

IN THE
Supreme Court of the United States

VINCENZO MILIONE, PETITIONER

v.

CITY UNIVERSITY OF NEW YORK ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK SUPREME COURT
APPELLATE DIVISION - SECOND DEPARTMENT*

**BRIEF FOR ITALIAN-AMERICAN LEGAL DEFENSE
HIGHER EDUCATION FUND, INC. AS AMICUS CURIAE
SUPPORTING PETITIONER**

JOHN VIRDONE
Counsel of Record

*900 Merchants Concourse
Suite 212
Westbury, NY 11590
john@virdonelaw.com
(516) 570-3875*

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AMICUS CURIAE'S INTEREST¹

The "national origin related" issues raised in this appeal are the primary reason the Italian-American Legal Defense and Higher Education Fund, Inc. ("IALDHEF") was founded. The elimination of anti-Italian-American discrimination by advocating for fair and consistent treatment of Italian Americans. The IALDHEF brought the largest class action case on behalf of Italian Americans over 25 years ago. The evidentiary standards for "national origin" cases are seminal issues to insure fairness to ethnic minorities. Affirmative action programs for Italian-Americans like those created pursuant to Executive Order 11246 (U.S. Dept. of Labor, Off. of Fed. Contract Compliance Prgs, *EEO and Affirmative Action Guidelines for Federal Contractors Regarding Race, Color, Gender, Religion and National Origin*) are required to insure fundamental fairness in employment.

IALDHEF is familiar with this case's issues and history. Its President, Dr. Joseph Scelsa, was former Calandra Institute director and present at its inception. CUNY also discriminated against him in the same way it has discriminated against Plaintiff in this case, resulting in two favorable lawsuit settlements after extensive hearings and legal submissions. In fact over 40 CUNY employees were granted arbitration to resolve individual claims that were not settled outright. An Italian American Museum was established under

¹ I Fed. R. App. P. 29(c)(5), undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity -- other than *amicus*, its members, and counsel -- made a monetary contribution to the preparation or submission of this brief

the auspices of CUNY and Italian Americans were once again designated as an affirmative action group.

REASONS FOR GRANTING THE PETITION

This appeal presents a question of exceptional importance, namely, whether Title VII plaintiffs are being precluded from asserting their rights because of an overly high evidentiary standard applied by the lower courts. Consideration of the petition is also necessary because the decision below conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000) ("*Reeves*"), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("*Anderson*") and Second Circuit precedent. Judge Jose Cabranes, dissenting about a different subject matter in *US. v. Taylor*, 2014 WL 2154375, serendipitously summarized the issue: the original panel's decision "defies not only our own case law, but controlling Supreme Court precedent."

Argument

I. The New York Court Decision Upholding Summary Judgment Conflicts with Supreme Court and Second Circuit Precedent as previously outlined for the court in December of 2014.

A. Conflicts with *Reeves v. Sanderson* / *Anderson v. Liberty Lobby*

The general holding of *Reeves* is that when deciding whether to grant a summary judgment motion, a court "reviews all the evidence in the record," *Id.* at 150 including the *prima facie* case and pretext evidence *Id.*

at 153, "drawing all reasonable inferences in favor of the nonmoving party" *Id.* at 150. The court weighs pretext evidence's impact *Id.* at 148. If the *prima facie* and the rest of the evidence shows a foundation of animus, *Id.* at 153, or would allow a rational fact finder to conclude that the employer's explanation for its adverse action was false, the case should be submitted to a jury.

Contrary to *Reeves* and *Anderson*, the Second Circuit sometimes uses a pretext-plus standard to evaluate summary judgment motions. For example, *James v. NY Racing Ass'n*, 233 F.3d 149,157, (2d Cir. 2000) affirmed summary judgment despite *prima facie* and other evidence that "would allow a reasonable fact finder to conclude the employer's explanation ... was false". In *Weinstock v. Columbia Univ.*, 224 F.3d 33,58 (2d Cir. 2000), the dissent saw a material issue of fact in the pretext evidence. Despite genuine issues of fact existing regarding the truthfulness of employer's explanation, *Schnabel v. Abramson*, 232 F.3d 83, 88 n.3 (2d Cir. 2000) ("*Schnabel*") found that the plaintiff had introduced enough evidence to allow a reasonable juror to "conclude that the stated reasons for discharge were pretext," yet refused to allow a discrimination inference and upheld summary judgment. Making cases even easier to dismiss, some courts do not draw "all reasonable inferences in favor of the nonmoving party" when considering pretext evidence *see, e.g., Schnabel* at 88 (despite a jury issue of pretext, plaintiff "has not demonstrated that the asserted pretextual reasons were intended age discrimination"); *Malacara v. City of Madison*, 224 F.3d 727, 733 (7th Cir. 2000) (majority ignored *prima facie* and pretext evidence favorable to plaintiff); *Falcon v. Trs of the State Colleges in Colo.*, No. 99-1318, 2000 U.S. App. LEXIS 14338, at *14. Former Justice O'Connor asserted that courts using

this pretext-plus standard misconceive "the evidentiary burden borne by plaintiffs" *Reeves* at 146. In fact, a genuine issue of material fact arises "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* at 248. Following *Anderson* and *Reeves* (but not *Schnabel* and the other cases above), *Holcomb v. Iona College*, 521 F.3d 130, 141 (2d Cir. 2008) used a permissive pretext standard by ruling that a jury *could* reasonably conclude that the reasons CUNY gave for its adverse employment actions were pretext. Similarly, *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 180 (2d Cir. 2005) denied summary judgment because it found sufficient basis to doubt defendant's rationale for its adverse action.

B. The Court Required Too Much Evidence of Discriminatory Motive to Establish Genuine Issue of Material Fact

The intent to discriminate may be established by a historical pattern of institutional discrimination. *St. Mary's of Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). Statistical patterns showing underrepresentation of Italian-Americans are probative because imbalance is often a telltale sign of purposeful discrimination. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977) ("*Teamsters*"). In fact, pretext can be established "through statistical proof revealing a pattern ... of a discriminatory purpose." *Rodriguez v. Bd. of Ed. of Eastchester U Free Sch*, 620 F.2d 362, 367 (1980) citing *McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973). The record shows a historical pattern of institutional discrimination over decades:

- NYS Comm. for Human Rights found CUNY discriminated in the hiring and promotion of Italian-Americans in 1971 (JA517);
- Chancellor Kibbee found CUNY discriminated in 1976 (JA23);
- N.Y.S. Sen. John D. Calandra found discrimination in 1978 (JA22-3), (JA829);
- Chancellor Joseph S. Murphy in 1986 (JA937);
- District Judge Motley found discrimination in 1992 (JA24);
- *Scelsa v. CUNY*, 806 F.Supp. 1126, District Judge Motley (again) found discrimination in 1994 (JA558);
- CUNY discrimination evidenced in "1999 Agreement" (JA832);
- EEOC reasonable cause to believe CUNY discriminated 2009 (JA727)

From 2007 - 2010, Italian-Americans were more than 50% underemployed in 10 of CUNY's 24 colleges (JA1364). Indeed, Italian-Americans have been underemployed and underrepresented at CUNY (JA988- 989, JA1192-1193) since the 1970's. Fifty percent underemployment for over 30 years does not prove a pattern and practice of discrimination. However, it is "to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the ethnic composition of the community." *Teamsters* fn.20. This Court must be aware that it is likely the underrepresentation of Italian-Americans for over 30 years did not occur by chance. It is evidence of discriminatory animus against Italian-Americans. Hence, a jury *could* reasonably

conclude the reasons given for CUNY's adverse actions were pretext and represent a genuine issue of material fact. *Anderson* at 247; *Holcomb v. Iona College*, 521 F.3d 130, 141 (2d Cir. 2008). Perhaps the Second Circuit has been especially inconsistent in applying the *Reeves* and *Anderson* evidentiary burden to establish genuine issues of material fact for pretext in national origin cases. "Most courts have interpreted Title VII's 'national origin' provision narrowly," making cases asserting this class more likely to be dismissed. Jacqueline Grace Diaz, *The Divided States of America: Reinterpreting Title VII's National Origin Provision to Account for Subnational Discrimination Within the United States*, 162 U. Pa. L. Rev. 649 (2014). Maybe under a "halo," courts make these cases even easier to dismiss by increasing evidentiary burdens. Whatever the reason, "there have traditionally been fewer charges filed with the EEOC alleging national origin." U.S. EEOC, *Expanding the Reach - Making Title VII Work/or Women and National Origin Minorities: Pregnancy, Harassment, and Language Discrimination*, 2004.

CONCLUSION

IALDHEF urges this Court to grant the petition because it presents an "important issue" upon which the lower courts have given rulings inconsistent with evidentiary standards established in *Reeves*, *Anderson* and Second Circuit precedent. The New York Courts improperly used a more demanding standard in evaluating whether a genuine issue of material fact existed as to pretext, improperly substituting its own assessment of pretext evidence for that of a reasonable jury. For these reasons, *amicus*

curiae respectfully requests this Court grant Appellant's petition and reverse the decision of the New York Court of Appeals.

Respectfully Submitted,
John Virdone, Esq.
Counsel of Record
900 Merchants Concourse
Suite 212
Westbury, NY 11590
(516) 570-3875