

Nos. 07-1428 & 08-328

IN THE
Supreme Court of the United States

FRANK RICCI, *ET AL.*

Petitioners,

v.

JOHN DeSTEFANO, *ET AL.*

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
For The Second Circuit**

**AMICUS BRIEF OF THE OPPORTUNITY AGENDA
IN SUPPORT OF RESPONDENTS**

ANKUR J. GOEL

Counsel of Record

KELLY M. FALLS

AMY H. GRANGER

MCDERMOTT WILL &

EMERY LLP

600 Thirteenth Street, N.W.

Washington, D.C. 20005

(202) 756-8000

ALAN JENKINS

JUHU THUKRAL

KEVIN S. HSU

THE OPPORTUNITY AGENDA

568 Broadway, Suite 302

New York, NY 10012

(212) 334-5977

Counsel for Amicus Curiae

March 25, 2009

TABLE OF CONTENTS

	Page
INTERESTS OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	6
I. INVESTIGATING AND RESPONDING TO DISPARATE OUTCOMES TO IDENTIFY POTENTIALLY DISCRIMINATORY PRACTICES IS ESSENTIAL TO ENSURING EQUAL OPPORTUNITY AND CONSISTENT WITH TITLE VII	6
A. This Court’s Cases Recognize the Government’s Responsibility to Investigate and Respond to Evidence of Discriminatory Procedures	7
B. Attending to Disparate Outcomes is Especially Important in Addressing Contemporary Discrimination.....	12
C. International Consensus Supports the Legality of Voluntarily Attending to the Discriminatory Results of Facially Neutral Practices	31

TABLE OF CONTENTS

	Page
II. EFFORTS TO ASSURE SELECTION PRACTICES ARE NOT DISCRIMINATORY DO NOT TRIGGER STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE IN THE ABSENCE OF EVIDENCE THAT THEY ARE A PRETEXT FOR INTENTIONAL DISCRIMINATION	34
A. Examining or Responding to Evidence that Discriminatory Outcomes are Avoidable, that Less Discriminatory Alternatives Exist, or that Selection Criteria are Valid does not Constitute Race-Based Decisionmaking.....	35
B. Where Title VII Compliance is Pretext for Discriminatory Intent, Both the Enforcement Mechanisms of Title VII and the Equal Protection Clause are Triggered	39
CONCLUSION	41

TABLE OF AUTHORITIES

	Page
CASES	
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974).....	10, 13, 34
<i>Arlington Heights v. Metro. Hous. Dev. Corp.</i> , 429 U.S. 252 (1977).....	8, 15, 39
<i>Asbestos Workers Local 53 v. Vogler</i> , 407 F. 2d 1047 (5th Cir. 1969).....	19, 20
<i>Azimi v. Jordan’s Meats, Inc.</i> , 456 F. 3rd 228 (1st Cir. 2006).....	13
<i>Bartlett v. Strickland</i> , No. 07-689, 556 U.S. ___, slip op. (S. Ct. Mar. 9, 2009).....	6
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986).....	8, 15, 39
<i>Bush v. Vera</i> , 517 U.S. 952 (1996).....	38
<i>Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.</i> , 519 F.3d 666 (7th Cir. 2008).....	12
<i>Cleveland Branch, NAACP v. City of Parma</i> , 263 F.3d 513 (6th Cir. 2001).....	20
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982).....	37

<i>D.H. and Others v. Czech Republic</i> , 57325/00 Eur. Ct. H.R. (Nov. 13, 2007).....	4
<i>Griggs v. Duke Power</i> , 401 U.S. 424 (1971).....	5, 9, 13, 19
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003).....	31, 38
<i>Int'l Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977).....	passim
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	32
<i>Mayor of Phil. v. Educ. Equal. League</i> , 415 U.S. 605 (1974).....	10
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973).....	10, 15, 40
<i>Miller-El v. Dretke</i> , 545 U.S. 231 (2005).....	15
<i>Murray v. Schooner Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804)	32
<i>Nelson v. Wal-Mart Stores, Inc.</i> , 245 F.R.D. 358 (E.D. Ark. 2007).....	21
<i>Nev. Dep't of Human Res. v. Hibbs</i> , 538 U.S. 721 (2003).....	19, 28
<i>Parents Involved in Cmty. Sch.</i> <i>v. Seattle Sch. Dist. No. 1</i> , 127 S.Ct. 2738 (2007).....	3, 38, 39

<i>Parham v. S.W. Bell Tel. Co.</i> , 433 F.2d 421 (8th Cir. 1970).....	18
<i>Pigford v. Glickman</i> , 185 F.R.D. 82 (D.D.C. 1999).....	25, 26
<i>Richmond v. J. A. Croson Co.</i> , 488 U.S. 469 (1989).....	9, 10
<i>Roberts v. Texaco</i> , 979 F. Supp. 185 (S.D.N.Y. 1997).....	13, 18
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	31
<i>Alabama v. United States</i> , 304 F.2d 583 (5th Cir.).....	18
<i>Thomas v. Wash. County Sch. Bd.</i> , 915 F.2d 922 (4th Cir. 1990).....	21
<i>Washington v. Davis</i> , 426 U.S. 229 (1976).....	8, 39, 40
<i>Watson v. Fort Worth Bank & Trust</i> , 487 U.S. 977 (1988).....	30
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886).....	7, 8, 39
STATUTES	
42 U.S.C. § 2000-e2(k)(1)(A).....	11, 35
42 U.S.C. § 2000-e2(k)(1)(C).....	11

26 U.S.C. § 501(c)(3)	1
-----------------------------	---

OTHER AUTHORITIES

136 Cong. Rec. S10727-03 (daily ed. July 26, 1990).....	25
140 Cong. Rec. S7634 (daily ed. June 24, 1994).....	32
660 U.N.T.S. 195	32
Alexander R. Green et al., <i>Implicit Bias among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients</i> , 22 J. GEN. INTERN. MED. 1231 (2007).....	29, 30
Anthony G. Greenwald et al., <i>Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm</i> , 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).....	29
Brent Wade, <i>Fueled By Bigotry</i> , WASH. POST, June 14, 1998	18
Cassandra Jones Havard, <i>African-American Farmers and Fair Lending: Racializing Rural Economic Space</i> , 12 STAN. L. & POL'Y REV. 333 (2001).....	25
Charles M. Blow, <i>A Nation of Cowards?</i> N.Y. TIMES, Feb 21, 2009	29

- David L. Hamilton & Terrence L. Rose,
*Illusory Correlation and the Maintenance of
 Stereotypic Beliefs*, 39 J. OF PERSONALITY &
 SOC. PSYCHOL. 832, 832 (1980) 28
- Dawn L. Smalls, *Linguistic Profiling and the
 Law*, 15 STAN. L. & POL'Y REV 579 (2004) 17
- Devah Pager & Bruce Western, RACE AT
 WORK, REALITIES OF RACE AND CRIMINAL
 RECORD IN THE NYC JOB MARKET 1 (2005) 15, 16
- Devah Pager & Lincoln Quillian, *Walking the
 Talk? What Employers Say Versus What
 They Do*, 70 AM. SOCIOLOGICAL REV. 355
 (June 2005)..... 14
- Ian F. Haney Lopez, *Institutional Racism:
 Judicial Conduct and a New Theory of
 Racial Discrimination*, 109 YALE L. J. 1717
 (June 2000)..... 19, 21
- Jerry Kang, *Trojan Horses of Race*,
 118 HARV L. REV. 1489 (2005) 14, 27
- Kristin A. Lane et al., *Implicit Social
 Cognition and the Law*, 3 ANN. REV.
 L. & SOC. SCI. 427 (2007) 26
- Linda Hamilton Krieger, *The Content of Our
 Categories: A Cognitive Bias Approach to
 Discrimination and Equal Employment
 Opportunity*, 47 STAN. L. REV. 1161, 1188
 (1995)..... 27

Marianne Bertrand & Sendhil Mullainathan, <i>Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination</i> , AM. ECON. REV. 991 (Sept. 2004).....	17, 18
Office of Juvenile Justice and Delinquency Prevention, <i>Disproportionate Minority Confinement 2002 Update iii</i> (Sept. 2004).....	23, 25
Office of Juvenile Justice and Delinquency Prevention, <i>Minorities in the Juvenile Justice System</i> (Dec. 1999)	24
Office of Policy Dev. and Research, U.S. Dep't of Housing and Urban Dev., <i>All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions</i> (Apr. 2002)	22, 23
Pew Research Center, <i>Optimism About Black Progress Declines 1</i> (Nov. 13, 2007)	14
Pope et al., DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 (2002).....	24
PREJUDICE, DISCRIMINATION AND RACISM, 3-10 (John F. Dovidio & Samuel L Gaertner, eds., Academic Press, Inc.) (1986).....	14

Thomas Purcell, William Idsardi & John Baugh, <i>Conceptual and Phonetic Experiments on American English Dialect Identification</i> , 18 J. OF LANG. AND SOC. POL'Y 10 (Mar. 1999).....	17
U.N. Office of the High Comm'r for Human Rights, Comm. on the Elim. of all Forms of Racial Discrim., <i>General Rec. no. 14: Definition of Discrim.</i> ¶1, U.N. Doc. A/48/18 (Mar. 22, 1993)	33

INTERESTS OF AMICUS¹

The Opportunity Agenda, a project of the Tides Center, is a communications, research, and advocacy organization with the mission of building the national will to expand opportunity in America. Among The Opportunity Agenda's core objectives is the elimination of barriers to equal employment opportunity irrespective of race, gender, nationality, socioeconomic status, or disability. The organization's recent activities have included research regarding unequal access to employment, credit, and other economic opportunities across the nation. The subject matter of this case is therefore of keen interest to the organization.

The Opportunity Agenda's parent organization, the Tides Center, is a not-for-profit, 26 U.S.C. § 501(c)(3) California corporation that provides core management and financial services as a fiscal sponsor to approximately 350 nonprofit program initiatives. The Tides Center actively promotes change toward the principles of social justice, broadly shared economic opportunity, fundamental respect for individual rights, the vitality of communities, and a celebration of diversity.

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief in the form of blanket consent letters filed with the Clerk.

SUMMARY OF ARGUMENT

Because much of this case has been couched in terms of “avoiding liability” or “good faith compliance” with the law, Pet. Br. 28, Resp. Br. 45, it is important to remember what the case is fundamentally about: the ability of employers, and particularly state and local governments proactively to ensure that their workforce selection procedures provide equal opportunity and are free from discrimination.

1. A. When an employer encounters evidence “on the ground” that its procedures may be discriminatory, it is faced with a choice: ignore the evidence and adopt the results of a possibly discriminatory process, or attend to that evidence by reexamining the process, exploring viable alternatives, and suspending a pending decision if necessary to avoid a biased outcome. The latter course is dictated not only by Title VII, but also by the responsibility, rooted in the Equal Protection Clause, to ensure equal opportunity for all.

Adopting Petitioners’ interpretation of the law would be contrary to this Court’s precedent, and would hobble a wide range of established and effective equal opportunity measures. For example, if a school district were to propose that new schools be sited in a particular location, and subsequently determine that the site would result in unnecessary racial concentration, this Court’s case law would allow the school district to decline to go forward with the site plan while it considered other alternatives.

See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007).

Similarly, if a city commission consistently awards public contracts only to white contractors despite clear evidence that many equally qualified minority contractors exist and have bid for city contracts, a City Council that suspects the commissioners are engaging in *intentional* discrimination may suspend all contract approvals until a full investigation can be completed, and alternative procedures explored. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989).

B. The same principles clearly apply in the employment context. It is especially important now, in the 21st century, to assure that the law allows employers voluntarily to pause their hiring and promotion procedures, and look for better alternatives.

Our nation has made great progress in reducing and eliminating discrimination, but racial disparities remain pervasive, and discrimination has not been eradicated. Discrimination today is far less likely to announce itself overtly, but instances of covert, intentional discrimination remain and are routinely documented. Moreover, contemporary social science research has identified the extent to which discrimination is embedded within social institutions, and has further identified the unintentional, implicit biases that individuals hold as a part of human nature.

Covert bias, institutionalized bias, and implicit (unintentional) bias coalesce to cause the kinds of disparities that remain pervasive throughout American society. Evidence of these contemporary forms of unlawful discrimination is often found initially in the disparate racial outcomes themselves, and its more complex nature is especially likely to require investigation and assessment of procedures.

C. Consensus exists across governments that proactive responses to statistical evidence of discrimination are lawful and integral to protecting equal opportunity. That consensus is reflected in the international Convention on the Elimination of All Forms of Racial Discrimination, a treaty to which the United States and 173 of the world's other governments have agreed. And it is evident in the international embrace of the *Griggs* disparate impact standard. See *D.H. and Others v. Czech Republic*, 57325/00 Eur. Ct. H.R. (Nov. 13, 2007).

2. A. Importantly, although the Title VII doctrine is routinely referred to as “disparate impact,” the disparate racial outcomes and impacts are not themselves unlawful. Rather, the disparate outcomes are “markers” an employer may properly interpret as signaling a need to scrutinize its selection procedures to assure that they are not unlawful, that they meets legitimate business needs, and that an effective, but less discriminatory alternative does not exist.

Contrary to petitioners' contention, Pet. Br. 44, reexamining and abandoning planned decisions

based on numerical evidence of discrimination and the prospect of less discriminatory alternatives is fully consistent with Title VII. Indeed, doing so fulfills Congress's preference for voluntary compliance with that statute, and this Court's emphasis on Title VII's role in eliminating "built-in headwinds" against advancement. *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971).

Attending to these discriminatory outcomes does not warrant strict scrutiny under the Equal Protection Clause. Whereas strict scrutiny *is* triggered by certain uses of racial classifications to influence the ultimate racial *composition* of a workforce, student body, or field of contractors, the focus of Title VII and of the governmental decision in this case was on the fairness and legality of the *selection procedure*, irrespective of the racial distribution that it ultimately produces, and without assigning particular individual candidates to favored or disfavored groups.

B. Of course, where compliance with Title VII operates as a pretext for racial animus, both the enforcement mechanisms of Title VII and, in the case of public employers, the Equal Protection Clause act to check discriminatory conduct.

For all of these reasons, this Court should affirm the decision below.

ARGUMENT

I. INVESTIGATING AND RESPONDING TO DISPARATE OUTCOMES TO IDENTIFY POTENTIALLY DISCRIMINATORY PRACTICES IS ESSENTIAL TO ENSURING EQUAL OPPORTUNITY AND CONSISTENT WITH TITLE VII

Since the Civil Rights Act of 1964 was enacted, our nation has made remarkable progress in promoting equal opportunity and freedom from discrimination. Official segregation has been abolished, overt bias has receded, and the country has elected its first African-American President.

Yet abundant research and experience make clear that significant work remains, and that state and municipal governments have a crucial role to play in ensuring equal opportunity in employment, housing, and other sectors. *Cf. Bartlett v. Strickland*, No. 07-689, 556 U.S. ___, slip. op. at 21 (Mar. 9, 2009) (opinion of Kennedy, J.) (“[R]acial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions.”). Fulfilling that role, moreover, necessitates that governments have the authority, and often the obligation, to investigate and root out discriminatory processes and mechanisms, as well as to identify and substitute less discriminatory alternatives. Doing so is part and parcel of, and

fully consistent with, Title VII strictures on governmental employers.

This Court's cases recognize the need for public employers to investigate and avoid potentially discriminatory practices by examining disparate outcomes to determine if they are unlawful, or if better alternatives are available. Doing so is particularly important to addressing the kind of covert, institutional, and implicit biases that are dominant today.

A. This Court's Cases Recognize the Government's Responsibility to Investigate and Respond to Evidence of Discriminatory Procedures

This Court has long held that governmental employers have the authority, and often the obligation, to investigate and respond when disparate outcomes suggest that discriminatory procedures may exist. It is crucial for employers to do so to address intentional discrimination under the Constitution and federal statutes, as well as processes with unintentional and unnecessary discriminatory effects in violation of Title VII's disparate impact standards.

1. Since at least 1886, in *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), the Court has recognized that the Fourteenth Amendment requires examining decisions that have a discriminatory effect to determine whether there is an underlying discriminatory motive, in violation of the Equal

Protection Clause. Facially neutral laws or policies can be “void by reason of [their] administration, operating unequally, so as to punish in [one] what is permitted to others as lawful.” *Id.* at 369. Statistically unequal outcomes in the “actual operation” of decisionmaking criteria, the Court further found, *id.* at 373, are highly relevant—though not necessarily determinative—in identifying unlawful discrimination.

A long line of subsequent cases has noted that a facially neutral law can be applied in a discriminatory manner, and that racially disparate outcomes are compelling warning signs of discriminatory intent, warranting governmental attention. *See, e.g., Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of [a] state action.”); *Washington v. Davis*, 426 U.S. 229, 241 (1976) (“[A] law’s disproportionate impact is [r]elevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.”); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (“[P]roof of discriminatory impact may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.” (internal quotation marks omitted)).

Petitioners’ contention that it is unlawful to halt a public hiring process in order to explore the cause of a disparate outcome and investigate the

existence of alternatives, Pet. Br. 54, 59, flies in the face of this established jurisprudence. Under petitioners' reading, a public employer would violate Title VII by responding to statistical evidence of discrimination in its own ranks as stark as the "inexorable zero" African-American drivers identified by the Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

As Justice Kennedy recognized in his concurring opinion in *Croson*, "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." 488 U.S. at 518. Nothing in the text or history of Title VII suggests an intent to disable state and municipal employers from fulfilling that role. Even absent the prospect of adverse litigation, municipalities have the power and often the duty to investigate and suspend decisionmaking processes in light of starkly discriminatory outcomes or other strong indicia of discrimination. It defies reason to suggest, as petitioners do, that Title VII was intended to thwart that governmental role.

2. To the contrary, Title VII requires employers to identify and respond to disparate outcomes, both to root out intentional discrimination, and to eliminate procedures that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs*, 401 U.S. at 432. If the congressional selection of "[c]ooperation and voluntary compliance

