TITLE VII, VOLUNTARY COMPLIANCE AND RICCI: RESCUING MUNICIPALITIES FROM A LEGAL 'BACKDRAFT'

JARED D. STUECKLE*

The Supreme Court recently decided Ricci v. DeStefano, a case that had municipalities throughout the United States holding their breath. This case presents a scenario where either action by a municipal employer would result in potential liability under Title VII. Thus, the policy goal of Title VII—encouraging the voluntary compliance of employers by relaxing standards for liability when these attempts are made in good faith—is in danger of being undermined. This note examines both sides of this issue in light of the policy goals of Title VII. The note then delves into the background of the case, analyzes the legal claims made by both parties, and then analyzes the Supreme Court's ruling. possible outcomes of this case and the potential impact of these outcomes on similar future situations. Finally, the article asks whether the Court is able to find an appropriate middle-ground and how the Court's new standard will be affect future litigation.

I. INTRODUCTION

Frank Ricci, a New Haven firefighter, spent months in preparation for a promotional exam.[1] In addition to countless hours of study, he incurred additional personal costs to buy supplements and pay a friend to transcribe them to audio cassette in order to cope with his dyslexia.[2] The results of the exam put Ricci in position for a promotion, but the overall results were regarded as troublesome by the City of New Haven and the New Haven Civil Service Board (CSB) because of the racially disproportionate results.[3] The CSB and the City of New Haven found themselves wedged between the proverbial "rock and a hard place." Voting to certify the results would make them vulnerable to a claim from minority applicants. However, refusing to certify the test results could potentially create a reverse discrimination claim from the successful applicants whose test results were nullified.[4]

The issue in *Ricci v. DeStefano* is whether municipalities are subject to reverse discrimination claims under Title VII by refusing to certify test results

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[1] J.D. Candidate, Duke University School of Law, 2010; MA University of North Carolina at Chapel Hill, 2006; BA Central Washington University, 2004. I would like to thank Professor Katharine T. Bartlett for all of her help and support during the writing process. I would also like to thank my wife Laura, and the rest of my family for their unending encouragement and love.

*Ricci v. DeStefano (*Ricci I*), 554 F. Supp. 2d 142, 146 (D. Conn. 2006).

2. *Id*.

3. *Id*. at 145.

4. *Id*.

with an adverse impact on employees of a protected class.[5] This note begins by providing a brief background of employment discrimination law and the policy behind Title VII. Next, this note discusses the background of the case in the context of employment law and Title VII. After analyzing the case, this note will introduce the legal issues that are implicated and assess the validity of each claim. Then, the final section examines analyzes the Supreme Court's rulings and how the ruling will affect how lower courts treat similar situations in the future.

II. EMPLOYMENT DISCRIMINATION UNDER TITLE VII

This section gives a brief background in employment discrimination law and addresses the legal mechanisms of Title VII that are necessary to understand the intricacies of the *Ricci* case. The important social policies behind Title VII will be analyzed as they relate to this case and to employment discrimination in general.

A. The Law

The 1960's instituted sweeping change in society as well as in the field of employment law, highlighted by the passage of the Civil Rights Act of 1964.[6] A key provision of the act is Title VII, which grants protection to employees from certain employment actions based on their status, such as race, sex, color, religion, or national origin.[7] For example, an employer violates Title VII by refusing to hire an applicant because of the applicant's race. Proscribing employment actions based on an employee's status forces employers to consider the individual's merits for the specific job and prohibits treatment based on conscious or unconscious stereotypes about their membership in a protected class.[8]

Two ways that Title VII protects employees is by prohibiting disparate treatment and disparate impact. Disparate treatment occurs where an "employer simply treats some people less favorably than others because of their race, religion, sex, or national origin."[9] Employees are only protected where the employer's action affects the terms and conditions[10] of their employment and where the action was 'because of' the employee's membership in a protected class.[11] Disparate treatment based on *any* such status is prohibited under Title

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5. Ricci v. DeStefano (*Ricci II*), 530 F.3d 87 (2d Cir. 2008) (per curiam), *cert. granted*, 129 S. Ct. 894 (mem.) (U.S. Jan. 9, 2009) (No. 08-328).

6. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.). *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 520-22 (2001) (examining contemporary solutions to more subtle and complex forms of employment discrimination).

7. 42 U.S.C. § 2000e et seq. (1976).

8. *See* 42 U.S.C. § 2000e-2; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-324 (1986-87).

9. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, n.15 (1977).

10. Minor v. Centocor, 457 F.3d 632, 634 (7th Cir. 2006).

11. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 (1973). This requirement ensures causation between an employer's actions and the motives behind the action. This element

VII; even a white male who gets fired because of his race or gender has a valid claim under Title VII, known as reverse discrimination.[12]

In contrast, disparate impact occurs where an employer institutes what seems to be a neutral policy, "but that in fact fall[s] more harshly on one group than another and cannot be justified by business necessity."[13] An employer would, under disparate impact, violate Title VII by requiring all secretaries to be 5'6" or shorter, if this policy disproportionately prevented men from obtaining these positions and if the height requirement was not related to the actual performance of secretarial work.[14] Disparate impact protection, however, does not extend to the majority and thus, a disparate impact claim may only be brought by a person in the minority.[15]

Employment discrimination claims use a burden-shifting format. For example, in a disparate treatment case, the plaintiff is required to present a prima facie case of discrimination, which requires only a burden of production.[16] The burden then shifts to the employer to produce a plausible and legitimate non-discriminatory reason for the decision.[17] The burden then shifts back to the plaintiff to persuade the factfinder that unlawful discrimination did occur by offering proof that discrimination was the sole motive or that it was a contributing factor to the adverse employment action.[18] No matter how the

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differentiates between an employer, who may have racist attitudes, that fires a black employee because of a personality conflict, and an employer who fires a black employee because of a racial animus; the former being allowed under Title VII and the latter prohibited. The key distinction is that the first employee was fired for a job-related reason (getting along with supervisors) and the second employee was fired for a reason unrelated to that employee's job performance (their race). *See id*.

12. McDonald v. Santa Fe Trail, 427 U.S. 273, 278-79 (1976). *See also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating that Title VII prohibits "[d]iscriminatory preference for any group, minority or majority"). For an in-depth look at *Griggs*, see Michael Selmi, *Was Disparate Impact Theory a Mistake*?, 53 UCLA L. REV. 701 (2006).

13. *Teamsters*, 431 U.S. at 335, n.15 (1977). "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431. Discriminatory tests are impermissible unless they are "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 C.F.R. § 1607.4(c) (1978). The correlation must be shown by professionally acceptable methods. Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

14. If the height requirement was validly tied to the actual performance of a secretarial job, or was in some way necessary for the duties of a secretary, then the business necessity of such a requirement would provide an affirmative defense to a disparate impact claim. *See* 42 U.S.C. § 2000e-2(k). Even if a requirement is a business necessity, it will not be allowed if there are other less discriminatory alternatives available. *See id*.; Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387 (1995-96).

15. *See* 42 U.S.C. § 2000e-2(k). Another key distinction between the two theories is that disparate treatment requires a showing of discriminatory intent, whereas disparate impact does not. *See Teamsters*, 431 U.S. at 335, n.15 (1977).

16. *McDonnell Douglas*, 411 U.S. at 802. The prima facie standard is minimal, requiring proof that the plaintiff belongs to a protected group, that the plaintiff suffered an adverse employment action at the hands of the defendant, and that the defendant was motivated to take such an action because of the plaintiff's protected status. *See id*.

17. *Id*. Again, the burden at this stage is but one of production.

18. *Id*. at 804. Under a single-motive proof structure, the plaintiff must prove that the defendant's proffered reason is pretextual, and that there exists an underlying intent to discriminate. *Id*. Under a mixed-motive structure, the plaintiff must prove the defendant took the plaintiff's

employer makes the decision, "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."[19]

B. The Policy

Title VII established a new foundation that would shape the workforce as America entered the twentieth century. It arose out of a fundamental need of protection for employees, directly because discrimination had become commonplace in, and even a fundamental part of, the workforce. Title VII prohibits "artificial, arbitrary, and unnecessary barriers" that seek to limit or classify applicants for employment or deprive them of any employment opportunities.'[20] Put more simply, Title VII makes "it an illegal practice to use race as a factor in denying employment."[21] Title VII even bans reverse discrimination, extending protection from minority to non-minority employees.[22]

Title VII also promotes the idea that employees should be considered based on their individual merit as an employee, not based on assumptions about groups of people. The goal of Title VII is that criteria will measure the person for the job, not the person in the abstract; such assumptions or stereotypes are irrelevant to an individual's performance on the job. Title VII also attempts to prevent unconscious stereotypes from impermissibly altering the workforce by prohibiting policies that may seem neutral on their face, but that discriminate when put into practice. In this way, "artificial, arbitrary, and unnecessary barriers to employment" are prohibited, even if they operate "invidiously."[23]

Congress was also concerned about efficiency in America's workforce, and felt that only through "fair and racially neutral employment and personnel decisions" could efficiency be maximized.[24] The underlying theory is that diversity increases efficiency and maximizes value by assigning the best person for the job. From a societal perspective, diversity helps workers develop socially constructive skills, such as learning how to work well with different types of

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protected status into account, as one of many other reasons that factored into the defendant's decision. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The result under a mixed-motive case is that damages may be limited if the defendant is able to prove that the same decision would have resulted even if the discriminatory motive had not entered into the decision-making process. *See id*. *See also* Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982) (examining the causation requirements under mixed-motive structures in comparison to pretext under a single motive structure).

19. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Disparate impact claims also use a burden shifting format, but knowledge of such a format is unnecessary to understand *Ricci*.

20. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

21. 110 CONG. REC. 13088 (1964) (remarks of Sen. Humphrey).

22. Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616 (1987).

23. *Griggs*, 401 U.S. 424, 431 (1971). "Every individual employee is protected against both discriminatory treatment and against practices that are fair in form but discriminatory in operation." Connecticut v. Teal, 457 U.S. 440, 455-56.

24. *McDonnell Douglas*, 411 U.S. at 801.

people. Overall, Title VII views diversity as socially beneficial and intrinsically beneficial, such that diversity is good for its own sake.[25]

Title VII encourages voluntary compliance by promoting voluntary settlement of employment discrimination claims, encouraging employers to implement preventative measures, and offering incentives for employers by easing the evidentiary burdens for employers who voluntarily comply with Title VII. Encouraging voluntary compliance benefits society as a whole, by instilling the idea that everyone has the right to equal employment opportunities. Transforming this concept into an internal entitlement, regulated privately, as well as enforcing it as an external requirement, regulated governmentally, leads to more effective compliance in society, which in turn reduces the institutional costs of regulation. In this area, voluntary affirmative action has been allowed as a way to improve on the past discrimination of a class of people in the workforce. Affirmative action does this by attempting to level the playing field, or make up for all of the structural and socio-economic disadvantages that minorities face in competing in an open market.

III. RICCI V. DESTEFANO – A BACKGROUND

This section will provide a brief overview of the case and its procedural history. Then, the significant facts will be presented and analyzed in relation to the perspectives of each party, which serve as an important backdrop to the analysis of the legal claims in the following section.

A. Overview

In late 2003, the New Haven Fire Department administered oral and written tests as part of the promotional process to reach the ranks of Lieutenant and Captain.[26] A total of 118 applicants took the test, of which there were 68 white applicants, 27 black applicants, and 23 Hispanic applicants.[27] Based on the test results and the city's hiring policies,[28] zero African American applicants and only two Hispanic applicants would even be eligible for promotion.[29] The New Haven Civil Service Board (CSB) then held hearings to determine whether or not to certify the results of the exam.[30] During these meetings, the CSB was advised that the exam results showed a "very significant disparate impact."[31] Applicants, experts, and community leaders testified in support of both sides, and the

25. *But see* Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live With Racial Inequality*, 75 U. CIN. L. REV. 87, 120-24 (2006) (contrasting diversity with social engineering).

26. *Ricci II*, 530 F.3d 87, 94 (2d Cir. 2008) (Cabranes dissenting).

27. *Id*.

28. The city had instituted a 'Rule of Three' mandate that required a vacancy to be filled from among the three individuals with the highest cumulative score. *Id*. at 103.

29. *Id*. at 94. These numbers are based on immediate openings, but since test results remain active for 1-2 years, future openings would enable three African American applicants to be promoted to Lieutenant. *See* Supplemental Brief of Petitioners at 11, Ricci v. DeStefano, No. 07-1428 (U.S. Aug. 21, 2008).

30. *See Ricci II*, 530 F.3d at 104.

31. *Id*. at 104.

resulting vote of the CSB ended in a tie.[32] Since a tie meant the results were not affirmatively certified, 18 applicants filed a reverse discrimination claim of disparate treatment in the District Court of Connecticut.[33]

The District Court ruled in favor of the defendants' motion for summary judgment, and denied the plaintiff's motion for summary judgment.[34] On appeal, a panel of the United States Court of Appeals for the Second Circuit affirmed the ruling of the District Court with a summary order.[35] The panel later withdrew the summary order and issued a per curiam opinion, which adopted the District Court's ruling in toto.[36] On a narrow majority vote, the Second Circuit opted not to rehear the case en banc.[37] The Supreme Court, after hearing arguments, ruled in favor of the petitioners and reinstated the original test scores.[38]

B. The Construction of the Test

The promotional exam, prepared by Industrial/Organizational Solutions, Inc. (IOS), an independent test-making company, was constructed by issuing a questionnaire from a random sample of captains and lieutenants in order to highlight the most important skills for each position.[39] Once the key skills were identified, the list was then sent to all captains and lieutenants who then assigned a ranking to the particular qualities/skills.[40] The key qualities and skills identified were then used as the foundation in constructing the oral and written portions of the exam.[41] As per the contract between the city and the firefighter's union, the weight of the written portion was set at 60% and the weight of the oral portion at 40%.[42] A cumulative score of 70 was set as the cut-off score to determine a passing grade.[43] Each portion of the exam was reviewed independently, and a syllabus was given to all applicants.[44] All of the test questions came from the listed study materials, with the syllabus identifying specific chapters in the study materials.[45]

The results of the test revealed "significant and unexpected racial disparities."[46] Out of the 41 applicants for Captain (with 8 black applicants and 8 Hispanic applicants), only 2 Hispanic candidates would be eligible for the 7

32. *See id*. at 104-08.
33. *Id*. at 103, 108.
34. *Id*. at 94.
35. *Id*.
36. *Id*.
37. *Id*.
38. Ricci v. DiStefano (*Ricci III*), 129 S.Ct. 2658, 2678 (U.S. 2009)
39. *Id*. at 103; Petition for Writ of Certiorari at 5-6, Ricci v. DeStefano, No. 07-1428 (U.S. May 14, 2008).
40. *Ricci II*, 530 F.3d 87, 105 (2d Cir. 2008).
41. *Id*. at 105.
42. *Id*. at 103.
43. *Id*.
44. *Ricci I*, 554 F. Supp. 2d 142, 147.
45. *Ricci II*, 530 F.3d 87 at 107.
46. Supplemental Brief of Respondents at 4, Ricci v. DeStefano, No. 08-328 (U.S. Nov. 13, 2008).

openings.[47] Out of the 77 applicants for Lieutenant (with 19 black applicants and 15 Hispanic applicants), no minority candidates qualified for the 8 vacancies.[48] However, for the exam to remain valid, certification of the results was required by the New Haven Civil Service Board (CSB) in order to actually begin filling vacancies.[49]

C. Two Perspectives on the Hearings

The CSB held five public hearings to determine whether or not to certify the results of the exam.[50] The vote by the CSB at the conclusion of the hearings ended in a tie, effectively denying certification of the test results. The hearings set the stage for the litigation that followed and provide a crucial insight on whether or not the exam was validly constructed and whether improper motives influenced the vote of the CSB.

The petitioners claimed that nothing from the hearings proved the exam invalid. The hearings showed the great lengths that the City went to meticulously construct the test to assess the key skills and abilities of applicants in relation to the specific position.[51] The preparers of the exam also sought to reduce racial disparity by over-representing minorities throughout each stage of development, by writing the exam below a tenth grade reading level, and by allowing candidates to take the oral portion regardless of their performance on the written portion.[52]

The City, in contrast, argued that the hearings established deficiencies in the exam's construction, which when combined with the racially disparate results, justified certification being refused. During the hearings, multiple experts testified that results showing such a severe racial disparity are a clear signal that the exam may be faulty. Additionally, IOS admitted that the chosen cut-off score of 70 did not actually reflect the minimal competence for promotion; in other words, it was chosen arbitrarily.[53] The scores from the exam were to be ranked and promotions would be determined from the rankings, requiring precise scoring to reflect "better anticipated job performance" for each higher score.[54] Yet IOS, in the testimony of a representative at one of the hearings, never testified that the calibration was "precise enough to be used to rank-order candidates."[55]

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47. *Ricci II*, 530 F.3d at 103.

48. *Id*. at 104.

49. *Id*.

50. *Id*.

51. *See Ricci III*, 129 S.Ct. 2658, 2678 (U.S. 2009).

52. *Id*. at 105-06. Supplemental Brief of Petitioners at 7-8, Ricci v. DeStefano, No. 07-1428 (U.S. Aug. 21, 2008). The oral portion of the exam was also constructed to mitigate racial disparities by thoroughly training each evaluator and by requiring that each three-person evaluation panel have two minority evaluators.

53. *See* Supplemental Brief of Respondents at 30, Ricci v. DeStefano, No. 08-328 (U.S. Nov. 13, 2008). "Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force." 29 C.F.R. § 1607.5.

54. Respondents' Brief on the Merits at 31, Ricci v. DeStefano, No. 07-1428 (U.S. March 2009).

55. *Id*.

The motivation behind the vote for certification was crucial in determining if the City violated Title VII. The petitioners claimed that the City's argument was merely pretext, to cover up for insufficiencies in the hearings and the political pressure that improperly influenced the CSB's vote. To establish pretext, petitioners claimed that Boise Kimber, and influential leaders in the black community who had previously supported Mayor DeStefano, conspired with DeStefano to "privately push the board to scuttle the promotions."[56] Destefano opposed certification because of the political ramifications of disappointing Kimber, and DeStefano even discussed making the hearings seem neutral and deliberate in order to cover up the racial and political motivations.[57] Further evidence of pretext was shown by the refusal of the CSB to allow two top New Haven Fire Department officials, who helped develop the test, and one of whom is black, to testify that the exam was "fair and valid."[58]

The City, on the other hand, claimed that legitimate concerns about the exam and the disparate results it produced, along with the duty to comply with Title VII, motivated the CSB's decision. The validity and job-relatedness of the test was put in doubt during the hearings. Examples such as the lack of a valid cut-off score,[59] the doubt regarding whether the test was calibrated to be precise enough to be used for rank-order scoring,[60] the failure to review the test within the department,[61] contradictory information in the source material,[62] and the testing of irrelevant material[63] left serious questions about the exam's validity. Problems with the test and the development of the test, combined with the test's racially disparate results, supported the City's claim that they acted in good faith to voluntarily comply with Title VII.

IV. ANALYZING THE LEGAL CLAIMS

The petitioners in *Ricci* alleged that the City's actions violated the Equal Protection Clause and/or Title VII. The majority of this section will analyze the Title VII claim, followed by a brief discussion about the Equal Protection Claim. The two main issues in the Title VII claim are whether the City was actually motivated by a duty to voluntarily comply with Title VII and whether the City was allowed, under Title VII, to refuse to act on the results of a test because of its racially disparate results.

A. Motivation: Duty to Comply or a Mere Pretext for Discrimination?

The focus of a disparate treatment claim is whether discriminatory intent motivated the employer's decision. In a typical case, the employer proffers a legitimate reason for the decision, and the plaintiff must then persuade the

56. *Id*. at 11.
57. *Id*. at 31.
58. *Id*. at 14.
59. *Id*. at 3.
60. *Id*. at 31.
61. *Id*. at 4.
62. *Id*. at 7.
63. *Id*.

factfinder that the proffered reason is actually pretext for discrimination. When applying this standard to *Ricci*, the focus is whether the CSB's decision was motivated by the race of the petitioners or by their proffered legitimate explanation, their duty to voluntarily comply with Title VII and avoid disparate impact discrimination.

Although the evidentiary burden of production shifts in the preliminary stages of a disparate treatment case, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[64] To meet this burden, the defendant's legitimate reason must be shown to be a pretext for discrimination: that the defendant's reasons were "not its true reasons,"[65] and that they are "unworthy of credence."[66] Thus, a plaintiff *may* prevail by meeting its prima facie case and disproving the defendant's explanation, but *shall* prevail by disproving the defendant's reason and offering persuasive evidence that discriminatory intent actually motivated the decision.[67] The Supreme Court found that the petitioners proffered enough evidence to prove that the City was motivated by discriminatory intent, and that "fear of litigation alone" could not justify refusing to certify the test.[68]

In its decision, the Supreme Court dismisses any notion that the test was not job-related and consistent with business necessity.[69] The Court states that there is "no genuine dispute" and that any claims to the contrary are blatantly contradicted by the record.[70] However, the Court declines to address serious issues with the test, specifically the failure to establish an appropriate cut-off score for the exam, the failure to internally review the exam for inconsistencies, and the failure to precisely calibrate the scoring of the exam to correlate with a candidate's expected job performance. The most likely interpretation of why these issues did not sway the Court is that the City did not ask for a follow-up report from IOS, which was offered, regarding the test's consistency with EEOC guidelines for examination validation.[71] The Court implicitly suggests that the City's decision about the test's validity had already been made prior to the CSB hearings, and that no amount of evidence pertaining to the validity of the exam would have persuaded the City that the test was not valid.[72] Had the City requested the technical report from IOS and done more unbiased research into the exam's validity, it is possible that the concerns found with the exam would have persuaded the Court to rule in the City's favor. However, the City's reactions to the exam results and its lack of follow-up with the creators of the

64. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

65. *Id.*

66. *Id.* at 256.

67. *See* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). Disproving the proffered legitimate reason "is not always sufficient to sustain an ultimate finding of intentional discrimination." Fisher v. Vassar College, 114 F.3d 1332, 1338 (1997).

68. *See Ricci III*, at 2680

69. *Ricci III*, at 2678.

70. *Id.*

71. *See id.* at 2679.

72. *See id.* (stating that the city "turned a blind eye to evidence that supported the exam's validity").

exam displayed an air of pretext, resulting in the Court's finding for the petitioners.

Another potential interpretation of the Supreme Court's finding is that an exam need not be perfect, but only job-related and consistent with business necessity. Therefore, any deficiencies found in this exam only demonstrated that although the test was not perfect, the deficiencies were not significant enough to call into question the job-relatedness of the test. This, paired with the pretextual motive of the City, were enough to persuade the Supreme Court to overturn the lower court's decision and rule in favor of the petitioners.

Additionally, the Court found that there was no genuine issue of material fact that a less discriminatory alternative was available to the City.[73] The City claimed that adjusting the weight of the scores, or that allowing the scores to be banded[74], would create less discriminatory results.[75] The Court correctly noted that both of these options would violate the Title VII prohibition on adjusting test scores.[76] The City further argued that an available less discriminatory alternative was available, as evidenced by the testimony of Christopher Hornick who suggested the use of an 'assessment center' approach as a way to reduce discriminatory impact.[77] The Court dismissed this contention because his overall testimony suggested that the City *should* certify the results and that this "brief mention. . .standing alone, does not raise a genuine issue of material fact."[78]

B. When can a Municipality Refuse to Certify Test Results?

Petitioner's claim that the City violated Title VII by refusing to certify the results of a valid promotional exam fails in three ways. Title VII proscribes certain types of use in relation to test scores: adjusting scores, using different cut-off scores, or otherwise altering scores on the basis of race.[79] First, the City did not *use* the test scores. According to the plain meaning of the statute, Title VII bans only specific types of use when based on race and thus, a decision not to use a test cannot be deemed a "discriminatory use."[80] Second, declining to use a test is different than adjusting or altering test results. Once again, an adjustment or alteration suggests usage, and a decision not to use test results does not change the scores of the test-takers (which is prohibited), it nullifies the process. Legislative history speaks directly to this point, stating that the provision does not "require that test scores be used at all."[81] As previously discussed, the decision by the CSB was not made on the basis of race, although

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73. *Id*. at 2679-81.

74. Banding is "the practice of rounding scores to the nearest whole number and considering all candidates with the same whole-number score as being of one rank." *Id.* at 2679-80.

75. *Id*. at 2679-80.

76. *Id*. Allowing these actions would permit race-norming or other quota-systems that would potentially violate the Equal Protection Clause and would go against the overall goals of Title VII.

77. *Id*. at 2668-69.

78. *Id*. at 2680.

79. 42 U.S.C. § 2000e-2(l).

80. *Id*. Even the title of this particular statute, "Prohibition of discriminatory use of test scores," implicates it is restricting use, and not non-use. *Id.*

81. 137 CONG. REC. 15,472 (1991) (statement of Sen. Gore).

the disparate results signaled that the test might potentially be invalid, the decision was made because of concerns about the job-relatedness of the test and the test development process, as well as the availability of alternatives with less racial disparities.[82] Finally, imposing a higher burden, such as a requirement to validate a test, "on a party seeking to comply voluntarily with Title VII is contrary to the case law and the statute's underlying policy."[83] The heightened burden is specifically contrary to Title VII's preference for voluntary compliance, since it requires a judicial determination before remedial action can be taken.[84] Such a position contravenes the "strong preference for encouraging voluntary settlement of employment discrimination claims."[85]

C. Equal Protection[86]

The hallmark of the Equal Protection Clause is the tenet that "the government may not subject persons to unequal treatment based on race."[87] Race-based classifications, those that explicitly distinguish "between people on the basis of some protected category," are subject to strict scrutiny by courts.[88] However, merely being "conscious of race" in taking an action does not immediately subject the actor to strict scrutiny.[89] The distinction between a racial classification and being 'race-conscious' strikes a balance between constitutional legislation using a "suspect tool" such as race to achieve an important goal and unconstitutional legislation using such classifications unnecessarily. Equal Protection also extends to a facially neutral law, providing it is motivated by

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82. *See supra*, Part IV.A.1.

83. Bushey v. New York State Civ. Serv. Comm'n, 733 F.2d 220, 226 (1984). "The guidelines do not require or mandate a validity study where an employer decides against using a certain selection procedure that manifests" racially adverse impact. *Ricci I*, 554 F. Supp. 2d 142, 155 (D. Conn. 2006).

84. *Id*.

85. Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981).

86. Since the Supreme Court decided Ricci on other grounds, the court did not consider the Equal Protection issue apparent in the case. *See Ricci III*, at 2681 (Scalia, concurring).

87. Hayden v. County of Nassau, 180 F.3d 42, 49 (1999). For an interesting article examining the tensions between equal protection and disparate impact law, specifically how equal protection could be used to invalidate disparate impact law, see Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494 (2003-2004).

88. *See* Loving v. Virginia, 388 U.S. 1, 10-12 (1967). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool"); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (stating that classifications requiring strict scrutiny "are constitutional only if they are narrowly tailored to further compelling governmental interests"). For an in-depth study on City of Richmond v. J.A. Croson Co., see Michael Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 7, 1729 (June 1989).

89. *Hayden*, 180 F.3d at 49. This brings out an interesting tension in Title VII's underlying policy. Disparate treatment prohibits decisions based on race and thus discourages focusing on an employee's race. However, disparate impact prohibits unintentional discrimination, and thus mandates employers to focus on the racial makeup of their workforce in order to avoid racially adverse practices. *See also* Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 5, 953 (Mar. 1993) (criticizing the 'colorblind' movement by comparing transparency with discriminatory effect in employment discrimination law).

discriminatory intent[90] and its application results in a discriminatory effect,[91] or if the law is applied in a discriminatory fashion.[92]

Petitioners characterized the City's refusal to certify the results of the promotional exam as "a race-based government action grounded solely on the racial distribution of the test results."[93] The main problem with this characterization is that it relies on cases where race was specifically taken into account in the decision to promote, whether by race-norming the test results or by race-based eligibility lists.[94] In contrast, the City's decision not to certify the test results and to pursue other less discriminatory measures is not a racial classification because it does not treat candidates "differently on account of their race."[95] Petitioners rely on the City's "race-coded list" as proof of racial classification, yet the EEOC requires employers to keep such lists to record the racial impact of employment practices.[96] Courts have consistently exempted actions from strict scrutiny that are "necessarily conscious of race" as long as the actions treat "all persons equally."[97] The City should not be subjected to strict scrutiny merely by being aware of a racial disparate impact and taking action to avoid such disparity, since certification was denied for all candidates, regardless of their race.

Petitioners also claim, in the alternative, that the decision of the CSB was motivated by discriminatory intent and had a discriminatory effect on the successful candidates because of their race.[98] Yet petitioners try to prove discriminatory intent by pointing to the City's awareness of racial disparity, and as such should be subject to strict scrutiny because they were motivated to remedy disparate impact due to race.[99] Case law, however, is well established that an "intent to remedy the disparate impact [of] the prior exams is not equivalent to an intent to discriminate against non-minority applicants."[100] Further, Congress actually mandates "the removal of artificial, arbitrary, and

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90. Personnel Administrator v. Feeney, 442 U.S. 256 (1979) (finding that discriminatory intent is evident when a decision-maker selects a "particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

91. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).

92. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). *See also Hayden*, 180 F.3d at 49 (ruling that a test administered uniformly to all applicants did not implicate an express racial classification).

93. *Pet. Brief* at 18, Docket Nos. 07-1428, 08-328.

94. *See* Williams v. Pharmacia, 137 F.3d 944, 954 (7th Cir.1998); Biondo v. City of Chicago, 382 F.3d 680 (7th Cir. 2004).

95. Crawford v. Bd. of Educ., 458 U.S. 527, 537 (1982).

96. 29 C.F.R. § 1607.4(A) (stating that employers "should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group").

97. *Hayden* at 49. Mechanisms that "are race conscious but do not lead to different treatment based on a classification" are unlikely to demand strict scrutiny to be found permissible. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in judgment).

98. This is assuming that the test is in fact valid, since there are no "vested rights," Billish v. City of Chicago, 989 F.2d 890, 895 (7th Cir. 1993) (en banc) (Posner, J.), in a "wrongfully awarded job to which another is entitled," *Croson*, 488 U.S. at 526 (Scalia, J., concurring in the judgment).

99. *Pet. Brief* at 18, Docket Nos. 07-1428, 08-328.

100. *Hayden* at 51.

unnecessary barriers to employment when the barriers operate invidiously to discriminate."[101] Accordingly, the City's actions should not violate the Equal Protection Clause.

V. THE SUPREME COURT'S RULING

The district court's proffered test for liability would have established that "a public employer, when faced with a prima facie case of disparate-impact liability under Title VII, does not violate Title VII of the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid liability."[102] The district court tried to balance the interests of Title VII with the Equal Protection Clause, but the ruling was too broad. A municipality's "desire to mitigate or avoid disparate impact does not justify preferential treatment for any group,"[103] and merely requiring a prima facie disparate impact case to invoke a blanket defense of voluntary compliance opens the door for potential abuse. Since, in some cases, a prima facie disparate impact case can be made by relying on results alone, a municipality could avoid any further showing or investigation into the test, and deny the results based solely on the race of the successful candidates. Judge Cabranes, in his dissenting opinion, feared that "municipal employers could reject the results of an employment examination whenever those results failed to yield a desired racial outcome."[104] This would create a quota-like system, yet benefit employers by allowing them to avoid liability and proper judicial scrutiny.[105] Applying this test allows a potential defense based on a showing of numbers alone, allowing for potential abuse by closing off inquiry into the motivations of the municipality and by preventing a finding of pretext.

In reversing the district court, the Supreme Court ruled that "fear of litigation alone" cannot justify race-based disparate treatment.[106] The court borrowed the strong-basis-in-evidence standard (Strong Basis Test) from cases involving the Fourteenth Amendment's Equal Protection Clause to determine when certain race-based remedial actions by governmental entities are constitutional.[107] In applying this standard, the Supreme Court sought to read disparate treatment and disparate impact prohibitions together.[108] Requiring a higher burden of production from municipalities prevents a 'blanket defense'[109] to liability and also safeguards the legitimate expectations of employees. The

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101. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

102. *Ricci II*, 530 F.3d 88, 90 (2d Cir. 2008) (Parker, J., concurring).

103. *Biondo*, 382 F.3d at 684.

104. *Id*. at 98.

105. *See id*.

106. *Ricci III*, 129 S.Ct. 2658, 2681 (U.S. 2009).

107. *Id*. at 2675.

108. *Id*.

109. Allowing a 'blanket defense' to disparate treatment claims based on a subjective fear of liability for disparate impact would diminish the effectiveness of employment discrimination law. This would allow any employer in a similar scenario to claim that they took action for fear of liability, even if this fear is objectively unreasonable. The 'blanket defense' would also curb voluntary compliance because employers armed with such a wide-reaching defense would be less worried about litigation and thus less motivated to take preventative measures.

new standard also follows logically with established precedent that prohibits the race-norming of test results.[110] Since the changing of test results to create a racially preferable workplace is not allowed, it follows that throwing out test results because the results are not racially preferable should also be prohibited.[111]

The Supreme Court then applied the standard to the facts of the case and issued summary judgment in favor of the petitioners.[112] The City relied on the disparate results of the test in choosing not to certify the exam, but did not sufficiently proffer enough evidence that the exam was not justified by business necessity or that a less prejudicial alternative existed at the time.[113]

A. Is the Strong Basis Test the Correct Standard?

The Strong Basis Test, as applied in *Ricci*, requires that governmental agencies go beyond a mere prima facie showing of disparate impact liability.[114] There must also be a strong-basis-in-evidence that the exam is not a business necessity or that there is a less prejudicial means of testing.[115] In adopting this standard, the majority relied on *Croson* and *Wygant*, both Equal Protection cases where race was the "decisive factor."[116]

The dissent argues against the Strong Basis Test, in favor of a less demanding standard. Employers would not be subject to disparate treatment liability if they had reasonable doubts about the reliability of the scores.[117] This standard seems to give an employer who is striving to voluntarily comply with Title VII the benefit of the doubt, as long as it has "good cause to believe the [testing] device would not withstand examination for business necessity."[118] This standard is likened to affirmative action cases, where under an affirmative action plan race is an acceptable consideration if race is only "one of numerous factors."[119]

Both the majority and the dissent offer a compelling analysis of prior case law and a persuasive argument for applying each standard. This begs the question, which standard is better? Unfortunately, the answer to this question depends on which underlying policy of Title VII the "decider" thinks is more important. The dissent aptly criticizes the majority's lack of clarity in applying the Strong Basis Test, as key questions are left unanswered, and will no doubt be litigated in the lower courts for years to come.[120] By suggesting a less stringent standard, the dissent similarly neglects to adequately clarify the threshold for its

110. *Ricci III*, at 2676.
111. *Id.*
112. *Id.* at 2664.
113. *Id.*
114. *See id.* at 2675-76.
115. *Id.*
116. *Ricci III*, dissent, at 2701.
117. *Ricci III*, dissent, at 2699.
118. *Id.*
119. Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616, 638 (1987).
120. *See Ricci III*, dissent, at 2699, 2701.

proffered standard.[121] The Strong Basis Test borders on being too strict a standard and it is unclear where a showing of a strong-basis-in-evidence begins and having to establish a "provable, actual violation" ends.[122] In the same vein, the dissent's standard borders on being too permissive, failing to clarify what exactly constitutes reasonable doubts about an exam's reliability, and when exactly an employer has "good cause" to doubt business necessity.[123]

Each side also champions different policy justifications to rationalize its preferred standard. Under the dissent's more lenient standard, a benefit of the doubt is given to employers who are presented with disparate results of employment practices, reasonably doubt the dubious practices, and seek to voluntarily comply with Title VII by suspending the suspicious practices in order to prevent further disparate impact.[124] This rule, if implemented, is potentially dangerous because the standard of proof is low, and seemingly subjective, in that it is dependent on the belief of the employer that an employment practice is not a business necessity. Thus, in the name of voluntary compliance, the courts could potentially be sanctioning a defense to disparate treatment that could be easily abused.[125] Additionally, such a low standard presents a danger of instituting de facto quota systems, which is also inapposite to the goals of Title VII.[126]

The dissent argues that the Strong Basis Test is vague, potentially too strict, and thwarts the Title VII policy to encourage voluntary compliance.[127] While this criticism indeed has its merit, a more stringent standard in cases such as *Ricci* is logically appropriate. In *Ricci*, New Haven wanted to throw the test results out (an action that is definitely disparate treatment) because of the racially disparate results of the promotional exam (which may or may not have been the result of illegal disparate impact).[128] A stricter test is justified because in order to engage in disparate treatment, an employer should have to show more than a mere possibility of disparate impact.

Consider a "smoke without fire"[129] scenario where a municipality uses a promotional exam that distinguishes the most qualified candidates for a particular job, but it just so happens that the results of the exam would promote all candidates of one protected status and no candidates of another. While the object of disparate impact law is to "smoke out" employment practices caused by non-business related discrimination (fire), in this scenario there is smoke but there is no fire because the test produces dubious results but is not discriminatory. Under the majority's standard, the municipality would not be

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121. *Id*. at 2699.

122. *Ricci III*, at 2676.

123. *Ricci III*, dissent, at 2699.

124. *Id*.

125. That is to say that employers could, in bad faith, argue good faith compliance to escape liability.

126. *Ricci III*, at 2675.

127. *See Ricci III*, dissent, at 2699-2702.

128. This argument is based on the assumptions that throwing the test results out was in fact an adverse employment action and that the racially disparate results were the decisive factor for the CSB's decision.

129. An allusion to the epistemological musings of the Carvakan school of Indian philosophy.

able to throw out the results. However, under the dissent's more permissive standard, the municipality may very well be able to "voluntarily comply" and dismiss the results as long as they can prove that they had good cause to believe the exam "would not withstand examination for business necessity."[130] The municipality would not need to show that the test did not *actually* conform to the requirement of business necessity, just that there was good cause to be concerned about the reliability of the test. The dissent's standard is equally as vague as the Strong Basis Test, but it causes more concern because of a potential for abuse by employers discriminating under the guise voluntary compliance.

B. Is this the Correct Application of the Standard?

After establishing a new standard, the majority issued summary judgment in favor of the petitioners, ruling that no genuine issue of material fact existed to dispute the claim that the CSB considered only the racially disparate results in making its decision.[131] The dissent points out that the ruling overlooks the problems inherent in the test and the availability of less discriminatory alternative methods of testing.[132] No business justification was given for the 60/40 ratio for weighting the written and oral portions[133] and alternative methods with less discriminatory impact *were* discussed in the CSB hearings. In reaching its decision, the majority overlooks the minor flaws involved in creating the test, creating an emphasis that an employment practice need only be "consistent with business necessity" and not perfectly business related.[134] The majority also emphasizes that racial considerations can be taken into account when creating a test in an effort to minimize disparate racial impact, but once the test has been given, allowing a municipality to reject the results based almost exclusively on the racial make-up of the results is akin to a quota system, and is illegal under Title VII.[135]

Two factors in Ricci may have swayed the majority in regards to the availability of less discriminatory alternative methods of testing available to New Haven. First, New Haven was constrained by their agreement with the union on requiring a 60/40 weight given to the written and oral portions of the exam.[136] The dissent questions the business necessity of this requirement,[137] but a possible explanation for this rationale is that the majority's conclusion implicitly gives deference to such bargained-for agreements. Alternatively, the majority's conclusion in this regard may in fact mean that other less discriminatory methods were not available, since the other methods discussed would have weighted the scores differently and were therefore precluded by the union agreement.

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130. *Ricci III*, dissent, at 2699.
131. *Ricci III*.
132. *See Ricci III*, dissent, at 2702-07.
133. *Id.* at 2699, n.5.
134. *See* Title VII, 703(k).
135. *See Ricci III*, at 2676-77.
136. *Id.* at 2665.
137. *Ricci III*, dissent, at 2699, n.5.

Additionally, less discriminatory methods that were available only garnered passing reference in a few of the hearings.[138] When alternative methods were mentioned, they were only mentioned generically, no specific methods were discussed in detail nor were specific alternative methods of testing proposed.[139] Since so much of the debate and deliberations during the CSB hearings focused on the racially disparate results and the business necessity of the test, the majority may have considered this proof that the decision was based on the racially disparate results, and not that the CSB had alternative methods in mind when voting not to certify. Future courts may distinguish *Ricci* from other cases where more discussion and consideration is given to business necessity and alternative methods of testing or where bargained-for agreements on testing methods are not present.

VI. BALANCING ACT – DOES THE SUPREME COURT FIND A MIDDLE-GROUND?

The scope of a precedential ruling must be broad enough to allow future applications in similar, but not necessarily exact, conditions, but must also avoid being so broad that it applies to situations it was not intended for. In employment discrimination, a new rule must further Title VII without violating the Equal Protection Clause. A rule should also carefully balance the overall interests of employees, employers, and the government.

The Strong Basis Test tries to balance the competing interests of employers, employees, and the government in a way that is consistent with Title VII and the Equal Protection Clause. Although it is unclear how the rule will be applied, future government entities are on notice that more than fear of litigation is required. It is also unclear how this new standard will affect voluntary compliance from employers.

This approach serves the interests of employees by requiring a heightened standard of proof for the employer. In order to avoid liability, the employer must go beyond the numbers, and investigate the test itself and the testing process.[140] Requiring this inquiry prevents an employer from using an "unsubstantiated fear" of a disparate impact suit as pretext for discrimination.[141] Likewise, employees also benefit from a bona fide defense for employers because the defense is grounded in scrutinizing a test's job-relatedness. Improving the correlation between testing criteria and actual job performance increases an employer's ability to choose the best individual for the job, thus benefiting employer and employee alike. The Strong Basis Test also serves the interests of the government by retaining the integrity of Title VII by providing an avenue between the 'rock and a hard place' that future employers may find themselves in, while still mandating equal opportunities for employees.

Courts have established that "voluntary compliance is a preferred means of achieving Title VII's goal of eliminating employment discrimination."[142]

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138. *See Ricci III*, at 2667-71.
139. *See id.*
140. *Ricci III*, at 2675.
141. *See Pet. Brief* on the Merits at 28-32 (Nos. 07-1428 & 08-328).
142. Kirkland v. N.Y. State Dept. of Correc. Serv., 711 F.2d 1117, 1128 (2nd Cir. 1983).

Congress offers incentives to employers to implement internal regulations and increase compliance rates, while simultaneously reducing the burden of regulation imposed on the government. However, it is unclear how the Strong Basis Test will affect voluntary compliance. The dissent warns that using the new standard will reduce voluntary compliance because of the current uncertainty as to how courts will apply the Strong Basis Test, compounded by the fact that the majority has offered little guidance on applying this test in Title VII cases.[143] The Strong Basis Test may impose so high a burden on governmental entities that it may actually be in their best interests *not* to voluntarily comply, at the risk of costly litigation or a fear of future liability. Voluntary compliance is the touchstone of Title VII because it is the most effective way to reduce employment discrimination, it reduces policing and enforcement costs on the government, and it reduces litigation costs by giving incentives to proactive employers.[144] Due to current uncertainty, the courts are now faced with the challenge of developing a uniform and consistent approach to the Strong Basis Test that is in keeping with the Supreme Court's ruling and does not disincentivize employers from voluntarily complying with Title VII. In doing so, the government's interest will be furthered by promoting equal employment opportunities and abolishing arbitrary barriers to employment.[145]

VII. CONCLUSION

The *Ricci* case presents difficulties for future courts, left in the dark as to how to apply the Strong Basis Test. *Ricci* also leaves considerable uncertainty for future municipalities trying to voluntarily comply with the requirements of Title VII. The Supreme Court made it clear that "fear of litigation alone" does not justify disparate treatment, but where future district courts will draw the line is unclear.[146] In addition to a lack of guidance from the Supreme Court, there remains continued uncertainty *if* disparate treatment is *ever* constitutional.[147] By requiring more than just a prima facie threat of disparate impact liability, the new standard does guard against creating a 'blanket defense' against liability that would allow employers to discriminate under the guise of diversity, thus nullifying the protections afforded by Title VII. The new standard tries to create a middle-ground that protects the interests of all parties and furthers voluntary compliance under Title VII. This will only be accomplished if lower courts apply the Strong Basis Test uniformly, which is unlikely given the lack of guidance for doing so from the Supreme Court. Future municipalities are left to wonder when enough evidence exists that will justify disregarding promotional exam results, if ever.

143. *Ricci III*, dissent at 2701-02.
144. *Id*.
145. *Griggs*, 401 U.S. at 431.
146. *Ricci III*, at 2681.
147. *See Ricci III*, Scalia, J. concurring at 2682.