that their public policy perspective and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

STATEMENT OF FACTS AND OF THE CASE

The facts of the case are set forth in detail in the parties' briefs to this Court. This brief examines the conflict between disparate impact theory and the Equal Protection Clause in cases such as this one, where government discriminates against people of one race, in order to avoid an adverse impact on people of another race. Here, the City decided to allow the Fire Department's promotional eligibility lists to expire. The City's decision was racially motivated: the next applicants in line for promotions were Caucasian, and the City feared a disparate impact challenge from the black firefighters had the Caucasian firefighters been promoted. Margerum, *et al.*, Reply Brief at 11.

ARGUMENT

DISPARATE IMPACT LIABILITY RAISES SERIOUS EQUAL PROTECTION CONCERNS

The Supreme Court has emphasized that distinctions between persons based solely upon ancestry "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality' and that 'racial discrimination are in most circumstances irrelevant and . . . prohibited.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). All racial classifications by government are "inherently suspect," *id.* at 223, and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993).

The core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989).

Title VII itself makes no distinction between races (*see* 42 U.S.C. § 2000e-2(a)(1)), and that fact was central to its adoption in 1964. In the debate surrounding the enactment of Title VII, the central concern expressed by the opponents of the bill was that the statute would be used to enforce quotas, racial balance, and other race-conscious remedies. *See* Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 184-97 (1992). In an oft-quoted rejoinder to these concerns, Minnesota Senator Hubert Humphrey famously responded:

> I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provided that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there.

Id. (citing 110 Cong. Rec. 7420 (1964))

Senator Humphrey's defense carried the day. Importantly, it is unlikely that Title VII would have passed had the text of the bill not been clearly written to avoid claims that it would sanction racial balancing. *Id.*

But those who favored a remedy for actions that create unequal results, as opposed to unequal treatment, took their arguments to the courts. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 715-16 (2006).

Ultimately, the Civil Rights Act of 1991 provided a statutory basis for disparate impact. 42 U.S.C. § 2000e-2(k).

The disparate impact provision is controversial because it forces employers to make race-based decisions in order to avoid potential disparate impact lawsuits. *See Ricci*, 557 U.S. at 577. *See also Briscoe v. City of New Haven*, 654 F.3d 200, 201-02 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012) (New Haven firefighter challenged the certification of the *Ricci* test results for causing racial disparities). And that leads to intentional discrimination, the very type of discrimination that Title VII and the Equal Protection Clause were adopted to combat. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII."); *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.").

The Court's decision in *Ricci*, 557 U.S. 557, highlights the conflict between disparate impact and the constitutional guarantee of equal protection. The decision also demonstrates how the specter of disparate impact litigation leads government employers to engage in unconstitutional race-conscious decision making in an attempt to avoid liability for such claims. White and Hispanic firefighters sued New Haven, Connecticut, following the City's refusal to certify promotion examination results,

because the City feared liability for the disparate racial impact on minority firefighters. The Court condemned that action, holding that the City's race-based decision making violated Title VII. *Ricci*, 557 U.S. at 563. Allowing the City to take race-based actions on a "good-faith belief" that its actions are necessary to avoid disparate impact claims would "amount to a de facto quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.'" *Id.* at 581-82 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988)).

Disparate impact "not only permits but affirmatively requires" race-conscious decision making "when a disparate-impact violation would otherwise result." *Id.* Pressuring employers to make unlawful race-conscious decisions in order to avoid Title VII liability is precisely the equal protection harm identified in *Ricci*. 557 U.S. at 594 (Scalia, J., concurring) (probing whether disparate impact is consistent with equal protection due to the race-based classifications it encourages). "But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, . . . whether private, State, or municipal—discriminate on the basis of race." *Id.* (citations omitted). The danger is that "disparate-impact provisions place a racial thumb on the scales, often requiring [state or municipal governments] to evaluate the racial

outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

In order to reconcile the disparate treatment and disparate impact provisions of Title VII, the *Ricci* Court borrowed the "strong basis in evidence" standard from equal protection cases. *See Ricci*, 557 U.S. at 582-84. The new test narrowly limits the circumstances that would justify an employer's intentional discrimination against one group of persons in order to avoid or remedy unintentional discrimination against another group. *Id.* at 583. Although this heightened evidentiary standard may resolve the statutory conflict between disparate treatment and disparate impact, it may not be sufficient to save Title VII's disparate impact provisions in a constitutional challenge. Justice Kennedy, writing for the majority, noted that "[w]e . . . do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case." *Id.* at 584.

Although *Ricci* did not resolve the tension between equal protection and disparate impact doctrine, Justice Scalia observed in his concurrence that the Court was "merely postponing the evil day" when the Court must decide "whether, or to what extent, are the disparate-impact provisions . . . consistent with the Constitution's guarantee of equal protection[.]" *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). Equal protection considerations are crucial whenever an entity attempts to avoid disparate impact liability. Had the City of New Haven in *Ricci* altered the weights

assigned to the written and oral components of its examination, it could have changed the test results so that more minorities would have received higher passing scores and promotions. In doing so, New Haven would have reduced or eliminated a racial disparate impact and escaped liability for any such claims. However, in altering the results to achieve a predetermined outcome, New Haven would have engaged in race-conscious decision making, perhaps even rigging the results to achieve racial quotas. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 53, 64 (2009) (describing the City's ability to determine the likely racial outcome of alternative testing protocols). Where the government proposes to ensure participation of some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 307.

Even before *Ricci*, the Court expressed concern that expansion of the disparate impact doctrine could lead to the adoption of unconstitutional racial quotas. In *Watson*, the Court noted that "preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution." 487 U.S. at 993 (citation omitted). Legal rules leaving public and private employers with "little choice" but to adopt race-conscious measures stray "far from the intent of Title VII." *Id.*

Advising against such measures, the Court warned that "[i]f quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted." *Id.*

As in *Ricci*, the City's reasons for allowing the promotional list to expire in this case were related to the racial distribution of firefighters on the list. The City would not have let the list expire had the next eligible candidates on the list been African-American firefighters. Thus, the City made the decision to treat candidates differently because of race and fear of disparate impact litigation. Neither reason justifies the resulting intentional discrimination against those firefighters who excelled on the promotional examination.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court to uphold the decision of the lower court that the City of Buffalo failed to meet the "strong basis in evidence" standard of *Ricci v. DeStefano*.

DATED: November 26, 2014.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I, Pamela Spring, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On November 26, 2014, a true copy of a BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION; THE CENTER FOR EQUAL OPPORTUNITY; PROJECT 21; THE INDIVIDUAL RIGHTS FOUNDATION; REASON FOUNDATION; AND THE CATO INSTITUTE IN SUPPORT OF APPELLANTS-RESPONDENTS was placed in envelopes addressed to:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 26th day of November, 2014, at Sacramento, California.

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