

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

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

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1 P R O C E E D I N G S

2 (10:09 a.m.)

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

6 Mr. Coleman.

7 ORAL ARGUMENT OF GREGORY S. COLEMAN

8 ON BEHALF OF THE PETITIONERS

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

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

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

25 Governmental employment actions grounded in

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

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

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

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

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

25 JUSTICE GINSBURG: That was pursuant to --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. COLEMAN: I also --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 JUSTICE GINSBURG: It wasn't my --

12 JUSTICE KENNEDY: No. No. It was --

13 MR. COLEMAN: It was --

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

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

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

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

3 MR. COLEMAN: Well --

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

6 MR. COLEMAN: Nobody can know in fact --

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

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

11 CHIEF JUSTICE ROBERTS: Are you assuming --

12 JUSTICE BREYER: The answer is yes.

13 CHIEF JUSTICE ROBERTS: Are you --

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

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

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

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

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Counsel, some time

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

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

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

7 (Laughter.)

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

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

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

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

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

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

11 JUSTICE SOUTER: Then --

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

18 JUSTICE SOUTER: But even --

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

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

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

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

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

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

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

5 MR. COLEMAN: I --

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

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

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

1 group.

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

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

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

20 MR. COLEMAN: I think --

21 JUSTICE BREYER: It is? How?

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

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

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

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

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

11 (Laughter.)

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

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

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

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

11 JUSTICE STEVENS: May I ask you one
12 question --

13 MR. COLEMAN: Of course.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.
19 Coleman.

20 Mr. Kneedler.

21 ORAL ARGUMENT OF EDWIN S. KNEEDLER

22 ON BEHALF OF THE UNITED STATES,

23 AS AMICUS CURIAE,

24 SUPPORTING VACATUR AND REMAND

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

1 please the Court:

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

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

7 MR. KNEEDLER: Yes.

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

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

22 CHIEF JUSTICE ROBERTS: Yeah.

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

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

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

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

16 JUSTICE SCALIA: They are at war with one
17 another.

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

19 JUSTICE SCALIA: How can one avoid --

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

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

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

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

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

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

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

1 impact.

2 MR. KNEEDLER: Well, this --

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

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

12 JUSTICE GINSBURG: How does that --

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

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

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

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

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

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

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

8 JUSTICE SCALIA: I'm sorry.

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

12 JUSTICE GINSBURG: Can you be --

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

15 MR. KNEEDLER: Yes --

16 JUSTICE SCALIA: Not just in response to
17 that.

18 MR. KNEEDLER: If it's --

19 JUSTICE SCALIA: A reasonable --

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

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

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

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

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

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

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

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

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

23 MR. KNEEDLER: Yes.

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

1 the test --

2 MR. KNEEDLER: And --

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

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

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

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

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

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

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

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

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

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

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

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

1 that is discriminatory.

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

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

13 CHIEF JUSTICE ROBERTS: Can it be --

14 MR. KNEEDLER: This was not a --

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

18 MR. KNEEDLER: Yes.

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

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

1 not say so many black firefighters would be promoted --

2 CHIEF JUSTICE ROBERTS: It didn't care --

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

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

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

11 JUSTICE KENNEDY: But it looked at the --

12 MR. KNEEDLER: -- not the individual --

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

16 MR. KNEEDLER: It -- it --

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

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

25 CHIEF JUSTICE ROBERTS: It didn't look at

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

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

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

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

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

23 MR. KNEEDLER: Yes.

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

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

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

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

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

25 JUSTICE SCALIA: Isn't that a controverted

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

2 MR. KNEEDLER: Well --

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

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

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

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

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

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Meade.

14 ORAL ARGUMENT OF CHRISTOPHER J. MEADE

15 ON BEHALF OF THE RESPONDENTS

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

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

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

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

9 JUSTICE ALITO: If all the employer --

10 CHIEF JUSTICE ROBERTS: Can I ask you --

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

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

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

24 MR. MEADE: Our view --

25 JUSTICE ALITO: -- that alone would be

1 sufficient?

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

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

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

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

1 not a discretionary decision by an employer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. MEADE: Well --

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

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

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

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

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

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

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

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

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

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

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

25 Here the Petitioners argue that there is an

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

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

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

25 CHIEF JUSTICE ROBERTS: I guess it would go

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

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

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

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

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

1 MR. MEADE: Or --

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

8 MR. MEADE: Well --

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

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

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

23 MR. MEADE: Assuming that strict scrutiny
24 applies --

25 JUSTICE SCALIA: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: You just referred --

16 MR. MEADE: -- and therefore --

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

21 Are you just changing positions on that?

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

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

5 JUSTICE GINSBURG: What do you mean by --

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

8 CHIEF JUSTICE ROBERTS: Justice Kennedy.

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

15 On the other hand, 2000e-(1)(2) says that
16 test results can't be altered. There's a statutory
17 interpretation question of whether that means they can't
18 be used altogether. Two points about the statute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 How's that a strong basis in the evidence?

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

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

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

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

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

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

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

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

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

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

10 MR. MEADE: Yes and no --

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

14 (Laughter.)

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

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

20 MR. MEADE: No, no.

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

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

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

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

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

13 MR. MEADE: That's correct.

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

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

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

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

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

5 JUSTICE SOUTER: Okay.

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

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

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

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

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

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

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

8 CHIEF JUSTICE ROBERTS: But --

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

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

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

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

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

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

11 (Laughter.)

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

14 MR. MEADE: Absolutely. If the Petitioners
15 --

16 CHIEF JUSTICE ROBERTS: I'm sorry --

17 JUSTICE STEVENS: Absolutely what?

18 (Laughter.)

19 MR. MEADE: Absolutely yes.

20 JUSTICE SCALIA: Absolutely positively?

21 (Laughter.)

22 MR. MEADE: Absolutely positively.

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

25 MR. MEADE: Yes, because --

1 CHIEF JUSTICE ROBERTS: Yes, they can --

2 MR. MEADE: Yes, they -- they need to
3 certify the -- the results.

4 JUSTICE STEVENS: They would have to certify
5 it.

6 MR. MEADE: They would have to certify the
7 results. Sorry I was unclear. They would have to
8 certify the -- the results. The question here is
9 whether there is in fact a fair process. It's --

10 CHIEF JUSTICE ROBERTS: Well, just to get
11 back to your answer to Justice Stevens, you say they'd
12 have to certify it. You say that, in that situation,
13 the decisionmaker could not have a reasonable basis for
14 thinking further investigation is required. Why? Just
15 because the second test came out the same way? It's not
16 at all reasonable to think they ought to look at it
17 further?

18 MR. MEADE: Well, not on the basis of -- of
19 the investigation that Justice Stevens, I understood,
20 hypothesized, as part of the example.

21 JUSTICE ALITO: And that would be so, even
22 if another Mr. Hornick showed up and said, I could --

23 (Laughter.)

24 JUSTICE ALITO: I could make a better -- I
25 could make a test? And here are some problems with this

1 second test that you gave?

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

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. MEADE: Thank you.

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

10 REBUTTAL ARGUMENT OF GREGORY S. COLEMAN

11 ON BEHALF OF THE PETITIONERS

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

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

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

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

13 MR. COLEMAN: I think consistent with the
14 answer I gave you before, Justice Breyer, that based on
15 --

16 JUSTICE BREYER: That it's unconstitutional?

17 MR. COLEMAN: Based on that alone --

18 JUSTICE BREYER: Yes.

19 MR. COLEMAN: No, it would not be.

20 JUSTICE BREYER: It would not be
21 unconstitutional?

22 MR. COLEMAN: It --

23 JUSTICE BREYER: And what about --

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

1 JUSTICE BREYER: All right. Oh, oh.

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

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

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

11 JUSTICE BREYER: Oh, so.

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

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

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

1 JUSTICE BREYER: I know that, but I -- I --
2 (Laughter.)

3 JUSTICE BREYER: That was not my objective.

4 MR. COLEMAN: If --

5 JUSTICE BREYER: I want to test out just
6 what it is about this case.

7 MR. COLEMAN: If -- if that is not done on
8 the -- on the basis of race, then, no. The institution
9 of the 10 percent rule itself, most people believe --

10 JUSTICE BREYER: Well, you said no. Can
11 Texas do that or not?

12 MR. COLEMAN: Likely, yes. The answer is --

13 JUSTICE BREYER: Yes.

14 MR. COLEMAN: -- it can do it.

15 JUSTICE BREYER: Okay. And the difference
16 here precisely is what?

17 MR. COLEMAN: Is that, under State law,
18 these individuals had gone through an existing process
19 and had -- under State law, had been determined to be
20 the most qualified candidates and, barring anything
21 else, would have been promoted. So the classification
22 that is made clearly does distinguish between those who
23 are qualified for promotion and those who are not
24 qualified for promotion and would not receive.

25 It violates that -- that singular principle

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

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

9 MR. COLEMAN: If --

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

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

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

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

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

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

12 JUSTICE BREYER: But in your -- in my
13 example, to go back, the thing you've identified, it
14 seems to me, is Texas couldn't do this. It couldn't
15 look at the class that they're going to choose with the
16 10 percent and say, you know, there are not enough
17 minorities, I think we'll go to 15 percent this year.

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

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

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

2 MR. COLEMAN: I also agree with that.

3 JUSTICE BREYER: That they couldn't do that.

4 And again you that say the ordinary employer across
5 America who announces a deadline for getting in
6 applications cannot, once it sees those applications,
7 say, you know, there are not enough minorities. I want
8 to extend the deadline.

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

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

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

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

21 MR. COLEMAN: If --

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

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

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

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

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

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

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.

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

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