Recent Development: *Ricci v. DeStefano*

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In March 2004, the City of New Haven, Connecticut faced a difficult choice. In late 2003, the City had just administered a firefighting promotion exam that called for seventeen of nineteen available positions to be filled by whites, despite the fact that more than 42% of test takers were racial minorities.[1] Worse, this racial disparity occurred in the context of the firefighting profession, a line of work historically hostile to nonwhites,[2] and a New Haven fire department in which only 18% of senior officers are black or Hispanic, despite a city population that is approximately 60% black and Hispanic.[3] As a result, the City's legal counsel warned[4] that if it certified the results of the exam, it would face liability under a provision of Title VII of the Civil Rights Act that proscribes employment practices that have a *disparate impact* on the basis of race.[5]

On the other hand, if the City discarded the results of the exam, the predominately white firefighters who had done well on it might sue under a different provision of Title VII that prohibits employers from engaging in *disparate treatment* on the basis of race or taking adverse employment actions against a person because of her race.[6] These firefighters would argue that they deserved the promotions because of their hard work to prepare for and succeed on the exam, including, in the case of Frank Ricci, impressive efforts to overcome dyslexia.[7] After hearing from these two competing perspectives, the City decided in March 2004 to set aside the results of the exam, promote no one at that time, and start over again.[8]

After this decision, seventeen white firefighters and one Hispanic firefighter who passed the examination sued the City, its mayor John DeStefano, and others, alleging violations of the disparate-treatment provision of Title VII and the U.S. Constitution's Equal Protection Clause.[9] In September 2006, the district court granted summary judgment for the City.[10] A panel of the Second Circuit then summarily affirmed.[11] In June 2009, the Supreme

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[1] Ricci v. DeStefano, 129 S. Ct. 2658, 2666 (2009).

[2] U.S. Commission on Civil Rights, For All the People. . .by the People: A Report on Equal Opportunity in State and Local Government Employment 71 (1969), *reprinted in* 118 Cong. Rec. 1817 (1972).

[3] *Ricci*, 129 S. Ct. at 2691 (Ginsburg, J., dissenting).

[4] *Id.* at 2695.

[5] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[6] *See id.* § 2000e-2(a).

[7] *See Ricci*, 129 S. Ct. at 2667.

[8] *See id.* at 2669-71.

[9] Complaint, Ricci v. DeStefano, 554 F. Supp. 2d 142 (D. Conn. 2006) (No. 3:04cv1109).

[10] Ricci v. DeStefano, 554 F. Supp. 2d 142, 163 (D. Conn. 2006).

[11] Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).

Court reversed and held, five to four, that New Haven had violated the disparate-treatment provision of Title VII by discarding the results of the test.[12] The majority established the standard that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a *strong basis in evidence* to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[13] As the Court applied this standard, the City did not have enough evidence to believe it would be liable under the disparate-impact provision if it accepted the results because, according to the majority, there was strong evidence that the exam was job related[14] and little evidence of equally valid and less discriminatory alternatives.[15]

In order to reach this conclusion, the majority ignored its own Title VII precedent that tolerated disparate impacts only when the employer could demonstrate true "business necessity" or "job related[ness]."[16] In its place, the majority crafted a seemingly difficult to satisfy "strong basis in evidence" standard out of unrelated Equal Protection Clause cases. In so doing, the majority locked in some discriminatory employment practices, made voluntary compliance with the disparate-impact provision of Title VII significantly more difficult, and suggested an ongoing limitation of the disparate-impact provision as it is brought into line with equal protection norms.

Part I of this Article describes the legal context of the Court's decision. Part II then examines the factual and procedural background of the case. Part III outlines the majority opinion, along with two concurrences and one dissent. Finally, Part IV examines the implications of the decisions for employment discrimination and the future of the Court.

I. Legal Context

Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of race.[17] Section 2000e-2(a) of the 1964 Act provides that "it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ."[18] Section 2000e-2(a) clearly prohibits "disparate treatment," or intentional discrimination on the basis of race.[19] In *Griggs v. Duke Power*, the Supreme

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[12] *Ricci*, 129 S. Ct. at 2681.
[13] *Id.* at 2677 (emphasis added).
[14] *See id.* at 2678.
[15] *See id.* at 2679.
[16] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing *Griggs*, 401 U.S. at 432).
[17] 42 U.S.C. §§ 2000e–2000e-17 (2006).
[18] *Id.* § 2000e-2(a).
[19] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

Court also held that the Civil Rights Act prohibits employment decisions with a "disparate impact" based on race[20] and "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[21] The *Griggs* Court held that the use of an "intelligence" test with a disparate racial impact violated Title VII, arguing that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability . . . . Congress directed the thrust of the [1964 Civil Rights] Act to the *consequences* of employment practices, not simply the motivation."[22] The Court emphasized that disparate impacts can be tolerated only if they relate to a "business necessity": "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[23]

In 1989, a bare majority of the Supreme Court, including Justice Kennedy (author of the *Ricci* majority opinion), attempted to limit disparate-impact liability[24] but was reversed by Congress in 1991.[25] In *Wards Cove Packing Co., Inc. v. Atonio*, the Court made it significantly more difficult for plaintiffs to prove disparate impact by diluting the "business necessity" defense into a question of "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer . . . . [T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business."[26] Yet Congress effectively reversed the Court when it passed the 1991 Civil Rights Act, which explicitly stated that its purpose was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . . and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*"[27] and "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate-impact suits under Title VII."[28] To that end, Congress codified the "disparate impact" component of Title VII by adding language that Title VII is violated if an employer "uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[29] In applying the disparate-impact provision, the Equal Employ-

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[20] *See Griggs*, 401 U.S. at 430-31.
[21] *Id.* at 430.
[22] *Id.* at 432 (emphasis in original).
[23] *Id.* at 431.
[24] *See* Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989).
[25] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
[26] *Wards Cove*, 490 U.S. at 659.
[27] Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071 (1991).
[28] *Id.* § 3(3), 105 Stat. at 1071.
[29] *Id.* § 105(a), 105 Stat. at 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

ment Opportunity Commission ("EEOC") has promulgated the "four-fifths rule," under which an employment practice that results in a "selection rate for any race, sex, or ethnic group which is less than four-fifths (or 80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact."[30]

II. Factual and Procedural Background

In November and December 2003, the City of New Haven issued examinations to candidates who sought to become lieutenants and captains in the New Haven Fire Department.[31] The City hired a private firm, Industrial/Organizational Solutions ("IOS"), to design the exam and required that 60% of the score come from a written component and 40% from an oral component.[32] There were sizable racial disparities in the results of the exam. The pass rate for blacks and Hispanics was about half that of whites; approximately 60% of whites passed, as did 33% of blacks and 26% of Hispanics.[33] There were even greater disparities among those eligible under City policy for promotion based on these results: of the nineteen people who were eligible for promotion to lieutenant or captain, seventeen were white, while only two were Hispanic and none were black, even though blacks and Hispanics comprised more than 42% of those who took the promotion test.[34]

Shortly after the exam, the City's legal counsel raised the concern that the test had adversely impacted minorities and that using it to make promotions risked liability under Title VII.[35] The City's Civil Service Board ("CSB") then held five hearings in which it heard from a different promo-

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[30] Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2008).

[31] Ricci v. DeStefano, 129 S. Ct. 2658, 2665-66 (2009).

[32] *Id.* at 2665.

[33] *See id.* at 2666. Seventy-seven candidates took the lieutenant exam, of whom forty-three were white, nineteen were black, and fifteen were Hispanic. *Id.* Thirty-four candidates passed the lieutenant exam, of whom twenty-five were white, six were black, and three were Hispanic. *Id.* An additional forty-one candidates took the captain exam, of whom twenty-five were white, eight were black, and eight were Hispanic. Twenty-two candidates passed the captain exam, of whom sixteen were white, three were black, and three were Hispanic. *Id.*

[34] *Id.* The City's charter required hiring decisions to be made according to a "rule of three," meaning that promotions had to be given to a candidate who got one of the top three scores on the promotional exam. *Id.* at 2665. In this case, there were eight vacant lieutenant positions and seven vacant captain positions, so the "rule of three" made only the top ten scorers on the lieutenant exam and top nine scorers on the captain exam eligible for promotion. *Id.* at 2666. On the lieutenant exam, all of these top ten scorers eligible for promotion were white. *Id.* The highest scoring black candidate for lieutenant ranked thirteenth, and the highest scoring Hispanic candidate for lieutenant ranked twenty-sixth. *Id.* at 2692 (Ginsburg, J., dissenting) (disagreeing with the district court's statement that the highest scoring black candidate ranked fourteenth and the highest scoring Hispanic candidate ranked twenty-seventh, 554 F. Supp. 2d 142, 145 n.3). On the captain exam, the top nine scorers who were eligible for promotion consisted of seven whites and two Hispanics. *Ricci*, 129 S. Ct. at 2666. The highest scoring black candidate for captain ranked fifteenth. *Id.* at 2629 (Ginsburg, J., dissenting) (disagreeing with the district court's statement that the highest scoring black candidate ranked sixteenth, 554 F. Supp. 2d 142, 145 n.2).

[35] *See Ricci*, 129 S. Ct. at 2666-67.

tion test designer who suggested that the disparate impact might be reduced through alternative tests that alter the sixty/forty balance between written and verbal or that utilize an "assessment center" where candidates respond to real-world situations instead of completing written and verbal portions.[36] The CSB also heard from firefighters who spoke for and against certifying the results,[37] influential community leader Rev. Boise Kimber who argued strenuously against certifying the results,[38] and numerous other parties. At the last meeting the City's counsel opined that "promotions . . . as a result of these tests would not be consistent with federal law," in light of the "severe adverse impact[ ]" and the existence of "much better alternatives . . . ."[39] The CSB then voted on whether to certify the results.[40] The vote was a tie, so the exam results were not certified and no one was promoted.[41]

As a result of the City's decision not to certify the results, seventeen white firefighters and one Hispanic who passed the examination brought suit in federal court against the City, along with its mayor, legal counsel, and others (collectively "the City").[42] These plaintiffs alleged, among other things, that by failing to certify the results, the City violated the disparate-treatment provision of Title VII and the Equal Protection Clause by making race-based classifications during promotions or by applying facially neutral promotion criteria in a discriminatory manner.[43]

The U.S. District Court for the District of Connecticut, Judge Arterton, ruled for the City, granting its motion for summary judgment on the plaintiffs' Title VII and Equal Protection claims.[44] First, the court rejected the plaintiffs' Title VII claim on the grounds that there was a disparate impact under the EEOC four-fifths rule[45] and that "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent . . . ."[46] The court rejected the argument that the City had only a pretextual motivation of complying with the disparate-impact provision of Title VII,[47] stating that there was "a total absence of any evidence of discriminatory animus towards plaintiffs" as an

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[36] *Id.* at 2668-69.
[37] *Id.* at 2667.
[38] *Id.* at 2685 (Alito, J., concurring).
[39] *Id.* at 2670.
[40] *Id.* at 2671.
[41] *Id.*
[42] Complaint, Ricci v. DeStefano, 554 F. Supp. 2d 142 (D. Conn. 2006) (No. 3:04cv1109).
[43] *Id.*
[44] Ricci v. DeStefano, 554 F. Supp. 2d 142, 163 (D. Conn. 2006). The District Court also granted the City's motion for summary judgment on separate claims by the plaintiffs under 42 U.S.C. § 1985 (civil rights conspiracy) and the First Amendment (freedom of association). *Id.* The court also declined to exercise supplemental jurisdiction over the plaintiffs' state law claim for intentional infliction of emotional distress since it had disposed of all federal claims. *See id.*
[45] *Id.* at 158.
[46] *Id.* at 160.
[47] *Id.* at 152-60.

underlying motivation.[48] In support, the court relied extensively on Second Circuit precedent, which established that "the intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants."[49] Second, the district court rejected the plaintiffs' equal protection claim. The court reasoned that there was no facial classification based on race because "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted."[50] Similarly, the court concluded that the exam was not applied in a discriminatory manner because it was "administered and scored in the same manner for all applicants . . . ."[51]

On appeal, the Second Circuit affirmed. A panel of the Second Circuit consisting of then Judge Sotomayor, and Judges Pooler, and Sack issued a summary order affirming the judgment of the district court "substantially" for the reasons stated by the court below.[52] The panel did note, however, that the City's CSB had "no good alternatives"[53] and that "because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected."[54] After another Second Circuit judge requested a poll on whether to rehear the case en banc,[55] the panel withdrew its summary order, and issued a per curiam opinion similar to the summary order except that it adopted the reasoning of the district court in its entirety.[56] Three days later, the Second Circuit voted seven to six to deny rehearing en banc.[57] Judge Cabranes dissented from this denial, arguing that the case was too novel and complex for such a per curiam opinion and explicitly requesting Supreme Court review on whether the City's actions violated the Equal Protection Clause and Title VII.[58] The Supreme Court granted certiorari.[59]

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[48] *Id.* at 158.

[49] Hayden v. County of Nassau, 180 F.3d 42, 51 (2d Cir. 1999), *quoted in Ricci*, 554 F. Supp. 2d at 157. The district court also relied on *Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1130 (2d Cir. 1983) ("a showing of a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for a voluntary compromise containing race-conscious remedies"), and *Bushey v. New York State Civil Service Commission*, 733 F.2d 220 (2d Cir. 1984).

[50] *Ricci*, 554 F. Supp. 2d at 161.

[51] *Id.*

[52] Ricci v. DeStefano, 264 Fed. App'x 106, 107 (2d Cir. 2008).

[53] *Id.*

[54] *Id.*

[55] *See* Ricci v. DeStefano, 530 F.3d 88, 88 (2d Cir. 2008).

[56] Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).

[57] *See id.* at 88.

[58] *Id.* at 94-101 (Cabranes, J., dissenting).

[59] Ricci v. DeStefano, 129 S. Ct. 893 (2009); Ricci v. DeStefano, 129 S. Ct. 894 (2009).

III. The Supreme Court's Opinion

This section addresses the majority's opinion holding that the City violated the disparate-treatment provision of Title VII in Part A; then discusses Justice Scalia's concurrence and Justice Alito's concurrence in Parts B and C, respectively; and finally examines Justice Ginsburg's dissent in Part D.

A. The Majority Opinion

The Supreme Court reversed and remanded, holding that the City violated the disparate-treatment provision of Title VII when it discarded the results of the test.[60] The Court did not reach the equal protection issue.[61] Writing for a five to four majority, Justice Kennedy, with Chief Justice Roberts and Justices Alito, Scalia, and Thomas, began his analysis with the premise that "[t]he City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."[62] In support, the majority argued that the City had "rejected the test results solely because the higher scoring candidates were white,"[63] and that "[w]ithout some other justification, this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[64]

The Court then turned to the core question of when an employer's interest in avoiding disparate-impact liability under Title VII could justify disparate treatment. It concluded that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a *strong basis in evidence* to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[65] According to the majority, only this strong-basis-in-evidence standard "gives effect to both . . . provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances."[66] Interestingly, even though the Court did not reach the equal protection issue, it derived this strong-basis-in-evidence standard from its equal protection jurisprudence. The Court noted that in the equal protection context, "certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the reme-

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[60] Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

[61] *Id.* at 2672 ("A decision for petitioners on their statutory claim would provide the relief sought. . . . '[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" (citations omitted)).

[62] *Id.* at 2673.

[63] *Id.* at 2674.

[64] *Id.* at 2673.

[65] *Id.* at 2677 (emphasis added).

[66] *Id.* at 2676.

dial actions were necessary."[67] Though the majority did not "consider whether the statutory constraints under Title VII must be parallel in all respects to those under the Constitution,"[68] it drew on these cases because "[t]he same interests are at work in the interplay between the disparate-treatment and disparate-impact provisions of Title VII."[69]

The majority sought to locate this strong-basis-in-evidence standard between the positions of the litigants. It rejected what the Court characterized as the position of the defendants, essentially adopted by the dissent,[70] that an employer is justified in race-conscious conduct if it has a good faith belief that such action is necessary to comply with the disparate-impact provision of Title VII.[71] The Court indicated that such a position did too little to comply with the disparate-treatment provision of Title VII[72] and would encourage employers to discard the results of promotional exams even when there is little evidence of disparate impact, which "would amount to a *de facto* quota system . . . ."[73] On the other hand, the Court also attempted to distinguish its standard from the plaintiffs' proposed approach, under which an employer could never take race-based action or could do so only if it was actually in violation of the disparate-impact provision.[74] The majority also claimed that its interpretation of Title VII "does not prohibit an employer from considering, *before* administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race."[75]

The Court then applied its strong-basis-in-evidence standard to the City's actions and asserted that "there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results."[76] The Court did acknowledge that "[t]he racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact liability."[77] Indeed, the City was "compelled to take a hard look at the examinations"[78] in part because "[t]he pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the eighty-percent standard set by the EEOC to implement the disparate-impact provision of Title VII."[79] Nonetheless, the majority concluded

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[67] *Id.* at 2662 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).
[68] *Id.* at 2675.
[69] *Id.* at 2675-76.
[70] *Id.* at 2699 (Ginsburg, J., dissenting).
[71] *Id.* at 2674-75 (majority opinion).
[72] *Id.* at 2675.
[73] *Id.*
[74] *Id.* at 2674; *see also* Brief of Petitioner-Appellant at 43, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (Nos. 07-1428 & 08-328).
[75] *Ricci*, 129 S. Ct. at 2677 (emphasis added).
[76] *Id.* at 2681.
[77] *Id.* at 2677.
[78] *Id.* at 2678.
[79] *Id.*

that, under Title VII, the City did not have a strong basis in evidence that it would face disparate-impact liability because the examinations met two conditions of Title VII: job relatedness and lack of alternative.[80] First, the examinations were job related in light of the steps IOS took when developing it to analyze the captain and lieutenant positions and draw questions from Fire Department source material.[81] Second, the Court concluded that there was insufficient evidence that any alternative approach—including relying more on assessment centers or the oral portion of the exam—was equally valid and less discriminatory.[82] Since the City did not have to be concerned about these two conditions, the Court concluded that the City lacked a strong basis in evidence for believing it would face disparate-impact liability.[83] The Court therefore concluded that the plaintiff firefighters were "entitled to summary judgment on their Title VII claim."[84]

B. Scalia's Concurrence

Though he joined the majority, Justice Scalia also wrote a brief separate concurrence:

> to observe that [the Court's] resolution of this dispute merely postpones the evil day on which [it] will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?[85]

He questioned why the federal government, through Title VII, should be permitted to require employers to take remedial, race-based action when a disparate impact would otherwise occur.[86] Interestingly, Scalia seemed to equate the government mandate of such remedial action to instances of outright government discrimination such as school segregation, as he drew on *Bolling v. Sharpe*,[87] the case that applied *Brown v. Board of Education* to the federal government,[88] for the proposition that the government may not engage in such discrimination.[89]

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[80] *Id.*
[81] *Id.* at 2678-79.
[82] *Id.* at 2679-81.
[83] *Id.* at 2681.
[84] *Id.*
[85] *Id.* at 2681-82 (Scalia, J., concurring).
[86] *Id.* at 2682.
[87] 347 U.S. 497 (1954).
[88] *Id.* at 500.
[89] *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

C. Alito's Concurrence

Justice Alito, joined by Justices Scalia and Thomas, concurred to argue that even if a standard were adopted that was more accommodating of efforts to avoid disparate impacts, such as that of the dissent,[90] the district court still erred in granting summary judgment to the City. This was because a reasonable juror could have found that the City's true concern was not to avoid a disparate impact, but rather "to placate a politically important racial constituency" and avoid "'the wrath of [Rev. Boise] Kimber and other influential leaders of New Haven's African-American community.'"[91] Justice Ginsburg responded, in her dissent,[92] that there was significant pressure on the CSB from advocates both for and against certification and that there was a distinction between political considerations and unlawful discrimination,[93] especially since the district court found "'a total absence of any discriminatory animus'" toward the plaintiff firefighters.[94] Alito then noted that discriminatory hiring decisions are unlawful regardless of whether they are based on political considerations.[95]

D. Ginsburg's Dissent

Justice Ginsburg, joined by Justices Breyer, Souter, and Stevens, dissented. First, Ginsburg questioned the majority's opening "premise"[96] that there was disparate treatment in need of some defense, arguing that an employer does not act "because of race" when changing employment practices to comply with Title VII.[97] Second, the dissent argued that the majority's "strong basis in evidence" standard itself was inconsistent with the Supreme Court's Title VII precedent. Ginsburg noted that equal protection jurisprudence is a poor place from which to derive a standard to implement Title VII's disparate-impact and disparate-treatment provisions because "the Equal Protection Clause, this Court has held, prohibits only intentional discrimination; it does not have a disparate-impact component."[98]

The standard that Ginsburg would have applied instead is that an employer does not violate Title VII's disparate-treatment provision for rejecting a selection device with a disparate racial impact as long as it has "good cause to believe the device would not withstand examination for business

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[90] *See* Part III.D *infra*.

[91] *Ricci*, 129 S. Ct. at 2684 (Alito, J., concurring) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 162 (D. Conn. 2006)).

[92] *See* Part III.D *infra*.

[93] *Ricci*, 129 S. Ct. at 2708-09 (Ginsburg, J., dissenting).

[94] *Id.* at 2710 (quoting *Ricci*, 554 F. Supp. 2d at 158).

[95] *Id.* at 2688 (Alito, J., concurring).

[96] *Id.* at 2673 (majority opinion).

[97] *Id.* at 2699 (Ginsburg, J., dissenting).

[98] *Id.* at 2700 (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Washington v. Davis, 426 U.S. 229, 239 (1976)).

necessity."[99] In support of this good-cause standard, the dissenters argued that "in codifying the *Griggs* and *Albemarle* instructions [in the 1991 Civil Rights Act], Congress declared unambiguously that selection criteria operating to the disadvantage of minority group members can be retained only if justified by business necessity."[100] Ginsburg also rooted her standard in a view that the disparate-impact and disparate-treatment provisions of Title VII are on "an equal footing" as "twin pillars of Title VII . . . ,"[101] which requires a standard more accommodating of efforts to prevent disparate impacts than the majority's rigid strong-basis-in-evidence standard.

Applying its good-cause standard, the dissent found that the City did not violate the disparate-treatment provision of Title VII when it rejected the exam because it had "ample cause to believe its selection process was flawed and not justified by business necessity."[102] Ginsburg focused on two unnecessary flaws of the exam that resulted in the disparate impact: the 60/40 written/oral ratio and the lack of assessment centers.[103] This evidence of alternatives that would satisfy the fire department's business necessities in a less discriminatory manner meant that "the City had good cause to fear disparate impact liability."[104] In light of that good cause, the dissent would have upheld the judgments below and held that the City did not violate the disparate-treatment provision of Title VII by acting with good cause to comply with the co-equal disparate-impact provision.[105]

IV. Analysis

In applying the strong-basis-in-evidence standard so strictly, the Court locked in some discriminatory employment practices and made voluntary compliance with the disparate-impact provision of Title VII much more difficult. Part A examines this effect on employers and employment discrimination. Part B analyzes *Ricci*'s clues about the likely direction of the Roberts Court in future Title VII cases.

A. Effect on Employers and Employment Discrimination

The clearest effect of the majority's opinion will be to lock in ongoing employment practices that have disparate racial consequences, even when employers want to change them. In light of the majority's rigid strong-basis-in-evidence standard, both public and private employers will now be more reluctant to attempt to remedy disparate impacts once hiring and promotion

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[99] *Id.* at 2699.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 2703.
[103] *Id.* at 2703-07.
[104] *Id.* at 2707.
[105] *See id.* at 2703.

processes have been set in place. If New Haven had no strong basis for believing that it would be subject to disparate-impact liability—despite the fact that its test outcomes fell well below the EEOC's four-fifths rule, the existence of testimony about alternative procedures, and the explicit threats of litigation it received—few circumstances would satisfy the strong-basis-in-evidence standard as the Court applied it. As a result, district courts applying *Ricci* are likely to establish something close to a de facto bar on all efforts to cure racially skewed results once the selection process has been set in place.

Less clear is how lower courts will now regard prophylactic efforts to prevent disparate impacts from emerging in the first place. The Court's standard requires a strong basis in evidence to justify "*avoiding* or remedying an unintentional disparate impact . . . ."[106] The conspicuous inclusion of "avoiding" in the standard suggests a potential application to even efforts made before employment practices are administered to design practices to achieve a racially diverse workforce. Furthermore, the Court's sharp criticism of efforts to "obtain[ ] the employer's preferred racial balance"[107] and decisions made "because of race"[108] suggests hostility to anything that could be construed as the pursuit of racial balance, regardless of timing. Yet other language in the majority opinion indicates that efforts "to provide a fair opportunity for all individuals" before issuing an exam are acceptable.[109] Additionally, in oral argument, counsel for the plaintiff firefighters conceded that employers may take racial proportionality into account prospectively when choosing what kind of test to administer.[110] This ambiguity may result in conflicting lower court interpretations of the application of *Ricci* to prophylactic modifications of employment practices to achieve a diverse workforce. Thus, further Supreme Court clarification may be needed.

An unanswered question is whether *Ricci* leaves employers with expanded liability or relatively insulated. On the one hand, *Ricci* clearly increases employers' exposure to disparate-treatment liability by creating the risk that employer efforts to comply with Title VII in fact violate it. To the extent that *Ricci* expanded this liability without cabining disparate-impact liability, employers face more liability than ever and are caught in a lose-lose situation when a test they administer turns up racially skewed results. In support of this reading, a district court recently distinguished *Ricci*'s reasoning on the probable lack of disparate-impact liability in New Haven and found that a New York City firefighter exam violated Title VII's disparate-

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[106] *Id.* at 2677 (majority opinion) (emphasis added).
[107] *Id.* at 2675.
[108] *Id.* at 2699.
[109] *Id.* at 2677.
[110] Transcript of Oral Argument at 24-25, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (Nos. 07-1428 & 08-328).

impact provision.[111] Yet on the other hand, the *Ricci* Court concluded by noting that New Haven was insulated from a disparate-impact suit by its need to avoid disparate treatment: "in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."[112] If lower courts apply this insulation to other employers who would need to use similar race-conscious means to remedy disparate impacts, *Ricci* will leave employers insulated from a significant amount of disparate-impact liability. As a result, some employers may be able to shelter practices with disparate impacts by setting them in motion, as their ongoing operation would often establish the evidence that remedying the practice would involve disparate treatment against those advantaged by it.

In light of this ambiguity about the remaining extent of disparate-impact liability, employers would be well advised to think through the implications of their hiring, promotion, and termination methods well before the fact. New Haven, for instance, gave far too little consideration to the implications of its heavy reliance on a written examination. This outcome will, however, put many employers in a difficult position given that the results of selection processes cannot always be anticipated. Employers such as smaller businesses with little experience hiring and promoting will find it particularly difficult to anticipate results in advance. This need to anticipate puts underrepresented job applicants in an even more difficult position, as their only opportunity to influence and object to the selection process would come, in many cases, before their relationship with the employer even begins.

B. The Direction of the Court

The *Ricci* Court imported equal protection analysis into Title VII law by deriving its strong-basis-in-evidence standard from equal protection case law.[113] Left unclear is whether the Court's next steps will merely conform disparate-impact law more fully to equal protection norms or whether the Court is preparing to eventually hold that Title VII's disparate-impact provision actually violates the Equal Protection Clause. The latter is probably unlikely at this point: Scalia was not able to get any other signatories on his concurrence suggesting such a path, and overturning a doctrine codified by Congress in the 1991 Civil Rights Act would be a particularly aggressive

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[111] United States v. Vulcan Soc., Inc., No. 07-cv-2067, 2009 WL 2180836, at *3-*4 (E.D.N.Y. July 22, 2009) (holding that a New York City firefighting promotion exam violated the disparate impact provision of Title VII in light of the statistical disparity between the promotion rates of white and minority applicants that was not justified by job-related considerations).

[112] *Ricci*, 129 S. Ct. at 2681.

[113] *Id.* at 2675 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).

abrogation of legislation. However, *Ricci* does lay the groundwork for such a decision if the Court becomes more conservative or emboldened, since the decision imports equal protection analysis into Title VII law by rooting its strong-basis-in-evidence standard in its equal protection jurisprudence. The majority may be planting a precedent that it can later use in support of more radical change. If a future Court followed Scalia and concluded that equal protection precludes the government from requiring employers to cure a disparate impact with disparate treatment, it would be following a route it has taken before. For instance, Scalia's citation[114] to *Bolling v. Sharpe* for the proposition that the government may not discriminate on the basis of race echoes the Court's recent citations in *Parents Involved in Community Schools v. Seattle School District Number 1* to *Brown v. Board of Education*.[115] *Parents Involved* was somewhat different in that it prohibited a voluntary effort to address segregated schools.[116] Yet *Parents Involved* tracks the reasoning of Scalia's *Ricci* concurrence in that it similarly uses a Warren Court-era desegregation precedent to justify preventing voluntary efforts at integration. The fact that a majority of the Court accepted this approach in *Parents Involved* therefore suggests that Scalia's concurrence in *Ricci* may have more support than it seems.

More likely, however, is that the Court will instead continue the process begun in *Ricci* of importing equal protection norms into Title VII disparate-impact law. A major purpose of Title VII has been to remedy the historic effects of discrimination on certain groups and to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[117] Yet equal protection doctrine, at least since *Adarand Constructors Inc. v. Peña*, has only addressed individual and current discrimination.[118] As a result, the importation of equal protection principles means that the disparate-impact provision may no longer be justified by the purpose of remedying historic discrimination against minority groups.[119] Instead, the purpose of the disparate-impact provision will need to be framed as an evidentiary device that identifies hidden intentional discrimination.[120] Indeed, in his concurrence, Scalia noted that this evidentiary justification may be a way to save disparate-impact law from invalidation under the

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[114] *Id.* at 2682 (Scalia, J., concurring).

[115] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007).

[116] *Id.* at 709-10.

[117] Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

[118] *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("the Fourteenth Amendment 'protect[s] *persons*, not *groups*'" (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995))).

[119] *See generally* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003) (analyzing the tension between the historical discrimination orientation of disparate-impact laws and the individualist and presentist concerns of equal protection doctrine and suggesting ways of reconciling the two sorts of concerns).

[120] *See id.* at 499.

Equal Protection Clause.[121] As future courts interpret *Ricci*, this more limited agenda for disparate-impact law seems inevitable in light of settled equal protection law since *Adarand*.

Whether it takes the more limited or aggressive approach, it is clear the majority is still reformulating the law in this area. The majority signaled that it ascribes little precedential value to core precedents in this area from the 1970s. Despite the fact that *Griggs* and *Albemarle Paper Co. v. Moody* were the foundational cases in shaping disparate-impact liability and the fact that the 1991 Civil Rights Act wrote those cases into Title VII itself, the Court limited its discussion of them to a dutiful paragraph reciting their holdings as history.[122] *Griggs*, in particular, directly addressed the relevant question of when an employment practice is justified despite a disparate impact, holding that such practices are justified only by business necessity.[123] Yet when setting the standard for when an effort to comply with the disparate-impact provision violates the disparate-treatment provision, the majority ignored these Title VII precedents and turned instead to its favored equal protection cases, *City of Richmond v. J.A. Croson Co.* and *Wygant v. Jackson Board of Education*.[124] This willingness to ignore precedents, even those written into the law being interpreted, suggests the Court is prepared to chart its own course in this space and has more work to do.

Ultimately, the *Ricci* Court concluded that employers may not set aside established hiring and promotion processes after they discover their disparate impacts unless they have a strong basis in evidence to believe they will otherwise be subject to disparate-impact liability. In applying the strong-basis-in-evidence standard so strictly, the Court locked in discriminatory employment practices and made voluntary compliance with Title VII much more difficult. In so doing, the Roberts Court signaled its willingness to set aside established precedent and foreshadowed a continued limitation of the disparate-impact provision of Title VII as it is brought into line with equal protection norms.

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[121] Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).
[122] *Id.* at 2672-73.
[123] Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).
[124] *Ricci*, 129 S. Ct. at 2675.