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Roger Pilon, Vice President for Legal Affairs, Cato Institute:
Burying the Law

Judge Sotomayer's handling of Ricci v. DeStefano, which the Supreme Court is expected to decide next month, will likely be crucial in her confirmation hearings. To respond to my good friend Tom Goldstein, I'll draw from Cato's amicus brief.

On both facts and law, the case is relatively simple. The City of New Haven, Connecticut, gave a race-neutral test to firefighters seeking command positions. Only whites and one or two Hispanics scored well enough to be eligible for promotion. Pressured by the city's black community, the Civil Service Board declined to certify the exam results for fear of a "disparate impact" suit—effectively throwing out the results.

Frank Ricci, a dyslexic firefighter who'd undertaken extraordinary measures to do well on the exam, plus others brought suit under Title VII and the Constitution's Equal Protection Clause. The district court held that the City's refusal to certify was not intentional discrimination under the Equal Protection Clause because it had acted from a concern that certifying the results "would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend." The appellate panel, on which Judge Sotomayor sat, summarily affirmed.

Ricci's petition for rehearing by the entire Second Circuit was denied 7-6, generating a strong dissent from Judge Jose Cabranes—like Sotomayor a Clinton appointee. Cabranes argued that under the court's rationale, "any race-based employment decision undertaken to avoid a threatened or perceived Title VII lawsuit is

immune from scrutiny under Title VII," regardless of whether there is any basis for a suit. And no such basis appears here.

In a nutshell, Title VII outlaws intentional discrimination on certain grounds. In such "disparate treatment" cases the employee must establish a prima facie case of discrimination, after which the burden shifts to the employer to articulate legitimate, nondiscriminatory reasons for the decision. The burden then shifts back to the employee to prove that the employer's reasons are "pretext."

Title VII also outlaws certain facially neutral employment practices such as tests that have adverse impacts on members of one race compared to another. Like disparate treatment claims, these "adverse impact" claims are analyzed under a burden-shifting framework. The employee must establish a prima facie case of discrimination, after which the burden shifts to the employer to demonstrate that the challenged practice is job related for the position in question and consistent with "business necessity." The burden then shifts back to the employee to demonstrate an alternative employment practice that is available, equally valid, and less discriminatory, which the employer has refused to adopt. Because such practices are facially neutral, however, the plaintiff establishes a prima facie case simply by showing that the practice in question results in statistical disparity—that members of one race do better on a test, say, than members of another, which is fairly easy to do.

Ricci was bringing a claim of the first kind, charging intentional discrimination or disparate treatment. But after assuming that he had established a prima facie case, the district court concluded that the city had established a legitimate, nondiscriminatory reason for its decision not to certify the exam results: fear of a Title VII "adverse impact" suit by the black test takers. The district court concluded, and the Second Circuit affirmed, that this fear constituted a legitimate, nondiscriminatory reason because there was an undisputed statistical disparity that would have supported a prima facie adverse impact claim against the city.

What the court did not find, however, was that the exams were not legitimate because not job-related. In fact, the only evidence in the record suggests just the opposite: the city commissioned a post-exam validation study and was aware that it would have validated the tests, but it decided to block the study. Nor did the court find that the city had shown an alternative, less discriminatory test. In other words, the court held that statistical disparity alone, which might have led to a Title VII adverse impact suit, justified the city's decision to throw out the test results. Among the perverse practical results of this ruling is that employers, at the least sign of litigation, will throw out often valuable race-neutral employment procedures whenever they produce racial disparities.

That and more was part of Judge Cabranes's dissent. But he also exposed more disturbing matters. As Ed Whelan, president of the Ethics and Public Policy Center, has written, Cabranes found it "highly unusual that [District Judge Janet Arterton] could grant summary judgment for the city officials notwithstanding her acknowledgement that the evidence was sufficient to enable a jury to find that the city officials 'were motivated by a concern that too many whites and not enough minorities would be promoted.' Further, Cabranes [found] it remarkable that such a 'path-breaking opinion' was 'nevertheless unpublished.'"

But on appeal, "the judicial effort to bury the firefighters' claims got worse," Whelan writes. Despite voluminous case materials, the Sotomayer panel, in the words of Cabranes, "affirmed the District Court's ruling in a summary order containing a single substantive paragraph," which it published as a per curium opinion only four months later, just three days before Cabranes issued his opinion. As Cabranes concludes:

"This per curiam opinion adopted in toto the reasoning of the District Court, without further elaboration or substantive comment, and thereby converted a lengthy, unpublished district court opinion, grappling with significant constitutional and statutory claims of first impression, into the law of this Circuit. It did so, moreover, in an opinion that lacks a clear statement of either the claims raised by the plaintiffs or the issues on appeal. Indeed, the opinion contains no reference whatsoever to the constitutional claims at the core of this

case, and a casual reader of the opinion could be excused for wondering whether a learning disability played at least as much a role in this case as the alleged racial discrimination. This perfunctory disposition rests uneasily with the weighty issues presented by this appeal."

An understatement, to be sure.

In sum, if Cabranes is right (we'll know soon), the Sotomayor panel ignored the law and then tried to bury a case that cried out for justice, if not empathy.

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