RICCI v. DESTEFANO: "FANNING THE FLAMES" OF REVERSE DISCRIMINATION IN CIVIL SERVICE SELECTION

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I. INTRODUCTION

Beginning with the Equal Protection Clause of the United States Constitution[1] and the Civil Rights Act of 1964,[2] the United States has made great strides in its journey towards widespread racial equality in both the private and public sectors. Such success, however, has not come without a cost. In an effort to maximize equality in the workforce, employers have engaged in controversial hiring decisions, to the dismay of countless applicants who believe that they have been disadvantaged due to their non-minority classification.[3]

The City of New Haven, Connecticut, administered examinations for the purpose of filling vacancies in the command ranks of its fire department.[4] Due to the racially unequal distribution of the test results,[5] the New Haven Civil Service Board ("the Board") refused to certify the results of the two promotional examinations in an alleged effort to comply with state and federal anti-discrimination laws.[5] Frank Ricci, a white man, along with sixteen other white individuals

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1. U.S. CONST. amend. XIV, § 1 ("[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . .").

2. 42 U.S.C. § 1971 et seq. (1988); 42 U.S.C. § 2000e et seq. (1976) (Title VII of the Civil Rights Act prohibits discrimination by employers on the basis of race, color, religion, sex, or national origin).

3. *See* Biondo v. City of Chicago, 382 F.3d 680 (7th Cir. 2004) (allegedly favoring minorities in employment decisions); *see* Ricci v. DeStefano (*Ricci I*), 554 F. Supp. 2d 142 (D. Conn. 2006) (same).

4. *Ricci I*, 554 F. Supp. 2d at 145.

5 *Id.*

5. *Id.* at 150.

and one Hispanic (Petitioners) who fared well on the examinations but received no promotion, brought suit alleging that the city officials charged with making the hiring decisions for the fire department violated their civil (Title VII) and constitutional (Equal Protection Clause) rights to be free from employment discrimination and to enjoy the equal protection of the laws.[6]

On September 28, 2006, the District Court of Connecticut granted Respondents' motion for summary judgment on both the Title VII and equal protection claims.[7] The Second Circuit, by summary order entered February 15, 2008, adopted and fully affirmed the district court's judgment. It later converted this summary order into a binding precedential opinion before voting seven to six to deny rehearing *en banc*.[8] Due to a circuit split on the issue, the United States Supreme Court granted certiorari[9] on January 9, 2009, to determine whether, under Title VII and the Equal Protection Clause, a state employer may reject the results of a race-neutral civil-service selection examination due to unintended racially-disproportionate test results.[10]

II. FACTS

In November and December 2003, the New Haven Fire Department sought to fill Captain and Lieutenant vacancies by administering written and oral examinations to its firefighters.[11] Petitioners are seventeen white candidates and one Hispanic candidate[12] who expended significant sums of money, studied intensely, and performed very well on the promotional exams but who were denied promotion because, without the Board's certification of the test results, the promotional process could not move forward.[13] Pursuant to New Haven's Charter and Civil Service Regulations, hiring and promotions must be based strictly on merit as determined

6. Supplemental Brief of Petitioners at 1, Ricci v. DeStefano, No. 07-1428 (U.S. Aug. 21, 2008).

7. *Ricci I*, 554 F. Supp. 2d at 163.

8. Petition for Writ of Certiorari at 12–13, Ricci v. DeStefano, No. 08-328 (U.S. Sept. 8, 2008).

9. 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).

10. Petition for Writ of Certiorari at 3, Ricci v. DeStefano, No. 08-328 (U.S. Sept. 8, 2008).

11. *Ricci I*, 554 F. Supp. 2d at 145.

12. Petition for Writ of Certiorari at 3, Ricci v. DeStefano, No. 08-328 (U.S. Sept. 8, 2008).

13. *Ricci I*, 554 F. Supp at 144, 146.

by competitive examination.[14] After each examination, the Civil Service Board must certify a list of those eligible for promotion and fill each employment vacancy according to the "Rule of Three," which mandates that a civil service position be filled from among the top three scorers on the list.[15] I/O Solutions ("IOS"), a seven-year-old Illinois company that specializes in entry-level and promotional examinations for public safety departments, designed the examinations that the New Haven Fire Department utilized in 2003.[16]

Forty-one applicants took the exam to fill the Captain vacancies, of which twenty-five were white, eight were black, and eight were Hispanic.[17] Based on the scores and pursuant to the "Rule of Three," no blacks and at most two Hispanics would be eligible for promotion because the top nine scorers were seven whites and two Hispanics.[18] Seventy-seven applicants took the exam to fill the Lieutenant vacancies, of which forty-three were white, nineteen were black, and fifteen were Hispanic. Because all of the top scorers were white, no blacks or Hispanics would have been eligible for promotion.[19]

Due to the correlation between test performance and race, which reflected a disparate impact,the Civil Service Board held five hearings to determine whether it should certify the results and promote the top scorers in accordance with past practice or instead reject the results due to their racial disproportion.[20] During these hearings, the Board heard from a variety of experts and state officials regarding the fairness of the test and possible reasons for the disparate impact.[21] Ultimately, the board split two to two on the question of certifying each exam, which resulted in the promotional lists not being certified.[22]

Ricci v. DeStefano arises from the decision not to certify the exams and the allegedly discriminatory consequences of the Board's

14. Petition for Writ of Certiorari at 4–5, Ricci v. DeStefano, No. 08-328 (U.S. Sept. 8, 2008).

15. *Id.* at 5.

16. *Ricci I*, 554 F. Supp. 2d at 145.

17. *Id.*

18. *Id.* The City Charter mandates a "Rule of Three," which requires all civil service positions to be filled by an individual among the top three scores on such an exam. The top nine scores included seven white applicants and two Hispanic applicants.

19. *Id.*

20. *Id.* at 145–46.

21. *Id.* at 145–50.

22. *Id.* at 150.

decision.[23] Petitioners allege that non-certification was due to political pressure—an effort to garner the votes of minority constituents in New Haven—and amounted to both Title VII and Equal Protection violations; Respondents argue that the decision not to certify was made wholly for the purposes of complying with federal, state, and local anti-discrimination laws.[24]

III. LEGAL BACKGROUND

In *McDonnell Douglas Corp. v. Green*, the Supreme Court delineated a three-part burden-shifting test to apply to Title VII cases involving an allegation of intentional discrimination in an employment termination.[25] Under this framework, plaintiffs first must establish a *prima facie* case of discrimination on account of race.[26] To do so, they must prove: (1) membership in a protected class; (2) qualification for the position; (3) an adverse employment action; and (4) circumstances giving rise to an inference of discrimination on the basis of membership in the protected class.[27] The burden of production then shifts to the employer who must articulate some legitimate, nondiscriminatory reason for the rejection of the employee.[28] The employer's burden is satisfied if the proffered evidence, "'taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action.'"[29] If the employer puts forth such a neutral reason for the employee's termination, the burden shifts back to the employee to prove that the employer's alleged reason was in fact a pretext for discrimination.[30]

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23. *Id.* at 144.

24. *Id.* at 150–51.

25. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Although *McDonnell Douglas* involved an employment termination, its test still applies to non-promotion employment cases as well.

26. Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000).

27. *See McDonnell Douglas*, 411 U.S. at 802. ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.").

28. *Id.*; Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 142 (2000).

29. Schnabel v. Abramson, 232 F.3d 83, 88 (2d Cir. 2000) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993)).

30. Ricci v. DeStefano (*Ricci I*), 554 F. Supp. 2d 142, 152 (D. Conn. 2006).

In *Hayden v. County of Nassau*, white and Hispanic applicants to the police department, including both males and females, brought a class action lawsuit against the county alleging that the police officers' entrance examination, which was designed to minimize discriminatory impact on minority candidates, actually discriminated against non-minority candidates in violation of the Equal Protection Clause, Title VII, and the Civil Rights Act.[31] The Second Circuit held that the race-conscious configuration of the exam did not violate any of these provisions because the Nassau County Police Department was merely complying with several consent decrees prohibiting it from engaging in discriminatory practices or utilizing examinations that were unfair to minority applicants.[32] The county had conducted a validity analysis to determine the configuration of the exam that both was sufficiently job-related and minimized the adverse impact on minority applicants.[33] Plaintiffs asserted that the choice to reconfigure the exam, in order to reduce the adverse impact on black candidates, necessarily discriminated against non-minorities on the basis of race.[34]

The *Hayden* court rejected plaintiffs' contentions and stated that plaintiffs were "mistaken in treating racial motive as a synonym for constitutional violation" and that "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race."[35] This concern alone, however, does not render these statutes automatically unlawful.[36] The court held that the construction of the Nassau County test to minimize adverse impact on minorities was not intentional reverse discrimination against whites because all applicants took the same test and were thus treated uniformly on the basis of race.[37] In response to plaintiffs' assertion that the design of the test illustrated impermissible discriminatory intent, the Second Circuit stated that nothing in the court's jurisprudence disallowed the use of race-neutral means to improve racial equality;[38] rather, the court held that "the

31. Hayden v. County of Nassau, 180 F.3d 42, 46 (2d Cir. 1999). The Second Circuit analyzes hiring and promotion decisions in a like manner.

32. *Id.*

33. *Id.* at 46–47. A validation study is the process that establishes, by statistical analysis, that a particular test serves its intended purpose and measures the appropriate criteria.

34. *Id.* at 47.

35. *Id.* at 49 (quoting Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998)).

36. *Id.*

37. *Id.* at 50.

38. *Id.* at 51.

intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants."[39]

In *Kirkland v. New York State Department of Correctional Services*, the Second Circuit dealt with the issue of voluntary compliance with regard to Title VII of the Civil Rights Act.[40] It stated that voluntary compliance is, in fact, a "preferred means of achieving Title VII's goal of eliminating employment discrimination."[41] The Second Circuit, in *Kirkland*, affirmed the district court's decision to approve a settlement that dealt with promotional order among the ranks of the employees at the Department of Correctional Services after minority employees had put forth a *prima facie* case of adverse impact.[42] This settlement would attempt to correct the discrimination present in the examinations by determining promotion order on the basis of both exam results *and* race-normed adjustments to the exam.[43] The court noted that requiring a full hearing before approving the settlement would undermine Title VII's preference for voluntary compliance and was thus unwarranted.[44] Accordingly, it determined that voluntary compliance with Title VII actions are presumptively valid and should be approved unless there is some showing of provisions that are either unlawful or against public policy.[45] Therefore the court held that a statistical demonstration of disproportionate racial impact regarding an employment decision constitutes "a sufficiently serious claim of discrimination to serve as a predicate for a voluntary compromise containing race-conscious remedies."[46]

The Second Circuit expanded *Kirkland* in *Bushey v. New York State Civil Service Commission.*[47] In *Bushey*, the Civil Service administered a series of promotional examinations for supervisory positions in the state's correctional services departent; as in *Kirkland*, the tests indicated a significant adverse impact on minorities, with

39. *Id.*
40. Kirkland v. N.Y. State Dep't of Corr. Servs., 711 F.2d 1117, 1121 (2d Cir. 1983).
41. *Id.* at 1128.
42. Ricci v. DeStefano (*Ricci I*), 554 F. Supp. 2d 142, 157 (D. Conn. 2006); *Kirkland*, 711 F.2d at 1130.
43. *Kirkland*, 711 F.2d at 1133.
44. *Id.* at 1130.
45. *Id.* at 1128–29.
46. *Id.* at 1130.
47. *Ricci I*, 554 F. Supp. 2d at 157; Bushey v. N.Y. State Civil Serv. Comm'n (*Bushey I*), 733 F.2d 220, 227 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985) (allowing State to adopt a remedial measure without direct pressure from minority applicants).

non-minority applicants passing at almost twice the rate of minority applicants.[48] In order to rectify this situation, the Civil Service race-normed the scores for each group, which increased the pass rate of the minority group to that of the non-minority group.[49] Although the plaintiffs argued that the state's adjustment of minority candidates' raw test scores discriminated against non-minority candidates in violation of Title VII, the Second Circuit held that the disparate score distribution between the two groups was sufficient to establish a *prima facie* showing of an adverse impact on minority test-takers.[50] Therefore, in accordance with *Kirkland*, there existed a sufficiently serious claim of discrimination "to serve as a predicate for employer-initiated, voluntary race-conscious remedies."[51]

Although the *Ricci v. DeStefano* court relied primarily on Second Circuit decisions, other circuits have handled both Title VII and equal protection claims differently by prohibiting most race-based government decision-making that is not narrowly tailored to a government purpose.[52] In *Williams v. Consolidated City of Jacksonville*, for example, the Eleventh Circuit held that the Equal Protection Clause does not allow city officials to refuse to fill existing employment vacancies based on the race of those in line for them—a decision that squarely conflicts with Second Circuit decisions, which allow for employers to adopt voluntary remedial measures to avoid Title VII liability.[53] In *Dallas Firefighters Association v. City of Dallas*, the Fifth Circuit held that the promotion of women and minorities over higher-ranked white males violated the Equal Protection Clause due to the race-based and gender-based treatment afforded to each group.[54] Similarly, the Seventh Circuit in *Biondo v. City of Chicago* held that neither Title VII nor the Equal Protection Clause allow a city to respond to competitive examinations' disparate impact on minorities by denying or delaying promotions of white applicants or

48. *Bushey I*, 733 F.2d at 222.
49. *Id.* at 222–23.
50. *Id.* at 224–25.
51. *Id.* at 228.
52. *See Ricci I*, 554 F. Supp. 2d at 157–60; Petition for Writ of Certiorari at 28–29, Ricci v. DeStefano, No. 08-328 (U.S. Sept. 8, 2008).
53. Williams v. Consol. City of Jacksonville, 341 F.3d 1261, 1269 (11th Cir. 2003).
54. Dallas Fire Fighters Assoc. v. City of Dallas, 150 F.3d 438, 441 (5th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999).

by employing race-dependent eligibility lists.[55] In essence, while the Second Circuit focuses primarily on Title VII implications when assessing civil service testing and hiring decisions, other circuits place a stronger emphasis on race-based decision-making in conjunction with the Fourteenth Amendment and its Equal Protection Clause.[56]

IV. HOLDING

Because the Second Circuit summarily affirmed "for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below" and did so without engaging in its own discussion of the relevant issues,[57] this section focuses primarily on the district court's analysis of the issues presented in this case.[58]

A. Title VII Claim

Because Petitioners alleged that Respondents' decision not to certify the examination results amounted to intentional discrimination against the non-minority applicants, the court applied the *McDonnell Douglas Corp. v. Green* three-pronged burden-shifting framework to the facts of the case.[59] Under this framework, the court found that Petitioners satisfied all four factors needed to establish a *prima facie* case of discrimination[60]: they had shown membership in a protected class, qualification for the positions in question, an adverse employment action, and circumstances that gave rise to an inference of discrimination on the basis of membership in the protected class.[61] Although Respondents argued that Petitioners cannot establish an inference of discrimination when all applicants are treated the same, the court assumed *arguendo* that Respondents' acknowledgement that racial concerns motivated their denial of certification was sufficient to satisfy the inference of discrimination necessary to establish a *prima facie* case.[62]

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55. Biondo v. City of Chicago, 382 F.3d 680, 684 (7th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005). An eligibility list is a list of applicants qualified for promotion based on examination scores.

56. Petition for Writ of Certiorari at 28, Ricci v. DeStefano, No. 08-328 (U.S. Sept. 8, 2008).

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

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

59. *Id.* at 151.

60. *Id.* at 152.

61. *Id.* at 151–52.

62. *Id.* at 152.

Once the *prima facie* case had been established, the burden shifted to the Respondents to produce evidence that there was a nondiscriminatory reason for the adverse action taken against the Petitioners.[63] The court held that Respondents' good faith attempt to comply with Title VII was a legitimate nondiscriminatory reason for refusing to certify the exams and thus satisfied their burden of production under the *McDonnell Douglas* test.[64] To overcome this presumption in favor of the Respondents, the Petitioners had to show that the City of New Haven's proffered explanation was pretextual and thus merely an attempt to mask the underlying intent to discriminate.[65]

The court ultimately held that Petitioners failed to show pretext on the part of Respondents and thus did not satisfy their third burden under the *McDonnell Douglas* test.[66] Although Petitioners argued that Respondents' diversity rationale is prohibited as reverse discrimination under Title VII, the court followed both *Hayden v. County of Nassau* and *Kirkland v. New York State Department of Correctional Services* in finding that this statute actually allows for the use of race-neutral means to increase minority and female representation in the workforce.[67] An intent to remedy a disparate impact is not, therefore, equivalent to an intent to discriminate against non-minority applicants.[68]

The court further held that the Respondents' remedy was decidedly less race-conscious than the remedies in *Kirkland* and *Bushey v. New York State Civil Services Commission*—both of which the Second Circuit had approved.[69] New Haven did not race-norm the scores but rather decided to start over with a new test entirely so as to remedy the disparate impact of the last examinations.[70] Thus, while the Board took race into account when making its decision not to certify the results, the outcome was race-neutral due to the fact that *all* test results were discarded and *all* applicants would have to participate in

63. *Id.*
64. *Id.*
65. *Id.*; *see also* Reeves v. Sanderson Plumbing, 530 U.S. 133, 143 (2000) (finding employer's proferred evidence unworthy of credence).
66. *Ricci I*, 554 F. Supp. 2d at 160.
67. *Id.* at 157–58.
68. *Id.* at 157; Hayden v. County of Nassau, 180 F.3d 42, 51 (2d Cir. 1999).
69. *Ricci I*, 554 F. Supp. 2d at 158.
70. *Id.*

another selection process.[71] Consequently, the court held that Petitioners do not have a viable claim of reverse disparate impact or discrimination. Utilizing the reasoning of *Hayden*, the court found no evidence of discriminatory animus towards Petitioners; rather, it found that the Board, the City of New Haven, and the other Respondents were merely trying to eliminate employment discrimination by voluntarily complying with Title VII regulations.[72] The court held that Respondents' motivation to deny promotions due to a test with a racially disparate impact does not constitute discriminatory intent; as such, there is insufficient evidence for Petitioners to prevail on their Title VII claim.[73]

B. Equal Protection Claim

Petitioners argued that Respondents violated the Equal Protection Clause either by employing a race-based classification system for promotion or by applying facially neutral promotion criteria in a racially discriminatory manner.[74] In accordance with *Adarand Constructors Inc. v. Pena*, the court acknowledged that non-minorities have been found to be a protected group for purposes of equal protection claims.[75] But in response to Petitioners' claims, the court held that Respondents did not employ any racial classifications because every applicant was treated in the same way when the Board denied certification of the test results.[76] In accordance with the *Hayden* decision, the court stated that there is no racial classification when an examination is "administered and scored in an identical fashion for all applicants" or when an entrance exam is designed to diminish an adverse impact on minority applicants.[77] Likewise, the court rejected the Petitioners' claim that the exam was a facially neutral test used in a discriminatory manner for the same reason the *Hayden* court denied a finding of racial classification—"equal" treatment of all applicants.[78] The Court rested this premise on the fact

71. *Id.*
72. *Id.*; *see also Hayden*, 180 F.3d at 51.
73. *Ricci I*, 554 F. Supp. 2d at 160.
74. *Id.*
75. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 210 (1995); *Ricci I*, 554 F. Supp. 2d at 160.
76. *Ricci I*, 554 F. Supp. 2d at 161; *Hayden*, 180 F.3d at 48.
77. *Ricci I*, 554 F. Supp. 2d at 161 (quoting *Hayden*, 180 F.3d at 48).
78. *Id.*; *see also supra* notes 37–39 and accompanying text.

that all applicants took the same test and were scored in an identical fashion.

Although Petitioners continued to assert discriminatory intent on the part of Respondents, the court held that Respondents acted to further their goal of diversity in the fire department, to remedy the exam's disparate impact on minorities, and to prevent the City from being sued under Title VII by unsuccessful minority applicants.[79] As a result, the court denied the Petitioners' equal protection claim.[80]

V. ANALYSIS

The *Ricci v. DeStefano* holding is problematic from both a legal and political standpoint. As stated in *Wygant v. Jackson Board of Education*, "[r]acial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial examination."[81] In *Ricci*, the court acknowledged that Respondents denied promotion to non-minority applicants because they were concerned about the racial disparities in the test results and that, but for this disparate impact, Petitioners would have been promoted.[82] Despite this seemingly clear-cut case of race-based decision-making, the court failed to apply strict scrutiny, setting itself apart from other circuit courts.[83] Instead, it stated that because nobody was promoted and that the result was the same for all, no racial classification occurred and a lower level of scrutiny was appropriate.[84]

The results, however, were *not* the same for all; those who earn low scores should have no right to be promoted, whereas those who earn high scores should be eligible to be promoted. Treating Petitioners, who were among the top scorers on the exam, and other applicants equally—by denying them all a promotion—is an unfair manipulation of equal protection law.

Another error in the court's judgment is the incongruity in its reasoning: for Title VII purposes, the court assumed Petitioners had

79. *Id.* at 162.

80. *Id.*

81. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (plurality opinion) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978)).

82. *Ricci I*, 554 F. Supp. 2d at 152.

83. Petition for Writ of Certiorari at 16, Ricci v. DeStefano, No. 08-328 (U.S. Sept. 8, 2008); Biondo v. City of Chicago, 382 F.3d 680, 684 (7th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005) (awarding damages to white applicants for unfair treatment).

84. *Ricci I*, 554 F. Supp. 2d at 161.

suffered a race-based adverse employment action, yet it also held that no racial classification had occurred for equal protection purposes.[85] If the court found a racial classification, Respondents would need to assert a compelling state interest for their actions and prove that they were narrowly-tailored to meet this goal.[86] Instead, the court, failing to apply strict scrutiny, allowed Respondents to satisfy their burden of proof by simply asserting a "good faith belief" that a disparate impact existed among the test scores and that this alone justified the decision not to certify the exams.[87] Such lax equal protection jurisprudence is a risky precedent for the court to set.

While the Second Circuit concluded that Respondents' allegedly race-based decisions were justified due to their desire to fulfill their obligations under Title VII, the Seventh Circuit has expressly rejected this reasoning in *Biondo v. City of Chicago*:

> Still, the premise of the City's argument is that regulations supply a compelling governmental interest in making decisions based on race. How can that be? Then Congress or any federal agency could direct employers to adopt racial quotas, and the direction would be self-justifying: the need to comply with the law (or regulation) would be the compelling interest. Such a circular process would drain the equal protection clause of meaning.[88]

In accordance with established rules of statutory construction, a statute must be read with the presumption that Congress did not intend to authorize conduct strictly prohibited by the Constitution.[89] To allow such behavior would upset the balance of power integral to the functioning of the United States government and render the Equal Protection Clause powerless in its wake.

The *Ricci* courts' assertion that requiring a judicial determination of discrimination against minorities in disparate impact cases would undermine Title VII's policy favoring voluntary compliance is relatively unpersuasive.[90] The Supreme Court has held in previous cases that affirmative action plans must be strictly monitored "to

85. *Id.* at 152, 161.

86. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2770 (2006) (Thomas, J., concurring).

87. *Ricci I*, 554 F. Supp. 2d at 152.

88. Biondo v. City of Chicago, 382 F.3d 680, 684 (7th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005).

89. Bushey v. N.Y. State Civil Serv. Comm'n (*Bushey II*), 469 U.S. 1117 (1985) (Rehnquist, J., dissenting).

90. *See Ricci I*, 554 F. Supp. 2d at 157.

prevent the practice of discrimination for discrimination's sake."[91] In an effort to avoid Title VII lawsuits from minority applicants, New Haven and related Respondents denied all promotions without conducting a validity study of the exams or searching for alternative tests with less adverse impact, as other circuits have required, and yet were somehow still successful in both the district court and the circuit court.[92]

A valid, though unsuccessful, argument put forth by Petitioners was that Respondents masked their attempt to achieve political favoritism among minority voters as an effort to comply with Title VII and related anti-discrimination laws.[93] Although the court may have been hesitant to accept the legitimacy of this contention, Petitioners proffered evidence illustrating a pattern of political manipulation by the City of New Haven in its promotional decisions in both the police and fire departments.[94] Such a political motive would seemingly be sufficient to establish pretext behind Respondents' actions, but the court held, as had the Tenth Circuit in *EEOC v. Flasher Co., Inc.*, that pretext is not shown even if an unseemly reason, such as political favoritism, actually accounts for the decision.[95] This standard seems to have far-reaching political implications. If the Supreme Court fails to uphold strict scrutiny in *Ricci*, the very sort of "race politics" that allegedly occurred in New Haven might "lurk behind any racial classification not held to the exacting strictures of the [Equal Protection] Clause."[96] Elected officials would thus be able to achieve political goals and gain the support of minority voters while actually engaging in intentional discrimination against non-minority constituents.

Although achieving racial diversity in the New Haven Fire Department is an admirable goal, an attempt to do so at the expense of well-qualified firemen who worked hard to pass a race-neutral and presumptively valid civil service examination deserves stricter judicial scrutiny. The Second Circuit adhered to its own jurisprudence in

91. *Bushey II*, 469 U.S. at 806–07 (Rehnquist, J., dissenting).
92. *Ricci I*, 554 F. Supp. 2d at 150.
93. *Id.*
94. *Id.*
95. *Id.* at 160; *see EEOC v. Flasher Co., Inc.*, 986 F.2d 1312, 1321 (10th Cir. 1992) (pretext is not shown merely because "some less seemly reason—personal or political favoritism, a grudge, random conduct an error in the administration of neutral rules—actually accounts for the decision").
96. Petition for Writ of Certiorari at 16, Ricci v. DeStefano, No. 08-328 (U.S. Sept. 8, 2008).

formulating its opinion, but one has to wonder how long the court's loose scrutiny of seemingly race-based decision-making will fan the flames of reverse racial discrimination or if the Supreme Court will use *Ricci* in order to halt this approach.

VI. ARGUMENTS AND DISPOSITION

A. Strengths and Weaknesses of Petitioners' Argument

Although Petitioners made several allegations regarding the unlawfulness of the City's actions, they would have been more likely to prevail if they had put forth a mixed-motive, rather than an intentional, discrimination claim. With intentional discrimination comes a heightened burden of proof, whereas a mixed-motive claim is subject to the less stringent framework of *Price Waterhouse v. Hopkins*.[97] If Petitioners alleged that Respondents made decisions based on a mixture of legitimate and illegitimate considerations, *Price Waterhouse* establishes that Respondents would pass constitutional muster only if they could prove that they would have made the same decision regardless of the discriminating/illegitimate factor.[98] Here, Respondents' decision to decline certification of the exam results was motivated, at least in part, by the race of those who scored well on the exam; thus, it would be difficult for Respondents to escape liability under this framework.[99] Though Petitioners asserted political influence and fear of public criticism as reasons behind Respondents' actions, doing so under the mixed-motive framework would have resulted in a better chance of prevailing in both the lower courts and the Supreme Court.

Although rejected by the courts below, Petitioners argued that the Equal Employment Opportunity Commission's Uniform Guidelines for Employee Selection Procedures ("the Guidelines") mandate that Respondents conduct a validation study before deciding not to certify the examinations.[100] This argument is reasonable, given the fact that defendants merely relied on a "good faith belief" that disparate impact alone would justify their decision to decline certification.[101] As

97. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
98. *Id.* at 244–45; Brief of Respondents, Ricci v. DeStefano, No. 08-328 (U.S. Nov. 13, 2008).
99. *See* Ricci v. DeStefano (*Ricci I*), 554 F. Supp. 2d 142, 152 (D. Conn. 2006).
100. *Id.* at 154.
101. *Id.* at 151.

the Guidelines state, "the greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness."[102] The scenario in *Ricci v. DeStefano* presents the situation opposite to typical discrimination cases, but Respondents should still have a duty to look into the validity of the exams before rejecting them without further investigation. The examinations may in fact have been unfair, but the Guidelines imply that a validation study would be necessary in order to uphold such a defense.[103] As Petitioners rightfully concede, Title VII provides that professionally-developed and properly-validated tests are a defense to a claim of disparate impact.[104] Thus, Respondents' fear of potential Title VII liability with regard to minority applicants would be unwarranted if the promotion exam was proved valid. If the Supreme Court adopts Petitioners' arguments on this issue, the Petitioners have a greater chance of prevailing on their discrimination claim.

B. Strengths and Weaknesses of Respondents' Argument

The strength of Respondents' case stems from the overarching policy rationale behind their actions—achieving racial diversity in the fire department. Respondents, however, put forth a weak attempt to justify the actions they took in purported compliance with Title VII. The Board argues that it rejected the test results based in large part on the testimony of Dr. Christopher Hornick, an industrial/organizational psychologist who runs a consulting business in competition with IOS who testified at the Civil Service Board hearings.[105] Dr. Hornick testified that the results of the promotional tests had a "relatively high adverse impact" and that the test his company designs would not produce such an unfair result.[106] Although testimony from other experts in the field provided contrary feedback, the Board decided that Dr. Hornick's testimony provided it the basis for a good faith belief that certifying the results would put the Board in violation of Title VII and state anti-discrimination laws.[107] A good faith belief, rather than an informed belief, in the legitimacy of their actions is a weak argument to present to the Supreme Court.

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102. *Id.* at 155.
103. *Id.*
104. *Id.* at 154; 42 U.S.C. § 2000e-2(h).
105. *Ricci I*, 554 F. Supp. 2d at 148.
106. *Id.*
107. *Id.*

Although the adequacy of Respondents' justification for their actions is questionable, they do have statistics on their side. Specifically, the Equal Employment Opportunity Commission's ("EEOC's") "four-fifths rule" states that a selection tool that yields a selection rate for any racial group that is less than four-fifths of the rate for the group with the highest rate is generally regarded by federal enforcement agencies as evidence of adverse impact.[108] Here, black applicants had a pass rate of about one-half that of the white applicants—well below the four-fifths required to satisfy EEOC standards.[109] Because this low pass rate was not appreciably different from the rate in years past, when Respondents took no action, Petitioners may still be able to establish the required pretext on behalf of Respondents.[110] Respondents' assertion that their actions were merely a response to the disparate pass rate on the exam is suspect and should be examined further by the Supreme Court.

C. Likely Disposition of the Supreme Court

Given its prior holdings in equal protection cases, the Supreme Court will likely reverse the judgment of the Second Circuit and find in favor of Petitioners.[111] The Court has held that "[r]ace-based government decision making is categorically prohibited unless narrowly tailored to serve a compelling interest."[112] Thus, unlike the Second Circuit, the Court will likely apply strict scrutiny to Respondents' actions. Although it has held diversity to be a compelling interest in higher education due to the educational benefits of having a "critical mass" of diverse students, it is unlikely that the same diversity rationale will be accepted in the civil service arena.[113]

As the Court held in *City of Richmond v. J.A. Croson Co.*, one of the purposes of strict scrutiny is to "smoke out" attempts by city

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108. *Id.* at 153.

109. *Id.*

110. *Id.* at 154.

111. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (subjecting race-based decision-making to strict scrutiny); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (barring quota systems in college admissions due to unconstitutionality with regard to non-minority applicants); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2006) (failing to find compelling interest in outright racial balancing).

112. *Parents Involved*, 127 S. Ct. at 2770.

113. *See* Grutter v. Bollinger, 539 U.S. 306 (2003)(finding that law schools have a compelling interest in obtaining a diverse student body).

officials to practice racially-motivated politics under the guise of remedial action.[114] If the Court finds that Respondents' actions were the result of undue political influence, it would be hard-pressed to allow this justification to pass strict scrutiny. The Court has deemed "outright racial balancing" to be unconstitutional and may very well characterize New Haven's actions as such.[115] Unless the Court significantly deviates from its precedent, the Respondents' arguments are unlikely to prevail under a more exacting standard of review.

114. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 488 (1989).
115. *Id.* at 507; *Grutter*, 539 U.S. at 330; *Parents Involved*, 127 S. Ct. at 2757.