IN THE SUPREME COURT OF THE UNITED STATES

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FRANK RICCI, ET AL., :

Petitioners :

v. : No. 07-1428

JOHN DESTEFANO, ET AL.; :

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and

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FRANK RICCI, ET AL., :

Petitioners :

v. : No. 08-328

JOHN DESTEFANO, ET AL. :

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Washington, D.C.

Wednesday, April 22, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

GREGORY S. COLEMAN, ESQ., Austin, Tex.; on behalf of the Petitioners.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of

the United States, as amicus curiae, supporting vacatur and remand.

CHRISTOPHER J. MEADE, ESQ., Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument today in Case 07-1428, Ricci v. DeStefano, and the consolidated case.

Mr. Coleman.

ORAL ARGUMENT OF GREGORY S. COLEMAN

ON BEHALF OF THE PETITIONERS

MR. COLEMAN: Good morning, Mr. Chief Justice, and may it please the Court:

Racial classifications are inherently pernicious and, if not checked, lead as they did in New Haven to regrettable and socially destructive racial politics.

Neither equal protection nor Title VII justified New Haven's race-based scuttling of the promotions Petitioners earned through the civil service process mandated by Connecticut law. The lower court required no strong evidentiary basis that the City was acting to remedy or avoid any actual discrimination, but strong safeguards are needed to smoke out illegitimate uses of race and to extinguish the racial favoritism that civil service laws -- excuse me -- are intended to prevent.

Governmental employment actions grounded in

race must be strictly scrutinized because they engender divisiveness and cause race-grounded harm that the Constitution seeks to avert. That standard does not change with the race of those the government seeks to --

JUSTICE STEVENS: May I just ask this question? Is it undisputed that it was a race-based decision?

MR. COLEMAN: No, Justice Stevens. I think the city makes the argument that it was not a race-based decision simply because the effect of the scuttling resulted in no promotions being given at all. We believe that that is not a basis for distinguishing this. That it still remains a race-based decision.

JUSTICE STEVENS: Are you contending that that's an issue of fact that has to be tried out or that we should accept your version of that -- of that issue?

MR. COLEMAN: I believe that that's an issue of law, Your Honor. It is no different ultimately than what the Court concluded in Croson. This type of an argument that a do-over is not a racial classification is exactly what happened in Croson. There was a do-over declared, a -- a rebidding; and yet the Court said, because that rebidding was declared for racial reasons, it would nevertheless be subjected to --

JUSTICE GINSBURG: That was pursuant to --

to an affirmative action plan, and here we're dealing with this concept under Title VII of disparate impact. And let's take for one example a test that's given by a police department, a fire department, and it -- it's a physical fitness test, and it disproportionately excludes female applicants. And when the results come in and there are no women on the eligibility list, the department reconsiders. It thinks there is something wrong with this test. It can probably test for the necessary skills in a way that will not achieve those results.

Would it be similarly impermissible, similarly based on an impermissible criterion, if the department said: We're not going to -- we have got the results of that test. We're going to throw it out and substitute another that will not have those skewed results.

MR. COLEMAN: If that decision was grounded in a determination that we simply need to ensure that there are more women on the force, then, yes, it would be subjected to heightened scrutiny, maybe not strict scrutiny under that --

JUSTICE GINSBURG: Not more women on the force, but this test that we're giving has the effect of excluding most women, just as the high school diploma

had the effect, a disproportionate effect, on one race.

MR. COLEMAN: I think your question gets to part of the heart of this case, and that is, ultimately: Is the decision that's being made one that is -- is based in race or is -- is based on a determination that there is an improper test? But this decision is grounded in race if -- if the police department in your case had clear evidence that the test was simply unnecessary, that it was not job-related and could be clearly done by an identifiable alternative, I think at the end of the day there might be some basis. But if it is grounded in --

JUSTICE GINSBURG: So they would have to go -- I take it from what you said they would have to go as far as proving a Title VII disparate impact case against themselves. They couldn't do anything short of that to prevail when it is the majority race that is complaining about discrimination.

MR. COLEMAN: To use the constitutional analogy, Your Honor, I think Wygant, Croson, Adarand, other cases, make clear that you do not have to prove the violation against yourself, but you do have to demonstrate that you have a strong basis in evidence for believing you are violating the law. In Wygant the plurality set that out citing convincing evidence.

JUSTICE SOUTER: The problem, Mr. Coleman, is that -- that the cases you are relying on, it seems to me, are cases in which ultimately what is being judged is a different result in the -- at the end point of the process which was starting. And the problem that I have with -- with using cases like that and -- and essentially the problem I -- I have with your argument is that it leaves a -- a municipality or a governmental body like New Haven in a -- in a damned if you do, damned if you don't situation. Because on -- on the very assumptions that you are making, if they go forward with -- with their -- their hiring plan, they certify the results and go forward with it, they are inevitably facing a disparate impact lawsuit.

If they stop and say, wait a minute, we're starting down the road toward a disparate impact lawsuit and, indeed, there may be something wrong here, they are inevitably facing a disparate treatment suit. And whatever Congress wanted to attain, it couldn't have wanted to attain that kind of a situation.

Why isn't the most reasonable reading of this set of facts a reading which is consistent with giving the city an opportunity, assuming good faith, to start again? And I -- I recognize there's got to be a good faith condition, and the -- the good faith can

always be attacked. But isn't that the only way to avoid the damned if you do, damned if you don't situation?

MR. COLEMAN: No, I completely disagree with that, Justice Souter. It not simply a matter of good faith. The use of race in government is so -- the Court has been so --

JUSTICE SOUTER: But you make no distinction between race as an animating discriminating object on the one hand and race consciousness on the other. There is no way to deal with a situation like this any more than there is a way to deal with -- with setting lines in voting districts --

MR. COLEMAN: I also --

JUSTICE SOUTER: -- without pervasive race consciousness. That is not unconstitutional, and it seems to me that you are not observing that distinction in -- in your reply.

MR. COLEMAN: I disagree with that as well, Justice Souter. There is a strong difference in what happened in this case. In partial answer to Justice Ginsburg's question, et al., this is not an issue where the -- where the city had before it and was making a determination that our examination is not job related. In fact, it is clear on the record that what the city

said is, this comes to the wrong racial result, and, therefore, there must be something wrong with the test. When pressed --

JUSTICE KENNEDY: Well, let me ask you this -- this question, and I don't mean to interrupt your answer, but it is based on what Justice Souter and Justice Ginsburg have both been asking. Hypothetical case: The city says, our test is not very good. We need a new test.

The expert says, don't pay us to have a new one. There are two great ones out there. One is in City A. The other is in City B. Use either one of those. They are great.

They check. They find out that City A has a disparate impact in the statistical sense, not in the legal sense; that it disadvantages minorities, at least if you look at the passage rates. The other test doesn't. Are they permitted to take the test that doesn't have that differential?

MR. COLEMAN: Under our alternative argument, Your Honor, assuming that -- that fixing disparate impact can be a compelling interest, we believe that you would at least have to demonstrate a strong basis in evidence to show that there is liability under (k)(2) -- your -- your example --

JUSTICE KENNEDY: My -- my question is -- and you can answer, I guess, both under Title VII and -- and under the Fourteenth Amendment. The city says, the only reason -- the only reason for our selecting the test from City B -- and both tests are very good tests -- is because minorities are better represented on the passing rate. Is that permissible?

MR. COLEMAN: Under the Armstrong basis of evidence test, it might very well be because it meets the second qualification of the disparate impact statute, in which there is a specific alternative that is equally valid. If you are -- if you are going to assume that it can be shown to be equally valid and that it has less disparate impact --

JUSTICE KENNEDY: And do you find -- and do you find any constitutional deficiency in the city's choice in that hypothetical case? Is there any Fourteenth Amendment problem?

MR. COLEMAN: Well, we are certainly quite troubled that the Court would say, as it has not said, that the idea of -- of overcoming purely unintentional discrimination can be a compelling interest for cutting off what we believe is intentional discrimination. But barring that, our test, our backup test, is then that the strong basis in evidence test that exists from

Wygant and Croson would at least in its -- require that you have a strong basis in evidence for demonstrating liability under this --

JUSTICE SOUTER: Well, what -- what if you've got -- what if you've got the basis of Justice Kennedy's hypothetical? You've -- you've got a municipality. It's a racially mixed municipality. It's got two tests. That's his hypothetical. One of them seems to suggest that there is going to be a significant racial disparity in the results if they use it. The other one from the other city or the other State suggests not. That's all they've got to go on.

Is that a strong basis in evidence, or did they walk their way into a lawsuit by you if they adopt the -- the test that doesn't -- that at least in the other place hasn't produced the disparity?

MR. COLEMAN: Under that argument, as long as it can be demonstrated to be equally content valid, equally or better content valid and to have a lesser impact, then it would show -- it would establish a stronger --

JUSTICE SCALIA: They would not have discriminated against any particular --

MR. COLEMAN: That's -- that's correct, Your Honor.

JUSTICE SCALIA: -- white or -- or majority applicants in -- in that selection, which is what occurred here. You had -- you had some applicants who were winners, and their -- their promotion was -- was set aside. That doesn't exist in these hypotheticals at all. It's just an abstract question of which of these two systems should be adopted.

MR. COLEMAN: Well, I understood Justice Kennedy's hypothetical to be after you have taken a test and building upon the hypothetical.

JUSTICE GINSBURG: It wasn't my --

JUSTICE KENNEDY: No. No. It was --

MR. COLEMAN: It was --

JUSTICE KENNEDY: It was designed to show, and maybe it's theoretical, but I want to know the answer so that I can understand this case. It's designed to ask you the question whether or not race consciousness is ever permissible.

MR. COLEMAN: If -- if in your situation is simply in your situation the initial giving of the test, can you choose between those two tests, then we believe based upon what the Court has said in the past that a city could do that.

JUSTICE BREYER: A city can in fact choose a test simply because there will be more minority people

who will in fact end up in the positions, that's your view?

MR. COLEMAN: Well --

JUSTICE BREYER: You needn't do anything else? I mean, that is your answer to Justice Kennedy?

MR. COLEMAN: Nobody can know in fact --

JUSTICE BREYER: I want to know is that your answer to Justice Kennedy or not?

MR. COLEMAN: Under that hypothetical, we believe they can choose that test.

CHIEF JUSTICE ROBERTS: Are you assuming --

JUSTICE BREYER: The answer is yes.

CHIEF JUSTICE ROBERTS: Are you --

JUSTICE BREYER: If that's so, what's the difference here? The most that you're saying is the worst that could have happened here; the worst that could have happened is that some experts told them, this test -- by the way, test one is -- is even worse than in Justice Kennedy's hypothetical. It's a test that probably discriminates negatively against minorities. So if you admit he could do it even if the test didn't discriminate negatively against minorities, namely test -- in his case, why can't you do it triply, in the case where there's evidence that they did discriminate, the test does discriminate against minorities?

MR. COLEMAN: Two very strong differences, Justice Breyer. First of all, our -- our firefighters had already taken the test; they had earned their promotions under state law. There was nothing left to do but to ministerially certify the lists, all right? The second difference is this. The only --

JUSTICE GINSBURG: Well, that can't be right if they -- if what you just answered to Justice Kennedy is -- is right.

Suppose they had very strong evidence that the test that they had given that had these results, just as my physical fitness test that excluded all women -- that had it those results, it wasn't job-related, and there was a better test available, they wouldn't have any vested right in getting the promotions under those circumstances, would they?

MR. COLEMAN: We're not claiming that it's a vested right. What we're claiming is that sometimes the Court has permitted governments to use race to remedy discrimination, and what would be needed in that hypothetical, Your Honor, is -- is the discrimination; and under your hypothetical there might very well be a strong case of discrimination, but under these facts there is no evidence in this record, and the city conceded below and never asserted in its bio in this

case that it had any basis to contest the job-relatedness of this examination or these examinations that were given. That is not part of the record in this case. The --

JUSTICE SCALIA: What -- one of the briefs said that, and maybe it wasn't done below, but one of the briefs said part of the claim is that some of the things that this test tested for were not -- were not qualities or abilities that were needed in New Haven, although they might be needed in other fire departments. The test had not been localized. Wasn't that part of the -- part of the objection?

MR. COLEMAN: No, Your Honor, not in the district court. If you look at 1024a of the Pet. App., the city's lawyer in front of the district court and in its pleadings on summary judgment very clearly states that they didn't believe the job relatedness is even relevant to the case. All that they needed was good faith. They didn't need job relatedness, they didn't need an actual alternative, which is the basis of some of the hypotheticals you're giving. All they need is good faith.

JUSTICE GINSBURG: Then why did they have the testimony before the Civil Service Board, about -- somebody from another testing company said this is a

multiple choice test; it tests rote memory; we could have come up with a test that would better test the skills needed to be -- nothing about the localization, but something about command presence. There was a term used, assessment centers; that this test didn't effectively test the skills that you needed on the job, and others did.

MR. COLEMAN: Justice Ginsburg, that's not at all what Mr. Hornick said in front of the Civil Service Board. What he said is first, I didn't look at the test; two, I looked at the results and I see disparate impact; three, I'm not going to tell you what exams we gave, but I'm mentioning this thing called an assessment center, but I could design a better test, not having even looked at this test.

But at the end of the day he also said, I think you should go ahead and give these promotions and in the future maybe you could fix your test. He didn't say here's an alternative; here's why this would be equally valid, here's why -- excuse me -- here's why this would have lesser impact. He simply said there is a concept called an assessment center, and I think that that might help you in the future, but you should go ahead and give the promotions on this test. Same --

CHIEF JUSTICE ROBERTS: Counsel, some time

ago you said you had two answers to Justice Breyer's question. I would like to hear the second one.

MR. COLEMAN: Well, I actually think I got to the -- the first.

JUSTICE BREYER: If you got to that, then I have -- I'd like one follow-up, and that's it.

(Laughter.)

CHIEF JUSTICE ROBERTS: Maybe if you don't mind, you could remind me what the second answer was.

MR. COLEMAN: Again -- again, getting to the -- the fundamental point is, the use of race is so, so very important that the Court has always expressed skepticism and hostility to it, and what we're saying under this argument regarding a strong basis in evidence, and I think this answers both your hypothetical and Justice Souter's, is that what the city is saying, we don't have to demonstrate a strong basis in evidence for liability, we concede that we don't have that; all we have is good faith. And that's not enough. That leads --

JUSTICE SOUTER: But you are -- as I understand it, you are imposing your strong basis in evidence test on what you referred to a second ago as the use of race, and that cannot be correct, because the use of race includes race-conscious decisions which are

not discriminatory decisions, and they certainly do not implicate the -- the obligation that you want to impose.

You -- if -- if your argument is going to be coherent with what we start with, it can't be based merely on the use of race because if it does, then you are, in effect, turning any race-conscious decision into a discrimination decision, and that equation we certainly haven't made and we're never going to make.

MR. COLEMAN: That's not our intention, Justice Souter.

JUSTICE SOUTER: Then --

MR. COLEMAN: Our argument is clearly that this is not race-conscious, that it is race-based. The only determination that the city made is we don't like the results of this test; there must be something different that we can do; and we don't need to demonstrate --

JUSTICE SOUTER: But even --

MR. COLEMAN: -- viability or strong basis in evidence. We can simply fix it.

JUSTICE SOUTER: I don't want to turn this into just a rhetoric exercise, but I think the rhetoric is important. You say the city took the position, we don't like the results of this test. That kind of a statement is consistent with saying, look, we don't like

the race of the people who are going to benefit from this. It's also consistent with the city's taking the position that there is such a racial disparity here that we are either asking for trouble or walking blindly or perhaps foolishly into a -- a racial disparity lawsuit based on disparate impact.

Those are two very, very different attitudes. The first one is discriminatory. I don't see how the second one is discriminatory.

MR. COLEMAN: But it -- it clearly is, Justice Souter. I think the distinction we're making in part is this principle of individual dignity that the Court has recognized is so strong distinguishes the hypothetical that Justice Kennedy gave me from -- form the example that we have in this case where they had already taken the test; identifiable individuals had earned their promotions; and then the city says too many non-minorities passed this test, and we are going to scuttle these results based on identifiable individuals who have passed and not based on any -- anything approaching a demonstration that there is actually any disparate impact liability.

JUSTICE SOUTER: But the cost of drawing the distinction between this case and Justice Kennedy's hypothetical example is that if we draw that

distinction, the only way the city can get itself out of not only a certain lawsuit, but quite probably a successful lawsuit, is to make, in practical terms, a preliminary case against itself.

MR. COLEMAN: I --

JUSTICE SOUTER: And it -- I cannot conceive that Congress intended to put a city into that situation saying you've either got to blunder ahead into a losing lawsuit in court, or you have got to stop and expose yourself to another lawsuit which you can only win by proving that you at least had taken some steps in violating the law the first time. That is inconceivable.

MR. COLEMAN: Justice Souter, I understand the concern about the employer's point of view, which we don't think stands here just because of the blatant way the City went about this. But in general terms we're not asking, contrary to Wygant, contrary to Croson, that you prove up a claim against yourself.

But what we are saying is that the standard cannot be so light that the City very lightly and without any demonstration whatsoever that there might actually be liability here, based simply on the numbers, can say well, we're going to avoid liability and we're going to favor the minority group over the non-minority

group.

All we're asking for is that the City undertake an honest and -- and open assessment of are we really likely to be liable here under the disparate impact provision of Title VII.

JUSTICE BREYER: What do you do if there is not a liability in question? Suppose a school district deliberately, to obtain greater racial diversities in the schools draws district boundaries in a particular way among neighborhoods or plans a construction program. Then suppose having done that, indeed having once drawn the boundaries, a group comes to the school district and says you can achieve greater diversity if you redraw the boundary. You can achieve greater diversity if instead of building this school where the -- where the foundations are laid already, you build the school over here instead.

Is that, in your view, different from your case?

MR. COLEMAN: I think --

JUSTICE BREYER: It is? How?

MR. COLEMAN: I think it is. I think you're giving examples from Justice Kennedy's --

JUSTICE BREYER: That's just what I'm doing exactly.

MR. COLEMAN: It's -- it's really isn't different from Justice Thomas also had an example in Grutter. These are --

JUSTICE BREYER: But I'm interested in the distinctions, not whether it's similar to Justice Thomas's or not. I'm interested in the distinctions between this program -- I'll add one more if you want just this program, an employer --

JUSTICE SCALIA: Can I hear his answer to this one first? I'm getting confused.

(Laughter.)

MR. COLEMAN: I think the Court is certainly not fully in agreement on these questions, but the Court has at least an opinion suggested that those types of examples really are more of -- as Justice Souter, you were saying, the race-conscious type determination, and they don't violate this principle of individual dignity. You're not taking individuals one by one who have already earned promotions, and you're taking away benefits from them clearly on the --

JUSTICE BREYER: And the difference between that and drawing the school district boundary, which takes from the individual children who live in that neighborhood the right to go to this school, which they think is a better one, and sends them to that school,

which they think is a worse one, the difference between changing that boundary and changing the exam is what?

MR. COLEMAN: The difference that the Court, I believe, has suggested is that that type of a redrawing is likely to include a number of traditional redistricting factors and that race in that instance, unless it was shown to ultimately predominate, would not make it a race -- or, excuse me, a race-based effort that would violate equal protection. I believe that's --

JUSTICE STEVENS: May I ask you one question --

MR. COLEMAN: Of course.

JUSTICE STEVENS: -- because I'm not sure I understood your answer to Justice Kennedy?

What is your answer to Justice Kennedy's question about the two alternatives, one of which would fit exactly into the concluding clause of the first question presented to achieve racial proportionality in candidates selected? He says there are two alternatives before the school board, one would achieve the proportionality, the other would not. Are they free to choose the former?

MR. COLEMAN: Again, assuming that no test has previously been given, if there are two tests, they

are equally valid, one can be demonstrated to have lesser disparate impact, if there are no other circumstances, then we think they could likely under that test --

JUSTICE STEVENS: They could take that test, even though its sole purpose was to achieve racial proportionality in candidates selected?

MR. COLEMAN: I disagree that its sole purpose would be for that reason, Justice Stevens. As long as it meets the other criteria for job relatedness, it would still be fulfilling the City's necessary needs for -- for identifying quality candidates for making sure --

JUSTICE STEVENS: This is the -- putting to one side liability in the lawsuit, is the interest in avoiding disparate impact a valid State interest?

MR. COLEMAN: We certainly have taken the position if disparate impact is identified purely as unintentional discrimination, then we don't believe it's a compelling State interest to overcome --

JUSTICE STEVENS: I didn't say compelling. I said is it a valid State interest. Just the interest in avoiding the kind of results you got here.

MR. COLEMAN: I'm not sure that we are questioning whether there's a State interest in --

JUSTICE STEVENS: The City is not merely trying to avoid liability, they are trying to avoid a disparate impact. Is that a valid interest?

MR. COLEMAN: If the disparate impact is caused by something that could be demonstrated to equate to discrimination on behalf of the entity, which is what the elements of --

JUSTICE GINSBURG: But I thought the whole idea of disparate impact is it's unintentional, that's the assumption, disparate treatment, intentional discrimination, disparate impact, unintentional, but it has askewed racial results.

MR. COLEMAN: There are two aspects to that, Justice Ginsburg. The first is that you may have disparate impact if it is caused by unintentional discrimination. But you may have disparate impact that occurs through no discrimination, intended or otherwise. And Watson clearly recognized that. And when Watson said we need to have strong evidentiary standards in evaluating disparate impact liability, it was recognizing that employers can't act simply to fix numerical disparities, because otherwise that leads to soft quotas.

What we need is some demonstration that there is at least discrimination on behalf of the

entity, and perhaps that's unintentional, perhaps it's not.

JUSTICE GINSBURG: How do we know whether something is discriminatory or just that it will have a certain effect? Because it's in spite of. For example, the Greek standard, the employer wants everybody to have a high school diploma, he wants an upgraded working staff, was told by this Court you can't do that because you would disproportionately exclude one race.

MR. COLEMAN: Congress has spoken on this issue, has identified job relatedness and lack -- and the refusal of an alternative in K itself. We believe this is with the provisions we have cited, H, J and L, all in which Congress expressed a strong intent to favor tests.

If I may reserve the balance of my time, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Coleman.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE,
SUPPORTING VACATUR AND REMAND

MR. KNEEDLER: Mr. Chief Justice, and may it

please the Court:

This Court has long recognized that Title VII prohibits not only intentional discrimination but acts that are discriminatory in their operation.

CHIEF JUSTICE ROBERTS: With respect to both blacks and whites, correct?

MR. KNEEDLER: Yes.

CHIEF JUSTICE ROBERTS: So, can you assure me that the government's position would be the same if this test -- black applicants -- firefighters scored highest on this test in disproportionate numbers, and the City said we don't like that result, we think there should be more whites on the fire department, and so we're going to throw the test out? The government of United States would adopt the same position?

MR. KNEEDLER: Yes, and let me -- your question had two parts of it. You said there are too many blacks or too many whites. That is not a permissible objective under our view. The employer's action has to be tied to a concern about a violation of the disparate impact of --

CHIEF JUSTICE ROBERTS: Yeah.

MR. KNEEDLER: -- under -- under Title VII.

CHIEF JUSTICE ROBERTS: That's the part I don't understand. What you're saying is that the

department can engage in intentional discrimination to avoid concern that they will be sued under disparate impact. Why doesn't it work the other way around as well? Why don't they say, well, we've got to tolerate the disparate impact because otherwise, if we took steps to avoid it, we would be sued for intentional discrimination? This idea that there is this great dilemma -- I mean, it cuts both ways.

MR. KNEEDLER: Well, to -- to say that an employer violates the disparate treatment provision of Title VII when it seeks to -- when it acts for the purpose of complying with the disparate impact provisions of Title VII would be to set those two mutually reinforcing provisions of Title VII at war with one another, contrary to --

JUSTICE SCALIA: They are at war with one another.

MR. KNEEDLER: No, I don't think so.

JUSTICE SCALIA: How can one avoid --

MR. KNEEDLER: One of the purposes of -- of the disparate impact test, as this Court has recognized, is -- is as a prophylactic against intentional discrimination, to root it out; also, as this Court said in Watson, to identify possible instances of subjective or -- excuse me, subconscious discrimination, and in

some cases, to break down barriers that have existed in the past, for example, possibly the 60/40 weighting requirement that was under longstanding collective bargaining agreement.

The disparate impact test has been recognized since Griggs as fundamental to fulfilling the purposes of Title VII.

Title VII also has another important objective, as this Court has repeatedly recognized, which is that the voluntary compliance is the preferred objective -- excuse me -- preferred means of achieving the objectives of Title VII. Employers therefore require considerable flexibility in assessing their practices and deciding on appropriate action if it looks like one of their actions -- their practices would violate --

JUSTICE SCALIA: If it looks like or if the employer just in good faith believes?

MR. KNEEDLER: We think -- we think --

JUSTICE SCALIA: When I say they're at war with one another, I mean they become at war with one another when you say that all that is necessary to permit intentional discrimination is the employer's good faith belief that if he didn't intentionally discriminate, he'd be caught in a situation of disparate

impact.

MR. KNEEDLER: Well, this --

JUSTICE SCALIA: At that point, they're at war with each other.

MR. KNEEDLER: Well, in -- in our view, the -- in -- in the situation here where the -- where the test has been given, and there is a list produced, we believe that the -- in order to avoid summary judgment and a disparate treatment case on a claim of intentional discrimination, the employer would have to show that his concerns were reasonable ones. It has to be --

JUSTICE GINSBURG: How does that --

MR. KNEEDLER: -- more than simply a disparate --

JUSTICE GINSBURG: I know you said that in your brief when you made a distinction between mere good faith and reasonable belief. So how does one determine whether the concern that the employer is expressing is really in good faith or is reasonable? What are the indicia of reasonableness?

MR. KNEEDLER: I -- for example, a -- a gross statistical disparity. A statistical disparity makes out a prima facie case under Title VII. We're not saying that in all cases simply a statistical disparity would be sufficient. A gross statistical disparity

could lead the -- the employer to believe that something was wrong with the test. So I think -- but in addition if the employer has concerns about the validity of the test -- as you pointed out, concerns were expressed to the Civil Service Board in this case.

JUSTICE ALITO: Mr. Kneedler, could you explain how summary judgment in favor of the defendants on the Title VII disparate treatment claim can possibly be affirmed, even if the employer had reason to believe that the test that was given would expose itself to liability under a disparate impact theory? If that's not the employer's real reason for refusing to go ahead with the promotions, then isn't there liability under a disparate treatment -- under a disparate treatment theory, and that's a question for the jury? So how can we possibly affirm summary judgment here?

MR. KNEEDLER: Well, we're -- we're not suggesting that the Court should affirm summary judgment. We're -- we're suggesting remand. The District Court identified reasons other than complying with Title VII's disparate impact standard for the employer's action here, diversity and role model, promotion of role models which we do not see as falling within this framework. But if the only evidence that the plaintiff has that the employer took race into

account was that the employer was aware, as obviously the disparate impact provisions require him to be, of the racially disparate impact of the test, and the employer acts in response to that, if that is the only evidence the -- the plaintiffs had, then the employer would be entitled to summary judgment. We think that the evidence --

JUSTICE SCALIA: I'm sorry.

MR. KNEEDLER: We think that evidence of pretext or evidence that there is something else has to be external or something other than --

JUSTICE GINSBURG: Can you be --

JUSTICE SCALIA: And a reasonable response to that, is your position?

MR. KNEEDLER: Yes --

JUSTICE SCALIA: Not just in response to that.

MR. KNEELDER: If it's --

JUSTICE SCALIA: A reasonable --

MR. KNEEDLER: If it's not reasonable, then we think that that would be evidence of -- of pretext -- and --

JUSTICE GINSBURG: Can you be specific about what facts you think should be tried on remand? Because you do distance yourself from the Respondents. You are

not urging affirmance of the summary judgment. You say there are or may be genuine issues of fact. So what are they?

MR. KNEEDLER: Well, I think they go primarily to the district court's identification of diversity and -- and role models as possible motivations for what the -- what the employer was doing. The plaintiffs have also alleged that the -- that there was influence on the Civil Service Board external to the -- to the board's own decision. By the way, I should point out in this regard, at pages 166 and 167 of the Joint Appendix, the two board members who voted not to certify expressed concerns about the validity of the test based on what they had heard at the hearing.

We don't think realistically a board in this situation should be required to do more, because it's important to recognize that the -- what the employer did here was not what concerned the Court in Wygant and cases like this. The Court -- the employer did not adopt racial classifications with all the potential for adverse consequences for individuals who are labeled by race and promote on the basis of race. That's not what the employer did here. The employer paused and decided that there might be another nondiscriminatory or less discriminatory means. In other words --

JUSTICE KENNEDY: Well, counsel, you know, I've given law school examinations, looked at them, and bar examinations for years. There's never been one, when I don't look at it after the fact and say, you know, this could be better, this -- this was not quite right.

So shouldn't there be some standard that there has to be a significant, a strong showing after the test has been taken that it's deficient? Before it can be set aside?

MR. KNEEDLER: We -- we don't think so, and for several reasons. First of all, the action that the employer has taken in response, as I just said, is not a racial classification response. It is a facially neutral response where the -- where the employer has decided the test will -- perhaps we'll look for another standard which would be given and applied equally to all applicants.

JUSTICE SCALIA: And you would say that -- and I'm asking the same question the Chief Justice asked earlier -- you would say that if it had come out the other way --

MR. KNEEDLER: Yes.

JUSTICE SCALIA: And if there had been a disproportionate number of minorities who -- who passed

the test --

MR. KNEEDLER: And --

JUSTICE SCALIA: You would say that it's neutral to set that test aside?

MR. KNEEDLER: And we -- and we --

JUSTICE SCALIA: I don't think you'd say that.

MR. KNEEDLER: Well, we -- there also has to be some concern that the test may not be job-related and -- and that there may not be other alternatives. And we've been talking just about the prima facie case, but those are important elements as to whether the test is job-related.

JUSTICE SCALIA: It's whether it is -- it is neutral to set aside a test simply because one race predominates.

MR. KNEEDLER: No, but the -- but the --

JUSTICE SCALIA: How you can call that race-neutral I -- I do not know.

MR. KNEEDLER: It's facially neutral. I wanted to make the point that this is not the sort of intentional discrimination favoring one individual because of his race or disfavoring another. What the employer has done here is -- is responded to the impact of the test in general terms, not on specific --

JUSTICE BREYER: What do you think of an employer who does the following? He advertises a job. Everyone comes in and applies. He says May 1 is the deadline. When he sees the applicants, he thinks, I'd prefer more diversity. And solely because he lacks diversity among women, minorities, and whatever, he says, you know, I'm going to extend the deadline 2 months, and I hope I'll get a few more minority or female applicants.

Now, what's his reason? He wants more diversity in the workforce. Now, in your opinion, does the Constitution permit that extension?

MR. KNEEDLER: I -- I think that's a more difficult question, but there may -- there may be a situation where the employer is concerned that his recruitment or his job announcement has had a disparate impact in terms of the -- of the applications that he has gotten. In -- in that situation, the employees who have responded and may be advantaged, like the people promoted here may actually be taking advantage of a test that imposes barriers and disadvantages other people.

So when -- when we consider the impact in a situation like this on somebody who has passed the promotion test, it's important to consider that the people who have passed it may have benefited from a test

that is discriminatory.

CHIEF JUSTICE ROBERTS: Counsel, this may be the same question Justice Breyer asked, but I'd like something closer to a yes or no answer. Does the government consider promotion of diversity by itself a compelling state interest in the employment context as opposed to the school context?

MR. KNEEDLER: We think -- we think it probably is a compelling state interest, but it is not one that -- that can be advanced by race -- by racial classifications. And that -- and that is our basic submission here. This was not a --

CHIEF JUSTICE ROBERTS: Can it be --

MR. KNEEDLER: This was not a --

CHIEF JUSTICE ROBERTS: Can it be advanced by taking actions to avoid what is perceived as a disparate impact?

MR. KNEEDLER: Yes.

CHIEF JUSTICE ROBERTS: In other words, the disparate impact is regarded as something you can intentionally respond to by drawing racial distinctions solely because you would like a more diverse workforce?

MR. KNEEDLER: No, not drawing racial distinctions. That's our -- this -- the employer's response here did not draw racial distinctions. It did

not say so many black firefighters would be promoted --

CHIEF JUSTICE ROBERTS: It didn't care --

MR. KNEEDLER: -- and so many white --

CHIEF JUSTICE ROBERTS: It didn't care -- it had to draw racial distinctions because it looked at the test and said, we think there's a problem because of the racial makeup of who's going to get the promotions.

MR. KNEEDLER: The employer was responding to the discriminatory test or what -- what it was reasonably concerned was a discriminatory test --

JUSTICE KENNEDY: But it looked at the --

MR. KNEEDLER: -- not the individual --

JUSTICE KENNEDY: Counsel, it looked at the results, and it classified the successful and unsuccessful applicants by race.

MR. KNEEDLER: It -- it --

JUSTICE KENNEDY: And then -- and you want us to say this isn't race? I have -- I have trouble with this argument.

MR. KNEEDLER: No, with respect, it did not classify according to race; it looked in general terms. It did not have the names of individual people. It looked in general terms at what the racial disparity of the test was. It just --

CHIEF JUSTICE ROBERTS: It didn't look at

names; it just looked at the label of what their race was. That's all they were concerned about.

MR. KNEEDLER: Title VII's disparate impact test requires -- requires an employer to be aware of and respond --

JUSTICE KENNEDY: But that's inconsistent with your answer to the Chief Justice who was exploring whether or not what we have here is a -- is a racial criteria, pure and simple, and you say, well, it's general. And then we point out that each applicant didn't have his name, but they had his or her race.

MR. KNEEDLER: But the employer -- the employer was not making a decision to go forward and appoint individuals or promote individuals because of their race. The employer stopped there and said we're going to start over. That new test would be given equally to all employees, not any one particular employee.

JUSTICE STEVENS: Mr. Kneedler, can I ask you this? You -- you've recommended that we set aside the summary judgment and send the case back for a hearing.

MR. KNEEDLER: Yes.

JUSTICE STEVENS: What is the issue of fact that you think needs to be decided?

MR. KNEEDLER: As I've mentioned to Justice Ginsburg, I think it would go -- there are several things. One, it would go to the justifications that were advanced by, that identified by the district court here that do not fit into this framework, do not fit into complying with the Title VII disparate impact test, and those are promotion of diversity and -- and role models.

That is -- that is one. Also the district court did not apply what we believe is the right test, whether the employer had a reasonable basis for believing that what it was doing was necessary or a reasonable basis to believe it might be violating the disparate impact test. If it did not have a reasonable basis then we believe there would be a triable issue for the jury.

JUSTICE GINSBURG: When -- when I asked that you question, you said that one issue of fact was whether the board was acting in response to improper influence, to racial politics.

MR. KNEEDLER: Yes. That -- the district court rejected that argument and whether or not that should be revisited on remand is -- is another matter. We're --

JUSTICE SCALIA: Isn't that a controverted

issue of fact? How can you possibly get around that?

MR. KNEEDLER: Well --

JUSTICE SCALIA: I mean, one side says what you say is just pretext; the real reason was just politics. Isn't that an issue of fact that has to be tried?

MR. KNEEDLER: Well, under this -- under this Court's decisions dealing -- dealing with summary judgment, even on questions of intent, the -- the plaintiff ordinarily has to come up with some affirmative evidence that there was -- that there was in this case an impermissible racial motive to do that. And the -- the district court looked at what the civil service commissioners said and concluded that -- that they did not have an impermissible racial motive, that they were responding to concerns about the validity of -- of the test.

JUSTICE ALITO: But does the government think that you can just -- in a case like this you can just look at what -- what is said by the ultimate decision-maker and ignore the input from other people who may have influenced the process?

MR. KNEEDLER: No, no, we do not. There may be other people who had input into the process, and whether the -- the district court evaluated that and

concluded that the -- that the input, that there was not a triable issue for summary judgment -- to avoid summary judgment on that question. That would be open to the district court to reconsider on remand. We don't deny that -- that it could go beyond that, but our principal concern here is the analytical framework that an employer who seeks to comply with the disparate impact requirements of Title VII which have been longstanding should not be teamed to have engaged in the sort of intentional discrimination that either the Equal Protection Clause or Title VII prohibits.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Meade.

ORAL ARGUMENT OF CHRISTOPHER J. MEADE

ON BEHALF OF THE RESPONDENTS

MR. MEADE: Mr. Chief Justice, and maybe it please the Court:

Employers, both private and public, are required to comply with Title VII's disparate impact provisions, which seek to root out barriers to equal opportunity. When an employer learns that a practice has a severe adverse impact such that it creates an inference of discrimination, and evidence further supports that inference, the employer should be granted some limited degree of flexibility to act. An employer

certainly should not be encouraged or forced to make a promotion on the basis of the questionable practice.

Title VII's disparate impact provisions are designed to remove structural barriers to discrimination, and when an employment practice has an adverse impact such that it substantiates an inference of discrimination, an employer should look beyond that adverse impact.

JUSTICE ALITO: If all the employer --

CHIEF JUSTICE ROBERTS: Can I ask you --

JUSTICE ALITO: If all the employer has is evidence that the test results violate the four-fifths rule, is that sufficient?

MR. MEADE: In our view it is not sufficient, and that is not what was at issue here. First of all, there was a severe adverse impact, much lower than the four-fifths rule, much lower than what this Court found in Connecticut v Teal, and in addition, not just on the pass/fail ratio --

JUSTICE ALITO: Well, if I could modify the question. Is there some statistical point at which that's sufficient, if it's not four-fifths, if it's nine-tenths --

MR. MEADE: Our view --

JUSTICE ALITO: -- that alone would be

sufficient?

MR. MEADE: Our view is that it might be conceivable under Title VII in some cases for the statistical disparity to be so severe such that it would give an employer a reasonable basis under Title VII. However, that's not what we argue here.

We argue here that an employer should be able to act when it has a severe adverse impact which creates an inference of discrimination, coupled with evidence that creates doubts about the flaws in the test or the possibility of alternatives.

CHIEF JUSTICE ROBERTS: Can I ask you to touch on the distinction between racial discrimination and race-conscious action? The actions that were taken in many of our cases, in Croson and Adarand, Parents Involved, Wygant, were obviously race-conscious actions; there was a reason that the governments in those cases were taking the action. It was because of what they saw as the impact on race. Yet we concluded that was racial discrimination. So what's the -- how do you draw the line between race-conscious that's permitted and racial discrimination that's not?

MR. MEADE: Well, two answers, Mr. Chief Justice. First of all, this race consciousness is race consciousness that's mandated by Federal law. This is

not a discretionary decision by an employer.

CHIEF JUSTICE ROBERTS: Well, but if we -- if we agree with your -- I mean, you're assuming, it seems to me in your argument, that the actions that they've taken here are not intentional racial discrimination; and of course if they're not, then you don't have much to worry about. But let's assume that they are, as we found they were in Croson and Wygant and Adarand and Parents Involved.

MR. MEADE: Well, the difference in those cases that you talk about, Croson, Adarand, Parents Involved, they involve express racial quotas -- excuse me, express racial classifications, where the government is making a decision based on a particular individual on the basis of race.

CHIEF JUSTICE ROBERTS: And the only reason you say that isn't by an individual is that you have blacked out the names?

MR. MEADE: No, because it's a facially neutral action which applies to all test takers the same. That doesn't mean --

CHIEF JUSTICE ROBERTS: So your position is what? They threw out the test, so you would have no problem at all if they looked at those results and they were predominantly black rather than white; you would

say the city can throw out the test and there's no racial discrimination there at all?

MR. MEADE: No, I would say that there's no classification. However, there's another way to trigger strict scrutiny and that comes under cases like Arlington Heights and Feeney, and the action that the -- the facially neutral action that the city took here falls under that line of cases. And then --

JUSTICE SCALIA: I don't see how you can call it facially neutral. It's neutral because you throw it out for the losers as well as for the winners? That's neutrality?

MR. MEADE: There is no classification, because each individual, and -- when a particular individual is looked at and a decision is made on the basis of race, that is a racial classification. If --

CHIEF JUSTICE ROBERTS: So this case would come out differently, if the list was there with then names and they go down and instead of saying throw out the test, they said Jones, you don't get the promotion because you're white; Johnson, you don't get it because you're white. And they go down the list and throw out everybody who took the test; then that would be all right?

MR. MEADE: Well, the point is, if all the

tests are being thrown out and different decisions are not being made on the basis of different individuals on the basis of race, then --

CHIEF JUSTICE ROBERTS: So they can keep -- they get do-overs until it comes out right? Or throw out this test; they do another test; oh, it's just as bad, throw that one out; get another one that's a little better, but not so -- throw that one out?

MR. MEADE: Well, two responses. The first response is a legal one, the second one is a practical one. As to the legal answer, if a city were to do that or an employer were to do that again and again, first of all, that would go to intent, whether the intent of the employer were actually to comply with Title VII or for some other intent.

Second of all, it would speak to whether there are actually equally valid less discriminatory alternatives. Second, the practical --

CHIEF JUSTICE ROBERTS: Well if -- how many times before it's a problem?

MR. MEADE: Well --

CHIEF JUSTICE ROBERTS: You say if they did it over and over again. What if they did it twice here?

MR. MEADE: Well, that would be a question about whether they had a reasonable basis to do it. And

I would say if they did it a second time, that could create an inference of discrimination.

JUSTICE GINSBURG: What -- what has New Haven done in fact? This certification was requested in March of 2004; we're now 2009. What has New Haven done in order to get lieutenants and captains in the fire department?

MR. MEADE: Justice Ginsburg, this is information outside the record, of course. The -- the city has held tests for other positions, both written and oral, in assessment centers that have not had a severe disparate impact -- actually, that have not had an adverse impact at all under the four-fifths rule.

And specifically for the lieutenants and captains, what the city has been forced to do is have temporary acting promotions on a rotating basis based on seniority. But the city has not gone forward with any promotions yet, and, in fact, the Petitioners in this case may in the end receive some or all of the promotions. But the city has a duty to make sure that its process is fair for all applicants, both black and white.

JUSTICE BREYER: I have purposely gone, of course, to the concurring opinion because I believe it's the controlling opinion in Parents Involved, and there

are two examples in that opinion. One is strategic site selection of new schools, i.e., a planned building, and the second is drawing attendance zones with a general recognition of the demographics. Those are given as examples of instances where there is race consciousness, but it does not trigger strict scrutiny.

Now, why is your case like that rather than being like those examples where an employer or a government official picks particular people or uses quotas in order to get a certain quota or pay attention to race in an individual selection, both based on race, which clearly does require strict scrutiny? And if there is a difference, even then why is yours justified?

MR. MEADE: Justice Breyer, there are two ways to enter strict scrutiny. One is a racial classification which makes different decisions based on different individuals on the basis of race. Cases like Croson or Wygant or even affirmative action plans are examples of making different distinctions based on different individuals on the basis of race.

There is another line of cases about -- where there's a discriminatory purpose plus adverse impact on a certain group under the Arlington Heights line of cases.

Here the Petitioners argue that there is an

adverse impact on them. Of course, that depends on the assumption that there was, in fact, a valid test. But here, then, under that line of cases the question is: What is the discriminatory purpose? And this Court's cases are not clear about what a discriminatory purpose is under the Arlington Heights line of cases. However, the answer to your question is: Compliance with a Federal statute, even a race conscious Federal statute, cannot be deemed a discriminatory purpose under the Arlington -- Arlington Heights inquiry. It is very different.

CHIEF JUSTICE ROBERTS: Is that -- I am sorry. Is that correct if we -- we conclude strict scrutiny does apply under the Constitution? Compliance with a statute, looking at impact, is a compelling interest trumping strict scrutiny under the Equal Protection Clause?

MR. MEADE: No, Your Honor. If strict scrutiny applies, then the question is: Is there a compelling interest? And complying -- complying with a Federal statute needs to be a compelling interest under the Equal Protection Clause. The reason is, otherwise, State and local governments would be in an impossible position of trying to determine whether they should --

CHIEF JUSTICE ROBERTS: I guess it would go

to how you construe the statute. It seems to me an odd argument to say that you can violate the Constitution because you have to comply with the statute.

MR. MEADE: Well -- well, I would disagree. That would only be true if there were some doubt as to the constitutionality of the disparate impact provisions. But here that -- this Court first articulated "disparate impact." Congress has reaffirmed that.

JUSTICE KENNEDY: Well -- well, but you are loading the -- the equation. The Chief Justice's question I don't think has been -- been fully answered. You are -- you are saying that you can eliminate constitutional concerns because the statute is enacted, which just repeats those same constitutional concerns. It's -- it's like having two tracks on the audio that don't quite fit.

MR. MEADE: Well, I -- I may have misunderstood the question, but compliance with Federal statutes have to be a compelling interest as long as that -- that statute is constitutional. Now --

JUSTICE SCALIA: Of course you're not saying that -- that the test is -- is compliance. You're -- you're saying the belief that it's necessary for compliance is a compelling State interest.

MR. MEADE: Or --

JUSTICE SCALIA: I mean everybody would probably concede that if -- if continuing would clearly be in violation, of course, it's a compelling interest. But the issue here is: Is it enough if the employer simply worries that if he doesn't make the change, he may be in violation?

MR. MEADE: Well --

JUSTICE SCALIA: What -- what's the line there?

MR. MEADE: Well, the line is set out by this Court's cases. So assuming strict scrutiny applies and assuming that compliance with Title VII is a compelling interest, then the question is whether an employer has a sufficient basis. And this Court's cases, both in the intentional and unintentional context, say that that's a strong basis in evidence, and so that would be the relevant test. This Court has applied --

JUSTICE SCALIA: You acknowledge strong basis in evidence is -- is what -- what the city has to have?

MR. MEADE: Assuming that strict scrutiny applies --

JUSTICE SCALIA: Right.

MR. MEADE: -- then, yes, then the city needs to have a strong basis.

CHIEF JUSTICE ROBERTS: Can I get back just -- just -- since I don't understand it yet, the distinction between intentional racial discrimination and race conscious action. I thought both the plurality and the concurrence in Parents Involved accepted the fact that race conscious action such as school siting or drawing district lines is -- is okay, but discriminating in particular assignments is not.

Now, why is this not intentional discrimination? I understood you to say it was because you don't have particular individuals being treated on the basis of their race. You are going to have to explain that to me again, because there are particular individuals here. They are the plaintiffs, and they say they didn't get their jobs because of intentional racial action by the -- the city. Why is that not on the racial -- intentionally racial discrimination side rather than the permissible race consciousness side?

MR. MEADE: Well, again, this is a question about what triggers strict scrutiny, and compliance with the Title -- compliance with the Federal statute should not be deemed a -- a discriminatory purpose. However, if strict scrutiny applies, then this Court's

traditional strict scrutiny analysis is a way to test the decision.

CHIEF JUSTICE ROBERTS: Well, that -- you may be right that that's what the question is about. I still don't have in my mind from you a line about how we decide. Because there are many cases, Croson, Adarand, Wygant, Parents Involved, where we said action taken obviously because of race is nonetheless discrimination. So -- and then there are cases where we have recognized that race conscious action is permissible. Again, what -- when I look at something like this, how I do decide which side of the line that's on -- this is on?

MR. MEADE: Well, again, all of those other cases involved discretionary actions by State actors, and those are -- were making decisions, trying to comply, trying to further various goals, and in those cases making a very express use of race that a particular individual -- when that person was looked at, whether in Croson, whether in Wygant, whether in Parents Involved, a particular decision was made as to that individual.

CHIEF JUSTICE ROBERTS: But just to take Parents Involved, it wasn't a necessary -- the driving factor was not a specific decision with respect to specific individuals. They didn't care whether it was

Jones or Smith that they were citing. All they cared about was the race. And it seems the -- the same here. You maybe don't care whether it's Jones or Smith who is not getting the promotion. All you care about is who is getting the promotion. All you care about is his race.

MR. MEADE: Well, the -- the difference there is that in that case, Jones and Smith, different decisions were being made on the basis of race such that there was a labeling on the basis of race. And here there is no such labeling because here there is a question about whether this process is in fact picking the most qualified individuals for the job. And that's what Title VII is designed to do.

It is, yes, certainly a race conscious decision, a race conscious statute. But what Title VII is trying to do is to make sure that we don't perpetuate discrimination, albeit unintentional, and, therefore, to take away barriers that have existed over time and that continue to exist.

JUSTICE GINSBURG: When you say "take away barriers," one thing is not a hundred percent clear. Your position is we have to do this in order to avoid Title VII disparate impact liability. Are you not reciting as a justification either the diversity in police -- policing firefighting or still overcoming a

legacy of the past where fire departments were among the most notorious excluders on the basis of race? You are not -- you are not saying rectification of past discrimination? You are not saying diversity?

MR. MEADE: We're not saying that. We did not say that below. And, in fact, the board members who voted against certification cited flaws with the test and flaws with the process, and that was the basis for their failure to certify.

And the problem with a discriminatory test is that it does not set a level playing field. It may create an illusion of meritocracy, but the problem is it not only disfavors certain individuals, but on the flip side, it also necessarily advantages others --

CHIEF JUSTICE ROBERTS: You just referred --

MR. MEADE: -- and therefore --

CHIEF JUSTICE ROBERTS: I'm sorry. You just referred to a discriminatory test. What you said in the district court, and I quote, the issue is not whether the tests were valid.

Are you just changing positions on that?

MR. MEADE: No, not at all. The ultimate validity of the test, our position below, was not relevant; the question is what was before the board. And the board heard 5 days of testimony over 2 months.

And as I mentioned, the two individuals who voted against certification cited concerns with the test and concerns with the process, and that was the basis for their decision.

JUSTICE GINSBURG: What do you mean by --

JUSTICE KENNEDY: I'd like to talk just briefly --

CHIEF JUSTICE ROBERTS: Justice Kennedy.

JUSTICE KENNEDY: I would like to talk just briefly about this point that the -- some of our hypotheticals where the test hadn't been given yet. Here the test has been given. And I had some concerns along the line of Justice Ginsburg's question. She said, well, it's not a vested interest.

On the other hand, 2000e-(l)(2) says that test results can't be altered. There's a statutory interpretation question of whether that means they can't be used altogether. Two points about the statute.

Number one, doesn't that diminish at least the force of the argument that this is a vested interest? It means the tests are -- have a -- have a certain presumption in -- in their favor.

Secondly, on -- and maybe this is a question for the -- for the Petitioners rather than you. If we -- let's assume that we relied on that statute and said

that there's a Title VII violation here because the statute was violated. I know you have an interpretational argument there. Would that give the Petitioners all the relief they need here, or is there still additional relief under their 1983 cause of action?

MR. MEADE: To answer your first question, the question of statutory interpretation, I would disagree with the suggestion that that gives support to the Petitioners' side, and for the following reason: Congress made a careful judgment about what can and can't be done once tests have been administered, and it told employers it -- it can't alter the scores when those scores are being used. And in -- what that --

JUSTICE KENNEDY: It can't alter the results. But let's not get into the statutory interpretation --

MR. MEADE: But the -- but the point is that that ties the hands of employers so that the employer, in fact, is limited in what it can do. Just because a test has been administered doesn't mean that Title VII's disparate impact provisions suddenly disappear. And as a number of lower courts have stated, there's no entitlement to be promoted on the basis of a flawed or discriminatory test.

The problem is, the alternative is to force employers to go forward and to use a discriminatory or a potentially discriminatory test. That has two problems.

First, it's inconsistent with the goal of merit-based selection; and second of all, if it turns out that there is, in fact, discrimination, a court then needs to undo that discrimination. A court will often need to use racial quotas or set-asides to try to undo or to remedy the discrimination that has happened.

So it's much better for an employer to stop, to not go forward with discrimination, even after the test has been used, rather than to rush forward and to create potentially further discrimination and a more aggressive use of race down the road.

Another problem with creating a high standard is it will discourage employers from removing barriers to equal opportunity. For example, with respect to an ongoing practice, if an employer learns that that practice has a disparate impact, but is not sure one way or another, and gets rid of that provision, under Petitioners' theory that employer will necessarily be liable to either blacks or whites. The only way that it can defend against a lawsuit by whites would be to argue that it was, in fact, violating the disparate impact rights of black Americans.

CHIEF JUSTICE ROBERTS: What type of -- what type of other things are you talking about there?

MR. MEADE: I mean, it could -- could be, for example, if there were a five-part training program that the City or an employer set up, and individuals may have completed some portion of the training program such that there would be similar reliance interests like the --

CHIEF JUSTICE ROBERTS: Well, the question, I guess, would be whether the program was valid or not under the traditional approaches you take under Title VII.

MR. MEADE: Exactly. But then the question is whether you're forced --

CHIEF JUSTICE ROBERTS: So does your position here depend on a conclusion that this test is invalid?

MR. MEADE: No, it doesn't. The question is whether the employer had a sufficient basis at the time of its action to make a determination that the test should not be used.

JUSTICE ALITO: And why didn't it have a sufficient basis here? It -- it chose the company that framed the test, and then as soon as it saw the results, it decided it wasn't going to go forward with the

promotions. The company offered to validate the test. The City refused to pay for that, even though that was part of its contract with the company. And all it has is this testimony by a competitor, Mr. Hornick, who said -- who hadn't seen the test, and he said, I could do a better test -- you should make the promotions based on this, but I could give you -- I could draw up a better test, and by the way, here's my business card if you want to hire me in the future.

How's that a strong basis in the evidence?

MR. MEADE: Well, first of all, the City did not act on the basis of numbers alone. It had 5 days of hearings where it heard from stakeholders on all sides. And it heard numerous flaws in the test at those hearings.

For example, there were arbitrary weightings of the scores which had no scientific basis; the company skipped critical design steps in the process; and although this was not before the board, it later turned out that there was no calibration in either the cut-off score or how the test was ultimately going to be used. Previous tests had a much less severe adverse impact. This test was an outlier.

JUSTICE ALITO: What difference does the cut-off score make?

MR. MEADE: The difference of a cut-off score is a determination, a scientifically based determination to determine who is qualified and who is not qualified for --

JUSTICE ALITO: Well, I understand that, but the people at the top would -- the problem here was not the composition of the people who scored above the cut-off, was it? It was the composition of the -- of the people who would be eligible for promotion under the "rule of three"?

MR. MEADE: Well, two responses, Justice Alito. First of all, as to the pass-fail rate, that could create a separate disparate impact violation under Federal law. So that was relevant for separate purposes.

But in addition, it's also true that the test was not calibrated for use for rank ordering, to ensure that a 93 was better than a 91. And this was a special problem because of an intervening decision by a court that was -- that was rendered after the tests were designed, after the tests were taken, after the tests were scored.

There was -- there's no evidence that the tests were precise enough to be able to determine who -- who should rank higher versus lower based on those

scores. And the amicus brief of the human resources -- human resources professionals points out this point.

CHIEF JUSTICE ROBERTS: So your response to me that you don't have to show that the test is invalid, your argument is you just have to show that there's a basis for being worried that it might be invalid. And then it seems to me the only distinction is how high a showing you require. And you reject the idea that you have to show a strong basis in the evidence?

MR. MEADE: Yes and no --

JUSTICE SCALIA: I thought you just said that. I just thought you just -- I was -- almost wrote it down.

(Laughter.)

JUSTICE SOUTER: I think your phrase was -- I think --

CHIEF JUSTICE ROBERTS: I understand from -- I guess I should say I understand from your brief if not from your argument that --

MR. MEADE: No, no.

CHIEF JUSTICE ROBERTS: You agree with the strong basis in fact standard?

MR. MEADE: To answer in a way that's consistent to -- to both of you, the answer is if the test is under Title VII, strong basis should not be the

standard. This Court has never indicated that it should be. And that would be much too high of a standard to place on private employers.

However, if this Court concludes that strict scrutiny applies, which we think it should not, but if this Court concludes that strict scrutiny does apply, then, yes, we agree --

CHIEF JUSTICE ROBERTS: So I guess, my -- so my -- your position is that you should never have a strong basis in fact standard, because you don't think strict scrutiny should apply, and you think if it's under Title VII, it's only reasonableness?

MR. MEADE: That's correct.

CHIEF JUSTICE ROBERTS: So your position is that the city -- the -- the government can take action without -- only if it's reasonable. It's a reasonable view of whether or not they might or might not be liable. That's the standard. And then they can engage in race-based action?

MR. MEADE: We agree with the government's articulation of the standard of reasonable basis. Again, I would --

JUSTICE SOUTER: But does it have to be reasonable basis to believe they would be liable if they went ahead? Or can reasonableness refer to something

other than the probability of or the -- the likelihood of liability?

MR. MEADE: I agree that it could be something less than that. And if --

JUSTICE SOUTER: Okay.

CHIEF JUSTICE ROBERTS: Well, what is something less than that, that they might be sued?

MR. MEADE: No, not that they might -- might be sued. Again, this is, just in the Title VII context, so this will affect all private employers, some of which will be small employers where a single human resource professional will be trying to make the determination. There won't be hearings as there were in this case. And the question is sometimes a severe prima facie case could be sufficient under Title VII, not under the strong basis standard, but potentially under Title VII. And if a human resource professional or if an employer had a belief that further investigation could yield evidence of a Title VII violation, that would be sufficient under the reasonable basis standard.

CHIEF JUSTICE ROBERTS: Isn't that -- isn't that kind of a blank check to discriminate, if all they need is a reasonable basis to think that further investigation might be useful?

MR. MEADE: No, it's not because this is a

way to reconcile, under Title VII, the two provisions of this statute. However, in this case --

CHIEF JUSTICE ROBERTS: No, I'm sorry -- that's an answer about why it would be okay. I'm just saying, isn't it in fact a blank check?

MR. MEADE: Well, I would disagree. No, it is not a blank check.

CHIEF JUSTICE ROBERTS: But --

MR. MEADE: Here, however, we had much more. There was a strong basis in evidence here. This Court, under the strong basis standard, has suggested that a strong basis is met when the threshold conditions for liability are met. That's what this Court said in Bush v. Vera, a plurality in Bush v. Vera, as well as Abrams v. Johnson.

The question is how to apply that standard to this case. That standard would suggest that a prima facie case, which, again, is not just adverse impact alone, but it's adverse impact that creates an inference of discrimination could be enough. Here we have not just that, not just --

JUSTICE STEVENS: Mr. Meade, let me -- let me go back to one earlier question. Suppose everybody agrees that you're right on the -- on the record here now, and the City goes ahead and does another test, with

all the advantages and studies they've made and so forth and so on, and it turns out you just had an unfortunate selection of candidates, and they come out exactly the same way. Would you agree that at that time the City would have to certify the results?

MR. MEADE: Assuming that it was a test that was valid --

JUSTICE STEVENS: It's a test they made after talking to everybody who testified in this case and filed amicus briefs and everything else --

(Laughter.)

JUSTICE STEVENS: And they came out, and it turned out exactly the same results.

MR. MEADE: Absolutely. If the Petitioners --

CHIEF JUSTICE ROBERTS: I'm sorry --

JUSTICE STEVENS: Absolutely what?

(Laughter.)

MR. MEADE: Absolutely yes.

JUSTICE SCALIA: Absolutely positively?

(Laughter.)

MR. MEADE: Absolutely positively.

CHIEF JUSTICE ROBERTS: I still -- I still don't have absolutely yes -- of what?

MR. MEADE: Yes, because --

CHIEF JUSTICE ROBERTS: Yes, they can --
MR. MEADE: Yes, they -- they need to certify the -- the results.
JUSTICE STEVENS: They would have to certify it.
MR. MEADE: They would have to certify the results. Sorry I was unclear. They would have to certify the -- the results. The question here is whether there is in fact a fair process. It's --
CHIEF JUSTICE ROBERTS: Well, just to get back to your answer to Justice Stevens, you say they'd have to certify it. You say that, in that situation, the decisionmaker could not have a reasonable basis for thinking further investigation is required. Why? Just because the second test came out the same way? It's not at all reasonable to think they ought to look at it further?
MR. MEADE: Well, not on the basis of -- of the investigation that Justice Stevens, I understood, hypothesized, as part of the example.
JUSTICE ALITO: And that would be so, even if another Mr. Hornick showed up and said, I could --
(Laughter.)
JUSTICE ALITO: I could make a better -- I could make a test? And here are some problems with this

second test that you gave?

MR. MEADE: Again, having gone through all the different examples that Justice Stevens said, at that point then -- then it would be -- the City would need to go forward with the test.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. MEADE: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Coleman, to keep the time even here, I think you have 8 minutes.

REBUTTAL ARGUMENT OF GREGORY S. COLEMAN

ON BEHALF OF THE PETITIONERS

MR. COLEMAN: There's another statute that the Court ought to consider in the Title VII context, and that's section 2000e-7, which says that Title VII will not overrule and pre-empt State law unless there is a violation of Title VII.

In asserting that, under any reasonable basis, as long as they have a reasonable basis, they can dispense with all the provisions of Connecticut civil service law, all these provisions that were put in place to get rid of cronyism, to get rid of discrimination can be set aside based on nothing more than a numerical disparity or perhaps a concern about the test we think cuts against Congress's intent in Title VII in respecting these State and local laws that are intended

to ensure that employment practices are fair and that they choose and select those who are best qualified to put into these very important first-responder organizations.

JUSTICE BREYER: Do you -- I'm still back on -- a university decides that tenure requirements lead to fewer women professors, so they say as an experiment what we would like to do is not have them for a couple of years; see what happens. On your view is that unconstitutional? Because, after all, it will certainly mean that certain majority race assistant professors have now lost the promotion they otherwise would have.

MR. COLEMAN: I think consistent with the answer I gave you before, Justice Breyer, that based on --

JUSTICE BREYER: That it's unconstitutional?

MR. COLEMAN: Based on that alone --

JUSTICE BREYER: Yes.

MR. COLEMAN: No, it would not be.

JUSTICE BREYER: It would not be unconstitutional?

MR. COLEMAN: It --

JUSTICE BREYER: And what about --

MR. COLEMAN: You're not taking away tenure from anybody.

JUSTICE BREYER: All right. Oh, oh.

MR. COLEMAN: You're just saying we want to change the tenure process.

JUSTICE BREYER: But what we are doing is not giving the promotions to the assistant professors who otherwise would have job security.

MR. COLEMAN: The analogy to your analogy is that if we have a series of people who go through the tenure process that exists and it turns out, you know, we -- we don't like the results, and --

JUSTICE BREYER: Oh, so.

MR. COLEMAN: -- therefore we want to change it.

JUSTICE BREYER: It's the result -- it's that you identify the person that makes your -- so in Texas, for example, they take the top 10 percent of all the high school graduates and put them in the university. Now, suppose they just decided, you know what we want to do? The top 5 percent. We want to see how that works. And, of course, then there are people who in fact would have gotten into the university -- and perhaps we can imagine a majority of the majority race -- and now they don't. Can Texas do that?

MR. COLEMAN: Well, you've chosen a very controversial subject.

JUSTICE BREYER: I know that, but I -- I --
(Laughter.)
JUSTICE BREYER: That was not my objective.
MR. COLEMAN: If --
JUSTICE BREYER: I want to test out just what it is about this case.
MR. COLEMAN: If -- if that is not done on the -- on the basis of race, then, no. The institution of the 10 percent rule itself, most people believe --
JUSTICE BREYER: Well, you said no. Can Texas do that or not?
MR. COLEMAN: Likely, yes. The answer is --
JUSTICE BREYER: Yes.
MR. COLEMAN: -- it can do it.
JUSTICE BREYER: Okay. And the difference here precisely is what?
MR. COLEMAN: Is that, under State law, these individuals had gone through an existing process and had -- under State law, had been determined to be the most qualified candidates and, barring anything else, would have been promoted. So the classification that is made clearly does distinguish between those who are qualified for promotion and those who are not qualified for promotion and would not receive.
It violates that -- that singular principle

of individual dignity to have these individuals be told, on the basis of race, you're not --

JUSTICE GINSBURG: But if it were shown that, in fact, this test was not job-related and, in fact, the majority of fire departments scotched this test years ago and substituted what most agree is a better test, even so you would say it would violate the rights of the plaintiffs you represent, even --

MR. COLEMAN: If --

JUSTICE GINSBURG: Even if there's strong evidence that it's not job-related and that there's a better test that doesn't produce these skewed results?

MR. COLEMAN: I don't think that's what we've said, Justice Ginsburg. Under our alternative formulation in which the Court recognizes --

JUSTICE GINSBURG: But what -- what would that do to the civil service merit system that says if you pass the test you should be certified?

MR. COLEMAN: The difference is this, Justice Ginsburg: The example you have given would clearly satisfy or likely satisfy a strong basis in evidence that you are actually in violation of the disparate impact provision of Title VII. There are three prongs. The first is adverse impact; the second is that your test is not related; and the third is the

existence of this alternative that is equally valid and that results in lower disparate impact.

The City has never asserted -- and I hear it today continue to say, we don't have to show those other two prongs, that a numerical disparity enough may allow the City to conclude that there must be something wrong with the test. This kind of res ipsa loquitur theory of disparate impact is one that the courts have not recognized and that Watson said we cannot allow because it results in racial balancing and soft quotas based on disparate impact --

JUSTICE BREYER: But in your -- in my example, to go back, the thing you've identified, it seems to me, is Texas couldn't do this. It couldn't look at the class that they're going to choose with the 10 percent and say, you know, there are not enough minorities, I think we'll go to 15 percent this year.

MR. COLEMAN: That I agree with, Justice Breyer.

JUSTICE BREYER: It could not. And moreover, in the case of the tenure, what the school couldn't do is it couldn't say, looking over at the present tenured faculty and those who were just ready for promotion and who in all probability will be, we're going to go to the non-tenure system this year. We're

going to go to the non-tenure system this year.

MR. COLEMAN: I also agree with that.

JUSTICE BREYER: That they couldn't do that. And again you that say the ordinary employer across America who announces a deadline for getting in applications cannot, once it sees those applications, say, you know, there are not enough minorities. I want to extend the deadline.

MR. COLEMAN: That's also correct, Justice Breyer.

JUSTICE BREYER: All right. And therefore this is a very far-reaching decision.

MR. COLEMAN: No, not necessarily, Your Honor. Okay, what --

JUSTICE SOUTER: You are -- you are saying, as I understand it, that if the -- if the city in a case like this, prior to giving a test, looked at the test and says, wait a minute, this is going to produce really disparate results, they can stop, regroup, and think it through again and maybe come up with a different test.

MR. COLEMAN: If --

JUSTICE SOUTER: But if they don't realize that and they go ahead with the test, and they then see the -- the disparate results, it's too late. And it seems to me that the trouble with drawing that

distinction is that the city is not in the testing business. They are unlikely to know what the results are going to be. So you're saying that the city that is -- that is prescient can adjust, the city that doesn't find out there's something wrong or at least undesirable from their standpoint until after the test results cannot readjust?

MR. COLEMAN: I don't think that's our position, Justice Souter. The first case I think is the hypothetical Justice Kennedy posed to me. The second case, as we've been talking about, is that you identify the disparate impact after the test has been given. Under this alternative theory that would allow a -- an employer to respond, all we are asking under the strong basis in evidence test is that you not react out of a concern, or out of this mere reaction to the numbers, but that you then look, is the test valid? Do you have convincing evidence, in the words of Wygant, to form a strong basis in evidence that if you did go forward --

JUSTICE SOUTER: But if they see it coming, they don't have to show a strong basis in evidence for changing the test prior to the time they give it?

MR. COLEMAN: Consistent with what -- my conversation with Justice Breyer, if they see it coming and do it ahead of time, it doesn't violate that

principle of individual dignity and that -- and doesn't discriminate against particularized and identifiable individuals.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:33 a.m., the case in the above-entitled matter was submitted.)

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