No. 00-6322

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CANDACE CARRABUS, CHRISTOPHER BARRY, et al.,

Plaintiffs-Appellants,

v.

ALAN SCHNEIDER, et al.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS APPELLEE

WILLIAM R. YEOMANS
Acting Assistant Attorney General

DENNIS J. DIMSEY
LISA J. STARK
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-4491

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

Plaintiffs, applicants for the Suffolk County, New York, Police Department, challenge the administration, grading, and weighting of a 1999 police officer hiring examination utilized by Suffolk County pursuant to a 1986 consent decree approved by the district court. Plaintiffs, below, alleged that the examination violated the Privileges and Immunities Clause of the Fourteenth Amendment, the Tenth Amendment, the 1986 consent decree, four New York State statutory provisions - - Article V, Section 6, of the New York State Constitution, Sections

50(6) and 85 of the New York Civil Service Laws, and Section 349 of the New York General Business Law - - and Suffolk County Code, Section 580. The district court had subject matter jurisdiction under 28 U.S.C. 1331, 1343, 1367, 1441, and 1443. On September 27, 2000, the district court entered final judgment dismissing plaintiffs' Amended Petition and on October 19, 2000, plaintiffs filed a timely notice of appeal. This Court has appellate jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether plaintiffs' Amended Petition, which alleges that Suffolk County scored a written police officer hiring examination to reduce its adverse impact on minority applicants, states a claim pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), the consent decree, various New York constitutional, state, and local provisions relating to civil service examinations, the Tenth Amendment, or the Privileges and Immunities Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

A. *Prior Proceedings*

In 1983, the United States sued the County of Suffolk, the Suffolk County Civil Service Commission, and the Suffolk County Police Department ("SCPD"), hereinafter collectively referred to as "the County," alleging *inter alia*, that they had engaged in a pattern and practice of discrimination against females, blacks, and Hispanics with regard to job opportunities in violation of Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (J.A. 161).[1] Among other claims, the United States alleged that the County had unlawfully discriminated when it utilized a written examination to hire police officers that had an adverse impact on African American and Hispanic applicants. *Ibid.* In 1986, after three years of litigation, the parties settled the case and entered into a consent decree, which was approved by the district court. *Ibid.*

In May 2000, plaintiffs, applicants of both genders who took the 1999 Suffolk County police officer entry SHL Landy/Jacobs examination (SHL examination), filed an action against the County in the New York Supreme Court in Suffolk County pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), challenging the use and scoring of the examination. They alleged that the County "manipulat[ed] test questions and answers * * * to achieve specific results, thereby disregarding mandatory merit and fitness requirements for police officer positions," and sought an injunction prohibiting the County from hiring based on the test results (J.A. 25, 110). The county court issued a temporary restraining order barring the County from hiring, refused to enjoin use of the examination, and set a hearing date of May 22, 2000, for consideration of plaintiffs' application for a preliminary injunction (J.A. 163-164).

On May 19, 2000, the County filed in the United States District Court for the

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[1] "J.A." refers to the Joint Appendix plaintiffs filed with this Court under separate cover along with their brief. "Br." refers to plaintiffs' brief filed with this Court. "R." refers to the docket number on the district court docket sheet.

Eastern District of New York a Notice of Removal to federal court pursuant to 28 U.S.C. 1441(a) and (b), 1443(2), and the All Writs Act, 28 U.S.C. 1651 (J.A. 1). On June 19, 2000, plaintiffs filed a motion requesting the case be remanded to state court (J.A. 164). The following day, the United States intervened as a defendant in the federal action (J.A. 1, 164).

On June 27, 2000, plaintiffs filed an Amended and Supplemental Petition (Amended Petition) in federal court, challenging the use of the 1999 SHL examination and alleging that its raw scores were "manipulat[ed]" and "weight[ed]" to their detriment (J.A. 25). They maintained that the examination relied on too many "non-competitive psychological inquiries," failed to provide a valid measure of abilities, and was graded to "eliminat[e] * * * cognitive portions" so as to result in the hiring of a greater number of minority and "unqualified applicants" in violation of the consent decree, the Tenth Amendment, the Privileges and Immunities Clause of the Fourteenth Amendment, and various New York constitutional, state, and local law provisions (J.A. 25, 32). Plaintiffs also requested that its experts have an opportunity to review the "test's validation studies * * * and any other summary report used in the determination of the grading and weighing" (J.A. 21).

On June 29, 2000, the United States and the County filed a joint motion opposing plaintiffs' motion to remand (J.A. 1). That same date, the County filed a motion to vacate the county court's temporary restraining order. On July 28, 2000, the district court heard argument on both motions (J.A. 2). On August 2, 2000, the

district court, in a published opinion, denied plaintiffs' motion to remand and ruled that the temporary restraining order was moot since it had expired on June 1, 2000 (J.A. 2, 5-18; *Carrabus* v. *Schneider*, 111 F. Supp. 2d 204 (E.D.N.Y. 2000)).

In papers dated July 10, 2000, the United States and the County jointly moved to dismiss plaintiffs' Amended Petition pursuant to Rule 12(b)(6) of the Fed. R. Civ. P. (J.A. 82-108). They argued that plaintiffs had deliberately avoided seeking relief pursuant to the Equal Protection Clause of the Fourteenth Amendment and Title VII to avoid the impact of *Hayden* v. *Nassau County*, 180 F.3d 42 (2d Cir. 1999), and in any event, had failed to allege sufficient facts to establish a claim pursuant to Title VII, the consent decree, any of the cited provisions of New York constitutional, state, or local law, the Tenth Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment.

In papers dated August 9, 2000, plaintiffs opposed defendants' joint motion and sought discovery and an opportunity to examine the studies relating to the validation and scoring of the SHL examination (J.A. 109-120). On September 8, 2000, the district court heard argument on defendants' joint motion to dismiss (J.A. 129-157). On September 19, 2000, the district court issued a Memorandum & Order granting defendants' motion and dismissing all plaintiffs' claims for failure to state a claim for relief (J.A. 158-179; *Carrabus* v. *Schneider*, 119 F. Supp. 2d 221 (E.D.N.Y. 2000)). On October 19, 2000, plaintiffs filed a timely notice of appeal (J.A. 182).

B. *The Consent Decree And Factual Background*

1. In 1986, in lieu of litigating Title VII claims regarding the employment practices of the SCPD, the United States and the County agreed to enter into a consent decree, which was approved by the district court (J.A. 40-70). As part of the decree, the County "denie[d] * * * engag[ing] in a pattern or practice of discrimination against women, blacks, or hispanics," but acknowledged that "certain of its selection criteria * * * and the existence of a substantial disproportion between the percentages of women, blacks, and hispanics in the SCPD as compared to the[ir] percentages * * * within the relevant labor market, may give rise to an inference [of] discrimination" (J.A. 41). It also "recognize[d]" that the examination currently used for entry level hiring "has had and, if continued to be used,* * * will have a substantial adverse impact upon black, hispanic, and female, as compared to white and male, Police Officer candidates" (J.A. 47).

The decree's purpose is to ensure that "women, blacks, and hispanics are considered for employment by Suffolk County in the SCPD on an equal basis with white males" (J.A. 42). It bars the County from utilizing any selection criteria for employment "which has either the purpose or the effect of discriminating on the basis of sex, race, or national origin" and vests the United States with responsibility for monitoring the County's compliance with its terms (J.A. 42, 43, 45-46, 64-68). It also expressly prohibits the County from utilizing any qualification or selection criteria that has an "adverse racial, gender, or ethnic impact, unless [it] ha[s] been validated in accordance with the *Uniform Guidelines" on Employee Selection*

Procedures (“Uniform Guidelines”) (J.A. 46).

Towards these goals, the decree specifies that the County, with the approval of the United States, has agreed to retain Richardson, Bellows, Henry and Co. (RBH), an independent testing firm, to develop and validate a new selection device for hiring police officers (J.A. 44). It sets forth specific procedures RBH is to follow and provides that upon agreement of the United States and the County that RBH’s proposal, or any portion of it, is consistent with the Uniform Guidelines, they shall file a joint motion seeking the district court’s authorization to administer and utilize RBH’s procedure (J.A. 44-45). However, “if the United States believes that the proposed * * * procedure will have adverse impact and that there is insufficient evidence of validity to support [its] use, it shall * * * file an appropriate motion to challenge [its] use” (J.A. 46).

The decree vests the United States Department of Justice with oversight and monitoring responsibilities to ensure that the County complies with its various provisions (J.A. 64-68). Consistent with those responsibilities, Paragraph 8 of the decree provides “[e]xcept as to the RBH Police Officer selection procedure,” the County shall provide the United States Department of Justice with at least 90 days notice prior to implementation of any changes regarding the County’s “selection criteria for hire, assignment, transfer or promotion” for the SCPD force (J.A. 46). Neither Paragraph 8 nor any other provision of the decree requires the United States or the County to obtain the district court’s approval prior to utilizing any selection or qualification criteria, other than the RBH examination (J.A. 163). To

date, neither the County nor the United States has moved to dissolve the decree, "which remains in force," and except for the instant case, there has been no litigation regarding its enforcement or administration (J.A. 7, 136).

2. Throughout the pendency of the decree, the County has consulted with the Department of Justice regarding selection procedures and examinations used to hire and promote candidates for and within the SCPD (J.A. 163). In 1988, 1992, and 1996, the County, consistent with the terms of the decree, administered the RBH entry-level hiring examination (J.A. 26, 163). Within weeks of issuing a list of eligible applicants from the 1996 examination, County officials received reports of cheating (J.A. 132). As a result of an official investigation, a Suffolk County police sergeant was indicted and pled guilty to unlawfully possessing and using questions from the 1996 examination (J.A. 133). In addition, the County could not hire any officers utilizing the results of the 1996 examination and had to develop a new entry-level hiring test (J.A. 132-133, 134).

In accordance with the terms of the decree, the County notified the Department of Justice about the necessity for a new examination (J.A. 135). It canvassed other municipalities to determine what examinations and vendors were available and after a two-year nationwide search, it selected expert consultants from Landy/Jacobs to develop a new hiring examination (J.A. 134). The United States approved of the County's choice (J.A. 135).

It took approximately a year for Landy/Jacobs to develop and validate a new examination (J.A. 134). Prior to the County's utilization of the new examination,

Landy/Jacobs provided the Department of Justice with its validation study and underlying data (J.A. 135). The Department, utilizing its own expert, independently evaluated and approved of the examination (*ibid.*; *id.* at 171 n.2).

In May 1999, the SHL examination was administered to approximately 27,000 applicants for the SCPD (Br. 7). Afterwards, the County, in accordance with the recommendation of the Department of Justice, scored and weighted the examination to maintain its validity and lessen its adverse impact on minorities (J.A. 135, 163).

C. *The District Court's Decision*

1. *Overview*

On September 19, 2000, the district court issued a Memorandum & Order dismissing all of plaintiffs' claims for failure to state a claim upon which relief could be granted (J.A. 159-179). Relying on *Hayden* v. *Nassau County*, 180 F.3d 42 (2d Cir. 1999), a "virtually identical challenge to a hiring examination used by [the] Nassau County Police Department," the district court concluded that plaintiffs had failed to allege sufficient facts to make out a claim of unlawful discrimination. It explained, because plaintiffs' allegations regarding "'the manipulation of raw scores, weighting of portions of the tests, and other strategies, including the elimination of cognitive portions of the test'" "do[] not * * * support either a theory of disparate treatment or impact, plaintiffs do not state a claim of reverse discrimination under Title VII" (J.A. 160, 165, quoting plaintiffs' Amended Petition at J.A. 25). The court further ruled, "[a]s for plaintiffs' remaining claims,

which are predicated entirely in the 1986 Consent Decree itself and in other provisions of federal, state and county law, these also fail to allege facts sufficient to establish liability on the part of the County" (J.A. 161).

The district court rejected plaintiffs' claims that dismissal prior to discovery or a hearing to determine the validity of the SHL exam was premature (J.A. 168-170, 173-174). Relying in part on *Hayden*, it held that such relief was unavailable since plaintiffs had failed to state a claim that the examination resulted in disparate impact or treatment in violation of either Title VII or the consent decree (J.A. 168-169). In addition, citing 42 U.S.C. 2000e-7 and precedent of this Court, the district court ruled that plaintiffs' state law claims did not justify consideration of the examination's validity since the test was administered pursuant to a Title VII consent decree and "Title VII explicitly relieves employers from any duty to observe a state hiring provision which purports to require or permit a discriminatory employment practice" (J.A. 174, quoting *Guardians Ass'n of New York City Police Dep't, Inc.* v. *Civil Serv. Comm'n*, 630 F.2d 79, 104-105 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981)).

2. *Claims Relating To Title VII*

The district court concluded that plaintiffs failed to allege sufficient facts to establish that the County unlawfully discriminated (J.A. 165-170). At the outset, it noted that plaintiffs' Amended Petition contains "no claims under the Equal Protection Clause of the Fourteenth Amendment or Title VII" (J.A. 165).

Further, the district court pointed out that this Court previously ruled that an

"allegation that an entrance examination was designed to mitigate the negative impact on minority candidates [does] not state a claim of discrimination" under either the Equal Protection Clause or Title VII (J.A. 165). It explained, "*Hayden* makes clear" that a claim that an examination was designed and scored to reduce adverse impact against minorities and that "plaintiffs are disadvantaged by the minimization of cognitive skills" "'is *wholly insufficient to state a claim that the County intended to discriminate* against appellants'" or that plaintiffs "endure[d] a disparate impact" (J.A. 166, 167, quoting *Hayden*, 180 F.3d at 50-51 (emphasis supplied by the district court)).

The court concluded that plaintiffs' allegations were insufficient "to establish an intent on the part of the County to discriminate" because plaintiffs, here, like the plaintiffs in *Hayden*, do not allege that the SHL examination was adopted or scored with "a desire to adversely affect them" (J.A. 160-161, 165, 166). Rather, the court noted, just as in *Hayden*, 180 F.3d at 52, "it is undisputed that all police officer applicants were treated identically" and "all exams were scored in an identical manner" regardless of race, gender, or ethnicity (J.A. 166). As to disparate impact, the court reasoned that plaintiffs' allegations were insufficient since the "SHL exam was scored in the same manner for all applicants regardless of race or gender, [and] plaintiffs [have] not show[n] that they were excluded from full consideration or disadvantaged in any way because of their race or gender" or that deemphasizing cognitive aspects of the SHL exam caused them any hardship on the basis of race, gender, or ethnicity (J.A. 167).

The district court likewise rejected plaintiffs' claim that the administration and scoring of the SHL examination, which allegedly included the elimination of cognitive portions, "creates an invalid 'quota system'" (J.A. 171, quoting plaintiffs' Amended Petition at J.A. 33). It noted that the *Hayden* Court dismissed a virtually identical allegation stating "a County's desire to design an exam which would lessen the discriminatory impact on black[, hispanic, and women] applicants is simply not analogous to a quota system or a minority set-aside where candidates, on the basis of their race [or gender], are not treated uniformly" (J.A. 171, quoting *Hayden*, 180 F.3d at 50).

The district court also pointed out that plaintiffs were misguided to the extent they attempted to rely on its prior Memorandum & Order, denying their request to remand the case to state court, in arguing that their Amended Petition should not be dismissed (J.A. 168-169). It explained that because "the standard for removal * * * simply contemplates the existence of a claim that 'arises under' federal law" and differs substantially from the "Rule 12(b)(6) * * * requirement that a plaintiff allege facts that if true, would make out a claim under the relevant law," plaintiffs' "merely having pleaded a federal question that establishes proper subject matter jurisdiction * * * does not automatically imply that [their] challenge to the SHL Exam will survive Rule 12(b)(6) scrutiny" (J.A. 169).

3. *Claims Pursuant To The Consent Decree*

The district court also ruled that plaintiffs failed to state a claim that the County's utilization of the SHL examination violated the consent decree. It noted,

"the Consent Decree makes perfectly clear that the only type[s] of allegations that would violate the Decree are those that involve treating applicants differently on the basis of race or gender. Because plaintiffs have alleged no such treatment, they have no claim under the Consent Decree" (J.A. 171 (citation to the decree omitted)).

The court likewise rejected plaintiffs' contention that the County violated the decree when it utilized the SHL examination without its prior approval (J.A. 170-171). It explained there is no "language in the Consent Decree which prohibits the County from developing an alternative examination to that described in the Decree unless it obtains the court's prior approval" or "creates an obligation on the part of any of the parties * * * to seek the court's leave to amend the selection instrument originally established in the Decree" (J.A. 170). Rather, because "the Consent Decree merely provides that the County inform the United States prior to implementing any changes in * * * hiring qualifications or selection criteria," and the County complied with that requirement with regard to the SHL examination, its utilization did not violate the agreement (*ibid.*).

4. *Claims Pursuant To New York Constitutional, State, And Local Provisions Relating To Civil Service Examinations*

The district court concluded that plaintiffs' allegations regarding the County's utilization and scoring of the SHL examination failed to state a claim pursuant to Article V, Section 6, of the New York State Constitution, Section 50(6) of the New York Civil Service Law, and the Suffolk County Code, all of

which require a civil service examination to be "competitive" and relate to an applicant's "merit and fitness" for the job (J.A. 174-176, 177-178). It explained that the cited provisions do not prohibit "the testing of non-cognitive skills" or "assigning various questions different weights" (J.A. 174-176). Further, the court noted that both this Court and New York State courts have held that noncognitive tests are competitive and "legitimate[] * * * predictors of job performance" (J.A. 174-175). Consequently, it held that the County's alleged elimination of cognitive portions of the SHL did not establish a violation of New York constitutional, state, or local law.

The district court also rejected plaintiffs' claims that the County's weighting of the SHL examination violated provisions of the New York State Constitution and New York Civil Service Law relating to veteran preferences (J.A. 176). It explained because "the regulations that apply to the New York State Civil Service Commission * * * make clear that civil service examinations may be scored by using formulas such as weighting * * * [and] the methods alleged to have been used fall squarely within the formulas permissible under the regulations, plaintiffs' claim that the SHL Exam infringes upon their right to receive a veterans' preference must fail" (*ibid.*).[2]

[2] The district court also ruled that plaintiffs failed to state a claim pursuant to Section 349 of the General Business Law of New York since that provision relates exclusively to "conduct that is consumer oriented" (J.A. 177 (citation omitted)).

5. *Claims Pursuant To The Federal Constitution*

The district court ruled that plaintiffs' allegation that the County violated the Tenth Amendment by utilizing the SHL examination to award positions "to individuals whose presence on the police force would endanger the public safety and public purse," did not state a claim for relief (J.A. 172, quoting plaintiffs' Amended Petition at J.A. 33). It explained that plaintiffs, who are private parties, are unable to meet the injury and redressability requirements of standing (J.A. 172). In addition, assuming plaintiffs have standing, the district court characterized as "questionable" their unsupported assumption that reducing the weight assigned to cognitive portions of the test necessarily results in a less competent police force (J.A. 172-173 n.4). Further, the court concluded that because the SHL examination was adopted pursuant to enforcement of a Title VII consent decree, it cannot impermissibly infringe upon a state's sovereignty rights pursuant to the Tenth Amendment (*ibid.*).

The district court also ruled that plaintiffs failed to state a claim under the Privileges and Immunities Clause of the Fourteenth Amendment by alleging that the administration of the SHL examination resulted in denial of state veteran preference points (J.A. 173). It explained that the Privileges and Immunities Clause protects only federal rights that are "essential attributes of national citizenship," not benefits provided under state law (*ibid.* (citation omitted)).

SUMMARY OF ARGUMENT

The district court correctly dismissed plaintiffs' Amended Petition for failure to state a claim pursuant to Title VII of the Civil Rights Act of 1964, the consent decree, various New York constitutional, state and local provisions relating to civil service examinations, the Tenth Amendment, and the Privileges and Immunities Clause of the Fourteenth Amendment.

Plaintiffs carefully drafted their complaint to avoid alleging discrimination in violation of Title VII. Thus, there is no basis for their seeking relief on that ground in this Court.

Further, this Court's decision in *Hayden* v. *Nassau County*, 180 F.3d 42 (2d Cir. 1999), establishes that even if plaintiffs had sought relief pursuant to Title VII, they can prove no set of facts to support such a claim. Plaintiffs have not alleged that minority applicants were given a preference in hiring, that minority applicants were given a different test than other applicants, that minority applicants' tests were scored differently, or that different cut-off scores were used for individual applicants of different races. They are likewise not entitled to discovery regarding the validity of the SHL examination, since caselaw establishes that a test's validity is irrelevant without an adequate allegation of discrimination.

The district court also properly dismissed plaintiffs' Amended Petition for failure to state a claim pursuant to Article V, Section 6, of the New York Constitution, Section 50(6) of the New York State Civil Service Law, and Section 580-1 of the Suffolk County Code, provisions pertaining to civil service

examinations. Those provisions, as well as New York State and federal case law interpreting them, establish that civil service examinations may test for noncognitive abilities and still be job-related and measure an applicant's merit and fitness for a job. Further, regardless of the requirements of New York law, this Court has repeatedly held that state and local laws cannot be relied upon to justify a selection procedure that violates Title VII. Because the 1999 SHL examination was administered pursuant to a Title VII consent decree that obligates the County to avoid employment practices that unlawfully result in adverse impact upon minorities, and plaintiffs concede that the SHL examination as originally given had an adverse impact on minorities, they cannot rely on state law to argue that the examination must be scored to maximize adverse impact.

Moreover, the district court correctly dismissed plaintiffs' Amended Petition for failure to state a claim pursuant to the Tenth Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment. Apart from the conclusory and speculative nature of plaintiffs' allegations, plaintiffs lack standing and fail to allege facts that establish a violation of the Tenth Amendment. In addition, plaintiffs' claim that the County's utilization of the SHL examination resulted in the denial of state awarded veteran preference points in violation of the Privileges and Immunities Clause of the Fourteenth Amendment does not state a claim, since that Clause does not protect privileges provided by state law.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE PLAINTIFFS' AMENDED PETITION FOR FAILURE TO STATE A CLAIM

This Court's review of the district court's order dismissing plaintiffs' Amended Petition is de novo. *Hayden* v. *Nassau County*, 180 F.3d 42, 47 (2d Cir. 1999); *Still* v. *DeBuono*, 101 F.3d 888, 891 (2d Cir. 1996). The Court must accept all well-pled allegations as true and draw all reasonable inferences in favor of plaintiffs. *Ibid.* "Ordinarily, * * * [a] court must confine its consideration to facts stated on the face of the complaint, in documents appended * * * or incorporated [thereto,] and to matters of which judicial notice may be taken." *Tarshis* v. *Riese*, 211 F.3d 30, 38 (2d Cir. 2000); see also *Ronzani* v. *Sanofi S.A.*, 899 F.2d 195, 196 (2d Cir. 1990). "[B]ald assertions and conclusions of law will not suffice," *Leeds* v. *Meltz*, 85 F.3d 51, 53 (2d Cir. 1996), to state a claim, however, since this Court "give[s] no credence to [a] plaintiff's conclusory allegations," *Dawes* v. *Walker*, 239 F.3d 489, 491 (2d Cir. 2001). Further, allegations made for the first time on appeal are insufficient, since they are not part of the complaint. See *Harris* v. *Champion*, 51 F.3d 901, 907 (10th Cir. 1995). Accordingly, a motion to dismiss is properly granted when "the pleadings do not delineate adequately the elements of the cause of action upon which the plaintiff's theory of liability is predicated," *Tarshis*, 211 F.3d at 39, or "where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *DeBuono*, 101 F.3d at 891 (internal quotations marks and citations omitted).

Plaintiffs argue that the district court erred in dismissing their Amended Petition, which alleges that the administration, grading, and weighting of the 1999 SHL examination - - "result[ing in the] manipulation of raw scores, weighting of portions of the test, and other strategies, including the elimination of cognitive portions of the test" to increase the number of minority applicants hired - - violated various constitutional, federal, state and local laws. Plaintiffs' contentions are without merit (J.A. 25).

A. *Plaintiffs' Amended Petition Does Not State A Claim Pursuant To Title VII Or The Consent Decree Or Justify Discovery As To The Validity Of The SHL Examination.*

Plaintiffs argue (Br. 13-21) that the district court erred in dismissing their Amended Petition alleging a violation of Title VII prior to allowing discovery as to the validity of the SHL examination. Plaintiffs, however, aware of this Court's decision in *Hayden*, carefully drafted their complaint to avoid alleging unlawful discrimination and seeking relief pursuant to Title VII. Consequently, there is no justification for their seeking relief on that basis in this Court.[3]

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[3] Plaintiffs have also made representations to this Court that are inconsistent with the record. They assert (Br. 18-19) that the County "has eliminated cognitive function measures from the substantive grading [of the SHL examination] * * * [and that] the grading * * * is a mystery to [all] but Appellees and S.H.L. Landy Jacobs." The record reflects otherwise. The affidavit of Rick Jacobs, Chief Operating Officer of SHL, attached and filed below in support of the County's motion to vacate the county court's temporary restraining order, specifies the manner in which the SHL examination was actually scored and the fact that the cognitive portions were *twice* utilized in selecting candidates (R. 10). The affidavit provides (*ibid.*):

> 15. I understand that petitioners in this matter allege that

(continued...)

Further, controlling precedent of this Court establishes that even if plaintiffs had sought to allege a Title VII violation, they can prove no set of facts to support such a claim. In addition, caselaw holds that the validity of the SHL examination is irrelevant without an allegation of discrimination, and that the County was entitled to score the examination to reduce adverse impact on minorities. Accordingly, the district court correctly concluded that plaintiffs were not entitled to relief pursuant to Title VII.

A party may allege a violation of Title VII by relying on either disparate treatment or disparate impact theory. A disparate treatment claim is an allegation that an employer acts with intent to discriminate and "treats some people less favorably than others because of their race, color, religion, sex, or national origin." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). See also *Hayden*, 180 F.3d at 52. A disparate impact claim, on the other hand, "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and

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[3](...continued)

> the cognitive component [of the SHL examination] was not scored or used. This is completely in error. The cognitive items were scored.
>
> 16. The [SHL examination] requires that a candidate achieve a passing score on the cognitive ability test to remain in the competition for appointment. Once a candidate qualified based upon passing the cognitive test, cognitive ability test score, along with the scores from the [other portions of the test] * * * were weighted to form a composite score.

cannot be justified by business necessity." *International Bhd. of Teamsters*, 431 U.S. at 335 n.15. See also *Hayden*, 180 F.3d at 52.

1. In the court below, plaintiffs chose not to seek relief under either theory. Their Amended Petition does not allege discrimination in violation of Title VII. It does not utilize the terms discrimination, reverse discrimination, disparate treatment, or disparate impact as to the examination it challenges.[4] Nor does it identify the race or ethnicity of any of the plaintiffs or the class of individuals allegedly disadvantaged by the County's utilization of the SHL examination. See *Tarshis*, 211 F.3d at 38 (noting deficiency of pro se Title VII complaint alleging national origin discrimination that fails to identify plaintiff's national origin).

Further, plaintiffs' Amended Petition does not allege that the County intentionally discriminated against them on the basis of race, ethnicity, or gender. It does not maintain that plaintiffs were not hired because of those features or that any specific racial, gender, or ethnic group was disadvantaged by the County's utilization of the SHL examination. It likewise does not allege that police officer applicants were treated differently based on race, gender, or ethnicity or specify

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[4] Plaintiffs twice utilized the term "disparate impact" in their Amended Petition as to issues unrelated to their specific claims regarding the administering, scoring, and weighting of the SHL examination. First in a section of their Amended Petition entitled "Timetable of Events," plaintiffs noted that, in 1983, the "United States sue[d] Suffolk County alleging *disparate impact* of [the] Educational Testing Service Police Applicant Test" (J.A. 26 (emphasis added)). Further, in an apparent attack on the judiciary for the "pass given by courts from [strict] scrutiny to selection devices which have an alleged social purpose acceptable to the court," plaintiffs asserted that "the end result of such short sighted activism * * * is more *disparate impact* * * * not less (J.A. 35 (emphasis added)).

that minority applicants received a preference, were given a different exam, had their exams scored differently, or were provided a different cut-off score for passing than other applicants.

Similarly, plaintiffs' Amended Petition fails to allege that the SHL examination had a disparate impact on them as a result of race, gender, or ethnicity, *i.e.*, that the examination caused the selection of a higher proportion of minority or female applicants significantly different from that of the pool of applicants. See *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 933 F.2d 1140, 1146 (2d Cir.), cert. denied, 502 U.S. 924 (1991). It does not allege that the County's administration or scoring of the examination adversely affected or fell more harshly on any particular gender or racial group of applicants. Accordingly, plaintiffs' Amended Petition reflects that plaintiffs deliberately chose not seek relief pursuant to Title VII.

2. Moreover, even if properly drafted, controlling precedent establishes that the factual allegations contained in plaintiffs' Amended Petition are legally insufficient to state a claim of unlawful discrimination. In *Hayden*, 180 F.3d at 51, this Court held that the district court properly dismissed a class action complaint filed by white and Hispanic applicants, challenging Nassau County's police officer hiring examination - - which was designed to lessen its discriminatory impact on black applicants and which they argued "did not include any of the cognitive sections which had been administered" - - as a violation of Title VII and the Equal Protection Clause. It explained that Nassau County's designing and administering

an entrance exam that reduced the adverse impact on black candidates did not "demonstrate either discriminatory intent or discriminatory impact." *Id.* at 50. It further stated, "[a] desire to reduce the adverse impact on black applicants and rectify hiring practices which the County admitted in * * * [a] consent order might support an inference of discrimination is not analogous to an intent to discriminate against non-minority candidates." *Id.* at 51.

Further, in *Hayden*, this Court specifically rejected plaintiffs' claim that a county's failure "to include any * * * cognitive sections" in an exam was sufficient to state a claim that they "were adversely impacted" in violation of Title VII. *Id.* at 51. It explained, because plaintiffs "concede that, on average, they scored higher than black applicants * * * [, the fact that they] may have performed even better had the * * * exam included cognitive sections" does not "establish a claim [of] prejudice." *Id.* at 52. "[S]ince the qualifying score was lowered for *all* applicants, regardless of race, the plaintiffs were neither excluded from full consideration because of their race, nor were they disadvantaged because of their race." *Ibid.*

The instant case is controlled by *Hayden*. Here, as in *Hayden*, the County entered into a consent decree in which it acknowledged that statistical evidence "g[a]ve rise to an inference that discrimination ha[d] occurred" against "women, blacks and hispanics" and barred it from "utiliz[ing] * * * selection criteria for hire * * * which have an adverse racial * * * impact" unless validated (J.A. 41, 46). Further, like Nassau County, Suffolk County, "although * * * necessarily conscious of race in redesigning its entrance exam," ensured that it "was administered and

scored in the same manner for all applicants." *Hayden*, 180 F.3d at 49-50. Similarly, as in *Hayden*, plaintiffs, here, concede that the challenged examination had an adverse impact on minorities since it initially resulted in "lists with small numbers of minority candidates in the top levels" (J.A. 29). Accordingly, relying on *Hayden*, the district court properly dismissed plaintiffs' Amended Petition for failure to state a claim pursuant to Title VII.

Plaintiffs nonetheless argue (Br. 13-14) that *Hayden* is distinguishable because they have "allege[d] the alteration or manipulation of examination answers [occurred] after the initial grading of the same." Plaintiffs, however, misperceive *Hayden*. In *Hayden*, just as in the instant case, the County decided how to score the examination to reduce adverse impact *after* the applicants took the examination and the answers were analyzed. Indeed, in *Hayden*, 180 F.3d at 47, before experts ultimately decided to eliminate 16 sections of the exam, they "considered several different configurations, or test batteries, of the twenty-five sections * * * administered to the applicants [with a] goal * * * [towards] find[ing] a test battery which was sufficiently valid," yet reduced the adverse impact on minorities. Accordingly, there is no valid distinction between this case and *Hayden*.

To the extent that plaintiffs now contend (Br. 13) that *Hayden* does not control because they have alleged "an intentional manipulation of test answers, which favors minority groups, by making the majority of their responses the correct answer to subjective answers," they are mistaken. At the outset, plaintiffs' Amended Petition does not set forth such a claim. In the two paragraphs of their

Amended Petition that plaintiffs cite (Br. 14), they merely allege that: (1) the County's "manipulating test questions and answers * * * to achieve specific results [in] disregard[ ] [of] mandatory merit and fitness requirements" was "arbitrary and capricious" in violation of New York State and Suffolk County laws; and (2) "the grading lists were altered after the use originally of a substantial number of cognitive questions[] created grading lists with small numbers of minority candidates in the top levels." Even under liberal pleading rules, such contentions are insufficient to allege a Title VII claim, since the complaint makes no mention of the statute; does not allege discrimination, reverse discrimination, disparate impact, or disparate treatment; does not identify the race or ethnicity of plaintiffs or the allegedly disadvantaged group; and does not maintain that the County treated applicants differently, or that the examination was scored differently, on the basis of race, gender, or ethnicity.

In any event, consistent with *Hayden*, plaintiffs' belated allegation does not make out a claim of disparate treatment or impact. As discussed earlier and explained by this Court in *Hayden*, plaintiffs "fail to establish any intent to discriminate against them [by the] * * * County's efforts to craft an exam which lessens the discriminatory impact on minority candidates" or that "they were injured or disadvantaged in some way" as a result of race. *Hayden*, 180 F.3d at 52-53.

Further, to the extent plaintiffs now claim (Br. 13, 14) that the County's reduction of adverse impact is "fraudulent" and violates the consent decree, they

are misguided. Their Amended Petition does not allege or use the word fraud. Moreover, it is well established that allegations of conduct constituting fraud must be stated with particularity. Fed. R. Civ. P. 9(b). See *Novak* v. *Kasaks*, 216 F.3d 300, 306 (2d Cir.), cert. denied, 121 S. Ct. 567 (2000); *Chill* v. *General Electric Co.*, 101 F.3d 263, 266 (2d Cir. 1996). In addition, as noted above, plaintiffs' allegations regarding the County's conduct, although less precise, are fundamentally no different than in *Hayden*, and thus they have no basis to complain about the County's reducing adverse impact in light of the consent decree requiring it to do so. Accordingly, the district court properly dismissed plaintiffs' Amended Petition for failure to state a claim of unlawful discrimination pursuant to Title VII or the consent decree.[5]

3. Finally, contrary to plaintiffs' suggestion (Br. 15-16, 18-19, 21), the district court correctly ruled that neither Title VII nor the consent decree entitles them to a hearing or discovery to determine the validity of the SHL examination. Title VII, as well as the consent decree, bars the County from utilizing selection procedures that have either the purpose or effect of discriminating on the basis of race, gender, or national origin unless they are validated in accordance with the

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[5] Plaintiffs' reliance (Br. 14) on *Haines* v. *Kerner*, 404 U.S. 519 (1972), is misplaced. In *Haines*, 404 U.S. at 520, the Supreme Court held that it was error to dismiss a prisoner's pro se complaint, "however inartfully pleaded," seeking to recover damages for claimed physical injuries and deprivation of rights without allowing him to present evidence on his claims. Here, plaintiffs, who are represented by counsel, are properly held to more "stringent standards" and were already provided one opportunity to amend their complaint.

Uniform Guidelines. See 42 U.S.C. 2000e-2(k)(1)(A)(i); J.A. 43, 46. They do not, however, absent adverse impact, require the County to utilize a selection procedure that is job-related. See *Bushey* v. *New York State Civil Serv. Comm'n*, 733 F.2d 220, 224 (2d Cir. 1984), cert. denied, 469 U.S. 1117 (1985) ("[t]he case law clearly provides that a prima facie case is established by a showing that an examination has an adverse racial impact on minority candidates. *Thereafter*, legitimate, job-related explanations * * * become relevant") (emphasis added); *Kirkland* v. *New York State Dep't of Corr. Serv.*, 711 F.2d 1117, 1132 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984) ("a test's job-validity * * * does not affect the question whether a *prima facie* case has been properly established" pursuant to Title VII). Consequently, because plaintiffs have not alleged disparate treatment or disparate impact discrimination, neither Title VII nor the consent decree entitles them to a hearing or discovery as to the SHL examination's job-relatedness or validity.

Further, plaintiffs' reliance on *Vulcan Society of the New York City Fire Dep't, Inc.* v. *Civil Service Comm'n*, 490 F.2d 387 (2d Cir. 1973), is misplaced. In that case, this Court affirmed a district court's rulings that a written civil service examination utilized to hire firemen had a disparate impact on minorities and was not sufficiently proven to be job-related to survive attack. It explained that the district court correctly concluded that the written examination, absent a competitive physical agility test, could not be utilized to hire because the written component had not been sufficiently validated, or proven "to bear a demonstrable relationship

to successful performance of the jobs for which it was used." *Id.* at 394, quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). This Court, however, did not hold, or even suggest, as plaintiffs imply (Br. 18-19), that selection criteria must be validated when the party challenging the procedure fails to allege they have suffered disparate impact or treatment based on race, ethnicity, or gender. Accordingly, the district court correctly dismissed plaintiffs' Amended Petition for failure to state a claim pursuant to Title VII or the consent decree without allowing discovery or a hearing as to the validity of the SHL examination.

B. *Plaintiffs' Amended Petition Fails To Allege Sufficient Facts To State A Claim Pursuant To New York State Constitutional, Statutory, Or Local Laws Pertaining To Civil Service Examinations.*

Plaintiffs contend (Br. 15-19, 22-24) that the district court erred in dismissing their Amended Petition for a failure to state a claim pursuant to Article V, Section 6, of the New York Constitution,[6] Section 50(6) of the New York State Civil Service Law,[7] and Section 580-1 of the Suffolk County Code.[8] They

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[6] Article V, Section 6 of the New York State Constitution provides:

> Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive.

[7] Section 50(6) of the New York Civil Service Law provides:

> Examinations shall be practical in their character and shall relate to those matters which will fairly test the

(continued...)

maintain (Br. 17, 21, 22) that the County's elimination of cognitive portions of the SHL exam violates the aforementioned provisions of law, all of which require civil service exams to be "competitive" and test "merit and fitness" for the job.[9]

1. Article V, Section 6, of the New York Constitution "ensure[s] that a reasonable basis exists for determining merit and fitness for civil service positions throughout New York State." *Merlino* v. *Schneider*, 715 N.E.2d 99, 102 (N.Y. 1999). That requirement, however, is not absolute. By its terms, Article V, Section 6, twice qualifies the mandate dictating that the requirement applies "as far as

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[7](...continued)

> relative capacity and fitness of the persons examined to discharge the duties of that service into which they seek to be appointed.

[8] Section 580-1(A) of the Suffolk County Code provides:

> The purpose of these rules is to provide an orderly and uniform system for the administration of civil service in the County of Suffolk on the basis of merit and fitness as provided in Article V, Section 6 of the New York State Constitution, the Suffolk County Charter and the Civil Service Law[s].

[9] Plaintiffs filed their Amended Petition pursuant to CPLR Article 78 (J.A. 23). It is questionable, however, whether they can proceed with their action. "It is beyond dispute that parties must 'exhaust all possibilities of obtaining relief through administrative channels before appealing to courts' * * * and pursuant to subdivision 5 of section 6 of the Civil Service Law, actions and determinations of the Civil Service Department are made appealable to the Civil Service Commission." *Kirk* v. *Bahou*, 423 N.Y.S.2d 540, 541 (N.Y. App. Div. 1979), aff'd, 414 N.E.2d 399 (N.Y. 1980) (internal citations omitted). Failure to do so results in dismissal of the action. *Ibid.* Plaintiffs' Amended Petition does not allege they initiated an administrative action or that the Civil Service Commission has denied them relief. Accordingly, plaintiffs' Amended Petition is also subject to dismissal for failure to exhaust administrative remedies.

practicable."

More than a half century ago, the New York courts articulated the standard for determining whether an examination is "competitive" within the meaning of Article V, Section 6. See *Fink* v. *Finegan*, 1 N.E.2d 462 (N.Y. 1936); *Sloat* v. *Board of Examiners*, 9 N.E.2d 12 (N.Y. 1937). In order for a test to be "competitive," it "should employ objective standards *as far as practicable* * * * [and] be devised in a way that demonstrates that it tests merit and fitness and is not based upon the unfettered * * * preferences of the examiners." *Merlino*, 715 N.E.2d at 102.

None of the provisions of New York constitutional, state, or local law cited by plaintiffs requires that civil service examinations test cognitive skills or bars the use of tests that consider non-cognitive traits such as personality, motivation, physical abilities, human relations, judgment, and experience. Significantly, the New York courts have consistently recognized the value of testing non-cognitive capabilities and do not even require such examinations to be written. See, *e.g.*, *Merlino*, *supra* (oral language examination testing for grammar, vocabulary, and pronunciation "competitive" as mandated by state Constitution); *Carroll* v. *Ortiz*, 470 N.Y.S.2d 978 (N.Y. Sup. Ct. 1983) (interactive, oral role-playing designed to test applicants for police lieutenant's ability to monitor others, provide direction, supervise, and resolve conflict consistent with Article V, Section 6, of the New York State Constitution); *Bobrowich* v. *Poston*, 383 N.Y.S.2d 113 (N.Y. App. Div. 1976) (examination that evaluates training and experience meets statutory and

constitutional requirements). Interpreting civil service law, they have held that not all questions and answers included in a test need to be counted, that an exam need not take a certain form, and that certain questions need not be included. See *Desmond* v. *Bahou*, 432 N.Y.S.2d 924 (N.Y. App. Div.), appeal denied, 418 N.E.2d 679 (N.Y. 1980) (affirming dismissal of petition challenging decision not to count 15 of the questions on a written examination); *Farkas* v. *New York State Dep't of Civil Serv.*, 520 N.Y.S.2d 254 (N.Y. App. Div. 1987), appeal denied, 524 N.E.2d 430 (N.Y. 1988) (affirming dismissal of petition complaining that oral examination should have included fourth question).

In addition, this Court has long recognized the defects inherent in written, cognitive civil service examinations, since they often cause adverse impact and may not demonstrate an ability to perform the job in question. See, *e.g.*, *Kirkland*, 711 F.2d at 1131-1132; *Guardians Ass'n of New York City Police Dep't, Inc.* v. *Civil Serv. Comm'n*, 630 F.2d 79, 96, 97 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); *Vulcan Soc'y*, 490 F.2d at 397 (2d Cir. 1973). As a result, this Court has explained, "a high examination score does not necessarily demonstrate an ability to perform on the job." *Suarez* v. *Ward*, 896 F.2d 28, 29 (2d Cir. 1990). See also *Cassidy* v. *Municipal Civil Serv. Comm'n*, 337 N.E.2d 752, 754 (N.Y. 1975) ("[a]n individual's ability to achieve a high examination score does not necessarily demonstrate his capacity to perform the actual duties of a particular civil service position; moreover, examination success cannot reveal any possible defects of personality, character or disposition which may impair the performance of one's

duties in a position”).

In addition, this Court has repeatedly recognized that noncognitive examinations may be job-related, thereby testing an applicant’s merit and fitness for the job. See, *e.g.*, *Hayden*, 180 F.3d at 47; *Vulcan Soc’y*, 490 F.2d at 397-398. For example, in *Hayden*, it acknowledged that a written examination that was scored to eliminate cognitive questions, and excluded 16 of 25 sections originally administered, was nonetheless valid and job-related. 180 F.3d at 47.

Moreover, this Court likewise has endorsed the use of an alternative scoring technique that reduces adverse impact even when a city charter called for rank-order selection. See *Bridgeport Guardians*, 933 F.2d at 1148. In *Bridgeport Guardians*, this Court held that a district court properly exercised its discretion and ordered “banding” in lieu of rank-order selection as prescribed by a city charter, since the former alleviated disparate impact and would serve the city’s interests.

Applying this precedent, the district court correctly concluded that plaintiffs’ Amended Petition does not state a claim pursuant to New York constitutional, state, or county law. First, plaintiffs’ argument that the SHL examination fails to comply with statutory requirements presumes that written cognitive examinations are the only selection mechanisms that are competitive, merit-based, and accurately assess an applicant’s ability to perform. Plaintiffs’ assumption is contrary to the plain language of the provisions they cite and caselaw interpreting them.

Further, plaintiffs have not alleged that the SHL examination is subjective or provides the scorer with unfettered discretion in determining what answers are

correct. Nor have they contended that applicants were ranked according to the subjective opinion of examiners without regard to how they actually scored. As a result, plaintiffs have failed to allege that the SHL examination was not "competitive" within the meaning of New York law.

Plaintiffs have also failed to allege sufficient facts to suggest that the claimed elimination of cognitive questions from the SHL examination resulted in a test unrelated to merit and fitness. After all, they do not dispute that the *entire* SHL examination was developed by independent experts retained by the County and then reviewed and approved by an expert with the Department of Justice (J.A. 27, 134-135). Further, the County voluntarily adopted all the Department's recommendations and scored the exam to retain its validity while reducing adverse impact on minorities. Consequently, plaintiffs' claim that the County eliminated cognitive portions of the exam does not, by itself, suggest that the *remaining* sections are somehow unrelated to fitness and merit. See *Hayden*, 180 F.3d at 47.

To the extent plaintiffs allege (Br. 18, 21) that the SHL examination is unlawful because it is nothing more than "a lottery," their unsupported, conclusory allegation was properly dismissed. Indeed, their Amended Petition does not support their claim that applicants were randomly selected without regard to how they scored on the SHL examination. Consequently, the district court did not err when it dismissed plaintiffs' Amended Petition for failing to state a claim under New York law.

2. Regardless of the requirements of New York law, plaintiffs have not

stated a claim for relief. This Court has repeatedly held that state and local laws cannot be utilized to justify a selection procedure that violates Title VII. See *Bridgeport Guardians*, 933 F.2d at 1148; *Kirkland*, 711 F.2d at 1132 n.18; *Guardians*, 630 F.2d at 104-105; *White* v. *Wellington*, 627 F.2d 582, 587 (2d Cir. 1980). For example, in *Guardians*, this Court ruled that New York City could not rely on the requirements of Article V, Section 6, of the New York State Constitution or other state civil service laws to justify its hiring police officers on the basis of rank-ordering when test results produced a disparate racial impact. This Court explained, "Title VII explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice." 630 F.2d at 104-105, quoting 42 U.S.C. 2000e-7. See also *Quinones* v. *City of Evanston*, 58 F.3d 275, 280 (7th Cir. 1995).

In addition, it is equally well established that state law does not relieve a party of its obligations pursuant to a court-approved consent decree. See *Badgley* v. *Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986), cert. denied, 479 U.S. 1067 (1987) (a "federal judgment, * * * [which includes] the terms of a consent judgment," "overrides any conflicting state law or state court order"); *Kirkland*, 711 F.2d at 1132 n.18 ("[b]ecause state law must yield to federal law in Title VII cases * * * we need not consider whether the settlement agreement violates state law"); *United States* v. *New York City Bd. of Educ.*, 85 F. Supp. 2d 130, 151 (E.D.N.Y. 2000) (same). See also *Hoots* v. *Pennsylvania*, 672 F.2d 1124, 1132 (3d Cir. 1982), quoting *Haney* v. *County Bd. of Educ.*, 429 F.2d 364, 368 (8th Cir. 1970) ("the

remedial power of the federal courts under the Fourteenth Amendment is not limited by state law").

Applying this precedent, plaintiffs, here, cannot rely on state law to establish a cause of action. It is undisputed that the SHL examination was administered pursuant to a Title VII consent decree. Prior to the decree's entry, the County presumably appointed police officers in accordance with New York state law. As this Court has pointed out, if a city "has been in compliance with state law, * * * [and] there is reasonable cause to believe there has been invidious racial discrimination in past police civil service appointments, * * * then the inference follows that the obligations imposed by federal civil rights legislation conflict with state civil service legislation." *White*, 627 F.2d at 587.

Further, plaintiffs seek to utilize state law as a sword to prevent the County from fulfilling its obligations pursuant to a court-approved Title VII consent decree. After all, it is undisputed that, consistent with Title VII, the County entered into a consent decree in 1986, after conceding that "the existence of a substantial disproportion between the percentages of women, blacks, and hispanics in the SCPD as compared to the percentages of women, blacks, and hispanics within the relevant labor market, may give rise to an inference that discrimination has occurred" (J.A. 41). The decree obligates the County to avoid employment practices and tests that result in unlawful adverse impact upon minorities (J.A. 41-47).

Moreover, plaintiffs concede in their Amended Petition that the SHL

examination as originally given had an adverse impact on minority candidates (J.A. 29). As a result, they cannot rely on state law to require the County to violate the consent decree and Title VII and score the SHL so as to maximize adverse impact.

3. None of the four cases plaintiffs cite (Br. 22-23) - - *Merlino*, *supra*; *Mena* v. *D'Ambrose*, 377 N.E.2d 466 (N.Y. 1978); *McGowan* v. *Burstein*, 525 N.E.2d 710 (N.Y. 1988); and *In re Professional, Clerical, Technical Employees Ass'n and Buffalo Board of Education*, 683 N.E.2d 733 (N.Y. 1997) - - support their claim that the district court erred in dismissing their Amended Petition pursuant to New York constitutional, state or local law or that they are entitled to any relief. In *Merlino*, as previously discussed, the court held that the oral language proficiency portion of a civil service examination used to hire a Spanish-speaking probation officer was competitive as mandated by Article V, Section 6, of the State Constitution. In *Mena*, the court ruled that where plaintiffs, who ranked second, third, and fourth on an eligibility list for captain in the New York City Transit Police Department, promptly commenced an action seeking appointments during the active life of the list based on an undisputed error in grading their tests, the fact that the list expired during the life of the litigation did not preclude relief.

The other two decisions are actually inconsistent with plaintiffs' position. In *McGowan*, 525 N.E.2d at 712, the court held that Article V, Section 6, of the New York Constitution "does not require a blanket prohibition" on "zone scoring" - - a scoring technique, like banding, that groups and treats applicants whose test scores fall within a designated range as having scored the same. In dicta, it emphasized

the importance of ensuring that test results do not have an adverse impact on minorities in violation of Title VII. It noted, "as defendants point out, care must be taken that success on the examination does not depend on factors that are unrelated to the candidate's fitness for the position, not only because fitness is the object of the merit system, but also because such factors may discriminate among equally qualified candidates along ethnic, racial, or sexual lines, in violation of the State Human Rights Law (Executive Law Section 296) and the Federal Civil Rights Law (42 U.S.C. Section 2000e *et seq.*)." 525 N.E.2d at 711.

Finally, in *In re Professional, Clerical, Technical Employees Ass'n*, the court held that public policy does not bar enforcement of a collective bargaining agreement, which - - inconsistent with Section 61 of the Civil Service Law that allows the School Board to select from among the three highest ranked candidates based on test scores - - requires the appointment of a covered member who has the highest score. It explained that enforcement of the agreement was permissible, in part, because the School Board "voluntarily bargain[ed]" for the restriction of its discretion, and precedent establishes that "a municipal employer may agree to give preference for the filling of vacancies to certain individuals without offending public policy." 683 N.E.2d at 739.[10] Accordingly, the district court correctly

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[10] In light of that decision, plaintiffs are wrong to criticize the United States and assert (Br. 9) that the Department of Justice "has taken it upon itself * * * to abolish the protections of civil service" established by law. After all, like the restrictions imposed on the Board of Education by the collective bargaining agreement, the requirements of the consent decree, which include the United States' responsibilities to monitor the County's compliance, were "voluntarily

(continued...)

dismissed plaintiffs' Amended Petition for failure to state a claim that the County violated state law when it administered and scored the SHL examination to lessen its adverse impact on minorities.

C. *Plaintiffs' Amended Petition Fails To State A Claim For Relief Pursuant To The Tenth Amendment Or The Privileges And Immunities Clause Of The Fourteenth Amendment.*

Plaintiffs argue (Br. 20-21) that the County's utilization of the SHL examination violates the Tenth Amendment because it causes the hiring of unqualified applicants thereby "commandeering state and local officials' * * * duty to safeguard the public safety" (J.A. 32). Apart from the conclusory and speculative nature of plaintiffs' allegations, plaintiffs lack standing to present their claim and have failed to allege facts that establish a violation of the Tenth Amendment.

1. Article III of the Constitution precludes a federal court from adjudicating anything other than a "case or controversy." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). To establish Article III standing, a litigant must satisfy three requirements: (1) he must have suffered some actual or threatened injury; (2) the injury must be "fairly traceable" to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress the injury. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 590-591 (1992).

Further, the "injury" requirement of the standing doctrine provides authority

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[10](...continued)
bargain[ed]." *In re Professional, Clerical, Technical Employees Ass'n*, 683 N.E.2d at 739.

to invoke federal jurisdiction "only when the plaintiff himself has 'suffered some threatened or actual injury resulting from the putatively illegal action.'" *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973). The question "is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, * * * the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978), quoting *Warth*, 422 U.S. at 499.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It protects a State and its political subdivisions from unlawful encroachments by the federal government. Thus, to assert an injury pursuant to that provision, plaintiffs must be affiliated in some capacity with the governmental subdivision. See *Tennessee Elec. Power Co.* v. *Tennessee Valley Auth.*, 306 U.S. 118, 144 (1939) ("absent the states or their officers," private parties "have no standing * * * to raise any question under the [Tenth] [A]mendment"). See also *Nance* v. *E.P.A.*, 645 F.2d 701, 716 (9th Cir.), cert. denied, 454 U.S. 1081 (1981) ("insofar as the tenth amendment is designed to protect the interest of states qua states," standing of [a] private party "may be

seriously questioned"). While some courts have relaxed the requirement in limited circumstances, see, *e.g.*, *Seniors Civil Liberties Ass'n* v. *Kemp*, 965 F.2d 1030, 1034 n.6 (11th Cir. 1992), it is particularly inappropriate for a private party to raise Tenth Amendment concerns when the governmental entity is a party to the action and takes a contrary position. See *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 761-762 (10th Cir. 1980), cert. denied, 450 U.S. 1050 (1981).

On appeal, plaintiffs vaguely suggest (Br. 20-24) two types of injury resulting from the alleged violation of the Tenth Amendment: (1) an invasion of a state's sovereignty rights to exercise police power; and (2) the hiring of unqualified police officers so as to endanger the public. Plaintiffs are not in a position to present either claim, and neither is legally sufficient to establish standing.

Plaintiffs have not claimed any personal injury from the alleged invasion of the State's sovereignty interests. They are not officers of the state and have not alleged any delegated power that justifies their asserting injury on behalf of a governmental entity. Moreover, they are particularly unjustified in alleging injury on behalf of the County, since the County seeks to engage in the very action - - administering and scoring the the SHL examination - - they seek to challenge. Thus, the alleged invasion of sovereignty interests is not plaintiffs' to assert.

Even assuming the alleged invasion of sovereignty interests constitutes adequate injury, plaintiffs nonetheless lack standing because they are unable to establish that the invasion will be redressed or rectified by the relief they request, invalidation of the SHL examination. Plaintiffs complain (J.A. 32; Br. 8-10) that

the United States is unlawfully encroaching on the state's police powers, but do not attack the legality of the underlying decree. Thus, even if they obtain the relief they request - - rescoring of the SHL examination - - the United States, pursuant to the terms of the decree, will continue to monitor the County's compliance with it and Title VII. Accordingly, because the requested relief will not redress the alleged injury resulting from the Tenth Amendment violation, plaintiffs do not have standing to pursue their claim.

To the extent that plaintiffs claim (J.A. 32; Br. 20-21) injury as individuals who suffer harm from an inadequate police force and an unsafe community, they also lack standing. Apart from the wholly conjectural and speculative nature of their asserted injury, plaintiffs fail to allege a sufficient connection to Suffolk County so as to establish that they have suffered "palpable injury." *Warth*, 422 U.S. at 501. See also *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Their Amended Petition does not allege that any individual plaintiff resides, works, or spends a substantial amount of time in Suffolk County. *Warth*, 422 U.S. at 503. Nor does it detail the need of any individual plaintiff for Suffolk County's police protection or the harm he will suffer if it is inadequate.[11] Accordingly, plaintiffs have failed to allege a sufficient connection to Suffolk County to show that they have in fact been injured by Suffolk County's alleged "abdicat[ion of] its responsibility to safeguard

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[11] Plaintiffs' sole connection to Suffolk County is described in a single sentence of the Amended Petition, which states that plaintiffs "are taxpayers in the State of New York who have paid Suffolk County sales tax, local real estate taxes including police district taxes for the Suffolk County Police Department, *or* other taxes including New York State income tax and sales tax" (J.A. 24) (emphasis added).

the public" (J.A. 32). See *Sierra Club*, *supra* (concerned citizens lacked standing to object to activities in park, since complaint failed to allege that any of the plaintiffs used the park or would be affected in any of their activities); *Sierra Club* v. *SCM Corp.*, 747 F.2d 99 (2d Cir. 1984) (allegations that club members lived or owned property in the vicinity of a creek where there was allegedly unlawful pollution insufficient to establish standing in absence of specific claim that they used creek).

2. Even assuming injury, plaintiffs lack standing because they are unable to establish that the alleged injury is traceable to the SHL examination. In light of the fact that the SHL examination is only the first phase in the County's selection process and candidates are not hired merely on the basis of their test scores, any inadequacy in the competency of Suffolk County's police force cannot be attributed to the test. Further, even if test scores on the SHL examination were the sole basis for hiring, plaintiffs have failed to allege any facts to support their claim that those selected are unqualified.

Even assuming plaintiffs have standing, their allegation that the County's use of the SHL examination constitutes an unconstitutional encroachment by the federal government into the State's police powers and sovereignty rights fails to state a claim for relief. It is well established that the Tenth Amendment places no restrictions on Congress' power to invade a state's autonomy and legislate under Section 5 of the Fourteenth Amendment. See *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980); *Fitzpatrick* v. *Blitzer*, 427 U.S. 445, 452-456 (1976). This

Court has also held that actions taken pursuant to Title VII do not violate the Tenth Amendment. *Guardians*, 630 F.2d at 88.

In the instant case, neither the County nor the federal government's action with regard to the SHL examination can be attacked pursuant to the Tenth Amendment, since both are exercising enforcement responsibilities pursuant to Title VII. Indeed, it is undisputed that both are acting pursuant to the terms of a consent decree entered to settle Title VII litigation. Accordingly, defendants' actions cannot violate the Tenth Amendment.

Further, in order to establish a violation of the Tenth Amendment, the federal government must force or "commandeer" the state to take action. See *New York* v. *United States*, 505 U.S. 144, 161 (1992), quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981). See also *Padavan* v. *United States*, 82 F.3d 23, 29 (2d Cir. 1996). In the instant case, the federal government clearly has not compelled the County to administer the SHL examination. As previously noted, the County chose to administer and score the test pursuant to a consent decree that it voluntarily signed. Further, in compliance with the agreement, the County selected the company that developed the examination, approved of and chose to administer the SHL exam to applicants, and elected to score it in a manner to which plaintiffs now object. Such voluntary conduct cannot constitute a violation of the Tenth Amendment. See *Padavan*, 82 F.3d at 29. Accordingly, plaintiffs' Tenth Amendment claim was properly dismissed.

Finally, the district court properly dismissed plaintiffs' claim that the

County's utilization of the SHL examination results in the denial of state-awarded veterans preference points in violation the Privileges and Immunities Clause of the Fourteenth Amendment. As the district court explained (J.A. 173), that Clause protects only rights guaranteed by the federal government. See *New York* v. *Richardson*, 473 F.2d 923 (2d Cir.), cert. denied, 412 U.S. 590 (1973); *Lutz* v. *City of York*, 899 F.2d 255, 263 (3d Cir. 1990). Since plaintiffs seek to vindicate points awarded to veterans pursuant to state law (Br. 24-25), they are not entitled to relief under the Privileges and Immunities Clause.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

WILLIAM R. YEOMANS
Acting Assistant Attorney General

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DENNIS J. DIMSEY
LISA J. STARK
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-4491

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set out in Fed. R. App. P. 32 (a) (7) (B). The brief was prepared using WordPerfect 9.0, using 14 point Times New Roman font, and contains 11,515 words.

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Lisa J. Stark
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2001, two copies of the foregoing Brief For The United States As Appellee were served by first-class mail on the following counsel of record:

Robert H. Cabble, Esq.
County Attorney's Office
Suffolk County
100 Veterans Memorial Hwy.
P.O. Box 6100
Hauppauge, New York 11788-0099

A. Craig Purcell, Esq.
Rubin & Purcell
330 Vanderbilt Motor Pkwy.
Suite 300
Hauppauge, New York 11788

Larry E. Kelly, Esq.
Glynn & Mercep
North Country Road
P.O. Box 712
Stoney Brook, New York 11790

____
LISA J. STARK
Attorney
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078